

IN THE SUPREME COURT OF WISCONSIN

No. _____

DAVID STRANGE, INDIVIDUALLY AND AS DEPUTY OPERATIONS
DIRECTOR - WISCONSIN FOR THE DEMOCRATIC NATIONAL COMMITTEE,

Petitioner,

v.

WISCONSIN ELECTIONS COMMISSION (WEC); MEAGAN WOLFE, IN HER
OFFICIAL CAPACITY AS ADMINISTRATOR OF WEC; DON MILLIS,
ROBERT SPINDELL, JR., MARGE BOSTELMANN, ANN JACOBS, MARK THOMSEN,
AND CARRIE RIEPL, IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF WEC,
AND WISCONSIN GREEN PARTY,

Respondents.

**MEMORANDUM IN SUPPORT OF PETITION
FOR ORIGINAL ACTION**

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INTRODUCTION

Earlier this year, the Court found that the Presidential Preference Selection Committee erroneously exercised its discretion by failing to place a lawful presidential candidate on the primary ballot. *Phillips v. Wis. Elections Comm’n*, 2024 WI 8, ¶¶9-12, 410 Wis. 2d 386, 393, 2 N.W.3d 254 (per curiam). Noting the pressing need to grant a petition for original action and promptly rule so that “local election officials can begin the process of preparing, printing, delivering, and mailing absentee ballots by the statutorily required deadlines,” the Court chose not to remand the matter to the Wisconsin Elections Commission (“WEC” or “the Commission”). *Id.*, ¶12. The Court instead “direct[ed] that the name of Dean Phillips be placed on the 2024 Democratic presidential preference primary ballot as a candidate for the office of president of the United States.” *Id.*, ¶12. The Court issued its decision on the merits seven days after the candidate filed his petition for leave to commence an original action, *id.*, ¶¶5-6, and no Justice dissented from the opinion and order that the candidate be placed on the ballot.

The Petition for Original Action filed in this case presents a similar scenario, and virtually identical justification for the Court to exercise its original jurisdiction. Absent this Court’s intervention, the WEC *will* place an *unlawful* candidate on the ballot for the November 2024 general election. And it will do so 8 days from now.

The Commission indicated that the Wisconsin Green Party has attained ballot status to place candidates for the offices of president and vice president of the United

States on the ballot in the general election in Wisconsin in November 2024,¹ and the Wisconsin Green Party publicly announced Jill Stein and Butch Ware as its candidates for president and vice president, respectively.

But the Wisconsin Green Party failed to comply with Wisconsin's election statutes governing presidential electors, and Wisconsin law therefore bars any Wisconsin Green Party candidate from appearing on the ballot for president in the November 5, 2024 election. In particular, and as set forth in this Brief and the Petition for Original Action it supports, the Wisconsin Green Party is legally foreclosed under Wisconsin law from nominating any presidential electors, and therefore cannot field candidates for president and vice president who are eligible to appear on the ballot in Wisconsin in November.

Presidential electors play a central role in presidential elections in the United States: it is the presidential electors from each state that cast their votes for President of the United States on January 6 following a presidential election year. 3 U.S.C. § 15. But the process by which each state selects its presidential electors is a function of each state's laws. U.S. Const., art. II, § 1, cl. 2. In Wisconsin, the Legislature has set forth those laws in, *inter alia*, Wisconsin Statutes sections 5.10, 5.64(1)(em) 7.75(1), 8.25(1), 8.18. Most pertinent to the Petition for Original Action here, in Wisconsin, each political party's presidential electors must be selected as set forth

¹ *U.S. President (On The Ballot)*, Wisconsin Elections Commission, <https://elections.wi.gov/candidates/federal-candidates#4257225834-2909155364> last accessed Aug. 14, 2024)

in Wisconsin Statutes section 8.18. That statute provides that certain expressly identified members of each political party seeking to run a candidate in the presidential election “shall meet in the state capitol at 10 a.m. on the first Tuesday in October of each year in which there is a presidential election” to nominate presidential electors for that political party. Wis. Stat. § 8.18(1). The statutorily prescribed members who must meet are: (i) “[c]andidates for the senate and assembly nominated by each political party at the primary”; (ii) “the state officers” of each political party; and (iii) “the holdover state senators of each political party[.]” *Id.*

It has long been clear that the Wisconsin Green Party had no affiliated individuals in the latter two categories eligible to nominate presidential electors. Yet the August 13, 2024 primary offered one final opportunity for the Wisconsin Green Party to satisfy the statutory requirements necessary for the Party identify an affiliated person eligible to nominate a presidential elector. That opportunity was for a Wisconsin Green Party candidate to qualify for placement on the November ballot for a legislative district, which a candidate could have done with as few as 200 write-in votes in a single Assembly district, for example. Wis. Stat. §§ 8.16(2), 8.15(6). But WGP failed to nominate any candidates for Wisconsin Senate or Assembly,² and no Wisconsin Green Party candidate garnered a sufficient number

² See *2024 Partisan Primary Candidates on Ballot*, Wisconsin Elections Commission, <https://elections.wi.gov/media/26866/download> (last accessed Aug. 14, 2024)

of write-in votes to appear as candidate for Wisconsin Senate or Assembly, according to the requirements of Wisconsin Statutes section 8.16(2).

Thus, as of the August 13 primary election, the Wisconsin Green Party conclusively has no candidates for Wisconsin Senate or Assembly in the general election, nor are there currently any Wisconsin Green Party state officeholders or holdover senators. Consequently, no individual will be authorized under Wisconsin Statutes section 8.18 to nominate presidential electors to represent the Wisconsin Green Party when political parties must meet to nominate presidential electors on the first Tuesday of October.

WEC will meet on August 27, 2024 to “consider and grant ballot access to all candidates for president and vice president of United States.”³ August 27, 2024 is also the deadline by which “the commission shall [...] transmit to each county clerk a certified list of all candidates on file in its office for which electors in that county may vote.” Wis. Stat. §§ 7.08(2)(a); 10.06(1)(i). Following the Commission’s transmission of the certified list of candidates, “[t]he county clerk shall prepare copy for the official ballots immediately upon receipt of the certified list of candidates’ names from the commission.” Wis. Stat. § 7.10(2).

Under the law governing “official ballots,” however, the “names of the presidential electors for the candidates supplied under ss. 8.18(2) [...] are not listed

³ <https://elections.wi.gov/sites/default/files/documents/New%20Challenge%20Procedure%20Memo%20-%20July%201%2C%202024.pdf> (last accessed Aug. 19, 2024).

on the ballot but a vote for the candidates for president and vice president is a vote for them through their named presidential electors.” Wis. Stat. § 5.64(1)(em); *see also, e.g.*, Wis. Stat. § 5.10 (“[T]he names of the electors do not appear on the ballot and no reference is made to them, [but] a vote for the president and vice president named on the ballot **is a vote** for the electors of the candidates for whom an elector’s vote is cast.” (emphasis added)).

Because the Wisconsin Green Party has no affiliated individuals who are eligible under Wisconsin law to nominate presidential electors for the Wisconsin Green Party, the Party **cannot** as a matter of law field a candidate for president “for which electors in that county may vote.” Wis. Stat. § 7.08(2)(a). Were the WEC to certify Wisconsin Green Party candidates for president and vice president to appear on the Wisconsin ballot in November, county clerks would be placing on the ballot a presidential candidate who would have no lawful electors to vote for them in the Electoral College on December 17, 2024. Wis. Stat. § 7.75; 3 U.S.C. § 7. Allowing the Wisconsin Green Party candidate to be placed on the presidential ballot in Wisconsin in November would constitute a great fraud on the public by presenting voters with a candidate whom they logically would believe **could** be elected president, but who, in fact, could **not** be legally elected. Indeed, “voters finding a ticket upon the official ballot are not required to determine whether it is entitled to a place thereon, but may safely rely upon the action of the officers of the law, who, they have a right to suppose, have performed their duty.” *State ex rel. Dithmar v. Bunnell*, 131 Wis. 198, 110 N.W. 177, 181 (1907) (cleaned up).

Petitioner therefore respectfully requests that the Court grant his Petition for Original Action and take jurisdiction of his claims, and enjoin WEC—on or before August 27, 2024—from certifying the Wisconsin Green Party or its candidates for president and vice president for placement on the November 2024 Wisconsin general election ballot.

BACKGROUND

I. The Wisconsin Election Commission’s Certification of Candidates for President and Vice President, and the Ballot Printing Process.

At a previous meeting, the six commissioners of the Wisconsin Elections Commission unanimously decided to “grant approval of ballot status for the Wisconsin Green Party (“WGP”) for the 2024 Partisan Primary and General Election[.]”⁴ WEC will meet again on August 27, 2024 to “consider and grant ballot access to all candidates for president and vice president of United States.”⁵

At or shortly after that meeting, “the commission shall [...] transmit to each county clerk a certified list of all candidates on file in its office for which electors in that county may vote.” Wis. Stat. § 7.08(2)(a).

WEC must certify that list “no later than the deadlines established in s. 10.06,” *id.*, meaning that WEC must certify that list “[a]s soon as possible after the state canvass, but no later than the 4th Tuesday in August”—*i.e.*, August 27,

⁴ <https://elections.wi.gov/sites/default/files/documents/February%208%202024%20Open%20Session%20Minutes%20APPROVED.pdf> (last accessed Aug. 19, 2024).

⁵ <https://elections.wi.gov/sites/default/files/documents/New%20Challenge%20Procedure%20Memo%20-%20July%201%2C%202024.pdf> (last accessed Aug. 19, 2024).

2024. Wis. Stat. § 10.06(1)(i). Thereafter, “[t]he county clerk shall prepare copy for the official ballots immediately upon receipt of the certified list of candidates’ names from the commission.” Wis. Stat. 7.10(2).

On September 18, 2024, county clerks (who print ballots) must deliver ballots to local clerks, Wis. Stat. §§ 7.10(1), (3), so that local officials can comply with the September 19, 2024 UOCAVA deadline to begin sending ballots. Wis. Stat. §§ 7.10(3), 7.15(1)(c), (cm).

II. Background on the Law Governing Presidential Electors.

A. Relevant Federal Law.

The United States Constitution provides that the president and vice president are elected by a majority vote of the presidential electors of the 50 states and the District of Columbia. U.S. Const., art. II, § 1, cl. 3. Those presidential electors are appointed pursuant to the laws of each state. *Id.* at cl. 2. Ultimately, each state’s Governor “shall issue a certificate of ascertainment of appointment of electors, *under and in pursuance of the laws of such State* providing for such appointment and ascertainment enacted prior to election day.” 3 U.S.C. § 5 (emphasis added).

B. Relevant Wisconsin Law.

In Wisconsin, the slate of presidential electors representing each candidate whose names will appear on the ballot are nominated through specific procedures prior to each presidential election. *See* Wis. Stat. §§ 8.18, 8.185, 8.20. Once the slate of presidential electors representing each candidate has been chosen, although the names of the presidential electors “do not appear on the ballot and no reference is

made to them, a vote for the president and vice president named on the ballot is a vote for the electors of the candidates for whom an elector's vote is cast." Wis. Stat. § 5.10. Thus, under Wisconsin's election statutes, "all references to the presidential election, the casting of votes and the canvassing of votes for president, or for president and vice president, mean votes for them through their pledged presidential electors." *Id.*; *see also* Wis. Stat. § 8.25 ("A vote for the president and vice president nominations of any party *is a vote* for the electors of the nominees." (emphasis added)).

Accordingly, after the election:

The presidential electors, when convened, shall vote by ballot for that person for president and that person for vice president who are, respectively, the candidates of the political party which nominated them under s. 8.18, the candidates whose names appeared on the nomination papers filed under s. 8.20, or the candidate or candidates who filed their names under s. 8.185 (2)[.]

Wis. Stat. § 7.75(2).

The statutes, therefore, contemplate only three types of presidential electors, each of whom "shall vote" for certain candidates, depending on the process by which they were elected: (1) presidential electors nominated by a political party under section 8.18; (2) presidential electors supporting an independent candidate under section 8.20; and (3) presidential electors supporting a write-in candidate

under section 8.185(2). Wis. Stat. § 7.75(2). This Petition involves the first method of nominating presidential electors—political party nomination.⁶

III. WGP Failed to Comply with the Political Party Procedure for Selecting Presidential Electors under Wisconsin Statutes Section 8.18(1).

Political parties in Wisconsin qualify for a party column on the ballot under Wisconsin Statutes section 5.62. *See* Wis. Stat. § 5.02(16m). Once parties qualify for a party column, they must nominate their presidential electors through the processes outlined in Wisconsin Statutes section 8.18. Thus, to secure ballot access for the party’s presidential and vice presidential candidates, all political parties, including WGP, must both qualify through Wisconsin Statutes section 5.62 and comply with Wisconsin Statutes section 8.18. Although WGP qualified through Wisconsin Statutes section 5.62, it failed to comply with section 8.18.

A. Compliance Wisconsin Statutes Section 5.62.

This Petition involves WGP’s attempt to qualify for ballot access through Wisconsin Statutes section 5.62(1)(b).⁷ Section 5.62(1)(b) provides that a political

⁶ WGP did not attempt to secure ballot status through the independent candidate procedure under Wisconsin Statutes section 8.20 and is now foreclosed from doing so. The write-in procedure under section 8.185(2) remains available to WGP. However, it is axiomatic that a write-in candidacy does not appear on the ballot. Wis. Stat. § 5.64(1)(g) (“Following under the independent candidates for each office, a space shall be provided for the elector to write in the name of a candidate of his or her choice for that office.”).

⁷ Alternatively, a political organization may submit a petition to the Commission with 10,000 signatures, at least 1,000 of which are from Wisconsin electors residing within each of Wisconsin’s eight congressional districts. Such a petition must be filed by 5 p.m. on April 1 of an election year. Wis. Stat. § 5.62(2)(a). At least one other party has used this procedure. *See, e.g.,* Molly Beck and Jessie Opoien, ‘No Labels’ party has enough signatures for ballot access in Wisconsin, Milwaukee Journal Sentinel <https://www.jsonline.com/story/news/politics/elections/2024/03/28/no-labels-party-says-it-has-enough-signatures-for-wisconsin-ballot/73135485007/> (last accessed Aug. 14, 2024).

organization that was listed as “independent” at the last general election and whose candidate for any statewide office in that election received at least 1% of the total votes cast for that office is entitled to a separate column or row on the (August) partisan primary ballot if the organization files a petition with WEC by 5 p.m. on April 1 of an election year. Wis. Stat. § 5.62(1)(b).

In 2022, Sharyl McFarland, a candidate affiliated with WGP, gained ballot access as an independent candidate for Wisconsin Secretary of State. Ms. McFarland received 1.58% of the total statewide vote in the Secretary of State race.⁸ Based solely upon the votes cast for Ms. McFarland, WGP petitioned WEC in 2024 to obtain status as a recognized political party under Wisconsin law. WEC accepted the petition and granted WGP ballot access status as a political party in the 2024 general election for president and vice president.⁹ WGP purports to be a recognized political party as a result of WEC’s acceptance of WGP’s letter requesting that status.

B. Compliance with Wisconsin Statutes Section 8.18.

Wisconsin law dictates how a political party with ballot status that seeks to place candidates for president and vice president must select its presidential electors:

⁸ *Ballot Status History—Wisconsin Green Party*, GPUS Elections Database, <https://www.greenpartyus.org/ballot-status-history/wisconsin/> (last accessed Aug. 14, 2024); Sarah Lehr, *Wisconsin Green Party clears hurdle to appear on ballot in 2024*, Wisconsin Public Radio (Nov. 30, 2022), <https://www.wpr.org/politics/wisconsin-green-party-election-ballot-2024> (last accessed Aug. 14, 2024).

⁹ *U.S. President (On The Ballot)*, Wisconsin Elections Commission, <https://elections.wi.gov/candidates/federal-candidates#4257225834-2909155364> (last accessed Aug. 14, 2024).

(1) Candidates for the senate and assembly nominated by each political party at the primary, the state officers and the holdover state senators of each political party shall meet in the state capitol at 10 a.m. on the first Tuesday in October of each year in which there is a presidential election.

(2) The purpose of the convention is to nominate one presidential elector from each congressional district and 2 electors from the state at large. The names of the nominees shall be certified immediately by the chairperson of the state committee of each party to the chairperson of the commission.

Wis. Stat. § 8.18.

In accordance with Wisconsin Statutes section 8.18, WEC has scheduled a 10:00 a.m. “Presidential Electors Nomination Meeting” on October 1, 2024, at the State Capitol.¹⁰ Only the political party representatives expressly identified in section 8.18(1)—namely, “[c]andidates for the senate and assembly nominated by each political party at the primary, the state officers and the holdover state senators of each political party”—are permitted by statute to select the party’s electors. Wis. Stat. § 8.18(1). WGP currently has no state officers or holdover Wisconsin senators.¹¹

¹⁰ *Presidential Elections Nomination Meeting*, Wisconsin Elections Commission, <https://elections.wi.gov/event/presidential-electors-nomination-meeting-0> (last accessed Aug. 14, 2024).

¹¹ The term “state office” is defined in Wis. Stat. § 5.02(23) as “the offices of governor, lieutenant governor, secretary of state, state treasurer, attorney general, state superintendent, justice of the supreme court, court of appeals judge, circuit court judge, state senator, state representative to the assembly and district attorney.” Of course, some of those offices are not partisan, and therefore could not be “of” the Wisconsin Green Party (or any other party). Wis. Stat. § 8.18(1).

Nor does WGP have any candidates for Wisconsin Senate or Assembly who will be placed on the ballot in November, although it could have fielded candidates for these state offices in two different ways.

First, WGP could have nominated candidates to run for representative of any one or more of Wisconsin's Senate or Assembly districts in the 2024 partisan primary. Specifically, a WGP candidate for Wisconsin Senate or Assembly would have been required to file the requisite minimum number of qualifying elector signatures and a declaration of candidacy with WEC by 5 p.m. on June 1, 2024. Wis. Stat. § 8.15(1).

WGP could have secured a candidate for any of the Wisconsin Senate with as few as 400 signatures, Wis. Stat. § 8.15(6)(c), or a candidate for Wisconsin Assembly with as few as 200 signatures, Wis. Stat. § 8.15(6)(d). No WGP candidate submitted the requisite number of signatures for any Wisconsin Senate or Assembly seat on or before June 1, 2024.¹²

Second, WGP could have supported a write-in candidate in its column at the August 13 partisan primary for any one of the Wisconsin Senate or Assembly seats to be elected in November. Wis. Stat. § 8.16(2). To nominate by write in, WGP could have secured a candidate for the Wisconsin Senate with as few as 400 write-in votes in a district or a candidate for the Wisconsin Assembly with as few as 200 write-in votes in a district. Wis. Stat. § 8.16(2).

¹² See *2024 Partisan Primary Candidates on Ballot*, Wisconsin Elections Commission, <https://elections.wi.gov/media/26866/download> (last accessed Aug. 14, 2024).

While the canvass of the August 13, 2024 primary will not be completed until August 23, 2024, Wis. Stat. § 7.60(5), it is apparent that WGP did not secure a candidate for Wisconsin Senate or Assembly in the August 13, 2024 primary. *See, e.g., Hollander Aff., Ex. A, ¶¶63-67.*¹³

Accordingly, WGP has no party representative legally authorized to participate in the Presidential Electors Nomination Meeting on October 1, 2024.

ARGUMENT

I. The Court Should Take Original Jurisdiction.

A. This Petition Meets the Criteria for Original Actions.

This Court “may hear original actions and proceedings.” Wis. Const. art. VII, § 3. Although this Court rarely exercises its original jurisdiction, the Court does so when the “questions presented are of such importance as under the circumstances to call for [a] speedy and authoritative determination by this court in the first instance.” *Petition of Heil*, 230 Wis. 428, 284 N.W. 42, 50 (1938).

Indeed, this Court has a long history of taking original jurisdiction over ballot-access disputes. *Lab. & Farm Party v. Elections Bd., State of Wis.*, 117 Wis. 2d 351, 352, 344 N.W.2d 177 (1984) (“Because we conclude that this matter is *publici juris*, it is therefore appropriate for us to exercise our original jurisdiction.”); *McCarthy v. Elections Bd.*, 166 Wis. 2d 481, 485, 480 N.W.2d 241, 242 (1992)

¹³The Court can also take judicial notice of the individual county clerks’ unofficial election results. Wis. Stat. § 901.01(2). Links to each county’s reporting data is available on WEC’s website. <https://elections.wi.gov/wisconsin-county-election-websites> (last accessed Aug. 19, 2024).

(“[T]his matter is *publici juris* and we exercise our original jurisdiction[.]”); *Phillips*, 2024 WI 8, ¶1, 410 Wis. 2d 386, 2 N.W.3d 254 (“[W]e conclude that this matter is *publici juris*, and we exercise our original jurisdiction.”). The Court should do so again here, as this case, like those ballots-access disputes, contains three hallmarks of an action appropriate for original jurisdiction.

First, the dispute must be resolved quickly, as WEC must certify the candidates before August 27, 2024. Wis. Stat. § 10.06(1)(i); *see also Lab. & Farm Party*, 117 Wis. 2d at 354 (noting, *inter alia*, the “shortness of time available before the ballots are to be printed” as the basis for taking original jurisdiction); *Phillips*, 2024 WI 8, ¶12 (“[T]here is a need for the certified list of candidates to be transmitted so that the local election officials can begin the process of preparing, printing, delivering, and mailing absentee ballots by the statutorily required deadlines.”).

Second, this is a dispute over WGP’s ability to field a candidate for president and vice president in each of Wisconsin’s seventy-two counties. In all likelihood, over three-million Wisconsinites will cast votes in November and those ballots either will or will not list the WGP candidates for president and vice president. Thus, this matter is *publici juris*. *See, e.g., Lab. & Farm Party*, 117 Wis. 2d at 354 (citing, *inter alia*, “the statewide importance of the issues raised” as the basis for taking original jurisdiction); *Wisconsin Pro. Police Ass’n, Inc. v. Lightbourn*, 2001 WI 59, ¶4, 243 Wis. 2d 512, 627 N.W.2d 807 (“The supreme court limits its exercise of

original jurisdiction to exceptional cases in which a judgment by the court significantly affects the community at large.”).

Finally, “[t]he relevant facts in this case are undisputed[.]” *Lab. & Farm Party*, 117 Wis. 2d at 353. The facts supporting this Petition are set forth in the Petition.¹⁴ However, the key facts—namely, whether WGP has any public officials listed in Wis. Stat. § 8.18(1)—are also facts that readily ascertainable and not subject to reasonable dispute, and are therefore subject to judicial notice. Wis. Stat. § 902.01(2). This dispute largely turns on the construction of Wisconsin’s election statutes, and the “construction of a statute and its application to undisputed facts are questions of law that [this Court] generally review[s] independently.” *Cnty. of Dane v. Lab. & Indus. Rev. Comm’n*, 2009 WI 9, ¶14, 315 Wis. 2d 293, 759 N.W.2d 571.

B. The Court Should Follow Its Precedent of Quickly Adjudicating Ballot-Access Cases on the Merits and Grant the Petition and Relief Petitioner Seeks.

As this Court has repeatedly recognized, ballot-access litigation contains inherently short deadlines. *Hawkins v. Wis. Elections Comm’n*, 2020 WI 75, ¶5 n.1, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam); *Phillips*, 2024 WI 8, ¶12; *Lab. & Farm Party*, 117 Wis. 2d at 354; *State ex rel. Rinder v. Goff*, 129 Wis. 668, 109 N.W. 628, 631 (1906). The legal issues and request for relief before the Court in the Petition implicate the same short deadlines the Court has noted in the past.

¹⁴ To the extent anything with evidentiary value is required, the facts set forth in this Petition were also set forth in the Verified Complaints filed before WEC. *See* Affidavit of David P. Hollander in Support of Petition for Original Action (“Hollander Aff.”), Exs. A and C.

Consequently, the Court should quickly take jurisdiction of this action, decide this case on the merits, and issue the relief Petitioner seeks:

We ordinarily would remand the matter back to the Selection Committee with directions for it to properly exercise its discretion. The Commission, however, advises us that there is a need for the certified list of candidates to be transmitted so that the local election officials can begin the process of preparing, printing, delivering, and mailing absentee ballots by the statutorily required deadlines. We therefore conclude that there is insufficient time to permit remand to the Selection Committee for the proper exercise of discretion. Consequently, we direct that the name of Dean Phillips be placed on the 2024 Democratic presidential preference primary ballot as a candidate for the office of president of the United States.

Phillips, 2024 WI 8, ¶12; *see also State ex rel. Rinder*, 109 N.W. at 631 (finding a ballot-access dispute was one of the “extreme cases [...] demanding the use of mandamus to control the performance of prospective duties” because the election was nearing and “if the writ were delayed until four days before election, it would be fruitless. No hearing or judgment could then be obtained in time to be of any use.”).

C. Petitioner Acted As Quickly As Possible In Bringing This Claim.

1. Petitioner’s Claim Did Not Ripen Until, At The Earliest, August 14, 2024.

Petitioner filed this Petition promptly after it became clear that WGP had failed to qualify a single individual to nominate the party’s presidential electors. Indeed, “[c]andidates for the senate and assembly nominated by each political party *at the primary*”—held on August 13, 2024—are among those eligible to nominate

presidential electors. Wis. Stat. § 8.18(1) (emphasis added). WGP had two opportunities to lawfully nominate a state legislative candidate.

Specifically, a WGP candidate for Wisconsin Senate or Assembly could have filed the requisite number of qualifying elector signatures and a declaration of candidacy with WEC by 5 p.m. on June 1, 2024. Wis. Stat. § 8.15(1). WGP could have secured a candidate for the Wisconsin Senate with as few as 400 signatures, Wisconsin Statutes section 8.15(6)(c), or a candidate for Wisconsin Assembly with as few as 200 signatures, Wisconsin Statutes section 8.15(6)(d).

Alternatively, WGP could have supported a write-in candidate for Wisconsin Senate or Assembly in the 2024 partisan primary. Wis. Stat. § 8.16(2). Likewise, WGP could have secured a candidate for the Wisconsin Senate with as few as 400 write-in votes or a candidate for the Wisconsin Assembly with as few as 200 write-in votes in the August 13, 2024 primary. Wis. Stat. § 8.16(2).

Had WGP done so, its presidential electors could have been selected by WGP's "[c]andidates for the senate and assembly nominated by each political party at the primary." Wis. Stat. § 8.18(1). Having chosen not to do so, however, WGP is now legally foreclosed under Wisconsin law from nominating any presidential electors.

Accordingly, Petitioner could not file a complaint until he knew that WGP would fail to qualify a single state legislative candidate for the ballot. A "claim is not ripe if it rests on contingent future events that may not occur as anticipated, or indeed may not occur at all." *Int. of C. G.*, 2021 WI App 11, ¶29 n.7, 396 Wis. 2d

105, 955 N.W.2d 443, *aff'd*, 2022 WI 60, 403 Wis. 2d 229, 976 N.W.2d 318 (internal quotations omitted). When the resolution of a claim “depends on hypothetical or future facts, [it is] not ripe for adjudication and will not be addressed by this court.” *Tammi v. Porsche Cars N. Am., Inc.*, 2009 WI 83, ¶3, 320 Wis. 2d 45, 768 N.W.2d 783 (internal quotations omitted).

Moreover, Petitioner filed *two* Complaints with WEC seeking to prevent WEC from exceeding its authority in the manner complained of here. WEC dismissed the first Complaint without prejudice for *failing to name* an election official as a respondent. *Hollander Aff.*, Ex. B. Then, WEC dismissed the second Complaint the very next day *for naming* election officials. *Id.*, Ex. D.

2. This Action is Timely under *Hawkins*.

Four years ago, this Court denied a Petition for Original Action filed by the 2020 WGP presidential candidate, Howie Hawkins, who sought relief from WEC’s ruling that his name and the name of his vice presidential candidate could not be included on the November 2020 presidential ballot in Wisconsin. *See Hawkins*, 2020 WI 75, ¶10. Although the Court denied the petition there, its order doing so weighs strongly in favor of granting this Petition. The key event—both in 2020 and now—is WEC’s transmission of the certified lists of candidates to the county clerks, Wis. Stat. §§ 7.08(2)(a), 10.06(1)(i), who “shall prepare copy for the official ballots immediately upon receipt of the certified list of candidates’ names from the commission.” Wis. Stat. § 7.10(2).

In 2020, WEC certified the candidate list on August 26, *Hawkins*, 2020 WI 75, ¶3, but Hawkins did not file his petition for original action until September 3, *id.*, ¶4. At that point, “[m]any ballots [...] [had] already been printed” and clerk had “already sent out hundreds, and more likely thousands, of those absentee ballots.” *Id.*, ¶8. “Ordering new ballots to be printed would be an expensive and time-consuming process” which “would create a substantial possibility of confusion among voters who had already received, and possibly returned, the original ballots.” *Id.*

Hawkins filed his petition eight days *after* the candidates were certified. This Petition, in contrast, comes eight days *before* WEC will certify the candidates. Wis. Stat. §§ 7.08(2)(a), 10.06(1)(i), and therefore presents none of the problems inherent in litigating the names on a ballot for a “general election [that] has essentially begun[.]” *Hawkins*, 2020 WI 75, ¶5. No candidates have been certified, and no ballots have been printed, mailed, or voted.

II. WGP’s Candidates Should Be Excluded from the November Ballot.

A. WGP Has No Constitutional Right to Appear On The Ballot.

It bears emphasizing that this Petition presents solely the question of whether WGP complied with the legal requirement governing ballot access. Wisconsin Statutes section 5.01(1), which provides that election statutes should be “construed to give effect to the will of the electors,” *id.*, has no bearing here. That provision “applies only after the holding of the election and the will of the electors has been manifested.” *State ex rel. Oaks v. Brown*, 211 Wis. 571, 249 N.W. 50, 53 (1933).

Likewise, “[w]hile the right to vote is an inherent or constitutional right, the right to be a candidate is not of that character. It is a political privilege which depends upon the favor of the people and this favor may be coupled with reasonable conditions for the public good.” *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 617, 37 N.W.2d 473 (1949).

Consistent with *Frederick*, courts routinely hold that “[i]t is a prerequisite to the right of a candidate to have his or her name printed on the official ballot that the governing legal requirements be complied with.” 29 C.J.S. Elections § 279. “[L]imiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable.” *Burdick v. Takushi*, 504 U.S. 428, 440 n.10 (1992); *Beller v. Kirk*, 328 F. Supp. 485, 486 (S.D. Fla. 1970), *aff’d sub nom. Beller v. Askew*, 403 U.S. 925 (1971) (“The State has the right and duty to establish reasonable regulations for the conduct of elections for state offices. There is no constitutional right to have one’s name printed on the ballot.”); *Greene v. Raffensperger*, No. 22-CV-1294-AT, 2022 WL 1136729, at *21 (N.D. Ga. Apr. 18, 2022) (recognizing state’s “legitimate interest in proceeding with the specific statutory process it has established to ensure that only qualified candidates appear on the ballot”). Thus, the sole question is whether WGP complied with the governing statutory procedures. It did not.

B. WGP Failed To Comply With Wisconsin Statutes Section 8.18(1).

Wisconsin Statutes section 8.18 dictates that the specifically enumerated individuals “of each political party *shall* meet in the state capitol,” to “nominate one presidential elector from each congressional district and 2 electors from the state at large.” Wis. Stat. § 8.18(1), (2). The “word ‘shall’ is generally presumed mandatory when it appears in a statute.” *Backus v. Waukesha Cnty.*, 2022 WI 55, ¶18 n.11, 402 Wis. 2d 764, 976 N.W.2d 492.

WGP currently has no senate candidates, no assembly candidates, no state officeholders, and no holdover state senators, and “the enumeration of specific alternatives in a statute is evidence of legislative intent that any alternative not specifically enumerated is to be excluded.” *In Int. of C.A.K.*, 154 Wis. 2d 612, 621, 453 N.W.2d 897 (1990); *see also, e.g., In re Est. of Kuhn*, 2000 WI App 113, ¶13, 235 Wis. 2d 210, 612 N.W.2d 385 (“When the legislature provides a finite list of exceptions to a general rule, we presume that the legislature did not intend other exceptions.”); *In re Guardianship of B.C.L.-J.*, 2016 WI App 25, ¶17, 367 Wis. 2d 697, 877 N.W.2d 401 (finding that grandparent could not petition for appointment of guardian because “[o]nly certain persons may file a petition for the appointment of a guardian under [the statute and] [g]randparents are not among the persons listed in the statute”).

As a recognized political party, WGP has had ample opportunity to satisfy the reasonable and minimal requirements of Wis. Stat. § 8.18 by nominating at least one candidate for senate or assembly in the months leading up to, and including, the

partisan primary held on August 13, 2024. It did not do so. As a result of its own failure to comply with the minimal statutory requirements to nominate presidential electors, WGP now lacks the requisite representatives to convene at the Capitol on the first Tuesday in October for the purpose of nominating presidential electors, as Wisconsin Statutes section 8.18 requires. Section 8.18 is the *sole* mechanism under Wisconsin law to nominate a political party’s presidential electors—there is no other way to do it under Wisconsin law—and WGP has failed to satisfy the minimal requirements necessary to participate. Wisconsin law provides no other means for WGP, or any other political party, to nominate presidential electors in Wisconsin.

C. WGP’s Failure to Comply Must Result In Exclusion From The Ballot.

Because WGP cannot lawfully nominate presidential electors to represent the party’s presidential and vice presidential candidates, those candidates are not qualified to appear on the general election ballot. This is true both as a matter of statutory construction and under well-established common law principles.

First, the WGP candidates cannot appear on the ballot as a matter of straightforward statutory construction. WEC has authority to “transmit to each county clerk a certified list” including only those candidates “for which electors in that county may vote.” Wis. Stat. § 7.08(2)(a). Under the statute governing general election ballots, however, the “names of the presidential electors for the candidates supplied under ss. 8.18(2) [...] are not listed on the ballot but a vote for the candidates for president and vice president is a vote for them through their named presidential

electors.” Wis. Stat. § 5.64(1)(em); *see also* Wis. Stat. § 8.25 (“A vote for the president and vice president nominations of any party *is a vote* for the electors of the nominees.” (emphasis added)); Wis. Stat. § 5.10. Because WGP’s presidential electors do not—and will not—exist, WGP’s candidate is not a “candidate[] [...] for which electors in that county may vote.” Wis. Stat. § 7.08(2)(a). They are not, therefore, names that can be certified to the county clerks for printing on the official ballot.

This conclusion is bolstered by the statutory context—the electoral college is to be attended by electors who have been lawfully appointed. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (“[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.”). If the WGP candidate receives the most votes in Wisconsin’s general election it would result in substantial confusion (at best) and mass disenfranchisement (at worst).

After the election, “[t]he presidential electors, when convened, shall vote [for] the candidates of the political party which nominated them *under s. 8.18[.]*” Wis. Stat. § 7.75(2). WGP’s presidential electors would have tenuous legal status and may not even be required to vote for the WGP Candidates, as WGP would not be “the political party which nominated them *under s. 8.18[.]*” Wis. Stat. § 7.75(2) (emphasis added).

Likewise, the Governor is required to “issue a certificate of ascertainment of appointment of electors, *under and in pursuance of the laws of such State* providing for such appointment and ascertainment enacted prior to election day.” 3 U.S.C. § 5 (emphasis added). The Governor would be put in the impossible choice of either certifying that an unlawful act was performed “under and in pursuance of the laws” or withholding Wisconsin’s electoral college votes—and with it the voice of over three million Wisconsinites.

Second, WGP’s candidate cannot appear on the ballot for president and vice president, as “the law does not permit or require that which is futile[.]” *State ex rel. Kropf v. Gilbert*, 213 Wis. 196, 251 N.W. 478, 484 (1933); *accord, e.g., Logan v. City of Two Rivers*, 227 Wis. 499, 278 N.W. 861, 863 (1938). Indeed, the State of Wisconsin has “an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.” *Bullock v. Carter*, 405 U.S. 134, 145 (1972). Thus, the Supreme Court of the United States has rejected the contention that “voters are entitled to cast their ballots for unqualified candidates,” explaining “that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable.” *Burdick v. Takushi*, 504 U.S. 428, 440 n.10 (1992). Indeed, “it is both wasteful and confusing to encumber

the ballot with the names of frivolous candidates.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).¹⁵

As a result, states do not place a candidate on the ballot when they cannot possibly win the election and assume the office. *See Am. Party of Texas v. White*, 415 U.S. 767, 782 (1974) (States may “insist that political parties appearing on the general ballot demonstrate a significant, measurable quantum of community support.”); *Lindsay v. Bowen*, 750 F.3d 1061, 1063 (9th Cir. 2014) (excluding a candidate from a ballot “based on undisputed ineligibility due to age do not limit political participation by an identifiable political group whose members share a particular viewpoint, associational preference or economic status” (internal quotations omitted)); *Hassan v. Colorado*, 495 F. App’x 947, 948–49 (10th Cir. 2012) (affirming decision to exclude a naturalized citizen, ineligible to hold office, from the presidential ballot); *Socialist Workers Party of Ill. v. Ogilvie*, 357 F. Supp. 109, 113 (N.D. Ill. 1972) (*per curiam*) (affirming Illinois’ exclusion of a thirty-one-year-old candidate from the presidential ballot).

For example, in a case decided by then-Judge Gorsuch, a candidate argued that even if he was “ineligible to *assume the office* of president [...] it was still an unlawful act of discrimination for the state to deny him *a place on the ballot*.”

¹⁵ In addition, a party does not have “a right to use the ballot itself to send a particularized message, to its candidate and to the voters” as “[b]allots serve primarily to elect candidates, not as forums for political expression.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997); *see also Burdick*, 504 U.S. at 438 (The “function of the election process is to winnow out and finally reject all but the chosen candidates” and “[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.”).

Hassan, 495 F. App'x at 948 (emphasis in the original). Justice Gorsuch rejected that contention, concluding that “a state’s legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office.” *Id.*

Those principles apply with even greater weight here. “The object of election laws is to secure the rights of duly qualified electors and not to defeat them.” *State ex rel. Dithmar v. Bunnell*, 131 Wis. 198, 110 N.W. 177, 180–81 (1907); Wis. Stat. § 5.01(1). “[V]oters finding a ticket upon the official ballot are not required to determine whether it is entitled to a place thereon, but may safely rely upon the action of the officers of the law, who, they have a right to suppose, have performed their duty.” *State ex rel. Dithmar*, 110 N.W. at 180–81(cleaned up). Voters are entitled to rely on the official ballot “when no irregularity or want of authority appears on the face of the ballots.” *Id.*; see also *Serpas v. Trebucq*, 1 So. 2d 346, 352 (La. Ct. App. 1941) (“[V]oters are warranted in assuming that election officials have investigated the eligibility of the candidates before placing their names on the ballots[.]”).

Here, the ballot would list the WGP Candidates with no disclaimer or other indication that the candidates do not exist and cannot possibly win. The Court should not allow such a situation, as “[p]enalizing the voters” for relying on election officials’ actions “is beyond unfair.” *Trump v. Biden*, 2020 WI 91, ¶25, 394 Wis. 2d 629, 951 N.W.2d 568

D. The Authorities Indicating That An Unqualified Elector May Appear on the Ballot Do Not Apply Here.

In two cases, this Court has suggested that a candidate may appear on a ballot, even if they are ineligible to serve in the office. Specifically, 100 years ago, this Court held that the “Legislature has carefully refrained from lodging either with the judicial branch or with any administrative officer the power to limit free choice by the elector, that he still enjoys the right to vote for whom he will, whether the person voted for be eligible or ineligible, qualified or disqualified.” *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563, 567 (1922); *id.* at 567 (“A careful search of the entire body of statutory law fails to disclose any attempt on the part of the Legislature to require that the name of a person so certified shall be that of a person eligible to hold the office for which he is a candidate.”). The Court reaffirmed this holding in 1949, explaining that “[t]he result in the case of a candidate who would not be qualified to take office if elected is unsatisfactory, but it is a matter for legislative action and in the absence of such legislative action neither the appellants nor the courts may invade the legislative field.” *State ex rel. Sullivan v. Hauerwas*, 254 Wis. 336, 340, 36 N.W.2d 427 (1949). *Marathon County* and *Sullivan* do not apply here for at least four reasons.

First, both cases were premised on the Court’s inability to find statutory authority to keep the candidates off the ballot after a “careful search of the entire body of statutory law[.]” *Marathon Cnty.*, 190 N.W. at 567; *Sullivan*, 254 Wis. at 338. Here, there *is* statutory authority to exclude the WGP candidates from the

ballot: WEC may only certify to each county clerks those candidates “for which electors in that county may vote.” Wis. Stat. § 7.08(2)(a). The WGP candidates are not such candidates. *See supra*, Section II(C).

Indeed, Wisconsin Statutes section 8.30 now says that WEC “may refuse to place the candidate’s name on the ballot if [...] the candidate is ineligible to be nominated or elected” or if “could not qualify for the office sought within the time allowed by law for qualification because of age, residence, or other impediment.” Wis. Stat. § 8.30(1)(b)-(c). WEC has twice refused to adjudicate this claim and now, as in *Phillips*, “there is insufficient time to permit remand to the [Commission] for the proper exercise of discretion.” *Phillips*, 2024 WI 8, ¶12. And so, as in *Phillips*, the Court should make the ballot eligibility decision itself.

Second, neither case involved a presidential election. *Marathon County* involved a state Senate race and *Sullivan* involved a circuit court race. In both instances, there are procedures to quickly re-fill the vacant seat. *See, e.g.*, Wis. Stat. § 8.50. Here, by contrast, there is only one possible opportunity for Wisconsin voters to select their presidential electors. 3 U.S.C. §§ 5, 15.

Third, and relatedly, keeping WGP on the ballot could result in mass disenfranchisement. *See supra*, Section II(C). No such concern was present in *Marathon County* or *Sullivan*. Electors may have wasted an afternoon—being required to come back for a special election—but their votes were not wasted entirely. *See* Wis. Stat. § 8.50 (outlining procedures for special election for certain offices); Wis. Stat. § 17.19 (outlining procedures for filling vacant offices).

Finally, Marathon County was premised on the principle that a candidate’s eligibility to serve was non-judicial until they win the election, and then “the question of eligibility becomes a judicial question after the election when he has received a plurality of votes and is seeking the title to the office for which he is a candidate.” *Marathon Cnty.*, 178 Wis. 468. One-hundred years later, the Court clarified that those taking issue with the conduct of an election have the right, and also the duty, to raise their challenge *before* the election. *See Trump*, 2020 WI 91, ¶32 (“Election claims of this type must be brought expeditiously. The Campaign waited until after the election to raise selective challenges that could have been raised long before the election.”). Petitioner properly does so here.

III. The Court should enter declaratory and injunctive relief.

“Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Wis. Stat. § 806.04(1). This jurisdiction exists “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” Wis. Stat. § 806.04(12). Wisconsin Statutes § 806.04 is “remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.” Wis. Stat. § 806.04(12).

The purpose of declaratory relief is to secure a “determination *prior to the time that a wrong has been threatened or committed*. The purpose is facilitated by authorizing a court to take jurisdiction *at a point earlier in time than it would do*

under ordinary remedial rules and procedures.” PRN Assocs. LLC v. State, Dep’t of Admin., 2009 WI 53, ¶53, 317 Wis. 2d 656, 766 N.W.2d 559 (internal quotations omitted; emphases by the Court). Thus, “sovereign immunity does not bar a suit for a declaratory ruling that an individual state official or agency has violated a statute ***when there is an anticipatory or preventative purpose for the ruling.***” *Id.* (internal quotations omitted; emphasis by the Court); *see also Teigen v. Wis. Elections Comm’n*, 2022 WI 64, ¶87, 403 Wis. 2d 607, 976 N.W.2d 519, *overruled on other grounds by Priorities USA v. Wis. Elections Comm’n*, 2024 WI 32, ¶87, 412 Wis. 2d 594, 8 N.W.3d 429 (affirming, in part, “the circuit court’s declarations and permanent injunction of WEC's erroneous interpretations of law”).

This Court “has been designated by the constitution and the legislature as a law-declaring court.” *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (internal quotations omitted). It is the “final arbiter” on questions of Wisconsin law, *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 2018 WI 75, ¶78, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion). Thus, once the Court issues declaratory relief, WEC and its Commissioners will be bound to follow that declaration. *See Wis. Stat. § 15.06(8)* (“Every commissioner shall take and file the official oath prior to assuming office.”).

However, Wisconsin’s Uniform Declaratory Judgment Act grants courts the authority to issue relief supplemental to a declaratory judgment “whenever necessary or proper.” Wis. Stat. § 806.04. “Injunctive relief may be granted in aid of a declaratory judgment, where necessary or proper to make the judgment

effective.” *Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 336, 81 N.W.2d 713 (1957); *see also Lewis v. Young*, 162 Wis. 2d 574, 581, 470 N.W.2d 328 (Ct. App. 1991) (“Injunctive relief may be granted in aid of a declaratory judgment.”).

As a leading treatise puts it, “[i]t appears that the supreme court has broad power to grant any appropriate relief in an original action.” Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* (9th ed. 2022), § 25.3. Here, there is no margin for error or confusion, as “there is a need for the certified list of candidates to be transmitted so that the local election officials can begin the process of preparing, printing, delivering, and mailing absentee ballots by the statutorily required deadlines.” *Phillips*, 2024 WI 8, ¶12. Accordingly, Petitioner respectfully requests that the Court enter both declaratory and injunctive relief.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition, take jurisdiction over the matter, and grant the relief sought in the Petition.

DATED: August 19, 2024.

Respectfully submitted,

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