SUPREME COURT OF WISCONSIN

No. 2020AP1930-OA

WISCONSIN VOTERS ALLIANCE, *et al.*,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Respondents.

Original Action in the Wisconsin Supreme Court

CORRECTED RESPONSE OF RESPONDENT-INTERVENOR DEMOCRATIC NATIONAL COMMITTEE TO EMERGENCY PETITION FOR ORIGINAL ACTION

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INTRODUCTION

A group calling itself the "Wisconsin Voters Alliance" (WVA), together with a mere 30 individuals of the nearly 3.3 million Wisconsin voters who cast ballots in the recent presidential election, has filed an "Emergency Petition for Original Action" asking this Court (1) to "**nullify** [the] Presidential Election result" in Wisconsin and declare it "**void**"; (2) to enjoin the Wisconsin Elections Commission (WEC) from certifying the election, so that the state legislature can lawfully appoint the presidential electors in accordance with their preference, rather than the voters; and (3) to order Governor Evers to certify under 3 U.S.C. § 6 electors chosen by the State Legislature rather than those elected by Wisconsin's voters. Pet. 2, 41-42 (emphasis added). Such a result would be unprecedented in American history and unthinkable in our modern constitutional democracy.

President-elect Biden and Vice President-elect Harris carried the State of Wisconsin by over 20,000 votes in the November 3, 2020 general election. App. 1.[1] Biden and Harris are therefore entitled as a matter of law to Wisconsin's ten electoral votes. *See* Wis. Stat. §§ 5.10, 5.64(1)(em), 7.70(5)(b), 8.18, 8.25(1). Petitioners seek to disenfranchise the over **1.6 million Wisconsin citizens** who voted for the Biden-Harris electors. *See id.* § 5.10 ("[A] vote for the president and vice president named on the ballot is a vote for the electors of the candidates for whom an elector's vote is cast"). Petitioners' requested "relief" is an affront to our most cherished constitutional and democratic values. We are unaware of any state or federal court that has ever attempted such a shift of authority from a state's voters to the state's

[1] All citations to App. are to the numbered exhibits in the Appendix that accompanies this response.

legislature. Doing so would violate both the Wisconsin and federal constitutions.

Petitioners do not disclose that their request is part of a coordinated effort launched this week to "file federal and state lawsuits challenging the presidential election results in Wisconsin, Pennsylvania, Michigan, Nevada, Georgia, and Arizona." App. 3. These challenges are part of a "partnership" between the Amistad Project of the Thomas More Society and the Trump campaign. *Id.* The "partners" in this new wave of litigation are seeking to demonstrate a variety of "common violations across the six states," App. 5, with the goal of using the judiciary to deliver the presidency to Donald J. Trump, never mind how the voters have spoken. Further, over and over again, when the Trump campaign and its allies have sought to overturn election results in at least five states over the past two weeks, judges have universally rejected those challenges, finding that the plaintiffs lacked

any evidence to support their claims (much less sufficient evidence to justify their extraordinary requests for relief).

The Wisconsin version of this multi-state effort to undo the 2020 presidential election—the "Emergency Petition for Original Action" now before this Court—is a grab bag of assorted generalized grievances that fall into three broad categories. All are without merit. *First*, Petitioners repeatedly attack the alleged influence of what they call "Zuckerberg money" on the outcome of the November 3 election. Pet. ¶ 8; *see id.* ¶¶ 2-3. 49-72, 111-14. They claim that "the Zuckerberg-funded private organization, the Center for Technology and Civic Life [CTCL], gifted over $6,000,000 to the Cities of Racine, Kenosha, Green Bay, Madison and Milwaukee, all Democratic Party strongholds, in order for those cities to facilitate the use of absentee voting," which supposedly resulted in "restrict[ing] in-person voting in rural/small town areas while promoting in-person/absentee

voting in urban areas." *Id.* ¶¶ 3, 112. WVA's virtually identical challenge to the work of the CTCL in Wisconsin was rejected *prior* to the November 3 election by the U.S. District Court for the Eastern District of Wisconsin, the Seventh Circuit, and the U.S. Supreme Court. *See Wisconsin Voters Alliance v. City of Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020) (Griesbach, J.), *stay denied,* 2020 WL 6591209 (E.D. Wis. Oct. 21, 2020), *stay denied*, No. 20-3002 (7th Cir. Oct. 23, 2020), *stay denied,* No. 20A75 (U.S. Oct. 29, 2020) (Kavanaugh, J., in chambers). Many similar challenges to the CTCL grants have been rejected by courts throughout the Nation. *See* p. 19 & n. 2 *infra.* Nor, in any event, do Petitioners' allegations concerning grant funding remotely support their extraordinary demand to disregard every Wisconsinite's vote.

Second, Petitioners challenge several absentee voting practices that were carried out statewide pursuant to well-

publicized WEC instructions and guidance dating back many months and in one instance ***four years.*** *See* Pet. ¶¶ 22-32, 69-70, 75-104. Petitioners could have challenged these practices long before the November 3 election through Wis. Stat. chapter 227 judicial review but chose not to. All of these assorted grievances also have been raised in the pending recount proceedings requested by President Trump and will be subject to judicial review, if President Trump seeks such review, pursuant to the exclusive remedy afforded in Wis. Stat. § 9.01(6)-(9).

Third, Petitioners submit what they label a "government data report and estimates" prepared by an alleged "expert," Matthew Braynard, who runs a business he calls "External Affairs, Inc." Pet. 41; *see* Braynard Expert Report ("Rep.") at 3-4. He claims that External Affairs has combed through various government and private databases (including one maintained by a group called "L2 Political")

and then investigated ***individual Wisconsin voters*** using "the staff of [his] call centers and social media researchers." Rep. at 3. In other words, Mr. Braynard and his staff apparently cold-called Wisconsinites to question them about their voting behavior and reviewed Wisconsinites' social media postings to identify photos or other information supposedly inconsistent with their voting status. *Id.* at 6. Petitioners claim that External Affairs' "data" gathered in this dubious fashion demonstrate that **156,807 Wisconsinites** either cast "illegal votes" or cast "legal votes" that were not counted. Pet. 3. Petitioners apparently want this Court to conduct an inquisition into Mr. Braynard's allegations against these voters and the state and local officials who allowed them to cast their ballots.

Based on the combination of these factors—the "Zuckerberg money," the WEC's alleged misapplication of various Wisconsin statutes, and the "government data report

and estimates" assembled by "External Affairs, Inc."—Petitioners ask this Court in the exercise of its *discretion* to do something no court to our knowledge has ever done in American history—"**nullify**" and "**void**" the presidential election results in a state and order the WEC not to certify the election so that the state legislature can choose its own preferred slate of electors instead. But "Wisconsinites have a fundamental right to vote. Therefore, a vote legally cast and received by the time the polls close on Election Day **must be counted** if the ballot expresses the will of the voter." *O'Bright v. Lynch*, No. 2020AP1761-OA (Wis. Sup. Ct. Oct. 29, 2020) (Roggensack, C.J., concurring) (emphasis added); *see also Ollmann v. Kowalewski*, 238 Wis. 574, 579, 300 N.W. 183, 185 (1941) (failure to count voter's ballot "for no fault of his own would deprive him of his constitutional right to vote," which "'cannot be baffled by latent official failure or defect'") (citation omitted); *United States v. Classic*, 313 U.S.

299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted ….").

Petitioners' Emergency Petition for Original Action should be denied for many reasons. *First*, Petitioners lack standing to pursue their generalized grievances about how the WEC and local elections officials conducted the 2020 general election in the midst of a once-in-a-century global pandemic. Literally any voter could raise the same objections they make, and there no doubt would be many more such suits if this one were allowed to proceed. Petitioners have not suffered any *personal* injury separate and apart from the public at large, and thus lack the personal stake necessary to sue.

Second, the Petition seeks an improper end-run around Wisconsin's "exclusive judicial remedy" for any "alleged irregularity, defect or mistake committed during the voting or

canvassing process." Wis. Stat. § 9.01(11). That "exclusive" remedy is not an original action in this Court by individual voters, but an action in circuit court by the defeated candidate when the recount is over. The challenges raised by Petitioners either have been raised in the recount proceedings or could have been by Petitioners' "partner," the Trump campaign. There is no reason for this Court to exercise its discretion to allow Petitioners to use an original action to disrupt and delay either the completion of the recount or judicial review of the recount under Section 9.01.

Third, Petitioners seek to challenge through an original action longstanding WEC guidance documents that were relied upon by local election officials and voters throughout the State. But Wis. Stat. § 227.40(1) provides "the exclusive means of judicial review of the validity of a … guidance document" issued by a state agency like the WEC. This "exclusive" avenue for review includes any argument that an

agency guidance document "exceeds the statutory authority of the agency"—precisely what Petitioners claim here. *Id.* § 227.40(4)(a).

Fourth, the Court should not exercise jurisdiction over this case because Petitioners make numerous allegations of disputed fact. Petitioners' claims rest not only on questions of law, but also on assertions that certain jurisdictions improperly promoted absentee voting; that voters who self-identified as indefinitely confined were not, in fact, indefinitely confined; and that municipal clerks improperly cured witness address issues. These are questions of fact that the parties are sure to dispute. Petitioners ask this Court to accept their allegations and the report of their self-styled "expert" as "sufficient evidence" of unlawful conduct to warrant discarding the election results. Pet. ¶ 8. But Petitioners' allegations, if they state any claim at all, must be the subject of discovery and fact-finding. This Court has

repeatedly said it will not exercise jurisdiction in such a case, and there is no reason to make an exception here.

Fifth, this Court has emphasized that it will not exercise its original jurisdiction when a petitioner could have challenged the disputed practice much earlier, before others relied on it. Whether labeled as laches, estoppel, unclean hands, or simply the exercise of sound equitable discretion, this Court does not grant original jurisdiction when a petitioner has slept on his rights. *See, e.g.*, *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 948 N.W.2d 877; *Wis. Small Bus. United, Inc. v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis. 2d 308, 946 N.W.2d 101. Petitioners could have raised their objections long before the election—as long as four years ago—and they have no right now to use an original action to retroactively disenfranchise the entire Wisconsin electorate simply for following the law as

construed and applied by the WEC and local election officials throughout the State.

Sixth, Petitioners do not meet the requirements for declaratory and injunctive relief. Their lack of standing and inability to show that this matter is ripe for adjudication (where it depends on untested factual assertions, concerns a recount that is still pending, and assumes without any evident basis the Legislature's willingness to go along with Petitioners' extraordinary scheme) preclude a declaratory judgment action, the equities do not support granting an injunction, and their manifestly flawed legal theories support neither form of relief.

Finally, the extraordinary relief Petitioners request—discarding the votes of every Wisconsinite and throwing the election to the Legislature to usurp the popular vote—would violate the rights of Wisconsin voters under the United States and Wisconsin Constitutions and federal law.

LEGAL STANDARD

This Court has discretion to exercise original jurisdiction over a case that "so importantly affect[s] the rights and liberties of the people of this state as to warrant such intervention." *Petition of Heil*, 230 Wis. 428, ¶¶ 11, 284 N.W. 42, 49 (1938); *see also* Wis. Const. art. VII, § 3(2); Wis. Stat. § 809.70. The Court, however, has declined to exercise such jurisdiction where it is "too late to grant petitioners any form of relief that would be feasible," or where granting relief would cause "undue damage." *Hawkins*, 2020 WI 75, ¶ 5. The Court also typically declines to exercise original jurisdiction where material facts are disputed, because it "is not a fact-finding tribunal." Wis. S. Ct. Internal Operating Procedures III.B.3.

COUNTERSTATEMENT OF THE CASE & THE FACTS

As discussed in the Introduction, the Emergency Petition identifies three broad categories of alleged misconduct. We address each of these categories in turn.

A. THE CENTER FOR TECH AND CIVIC LIFE

As Judge Griesbach found last month, the CTCL is "a private non-profit organization" that, through its COVID-19 Response Grant Program, has awarded grants to municipalities of all sizes "to assist them in safely conducting a national election in the midst of the public health emergency created by the COVID-19 pandemic." *City of Racine,* 2020 WL 6129510, *1. In the leadup to the November election, CTCL offered grants "to every local election department in every state in the union to ensure that they have the staffing, training, and equipment necessary so that this November every eligible voter can participate in a safe and timely way and have their vote counted." App. 7.

As Judge Griesbach found, although Petitioners suggest these grants went only to five cities in Wisconsin (Milwaukee, Madison, Green Bay, Racine, and Kenosha), over 100 Wisconsin municipalities throughout the State, urban and rural, received grants from CTCL on a strictly non-partisan basis. *City of Racine*, 2020 WL 6129510, **1-2. CTCL made these grants to the Cities of Altoona, Amery, and Antigo, at one end of the alphabet, all the way through to the Town of Weston, the Township of Wien, and the Village of Wilton at the other end, along with another hundred municipalities in between. *See* App. 24-28.

Judge Griesbach held *prior* to the election that "nothing in the [Wisconsin] statutes Plaintiffs cite, either directly or indirectly, … can be fairly construed as prohibiting the defendant Cities from accepting funds from CTCL." 2020 WL 6129510, *2. The Seventh Circuit and the U.S. Supreme Court (acting through Justice Kavanaugh, as then-

Circuit Justice for the Seventh Circuit) rejected WVA's request for *pre-election relief*. *See* p. 7 *supra*. Now WVA is asking this Court to "nullify" and "void" the election results, after the fact, based on these same bogus allegations.

In addition to the six-state round of litigation it unleashed this week (*see* App. 3), the Amistad Project brought an earlier wave of challenges to "Zuckerberg money" and the work of the CTCL prior to the election. These included *City of Racine* along with similar suits in Texas, Pennsylvania, Georgia, Iowa, Minnesota, Michigan, and South Carolina. Every one of these challenges failed.[2]

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[2] *See, e.g.*, *Texas Voters All. v. Dallas Cty.*, No. 4:20-CV-00775, 2020 WL 6146248, at *4 (E.D. Tex. Oct. 20, 2020) (denying motion for preliminary injunctive relief based on, among other things, failure to establish both standing and likelihood of success on the merits); *see also id.* (E.D. Tex. Nov. 17, 2020) (subsequently voluntarily dismissing case); *see also Pennsylvania Voters All. v. Ctr. Cty.*, No. 4:20-CV-01761, 2020 WL 6158309, at *1 (M.D. Pa. Oct. 21, 2020), *aff'd* (3d. Cir. Nov. 23, 2020); *Georgia Voter All. v. Fulton Cty.*, No. 1:20-CV-4198-LMM, 2020 WL 6589655, at *3 (N.D. Ga. Oct. 28, 2020) (denying motion for preliminary injunctive relief based on, among other things, failure to establish likelihood of success on the merits); *see also id*. (N.D. Ga. Nov.

B. WEC-APPROVED PRACTICES

1. Witness address requirement. An absentee voter must complete her ballot and sign a "Certification of Voter" on the absentee ballot envelope in the presence of a witness. Wis. Stat. § 6.87(4)(b); *see* Ex. 4. The witness must then sign a "Certification of Witness" on the envelope, which must include the witness's address. Wis. Stat. § 6.87; *see* App. 29. The witness-address requirement is "mandatory," *id.* §

4, 2020) (subsequently voluntarily dismissing case); *see also Election Integrity Fund, et al., Plaintiffs, v. City of Lansing & City Of Flint, Defendants*., No. 1:20-CV-950, 2020 WL 6605987, at *3 (W.D. Mich. Oct. 19, 2020) (denying preliminary injunctive relief based on, among other things, failure to establish standing); *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *5 (N.D. Iowa Oct. 20, 2020) (denying motion for preliminary injunctive relief based on failure to establish likelihood of success on the merits); *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937, at *8 (D. Minn. Oct. 16, 2020) (denying motion for preliminary injunctive relief based on failure to establish standing); *South Carolina Voter's Alliance v. Charleston Cty.*, No. 2:20-3710-RMG (D.S.C. Oct. 26, 2020) (denying motion for preliminary injunctive relief based on, among other things, failure to establish likelihood of success on the merits); *see also id.* (D.S.C. Nov. 17, 2020 subsequently voluntarily dismissing case).

6.84(2), and "[i]f a certificate is missing the address of a witness, the ballot may not be counted," *id.* § 6.87(6d).

Petitioners concede (Pet. ¶¶ 87-89) that, since October 2016, the WEC has instructed municipal clerks that, while they may *never* add missing *signatures*, they "*must* take corrective action" to add missing *witness addresses* if they are "'reasonably able to discern'" that information by contacting the witnesses or looking up the addresses through reliable sources. App. 30-31. The WEC has repeated these instructions in multiple guidance documents over the past four years. *See* App. 34 (guidance in current WEC Election Administration Manual that clerks "may add a missing witness address using whatever means are available," and "should initial next to the added witness address"). This construction was adopted unanimously by the WEC over four years ago; has governed in *eleven* statewide races since then, including the 2016 presidential election and recount; has been

relied upon by local election officials and voters throughout the State; and has never been challenged through Chapter 227 judicial review or otherwise. App. 38-39

Until now. Petitioners now complain that "the Milwaukee Election Commission" followed this supposedly illegal guidance, resulting in more ballots being accepted in Milwaukee County than should have been allowed. Pet. ¶¶ 90-93, 98-101. But even if this agency guidance were wrong (it was not), the reliance was not just in Milwaukee County—clerks throughout the State relied in good faith on the WEC's instructions to cure missing witness addresses. And Petitioners do not explain why they did not challenge this longstanding guidance *before* the election, whether under chapter 227 or otherwise.

2. "Indefinitely confined" exemption. Voters who self-certify that they are "indefinitely confined because of age, physical illness or infirmity or … disabled for an

indefinite period" are not required to submit photocopies of their photo IDs with their absentee ballot applications. Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)(2). After the pandemic hit Wisconsin in March and the Evers Administration issued a "Safer-at-Home Order" on March 24, some county clerks advised voters that they could claim to be "indefinitely confined" pursuant to the order for purposes of voting absentee in the April 7 spring election. Both the WEC and this Court disagreed with that broad and unqualified reading. Instead, the WEC issued, and this Court endorsed, much narrower guidance that left the decision to individual voters subject to certain guidelines.

The WEC's March 29, 2020 guidance, which remains in effect, provides in pertinent part:

> 1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for

> electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.
>
> 2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

App. 40. The WEC's guidance goes on to explain:

> We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. ***During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates.*** We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

App. 41 (emphasis added).

Consistent with Wisconsin's decades-long legislative policy of taking voters at their word concerning indefinite confinement, the Commission's guidance emphasizes the importance of avoiding any "proof" requirements. "Statutes do not establish the option to require proof or documentation from indefinitely confined voters. Clerks may tactfully verify with voters that the voter understood the indefinitely confined status designation when they submitted their request, but they may not request or require proof." *Id*.[3]

In a March 31, 2020 order, this Court granted the Republican Party of Wisconsin's motion for a temporary restraining order, directing the Dane County Clerk to "refrain from posting advice as the County Clerk for Dane County

[3] The relevant portion of what is now numbered Section 6.86(2)(a) has been unchanged since 1985, when the Legislature eliminated a formal affidavit requirement for those claiming to be "indefinitely confined" and allowed voters to self-certify. *See* WIS. STAT. § 6.86(2) (1985). For the past 35 years, the Legislature has trusted voters to self-certify their condition.

inconsistent with the above quote from the WEC guidance." *Jefferson v. Dane Cty.*, No 2020AP557-OA (Mar. 31, 2020). In so holding, this Court effectively sustained the WEC's guidance for the term "indefinitely confined" as quoted above, at least pending a final decision in *Jefferson*.

Neither the WEC nor this Court provided further guidance before the November 3 election. This Court heard oral argument in *Jefferson* on September 29; a decision is pending. The Court elected not to decide the case prior to the election by expediting briefing and argument. The WEC guidance (as endorsed by this Court) thus remained in effect through the election, and voters throughout the State relied upon it.

C. "EXPERT" INVESTIGATIONS.

Petitioners' professed "expert," Matthew Braynard, claims his company, "External Affairs, Inc.," has identified (through analysis of government databases, cold calls to

voters, and "social media research"), **156,807 Wisconsin voters** who allegedly cast either "illegal votes" or "legal votes" that were never counted. Pet. 3; *see* Rep. at 4-10. Petitioners claim that Braynard's analysis proves "the election result is void because of illegal votes counted, legal votes not counted, counting errors and election official illegalities." Pet. ¶ 116. They complain that enough "Republican" ballots were tampered with—either because the ballots were requested by other people or were returned but never counted—"to change the election result" in Wisconsin. *Id.* ¶¶ 117-18. And they also complain, based on Braynard's "report," about electors voting where they did not reside, electors claiming to be "indefinitely confined" when they were not, out-of-state residents voting in state, and "double votes." Pet. 3, 41-42; Rep. 4-10.

Braynard goes so far as to allege that, of the 213,215 absentee voters who claimed to be "indefinitely confined,"

"**45.23%** of those individuals were not indefinitely confined on Election Day." Rep. 9-10. His conclusion that nearly 100,000 Wisconsin voters illegally claimed to be indefinitely confined is based on vaguely described "investigations" by his staff "using the internet and social media" of voters claiming this status. *Id.* at 10. Among other things, he claims his staff identified information "demonstrating the individuals were not indefinitely confined," such as a photo of a person "riding a bike." *Id.* And he used "call centers" to make cold calls to voters inquiring about the veracity of information they had provided to election officials. *Id.* at 6-9.

ARGUMENT

A. PETITIONERS LACK STANDING

To have standing, "a party must have a *personal stake* in the outcome of the controversy." *Marx v. Morris*, 2019 WI 34, ¶ 35, 386 Wis. 2d 122, 925 N.W.2d 112 (emphasis added); *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*,

Inc., 2011 WI 36, ¶ 40, 333 Wis. 2d 402, 797 N.W.2d 789. Petitioners must show they "suffered or were threatened with an injury to an interest that is legally protectable." *Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517; *see also Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 40 (standing depends on "whether the interest of the party whose standing is challenged will be injured" or "adversely affected"). Even construing these requirements "liberally," *Krier*, 317 Wis. 2d 288, ¶ 20, neither the individual Petitioners nor WVA has standing to bring suit.

The individual Petitioners claim (at ¶ 10) standing to challenge the election processes because they are "Wisconsin elector[s]" and "voters." But Petitioners nowhere specify how they have been *personally* injured by the outcome or process of the election. For instance, they do not allege that their own right to participate in the election was impaired. *Cf. Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982) (plaintiff

must show that judicial relief "will relieve a discrete injury to himself"); *see Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wisconsin,* 69 Wis. 2d 1, 11, 230 N.W.2d 243 (1975) (noting persuasive value of federal cases in state standing analysis). Without a more specific or particularized injury, the individual Petitioners have failed to demonstrate they have "a personal stake in the outcome" of this case. *Krier*, 317 Wis. 2d ¶ 20.[4]

Nor has the WVA suffered injury sufficient to support standing. It nowhere claims any injury to its own interests as an organization. *Munger v. Seehafer*, 2016 WI App 89, ¶ 53, 372 Wis. 2d 749, 890 N.W.2d 22; *see also People for the Ethical Treatment of Animals v. U.S. Dep't of Agriculture*,

[4] The individual Petitioners also imply, without explanation (at ¶ 10), that they have standing based on their status as "taxpayer[s]." They do not. The Petition does not allege or otherwise support any inference that petitioners have sustained injury in the form of "some pecuniary loss." *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961).

797 F.3d 1087, 1093 (D.C. Cir. 2015) ("The United States Supreme Court has made plain that a "concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests" and thus suffices for standing.") (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Though WVA broadly claims (at ¶ 9) to be a membership organization, it has failed to allege any facts or otherwise demonstrate that "at least one of its members would have had standing" to sue based on individual injuries as opposed to generalized grievances. *Munger*, 2016 WI App 89, ¶ 53; *see also Texas Voters All. v. Dallas Cty.*, No. 4:20-CV-00775, 2020 WL 6146248, at *8 (E.D. Tex. Oct. 20, 2020) (rejecting standing claims of similar organization, Texas Voters Alliance, because of its failure to identify concrete injury).

Indeed, instead of demonstrating their "personal stake" in this controversy, *Marx*, 386 Wis. 2d 122, ¶ 35, both the individual Petitioners and WVA merely imply (¶¶ 8–10) that they have been harmed generally because election officials "fail[ed] to administer and conduct the November 3, 2020 election . . . in accordance with Wisconsin law." This amounts to no more than a "'generalized grievance[]' about the administration" of the election. *Cornwell Pers. Assocs., Ltd. v. Dep't of Indus., Labor & Human Relations*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (App. 1979). Put another way, petitioners "claim[] only harm to [their] and every citizen's interest in proper application of the Constitution and laws," and the relief they seek "no more directly and tangibly benefits [them] than it does the public at large . . . ." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 573–74 (1992). These grievances are insufficient to establish Petitioners' standing in this case. *See, e.g., Pennsylvania Voters All. v. Ctr. Cty.*, No.

4:20-CV-01761, 2020 WL 6158309, at *4 (M.D. Pa. Oct. 21, 2020) (injuries of plaintiffs, including similar "Alliance" organization, challenging work of the CTCL prior to the election "constitute[d] generalized grievances" that were "insufficiently particularized to support standing").

In the end, Petitioners lack standing and no "judicial policy" or other prudential consideration supports exercising jurisdiction. *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 40. To the contrary, allowing these claims to proceed in the absence of any showing of individualized injury to the Petitioners would open a "universe of entities or people" who could similarly bring challenges to the outcome or conduct of any election. *Krier*, 317 Wis.2d 288, ¶ 20.

B. THIS COURT SHOULD DENY THE PETITION BECAUSE IT SEEKS AN END-RUN AROUND WISCONSIN'S RECOUNT PROCEDURE

Petitioners are improperly attempting to circumvent the "exclusive remedy" authorized under Wisconsin law for

alleged defects in an election: a recount, followed, if necessary, by an appeal to circuit court. Indeed, such a recount is underway, requested by President Trump and addressing many of the same issues Petitioners raise here. The Court should reject Petitioners' attempted end-run.

Wisconsin's Election Code establishes an "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 remedy is a recount, which an aggrieved candidate or, in the case of a referendum, an elector, may request by petition. *Id.* § 9.01(1)(a). If, when the recount is complete, a candidate is "aggrieved by the recount," he may appeal to circuit court. *Id.* § 9.01(6)(a).

This Court has emphasized that "the recount statute plainly and unambiguously provides the exclusive remedy for challenging the results of an election based on mistakes in the

canvassing process." *State ex rel. Shroble v. Prusener*, 185 Wis. 2d 102, 107, 517 N.W.2d 169 (1994); *see also Carlson v. Oconto Cty. Bd. of Canvassers*, 2001 WI App 20, ¶ 7, 240 Wis. 2d 438, 623 N.W.2d 195.

Shroble concerned a losing candidate who, having missed the recount deadline, instead attempted to challenge the election result through a *quo warranto* action. 185 Wis. 2d at 106-09. The Court rejected the attempt based on the "unambiguous exclusivity language in sec. 9.01(11)." *Id.* at 110. The Court also rejected an argument that, by making a recount the "exclusive remedy," Section 9.01 violated the constitutional rights of individual voters, whom it did not authorize to seek a recount, instead reserving that power (except as to referenda) for aggrieved candidates. *Id.* at 113-16.

These authorities demonstrate that Petitioners' request to this Court is fatally deficient in at least three respects.

First, this Court is not the proper forum in which to challenge "an alleged irregularity, defect, or mistake committed during the voting or canvassing process." Wis. Stat. § 9.01(11). Rather, a recount, followed by an appeal to the circuit court, is the "exclusive remedy" for such alleged wrongs.

Second, Petitioners are not the proper parties to raise such a challenge. Instead, as relevant here, the Election Code reserves that right to the candidates themselves. *See* Wis. Stat. § 9.01(1)(a) (recount may be requested by "[a]ny candidate voted for at any election who is an aggrieved party"); *id.* § 9.01(6) ("any candidate … aggrieved by the recount may appeal to circuit court"); *see also Shroble*, 185 Wis. 2d at 114 ("sec. 9.01 does not allow members of the electorate to request a recount"). Indeed, in this case, the party authorized to pursue the "exclusive remedy," President Trump, is already doing so.

Third, even if this were a proper forum, which it is not, and even if Petitioners were proper plaintiffs to assert these claims, which they are not, they could not do so *now*, while the recount remains pending. A suit to challenge a recount may proceed only "*after* completion of the recount determination by the board of canvassers in all counties concerned, or … *after* completion of the recount determination by the commission chairperson or the chairperson's designee whenever a determination is made by the chairperson or designee." Wis. Stat. § 9.01(6)(a).

Section 9.01 reflects the Legislature's decision to adopt a single "exclusive" remedy for alleged election defects. Petitioners articulate no basis to disregard that carefully crafted legislative scheme, and there is none.

C. THIS COURT SHOULD DENY THE PETITION TO THE EXTENT IT CHALLENGES WEC GUIDANCE DOCUMENTS SUBJECT TO THE EXCLUSIVE JUDICIAL REVIEW PROVISIONS OF WIS. STAT. § 227.40(1).

Petitioners devote a substantial part of their challenge to claiming that the WEC's guidance to local election officials and voters about curing missing witness addresses and claiming "indefinitely confined" status violates the relevant statutes and should be declared illegal, *and* that voters who relied on this guidance should now be disenfranchised. *See* Pet. ¶¶ 25-32, 69-70, 75-104. As discussed above, since October 2016, the WEC has instructed local election officials that they should attempt to fill in missing witness addresses either by contacting the witnesses or looking up the addresses through reliable public databases. *See* pp. 21-22, *supra*. As for "indefinitely confined" status, the Commission issued guidance last March 29 (endorsed by this Court on March 31) that, to claim this status, a voter need

not suffer from a "permanent or total inability to travel outside of the residence"; that the decision "is for each individual voter to make based upon their current circumstance"; and that "many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the [pandemic] crisis abates." App. 40-41.

Petitioners may not challenge this Commission guidance through an original action in this Court because "the exclusive means of judicial review of the validity of a rule or guidance document shall be an action for declaratory judgment as to the validity of the rule or guidance document brought in the circuit court," not this Court. Wis. Stat. § 227.40(1). These "exclusive" review procedures are the way to present claims that an agency guidance document "exceeds the statutory authority of the agency," *id.* § 227.40(4)(a), which is precisely what Petitioners are seeking here.

The Commission unquestionably is subject to chapter 227 review. *See id.* § 227.01(1) (an "agency" subject to chapter 227 "means a board, commission, committee, department or officer in the state government," with limited exceptions not relevant here). And the Commission's pronouncements about whether and to what extent local election officials should cure missing witness addresses, and when voters may claim to be "indefinitely confined" during the current public health crisis caused by the pandemic, are clearly "guidance documents." They are official communications issued by the WEC advising local election officials and voters how it interprets and applies the statutory witness address and "indefinitely confined" provisions. *Id.* § 227.01(3m)(a).[5] The exclusive review provisions of Section

[5] Section 227.01(3m)(a) provides that, with limited exceptions not relevant here, "'guidance document' means … any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin, that does any of the

227.40 "are not permissive, but rather are mandatory." *Richards v. Young*, 150 Wis.2d 549, 555, 441 N.W.2d 742 (1989); *see State v. Town of Linn*, 205 Wis.2d 426, 449, 556 N.W.2d 394 (Ct. App. 1996).

Moreover, as discussed above, Wisconsin's election recount procedure provides the "exclusive" remedy for alleged election defects, and "[t]he remedy [in § 9.01] covers only those matters which are of such a character that the board of canvassers can correct. . . ." *Clapp v. Joint School Dist. No. 1*, 21 Wis. 2d 473, 478 (Wis. 1963), 21 Wis. 2d at 478. Because the board of canvassers does not have the power to invalidate WEC guidance documents and, in fact, must comply with such guidance (see Wis. Stat. § 7.21(1)),

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following: (1) Explains the agency's implementation of a statute or rule enforced or administered by the agency, including the current or proposed operating procedure of the agency. (2) Provides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected."

neither Sections 9.01 nor 227.40 can be used post-election to invalidate ballots cast in compliance with such guidance.

D. THIS COURT SHOULD DENY THE PETITION BECAUSE IT IS HIGHLY FACT-BOUND

A further reason this Court should decline to exercise its original jurisdiction is that this matter cannot be adjudicated without extensive fact-finding of the sort that is the province of trial courts, not this Court.

This Court "generally will not exercise its original jurisdiction in matters involving contested issues of fact." Wis. S. Ct. Internal Operating Procedures III.B.3; *see Green for Wis. v. State Elections Bd.*, 2007 WI 45, ¶ 3, 300 Wis. 2d 164, 732 N.W.2d 750 (Crooks, J., concurring) ("This court grants petitions for original jurisdiction 'with the greatest reluctance ... especially where questions of fact are involved.'" (citation and internal quotation marks omitted)). Instead, the Court typically grants petitions for original action only when the parties seek to resolve important questions of

pure law. *See State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 19, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser, J., concurring) (original action proper in part because case presented "no issues of material fact").

Here, Petitioners' challenge rests on numerous factual allegations that are unsuitable for adjudication in the Supreme Court. One need look no further than Petitioners' "issue presented" to understand that Petitioners are asking this Court to undertake a broad, open-ended factfinding exercise. The issue, according to Petitioners, is:

> ***Whether there is sufficient evidence*** of the Wisconsin Election Commission and local elections officials, primarily in the cities which received Zuckerberg money, failing to administer and conduct the November 3, 2020 election for presidential electors in accordance with Wisconsin law that the election should be declared void and the choice of the Presidential Electors revert back to the State Legislature.

Pet. ¶ 8. Petitioners are right about one thing. Adjudicating their claims would require the Court to consider and weigh

the sufficiency of their purported evidence. But that is not a proper basis for this Court's original jurisdiction; to the contrary, it is a reason to deny the petition.

Nor can there be any doubt that the petition presents issues of fact making it improper for the exercise of this Court's original jurisdiction. The petition itself is rife with factual allegations the parties are certain to dispute. Petitioners allege, for example, that certain jurisdictions "knew in 2020 that Biden's voters would be voting primarily by absentee vote which is why [they] aggressively 'promoted,' 'encouraged' and overzealously solicited' voters to vote absentee—including eliminating absentee ballot security requirements." Pet. ¶ 70. Similarly, Petitioners contend that "clerks did not remove from the absentee voter list … absentee voters who claimed 'indefinitely confined' status. but who in fact were no longer 'indefinitely confined' …." *Id.* ¶ 81. "***This fact***," Petitioners allege, "resulted in

electors … casting ballots as 'indefinitely confined' … who were not actually 'indefinitely confined.'" *Id.* ¶ 82. Petitioners similarly rely upon numerous factual allegations to support their claims concerning alleged deficiencies in the handling of absentee ballots with missing witness information, alleged failures to enforce residency requirements, alleged double voting, and alleged lack of transparency. *See, e.g.*, *id.* ¶¶ 104, 106-107, 109-114. All of those allegations will be vigorously disputed by the parties.

Petitioners ask the Court to consider not only factual allegations but also an "expert" report. This report, Petitioners contend, "show[s] that the election result is void because of illegal votes counted, legal votes not counted, counting errors and election official illegalities." Pet. ¶ 116. These, too, are matters of sharply contested fact. Indeed, the purported expert describes his own report as "a statement of my relevant opinions and an outline of the ***factual basis*** for

these opinions." Rep. at 2 (emphasis added). He also offers this caveat:

> The opinions and facts contained herein are based on the information made available to me in this case prior to preparation of this report, as well as my professional experience as an election data analyst. I reserve the right to supplement or amend this statement on the basis of further information obtained **prior to the time of trial** or in order to clarify or correct the information contained herein.

Id. (emphasis added). In other words, Petitioners' core contention that the election results must be overturned rests not on a legal issue of the sort that typically supports this Court's original jurisdiction, but on a mix of factual assertions and opinions, all of which are concededly subject to further supplementation or amendment to the extent this case goes forward.

To the extent Petitioners contend exigency supports an exercise of original jurisdiction over this fact-bound dispute, they are mistaken. This Court has rejected similar requests to

accept original jurisdiction on the basis of "emergencies" manufactured by the petitioners themselves. *See Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877. "Mere expedition of causes, [and] convenience of parties to actions … are matters which form no basis for the exercise of original jurisdiction." *State ex rel. Atty. Gen. v. John F. Jelke Co.*, 230 Wis. 497, 503, 284 N.W. 494 (1939) (internal quotation marks omitted).

As this Court has explained, "[t]he circuit court is much better equipped for the trial and disposition of questions of fact than is this court and such cases should be first presented to that court." *In re Exercise of Original Jurisdiction of Sup. Ct.*, 201 Wis. 123, 128, 229 N.W. 643 (1930) (per curiam). That sensible observation is just as true 90 years later and counsels denial of the petition.

E. THIS COURT SHOULD DENY THE PETITION BECAUSE EQUITY BARS RELIEF

The petition should also be denied because Petitioners are barred from obtaining their requested relief by the equitable doctrines of laches, unclean hands, and equitable estoppel.

1. Laches Bars Petitioners' Requested Relief

Petitioners are barred by laches from pursuing the relief they seek. "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. "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 (citations and internal quotation marks omitted), *cert. denied sub nom. Wis. ex rel. Wren v. Richardson*, 140 S. Ct. 2831 (June 1, 2020).

Those principles are especially relevant in election-related matters, where diligence and promptness are required. As the Seventh Circuit explained in *Fulani v. Hogsett*, 917 F.2d 1028 (7th Cir. 1990), "[i]n the context of elections … any claim against a state electoral procedure must be expressed expeditiously." *Id.* at 1031. That is because, "[a]s time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made." *Id.*; *see also Clark v. Reddick*, 791 N.W.2d 292, 294-96 (Minn. 2010) (declining to hear ballot challenge when petitioner delayed filing until 15 days before absentee ballots were to be made available); *Knox v. Milwaukee Cty. Bd. of Election Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984) (denying preliminary injunction where complaint was filed seven weeks before election). For that reason, the U.S. Supreme Court has for many years "insisted that federal courts not change electoral rules close to

an election date." *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641-42 (7th Cir. 2020) (citing, *inter alia*, *Purcell v. Gonzalez*, 549 U.S. 1 (2006)), *stay denied*, No. 20A66, 2020 WL 6275871 (Oct. 26, 2020).

Under Wisconsin law, laches has three elements: (1) the party asserting a claim unreasonably delayed in doing so; (2) a second party lacked knowledge that the first party would raise that claim; and (3) the delay prejudiced the second party. *See Brennan*, 2020 WI 69, ¶ 12. All three elements are satisfied here, barring Petitioners' claims.

a. Petitioners have unreasonably delayed in raising their challenge.

Petitioners ask this Court to change the rules of a presidential election that already has been conducted. The State expended substantial resources in ensuring that the election took place in a secure and lawful manner. Untold numbers of Wisconsinites devoted countless hours, at

significant personal risk during a pandemic, to prepare for, hold, and tally the vote. And Wisconsin voters relied upon the election procedures in casting their ballots as directed. Now, Petitioners ask this Court to undo all of those efforts and abrogate the fundamental right to vote for all Wisconsinites by overthrowing rules and protocols that have been in effect—and known to Petitioners—for months or even years.

For example, the Wisconsin procedure for curing issues with witness addresses that Petitioners challenge was endorsed by the WEC *four years ago*. *See* App. 30-31. After receiving unanimous bipartisan approval in 2016, the procedure went unchallenged by Petitioners, or anyone else, for *eleven* subsequent election cycles, including the 2016 presidential election. *Id.* This year, municipal election clerks again relied on the WEC's guidance concerning the cure procedure. Petitioners had ample opportunity to object to the

procedure before the State of Wisconsin and thousands of Wisconsinites expended enormous time and resources in reliance upon its application in the 2020 election. Instead, Petitioners waited to see the outcome of that election and, obviously unsatisfied, challenge the procedure now. That is a textbook example of unreasonable delay.

Petitioners similarly complain, based on guidance issued in Dane County in March 2020, that nearly 100,000 ballots cast by "indefinitely confined" voters were "illegal" and must be discarded. Pet. at 3. Here too, Petitioners were aware of any supposed issue well before the election, including as a result of litigation in this Court. On March 31, 2020—more than *seven months* before the general election—this Court granted temporary injunctive relief based on its conclusion that the Dane County guidance was in error and endorsed as adequate the WEC's clarifying guidance. The same guidance was in effect for this year's general election.

Although the *Jefferson* litigation remains ongoing, Petitioners have never sought to intervene to address their purported concerns, instead waiting until the general election was over and their preferred candidate had lost. Once again, such delay is unreasonable.

b. Respondent-Intervenor did not know Petitioners would raise their claim.

The second requirement for laches, that another party was unaware Petitioners would raise their claim, is also satisfied. *See Brennan*, 2020 WI 69, ¶ 18. Respondent-Intervenor had no way to anticipate Petitioners' misguided effort to disenfranchise hundreds of thousands of Wisconsinites, after the fact, based on participation in an election according to procedures of which Petitioners have been aware for years. Nor did Respondent-Intervenor have reason to anticipate that WVA would simply re-file in this

Court allegations against CTCL that had been rejected by Judge Griesbach before the election.

c. Petitioners' delay has prejudiced Respondent-Intervenor and other parties.

Also satisfied here is the final requirement of laches, prejudice. "What amounts to prejudice … depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position." *Brennan*, 2020 WI 69, ¶ 19 (quoting *Wren*, 2019 WI 110, ¶ 32). Petitioners' delay in asserting their groundless claims will be enormously prejudicial to Respondents, Respondent-Intervenor, and many thousands of Wisconsinites who relied upon the election practices Petitioners belatedly challenge.

By the time Petitioners filed this action, the election had been over for three weeks. More than 3.2 million Wisconsinites had voted in reliance on the very procedures

that Petitioners now, their side having lost the election, insist were unlawful. To disenfranchise those voters as Petitioners demand would violate the constitutional rights of millions of Wisconsin voters. In *Brennan*, this Court denied a request to overturn a budget enactment on which Wisconsinites had relied. That enactment, the Court explained, gave rise to "**substantial reliance interests** on behalf of both public and private parties across the state." 2020 WI 69, ¶ 27 (emphasis added). The Court declined to disturb such reliance interests based on claims not "brought in a timely manner." *Id.* at ¶ 31. Petitioners' untimely challenges in this matter should similarly be rejected.

In the election context, this Court and other courts routinely deny untimely requests for injunctive relief specifically because of the prejudice that doing so would cause. The conclusion that such claims are too late obtains even when the request is asserted *before* the election. *See,*

e.g., *Hawkins v. Wis. Elections Comm'n*, 2020 WL 75, 393 Wis. 2d 629, 948 N.W.2d 877; *see also Democratic Nat'l Comm.*, 977 F.3d at 642; *Fulani*, 917 F.2d at 1031. Recently, in *Hawkins*, the Court considered a petition filed by members of the Green Party nearly three months *before* the 2020 general election. The Court concluded there was insufficient time to grant "any form of relief that would be feasible," and that granting relief would "completely upset[] the election," causing "confusion and disarray" and "undermin[ing] confidence in the general election results." *Id.* at ¶¶ 9-10. Accordingly, the Court denied the petition. Overturning the results of an election after it has been held, as Petitioners demand, would create far more confusion, disarray, and loss of confidence in the results.

This Court similarly declined to exercise its original jurisdiction when petitioners sought to enjoin the Wisconsin Elections Board from conducting the 2002 elections. *See*

Jensen v. Wis. Elections Bd., 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537. The Board had established a date by which it hoped to certify new districts; accepting jurisdiction would cause "the legality of the new district boundaries [to] remain in doubt for an additional, unknown period of time." *Id.* at ¶ 21. The Court, therefore, could not "responsibly" exercise its original jurisdiction. *Id.* at ¶ 22. So too here.

Numerous other courts have likewise denied extraordinary relief in election-related cases due to laches or similar considerations.[6] As one such court explained, "[a]s

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[6] *See, e.g.*, *Clark*, 791 N.W.2d at 294-296; *see also Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) ("It would be inequitable to order preliminary relief in a suit filed so gratuitously late in the campaign season."); *Fulani*, 917 F.2d at 1031 (denying relief where plaintiffs' delay risked "interfer[ing] with the rights of other Indiana citizens, in particular the absentee voters"); *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (laches barred claims where candidate waited two weeks to file suit and preliminary election preparations were complete); *McCarthy v. Briscoe*, 539 F.2d 1353, 1354-1355 (5th Cir. 1976) (denying emergency injunctive relief where election would be disrupted by lawsuit filed in July seeking ballot access in November election); *Wood v. Raffensperger*, 1:20-cv-04651, Dkt. 54 (N.D. Ga. Nov. 20, 2020) (denying injunctive relief where plaintiff "could have, and should have, filed his constitutional challenge much sooner than he did, and certainly

time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights." *Kay*, 621 F.2d at 813. That principle applies with even greater force here, where the election is not merely imminent, but over.

If Petitioners had desired an adjustment to Wisconsin's election procedures, it was incumbent upon them to demand such an adjustment, through litigation or otherwise, in time to avoid prejudicing the WEC, municipal clerks, and Wisconsin voters who otherwise would conduct and participate in the

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not two weeks *after* the General Election."); *Navarro v. Neal*, 904 F. Supp. 2d 812, 816 (N.D. Ill. 2012) ("By waiting so long to bring this action, plaintiffs 'created a situation in which any remedial order would throw the state's preparations for the election into turmoil.'"), *aff'd*, 716 F.3d 425 (7th Cir. 2013); *State ex rel. Schwartz v. Brown*, 197 N.E.2d 801 (Ohio 1964) (dismissing mandamus complaint to place candidate on ballot after ballot form was certified).

election in good faith according to the existing procedures. Were this Court to grant Petitioners the relief they seek, the votes of many thousands of Wisconsinites who voted in good faith according to established procedures would be discarded. That would be massively prejudicial to Respondent-Intervenor and thousands of others. The Court should not countenance such a result.

2. Petitioners Are Equitably Estopped

Petitioners also are equitably estopped from obtaining their requested relief. Equitable estoppel doctrine "focuses on the conduct of the parties" and consists of four elements: "(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." *Milas v. Labor Ass'n of Wisconsin, Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997).

The first and second elements of the equitable estoppel test are satisfied by Petitioners' inaction. *See Milas*, 214 Wis. 2d at 11. The third element is also satisfied because Petitioners' apparent acquiescence to the procedures they now challenge "induce[d] reasonable reliance," *id.* at 11, on the part of other Wisconsinites. Again, Respondents undertook an enormous effort to facilitate a general election in which more than 3.2 million Wisconsinites cast ballots. In doing so, Respondents reasonably relied upon the notion that anyone wishing to raise concerns about Wisconsin's election procedures would do so *before* millions of voters cast their ballots. Likewise, Wisconsinites who voted in the election, and Respondent-Intervenor, who participated in the election, did so in reliance that, once all pre-election litigation had been resolved in the months and weeks leading up to the election, all parties could then proceed with voting under the rules as they stood.

The Court's decision in *Milas* is instructive. There, Ozaukee County and certain of its officials agreed to arbitrate a personnel matter with a discharged deputy sheriff, despite the expiration of a collective bargaining agreement requiring arbitration. 214 Wis. 2d at 12. "The County's full participation in the arbitration process implied a good faith effort to resolve the dispute through arbitration," and "[a]t no time during the arbitration proceeding … did the County object to the arbitrator's jurisdiction." *Id.* Instead, the County waited, objecting to the arbitrator's jurisdiction in circuit court only "17 months after the filing of the disciplinary charges, one year after commencement of the arbitration proceeding and three months after announcement of the arbitration award," and "after the arbitrator ruled against the County." *Id.* The Court held the County was "estopped from challenging the validity of the arbitration award." *Id.* at 16.

Finally, the fourth element of the equitable estoppel test is satisfied here because the WEC, state election officials, Respondent-Intervenor, and Wisconsin voters would all suffer grievous prejudice if Petitioners were granted relief. Respondents, including the WEC, would suffer prejudice in the form of countless hours of lost time and enormous outlays of wasted resources. Winning candidates would be deprived of the result they rightfully obtained. And many thousands of voters, having cast the ballots that Petitioners now seek to discard, would suffer disenfranchisement—a result that neither equity nor the federal and state constitutions can tolerate. *See Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1061 (7th Cir. 2020) ("It is undeniable that the right to vote is a fundamental right guaranteed by the Constitution. The right to vote is not just the right to put a ballot in a box but also the right to have one's vote counted." (citations omitted)).

3. Petitioners' Own Unclean Hands Preclude Relief

Petitioners are also barred from relief by their own unclean hands. "The principle that a plaintiff who asks affirmative relief must have clean hands before the court will entertain his plea is both ancient and universally accepted." *Timm v. Portage Cty. Drainage Dist.*, 145 Wis. 2d 743, 753, 429 N.W.2d 512 (Ct. App. 1988) (internal quotation marks omitted). The doctrine bars injunctive relief when a petitioner's own misconduct has "'immediate and necessary relation to the equity that he seeks.'" *Henderson v. United States*, 135 S. Ct. 1780, 1783 n.1 (2015) (citation omitted).

Conduct constituting "unclean hands" need not be unlawful; "any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean." *David Adler & Sons Co. v.*

Maglio, 200 Wis. 153, 160, 228 N.W. 123 (1929) (citation omitted).

Petitioners challenge the addition of witness addresses to absentee envelopes and the issuance of guidance related to indefinite confinement—but Petitioners could have raised these issues before the election. The WEC guidance for curing missing witness address information has been in place since 2016, and the guidance on indefinite confinement has been in place since March, affording Petitioners ample opportunity to challenge it before the election.

Instead, Petitioners waited, knowing thousands of Wisconsinites would follow the procedures they now contend are unlawful. Then, when the outcome of the election did not satisfy Petitioners, they manufactured an "emergency" as a basis to demand extraordinary relief from this Court. Having chosen not to challenge Wisconsin's election procedures before the election, Petitioners cannot now be heard to

demand relief from the outcome because those procedures were used. The "equity" they seek has an "immediate and necessary relation" to their own inaction, and they are not entitled to relief. *Henderson*, 135 S. Ct. at 1783 n.1.

F. PETITIONERS ARE NOT ENTITLED TO DECLARATORY OR INJUNCTIVE RELIEF

The Court should also decline to exercise its original jurisdiction because Petitioners are manifestly unable to satisfy the legal requirements for the relief they request.

1. Petitioners Cannot Meet the Requirements to Maintain a Declaratory Judgment Action

To obtain a declaratory judgment, Petitioners must demonstrate the existence of the "conditions precedent to the proper maintenance of a declaratory judgment action," including that they have a "legally protectible interest," *i.e.*, standing, and that this dispute is "ripe for judicial determination." *Tooley v. O'Connell*, 77 Wis. 2d 422, 433-34, 253 N.W.2d 335, 340 (1977). Moreover, in order to

obtain a judgment, Petitioners would need to prevail on the merits. Petitioners fall short in multiple respects.

First, Petitioners lack standing for the reasons stated in Section I, *supra*. This precludes Petitioners from maintaining a declaratory judgment action (or any action). *See, e.g.*, *Lake Country Racquet & Ath. Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶¶ 23-24, 259 Wis. 2d 107, 118-19, 655 N.W.2d 189, 195.

Second, this dispute is not ripe. For a claim to be ripe, "the facts [must] be sufficiently developed to avoid courts entangling themselves in abstract disagreements." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 43, 309 Wis. 2d 365, 749 N.W.2d 211 (internal quotation marks omitted). It is not necessary that "all adjudicatory facts … be resolved," but "[t]he facts on which the court is asked to make a judgment should not be contingent or uncertain." *Id.* Here, no discovery has occurred, and, to say the least, there are very

substantial reasons to doubt the facts alleged. Not only that, the facts are contingent upon a pending recount addressing many of the same issues. And, as relevant to Petitioners' demand to enjoin the WEC from certifying the election results "so that the Legislature can lawfully appoint the electors," Pet. at 42, the petition provides no basis to conclude that the Legislature itself would choose, or even cooperate with, such an extraordinary scheme.

Third, Petitioners are wrong on the merits. As explained in Section V.B. *infra*, a review of the petition demonstrates the infirmity of the legal theories underlying Petitioners' extraordinary demand to overturn the election results.

2. Petitioners Cannot Meet the Requirements to Obtain an Injunction

To obtain an injunction, Petitioners must demonstrate, among other things, that "on balance, equity favors issuing

the injunction." *Diamondback Funding, LLC v. Chili's of Wis., Inc.*, 2007 WI App 162, ¶ 15, 303 Wis. 2d 746, 735 N.W.2d 193 (citation omitted). To the extent they seek a preliminary injunction, Petitioners also must show they are likely to succeed on the merits. *See Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313 (1977). Petitioners cannot do so. They cannot demonstrate that equity favors granting the relief they seek, for all the reasons explained in Section V, *supra*. And they cannot show a likelihood of success on the merits. Rather, and as explained below, each of the legal theories advanced by Petitioners is fatally deficient.

a. Petitioners are not likely to succeed on their claim that the WEC unlawfully instructed election clerks to cure missing witness addresses based on reliable information.

WEC guidance, in place for more than four years and grounded in a reasonable interpretation of the Wisconsin

Election Code, permits (and in some instances even requires) the practice of curing missing witness addresses based on reliable information. Since 2016, including in the 2016 general election, the WEC has required clerks to "take corrective action in an attempt to remedy a witness address error." App. 30-31. Election officials were instructed to inform voters of the potential deficiency only when it was clear it could not be corrected by the officials themselves. *Id*. The WEC required those same measures in the 2020 General Election. *See* App. 43-46. The WEC's guidance is grounded in a reasonable interpretation of the Election Code, which states that a clerk "may" return an absentee ballot with an improperly completed certificate or no certificate, but does not suggest that a clerk may not instead remedy a witness address issue herself. WIS. STAT. § 6.87(9). Thus, there is no authority for the rule Petitioners now seek to impose.

b. Petitioners are not likely to succeed on their claim that the WEC unlawfully instructed clerks not to invalidate ballots of voters self-identifying as indefinitely confined.

The "indefinitely confined" exemption in WIS. STAT. § 6.82(2)(a) is not new. The substantive provision allowing absentee voting for "indefinitely confined" electors has been in place for more than forty years, and the relevant text of section 6.82(2)(a) has been unchanged since 1985. *See* Wis. Stat. § 6.86(2) (1985); 1985 Wisconsin Act 304.

As detailed above, the WEC on March 29, 2020, issued guidance on applying the "indefinitely confined" exemption during the pandemic. *See* App. 40-42. Just two days later, in considering a challenge to guidance provided by certain county election officials, this Court held that the WEC guidance "provide[d] the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." *Jefferson v. Dane Cty.*, No. 2020AP557-OA, at

2 (Mar. 31, 2020). The WEC's guidance has remained unchanged since then and was effective for the 2020 general election.

Heedless of this history, Petitioners seek to invalidate thousands of ballots cast by persons who, consistent with the WEC's guidance, self-identified as indefinitely confined. That attempt must fail. Petitioners have identified no basis to invalidate votes cast in reliance on the guidance. Nor could they in light of this Court's conclusion that the guidance provided the required "clarification on the purpose and proper use of the indefinitely confined status."[7]

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[7] Even if Petitioners had presented any evidence that the "indefinite confinement" provision was misused by even a single voter, which they have not, their burden to obtain relief would be very high. This Court long ago held that "post-election inquiries into the elusive subject of a voter's state of mind" and similar "investigations" into whether a voter met specific absentee ballot requirements would "cause as much or more mischief than [they] would cure." *Schmidt v. City of West Bend Bd. of Canvassers*, 18 Wis.2d 316, 322, 118 N.W.2d 154 (1962).

Petitioners further claim that the May 13, 2020 directive from the WEC Administrator concerning whether to de-activate a voter's absentee request was unlawful. *See* Pet. ¶¶ 79-90. That directive provided in relevant part as follows:

> Can I deactivate an absentee request if I believe the voter is not indefinitely confined?
>
> No. All changes to status must be made in writing and by the voter's request. Not all medical illnesses or disabilities are visible or may only impact the voter intermittently.

Pet. ¶ 79; *see id.* Ex. 16 at 3. The directive accurately reflects Wisconsin law, which provides in relevant part that "[i]f any elector is no longer indefinitely confined, *the elector* shall so notify the municipal clerk." WIS. STAT. § 6.86(2)(a) (emphasis added). Furthermore, under Wisconsin law an election clerk may remove an elector from the indefinitely confined list only if the elector fails to respond within 30 days to a written notice, "upon request of the elector[,] or upon

receipt of reliable information that an elector no longer qualifies for the service." WIS. STAT. § 6.86(2)(b).

Far from showing that the WEC violated Wisconsin law, Petitioners merely highlight the WEC's adherence to the law.

c. Petitioners are not likely to succeed on their claim that Wisconsin officials acted unlawfully by accepting grant funding.

As discussed above, Petitioners' contention that certain jurisdictions acted unlawfully by accepting grant funding to assist with safe administration of an election during a pandemic has already been uniformly rejected by courts in multiple jurisdictions. It is utterly meritless. And, even if Petitioners could show that the grants were unlawful (which they cannot), that would not remotely support invalidating the votes of every Wisconsin voter in the 2020 election. WVA's own recent unsuccessful efforts in the Eastern District of

Wisconsin are illustrative. As discussed above, WVA sought a temporary restraining order based on the same allegations and legal theories Petitioners advance here. Judge Griesbach denied the motion because plaintiffs had no reasonable likelihood of success on the merits. He emphasized that "over 100 additional Wisconsin municipalities received grants as well" as those singled out (as here) in the complaint, and that nothing the plaintiffs cited could be "fairly construed as prohibiting the defendant Cities from accepting funds from CTCL." *City of Racine,* 2020 WL 6129510, *2; *see also* Ex. 3 at 18-22 (list of Wisconsin towns, townships, villages, and cities that received CTCL funds). Exactly the same conclusion applies here.

G. THE PETITION SHOULD BE DENIED BECAUSE THE REQUESTED RELIEF IS BARRED BY FEDERAL AND STATE LAW

Finally, the Court should deny the petition because the relief Petitioners seek is impermissible as a matter of law.

Petitioners seek a declaratory judgment "null[ifying]" the results of the presidential election, as well as an injunction that would prevent certification of the lawfully elected Biden-Harris slate of electors and require the Governor to certify a slate chosen by the Legislature. Pet. 42. Petitioners' shocking request "is simply not how the Constitution works." *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 6821992, at *12 (M.D. Pa. Nov. 21, 2020).

1. The Relief Sought Would Violate Federal And Wisconsin Constitutional And Statutory Frameworks For Choosing Presidential Electors

The U.S. Constitution empowers state legislatures to choose the "Manner" of appointing presidential electors, U.S. Const. art. II, § 1, cl. 2, pursuant to their lawmaking authority. Under that provision, the Wisconsin Legislature, like every other state legislature, has chosen to appoint electors according to popular vote. The Legislature directed this

choice in its first session after Wisconsin's admission to the Union in 1848, when it passed a law that the State's first governor signed providing that there shall be held a "[g]eneral election … in all of the counties of the state for the election of … electors of president and vice-president." 1848 Wis. Sess. Laws 192. That law provided no role for the Legislature in presidential elections. Municipal "supervisors" and "clerks" were to administer the election, count ballots, and certify the results to a county clerk. *Id.* at 193-94, 198-200. The county clerk in turn would certify election results and send the certification to the secretary of state, state treasurer, and attorney general, who would make a final determination as to the victors. *Id.* at 201-04. The omission of the Legislature was deliberate; the same statute included a process by which the Wisconsin "senate and assembly" would meet in "joint convention" and vote to select U.S. senators. *Id.* at 205-06.

Today, Wisconsin adheres to the same method established in 1848, selecting presidential electors based on the results of the popular vote. Municipal and county officials still administer the election and transmit vote totals to county officials, WIS. STAT. §§ 7.51(1), 7.60, but instead of sending vote totals to the secretary of state, treasurer, and attorney general, county officials now certify vote totals to the WEC, *id.* § 7.70(3). Based on the result, the WEC provides a certificate of election to the electors pledged to the winning candidate. *Id.* §7.70(5)(a). Responsibility for any recount lies with the relevant municipal or county board of canvassers, and recount litigation is heard in state courts. *Id.* § 9.01(1), (6)-(9). Nowhere is the Legislature involved—not in election administration, vote counting, or recounts.

Because the Legislature has determined that the "Manner" of appointing presidential electors in Wisconsin is by popular vote on Election Day, the Electors Clause of the

U.S. Constitution requires that the presidential election be conducted in accordance with that chosen "Manner." *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("When the state legislature vest[s] the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental."). Petitioners cannot upend this process by asking the Court to replace the State's duly selected "Manner" of choosing electors with a different one based on a simple majority vote of legislators.

Instead, any such change could only have been made through Wisconsin's ordinary legislative process, including bicameralism and presentment to the Governor. *See* WIS. CONST. art. IV, § 17 ("No law shall be enacted except by bill"); *id.* art. V, § 10(1)(a) ("Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor."); *Smiley v. Holm*, 285 U.S. 355, 373 (1932) (state legislature's power to choose "manner" of

congressional elections under Elections Clause requires following ordinary lawmaking requirements); *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015) (internal quotation marks omitted) (because prescribing manner of elections "involves lawmaking in its essential features and most important aspect," legislative decisions on that subject "must be in accordance with the method which the State has prescribed for legislative enactments"); *id.* at 841 (Roberts, C.J., dissenting) (agreeing with majority that state legislature operates "within the ordinary lawmaking process" when it enacts election laws). And, in fact, in the last 49 years, Wisconsin has amended statutory provisions related to the time, place, and manner of federal elections more than 100 times, in *every instance* according to its constitutional lawmaking process, including presentment to the Governor. *See* Wis. Const. art. IV, § 17; *id.* art. V, § 10.

In addition, any such change to Wisconsin election law would have to have been made *before* Election Day. The U.S. Constitution grants Congress the power to "determine the Time of chusing the Electors." U.S. Const. art. II, § 1, cl. 4. Congress has done so, providing that electors "shall be appointed in each State, on the Tuesday next after the first Monday in November, in every fourth year," *i.e.*, on Election Day. 3 U.S.C. § 1. As required, Wisconsin held its election on Election Day. The injunction Petitioners now request would violate Congress' directive that electors be chosen on Election Day. 3 U.S.C. § 1.

Congress has provided for only one narrow exception to the general rule in 3 U.S.C. § 1. If a State "has held an election … and *has failed to make a choice* on the day prescribed by law, the electors may be appointed on a subsequent day" by the state legislature. 3 U.S.C. § 2 (emphasis added). But Wisconsin's voters *did* "make a

choice" on Election Day. Approximately 3.2 million Wisconsin voters cast ballots. The specific choice they made will be confirmed through the ongoing recount and certification process required by the Election Code, but that they made a choice is clear. A "fail[ure] to choose" occurs only when a state that chooses electors via a popular vote fails to *hold an election* on the day Congress has designated (or the vote results in a tie). Such a failure does not occur because in Wisconsin, as elsewhere, the process of counting valid ballots lasts beyond Election Day.[8]

Wisconsin voters made their choice in the 2020 presidential election in the "Manner" prescribed by the Legislature. Petitioners' attempt to bypass that choice is

[8] 3 U.S.C. § 6—which Petitioners cite in their "Statement of the relief sought," Pet. 42—directs the "executive of each State" to certify the slate of electors chosen "by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment." 3 U.S.C. § 6. By its plain terms, the statute contemplates that the Governor will certify the slate of electors chosen *on Election Day* by Wisconsin's voters, pursuant to Wisconsin law—and not an alternative slate chosen by the Legislature after Election Day, in defiance of Wisconsin law.

contrary to the federal constitution and federal statutes, and thus must be rejected.

2. Direct Legislative Selection of Electors Would Unconstitutionally Disenfranchise Voters

The relief Petitioners seek would also violate Wisconsinites' fundamental right to have their votes counted under both the U.S. and Wisconsin constitutions. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1061 (7th Cir. 2020) (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)); *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 62 n.14, 357 Wis. 2d 469, 499, 851 N.W.2d 262, 277 ("Wisconsin's protection of the right to vote is even stronger [than the protections of federal law] because in addition to the equal protection and due process protections of Article I, Section 1 of the Wisconsin Constitution, the franchise for Wisconsin voters is expressly declared in Article III, Section 1 of the Wisconsin Constitution.") 2014 WI 98, ¶ 23;

Ollmann, 300 N.W. at 185 ("Voting is a constitutional right … and any statute that denies a qualified elector the right to vote is unconstitutional and void."). Granting Petitioners' request to "null[ify]" the results of the election would abrogate that fundamental right for all Wisconsinites who voted on Election Day, violating those voters' equal protection, due process, and First Amendment, and equal protection rights, as well as their rights under Articles I and III of the Wisconsin Constitution.

a. Nullification of the Popular Vote Would Violate Wisconsin Voters' Due Process Rights

Nullifying the election results of the general election and ordering the Governor to certify a different slate of electors would also violate voters' due process rights. Petitioners propose that the Court invalidate millions of ballots lawfully cast under the rules in place at the time, with no opportunity to cure. Such an "application of [a] new …

rule to nullify previously acceptable" election procedures, "without prior notice," is quintessentially "unfair and violate[s] due process." *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1971).

Numerous cases have identified a procedural due process violation reached that result on similar facts. *See, e.g., Self Advocacy Solutions N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1054 (D.N.D. 2020) (plaintiffs were likely to succeed on procedural due process claim because signature-matching requirement failed "to provide affected voters with notice and an opportunity to cure a signature discrepancy before a ballot is rejected"); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D.N.H. 2018) (granting summary judgment on procedural due process claim because signature-matching requirement was not accompanied by notice or opportunity to cure); *cf. PHH v. CFPB*, 839 F.3d 1, 48 (D.C. Cir. 2016) (Kavanaugh, J.) (explaining that the government may not "officially and

expressly" tell citizens that they are "legally allowed to do something," only later to tell them "just kidding"), *rev'd on other grounds*, 881 F.3d 75 (2018) (*en banc*).

In addition, invalidating ballots after the election would be fundamentally unfair, infringing affected voters' right to substantive due process. *See, e.g.*, *Northeast Ohio Coal. v. Husted*, 837 F.3d 612, 637 (6th Cir. 2016) ("The Due Process Clause is implicated in exceptional cases where a state's voting system is fundamentally unfair." (internal quotation marks omitted)); *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) ("[A]n election is a denial of substantive due process if it is conducted in a manner that is fundamentally unfair."); *Roe v. Alabama*, 43 F.3d 574, 580-81 (11th Cir. 1995) ("If … the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated." (internal quotation marks

omitted)); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (same).

Invalidating the ballots cast by Wisconsinites on Election Day with no compelling or even rational basis to do so, but instead based solely upon Petitioners' retroactive and deeply flawed reinterpretation of the Election Code would similarly violate due process.

b. Nullification of the Popular Vote Would Violate Wisconsin Voters' First Amendment Rights

Finally, invalidating Wisconsinites' votes based on Petitioners' post-election legal challenges would also violate the First Amendment rights of affected voters. The U.S. Supreme Court has recognized individuals' right "to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *see also Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (statute burdening voter's ability to participate in election "substantially abridged her ability to associate

effectively with the party of her choice"). The Court has also held that "limiting the choices available to voters … impairs the voters' ability to express their political preferences." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. at 173, 184 (1979).

Here, granting the requested relief would result in Wisconsinites' votes being not only disfavored, but rendered "null" and "void." Pet. at 2, 41-42. This would ignore those voters' choices, severely burdening their First Amendment rights without any compelling or even rational justification. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (discussing the "right of qualified voters, regardless of their political persuasion, to cast their votes effectively"); *Dart v. Brown*, 717 F.2d 1491, 1504 (5th Cir. 1983) (noting First Amendment right "to cast a meaningful vote for a candidate of one's choice"); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 180 (4th Cir. 1983) ("The Constitution protects the

right of qualified citizens to vote and to have their votes counted as cast.").

The Eleventh Circuit's decision in *Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312 (11th Cir. 2019), illustrates the problem with Petitioners' proposed remedies. Lee concerned a signature-matching requirement under which that created the possibility that "voters whose signatures were deemed a mismatch might not learn that their vote would not be counted until it was too late to do anything about it," and thus imposed imposing "at least a serious burden on the [First Amendment] right to vote." *Id.* at 1321. The court observed that "it is a basic truth that even one disenfranchised voter—let alone several thousand—is too many." *Id.* (internal quotation marks omitted).

Here, Petitioners seek disfranchisement of millions of Wisconsin voters—a result far more concrete, severe, and

intolerable than the result in Lee. The requested relief thus unduly burdens those voters' First Amendment rights.

c. Nullification of the Popular Vote Would Violate Wisconsin Voters' Equal Protection Rights

Finally, Petitioners' plan to substitute a different slate of electors for the Biden-Harris slate chosen by a majority of Wisconsin voters would violate the equal protection rights of all voters who chose the winning slate.

In Wisconsin, as in all other states, presidential electors are chosen by popular vote. Wisconsinites cast their votes "[b]y general ballot at the general election for choosing the president and vice president of the United States," and a "vote for the president and vice president nominations of any party is a vote for the electors of the nominees." WIS. STAT. § 8.25(1); *see also id.* § 5.10. Wisconsin's election code requires certification of the single slate of presidential electors committed to the candidates for President and Vice

President who received the highest number of votes in the statewide general election. *See* WIS. STAT. § 7.70(5)(b).

Upending that well-established system and authorizing the Legislature to displace Wisconsin voters' choice would violate the equal protection rights of Wisconsin voters who cast ballots for President-elect Biden and Vice President-elect Harris under both the United States Constitution and the Wisconsin Constitution. *See* U.S. Const. amend. XIV, § 1; Wis. Const. art. I, § 1; *Bush*, 531 U.S. at 104 (the "fundamental nature" of the right to vote means "equal weight accorded to each vote and the equal dignity owed to each voter"); *accord Shipley*, 947 F.3d at 1061 (citing Burdick, 504 U.S. at 433). Because Wisconsin has chosen to empower its citizens to choose its presidential electors at the ballot box, *see* Wis. Stat. §§ 5.10, 8.25(1), the Equal Protection Clause forbids Wisconsin from, "by later arbitrary and disparate treatment, valu[ing] one person's vote over that

of another." *Bush*, 531 U.S. at 104-05; *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause."); *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 54, 132 N.W.2d 249 (1965) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

Disregarding Wisconsinites' popular vote as Petitioners request would flout that principle, arbitrarily and disparately favoring Trump-Pence voters and violating the rights of Biden-Harris voters to equal protection of the law. One can hardly imagine a starker example of "arbitrary and disparate treatment." *Bush*, 531 U.S. at 104; *see also GTE Sprint Comm'ns Corp. v. Wisconsin Bell, Inc.*, 155 Wis. 2d 184, 193 (1990) ("irrational or arbitrary classification[s]" violate equal

protection); *Dells v. Kennedy*, 49 Wis. 555, 558 (1880) (law would be unconstitutional and "void" if it "arbitrarily disfranchised" voters). Petitioners have articulated no rational or non-arbitrary reason (let alone a "compelling" reason) to impose that disparate treatment—only Petitioners' own self-serving and lawless desire to nullify an election their preferred candidates lost.

CONCLUSION

For the reasons stated above, this Court should deny the Emergency Petition for Original Action.