

No. \_\_\_\_\_

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## **In the Supreme Court of Wisconsin**

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DONALD J. TRUMP, MICHAEL R. PENCE, and DONALD J. TRUMP FOR PRESIDENT,  
INC.,

PETITIONERS,

v.

ANTHONY S. EVERS, Governor of Wisconsin in his official capacity, THE WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, Chair of the Wisconsin Elections Commission in her official capacity, SCOTT McDONELL, Dane County Clerk in his official capacity, ALAN A. ARNSTEN, Member of the Dane County Board of Canvassers in his official capacity, JOYCE WALDROP, Member of the Dane County Board of Canvassers in her official capacity, GEORGE L. CHRISTENSON, Milwaukee County Clerk in his official capacity, TIMOTHY H. POSNANSKI, Member of the Milwaukee County Board of Canvassers in his official capacity, RICHARD BASS, Member of the Milwaukee County Board of Canvassers in his official capacity, and DAWN MARTIN, Member of the Milwaukee County Board of Canvassers in her official capacity,

RESPONDENTS.

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

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## **ISSUES PRESENTED BY THE CONTROVERSY**

1. Whether absentee ballots issued in-person to voters by municipal clerks' offices in Milwaukee County and Dane County without the required written application, pursuant to Wis. Stat. § 6.86(1)(ar), are illegal and invalid.

2. Whether absentee ballots issued by municipal clerks' offices in Milwaukee County and Dane County without the required written application, pursuant to Wis. Stat. § 6.86(1)(ar), should be excluded from the Presidential Election results in Wisconsin as required by Wis. Stat. § 6.84(2).

3. Whether absentee ballots accompanied by incomplete certifications or on which municipal clerks added missing information in contravention of Wis. Stat. §§ 6.84(2) and 6.87(6d) are illegal and invalid.

4. Whether absentee ballots accompanied by incomplete certifications or on which municipal clerks added missing information in contravention of Wis. Stat. §§ 6.84(2) and 6.87(6d) should be excluded from the Presidential Election results in Wisconsin as required by Wis. Stat. § 6.84(2).

5. Whether absentee ballots cast by electors claiming Indefinite Confinement status, which status was claimed on or after March 25, 2020, for which there was no voter identification provided are illegal and invalid.

6. Whether absentee ballots cast by electors claiming Indefinite Confinement status, which status was claimed on or after March 25, 2020, for which there was no voter identification provided should be excluded from the Presidential Election results in Wisconsin.

7. Whether stationing poll workers, receiving ballots, witnessing ballot certifications and other clerk's office activities in Madison's "Democracy in the Park" events complied with Wisconsin Election laws.

8. Whether relief by drawdown is appropriate for legal violations committed at "Democracy in the Park" events.

### INTRODUCTION<sup>1</sup>

The 2020 Presidential Election (the "Election") is one of the closest contests in history with numerous states reporting results within a single percentage point, including Wisconsin. In addition to the just concluded Wisconsin Recount and these proceedings, recounts, election challenges, audits and other post-election actions have taken place or are ongoing in Georgia, Pennsylvania, Michigan, Arizona, and Nevada. The final determination of outcome of the Election hangs in the balance.

Here, in Wisconsin, Petitioners have identified systemic violations of Wis. Stat. Ch. 6 with regard to the issuance, acceptance, and, ultimately, the inclusion in the vote totals of certain absentee ballots. The remedy for these violations is expressly dictated by statute. Ballots issued, accepted, and/or counted in violation of the specific provisions at issue in this case ***cannot*** be "included in the certified results" of the 2020 Presidential Election. *See* Wis. Stat. § 6.84(2) ("Ballots cast in

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<sup>1</sup> Citations to "App. \_\_\_\_" refer to the page(s) of the Appendix filed with Petitioners' Petition for Original Action; citations to the transcript of the Recount proceedings in Milwaukee County appear as "Milwaukee Cty. Trans. [date] at [page:line]" and citations to the transcript of the Recount proceedings in Dane County appear as "Dane Cty. Trans. [date] at [page:line]."



contravention of the procedures specified in [Wis. Stat. §§ 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4.] may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.”); accord *Lee v. Paulson (in re Ballot Recount)*, 2001 WI App 19 (ordering the removal of improperly issued absentee ballots from the final vote totals and changing the outcome of an election.).

The unofficial results of the Election in Wisconsin reported by the Wisconsin Elections Commission (“WEC”) indicate that President Donald J. Trump and Vice President Michael R. Pence received 1,610,076 votes and Joseph R. Biden and Senator Kamala D. Harris received 1,630,503 votes, a difference of 20,427 votes or 0.620%. WEC, Unofficial Results for the November 3, 2020 General Election, *available at* <https://elections.wi.gov/node/7234>. The Recount totals certified by WEC indicate that President Donald J. Trump and Vice President Michael R. Pence received 1,610,184 votes and Joseph R. Biden and Senator Kamala D. Harris received 1,630,866 votes. WEC, Statement of Canvas for President, Vice President and Presidential Electors General Election, November 3, 2020, *available at*: [https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President\\_0.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President_0.pdf); Milwaukee Cty. Trans. 11/27/20 at 27:11-28:7; Dane Cty. Trans. 11/29/20 at 12:15-25. App. 120:11-121:8, 261 at 12:15-25.

Petitioners, President Donald J. Trump and Vice President Michael R. Pence, requested a recount of the results in both Milwaukee County and Dane County pursuant to Wis. Stat. § 9.01(1)(a) (the “Recount”). The Verified Petition filed to request the Recount details mistakes, irregularities, and illegal behavior affecting more than enough votes to alter the outcome of the election. WEC, Unofficial Results for the November 3, 2020 General Election, *available at* <https://elections.wi.gov/node/7234>. The Recount verified those claims.

While there was a pattern of activities improperly undertaken that affected the Election, four stand out: (1) a total of at least 170,140 absentee ballots were improperly counted as they were issued without the elector having first submitted a written application as expressly required by Wis. Stat. § 6.86(1)(ar); (2) no less than 5,517 absentee ballots were improperly counted as the certifications were, when received by the clerks’ offices, incomplete and, as to a substantial proportion, the clerks’ offices subsequently altered the certifications by inserting missing information; (3) 28,395 absentee ballots were counted that were cast by individuals claiming Indefinite Confinement status even as there was “reliable information that [the]... elector no longer qualifies for the service....” Wis. Stat. § 6.86(2); and (4) 17,271 absentee ballots were cast or received at “Democracy in the Park” events.<sup>2</sup>

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<sup>2</sup> Other improper actions occurred during the recount as in Milwaukee, ballots with no clerk’s initials were allowed to be recounted in contravention of Wis. Stat. 6.80(2)(d). Milwaukee Cty. Trans. 11/24/20 at 65:21-66:21. App. 114:21-115:21.

Despite clear law to the contrary and the express objections by the Trump Campaign to the inclusion in the Recount totals of the ballots identified above, the Milwaukee County and Dane County Boards of Canvassers improperly included those ballots in their Recount totals. The fact that the Milwaukee County and Dane County Boards of Canvassers rendered decisions that are in direct conflict with applicable Wisconsin Statutes and published case law implicates an urgent matter of state-wide and national importance and warrants the Court's exercise of its original jurisdiction.

Contrary to the express provision of Wisconsin Statutes, allowing for a five day period to appeal the results of the recount, Governor Evers appears to have begun to take steps to issue a certificate of election and name Wisconsin's electors. Wis. Stat. § 7.70(5)(a) ("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 ..."); Wis. Stat. § 9.01(6)(a) ("within 5 business days after completion of the recount determination by the commission chairperson ... any candidate ... aggrieved by the recount may appeal ..."). The Court must act in these proceedings to order the Governor to withdraw that certificate and to allow for the orderly recount process to continue.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

If this Court grants the Petition for Original Action, that will indicate that this case is appropriate for argument and publication.

## STATEMENT OF THE CASE

### A. The Relevant Election Law Governing Absentee Balloting

The voting process in Wisconsin elections is governed by Chapters 5-10 of the Wisconsin Statutes. Voting by absentee ballot is authorized by Wis. Stat. § 6.20 under the specific procedures set forth in Wis. Stat. §§ 6.84 to 6.89.

The Wisconsin Legislature has made it clear that voting in-person on Election Day is a constitutional right, but that voting by absentee ballot is a privilege that must be “carefully regulated.” Specifically, Wis. Stat. § 6.84 states as follows:

LEGISLATIVE POLICY. The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged. In contrast, voting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse; to prevent overzealous solicitation of absent electors who may prefer not to participate in an election; to prevent undue influence on an absent elector to vote for or against a candidate or to cast a particular vote in a referendum; or other similar abuses.

Because of the need to “carefully regulate[ ]” absentee balloting, Wisconsin law requires that “with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4., *shall be construed as mandatory.*” Wis. Stat. § 6.84(2) (emphasis added). In an effort to leave no doubt, the Legislature prescribed the specific remedy for any failure to adhere to these provisions:

Ballots cast in contravention of the procedures specified in those provisions ***may not be counted***. Ballots counted in contravention of the procedures specified in those provisions ***may not be included in the certified result of any election***.

Wis. Stat. § 6.84(2) (emphasis added).

**i. Written Application is Required for All Absentee Ballots, Including All In-Person Absentee Ballots.**

Pursuant to Wis. Stat. § 6.86(1)(a) an eligible voter must apply to vote by absentee ballot by submitting a “written application to the municipal clerk” by one of six expressly prescribed methods, including by mail, email or facsimile, and in person at the municipal clerk’s office. Wis. Stat. § 6.86(1)(a). In order to facilitate that process, a Form EL-121 is provided to the voters. WEC, EL-121 Application for Absentee Ballot (rev. 2020-07), available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/EL-121%20Application%20for%20Absentee%20Ballot%20%28rev.%202020-06%29.pdf>; App. 161-162.

In-person absentee balloting is authorized by Wis. Stat. § 6.86(1)(b), which requires as follows:

If application [for an absentee ballot] is made in person, the application shall be made no earlier than 14 days preceding the election and no later than the Sunday preceding the election. No application may be received on a legal holiday. A municipality shall specify the hours in the notice under s. 10.01 (2) (e). The municipal clerk or an election official shall witness the certificate for any in-person absentee ballot cast.

Wis. Stat. § 6.86(1)(b).

While statutes allow for the absentee process to occur in person, the Wisconsin Statutes expressly and unequivocally make clear that the elector must submit a written application before a ballot can be issued and that a municipal clerk is prohibited from issuing an absentee ballot to an elector unless that elector first submits a written application for the ballot:

[T]he municipal clerk ***shall not issue an absentee ballot unless the clerk receives a written application therefor*** from a qualified elector of the municipality. The clerk shall retain each absentee ballot application . . . ***if a qualified elector applies for an absentee ballot in person*** at the clerk's office, the clerk shall not issue the elector an absentee ballot unless the elector presents proof of identification. ***The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application*** ...

Wis. Stat. § 6.86(1)(ar) (emphasis added). Indeed, Form EL-121 expressly provides for its use when submitting a ballot during the in person absentee voting period—a box to be checked by the clerk indicates it was completed for an “in-person voter.” WEC, EL-121 Application for Absentee Ballot (rev. 2020-07), *available at* <https://elections.wi.gov/sites/elections.wi.gov/files/2020-06/EL-121%20Application%20for%20Absentee%20Ballot%20%28rev.%202020-06%29.pdf>; App. 161-162. Clerks outside of Dane and Milwaukee County appropriately required a separate application for in person voting under Wis. Stat. § 6.86(1)(b). Aff. Lori Opitz (11/20/20) ¶¶ 2-4; App. 222-223.

Furthermore, ***Wisconsin law requires strict compliance with absentee ballot procedures***, including those governing the in-person absentee balloting process:

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

Wis. Stat. § 6.84(2) (emphasis added); *accord Lee v. Paulson*, 2001 WI App 19, 241 Wis.2d 38, 623 N.W.2d 577 (excluding 5 absentee ballots from the certified election results because there was no corresponding written application. The removal of the 5 ballots changed the outcome of the election).

As a result, absentee ballots in Wisconsin may not be counted or included in the certified election results without a corresponding and prior written application.<sup>3</sup>

**ii. Absentee Ballot Certifications Must be Complete and Cannot Be Altered by Municipal Clerks.**

Absentee balloting must be witnessed, and the certification on the outside of the envelope provides a place where the witness must sign *and provide his or her address*. Wis. Stat. § 6.87(2). If the certification lacks the witness's address, it may not be counted: "*If a certificate is missing the address of a witness, the ballot may not be counted.*" Wis. Stat. § 6.87(6d) (emphasis added). Lest there be any doubt about whether this is directory or mandatory, this provision falls within the scope of provisions that § 6.84(2) declares mandatory. As recently as 2015 the Wisconsin

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<sup>3</sup> In Milwaukee, Petitioners requested to review all written applications for absentee ballots (Milwaukee Cty. Trans. 11/20/20 at 9:18 – 21), but after being told all written applications were or would be at the recount site (Milwaukee Cty. Trans. 11/20/20 at 35:9-17), Petitioners were denied the right to see or inspect the boxes purportedly containing written applications. Milwaukee Cty. Trans. 11/22/20 at 22:12 – 56:23). App. 3:18-21, 9:9-17, 69:12-103:23.

Legislature reaffirmed the essential requirement that the ballot envelope certificate must be fully and accurately completed by the voter and the witness. 2015 Wis. Act 261, § 78 (creating Wis. Stat. § 6.87(6d)).

The Legislature provided one, and only one, legal method for remedying an improperly completed absentee ballot certification (such as a certification lacking the witness's address), and that is to return it to the elector:

If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot . . .

Wis. Stat. § 6.87(9).

**iii. Unless an Elector is “Elderly, Infirm or Disabled and Indefinitely Confined” Absentee Ballots Cannot Be Issued Without the Elector Providing Photo Identification.**

Wisconsin statutory law expressly requires that all eligible electors must provide proof of identification in order to register to vote, and each time they vote. Wis. Stat. §§ 6.79(2)(a), (3), and 6.87(1). Photo identification is also required when requesting to vote by absentee ballot. Wis. Stat. §§ 6.86(1)(ac), (ar) and 6.87(1).

There are very limited exceptions to the requirement that an elector must provide photo identification with any application for an absentee ballot, including an exception if an elector certifies that he or she is “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period . . .” Wis. Stat. § 6.86(2)(a). In fact, in order to qualify for the exception, an elector must be “elderly, infirm or disabled *and* indefinitely confined.” *Frank v. Walker*, 17 F. Supp.



3d 837, 844 (E.D. Wis. Apr 29, 2014) (emphasis added), *rev'd on other grounds*, 768 F.3d 744 (7<sup>th</sup> Cir. 2014). An elector who meets the strict definition of “indefinitely confined” in Wis. Stat. § 6.86(2)(a) must sign a statement to that effect, and then “the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement . . . which contains the name and address of the elector and verifies that the name and address are correct.” Wis. Stat. § 6.87(4)(b)2.

This exception is not limitless. Municipal clerks are expressly charged with the responsibility to review and expunge from the voter rolls those claiming “indefinitely confined” status when the Clerk has “reliable information that [the]... elector no longer qualifies for the service.” Wis. Stat. § 6.86(2)(b). Moreover, electors who claimed they were indefinitely confined, but are no longer indefinitely confined or physically ill, infirm, elderly, or disabled are obligated to take steps to be removed from such status. Wis. Stat. § 6.86(2)(a) (“If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.”). *See* Aff. Kyle J. Hudson (Nov.25, 2020) ¶2, Exs. A-G. App. 242-258.

**iv. Municipal Clerks Cannot Create Multiple Offices to Conduct Absentee Voting, Receive Ballots, Witness Envelopes And The Like at Times of Their Choosing.**

Wisconsin does not allow advance voting; instead, it has created a system of carefully tailored statutes for absentee voting. Among the issues addressed in the statutes are matters related to how a municipal clerk must act in advance of the election. So, for example, a municipal clerk must have only one place where ballots

are received and if an alternate location is preferable, for in-person voting and the like, then the clerk must comply with very stringent rules described in Wis. Stat. 6.855(1), including authorization from the governing body and creation of only one such alternate office. That law comports with prior decisions of this Court, under a predecessor statute, excluded absentee ballots delivered to a location other than the appropriate municipal clerk's office. *Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775, 780 (1957)

**B. Wisconsin Statutes Expressly Provide for Limited Methods of Delivery of Absentee Ballots Pursuant to Wis. Stat. § 6.87(4)(b)(Providing for Mail or In-Person Delivery).<sup>4</sup>**

The 2020 Election involved unprecedented amounts of mail-in absentee balloting because of the COVID-19 Pandemic. Interestingly, substantially fewer absentee voters completed ballots in-person at clerks' offices in 2020 than in the 2016 November General Election. *Compare* WEC, Absentee Voting Statistics for the November 3, 2020 General Election, *available at* <https://elections.wi.gov/index.php/node/7236> *with* WEC, 2016 General Election Summary Statistics, *available at*

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<sup>4</sup> Although colloquially referred to as "early voting," Wisconsin law does not actually permit early voting. Instead, Wisconsin law authorizes a 14-day window preceding an election during which electors are authorized to request their absentee ballot in person at their clerk's office and during which the clerk is authorized to act as the witness on an elector's absentee ballot envelope. Wis. Stat. § 6.86(1)(b). Once the completed absentee ballot envelope is witnessed by the clerk, an elector's absentee ballot is added to any absentee ballots the clerk has received by mail and processed and counted in the same manner as all other absentee ballots in the elector's ward. *Id.* These in-person absentee ballots are, as a matter of law, no different than any other absentee ballot and are treated as such.

[https://elections.wi.gov/sites/elections.wi.gov/files/publication/2016\\_general\\_election\\_summary\\_statistics\\_pdf\\_15354.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/publication/2016_general_election_summary_statistics_pdf_15354.pdf).

108,947 absentee ballots were issued by municipalities within Milwaukee County and an additional 61,193 absentee ballots were issued by municipalities in Dane County, during the “in-person absentee voting” period pursuant to Wis. Stat. § 6.86(1)(b) (the “In-Person Absentee Ballots”). Milwaukee Cty. Trans. 11/21/20 at 184:14-187:22; Dane Cty. Trans. 11/22/20 at 57:23-59:13; App. 61:14-64:22, 144 at 57:23 to 145 at 59:13.

None of the 170,140 in-person absentee ballots issued in Milwaukee and Dane Counties during the in-person period under Wis. Stat. § 6.86(1)(b) had an associated written application. Instead, in both Dane and Milwaukee County, the Canvassing Boards during the Recount found that the Clerk’s receipt of form EL-122 (the “Envelope” in which the absentee ballot is placed by the elector), was sufficient to satisfy the statutory written application requirement. *See e.g.*, Milwaukee Cty. Trans. 11/20/20 at 35:18-25; Dane Cty. Trans. 11/22/20 at 58:19-21; Aff. Claire Woodall-Vogg ¶ 16. App. 9:18-25, 145 at 58:19-21, 182-183, 259, 264-267. Other municipalities, outside of Dane and Milwaukee County, did comply with the statute by requiring a written application, in accordance with the Statutes. Dane Cty. Trans. 11/28/20 at 7:7-25; Aff. Lori Opitz ¶¶ 2-4; App. 115 at 6:7-25, 222-223.

During the Recount Petitioners objected to all In-Person Absentee Ballots issued without a corresponding written application and requested that the Board of

Canvassers reject those ballots. Milwaukee Cty. Trans. 11/22/20 at 4:20-24; Dane Cty. Trans. 11/20/20 at 15:9-18:14. App. App. 68:20-24, 126 at 15:9 to 127 at 18:14. Both the Milwaukee County and Dane County Boards of Canvassers overruled Petitioners' objections. Milwaukee Cty. Trans. 11/21/20 at 186:11-187:10; Dane Cty. Trans. 11/20/20 at 36:15-40:25. App. 63:11-64:10, 129 at 36:15 to 130 at 40:25. As a result, the absentee ballots cast during the in-person period, without an application, were included in the Recount totals.<sup>5</sup> Petitioners have filed this original action to rectify the Milwaukee County and Dane County Boards of Canvassers' erroneous inclusion of In-Person Absentee Ballots issued without a corresponding written application in the Recount.

**C. Accepting Incomplete Absentee Ballot Certifications and Altering Absentee Ballot Certifications in the 2020 Election.**

The sole statutorily-authorized remedy for an incomplete absentee ballot certification is for the clerk to send it back to the elector (with a new certification envelope, if necessary) so that the missing address can be supplied by the proper person — a person that is obviously not the clerk. Wis. Stat. § 6.87(9) ("If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary,

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<sup>5</sup> To avoid administrative concerns arising from incorrect findings and conclusions by the Canvassing Boards, Petitioners argued to exclude the questionable ballots and then complete the process both with and without counting those ballots. Petitioners' request was denied. *See e.g.*, Dane Cty. Trans. 11/20/20 at 63:19-65:11 App. 135 at 63:19 to 65:11.

whenever time permits the elector to correct the defect and return the ballot . . .”).<sup>6</sup> No municipal or county clerk is authorized to alter an elector’s certificate envelope. Yet for the 2020 Election, clerks in municipalities throughout Milwaukee and Dane Counties altered absentee ballot certifications rather than following the correct procedure under Wis. Stat. § 6.87(9). Milwaukee used red ink to signify an address had been added or altered by the clerk’s office. Milwaukee Cty. Trans. 11/20/20 at 115:11-128:17. App. 28:11-41:17. *See also* Youtube.com, *Milwaukee Central Count Training Video* (April 1, 2020), <https://www.youtube.com/watch?v=hbm-pPaYIqk> (last visited November 25, 2020)(City of Milwaukee training video indicating, from 10:40 to 11:15 of the video, that election officials may insert a missing witness address in “red ink,” which is contrary to law). In other municipalities, the clerks initialed the certification next to the addresses they added. The total of those incomplete and altered certifications was 5,517. Aff. Kyle Hudson (Nov. 30, 2020) ¶ 4; Aff. Joe Voiland (Nov. 30, 2020) ¶ 4; Aff. Joe Voiland ¶¶ 3-4 (Nov. 30, 2020). App. 268, 271-273.<sup>7</sup> In other instances, certifications were incomplete or otherwise defective, but the Boards nonetheless counted them on the same basis. Milwaukee Cty. Trans. 11/20/20 at 68:1-74:8; 11/24/20 at 64:11-65:10;

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<sup>6</sup> It appears the Wisconsin Elections Commission has incorrectly instructed clerks to alter absentee ballot certifications in direct contravention of our statutes. When the elector's absentee ballot certification lacks the witness's address, WEC suggests clerks engage in original research to discover the address and then fill it in. *See* WEC, Spoiling Absentee Ballot Guidance dated October 19, 2020, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-10/Spoiling%20Ballot%20Memo%2010.2020.pdf>.

<sup>7</sup> The referenced affidavits summarize the total ballots objected to due to incomplete in a variety of ways and altered certifications as indicated in the Recount transcripts. At the time of this filing the actual exhibits were not in Petitioners’ possession, but Petitioners will supplement a complete tally when the final tally is obtained.

App. 21:1-27:8, 113:11-114:10. In total, the Boards, together, counted 5,517 certifications that were either altered by clerks or that were incomplete or otherwise defective. Aff. Kyle Hudson (Nov. 30, 2020) ¶ 4; Aff. Joe Voiland (Nov. 30, 2020) ¶ 4. App. 268, 271-273. The Milwaukee County Board of Canvassers segregated these altered absentee ballot certifications. Milwaukee Cty. Trans. 11/20/20 at 57:14-23, 58:8-67:7; App. 10:14-23, 11:8-20:7.

During the Recount Petitioners objected to the canvassers counting Incomplete and Altered-Certification Absentee Ballots and requested that such ballots be rejected. Dane Cty. Trans. 11/20/20 at 48:25 – 49:8; Milwaukee Cty. Trans. 11/23/20 at 25:19-27:21; App. 91 at 48:25-49:8, 69:19-71:21. Both the Milwaukee County and Dane County Boards of Canvassers overruled Petitioners’ objections to the counting of Incomplete and Altered-Certification Absentee Ballots and continued counting those ballots as part of the Recount. Dane Cty. Trans. 11/20/20 at 60:1-65:14; Milwaukee Cty. Trans. 11/20/20 at 115:11-128:17. App. 344 at 60:1-65:14, 28:11-41:17. As a result, both Boards of Canvassers, over Petitioners’ objections, counted ballots on which the witness certification was missing entirely or was otherwise incomplete.

Petitioners have filed this original action to rectify the Milwaukee County and Dane County Boards of Canvassers’ erroneous inclusion of Incomplete and Altered-Certification Absentee Ballots in the Recount.

**D. “Indefinitely Confined” Voters in the 2020 Election.**

The 2020 Election involved unprecedented numbers of electors claiming that they qualified for issuance of an absentee ballot without providing photo identification because they were “indefinitely confined” pursuant to Wis. Stat. § 6.86(2)(a). In fact, since 2019 the number of electors claiming “indefinitely confined” status and thereby obtaining an absentee ballot without the otherwise required photo identification increased to nearly 250,000 from 72,000. MACIVERNEWS, *A Quarter-Million Wisconsin Voters Claim to be “Indefinitely Confined” and Not Bound By Voter ID*, Oct. 29, 2020, available at <https://www.maciverinstitute.com/2020/10/a-quarter-million-wisconsin-voters-claim-to-be-indefinitely-confined/>.

The numbers for Milwaukee and Dane County alone are concerning. In total there were 15,102 electors in Dane County and 31,396 electors in Milwaukee County who claimed to be “indefinitely confined” for the November 3, 2020 election and then voted without supplying any identification. Milwaukee Cty. Trans. 11/27/20 at 19:23-22:3; Dane Cty. Trans. 11/28/20 at 7:2-12:6; Aff. Jordan Moskowitz (dated 11/27/20) ¶¶ 2-6, Exs. 1-4; Aff. Jordan Moskowitz (dated 11/25/20) ¶ 2-6. App. 118:23-121:3, 155 at 7:2 to 156 at 12:6, 224-233, 240-241. It is also clear that these numbers swelled after the March 25, 2020 public statements by the clerks of both Dane and Milwaukee County that any elector could claim this status in light of the Governor’s Safer at Home Order. *See, e.g.*, App. 235-237, March 31, 2020 Order, *Jefferson v. Dane*, No. 2020AP557-OA at 2 (explaining that the Dane County and Milwaukee County Clerks indicated that “all Dane [and

Milwaukee] County voters could declare themselves to be ‘indefinitely confined’ under Wis. Stat. § 6.86(2)” because of the Safer at Home Order, “thereby avoiding the legal requirement to present or upload a copy of the voter’s proof of identification when requesting an absentee ballot” and concluding that such “advice was legally incorrect.”). Of the electors claiming to be indefinitely confined in Milwaukee County, 19,488 of them claimed the status after March 25th. Milwaukee Cty. Trans. 11/27/20 at 19:23-22:3; App. 118:23-121:3. In Dane County the corresponding number is 8,907. Dane Cty. Trans. 11/28/20 at 7:2-12:6; Aff. Jordan Moskowitz (dated 11/27/20) ¶¶ 2-6, Exs. 1-4; App. 155 at 7:2 to 156 at 12:6, 224-233.

This Court enjoined the clerks from making certain statements and clarified that the existence of the Governor’s Order alone was not a sufficient basis to claim indefinitely confined status. *Id.* at 3. However, it is clear that municipal clerks took no steps to investigate or to correct the voter rolls. Aff. Jordon Moskowitz (dated 11/27/20) Exs. 3-4. App. 230-233

Petitioners objected to the inclusion of all absentee ballots issued to electors claiming to be indefinitely confined after March 25, 2020 who did not otherwise have photo identification on file with their clerk. Dane Cty. Trans. 11/20/20 at 53:22-55:20, Milwaukee Cty. Trans. 11/27/20 at 19:23-22:2; App. 132 at 53:22 to 133 at 55:20, 118:23-121:2. Both Boards of Canvassers rejected the objections and counted the ballots. Dane Cty. Trans. 11/28/20 at 28:3-6; Milwaukee Cty. Trans. 11/27/20 a 21:7-22:2t; App. 160 at 28:3-6, 120:7-121:2.



**E. “Democracy in the Park.”**

Apparently to avoid numerous restrictions imposed by the statutes, the City of Madison invented “Democracy in the Park.” By this scheme the City placed poll workers in 206 locations on September 26 and October 3 (Dane Cty. Trans. 11/24/20 at 52:16-56:15; Aff. Kyle J. Hudson (11/23/20) ¶¶3-6, Exs. B-E; App. 148 at 52:16 to 149 at 56:15, 163-175), mimicked polling places by putting up signs identical to those for elections (*Id.* at 57:11-58:16; App. 149 at 57:11 to 150 at 58:16, 163-164, 168-169, 175-183), and then acted in every way as if it were an election excepting only that they did not distribute ballots. *Id.* at 52:16-64:10; App. 148 at 52:16 to 151 at 64:10.

While the audacity of the scheme might be lauded by the Biden campaign—it was heavily promoted by them (*Id.* at 57:11-58:16; Aff. Kyle J. Hudson (11/23/20) ¶2, Ex. A; App. 149 at 57:11 to 110 at 58:16, 163-166)—it flagrantly violates a host of election laws. If, for example, these locations are “extensions” of the Clerk’s Offices, they are barred by prior rulings of this Court *Olson v. Lindberg*, 2 Wis. 2d 229, 236, 85 N.W.2d 775, 780 (1957) (excluding absentee ballots delivered to a location other than the appropriate municipal clerk’s office under a prior version of the statute).

These “Democracy in Park” locations were not legally established alternate absentee ballot sites because they were not established by the City of Madison Common Council; instead they were “created by, planned by, staffed by, and paid for by the City Clerk’s Office.” City of Madison, Statement of Madison City Clerk

Maribeth Witzel Behl Regarding Democracy in the Park (Sept. 25, 2020), *available at* <https://www.cityofmadison.com/clerk/news/statement-of-madison-city-clerk-maribeth-witzel-behl-regarding-democracy-in-the-park>. *See also* App. 176-184 (City of Madison post regarding “Democracy in the Park”).

Alternate absentee ballot sites, however, may only be established by the “governing body of a municipality” and, if such a site is designated by the governing body of a municipality, then “no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted in the office of the municipal clerk or board of election commissioners.” Wis. Stat. § 6.855(1). There can be only one such site, but here there were 206, and the single site must be “as near as practicable” to the original office—something all 206 could not have been. *Id.*

Moreover, Wisconsin Statutes contemplate only limited ways in which an absentee ballot may be returned. It is either mailed or it is delivered in person to the clerk’s office. Wis. Stat. § 6.87(4)(b). So, the dilemma for Madison was that these sites were either considered additional clerk’s offices, in which case they were barred by Wis. Stat. § 6.855(1), or they were not clerk’s offices, in which case they run afoul of the allowable methods for delivery of such ballots and run afoul of rules barring ballot delivery at places other than the clerk’s office. Wis. Stat. § 6.87(4)(b); *Olsen*. Either way, the ballots received at “Democracy in the Park” violate the law and must not be counted.

## STANDARD OF REVIEW

Although there is no decision below for this Court to review, statutory interpretation presents a pure question of law. *Moustakis v. State of Wis. Dep't of Justice*, 2016 WI 42, ¶ 16, 368 Wis. 2d 677, 880 N.W.2d 142.

This Court has *de novo* review over Respondents' erroneous interpretation of law. Specifically, this "[C]ourt **shall** set aside or modify the determination if it finds that the board of canvassers or chairperson has erroneously interpreted a provision of law and a correct interpretation compels a particular action." Wis. Stat. § 9.01(8); *see also Lee*, 2001 WI App 19, ¶ 4.

## SUMMARY OF THE ARGUMENT

This Court should grant the Petition for Original Action, under well-established standards for deciding issues of great, statewide (and national) importance, where prompt, purely legal resolution is in the public interest. The Milwaukee County and Dane County Boards of Canvassers failed to correctly apply clear and unambiguous statutory law by including unauthorized and otherwise unlawful absentee ballots in the Recount. Prompt resolution of this legal dispute is of the essence to the public interest because, absent this Court's action, the Election will be certified and/or a Certificate of the Election prepared and signed by the Governor using results that improperly include unauthorized and otherwise unlawful absentee ballots that, by law, shall not be counted. *See* Wis. Stat. § 7.70(5)(a) (prohibiting the governor or chair of WEC from issuing "a certificate of

election until the recount has been completed and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided”).<sup>8</sup> 170,140 In-Person Absentee Ballots issued without the required written application, 5,517 Incomplete and Altered-Certification Absentee Ballots, 28,395 Indefinitely Confined Absentee Ballots, and 17,271 Absentee Ballots received at Democracy in the Park must, by statutory procedures, be withdrawn from the total ballots before any certificate is issued for the Election.

Specifically, Respondents’ decision to count and include in the Election results In-Person Absentee Ballots issued without the required written application is directly contrary to clear and unambiguous statutory law. The privilege of casting an absentee ballot requires the elector to “make *written application* to the municipal clerk,” and even if the absentee balloting procedures take place in person at the clerk’s office, “the municipal clerk *shall not issue an absentee ballot unless the clerk receives a written application therefor* from a qualified elector of the municipality.” Wis. Stat. §§ 6.86(1)(a) and (1)(ar).

Because the In-Person Absentee Ballots at issue in this matter were issued in direct contravention of Wis. Stat. § 6.86, they “*may not be counted*” and “*may not be included in the certified result of any election.*” Wis. Stat. § 6.84(2) (emphasis added).

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<sup>8</sup> In the event more time is required to reach a complete tabulation, the Court can Order the appointment of both Trump and Biden electors prior to December 14, 2020. Once the result is known, the correct slate may be counted when the Electoral College votes are opened on January 6, 2020. 3 U.S.C. § 15.

Likewise, Respondents' decision to count and include in the Election results Incomplete and Altered-Certification Absentee Ballots is directly contrary to statutory law.

Again, because absentee balloting is a privilege, its requirements and procedures (as contained in Wis. Stat. §6.86 and § 6.87(3)-(7)) are mandatory and strictly construed. A witness is necessary for an elector to vote an absentee ballot, and such witness must sign *and provide his or her address on a certification*. Wis. Stat. § 6.87(2) (emphasis added). An absentee ballot received by a municipal or county clerk without the witness's address is defective and can only be cured by returning the ballot to the elector so the elector may have the witness supply the address. Wis. Stat. § 6.87(9). There is no authority in the Wisconsin Statutes for clerks to alter absentee ballot envelopes and Wis. Stat. § 6.87(6d) expressly states that "[i]f a certificate is missing the address of a witness, *the ballot may not be counted*." (emphasis added). Those same rules apply if the ballot envelope is incomplete or corrected by a clerk.

Respondents' decision to count and include in the Election results *all* Indefinitely Confined Absentee Ballots issued without the required photo identification is also contrary to clear and unambiguous statutory law. In order to qualify for the exceptions, an elector must be "elderly, infirm or disabled *and* indefinitely confined." *Frank*, 17 F. Supp. 3d 837, 844 (E.D. Wis. Apr 29, 2014) (emphasis added), *rev'd on other grounds*, 768 F.3d 744 (7<sup>th</sup> Cir. 2014). Voters who claimed they were "indefinitely confined," but were not themselves physically, ill, infirm, elderly, or disabled, provided a false

certification on their absentee ballot application and such ballots “*may not be counted*” and “*may not be included in the certified result of any election.*” Wis. Stat. § 6.84(2) (emphasis added).

The inclusion of absentee ballots received at “Democracy in the Park” events violates many of the essential principals underlying Wisconsin’s choice to allow only absentee voting in advance of Election Day. The City of Madison’s scheme either violates laws barring the creation of more than one location to receive ballots (Wis. Stat. § 6.855(1)) or violates laws authorizing only two methods for the voter to deliver an absentee ballot. Wis. Stat. § 6.87(4)(b). Just as it did in *Olson*, this Court must exclude absentee ballots collected at locations other than the clerk’s office.

The questions raised in the Petition will impact whether clear statutory law is followed in every future election in this State. The Petition presents these questions in the context of a live, justiciable action that will allow this Court to clarify the law not only in this election, but in the process provide guidance for future elections, as well. This case presents substantial legal issues, and, in several instances, matters of first impression. These are legal issues of statutory interpretation, meaning that no fact finding by this Court is necessary.

## **ARGUMENT**

### **I. The Proper Exclusion of Illegal and Defective Absentee Ballots From the Recount Is An Issue Of Great Public Importance, Warranting This Court’s Assertion Of Its Original Action Authority.**

Of the several considerations governing the decision to grant a petition for original action pursuant to Wis. Const. art. VII, § 3 and Wis. Stat. § 809.70, the most

important factor is whether “the questions presented are of [great, statewide] importance,” such as issues that are “*publici juris*.” *Petition of Heil*, 230 Wis. 428, 443–46, 284 N.W. 42 (1939). Cases raising issues of the proper application of election law and election integrity have often met this standard. *See, e.g.*, Am. Order, *Wis. Legislature v. Evers*, No. 2020AP608-OA, at 4 (granting an original action “in light of the extraordinary circumstances and importance of the issues” raised with regard to the April 2020 Primary Election); *see also* March 31, 2020 Order, *Jefferson v. Dane*, No. 2020AP557-OA (at App. 235-237).

This Court also considers whether the issue presented by the petition is a matter of some “exigency.” *Heil*, 230 Wis. at 447. Moreover, this Court is more likely to grant a petition where a “speedy and authoritative resolution” is possible due to limited material factual disputes, *id.* at 446, such that “no fact-finding procedure is necessary,” *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 683, 264 N.W.2d 539 (1978).

The purely legal questions presented by this Petition qualify for this Court’s original action jurisdiction. Most importantly, “the questions presented are of [great, statewide (and even national)] importance,” such that these issues are unquestionably “*publici juris*.” *Heil*, 230 Wis. at 446–48.

The unofficial results of the Presidential Election in Wisconsin indicate that a fraction of a single percentage point and only approximately 20,000 votes statewide separate the candidates. WEC, Unofficial Results for the November 3,

2020 General Election, available at <https://elections.wi.gov/node/7234>. The Recount counted more than one hundred thousand unauthorized and otherwise unlawful absentee ballots, and these unlawful absentee ballots will determine the outcome of the Election, unless this Court exercises its original jurisdiction to ensure they are excluded. This Court's immediate intervention is necessary to preserve the integrity of, and confidence in, this and future Elections. This is an “exceptional case[] in which a judgment by the court [would] significantly affect[] the community at large.” *Wisconsin Professional Police Ass’n v. Lightbourn*, 2001 WI 59, ¶4, 243 Wis. 2d 512, 627 N.W.2d 807.

Granting this Petition is also important because the people of this state and the nation will benefit from a “speedy and authoritative determination” of the correct Election results. *Heil*, 230 Wis. at 446. Absent this Court’s speedy holding and final declaration that Respondents acted contrary to clear statutory law, the Petitioners, as well as the people of Wisconsin, will suffer irreversible harm by allowing the Election to be decided by the inclusion of unauthorized or otherwise unlawful absentee ballots.

The recount procedures set forth in Chapter 9 are the exclusive remedy for “an alleged irregularity, defect or mistake committed during the voting or canvassing process.” Wis. Stat. § 9.01(11). That exclusive remedy includes judicial review and, ultimately, review by this Court. *See* Wis. Stat. §§ 9.01(6)-(9). The normal judicial process is not possible in this case, with both Petitioners and the State of Wisconsin under significant time constraints. The Electoral College will



meet and cast their votes for President and Vice President on December 14, 2020. Wis. Stat. § 7.75(1). If this Court does not immediately take this case, Wisconsin is at serious risk of having no representation at the Electoral College or of having the wrong slate of electors cast Wisconsin's votes. Moreover, Petitioners will have their legitimate concerns decided long after the decision could have any impact on their rights. In this case, there is not enough time to follow the normal judicial procedure without this Court asserting its original jurisdiction authority immediately.

If this were a more typical situation, involving a state or local office, perhaps there would be adequate time to complete a recount and for all three levels of judicial review to play out. But here, there are hard deadlines which are incompatible with the normal time for judicial review. Therefore, immediate relief is necessary, both to ensure Petitioners are treated fairly and are given adequate time to pursue all available judicial remedies, and to ensure that the public interest in fair and orderly process in an election of national importance is satisfied. The deadline for the Governor to sign a certificate of election for the Election and deliver to the state's presidential electors is Monday, December 14, 2020, Wis. Stat. § 7.70(5)(b), and Wisconsin's presidential electors are required to then meet and give their votes at the State Capitol on Monday, December 14, 2020. Wis. Stat. § 7.75(1); *see also* 3 U.S.C. § 7. These deadlines make it impossible to follow appeal procedures in lower courts. *See, e.g. Underwood v. Karns*, 21 Wis. 2d 175, 179-80, 124 N.W.2d 116, 118-19 (1963) (holding that if "a statute relating to an administrative agency provides a direct method of judicial review of agency action, such method of review

is generally regarded as exclusive,” but adding that such exclusivity must take into account whether “the statutory remedy is plain, speedy, and adequate”). If this Court does not assert its original jurisdiction and decide these issues of great statewide and national importance, Petitioners will have no remedy and the people of this State will have little faith in the integrity of the Election. This is precisely the type of case that gave rise to the maxim that justice delayed is justice denied.

Finally, the questions that are presented here are issues of purely legal, statutory interpretation, where “no fact-finding procedure is necessary.” *Klecza*, 82 Wis. 2d at 683. The statutory remedies, such as a “drawdown” under Wis. Stat. § 9.01(1)(b), are explicit and can be completed expeditiously. Importantly, the parties do not dispute that In-Person Absentee Ballots were cast without the corresponding application, that clerks altered the witness certification for absentee ballots and other certifications were incomplete. The Indefinitely Confined Absentee Ballots at issue have been explicitly named and the exact number of ballots received at “Democracy in the Park” events was recorded.<sup>9</sup>

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<sup>9</sup> Apparently recognizing the questionable character of “Democracy in the Park,” the City of Madison chose to commingle ballots witnessed and ballots received at the event. In addition, though completely separated prior to delivery to the City Clerk, that Clerk chose to then further commingle those absentee ballots with other absentee ballots. Dane Cty. Trans. 11/24/20 at 52:16-56:15. App. 148 at 52:16 to 149 at 56:15. Such a willful attempt to preclude further identification ought not be condoned.

**II. Respondents' Decisions to Count and Include in the Election Results In-Person Absentee Ballots Without The Required Application, Incomplete and Altered-Certification Absentee Ballots, Indefinitely Confined Absentee Ballots, and "Democracy in the Park" Absentee Ballots Are Legally Wrong.**

"[S]tatutory interpretation begins with the language of the statute." If the meaning of that language is plain, that ends the inquiry. *Kalal v. Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* In this case the applicable statutory law is plain on its face and unambiguous given the common ordinary and accepted meaning of its terms. As a result, Respondents are plainly wrong, as a matter of law, in their failure to exclude defective In-Person Absentee Ballots, Incomplete and Altered-Certification Absentee Ballots, Certain Indefinitely Confined Absentee Ballots and Democracy in the Park Absentee Ballots. These are not decisions to be made at the whim of a municipal or county clerk, or for that matter by WEC. Such decision making, not premised in the statutes themselves, invites disparate treatment of voters and, if followed, would call into question the entire election. *Bush v. Gore*, 531 U.S. 98, 104-110, 121 S. Ct. 525 (2000). The goal of attempting to cure defective ballots, however laudable, does not permit Respondents, municipal clerks or courts to "make stuff up." See *Town of Wilson v. City of Sheboygan*, 2020 WI 16, ¶77, 390 Wis. 2d 266, 938 N.W.2d 493 ("It reminds me of the two rules Justice Neil Gorsuch tells his law clerks. The first rule is, "Don't make stuff up." The second

rule is, "When people beg, and say, 'Oh the consequences are so important,' and when they say, 'You're a terrible, terrible person if you don't,' just refer back to Rule No. 1.") (Hagedorn, J., concurring).

**A. Respondents' Decision to Count In-Person Absentee Ballots Issued Without The Required Written Application Is Directly Contrary To Clear And Unambiguous Statutory Law.**

Section 6.86(1)(a) of the Wisconsin Statutes directs that an eligible voter seeking to vote by absentee ballot “may make *written application* to the municipal clerk of that municipality for an official ballot,” including by mail and in person at the municipal clerk’s office. (emphasis added). In-person absentee balloting is often mischaracterized as “early voting,” but this procedure is simply a method by which an elector may conveniently obtain and vote an absentee ballot in person, rather than waiting to receive the ballot in the mail. As especially relevant here, all of the absentee balloting requirements apply to this process just as they apply to all other methods for requesting and issuing absentee ballots.

Neither Dane nor Milwaukee Counties obtained an application prior to delivering a ballot to in-person absentee voters. *See e.g.*, Milwaukee Cty. Trans. 11/20/20 at 35:18-25; Dane Cty. Trans. 11/22/20 at 58:19-21. App. 9:18-25, 145 at 58:19-21. This practice is plainly contrary to Wis. Stat. § 6.86(1)(a) (“Any elector of a municipality who is registered to vote whenever required and who qualifies under §§ 6.20 and 6.85 as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods....”). This principle is confirmed in § 6.86(1)(b), that confirms for the period

of the in-person absentee voting, “the application shall be made.” Finally, § 6.86(ar) leaves no doubt whatsoever that a written application is required to obtain an absentee ballot. “[T]he municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality” and the clerk is required to “retain each absentee ballot application.” Wis. Stat. § 6.86(1)(ar).<sup>10</sup>

In an attempt to explain their behavior, Dane and Milwaukee County take the position that Form EL-122 (the certificate envelope into which an absentee elector places the ballot) constitutes the application described in the Statute. App. 259. This is plainly wrong as it requires reading language out of the Statute and requires one to ignore the structure imposed by the statutes. It is even contradicted by WEC’s own guidance.

Consider, for example, the statutory language expressly addressing in person voting. It begins by noting that “If the application is made in person, the application shall be made no earlier than 14 days preceding the election and no later than the Sunday preceding the election.” § 6.86(1)(b). The statute then describes, as a separate matter, that “The municipal clerk or an election official shall witness the certificate for an in-person absentee ballot cast.” The “certificate” (*i.e.* ballot envelope) and the “application” are distinctly different documents treated differently in the statute.

This reading of § 6.86 is confirmed even more emphatically if one considers the requirements related to the certificate envelope (EL-122) and the application. The

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<sup>10</sup> Form EL-121 can satisfy this requirement. App. 161. It contains a specific box to be checked when it is submitted during the in person voting period. *Id.*

municipal clerk is, by law, required to “retain each absentee ballot application.” Wis. Stat. § 6.86(1)(ar). Yet, the certificate envelopes are expressly not retained by the municipal clerk, but must, instead, be delivered to the County. Wis. Stat. § 7.52(4)(i)(“...the municipal clerk shall transmit the used envelopes to the county clerk”). WEC even provides a form for the delivery of those the EL-122 to the County, and sets out post-election procedures describing that same process. WEC, Used Certificate Envelopes of Absentee Electors, *available at: [https://elections.wi.gov/sites/elections.wi.gov/files/gab\\_forms/4/el\\_103\\_used\\_certificate\\_envelope\\_pdf\\_13716.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/gab_forms/4/el_103_used_certificate_envelope_pdf_13716.pdf)*. WEC emphasizes the statutory requirement to forward the absentee ballot envelopes to the County in its explicit advice to municipal clerks on how to conclude election reporting. WEC, Election Day Manual for Wisconsin Election Officials (Sept 2020), p. 140, *available at: <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Election%20Day%20Manual%20%282020-09%29.pdf>*. One cannot square those two statutory provisions, or WEC’s own forms and instructions, with the suggestions now made by the Dane and Milwaukee County Canvassing Boards. However, if the application is a distinct, separate document, then the two provisions, and WEC’s forms and instructions, are entirely consistent.

Interestingly, WEC’s Recount Manual also confirms that the EL-122 is not the application required by the statute. First, it, like the statutory language, recognizes that “the absentee ballot certificate envelopes” are a distinct document to be reviewed in order

to determine the number of voters. WEC, Recount Manual November 2020,<sup>11</sup> at pp. 7-8 available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Recount%20Manual%20Final%20%2811-2020%29%20highlight.pdf>. App. 194-195. Indeed, in the immediately following section it separately deals with the Applications.

Moreover, in attempting to justify the situation where the “separate application” is missing, WEC makes no mention whatsoever of the Certificate Envelope (Form EL-122), but instead simply explains other reasons to ignore the absence of the required Application. If, as the Canvassing Boards suggest, the EL-122 is the Application, then there would never be a need to look for a separate Application, because, by law, every absentee ballot must be delivered in a sealed, ballot certificate envelope. Wis. Stat. § 6.87(4)(b)1.

Indeed, the actual Application form, EL-121, contains a specific box to be checked for in person absentee voters. App. 161. Again, there would be no need for that box on the form if, as is now suggested, the certificate envelope was the application. Necessarily that same voter will be completing the certificate envelope whether they vote in person at the clerk’s office or vote through the mail.

Certain practical aspects of the process also confirm the need for a separate application. The law expressly requires that “the clerk shall not issue the elector an

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<sup>11</sup> A prior version of the Recount Manual, published in August 2018, contained identical information. WEC, Recount Manual August 2018, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf>.

absentee ballot unless the elector presents proof of identification. The clerk shall verify that the name on the proof of identification presented by the elector conforms to the name on the elector's application ...” Wis. Stat. § 6.86(1)(ar). If the application and the certificate are one document, there would be no point making the comparison. Moreover, the application must be received before the ballot is provided. Recall the language of the statute, “[T]he municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality”. *Id.* If the EL-122 is the application, then it would need to be completed and returned to the clerk before the ballot is provided. But, the EL-122 is not given to the clerk until after the elector has voted, the ballot is placed in the sealed certificate envelope and only then is the certificate envelope handed back to the clerk. The clerk has not received it in the time frame expressly required by the statute.

Pursuant to Wis. Stat. § 6.84(2), the requirements of § 6.86 are expressly mandatory. “Ballots cast in contravention of [§ 6.86] ***may not be counted***” and “***may not be included in the certified result of any election.***” Wis. Stat. § 6.84(2) (emphasis added); *Accord Lee v. Paulson*, 2001 WI App 19, 241 Wis. 2d 38, 623 N.W.2d 577..

The Court of Appeals has already ruled that, based on the statutes cited above, absentee ballots cast without an associated written application must be excluded. In *Lee v. Paulson (in re Ballot Recount)*, a local county supervisor’s race during the November 2000 general election went to a recount. 2001 WI App 19, ¶¶ 1-3. During the recount, the Polk County Board of Canvassers concluded that Walter Lee received 159 votes and that David Paulson received 161 votes, but during the recount the board found that five



absentee ballots did not have the required application. *Id.* ¶ 2. Nevertheless, the Board of Canvassers decided to include the absentee ballots without applications. *Id.* ¶ 3.

On review of the Board of Canvassers' results, the Wisconsin Court of Appeals held that any and all absentee ballots issued without a written application cannot be counted pursuant to Wis. Stat. §§ 6.84(1)-(2) & 6.86(1)(ar) and since all of the defective absentee ballots were cast for Mr. Paulson five votes were deducted from his totals and Mr. Lee prevailed with 159 votes to Mr. Paulson's 156 votes. *Id.* ¶ 11.

This is not news to WEC. In a remarkably disingenuous section of its Recount Manual (discussed earlier in the context of the separate character of the application and certificate envelope), WEC suggests that the Board of Canvassers should ignore both the statutes and *Lee v. Paulson*, and instead follow the informal opinion of WEC's staff attorney. WEC, Recount Manual November 2020, at pp. 7-8, n. 5, *available at* <https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf> (stating that “[t]here should be a written application for each absentee ballot envelope except those issued in-person in the clerk’s office,” instructing canvassers to “not reject an absentee ballot if there is no separate written application,” and noting as contrary authority for these instructions both Wis. Stat. § 6.84(2) and the *Lee v. Paulson*); App. 194-195. Of course, WEC avoids any responsibility for this patently incorrect advice by explaining that the Boards of Canvassers must make their own legal decisions. *Id.* at Appx. 14-15; App. 217-218.

During the Recount, Petitioners identified 170,140 In-Person Absentee Ballots that were issued and cast without the required written application in Milwaukee County

and Dane County. Milwaukee Cty. Trans. 11/21/20 at 184:14-187:22; Dane Cty. Trans. 11/22/20 at 57:23-59:13; App. 61:14-64:22, 144 at 57:23 to 145 at 59:13. Petitioners objected to counting any of these ballots and requested that they be excluded from the results. Milwaukee Cty. Trans. 11/22/20 at 4:20-24; Dane Cty. Trans. 11/20/20 at 15:9-18:14. App. 68:20-24, 126 at 15:9 to 127 at 18:14. However, despite the clear law requiring that those In-Person Ballots must not be counted, Respondents overruled Petitioners' objections and continued illegally counting such ballots as part of the Recount. Milwaukee Cty. Trans. 11/21/20 at 186:11-187:10; Dane Cty. Trans. 11/20/20 at 36:15-40:25. App. 63:11-64:10, 129 at 36:15 to 130 at 40:25.

This Court should exercise its original jurisdiction, declare that absentee ballots lacking a corresponding application may not be counted, and enjoin the inclusion of any such ballot in the results and certification of the Election.

**B. Respondents' Decision to Include and Count Incomplete and Altered-Certification Absentee Ballots is Contrary to Law.**

Because absentee balloting is a privilege and not a right, an elector voting absentee must strictly comply with all mandatory procedures contained in the Wisconsin Statutes or the ballot cannot be counted. Wis. Stat. § 6.84(2).

When casting an absentee ballot, the elector places his or her ballot inside the ballot certification envelope and seals it. The process must be witnessed, and the certification on the outside of the envelope provides a place where the witness must sign and provide his address. Wis. Stat. § 6.87(2). If the certification lacks the witness's address, it may not be counted: *"If a certificate is missing the address of*

*a witness, the ballot may not be counted.*” Wis. Stat. § 6.87(6d) (emphasis added). Lest there be any doubt about whether this is directory or mandatory, this provision falls within the scope of those provisions that § 6.84(2) says is mandatory.

The Wisconsin Statutes provide that the only method of correcting an incomplete absentee ballot certification is for the clerk to return it to the elector so the elector, not the clerk, can remedy the problem. Wis. Stat. § 6.87(9) (“If a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector, inside the sealed envelope when an envelope is received, together with a new envelope if necessary, whenever time permits the elector to correct the defect and return the ballot . . .”).

In this case, the Recounts have identified 5,517 Incomplete and Altered-Certification Absentee Ballots. Aff. Kyle Hudson (Nov. 30, 2020) ¶ 4; Aff. Joe Voiland (Nov. 30, 2020) ¶ 4. App. 268, 271-273. Petitioners objected to the counting of those ballots and requested that such ballots be rejected. Dane Cty. Trans. 11/20/20 at 48:25–49:8; Milwaukee Cty. Trans. 11/23/20 at 25:19-27:21; App. 131 at 48:25 to 49:8, 106:19-108:21. However, despite the clear law requiring that these Incomplete and Altered-Certification Absentee Ballots not be counted, Respondents overruled Petitioners’ objections and those ballots are a part of the Recount totals. Dane Cty. Trans. 11/20/20 at 60:1-65:14; Milwaukee Cty. Trans. 11/20/20 at 115:17-128:17; App. 134 at 60:1 to 135 at 65:14, 28:17-41:17.

This Court should exercise its original jurisdiction to declare that Incomplete and Altered-Certification Absentee Ballots may not be counted and enjoin the inclusion of any such ballot in the results and certification of the Election.

**C. Respondents’ Decision to Count and Include In The Results All Indefinitely Confined Absentee Ballots Issued Without The Required Photo Identification Is Improper.**

Wisconsin statutory law expressly requires that all eligible electors must provide proof of identification in order to register to vote, and each time they vote. Wis. Stat. §§ 6.79(2)(a), 6.87(1). Photo identification is also required when requesting to vote by absentee ballot. Wis. Stat. §§ 6.86(1)(ac), (ar), 6.87(1).

Because voting by absentee ballot, rather than in person, is a “privilege,” the statutory requirements for absentee balloting are strictly applied. Wis. Stat. §§ 6.84(1) (requiring that “the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud and abuse . . .”), and (2) (requiring that “matters relating to the absentee ballot process,” including Wis. Stat. §§ 6.86 and 6.87(3) to (7) “shall be strictly construed as mandatory.”).

There are very limited exceptions to the requirement that an elector must provide photo identification with any application for an absentee ballot, including an exception if an elector certifies that he or she is “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period.” Wis. Stat. § 6.86(2)(a). In fact, in order to qualify for the exceptions, an elector must be “elderly, infirm or disabled **and** indefinitely confined.” *Frank*, 17 F. Supp. 3d at 844 (emphasis added), *rev’d on other grounds*, 768 F.3d 744 (7<sup>th</sup> Cir. 2014).

An elector who meets the strict definition of “indefinitely confined” in Wis. Stat. § 6.86(2)(a) must sign a statement to that effect, and then “the elector may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement . . . which contains the name and address of the elector and verifies that the name and address are correct.” Wis. Stat. § 6.87(4)(b)2.

For the Election, the number of electors claiming “indefinitely confined” status and thereby obtaining an absentee ballot without the otherwise required photo identification increased massively. In Milwaukee and Dane Counties alone 46,498 absentee ballots were issued to electors claiming such status without identification and who returned an absentee ballot. Dane Cty. Trans. 11/28/20 at 7:2-12:8 (Dane County had 15,102 voters in this category and 8,907 claimed such status after March 25<sup>th</sup>); Milwaukee Cty. Trans 11/27/20 at 19:23-22:2 (Milwaukee County had 31,296 voters in this category and 19,488 claimed such status after March 25<sup>th</sup>); App. 155 at 7:2 to 166 at 12:8, 188:23-221:2. As noted earlier, the number of those claiming to be indefinitely confined in Dane and Milwaukee Counties ballooned after the clerks of both counties issued public statements that all electors could claim this status based solely on the Governor’s Safer at Home Order. This Court conclusively declared that such advice was incorrect. *See*, March 31, 2020 Order, *Jefferson v. Dane County*, No. 2020AP557-OA at 2 at App. 235-237 (explaining that the Dane County and Milwaukee County Clerks indicated that “all Dane [and Milwaukee] County voters could declare themselves to be ‘indefinitely confined’ under Wis. Stat. § 6.86(2)” because of the Safer at Home Order “thereby avoiding the legal

requirement to present or upload a copy of the voter’s proof of identification when requesting an absentee ballot” and concluding that such “advice was legally incorrect.”).

As the Recount demonstrated, the damage was already done. This Court could have taken solace that so long as the clerks did their job under the statutes, the voter rolls would be cleared of those who were not qualified for the status. The clerks and the electors each had an obligation to act. Municipal clerks are expressly charged with the responsibility to review and expunge from the voter rolls those claiming to be Indefinitely Confined Voters when the Clerk has “reliable information that [the]... elector no longer qualifies for the service.” Wis. Stat. § 6.86(2)(b). Moreover, electors who claimed they were Indefinitely Confined, but were not physically ill, infirm, elderly, or disabled were obligated to take steps to remove themselves from that status prior to the November 3, 2020 election. Wis. Stat. § 6.86(2)(a) (“If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.”) The Dane County Clerk acknowledged this obligation. Aff. Jordan Moskowitz (11/27/20) ¶8, Ex. 6. App. 224-225, 238-239. Unfortunately, no action was taken. *See id.* ¶ 6, Ex. 4. App. 224, 223.

Indefinitely Confined Absentee Ballots issued without the required photo identification to electors that were not “elderly, infirm or disabled and indefinitely confined” were issued in violation of clear and unambiguous law and must be excluded from any certified results of the Election. Wis. Stat. § 6.86(2)(a); *Frank*, 17 F. Supp. 3d at 844. During the Recount, Petitioners identified with

specificity Indefinitely Confined Absentee Ballots that were issued after the improper March 25, 2020 statements by the Dane County and Milwaukee County Clerks. Dane Cty. Trans. 11/28/20 at 7:2-12:8; Milwaukee Cty. Trans 11/27/20 at 19:23-22:2. App. 155 at 7:2 to 156 at 12:8, 117:23-221:2. Petitioners isolated only those claiming the status after March 25 (the date of the offending Facebook post discussed by this Court in *Jefferson v. Dane County*, No. No. 2020AP557-OA) who had no identification on file and who did not vote in specific locations where their identity would have been noted. Petitioners objected to counting any of these ballots and requested that they be excluded from the results. Dane Cty. Trans. 11/20/20 at 53:22-55:20, Milwaukee Cty. Trans 11/27/20 at 19:23-22:2. App. 132 at 53:22 to 133 at 55:20, 118:23-221:2. However, despite the statutes requiring photo identification, the Boards overruled Petitioners' objections and continued improperly counting those ballots as part of the Recount. Milwaukee Cty. Trans. 11/27/20 at 20:5-22:2; Dane Cty. Trans. 11/20/20 at 53:22-66:9; App. 119:5-221:2, 132 at 53:22 to 96 at 66:9.

This Court should exercise its original jurisdiction, declare that absentee ballots issued without photo identification to any elector that was not “elderly, infirm or disabled *and* indefinitely confined” are invalid, and enjoin the inclusion of at least the narrowest subset of that group, 28,395, in the results and certification of the Election.

**D. Receipt of Ballots and Other Activities by the City of Madison at “Democracy in the Park” Events Violate Wisconsin Election Laws.**

Wisconsin laws are designed to prohibit the very activities the City of Madison engaged in during “Democracy in the Park” events. Wisconsin is not an early voting state, yet the City of Madison did everything it could to treat Madison voters as if it were just that.

By creating 206 polling locations—that is locations manned by poll workers, with signage for polling places, providing witnesses for absentee ballots and otherwise acting in virtually every way like a place an elector could cast a ballot prior to election day and even prior to the limited 14 day period authorized by statute for in-person absentee balloting—the City of Madison ignored the prohibition on receiving ballots anywhere other than the clerk’s office. Wis. Stat. § 6.87(4)(b)1; *Olson*, 2 Wis. 2d at 236; Dane Cty. Trans. 11/24/20 at 52:16-56:15; Aff. Kyle J. Hudson ¶¶3-6, Exs. B-E; App. 148 at 52:16 to 149 at 56:15, 163-175. It failed to comply with virtually every substantive provision of Wis. Stat. § 6.855(1) (*e.g.* no Governing authority approval, multiple offices when only one is allowed) to establish an alternative clerk’s office. If, in the alternative, the City of Madison believes it can simply receive ballots anywhere it chooses, at any times it chooses, through anyone it chooses, then it is wrong. This Court (*Olson*, 2 Wis. 2d at 236) and the Statutes (Wis. Stat. § 6.87(4)(b)) plainly do not authorize such actions.



The City's attempt to evade the direct prescriptions of Wisconsin absentee voting requirements must be rejected and the total of the ballots received 17,271, as a result of those actions should be drawn down.

## **CONCLUSION**

This Court should grant the Petition and provide the requested relief by ordering that the results and certification of the Election may not include any In-Person Absentee Ballots without an associated written application, Incomplete and Altered-Certification Absentee Ballots, any absentee ballots issued to persons who claimed to be Indefinitely Confined after March 25, 2020 and who failed to provide photo identification and those ballots received at "Democracy in the Park" events.

Moreover, Court should enter such orders as necessary to enjoin, or otherwise direct, Governor Anthony Evers to rescind and withdraw any prior certification he may have attempted to enter related to the selection of electors.

Dated this 1st day of December, 2020.

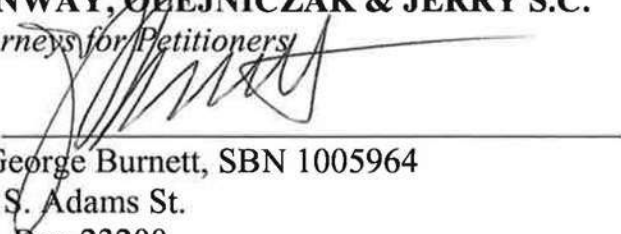
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## CERTIFICATION

I hereby certify that this memorandum conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this memorandum is 10,784 words, exclusive of the caption, Table of Contents and Authorities, Statement of Issues, signature page, and the Certification.

Dated this 1<sup>st</sup> day of December, 2020.

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No. \_\_\_\_\_

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## **In the Supreme Court of Wisconsin**

DONALD J. TRUMP, MICHAEL R. PENCE, and DONALD J. TRUMP FOR  
PRESIDENT, INC.,

PETITIONERS,

v.

ANTHONY S. EVERS, Governor of Wisconsin in his official capacity, THE  
WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, Chair of the  
Wisconsin Elections Commission in her official capacity, SCOTT  
MCDONELL, Dane County Clerk in his official capacity, ALAN A.  
ARNSTEN, Member of the Dane County Board of Canvassers in his  
official capacity, JOYCE WALDROP, Member of the Dane County Board of  
Canvassers in her official capacity, GEORGE L. CHRISTENSON, Milwaukee  
County Clerk in his official capacity, TIMOTHY H. POSNANSKI, Member of  
the Milwaukee County Board of Canvassers in his official capacity,  
RICHARD BASS, Member of the Milwaukee County Board of Canvassers  
in his official capacity, and DAWN MARTIN, Member of the Milwaukee  
County Board of Canvassers in her official capacity,

RESPONDENTS.

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### **PETITIONERS' APPENDIX**

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