No. 20-3414

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONALD J. TRUMP, as candidate for
President of the United States of America,
Plaintiff-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,
Defendants-Appellees,

Appeal from the United States District Court
for the Eastern District of Wisconsin, Milwaukee Division
Civil Action No. 2:20-cv-01785
Hon. Brett H. Ludwig

APPELLANT'S BRIEF

William Bock, III
James A. Knauer
Kevin D. Koons
Kroger, Gardis & Regas, LLP
111 Monument Circle, Suite 900
Indianapolis, Indiana 46204
(317) 692-9000

Attorneys for Plaintiff-Appellant Donald J. Trump

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned attorneys, pursuant to Circuit Rule 26.1, on behalf of Plaintiff-Appellant Donald J. Trump, discloses the following:

1. The full name of every party that the attorney represents in the case:

Donald J. Trump

2. The names of all law firms whose partners or associates have appeared for the parties in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kroger, Gardis & Regas, LLP
111 Monument Circle, Suite 900
Indianapolis, Indiana 46204-5125

3. If the party or amicus is a corporation:

a. Identify all its parent corporation, if any, and

N/A

b. List any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

JURISDICTIONAL STATEMENT

A. District Court Jurisdiction

The United States District Court for the Eastern District of Wisconsin had subject matter jurisdiction over this matter as a civil action arising under the laws of the United States pursuant to 42 U.S.C. § 1983 and Art. I, § 4, cl. 2, Art. II, § 1, cl. 4 and the First and Fourteenth Amendments of the United States Constitution, and 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1343 (civil rights and elective franchise), 28 U.S.C. § 2201 (authorizing declaratory relief), and 28 U.S.C. § 2202 (authorizing injunctive relief). Plaintiff-Appellant was a candidate for President of the United States in Wisconsin's November 3, 2020 election. (ECF No. 1.) Defendants are state and local election officials sued in their official capacities for declaratory and injunctive relief regarding *ultra vires* modifications to the Legislature's explicit directions for the manner of conducting absentee voting in Wisconsin for the presidential election. (ECF No. 1.) The Defendants' "significant departure[s] from the legislative scheme for appointing Presidential electors present[] a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

B. Appellate Jurisdiction

The United States Court of Appeals for the Seventh Circuit has jurisdiction over appeals from the United States District Court for the Eastern District of Wisconsin, Milwaukee Division and over appeals from final orders pursuant to 28 U.S.C. § 1291.

On December 12, 2020, the district court entered its Decision and Order (A001) and Judgment. (A024).[1] A notice of appeal was timely filed on December 12, 2020, which is within 30 days of both entries of the district court's orders pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether Defendants' circumvention of safeguards established by the Wisconsin Legislature for distribution and collection of absentee ballots resulted in violations of U.S. Const. art. II, § 1, cl. 2 because the Presidential election was not conducted in "such Manner as the Legislature may direct," rendering the election void.

2. Whether the standard-less, non-uniform implementation of absentee ballot drop boxes violated Plaintiff-Appellant Donald J. Trump's right to Equal Protection, in violation of the U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff-Appellant Donald J. Trump, as candidate for President of the United States of America, brings this action for injunctive and declaratory relief against

[1] Citations to items included in the President's Circuit Rule 30(a) appendix will be denoted "A" followed by the relevant page number(s) of that appendix. Citations to items in the President's Circuit Rule 30(b) appendix will be denoted "B" followed by the relevant page number(s) of that appendix. References to portions of the record not contained in any appendix to this brief will cite to the relevant district court docket entry (i.e., "ECF No. ___"), and the ECF page number for pinpoint cites. However, citations to the transcript of the December 10, 2020 hearing (ECF No. 130) will be cited to the page and line numbers of the transcript as "Tr. [page no.]:[line no.]."

the Defendants—various Wisconsin election officials[2]—concerning the presidential election held in Wisconsin on November 3, 2020, particularly in relation to absentee voting. President Trump seeks redress under 42 U.S.C. § 1983 for the Defendants' violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and the Electors Clause of Article II, Section 1, Clause 2, by failing to conduct the election "in such Manner as the Legislature thereof may direct."

In the 1980s, long before the prospect of a Trump or Biden candidacy, the Wisconsin Legislature declared Wisconsin policy that absentee voting "is a privilege exercised wholly outside the traditional safeguards of the polling place" and thus "must be carefully regulated to prevent the potential for fraud and abuse." Wis. Stat. § 6.84(1). The Legislature then prescribed a statutory absentee voting procedure and declared that "[b]allots cast in contravention of the procedures

---

[2] Throughout this Brief, the following party definitions and abbreviations have been used:

> "**WEC**" refers to Defendants Wisconsin Election Commission, and its members Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Dean Knudson, Robert F. Spindell, as well as Douglas J. La Follette, Wisconsin Secretary of State, who joined in WEC's responses.
>
> "**Milwaukee City Defendants**" refers to Defendants Mayor Tom Barrett, City Clerk Jim Owczarski, and Claire Woodall-Vogg, Executive Director of the Milwaukee Election Commission.
>
> "**Milwaukee County Defendants**" refers to County Clerk George L. Christenson and County Election Director Julietta Henry.
>
> "**Joint Municipal Defendants**" refers to Defendants County Clerk Scott McDonell (**Dane County**), Mayor Satya Rhodes-Conway and Clerk Maribeth Witzel-Behl (**City of Madison**), Mayor Cory Mason and Clerk Tara Coolidge (**City of Racine**), Mayor John Antaramian and Clerk Matt Krauter (**City of Kenosha**), Mayor Eric Genrich and Clerk Kris Teske (**City of Green Bay**).

specified in those provisions may not be counted." Wis. Stat. § 6.84(2). Defendants, however, implemented absentee voting procedures outside those "carefully regulated" provisions in the November 2020 election. In particular, President Trump identified four such *ultra vires* absentee voting procedures and practices:

1. WEC issued guidance and other Defendants and election officials throughout Wisconsin installed 500 unmanned ballot drop box repositories that "are not found anywhere in the absentee voting statutes";[3]
2. In reliance upon the WEC's drop box guidance the City of Madison held "Democracy in the Park" events during which it set up 200 sites around the city where volunteers, referred to by the Clerk as "human drop boxes," collected more than 17,000 absentee ballots in advance of the early in-office absentee voting period established by statute;
3. Municipal clerks improperly injected themselves into the absentee voting process by unilaterally completing missing information on absentee ballot envelopes, typically related to the witness's address, contrary to statute; and
4. Defendants circumvented the Legislature's photo ID requirements by encouraging widespread misuse of Wisconsin's "indefinitely confined" exception for absentee ballot requests.

[3] *Trump v. Biden*, No. 2020AP2038, 2020 WL 7331907, at *20 (Wis. Dec. 14, 2020) (Roggensack, C.J., Ziegler & Rebecca Grassl Bradley, JJ., dissenting).

Additionally, the Wisconsin Election Code contains mandatory provisions requiring that absentee ballots in the first three categories listed above may not be counted and cannot be included in the certified results of any election. Defendants serially refused to enforce this aspect of the Wisconsin Election Code.

These practices and methods violated the Electors Clause because they amounted to an election conducted by executive branch officials that was not "in such Manner as the Legislature thereof may direct." President Trump seeks a declaratory judgment that the election was not conducted in a lawful manner and therefore electoral votes cast on December 14 as a result of the flawed election are not valid, and injunctive relief ordering Governor Evers to issue a certificate of determination consistent with, and only consistent with, the appointment of electors by the Wisconsin legislature.

B. Course of Proceedings and Disposition Below

On December 2, 2020, just two days after Wisconsin completed its statewide canvass and recount (B028 ¶ 8), President Trump filed the instant action, along with a request for an expedited final hearing and trial on the merits. (ECF Nos. 1 and 6.) On December 3, 2020, the district court ordered a scheduling conference for the following day (ECF No. 14) at which all parties appeared by counsel. At the scheduling conference, the district court set a final hearing and trial on the merits for December 10, 2020, and ordered the Defendants to respond to the Plaintiff's Complaint and Motion for Preliminary Injunction by 5 p.m. on December 8, 2020, with Plaintiff's Reply due by 12 noon on December 9, 2020. (ECF No. 45.)

On December 8, 2020, in addition to responses to Plaintiff's Motion for Preliminary Injunction, Defendants filed Motions to Dismiss (ECF Nos. 69, 71, 78, 86 (including a supporting Declaration by Defendant Claire Woodall-Vogg, ECF No. 80), 84, 96, 97, and 99) (the "Motions to Dismiss"). On December 9, 2020, Plaintiff filed his response to the Motions to Dismiss. (ECF No. 109.)

The district court repeatedly admonished the parties to reach a set of stipulated facts to obviate the need for witnesses. (ECF No. Nos. 93, 104, 105, and 122.)

On December 10, 2020, the district court held the final hearing and trial on the merits via remote proceedings. (ECF No. 116, 130.) At the outset of the hearing, the district court again admonished the parties to reach a set of stipulated facts and gave the parties a lengthy recess to complete their stipulations. (Tr. 14:4-15:24.) The parties ultimately reached a stipulated set of facts and all exhibits, including any exhibits attached to the Defendants' motions to dismiss (B025-B039; ECF Nos. 117, 119, 73, 80, and 82), and the district court heard closing arguments of counsel. (Tr. 16:4-17:12 (discussion of stipulations[4]), B025-B034 (filed stipulations), B037-B038 and B039 (stipulated affidavits).) At the conclusion of the hearing, the Court denied the motions to quash and motion in limine as moot. (ECF No. 133.)

On December 12, 2020, the district court issued a *Decision and Order* granting the Motions to Dismiss and denying Plaintiff's motion for preliminary injunction (A001), and entered Judgment against Plaintiff. (A024.) That same day, Plaintiff timely filed his Notice of Appeal. (ECF No. 136.)

[4] The remainder of the hearing transcript comprises closing argument.

C. Statement of Facts

On November 3, 2020, Wisconsin joined the rest of the nation in holding a general election for selecting Electors to vote for the Offices of President and Vice President of the United States. (B027 ¶ 7.) Nearly 3,300,000 total ballots were cast in Wisconsin's November 3rd election. (B027 ¶ 7.) Of that amount, 1,957,514 were absentee ballots, 651,422 of which were cast in person, with the remaining 1,306,092 (2/3rds of all absentee ballots) cast by mail or in a drop box.[5] By comparison, in Wisconsin's 2016 presidential election, just over 3,000,000 ballots were cast, only 819,316 of which were absentee ballots, with 674,514 of those absentee ballots cast in person, and the remaining 144,802 (18% of all absentee ballots) cast by mail.[6]

On November 17, 2020, the last county in Wisconsin submitted its canvass of votes to the Wisconsin Elections Commission ("WEC"). (B028 ¶ 8.)

On November 18, 2020, President Trump requested a recount in Dane and Milwaukee Counties. (B028 ¶ 9.) The final state canvass was completed on November 30, 2020. (B028 ¶ 8.) Two days later, President Trump filed his Complaint. (ECF No. 1.) Both in his Complaint and at the trial, President Trump challenged the four absentee ballot practices set forth above in President Trump's

---

[5] https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/AbsenteeCounts_County%2011-1-2020.csv.

[6] https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Exhibit%20A%20Absentee%20Voting%20Data%202016-2020%20%28Amended%209.23.2020%29.pdf

description of the Nature of the Case. The relevant facts pertaining to these methods and practices are stated separately below.

1. Wisconsin's absentee voting procedures.

In the 1980s, the Wisconsin Legislature made a policy choice that absentee voting is a *privilege* not a *right*:

> [V]oting by absentee ballot is a ***privilege*** exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of ***voting by absentee ballot must be carefully regulated*** to prevent the potential for fraud or abuse[.]

Wis. Stat. § 6.84(1) (emphases added). The Legislature also directed:

> Notwithstanding s. 5.01(1), with respect to ***matters relating to the absentee ballot process***, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. ***shall be construed as mandatory***. ***Ballots cast in contravention of the procedures specified in those provisions may not be counted.*** Ballots counted in contravention of the procedures specified in those provisions ***may not be included in the certified result*** of any election.

Wis. Stat. § 6.84(2) (emphases added); *see also*, *Jefferson v. Dane County*, 2020 WL 7329433 at *4 ¶16 (Wis. Dec. 14, 2020) ("matters relating to the absentee ballot process…shall be…mandatory.") (quoting statute).

"In most circumstances, the requirements to obtain an absentee ballot are twofold: (1) apply with the elector's municipal clerk and (2) provide a photo proof of identification with the application." *Id.* at 9 ¶ 17 (footnote omitted). However, "[i]f an elector qualifies to receive an absentee ballot [as (1) an elector who is indefinitely confined or (2) an elector who is disabled for an indefinite period], the elector is not required to provide photo identification to obtain a ballot." *Id.* at 10 ¶¶ 18–19. "In addition, when an elector qualifies to receive an absentee ballot because he or she is

indefinitely confined or disabled for an indefinite period, the elector automatically receives an absentee ballot for every election until the elector notifies the municipal clerk that he or she is no longer indefinitely confined, fails to cast and return a ballot, or the clerk receives reliable information that the 'elector no longer qualifies for the service.'" *Id.* at 10–11 ¶ 20 (quoting Wis. Stat. § 6.86(2)(a), (b)).

2. Election workers completed witness address information that was missing from absentee ballot certificates.

Wisconsin law provides that absentee ballot return envelopes must contain a voter's certification of certain information, must be executed by a witness, and must include the witness's address. Wis. Stat. § 6.87(2). In 2015, the Legislature indicated it deemed the witness address information of utmost importance when it added the following provision: "If a certificate is missing the address of a witness, the ballot may not be counted." Wis. Stat. § 6.87(6d).

In response to the new provision, WEC "set a policy that a complete address contains a *street number, street name and name of municipality*." (B052) (emphasis in original). And just three weeks before the 2016 election, WEC issued new guidance stating:

> The WEC has determined that clerks *must* take corrective actions in an attempt to remedy a witness address error. If clerks are reasonably able to discern any missing information from outside sources, clerks are not required to contact the voter before *making that correction directly* to the absentee certificate envelope.

(B052) (first emphasis in original, second emphasis added). WEC issued this guidance despite the "concern some clerks have expressed about altering information on the certificate envelope, especially in the case of a recount." (B053.)

WEC summed up its guidance, stating "municipal clerks shall do all that they can reasonably do to obtain any missing part of the witness address," including supplying missing information based on the clerk's own personal knowledge. (B053.)

Three weeks later, President Trump won Wisconsin's electoral votes by a margin of just over 22,700 votes after a statewide recount. (A001.) There is no evidence in the record whether any envelope for an absentee ballot cast in that election contained any witness address information filled in by election officials. President Trump was not a candidate in any subsequent Wisconsin elections until the 2020 election season.

In late March 2020, amidst fears of a global pandemic in the weeks leading to Wisconsin's April 7th presidential primary, the Democratic National Committee and Democratic Party of Wisconsin filed an action for emergency preliminary injunctive relief to enjoin enforcement of the witness requirement for absentee voting. *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 958 (W.D. Wis. 2020). On April 2, 2020, the district court in that case enjoined WEC from enforcing the statutory requirement that an absentee ballot must be witnessed, as long as the voter provided a written statement that he or she could not safely obtain a witness certification despite reasonable efforts to do so. *Id.* at 983. The very next day, this Court stayed that injunction, expressing "concern[s] with the overbreadth of the district court's order, which categorically eliminates the witness requirement applicable to absentee ballots and gives no effect to the state's substantial interest

in combatting voter fraud." *Democratic Nat'l Comm. v. Bostelmann*, No. 20-1538, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020).

On April 5, 2020, WEC issued new guidance in light of this Court's decision. (*See* B060 (see header on B061 identifying guidance as "Post Appeals Court Decision Absentee Signature Requirement").) This new guidance appeared to retreat from the October 2016 guidance concerning the clerk's role in filling in missing witness information, as evidenced by the following:

> **6. What if a clerk has received a ballot back from a voter with required witness information missing?**
>
> They should make their best effort to ***contact the voter to advise them of their options to provide the missing information***. …
>
> **7. What are the options for a voter to provide missing witness information on the absentee ballot return envelope?**
>
> ***The voter has the option to correct the absentee certificate envelope in the clerk's office, by mail, or at the polling place***/central count location on election day.

(B061, bold italics added.) Noticeably missing from this guidance was any suggestion that election officials could fill in missing witness address information; rather, everything in the guidance suggested otherwise.

On September 18, 2020, once the spotlight on absentee witnesses had passed, WEC published an updated comprehensive, 250-page *Election Administration Manual for Wisconsin Municipal Clerks*. (ECF No. 117-72 p. 23.) Buried on page 99 of the Manual, WEC included the following statement: "Clerks may add a missing witness address using whatever means are available. Clerks should initial next to

the added witness address." (B070 (for extract of page); ECF No. 80-2 p. 101¶ 8.b.). However, under the immediately following heading, *Correcting Defective Absentee Certificate Envelopes*, the Manual specified the step-by-step process for "curing" defective certificate envelopes:

> 1. The municipal clerk reviews each absentee certificate envelope…for any errors (e.g. *missing…witness signature* ***and address***…).
>
> 2. If there is an error, the clerk should contact the voter, if possible. Wis. Stat. § 6.87(9).
>
>   a. The *voter has the option* to correct the absentee certificate envelope *in the clerk's office, by mail, or at the polling place*/central count location on Election Day.
>
>   * * *
>
>   b. The original witness must always be present to correct any certificate errors.

(B070 (for extract of page); ECF No. 80-2 pp. 101–02, emphases added.)

On October 19, 2020, just two weeks before the election, WEC again issued further guidance entitled, *Spoiling Absentee Ballot Guidance*. (B083.) On page 3, under the heading, *Absentee Voter Errors or Ballot Damage After the Spoiling Deadline*, WEC stated the following:

> On Election Day, if a voter needs to correct…missing voter information, missing voter signature, or missing witness signature. ***The witness can appear without the voter to add their signature or address***. Please note that ***the clerk should attempt to resolve any missing witness address information*** prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness). ***The witness does not need to appear to add a missing address***

(B085, emphases added.)

In the November 2020 Wisconsin election, election workers added information to the witness address on the envelopes of unspecified number of absentee ballots,[7] and these absentee ballots were counted as valid votes. (B029 ¶ 17.) At the Milwaukee Central Count on election day, Defendant Woodall-Vogg made an announcement that ballot counters who happened on a ballot without a witness address could go to a computer, look the address up and insert it on the ballot. (B037-B038 ¶ 11.) In the district court below, Defendants claimed they used WEC's written guidance to guide their handling of the absentee ballot witness addresses. (B028 ¶ 11.) However, Defendants did not specify which written guidance they followed.

Neither municipal clerks' offices nor WEC keep statistics or records that would enable the calculation of the number of ballot envelopes containing such additions. (B029 ¶ 17.)

3. Defendants' statements on and widespread use of Wisconsin's "indefinitely confined" exception for absentee ballot requests.

On March 24, 2020, WEC posted guidance in one of its FAQ documents relating to the COVID-19 pandemic, which included the following statements:

> During the current public health crisis, many voters of a certain age or in at-risk populations may meet [the] standard of indefinitely confined until the crisis abates.

(ECF No. 117-2 pp. 1–2.)

[7] Approximately 5,500 ballots had defective or missing witness address information in Milwaukee County and an unknown number of such ballots from Dane County. (ECF Nos. 132-3 at 76:10–12, 132-1 p. 2, and 132-2 at 7 ¶ 11.a)

The next day, March 25, 2020, the Dane County Clerk McDonell emailed an announcement to all Dane County Municipal clerks and posted on his official Facebook page urging "all voters who request a ballot and have trouble presenting valid ID to indicate that they are indefinitely confined." (B030 ¶ 23.) That same day, the Milwaukee County Clerk issued a similar statement. (B031 ¶ 25.)

On March 27, 2020, Mark Jefferson and the Republican Party of Wisconsin filed an Original Action with the Wisconsin Supreme Court seeking a declaration that the Dane County Clerk's statement was erroneous and a preliminary injunction directing him to remove his posts and issue a corrective statement. *Jefferson*, 2020 WL 7329433, at *2.

On March 29, 2020, WEC issued further guidance stating:

> 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.

(A008; B054; ECF No. 117-2 p. 1.)

On March 31, 2020, the Wisconsin Supreme Court granted the request for a temporary injunction, holding that McDonell's public advice urged voters to violate Wisconsin election law and ordered any future postings to conform to the above two paragraphs from WEC's statement. (ECF No. 73-5 pp. 2–3.) The Court confined its

holding to the two specific paragraphs quoted in its order and did not adjudicate the remaining content from the WEC guidance, which WEC did not retract but rather re-published in its March 29 guidance. (B055). The Wisconsin Supreme Court then granted the Petition for Original Action and assumed jurisdiction over the case the following day. *Jefferson*, 2020 WL 7329433, at *2. The Wisconsin Supreme Court's final adjudication, however, remained pending until after the election, when it rendered its final decision on December 14, 2020. *Id.*

Meanwhile, in response to the Wisconsin Supreme Court's temporary injunction, the Milwaukee County Clerk removed his Facebook posting. (B031 ¶ 26.)

As of the November 3, 2020 election, a total of 11,374 voters in the City of Madison had claimed to be indefinitely confined. (B030 ¶ 21.) Similarly, a total of 29,391 voters in the City of Milwaukee had claimed to be indefinitely confined. (B030 ¶ 22.)

As of November 10, 2020, approximately 240,000 Wisconsin voters had requested absentee ballots claiming to be "indefinitely confined." (B029 ¶ 18.)[8] By comparison, a total of 66,611 Wisconsin voters cast absentee ballots in the 2016 general presidential election claiming to be indefinitely confined. (B029-B030 ¶ 19.)

4. Defendants installed 500 unmanned absentee ballot drop boxes around the state.

In June 2020, the Mayors of Wisconsin's five largest cities—Madison, Milwaukee, Racine, Kenosha and Green Bay—sought private grant funding for a

[8] The number of ballots that were actually cast and counted on that basis was unknown as of the trial date. (B029 ¶ 18.)

collaboratively developed plan for the upcoming November election that would, among other things, "Encourage and Increase Absentee Voting (By Mail and Early, In-Person)," B090, and secure "resources to purchase additional secure drop-boxes and place them at key locations throughout their cities, including libraries, community centers, and other well-known places…." (B096.)

On July 6, 2020, the Mayors announced they had secured $6.3 million in funding from Center for Tech and Civic Life (CTCL) for their plan. (ECF No. 117-28.) Although the Mayors secured funding for their plan, the WEC had not yet issued any guidance for drop boxes, which "are not found anywhere in the absentee voting statutes."[9]

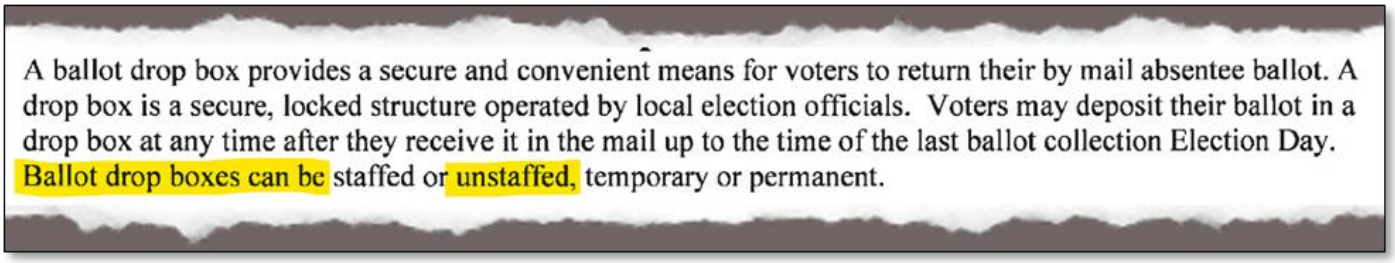
On August 19, 2020, WEC issued guidance on absentee ballot drop boxes. (A008; B063.) Although WEC's guidance largely followed a nationwide resource developed by the U.S. Cybersecurity and Infrastructure Security Agency (CISA), WEC's guidance omitted a key warning from CISA:

> If you are considering the use of ballot drop boxes, *you should review your existing laws and requirements and determine whether emergency changes may be necessary*. A full list of state practices can be found at the National Conference of State Legislators (NCSL) website listed in the Additional Resources section.

(ECF No. 117-15 p. 3, emphasis added.) Notably, WEC's guidance on drop boxes did not cite a single Wisconsin statute and made no attempt to identify any statutory authority for its guidance. (*See* B063.) WEC also did not attempt to "[p]romulgate rules under ch. 227 applicable to all jurisdictions for the purpose of interpreting or

[9] *Trump*, 2020 WL 7331907, at *20 (Roggensack, C.J., Ziegler & Rebecca Grassl Bradley, JJ., dissenting).

implementing the laws regulating the conduct of elections" relating to dropboxes. Wis. Stat. § 5.05(1)(f). Although the Wisconsin Election Code prescribes rules for establishing alternate absentee ballot sites at which voters "may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors," that site "shall be staffed by the municipal clerk or the executive director of the board of election commissioners" or their employees. Wis. Stat. § 6.855(1) and (3). However, WEC's guidance directly contradicted these rules, instead stating that drop boxes can be *unstaffed*:


A ballot drop box provides a secure and convenient means for voters to return their by mail absentee ballot. A drop box is a secure, locked structure operated by local election officials. Voters may deposit their ballot in a drop box at any time after they receive it in the mail up to the time of the last ballot collection Election Day. Ballot drop boxes can be staffed or unstaffed, temporary or permanent.

(B063.)

Sometime near the week of September 10, 2020, the City of Milwaukee installed 15 new dropboxes around the city. (ECF No. 117-58.) But later, just a week before the election, Milwaukee replaced its 15 dropboxes with "sturdier, longer-lasting" dropboxes that had "important security features." (B113; B032 ¶ 29.) This last-minute replacement calls into question the strength and security of its earlier dropboxes. Meanwhile, just weeks before the election, the City of Madison added 14 dropboxes around the city. (B110; B032 ¶ 30.) None of the absentee drop boxes in Dane and Milwaukee Counties were staffed. (B032 ¶ 27.) One box in Madison was placed in a large public park not adjacent to any building. (B032 ¶ 30.)

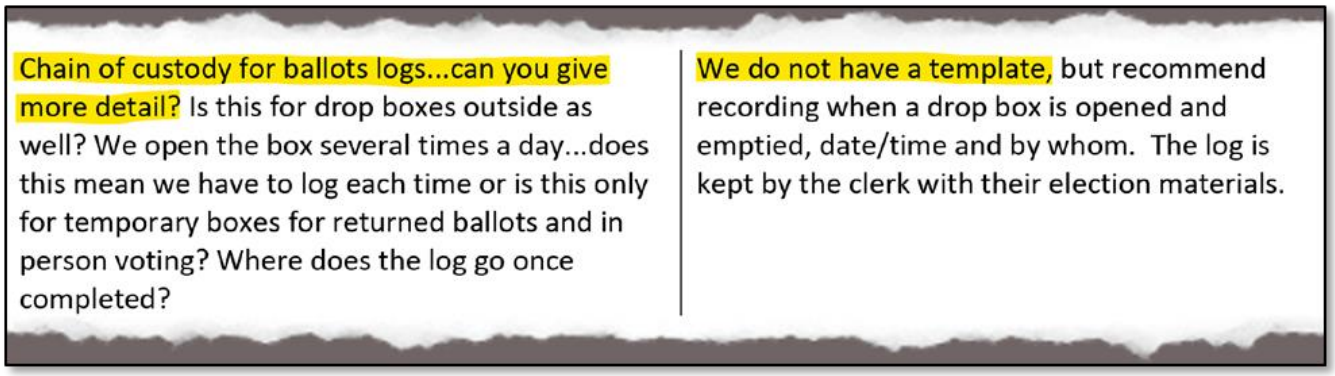
Over 500 absentee ballot boxes were used across Wisconsin in the November 2020 presidential election. (B032 ¶ 28.) Dropboxes were deployed in a variety of contexts, and WEC's "guidance" lacked any semblance of uniform standards. For example, the City of Oshkosh implemented a "drop box" with a sign that it was "for tax bills, water bills, parking tickets, and absentee ballots." (B108.) In its discovery responses, WEC provided a list of questions and answers from municipal clerks to WEC. (B077.) A sampling of those questions (left side) and WEC's answers (right side) are as follows:

The drop box I wanted to order was not approved by the Village president so he chose one. It is also a payment drop box that will be used by residents to drop utility payments after hours. I do not like that idea but there was not any way I was going to win that fight. Disallowed or just a really bad idea?	Some municipalities are combining the return of absentee ballots with existing drop boxes, which is fine. Clerks need to be certain that ballots are retrieved in a timely manner.

(B077.)

Can municipalities share a drop box?	There is nothing that prohibits it.

(B078.)



Chain of custody for ballots logs...can you give more detail? Is this for drop boxes outside as well? We open the box several times a day...does this mean we have to log each time or is this only for temporary boxes for returned ballots and in person voting? Where does the log go once completed?	We do not have a template, but recommend recording when a drop box is opened and emptied, date/time and by whom. The log is kept by the clerk with their election materials.

(B079.)

While WEC does not maintain statewide records concerning the number of ballots collected from dropboxes, the City of Madison collected at least 9,346 and the City of Milwaukee collected approximately 65,000–75,000 absentee ballots from dropboxes for the November 2020 election. (B028-B029 ¶¶ 12–14.)

5. The City of Madison held "Democracy in the Park" events during which volunteers collected absentee ballots at 206 parks around the city.

In Madison, Defendant City Clerk Witzel-Behl conceived of an event she called "Democracy in the Park" held on two consecutive Saturdays in late September and early October. (B032 ¶ 31.) The events consisted of stationing primarily volunteer poll workers at more than 200 Madison parks to get people registered to vote, accept absentee ballots, and serve as a witness for people who had not yet filled out their absentee ballot. (ECF No. 117-54; B109.) Defendant Witzel-Behl referred to the poll workers as "human drop boxes." (B029 ¶ 16.) Ballot materials and voted absentee ballots at the end of the day were exchanged between poll workers and couriers using a "code phrase." (ECF No. 117-52 pp. 3, 21.)

The events were publicized and pushed by the Biden campaign. (ECF No. 117-64.)

WEC did not issue any written guidance concerning the event, and Defendant Witzel-Behl did not use any WEC written guidance in connection with the event. (B028 ¶ 11.)

Concerns over the legality of the events caused a handful of voters to preemptively file lawsuits asking a judge to declare that their absentee ballots had been legally collected at the events. (ECF No. 117-54 p. 2.)

A total of 17,271 absentee ballots were collected through the two Democracy in the Park events. (B029 ¶ 15.)

SUMMARY OF ARGUMENT

Defendants' actions took place against the backdrop of a global pandemic and a hotly contested presidential election, plunging Wisconsin into a maelstrom of election litigation and uncertainty. Some Madison voters even preemptively sought judicial refuge to determine whether their ballots counted after questions arose about the Madison Clerk's "Democracy in the Park." This level of uncertainty is part of the cost of policies which pushed the limits and went over the lines drawn by the Legislature in the Wisconsin Election Code.

At the same time, the Wisconsin state judiciary is riven by a fractured State Supreme Court that has largely decided election cases based only on threshold procedural issues and has for the most part refused to address the merits of issues that underlie this case. A partial exception that proves the rule is a case decided

just two days ago related to the "indefinitely confined" exception in the Election Code much discussed here. The Wisconsin Republican Party filed that case in March concerning important issues for the August and November elections in Wisconsin, yet the Supreme Court did not reach a final decision until December 14.

In *Bush v. Gore*, the Supreme Court identified one of the questions presented as "whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2 of the United States Constitution." 531 U.S. at 113. This case presents the related question of whether the Wisconsin Election Commission and other administrative Defendants established new and different procedures for absentee voting in Wisconsin, questions that the Wisconsin Supreme Court has refused to answer.

The Wisconsin Legislature declared Wisconsin policy that absentee voting "is a privilege exercised wholly outside the traditional safeguards of the polling place" and thus "must be carefully regulated to prevent the potential for fraud and abuse." Wis. Stat. § 6.84(1). The Legislature then prescribed a statutory absentee voting procedure and declared that "[b]allots cast in contravention of…those provisions may not be counted." Wis. Stat. § 6.84(2).

Defendants, however, have implemented a very permissive and different approach to absentee voting, perhaps best summed up in WEC's response to a question from a municipal clerk asking whether two different municipalities can share the same absentee ballot drop box: "There is nothing that prohibits it." (B078.) Like the teenager who pushes parental limits, Defendants take the view

that as long as the Legislature hasn't expressly prohibited a practice, we can get away with it. In this case, President Trump has challenged four such *ultra vires* absentee voting procedures and practices. (*See supra* p. 4.)

The Defendants usurped the Legislature's authority to establish absentee voting procedures when they promulgated guidance and developed practices contrary to the unambiguous requirements of the Wisconsin Election Code.

When state actors cross constitutional lines and tread on the authority of the State Legislature in a Presidential election, it is the responsibility of federal courts to hold the constitutional boundary. Only by holding the constitutional line will these practices be deterred in the future.

ARGUMENT

A. The Electors Clause

Article II, Section 1, Clause 2, the "Electors Clause," of the United States Constitution provides in relevant part:

> Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress[.]

1. The Electors Clause vests exclusive authority in the state "Legislature"

The Electors Clause unambiguously vests power to determine the manner of selecting Presidential electors exclusively in the "Legislature" of each state. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). "Art. II, § 1, cl. 2, 'convey[s] the broadest power of determination' and 'leaves it to the legislature exclusively to

define the method' of appointment." *Bush*, 531 U.S. at 113 (Rehnquist, C.J., concurring), quoting *McPherson*, 146 U.S. at 27. "The state legislature's power to select the manner for appointing electors is plenary," *Bush v. Gore*, 531 U.S. at 104.

"[I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 76. Courts are called upon to "respect . . . the constitutionally prescribed role of state *legislatures*" while enforcing against other state actors, whether they be courts,[10] executives[11] or election officials,[12] the "responsibility to enforce the explicit requirements of Article II." *Bush v. Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

2. The State Election Code cannot be significantly altered by non-legislative actors without implicating the Electors Clause

"A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. at 113.

---

[10] *See, e.g.*, *Bush v. Gore*, *supra*, (court infringed on legislative authority under Article II).

[11] *See*, *e.g.*, *Carson v. Simon*, 978 F.3d 1051, 1062 (8th Cir. 2020) (executive branch official invaded exclusive authority of state legislature).

[12] See, e.g., *Democracy N Carolina v. N. Carolina State Bd. of Elections*, 2020 WL 6589362, at *1–2 (M.D.N.C. Oct. 2, 2020), amended on reconsideration, 2020 WL 6591367 (M.D.N.C. Oct. 5, 2020) (district court considered whether directive of State Board of Elections conflicted with State Election Code in violation of Article II).

In *Bush v. Gore* the Supreme Court identified one of the questions presented as "whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2 of the United States Constitution." *Id.* at 103. In a concurring opinion joined by Justices Scalia and Thomas, Chief Justice Rehnquist said "the text of the [state] election law itself, and not just its interpretation by the courts of the States, takes on independent significance" in the context of Art. II, § 1, cl. 2. *Id.* at 113.

The Chief Justice noted that, "[i]solated sections of the [election] code may well admit of more than one interpretation, but *the general coherence of the legislative scheme may not be altered* by judicial interpretation[.]" *Id.* at 114 (emphasis added). Under Art. II, § 1, cl. 2 the Supreme Court must "determine whether a state court has infringed upon the legislature's authority" and in "interpret[ing] . . . election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II." *Id.* at 114, 115. Article II requires "respect for the constitutionally prescribed role of state *legislatures*." *Id.* at 115 (emphasis original). "[I]n a Presidential election the clearly expressed intent of the legislature *must* prevail." *Id.* at 120 (emphasis added).

Therefore, the principle that Art. II, § 1, cl. 2 forbids other state actors from intruding on the Legislature's prerogative by misinterpreting clearly expressed statutory directives is clear. The principle of non-intrusion on the legislative domain applies under both Art. II, § 1, cl. 2 (presidential elections) and Article I § 4 (congressional elections), *i.e.*, under both the Electors and Elections Clauses.

Under both the Electors and Elections Clauses it is the state legislature, and only the state legislature, that is required to "*prescribe the details* necessary to hold [federal] elections." *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (Elections Clause) (emphasis added). The *Harkless* court said that "the [Elections] Clause expressly presses states into the service of the federal government" by requiring the state legislatures to "prescribe the details" for federal elections and "[t]his stands in stark contrast to virtually all other provisions of the Constitution, which merely tell the states 'not what they must do but what they can or cannot do.'" *Id.* (citation omitted). In this unique respect, "the Constitution primarily treats states as election administrators rather than sovereign entities." *Id.* Of course, when a State's election procedures are inconsistent with constitutional requirements a federal court, "has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution[.]" *Judge v. Quinn*, 387 F. App'x 629, 630 (7th Cir. 2010).

3. The district court erred by concluding the Electors Clause requires no more than that a Presidential election in Wisconsin be conducted by popular vote

The district court found "defendants' actions as alleged in the complaint were undertaken under . . . color of Wisconsin law" (A017), but ruled the President's Article II claims failed on the merits because defendants conduct did not violate Article II. (A018–20.) The district court held that the term "manner" in Art. II, § 1, cl. 2 refers solely to the "form," "method" or "mode" (all synonymous terms in the district court's view) of election, meaning whether electors are selected "by general ticket, by districts, [or] by popular vote." (A018–19.) Thus, the district court opined

that failure of state officials to follow legislative direction for administering a Presidential election *could not* constitute an Electors Clause violation. *See*, *e.g.*, A019–20.) The district court's holding regarding the scope of the Electors Clause presents a pure issue of law, reviewed *de novo*. *Thomas v. Gen. Motors Acceptance Corp.*, 288 F.3d 305, 307 (7th Cir. 2002).

The Wisconsin Election Code directs selection of electors "[b]y general ballot at the general election for choosing the president and vice president of the United States." Wis. Stat. § 8.25(1). According to the district court, in a Presidential election in Wisconsin U.S. Const. art. II, § 1, cl. 2 can only be violated if non-legislative officials conduct an election through means other than "general ballot" (*i.e.*, popular vote). (A019–20.) Thus, despite cases giving a broader scope to "manner" as used in both the Electors and Elections Clauses, the district court ruled "manner" in the Electors Clause has nothing to do with compliance by State officials "with underlying rules of election administration." *Id.* at 19.

According to the district court, no matter how significantly State officials might deviate from the "legislative scheme"[13] in conducting a Presidential election, there can be no Electors Clause violation. Therefore, in the district court's view, the Electors Clause is a dead letter so long as state statute provides for a general ballot and the election is ultimately conducted via popular vote, something that has not been an issue in Wisconsin for more than 150 years. However, the district court's holding is inconsistent with the plain meaning of the Electors Clause and well out of

[13] *Bush v. Gore*, 531 U.S. at 113, 114 (Rehnquist, C.J., concurring).

the judicial mainstream. By employing a cramped construction of "manner" the district court's holding threatens to exacerbate the problem of state executive branch and administrative officials substituting their judgment for that of the state legislature when administering Presidential elections. Accordingly, reversal is required.

i. Plain Meaning of "Manner" As Used in the Electors Clause

The term "Manner" has been broadly used to connote a "way of doing something" since the 13th Century or as the "way something happens" from the mid-14th Century, according to etymoline.com.[14] Noah Webster's *American Dictionary of the English Language* (1828) lists the primary meaning of "manner" as "Form; method; *way of performing or executing*."[15] An expansive understanding of "manner" is also seen in the first law passed by the U.S. Congress after ratification of the U.S. Constitution, "An Act to regulate the Time and Manner of administering certain Oaths," 1 Stat. 23 (1789).[16] In this first Act of Congress "manner" encompassed descriptions or designations: (1) of the persons to whom the oath was to be administered, (2) of the stations of the persons by whom the oath was to be administered, (3) of other things that the person "administering the oath" was to do, including to "cause a record or certificate thereof to be made" and (4) to "record or

[14] *Available at*: https://www.etymonline.com/word/manner.

[15] (Emphasis added) *available at*: http://webstersdictionary1828.com/Dictionary/Manner.

[16] *Available at*: http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=146.

certify the oath of office," and (5) of consequences or penalties for failure to take the oath. Thus, "Manner" referred to a variety of ancillary procedures associated with the oath of office, not just to whom it was administered. Thus, the district court's construction of "Manner" is not supported by the plain meaning of that term at the time the Constitution was adopted.

ii. Judicial Construction of "Manner" As Used in the Contemporaneously Adopted Electors and Elections Clauses

Nor is the district court's construction of "manner" supported by subsequent usage of that term. The district court's understanding purports to rest upon Justice Thomas' concurring opinion in *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020). However, Justice Thomas' concurrence addressed a different issue entirely from whether "Manner" includes statutes having to do with administration of a Presidential election. The *Chiafalo* case dealt with whether a State may punish a so-called "faithless elector," *i.e.*, an elector who at the electoral college does not vote for the candidate for President for whom the elector is pledged to vote. Justice Thomas analyzed the term "Manner" contained in Article II solely in the context of whether it spoke to the post-election punishment of electors, concluding it said nothing about whether States could punish "faithless electors" and that authority to punish faithless electors was therefore reserved to the States or people and did not need to be implied in Article II. *Chiafalo*, 140 S. Ct. at 2335.

Given that the focus in *Chiafalo* was on how States treat electors *after* they are elected, Justice Thomas' analysis did not address whether "Manner" as used in Article II extends to statutes regulating how electors are chosen and to interference

with, or rewriting of, such statutes by non-legislative actors. However, Justice Thomas observed that in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995), the Supreme Court construed "Manner" in the "Elections Clause" to include "'a grant of authority to issue procedural regulations,' [although] not 'the broad power to set qualifications'" for office. *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring).

Thus, Justice Thomas explicitly recognized that under Article I § 4 the term "Manner" refers to "procedural regulations" the Legislature may adopt in connection with an election for Senators and Representatives. This is not an anomalous interpretation of "manner." The Elections Clause "is broadly worded and has been broadly interpreted." *Ass'n of Cmty. Orgs. for Reform Now*, 56 F.3d 791, 794 (7th Cir. 1995) (hereafter "ACORN"). For instance, "the 'Manner' of holding elections has been held to embrace the system for registering voters." *Id.* at 793. A number of other cases under the Elections Clause also interpret "manner" to encompass legislatively adopted rules pertaining to the administration of federal elections.[17]

There is no reason to believe that "Manner" should be broadly interpreted to encompass determination of procedural regulations for elections for Senators and Representatives under Article I but not encompass election administration rules in a Presidential election under Article II of the same Constitution.

---

[17] *See*, *e.g.*, *U.S. Term Limits, Inc.*, 514 U.S. at 833-834 (Elections Clause is a "grant of authority to issue procedural regulations"); *Judge v. Quinn*, 612 F.3d 537, 552 (7th Cir.), *opinion amended on denial of reh'g,* 387 F. App'x 629 (7th Cir. 2010) ("The notion that state legislatures play an essential role in promulgating the law that governs congressional elections . . . has deep roots."); *ACORN*, 56 F.3d at 793-94.

Therefore, this Court should reverse the holding of the District that the Electors Clause cannot apply to protect from administrative or executive branch usurpation legislatively adopted Election Code provisions which describe how a statewide election for President is to be administered. (A018–20.)

4. The district court erred through alternative holdings that the WEC's guidance was authorized by the Legislature and/or that any departures were not material or significant

The district court found, alternatively, that even if "Manner" includes aspects of election administration that Defendants administered Wisconsin's 2020 Presidential election as directed by the Wisconsin Legislature. (A020). The court said "[f]irst, the record shows defendants acted consistently with, and as expressly authorized by, the Wisconsin Legislature. Second, their guidance was not a significant or material departure from legislative direction." *Id.*

The district court identified four reasons guidance by the WEC was purportedly authorized by the Legislature:

(1) the Legislature "authorized the commission to issue guidance to help election officials…interpret…and…court decisions" (citing Wis. Stat. § 5.05(5t)),

(2) the Legislature authorized the Commission to issue advisory opinions (citing Wis. Stat. § 5.05(6a)),

(3) the Commission is authorized to promulgate rules (citing Wis. Stat. § 5.05 (1)(f)), and

(4) the Commission has responsibility for the "administration of election laws (citing Wis. Stat. § 5.05 (1)).

As the first prong of the trial court's alternative holding is based on an interpretation of law, this Court's review is plenary. *Thomas*, 288 F.3d at 307.

As the district court acknowledged, the WEC directives challenged by the President are "guidance" documents (A021), not advisory opinions or rules that went through an administrative rule making process. Nor can guidance documents be legitimately regarded as the "administration of election laws" (A021) to the extent such guidance conflicted with election laws. Guidance documents "are not the law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions." *Serv. Employees Int'l Union, Local 1 v. Vos*, 946 N.W.2d 35, 67 (Wis. 2020). Guidance documents "impose no obligations, set no standards, and bind no one." *Id.* Functionally, and as a matter of law, they are entirely inert." *Id.* Therefore, as a clear matter of law the Wisconsin Legislature did not authorize the WEC to issue guidance inconsistent with State Election Law. The district court does not suggest that the WEC was delegated authority to override the Election Code and none of the statutes cited by the district court suggest the WEC was given such power.

Therefore, the first prong of the district court's alternative holding must fail if the President demonstrates that the guidance issued by the Commission conflicted with the Election Code. The President's analysis of why Commission guidance conflicted with the Wisconsin Election Code is set forth in the sections immediately below. Again, the question of whether the Commission's guidance deviated from the

Code raises a pure question of law subject to plenary consideration. *Thomas*, 288 F.3d at 307.

The second prong of the Court's alternative holding is that the Commission's "guidance was not a significant or material departure from legislative direction." (A020). The district court asserts:

> [T]he record does not show any significant departure from the legislative scheme during Wisconsin's 2020 Presidential election. At best, plaintiff has raised disputed issues of statutory construction on three aspects of election administration. While plaintiff's disputes are not frivolous, the Court finds these issues do not remotely rise to the level of a material or significant departure from [the] Wisconsin Legislature's plan for choosing Presidential Electors.

(A021).

On their face, questions about whether departures by WEC and other state actors were material or significant might appear to present mixed questions of fact in law, as to which "the clear-error standard governs." *Thomas*, 288 F.3d at 307. Considering such questions outside the constitutional context, a reviewing court would "ask not whether the ruling was erroneous but whether it was clearly erroneous." *United States v. Frederick*, 182 F.3d 496, 499 (7th Cir. 1999).

However, in the context of important constitutional questions courts will apply *de novo* review to mixed questions of fact and law in order to ensure that constitutional standards develop in a clear, consistent and coherent manner. *See*, *e.g.*, *Thomas*, 288 F.3d at 307 (noting plenary review of mixed questions of fact and law can be appropriate in constitutional cases); *United States v. Meyer*, 157 F.3d 1067, 1074 (7th Cir. 1998) ("We review the district court's decision that a defendant

has failed to present sufficient evidence to become entitled to a jury instruction on a theory of defense *de novo*."); *see also Bush v. Gore*, 531 U.S. at 104-111 (while no standard of review was expressly articulated, the Court did not show deference to the findings of the Florida Supreme Court). Therefore, this Court should undertake *de novo* review of all mixed questions of fact and law, including whether the deviations from the Wisconsin Election Code were material or significant.

Furthermore, in the unique context of Article II a significant departure from the State Election Code must be considered material *per se*, requiring finding a constitutional violation without proof of how many ballots were impacted or whether the outcome of the election would have changed had the violation not occurred. The failure to adhere to constitutional standards in a Presidential election impugns the reliability of the election structure itself, in a manner analogous to structural error in a criminal trial. *See*, *e.g.*, *Powers v. Ohio*, 499 U.S. 400, 411-12 (1991); *Crittenden v. Chappell*, 804 F.3d 998, 1003 (9th Cir. 2015) ("it is well established that a Batson violation is structural error").[18]

For instance, in *Bush v. Gore*, the Court made no finding as to how many ballots would have been impacted as a result of the equal protection violation identified and did not find that the equal protection violation inherent in the recount process ordered by the Florida Supreme Court would have changed the outcome of the

[18] The idea that certain rights are sufficiently important to organized society that the violation of those rights will be declared in a lawsuit even without proof of defined damages holds in other areas as well. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding the "absolute" right to procedural due process warrants awarding nominal damages without proof of actual injury)

election. As the Court said, "[w]hen 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 v. Gore*, 531 U.S. at 104. Therefore, an Article II violation is established when the fundamental right to vote for President "as the legislature has prescribed" is violated, without need to show that that the violation established would have changed the outcome of the election.[19] In any case, the deviations from the Election Code in this case were significant by any reasonable measure.

5. The district court erred by concluding the adoption of absentee ballot "drop boxes" by Wisconsin election administrators did not violate the Electors Clause

i. The district court's order barely references absentee ballot drop boxes

The district court findings only note the WEC's August 19, 2020, guidance on drop boxes and no Code sections. (A008). This is not surprising as drop boxes are not referenced in the Election Code.

ii. Absentee ballot drop boxes are inconsistent with the legislative plan for voting absentee ballots in Wisconsin

The district court did not analyze whether absentee ballot drop boxes are consistent with the Election Code. They are not.[20]

---

[19] Proving fraudulently cast ballots is not a necessary element of an Article II claim. An Article II violation is established upon proof that the direction of the Legislature was not followed.

[20] *See* Trump, 2020 WL 7331907 at *20 (Roggensack, C.J, dissenting) ("[D]rop boxes are not found anywhere in the absentee voting statutes [and] are nothing more than another creation of WEC to get around the requirements of Wis. Stat. § 6.87(4)(b)1.")

In a "mandatory" section detailing the absentee voting procedure, the Wisconsin Election Code specifies exactly where and how absentee ballots may be cast and deposited: "The envelope [containing the absentee ballot] shall be *mailed* by the elector, or *delivered in person*, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1; *see Olson v. Lindberg*, 85 N.W.2d 775, 781 (Wis. 1957) (failure to properly deliver ballots rendered them uncounted).

The Legislature has made a single accommodation, providing for alternate sites to which voters may return absentee ballots, but those alternate sites "***shall be staffed*** by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners." Wis. Stat. § 6.855(3) (emphasis added). Moreover, the alternate sites "shall be located as near as practicable to the office of the municipal clerk or board of election commissioners," and "no site may be designated that affords an advantage to any political party." Wis. Stat. § 6.855(1). Likewise, Wis. Stat. § 7.15(2m) provides, "I]n a municipality in which the governing body has elected to an establish an alternate absentee ballot site under s. 6.855, ***the municipal clerk shall operate such site as though it were his or her office*** for absentee ballot purposes and shall ensure that such site is ***adequately staffed***." (Emphases added).

There are no options in the Election Code for returning an absentee ballot other than by mail or "*deliver[y] in person*, to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1. Delivery in one of these two manners is mandatory and non-compliance means the absentee ballot "***may not be counted.***" Wis. Stat. §

6.84(2). As explained above, the location of such delivery whether by mail or in person is a physical office (either the clerk's office or an alternate absentee ballot site) required to be "adequately staffed" with "employees of the clerk or the board of election commissioners." This process ensures the security of ballot delivery and provides for a clear chain of custody.

Upon receipt of an absentee ballot the clerk has two options. "If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector" if there is sufficient time for the elector to correct the defect and return the ballot before 8 p.m. on election day." Wis. Stat. § 6.87(9). If the clerk does not return the absentee ballot for correction of the certificate(s) by the voter, "the clerk **shall** enclose it, unopened, in a carrier envelope which shall be securely sealed and endorsed with the name and official title of the clerk, and the words "This envelope contains the ballot of an absent elector and must be opened in the same room where votes are being cast at the polls during polling hours on election day or, in municipalities where absentee ballots are canvassed under s. 7.52, stats., at a meeting of the municipal board of absentee ballot canvassers under s. 7.52, stats." Wis. Stat. § 6.88(1).

The formality of the statutory absentee ballot receipt and securing process which occurs in the clerk's office or at an alternate absentee ballot site is striking, making clear the Legislature's intent was that absentee ballots, whether mailed or delivered in person, only be received in an office staffed by trained employees who would immediately place ballots in a "securely sealed" "carrier envelope" to be

further "endorsed with the name and official title of the clerk" and a statement that the envelope would only be opened at the place where votes are cast on election day. These provisions make clear the Legislature intended absentee ballots only be received in an office where the statutory formalities could be observed and a tight chain of custody maintained.

The clarity of these procedures is why it is beyond reasonable dispute that un-manned absentee ballot drop boxes are inconsistent with the Legislature's strict processes for handling absentee ballots. Certainly, the Legislature never intended that absentee ballots would merely be dropped off in un-manned boxes, or deposited in municipal utility bill payment slots or library book depositories where the absentee ballots mingled with books or bills, or that a ballot would be pushed through a mail slot in the door of a city hall where it might lay on the floor until whomever happened by picked it up and (hopefully) passed it along.[21] Yet, this is exactly what happened in Wisconsin in the 2020 Presidential election with a mish-mash of multi-use slots, un-manned ballot boxes and, in the City of Madison, hundreds of so-called "human drop boxes" (most not even clerk's office employees) in City Parks weeks before in office absentee balloting was even permitted to begin, all due to the erroneous advice of the WEC.

iii. The WEC's endorsement of absentee ballot drop boxes

As discussed on pages 15–16 *supra*, the Mayors of Wisconsin's five largest cities obtained funding from an out of state not-for-profit corporation for absentee ballot

[21] ECF Nos. 117-18, -19, -20, -21, -22, -23, -48, -71, p. 37 (Repurposing Options).

drop boxes, among other things.[22] Only after receiving funding did WEC begin issuing guidance that contradicted the Legislature's directive regarding the handling of absentee ballots. (ECF 117-13, p. 1.)

iv. Absentee ballot drop boxes in Wisconsin were a late breaking but major development in the Wisconsin election landscape

Such was the frenetic pace of drop box addition in Wisconsin in the late summer and fall that by the November 3 election Wisconsin had more than 500 drop boxes and multi-use slots in which absentee ballots were being deposited,[23] including, of course, in the five largest cities which had gotten more than a two-month head start in addition to the generous CTCL funding. (*See* discussion *supra*, pp. 15–16.)

v. Absentee ballot drop boxes had a material impact on the 2020 Presidential election in Wisconsin

Drop boxes were an entirely new method of balloting in Wisconsin, expanding the ways an absentee ballot can be voted, while making absentee ballots more vulnerable and less secure. There is no dispute that no fixed standards guided the use of drop boxes. Thus, drop boxes in the 2020 Presidential election collided with the Legislature's starting point for absentee balloting in Wisconsin, that it "must be carefully regulated to prevent the potential for fraud or abuse." Wis. Stat. § 6.84(1).

Drop boxes lacked many safeguards the Legislature is careful to employ to protect aspects of the voting process actually covered in the Election Code, such as

[22] *Id.*, p. 10.

[23] ECF 117-18.

requirements for bi-partisan oversight,[24] requirements for public notice[25] and public access.[26] In fact, a federal fact sheet on which WEC's guidance was based recommends "bipartisan teams to be at every ballot drop-off location precisely when polls close"[27] but WEC deleted this recommendation from its guidance.[28]

Moreover, the manner in which drop boxes and multi-use slots were used around the State gave potentially thousands of individuals not employed in a clerk's office (and therefore not trained in election standards or duty bound to be non-partisan) access to absentee ballots, something that is anathema to the carefully crafted absentee balloting provisions in the Election Code. The un-manned drop boxes clearly opened the absentee balloting process up to the very concerns about fraud and abuse the Legislature was concerned about, including the unsavory practice of ballot harvesting and a greater potential for "overzealous solicitation of absent electors who may prefer not to participate in an election" as well as the possibility of "undue influence on an absent elector . . . or . . . similar abuses."[29] Un-manned ballot drop boxes are more vulnerable to all such concerns

---

[24] *See*, *e.g.*, Wis. Stat. §§ 6.855(1), 6.875(4)(a), 6.875(7), 6.88(3)(b), 7.15(1)(k), 7.20(2), 7.30(2), 7.41(4)

[25] *See*, *e.g.*, Wis. Stat. §§ 6.875(4)(a), 7.41, 7.515(3)(a).

[26] *Id.*

[27] ECF 117-15, p. 5.

[28] ECF 117-13.

[29] Wis. Stat. § 6.84(1).

Furthermore, as the Legislature did not direct an orderly roll-out of absentee ballot drop boxes, and the largest cities in the State clearly got a head start, there was significant potential for this new voting method to be used to partisan advantage, to the detriment of areas of the State that may not have been adequately funded or alerted as early to the new vote casting method. These are all reasons it is important the Legislature be in charge of the introduction of a significant new method of gathering absentee ballots, but the Legislature was not involved, in clear violation of Article II.

There is no doubt the impact of this new absentee balloting method was significant. Approximately 75,000 – 85,000 known absentee ballots were cast in direct contravention of the Wisconsin Election Code, and those numbers represent only 30 of the more than 500 illegal absentee ballot drop boxes in the State, and all in a Presidential election decided by less than 21,000 votes. (ECF 127 pp. 4–5 ¶¶ 13–14.) Any way that this unlawful and unconstitutional program is viewed it was material.

vi. So-called "human drop boxes" in the City of Madison had a material impact on the 2020 Presidential election

Another example why the drop box program initiated by the WEC was problematic was the so-called "Democracy in the Park" events which the City of Madison held on September 26 and October 3, 2020, well outside the two week period before election day when in-person absentee voting is permitted by Wis. Stat. § 6.86(1)(b).[30] These events, which primarily involved volunteer poll workers (not

[30] ECF 117-71, p. 103.

clerk's office employees) collecting absentee ballots at some 200 city parks in Madison were justified through the fiction that the poll workers who collected the ballots (clearly not promptly placing them in the carrier envelopes provided for in Wis. Stat. § 6.88(1), as video from the event, which is in the record, shows[31]) were allegedly "human drop boxes."[32] A total of 17,271 absentee ballots were collected in this non-statutory manner[33] in violation of Wis. Stat. § 6.87(4)(b)1 and consequently "may not be counted [and] . . . may not be included in the certified result of any election." Wis. Stat. § 6.84(2).[34] Thus, the WEC's improper drop box guidance spawned another unlawful method of collecting absentee ballots that was also clearly material under any measure.

The "Democracy in the Park" – "human drop box" events in Madison also demonstrated the danger that newly introduced voting methods not sanctioned by the Legislature can be turned for partisan ends. Public service announcements for these events which were proudly "created by, planned by, staffed by and paid for by

[31] ECF 117-55.

[32] ECF 127, p. 5, ¶ 16.

[33] ECF 127, p. 5, ¶ 15.

[34] The "may not be counted" requirement was not followed by election officials on election day or in the recount. Nevertheless, the language establishes the materiality of the deviations in the view of the Legislature.

the @CityofMadison Clerk's Office"[35] were paid for by the Biden for President Campaign and included the former Vice President's voice and tag line.[36]

6. The district court erred by concluding that guidance issued by the WEC authorizing clerks to alter absentee ballot witness certifications did not violate the Electors Clause

i. The Wisconsin Election Code bars clerks from altering absentee ballot witness certificates in any way

As explained above, the combined effect of Wis. Stat. §§ 6.87(9) and 6.88(1) is to make clear that clerks have only a single option to initiate correction of a defective absentee ballot certification and that is to return the absentee ballot and envelope to the voter for correction. "[T]he express mention of one matter excludes other similar matters not mentioned." *FAS, LLC v. Town of Bass Lake*, 733 N.W.2d 287, 297 (Wis. 2007). Thus, the WEC's shifting guidance which has encouraged clerks to alter absentee ballot witness certificates is contrary to the Election Code.

ii. Since 2016 the WEC has issued shifting guidance on the authority of clerks to alter absentee ballot witness certificates

About two weeks before the 2016 Presidential election, on October 18, 2016, the WEC issued what it characterized as a mandatory instruction, telling clerks they "**must** take corrective actions in an attempt to remedy a witness address error."[37] This directive was not supported in any way by the Election Code. Moreover, clerks

[35] ECF 117-49.

[36] ECF 117-64.

[37] ECF 117-72, p. 4 (emphasis original).

were instructed they were "not required to contact the voter before making that correction directly to the absentee certificate envelope."[38]

The WEC's 2016 eve of election instruction to clerks to tamper with witness certificates was a serious error. The witness certificate is an important aspect of the Legislature's effort to protect the integrity of absentee voting, which is why the certificate is completed "subject to the penalties of s. 12.60(1)(b), Wis. Stats., for false statements." Wis. Stat. § 6.87. The certificate is part of the evidentiary basis for a poll inspector's decision whether to allow a ballot envelope to be opened so that the absentee ballot can be counted. Wis. Stat. § 6.88(3)(a). An absentee ballot is only supposed to be opened if "the inspectors find that the certification has been properly executed." *Id.* "When the inspectors find that a certification is insufficient . . . the inspectors shall not count the ballot." Wis. Stat. § 6.88(3)(b). In fact, the only time the Wisconsin Election Code authorizes an election worker to write upon an absentee ballot envelope is when the ballot is *not counted*. *Id*. Only after that determination, "[t]he inspectors shall endorse [the] ballot not counted on the back, 'rejected (giving the reason)'." Wis. Stat. § 6.88(3)(b). Only uncounted envelopes are to be written on, and even then only "on the back," never on the witness certificate itself.

As these statutes confirm, the witness certificate is a key piece of the evidentiary chain designed by the Wisconsin Legislature to protect the integrity of absentee balloting. That is why Wis. Stat. § 6.87(6d) states unequivocally, "[i]f a

[38] *Id.*

certificate is missing the address of a witness, the ballot may not be counted." Further, Wis. Stat. § 6.84(2) underscores the Legislature's unambiguous and rather emphatic message that alteration of a witness certificate is absolutely forbidden. A ballot missing the address of a witness "may not be included in the certified result of any election." Wis. Stat. § 6.84(2). Thus, the WEC's 2016 instruction for clerks to engage in witness certificate tampering was a serious deviation from the Legislative plan for absentee balloting.

There is no uncertainty regarding what information the statutory witness address requirement is seeking. The WEC has consistently interpreted the required information as "the street number and street name (or P.O. Box) and the municipality of the witness."[39]

While the 2016 instruction for clerks to alter witness certificates was far afield from the Election Code, President Trump had no occasion to challenge it because he won the election in 2016 and therefore could not have brought a challenge as an aggrieved party. Nor was President Trump a candidate in any election in Wisconsin between 2016 and 2020.

In 2020 the guidance given by the WEC continued to include erroneous instructions to clerks to try to track down the absentee voter to get their assistance to correct defective certificates (rather than either mailing an insufficient envelope back to the voter or, if an envelope was retained by the clerk, protecting the chain of custody of the received absentee ballot by placing it in a sealed carrier envelope as

[39] ECF 117-72, p. 5 (2016); ECF 117-36 (2020).

directed by the statute discussed above).[40] However, WEC guidance in 2020 did not contain the earlier egregious direction to clerks to complete witness certificates without the involvement or knowledge of the voter, *that is, until October 19, 2020*.

iii. On October 19, 2020, the WEC strikes again, altering guidance and endorsing certificate alterations undertaken without knowledge of the voter

On October 19, 2020, for the first time in 2020, the WEC issued the startling pre-election directive to clerks that:

> The witness can appear *without the voter* to add their signature or address…[T]he clerk should attempt to resolve any missing witness address information…through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness). The witness does not need to appear to add a missing address.[41]

This is all absolutely contrary to the Election Code. However, the worst part is that this directive entirely takes the voter out of the picture. The directive makes clear the clerk may engage in alteration of the witness certificate based on "personal knowledge." Nor need the witness even be present. Thus, a witness certificate can be changed from invalid to allegedly valid solely by action of a clerk who was not even present when the ballot was marked and the certificates executed. Such actions amount to tampering and undermines the reliability, integrity and evidentiary value of the document. The clerks' actions are clearly contrary to the intent of the Legislature.

---

[40] ECF 117-72, pp. 15-17; ECF 117-72, pp. 33-35; ECF 117-36; ECF 117-72, pp. 139-140; ECF 117-71, pp. 1-3; ECF 117-71, pp. 80-81.

[41] ECF 117-35 (emphasis added).

iv. The WEC's October 19, 2020, guidance on altering absentee ballot witness certificates had a material impact on the 2020 Presidential election

Defendants ignored the mandatory requirement Code to not count an incomplete absentee ballot to the extent the Executive Director of the Milwaukee Elections Commission, Claire Woodall-Vogg announced, "that ballot counters who happened on a ballot without a witness address could go to a computer, look the address up and insert it on the ballot, but there was no mention of any procedure to verify the address."[42] Ms. Woodall-Vogg instructed another ballot counter at the central count facility to even count many absentee ballots in envelopes that had no signature on the witness signature line.[43] The Election Code provides that it is mandatory to not count such ballots and that they may not be included in any certified election results. Wis. Stat. § 6.84(2). These deviations were material as the plain language of the Code confirms and yet the WEC endorsed not following the Election Code and clerks complied.

7. The district court erred by concluding that guidance issued by the WEC altering the "indefinitely confined" status of voters did not violate the Electors Clause

i. The Wisconsin Election Code limits the "indefinitely confined" exception to four physical conditions

An initial request for absentee ballot requires photo identification, except for those who register as "indefinitely confined" or "hospitalized." Wis. Stat. § 6.86(2)(a), (3)(a). Registering for indefinite confinement requires certifying

[42] B037.

[43] B039.

confinement "because of age, physical illness or infirmity or [because the voter] is disabled for an indefinite period." *Id.* § 6.86(2)(a).

ii. The Clerks in Dane and Milwaukee Counties explicitly advised that all voters could use indefinite confinement in order to avoid Wisconsin's photo identification law

On or about March 25, 2020, the clerks in Dane and Milwaukee counties issued social media posts advising that Wisconsin voters were justified by the Covid-19 pandemic in claiming indefinitely confined status and in so doing could avoid the necessity of producing photo identification before obtaining an absentee ballot.[44] On March 27, 2020, the Republican Party of Wisconsin filed a petition for leave to commence an original action with the Wisconsin Supreme Court to address this flagrant effort to undermine Wisconsin's photo identification law by advising voters to apply for indefinite confinement status to avoid having to produce photo identification.

iii. On March 29, 2020, the WEC issued inaccurate guidance concerning indefinite confinement in conflict with State law

Two days later the WEC issued guidance providing in part, "[d]uring the current public health crisis, many voters of a certain age or in at-risk populations may meet the standard of indefinitely confined until the crisis abates."[45] This guidance, which is not tied to confinement based upon any of the four physical conditions identified in Wis. Stat. § 6.86(2)(a) is contrary to the Election Code.

[44] ECF 127, ¶¶ 23-26.

[45] ECF 117-2.

The WEC further instructed that [c]lerks…may not request or require proof."[46] This aspect of the guidance is not found anywhere in the Election Code and it seriously undermined the photo identification requirement by advising anyone who read it that a claim of indefinite confinement did not require proof and would never be challenged.

iv. On March 31, 2020, the Wisconsin Supreme Court reprimanded the Clerks in Dane and Milwaukee Counties

Two days later, the Supreme Court issued a short order approving two more innocuous paragraphs in the same WEC guidance and ordering the Dane County Clerk not to post advice inconsistent with those paragraphs. The Court said nothing about the problematic aspects of the WEC guidance referred to above, and the Wisconsin Republican Party continued the original action seeking additional relief from the Wisconsin Supreme Court to clarify the indefinite confinement issue.

v. The Wisconsin Supreme Court waited until December 14, 2020, to issue its final decision, leaving in place the WEC's erroneous guidance throughout the Presidential election

Finally, on December 14, 2020, a month and a half after the Presidential election, the Court issued its order finding that neither the pandemic nor a stay at home order made a voter indefinitely confined.[47]

[46] ECF 117-2.

[47] *Jefferson*, 2020 WL 7329433

vi. Wisconsin's failure to follow the clear direction of the Wisconsin Legislature on the "indefinitely confined" exception had a material impact on the 2020 Presidential election in Wisconsin

As a consequence of the foregoing, the WEC's inaccurate "indefinitely confined" guidance continued to impact the Presidential election in Wisconsin and Republicans were effectively barred from challenging the guidance in light of the long pending Wisconsin Supreme Court case. As of November, 2020 some 240,000 requests for absentee ballots based on indefinite confinement had been received, in comparison to only 66,611 requests in the 2016 Presidential election.[48]

B. The Equal Protection Clause

Amendment Fourteen, Section 1, the "Equal Protection Clause," to the United States Constitution provides, in relevant part:

> No State shall…deny to any person within its jurisdiction the equal protection of the laws.

1. The district court erred by finding Plaintiff waived his claim under the Equal Protection Clause

The district court found that "[w]hile counsel purported to reserve [an] Equal Protection claim, the complaint offers no clue of a coherent Equal Protection theory and plaintiff offered neither evidence nor argument to support such a claim at trial" holding that it was "therefore abandoned." (A001 n.1). Waiver constitutes a mixed question of fact and law, necessitating review under the clearly erroneous standard. *See Thomas*, *supra*.

[48] ECF 127, ¶¶ 18-19.

The Complaint alleges an equal protection claim based on the lack of standards associated with the absentee ballot drop boxes. (See B046–51 ¶¶ 193–203.) As specified at paragraphs 33-34, the complaint, which contained citations to many legal authorities, served as Plaintiff's opening brief. Paragraph 199 of the Complaint recited that "lack of uniform standards regarding the handling, security and openness of the process to the public in connection with the new use of un-manned, absentee ballot drop boxes, render[ed] them constitutionally suspect under the Equal Protection" clause. (B048.) In support of this argument the Complaint identifies "*Bush*, 531 U.S. at 109 (observing that the election recount process at issue there was 'inconsistent with the minimum procedures necessary to protect the fundamental right of each voter' [and that] 'there must be at least some assurance that the rudimentary requirements of equal treatement and fundamental fairness are satisfied.'" (B048).

Opposing counsel understood an equal protection claim had been raised as he addressed it in his argument at the hearing.[49] Plaintiff's counsel also discussed the lack of standards related to the drop boxes in some detail in argument at the hearing.[50] Therefore, the equal protection claim was not abandoned.

[49] Tr. 103:20–104:16.

[50] Tr. 28:15–31:14.

2. The district court erred by failing to find that standard-less, non-uniform implementation of absentee ballot drop boxes violates Equal Protection

For reasons similar to the concern in in *Bush v. Gore* that the lack of uniform standards in a statewide recount violated Equal Protection, the lack of uniform standards in rolling out Wisconsin's statewide absentee ballot drop box program is problematic under the Equal Protection Clause. Equal Protection is concerned with the prospect for "debasement or dilution"[51] of votes, which can occur when votes are lost due to lack of security standards. Just as there must be "minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount"[52] there must be "minimum [security] procedures" in place to protect the fundamental right of each voter to not have their vote diluted when the State employs a new method of voting. Similar to the ultimate concern in *Bush v. Gore*, the drop boxes and multi-use slots in Wisconsin are "not well calculated to sustain the confidence that all citizens must have in the outcome of elections. The State has not shown that its procedures include the necessary safeguards."[53] Therefore, the Court should find that the standard-less, procedure-less roll-out of a new drop box method of absentee voting in Wisconsin violated the Equal Protection rights of Wisconsin voters and harmed candidates by undermining confidence in the

[51] *Bush v. Gore*, 531 U.S. at 105, citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

[52] *Bush v. Gore*, 531 U.S. at 109.

[53] *Id.*

outcome of the election and likely diluting or debasing votes attempted to be cast for the candidate.

C. The President's Requested Remedy

1. Declaratory relief is appropriate

The Declaratory Judgment Act provides:

> [A]ny court of the United States…may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201.

"[T]he Declaratory Judgment Act does not 'extend' the 'jurisdiction' of the federal courts." *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 197 (2014). Rather, the Declaratory Judgment Act, "place[d] a remedial arrow in the district court's quiver." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995).

Each State is delegated authority to cast electoral votes for president in 2020, but only if 3 conditions are met:

1) a statewide vote for electors is held on Nov. 3; (required by 3 U.S.C. § 1)
2) that election must be held in the manner directed by the state legislature; (required by U.S. Const. art. II, § 1, cl. 2) and
3) the electors must cast their votes on Dec. 14 (required by 3 U.S.C. § 7).

If a State fails to meet any one of these conditions, it cannot cast its electoral votes for President and Vice President, just as in any other situation, public or private, the result reached by the agent is invalid if the conditions of the delegation are not honored.

In its discussion of standing, the district court properly held:

> If [President Trump] were to succeed in proving that defendants violated the Electors Clause, causing Wisconsin's Presidential Electors to be appointed in a manner inconsistent with the Wisconsin Legislature's directives, and depriving plaintiff of his opportunity to win those Presidential Electors, he should have the ability (and the standing) to enforce the Constitution's plain terms in federal court.

(A013).

The district court was correct. The holding regarding standing applies going forward—having found standing, the district court was empowered to declare President Trump's rights and other legal relations.

As set forth above, President Trump has demonstrated the Wisconsin presidential election was not conducted in the manner prescribed by the Wisconsin legislature. Consequently the election did not satisfy the Electors Clause. President Trump is entitled to a declaratory judgment that the election was not conducted in a lawful manner and therefore electoral votes cast on December 14 as a result of the flawed election are not valid.

2. Injunctive relief is appropriate

Following a declaration that the November 3, 2020 election was invalid, Wisconsin is not left without any electoral votes. The Electoral Count Act contains a savings provision permitting a state legislature to appoint electors in the event its state fails to make an election (or when the election was unconstitutional and void):

> Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

3 U.S.C. § 2.

The date that has "ultimate significance" under federal law is "the sixth day of January," the date set by 3 U.S.C. § 15 on which "the validity of electoral votes" is determined by Congress. *Bush v. Gore*, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting); *see also* Laurence H. Tribe, *Comment: eroG .v hsuB and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors*, 115 Harv. L. Rev. 170, 265-66 (2001) (noting that the only real deadline for a State's electoral votes to be finalized is "before Congress starts to count the votes on January 6").

The Wisconsin Elections Commissions championed Justice Ginsburg's reliance on January 6 as the date of ultimate significance earlier this month in the Wisconsin Supreme Court. (ECF No. 109-1, pp. 16–17, WEC Response filed in Case No. 20AP1971-OA on Dec. 1, 2020.) The Wisconsin Elections Commission argued that Wisconsin's ten electoral votes can be certified "after the electors have convened and cast their electoral votes," and before January 6. (ECF No. 109-1, p. 15.)

As the district court correctly held:

> [A] state governor may issue a certificate of ascertainment based on the canvassing and then a subsequent certificate of "determination" upon the conclusion of all election challenges. 3 U.S.C. §6. The certificate of "determination" notifies the U.S. Congress of the state decision when Congress convenes on January 6 to count the electoral votes. Indeed, the WEC acknowledged that plaintiff's claims are not moot in a filing with the Wisconsin Supreme Court.

(A015).

Consistent therewith, President Trump requested the district court issue injunctive relief ordering Governor Evers to issue a certificate of determination

consistent with, and only consistent with, the appointment of electors by the Wisconsin legislature.

CONCLUSION

Administrative officials should not subvert the Legislature's exclusive constitutional authority to determine the manner of the election. Doing nothing will only encourage partisans to violate the laws. Citizens' trust in governmental institutions, and the belief in transparent and fair elections will continue to erode. For these reasons, this Court should reverse the district court and remand with instructions to enter a declaratory judgment and injunction requiring Governor Evers to issue a certificate of determination consistent with, and only consistent with, the appointment of electors by the Wisconsin legislature.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) as verified through Microsoft Word's "Word Count" function.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 12-point Century Schoolbook font.

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF No. system. Participants in this case who are registered CM/ECF No. users will be served by the CM/ECF No. system.

/s/ William Bock, III

William Bock III
KROGER, GARDIS & REGAS, LLP
111 Monument Circle, Suite 900
Indianapolis, IN 46204
Phone: (317) 692-9000

Attorneys for Plaintiff-Appellant Donald J. Trump

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

The undersigned counsel hereby certifies that the Short Appendix to this Brief includes all materials required by Circuit Rule 30(a) and that the separately filed Appendix includes all materials required by Circuit Rule 30(b)

DATE: DECEMBER 16, 2020

Respectfully Submitted,

KROGER, GARDIS & REGAS, LLP

/s/ William Bock, III

William Bock III, Indiana Attorney No. 14777-49
James A. Knauer, Indiana Attorney No. 5436-49
Kevin D. Koons, Indiana Attorney No. 27915-49
KROGER, GARDIS & REGAS, LLP
111 MONUMENT CIRCLE, SUITE 900
INDIANAPOLIS, IN 46204
PHONE: (317) 692-9000

Counsel for Plaintiff-Appellant Donald J. Trump, candidate for President of the United States

CIRCUIT RULE 30(A) APPENDIX

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DONALD J. TRUMP,

Plaintiff,

v.

Case No. 20-cv-1785-BHL

The WISCONSIN ELECTIONS COMMISSION, ET AL.,

Defendants.

DECISION AND ORDER

This is an *extraordinary* case. Plaintiff Donald J. Trump is the current president of the United States, having narrowly won the state of Wisconsin's electoral votes four years ago, through a legislatively mandated popular vote, with a margin of just over 22,700 votes. In this lawsuit, he seeks to set aside the results of the November 3, 2020 popular vote in Wisconsin, an election in which the recently certified results show he was defeated by a similarly narrow margin of just over 20,600 votes. Hoping to secure federal court help in undoing his defeat, plaintiff asserts that the defendants, a group of some 20 Wisconsin officials, violated his rights under the "Electors Clause" in Article II, Section 1 of the Constitution.[1] Plaintiff seizes upon three pieces of election guidance promulgated by the Wisconsin Elections Commission (WEC)—a creation of the Wisconsin Legislature that is specifically authorized to issue guidance on the state election statutes—and argues that the guidance, along with election officials' conduct in reliance on that guidance, deviated so significantly from the requirements of Wisconsin's election statutes that the election was itself a "failure."

Plaintiff's requests for relief are even more *extraordinary*. He seeks declarations that defendants violated his Constitutional rights and that the violations "likely" tainted more than

[1] Plaintiff's complaint also refers to the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. At the December 9, 2020 final pre-hearing conference, plaintiff disclaimed reliance on any First Amendment or Due Process claims. While counsel purported to reserve the Equal Protection claim, the complaint offers no clue of a coherent Equal Protection theory and plaintiff offered neither evidence nor argument to support such a claim at trial. It is therefore abandoned. *See Puffer v. Allstate Ins. Co*., 675 F.3d 709, 718 (7th Cir. 2012) (undeveloped arguments and arguments unsupported by pertinent authority are waived).

50,000 ballots. Based on this declaratory relief, his complaint seeks a "remand" of the case to the Wisconsin Legislature to consider and remedy the alleged violations. Plaintiff's ask has since continued to evolve. In his briefing, he says he wants "injunctive relief" requiring the Governor "to issue a certificate of determination consistent with, and only consistent with, the appointment of electors by the Wisconsin legislature." In argument, counsel made plain that plaintiff wants the Court to declare the election a failure, with the results discarded, and the door thus opened for the Wisconsin Legislature to appoint Presidential Electors in some fashion other than by following the certified voting results.

Defendants want plaintiff's claims thrown out, arguing his complaint fails to state a claim and raising several knotty issues of federal jurisdiction. With the Electoral College meeting just days away, the Court declined to address the issues in piecemeal fashion and instead provided plaintiff with an expedited hearing on the merits of his claims. On the morning of the hearing, the parties reached agreement on a stipulated set of facts and then presented arguments to the Court. Given the significance of the case, the Court promised, and has endeavored, to provide a prompt decision. Having reviewed the caselaw and plaintiff's allegations, the Court concludes it has jurisdiction to resolve plaintiff's claims, at least to the extent they rest on federal law, specifically the Electors Clause. And, on the merits of plaintiff's claims, the Court now further concludes that plaintiff has not proved that defendants violated his rights under the Electors Clause. To the contrary, the record shows Wisconsin's Presidential Electors are being determined in the very manner directed by the Legislature, as required by Article II, Section 1 of the Constitution. Plaintiff's complaint is therefore dismissed with prejudice.[2]

PROCEDURAL BACKGROUND AND FINDINGS OF FACT

1. THE PARTIES

Plaintiff Donald J. Trump is the current, properly elected, President of the United States. In 2016, after a statewide recount, plaintiff won Wisconsin's Presidential Electors by 22,748 votes. *Certificate of Ascertainment for President, Vice President and Presidential Electors General Election – November 8, 2016*, seal affixed by Governor Scott Walker, National Archives,

[2] This decision constitutes the Court's findings of fact and conclusions of law under Federal Rule of Civil Procedure 52.

https://www.archives.gov/electoral-college/2016. Plaintiff went on to win the 2016 Electoral College with 304 electoral votes. 2016 Electoral College Results, National Archives, https://www.archives.gov/electoral-college/2016. He was a candidate for reelection to a second term as President in the November 3, 2020 election.

Defendant Wisconsin Elections Commission is a creation of the Wisconsin Legislature. *See* 2015 Wis. Act 118 §4, Wis. Stat. §5.05. It is a bi-partisan, six-person commission that has "responsibility for the administration" of the state election laws in Chapters 5 to 10 and 12 of the Wisconsin Statutes.[3] Wis. Stat. §15.61. Any action by the commission requires the affirmative vote of at least two-thirds of its members. Wis. Stat. §5.05(1e). Defendants Ann S. Jacobs, Mark L. Thomsen, Marge Bostelmann, Dean Knudson, and Robert F. Spindell, Jr. are five of the six members of the commission.[4]

Defendant Scott McDonnell is sued in his official capacity as the Dane County Clerk. As the county clerk, McDonnell has a host of election-related responsibilities, including providing ballots and elections supplies to the municipalities, preparing ballots, educating voters, and training election officials. *See* Wis. Stat. §7.10. Additionally, McDonnell serves on the county board of canvassers, which is responsible for examining election returns and certifying the results to the WEC. Wis. Stat. §7.60.

Defendants Maribeth Witzel-Behl, Tara Coolidge, Matt Krauter, and Kris Teske are sued in their official capacities as the City Clerks of Madison, Racine, Kenosha, and Green Bay. As city clerks, they supervise both voter registration and elections. Wis. Stat. §7.15. They provide training for voters and election officials and equip the polling places. *Id.* Additionally, they are part of each respective city's board of canvassers. Wis. Stat. §7.53.

Because of their substantial populations, Milwaukee County and the City of Milwaukee have additional "election boards." Milwaukee County has a county board of election commissioners and the City of Milwaukee has a municipal board of election commissioners. Wis. Stat. §7.20(1). These boards have the same powers and duties assigned to the municipal and county clerks in other parts of the state. Wis. Stat. §7.21. Defendant George L. Christiansen is sued in his official capacity as the Milwaukee County Clerk. As the county clerk,

[3] Chapter 11 of the Wisconsin Statutes contains the state's campaign finance laws, which are outside of the WEC's authority.

[4] For reasons not explained, plaintiff did not name Commissioner Julie M. Glancey as a defendant.

he serves as the executive director of the county board of election commissioners, *id.*, but he is not on the county board of canvassers. *See* Wis. Stat. §7.60. Jim Owczarski is sued in his official capacity as the Milwaukee City Clerk. Like Defendant Christiansen, Owczarski maintains some election-related responsibilities, but he is not on the city's board of canvassers. Wis. Stat. §7.53.

Julietta Henry is sued in her official capacity as Milwaukee County Elections Director. The record in unclear on Henry's duties as Elections Director. Claire Woodall-Vogg is sued in her official capacity as the Executive Director of the City of Milwaukee Election Commission. She has the same powers and duties assigned to city clerks throughout the rest of the state. *See* Wis. Stat. §7.21.

Defendants Tom Barrett, Satya Rhodes-Conway, Cory Mason, John Antaramian, and Eric Genrich are sued in their official capacities as the Mayors of Milwaukee, Madison, Racine, Kenosha, and Green Bay. Plaintiff contends that these five mayors unlawfully promoted the expansion of mail-in voting in their cities by adopting practices that were banned by the Wisconsin Legislature. Under Wisconsin's election statutes, mayors play no formal role in presidential elections.

Defendants Tony Evers and Douglas La Follette are sued in their official capacities as the Governor and Secretary of State of Wisconsin. As governor, in accordance with Wis. Stat. §7.70, Defendant Evers signed the certificate of ascertainment prepared by the WEC, affixed the state seal, and forwarded the certificate to the U.S. administrator of general services. Wis. Stat. §7.70(5)(b). Defendant La Follette also signed the certificate of ascertainment.

2. WISCONSIN'S MANNER OF CHOOSING PRESIDENTIAL ELECTORS

Article II, Section 1, Clause 2 of the United States Constitution (the "Electors Clause") states, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…" U.S. CONST. art. II, §1, cl. 2. Pursuant to this federal Constitutional command, the Wisconsin Legislature has directed that Wisconsin choose its Presidential Electors through a general election. *See* Wis. Stat. §8.25. Specifically, the Wisconsin Legislature has directed:

> (1) Presidential electors. By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress. 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). The statutes define "general election" as "the election held in even-numbered years on the Tuesday after the first Monday in November to elect United States … presidential electors." Wis. Stat. §5.02(5).

The Wisconsin Legislature has also established laws detailing the particulars of election administration; these details are set forth in Chapters 5 to 12 of the Wisconsin Statutes. For the last five years, responsibility for the administration of Wisconsin elections has rested with the WEC. The Wisconsin Legislature created the WEC in 2015 specifically to "have the responsibility for the administration of … laws relating to elections and election campaigns." 2015 Wis. Act 118 §4; Wis. Stat. §5.05. To carry out these duties, the legislature has delegated significant authority to the WEC. The Wisconsin Legislature directed the WEC to appoint an administrator to "serve as the chief election officer" of the state. Wis. Stat. §5.05(3d), (3g). The Wisconsin Legislature has authorized the WEC to conduct investigations, issue subpoenas, and sue for injunctive relief. Wis. Stat. §5.05(b), (d). The legislature also directed the WEC to receive reports of "possible voting fraud and voting rights violations," Wis. Stat. §5.05(13), and to "investigate violations of laws administered by the commission and … prosecute alleged civil violations of those laws." Wis. Stat. §5.05(2m)(a).

The Wisconsin Legislature has also assigned powers and duties under the state election laws to municipal and county clerks, municipal and county boards of canvassers, and in Milwaukee, the municipal and county boards of election commissioners. Wis. Stat. §§7.10, 7.15, 7.21. The Wisconsin Legislature has directed that these officials, along with the WEC, administer elections in Wisconsin. *See* Wis. Stat. chs. 5 to 10 and 12. When the polls close after an election, these officials make sure that "all ballots cast at an election … be counted for the person … for whom … they were intended." Wis. Stat. §7.50(2). Once all the votes have been counted, the WEC chairperson "shall publicly canvass the returns and make his or her certifications and determinations on or before … the first day of December following a general election." Wis. Stat. §7.70(3)(a). For the determination of Presidential Electors, the Wisconsin Legislature has directed the WEC to "prepare a certificate showing the determination of the results of the canvass and the names of the persons elected." Wis. Stat. §7.70(5)(b). The legislature has further directed that "the governor shall sign [the certificate], affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services." *Id.* At noon on

the first Monday after the second Wednesday in December, the Presidential Electors meet to vote for the presidential candidate from the political party which nominated them. Wis. Stat. §7.75.

In addition to logistically administering the election, the Wisconsin Legislature has directed the WEC to issue advisory opinions, Wis. Stat. §5.05(6a), and "[p]romulgate rules … applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." Wis. Stat. §5.05(1)(f). The WEC is to "conduct or prescribe requirements for educational programs to inform electors about voting procedures, voting rights, and voting technology." Wis. Stat. §5.05(12).

Finally, the Wisconsin Legislature has provided detailed recount procedures. Wis. Stat. §9.01. After requesting a recount, "any candidate … may appeal to circuit court." Wis. Stat. §9.01(6). The legislature has also directed that "[Wis. Stat. §9.01] 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).

3. WEC'S GUIDANCE IN ADVANCE OF THE 2020 PRESIDENTIAL ELECTION IN WISCONSIN

Consistent with its statutory mandate, since the start of the year, the WEC has published more than 175 messages to County and Municipal elections officials in anticipation of the November 2020 general election. *See Recent Clerk Communications*, Wisconsin Elections Commission, https://elections.wi.gov/clerks/recent-communications. In addition to notifying elections officials of training opportunities, relevant court decisions, and upcoming deadlines, these messages provided detailed guidance on how to prepare for the election and count the resulting votes. *See id.* As stipulated by the parties, the WEC issued specific guidance on three specific issues flagged by plaintiff: missing or incorrect absentee ballot witness certificate addresses, voters claiming indefinitely confined status, and absentee ballot drop boxes. (Stipulation of Proposed Facts and Exhibits, ECF No. 127 ¶11.)

WEC's guidance on at least one of these issues dates back even further. More than four years ago, on October 18, 2016, the WEC issued written guidance to city and county elections boards providing guidance on the topic of witness addresses provided in connection with absentee

balloting. (Stipulation, ECF No. 127 ¶4.)[5] This guidance explained to elections officials how to handle missing or incorrect witness addresses on absentee certificate envelopes. (Pl. Ex. 73, ECF No. 117-72.) The memo highlighted Wis. Stat. §6.87, which states "[i]f a certificate is missing the address of a witness, the ballot may not be counted." (*Id.*) Since the statute does not provide any additional details, the WEC defined "address" as a "street number, street name and name of municipality." (*Id.*) The memo then provided guidance for situations where a voter may have left off the certificate one or more components of the witness address. In the memorandum, the WEC states "clerks **must** take corrective actions in an attempt to remedy a witness address error." (*Id.*) The guidance allowed clerks to contact the voter to notify them of the address requirement; however, the clerk only had to contact the voter if the clerk could not "remedy the address insufficiency from extrinsic sources." (*Id.*) The WEC stated "clerks shall do all that they can reasonably do to obtain any missing part of the witness address." (*Id.*) The purpose of the guidance was to "assist voters in completing the absentee certificate sufficiently so their votes may be counted." (*Id.*) This has been the unchallenged guidance on the issue for more than four years.

In September 2020, as directed in Wis. Stat. §7.08(3), the WEC updated the Wisconsin Election Administration Manual. The updated manual states "[c]lerks may add a missing witness address using whatever means are available." *Wis. Election Admin. Manual*, 99 (September 2020). Finally, on October 19, 2020, the WEC issued "Spoiling Absentee Ballot Guidance," reaffirming the previous guidance, and stating "the clerk should attempt to resolve any missing witness address information prior to Election Day if possible, and this can be done through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness). The witness does not need to appear to add a missing address." (Pl. Ex. 35, ECF No. 117-35.)

On March 29, 2020, in the early stages of the COVID-19 pandemic, the WEC issued "Guidance for Indefinitely Confined Electors COVID-19" to election officials across the state. (Pl. Ex. 2, ECF No. 117-2.) Through the published guidance, the WEC stated that "many voters

[5] The parties' stipulation describes this as an October 19, 2016 memorandum. (Stipulation of Proposed Facts and Exhibits, ECF No. 127 ¶4.) The memo itself is dated October 18, 2016, however. (ECF No. 117-72.) The Court will use the date on the actual document.

of a certain age or in at-risk populations" may meet the standard of indefinitely confined due to the ongoing pandemic. (*Id.*) The Guidance also stated:

> 1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. 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 or infirmity, or disability.

(*Id.*) The WEC issued this guidance after the Dane County Clerk issued a statement advising that the pandemic itself was sufficient to establish indefinite confinement for all voters. (*See* Stipulation, ECF No. 127 ¶23.) The statement was challenged in court, and the Wisconsin Supreme Court granted a temporary injunction against the Dane County Clerk. *See Jefferson v. Dane County*, 2020AP557-OA (March 31, 2020). In concluding that the Dane County guidance was incorrect, the Wisconsin Supreme Court expressly confirmed that the WEC guidance quoted above provided "the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." *Id.*

On August 19, 2020, the WEC sent all Wisconsin election officials additional guidance that, among other things, discussed absentee ballot drop boxes. (Pl. Ex. 13, ECF No. 117-13.) Wisconsin law provides that absentee ballots "shall be mailed by the elector, or delivered in person, to the municipal clerk." Wis. Stat §6.87(4)(b). The WEC memorandum provided advice on how voters could return their ballots to the municipal clerk, including "information and guidance on drop box options for secure absentee ballot return for voters." (Pl. Ex. 13, ECF No. 117-13.) Citing to a resource developed by the U.S. Cybersecurity and Infrastructure Security Agency (CISA), the guidance states the "drop boxes can be staffed or unstaffed, temporary or permanent." (*Id.*) The memorandum stated that the "drop boxes … allow voters to deliver their ballots in person" and will allow voters "who wait until the last minute to return their ballot." (*Id.*) The memorandum lists potential types of drop boxes, along with security requirements, chain of custody, and location suggestions for the drop boxes. (*Id.*)

As stipulated by the parties, election officials in Milwaukee County, the City of Milwaukee, Dane County, and the City of Madison relied on the above WEC guidance when

handling absentee ballots with missing or incorrect witness address, using absentee ballot drop boxes, and handling voters that had claimed indefinitely confined status. (Stipulation, ECF No. 127 ¶11.) Because they relied on the guidance, election workers added missing information to the witness address on at least some absentee ballots, more than five hundred drop boxes were used throughout the state, and approximately 240,000 "indefinitely confined" voters requested absentee ballots. (*Id.* ¶¶ 17, 18, 28.)

4. THE 2020 PRESIDENTIAL ELECTION IN WISCONSIN

On November 3, 2020, nearly 3.3 million Wisconsin voters cast their ballots in the general election for the President and Vice President of the United States. (Stipulation, ECF No. 127 ¶7.) At 8:00 p.m., all polls in Wisconsin closed. Wis. Stat. §6.78. The respective boards of canvassers began to publicly canvass all the votes received at the polling place. Wis. Stat. §7.51.

Voting officials in Milwaukee dealt with an unprecedented number of absentee ballots during this election. (Pl. Ex. 62, ECF No. 117-61.) In Milwaukee and Dane Counties, and likely other locations, election officials processed the absentee ballots in accordance with guidance published by the WEC. (Stipulation, ECF No. 127 ¶11.) The WEC received the last county canvass on November 17, 2020. (*Id.* ¶8.) On November 18, 2020, the deadline for requesting a recount, plaintiff sought a recount under Wis. Stat. §9.01 of only Dane and Milwaukee Counties.[6] (*Id.* ¶9.) The Milwaukee County recount was completed on November 27, 2020 and the Dane County recount was completed on November 29, 2020. (Id. ¶10.) Once the recount was complete, the WEC prepared the Certificate of Ascertainment for the Governor's signature. *See* Wis. Stat. §7.70(5)(b). On November 30, 2020, Governor Evers signed the certificate and affixed the state seal. (Def. Ex. 501, ECF No. 119-1.)

On December 1, 2020, the day after Wisconsin certified its election results, Donald Trump, Michael Pence, and the Trump campaign filed a petition in the Wisconsin Supreme Court against Governor Tony Evers, the Wisconsin Elections Commission, and other state election officials.

[6] After receiving a recount petition and $3 million payment from the Trump campaign, the six-member, bipartisan commission conducted a meeting on November 18, 2020, at which the commission unanimously approved the recount order. The WEC ordered a partial recount of the presidential election results in Dane and Milwaukee Counties on November 19, 2020. The recount order required Dane and Milwaukee Counties' boards of canvassers to convene by 9 a.m. Saturday, November 21, and complete their work by noon on Tuesday, December 1. Wis. Elections Comm'n Order for Recount, Recount EL 20-01, https://elections.wi.gov/node/7250.

Trump v. Evers, No. 2020AP001971 (Wis. S. Ct.). The issues presented by the plaintiffs included whether absentee ballots should be excluded due to various alleged deviations from legislated election procedures. As a remedy, they asked the Court to decertify the state's election results and exclude 221,000 votes in Milwaukee and Dane Counties from the count. On December 3, 2020, the Wisconsin Supreme Court denied the petition for leave to commence an original action in the state Supreme Court, but noted that, as an aggrieved candidate, plaintiff could refile at the circuit court level.

That same day, plaintiff filed his complaint in this Court. Additionally on that day, plaintiff, along with Michael R. Pence, and Donald J. Trump for President, Inc. filed complaints in Dane and Milwaukee County Circuit Courts against Joseph R. Biden, Kamala D. Harris, and several Wisconsin election officials, some of whom are defendants in this case. *Trump v. Biden*, No. 2020CV007092 (Milw. Co. Cir. Ct.), No. 2020CV002514 (Dane Co. Cir. Ct.). Chief Justice Roggensack of the Wisconsin Supreme Court combined the cases and appointed Racine County Reserve Judge Stephen A. Simanek to hear it. The suits are substantially similar and both allege irregularities in the way absentee ballots were administered. In the Milwaukee County case, the plaintiffs allege the ballots were issued without the elector having first submitted a written application; there were incomplete and altered certification envelopes; and there was a massive surge in indefinitely confined absentee ballot voters. The Dane County case included the same claims, plus one involving an allegation that absentee ballots were improperly completed or delivered to City of Madison employees at a public event, "Democracy in the Park." The plaintiffs asked the state court to set aside the county board of canvassers' legal determinations that certain absentee ballots should be counted due to deviations in state elections laws.[7]

LEGAL CONCLUSIONS AND ANALYSIS

Plaintiff claims that defendants violated his rights under the Electors Clause by "deviating from the law, substituting their 'wisdom' for the laws passed by the State Legislature and signed by the Governor." (Pl. Br., ECF No. 109.) In the complaint, plaintiff contends three specific pieces of guidance issued by the WEC, and followed by the named defendants, contradict

[7] On December 11, Judge Simanek affirmed the recount and ruled against plaintiff in the state court proceeding. *Trump v. Biden*, No. 2020CV007092, Doc. 101 (Milw. Co. Cir. Ct. Dec. 11, 2020). Plaintiff has since filed an appeal in the Wisconsin Supreme Court.

Wisconsin's election statutes, and that the WEC lacked the authority to issue any guidance in contravention of Wisconsin law. (Compl., ECF No. 1.) Invoking the Court's federal question jurisdiction under 28 U.S.C. §1331, plaintiff asserts claims for the violation of his federal Constitutional rights under 42 U.S.C. §1983. (*Id.*) Among other remedies, he seeks declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §2201, and asks this Court to declare the Wisconsin general election void under the U.S. Constitution. (*Id.*)

I. This Court Has Limited Jurisdiction to Resolve Plaintiff's Electors Clause Challenge.

Before addressing the merits of plaintiff's claims, this Court has the obligation of confirming that it has jurisdiction even to consider them. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (federal district courts "possess only that power authorized by Constitution and statute"). Defendants offer a host of arguments related to the justiciability of plaintiff's claims. They insist that plaintiff lacks standing to assert his claims, that his claims are barred by the Eleventh Amendment, and that they are moot. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.) Finally, they contend that even if this Court could resolve plaintiff's claims, it should abstain from doing so. (Defs. Brs., ECF No. 70, 81, 87, 95, 101, and 120.) Despite the tricky questions of federal jurisdiction implicated by plaintiff's claims and requests for relief, the Court concludes plaintiff's claims are justiciable, at least in part. Given the importance of the issues at stake and the need for a prompt resolution, the Court will not abstain from ruling on whether defendants violated plaintiff's federal rights under the Electors Clause.

A. Plaintiff Has Standing to Seek an Adjudication of the Alleged Violation of His Rights under the Electors Clause.

Defendants insist that plaintiff lacks standing to assert claims and obtain declaratory relief based on the Electors Clause. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.) That plaintiff seeks primarily declaratory relief does not remove his obligation to establish standing. The Declaratory Judgment Act permits the Court to "declare the rights and other legal relations of any interested party," but only when there is "a case of actual controversy within its jurisdiction." 28 U.S.C. §2201(a). "A 'controversy' in this sense must be one that is appropriate for judicial determination," *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937), and

"the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

To establish standing, plaintiff bears the burden of proving that he "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016). An injury in fact is one in which plaintiff claims to have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan*, 504 U.S. at 560).

Plaintiff asserts that he suffered an injury in fact when he "was denied the Constitutional right to have electors appointed in a lawful manner in an election in which he was a candidate." (Pl. Br., ECF No. 109.) The Court agrees. The Eighth Circuit and the Eleventh Circuit have concluded that losing candidates likely have standing to bring a claim under the Electors Clause, because such a candidate has suffered a "personal, distinct injury." *Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, at *4 (11th Cir. Dec. 5, 2020); *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) ("An inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors."). That is the situation here: plaintiff, a candidate for election, claims he was harmed by defendants' alleged failure to comply with Wisconsin law. Assuming he could prove his claims, he has suffered an injury. Plaintiff, as a candidate for election, has a concrete, particularized interest in the actual results of the general election. *Carson*, 978 F.3d at 1057; *see Carney v. Adams*, ___ S. Ct. ___, 2020 WL 7250101 (Dec. 10, 2020) (holding plaintiff had not proved injury in fact sufficient to establish standing where plaintiff was merely potential candidate and had not yet applied for judicial position). Plaintiff has therefore established injury in fact.

Based on the allegations in his complaint, plaintiff also meets the other requirements for standing. He contends that defendants' failure to comply with Wisconsin law has resulted in a failed election, one in which he was one of the two major-party candidates for President. (Compl., ECF No. 1.) As administrators of the election, defendants implemented the Wisconsin election statutes and WEC's guidance. His harms are therefore traceable to defendants. And as redress, he seeks a declaration that defendants violated the Electors Clause by failing to follow the

directions of the Wisconsin Legislature during the 2020 Presidential Election.[8] (*Id.*) Redressability is established because "plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)). Thus, his alleged injury is fairly traceable to the challenged conduct of the defendants and would be redressed by a favorable judicial decision.

Defendants' arguments against standing are largely premised on their challenges to the merits of plaintiff's claims. For example, defendants complain that "[p]laintiff offers no proof whatsoever of how many votes were affected in the three categories of alleged state election law violations he identifies." (Def. Br., ECF No. 98.) But that argument puts the cart before the horse. A court must determine standing based on the allegations in the complaint, not based on its final resolution of the veracity of those allegations. *Spokeo*, 136 S. Ct. at 1547 ("Where, as here, a case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element."). If plaintiff were to succeed in proving that defendants violated the Electors Clause, causing Wisconsin's Presidential Electors to be appointed in a manner inconsistent with the Wisconsin Legislature's directives, and depriving plaintiff of his opportunity to win those Presidential Electors, he should have the ability (and the standing) to enforce the Constitution's plain terms in federal court.

B. The Eleventh Amendment and *Pennhurst* Do Not Apply to Plaintiff's Unique Article II Claims.

Defendants next argue that plaintiff's claims are barred by the Eleventh Amendment and the Supreme Court's decision in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). (Defs. Brs., ECF No. 75, 81, 98, 101, and 120.) They contend that plaintiff is complaining that defendants failed to comply with state law such that the Eleventh Amendment bars this Court from entertaining such claims. (*Id.*)

[8] The complaint alleges the exclusive remedy for a failed election resides in the Wisconsin Legislature. (Compl., ECF No. 1.) That allegation brought strongly into question whether this Court could redress Plaintiff's injury, a point raised by the Court at the initial hearing with the parties. Plaintiff has since explained that he seeks a declaration that the Wisconsin general election was a failed election under 3 U.S.C. §2, a declaration he argues is a predicate to allowing the Wisconsin Legislature to take action to determine the manner in which the state should appoint its Presidential Electors now that the originally chosen method has "failed." (Transcript, ECF No. 130.) While this explanation is tenuous, it sufficiently ties the relief requested to a potential remedy to establish standing.

The Eleventh Amendment provides that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Defendants are correct that, as a general matter, the Eleventh Amendment bars litigation in federal courts against a state.[9] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 336 (7th Cir. 2000) ("[The Eleventh] Amendment bars federal jurisdiction over suits brought against a state … [and] extends to state agencies as well."). But the Supreme Court has long held that suits against state agents, rather than against the state itself, based on those agents' violations of federal law, can be maintained in federal court without running afoul of the Eleventh Amendment. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). A federal court thus may adjudicate and order relief against state officers based on allegations of ongoing unconstitutional conduct. *Id.*; *MCI Telecommunications Corp.*, 222 F.3d at 345.

In *Pennhurst*, the Supreme Court clarified that the rule in *Ex parte Young* does not extend to claims based merely on alleged violations of state law. 465 U.S. at 106 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). Thus, under the Eleventh Amendment and state sovereign immunity, a federal court "cannot enjoin a state officer from violating state law." *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999).

The *Pennhurst* exception to *Ex parte Young* does not apply here, because plaintiff's claims are based on federal law—the Electors Clause of Article II, Section 1 of the U.S. Constitution. *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *75 (W.D. Pa. Oct. 10, 2020) (holding that claims under the Electors Clause are not barred by the Eleventh Amendment); *cf. Dean Foods Co.*, 187 F.3d at 614 ("the question at the heart of this jurisdictional matter is what is the source of the regulations' potential invalidity"). While plaintiff also cites provisions of Wisconsin's election statutes, he does so in an attempt to show that defendants violated not merely those statutes, but rather the Electors Clause itself. In this

[9] The Eleventh Amendment precludes a federal suit against state agencies, and this likely includes the Wisconsin Elections Commission. *See* Wis. Stat. §5.05; *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 336 (7th Cir. 2000); *Feehan v. Wisconsin Elections Commission*, No. 20-cv-1771, 2020 WL 7250219 (E.D. Wis. Dec. 9, 2020). The WEC has not made this argument. Even if it had, plaintiff's claims against the individual commission members would survive.

unique context, alleged violations of state laws implicate and may violate federal law. *See Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("[I]n the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution."). This is the opposite of what the Eleventh Amendment forbids; here, a truly federal cause of action is being articulated. Because plaintiff's claims and request for relief are premised on a federal Constitutional violation, not merely a violation of state law, *Pennhurst* does not apply, and the Eleventh Amendment does not bar plaintiff's claims.

C. Plaintiff's Claims Are Not Moot.

Defendants also contend plaintiff's claims are moot. (Defs. Brs., ECF No. 70, 75, 95, 120.) They insist that because plaintiff waited until after Wisconsin certified the election results to file suit, his suit is too late. (*Id.*) They further maintain that plaintiff's claims are moot because Governor Evers has already signed a "Certificate of Ascertainment For President, Vice President, and Presidential Electors General Election - November 3, 2020" (2020 Electoral College Results, National Archives, https://www.archives.gov/electoral-college/2020) on November 30, 2020, an act they contend makes this action irrelevant. (*Id.*)

The final determination of the next President and Vice President of the United States has not been made, however, and the issuance of a Certificate of Ascertainment is not necessarily dispositive on a state's electoral votes. *See Bush v. Gore*, 531 U.S. 98, 144 (2000) (Ginsburg J., dissenting) (noting none of the various Florida elector deadlines "has ultimate significance in light of Congress' detailed provisions for determining, on 'the sixth day of January,' the validity of electoral votes").

Under the federal statute governing the counting of electoral votes, a state governor may issue a certificate of ascertainment based on the canvassing and then a subsequent certificate of "determination" upon the conclusion of all election challenges. 3 U.S.C. §6. The certificate of "determination" notifies the U.S. Congress of the state decision when Congress convenes on January 6 to count the electoral votes. Indeed, the WEC acknowledged that plaintiff's claims are not moot in a filing with the Wisconsin Supreme Court. (Response of Respondents Wisconsin Elections Commission and Commissioner Ann Jacobs, *Trump v. Evers*, No. 20AP1971-OA, filed

Dec. 1, 2020, ECF No. 109-1.) At this time, it is also unclear whether the litigation commenced in state court, *Trump v. Biden*, No. 2020CV007092 (Milw. Co. Cir. Ct.), No. 2020CV002514 (Dane Co. Cir. Ct.), is coming to a final resolution sufficient to resolve plaintiff's challenges. Given plaintiff's pending appeal and the limited time available should that appeal succeed on the state law issues, this Court will proceed to decide the merits of the federal law claims. The Court concludes this case is not yet moot.

D. This Court Is Not Required to Abstain from Deciding Plaintiff's Challenge under the Electors Clause.

Defendants also contend that even if this Court could adjudicate plaintiff's claims, it should abstain from doing so. (Defs. Brs., ECF No. 70, 81, 87, 95, 101, and 120.) They focus on three different abstention doctrines: (1) *Wilton/Brillhart* abstention; (2) *Pullman* abstention; and (3) *Colorado River* abstention. (*Id.*) After reviewing the law under all three forms of abstention, this Court will decline defendants' invitation to abstain.

Defendants first invoke the *Wilton/Brillhart* abstention doctrine, derived from *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995), and *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942). Under the *Wilton/Brillhart* abstention doctrine, "district courts possess significant discretion to dismiss or stay claims seeking declaratory relief, even though they have subject matter jurisdiction over such claims." *R.R. St. & Co. v. Vulcan Materials Co.*, 569 F.3d 711, 713 (7th Cir. 2009). While labelled with Supreme Court case names, this form of abstention arises from the plain terms of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, itself. Section 2201 expressly provides that district courts "*may* declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). The statute thus gives district courts the discretion not to declare the rights of litigants. The Seventh Circuit has confirmed that a district court properly exercises discretion to abstain where, for example, "declaratory relief is sought and parallel state proceedings are ongoing." *Envision Healthcare, Inc. v. PreferredOne Ins. Co.*, 604 F.3d 983, 986 (7th Cir. 2010).

Defendants also invoke *Pullman* abstention. *R.R. Comm'n of Tex. v. Pullman Co*., 312 U.S. 496, 501-02 (1941). The *Pullman* doctrine "applies when 'the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law.'" *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664

F.3d 139, 150 (7th Cir. 2011) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17 (1996)). *Pullman* abstention is appropriate if there is (1) "a substantial uncertainty as to the meaning of the state law" and (2) "a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Id.* (internal quotation marks omitted).

Finally, defendants ask the Court to avoid deciding this case under *Colorado River* abstention. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976). Under *Colorado River* abstention principles, a federal court should abstain in favor of a parallel state court lawsuit if (1) "the concurrent state and federal actions are actually parallel" and (2) "the necessary exceptional circumstances exist to support a stay or dismissal." *DePuy Synthes Sales, Inc. v. OrthoLA, Inc.*, 953 F.3d 469, 477 (7th Cir. 2020) (internal quotation marks omitted).

The Court declines to abstain under any of these doctrines. The federal Constitutional issues raised in plaintiff's complaint are obviously of tremendous public significance. For the first time in the nation's history, a candidate that has lost an election for president based on the popular vote is trying to use federal law to challenge the results of a statewide popular election. While there is parallel litigation pending in the state court, that litigation does not address the federal constitutional issue that is the center of plaintiff's case. Given the importance of the federal issue and the limited timeline available, it would be inappropriate to wait for the conclusion of the state court case. In these circumstances, the Court will exercise its discretion to declare plaintiff's rights under the Electors Clause and will decline to utilize *Pullman* or *Colorado River* abstention principles to defer to the state court proceedings.

II. Plaintiff's Claims Fail on Their Merits—Wisconsin's Appointment of Presidential Electors for the 2020 Presidential Election Was Conducted in the Manner Directed by the Wisconsin Legislature.

To succeed on his claims for relief under 42 U.S.C. §1983, plaintiff must prove that defendants acted under the color of state law and deprived him of a right secured by the Constitution or laws of the United States. *Wilson v. Warren Cnty., Ill.*, 830 F.3d 464, 468 (7th Cir. 2016) (citations omitted). Plaintiff alleges that the defendants violated his rights under the Electors Clause in Article II, Section 1. (Compl., ECF No. 1.) There is no dispute that defendants' actions as alleged in the complaint were undertaken under the color of Wisconsin law.

Defendants strongly and uniformly dispute, however, that their conduct violated any Constitutional provision. (Defs. Brs., ECF No. 70, 81, 87, 95, 98, 100, 101, and 120.)

A. The Wisconsin Legislature Has Directed the Appointment of Presidential Electors to Be by Popular Vote.

The Electors Clause directs state legislatures to appoint presidential electors in a manner of their choosing. U.S. CONST. art. II, § 1, cl. 2. As the Supreme Court explained just this past summer, the Electors Clause was the result of "an eleventh-hour compromise" at the 1787 Constitutional convention. *Chiafalo v. Washington*, __ U.S. __, 140 S. Ct. 2316, 2320 (2020). Apparently fatigued and ready to return to their homes, the delegates decided on language that would give state legislatures the responsibility of choosing the "Manner" in which presidential electors would be appointed. *Id.* And the Supreme Court has confirmed that state legislators have "the broadest power of determination" over who becomes a Presidential Elector. *Id.* at 2324 (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)).

Today, the manner of appointment among the states is largely uniform. *See Chiafalo*, 140 S. Ct. at 2321. All states use an appointment process tied to the popular vote, with political parties fielding presidential candidates having the responsibility to nominate slates of Presidential Electors. *Id.* at 2321-22. But that manner of appointing Presidential Electors is not required by the Constitution. As Chief Justice Fuller explained in 1892:

> The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

McPherson, 146 U.S. at 27. Historically, presidential electors have been appointed directly by state legislatures, by general ticket, by districts, and by majority popular vote. *Id.* at 27-32 (summarizing the methods by which presidential electors were appointed by state legislatures during the first four presidential elections). But by 1832, "all States but one had introduced popular presidential elections." *Chiafalo*, 140 S. Ct. at 2321.

The Wisconsin Legislature's decision to appoint the state's presidential electors by popular vote is embodied in Wis. Stat. §8.25(1). This statute provides:

> Presidential electors. By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress. 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). The statutes define "general election" as "the election held in even-numbered years on the Tuesday after the first Monday in November to elect United States … presidential electors." Wis. Stat. §5.02(5).

Plaintiff contends defendants have violated the Electors Clause by failing to appoint the state's presidential electors in the "Manner" directed by the Wisconsin Legislature. (Compl., ECF No. 1.) By this, plaintiff means that he has raised issues with the WEC's guidance on three issues related to the administration of the election. This argument confuses and conflates the "Manner" of appointing presidential electors—popular election—with underlying rules of election administration. As used in the Electors Clause, the word "Manner" refers to the "[f]orm" or "method" of selection of the Presidential Electors. *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring) (citations omitted). It "requires state legislatures merely to set the approach for selecting Presidential electors." *Id.* Put another way, it refers simply to "the mode of appointing electors—consistent with the plain meaning of the term." *Id.*; *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("It has been said that the word 'appoint' is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode…").

The approach, form, method, or mode the Wisconsin Legislature has set for appointing Presidential electors is by "general ballot at the general election." Wis. Stat. §8.25(1). There is no dispute that this is precisely how Wisconsin election officials, including all the defendants, determined the appointment of Wisconsin's Presidential Electors in the latest election. They used "general ballot[s] at the general election for choosing the president and vice president of the United States" and treated a "vote for the president and vice president nominations of any party is a vote for the electors of the nominees." Absent proof that defendants failed to follow this "Manner" of determining the state's Presidential Electors, plaintiff has not and cannot show a violation of the Electors Clause.

Plaintiff's complaints about the WEC's guidance on indefinitely confined voters, the use of absentee ballot drop boxes, and corrections to witness addresses accompanying absentee ballots

are not challenges to the "Manner" of Wisconsin's appointment of Presidential Electors; they are disagreements over election administration. Indeed, the existence of these (or other) disagreements in the implementation of a large election is hardly surprising, especially one conducted statewide and involving more than 3.2 million votes. But issues of mere administration of a general election do not mean there has not been a "general ballot" at a "general election." Plaintiff's conflation of these potential nonconformities with Constitutional violations is contrary to the plain meaning of the Electors Clause. If plaintiff's reading of "Manner" was correct, any disappointed loser in a Presidential election, able to hire a team of clever lawyers, could flag claimed deviations from the election rules and cast doubt on the election results. This would risk turning every Presidential election into a federal court lawsuit over the Electors Clause. Such an expansive reading of "Manner" is thus contrary both to the plain meaning of the Constitutional text and common sense.

B. Even If "Manner" Includes Aspects of Election Administration, Defendants Administered Wisconsin's 2020 Presidential Election as Directed by the Wisconsin Legislature.

Plaintiff's claims would fail even if the Court were to read the word "Manner" in Article II, Section 1, Clause 2 to encompass more than just the "mode" of appointment. Including material aspects of defendants' election administration in "Manner" does not give plaintiff a win for at least two reasons. First, the record shows defendants acted consistently with, and as expressly authorized by, the Wisconsin Legislature. Second, their guidance was not a significant or material departure from legislative direction.

Plaintiff's "Manner" challenges all stem from the WEC's having issued guidance concerning indefinitely confined voters, the use of absentee ballot drop boxes, and corrections to witness addresses on absentee ballots. (Compl., ECF No. 1.) Plaintiff expresses strong disagreement with the WEC's interpretations of Wisconsin's election statutes, accusing the WEC of "deviat[ing] from the law" and "substitut[ing] their 'wisdom' for the laws passed by the State Legislature and signed by the Governor." (Pl. Br., ECF No. 109.) While plaintiff's statutory construction arguments are not frivolous, when they are cleared of their rhetoric, they consist of little more than ordinary disputes over statutory construction.

These issues are ones the Wisconsin Legislature has expressly entrusted to the WEC.

Wis. Stat. §5.05(2w) ("The elections commission has the responsibility for the administration of chs. 5 to 10 and 12."). When the legislature created the WEC, it authorized the commission to issue guidance to help election officials statewide interpret the Wisconsin election statutes and new binding court decisions. Wis. Stat. §5.05(5t). The WEC is also expressly authorized to issue advisory opinions, Wis. Stat. §5.05(6a), and to "[p]romulgate rules … applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns." Wis. Stat. §5.05(1)(f). The Wisconsin Legislature also directed that the WEC would have "responsibility for the administration of … laws relating to elections and election campaigns." Wis. Stat. §5.05(1). In sum, far from defying the will of the Wisconsin Legislature in issuing the challenged guidance, the WEC was in fact acting pursuant to the legislature's express directives.

If "Manner" in the Electors Clause is read to includes legislative enactments concerning election administration, the term necessarily also encompasses the Wisconsin Legislature's statutory choice to empower the WEC to perform the very roles that plaintiff now condemns. Thus, the guidance that plaintiff claims constitutes an unconstitutional deviation from the Wisconsin Legislature's direction, is, to the contrary, the direct consequence of legislature's express command. And, defendants have acted consistent with the "Manner" of election administration prescribed by the legislature.

Plaintiff points to language in Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*, stating that "[a] significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). But the record does not show any *significant* departure from the legislative scheme during Wisconsin's 2020 Presidential election. At best, plaintiff has raised disputed issues of statutory construction on three aspects of election administration.[10] While plaintiff's disputes are not frivolous, the Court finds these issues do not remotely rise to the level of a material or significant departure from Wisconsin Legislature's plan for choosing Presidential Electors.

[10] Even these three statutory construction issues were raised only after-the-fact. If these issues were as significant as plaintiff claims, he has only himself to blame for not raising them *before* the election. Plaintiff's delay likely implicates the equitable doctrine of laches. The Court does not need to reach that issue, however, and therefore makes no findings or holdings on laches.

Because plaintiff has failed to show a clear departure from the Wisconsin Legislature's directives, his complaint must be dismissed. As Chief Justice Rehnquist stated, "in a Presidential election the clearly expressed intent of the legislature must prevail." *Bush v. Gore*, 531 U.S. 98, 120 (2000) (Rehnquist, C.J., concurring). That is what occurred here. There has been no violation of the Constitution.

CONCLUSION

Plaintiff's Electors Clause claims fail as a matter of law and fact. The record establishes that Wisconsin's selection of its 2020 Presidential Electors was conducted in the very manner established by the Wisconsin Legislature, "[b]y general ballot at the general election." Wis. Stat. §8.25(1). Plaintiff's complaints about defendants' administration of the election go to the implementation of the Wisconsin Legislature's chosen manner of appointing Presidential Electors, not to the manner itself. Moreover, even if "Manner" were stretched to include plaintiff's implementation objections, plaintiff has not shown a significant departure from the Wisconsin Legislature's chosen election scheme.

This is an *extraordinary* case. A sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote based on disputed issues of election administration, issues he plainly could have raised before the vote occurred. This Court has allowed plaintiff the chance to make his case and he has lost on the merits. In his reply brief, plaintiff "asks that the Rule of Law be followed." (Pl. Br., ECF No. 109.) It has been.

IT IS HEREBY ORDERED:

1. Plaintiff's complaint, ECF No. 1, is DISMISSED WITH PREJUDICE.
2. Plaintiff's motion for preliminary injunction, ECF No. 6, is DENIED as moot.
3. Defendants' motions to dismiss, ECF No. 69, 71, 78, 84, 86, 96, 97, and 99, are GRANTED.
4. Defendant Governor Evers' oral motion for judgment under Fed. R. Civ. P. 52 is GRANTED.

Dated at Milwaukee, Wisconsin on December 12, 2020.

s/ *Brett H. Ludwig*
BRETT H. LUDWIG
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DONALD J TRUMP,

Plaintiff,

v.

THE WISCONSIN ELECTIONS COMMISSION, COMMISSIONER ANN S JACOBS, MARK L THOMSEN, COMMISSIONER MARGE BOSTELMANN, COMMISSIONER DEAN KNUDSON, ROBERT F SPINDELL, JR, GEORGE L CHRISTENSON, JULIETTA HENRY, CLAIRE WOODALL-VOGG, MAYOR TOM BARRETT, JIM OWCZARSKI, MAYOR SATYA RHODES-CONWAY, MARIBETH WITZEL-BEHL, MAYOR CORY MASON, TARA COOLIDGE, MAYOR JOHN ANTARAMIAN, MATT KRAUTER, ERIC GENRICH, KRIS TESKE, DOUGLAS J LA FOLLETTE, TONY EVERS, SCOTT MCDONELL,

Defendants,

WISCONSIN STATE CONFERENCE NAACP, DOROTHY HARRELL, WENDELL J HARRIS, SR, EARNESTINE MOSS, DEMOCRATIC NATIONAL COMMITTEE,

Intervenor Defendants.

JUDGMENT IN A CIVIL CASE

Case No. 20-cv-1785-bhl

☒ **Decision by Court.** This case came before the court, the court has decided the issues, and the court has rendered a decision.

PURSUANT TO THE COURT'S ORDER**,** the action is DISMISSED WITH PREJUDICE and the plaintiff shall recover nothing on the complaint.

Dated: December 12, 2020

GINA M. COLLETTI
Clerk of Court

s/ *Melissa P.*
(By) Deputy Clerk