STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN

V. Case No. 24 CF 1295

JAMES R. TROUPIS

BRIEF IN SUPPORT OF FIRST AND SECOND MOTIONS TO DISMISS

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PREFACE

This is the first of the three briefs addressing why this case must be dismissed. To orientate the Court, it's appropriate to describe the motions and how they relate. The facts at the heart of the criminal complaint arose almost four years ago—the 2020 Presidential election. Since then, those events have been the subject of multiple federal investigations and a civil lawsuit. After the federal investigation closed and the civil case settled, many expected the issue was over. But this summer, in the midst of the 2024 Presidential election, the Wisconsin DOJ filed this criminal complaint. Some hoped that once the headlines served their purpose and the election was over, the case would go away—the initial appearance (after all) is taking place six months after the charges issued. But it's now clear that's not going to happen. And so, the parties are digging-in and preparing for a fight.

That fight will take many forms. Currently, there are two motions to quash briefed before two different Dane County Judges over the State's subpoenas, covering over 14,000 privileged documents. The fight for this Court is, however, different. And (for now) the fight does not turn on the facts, but the law. As this matter is by every measure unprecedented, the defense is challenging the criminal complaint through four separate motions to dismiss—the first and second are addressed in this brief.

This brief explains *why* the criminal complaint fails to state probable cause that a crime was committed. And it spells out *why* the alternate electors had to meet and cast their ballot and it explains that the Attorney General's memo (and reasoning) finding that the ballot was not forged should have been provided in the criminal complaint. The

second brief explains why this case can't proceed because the Attorney General has refused to abide by the Legislature's demand that before election-related charges can be brought there must be a referral from the bi-partisan Commission. Here, there was none. And the failure to proceed with that referral means the Court is not competent to hear this case. The third brief is slightly different. In the briefing over the motions to quash, the State has adopted a position that interferes with the electors' ability to execute their duties under the Twelfth Amendment. And since all of Troupis's actions concerned the Presidential election and his client's right to petition Congress, state law cannot interfere with the electors' responsibilities—particularly those spelled out by the Electoral Count Act and the United States Constitution.

All of these briefs build on a central point—this case centers on a Presidential election and the rights and responsibilities that attend representing a client involved in a Presidential election that cannot be cast aside. Understanding this case demands that the Court grasp both the history of Presidential electors and how everything Troupis and the electors did was to preserve President Trump's rights as he challenged the 2020 Wisconsin election through the courts.

I. Introduction and overview of why the criminal complaint must be dismissed.

In November 2020, the Wisconsin election for the President was close—the day after the election, the two candidates were separated by less than 30,000 votes. Not surprisingly, Trump sought a recount and he needed a lawyer. Despite having no prior formal connections with the Trump campaign, Troupis took on the recount. He took on his client's case with the professionalism and commitment to excellence that are associated with his name. This included taking the case to the Wisconsin Supreme Court, where he lost 4–3—not on the merits but based on the doctrine of laches. He was right (a majority of the Court held), but his client had waited too long to bring the claim. In fairness to Troupis, when the Court reasoned that the claim should have been brought, he wasn't hired.

Prosecuting a client's legitimate claims is every lawyer's duty. We are called to do it ethically and with great vigor. And Troupis did just that. He ensured that his client's claims stayed viable as he sought level-upon-level of review. Keeping those claims alive meant that he followed the script set out in 1876 (in a disputed presidential election), echoed in 1960 (in another disputed presidential election), and trumpeted in 2000 by Justices Ginsburg's and Stevens's dissents in *Bush v. Gore* (in yet another disputed presidential election). The script was this: as the legal challenges to the election continued through the courts, an alternate slate of electors would vote on the date prescribed by law—December 14. That's because if the Supreme Court reversed, all of the legal

challenges would be for naught. Unless the Republican electors met and voted on December 14, their votes wouldn't have counted.

Troupis didn't keep silent about following that script; instead, he told the world in advance about it, putting it in his briefs. All of that was done to ensure that, if the claims prevailed, his client could be declared the winner. No client—especially in an election for the Presidency—wants to notch a victory on the battlefield of principle while losing the war simply because the electors failed to meet on the designated day.

Despite Troupis's best efforts, his client's claims were ultimately mooted. The Supreme Court didn't act in time and denied *certiorari* in February 2021. But as the legal proceedings concerning the Wisconsin electors continued, so did the political process—a process marred by the January 6 riots. In the aftermath, Congress formed a Select Committee and after taking thousands of hours of depositions and issuing hundreds of subpoenas for records, it published a long and detailed report. Congress also passed comprehensive amendments to the Electoral Count Act to address many of the very procedures used here—a powerful statement indeed that the procedures did comply with the law at the time, and now Congress wanted to close off those alternatives. And in the aftermath, prosecutions across the country (but not Wisconsin) immediately followed. Finally, four years later, and after another Presidential campaign, we have this prosecution, on a statute never before involved in an election matter and never to be used again—as Congress has (again) changed the law.

The other prosecutions concerning the 2020 election charge various state and federal crimes, but all of them are different from what we have here. As the January 6

Report made clear, the reason for that is simple: in those states and in those cases one Rudolph Giuliani was inextricably linked with every step of the process, where a slew of unsupported claims and meritless lawsuits (dubbed "unleashing the Kraken") polluted the legal process. But Giuliani's claims were not part of the Wisconsin recount suit. Instead, everything was done legitimately and honorably and as directed by Troupis.

Since Guiliani's slander and chicanery weren't part of the Wisconsin equation in 2020, the State has had to ground its charges on unique claims of conspiracy to utter a forged document. The alleged forgery being the ballot that the alternate slate of electors signed; and the conspiracy being Troupis's declaration to the world that while his client's claims are being litigated, he'd follow the script set out in prior Presidential elections and have an alternate slate of electors vote.

As explained below, there is not probable cause to believe that the alternate electors' ballot was a forgery, nor is there probable cause to believe Troupis engaged in a conspiracy to utter a forged document. For one, Wisconsin law is clear: a forged document is one that has been altered to appear as something other than it is. Here, there is no dispute that the document (an electoral ballot) appears to be precisely what it purports to be. And under Wisconsin law, that isn't a forgery. Likewise, you can only "utter" a forged document, you cannot utter a document that is what it purports to be. And, for that matter, you cannot conspire to do something lawful. After all, a conspiracy is an agreement to do a criminal act—e.g., submit a document that has been altered to be something other than what it is (e.g. a forged check). But one can't conspire to submit (read: utter) a document that is precisely what it purports to be—as here, an electoral

ballot. Since the complaint fails to spell out probable cause of a forgery, this Court lacks personal jurisdiction over Troupis and the case must be dismissed.

That's the heart of this case and the first reason the complaint must be dismissed: Troupis operated as a lawyer. As a lawyer, he ably prosecuted his client's claims. And having the alternate electors meet and vote was not criminal or even untoward—it's the prescribed (and universally accepted) means of keeping options alive during a Presidential recount. Put in more direct terms, it would have been malpractice for him to not have the electors meet and vote. None of those facts are included in the criminal complaint and yet all of them are contained the Attorney General's prior memo finding as to the allegations that the alternate electors "met in a concerted effort to ensure that they would be mistaken, as a result of their deliberate forgery and fraud, for Wisconsin's legitimate Presidential Electors, [t]he record does not support this allegation. Before and after the December 14 meeting, the Respondents publicly stated, including in court pleadings, that they were meeting to preserve legal options while litigation was pending." Before reading this brief, its worth reading that memo, which is attached as Exhibit A.

That is a Reader's Digest version of this brief. Properly understood, there was nothing illegal in Troupis's actions—to do otherwise would have been legal malpractice. Pure and simple. And in no way, shape, or form did the alternate electors' ballot constitute a forgery—the document was precisely what it purports to be. Thus, consistent with the case law and precedent discussed below, the criminal complaint must be dismissed.

II. To understand this case, it is essential that the Court understand the history of alternate electors.

Presidential recounts stand alone in the category of rarely consulted areas of law. In Wisconsin's 170-year history, there's only been one. And when it comes to disputed Presidential electoral votes, that too is thankfully rare—arising just a handful of times in the past 250 or so years. Understandably, those who practice in this area are few. What follows are the foundational principles of how the electoral college works and how disputed Presidential elections and recounts have been (and are) handled. Aside from case law and the statutory text, the account that follows comes from four principal sources. It relies heavily on *The January 6 Report*.[1] It draws from the explanations and insights by Professors Lessig and Seligman in *How to Steal a Presidential Election*.[2] It leans on Chief Justice Rehnquist's book, called *Centennial Crisis: The Disputed Election of 1876*.[3] And it cribs from the Department of Justice's own findings on this very issue.[4] All of those resources point to one indisputable fact: having the alternate electors meet and vote was not criminal, it was essential to preserving Troupis's clients rights. What's more, the electors' ballot is not a forgery—it's precisely what it purports to be. All of those points rest on what follows, and (again) what follows is not in dispute.

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[1] Final Report of the Select Committee to Investigate the January 6th Attack on The United States Capitol (N.Y. TIMES ed.) ("Committee").
[2] LAWRENCE LESSIG & MATHEW SELIGMAN, HOW TO STEAL A PRESIDENTIAL ELECTION (2024).
[3] WILLIAM REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).
[4] Ex A.

A. The Nineteenth Century's use of (and problems with) electors and the failure to vote on the designated date and time.

To grasp this case, it is necessary to understand (at a high level) the constitutional structure for selecting our President. At the Constitutional Convention, the Framers considered but rejected multiple proposals for selecting the President—ranging from popular vote to having Congress itself select the President.[5] Identifying problems with each, they created the electoral college, where states would choose (however they wanted) electors who would then gather and cast their votes for President.[6] The number of electors were tied to the total seats in Congress each state had. With this system, the key to winning the Presidency wasn't getting the most votes but winning the most electoral votes, which came by winning the states—even if it was just by a small margin. Getting the critical number of electors was all that mattered.[7]

The most important takeaway is that Presidential elections are decided by electoral votes and there are strict prescriptions governing the selection and appointment of electors. In a single (dense) paragraph, the Constitution sets out a few.[8] And federal law provides the rest—particularly the manner and means of electors meeting and voting—so that their votes can be considered "regularly given."[9] These prescriptions include two irrevocable, absolute, and inviolable deadlines for electoral votes: they must be cast at the same time across the country and the envelopes containing them must be opened on

[5] Committee, *supra* at 29.
[6] Committee, *supra* at 29–30.
[7] Lessig, *supra* at 28, 53; U.S. Const. 12th Amendment.
[8] U.S. CONST. art. II, § 1; *see also* U.S. Const. v
[9] 3 U.S.C. § 15 (2018); Committee, *supra* at 30

January 6.[10] In 2020, the voting had to take place on "noon on the Monday after the second Wednesday in December."[11] Failure of the electors to meet and vote on that day means the vote is not "regularly given" and won't count.[12]

That's right, a State's entire voice in the election of the President (the most important position in the country) is wiped out if the electors' vote isn't timely. That happened in New York in 1797, and then in Wisconsin in 1857; Wisconsin's electoral votes were cast a day late because a blizzard closed down all travel to Madison.[13] This one-day delay caused Congress to debate for two days whether to accept Wisconsin's electoral votes, ultimately Buchanan didn't need the votes, so the issue wasn't decided—Wisconsin's electoral votes were not included in the final total.[14] That is all to say: in Presidential election law, deadlines matter and there is no cure if you miss the deadline. It is the ultimate example of a statute of limitation.

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."[15] So each individual state has its own procedures for what to do if there are allegations of fraud or misfeasance or just a general recount.[16] As long as any challenge to the election is resolved six days before the electors have to vote—the first Monday after

[10] Lessig, *supra* at 56.
[11] 3 U.S.C. § 15 (2018).
[12] Lessig, *supra* at 52; *see also* Rehnquist, *supra* at 170.
[13] Lessig, *supra* at 28.
[14] *Id.*
[15] Committee, *supra* at 29; *see also id.* at 56.
[16] Lessig, *supra* at 56.

the second Wednesday—the votes fall into what's called a "safe harbor."[17] That safe harbor 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.[18]

But what happens if the procedures for challenging an election haven't run their course within the "safe harbor" or by the time the electors must vote? Put differently, what do the candidates do if, on the first Monday after the second Wednesday in December, it appears that one side is winning but the recount isn't done, or the legal challenges aren't exhausted? In those instances, both sides have their respective electors meet and vote.[19] 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, where Congress can decide which slate of electors to choose.[20] That is, both 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.[21]

[17] *Id.* at 55; *see also* 3 U.S.C. § 5 (2018).
[18] 3 U.S.C. § 5 (2018).
[19] Lessig, *supra* at 27–29.
[20] 3 U.S.C. § 1, *et seq.*
[21] Lessig, *supra* at 27–29.

B. The proper (and universally accepted) course of action is set by Hawaii in 1960.

Dealing with multiple slates of electors from a single state isn't new. It first arose in 1876, with the election of Rutherford B. Hayes.[22] During that election, the early returns had Samuel Tilden winning the popular vote, but he needed one of three states to win the electoral college—Florida, Louisiana, or Oregon.[23] In each of those states, both parties alleged fraud of one sort or another.[24] In all three states, both sides had electors meet and vote at the appropriate time. And as the challenges made their way through the courts, the candidates held on to the electors' ballots waiting to see who would be deemed the winner.[25] Eventually, one ballot would be given the certificate of ascertainment—although in Florida three different ballots were given a certificate of ascertainment.[26]

In all three states, there was disagreement over which ballot was valid. All of the ballots were sent to Congress, where the envelopes were opened and Congress adjourned so the issue could be debated and the facts investigated.[27] The investigation continued for weeks, but Congress was deadlocked; Republicans controlled the House and Democrats the Senate.[28] Recognizing that consensus was impossible, Congress devised a commission of five Democrats, five Republicans, and five Supreme Court Justices to determine which ballot was valid. In an 8-7 split (and two days before the inauguration),

[22] Rehnquist, *supra* at 105–08.
[23] *Id.* at 99.
[24] *Id.* at 105, 107, 110–11.
[25] *Id.* at 110–11.
[26] *Id.* at 106.
[27] *Id.* at 115.
[28] *Id.* at 113–14.

the commission deemed the Republican ballots the legitimate one, and Hayes was declared the winner.[29]

A decade after that hotly disputed election, Congress passed the Electoral Count Act, which set out a better (though now arcane) set of rules for counting electoral votes and deciding disputes.[30] The Act set out important procedures. First, the same hard and fast voting deadlines controlled.[31] Second, a certificate of ascertainment had to be given to the winning ballot *after* any challenges to the election are resolved.[32] And, third, certain procedures govern how Congress decides which votes to count if there is a dispute.[33]

Thankfully, after passing the Electoral Count Act, there was not much controversy. Most of the elections were landslides and clear winners emerged without recourse to the courts and potentially Congress weighing in on who won what state. Then came 1960 and the contested (and very close) election between Kennedy and Nixon.[34]

The 1960 election, particularly what happened in Hawaii, set the modern blueprint for how lawyers who represent Presidential campaigns are supposed to protect their client's interests during a recount or court challenge. In Hawaii, the state initially went for Nixon by 141 votes.[35] This was challenged in court. The suit was a timely endeavor and (as established above) the deadline for electoral voting waits for no one.[36] As the

[29] *Id.* at 175.
[30] 3 U.S.C. §§ 1–20 (2018).
[31] *Id.* § 7 (2018).
[32] *Id.* § 5(c)(1)(B) (2018).
[33] *Id.* §§ 5, 15(d)(A)–(D).
[34] Rehnquist, *supra* at 242; Lessig, *supra* at 28.
[35] Todd Zywicki, *The Law of Presidential Transitions and the 2000 Election*, 2001 B.Y.U. L. REV. 1573, 1609–11 (2001).
[36] *Id.* at 1610–11.

recount was still underway, both the Democrats and the Republicans had their respective (alternate) slates of electors meet and cast their ballots.[37] Initially, the Republican ballot was certified and sent to Congress.[38] Then, the judge overseeing the recount decided Kennedy had more votes.[39] That prompted the Democrats to send a copy of their elector's ballots to Congress, but without the certificate of ascertainment.[40] Finally, after the legal remedies and appeals had run their course, the Governor placed another certificate of ascertainment on Democrat elector's ballot and it was rushed to Congress.[41]

On January 6, then-Vice President Nixon had before him three envelopes that constituted the electors' ballots from Hawaii. He opened all three envelopes, which is the proper course under the Electoral Count Act.[42] And then, in front of the entire Congress, he stated: unless there is an objection, I will direct that the third envelope (a ballot for his opponent Senator Kennedy) be counted.[43] Hearing no objection, Hawaii went for Kennedy.[44]

That action embodied three important principles that resonate here and for every lawyer representing a Presidential campaign. First, when there is a dispute over an election and all the remedies and appeals have not been exhausted, a lawyer must protect his client's rights. Second, the way to protect a client's rights in a disputed election (where

[37] *Id.*; *see also* Lessig, *supra* at 28–29
[38] Zywicki, *supra* at 1610–11.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*; 3 U.S.C. § 15 (2018).
[43] Zywicki, *supra* at 1611–12.
[44] *Id.* at 1612; *see also id.* nn.124–25.

the challenge has not been resolved) is to have an alternate slate of electors vote on the prescribed date and provide the ballots to the Vice President. A failure to do so would mean that, even if the challenge prevails, the electoral votes that were fought so hard for would not be counted—an empty victory if there ever was one. And third, if the challenges are not resolved in time, all of these electoral votes are provided to the Congress for it to decide—sometimes that's easy (Hawaii in 1960) and sometimes that's hard (Florida, Louisiana, and Oregon in 1876). But Congress has the power (and responsibility) to decide which ballot is the proper one and so after the envelopes are opened, they break into their respective chambers, debate the matter, and then vote.[45]

C. In 2000, the Gore campaign forgot its history and Justices Ginsburg and Stevens alert all future campaigns: *follow Hawaii*.

Most of that history is relegated to seldom read books on disputed elections. But every once and awhile, those issues arise and failing to grasp them is not just legal malpractice but may also cost a client the election. That happened in 2000 during the Bush-Gore election. While most remember the case for its hanging chads, the real lesson from that case is this: pay attention to your history and know your deadlines. What the Gore campaign didn't do informs the steps that were taken here.

During that election, Florida was initially called for Bush—he had a lead by a few thousand votes.[46] This triggered an automatic recount in certain counties.[47] Challenges abounded, and the Florida Supreme Court took up the case twice.[48] There were

[45] Lessig, *supra* at 58–59.
[46] LARRY SABATO, OVERTIME! THE ELECTION 2000 THRILLER 11–12 (2002).
[47] *Id.* at 12.
[48] *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000), *Gore v. Harris*, 779 So. 2d 270 (Fla. 2000).

allegations that different standards were being used to evaluate the ballots, which violated the Equal Protection Clause.[49] And, it was argued, there was no way to get the recount done within the safe-harbor provision—again six days before the first Monday, after the second Wednesday in December. Thus, the recount had to stop, and Bush declared the winner.[50] That is the horn-book takeaway of the case.

But the real lesson of that case was left to the dissents and the post-mortem conducted by the lawyers who represented the Gore campaign. They all point to one critical flaw in the campaign's legal strategy: a single concession about timing.[51] During the argument before the Florida Supreme Court, Gore's lawyer was asked what the operative deadline was, and he said December 12 (the safe harbor date), which was then days away.[52] This meant (the majority of the Court found) that a final decision had to be rendered before then.[53] And since that date was sacrosanct and a full recount with uniform procedures could not be completed in time, the election had to be called.[54]

The Gore team's concession was as costly as it was unnecessary. In separate dissents, Justices Ginsburg and Stevens both wrote that Gore and the majority had it wrong.[55] The final slate of electors didn't have to be declared until January 6.[56] The parties should have followed the Hawaii plan and had two sets of electors vote on the

[49] *Bush v. Gore*, 531 U.S. 98, 103 (2000); *see also* Sabato, *supra* at 162–63.
[50] David A. Kaplan, THE ACCIDENTAL PRESIDENT 142–43 (2001).
[51] *Id.* at 142–43.
[52] *Id.* at 142–43.
[53] *Bush,* 531 U.S. at 113–14.
[54] Kaplan, *supra* at 162–63.
[55] *Bush*, 531 U.S. at 127 (Stevens, J., dissenting); *id.* at 144–45 (Ginsberg, J., dissenting).
[56] *Id.* at 144–45 (Ginsberg, J. dissenting).

determined day.[57] That would have given the courts and Florida officials time to do a proper recount.[58] Both dissents reasoned that the Hawaii plan provided options. And then (by January 6) the courts or the recount could declare the correct winner. If necessary, the Vice President could open the envelopes containing the alternate slates and recess and then a winner could be declared some time before the inauguration. There was no reason to rush to meet the safe harbor—just have the two sets of appointed electors vote and figure out the one that will count over the next month.[59]

In the post-mortem of the 2000 election, the lawyers and journalists involved in the recount reflected on this blunder and cited it as what cost Gore the election.[60] Later, independent recounts, showed that had the recount continued, Gore would have been elected.[61] Unfortunately, Gore's lawyers didn't understand their history. As both Ginsberg and Stevens noted: in a disputed election, all that mattered was that the electors vote on time and that the ballots be submitted before Congress convened on January 6. And even more to the point, as the election of 1876 shows, even that's not the final deadline: Congress could adjourn and debate the matter up until the inauguration. A less-than-ideal situation, but one that is allowed and should have been cited to the Court in *Bush v. Gore*—it would have made all the difference.[62] The hard-earned lesson for the Gore campaign was not easily lost on the election lawyers, who had worked on that

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[57] *Id.* at 127 (Stevens, J., dissenting).
[58] *Id.*
[59] *Bush*, 531 U.S. at 127 (Stevens, J., dissenting); *id.* at 144–45 (Ginsberg, J., dissenting).
[60] Kaplan, *supra* at 173 n.1.
[61] *Id.* at 9–11, *see also id.* nn.1, 2 (citing sources)
[62] Lessig & Seligman, *supra* at 8–9.

case—including Troupis. Your obligation as an attorney must be to advise the client to have the electors meet and vote. If nothing changes after they meet, then the electoral ballot becomes an historical artifact. If, instead, you fail to provide that advice and the electors do not meet as a result, your error may have cost your client the Presidency.

III. Consistent with that history and to preserve his client's claims, Troupis had an alternate slate of electors meet and vote.

The history lesson sketched above is essential to understanding this case. To the small cadre of lawyers who handle election law and Presidential recounts, those lessons are ingrained in their psyche. As any litigator knows, upon taking a case the first question is what's the deadline—how much time do I have? The second question is, do I have a viable claim? What follows is how the real deadlines sketched above played out around Troupis's efforts and how the claims he made and pursued had critical merit—after all, three State Supreme Court justices agreed with his claims.[63] Meaning: Troupis wasn't just throwing everything at the wall hoping something would stick, he was raising real claims about the election that had to be brought on behalf of his client.

[63] *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568.

A. The *Biden v. Trump's* procedural history until the case reaches the Wisconsin Supreme Court.

The 2020 election took place on November 3, and it would take a few days for Wisconsin to be called for Biden.[64] The Trump campaign contacted Troupis—he had, after all, helped draft the Wisconsin Election law statute and was lead counsel in Justice Prosser's successful 2011 state-wide recount.[65] Over the intervening days, he looked into the case and thought the claims had merit. Almost a week after the election, he agreed to take the case and pursue a recount. Within weeks there were 4,000 volunteers to help conduct the recount and a small core of lawyers to help with the legal challenges.

Recounts are costly endeavors, and to keep down costs, the campaign sought a recount in Wisconsin's two most populace counties—Milwaukee and Dane.[66] Over the course of the next few weeks, Troupis developed the factual record to support his challenges to (among other things) the way the absentee balloting had been conducted.[67] As this was happening, Troupis sought the advice of Kenneth Chesebro—his co-defendant. A Harvard Law grad, he specialized in election law and was part of Gore's legal team in 2000.[68]

As the factual groundwork was being developed to support the recount, Chesebro provided Troupis a memo outlining the operative dates that he had to work with.[69]

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[64] Committee, *supra* at 207.
[65] Todd Richmond, *Prosser Camp: Election Recount would be Frivolous,* WIS. L.J. (Apr. 18, 2011); Patrick Marley, *Prosser's Recount Got Ample Funding*, MILWAUKEE J. SENTINEL (Aug. 13, 2011).
[66] *See* Justin Clark Dep. at 151, 158, *available at https://tinyurl.com/*t7j44n54; Trump, 2020 WI 91, ¶ 4.
[67] *See Trump,* 2020 WI 91, ¶¶ 64–70.
[68] Elizabeth Williamson, *From Bush v. Gore to 'Stop the Steal.' New York Times*, Oct. 25, 2023.
[69] Ex B.

Consistent with the history (and case law) sketched above, Chesebro advised that the only real and imminent deadline was that the electors had to vote on December 14. After that, the only remaining deadline was January 6 (for the electors' ballots to get there) and then, the inauguration. The full memo is attached, and in it Chesebro lays out other dates but notes that they are not determinative—only December 14 and January 6 matter.[70]

Finally, armed with the evidence he needed, at the end of November, Troupis sought original jurisdiction before the Wisconsin Supreme Court.[71] That was denied, and he filed the challenge in the circuit court.[72] A week later, the circuit court denied the claims.[73] That very day, Troupis and his team filed a motion to bypass and two briefs.[74] The court immediately scheduled argument for December 12.

Knowing that there were only two days before the electors must meet and vote, Troupis alerted the Wisconsin Supreme Court that the Republican slate of appointed electors would meet at noon on December 14 at the Capitol and vote. In a footnote, he wrote:

> Following the recommended approach to situations involving court challenges in Presidential elections which are not resolved by the time the Presidential electors must cast their votes pursuant to Art. II, § 1, cl. 4, and 3 U.S.C. § 7 (this year, December 14), the Trump-Pence Campaign has requested its electors to sign and send to Washington on that date their votes, to ensure that their votes will count on January 6 if there is a later determination that they are the duly appointed electors for Wisconsin.[75]

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[70] Ex. B.
[71] *See Trump*, 2020 WI 91, ¶¶ 64–71.
[72] *Id.*
[73] *Id.*
[74] Brief of Plaintiffs-Petitioner/Appellants at 1, *Trump v. Biden*, (No. 2020AP2038).
[75] *Trump v. Biden,* 2020AP2038 (Supplemental brief filed Dec. 12, 2020) at 8 n.3.

In the paragraph that follows that text, he cites (of course) what Hawaii did in 1960. This way, the Wisconsin Supreme Court knew it didn't need to rush, there was still plenty of time to get this decision right because everyone's rights would be protected with the alternate slate of electors meeting and voting. (Indeed, if roles were reversed, the Biden-Harris campaign would have done the same—the Gore team's blunder would never be repeated). The day after oral argument and knowing Troupis's plans with the alternate electors, the Wisconsin DOJ alerted the Wisconsin Election Commission that there would be a slate of Republican electors at the Capitol on December 14 at noon.[76] In other words, no need to worry—this was all expected.

Two days after oral argument, on the morning of December 14, the Supreme Court ruled 4-3 against Troupis's argument—citing the doctrine of laches.[77] At this point, there were three options. First, Troupis could give up and tell the electors to go home without voting. But that's the client's call—not his—and the client doesn't have to make that call in the next two hours. Second, Troupis could advise his client to seek rehearing before the Wisconsin Supreme Court, and while they decide the petition have the electors vote to preserve the client's rights. Third, Troupis could advise his client to seek *certiorari* to the U.S. Supreme Court, and (like option two), have the electors vote to preserve the client's rights. But until Troupis talked with his client (the President of the United States) and the President decided what he wanted to do, Troupis had to advise that the alternate

[76] *See* Ex. C.
[77] *See Trump*, 2020 WI 91, ¶ 12.

slate of electors vote—follow Hawaii—so the claims weren't mooted. The client chose option three.

B. Consistent with his obligation to the client, Troupis sought to keep the case alive for the U.S. Supreme Court to rule.

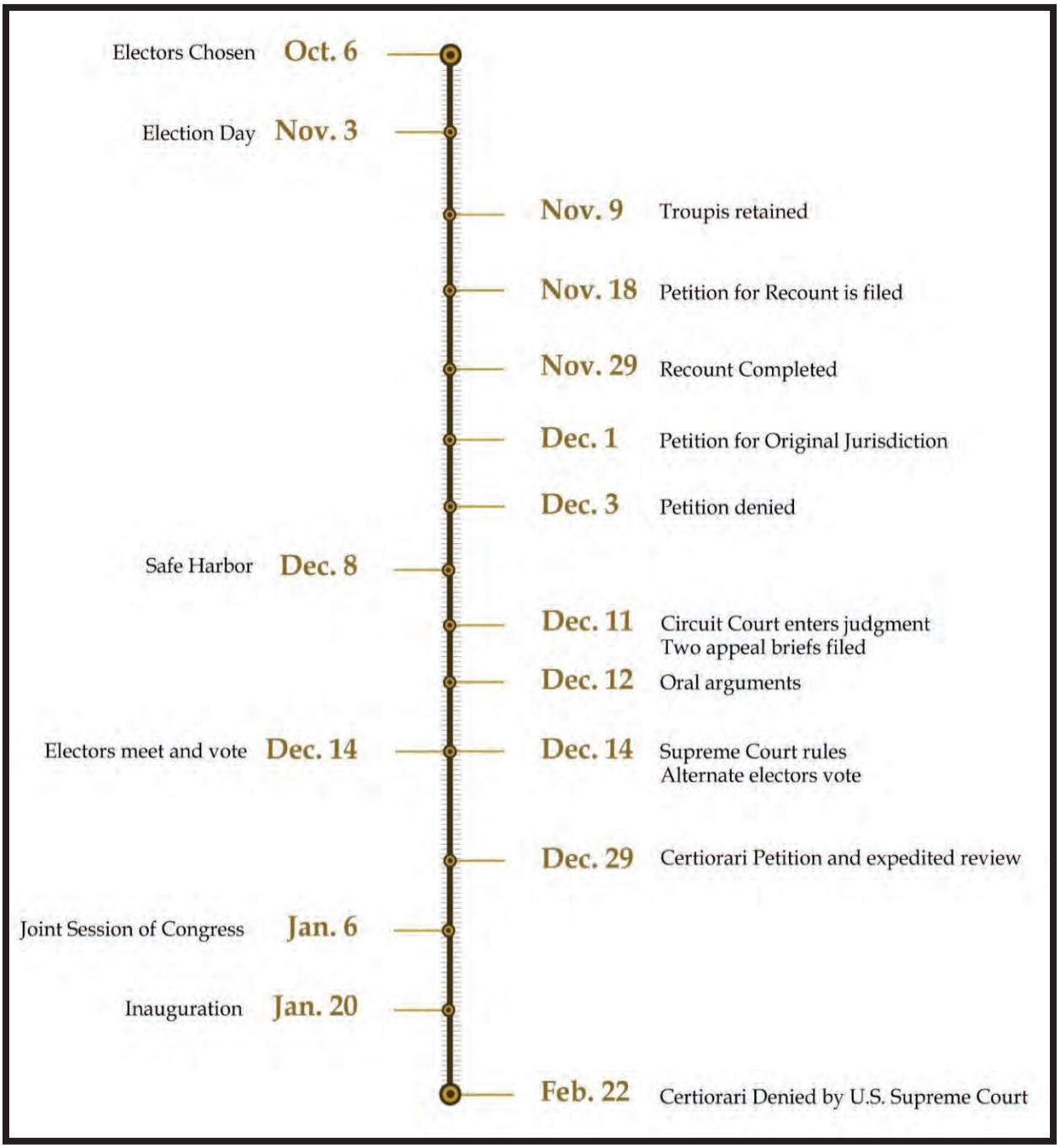
On December 29, just fifteen days after the Wisconsin Supreme Court had denied his claims, Troupis filed for *certiorari* before the U.S. Supreme Court.[78] On the same day, he asked the Court to expedite consideration—in the same manner that the *Bush v. Gore* case proceeded in 2000. Given the stakes, it would be quick briefing, a quick argument, and a quick decision. Unlike *Bush v. Gore*, however, the Supreme Court did not grant expedited review. Instead, it set a normal briefing schedule. Thus, as of January 6, the Wisconsin challenges to the recount were not final—the federal courts (*the* United State Supreme Court) was still considering the recount challenge. And as it was in 1876, Congress could have adjourned on January 6 to await the Supreme Court's decision.

To be clear, Troupis's suit had been timely filed and appealed through the Wisconsin court system. But the challenges had not been exhausted, because the U.S. Supreme Court—the final arbiter—had not ruled. As a legal matter, that meant up until the votes were counted on January 6 or in the days the followed, had Congress remained in session or had it undertaken an investigation as in 1876, there remained a possibility that the Supreme Court would rule that the Wisconsin electors' votes would go for Trump. Of course, we now know, that didn't happen. Instead, as Congress broke into

[78] Petition for Writ of Certiorari, *Trump v. Biden,* 141 S. Ct. 1387 (No. 20–882).

separate houses for the purpose of debating Arizona's electoral ballots, the riot that marred January 6 began.

That's a lot to digest and points can be muddled and lost. Here is a timeline of the relevant events that took place concerning the 2020 election with the relevant deadlines on the left, and the relevant actions on the right.



IV. In the riot's aftermath, every aspect of what happened is scrutinized by the January 6 committee and the WEC.

To begin, the January 6 Committee spent enormous resources determining what happened in the lead-up to the riot. This included extensive interviews with key members of the Trump legal team—from the White House Counsel and the general counsel for the election campaign to Giuliani and others. All of what follows is in the public record. These are all facts that were available to the government before it filed the complaint and its information that under *Franks/Mann* must be considered by the Court in determining whether the complaint states probable cause.

A. According to the January 6 Report, there's Team Normal and Team Giuliani—Troupis and his legitimate challenge lands in Team Normal.

Based on the January 6 Report, as the battleground states were called for Biden, the Trump campaign started to look at legal challenges. It filed for a recount in Wisconsin, but not in any other state. Wisconsin stands apart. That's critical to understanding this case. As Justin Clark (not to be mistaken with the former AAG Jeffrey Clark), a close advisor to President Trump, said in his deposition:

> This Wisconsin case that [Troupis] was working on was—I thought it was the real case. Like it was a case that had a remedy, that I believe we had the law right. Actually, like I said, it ended up going to the Wisconsin Supreme Court and lost on a four-three vote. It was a real election challenge with respect to absentee ballot handling in Dane and Milwaukee County.[79]

[79] Clark Dep.*supra* n.66 at 114.

Other states (to be very clear) went through challenges to the election, but those were not recounts as that term is statutorily understood and those challenges were not arguably within the individual state's procedures for challenging elections.[80]

While the Wisconsin effort may have had the only "real case," that didn't stop others from co-opting Chesebro's memos to Troupis. According to the January 6 report, the Trump campaign told the President that there was very little chance of success in all of these challenges, which would be necessary to overturn the election.[81] But instead of backing off, Trump sought new counsel and a different plan of attack. This other plan of attack involved (among others) Rudy Giuliani, Sidney Powell, and Jenna Ellis.[82] As the January 6 Committee found, there were two competing factions of lawyers in the 2020 post-election challenges by Trump—Team Normal and Team Giuliani.[83]

Team Giuliani read the memo that Chesebro had prepared about the deadlines, which was circulated among all of the lawyers working on the recount efforts.[84] That memo was followed up with one from December 6 and another on December 9, in which Chesebro outlined the statutory requirements that governed using the alternate slate of electors.[85] In those later two memos, Chesebro "wargamed" a plan reminiscent of the early days of the Republic and that was floated in the 1876 election: when the Vice President opens the envelopes (as demanded by the XII Amendment) he alone decides

[80] Lessig, *supra* at 55, 59.
[81] Committee, *supra* at 93.
[82] *Id.* at 99–102, 227.
[83] *Id.* at 17, 203, 208–09, 349–50.
[84] *Id.* at 41, 305–07, 343–45, 41; 150 n.220.
[85] Ex. B; *id.* at 305–07, 343–45

what electoral votes to count.[86] That, of course, conflicts with the Electoral Count Act and tradition, which places the decision in the hands of Congress to debate and vote.[87] But it was consistent with the views of some scholars, and it had support in the political machinations of the 1876 election. Indeed, Chief Justice Rehnquist made it clear that both Hayes and Tilden saw that as a legitimate possibility.[88]

When "wargaming" this point, Cheseboro stated the obvious: "I recognize that what I suggest is a bold, controversial strategy, and that there are many reasons why it might not end up being executed on January 6. But as long as it is one possible option, to preserve it as a possibility it is important that the Trump-Pence electors cast their electoral votes on December 14."[89] Again, advising a client about his legal options is what a lawyer is ethically bound to do.[90]

While Troupis continued to pursue his client's legitimate Wisconsin claims through the U.S. Supreme Court, Team Giuliani blanketed the country with claims of fraud.[91] Some were fantastic, and according to the Committee, those claims were investigated and rejected by the Department of Justice.[92] As this was going on and the allegations of fraud grew greater and greater and were being echoed as "Stop The Steal," alternate slates of electors met and cast their votes in six states.[93] The problem was that

[86] Ex. B; Committee, *supra* at 343–45.
[87] 3 U.S.C. § 15 (2018).
[88] Rehnquist, *supra* at 90.
[89] Ex B.at 114.
[90] Wis. SCR 20:1.2(a).
[91] Committee, *supra* at 237–55.
[92] *See id.* at 104–09, 237–254.
[93] *Id.* at 305–18.

those States' elections were (unlike Wisconsin) arguably final.[94] The procedures set by state law had been exhausted within the Act's so-called safe harbor provision, and were thus deemed presumptively unchallengeable.[95]

That's a clear and essential distinction central to this case. Troupis's recount efforts in Wisconsin were not made with allusions to rampant fraud.[96] Rather, his claims were straightforward: specific election laws had not been followed.[97] His claims were legally and factually well-established.[98] Indeed, three justices agreed with him on the facts and the law. The majority's disagreement didn't focus on the logic of his arguments, but the equities that accepting them would bring—disqualifying tens of thousands of votes.[99] Put differently, there was nothing in his claims about unsupported allegations of fraud; his arguments were legitimate and grounded on sound legal principles.

B. The January 6 Committee finds that Team Giuliani's efforts were unsupported.

While Team Normal was still fighting its good fight in Wisconsin, Team Giuliani was pounding its narrative of fraud in other states.[100] And in the later part of December, that wing of the Trump Campaign found (and hired) a former dean of Chapman Law School, Dr. John Eastman.[101] As Christmas approached and as Troupis was preparing to file for *certiorari* to the U.S. Supreme Court, Eastman wrote a memo outlining the various

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[94] Lessig, *supra* at 54, 59 (adding Georgia was arguably also not final).
[95] *Id.* at 55, 59.
[96] *Id.* at 59; *see also* Ex. C at 114.
[97] *Trump*, 2020 WI 91, ¶¶ 64–140.
[98] *See id.; see also* Ex. B at 114.
[99] *Trump,* 2020 WI 91, ¶ 20.
[100] Committee, *supra* at 105–10, 357–399.
[101] *Id.* at 357–399.

scenarios that could take place and secure Trump the Presidency.[102] There is no suggestion that as Troupis was drafting his cert petition, he ever participated in any discussions about Eastman's memo or even saw it. But this point must be clear: the Eastman memo was central to what happened on January 6.[103]

As the Committee described, Team Guiliani was "a coup in search of a legal theory" and Eastman's memo provided that theory.[104] After that memo, Team Guiliani put all its attention on pressuring Pence to exercise Eastman's theory.[105] This included marathon meetings between Eastman and Pence. During some of these meetings, lawyers from Team Normal tried to convince the Vice President that Eastman's view of the law was wrong.[106] The Vice President could not unilaterally decide which ballots to count—it was up to Congress to make that determination.[107] (For his part, Troupis was not consulted. After December 16, his role was limited to the hard work of filing a cert petition). Ultimately, Pence agreed with Team Normal: he would open all the envelopes and Congress could recess and debate which slate of electors to choose if there were any challenge to them.

The January 6 Committee's report draws a very clear line of demarcation between Team Normal and Team Giuliani. In it all, there are two points worth stressing. First, the Team Normal lawyers still had a job to do—they had a client with legitimate claims being

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[102] *Id.* at 360–61.
[103] *See* Subpoena Application.
[104] Committee, *supra* at 357.
[105] *Id.* at 360–64.
[106] *Id.* at 364–65; *see also id.* at 366–71.
[107] *Id.* at 365.

briefed before the United States Supreme Court. And they were duty bound to pursue those claims. Troupis, of course, did that in his pleadings—no one has ever alleged that a single pleading was frivolous. Second, Team Giuliani was separated from Team Normal. As Team Giuliani spread claims of fraud, Team Normal did not embrace them, or expound on them. And as the captain of Team Normal, Justin Clark, said in his deposition: "This Wisconsin case that [Troupis] was working on was—I thought it was the real case. Like it was a case that had a remedy, that I believe we had the law right."[108]

C. The Attorney General advises the Wisconsin Election Commission that the alternate slate of electors' meeting doesn't violate the law.

With the Supreme Court's denial of *certiorari* in February, Troupis's involvement with the recount was over. Yet Troupis was immediately attacked for having represented Trump's recount efforts. Law Forward also made complaints to the Wisconsin Election Commission, alleging that the alternate electors violated the law.[109] As to that complaint, the Commission solicited an opinion from the Wisconsin Department of Justice on the matter, and Attorney General (the same body now prosecuting Troupis) wrote a lengthy memo rejecting those complaints.[110] While the criminal complaint *briefly* alludes to this memo, it then states (incorrectly) that the memo didn't consider the crime of forgery.[111] It's important that the Court see that the Attorney General did consider the crime of forgery and how the memo agrees with everything that was sketched above.

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[108] Clark Dep, *supra* fn.66 at 114.
[109] *Sickel v. Hitt,* 2021 EL 2021-13.
[110] *See* Ex. A.
[111] *See* Affidavit ¶ 56.

First, it noted that Troupis openly and publicly forecasted that the alternate electors would meet by stating in his brief: "Following the recommended approach to situations involving court challenges in Presidential elections which are not resolved by the time the Presidential electors must cast their votes pursuant to Art. II, § 1, cl. 4, and 3 U.S.C. § 7 (this year, December 14), the Trump-Pence Campaign has requested its electors to sign and send to Washington on that date their votes, to ensure that their votes will count on January 6 if there is a later determination that they are the duly appointed electors for Wisconsin."[112]

Second, it noted: "In a social media post, Respondent[s] indicated that the Trump and Pence electoral college votes were '[j]ust keeping our legal options open.' The Republican Party of Wisconsin, via Respondent Hitt, stated: 'While President Trump's campaign continues to pursue legal options for Wisconsin, Republican electors met today in accordance with statutory guidelines to preserve our role in the electoral process with the final outcome still pending in the courts."[113]

Third, after outlining the relevant law, the Wisconsin DOJ found that nothing "prohibits or otherwise limits a party from meeting to cast electoral votes during a challenge to an election tabulation. [The statutes] say nothing about an alternative set of electors casting votes and do not expressly prohibit a slate of electors from casting votes to preserve their votes in case pending legal challenges prove successful."[114]

[112] *Id.* at 5.
[113] *Id.* at 5 (internal citations omitted).
[114] *Id.* at 7.

Fourth, it notes that "even assuming the Complainants were right that the Respondents had no duty to meet, it does not necessarily follow that meeting violated the law."[115] And in that same paragraph, it adds: "the Complainant's argument—that the Respondents were not electors—presumes the outcome of the state procedures. And as noted above, *Wisconsin law does not prohibit an alternative set of electors from meeting*."[116]

Fifth, it analogizes this situation to the 1960 Election in Hawaii and found that the critical question for having two slates of electors meet is whether there is an on-going dispute: "an election canvassing is not necessarily final while legal challenges are pending."[117] And—and this is an important *and*—it found that "[i]n the Wisconsin 2020 election, *there was no final court decision by December 14*."[118]

Sixth, and most importantly, the DOJ memo made the following finding, which seems directly on point to whether there was a conspiracy to commit forgery afoot—the very question this Court must answer. The memo answers that question using the word "concerted" rather than "conspiracy," but here's the critical finding that speaks directly to the crime of "forgery," which is at the heart of the criminal complaint:

> Finally, Complainants argue that the Respondents "met in a concerted effort to ensure that they would be mistaken, as a result of their deliberate ***forgery*** and fraud, for Wisconsin's legitimate Presidential Electors." ***The record does not support this allegation. Before and after the December 14 meeting, the Respondents publicly stated, including in court pleadings, that they were meeting to preserve legal options while litigation was pending.***"[119]

[115] *Id.*
[116] *Id.* at 8 (emphasis added).
[117] *Id.* at 9.
[118] *Id.* at 10 (emphasis added); *see also Trump v. Wis. Elections Comm'n,* 506 F.Supp.3d 629, 634–35 (E.D. Wis. 2020).
[119] Ex. A. at 10 (emphasis added).

The defense could not have made those points better.

V. The criminal complaint fails to set out probable cause that the crime of forgery was committed.

None of that information from the memo or that background on how electors work when there's an ongoing legal challenge to a Presidential election is laid out in the criminal complaint. Yet all of that information informs why Troupis did not conspire to utter a forged document and all of that information informs why the alternate electors ballot is not a forgery. Here is the legal minutiae informing both points and explaining why this complaint must be dismissed.

When a complaint fails to set forth essential facts that set out probable cause that a crime was committed, it is deemed legally insufficient and must be dismissed.[120] The review is not done in a hypertechnical sense, but through a common sense evaluation. [121] What's more, under *Mann* "the principles of *Franks* permit an attack on criminal complaints where there has been an omission of critical material where inclusion is necessary for an impartial judge to fairly determine probable cause."[122] That's all basic criminal procedure: does the criminal complaint set out probable cause that the alternate electors ballot is a forgery and should the omitted facts about the legality and need for the alternate electors meeting and casting their ballot have been included in the complaint? As established below, because the criminal complaint doesn't set out facts establishing the ballot was a forgery and because the criminal complaint omits the

[120] *State v. Haugen,* 52 Wis 2d 791, 191 N.W.2d 12 (1971); *State ex rel. Cullen v. Ceci*, 45 Wis.2d at 442-43, 173 N.W.2d at 175, *quoted with approval in State v. White*, 97 Wis.2d 193, 197, 295 N.W.2d 346, 348 (1980).
[121] *State ex rel. Evanow v. Seraphim*, 40 Wis.2d 223, 226, 161 N.W.2d 369, 370 (1968).
[122] *State v. Mann*, 123 Wis. 2d 375, 385-386

Attorney General's own finding that it was proper and necessary for the alternate electors to meet and vote on December 14, the complaint must be dismissed.

A. If roles were reversed, the alternate electors for Democrat candidates would have met and voted to ensure Al Gore's mistake was not repeated.

The first problem with the complaint is that it fails to grasp what the Attorney General's memo from two years earlier so well grasped: that in the case of a disputed election that isn't resolved by noon on December 14, electors from both sides must meet and vote to preserve the candidate's rights. The memo is undisputed and not subject to different interpretations. And the memo makes clear that while the Wisconsin Supreme Court had ruled at 10 AM that day, Trump still had time to (and did appeal to) the United States Supreme Court. Nothing was finally decided until the U.S. Supreme Court ruled—in other words, the legal challenge was on-going.

Nowhere in the affidavit does it mention that when there are on-going legal challenges to a Presidential election, that to preserve the electors' rights (in case of a reversal) the alternate slate of electors must meet and cast their ballot—it's malpractice not to do that. Nowhere does it mention that this is the proper and universally accepted manner of dealing with disputed elections—from 1960 to Justices Stevens's and Ginsberg's dissent that's the prescribed way of proceeding in the face of an on-going recount or challenge in the courts. And nowhere does it supply the evidence or *reasoning* that the Attorney General used to find that no crime was committed—not a single quote, let alone the one highlighted and boxed-off above, concluding that the record does *not*

support an allegation of a concerted effort of forgery and fraud related to the electors' ballots.

That history of Presidential electors and *how* they must operate in a contested election is nowhere to be found in the criminal complaint. Yet it's that history, which the Attorney General used to reject claims of forgery two years ago. Again, when it came to the allegation that the electors met in "a concerted effort to ensure that they would be mistaken, as a result of their deliberate ***forgery*** and fraud, for Wisconsin's legitimate Presidential Electors," the Attorney General said: "the record does not support this allegation."[123] These facts, known to the Department of Justice are nowhere to be found in the Criminal Compliant.[124] And yet when this Court looks at the omissions cited above—omissions that *Mann* demands this Court considers—and the Court considers them in their totality, there is not probable cause to proceed and the complaint must be dismissed.

B. The affidavit fails to grasp that the alternate electors' certificates are not a forgery.

The second problem with the complaint is it's theory of forgery and how it abandons the accepted elements of a forgery in arguing that the alternate elector's ballot is a forgery. "The forgery statutes are designed to safeguard confidence in the genuineness of documents relied upon in commercial and business activity."[125] Consistent with that, Blackstone's definition of forgery is: "the fraudulent making or alteration of a writing to the prejudice of another man's rights" and Coke's was similar:

[123] Ex. A at 10.
[124] *See State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).
[125] *Id.*

"to forge is metaphorically taken from the smith who beateth upon his anvil and forge what fashion or shape he will; the offence is called *crimen falsi* . . . this is properly taken where the act is done in the name of another person."[126] That is, the document has to "be a false writing or alteration of an instrument."[127] And important here, "the term 'falsely' as applied to making or altering a writing in order to make it a forgery does not refer to the contents or tenor of the writing or to the facts stated therein, *but implies that the paper or writing is not genuine, that in itself it is false or counterfeit*."[128] Thus, a "forgery cannot be committed by the genuine making of an instrument."[129]

That proper understanding of forgery is (not surprisingly) echoed in the leading case on forgery in Wisconsin: *Entringer.* There, the Court noted: "'[I]t is very doubtful, whatever writing appeared upon [the documents], they could be held to be the subject of … forgery so long as the writing did not misrepresent their origin."[130] The Court continued: "In this connection it is essential to distinguish between a false instrument and false statements in an instrument."[131] And that point found force (and support) in the leading treatises: "A false statement of fact in an instrument which is itself genuine . . . is not forgery."[132] Or as another Court has put it: "A forged memorandum is 'falsely made'; a memorandum that contains erroneous information is simply 'false.'"[133]

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[126] 23 AM. JUR. 2D § 2 (internal citation omitted).
[127] *Id.* § 6 (emphasis added).
[128] *Id.* § 7 (citing *People v. Bendit*, 43 P.901 (Cal. 1896)) (emphasis added).
[129] *Id.* (citing *United States v. Staats*, 49 U.S. 41 (1849)).
[130] *Entringer*, 2001 WI App ¶ 11 (quoting *First Am. State Bank* v. *Aetna Cas. & Surety, Co.* 25 Wis. 2d 190, 195–96 (1964)).
[131] *Id.* ¶ 13 (quoting ROLLINS M. PERKINS, PERKINS ON CRIMINAL LAW, ch. 4 § 8 (2d ed. 1969)).
[132] *Id.* (quoting *DeRose v. Colorado*, 171 P. 359, 360 (Colo. 1918)).
[133] *Moskal v. United States*, 498 U.S. 103, 119 (Scalia., J. dissenting).

Under Wisconsin law, as described by *Entringer*, "'it is very doubtful, whatever writing appeared upon [the documents], they could be held to be the subject of … forgery so long as the writing did not misrepresent their origin." [134] The court continued: "In this connection it is essential to distinguish between a false instrument and false statements in an instrument."[135] And the court cited the venerable *Perkins on Criminal Law,* where this point is explained and forgery is distinguished from other crimes: "A false statement of fact in an instrument which is itself genuine, by which another person is deceived and defrauded, is not forgery."[136] Put differently, "Forgery cannot be committed by the making of a genuine instrument, although the statements made therein are untrue."[137]

Here, the electors' ballot is not a forgery. It's precisely what it purports to be—the votes for the President of the United States by the electors who signed the ballot. The signatories all agree that's their name. It's their signatures. Everyone agrees it was executed on the date and time it says: noon at the Capitol on December 14. And there is no fabricated seal or marking making it something other than what it purports to be. In other words, the document as described in the criminal complaint is simply not a forgery.

In response to this argument made in the Motions to Quash before Judges Mitchel and White, the State has adopted two creative theories of forgery to compensate for the document being authentic. First, before Judge Mitchell it argued that the ballot should have had a "proviso" on it—an asterisk—that it would only be used if the U.S. Supreme

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[134] *Entringer,* 2001 WI App ¶ 11–15 (citing *First Am. State Bank v. Aetna Cas. & Surety Co.*, 25 Wis. 2d 190, 130 N.W.2d 824 (1964), and *Moskal*, 498 U.S. at 129 and (quoting *Aetna Cas. & Surety, Co.* 25 Wis. 2d at 195–96).
[135] *Id.* ¶ 13 (quoting ROLLINS M. PERKINS, PERKINS ON CRIMINAL LAW, ch. 4 § 8 (2d ed. 1969)).
[136] *Id.* (quoting *DeRose v. People*, 64 Colo. 332, 171 P. 359, 360 (Colo. 1918)).
[137] *Id.,* quoting 37 C.J.S. § 10 at 74 (1997)

Court reversed.[138] And then before Judge White it added a second theory: that *whole* ballot is a forgery because it states that it's the votes of the electors for the President of the United States and once the Governor issued the Certificate of Ascertainment on November 30, 2020 that statement was false and thus the document was falsely made and if it was falsely made it was a forgery.[139]

To the first point, the State's position that there should be a proviso directly on the ballot ignores the fact that the alternate elector ballots from 1876 and 1960 didn't have any proviso—there is no asterisk on them. And they're all attached as Exhibt D in case the Court wants to look. Besides ignoring that history, the State did not cite a *single* case where a court (any court) had held that the lack of asterisk made a ballot (or any document) a forgery. And that's because the lack of a proviso speaks to whether a document was qualified not whether it was counterfeit.

There is just no basis to argue that the lack of a proviso—that this is only operative if the Supreme Court reverses—somehow makes a genuine document into a forgery. It doesn't. Wisconsin law doesn't demand it. And there had never been an asterisk placed on an alternate-elector ballot until some lawyers in Pennsylvania thought to add it in 2020. To put a fine point on it, the law doesn't make lawyers into criminals simply because they failed to add a CYA. And, for that matter, why would the proviso have to be on the actual ballot? Would a cover letter to Congress with the ballot have been okay—explaining that this ballot is only operative if the U.S. Supreme Court reverses? It would,

[138] *In the Matter of Subpoena Served on James R. Troupis,* 24CV2432 docket 13 at 21.
[139] *In the Matter of Subpoena Served on Lawforwad-Wisconsin,* 24GF8370 at 15, 17-18, 25

after all, accomplish the same thing. If a cover letter does the job, why not a footnote in a Supreme Court of Wisconsin brief or, for that matter, a press release? All of those steps do the same thing: alert the public that this document is meant to preserve the 1,610,184 votes cast for Trump/Pence in case a higher court rules in their favor. Put differently, the asterisk would have been superfluous.

As to the State's second point that the alternate electors could not claim that they were the electors because once the Certificate of Ascertainment was issued on November 30 that statement wasn't true—it was false. Defying history, the State argues the tautology: the statement that they were the duly elected electors was false and if it's false then the document is falsely made and if it's falsely made then it's a forgery. But in the context of forgery, "falsely made" relates to whether the instrument's origin is false—i.e., counterfeit, not whether it contains false information. Again, *Entringer*, is clear: "'[I]t is very doubtful, whatever writing appeared upon [the documents], they could be held to be the subject of … forgery so long as the writing did not misrepresent their origin."[140] The Court continued: "In this connection it is essential to distinguish between a false instrument and false statements in an instrument."[141] And that point found force (and support) in the leading treatises: "A false statement of fact in an instrument which is itself genuine . . . *is not forgery*."[142]

[140] *Entringer*, 2001 WI App ¶ 11 (quoting *First Am. State Bank* v. *Aetna Cas. & Surety, Co.* 25 Wis. 2d 190, 195–96 (1964)).
[141] *Id.* ¶ 13.
[142] *Id.* (quoting *DeRose v. Colorado*, 171 P. 359, 360 (Colo. 1918)).

That's the foundational point that the State fails to grapple with. It simply argues: the contents of the document are not genuine—*i.e.*, Trump didn't win. Got it. We agree. He didn't win. But that wasn't clear until the Supreme Court denied cert and the case was resolved in *January*. Again, true or not, the genuineness of *any* statement does not matter because a forgery only pertains to the genuineness of the execution.[143] In the context of forgery, "falsely made" doesn't relate to the statements in the document but whether the instrument's origin is false—*i.e.*, counterfeit. Consistent with those cases and principles, the ballot described in the criminal complaint is genuine and not a forgery.

C. The criminal complaint on its four-corners and especially considering the Attorney General's memo fails to set out probable cause of a crime.

The majority of this brief stakes out the position on the law and that's because the parties don't really dispute the facts. The question is: does the criminal complaint set out probable cause that the alternate electors ballot was a forgery? And the analysis is the familiar: look at the four corners, does it spell out that this document constitutes a forgery under Wisconsin law.[144] As made plain above, it doesn't. And so it must be dismissed—after all, "[a] criminal complaint must meet probable cause requirements to confer personal jurisdiction.[145]

Looking beyond the criminal complaint and reading (as *Mann* allows) the Attorney General's memo into the criminal complaint, the fact that the ballot is not a forgery is made even clearer.[146] Free from political pressure, that memo makes it clear

[143] R.13 at 17–18.
[144] *State v. Haugen*, 52 Wis. 2d 791, 793, 191 N.W.2d 12, 13 (1971)
[145] *State v. White*, 97 Wis. 2d 193, 197, 295 N.W.2d 346, 347 (1980).
[146] *State v. Mann*, 123 Wis. 2d 375, 391-392

that the alternate electors had to meet and vote to preserve Trump's rights as the legal challenges to the Wisconsin election continued. It makes clear that this was an accepted strategy—one rooted in precedent. And it makes clear what this motion has tried to make plain: when it comes to the allegation that Troupis and others "met in a concerted effort to ensure that they would be mistaken, *as a result of their deliberate forgery and fraud, for Wisconsin's legitimate Presidential Electors*. The record does not support this allegation." And thus, standing on the four-corners or with the Attorney General's memo, the criminal complaint must be dismissed.

VI. Conclusion

This Court has stepped into the beginning of round three in the fight over whether Troupis violated any law in representing the President during the 2020 recount. In each round, the State's position has adopted a different position further and further away from the facts that the Attorney General embraced just two years ago: Troupis and the electors did nothing illegal. Instead, his sin was representing a deeply unpopular client in prosecuting that client's legitimate claims about the Wisconsin election—claims that *three* Justices of the Wisconsin Supreme Court agreed with Troupis on. Troupis, as an attorney, did what he was called to do in representing his client—protect and preserve his client's legitimate claims. In doing so, he broke no election law (none is alleged or cited), he did nothing in secret, and he did nothing that wouldn't have been done by Biden's attorneys if the tables were turned. And importantly, he did nothing (and there's nothing alleged in the criminal complaint) that allows those actions to constitute the crime of forgery. As such, the complaint must be dismissed.

Dated this 2nd day of December 2024.

Respectfully submitted,

Electronically signed by Joseph A. Bugni
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Wisconsin Elections Commission

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March 15, 2022

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Re: Complaint filed with Wisconsin Elections Commission
Case No: 2021 EL 2021-13: Sickel v. Hitt, et al.

Exhibit A

EXHIBIT A

Dear parties and counsel:

This communication is to inform you that the above-referenced complaint was dismissed by the Wisconsin Elections Commission ("Commission") at its March 9, 2022, meeting.

The Commission passed the following motion in closed session:

> For the reasons set forth in the Department of Justice's February 9, 2022 memo, the Commission concludes that Complaint EL 2021-13 does not raise a reasonable suspicion that the respondents violated Wisconsin election law.

The motion passed unanimously with a vote of 6-0. All Commissioners participated in the decision.

The motion incorporates a February 9, 2022, memorandum. A copy of that memorandum is included with this letter. Prior to being incorporated into the motion, the memorandum was privileged and accordingly indicates "ATTORNEY CLIENT PRIVILEGED CONFIDENTIAL." Privilege was waived for this document, and this document only, by incorporation in the memorandum. Disclosing this memorandum is not a waiver of any other privilege.

Sincerely,

/s/ S. Mike Murphy

Mike Murphy, Outside Counsel, Wisconsin Elections Commission

WISCONSIN ELECTIONS COMMISSION

cc: Commission Members
Meagan Wolfe, Commission Administrator

Exhibit A

ATTORNEY CLIENT PRIVILEGED
CONFIDENTIAL

Date: February 9, 2022

To: Wisconsin Elections Commission

Subject: 2021 EL 21-13: *Sickel v. Hitt, et al.*
Memorandum on Complaint under Wis. Stat. § 7.75 and 5.10

This matter involves an allegation that ten presidential elector nominees violated certain Wisconsin election laws when they met on December 14, 2020, to vote as presidential electors for Donald Trump and Michael Pence. That vote occurred after a statement of canvas certified election results in favor of Joseph Biden and Kamala Harris, after a recount was completed, but while court challenges to the election result were pending. Complainants argue that the December 14, 2020, meeting was an unlawful attempt to undermine the election, and the Respondents argue that the meeting was necessary to avoid missing a statutory deadline while legal challenges were pending. Based upon the text of the relevant statutes, and in light of the facts, historical precedent, and related federal authorities, this memorandum concludes that the Complaint does not raise a reasonable suspicion that Respondents violated Wisconsin election law.

Complainants also argue that eight of the Respondents forfeited any defenses by not filing separate responses to the Complaint. Under the Commission's procedures for deciding complaints of this nature, a respondent does not default by declining to individually respond.

I. Nature of the proceeding.

This action is commenced under Wis. Stat. § 5.05. In a section 5.05 complaint, the Commission makes one of three initial findings. It may (1) find by a preponderance of the evidence that a complaint is frivolous, (2) fail to find that there is reasonable suspicion of a violation and dismiss the complaint, or

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(3) find that there is reasonable suspicion of a violation. Wis. Stat. §§ 5.05(2m)(c)2.am, 5.05(2m)(c)(4).

If the Commission finds that there is reasonable suspicion of a violation, it then has two options for how to proceed. First, it may authorize the commencement of an investigation. Wis. Stat. § 5.05(2m)(c)(4) ("if the commission believes that there is reasonable suspicion . . . the commission may by resolution authorize the commencement of an investigation.") At the end of such investigation, the Commission would determine whether probable cause exists to believe that a violation has occurred, whether to conduct further investigation, or whether to terminate the investigation due to lack of sufficient evidence to indicate a violation has occurred. Wis. Stat. § 5.05(2m)(c)(5). Additionally, "[a]t the conclusion of its investigation, the commission shall, in preliminary written findings of fact and conclusions based thereon, make a determination of whether or not probable cause exists to believe that a violation. . . has occurred or is occurring. Wis. Stat. § 5.05(2m)(c)(9).

Second, the Commission may make a finding of probable cause without an investigation. Wis. Stat. § 5.05(2m)(c)(6). The Commission could then authorize the administrator to file a civil complaint against the alleged violator or refer the matter to a district attorney. Wis. Stat. §§ 5.05(2m)(c)(6), (11).

No court decision has interpreted "reasonable suspicion" in the context of section 5.05. In other contexts, courts have indicated that reasonable suspicion exists when there is a particularized and objective basis to suspect there has been a violation of the law. This can be drawn using common sense inferences from everyday life, as well as the person's experiences. Reasonable suspicion is more than a hunch, but less than probable cause. *Kansas v. Glover*, 140 S.Ct. 1183 (2020); *see also State v. Newer*, 2007 WI App 236; *State v. Post*, 2007 WI 60, ¶ 18, 301 Wis. 2d 1, 11, 733 N.W.2d 634 ("this court has consistently maintained that the determination of reasonable suspicion is based upon the totality of the circumstances"); *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84, 88 (Wis. Ct. App. 1997) ("[t]he question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present. . ."); *State v. Patton*, 2006 WI App 235, ¶ 9, 297 Wis. 2d 415, 297 Wis.2d 415 (in the traffic stop context reasonable suspicion is a particularized and objective basis for suspecting the person stopped of criminal activity.")

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Probable cause is a higher standard than reasonable suspicion. *State v. Houghton*, 2015 WI 79, ¶ 21, 364 Wis. 2d 234; *Patton*, 297 Wis.2d 415 ¶ 9. Probable cause is defined in Wis. Admin. Code § EL 20.02(4) to mean "the facts and reasonable inferences that together are sufficient to justify a reasonable, prudent person, acting with caution, to believe that the matter asserted is probably true."

II. Scope of the Complaint.

The Complaint alleges that the respondents violated Wisconsin Statutes sections 7.75 and 5.10 and "[b]y this sworn Complaint [requests] that the Wisconsin Elections Commission investigate the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl. ¶ 32.) It further requests that the Commission "initiate an investigation pursuant to Wis. Stat. § 5.05(2m)(c)4. of the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl.[1] ¶ 33; Compl. Form[2] p. 1)

The complaint documents state that the Complainants have separately requested that the District Attorney for Milwaukee County investigate apparent criminal violations including crimes affecting the administration of government and forgery. (Compl. ¶ 35.) Complainants note that such investigation is "distinct from the civil actions [Complainants] request the Wisconsin Elections Commission to undertake." (Compl. ¶ 36.)

Consistent with the Complaint, this memorandum addresses the facts and arguments that the parties have raised regarding Wis. Stats. §§ 5.10 and 7.75. This memorandum does not address other potential violations of law, such as election fraud under Wis. Stat. § 12.13 or matters that the Complainants have raised to other authorities or discussed in the media, such as forgery under Wis. Stat. § 943.38, false swearing under Wis. Stat. § 946.32, falsely assuming to act as a public officer under Wis. Stat. § 946.69, simulating legal process under Wis. Stat. § 946.68, misconduct in public office under Wis. Stat. § 946.12, conspiracy, aiding, or attempt to commit such acts, or any other matter outside the scope of the complaint.

III. Nature of the Complaint.

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[1] "Compl." refers to the document titled "Sworn Complaint against fraudulent electors under Wis. Stat. § 5.05."

[2] "Compl. Form" refers to the document titled "State of Wisconsin Elections Commission Complaint Form."

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On February 15, 2021, Complainant Paul Sickel filed a Complaint against Andrew Hitt, Robert Spindell, Kathy Kiernan, Bill Feehan, Carol Brunner, Scott Grabins, Darryl Carlson, Pam Travis, Kelly Ruh, and Mary Buestrin (the "Respondents"). The Complaint and supporting briefs allege that the Respondents violated Wis. Stat. §§ 5.05 and 7.75.

The Complaint involves events following the November 3, 2020, presidential election. On November 19, 2020, the Commission issued an order for recount.[3] On November 30, 2020, the Chairperson of the Commission executed a statement of canvass certifying that electors for candidates Biden and Harris received the greatest number of votes. (Compl. Ex. D.) On the same day, Governor Evers executed a certificate of ascertainment, certifying that result. (Compl. Ex. E.)

Simultaneously with the canvassing, recount, and certification, several election-related lawsuits were pending in both state and federal court, including legal challenges to the results. *E.g.*, *Donald J. Trump, et al. v. Joseph R. Biden, et al.*, Milwaukee Cty. Case No. 20-CV-7092; *Donald J. Trump, et al. v. The Wisconsin Elections Commission, et al.*, E.D. Wis. 2:20-CV-01785-BHL. These lawsuits were not finally concluded until February and March 2021, when the U.S. Supreme Court denied certiorari review in both cases. As of December 14, 2020, the recount results had been upheld but appeals, or appeal opportunities, remained. (*See* timeline in Sur-Reply, p. 2–3.) In the state court case, on December 14, 2020, the Wisconsin Supreme Court rejected a Trump campaign challenge. The campaign then filed a petition for writ of certiorari with the United States Supreme Court on December 29, 2020, which was denied on February 22, 2021. In the federal case, the district court dismissed the Trump complaint on December 12, 2020, an appeal was filed on December 14, 2020, and the court of appeals affirmed the dismissal on December 24, 2020. The campaign then filed a petition for writ of certiorari with the United States Supreme Court on December 30, 2020, which was denied on March 8, 2021.

On December 11, 2020, the Trump plaintiffs in the state-court recount case filed a petition with the Wisconsin Supreme Court that addressed the meeting and electoral college votes in a footnote:

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[3] Available at *Order for Recount,* Wisocnsin Elections Commission, https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/WEC%20-%20Final%20Recount%20Order_0.pdf (last accessed November 3, 2021.)

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> Following the recommended approach to situations involving court challenges in Presidential elections which are not resolved by the time the Presidential electors must cast their votes pursuant to Art. II, § 1, cl. 4, and 3 U.S.C. § 7 (this year, December 14), the Trump-Pence Campaign has requested its electors to sign and send to Washington on that date their votes, to ensure that their votes will count on January 6 if there is a later determination that they are the duly appointed electors for Wisconsin.

(Goehre Aff. Ex. A: 8 n.3.)

On December 14, 2021, the Respondents met in the state Capitol building as electors for candidates Trump and Pence. (Compl. Ex. G.) Each executed a "Certificate of the Votes of the 2020 Electors From Wisconsin" indicating presidential votes for Trump and Pence. (Compl. Ex. G.) Respondents Hitt and Ruh sent the document to the President of the United States Senate, the Wisconsin Secretary of State, the Archivist of the United States, and the Chief Judge for the Western District of Wisconsin. (Compl. Ex. G.) The transmittal letter has only one signature, which appears to be of Andrew Hitt. (Compl. Ex. G.)

In a social media post, Respondent Feehan indicated that the Trump and Pence electoral college votes were "[j]ust keeping our legal options open." (Compl. Ex. H.) The Republican Party of Wisconsin, via Respondent Hitt, stated: "While President Trump's campaign continues to pursue legal options for Wisconsin, Republican electors met today in accordance with statutory guidelines to preserve our role in the electoral process with the final outcome still pending in the courts." (Compl. Ex. I.)

The Complaint alleges that "[t]he only reasonable inference that can be drawn from these documents [indicating electoral votes for Trump and Pence] is that the fraudulent electors created and delivered these documents for the purpose, and with the intent, that they be received as valid documentation for the purpose of inducing the United States Congress to credit the wrong candidates with having earned Wisconsin's ten electoral votes." (Compl. ¶ 24.) This, the Complainants contend, constituted fraud and an intent to undermine the presidential election. (Compl. ¶ 26.)

The Respondents deny this allegation, and state that they "acted with the sole intent of preserving standing and ensuring that if any of the pending legal

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cases were successful, the courts did not claim it was too late for the appropriate remedy to be awarded." (Resp. 2–3.)

IV. Issue 1: Whether the Respondents' December 14, 2020, meeting or execution of documents including a "Certificate of Nomination Presidential Electors Meeting: October 6, 2020" violated Wis. Stat. §§ 5.10 or 7.75.

The Complainants request that the Commission "initiate an investigation pursuant to Wis. Stat. § 5.05(2m)(c)4. of the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl. ¶ 33.)

a. Laws at issue:

Sections 5.10 and 7.75 state:

5.10 Presidential electors

Although the names of the 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. Under chs. 5 to 12, 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.

7.75 Presidential electors meeting

(1) The electors for president and vice president shall meet at the state capitol following the presidential election at 12:00 noon the first Monday after the 2nd Wednesday in December. If there is a vacancy in the office of an elector due to death, refusal to act, failure to attend or other cause, the electors present shall immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy. When all electors are present, or the vacancies filled, they shall perform their required duties under the constitution and laws of the United States.

(2) 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), except that at least one of the persons for whom the electors vote may not be an inhabitant of this state. A presidential elector is not required to vote for a candidate who is deceased at the time of the meeting.

Wis. Stat. §§ 5.10, 7.75. These statutes describe that Wisconsin voters select presidential electors by voting for the presidential candidates, and that electors shall meet on a certain date and cast electoral college votes for their candidates. In 2020, December 14 was the deadline for presidential electors to meet. After that date, the Section 7.75 deadline would have been missed.

b. Analysis:

The issue in this complaint is whether the Trump and Pence electors violated these statutes when they met, voted, and documented their votes, after the canvassing, recount, and certification were complete, but before court challenges to the recount outcome were complete.

Applying sections 5.10 and 7.75 begins with the plain language of the statutes. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Nothing in either statute prohibits or otherwise limits a party from meeting to cast electoral votes during a challenge to an election tabulation. Instead, section 5.10 merely says that while 'the presidential candidates' names appear on the ballot, votes for those candidates are votes for their electors. And section 7.75 merely lays out the procedure for presidential electors to cast their votes. They say nothing about an alternative set of electors casting votes and do not expressly prohibit a slate of electors form casting votes to preserve their votes in case pending legal challenges prove successful.

Petitioners contend that "Because the Republican candidates for the offices of President and Vice President of the United States did not win Wisconsin's statewide November 2020 election, the Republican Party's designees were not elected as Wisconsin's Presidential Electors. Accordingly, they had no legal duty to meet on December 14, 2020." (Compl. ¶ 17.) The argument, in essence, is that the Respondents were not "electors" to begin with, so they had no duty to meet and vote.

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As an initial matter, even assuming the Complainants were right that the Respondents had no *duty* to meet, it does not necessarily follow that meeting violated the law. The remainder of this argument has some facial appeal because the U.S. Constitution describes presidential electors as a product of the state election process. U.S. Const. art. II, § 1, cl. 2 ("Presidential Electors Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.") In other words, individuals nominated by a party to be electors are not actually electors until the state process decides who won the election. However, the Complainant's argument—that the Respondents were not electors—presumes the outcome of the state procedures. And as noted above, Wisconsin law does not prohibit an alternative set of electors from meeting.

Respondents point out that the election outcome was still under judicial review, so their votes were a necessary protection against missing the deadline should the challenges to the November 30 canvassing have succeeded. Court pleadings, a news release, and social media indicate that the Respondents' intent was to avoid missing the December 14, 2020, deadline while court challenges were pending. Respondents point out that if they did not meet that day, they risked having no electoral votes that could possibly be counted if their legal challenges were successful and Trump were declared the successful candidate by legal process. Respondents' concern is reasonable; courts have found that candidates' delays can bar legal rights. *See Trump v. Biden*, 2020 WI 91, ¶¶ 13–22, 394 Wis. 2d 629, 951 N.W.2d 568 (barring claims where "[t]he Campaign offers no justification for this delay; it is patently unreasonable"); *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877 ("petitioners delayed in seeking relief in a situation with very short deadlines and that under the circumstances, including the fact that the 2020 fall general election has essentially begun, it is too late to grant petitioners any form of relief"); *Joseph R. Santeler Complaint against Kanye West*, Case No. EL 20-30[4] (nomination papers rejected when submitted shortly after 5:00 p.m. deadline)

Complainants reply that if the intent was to preserve the deadline, the letter transmitting the record of Trump electoral votes could have stated expressly that the votes were contingent on the outcome of pending litigation,

[4] Meeting minutes available at *Notice of open and Closed Meeting*, Wisconsin Elections Commission, https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/August%2020%20Open%20Session%20Packet.pdf (last accessed November 3, 2021.)

Exhibit A

which is what occurred in other states such as Pennsylvania and New Mexico. (Compl. Reply p. 2–3.) That is a valid criticism of the transmittal letter signed by Respondent Hitt. (Compl. Ex. G.) The letter would have been more accurate, and may have prevented confusion or concern, if it had expressly stated that the votes were being transmitted only to meet the statutory deadline in case they became operative after the lawsuits were resolved. That would have been better practice, and may have prevented this proceeding, but it likely not a violation of election statutes.

In addition to Pennsylvania and New Mexico in 2020, there is additional historical precedent for protective presidential elector votes. In the 1960 presidential election between Nixon and Kennedy, Hawaii's canvassing showed Nixon a winner by 141 votes and the governor issued a certificate of election to the Republican slate. The results were challenged in a lawsuit brought by Democratic voters, and a recount was commenced. The recount was not completed by the date that presential electors voted, December 19, and both the Democrats and Republicans met and cast their votes for their respective candidates. The recount concluded on December 28, and two days later the court declared that Kennedy had won the election by 115 votes. Ultimately, three certificates of electoral college votes and the court's judgment was submitted to Congress, and the votes were counted for Kennedy in light of the December 30 court ruling. (Goehre Aff. Ex. C–F.)

The Respondents actions here were similar to those of the Democratic presidential electors in Hawaii. They cast their votes, even though the canvass did not reflect a Trump victory, in order to preserve the opportunity for the votes to be counted if a court challenge found that Trump received the majority of votes. Petitioners point out a difference that the recount was still underway in Hawaii when the Democratic electors met, but in Hawaii it was the court decision that ultimately ended the dispute. As a federal court recognized in the 2020 election litigation, an election canvassing is not necessarily final while legal challenges are pending:

> 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. . . . 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.

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> § 6. The certificate of "determination" notifies the U.S. Congress of the state decision when Congress convenes . . . to count the electoral votes.

Trump v. Wisconsin Elections Comm'n, No. 20-CV-1785-BHL, 2020 WL 7318940, at *9 (E.D. Wis. Dec. 12, 2020). In the Wisconsin 2020 election, there was no final court decision by December 14.

Although the Commission's decision is confined to a state law inquiry, it is notable that federal law and Supreme Court commentary contemplate the possibility of multiple slates of electors. Federal statutes include procedures for Congress to follow "in such case of more than one return or paper purporting to be a return from a State" (3 U.S.C. § 15), and deadlines for state courts to resolve election-related disputes. 3 U.S.C. § 5. In a case involving the 2000 presidential election, the Supreme Court noted, in a dissent, that these rules "do not prohibit a State from counting what the majority concedes to 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." *Bush v. Gore*, 531 U.S. 98, 127, 121 S. Ct. 525 (2000) (J. Stevens, dissenting). These authorities acknowledge the possibility that state procedures may result in multiple electoral votes being transmitted to the federal legislature.

Finally, Complainants argue that the Respondents "met in a concerted effort to ensure that they would be mistaken, as a result of their deliberate forgery and fraud, for Wisconsin's legitimate Presidential Electors." (Compl. 25.) The record does not support this allegation. Before and after the December 14 meeting, the Respondents publicly stated, including in court pleadings, that they were meeting to preserve legal options while litigation was pending. (Compl. Ex. H–I; Goehre Aff. Ex. A: 8.)

Under the plain text of Wis. Stats. §§ 5.10 and 7.75, and in light of the facts, historical precedent, and related federal authorities, the Complaint does not raise a reasonable suspicion that Wis. Stats. §§ 5.10 or 7.75 were violated.

V. Issue 2: Whether Respondents Robert Spindell, Kathy Kiernan, Carol Brunner, Scott Grabins, Darryl Carlson, Pam Travis, Kelly Ruh, and Mary Buestrin defaulted this action.

The Commission received two responses to the Complaint; the Response to Complaint filed by counsel for Andrew Hitt and an email from Bill Feehan

Exhibit A

stating that he joins the Hitt response. Complainants argue that all Respondents other than Hitt and Feehan have forfeited their opportunities to present facts and arguments or elected to not dispute the allegations. (Compl. Reply p. 1; Sur-Response p. 2.)

The statutes governing this complaint do not require a response and contain no provision for a default. The procedures in Wis. Stat. § 5.05 permit a respondent "to demonstrate to the commission . . that the commission should take no action against the person on the basis of the complaint," but there is no response requirement. Wis. Stat. § 5.05(2m)(c)2.a. There is no indication that a respondent defaults by not individually responding to a complaint. The Respondents other than Hitt and Feehan therefore did not default in this action by not submitting individual responses.

CONCLUSION

The allegations in the Complaint, and the supporting arguments and evidence, do not indicate that the Respondents violated Wis. Stats. §§ 5.10 or 7.75. Additionally, no Respondent is in default of those allegations.

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Privileged and Confidential

MEMORANDUM

TO: Judge James R. Troupis
FROM: Kenneth Chesebro
DATE: November 18, 2020
RE: **The Real Deadline for Settling a State's Electoral Votes**

You asked for a written summary of the legal analysis underlying my suggestion during our conference call that, in any judicial review of the canvassing/recounting in Wisconsin, we should emphasize that the presidential election timetable affords ample time for judicial proceedings, even if initial errors in the recount require a remand for further recounting.

Summary

There is a very strong argument, supported by historical precedent (in particular, the 1960 Kennedy-Nixon contest), that the real deadline for a finding by the Wisconsin courts (or, possibly, by its Legislature) in favor of the President and Vice President is not **December 8** (the "safe harbor" deadline under the Electoral Count Act), nor even **December 14** (the date on which electors must vote in their respective States), but **January 6** (the date the Senate and House meet for the counting of electoral votes).

Assuming the electors pledged to Trump and Pence end up meeting at the Wisconsin Capitol on December 14 to cast their votes, and then send their votes to the President of the Senate in time to be opened on January 6, a court decision (or, perhaps, a state legislative determination) rendered after December 14 in favor of the Trump-Pence slate of electors should be considered timely. On this view, the only real deadline during the next month is the December 14 deadline to cast electoral votes – so that any state judicial proceedings which extend past that date, working toward resolution of who has won Wisconsin's electoral votes, are entirely compatible with federal law provided that they are completed by January 6.

1. The January 6 Hard Deadline

The date which has "ultimate significance" under federal law, as Justice Ginsburg aptly noted, is "the sixth day of January," the date set by 3 U.S.C. § 15 on which the Senate and House determine "the validity of electoral votes." Bush v. Gore, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting). That is the first date on which any electoral votes are actually counted. On that date, the Twelfth Amendment directs, "[t]he President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

Exhibit B

2. What Must Happen on December 14

The other date of particular federal significance is the date that the ten Wisconsin electors pledged, respectively, to Trump-Pence and Biden-Harris, must meet in Madison to actually cast their electoral votes, if those votes are later to be eligible to be counted in Congress on January 6. Art. II, § 1, cl. 4, gives Congress the power to specify the date "on which [the electors] shall give their Votes, which Day shall be the same throughout the United States." Exercising that power, Congress has mandated that the electors "shall meet and give their votes on the first Monday after the second Wednesday in December" – this year, December 14 – "at such place in each State as the legislature of such State shall direct." 3 U.S.C. § 7.

In accord with § 7, the Wisconsin Legislature has directed that "[t]he electors for president and vice president shall meet at the state capitol" at noon on December 14. Wis. Stat. § 7.75(1).

Prudence dictates that the ten electors pledged to Trump and Pence meet and cast their votes on December 14 (unless by then the race has been conceded). It is highly uncertain, given the language in Art. II requiring that all electors throughout the United States vote on the same day, whether Congress could validly count electoral votes cast on a later date.[1]

It may seem odd that the electors pledged to Trump and Pence might meet and cast their votes on December 14 even if, at that juncture, the Trump-Pence ticket is behind in the vote count, and no certificate of election has been issued in favor of Trump and Pence. However, a fair reading of the federal statutes suggests that this is a reasonable course of action.

The basic responsibility of the electors is to "make and sign six certificates of the votes given by them" for President and Vice President, 3 U.S.C. § 9; "seal up the certificates so made by them," id., § 10; and forward them by registered mail to the President of the Senate and to other officials. Id., § 11. These actions are carried out without any involvement by state officials.

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[1] In 1857, Congress spent two days debating whether it would count electoral votes from Wisconsin which were cast one day late due to a blizzard in Madison. The result of the presidential election did not turn on the question, and it was left unresolved. Cong. Globe, 34th Cong., 3rd Sess., 644-60, 662-68 (1857).

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It also seems clear that if, before the electors cast their votes, the candidates for whom they are voting have been issued certificates of election, it is the duty of the governor to deliver the certificates to the electors "on or before the day" they are required to meet, id. at § 6, and the electors are then to attach the certificates to the electoral votes they transmit to the President of the Senate. Id., § 9.

But nothing in federal law requires States to resolve controversies over electoral votes prior to the meeting of the electors. Indeed, there is no set deadline for a State to transmit to Congress a certification of which slate of electors has been determined to be the valid one. The duty of a state governor is merely to transmit the certification "as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment . . . ." Id., § 6.

3. Hawaii's Electoral Votes in the 1960 Kennedy-Nixon Contest

The reasonableness of the above statutory analysis, and the prudence of the Trump-Pence electors meeting in Madison on December 14 to cast their votes and transmit them to Congress, regardless of the status of the electoral contest in Wisconsin at that juncture, is illustrated by how the Democratic Party handled the uncertainty over Hawaii's electoral votes in the 1960 presidential election between John F. Kennedy and Richard M. Nixon.[2]

Remarkably, Hawaii's electoral votes were counted in favor of Kennedy and Johnson when the votes were opened in Congress on January 6 even though:

(1) they did not arrive in Congress until that very morning;

(2) on the date the Electoral College met, December 19, 1960, Nixon's electors had in hand a certificate from the Hawaii governor certifying that Nixon had won the state (by 141 votes);

(3) the Kennedy electors nonetheless also met and voted on that day, to preserve the possibility that their votes would eventually be certified as the valid ones;

(4) on the same day, a Hawaii court ordered a recount of the entire state;

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[2] The following summary is adapted from Michael L. Rosin & Jason Harrow, "How to Decide a Very Close Election for Presidential Electors: Part 2," Take Care Blog, Oct. 23, 2020 (https://takecareblog.com/blog/how-to-decide-a-very-close-election-for- presidential-electors-part-2) (visited Nov. 17, 2020).

(5) only on December 28 did the Hawaii courts issue a final decision finding that Kennedy had, in fact, won the state (by 105 votes); and

(6) because the Kennedy electors had taken care to vote on the proper day, and the governor signed an amended certificate of election which was then rushed to Washington, in time to be counted in Congress, the electoral votes were awarded to Kennedy (although, it should be noted, the votes were counted only after Vice President Nixon, in his capacity as President of the Senate, suggested without objection that the votes be counted in favor of Kennedy "[i]n order not to delay the further count of the electoral vote," and "without the intent of establishing a precedent").

The last-minute counting of the Hawaii electoral votes in favor of Kennedy in 1960 buttresses the conclusion of constitutional law scholar Laurence Tribe that, absent some indication by a State to the contrary, the only real deadline for a state to complete its recount of a presidential election is "before Congress starts to count the votes on January 6."[3]

4. Nothing in Wisconsin Law Is Inconsistent With the Trump-Pence Electors Casting Their Votes on December 14, as the Kennedy-Johnson Electors Did in 1960

The Biden camp might well seek to create a sense of urgency, and try to artificially truncate the post-election process of recounting and adjudication, by claiming that Wisconsin has an important interest in having all controversies regarding the election resolved by December 8, in order to gain the benefit of the "safe harbor" provision of the Electoral Count Act, which purportedly mandates that a final result reached in a State by the safe-harbor date "shall be conclusive" when votes are counted in Congress. 3 U.S.C. § 5.[4] The U.S. Supreme Court's view that

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[3] 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).

[4] One must use the caveat "purportedly," because there are substantial reasons to doubt that the Electoral Count Act, enacted by the 50th Congress in 1877, can have any binding effect on the 117th Congress which will convene on January 3, regarding its authority and obligation to count electoral votes as it sees fit. In particular, there is a very strong argument that the Senate which convenes in January has the inherent power to set whatever rules it wishes for deciding challenges to the electoral votes cast in this election. To view the Electoral Count Act as tying the Senate's hands, unless amended, would mean that the Senate would need the permission of both the House and the President (absent a veto-proof

Florida had a strong interest in qualifying under this safe-harbor provision was a key factor in its decision to halt the ongoing Florida recount in the 2000 presidential election. Bush v. Gore, 531 U.S. 98, 110-11 (2000) (per curiam).

However, nowhere has the Wisconsin Legislature placed any priority on ensuring that post-election procedures in presidential contests are completed by the safe-harbor date. Far from mandating that certificates of election must be issued by this date, the Legislature has, with regard to all elections, affirmatively banned certificates of election from being issued unless and until all timely brought recounts, and subsequent judicial proceedings, have been exhausted:

> When a valid petition for recount is filed . . . the governor or commission may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appeal until the appeal is decided.

Wis. Stat. § 7.70(5)(a).[5]

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voting margin) to change the rules governing its deliberations, a result which cannot be squared with Art. I, § 5, providing that "[e]ach House may determine the Rules of its Proceedings . . . ." As Professor Tribe has noted, "[t]here is no constitutionally prescribed method by which one Congress may require a future Congress to interpret or discharge a constitutional responsibility in any particular way." Tribe, supra note 3, at 267 n.388 (citing Laurence H. Tribe, 1 American Constitutional Law, § 2-3, at 125-26 n.1 (3d ed. 2000)). See also Chris Land & David Schultz, On the Unenforceability of the Electoral Count Act, 13 Rutgers J. of Law & Pub. Pol'y 340, 368-77, 385-87 (2016); Vasan Kesavan, Is the Electoral Count Act Unconstitutional?, 80 N. Car. L. Rev. 1654, 1729-59, 1779-93 (2002).

[5] To be sure, in accord with ordinary practice, under which the winner of the electoral votes in Wisconsin will typically be known well in advance of the date when electors cast their votes, the Legislature has provided that in presidential elections, the govenor "shall prepare a certificate showing the determination of the results of the canvass and the names of the persons elected," and send six duplicate originals to one of the electors on or before the date electoral votes are cast. Wis. Stat. § 7.70(b). Obviously this ministerial duty exists only when a certificate of election has already issued under § 7.70(a), after all post-election recounts and related legal proceedings have reached finality. There is nothing in § 7.70(b) that purports to affect the timetable for resolving post-election proceedings.

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Conclusion

The position taken by the Trump-Pence campaign regarding the outside deadline for resolving post-election challenges could conceivably end up proving critical to the result of this election. If so, it would not be the first time: the failure of the Gore team in 2000 to focus on the real deadline early enough was a clear mistake. Thus, the issue of the real deadline should be examined carefully in the near future, so that the campaign presents a clear and united front concerning it.

Reflecting on the failure of the Gore challenge to Bush's victory in Florida, Ron Klain observed in a 2002 essay that "time was our enemy" – to an extent that "cannot be underestimated."[6] Klain's early mistake was to overlook the possibility that January 6 might be the real deadline for resolving the matter of who had won Florida's electoral votes. As Klain recounted, when he went on CNN shortly after the election (on November 10), he "rather offhandedly noted that there was plenty of time for a full and fair counting of the people's votes, given that the electoral votes were not scheduled to be counted until December 18 . . . ."[7]

The timetable for Gore to win the recount was further truncated by Gore attorney David Boies who, "during the first argument to the Florida Supreme Court," on November 20, "had said that the election would be over on December 12, because of an obscure provision of federal law."[8] Journalist and lawyer David Kaplan vividly describes Boies's fateful decision in answering the justices' question regarding the outside deadline for resolving the controversy over the recount:[9]

> The deadline [Boies] repeatedly cited was December 12, six days before the Electoral College met and twenty-two days hence – a veritable eternity in the day-to-day, minute-to-minute struggle. This was the date mandated by the Electoral Count Act by which states had to get their acts together, in order to prevent Congress from possibly rejecting a slate of presidential electors. December 12 was a so-called

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[6] Ronald A. Klain & Jeremy B. Bash, "The Labor of Sisyphus: The Gore Recount Perspective," in Overtime!: The Election 2000 Thriller (2002) (Larry B. Sabato, ed.), at 161.

[7] Id.

[8] Jeffrey Toobin, Too Close to Call: The Third-Six-Day Battle to Decide the 2000 Election 195 (2001).

[9] David A. Kaplan, The Accidental President: How 413 Lawyers, 9 Supreme Court Justices, and 5,963,110 (Give or Take a Few) Floridians Landed George W. Bush in the White House 142-43 (2001).

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safe harbor, but it was not a requirement ordained by either the U.S. Constitution, the Florida constitution, or even Congress itself. It was only in the nature of a benefit offered, with no penalty other than the absence of the benefit – sort of a no-risk offer. Any electoral slate determined thereafter simply would not be immune from congressional examination in a close election. That might seem like a big deal in theory, but did anyone really believe that in practice the electoral votes of one of the most populous states in the Union might go uncounted altogether? The distinction between a safe harbor as a freebie or absolute requirement was vital, but Boies didn't make it. Boies figured: Why should he? If his client got the time to count, Gore would overtake Bush and hand him the witch's hourglass

Wells pressed Boies on whether he agreed that December 12 represented the outer bounds.

"I do, Your Honor." He said this despite there being no state law or executive pronouncement to that effect.

Boies's concession of the date as a constitutional line over which no recount could cross would come back to haunt him in two weeks at the U.S. Supreme Court. It walled him in from ever offering such dates as December 18 (when the Electoral College convened), January 6 (when Congress met in joint session to count the electoral votes), or even January 20 (Inauguration Day). Indeed, January 20 was the only date mandated by the federal Constitution (in the Twentieth Amendment) – the other dates were mere statutory creations, which could be changed.

But to the extent the justices were going to come up with a new timetable, thinking about December 12 was critical. Any certification of the election – whether it included all, some, or none of the results from manual recounts – had to happen in time for the contest phase of Florida law to play out. A contest lawsuit needed time for trial and appeals. That had to be completed by December 12, according to Boies's answer.

If Boies had instead taken the position that January 6 was the real deadline for resolving the contest over Florida's electoral vote, citing the Hawaii 1960 example, Gore might ultimately have prevailed. So the issue of what is the real deadline is an issue that warrants close examination.

K.C.

Exhibit B

Privileged and Confidential

M E M O R A N D U M

TO: James R. Troupis
FROM: Kenneth Chesebro
DATE: December 6, 2020
RE: **Important That All Trump-Pence Electors Vote on December 14**

This follows up on my November 18 memo (copy here) advocating that unless the President and Vice President plan to concede the race if they fail to reach 270 electoral votes by December 14, the Trump-Pence electors all should meet in their respective States, and cast their votes and send them to Washington, so that the votes will be physically present at the joint session of Congress on January 6.

This memo briefly covers three points: (1) importance of all the electors in all six contested States voting; (2) messaging about this being a routine measure; and (3) logistics.

1. The Trump-Pence electors in all six contested States must vote

I'd be happy to follow up on the subject with a separate memo, if the national legal strategists are interested, but I've mulled over how January might play out, and it seems feasible that the Trump campaign can prevent Biden from amassing 270 electoral votes on January 6, and force the Members of Congress, the media, and the American people to focus on the substantive evidence of illegal election and counting activities in the six contested States, provided three things happen:

(a) All the Trump-Pence electors meet and vote, in all six contested States, and send in the certificates containing their votes, in compliance with federal and state statutes, on December 14;

(b) There is pending, on January 6, in each of the six States, at least one lawsuit, in either federal or state court, which might plausibly, if allowed to proceed to completion, lead to either Trump winning the State or at least Biden being denied the State (of course, ideally by then Trump will have been awarded one or more of the States); and

(c) On January 6, in a solemn and constitutionally defensible manner, consistent with clear indications that this what the Framers of the Constitution intended and expected, and consistent with precedent from the first 70 years of our nation's history, Vice President Pence, presiding over the joint session, takes the position that it is his constitutional power and duty, alone, as President of the Senate, to both open and count the votes, and that anything in the Electoral Count Act to the contrary is unconstitutional.

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I'm not necessarily advising this course of action, and the Vice President need not make a decision on how to proceed until January 6, and obviously there are many factors that will come to bear on how he proceeds, assuming the race has not been conceded before January 6. My point here is that it is important that the alternate slates of electors meet and vote on December 14 if we are to create a scenario under which Biden can be prevented from reaching 270 electoral votes, even if Trump has not managed by then to obtain court decisions (or state legislative resolutions) invalidating enough results to push Biden below 270.

Again, I'd be happy to elaborate further on the January 6 scenario I have in mind, but provided the three conditions above are met, unless I am missing something, I believe that what can be achieved on January 6 is not simply to keep Biden below 270 electoral votes. It seems feasible that the vote count can be conducted so that at no point will Trump be behind in the electoral vote count unless and until Biden can obtain a favorable decision from the Supreme Court upholding the Electoral Count Act as constitutional, or otherwise recognizing the power of Congress (and not the President of the Senate) to count the votes.

Specifically – but only if all six States are still contested, and all six slates of Trump-Pence electors had voted on December 14 – I think the count could be managed so that Biden would have to seek Supreme Court review either when he is behind 12-0 in the electoral count or, at latest, when he is behind 232-227.

Even if, in the end, the Supreme Court would likely end up ruling that the power to count the votes (in the sense of resolving controversies concerning them) does not lie with the President of the Senate, but instead lies with Congress (either voting jointly, or in separate Houses), letting matters play out this way would guarantee that public attention would be riveted on the evidence of electoral abuses by the Democrats, and would also buy the Trump campaign more time to win litigation that would deprive Biden of electoral votes and/or add to Trump's column.

I recognize that what I suggest is a bold, controversial strategy, and that there are many reasons why it might not end up being executed on January 6. But as long as it is one possible option, to preserve it as a possibility it is important that the Trump-Pence electors cast their electoral votes on December 14.

2. Messaging about the December 14 vote as routine

If the Trump campaign ends up deciding to have all of its electors vote on December 14, even in States in which Trump has not been declared the winner, presumably word of this will leak out prior to December 14. So perhaps before then there should be messaging that presents this as a routine measure that is necessary to ensure that in the event the courts (or state legislatures) were to later conclude

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that Trump actually won the state, the correct electoral slate can be counted in Congress in January – just as the Democrats did in Hawaii in 1960, which ended up with Hawaii's electoral votes being awarded to Kennedy, even though the litigation was not resolved until after the electors voted (see my Nov. 18 memorandum).

Two points might be made to support this as being a routine, sensible measure. First, our key adversary in Wisconsin, the Wisconsin Elections Commission (WEC), has recognized that there is plenty of time for litigation to play out, and no need to rush unduly, because the real deadline is January 6. See pages 6-10 of its Wisconsin Supreme Court brief, here.

Similarily, Justice Ginsburg noted that the date which has "ultimate significance" under federal law is "the sixth day of January," the date set by 3 U.S.C. § 15 on which the Senate and House determine "the validity of electoral votes." Bush v. Gore, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting) (opinion here).

Professor Tribe, a key Biden supporter and fervent Trump critic (e.g., here, here, and here), has likewise noted 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." 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) (copy here).

Further, respected voices in the minority community are recently on record that January 6 is the important date. Consider, for example, this article in Roll Call on October 26 (emphasis added):

> Some people believe the GOP's reluctance to support efforts in the battleground states of Michigan and Pennsylvania to begin processing mail-in votes before Election Day is tied to the fact that they have Democratic governors and Republican-controlled legislatures. If disputes over mail-in votes are dragging on in court when it comes time for the Electoral College to meet on Dec. 14, it's possible legislators could put up their own slates.
>
> Those disputes would land in the lap of Congress, and don't expect objections to come only from Republicans.
>
> Sherrilyn Ifill, president and director of the NAACP Legal Defense and Education Fund, noted during a webinar hosted by the Aspen Institute on Oct. 2 that just as the Black Caucus objected to the Florida vote in 2001, the same could happen in January if voters are intimidated from casting ballots or election officials are stopped by

> armed groups or court orders from counting absentee or provisional ballots.
>
> "We are a nonpartisan organization, but we believe it's critical that every vote is counted," she said. "And so I would just draw your attention to the fact that **we really have to take this all the way to Jan. 6**, and that potential statutory challenge may be received quite differently in 2021 than it was received in 2001."

Second, prominent liberal figures urged, just before election day, that given that post-election litigation might drag on for some time, each campaign should have its slate of electors vote on December 14.

Consider this essay, published on CNN.com by Van Jones and Larry Lessig on Nov. 4, when they thought Trump might be ahead in the count in Pennsylvania after election day, and that Democrats then would have to contest the State. Jones and Lessig wanted to make clear in advance that Democrats would have until January 6 to pull out a win (having learned Gore's painful lesson from 2000 that you need to give yourself as much time as possible to come from behind). After considering the key insight that can be gleaned from the 1960 Hawaii electoral count, they advised (emphasis added):

> That insight shows what should happen this year on December 14, 2020, when the electors are to meet to cast their ballots. **On that day**, assuming the final count of the popular votes has not yet been certified, **both slates** of Pennsylvania presidential electors should meet in Harrisburg. **Both slates should cast their votes** by ballot. And Pennsylvania Gov. Tom Wolf should await the final resolution of the popular vote count before he certifies which slate should represent the state. **So long as that certification happens before January 6, there is nothing that should stop it from being counted by Congress**.

Given such prior statements by these and other prominent liberal figures, it would be the height of hypocrisy for Democrats to resist January 6 as the real deadline, or to suggest that Trump and Pence would be doing anything particularly controversial in asking the electors pledged to them to please assemble in their respective States and cast their votes, and transmit them to Washington, on December 14, so that they might be counted in Congress if their slates are later declared the valid ones, by a court and/or state legislature.

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3. Logistics for casting/transmitting electoral votes on December 14

The federal-law requirements for the December 14 electors' meeting are set out in 3 U.S.C. §§ 6-11 (copy here).

The state-law requirements are set out in Wis. Stats. § 7.75 (here).

Obviously, there are party leaders and/or officials in each State who are familiar with the relevant details who would deal with the logistics, most of whom have handled such details in past elections. But here is a brief summary, in chronological order, of the requirements, which I set out to make clear that the electors in the contested States should be able to take the essential steps needed to validly cast and transmit their votes without any involvement by the governor or any other state official.

The electors here function, in effect, as agents of the federal government, under powers delegated to them by the federal Constitution and statutes (assuming that they end up being recognized as the validly appointed electors, following final judicial and/or state legislative action).

- Under federal law, the ten Trump-Pence electors must all meet, together, on December 14, "at such place in each State as the legislature of such State shall direct." 3 U.S.C. § 7.

- Under Wisconsin law, they "shall meet at the state capitol," i.e., in the Capitol Building, "at 12:00 noon." Wis. Stat. § 7.75(1).

- There is no requirement that they meet in public. It might be preferable for them to meet in private, to thwart the ability of protesters to disrupt the event – witness, via this video, what happened when the Trump-Pence electors met in public in 2016, even though the Trump-Pence victory in Wisconsin had not been contested. Even if held in private, perhaps print and even TV journalists would be invited to attend to cover the event.

- Preferably all ten electors who were on the ballot would be in attendance. But if some are unwilling (due to intimidation) or unable to make it, it is sufficient that three electors who were on the ballot make it, provided that other party stalwarts (not constitutionally disqualified from serving) are available to step in. Wis. Stat. § 7.75(1) ("if there is a vacancy in the office of an elector due to death, refusal to act, failure to attend or other cause, the electors present shall immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy.").

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● The ten electors would then all vote for Trump for President, and Pence for Vice President, separately. 3 U.S.C. § 8; Wis. Stat. § 7.75(2).

● The electors would then prepare six identical sets of papers – "certificates" – listing under separate headings their votes, indicating that each of them has voted for Trump for President, and Pence for Vice President. Apparently each page is signed by each elector. 3 U.S.C. § 9.

● The only thing ordinarily contemplated by Sect. 9 that the Trump-Pence electors would not be able to do (unless Trump wins by December 14) is staple to each of their certificates the certificate of ascertainment that the governor is directed to give the winning electors pursuant to 3 U.S.C. § 6. But, as the Hawaii 1960 example shows, this is hardly fatal; proof that the Trump-Pence electors are the validly appointed ones can be furnished to Congress before it meets on January 6.

● Next, the electors would place each certificate in a separate envelope, seal up the envelopes, and indicate on the outside of the envelopes that they contain the votes of the State of Wisconsin for President and Vice President. 3 U.S.C. § 10.

● Finally, the electors would transmit the six envelopes containing identical originals of their votes as follows:

–1 to the President of the Senate, by registered mail, on the same day ("forthwith").

–2 to Wisconsin's Secretary of State (apparently by hand), one to be held in reserve for the President of the Senate, and the other to be preserved as a public record.

–2 to the National Archives, one to be held in reserve for the President of the Senate, and the other to be preserved as a public record, also by registered mail ("[o]n the day thereafter").

–1 to the U.S. District Court for the Western District of Wisconsin (apparently by hand).

* * *

Given the possible upside of having the Trump-Pence electors meet to vote on December 14, it seems advisable for the campaign to seriously consider this course of action and, if adopted, to carefully plan related messaging.

K.C.

Exhibit B

MEMORANDUM

TO: James R. Troupis
FROM: Kenneth Chesebro
DATE: December 9, 2020
RE: **Statutory Requirements for December 14 Electoral Votes**

Here is a summary of the requirements under federal law, and under the law of the six States in controversy, concerning what is required for presidential electors to validly cast and transmit their votes. Obviously, there are party leaders and/or officials in each State who are familiar with the relevant details who would deal with the logistics, most of whom have handled such details in past elections. This memo merely supplies a general overview.

It appears that even though none of the Trump-Pence electors are currently certified as having been elected by the voters of their State, most of the electors (with the possible exception of the Nevada electors) will be able to take the essential steps needed to validly cast and transmit their votes, so that the votes might be eligible to be counted if later recognized (by a court, the state legislature, or Congress) as the valid ones that actually count in the presidential election. (On why this could work, see here and here.) And, they can do so without any involvement by the governor or any other state official (except, in some States, where access to the Capitol Building is or might be needed, or where the Governor must approve a substitute elector or, in Nevada, where the Secretary of State is involved).

It is important that the Trump-Pence Campaign focus carefully on these details, as soon as possible, if the aim is to ensure that all 79 electoral votes are properly cast and transmitted – each electoral vote being potentially important if the election ultimately extends to, and perhaps past, January 6 in Congress. The National Archives has a very helpful checklist, here.

I. FEDERAL LAW

The federal-law requirements for the December 14 electors' meeting are set out in 3 U.S.C. §§ 6-11 (copy here).

- Under federal law, the Trump-Pence electors must all meet, together, on December 14, "at such place in each State as the legislature of such State shall direct." 3 U.S.C. § 7.

- In most States there is no requirement that they meet in public. It might be preferable for them to meet in private, if possible, to thwart the ability of protesters to disrupt the event. Witness, via this video, what happened when the Trump-Pence electors met in public in Wisconsin in 2016, even though the Trump-Pence victory had not been contested. Even if held in private, perhaps print and even TV journalists would be invited to attend to cover the event.

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● Preferably all electors who were on the ballot in the particular State would be in attendance. But if some are unwilling (due to intimidation) or unable to make it, at least four of the States permit the electors who do attend to fill the empty slots with alternates. However, it is vital that any party stalwarts who are on hand to fill in if necessary be constitutionally eligible to serve – i.e., per Art. II, § 1, cl. 2, not a federal official or federal employee (not even having reserve status in the military).

● The electors would then all vote for Trump for President, and Pence for Vice President, separately. 3 U.S.C. § 8.

● The electors would then prepare and sign six identical sets of papers – "certificates" – listing under separate headings their votes, indicating that each of them has voted for Trump for President, and Pence for Vice President. 3 U.S.C. § 9. (For examples, see here the 2016 certificate signed in Wisconsin by its ten electors; images of the certificates submitted in 2016 are archived here).

● The only thing ordinarily contemplated by § 9 that the Trump-Pence electors would not be able to do is include with their certificates the certificate of ascertainment that the governor is directed to give the winning electors pursuant to 3 U.S.C. § 6. But, as the Hawaii 1960 example shows (see here and here), this is hardly fatal; proof that the Trump-Pence electors are the validly appointed ones can be furnished to Congress before it meets on January 6.

● Next, the electors would place each certificate in a separate envelope, seal up the envelopes, and indicate on the outside of the envelopes that they contain the votes of the State for President and Vice President. 3 U.S.C. § 10.

● Finally, the electors would transmit the six envelopes containing identical originals of their votes as follows:

–1 to the President of the Senate, by registered mail, on the same day ("forthwith").

–2 to the Secretary of State of the State, one to be held in reserve for the President of the Senate, and the other to be preserved as a public record.

–2 to the National Archives, one to be held in reserve for the President of the Senate, and the other to be preserved as a public record, also by registered mail ("[o]n the day thereafter").

–1 to the federal district court where the electors meet.

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II. STATE LAW

A. Arizona: 11 electors

The most straightforward State is Arizona, whose statutory provision regarding presidential elections lists no additional requirements beyond the federal-law requirements set out above. **Ariz. Rev. Stats. § 16-212** (here).

Assuming it is confirmed that there are no additional requirements (check carefully; perhaps there are regulations, for example, issued by the Secretary of State), the Trump-Pence electors presumably could meet and cast their votes anywhere in Arizona, anytime on December 14.

One concern: if one or more electors are absent from the meeting, **is there a procedure under Arizona law for filling vacancies?** The other five States make provision for that contingency. In the absence of any guidance, the electors present should simply vote to fill any vacancy.

B. Georgia: 16 electors

Georgia has two statutory provisions:

Ga. Code Ann. § 21-2-11 (here) requires that the electors "assemble at the seat of government of this state at 12:00 Noon" on December 14. But what does "seat of government" mean? See here. At minimum, they must meet somewhere in Atlanta – must they meet in the Capitol Building?

Ga. Code Ann. § 21-2-12 (here) supplies a mechanism for replacing one or more of the 16 electors if someone dies or fails to attend. In that event, the electors in attendance "shall proceed to choose by voice vote a person of the same political party . . . to fill the vacancy . . . ."

However, there's a wrinkle. Unlike in other States, where that choice is automatically effective, in Georgia a choice must be ratified: "immediately after such choice the name of the person so chosen shall be transmitted by the presiding officer of the college to the Governor, who shall immediately cause notice of his or her election in writing to be given to such person."

Could the Governor, in the current situation, refuse to ratify the choice, on the ground that this slate of electors is not the one the voters elected on Nov. 3 (according to the official canvass)? Given this statutory provision, **it seems imperative that every effort be made to secure the participation of all 16 electors, and to avoid making a substitution if at all possible**.

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C. Michigan: 16 electors

The relevant provisions of Michigan law are **Mich. Comp. Laws §§ 168.41 & 168.47** (here).

Michigan is much more specific about the location in which electors must meet, which could be a bit awkward.

Under § 168.47, the electors "shall convene in the senate chamber at the capitol of the state at 2 p.m., eastern standard time . . . ." However, there is no requirement that they convene on the senate floor where, presumably, the Biden-Harris electors will convene. Presumably they could convene in the senate gallery.

Replacement of any absent elector is much easier than in Georgia: the electors who show up "shall proceed to fill such vacancy by ballot, by a plurality of votes."

However, the qualifications for such replacement are more stringent than the federal requirements: under § 168.41, a Michigan elector must have been a U.S. citizen for at least 10 years, and a resident of Michigan for at least a year prior to Nov. 3.

D. Nevada: 6 electors

Nevada is an extremely problematic State, because it requires the meeting of the electors to be overseen by the Secretary of State, who is only supposed to permit electoral votes for the winner of the popular vote in Nevada. **Nev. Rev. Stats. §§ 298.065, 298.075** (see here).

These provisions are designed to thwart the "faithless elector." They make no sense when applied to this situation, in which we are trying to have an alternate slate vote, in hopes that its legitimacy will be validated before January 6. Therefore, perhaps arguably the Nevada electors could simply meet and cast their votes, without the involvement of the Secretary of State. After all if, as in the Hawaii example in 1960, an alternate slate can meet and vote without the Governor's certificate in hand, and the votes can later be deemed valid, then why should it matter that the alternate slate in Arizona, when voting on December 14, did not have the Secretary of State overseeing their voting?

It bears notice that in any scenario in which Trump and Pence might have a possibility of winning Nevada's electoral votes, the failure to have the Secretary of State oversee the vote would hardly seem like a significant hurdle. If there were a vote in Congress to take Nevada away from Biden and Harris, presumably along with it would come a vote to overlook this procedural detail.

Exhibit B

E. Pennsylvania: 20 electors

The statutory provisions in Pennsylvania parallel those in Georgia.

25 Pa. Stats. § 3192 (here) states that the electors "shall assemble at the seat of government of this Commonwealth, at 12 o'clock noon of" December 14. Again, does "seat of government" mean somewhere in Harrisburg, or does it instead mean the Capitol Building, specifically?

25 Pa. Stats. § 3194 (here) supplies a mechanism for replacing one or more of the 20 electors if someone dies or fails to attend. In that event, the electors in attendance "shall proceed to choose viva voce a person of the same political party . . . to fill the vacancy . . . ."

However, just as in Georgia, there is a wrinkle: the choice must be ratified: "immediately after such choice the name of the person so chosen shall be transmitted by the presiding officer of the college to the Governor, who shall forthwith cause notice in writing to be given to such person of his election . . . ." Given this statutory provision, **it seems imperative that every effort be made to secure the participation of all 20 electors, and to avoid making a substitution if at all possible**.

F. Wisconsin: 10 electors

Under Wisconsin law, the electors "shall meet at the state capitol," which presumably means the Capitol Building ("state capitol" being a term more specific than "seat of government"), "at 12:00 noon." Wis. Stat. § 7.75(1) (here).

Any absent elector may readily be replaced. Id. ("if there is a vacancy in the office of an elector due to death, refusal to act, failure to attend or other cause, the electors present shall immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy.").

* * *

In conclusion, it appears that voting by an alternate slate of electors is unproblematic in Arizona and Wisconsin; slightly problematic in Michigan (requiring access to the senate chamber); somewhat dicey in Georgia and Pennsylvania in the event that one or more electors don't attend (require gubernatorial ratification of alternates); and very problematic in Nevada (given the role accorded to the Secretary of State).

K.C.

Exhibit B

From: **Wolfe, Meagan - ELECTIONS** Meagan.Wolfe@wisconsin.gov
Subject: FW: Trump electors to meet on Monday
Date: December 13, 2020 at 5:27 PM
To: EL DL Elections Comm ELECdlelectionscommision@wisconsin.gov
Cc: EL DL Administration ELECDLAdministration@wisconsin.gov

Commissioners-

Please see below from DOJ.

Meagan

From: Kilpatrick, Steven C. <kilpatricksc@doj.state.wi.us>
Sent: Sunday, December 13, 2020 5:16 PM
To: Wolfe, Meagan - ELECTIONS <Meagan.Wolfe@wisconsin.gov>; Witecha, James - ELECTIONS <james.witecha@wisconsin.gov>
Subject: Trump electors to meet on Monday

In the rush of the last 48 hours, we neglected to pass along these three items filed by Trump on Friday. One is a letter stating that the defendants do not oppose bypassing the court of appeal, the Trump bypass petition itself, and the other is a Trump supreme court brief. The brief was not permitted and the bypass petition, obviously, worked – since the supreme court took the case.

Interestingly, in the bypass petition – see FN3 – there is statement that the Trump electors are going to meet and vote on Monday, Dec. 14, in the event the supreme court case comes out in their favor after Dec. 14 – to ensure that there is a slate of elector for Trump on Jan. 6.

I do not know whether the Trump electors plan to meet and vote at the Capitol building tomorrow.

Steve

Steven C. Kilpatrick | Assistant Attorney General
State of Wisconsin Department of Justice
Division of Legal Services / Special Litigation & Appeals Unit
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Phone: (608) 266-1792

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Exhibit C

State of Hawaii

WE, the undersigned, Electors of President and Vice-President of the United States of America, for the respective terms beginning on the twentieth day of January, in the year of our Lord one thousand nine hundred and sixty-one, being electors duly and legally appointed and qualified by and for the State of Hawaii, as appears by the annexed list of electors, made, certified, and delivered to us by the Executive of the State, having met and convened at the Capitol, in Honolulu, in said State, in pursuance of the Constitution and laws of the United States, and in the manner provided by the laws of the State of Hawaii, on the first Monday after the second Wednesday, being the nineteenth day of December, in the year of our Lord one thousand nine hundred and sixty.

Do Hereby Certify, That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for such President and then for such Vice-President, by distinct ballots.

And We Further Certify, That the following are two distinct lists; one, of the votes for President, and the other, of the votes for Vice-President, so cast as aforesaid:

List of all Persons Voted for as President, with the Number of Votes for Each.

NAME OF PERSON VOTED FOR	NUMBER OF VOTES
RICHARD M. NIXON OF CALIFORNIA	THREE

List of all Persons Voted for as Vice-President, with the Number of Votes for Each.

NAME OF PERSON VOTED FOR	NUMBER OF VOTES
HENRY CABOT LODGE OF MASSACHUSETTS	THREE

In Witness Whereof, we have hereunto set our hands.

Done at the Capitol, in the City of Honolulu, and State of Hawaii, on the first Monday after the second Wednesday, being the nineteenth day of December, in the year of our Lord one thousand nine hundred and sixty.

Electors

Exhibit D

State of Florida, } ss.
LEON COUNTY.

The Executive of the State of Florida having caused three lists of the Electors of this State, for President and Vice-President of the United States, to be made and certified and delivered to us—one of which said lists is hereto annexed—from which lists it appears that we, the undersigned, were duly appointed on the seventh day of November, A. D. eighteen hundred and seventy-six, Electors of President and Vice-President for and in behalf of the said State of Florida:

Now, Therefore, be it Remembered, and we do hereby certify and make known, that we, the undersigned, ROBERT BULLOCK, ROBERT B. HILTON, WILKINSON CALL and JAMES E. YONGE, Electors as aforesaid, did, on the first Wednesday of December, A. D. eighteen hundred and seventy-six, being the sixth day of said December, at 12 o'clock, M., meet, as such Electors, in the Capitol, at Tallahassee, to give our votes as such Electors for President and Vice-President of the United States; and did, then and there, give and cast our votes as such Electors, by ballot, for President of the United States; and did then and there give and cast our votes, as such Electors, by distinct ballots, for Vice-President of the United States, and the said ballots having been opened, inspected and counted, it did then and there appear that on four of said ballots was the name of SAMUEL J. TILDEN, of the State of New York, for President of the United States, and that upon four other of said ballots was the name of THOMAS A. HENDRICKS, of the State of Indiana, for Vice-President of the United States; We, the undersigned, do therefore and hereby certify and make known as follows:

1. That at the said election and voting, by us as aforesaid, the number of Electoral Votes cast for Samuel J. Tilden, of the State of New York, for President of the United States, was four votes.

2. That at the said election and voting, by us as aforesaid, the number of Electoral Votes cast for Thomas A. Hendricks, of the State of Indiana, for Vice-President of the United States, was four votes.

Done at Tallahassee on this, the 26th day of January, A. D. 1877. In testimony whereof, we have hereto set our hands and affixed our seals.

Wilkinson Call SEAL
James E. Yonge SEAL
Robt Bullock SEAL
Robert B. Hilton SEAL

Election of President and Vice-President of the United States

Exhibit D

State of Louisiana, *ss.*

We, the undersigned, Electors of President and Vice-President of the United States of America for the next ensuing regular term of the respective offices thereof, being Electors duly and legally appointed by and for the State of Louisiana as appears by the annexed list of Electors, made, certified and delivered to us by the direction of the Executive of the State, having met and convened in the City of New Orleans and the seat of government at the Hall of House of Representatives, in pursuance of the laws of the United States, and also in pursuance of the laws of the State of Louisiana, on the first Wednesday, the sixth day of December, in the year of our Lord one thousand eight hundred and seventy-six.

Do hereby Certify: That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for such President, and then for such Vice-President, by distinct ballots.

And we further Certify: That the following are two distinct lists; one of the votes for President, and the other of the votes for Vice-President.

List of Persons Voted for as President with the Number of Votes for each.

NAMES OF PERSONS VOTED FOR.	NUMBER OF VOTES.
SAMUEL J. TILDEN, Of the State of New York.	Eight votes

List of all Persons Voted for as Vice-President with the Number of Votes for each.

NAMES OF PERSONS VOTED FOR	NUMBER OF VOTES.
THOMAS A. HENDRICKS, Of the State of Indiana.	Eight votes

In Witness Whereof, we have hereunto set our hands.

Done at the Hall of the House of Representatives in the City of New Orleans, and State of Louisiana, the sixth day of December, in the year of our Lord one thousand eight hundred and seventy six, and of the United States of America the one hundred and first.

Exhibit D

United States of America
State of Oregon - County of Marion } ss

W. H. H. Odell, L. F. Cartwright, and J. H. Hall
electors of President and Vice President of the
United States for the State of Oregon, duly elected
and appointed in the year A. D. 1876, pursuant
to the laws of the United States and in the man-
ner directed by the laws of the State of Oregon,
do hereby certify that at a meeting held by us
at Salem, the seat of Government in and for
the State of Oregon on Wednesday the 6th day of
December A. D. 1876, for the purpose of casting
our votes for President and Vice President of the
United States,

A vote was duly taken by ballot for President
of the United States in distinct ballot for
President only, with the following result:

The whole number of votes cast for President
of the United States, was three (3) votes,

That the only person voted for for President
of the United States was Rutherford B. Hayes
of Ohio.

That for President of the United States
Rutherford B. Hayes of Ohio received three (3) votes,

In testimony whereof we have hereunto
set our hands on the first Wednesday of Decem-
ber, in the year of our Lord one thousand
eight hundred and seventy six.

W. H. H. Odell
L. F. Cartwright
J. H. Hall

Exhibit D