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CIRCUIT COURT  
DANE COUNTY, WI  
2024CF001295

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

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STATE OF WISCONSIN,

*Plaintiff,*

*v.*

Case No. 24 CF 1295

JAMES TROUPIS

*Defendant.*

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**FOURTH MOTION TO DISMISS RE:  
THE PROSECUTION VIOLATES THE SUPREMACY CLAUSE**

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**I. Introduction and overview of why the State's theory of prosecution violates the Supremacy clause.**

The State has developed its theory of prosecution around a simple and flawed syllogism. The Wisconsin Elections Commission determined that Joe Biden won the 2020 election, and Governor Evers issued the Certificate of Ascertainment. That settled the matter. Thus, *any* claim by the Republican electors that Trump won the election was false. And so the theory goes, the Republican electors' statement that they are the electors for President and that their ten votes go for Trump was false and if the statement was false then the ballot was falsely made and if the ballot was falsely made then it was a forgery. That theory has layers and layers of problems, but the most glaring and fundamental is: it violates the Supremacy Clause. That's no small matter – the case must be dismissed.

Presidential elections are federal matters, mandated by the Constitution and controlled by the Electoral Count Act. Passed after the disputed election of 1876 when there were problems in choosing between competing slates of electors, the Act sets out what to do when an on-going challenge forces both slates of electors to vote. The State's theory that the Republican electors could not claim to be electors and could not cast their ballot on December 14 (it would be a crime to do so) conflicts with the Republican elector's duties under federal law. And whenever there is a conflict between state and federal law, the federal right trumps—every single time. Indeed, the State cannot embrace a theory of prosecution that would hinder the Republican electors from voting in the disputed 2020 election any more than the Wisconsin Legislature could demand that the Republican electors vote in 2024 on a different date from what Congress has

prescribed. It just can't be done. The Constitution does not tolerate *any* interference by the states – particularly in something as important as a Presidential election.

Yet here, that's precisely what the State is trying to do with this prosecution. The Supremacy Clause does not, however, allow the State to punish Troupis, his co-defendants, or the Republican electors for casting their ballots and ensuring that *if* the U.S. Supreme Court overturned the Wisconsin Supreme Court, those votes would not be lost. Again, the Electoral Count Act sets out precise procedures to ensure that those votes aren't lost. And again: when there is a disputed election that has not been definitively called by the time the electors must meet and vote, then both sets of electors (Republican and Democrat) must meet and vote. And the State cannot interfere with those procedures one bit – let alone try to put Troupis in prison for following those very procedures.

The State's attempt to interfere with that practice doesn't just stand out as a first in our Nation's 236 years of Presidential elections, it is also the most glaring violation of the Supremacy Clause one could imagine. It would allow the Attorney General to interfere with a Presidential election, imprisoning the electors for doing precisely what the law commands. That can't be. As explained more fully below, this prosecution cannot continue. To do so allows a political prosecution to not just up-end forgery law in Wisconsin, but also threaten the very foundations of our legal system – namely, states cannot interfere with presidential elections. And thus, this case must be dismissed.

**II. The State's theory is that once the Governor issued the certificate of ascertainment the Republican electors could never vote.**

The defense has already filed a *lengthy* brief on the history of alternate electors in a disputed election.<sup>1</sup> It sets out how alternate slates of electors were used in *Hayes v. Tilden* and in *Kennedy v. Nixon*, and how that procedure should have been done in *Bush v. Gore*.<sup>2</sup> Before reading this brief and considering these arguments, it's best to read that brief. It makes pellucid the following critical and indisputable points.

When there is an ongoing legal challenge to a presidential election – in Wisconsin's 2020 election there was – and it is still on-going when the electors must meet and vote, the electors from both parties must meet and cast their respective ballots at noon on the first Monday after the second Wednesday in December.<sup>3</sup> In 2020, that was December 14th. There is *no* other way to make sure that if the U.S. Supreme Court reversed the Wisconsin Supreme Court and declared Trump the winner that the Republican electors' votes could count – December 14th is a hard and fast and immovable deadline.<sup>4</sup> If the electors failed to do so, even if the Supreme Court overturned the Wisconsin Supreme Court it wouldn't matter – their votes would be lost. And to avoid those votes being lost, the Electoral Count Act establishes that both sets of electors meet and cast their ballot. That point is irrefutable, as Justice Stevens observed:

But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. *They do not prohibit a State from counting what the majority concedes to*

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<sup>1</sup> R.8.

<sup>2</sup> R.8 at 7–23.

<sup>3</sup> 3 U.S.C. § 15 (2020); Wis. Stat. § 7.75(1).

<sup>4</sup> Todd Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 B.Y.U. L. REV. 1573, 1609–11 (2001).

*be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines.*<sup>5</sup>

That procedure and practice is all meant to ensure that the electors votes are not lost as the challenges proceed.<sup>6</sup>

Yet the State's theory ignores all of that and instead adopts this position: once the WEC called the election for Biden and the Governor certified it, the Republican electors could not claim that Trump won, and they were the electors. To do so was a crime. Here are the quotes from the brief before Judge White setting out the State's theory of prosecution.

The Unappointed Elector Certificate purports to be issued by "the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Wisconsin," who assigned Wisconsin's electoral votes to Donald Trump and Michael Pence. *That representation was "a lie relating to the genuineness of the document." And it purports to "have been made . . . by authority of one who did not give such authority." In other words, it was a forgery.*<sup>7</sup>

And it echoes the point here, making it plain that the authority it refers to is from the Governor's Certificate of Ascertainment and WEC's certification:

The certificate was unconditional; it did not suggest that its legitimacy was contingent on a favorable litigation outcome. *As noted, this representation was false in light of the Governor's Certificate of Ascertainment and the Wisconsin Supreme Court's affirmance of WEC's certification.*<sup>8</sup>

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<sup>5</sup> *Bush v. Gore*, 531 U.S. 98, 126–27 (Stevens, J dissenting) (internal citations omitted) (emphasis added); see also Josephson & Ross, *Repairing the Electoral College*, 22 J. Legis. 145, 166, n. 154 (1996).

<sup>6</sup> *Id.*

<sup>7</sup> *In the Matter of Subpoena Served on LawForward-Wisconsin*, 24GF837, State's Brief at 15 (internal quotation omitted) (emphasis added).

<sup>8</sup> *Id.* at 15 (internal citations omitted) (emphasis added).

Finally, the State's theory is spelled out completely in this long but telling summation paragraph.

In sum, the Unappointed Elector Certificate was a forgery not simply because it stated that it was issued by Wisconsin's "duly elected and qualified" presidential electors, but because it falsely purported to provide Wisconsin's genuine electoral votes to be counted on January 6 by the Vice President. *It could not lawfully do so, and the Unappointed Electors never possessed the authority to execute a valid electoral certificate.* Nevertheless, the conspirators attempted to use the Unappointed Elector Certificate on January 6 to count the Unappointed Electors as Wisconsin's electoral votes. *The Unappointed Elector Certificate was "falsely made" because it purported to be the certificate that the Vice President should consider as Wisconsin's electoral votes, even though the Biden-Harris Electors were Wisconsin's "duly elected and qualified" presidential electors.*<sup>9</sup>

Set out in three block quotes, that's the State's entire theory of prosecution. The Republican electors could not meet and vote because it was an exercise in authority the Republican electors didn't have—even though the legal challenges were on-going, neither the Commission or the Governor had declared Trump the winner. Put another way, the State's theory is: so long as the most recent recount or court case had not declared Trump the winner, the Republican electors could never cast their ballot without committing a crime. As explained below, that interpretation (and now application) of state law conflicts with the Republican electors' duties and it can't be tolerated under the Supremacy Clause.

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<sup>9</sup> *Id.* at 18. (internal citations omitted) (emphasis added).

**III. State law cannot interfere with federal law and when it does the case must be dismissed.**

Among the most basic and fundamental concepts of American law is the supremacy of federal law. The principle's foundation rests on Article VI of the Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."<sup>10</sup> And the effect of that provision was spelled out in *McCulloch v. Maryland*.<sup>11</sup> There are lofty quotes from that time, but they all boil down to the fact that states can't interfere with the application and effect of federal law – pure and simple.<sup>12</sup> And in the parlance of Supremacy Clause cases, federal law preempts state law.<sup>13</sup> Here, we're dealing with conflict preemption.<sup>14</sup>

The analysis for conflict preemption is straightforward: the court looks at whether there is a federal law bearing on the matter at issue.<sup>15</sup> If there is, the next question is whether the state law interferes with the federal law.<sup>16</sup> If the state law conflicts or hinders the federal law's operation, then its preempted.<sup>17</sup> The conflict does not have to be as pronounced as a federal law that says electors must meet and cast their ballot on Tuesday at noon and the State law says electors must meet and cast their ballot on Monday at noon. That's a problem. Rather, the Court looks at whether the State regulations interfere

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<sup>10</sup> U.S. Const. Article VI.

<sup>11</sup> *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

<sup>12</sup> *McCulloch*, 17 U.S. at 432; *Maryland v. Louisiana*, 451 U.S. 725, 746–48 (1981).

<sup>13</sup> *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

<sup>14</sup> *Hillsborough Cty, Fla v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712–14 (1985).

<sup>15</sup> *Maryland*, 451 U.S. at 746–48.

<sup>16</sup> *Id.*; see also *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 158 (1978).

<sup>17</sup> *Ray*, 435 U.S. at 158.

with the exercise of federal rights.<sup>18</sup> As spelled out below, Presidential elections are federal matters, covered by federal law, and the State's theory of prosecution conflicts with federal law and the case must be dismissed.

**A. Presidential elections are a federal matter, and the federal government has prescribed specific means of conducting them.**

The first point in the analysis is easy—the President is a federal officer and the Constitution creates the position.<sup>19</sup> And the procedure for electing the President with presidential electors is set out in Article II, the Twelfth Amendment, and the Electoral Count Act.<sup>20</sup> And so it follows (as the Supreme Court has observed) that: “The presidential electors exercise a federal function in balloting for President and Vice-President.”<sup>21</sup> That's clear as day.

It's also clear that the Electoral Count Act provides the manner and means of electors meeting and voting—so that their votes can be considered “regularly given.”<sup>22</sup> That's the statutory term of art.<sup>23</sup> While federal law provides the manner and means of having the electors vote, each state's laws provide “procedures to resolve election disputes, including through lawsuits if necessary.”<sup>24</sup> So each individual state has its own procedures for what to do if there are allegations of fraud or just a general recount.<sup>25</sup> As long as any challenge to the election is resolved six days before the electors have to vote,

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<sup>18</sup> *United States v. Missouri*, 114 F.4th 980, 986 (8th Cir. 2024); *Horne v. Dep't of Agric.*, 576 U.S. 351, 362 (2015).

<sup>19</sup> See U.S. Const. Article II.

<sup>20</sup> *Id.*; U.S. Const. Amend XII; see also 3 U.S.C. §§ 1 (2018), *et seq.*

<sup>21</sup> *Ray v. Blair*, 343 U.S. 214, 224 (1952).

<sup>22</sup> 3 U.S.C. § 15 (2018); *Final Report of the Select Committee to Investigate the January 6th Attack on The United States Capitol* (N.Y. TIMES ed.) (“Committee”) at 30.

<sup>23</sup> 3 U.S.C. § 15 (2018); Committee, *supra* at 30.

<sup>24</sup> Committee, *supra* at 29; see also *id.* at 56.

<sup>25</sup> LAWRENCE LESSIG & MATHEW SELIGMAN, *HOW TO STEAL A PRESIDENTIAL ELECTION* at 56 (2024).

then the votes fall into what's called a "safe harbor."<sup>26</sup> That means that those state's electoral votes are presumptively valid and practically immune from challenge. But the safe harbor only comes into play if *all* of the challenges in state or federal court to that state's election have been resolved six days before the electors meet and vote.<sup>27</sup>

When the challenges to an election haven't run their course within the "safe harbor," the Electoral Count Act contemplates (and precedent confirms) that there's a procedure for ensuring the electors' votes still count when a definitive winner can't be declared by the deadline.<sup>28</sup> That procedure is meant to ensure that electors comply with that hard and fast and immoveable deadline—the first Monday, after the second Wednesday. But once that deadline is complied with, the challenge can continue without prejudicing either candidate's rights.<sup>29</sup> And once the challenge is definitively resolved, then the Governor signs a certificate of "ascertainment of the appointed electors" and it's sent to Congress.<sup>30</sup> That all feeds into this fundamental and controlling point: when there's an ongoing challenge to an election, both the Democrat electors' and the Republican electors' ballots are executed and are available for Congress to count depending on how the challenges are resolved, and which slate is operative can change multiple times—as it did in Hawaii in 1960.<sup>31</sup> All of that is done through the Electoral Count Act's prescriptions.

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<sup>26</sup> *Id.* at 55; *see also* 3 U.S.C. § 5 (2018).

<sup>27</sup> 3 U.S.C. § 5 (2018).

<sup>28</sup> Lessig, *supra* at 27–29.

<sup>29</sup> *Id.*

<sup>30</sup> 3 U.S.C. § 1, *et seq.*

<sup>31</sup> Lessig, *supra* at 27–29.

**B. The State's theory of prosecution conflicts with federal law and it cannot be upheld.**

The first eight pages establish that electors exercise a federal duty. Clear enough. The block quotes from the State's brief establish – without question or qualification – that the State's theory is that the Republican electors could not meet and vote to exercise those rights on December 14th without committing a crime. Indeed, the Republican electors could not fill out the ballot, the ballot could not be submitted to Congress, and Trump's rights could not be protected while petitioning the U.S. Supreme Court – again, without the Republican electors casting their ballot, their votes would be forever lost.

The question then becomes whether the State's application of the forgery statute conflicts with the federal law.<sup>32</sup> A state statute is void to the extent it conflicts with a federal statute.<sup>33</sup> When it comes to conflict preemption, the question is whether the State law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>34</sup> And as set out above, while the State has the freedom to conduct elections, the ends that it chooses “must be consist[ent] with the letter and spirit of the Constitution.”<sup>35</sup>

Here, there is no question that the State's theory of prosecution provides “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” as articulated in the Electoral Count Act.<sup>36</sup> After the disputed election of 1876,

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<sup>32</sup> *Pub. Utilities Comm'n of State of Cal. v. United States*, 355 U.S. 534, 544 (1958).

<sup>33</sup> *Maryland*, 451 U.S. at 728 (quotation omitted).

<sup>34</sup> *Hines* 312 U.S. at 67 (quotation omitted).

<sup>35</sup> *Horne*, 576 U.S. 351, 362.

<sup>36</sup> *See Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 110 (1992); *see also Missouri*, 114 F.4th at 986.

Congress set out *explicitly* what should happen when there are multiple ballots sent to Congress.<sup>37</sup> There is no way to have two competing ballots opened if every time the party that is behind in the recount (or lost the last round of review in the courts) would be committing a crime when they vote on the first Monday after the second Wednesday in December. Indeed, under the State's theory the electors who are behind in the count (or down in the court case) are committing a crime *even though* the recount or court case may ultimately turn in their favor – the forgery is complete when the ballot is cast. To put a fine point on it: the State's theory is that when the Republican electors preserve their votes and rights under the Constitution, they are committing a crime. There can be no greater frustration with a federal right and statute than being imprisoned for exercising it. Thus, the State's theory of prosecution is incompatible with the way that disputes in presidential elections are supposed to be resolved under the Electoral Count Act.

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<sup>37</sup> 3 U.S.C. § 15 (2018).

#### IV. Conclusion

By prosecuting Troupis for protecting his client's rights and doing precisely what Biden's lawyers would have done had the Wisconsin Supreme Court ruled 4-3 for Trump, the State has not only run roughshod over the law of forgery and plead around the Legislature's protections for election-related crimes, but the State has also sought to hinder the exercise of a federal right. Go after the President's electors or go after the President's lawyer, it's all the same thing. The State is trying to imprison Troupis for doing what the law demands. The Electoral Count Act will make sure that it's properly sorted out. By criminalizing what that law – the federal law – provides, the State has done many things, the most glaring of which is to violate the Supremacy Clause, and that requires that this case must be dismissed.

Dated this 6th day of December, 2024.

Respectfully submitted,

For JAMES R. TROUPIS

Electronically signed by Joseph A. Bugni

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