

Supreme Court of Wisconsin

Appeal No. 2020AP001971-OA

Donald J. Trump, Michael R. Pence and Donald J. Trump for President,

Petitioners,

v.

Anthony S. Evers, Governor, in his official capacity, the Wisconsin Elections Commission, Ann S. Jacobs, Chair, in her official capacity, Scott McDonell, Dane County Clerk, in his official capacity, Alan A. Arnsten, Member, Dane County Board of Canvassers, in his official capacity, Joyce Waldrop, Member, Dane County Board of Canvassers, in her official capacity, George L. Christenson, Milwaukee County Clerk, in his official capacity, Timothy H. Posnanski, Member, Milwaukee Board of Canvassers, in his official capacity, Richard Bass, Member, Milwaukee County Board of Canvassers, in his official capacity and Dawn Martin, Member, Milwaukee Board of Canvassers, in her official capacity,

Respondents.

GOVERNOR TONY EVERS' OPPOSITION TO PETITION FOR ORIGINAL ACTION

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COUNTERSTATEMENT OF THE ISSUES

1. Whether President Trump's Petition properly invokes this Court's original jurisdiction, even though it purports to appeal the results of a partial recount and Wis. Stat. 9.01 clearly prescribes "the exclusive judicial remedy" to address "an alleged irregularity, defect or mistake committed during the voting or canvassing process" begins with an "appeal to circuit court"?
2. Whether this Court should grant an original petition despite the numerous fact-based issues that President Trump himself acknowledges through the submission of affidavits and even though Wis. Stat. § 9.01 designates the circuit court as the fact-finder?
3. Whether the doctrine of laches precludes President Trump from invoking this Court's original jurisdiction

to adjudicate belated complaints about the rules governing the November 3, 2020 election, when he had ample notice of those rules before the election?

4. Whether the relief that President Trump seeks—an order declaring void the certificate of ascertainment naming Wisconsin’s presidential electors that Governor Evers has signed, sealed, and transmitted pursuant to the state canvass in accord with Wis. Stat. § 7.70(5)(b) and relevant provisions of federal law—is lawfully available?
5. Whether, even if one or more of President Trump’s belated complaints with Wisconsin’s election laws had merit, the proper remedy is retroactive disenfranchisement of tens of thousands of Wisconsin voters who followed good-faith advice from election administrators?

6. Whether voters who cast in-person absentee ballots properly applied for their ballots by completing form EL-122, titled OFFICIAL ABSENTEE BALLOT APPLICATION/CERTIFICATION?
7. Whether longstanding Wisconsin Elections Commission guidance allowing election administrators to cure missing address information in witness certifications on absentee ballots is improper?
8. Whether President Trump's complaint about the decades-old provision of Wisconsin law that facilitates indefinitely confined Wisconsin residents obtaining absentee ballots justifies nullifying the votes of every voter who obtained a ballot for the November 3, 2020 election by certifying that they were indefinitely confined?
9. Whether the City of Madison violated Wisconsin law by facilitating voters returning absentee ballots to

secure, tamper-evident bags staffed by trained poll workers in City parks?

10. Whether President Trump properly raised the issue of Governor Evers' certification, and if it was raised, whether Governor Evers properly certified based on the plain language of Section 7.70(5)(b)?

INTRODUCTION

President Trump's Petition seeks nothing less than to overturn the will of nearly 3.3 million Wisconsin voters. It is a shocking and outrageous assault on our democracy. The relief he seeks is wrong as a matter of law, incorrect as a matter of fact, and mistaken as a matter of procedure. Indeed, he has sought relief in the wrong court and has refused to follow the proper steps under the statute that he himself acknowledges governs the appeal of recounts. And by focusing on alleged technical violations in only two counties, he has made plain

that his intent is not to fairly determine who Wisconsinites voted for to lead our country. He is simply trying to seize Wisconsin's electoral votes, even though he lost the statewide election. As the Third Circuit recently admonished the President in affirming the trial court's denial of an analogous suit, "[v]oters, not lawyers, choose the President." *Trump v. Secretary Commonwealth of Penn.*, No. 20-3371, at *20 (3d Cir. Nov. 27, 2020) (Gov. App. 131).

President Trump's Petition fails for numerous independent reasons.

First, this Court has no jurisdiction because Wis. Stat. § 9.01 is the exclusive remedy for the appeal of recounts—as President Trump acknowledges. That statute requires that any appeal must begin in the circuit court. Moreover, any timing issue here is of President Trump's own creation.

Second, the issues here are fact-bound. President Trump acknowledges as much by filing hundreds of pages of

affidavits and exhibits. The fact-based nature of any recount review—as reflected in Section 9.01 itself—makes an original proceeding in this Court inappropriate.

Third, the doctrine of laches bars President Trump’s claims. President Trump could have and should have raised these issues well before the election, much less the recount. The entire State of Wisconsin would suffer tremendous prejudice by allowing President Trump to raise these claims at this late date.

Fourth, the allegations of improper votes are incorrect. Each of the election procedures at issue in fact has a strong statutory basis, is rooted in longstanding practice, and indeed has been allowed by the Wisconsin Elections Commission.

Fifth, even if President Trump were somehow correct on the law, that would not justify or allow the sweeping relief he seeks. Voters acted in good faith, believing their votes would count and their will would be done. For good reason,

Wisconsin law, federal law, and the United States

Constitution all reflect the fundamental principle that a court should not throw out these votes in an after-the-fact attempt to overturn an election.

In short, the recount confirmed that President Trump lost Wisconsin. Indeed, President Trump's deficit increased through the recount. President Trump alleges no miscounting or other error that would call into question the intent of Wisconsin's voters. Instead, he seeks to win in court what he lost in the election. "Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so." *Trump v. Secretary*, No. 20-3371, at *1.¹

¹ Petitioners suggest that the Governor acted too soon in signing the certificate of ascertainability -- although they do not actually include this in the issues that want the Court to address. We note that the argument, if relevant here at all, is simply wrong because it is based on the wrong statutory provision. He cites 7.70(5)(a) whereas here the Governor acted under 7.70(5)b. Section

RELEVANT FACTS

Nearly 3.3 million Wisconsin voters cast ballots in the November 3, 2020 general election. (See Gov. App. 106) By a margin of more than 20,000 votes, they chose former Vice President Joe Biden to serve as the next President. (See *id.*)

On November 18, President Donald J. Trump and Vice President Michael R. Pence timely filed a recount petition. (See App. 108.) They requested a recount of all ballots in all wards in every City, Village, Town and other voting unit in Dane and Milwaukee Counties. (See *id.*) They did not seek a recount in any of Wisconsin's 70 other counties. (See *id.*) After receiving payment of the estimate of the cost of the

7.70(5)(b) governs the certification of presidential electors. Unlike Section 7.70(5)(a), that section does not contain any language staying certification during the pendency of a recount appeal. Indeed, when President Trump won in 2016, the certification was not stayed during the time to appeal the recount. Instead, Governor Walker signed the certification the same day the recount finished and right after the canvass.

requested recount, the WEC ordered the recount to proceed on November 19. (*See id.*)

The recount requested by President Trump and Vice President Pence resulted in a small net loss, increasing President-elect Biden's statewide margin to 20,682 votes. (*See App. 106.*) Neither recount uncovered any evidence of fraud, or of any vote-counting systematic issues that even theoretically could have impacted the results in the statewide presidential election. (*See, e.g., Pet'rs App. 263: Dane Cty. Tr. 11/29/2020 at 11:10*)

On the afternoon of Sunday, November 29, the WEC announced that the state canvass would occur the following day. At 3:30 p.m. on Monday, November 30— more than 24 hours after the WEC had issued notice²—the WEC

² *See* WEC, Presidential Election Canvass (Nov. 30, 2020), available at https://zoom.us/rec/play/8Wb-kHca3lZ1Ahaskb5wwb46Y03vmpX6NFvnwCDULK77MSDei611_c4xodn47annAwBIKbakX-XTX4Eb.AJbON0LwFeVdMKB9?startTime=

chairperson “publicly examine[d] the returns and determine[d] the results” as required under Wis. Stat. §§ 7.70(3) and 9.01(5)(c). The WEC chairperson’s action of “determin[ing] the results” triggered a window of 5 business days for President Trump and Vice President Pence to appeal to circuit court, if they wish to do so. Wis. Stat. § 9.01(6)(a).

Shortly after the WEC chairperson completed the state canvass, the WEC staff completed the ministerial task of preparing a certificate of ascertainment “showing the determination of the results of the canvass and the names of the persons elected” as presidential electors. Wis. Stat. § 7.70(5)(b). The WEC transmitted that certificate to the Governor, who signed it, affixed the great seal of the state, and transmitted it to officials in Washington, D.C., as

[1606771524000& x_zm_rtaid= aMwgpbcRtuP_6FUgLnU9g.1606866279674.b9367abb3cb77e9e15c05d4e39e50cc9& x_zm_rhtaid=309](#) at 0:18.

required by state and federal law. *See id.*; *see also* 3 U.S.C. § 6.

President Trump waited until Tuesday, December 1, 2020 to bring suit. This Court ordered responsive briefs be filed by 8:30 p.m. on that same day. As of the filing deadline, Governor Evers has still not been served with copies of President Trump’ pleadings and had to request copies from the Court Clerk’s office.

ARGUMENT

I. THIS PETITION IS NOT PROPERLY BEFORE THIS COURT.

A. This Court should not exercise original jurisdiction in contravention of the statutory exclusive remedy.

Under Wisconsin law, the recount procedures under Section 9.01 constitute the “exclusive remedy” for challenging any election results: “EXCLUSIVE REMEDY. This section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged

irregularity, defect or mistake committed during the voting or canvassing process.” Wis. Stat. § 9.01(11). President Trump admit as much in their Petition: “The recount procedures in Chapter 9 are the exclusive remedy for ‘an alleged irregularity, defect or mistake committed during the voting or canvassing process.’” Pet. at 26.

Section 9.01 provides the exact procedure to follow in appealing a recount. “Within 5 business days after completion of the recount determination by the [WEC] chairperson or the chairperson’s designee,” any candidate “aggrieved by the recount may appeal to *circuit court*,” which is empowered to address “issues of procedure, interpretations of law, and findings of fact.” Wis. Stat. § 9.01(6)(a), (8)(b). (emphasis added). The statute provides that the aggrieved party may subsequently appeal the circuit court’s order to the court of appeals. Wis. Stat. § 9.01(9).

This statutory procedure—and President Trump’s concession that Section 9.01 applies here—should end the matter. The appeal of the recount goes first to circuit court, which is statutorily tasked with holding a scheduling conference, securing ballots, and making findings of fact. *Id.* §§ 9.01(8)-(9). For good reason, the Legislature has not made this Court the finder of fact. *See infra* Part I.B.

President Trump’s response to this plain statutory language that is the exclusive remedy here is to argue that this Court should ignore it because “there is not enough time” to follow the statutorily-mandated procedures. (Pet. at 27.) This argument has two independent flaws that require this Court to deny jurisdiction and to follow the plain statutory command.

First, courts have a duty to follow the plain language of the statute and cannot simply overlook it. The plain language of the statute is unambiguous. Courts “assume that the legislature’s intent is expressed in the statutory language”

and, therefore, begin statutory interpretation “with the language of the statute.” *In re Elijah W.L.*, 2010 WI 55, ¶27, 325 Wis. 2d 584, 785 N.W.2d 369 (quoting *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶¶44-45, 271 Wis. 2d 633, 681 N.W.2d 110). “If the words chosen for the statute exhibit a plain, clear statutory meaning, without ambiguity, the statute is applied according to the plain meaning of the statutory terms.” *Lang v. Lions Club of Cudahy Wis. Inc.*, 2020 WI 25, ¶21, 390 Wis. 2d 627, 939 N.W.2d 582 (internal quotation marks and citations omitted). “In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.” *State v. Ozuna*, 2017 WI 64, ¶14, 376 Wis. 2d 1, 898 N.W.2d 20 (quoting *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967) (internal quotation marks omitted)). “[A]lthough a court may consider whether a particular interpretation of a statute would produce an absurd or unreasonable result, a court may not balance the policy

concerns associated with the ‘consequences of alternative interpretations.’” *Anderson v. Aul*, 2015 WI 19, ¶107, 361 Wis. 2d 63, 862 N.W.2d 304 (Zeigler, J., concurring).

The evolution of Wis. Stat. § 9.01 across time underlines this point. Where it is now exclusive, it was once expressly inclusive. Until 1983, the recount statute provided that “[n]othing in this section shall be construed to abrogate any right or remedy that any candidate may now have affecting the trying of title to office.” Wis. Stat. § 9.01(8) (1981-82). In 1983 Wisconsin Act 183, however, the Legislature repealed that provision and replaced it with the following exclusivity language: “This section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process.” Wis. Stat. § 9.01(11).

That the exclusivity language is unambiguous and precludes the pursuit of other judicial remedies to test the right to an elective office has been confirmed by Wisconsin courts. In *State ex. rel. Shroble v. Prusener*, a candidate for office failed to timely request a recount, and ultimately challenged the results of the election by, in part, pursuing an action in *quo warranto* under Wis. Stat. § 784.04, which itself dates back to the very early years of the state. 185 Wis. 2d 102, 106-07, 517 N.W.2d 169 (1994).

This Court unanimously held that the cases *Shroble* relied upon in support of his argument that he could pursue an action in *quo warranto* were no longer valid authority because they were decided prior to enactment of 1983 Wisconsin Act 183 and were therefore reliant on the prior version of the statute explicitly stating that “[n]othing in this section shall be construed to abrogate any right or remedy that any candidate may now have affecting the trying of title

to office.” *Id.* at 111 (citing Wis. Stat. § 9.01(8) (1981-82)). This Court held that, as amended, “the recount statute plainly and unambiguously provides the exclusive remedy for challenging the results of an election based on mistakes in the canvassing process,” because the “statute on its face is capable of no other interpretation.” *Id.* at 107, 110. Although not necessary to its conclusion, this Court explained that interpretation was also supported by evidence of legislative intent. *Id.* at 111-12.

The Court of Appeals subsequently upheld this conclusion regarding exclusivity: “[i]n Wisconsin, relief for the losing candidate is confined to the recount statute,” which “is the exclusive remedy for *any claimed election fraud or irregularity*.” *Carlson v. Oconto Cty. Bd. of Canvassers*, 2001 WI App 20, ¶7, 623 N.W.2d 195 (emphasis added).³

³ When both of these cases were decided, state law permitted any candidate to request a recount. The Legislature has since narrowed the

Thus, the plain text of the law, statutory history, legislative intent, and judicial interpretations uniformly show that the recount process is the exclusive remedy for seeking judicial review of alleged voting or canvassing irregularities, defects, or mistakes. An appeal to the circuit court may follow the recount. Wis. Stat. § 9.01(6).

Second, President Trump provide no support for its argument that “there is not enough time.” Indeed, to the

availability of a recount. Pursuant to 2017 Wisconsin Act 120, only a candidate who qualifies as an “aggrieved party” may request a recount. The result—precluding a candidate who does not qualify as “aggrieved” from challenging the results of an election—fits within the Legislature’s “constitutional power to say how, when and where elections shall be conducted.” *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶24, 357 Wis. 2d 360, 851 N.W.2d 302 (quoting *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949)). Moreover, where a legislative act has been construed by courts, the Legislature is presumed to know that, absent statutory amendment, the judicial construction will remain unchanged. *Reiter v. Dyken*, 95 Wis. 2d 461, 470-71, 290 N.W.2d 510 (1980) (internal citations omitted). Likewise, the Legislature is presumed to know the law when it writes statutes. See *Mack v. Joint Sch. Dist. No. 3, Vill. of Hales Corners, Cities of Greenfield & Franklin, Milwaukee Cty.*, 92 Wis. 2d 476, 489, 285 N.W.2d 604 (1979). Therefore, it is presumed that, in enacting this limitation, the Legislature recognized it was narrowing opportunities to challenge election results. In fact, that appears to be the very purpose of the limitation.

extent there is not enough time, it a problem of President Trump' own making. With 24 hours' notice before the state canvass meeting, President Trump had ample time to prepare their appeal and file it on November 30. This 24 hours' prior notice was more generous than that given in 2016. In that election, within hours of the recount concluding, the canvass occurred and the certificate of ascertainment issued that same day. Matthew DeFour, "Completed Wisconsin recount widens Donald Trump's lead by 131 votes," *Baraboo News Republic* (Dec. 13, 2016).⁴ If President Trump had filed in circuit court on November 30, given the looming the federal statutory safe harbor date of December 8 under 3 U.S.C. §5, Governor Evers would have embraced an expedited schedule. Instead, however, President Trump has wasted scarce time

⁴ Available at https://www.wiscnews.com/baraboonewsrepublic/news/state-and-regional/completed-wisconsin-recount-widens-donald-Trump-lead-by-131-votes/article_1da70107-cc7e-5ce3-859e-8ff37fcc9ce8.html (last visited Dec. 1, 2020).

seeking an original action in this Court and waiting for a ruling here. By doing so and then deliberately filing in the wrong venue despite the availability of expeditious treatment elsewhere, President Trump has acted like an arsonist complaining that his house is on fire.⁵

Moreover, Section 9.01 itself contemplates an expedited schedule. The appeal is “to be heard without a jury,” and the circuit court is required to hold a scheduling conference “promptly” after the filing of the appeal in order to adopt procedures that will “permit the court to determine the matter as expeditiously as possible.” Wis. Stat. § 9.01(7)(b). The appeal is to be “summarily heard” and any provisions under Wis. Stat. chs. 801 to 806 “which are inconsistent with a prompt and expeditious hearing do not

⁵ *Pearson v. Kemp*, 1:20-cv-4809-TCB, (N.D. Ga. Dec. 1, 2020), ECF No. 37 (order staying briefing schedule on action to enjoin certification in light of plaintiffs’ improper interlocutory appeal of temporary restraining order, remarking “Any delay in conducting the hearing on the claims in Plaintiffs’ complaint would be attributable to Plaintiffs—not this Court—since Plaintiffs are the ones who filed the notice of appeal.”).

apply.” *Id.* Similarly, any subsequent appeal to the Court of Appeals must be given precedence over other matters. Wis. Stat. § 9.01(9)(c).

President Trump’s citation of *Underwood v. Karns*, 21 Wis. 2d 175, 124 N.W. 2d 116 (1963), cuts against him. There, the Supreme Court held that the statutory procedure governed the appeal and rejected the attempt to bypass the statute. President Trump’s citation of the relevant language is also incomplete. The Court’s quotation in full states: “Where a statute relating to an administrative agency provides a direct method of judicial review of agency action, such method of review is generally regarded as exclusive, especially where the statutory remedy is plain, speedy, and adequate.” 21 Wis. 2d at 180, 124 N.W. 2d 119. Here, not only is the remedy in the statute plain, it is as speedy as President Trump want it to be and more than adequate. Moreover, this quotation cannot overcome the plain language in Section 9.01 itself and does

not provide an excuse for the Court to ignore the statutory command.

Because this Court is statutorily barred from granting this Petition, and because President Trump has not come close to demonstrating that the appellate process in Section 9.01 is insufficient here, this Court should deny the Petition.

B. The petition does not meet the criteria for the Court to exercise original jurisdiction.

President Trump present factual issues that are inappropriate for resolution in an original action. President Trump claim that this case is about purely legal issues and that no facts are in dispute. (Pet. p. 27.) This is patently false. First, if it were true that no facts were in dispute, then President Trump would have no need for the numerous affidavits filed in support of their claims for the purpose of establishing facts. (Aff. of Hudson, Pet'r. App. 163; Aff. of Moskowitz, Pet'r. App. 224; Second Aff. of Hudson, Pet'r

App. 242; Aff. of Woodall-Vogg, Pet'r. App. 264; Third Aff. of Hudson, Pet'r. App. 268; Aff. of Cook, Pet'r. App. 270; Aff. of Voiland, Pet'r. App. 271; Second Aff. of Voiland, Pet'r. App. 273.) The contents of affidavits are, of course, subject to testing through cross-examination.

Second, respondents absolutely dispute the alleged facts—namely that any invalid absentee ballots were inappropriately counted. At a minimum, in order to grant President Trump the relief of setting aside even a single ballot, a factfinder must determine whether and how many, if any, ballots were invalid, and how many such ballots were counted. This is a highly fact-intensive inquiry. Indeed, state law anticipates that judicial review of recount results is highly fact-specific. When a recount appeal is filed with a circuit court, the court must “forthwith issue an order directing” that “all ballots, papers and records affecting the appeal” be transmitted to the clerk of court or impounded and secured, or

both. Wis. Stat. § 9.01(7)(a). Preservation of the ballots and related papers allows for thorough court review, as necessary, to address the issues raised on appeal. This highly fact-specific inquiry is appropriate for a trial court, not an appellate court.

This Court has concluded that “[t]he Supreme Court is not a fact-finding tribunal,” and for that reason “generally will not exercise its original jurisdiction in matters involving contested issues of fact.” Wis. S. Ct., Internal Operating Procedures § III.B.3. Accord, e.g., *Green for Wis. v. State Elections Bd.*, 2006 WI 120, 297 Wis. 2d 300, 302, 723 N.W.2d 418. Indeed, only “with the greatest reluctance” will this Court “grant leave for the exercise of its original jurisdiction ... where questions of fact are involved.” *In re Exercise of Original Jurisdiction*, 201 Wis. at 128.

II. THE EQUITABLE DOCTRINE OF LACHES BARS RELIEF HERE.

Laches is an affirmative, equitable defense that bars relief when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim. *Wis. Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶11, 393 Wis. 2d 308, 946 N.W.2d 101 (citations omitted). "A party who delays in making a claim may lose his or her right to assert that claim based on the equitable doctrine of laches." *Dickau v. Dickau*, 2012 WI App 111, ¶9, 344 Wis. 2d 308, 824 N.W.2d 142 (citing *Zizzo v. Lakeside Steel & Mfg. Co.*, 2008 WI App 69, ¶7, 312 Wis. 2d 463, 752 N.W.2d 889). "Laches is founded on the notion that equity aids the vigilant, and not those who sleep on their rights to the detriment of the opposing party." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶14, 389 Wis. 2d 516, 936 N.W.2d 587, *cert. denied sub nom. Wis. ex rel. Wren v. Richardson*, 207 L. Ed. 2d 161 (U.S. June 1, 2020) (internal quotation marks and citations omitted).

In Wisconsin, laches has three elements: (1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay. *Wis. Small Businesses United*, 2020 WI 69, ¶12. As an equitable doctrine, “laches can and regularly does apply before a statute of limitation has expired.” *Id.*, ¶16. Laches is especially relevant in election-related matters, where the failure to resolve disputes as to the mechanics of the election well in advance could imperil the fundamental right to vote and extreme diligence and promptness are thus required. *See, e.g., Clark v. Reddick*, 791 N.W.2d 292, 294-96 (Minn. 2010) (declining on basis of laches to hear a challenge to a ballot when President Trump delayed filing petition until 15 days before absentee ballots were to be made available to voters); *Knox v. Milw. Cty. Bd. of Election Comm’rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984) (laches warranted denial of

preliminary injunction to restrain Wisconsin county elections where complaint filed seven weeks before election). *See also Democratic Nat’l Committee v. Wis. State Legislature*, No. 20A66, 2020 WL 627871, at *4 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay) (“The principle [of judicial restraint] also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process.”).

Indeed, within the past few weeks, a federal court in Georgia rejected similar challenges to the presidential election results in that state on laches grounds. *Wood v. Raffensperger*, No. 1:2020-cv-04651-SDG, 2020 WL 6817513 (N.D. Ga. Nov. 20, 2020). In doing so, the court stressed that laches principles are particularly salient in post-election cases because of the potential impact on the rights of voters and on public confidence in the electoral process:

Underscoring the exceptional nature of his requested relief, Wood's claims go much further; rather than challenging election rules on the eve of an election, he wants the rules for the already concluded election declared unconstitutional and over one million absentee ballots called into question. Beyond merely causing confusion, Wood's requested relief would disenfranchise a substantial portion of the electorate and erode public confidence in the electoral process.

Id. at *8. *Even* more recently, the Supreme Court of Pennsylvania likewise rejected similar challenges to the presidential elections results on laches grounds:

President Trump' challenge violates the doctrine of laches given their complete failure to act with due diligence in commencing their facial constitutional challenge, which was ascertainable upon Act 77's enactment.

See Kelly et al. v. Pennsylvania et al., No. 68 MAP 2020, 2020 WL 7018314, at *1 (Pa. Nov. 28, 2020) The same is true here.

A. President Trump Has Unreasonably Delayed in Seeking to Adjudicate His Claims.

President Trump has not acted with the requisite diligence and promptness. Their various challenges to

Wisconsin election procedures relied upon by Wisconsin voters became ripe months, and sometimes years, before the November 3, 2020 general election. And yet President Trump sat on his hands, doing nothing as Respondents worked diligently to carry out the election in the exceptional context of the ongoing COVID-19 pandemic. Instead, they waited to assert their claims until more than three million Wisconsinites' votes had already been cast and counted, until after President Trump knew the results of those votes, and until just days before the federal safe harbor date of December 8, 2020 under 3 U.S.C. §5.

While they are careful to bury the details in their several hundred-page Appendix, the procedures President Trump now seeks to rely on to try and nullify the will of the Wisconsin voters have been in place since well before the election. Specifically:

(1) *Allegations Involving In-Person Absentee*

Voting: President Trump seeks to disenfranchise “at least” 170,140 Milwaukee and Dane County voters who cast their ballots as “in person” absentee voters during the 14-day period preceding the November 3 election, as authorized by Wis. Stat. § 6.86(1)(b). (Pet. ¶ 19.) According to President Trump, these votes should be invalidated because the Counties accepted Form EL-122 as a certification of the fact that the voters had made the required written request for their absentee ballots. As the below image from the WEC’s web site demonstrates, President Trump’ position is not just frivolous, but could have been brought months prior to the election.

EL-122 Official Absentee Ballot Application/Certification

Form Name

Official Absentee Ballot Application/Certification

Form Number

EL-122

Form Description

Combination Absentee Ballot Application/Certification. Serves as an absentee ballot application and an absentee ballot certificate. Voters are not required to complete a separate absentee ballot application.

Attachment	Size
EL-122 Standard Absentee Ballot Certificate-portrait (rev. 2020-08).pdf	209.68 KB
EL-122 Standard Absentee Ballot Certificate-portrait - military and overseas (rev. 2020-08).pdf	167.21 KB
EL-122sp SPECIAL Absentee Ballot Certificate-portrait (rev. 2020-08).pdf	315.94 KB

Revision Date

2020-08

The WEC web site states, in no uncertain terms, that an EL-122 “*serves as an absentee ballot application and an absentee ballot certificate.*” See <https://elections.wi.gov/forms/el-122>, accessed Dec. 1, 2020 (emphasis added). The WEC web site also indicates this language has appeared on the WEC web site since at least August 2020, three months before the November election. In fact, the EL-122 which states on its first line that it is an

“Official Absentee Ballot Application/Certification,” has been in use since at least 2011. *See* Wisconsin Election Commission, *Special Teleconference Meeting* Wiseye.org (Nov. 18, 2020), at 3:20:22-:33, <https://wiseye.org/2020/11/18/wisconsin-elections-commission-special-teleconference-meeting-13/>. There is no conceivable merit to President Trump’s position, and no good faith basis for asserting it in their effort to disenfranchise 170,000 Wisconsin voters. But even if the position were plausibly defensible, the time to assert it would have been at some point in advance of the November election, not *after* 170,000 Wisconsin voters relied on this guidance in casting their votes.

(2) *Allegations Involving Voter Address Information:* President Trump complain about 5,517 ballots that supposedly had irregularities relating to the address information on the ballot envelope. (Pet. ¶21.) As President

Trump acknowledge in the Appendix filed with their Petition, the WEC issued a directive regarding this precise issue *more than four years ago* – back in October 2016⁶. (Pet’r. App. 275.) President Trump do not allege that there was any failure to comply with the WEC’s guidance, rather their issue is that the County Clerks acted in accordance therewith. President Trump offer no explanation for why they waited more than four years to challenge this directive, yet now seek to disenfranchise thousands of citizens who cast their votes in reliance on this guidance.

(3) *Allegations Involving Indefinitely Confined Absentee Ballots*: President Trump complain that a total of 28,395 indefinitely confined absentee ballots should not have been cast because the clerks were expressly charged with removing those voters from that status. (Pet. ¶23.) Once again, this

claim could and should have been brought months prior, indeed immediately after a March 31, 2020 order of this Court did not require the Dane County Clerk to determine which electors had applied for certain indefinite status and to remove them from the list of indefinitely confined voters. (Pet. Appx. at 235-37.) Plaintiffs offer no explanation for why they waited eight months to correct this perceived shortcoming, especially as litigation in this Court continued on that matter and other interested parties intervened. *See Jefferson v. Dane Cty.*, No. 2020AP557-OA (oral argument held Sept. 29, 2020).

(4) *Allegations Involving Ballots Cast At “Democracy in the Park”*: President Trump finally complain about ballots completed and/or delivered to employees of the City of Madison at an event held on September 26, 2020 – well over a month before the November 3, 2020 election. (Pet. ¶25.) As alleged in the Petition, this event was no secret, but rather was

widely publicized by everyone from the Biden Campaign to the Madison City Clerk. (Pet. ¶25.) And yet, President Trump did not come to this (or any other) Court in advance of the event to seek to enjoin it from happening. Rather, they sat on their hands while more than 17,000 Wisconsinites took advantage of this program, all of whom they now seek to belatedly strip of their right to vote.

In sum, President Trump dragged their feet, even as they knew the state was dutifully working to administer the election in accordance with the procedures and guidance President Trump now belatedly seek to undo, and that Wisconsin voters were relying on those procedures and guidance to exercise their right to vote.

President Trump' delay in bringing this matter before this court is unexplained, inexplicable, and inexcusable. Their delay is unreasonable in light of the extreme diligence and promptness of action required in matters related to ballot

printing. *See, e.g., Clark*, 791 N.W.2d at 294-96; *Knox*, 581 F. Supp. at 402; *cf. Hawkins v. Wis. Elections Comm’n*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam). Even worse, having waited to see whether they won or lost, President Trump now seek to turn their own dilatory conduct to their advantage. They argue that the more than hundred thousand Wisconsinites who relied on these well-known mechanisms for voting should be stripped of a fundamental and constitutionally protected right to vote—indeed perhaps the most fundamental right in our democracy. This is to say nothing of the other three million plus Wisconsin voters whose votes President Trump are putting in jeopardy by seeking to enjoin Wisconsin’s election process from playing out as it should. But the absence of opportunity to undo the perceived wrongs is entirely a result of President Trump’s own decisions. They should not be allowed to profit from a purported emergency of their own making.

B. Respondents Did Not Know President Trump Would Raise This Claim.

Respondents did not know before President Trump belatedly commenced this action that President Trump would seek this relief. To the contrary, President Trump had been expecting there would be more litigation concerning these issues prior to the election, and when there was not, appropriately assumed that President Trump would not seek to use the courts to disenfranchise voters after the fact.

And while many people feared that President Trump might bring frivolous suits, the possibility of a claim is not the same as knowledge of an impending suit. *See Wis. Small Businesses United*, 2020 WI 69, ¶18. The Governor had no warning of the extraordinary request now presented to this Court. In that respect, this case differs from *Watkins v. Milwaukee County Civil Service Commission*, 88 Wis. 2d 411, 423, 276 N.W.2d 775 (1979), where laches did not apply

because “[t]he President Trump informed the Commission at the time he rescinded his resignation that litigation would be commenced if a hearing were not granted.” Here, the absence of notice that litigation was imminent satisfies the second element of laches.

C. President Trump’ Unreasonable Delay Is Prejudicial.

Permitting this Petition to go forward despite President Trump’ inexcusable delay would cause unprecedented prejudice not just to Respondents, but to the more than 200,000 voters whose ballots are challenged by the Petition solely because they relied on longstanding State and County guidance regarding the mechanics of the election in casting their votes—and, indeed, all the nearly 3.3 million Wisconsinites who voted in the recent election, whose representation in the Electoral College could be jeopardized if the Petition proceeds.

Wisconsin officials administered this election, and Wisconsin voters exercised their fundamental right to vote, in reliance on the propriety of the pre-election policies and court decisions only now challenged by President Trump. Had President Trump raised and diligently pursued challenges to these policies and court decisions before the election, as they should have, then any required changes to election procedures could have been implemented in response to any court rulings before the election—before, that is, the voters of Wisconsin participated in the election in reliance on these very policies and court decisions.

Now, however, in the guise of a recount challenge, President Trump seeks to exploit their decision not to challenge these procedures earlier by invalidating more than 200,000 ballots that, they presume, were cast predominantly in favor of their opponents who prevailed in the election.

They do so just days before the safe harbor date established by federal law under 3 U.S.C. §5.

The right to vote is the foundational right of our democracy. President Trump chose to lie in the weeds for months nursing unasserted grievances with WEC, county, and municipal policies, and even a decision of this Court, only to spring out *after* the election and invoke those grievances in an effort to nullify the exercise of the right to vote by more than 200,000 Wisconsinite who cast their ballots in good faith and without even an allegation that any of them acted fraudulently, improperly, or in a manner in any way failed to comply with the instructions provided by their state and local officials. President Trump's scheme to overturn the results of the election they lost is exceptionally prejudicial to Respondents, to all Wisconsin voters, and to the foundations of democratic governance. Nothing could be more damaging

to the exercise of a critical constitutional right than retroactively nullifying that right entirely.

Courts routinely decline to change the rules of elections in the days and weeks leading up to an election, because of the significant prejudice caused by last-minute changes, which can result in voter confusion and depressed turnout. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). A court decision to *retroactively* change the rules *after* the election, and to invalidate more than 200,000 votes in the process, is even more unacceptable.

Federal appellate courts have repeatedly held that voters should not have their votes nullified for having followed guidance, policies, and court decisions in effect when they cast their ballot. *See, e.g., Griffin v. Burns*, 570 F.2d 1065, 1074-75 (1st Cir. 1978); *Ne. Ohio Coal. for the*

Homeless v. Husted, 696 F.3d 580, 597 (6th Cir. 2012).⁷

These courts have relied both on fundamental notions of fairness, and on federal constitutional due process protections. And this very election cycle, the U.S. Supreme Court followed suit in *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020). In that case, the Supreme Court stayed a district court’s order, in effect reinstating a briefly enjoined state-law witness requirement for absentee ballots. *See id.* But, in doing so, the Supreme Court expressly stated that any votes cast while the district court’s order had been in effect “may not be rejected for failing to comply with the witness requirement.” *Id.* The Court recognized the need to

⁷ President Trump suggest that the right to vote absentee is a “mere privilege” that does not implicate the right to vote. Pet. ¶ 27 (citing Wis. Stat. § 6.84(1)). However, the Supreme Court made clear in *Bush v. Gore* that states have an obligation to “satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right [to vote.]” 531 U.S. 98, 105 (2001). Arbitrarily disenfranchising more than 200,000 voters who cast their ballots in reliance on guidance from governmental officials, without challenging that guidance in advance of the election or affording those voters any opportunity to exercise their right to vote, would surely violate the fundamental right to vote, although the Court need not reach that issue to dismiss the petition on other grounds.

validate voters' reliance on the rules in place at the time they voted.

Nullifying more than 200,000 votes cast in the November general election based on President Trump inexcusably belated challenges to policies and court decisions in place well before the election would violate due process just as surely as the decisions struck down in *Grif* and *Husted*, and would run afoul of the U.S. Supreme Court's decision in *Andino*. Violating both the voting and due process rights of millions of Wisconsinites would be hugely, unfairly, and indisputably prejudicial.

III. PRESIDENT TRUMP'S REQUESTED RELIEF IS IMPROPER AND UNCONSTITUTIONAL.

Even if the Petition were properly before this Court, President Trump's requested relief—that the Court simply discard tens of thousands of ballots cast in the presidential election (and along with it, all the other elections held that

day in Wisconsin)—is unprecedented and improper. In fact, the relief requested is outrageous, undemocratic, and unconstitutional.

The right response to any post-election claims of improprieties is to follow the recount procedures outlined by Wisconsin law and to produce as accurate a count as humanly possible—a count that reflects the will of the voters. President Trump, unhappy with the outcome of that process, seeks instead to selectively and retroactively invalidate tens of thousands of votes, based on claims that election officials made technical errors in receiving those votes when and how they were cast. This requested relief would violate numerous fundamental federal laws.

A. President Trump’s requested relief violates due process.

The Due Process Clause of the federal Constitution protects not only the right to vote, but also the “right to have

one's vote counted." *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Granting the Petition and the requested relief would constitute a mass deprivation of Wisconsinites' constitutional right to vote. "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental." *Bush*, 531 U.S. at 104.

The due process deprivation would be particularly egregious here, where President Trump seek to nullify votes that were lawfully cast under the rules in place at the time they voted. As explained above, President Trump base their request for unprecedented relief on complaints about aspects of Wisconsin's election system that have been in place for months, and in some instances for years. *See supra*, Part II. A. Applying a new rule without notice to retroactively nullify ballots cast under the old rule is quintessentially unfair and violates due process. *See, e.g., Briscoe v. Kusper*, 435 F.2d

1046, 1055 (7th Cir. 1971) (applying new rule to nullify previously acceptable petition signatures without prior notice “was unfair and violated due process”). Federal appellate courts, relying both on fundamental notions of fairness and federal constitutional due process protections, have repeatedly held that voters should not have their votes nullified for having followed guidance, policies, and court decisions in effect when they cast their ballot. *See, e.g., Griffin v. Burns*, 570 F.2d 1065, 1074-75 (1st Cir. 1978); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012).

This very election cycle, in fact, the U.S. Supreme Court followed suit in *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020). In that case, the Supreme Court stayed a district court’s order, in effect reinstating a briefly enjoined state-law witness requirement for absentee ballots. *See id.* But, in doing so, the Supreme Court expressly stated that any votes cast while the district court’s order had

been in effect “may not be rejected for failing to comply with the witness requirement.” *Id.* The Court recognized the need to validate voters’ reliance on the rules in place at the time they voted.

B. President Trump’s requested relief violates 52 U.S.C. § 10101.

The relief requested would not only defy the Constitution, but would also violate the federal statutory prohibition—firmly established for 150 years—against denying any registered voter the right to vote in an election based on an immaterial error or omission under state law. 52 U.S.C. § 10101(a)(2)(B). President Trump do not allege fraud. Rather, they allege (without support) a series of purported instances of technical noncompliance with state election law. Under federal law, though, the standard imposed for ballot acceptance must directly relate to determining voter qualification. *See id.* Any requirement that is not material to

that specific function cannot be the basis for denying the right to vote. *Id.* Disqualifying a ballot for any reason other than those related to determining qualification to vote is impermissible under federal law. *Id.*

President Trump raises disputes over what constitutes a proper “written application” for an absentee ballot under state law; whether municipal clerks are permitted to add missing address information (if they have reason to know the information) to absentee ballot certifications; whether some voters *may* have improperly claimed “Indefinite Confinement” status (which under state law exempts voters from one voter identification requirement); and whether “Democracy in the Park” events technically comply with state election laws. President Trump is wrong on the law. Yet even if one or more of these disputes were to go President Trump’s way, the resulting alleged violations would constitute clearly immaterial errors or omissions under state law. For that

reason, granting the requested relief—the discarding of tens of thousands of votes based on immaterial errors or omissions under state law—would violate 52 U.S.C. § 10101(a)(2)(B).

C. President Trump’s requested relief violates equal protection.

Other than the “Democracy in the Park” events, which occurred in Madison, all of the alleged violations of law claimed by Petitioners were based on statewide legal guidance, and thus inevitably affected ballots cast across the state. Yet President Trump’s request as relief only that ballots be discarded from Dane and Milwaukee counties. Granting such relief, jerry-rigged to benefit President Trump’ interests, would clearly violate equal protection by treating voters in those two counties differently—less favorably—than similarly situated voters in all of Wisconsin’s other counties.

“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and separate treatment,

value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104 (2000). But that is precisely what this Court would be doing if it agreed to discard tens of thousands of votes cast in the presidential election in just two Wisconsin counties, while permitting votes cast in other counties to be counted despite suffering from precisely the same alleged legal defects as President Trump claim as the basis for discarding the Dane and Milwaukee County votes. Judicial relief cannot itself violate the Constitution. For that additional reason, President Trump cannot obtain their requested relief, even if they were able to prove their factual and legal case.

IV. THE PETITION FAILS ON THE MERITS.

Even if this Court were to consider exercising original jurisdiction over this matter, the Petition should still be denied because it fails on the merits. Governor Evers presents the following initial arguments in opposition to President Trump's claims, but expects to present more developed

arguments and to be heard in full should this Court decide to exercise original jurisdiction over this matter.

A. In-person absentee ballots are requested by written application.

Despite President Trump’s claim to the contrary, in-person absentee ballots are requested by written application as required by Wis. Stat. §6.86(1)(ar). (Pet. ¶¶19-20, 29-38.) President Trump ignores the fact that the absentee ballot envelope serves as both the application and the certification of the ballot. There is no ambiguity about this. Printed across the top of the document are the words “Official Absentee Ballot Application/Certification.”⁸ Thus by completing the form, voters are both applying for the ballot, in writing, and certifying the ballot.

⁸ See WEC Form EL-122, available at <https://elections.wi.gov/forms/el-122>; (Pet’r. App. 259.)

B. State law does not prohibit election officials from correcting witness address information on absentee ballot envelopes.

President Trump erroneously assumes that the only method for curing an absentee ballot with an improperly completed certificate is to “return the ballot to the elector” for correction, as anticipated by Wis. Stat. § 6.87(9). The form of correction under Wis. Stat. § 6.87(9) is not a provision expressly made mandatory by Wis. Stat. § 6.84(2).⁹ As Wisconsin’s election laws are otherwise construed to give effect to the will of the elector, *see* Wis. Stat. § 5.01(1), this method of correction is one option available to election officials, but it need not be understood as exclusive. Indeed, this more inclusive interpretation has been endorsed by the WEC, based upon input from the Wisconsin Department of Justice, since 2016. *See* Wis. Elections Comm’n Interim

⁹ For purposes of this argument, Governor Evers assumes, without conceding, that the plain text interpretation of Wis. Stat. § 6.84 is constitutional.

Administrator Michael Haas, *AMENDED: Absentee Certificate Envelopes: Missing or Insufficient Witness Address*, (October 14, 2016).¹⁰

C. Absentee ballots for indefinitely confined voters must be counted.

President Trump also fails to show that any voter designated as “indefinitely confined”—including those who registered without having photo ID on file, as permitted under Wis. Stat. § 6.87(4)(b)2.—received an absentee ballot in contravention of Wisconsin law. (Pet. ¶¶23-24, 46-57). This argument lacks any basis in law or fact.

President Trump alleges that voters who registered as indefinitely confined after March 24, 2020, “were necessarily suspect” (Pet. ¶46) such that municipal clerks were obligated to proactively and independently verify the legitimacy of each voter’s application for indefinitely confined status (Pet. ¶56).

¹⁰ Available at: https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/AMENDED_Comm%20Memo_Absentee%20Certificate_Address.pdf.

However, state law entrusts individual voters to determine whether they qualify to avail themselves of Wis. Stat. § 6.86(2)(a) and does not require that municipal clerks independently verify a voter's indefinitely-confined status. State law requires a clerk to remove a voter from the indefinitely-confined list only "upon receipt of reliable information that [a voter] no longer qualifies for the service." Wis. Stat. § 6.86(2)(b).

President Trump fails to give even one example of a municipal clerk receiving "reliable information" and failing to remove a voter from the list. Yet President Trump seeks to strike every vote cast by a voter indefinitely confined. There is no basis here for striking any absentee ballots cast by an indefinitely confined voter.

D. Absentee ballots delivered in the City of Madison at Democracy in the Park events are valid.

President Trump alleges that the City of Madison’s Democracy in the Park events were illegal and that any absentee ballots delivered to election officials at the events are therefore invalid. (Pet. ¶¶25-26 58-60.) Wis. Stat. § 6.87(4)(b)1. requires that an elector must either mail their absentee ballot to the clerk, or deliver the ballot in-person to the elector’s municipal clerk. The WEC has issued guidance interpreting this provision to allow the use of “drop boxes” as a method of personal delivery. *See* Wisconsin Elections Commission Administrator Meagan Wolfe, *Absentee Ballot Drop Box Information* (August 19, 2020).¹¹ One of the drop box options offered was a staffed, outdoor drop-off location. *Id.* at 2. At this type of site, election officials would accept the ballot from the voter and deposit the ballot in a ballot box. *Id.* To maintain ballot security, the WEC recommended using

¹¹ *See* <https://elections.wi.gov/node/7036> and click on the attachment “Drop Box Final.pdf” (last accessed December 1, 2020).

tamper-evident seals on the ballot box, and implementing a chain of custody log. *Id* at 3-4. Madison's City Attorney confirmed that the Democracy in the Park events followed these secure procedures. (Gov. App. 110) President Trump presents no evidence to contradict these facts or to call into doubt the validity of absentee ballots returned through the Democracy in the Park program.

CONCLUSION

For the reasons stated above, the petition should be denied.

Dated: December 1, 2020.

By: _____
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CERTIFICATION

I certify that the foregoing petition conforms to the rules contained in Wis. Stat. § (Rule) 809.62(4) and § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

Dated: December 1, 2020.

Jeffrey A. Mandell

CERTIFICATION OF FILING AND SERVICE

I certify that on December 1, 2020, as provided in the Court's Order dated December 1, 2020, this brief and the accompanying appendix were filed by electronic mail and also hand delivered to the Clerk of the Supreme Court.

I certify that on December 1, 2020, I caused a copy of this brief and the accompanying appendix to be emailed to counsel of record for President Trump and the other Respondents as previously agreed when they waived service of paper copies.

Dated: December 1, 2020.

Jeffrey A. Mandell

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, is an appendix that complies with Wis. Stat. (Rule) § 809.19(2)(a) and that contains, at a minimum, if applicable: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including

juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: December 1, 2020.

Jeffrey A. Mandell