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APPEAL,ATTYOPEN,CLOSED,RF

United States District Court
Eastern District of Wisconsin (Milwaukee)
CIVIL DOCKET FOR CASE #: 2:20-cv-01771-PP

Feehan et al v. Wisconsin Elections Commission et al
Assigned to: Chief Judge Pamela Pepper
Case in other court: 20-03396
USCA: Feehan: 12-00010-2020, 20-03396
Cause: 42:1983 Civil Rights Act

Date Filed: 12/01/2020
Date Terminated: 12/10/2020
Jury Demand: None
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

Plaintiff

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Date Filed	#	Docket Text
12/01/2020	1	COMPLAINT against All Plaintiffs by William Feehan. (Filing Fee PAID $400 receipt number AWIEDC-3652059) (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit, # 20 Exhibit, # 21 Exhibit, # 22 Exhibit, # 23 Exhibit, # 24

		Exhibit, # 25 Exhibit, # 26 Exhibit, # 27 Exhibit)(Dean, Michael) (Additional attachment(s) added on 12/1/2020: # 28 Civil Cover Sheet) (jcl).
12/01/2020	2	MOTION for Temporary Restraining Order by All Plaintiffs. (Dean, Michael)
12/01/2020	3	BRIEF in Support filed by All Plaintiffs re 2 MOTION for Temporary Restraining Order . (Dean, Michael)
12/01/2020		NOTICE Regarding assignment of this matter to Chief Judge Pamela Pepper; Consent/refusal forms for Magistrate Judge Joseph to be filed within 21 days; the consent/refusal form is available here. Pursuant to Civil Local Rule 7.1 a disclosure statement is to be filed upon the first filing of any paper and should be filed now if not already filed. (jcl)
12/01/2020	4	Magistrate Judge Jurisdiction Form filed by All Plaintiffs. (NOTICE: Pursuant to Fed.R.Civ.P. 73 this document is not viewable by the judge.) (Dean, Michael)
12/01/2020	5	DISCLOSURE Statement by All Plaintiffs. (Dean, Michael)
12/01/2020	6	MOTION to Amend/Correct Docket # 2: PLAINTIFFS MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF by All Plaintiffs. (Attachments: # 1 Text of Proposed Order)(Dean, Michael)
12/02/2020	7	ORDER signed by Chief Judge Pamela Pepper on 12/2/2020 re 6 Amended Motion for Injunctive Relief. (cc: all counsel)(cb)
12/02/2020	8	NOTICE of Appearance by Sidney Powell on behalf of All Plaintiffs. Attorney(s) appearing: Sidney Powell (Powell, Sidney)
12/03/2020	9	AMENDED COMPLAINT *removing Derrick Van Orden as Plaintiff* against All Defendants filed by William Feehan. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit)(Dean, Michael)
12/03/2020	10	Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF by William Feehan. (Attachments: # 1 Information Sheet Proposed Briefing Schedule)(Dean, Michael)
12/03/2020	11	NOTICE of Appearance by Jeffrey A Mandell on behalf of Tony Evers. Attorney(s) appearing: Jeffrey A. Mandell (Mandell, Jeffrey)
12/03/2020	12	NOTICE of Appearance by Rachel E Snyder on behalf of Tony Evers. Attorney(s) appearing: Rachel E. Snyder (Snyder, Rachel)
12/03/2020	13	NOTICE of Appearance by Howard Kleinhendler on behalf of William Feehan. Attorney(s) appearing: Howard Kleinhendler (Kleinhendler, Howard)
12/03/2020	14	MOTION to Intervene by James Gesbeck. (Attachments: # 1 Proposed Answer, # 2 Certificate of Service)(asc)
12/03/2020	15	BRIEF in Support filed by James Gesbeck re 14 MOTION to Intervene. (asc)
12/03/2020	16	MOTION Reassign Case Pursuant to Civil L.R. 3(b) by Tony Evers. (Attachments: # 1 Exhibit 1 - Notice from Case 20-CV-1785)(Mandell, Jeffrey)
12/03/2020	17	NOTICE of Appearance by Sean Michael Murphy on behalf of Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission. Attorney(s) appearing: Sean Michael Murphy, Jody J. Schmelzer, Colin T. Roth (Murphy, Sean)

12/03/2020	18	RESPONSE to Motion filed by William Feehan re 16 MOTION Reassign Case Pursuant to Civil L.R. 3(b) . (Dean, Michael)
12/03/2020	19	ORDER signed by Chief Judge Pamela Pepper on 12/3/2020 DENYING 16 defendant Tony Evers's motion to reassign case pursuant to Civil L.R. 3(b). (cc: all counsel)(cb)
12/03/2020	20	NOTICE of Appearance by Charles G Curtis, Jr on behalf of Democratic National Committee. Attorney(s) appearing: Charles G. Curtis (Curtis, Charles)
12/03/2020	21	NOTICE of Appearance by Michelle M Umberger on behalf of Democratic National Committee. Attorney(s) appearing: Michelle M. Umberger (Umberger, Michelle)
12/03/2020		Party Derrick Van Orden terminated. (amb) (Entered: 12/04/2020)
12/04/2020	22	MOTION to Intervene by Democratic National Committee. (Attachments: # 1 Exhibit 1-Proposed Answer, # 2 Text of Proposed Order)(Umberger, Michelle)
12/04/2020	23	BRIEF in Support filed by Democratic National Committee re 22 MOTION to Intervene . (Umberger, Michelle)
12/04/2020	24	DISCLOSURE Statement by Democratic National Committee. (Umberger, Michelle)
12/04/2020	25	REPLY filed by Tony Evers *to Plaintiff's Proposed Briefing Schedule*. (Mandell, Jeffrey)
12/04/2020	26	REPLY filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission *to Plaintiff's Proposed Briefing Schedule*. (Murphy, Sean)
12/04/2020	27	NOTICE of Appearance by Justin A Nelson on behalf of Tony Evers. Attorney(s) appearing: Justin A. Nelson (Nelson, Justin)
12/04/2020	28	NOTICE of Appearance by Davida Brook on behalf of Tony Evers. Attorney(s) appearing: Davida Brook (Brook, Davida)
12/04/2020	29	ORDER signed by Chief Judge Pamela Pepper on 12/4/2020. 10 Plaintiff's amended motion GRANTED IN PART to extent that it is Civil L.R. 7(h) expedited non-dispositive motion for expedited briefing schedule; defendant's opposition to plaintiff's amended motion due by 5:00 PM on 12/7/2020, plaintiff's reply due by 5:00 PM on 12/8/2020. The court DEFERS RULING on plaintiff's amended motion to extent that it asks the court to issue TRO or preliminary injunction. (cc: all counsel)(cb)
12/04/2020	30	NOTICE of Appearance by Stephen Shackelford, Jr on behalf of Tony Evers. Attorney(s) appearing: Stephen L. Shackelford, Jr. (Shackelford, Stephen)
12/04/2020	31	NOTICE of Appearance by Richard Manthe on behalf of Tony Evers. Attorney(s) appearing: Richard A. Manthe (Manthe, Richard)
12/04/2020	32	NOTICE of Appearance by Paul M Smith on behalf of Tony Evers. Attorney(s) appearing: Paul M. Smith (Smith, Paul)
12/04/2020	33	7(h) Expedited NON-DISPOSITIVE MOTION to Intervene by James Gesbeck. (Attachments: # 1 Certificate of Service)(lz)
12/04/2020	34	MOTION for Leave to File Excess Pages by Tony Evers. (Mandell, Jeffrey)
12/04/2020	35	NOTICE of Appearance by Sidney Powell on behalf of All Plaintiffs. Attorney(s) appearing: Sidney Powell (Powell, Sidney)
12/04/2020	36	TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/4/2020 re 34 MOTION for Leave to File Excess Pages filed by Tony Evers: The defendant seeks leave to file a brief in excess of the thirty pages allowed by Civil L.R. 7(f) because he proposes

		to both oppose the plaintiff's amended motion for injunctive relief and support his own, not yet filed motion to dismiss in the same pleading. The court appreciates any party's effort to streamline litigation, but would prefer that the defendant file separate briefs opposing the plaintiff's amended motion and supporting his own. This will avoid confusion when the plaintiff responds. The court **DENIES** the defendant's motion for leave to file excess pages. **NOTE: There is no document associated with this text-only order.** (cc: all counsel)(Pepper, Pamela)
12/04/2020	37	ORDER signed by Chief Judge Pamela Pepper on 12/4/2020 allowing James Gesbeck to file *amicus curiae* brief by 5:00 PM on 12/7/2020. (cc: all counsel, via mail to James Gesbeck)(cb)
12/05/2020	38	TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/5/2020 re 22 MOTION to Intervene filed by Democratic National Committee signed by Chief Judge Pamela Pepper on 12/5/2020: Under Civil L.R. 7(b), the plaintiff's response is due by December 25, 2020; because December 25 is a federal holiday, the court **ORDERS** that the plaintiff's response is due by December 28, 2020. **NOTE: There is no document associated with this text-only order.** (cc: all counsel)(Pepper, Pamela)
12/05/2020	39	TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/05/2020 re 33 MOTION to Intervene filed by James Gesbeck: Under Civil L.R. 7(h), the plaintiff's response is due by Friday, December 11, 2020. **NOTE: There is no document associated with this text-only order.** (cc: all counsel)(Pepper, Pamela)
12/05/2020	40	Expedited MOTION to Intervene by Democratic National Committee. (Umberger, Michelle)
12/06/2020	41	ORDER signed by Chief Judge Pamela Pepper on 12/6/2020. 40 Movant DNC's expedited motion to intervene GRANTED to extent that court has expedited its ruling on original motion to intervene. 22 Movant DNC's original motion to intervene DENIED. Movant DNC may file *amicus curiae* brief by 5:00 PM on 12/7/2020. (cc: all counsel)(cb)
12/06/2020	42	BRIEF in Support filed by William Feehan re 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF *Amended Brief*. (Dean, Michael)
12/06/2020	43	MOTION To File Separate Reply Briefs by William Feehan. (Dean, Michael)
12/06/2020	44	MOTION To Hold Consolidated Evidentiary Hearing/Trial by William Feehan. (Dean, Michael)
12/07/2020	45	TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/7/2020 re 43 MOTION To File Separate Reply Briefs filed by William Feehan: The court **GRANTS** the plaintiff's motion for leave to file separate reply briefs. If the defendants file a single opposition brief, the plaintiff must file one reply to that brief. If the defendants file separate opposition briefs, the plaintiff may file a reply for each opposition brief. The plaintiff also may file a separate reply for each brief filed by an amicus. (In other words, the plaintiff could file up to four reply briefs if the defendants file separate briefs and each amicus files a brief.) If the defendants file a separate motion to dismiss, the plaintiff may file an opposition brief of up to thirty pages under Civil L.R. 7(b). **NOTE: There is no document associated with this text-only order.** (cc: all counsel)(Pepper, Pamela)
12/07/2020		NOTICE of Hearing: Status Conference set for 12/8/2020 at 11:00 AM by telephone before Chief Judge Pamela Pepper. The parties are to appear by calling the court's conference line at 888-557-8511 and entering access code 4893665#. (cc: all counsel)(cb)
12/07/2020	46	RESPONSE to Motion filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean

		Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 44 MOTION To Hold Consolidated Evidentiary Hearing/Trial . (Murphy, Sean)
12/07/2020	47	AMICUS BRIEF in Opposition to 6 MOTION for Injunctive Relief filed by James Gesbeck. (asc)
12/07/2020	48	NOTICE of Appearance by David S Lesser on behalf of Democratic National Committee. Attorney(s) appearing: David S. Lesser (Lesser, David)
12/07/2020	49	NOTICE of Appearance by Jamie Dycus on behalf of Democratic National Committee. Attorney(s) appearing: Jamie S. Dycus (Dycus, Jamie)
12/07/2020	50	NOTICE of Appearance by Stephen Morrissey on behalf of Tony Evers. Attorney(s) appearing: Stephen E. Morrissey (Morrissey, Stephen)
12/07/2020	51	MOTION to Dismiss *Plaintiff's Amended Complaint* by Tony Evers. (Mandell, Jeffrey)
12/07/2020	52	RESPONSE to Motion filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 2 MOTION for Temporary Restraining Order . (Murphy, Sean)
12/07/2020	53	MOTION to Dismiss by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission. (Murphy, Sean)
12/07/2020	54	BRIEF in Support filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 53 MOTION to Dismiss . (Murphy, Sean)
12/07/2020	55	BRIEF in Opposition filed by Tony Evers re 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF . (Attachments: # 1 Exhibit 1 WVA v. WEC, # 2 Exhibit 2 Trump v. Boockvar, # 3 Exhibit 3 Wood v. Raffensperger, # 4 Exhibit 4 Wood v. Raffensperger (11th Cir.), # 5 Exhibit 5 King v. Whitmer TRO Decision, # 6 Exhibit 6 Zilisch v. R.J. Reynolds, # 7 Exhibit 7 Consolidate Water v..40 Acres, # 8 Exhibit 8 Jefferson v. Dane County, # 9 Exhibit 9 Bognet v. Secretary of Commonwealth, # 10 Exhibit 10 O'Bright v. Lynch Order, # 11 Exhibit 11 Trump v. Evers Order)(Mandell, Jeffrey)
12/07/2020	56	MOTION for Leave to File *Amicus Curiae Brief* by Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss. (Goode, Joseph)
12/07/2020	57	BRIEF in Opposition filed by Democratic National Committee re 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF . (Attachments: # 1 Exhibit 1 - Washington Voters Alliance Case, # 2 Exhibit 2 - Trump v. Evers Case, # 3 Exhibit 3 - Mueller v. Jacobs Case, # 4 Exhibit 4 - King v. Benson Case, # 5 Exhibit 5 - March 29, 2020 Guidance, # 6 Exhibit 6 - Jefferson v. Dane Case, # 7 Exhibit 7 - October 18, 2016 Guidance, # 8 Exhibit 8 - Election Manual, # 9 Exhibit 9 - November 10, 2020 Guidance)(Umberger, Michelle)
12/07/2020	58	UNPUBLISHED Decision *Pursuant to Civil L.R. 7(J)* filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission (Attachments: # 1 Exhibit 1- Martel v. Condos, # 2 Exhibit 2- Moore v. Circosta, # 3 Exhibit 3- Donald J. Trump for President v. Cegavske, # 4 Exhibit 4- Bognet v. Secretary of the Commonwealth of Pennsylvania, # 5 Exhibit 5- Donald J. Trump for President v. Boockvar, # 6 Exhibit 6- Donald J. Trump for President v. Pennsylvania, # 7 Exhibit 7- Wood v. Raffensperger, # 8 Exhibit 8- King v. Whitmer) (Murphy, Sean)

12/07/2020	59	BRIEF in Support filed by Tony Evers re 51 MOTION to Dismiss *Plaintiff's Amended Complaint* . (Attachments: # 1 Exhibit 1 Whitake v. Kenosha, # 2 Exhibit 2 Bognet v. Secretary of Commenwealth, # 3 Exhibit 3 Hotze v. Hollins, # 4 Exhibit 4 Wood v. Raffensperger, # 5 Exhibit 5 Wood v. Raffensperger (11th Cir.), # 6 Envelope 6 Moore v. Circosta, # 7 Exhibit 7 Trump v. Evers, # 8 Exhibit 8 WVA v. WEC, # 9 Exhibit 9 Trump Notice of Appeal, # 10 Exhibit 10Trump v. Biden Consolidation Order, # 11 Exhibit 11 Andino v. Middleton, # 12 Exhibit 12 Massey v. Coon, # 13 Exhibit 13 Balsam v. New Jersey, # 14 Exhibit 14 Thompson v. Alabama, # 15 Exhibit 15 Braynard Expert Report) (Mandell, Jeffrey)
12/07/2020	60	BRIEF in Opposition filed by Tony Evers re 44 MOTION To Hold Consolidated Evidentiary Hearing/Trial . (Mandell, Jeffrey)
12/08/2020	61	NOTICE of Appearance by Jon Greenbaum on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Jon Greenbaum (Greenbaum, Jon)
12/08/2020	62	NOTICE of Appearance by Allison E Laffey on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Allison E. Laffey (Laffey, Allison)
12/08/2020	63	NOTICE of Appearance by John W Halpin on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: John W. Halpin (Halpin, John)
12/08/2020	64	NOTICE of Appearance by Mark M Leitner on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Mark M. Leitner (Leitner, Mark)
12/08/2020	65	NOTICE of Appearance by Joseph S Goode on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Joseph S. Goode (Goode, Joseph)
12/08/2020	66	NOTICE of Appearance by Ezra D Rosenberg on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Ezra D. Rosenberg (Rosenberg, Ezra)
12/08/2020	67	NOTICE of Appearance by Jacob Conarck on behalf of Wisconsin State Conference NAACP. Attorney(s) appearing: Jacob P. Conarck (Conarck, Jacob)
12/08/2020	68	NOTICE of Appearance by Seth P Waxman on behalf of Democratic National Committee. Attorney(s) appearing: Seth P. Waxman (Waxman, Seth)
12/08/2020	69	ORDER signed by Chief Judge Pamela Pepper on 12/8/2020 GRANTING 56 Motion for Leave to File *Amicus Curiae Brief* filed by Earnestine Moss, Dorothy Harrell, Wisconsin State Conference NAACP, Wendell J. Harris, Sr. (cc: all counsel)(cb)
12/08/2020	70	Audio of statue conference held on 12/8/2020 at 11:08 a.m.; File Size (51.1 MB) (kgw)
12/08/2020	71	Court Minutes and Order from the Status Conference held before Chief Judge Pamela Pepper on 12/8/2020. The court **DENIES** the 44 Motion for Consolidated Evidentiary Hearing and Trial on the Merits. The court **ORDERS** the plaintiff to file his responses to the motions to dismiss (Dkt. Nos. 51 and 53) and reply brief in support of his motion for injunctive relief (Dkt. No. 10) by December 8, 2020 at 5 p.m. CST. The court **ORDERS** that if the defendants and amici wish to file reply briefs in support of the motions to dismiss, they must do so by December 9, 2020 at 3 p.m. CST. (Court Reporter Thomas Malkiewicz.) (kgw)

12/08/2020	72	BRIEF in Opposition filed by William Feehan re 51 MOTION to Dismiss *Plaintiff's Amended Complaint*, 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF , 53 MOTION to Dismiss *and Consolidated in Reply/Response to Response Briefs of Defendants and Opposition Briefs of Amici*. (Attachments: # 1 Exhibit, # 2 Exhibit)(Dean, Michael)
12/09/2020	73	REPLY BRIEF in Support filed by Tony Evers re 51 MOTION to Dismiss *Plaintiff's Amended Complaint* . (Attachments: # 1 Exhibit 1 American Commercial Barge Lines v. Reserve FTL, # 2 Exhibit 2 Trump v. Secretary of Pennsylvania)(Mandell, Jeffrey)
12/09/2020	74	ORDER signed by Chief Judge Pamela Pepper on 12/9/2020. 14 James Gesbeck's motion to intervene DENIED. 33 James Gesbeck's Civil LR 7(h) motion to intervene GRANTED to extent it asks the court to expedite ruling on motion to intervene and DENIED to extent it asks the court to grant motion to intervene. (cc: all counsel)(cb)
12/09/2020	75	MOTION to Seal Document *Public Motion Prior to Filing Sealed/Restricted Exhibits* by William Feehan. (Attachments: # 1 Exhibit, # 2 Exhibit)(Dean, Michael)
12/09/2020	76	BRIEF in Support filed by William Feehan re 75 MOTION to Seal Document *Public Motion Prior to Filing Sealed/Restricted Exhibits* . (Dean, Michael)
12/09/2020	77	REPLY BRIEF in Support filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 53 MOTION to Dismiss . (Murphy, Sean)
12/09/2020	78	UNPUBLISHED Decision *Pursuant to Civil L.R. 7(J)* filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission (Attachments: # 1 Exhibit 1- King, # 2 Exhibit 2- Bognet, # 3 Exhibit 3- Boockvar, # 4 Exhibit 4- Hotze, # 5 Exhibit 5- Massey, # 6 Exhibit 6- Aguila Management, # 7 Exhibit 7- Solow Building Co.)(Murphy, Sean)
12/09/2020	79	BRIEF in Opposition filed by Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP re 6 MOTION to Amend/Correct Docket # 2: PLAINTIFFS MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF , 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF . (Goode, Joseph)
12/09/2020	80	NOTICE of Appearance by Christopher Bouchoux on behalf of Democratic National Committee. Attorney(s) appearing: Christopher Bouchoux (Bouchoux, Christopher)
12/09/2020	81	NOTICE by Tony Evers *Notice of Supplemental Authority* (Brook, Davida)
12/09/2020	82	ORDER signed by Chief Judge Pamela Pepper on 12/9/2020 DENYING 75 plaintiff's Motion to Seal Document *Public Motion Prior to Filing Sealed/Restricted Exhibits*. (cc: all counsel)(cb)
12/09/2020	83	ORDER DISMISSING CASE signed by Chief Judge Pamela Pepper on 12/9/2020. 51 Defendant Evers's motion to dismiss plaintiff's amended complaint GRANTED. 53 Defendants Wisconsin Elections Commission and its Members motion to dismiss GRANTED. 6 Plaintiff's corrected motion for declaratory, emergency and permanent injunctive relief DENIED as moot. 10 Plaintiff's amended motion for temporary restraining order and preliminary injunction to be considered in an expedited manner DENIED as moot. 9 Plaintiff's amended complaint for declaratory, emergency and permanent injunctive relief DISMISSED. (cc: all counsel)(cb)
12/10/2020	84	NOTICE OF APPEAL as to 83 Order Dismissing Case,,, Terminate Motions,, by William Feehan. Filing Fee PAID $505, receipt number AWIEDC-3664794 (cc: all counsel) (Dean,

		Michael)
12/10/2020	85	JUDGMENT signed by Deputy Clerk and approved by Chief Judge Pamela Pepper on 12/9/2020. (cc: all counsel)(cb)
12/10/2020	86	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 84 Notice of Appeal (lmf)
12/10/2020	87	Attorney Cover Letter re: 84 Notice of Appeal (Attachments: # 1 Docket Sheet)(lmf)
12/10/2020	88	USCA Case Number 20-3396 re: 84 Notice of Appeal filed by William Feehan. (lmf)

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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs.

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

CASE NO. 2:20-cv-1771

COMPLAINT FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF

NATURE OF THE ACTION

1. This civil action brings to light a massive election fraud, multiple violations of the Wisconsin Election Code, *see, e.g.,* Wis. Stat. §§ 5.03, *et. seq.*, in addition to the Election and Electors Clauses and Equal Protection Clause of the U.S. Constitution. These violations occurred during the 2020 General Election throughout the State of Wisconsin, as set forth in the affidavits of dozens of eyewitnesses and the statistical anomalies and mathematical impossibilities detailed in the affidavits of expert witnesses.

2. The scheme and artifice to defraud was for the purpose of illegally and fraudulently

manipulating the vote count to manufacture an election of Joe Biden as President of the United States, and also of various down ballot democrat candidates in the 2020 election cycle. The fraud was executed by many means, but the most fundamentally troubling, insidious, and egregious ploy was the systemic adaptation of old-fashioned "ballot-stuffing." It has now been amplified and rendered virtually invisible by computer software created and run by domestic and foreign actors for that very purpose. This Complaint details an especially egregious range of conduct in Milwaukee County and the City of Milwaukee, along with Dane County, La Crosse County, Waukesha County, St. Croix County, Washington County, Bayfield County, Ozaukee County and various other counties throughout the Third District and throughout Wisconsin employing Dominion Systems, though this conduct occurred throughout the State at the direction of Wisconsin state election officials.

3. The multifaceted schemes and artifices implemented by Defendants and their collaborators to defraud resulted in the unlawful counting, or fabrication, of hundreds of thousands of illegal, ineligible, duplicate or purely fictitious ballots in the State of Wisconsin, that collectively add up to multiples of Biden's purported lead in the State of 20,565 votes.

4. While this Complaint, and the eyewitness and expert testimony incorporated herein, identify with specificity sufficient ballots required to set aside the 2020 General Election results, the entire process is so riddled with fraud, illegality, and statistical impossibility that this Court, and Wisconsin's voters, courts, and legislators, cannot rely on, or certify, any numbers resulting from this election. Accordingly, this Court must set aside the results of the 2020 General Election and grant the declaratory and injunctive relief requested herein.

Dominion Voting Systems Fraud and Manipulation

5. The fraud begins with the election software and hardware from Dominion Voting Systems Corporation ("Dominion") used by the Wisconsin Board of State Canvassers. The Dominion systems derive from the software designed by Smartmatic Corporation, which became Sequoia in the United States.

6. Smartmatic and Dominion were founded by foreign oligarchs and dictators to ensure computerized ballot-stuffing and vote manipulation to whatever level was needed to make certain Venezuelan dictator Hugo Chavez never lost another election. *See* Ex. 1, Redacted Declaration of Dominion Venezuela Whistleblower ("Dominion Whistleblower Report"). Notably, Chavez "won" every election thereafter.

7. As set forth in the Dominion Whistleblower Report, the Smartmatic software was contrived through a criminal conspiracy to manipulate Venezuelan elections in favor of dictator Hugo Chavez:

> Importantly, I was a direct witness to the creation and operation of an electronic voting system in a conspiracy between a company known as Smartmatic and the leaders of conspiracy with the Venezuelan government. This conspiracy specifically involved President Hugo Chavez Frias, the person in charge of the National Electoral Council named Jorge Rodriguez, and principals, representatives, and personnel from Smartmatic. The purpose of this conspiracy was to create and operate a voting system that could change the votes in elections from votes against persons running the Venezuelan government to votes in their favor in order to maintain control of the government. In mid-February of 2009, there was a national referendum to change the Constitution of Venezuela to end term limits for elected officials, including the President of Venezuela. The referendum passed. This permitted Hugo Chavez to be re-elected an unlimited number of times. . . .
>
> Smartmatic's electoral technology was called "Sistema de Gestión Electoral" (the "Electoral Management System"). Smartmatic was a pioneer in this area of computing systems. Their system provided for transmission of voting data over the internet to a computerized central tabulating center. The voting machines themselves had a digital display, fingerprint recognition feature to identify the voter, and printed out the voter's ballot. The voter's thumbprint was linked to a computerized record of that voter's identity. Smartmatic created and operated the

entire system. *Id.* ¶¶ 10 & 14.

8. A core requirement of the Smartmatic software design ultimately adopted by Dominion for Wisconsin's elections was the software's ability to hide its manipulation of votes from any audit. As the whistleblower explains:

> Chavez was most insistent that Smartmatic design the system in a way that the system could change the vote of each voter without being detected. He wanted the software itself to function in such a manner that if the voter were to place their thumb print or fingerprint on a scanner, then the thumbprint would be tied to a record of the voter's name and identity as having voted, but that voter would not tracked to the changed vote. He made it clear that the system would have to be setup to not leave any evidence of the changed vote for a specific voter and that there would be no evidence to show and nothing to contradict that the name or the fingerprint or thumb print was going with a changed vote. Smartmatic agreed to create such a system and produced the software and hardware that accomplished that result for President Chavez. *Id.* ¶15.

9. The design and features of the Dominion software do not permit a simple audit to reveal its misallocation, redistribution, or deletion of votes. First, the system's central accumulator does not include a protected real-time audit log that maintains the date and time stamps of all significant election events. Key components of the system utilize unprotected logs. Essentially this allows an unauthorized user the opportunity to arbitrarily add, modify, or remove log entries, causing the machine to log election events that do not reflect actual voting tabulations—or more specifically, do not reflect the actual votes of or the will of the people.[1]

10. This Complaint will show that Dominion violated physical security standards by connecting voting machines to the Internet, allowing Dominion, domestic third parties or hostile foreign actors to access the system and manipulate election results, and moreover potentially to

[1] *See* Ex. 7, August 24, 2020 Declaration of Harri Hursti, ¶¶45-48 (expert testimony in Case 1:17-cv-02989 in the U.S. District Court for the Northern District of Georgia). The Texas Secretary of State refused to certify Dominion for similar reasons as those cited by Mr. Hursti. *See* Ex. 9, State of Texas Secretary of State, Elections Division, Report of Review of Dominion Voting Systems Democracy Suite 5.5-A at 2 (Jan. 24, 2020).

cover their tracks due to Dominion's unprotected log. Accordingly, a thorough forensic examination of Dominion's machines and source code (pursuant to Wisconsin Statute § 5.905) is required to document these instances of voting fraud, as well as Dominion's systematic violations of the Voting Rights Act record retention requirements through manipulation, alteration, destruction and likely foreign exfiltration of voting records. See 52 U.S.C. § 20701.

11. These and other problems with Dominion's software have been widely reported in the press and been the subject of investigations. In certifying Dominion Voting Systems Democracy Suite, Wisconsin officials disregarded all the concerns that caused Dominion software to be rejected by the Texas Board of elections in 2020 because it was deemed vulnerable to undetected and non-auditable manipulation. Texas denied Certification because of concerns that it was not safe from fraud or unauthorized manipulation. (See Exhs 11 A and B).

12. An industry expert, Dr. Andrew Appel, Princeton Professor of Computer Science and Election Security Expert has recently observed, with reference to Dominion Voting machines: "I figured out how to make a slightly different computer program that just before the polls were closed, it switches some votes around from one candidate to another. I wrote that computer program into a memory chip and now to hack a voting machine you just need 7 minutes alone with a screwdriver."[2]

13. In addition to the Dominion computer fraud, this Complaint identifies several additional categories of "traditional" voting fraud that occurred as a direct result of Defendant Wisconsin Election Commission ("WEC") and other Defendants directing Wisconsin clerks and other election officials to ignore or violate the express requirements of the Wisconsin Election Code.

[2] Andrew W. Appel, *et al.*, "Ballot Marking Devices (BMDs) Cannot Assure the Will of the Voters" at (Dec. 27, 2019),(attached hereto as Exh. 10 ("Appel Study")).

First, the WEC issued "guidance" to county and municipal clerks not to reject "indefinitely confined" absentee voters, even if the clerks possess "reliable information" that the voter is no longer indefinitely confined, in direct contravention of Wisconsin Statute § 6.86(2)(6), which states that clerks must remove such voters. Second, the WEC issued further guidance directing clerks – in violation of Wisconsin Statute § 6.87(6)(d), which states that an absentee envelope certification "is missing the address of a witness, the ballot may not be counted" – to instead fill in the missing address information.

14. This Complaint presents expert witness testimony demonstrating that several hundred thousand illegal, ineligible, duplicate or purely fictitious votes must be thrown out, in particular:

A. A report from Dr. William Briggs, showing that there were approximately 29,594 absentee ballots listed as "unreturned" by voters that either never requested them, or that requested and returned their ballots;

B. Reports from Redacted Expert Witnesses who can show an algorithm was used to pick a winner.

15. In the accompanying redacted declaration of a former electronic intelligence analyst with 305th Military Intelligence with experience gathering SAM missile system electronic intelligence, the Dominion software was accessed by agents acting on behalf of China and Iran in order to monitor and manipulate elections, including the most recent US general election in 2020. (See Ex. 12, copy of redacted witness affidavit).

16. These and other "irregularities" demonstrate that at least 318,012 illegal ballots were counted in Wisconsin. This provides the Court with sufficient grounds to set aside the results of the 2020 General Election and provide the other declaratory and injunctive relief requested herein.

JURISDICTION AND VENUE

17. This Court has subject matter under 28 U.S.C. § 1331 which provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties

of the United States."

18. This Court also has subject matter jurisdiction under 28 U.S.C. § 1343 because this action involves a federal election for President of the United States. "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring); *Smiley v. Holm*, 285 U.S. 355, 365 (1932).

19. The jurisdiction of the Court to grant declaratory relief is conferred by 28 U.S.C. §§ 2201 and 2202 and by Rule 57, Fed. R. Civ. P.

20. This Court has jurisdiction over the related Wisconsin constitutional claims and state-law claims under 28 U.S.C. § 1367.

21. Venue is proper because a substantial part of the events or omissions giving rise to the claim occurred in the Eastern District. 28 U.S.C. § 1391(b) & (c).

22. Because the United States Constitution reserves for state legislatures the power to set the time, place, and manner of holding elections for Congress and the President, state executive officers have no authority to unilaterally exercise that power, much less flout existing legislation.

THE PARTIES

23. Plaintiff William Feehan, is a registered Wisconsin voter and a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin. Mr. Feehan is a resident of the City of La Crosse and La Crosse County, Wisconsin.

24. Presidential Electors "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing to challenge actions

of state officials implementing or modifying State election laws); *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam).

25. Plaintiff Feehan has standing to bring this action as a voter and as a candidate for the office of Elector under Wis. Stat. §§ 5.10, et seq (election procedures for Wisconsin electors). As such, Presidential Electors "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing to challenge actions of state officials in implementing or modifying State election laws); *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam).

26. Plaintiff Derrick Van Orden is a former United States Navy SEAL, who was the 2020 Republican nominee for Wisconsin's Third Congressional District Seat for the United States House of Representatives. Mr. Van Orden is a resident of Hager City, Pierce County, Wisconsin.

27. Mr. Van Orden "lost" by approximately 10,000 votes to the Democrat incumbent, U.S. Representative Ron Kind. Because of the illegal voting irregularities as will be shown below, Mr. Van Orden seeks to have a new election ordered by this court in the Third District, with that election being conducted under strict adherence with the Wisconsin Election Code.

28. Plaintiff Van Orden has standing as the ostensible "defeated" candidate in the Third Congressional District race, and seeks an order for a new election, complying with Wisconsin election law. Plaintiff Van Order received 189,524 votes or 48.67% as tallied versus Ron Kind who received 199,870 or 51.33% of the votes as reportedly tallied.

29. Plaintiffs brings this action to prohibit certification of the election results for the Office of President of the United States in the State of Wisconsin and to obtain the other declaratory and injunctive relief requested herein. Those results were certified by Defendants on November 30, 2020, indicating a plurality for Mr. Biden of 20,565 votes out of 3,240,867 cast.

30. The Defendants are Wisconsin Elections Commission ("WEC"), a state agency, and its members Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, and Robert F. Spindell, Jr., in their official capacities

31. Defendant Governor Tony Evers is named as a defendant in his official capacity as Wisconsin's governor.

32. Defendant WEC was created in 2015 by the Wisconsin Legislature as an independent agency under the Executive branch to administer Wisconsin's election laws. Wis. Stat. §§ 5.03 & 15.61. The WEC is authorized to adopt administrative rules pursuant to Chapter 227 of the Wisconsin Statutes, but nothing under Wisconsin's election laws authorizes the WEC to issue any documents, make any oral determinations or instruct governmental officials administering elections to perform any act contrary to Wisconsin law governing elections.

33. Furthermore, the Wisconsin Legislature also created municipal elections commissions for municipalities with a population greater than 500,000 and a county elections commissions for counties with a population greater than 750,000. Wis Stat. § 7.20. As a result, the City of Milwaukee Elections Commission was created as well as the Milwaukee County Elections Commission and the Dane County Elections Commission. These county and municipal elections commissions are responsible for administering the elections in their respective jurisdictions.

STATEMENT OF FACTS

34. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988, to remedy deprivations of rights, privileges, or immunities secured by the Constitution and laws of the United States and to contest the election results, and the corollary provisions under the Wisconsin Constitution.

35. The United States Constitution sets forth the authority to regulate federal elections. With respect to congressional elections, the Constitution provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.
>
> U.S. CONST. art. I, § 4 ("Elections Clause").

36. With respect to the appointment of presidential electors, the Constitution provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.
>
> U.S. CONST. art. II, § 1 ("Electors Clause").

37. None of Defendants is a "Legislature" as required under the Elections Clause or Electors Clause to set the rules governing elections. The Legislature is "'the representative body which ma[kes] the laws of the people.'" *Smiley*, 285 U.S. 365. Regulations of congressional and presidential elections, thus, "must be in accordance with the method which the state has prescribed for legislative enactments." Id. at 367; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 135 S. Ct. 2652, 2668 (U.S. 2015).

38. The WEC certified the Presidential Election results on November 30, 2020. The Presidential election results in Wisconsin show a difference of 20,565 "tallied" votes in favor of former Vice-President Joe Biden over President Trump.

39. Based upon all the allegations of fraud, statutory violations, and other misconduct, as stated herein and in the attached affidavits, it is necessary to enjoin the certification of the election results pending a full investigation and court hearing, and to order an independent audit of the November 3, 2020 election to ensure the accuracy and integrity of the election.

I. VIOLATIONS OF WISCONSIN ELECTION CODE

A. WEC Directed Clerks to Violate Wisconsin Election Code Requirements for Absentee Voting by "Indefinitely Confined" without Photo ID.

40. The Wisconsin State Legislature adopted Act 23 in 2011 to require Wisconsin electors to present an identification containing a photograph, such as a driver's license, to either a municipal or county clerk, when registering to vote and when voting. Wis. Stat. §§ 6.34; 6.79 (2). The Wisconsin State Legislature adopted the photo ID requirement to deter the casting of ballots by persons either not eligible to vote or persons fraudulently casting multiple ballots. *League of Women Voters of Wisconsin Education Network, Inc. v. Walker,* 851 N.W.2d 302, 314 (Wis. 2014).

41. Wisconsin's absentee voting is governed by Wisconsin Statutes § 6.84 - § 6.89. Under Wisconsin Statutes §6.86, every absentee elector applicant must present a photo ID when registering to vote absentee except absentee voters who registered as "indefinitely confined," Wis. Stat. §6.86 (ac), meaning someone confined "because of age, physical illness or infirmity or is disabled for an indefinite period." Wis. Stat. § 6.86(2)(a). As a result, Wisconsin election procedures for voting absentee based on "indefinitely confined" status circumvent the photo ID requirement, creating an avenue for fraudulent voting.

42. In order to ensure that only those who are "indefinitely confined" may use the "indefinitely confined" absentee ballot in an election, Wisconsin Statutes §6.86 provides that any elector who files an application for an absentee ballot based on indefinitely confined status may not use the absentee ballot if the electoral is no longer "indefinitely confined." Wisconsin Statutes § 6.86 (2)(b) further

provides that the municipal clerk "shall remove the name of any other elector from the list upon request of the elector or upon receipt of reliable information that an elector no longer qualifies for the service."

43. Despite this clear statutory requirement, the Administrator of the Wisconsin Election Commission, Meagan Wolfe, issued a written directive on May 13, 2020 to the clerks across the State of Wisconsin stating that the clerks cannot remove an allegedly "indefinitely confined" absentee voter from the absentee voter register if the clerk had "reliable information" that an allegedly "indefinitely confined" absentee voter is no longer "indefinitely confined." The directive specifically stated:

> Can I deactivate an absentee request if I believe the voter is not indefinitely confined? No. All changes to status must be made in writing and by the voter's request. Not all medical illnesses or disabilities are visible or may only impact the voter intermittently. (*See* WEC May 13, 2020 Guidance Memorandum).

44. The WEC's directive thus directly contradicts Wisconsin law, which specifically provides that clerks "shall" remove an indefinitely confined voter from the absentee voter list if the clerk obtains "reliable information" that the voter is no longer indefinitely confined.

45. As a result of the directive, clerks did not remove from the absentee voter lists maintained by their jurisdictions the absentee voters who claimed "indefinitely confined" status but who in fact were no longer "indefinitely confined." This resulted in electors who were allegedly "indefinitely confined" absentee voters casting ballots as "indefinitely confined" absentee voters who were not actually "indefinitely confined" absentee voters.

B. WEC Directed Clerks to Violate Wisconsin Law Prohibiting Counting of Absentee Ballot Certificates Missing Witness Addresses.

46. In 2015, the Wisconsin Legislature passed Act 261, amending Wisconsin's election laws, including a requirement, codified as Wisconsin Statute § 6.87(d), that absentee ballots include both

elector and witness certifications, which must include the address of the witness. If the address of the witness is missing from the witness certification, however, "the ballot may not be counted." *Id.*

47. On October 18, 2016, WEC reacted to this legislation by issuing a memorandum, which, among other things, permitted clerks to write in the witness address onto the absentee ballot certificate itself, effectively nullifying this express requirement. (*See* WEC October 18, 2016 Guidance Memorandum). Wisconsin election officials reiterated this unlawful directive in publicly posted training videos. For example, in a Youtube video posted before the November 3, 2020 General Election by Clarie Woodall-Voog of the Milwaukee Elections Commission, Ms. Woodall-Voog advised clerks that missing items "like witness address may be written in red."[3]

C. WEC Directed Clerks to Illegally Cure Absentee Ballots by Filling in Missing Information on Absentee Ballot Certificates and Envelopes.

48. On October 19, 2020, WEC instructed its clerks that, without any legal basis in the Wisconsin Election Code, they could simply fill in missing witness or voter certification information using, e.g., personal knowledge, voter registration information, or calling the voter or witness. The WEC further advised that voters or witnesses could cure any missing information at the polling place, again without citing any authority to do so under Wisconsin Election Code.

II. EXPERT WITNESS TESTIMONY: EVIDENCE OF WIDESPREAD VOTER FRAUD

A. Approximately 15,000 Wisconsin Mail-In Ballots Were Lost, and Approximately 18,000 More Were Fraudulently Recorded for Voters who Never Requested Mail-In Ballots.

49. The attached report of William M. Briggs, Ph.D. ("Dr. Briggs Report") summarizes the multi-state phone survey that includes a survey of Wisconsin voters collected by Matt Braynard,

[3] *See* https://www.youtube.com/watch?v=hbm-pPaYiqk (video a 10:43 to 11:07).

which was conducted from November 15-17, 2020. *See* Ex. 101, Dr. Briggs Report at 1, and Att. 1 ("Braynard Survey"). The Briggs analysis identified two specific errors involving unreturned mail-in ballots that are indicative of voter fraud, namely: "**Error #1:** those who were recorded as receiving absentee ballots ***without*** requesting them;" and "**Error #2:** those who returned absentee ballots but whose votes went missing (*i.e.*, marked as unreturned)." *Id.* Dr. Briggs then conducted a parameter-free predictive model to estimate, within 95% confidence or prediction intervals, the number of ballots affected by these errors out of a total of 96,771 unreturned mail-in ballots for the State of Wisconsin.

50. With respect to **Error #1**, Dr. Briggs' analysis estimated that **16,316-19,273 ballots** out of the total 96,771 unreturned ballots were recorded for voters who had **not** requested them. *Id.* With respect to **Error #2**, he found **13,991 – 16,757 ballots** out of 96,771 unreturned ballots recorded for voters who **did return their ballots were recorded as being unreturned.** *Id.* Taking the average of the two types of errors together, **29,594 ballots, or 31% of the total, are "troublesome."**

51. These errors are not only conclusive evidence of widespread fraud by the State of Wisconsin, but they are fully consistent with the fact witness statements cited above regarding the evidence about Dominion presented below insofar as **these unreturned absentee ballots represent a pool of blank ballots that could be filled in by third parties to shift the election to Joe Biden,** and also present the obvious conclusion that there must be absentee ballots unlawfully ordered by third parties that were returned.

52. With respect to **Error #1**, Dr. Briggs' analysis demonstrates that approximately **17,795 absentee ballots were sent to someone besides the registered voter named in the request**, and thus could have been filled out by anyone and then submitted in the name of another voter.

Regarding ballots ordered by third parties that were voted, those would no longer be in the unreturned pool and therefore cannot be estimated from this data set.

53. With respect to **Error #2**, Dr. Briggs' analysis indicates that approximately **15,374 absentee ballots were either lost or destroyed** (consistent with allegations of Trump ballot destruction) **and/or were replaced with blank ballots filled out by election workers, Dominion or other third parties.** Dr. Briggs' analysis shows that 31% of "unreturned ballots" suffer from one of the two errors above – which is consistent with his findings in the four other States analyzed (Arizona 58%, Georgia 39%, Pennsylvania 37%, and Wisconsin 45%) – and provides further support that these widespread "irregularities" or anomalies were one part of a much larger multi-state fraudulent scheme to rig the 2020 General Election for Joe Biden.

B. Nearly 7,000 Ineligible Voters Who Have Moved Out-of-State Illegally Voted in Wisconsin.

54. Evidence compiled by Matt Braynard using the National Change of Address ("NCOA") Database shows that 6,207 Wisconsin voters in the 2020 General Election moved out-of-state prior to voting, and therefore were ineligible. Mr. Braynard also identified 765 Wisconsin voters who subsequently registered to vote in another state and were therefore ineligible to vote in the 2020 General Election. The merged number is 6,966 ineligible voters whose votes must be removed from the total for the 2020 General Election.[4]

C. A Statistical Study Reveals that Biden Overperformed in those Precincts that Relied on Dominion Voting Machines

55. From November 13th, 2020 through November 28th, 2020, the Affiant conducted in-depth statistical analysis of publicly available data on the 2020 U.S. Presidential Election. This data

[4] Mr. Braynard posted the results of his analysis on Twitter. *See* https://twitter.com/MattBraynard/status/1329700178891333634?s=20. This Complaint includes a copy of his Report, (attached hereto as Exh. 3).

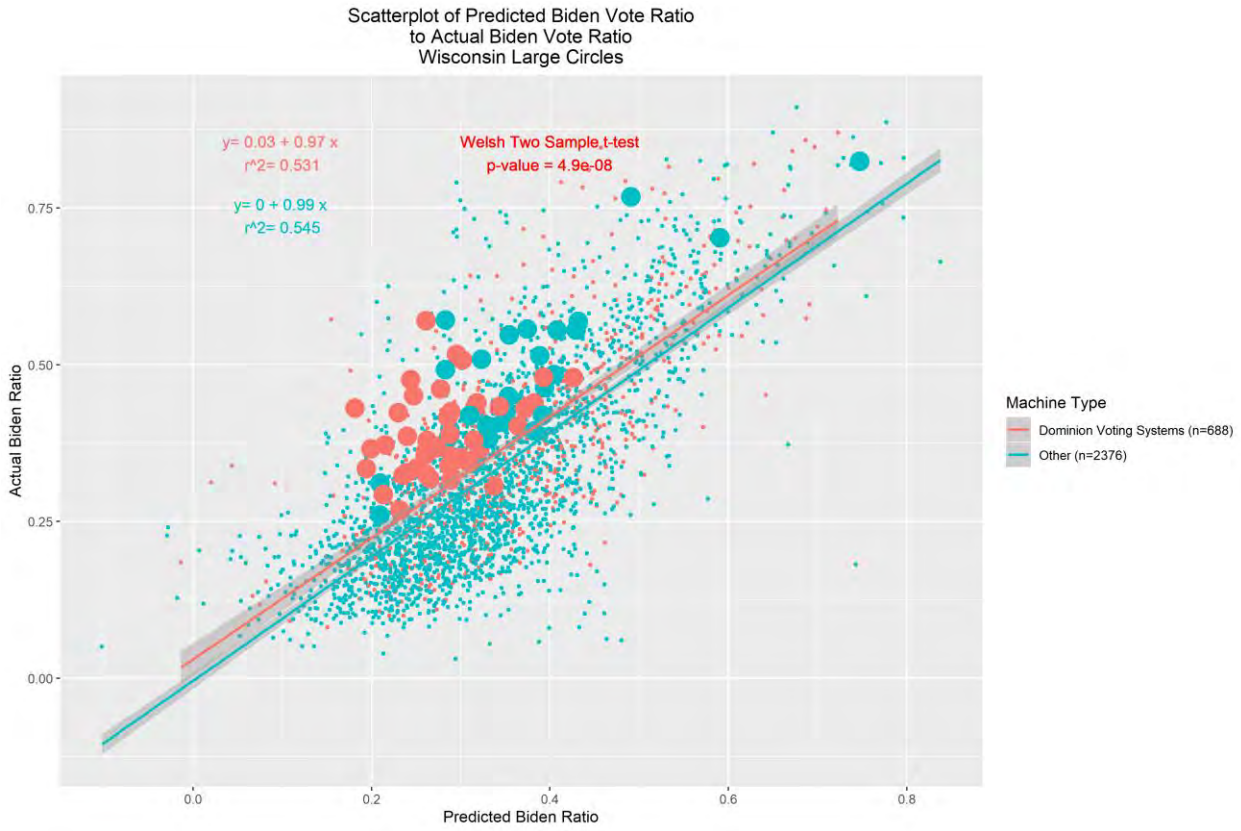
included vote counts for each county in the United States, U.S. Census data, and type of voting machine data provided by the U.S. Election Assistance Committee. The Affiant's analysis yielded several "red flags" concerning the percentage of votes won by candidate Biden in counties using voting machines provided by Dominion Voting Systems. These red flags occurred in several States in the country, including Wisconsin. (See attached hereto as Exh. 4, copy of redacted Affiant, B.S. Mathematics and M.S. Statistics).

56. The Affiant began by using Chi-Squared Automatic Interaction Detection (CHAID), which treats the data in an agnostic way—that is, it imposes no parametric assumptions that could otherwise introduce bias. Affiant posed the following question: "Do any voting machine types appear to have unusual results?" The answer provided by the statistical technique/algorithm was that machines from Dominion Voting Systems (Dominion) produced abnormal results. *Id.*

57. Subsequent graphical and statistical analysis shows the unusual pattern involving machines from Dominion occurs in at least 100 counties and multiple States, including Wisconsin. The results from the vast majority of counties using the Dominion machines is 3 to 5.6 percentage points higher in favor of candidate Biden. This pattern is seen easily in graphical form when the results from "Dominion" counties are overlaid against results from "non-Dominion" counties. The results from "Dominion" counties do not match the results from the rest of the counties in the United States. The results are clearly statistically significant, with a p-value of < 0.00004. This translates into a statistical impossibility that something unusual involving Dominion machines is *not* occurring. This pattern appears in multiple States, including Wisconsin, and the margin of votes implied by the unusual activity would easily sway the election results. *Id.*

58. The following graph shows the pattern. The large red dots are counties in Wisconsin that use Dominion voting machines. Almost all of them are above the blue prediction line, when in

normal situations approximately half of them would be below the prediction line (as evidence by approximately half the counties in the U.S. (blue dots) that are below the blue centerline). The p-value of statistical analysis regarding the centerline for the red dots (Wisconsin counties with Dominion machines) is 0.000000049, pointing to a statistical impossibility that this is a "random" statistical anomaly. Some external force caused this anomaly:



Id.

59. To confirm that Dominion machines were the source of the pattern/anomaly, Affiant conducted further analysis using propensity scoring using U.S. census variables (including ethnicities, income, professions, population density and other social/economic data) , which was used to place counties into paired groups. Such an analysis is important because one concern could be that counties with Dominion systems are systematically different from their counterparts, so

abnormalities in the margin for Biden are driven by other characteristics unrelated to the election. *Id.*

60. After matching counties using propensity score analysis, the only difference between the groups was the presence of Dominion machines. This approach again showed a highly statistically significant difference between the two groups, with candidate Biden again averaging three percentage points higher in Dominion counties than in the associated paired county. The associated p-value is < 0.00005, against indicating a statistical impossibility that something unusual is not occurring involving Dominion machines. Id.

61. The results of the analysis and the pattern seen in the included graph strongly suggest a systemic, system-wide algorithm was enacted by an outside agent, causing the results of Wisconsin's vote tallies to be inflated by somewhere between three and five point six percentage points. **Statistical estimating yields that in Wisconsin, the best estimate of the number of impacted votes is 181,440.** *Id.*

62. The summation of sections A through C above provide the following conclusions for the reports cited above, respectively.

- returned ballots that were deemed unreturned by the state: 15,374
- unreturned mail ballots unlawfully ordered by third parties: 17,795
- votes by persons that moved out of state or subsequently registered to vote in another state for the 2020 election: 6,966
- Votes that were improperly relying on the "indefinitely confined" exemption to voter ID: 96,437
- And excess votes arising from the statistically significant outperformance of Dominion machines on behalf of Joe Biden: 181,440

In Conclusion, the Reports cited above show a total amount of illegal votes identified that amount to 318,012 or over 15 times the margin by which candidate Biden leads President Trump in the state of Wisconsin.

III. FACTUAL ALLEGATIONS REGARDING DOMINION VOTING SYSTEMS

63. The State of Wisconsin, in many locations, used either Sequoia, a subsidiary of Dominion Systems, and or Dominion Systems, Democracy Suite 4.14-D first, and then included Dominion Systems Democracy Suite 5.0-S on or about January 27, 2017, which added a fundamental modification: "dial-up and wireless results transmission capabilities to the ImageCast Precinct and results transmission using the Democracy Suite EMS Results Transfer Manager module." (See Exh. 5, attached hereto, a copy of the Equipment for WI election systems).

A. Dominion's Results for 2020 General Election Demonstrate Dominion Manipulated Election Results.

64. Affiant Keshel's findings that reflect the discussion cited above:

> While Milwaukee County is focal for transparency and observation violations, including reporting statistically impossible vote counts in the early morning hours away from scrutiny, Dane County has surged far past support totals for President Obama, despite expected difficulties mobilizing student voters to polls. President Trump has reconsolidated the Republican base in suburban Milwaukee and far surpassed his 2016 support levels but has been limited in margin growth by historically improbable Democratic support in these strongholds, which defy years of data in Wisconsin in which the Republican party surged as the Democratic Party plunged. Finally, in strong Trump counties showing a double inversion cycle (one party up, the other down), particularly in rural and exurban Wisconsin, Trump's totals are soaring, and against established trends, Biden's totals are at improbable levels of support despite lacking registration population
> (*See* attached hereto, Exh. 9, Aff. of Seth Keshel, MBA)

County	Rep '08	Dem '08	Rep '12	Dem '12	Rep '16	Dem '16	Rep '20	Dem '20	Dem Percentage of Obama 2008 Votes
Ozaukee	32,172	20,579	36,077	19,159	30,464	20,170	33,912	26,515	128.8%
% Increase	N/A	N/A	12.1%	(6.9%)	(15.6%)	5.3%	11.3%	31.5%	

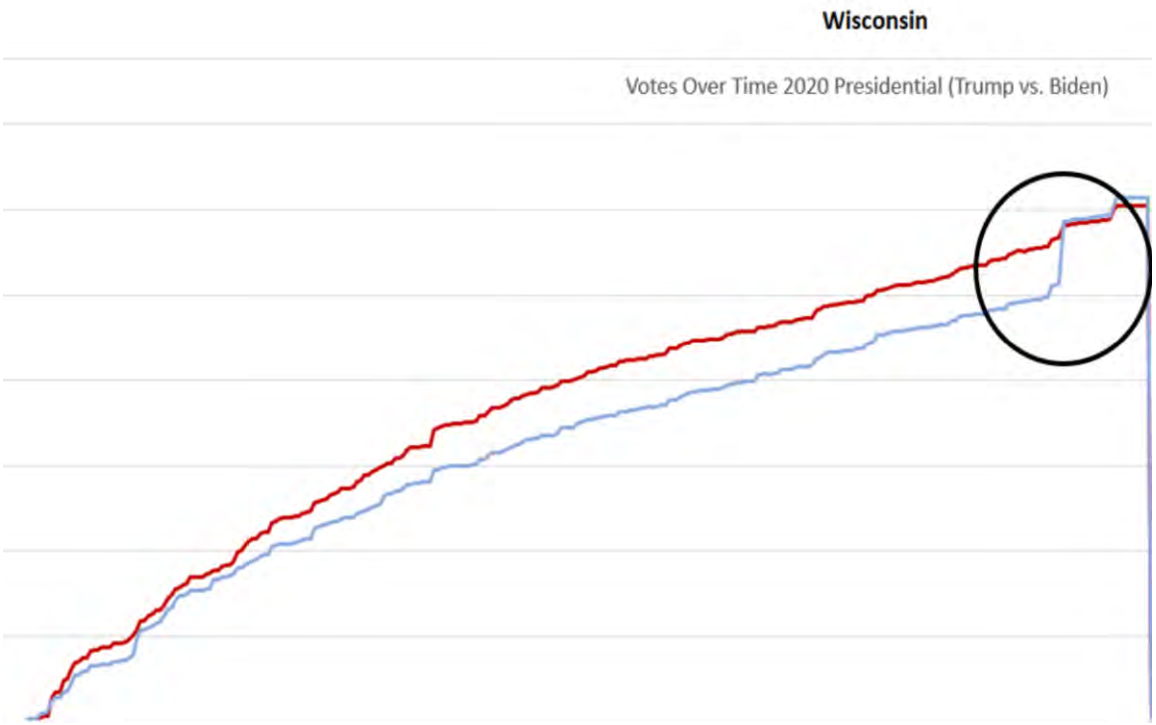
Dane	73,065	205,984	83,644	216,071	71,275	217,697	78,789	260,157	126.3%
% Increase	N/A	N/A	14.5%	4.9%	(14.8%)	0.8%	10.5%	19.5%	

Waukesha	145,152	85,339	162,798	78,779	142,543	79,224	159,633	103,867	121.7%
% Increase	N/A	N/A	12.2%	(7.7%)	(12.4%)	0.6%	12.0%	31.1%	

Racine	45,954	53,408	49,347	53,008	46,681	42,641	54,475	50,154	117.6%
% Increase	N/A	N/A	7.4%	(0.7%)	(5.4%)	(19.6%)	16.7%	17.6%	

Id.

65. Keshel provides a graph reflecting the voter returns in a time-series. The highly unlikely and remarkably convenient attainment of this block of votes provides for a stunning depiction of the election and generates many questions. The analysis provided by Plaintiffs' multiple experts, including data, statistics and cyber, will reveal clear evidence of the multiple frauds that combined to change the outcome of the 2020 election.



See Id.

B. Administrative and Judicial Decisions Regarding Dominion's Security Flaws.

66. **Wisconsin.** In 2018, Jill Stein was in litigation with Dominion Voting Systems ("DVS") after her 2016 recount request pursuant to WISCONSIN STAT.§5.905(4) wherein DVS obtained a Court Order requiring confidentiality on information including *voting counting source code*, which Dominion claims is proprietary – and must be kept secret from the public. (*See* unpublished decision, Wisconsin Court of Appeals, No. 2019AP272 issued April 30, 2020). Rather than engaging in an open and transparent process to give credibility to Wisconsin's Dominion-Democracy Suite voting system, the processes were hidden during the receipt, review, opening, and tabulation of those votes in direct contravention of Wisconsin's Election Code and Federal law.

67. **Texas.** The same Dominion Democracy Suite was denied certification in Texas by the

Secretary of State on January 24, 2020, specifically because the "examiner reports raise concerns about whether Democracy Suite 5.5-A system … **is safe from fraudulent or unauthorized manipulation**."[5]

68. **Georgia.** Substantial evidence of this vulnerability was discussed in Judge Amy Totenberg's October 11, 2020 Order in the USDC N.D. Ga. case of *Curling, et al. v. Kemp, et. al*, Case No. 1:17-cv-02989 Doc. No. 964. *See*, p. 22-23 ("This array of experts and subject matter specialists provided a huge volume of significant evidence regarding the security risks and deficits in the system as implemented in both witness declarations and live testimony at the preliminary injunction hearing."); p. 25 ("In particular, Dr. Halderman's testing indicated the practical feasibility through a cyber attack of causing the swapping or deletion of specific votes cast and the compromise of the system through different cyber attack strategies, including through access to and alteration or manipulation of the QR barcode.") The full order should be read, for it is eye-opening and refutes many of Dominion's erroneous claims and talking points.

69. A District Judge found that Dominion's BMD ballots are not voter verifiable, and they cannot be audited in a software independent way. The credibility of a BMD ballot can be no greater than the credibility of Dominion's systems, which copious expert analysis has shown is deeply compromised. Similar to the issues in Wisconsin, Judge Totenberg of the District Court of Georgia Northern District held:

> Georgia's Election Code mandates the use of the BMD system as the uniform mode of voting for all in-person voters in federal and statewide elections. O.C.G.A. § 21-2-300(a)(2). The statutory provisions mandate voting on "electronic ballot markers" that: (1) use "electronic technology to independently and privately mark a paper ballot at the direction of an elector, interpret ballot selections, ... such interpretation **for elector verification**, and print **an elector verifiable paper**

[5] See attached hereto, as Exh. 11, State of Texas Secretary of State, Elections Division, *Report of Review of Dominion Voting Systems Democracy Suite 5.5-A* at 2 (Jan. 24, 2020) (emphasis added).

> **ballot**;" and (2) "produce paper ballots which are marked with the elector's choices **in a format readable by the elector**" O.C.G.A. § 21-2-2(7.1); O.C.G.A. § 21-2-300(a)(2). Plaintiffs and other voters who wish to vote in-person are required to vote on **a system that does none of those things**. Rather, the evidence shows that the Dominion BMD system does **not produce a voter-verifiable paper ballot or a paper ballot marked with the voter's choices in a format readable by the voter because the votes are tabulated solely from the unreadable QR code**.
>
> See Order, pp. 81-82. (Emphasis added).

70. This case was later affirmed in a related case, in the Eleventh Circuit in 2018 related to Georgia's voting system in *Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270 (11th Cir. 2018). The Court found,

> **In summary, while further evidence will be necessary in the future, the Court finds that the combination of the statistical evidence and witness declarations in the record here (and the expert witness evidence in the related *Curling* case which the Court takes notice of) persuasively demonstrates the likelihood of Plaintiff succeeding on its claims. Plaintiff has shown a substantial likelihood of proving that the Secretary's failure to properly maintain a reliable and secure voter registration system has and will continue to result in the infringement of the rights of the voters to cast their vote and have their votes counted.**
>
> *Id.at* 1294-1295.

71. The expert witness in the above litigation in the United States District Court of Georgia, Case 1:17-cv-02989-AT, Harri Hursti, specifically testified to the acute security vulnerabilities, *see* Ex. 107, wherein he testified or found:

> A. "The scanner and tabulation software settings being employed to determine which votes to count on hand marked paper ballots are likely causing clearly intentioned votes to be counted" "The voting system is being operated in Fulton County in a manner that escalates the security risk to an extreme level" "Votes are not reviewing their BMD printed ballots, which causes BMD generated results to be un-auditable due to the untrustworthy audit trail." 50% or more of voter selections in some counties were visible to poll workers. Dominion employees maintain near exclusive control over the EMS servers. "In my professional opinion, the role played by Dominion personnel in Fulton County, and other counties with similar arrangements, should be considered an elevated risk factor when evaluating the security

risks of Georgia's voting system." *Id.* ¶26.

B. A video game download was found on one Georgia Dominion system laptop, suggesting that multiple Windows updates have been made on that respective computer.

C. There is evidence of remote access and remote troubleshooting which presents a grave security implication.

D. Certified identified vulnerabilities should be considered an "extreme security risk."

E. There is evidence of transfer of control the systems out of the physical perimeters and place control with a third party off site.

F. USB drives with vote tally information were observed to be removed from the presence of poll watchers during a recent election.

G. "The security risks outlined above – operating system risks, the failure to harden the computers, performing operations directly on the operating systems, lax control of memory cards, lack of procedures, and potential remote access are extreme and destroy the credibility of the tabulations and output of the reports coming from a voting system." *Id.* ¶49.

C. Foreign Interference/Hacking and/or Manipulation of Dominion Results.

1. Evidence of Vulnerability to Foreign Hackers.

72. In October of 2020 The FBI and CISA issued a JOINT CYBERSECURITY ADVISORY ON October 30, 2020 titled: **Iranian Advanced Persistent Threat Actor Identified Obtained Voter Registration Data**

> This joint cybersecurity advisory was coauthored by the Cybersecurity and Infrastructure Security Agency (CISA) and the Federal Bureau of Investigation (FBI). CISA and the FBI are aware of an Iranian advanced persistent threat (APT) actor targeting U.S. state websites to include election websites. CISA and the FBI assess this actor is responsible for the mass dissemination of voter intimidation emails to U.S. citizens and the dissemination of U.S. election-related disinformation in mid-October 2020.[1] (Reference FBI FLASH message ME-000138-TT, disseminated October 29, 2020). Further evaluation by CISA and the FBI has identified the targeting of U.S. state election websites was an intentional effort to influence and interfere with the 2020 U.S. presidential election.

(See CISA and FBI Joint Cyber Security Advisory of October 30, 2020, a copy attached hereto as Exh. 18.)

73. An analysis of the Dominion software system by a former US Military Intelligence expert subsequently found that the Dominion Voting system and software are accessible - and was compromised by rogue actors, including foreign interference by Iran and China. (*See* Exh. 1, Spider Declaration, (who remains redacted for security reasons).)

74. The expert does an analysis and explains how by using servers and employees connected with rogue actors and hostile foreign influences combined with numerous easily discoverable leaked credentials, Dominion allowed foreign adversaries to access data and intentionally provided access to Dominion's infrastructure in order to monitor and manipulate elections, including the most recent one in 2020. (See Exh. 12, Spider Declaration. Several facts are set forth related to foreign members of Dominion Voting Systems and foreign servers as well as foreign interference.).

75. Another Declarant first explains the foundations of her opinion and then addresses the concerns of foreign interference in our elections through hardware components from companies based in foreign countries with adverse interests. She explains that Dominion Voting Systems works with SCYTL, and that votes on route, before reporting, go to SCYTL in foreign countries. On the way, they get mixed and an algorithm is applied, which is done through a secretive process.

> The core software used by ALL SCYTL related Election Machine/Software manufacturers ensures "anonymity" Algorithms within the area of this "shuffling" to maintain anonymity allows for setting values to achieve a desired goal under the guise of "encryption" in the trap-door…
>
> (See Exh. 13, Aff. of Computer analysis, at par. 32).

76. The Affiant goes on to explain the foreign relationships in the hardware used by Dominion Voting Systems and its subsidiary Sequoia and explains specifically the port that

Wisconsin uses, which is called Edge Gateway and that is a part of Akamai Technologies based in Germany:

> "Wisconsin has EDGE GATEWAY port which is AKAMAI TECHNOLOGIES based out of GERMANY. Using AKAMAI Technologies is allowing .gov sites to obfuscate and mask their systems by way of HURRICANE ELECTRIC (he.net)"

77. This Declarant further explains the foundations of her opinion and then addresses the concerns of foreign interference in our elections through hardware components from companies based in foreign countries with adverse interests.

> The concern is the HARDWARE and the NON – ACCREDITED VSTLs as by their own admittance use COTS. The purpose of VSTL's being accredited and their importance is ensuring that there is no foreign interference / bad actors accessing the tally data via backdoors in equipment software. The core software used by ALL SCYTL related Election Machine/Software manufacturers ensures "anonymity". **Algorithms within the area of this "shuffling" to maintain anonymity allows for setting values to achieve a desired goal under the guise of "encryption" in the trap-door…**
>
> (See Id. at ¶32).

78. This Declarant goes on to explain the foreign relationships in the hardware used by Dominion Voting Systems and its subsidiary Sequoia and specifically the port that Wisconsin uses:

> "Wisconsin has EDGE GATEWAY port which is AKAMAI TECHNOLOGIES based out of GERMANY. Using AKAMAI Technologies is allowing .gov sites to obfuscate and mask their systems by way of HURRICANE ELECTRIC (he.net) Kicking it to anonymous (AKAMAI Technologies) offshore servers.
> Wisconsin Port.
>
> China is not the only nation involved in COTS provided to election machines or the networking but so is Germany via a LAOS founded Chinese linked cloud service company that works with SCYTL named Akamai Technologies that have offices in China and are linked to the server [for] Dominion Software.
>
> (See Id. at par. 21).

79. The Affiant explains the use of an algorithm and how it presents throughout the statement, but specifically concludes that,

The "Digital Fix" observed with an increased spike in VOTES for Joe Biden can be determined as evidence of a pivot. Normally it would be assumed that the algorithm had a Complete Pivot. Wilkinson's demonstrated the guarantee as:

$$\frac{\|U\|_\infty}{\|A\|_\infty} \leq n^{\frac{1}{2}\log(n)}$$

Such a conjecture allows the growth factor the ability to be upper bound by values closer to n. Therefore, complete pivoting can't be observed because there would be too many floating points. Nor can partial as the partial pivoting would overwhelm after the "injection" of votes. Therefore, external factors were used which is evident from the "DIGITAL FIX." (*See Id*. at pars. 67-69)

"The algorithm looks to have been set to give Joe Biden a 52% win even with an initial 50K+ vote block allocation was provided initially as tallying began (as in case of Arizona too). In the am of November 4, 2020 the algorithm stopped working, therefore another "block allocation" to remedy the failure of the algorithm. This was done manually as ALL the SYSTEMS shut down NATIONWIDE to avoid detection."

(*See Id*. at par. 73)

2. Background of Dominion Connections to Smartmatic and Hostile Foreign Governments.

80. An expert analysis by Russ Ramsland agrees with the data reflecting the use of an algorithm that causes the spike in the data feed, which is shown to be an injection of votes to change the outcome, because natural reporting does not appear in such a way.

81. And Russ Ramsland can support that further by documenting the data feed that came from Dominion Voting Systems to Scytl -- and was reported with decimal points, which is contrary to one vote as one ballot: **"The fact that we observed raw vote data coming directly that includes decimal places establishes selection by an algorithm, and not individual voter's choice. Otherwise, votes would be solely represented as whole numbers (votes cannot possibly be added up and have decimal places reported)."**

82. The report concludes that **"**Based on the foregoing, I believe these statistical anomalies and impossibilities compels the conclusion to a reasonable degree of professional certainty that the

vote count in Wisconsin, in particular for candidates for President contain at least 119,430 (Para. 13) up to 384,085 (Para. 15) illegal votes that must be disregarded. In my opinion, it is not possible at this time to determine the true results of the Wisconsin vote for President of the United States."

The History of Dominion Voting Systems

83. Plaintiffs can also show Smartmatic's incorporation and inventors who have backgrounds evidencing their foreign connections, including Serbia, specifically its identified inventors:

> Applicant: SMARTMATIC, CORP.
>
> Inventors**:** Lino Iglesias, Roger Pinate, Antonio Mugica, Paul Babic, Jeffrey Naveda, Dany Farina, Rodrigo Meneses, Salvador Ponticelli, Gisela Goncalves, Yrem Caruso[6]

84. Another Affiant witness testifies that in Venezuela, she was in official position related to elections and witnessed manipulations of petitions to prevent a removal of President Chavez and because she protested, she was summarily dismissed. She explains the vulnerabilities of the electronic voting system and Smartmatica to such manipulations. (See Ex. 17, Cardozo Aff. ¶8).

3. US Government Warnings Regarding Hacking by Hostile Foreign Governments.

85. In October of 2020 The FBI and CISA issued a JOINT CYBERSECURITY ADVISORY ON October 30, 2020 titled: **Iranian Advanced Persistent Threat Actor Identified Obtained Voter Registration Data**

> This joint cybersecurity advisory was coauthored by the Cybersecurity and Infrastructure Security Agency (CISA) and the Federal Bureau of Investigation (FBI). CISA and the FBI are aware of an Iranian advanced persistent threat (APT) actor targeting U.S. state websites to include election websites. CISA and the FBI

[6] *See* Patents Assigned to Smartmatic Corp., *available at:* https://patents.justia.com/assignee/smartmatic-corp

> assess this actor is responsible for the mass dissemination of voter intimidation emails to U.S. citizens and the dissemination of U.S. election-related disinformation in mid-October 2020.1 (Reference FBI FLASH message ME-000138-TT, disseminated October 29, 2020). Further evaluation by CISA and the FBI has identified the targeting of U.S. state election websites was an intentional effort to influence and interfere with the 2020 U.S. presidential election.
>
> (See Ex. 18, CISA and FBI Joint Cyber Security Advisory of October 30, 2020)

D. Additional Independent Findings of Dominion Flaws.

86. Further supportive of this pattern of incidents, reflecting an absence of mistake, Plaintiffs have since learned that the "glitches" in the Dominion system, that have the uniform effect of hurting Trump and helping Biden, have been widely reported in the press and confirmed by the analysis of independent experts.

1. Central Operator Can Remove, Discard or Manipulate Votes.

87. Mr. Watkins further explains **that the central operator can remove or discard batches of votes.** "After all of the ballots loaded into the scanner's feed tray have been through the scanner, the "ImageCast Central" operator will remove the ballots from the tray then have the option to either "Accept Batch" or "Discard Batch" on the scanning menu …. " (Ex. 106, Watkins aff. ¶11). ¶8.

88. Mr. Watkins further testifies that the user manual makes clear that the system allows for threshold settings to be set to find all ballots get marked as "problem ballots" for discretionary determinations on where the vote goes stating:

> 9. During the ballot scanning process, the "ImageCast Central" software will detect how much of a percent coverage of the oval was filled in by the voter. The Dominion customer determines the thresholds of which the oval needs to be covered by a mark in order to qualify as a valid vote. If a ballot has a marginal mark which did not meet the specific thresholds set by the customer, then the ballot is considered a "problem ballot" and may be set aside into a folder named "NotCastImages".

> 10. Through creatively tweaking the oval coverage threshold settings, and advanced settings on the ImageCase Central scanners, it may be possible to set thresholds in such a way that a non-trivial amount of ballots are marked "problem ballots" and sent to the "NotCastImages" folder.
>
> 11. The administrator of the ImageCast Central work station may view all images of scanned ballots which were deemed "problem ballots" by simply navigating via the standard "Windows File Explorer" to the folder named "NotCastImages" which holds ballot scans of "problem ballots". It may be possible for an administrator of the "ImageCast Central" workstation to view and delete any individual ballot scans from the "NotCastImages" folder by simply using the standard Windows delete and recycle bin functions provided by the Windows 10 Pro operating system. Id. ¶¶ 9-11.

2. Dominion – By Design – Violates Federal Election & Voting Record Retention Requirements.

89. The Dominion System put in place by its own design violates the intent of Federal law on the requirement to preserve and retain records – which clearly requires preservation of all records requisite to voting in such an election.

> **§ 20701.** Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation
>
> Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, **all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election,** except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

See 52 USC § 20701.

3. Dominion Vulnerabilities to Hacking.

90. Plaintiffs have since learned that the "glitches" in the Dominion system -- that have the uniform effect of hurting Trump and helping Biden -- have been widely reported in the press and confirmed by the analysis of independent experts, a partial summary of which is included below.

(1) Users on the ground have full admin privileges to machines and software. The Dominion system is designed to facilitate vulnerability and allow a select few to determine which votes will be counted in any election. Workers were responsible for moving ballot data from polling place to the collector's office and inputting it into the correct folder. Any anomaly, such as pen drips or bleeds, is not counted and is handed over to a poll worker to analyze and decide if it should count. This creates massive opportunity for improper vote adjudication. (Ex. 106 Watkins aff. ¶¶8 & 11).

(2) Affiant witness (name redacted for security reasons), in his sworn testimony explains he was selected for the national security guard detail of the President of Venezuela, and that he witnessed the creation of Smartmatic for the purpose of election vote manipulation:

I was witness to the creation and operation of a sophisticated electronic voting system that permitted the leaders of the Venezuelan government to manipulate the tabulation of votes for national and local elections and select the winner of those elections in order to gain and maintain their power. Importantly, I was a direct witness to the creation and operation of an electronic voting system in a conspiracy between a company known as Smartmatic and the leaders of conspiracy with the Venezuelan government. This conspiracy specifically involved President Hugo Chavez Frias, the person in charge of the National Electoral Council named Jorge Rodriguez, and principals, representatives, and personnel from Smartmatic which included … The purpose of this conspiracy was to create and operate a voting system that could change the votes in elections from votes against persons running the Venezuelan government to votes in their favor in order to maintain control of the government. (*Id.* ¶¶6, 9, 10).

91. Specific vulnerabilities of the systems in question that have been well documented or reported include:

A. Barcodes can override the voters' vote: As one University of California, Berkeley study shows, "In all three of these machines [including

Dominion Voting Systems] the ballot marking printer is in the same paper path as the mechanism to deposit marked ballots into an attached ballot box. This opens up a very serious security vulnerability: the voting machine can make the paper ballot (to add votes or spoil already-case votes) after the last time the voter sees the paper, and then deposit that marked ballot into the ballot box without the possibility of detection." (See Ex. 2, Appel Study).

B. Voting machines were able to be connected to the internet by way of laptops that were obviously internet accessible. If one laptop was connected to the internet, the entire precinct was compromised.

C. October 6, 2006 – **Congresswoman Carolyn Maloney calls on Secretary of Treasury Henry Paulson to conduct an investigation into Smartmatic based on its foreign ownership and ties to Venezuela.** (See Ex. 15). Congresswoman Maloney wrote that "It is undisputed that Smartmatic is foreign owned and it has acquired Sequoia … Smartmatic now acknowledged that Antonio Mugica, a Venezuelan businessman has a controlling interest in Smartmatica, but the company has not revealed who all other Smartmatic owners are. *Id.*

D. Dominion "got into trouble" with several subsidiaries it used over alleged cases of fraud. One subsidiary is Smartmatic, a company "that has played a significant role in the U.S. market over the last decade."[7] Dominion entered into a 2009 contract with Smartmatic and provided Smartmatic with the PCOS machines (optical scanners) that were used in the 2010 Philippine election, the biggest automated election run by a private company. The automation of that first election in the Philippines was hailed by the international community and by the critics of the automation. The results transmission reached 90% of votes four hours after polls closed and Filipinos knew for the first time who would be their new president on Election Day. In keeping with local Election law requirements, Smartmatic and Dominion were required to provide the source code of the voting machines prior to elections so that it could be independently verified. *Id.*

E. Litigation over Smartmatic "glitches" alleges they impacted the 2010 and 2013 mid-term elections in the Philippines, raising questions of cheating and fraud. An independent review of the source codes used in the machines found multiple problems, which concluded, "The software inventory provided by Smartmatic is inadequate, … which brings into

[7] *Voting Technology Companies in the U.S. – Their Histories and Present Contributions,* Access Wire, (Aug. 10, 2017), *available at:* https://www.accesswire.com/471912/Voting-Technology-Companies-in-the-US--Their-Histories.

question the software credibility."[8]

F. Dominion acquired Sequoia Voting Systems as well as Premier Election Solutions (formerly part of Diebold, which sold Premier to ES&S in 2009, until antitrust issues forced ES&S to sell Premier, which then was acquired by Dominion). This map illustrates 2016 voting machine data—meaning, these data do not reflect geographic aggregation at the time of acquisition, but rather the machines that retain the Sequoia or Premier/Diebold brand that now fall under Dominion's market share. Penn Wharton Study at 16.

G. In late December of 2019, three Democrat Senators, Warren, Klobuchar, Wyden and House Member Mark Pocan wrote about their 'particularized concerns that secretive & "trouble -plagued companies"' "have long skimped on security in favor of convenience," in the context of how they described the voting machine systems that three large vendors – Election Systems & Software, Dominion Voting Systems, & Hart InterCivic – collectively provide voting machines & software that facilitate voting for over 90% of all eligible voters in the U.S." (See Ex. 16).

H. Senator Ron Wyden (D-Oregon) said the findings [insecurity of voting systems] are "yet another damning indictment of the profiteering election vendors, who care more about the bottom line than protecting our democracy." It's also an indictment, he said, "of the notion that important cybersecurity decisions should be left entirely to county election offices, many of whom do not employ a single cybersecurity specialist."[9]

92. The House of Representatives passed H.R. 2722 in an attempt to address these very risks on June 27, 2019:

> This bill addresses election security through grant programs and requirements for voting systems and paper ballots.
>
> The bill establishes requirements for voting systems, including that systems (1) use individual, durable, voter-verified paper ballots; (2) make

[8] *Smartmatic-TIM Running Out of Time to Fix Glitche*s, ABS-CBN News (May 4, 2010), *available at*: https://news.abs-cbn.com/nation/05/04/10/smartmatic-tim-running-out-time-fix-glitches.

[9] Kim Zetter, *Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials*, VICE (Aug. 8, 2019) ("VICE Election Article"), *available at:* https://www.vice.com/en/article/3kxzk9/exclusive-critical-us-election-systems have-been-left-exposed-online-despite-official-denials.

> a voter's marked ballot available for inspection and verification by the voter before the vote is cast; (3) ensure that individuals with disabilities are given an equivalent opportunity to vote, including with privacy and independence, in a manner that produces a voter-verified paper ballot; (4) be manufactured in the United States; and (5) meet specified cybersecurity requirements, including the prohibition of the connection of a voting system to the internet.
>
> See H.R. 2722.

E. Because Dominion Senior Management Has Publicly Expressed Hostility to Trump and Opposition to His Election, Dominion Is Not Entitled to Any Presumption of Fairness, Objectivity or Impartiality, and Should Instead Be Treated as a Hostile Partisan Political Actor.

93. Dr. Eric Coomer is listed as the co-inventor for several patents on ballot adjudication and voting machine-related technology, all of which were assigned to Dominion.[10] He joined Dominion in 2010, and most recently served as Voting Systems Officer of Strategy and Director of Security for Dominion. Dr. Coomer first joined Sequoia Voting Systems in 2005 as Chief Software Architect and became Vice President of Engineering before Dominion Voting Systems acquired Sequoia. Dr. Coomer's patented ballot adjudication technology into Dominion voting machines sold throughout

[10] *See* "Patents by Inventor Eric Coomer," *available at:* https://patents.justia.com/inventor/eric-coomer. This page lists the following patents issued to Dr. Coomer and his co-inventors: (1) U.S. Patent No. 9,202,113, Ballot Adjudication in Voting Systems Utilizing Ballot Images (issued Dec. 1, 2015); (2) U.S. Patent No. 8,913,787, Ballot Adjudication in Voting Systems Utilizing Ballot Images (issued Dec. 16, 2014); (3) U.S. Patent No. 8,910,865, Ballot Level Security Features for Optical Scan Voting Machine Capable of Ballot Image Processing, Secure Ballot Printing, and Ballot Layout Authentication and Verification (issued Dec. 16, 2014); (4) U.S. Patent No. 8,876,002, Systems for Configuring Voting Machines, Docking Device for Voting Machines, Warehouse Support and Asset Tracking of Voting Machines (issued Nov. 4, 2014); (5) U.S. Patent No. 8,864,026, Ballot Image Processing System and Method for Voting Machines (issued Oct. 21, 2014); (6) U.S. Patent No. 8,714,450, Systems and Methods for Transactional Ballot Processing, and Ballot Auditing (issued May 6, 2014), available at: https://patents.justia.com/inventor/eric-coomer.

the United States, including those used in Wisconsin. (See attached hereto Exh 6, Jo Oltmann Aff.).

94. In 2016, Dr. Coomer admitted to the State of Illinois that Dominion Voting machines can be manipulated remotely.[11] He has also publicly posted videos explaining how Dominion voting machines can be remotely manipulated. See Id.[12]

95. Dr. Coomer has emerged as Dominion's principal defender, both in litigation alleging that Dominion rigged elections in Georgia and in the media. An examination of his previous public statements has revealed that Dr. Coomer is highly partisan and even more anti-Trump, precisely the opposite of what would expect from the management of a company charged with fairly and impartially counting votes (which is presumably why he tried to scrub his social media history). (See Id.)

96. Unfortunately for Dr. Coomer, however, a number of these posts have been captured for perpetuity. Below are quotes from some of his greatest President Trump and Trump voter hating hits to show proof of motive and opportunity. (See Id).

> If you are planning to vote for that autocratic, narcissistic, fascist ass-hat blowhard and his Christian jihadist VP pic, UNFRIEND ME NOW! No, I'm not joking. … Only an absolute F[**]KING IDIOT could ever vote for that wind-bag fuck-tard FASCIST RACIST F[**]K! … I don't give a damn if you're friend, family, or random acquaintance, pull the lever, mark an oval, touch a screen for that carnival barker … UNFRIEND ME NOW! I have no desire whatsoever to ever interact with you. You are beyond hope, beyond reason. You are controlled by fear, reaction and bullsh[*]t. Get your shit together. F[**]K YOU! Seriously, this f[**]king ass-clown stands

[11] Jose Hermosa, *Electoral Fraud: Dominion's Vice President Warned in 2016 That Vote-Counting Systems Are Manipulable*, The BL (Nov. 13, 2020), *available at*: https://thebl.com/us-news/electoral-fraud-dominions-vice-president-warned-in-2016-that-vote-counting-systems-are-manipulable.html.

[12] See, *e.g.,* "Eric Coomer Explains How to Alter Votes in the Dominion Voting System" (Nov. 24, 2020) (excerpt of presentation delivered in Chicago in 2017), *available at:* https://www.youtube.com/watch?v=UtB3tLaXLJE.

> against everything that makes this country awesome! You want in on that? You [Trump voters] deserve nothing but contempt. *Id.* (July 21, 2016 Facebook post).[13]

97. In a rare moment of perhaps unintentional honesty, Dr. Coomer anticipates this Complaint and many others, by slandering those seeking to hold election riggers like Dominion to account and to prevent the United States' descent into Venezuelan levels of voting fraud and corruption out of which Dominion was born:

> Excerpts in stunning Trump-supporter logic, "I know there is a lot of voter fraud. I don't know who is doing it, or how much is happening, but I know it is going on a lot." This beautiful statement was followed by, "It happens in third world countries, this the US, we can't let it happen here." *Id.* (October 29, 2016 Facebook post); (See also Exh. 6)

1. Dr. Coomer, who invented the technology for Dominion's voting fraud and has publicly explained how it can be used to alter votes, seems to be extremely hostile to those who would attempt to stop it and uphold the integrity of elections that underpins the legitimacy of the United States government:

> And in other news… There be some serious fuckery going on right here fueled by our Cheeto-in-Chief stoking lie after lie on the flames of [Kris] Kobach… [Linking Washington Post article discussing the Presidential Advisory Commission on Election Integrity, of which former Kansas Secretary of State Kris Kobach was a member, entitled, "The voting commission is a fraud itself. Shut it down."] *Id.* (September 14, 2017 Facebook post.] (Id.)

98. Dr. Coomer also keeps good company, supporting and reposting ANTIFA statements slandering President Trump as a "fascist" and by extension his supporters, voters and the United States military (which he claims, without evidence, Trump will make into a "fascist tool"). *Id.* (June 2, 2020 Facebook post). Lest someone claims that these

[13] In this and other quotations from Dr. Coomer's social media, Plaintiffs have redacted certain profane terms.

are "isolated statements" "taken out of context", Dr. Coomer has affirmed that he shares ANTIFA's taste in music and hatred of the United States of America, *id.* (May 31, 2020 Facebook post linking "F[**]k the USA" by the exploited), and the police. *Id.* (separate May 31, 2020 Facebook posts linking N.W.A. "F[**]k the Police" and a post promoting phrase "Dead Cops"). *Id.* at 4-5.

99. Affiant and journalist Joseph Oltmann researched ANTIFA in Colorado. *Id.* at 1. "On or about the week of September 27, 2020," he attended an Antifa meeting which appeared to be between Antifa members in Colorado Springs and Denver Colorado," where Dr. Coomer was present. In response to a question as to what Antifa would do "if Trump wins this … election?", Dr. Coomer responded "Don't worry about the election. Trump is not going to win. I made f[**]king sure of that … Hahaha." *Id.* at 2.

100. By putting an anti-Trump zealot like Dr. Coomer in charge of election "Security," and using his technology for what should be impartial "ballot adjudication," Dominion has given the fox the keys to the hen house ***and has forfeited any presumption of objectivity, fairness, or even propriety***. It appears that Dominion does not care about even an appearance of impropriety, as its most important officer has his fingerprints all over a highly partisan, vindictive, and personal vendetta against the Republican nominee both in 2016 and 2020, President Donald Trump. Dr. Coomer's highly partisan anti-Trump rages show clear motive on the part of Dominion to rig the election in favor of Biden, and may well explain why for each of the so-called "glitches" uncovered, it is always Biden receiving the most votes on the favorable end of such a "glitch." (Id.)

101. In sum, as set forth above, for a host of independent reasons, the Wisconsin election results concluding that Joe Biden received 20,608 more votes that President

Donald Trump must be set aside.

COUNT I

Defendants Violated the Elections and Electors Clauses and 42 U.S.C. § 1983.

102. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

103. The Electors Clause states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President. U.S. Const. art. II, §1, cl. 2 (emphasis added). Likewise, the Elections Clause of the U.S. Constitution states that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by *the Legislature* thereof." U.S. Const. art. I, § 4, cl. 1 (emphasis added).

104. The Legislature is "'the representative body which ma[kes] the laws of the people.'" *Smiley v. Holm,* 285 U.S. 355, 365 (1932). Regulations of congressional and presidential elections, thus, "must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015).

105. Defendants are not part of the Wisconsin Legislature and cannot exercise legislative power. Because the United States Constitution reserves for the Wisconsin Legislature the power to set the time, place, and manner of holding elections for the President and Congress, county boards of elections and state executive officers have no authority to unilaterally exercise that power, much less to hold them in ways that conflict with existing legislation.

106. Section I details three separate instances where Defendants violated the Wisconsin Election Code. First, the WEC May 23, 2020 "guidance", see Ex. 16, on the treatment of "indefinitely confined" voters, who are exempt from Wisconsin's photo ID

requirement for absentee ballot application, that directly contravened the express requirement in Wisconsin Election Code that clerks "shall" remove an allegedly "indefinitely confined" voter if the clerk has "reliable information" that that voter is not, or is no longer, "indefinitely confined." Second, the WEC's October 18, 2016, see Ex. 18, directed clerks to violate the express requirements of Wisconsin Statutes § 6.87(6)(d), which states "[i]f a certificate is missing the address of a witness the ballot may not be counted," when it directed clerks to fill in missing information on absentee ballot envelopes. Third, WEC and Wisconsin election officials violated Wisconsin Election Code, or acted *ultra vires*, insofar as they filled in missing witness or voter information on absentee ballots and permitted voters to cure ballots without statutory authorization. Section II provides expert witness testimony quantifying the number of illegal or ineligible ballots that were counted, and lawful ballots that were not, as a result of these and Defendants' other violations.

107. A report from Dr. William Briggs, shows that there were approximately 29,594 absentee ballots listed as "unreturned" by voters that either never requested them, or that requested and returned their ballots.

108. Evidence compiled by Matt Braynard using the National Change of Address ("NCOA") Database shows that 6,207 Wisconsin voters in the 2020 General Election moved out-of-state prior to voting, and therefore were ineligible. Mr. Braynard also identified 765 Wisconsin voters who subsequently registered to vote in another state and were therefore ineligible to vote in the 2020 General Election. The merged number is 6,966 ineligible voters whose votes must be removed from the total for the 2020 General Election.

109. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable

harm unless the injunctive relief requested herein is granted. Defendants have acted and, unless enjoined, will act under color of state law to violate the Elections Clause.

110. Accordingly, the results for President in the November 3, 2020 election must be set aside, the State of Wisconsin should be enjoined from transmitting the certified the results thereof, and this Court should grant the other declaratory and injunctive relief requested herein.

COUNT II

Governor Evers and Other Defendants Violated The Equal Protection Clause of the Fourteenth Amendment U.S. Const. Amend. XIV & 42 U.S.C. § 1983

Invalid Enactment of Regulations & Disparate Treatment of Absentee vs. Mail-In Ballots

111. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

112. The Fourteenth Amendment of the United States Constitution provides "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *See also Bush v. Gore*, 531 U.S. 98, 104 (2000) (having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over the value of another's). *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) ("Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). The Court has held that to ensure equal protection, a problem inheres in the absence of specific standards to ensure its equal application. *Bush*, 531 U.S. at 106 ("The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude,

necessary.”).

113. The equal enforcement of election laws is necessary to preserve our most basic and fundamental rights. The requirement of equal protection is particularly stringently enforced as to laws that affect the exercise of fundamental rights, including the right to vote.

114. The disparate treatment of Wisconsin voters, in subjecting one class of voters to greater burdens or scrutiny than another, violates Equal Protection guarantees because “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds*, 377 U.S. at 555. *Rice v. McAlister*, 268 Ore. 125, 128, 519 P.2d 1263, 1265 (1975); *Heitman v. Brown Grp., Inc.,* 638 S.W.2d 316, 319, 1982 Mo. App. LEXIS 3159, at *4 (Mo. Ct. App. 1982); *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 41, 56 P.3d 524, 536-37 (Utah 2002).

115. In statewide and federal elections conducted in the State of Wisconsin, including without limitation the November 3, 2020 General Election, all candidates, political parties, and voters, including without limitation Plaintiffs, in having the election laws enforced fairly and uniformly.

116. As set forth in Section I above, Defendants failed to comply with the requirements of the Wisconsin Election Code and thereby diluted the lawful ballots of the Plaintiffs and of other Wisconsin voters and electors in violation of the United States Constitution guarantee of Equal Protection. Further, Defendants enacted regulations, or issued guidance, that had the intent and effect of favoring one class of voters – Democratic absentee voters – over Republican voters. Further, all of these invalidly enacted rules by Defendant Wisconsin executive and administrative agencies, had the intent and effect of

eliminating protections against voter fraud, and thereby enabled and facilitated the counting of fraudulent, unlawful and ineligible votes, which were quantified in Section II. Finally, Section III details the additional voting fraud and manipulation enabled by the use Dominion voting machines, which had the intent and effect of favoring Biden and Democratic voters and discriminating against Trump and Republican voters.

117. Defendants have acted and will continue to act under color of state law to violate Plaintiffs' right to be present and have actual observation and access to the electoral process as secured by the Equal Protection Clause of the United States Constitution. Defendants thus failed to conduct the general election in a uniform manner as required by the Equal Protection Clause of the Fourteenth Amendment, the corollary provisions of the Wisconsin Constitution, and the Wisconsin Election Code.

118. Plaintiffs seek declaratory and injunctive relief forbidding Defendants from certifying a tally that includes any ballots that were not legally cast, or that were switched from Trump to Biden through the unlawful use of Dominion Democracy Suite software and devices.

119. The Briggs analysis identified two specific errors involving unreturned mail-in ballots that are indicative of voter fraud, namely: "**Error #1:** those who were recorded as receiving absentee ballots ***without*** requesting them;" and "**Error #2:** those who returned absentee ballots but whose votes went missing (*i.e.*, marked as unreturned)." Clearly the dilution of lawful votes violates the Equal Protection clause; and the counting of unlawful votes violates the rights of lawful Citizens.

120. In addition, Plaintiffs ask this Court to order that no ballot processed by a counting board in the Wisconsin Counties can be included in the final vote tally unless a challenger

was allowed to meaningfully observe the process and handling and counting of the ballot, or that were unlawfully switched from Trump to Biden.

121. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm unless the declaratory and injunctive relief requested herein is granted. Indeed, the setting aside of an election in which the people have chosen their representative is a drastic remedy that should not be undertaken lightly, but instead should be reserved for cases in which a person challenging an election has clearly established a violation of election procedures and has demonstrated that the violation has placed the result of the election in doubt. Wisconsin law allows elections to be contested through litigation, both as a check on the integrity of the election process and as a means of ensuring the fundamental right of citizens to vote and to have their votes counted accurately.

COUNT III

Fourteenth Amendment, Amend. XIV & 42 U.S.C. § 1983

Denial of Due Process On The Right to Vote

122. Plaintiffs refer to and incorporate by reference each of the prior paragraphs of this Complaint as though the same were repeated at length herein.

123. The right of qualified citizens to vote in a state election involving federal candidates is recognized as a fundamental right under the Fourteenth Amendment of the United States Constitution. *Harper,* 383 U.S. at 665. *See also Reynolds*, 377 U.S. at 554 (The Fourteenth Amendment protects the "the right of all qualified citizens to vote, in state as well as in federal elections."). Indeed, ever since the Slaughter-House Cases, 83 U.S. 36 (1873), the United States Supreme Court has held that the Privileges or Immunities Clause of the Fourteenth Amendment protects certain rights of federal

citizenship from state interference, including the right of citizens to directly elect members of Congress. *See Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (*citing Ex parte Yarbrough*, 110 U.S. 651, 663-64 (1884)). *See also Oregon v. Mitchell*, 400 U.S. 112, 148-49 (1970) (Douglas, J., concurring) (collecting cases).

124. The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it "is preservative of other basic civil and political rights." *Reynolds*, 377 U.S. at 562. Voters have a "right to cast a ballot in an election free from the taint of intimidation and fraud," *Burson v. Freeman*, 504 U.S. 191, 211 (1992), and "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

125. "Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted" if they are validly cast. *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted" means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555, n.29 (*quoting South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

126. "Every voter in a federal . . . election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson v. United States*, 417 U.S. 211, 227 (1974); *see also Baker v. Carr*, 369 U.S. 186, 208 (1962). Invalid or fraudulent votes "debase[]" and "dilute" the weight of each validly cast vote. *See Anderson*, 417 U.S. at 227.

127. The right to vote includes not just the right to cast a ballot, but also the right to have it

fairly counted if it is legally cast. The right to vote is infringed if a vote is cancelled or diluted by a fraudulent or illegal vote, including without limitation when a single person votes multiple times. The Supreme Court of the United States has made this clear in case after case. *See, e.g., Gray v. Sanders*, 372 U.S. 368, 380 (1963) (every vote must be "protected from the diluting effect of illegal ballots."); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op. of Stevens, J.) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *accord Reynolds v. Sims*, 377 U.S. 533, 554-55 & n.29 (1964).

128. The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States." *Anderson*, 417 U.S. at 226 (*quoting Prichard v. United States*, 181 F.2d 326, 331 (6th Cir.), *aff'd due to absence of quorum*, 339 U.S. 974 (1950)).

129. Practices that promote the casting of illegal or unreliable ballots or fail to contain basic minimum guarantees against such conduct, can violate the Fourteenth Amendment by leading to the dilution of validly cast ballots. See *Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

130. Section I details the Defendants violations of the Wisconsin Election Code. Section II provides estimates of the number of fraudulent, illegal or ineligible votes counted, and demonstrates that this number is many times larger than Biden's margin of victory.

131. Plaintiffs seek declaratory and injunctive relief enjoining Defendants from

certifying the results of the General Election, or in the alternative, conduct a recount or recanvas in which they allow a reasonable number of challengers to meaningfully observe the conduct of the Wisconsin Board of State Canvassers and the Wisconsin county Boards of Canvassers and that these canvassing boards exercise their duty and authority under Wisconsin law, which forbids certifying a tally that includes any ballots that were not legally cast, or that were switched from Trump to Biden through the unlawful use of Dominion Democracy Suite software and devices.

COUNT IV

Wide-Spread Ballot Fraud

132. Plaintiffs reallege all preceding paragraphs as if fully set forth herein.

133. The scheme of civil fraud can be shown with the pattern of conduct that includes motive and opportunity, as exhibited by the high level official at Dominion Voting Systems, Eric Coomer, and his visceral and public rage against the current U.S. President.

134. Opportunity appears with the secretive nature of the voting source code, and the feed of votes that make clear that an algorithm is applied, that reports in decimal points despite the law requiring one vote for one ballot.

135. The results of the analysis and the pattern seen in the included graph strongly suggest a systemic, system-wide algorithm was enacted by an outside agent, causing the results of Wisconsin's vote tallies to be inflated by somewhere between 3 and 5.6 percentage points. Statistical estimating yields that in Wisconsin, the best estimate of the number of impacted votes is 181,440. *Id.*

136. The Reports cited above show a total amount of illegal votes identified that amount to 318,012 or over 15 times the margin by which candidate Biden leads President Trump in the state

of Wisconsin.

137. The right to vote includes not just the right to cast a ballot, but also the right to have it fairly counted if it is legally cast. The right to vote is infringed if a vote is cancelled or diluted by a fraudulent or illegal vote, including without limitation when a single person votes multiple times. The Supreme Court of the United States has made this clear in case after case. See, e.g., *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (every vote must be "protected from the diluting effect of illegal ballots."); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op. of Stevens, J.) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *accord Reynolds v. Sims*, 377 U.S. 533, 554-55 & n.29 (1964).

138. Plaintiffs have no adequate remedy at law. Plaintiffs contest the results of Wisconsin's 2020 General Election because it is fundamentally corrupted by fraud. Defendants intentionally violated multiple provisions of the Wisconsin Election Code to elect Biden and other Democratic candidates and defeat President Trump and other Republican candidates.

PRAYER FOR RELIEF

139. Accordingly, Plaintiffs seek an emergency order instructing Defendants to de-certify the results of the General Election for the Office of President.

140. Alternatively, Plaintiffs seek an order instructing the Defendants to certify the results of the General Election for Office of the President in favor of President Donald Trump.

141. In the alternative, Plaintiffs seek an emergency order prohibiting Defendants from including in any certified results from the General Election the tabulation of absentee and mailing ballots which do not comply with the Wisconsin Election Code, including, without limitation, the tabulation of absentee and mail-in ballots Trump Campaign's watchers were prevented from

observing or based on the tabulation of invalidly cast absentee and mail-in ballots which (i) lack a secrecy envelope, or contain on that envelope any text, mark, or symbol which reveals the elector's identity, political affiliation, or candidate preference, (ii) do not include on the outside envelope a completed declaration that is dated and signed by the elector, (iii) are delivered in-person by third parties for non-disabled voters, or (iv) any of the other Wisconsin Election Code violations set forth in Section II of this Complaint.

142. Order production of all registration data, ballot applications, ballots, envelopes, etc. required to be maintained by law. When we consider the harm of these uncounted votes, and ballots not ordered by the voters themselves, and the potential that many of these unordered ballots may in fact have been improperly voted and also prevented proper voting at the polls, the mail ballot system has clearly failed in the state of Wisconsin and did so on a large scale and widespread basis. The size of the voting failures, whether accidental or intentional, are multiples larger than the margin in the state. For these reasons, Wisconsin cannot reasonably rely on the results of the mail vote. Relief sought is the elimination of the mail ballots from counting in the 2020 election. Alternatively, the electors for the State of Wisconsin should be disqualified from counting toward the 2020 election. Alternatively, the electors of the State of Wisconsin should be directed to vote for President Donald Trump.

143. For these reasons, Plaintiffs ask this Court to enter a judgment in their favor and provide the following emergency relief:

1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results;

2. An order enjoining Governor Evers from transmitting the currently certified election results the Electoral College;

3. An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election;

4. An immediate emergency order to seize and impound all servers, software, voting machines, tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11. related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiffs;

5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;

6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;

7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. CONST. Amend. XIV;

8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that

invalidates the certified results if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;

9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;

10. A permanent injunction prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;

11. Immediate production of 48 hours of security camera recording of all rooms used in the voting process at the TCF Center for November 3, 2020 and November 4, 2020.

12. Plaintiffs further request the Court grant such other relief as is just and proper, including but not limited to, the costs of this action and their reasonable attorney fees and expenses pursuant to 42 U.S.C. 1988.

Respectfully submitted, this 1st day of December, 2020.

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DECLARATION OF [redacted]

I, [redacted], hereby state the following:

1. [redacted]

2. I am an adult of sound mine. All statements in this declaration are based on my personal knowledge and are true and correct.

3. I am making this statement voluntarily and on my own initiative. I have not been promised, nor do I expect to receive, anything in exchange for my testimony and giving this statement. I have no expectation of any profit or reward and understand that there are those who may seek to harm me for what I say in this statement. I have not participated in any political process in the United States, have not supported any candidate for office in the United States, am not legally permitted to vote in the United States, and have never attempted to vote in the United States.

4. I want to alert the public and let the world know the truth about the corruption, manipulation, and lies being committed by a conspiracy of people and companies intent upon betraying the honest people of the United States and their legally constituted institutions and fundamental rights as citizens. This conspiracy began more than a decade ago in Venezuela and has spread to countries all over the world. It is a conspiracy to wrongfully gain and keep power and wealth. It involves political leaders, powerful companies, and other persons whose purpose is to gain and keep power by changing the free will of the people and subverting the proper course of governing.

5. [redacted] Over the course of my career, I specialized in the marines [redacted]

6. Due to my training in special operations and my extensive military and academic formations, I was selected for the national security guard detail of the President of Venezuela. [redacted]

[redacted]

7. [redacted] Señor Cabello was a long-time confederate of President Chavez and instrumental in his gaining power. In 2002, Señor Cabello had very briefly taken over the duties of the presidency while Hugo Chavez was imprisoned. Within hours of Señor Cabello taking over the presidency, Hugo Chavez was released from prison and regained the office of President. On December 11, 2011, Cabello was installed as the Vice-President of the United Socialist Party – the party of President Chávez and became the second most powerful figure in the party after Hugo Chávez. Cabello was appointed president of the National Assembly in early 2012 and was re-elected to that post in January 2013. After Hugo Chávez's death, Cabello was next in line for the presidency of the country, but he remained president of the National Assembly and yielded to Nicolás Maduro holding the position of President of Venezuela.

8. [redacted] President Chavez was very precise and exacting in his instructions in the details about meetings he wanted, where the meeting was to occur, who was to attend, what was to be done. [redacted]

9. [redacted] I was witness to the creation and operation of a

sophisticated electronic voting system that permitted the leaders of the Venezuelan government to manipulate the tabulation of votes for national and local elections and select the winner of those elections in order to gain and maintain their power.

10. Importantly, I was a direct witness to the creation and operation of an electronic voting system in a conspiracy between a company known as Smartmatic and the leaders of conspiracy with the Venezuelan government. This conspiracy specifically involved President Hugo Chavez Frias, the person in charge of the National Electoral Council named Jorge Rodriguez, and principals, representatives, and personnel from Smartmatic which included [redacted]. The purpose of this conspiracy was to create and operate a voting system that could change the votes in elections from votes *against* persons running the Venezuelan government to votes *in their favor* in order to maintain control of the government.

11. In mid-February of 2009, there was a national referendum to change the Constitution of Venezuela to end term limits for elected officials, including the President of Venezuela. The referendum passed. This permitted Hugo Chavez to be re-elected an unlimited number of times.

12. After passage of the referendum, President Chavez instructed me to make arrangements for him to meet with Jorge Rodriguez, then President of the National Electoral Council, and three executives from Smartmatic. Among the three Smartmatic representatives were [redacted] President Chavez had multiple meetings with Rodriguez and the Smartmatic team at which I was present. In the first of four meetings, Jorge Rodriguez promoted the idea to create software that would manipulate elections. Chavez was very excited and made it clear that he would provide whatever Smartmatic needed. He wanted them immediately to create a voting system which would ensure that any time anything was going to be voted on the voting system would guarantee results that Chavez wanted. Chavez offered Smartmatic many inducements, including large sums of money, for Smartmatic to create or modify the voting system so that it would guarantee Chavez would win every election cycle. Smartmatic's team agreed to create such a system and did so.

13. I arranged and attended three more meetings between President Chavez and the representatives from Smartmatic at which details of the new

voting system were discussed and agreed upon. For each of these meetings, I communicated directly with [redacted] on details of where and when to meet, where the participants would be picked up and delivered to the meetings, and what was to be accomplished. At these meetings, the participants called their project the "Chavez revolution." From that point on, Chavez never lost any election. In fact, he was able to ensure wins for himself, his party, Congress persons and mayors from townships.

14. Smartmatic's electoral technology was called "Sistema de Gestión Electoral" (the "Electoral Management System"). Smartmatic was a pioneer in this area of computing systems. Their system provided for transmission of voting data over the internet to a computerized central tabulating center. The voting machines themselves had a digital display, fingerprint recognition feature to identify the voter, and printed out the voter's ballot. The voter's thumbprint was linked to a computerized record of that voter's identity. Smartmatic created and operated the entire system.

15. Chavez was most insistent that Smartmatic design the system in a way that the system could change the vote of each voter without being detected. He wanted the software itself to function in such a manner that if the voter were to place their thumb print or fingerprint on a scanner, then the thumbprint would be tied to a record of the voter's name and identity as having voted, but that voter would not tracked to the changed vote. He made it clear that the system would have to be setup to not leave any evidence of the changed vote for a specific voter and that there would be no evidence to show and nothing to contradict that the name or the fingerprint or thumb print was going with a changed vote. Smartmatic agreed to create such a system and produced the software and hardware that accomplished that result for President Chavez.

16. After the Smartmatic Electoral Management System was put in place, I closely observed several elections where the results were manipulated using Smartmatic software. One such election was in December 2006 when Chavez was running against Rosales. Chavez won with a landslide over Manuel Rosales - a margin of nearly 6 million votes for Chavez versus 3.7 million for Rosales.

17. On April 14, 2013, I witnessed another Venezuelan national election in which the Smartmatic Electoral Management System was used to manipulate and change the results for the person to succeed Hugo Chávez

as President. In that election, Nicolás Maduro ran against Capriles Radonsky. [redacted] Inside that location was a control room in which there were multiple digital display screens – TV screens – for results of voting in each state in Venezuela. The actual voting results were fed into that room and onto the displays over an internet feed, which was connected to a sophisticated computer system created by Smartmatic. People in that room were able to see in "real time" whether the vote that came through the electronic voting system was in their favor or against them. If one looked at any particular screen, they could determine that the vote from any specific area or as a national total was going against either candidate. Persons controlling the vote tabulation computer had the ability to change the reporting of votes by moving votes from one candidate to another by using the Smartmatic software.

18. By two o'clock in the afternoon on that election day Capriles Radonsky was ahead of Nicolás Maduro by two million votes. When Maduro and his supporters realized the size of Radonsky's lead they were worried that they were in a crisis mode and would lose the election. The Smartmatic machines used for voting in each state were connected to the internet and reported their information over the internet to the Caracas control center in real-time. So, the decision was made to reset the entire system. Maduro's and his supporters ordered the network controllers to take the internet itself offline in practically all parts in Venezuela and to change the results.

19. It took the voting system operators approximately two hours to make the adjustments in the vote from Radonsky to Maduro. Then, when they turned the internet back on and the on-line reporting was up and running again, they checked each screen state by state to be certain where they could see that each vote was changed in favor of Nicholas Maduro. At that moment the Smartmatic system changed votes that were for Capriles Radonsky to Maduro. By the time the system operators finish, they had achieved a convincing, but narrow victory of 200,000 votes for Maduro.

20. After Smartmatic created the voting system President Chavez wanted, he exported the software and system all over Latin America. It was sent to Bolivia, Nicaragua, Argentina, Ecuador, and Chile – countries that were in alliance with President Chavez. This was a group of leaders who wanted to be able to guarantee they maintained power in their countries. When Chavez died, Smartmatic was in a position of being the only

company that could guarantee results in Venezuelan elections for the party in power.

21. I want to point out that the software and fundamental design of the electronic electoral system and software of Dominion and other election tabulating companies relies upon software that is a descendant of the Smartmatic Electoral Management System. In short, the Smartmatic software is in the DNA of every vote tabulating company's software and system.

22. Dominion is one of three major companies that tabulates votes in the United States. Dominion uses the same methods and fundamentally same software design for the storage, transfer and computation of voter identification data and voting data. Dominion and Smartmatic did business together. The software, hardware and system have the same fundamental flaws which allow multiple opportunities to corrupt the data and mask the process in a way that the average person cannot detect any fraud or manipulation. The fact that the voting machine displays a voting result that the voter intends and then prints out a paper ballot which reflects that change does not matter. It is the software that counts the digitized vote and reports the results. The software itself is the one that changes the information electronically to the result that the operator of the software and vote counting system intends to produce that counts. That's how it is done. So the software, the software itself configures the vote and voting result -- changing the selection made by the voter. The software decides the result regardless of what the voter votes.

23. All of the computer controlled voting tabulation is done in a closed environment so that the voter and any observer cannot detect what is taking place unless there is a malfunction or other event which causes the observer to question the process. I saw first-hand that the manipulation and changing of votes can be done in real-time at the secret counting center which existed in Caracas, Venezuela. For me it was something very surprising and disturbing. I was in awe because I had never been present to actually see it occur and I saw it happen. So, I learned first-hand that it doesn't matter what the voter decides or what the paper ballot says. It's the software operator and the software that decides what counts – not the voter.

24. If one questions the reliability of my observations, they only have to read the words of [redacted] a time period in

which Smartmatic had possession of all the votes and the voting, the votes themselves and the voting information at their disposition in Venezuela. [redacted] he was assuring that the voting system implemented or used by Smartmatic was completely secure, that it could not be compromised, was not able to be altered.

25. But later, in 2017 when there were elections where Maduro was running and elections for legislators in Venezuela, [redacted] and Smartmatic broke their secrecy pact with the government of Venezuela. He made a public announcement through the media in which he stated that all the Smartmatic voting machines used during those elections were totally manipulated and they were manipulated by the electoral council of Venezuela back then. [redacted] stated that all of the votes for Nicholas Maduro and the other persons running for the legislature were manipulated and they actually had lost. So I think that's the greatest proof that the fraud can be carried out and will be denied by the software company that [redacted] admitted publicly that Smartmatic had created, used and still uses vote counting software that can be manipulated or altered.

26. I am alarmed because of what is occurring in plain sight during this 2020 election for President of the United States. The circumstances and events are eerily reminiscent of what happened with Smartmatic software electronically changing votes in the 2013 presidential election in Venezuela. What happened in the United States was that the vote counting was abruptly stopped in five states using Dominion software. At the time that vote counting was stopped, Donald Trump was significantly ahead in the votes. Then during the wee hours of the morning, when there was no voting occurring and the vote count reporting was off-line, something significantly changed. When the vote reporting resumed the very next morning there was a very pronounced change in voting in favor of the opposing candidate, Joe Biden.

27. [redacted] I have worked in gathering information, researching, and working with information technology. That's what I know how to do and the special knowledge that I have. Due to these recent election events, I contacted a number of reliable and intelligent ex-co-workers of mine that are still informants and work with the intelligence community. I asked for them to give me information that was up-to-date information in as far as how all these businesses are acting, what actions they are taking.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was prepared in Dallas County, State of Texas, and executed on November 15, 2020.

[redacted]

An Analysis of Surveys Regarding Absentee Ballots Across Several States

William M. Briggs

November 23, 2020

1 Summary

Survey data was collected from individuals in several states, sampling those who the states listed as not returning absentee ballots. The data was provided by Matt Braynard.

The survey asked respondents whether they (a) had ever requested an absentee ballot, and, if so, (b) whether they had in fact returned this ballot. From this sample I produce predictions of the total numbers of: **Error #1**, those who were recorded as receiving absentee ballots *without* requesting them; and **Error #2**, those who returned absentee ballots but whose votes went missing (i.e. marked as unreturned).

The sizes of both errors were large in each state. The states were Georgia, Michigan, Wisconsin, and Arizona where ballots were across parties. Pennsylvania data was for Republicans only.

2 Analysis Description

Each analysis was carried out separately for each state. The analysis used (a) the number of absentee ballots recorded as unreturned, (b) the total responding to the survey, (c) the total of those saying they did not request a ballot, (d) the total of those saying they did request a ballot, and of these (e) the number saying they returned their ballots. I assume survery respondents are representative and the data is accurate.

From these data a simple parameter-free predictive model was used to calculate the probability of all possible outcomes. Pictures of these probabilities were derived, and the 95% prediction interval of the relevant numbers was calculated. The pictures appear in the Appendix at the end. They are summarized here with their 95% prediction intervals.

Error #1: being recorded as sent an absentee ballot without requesting one.

Error #2: sending back an absentee ballot and having it recorded as not returned.

State	Unreturned ballots	Error #1	Error #2
Georgia	138,029	16,938–22,771	31,559–38,866
Michigan	139,190	29,611–36,529	27,928–34,710
Pennsylvania*	165,412	32,414–37,444	26,954–31,643
Wisconsin	96,771	16,316–19,273	13,991–16,757
Arizona	518,560	208,333–229,937	78,714–94,975

*Number for Pennsylvania represent Republican ballots only.

Ballots that were not requested, and ballots returned and marked as not returned were classed as *troublesome*. The estimated average number of troublesome ballots for each state were then calculated using the table above and are presented next.

State	Unreturned ballots	Estimated average troublesome ballots	Percent
Georgia	138,029	53,489	39%
Michigan	139,190	62,517	45%
Pennsylvania*	165,412	61,780	37%
Wisconsin	96,771	29,594	31%
Arizona	518,560	303,305	58%

*Number for Pennsylvania represent Republican ballots only.

3 Conclusion

There are clearly a large number of troublesome ballots in each state investigated. Ballots marked as not returned that were never requested are clearly an error of some kind. The error is not small as a percent of the total recorded unreturned ballots.

Ballots sent back and unrecorded is a separate error. These represent votes that have gone missing, a serious mistake. The number of these missing ballots is also large in each state.

Survey respondents were not asked if they received an unrequested ballot whether they sent these ballots back. This is clearly a lively possibility, and represents a third possible source of error, including the potential of voting twice (once by absentee and once at the polls). No estimates or likelihood can be calculated for this potential error due to absence of data.

4 Declaration of William M. Briggs, PhD

1. My name is William M. Briggs. I am over 18 years of age and am competent to testify in this action. All of the facts stated herein are true and based on my personal knowledge.
2. I received a Ph.D of Statistics from Cornell University in 2004.
3. I am currently a statistical consultant. I make this declaration in my personal capacity.
4. I have analyzed data regarding responses to questions relating to mail ballot requests, returns and related issues.
5. I attest to a reasonable degree of professional certainty that the resulting analysis are accurate.

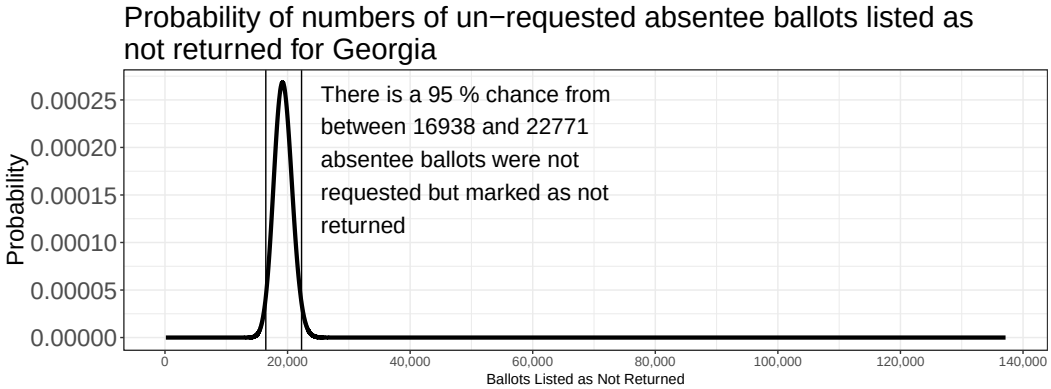
I declare under the penalty of perjury that the foregoing is true and correct.

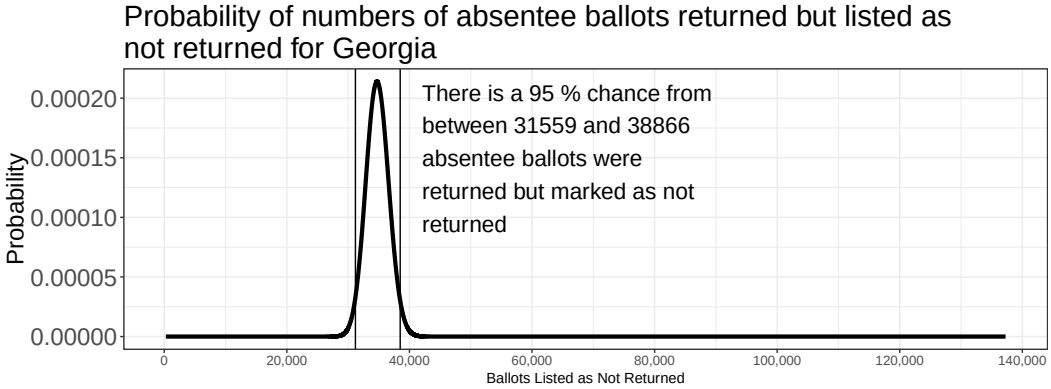
23 November 2020

William M. Briggs

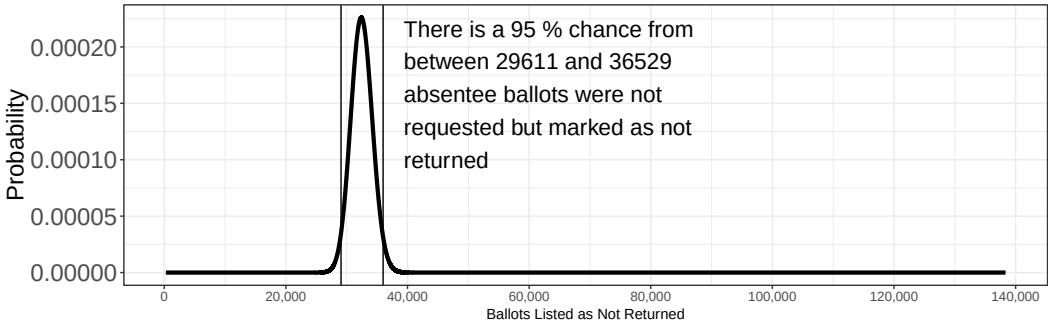
5 Appendix

The probability pictures for each state for each outcome as mentioned above.

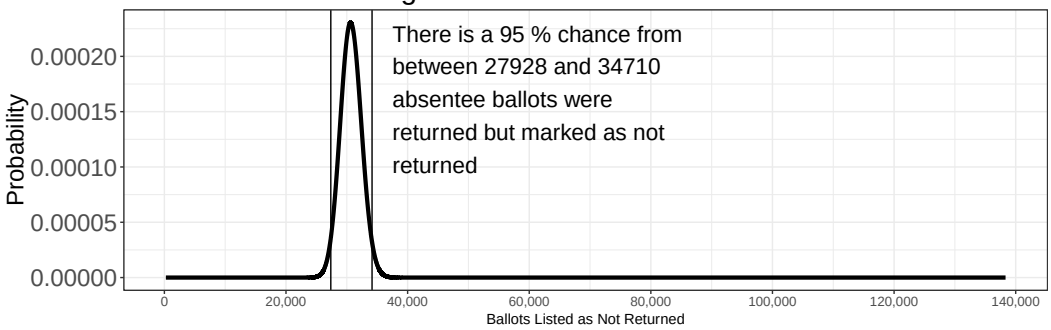




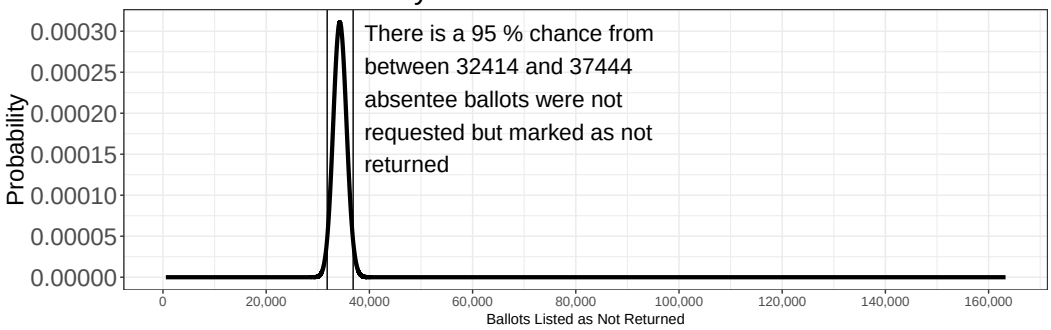
Probability of numbers of un−requested absentee ballots listed as not returned for Michigan



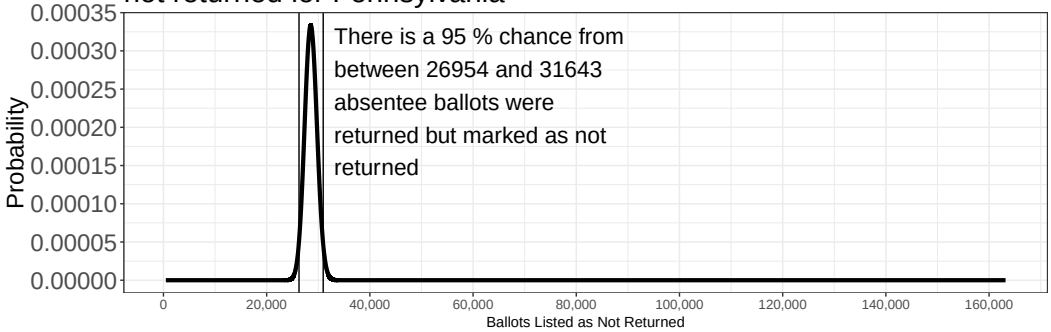
Probability of numbers of absentee ballots returned but listed as not returned for Michigan



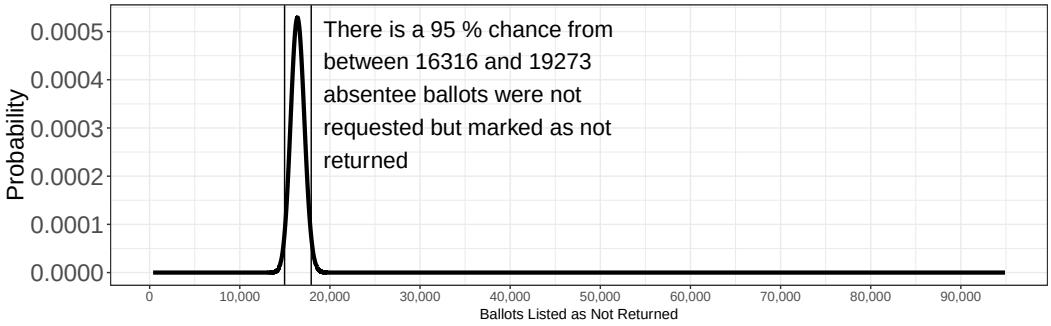
Probability of numbers of un−requested absentee ballots listed as not returned for Pennsylvania



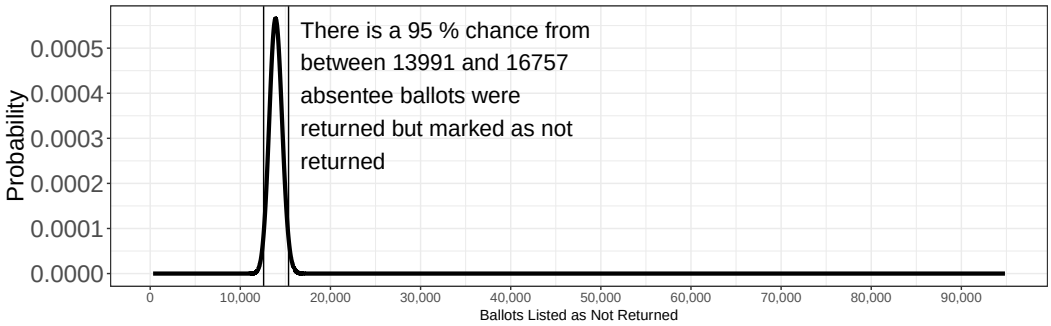
Probability of numbers of absentee ballots returned but listed as not returned for Pennsylvania



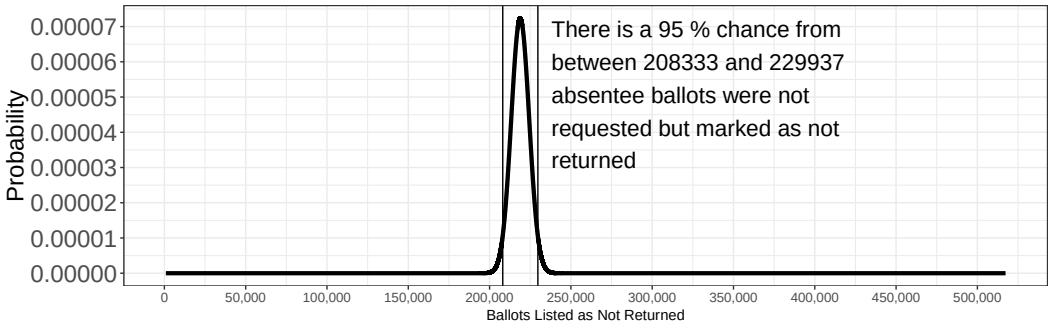
Probability of numbers of un−requested absentee ballots listed as not returned for Wisconsin



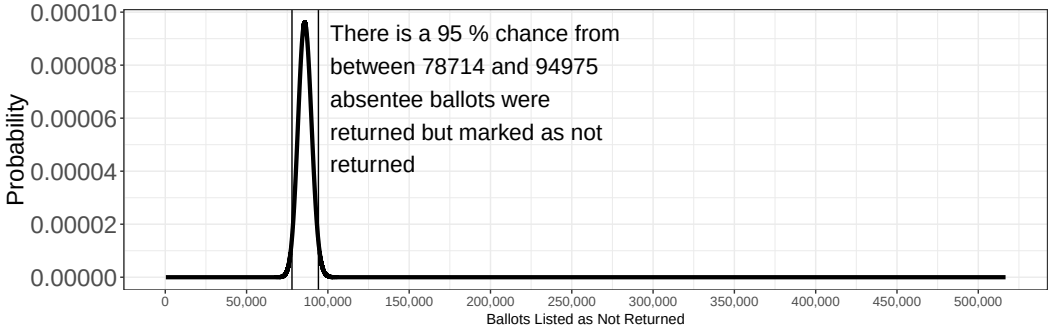
Probability of numbers of absentee ballots returned but listed as not returned for Wisconsin



Probability of numbers of un−requested absentee ballots listed as not returned for Arizona



Probability of numbers of absentee ballots returned but listed as not returned for Arizona



AZ Unreturned Live Agent - Mass Markets

			11/15/2020	11/16/2020	11/17/2020	
5,604	**Completes**		**745**	**1,881**	**2,978**	
684	**Q4=01**	1-Completed Survey	116	212	356	
1,945	**VM Message Left**	2-Message Delivered VM	90	657	1,198	
2,975	**up/RC**	3-Refused	539	1,012	1,424	
74,437	**No Answer**	4-No Answer	6,764	25,056	42,617	
1,663	**Numbers/Language**	5-Bad Number	245	384	1,034	
100.00%	**List Penetration**					
81,708	**Data Loads**					

Q1 - May I please speak to <lead on screen>?		**Response**	**11/15/2020**	**11/16/2020**	**11/17/2020**
1,812	40.05%	A-Reached Target	307	554	951
335	7.40%	Uncertain	80	124	131
2,377	52.54%	X = Refused	382	854	1,141
0	0.00%				
4,524	**100.00%**	**Sum of All Responses**	**769**	**1,532**	**2,223**

Q2 - Did you request Absentee Ballot in state of AZ?		**Response**	**11/15/2020**	**11/16/2020**	**11/17/2020**
1,120	45.00%	A-Yes [Go to Q3]	210	361	549

885	35.56%	B-No [Go to Q4]	162	286	437
24	0.96%	Member) [Go to Q3]	5	9	10
21	0.84%	Member) [Go to Q4]	3	10	8
72	2.89%	E-Unsure [Go to Close A]	10	18	44
7	0.28%	[Go to Close A]	-	1	6
360	14.46%	X = Refused	45	69	246
2,489	**100.00%**	**Sum of All Responses**	**435**	**754**	**1,300**

Q3 - Did you mail your ballot		**Response**	**11/15/2020**	**11/16/2020**	**11/17/2020**
344	16.16%	A-Yes [Go to Q4]	67	112	165
696	32.69%	B-No [Go to Close A]	116	237	343
11	0.52%	Member) [Go to Q4]	2	2	7
9	0.42%	Member) [Go to Close A]	1	4	4
14	0.66%	Close A]	3	4	7
1,055	49.55%	X = Refused	201	326	528
2,129	**100.00%**	**Sum of All Responses**	**390**	**685**	**1,054**

Q4 - Can you please give us the best phone number to reach you at?		**Response**	**11/15/2020**	**11/16/2020**	**11/17/2020**
678	82.48%	A-Yes (Capture Number) [Go to Q5]	116	212	350
144	17.52%	B-Refused [Go to Q5]	38	50	56

0	0.00%				
0	0.00%				
822	**100.00%**	**Sum of All Responses**	**154**	**262**	**406**

Q5 - Can you provide us your email address?		**Response**	**11/15/2020**	**11/16/2020**	**11/17/2020**
127	18.57%	01-Yes [Go to Close B]	24	36	67
557	81.43%	02-No [Go to Close B]	92	176	289
0	0.00%				
684	**100.00%**	**Sum of All Responses**	**116**	**212**	**356**

An Analysis of Surveys Regarding Absentee Ballots In Wisconsin

William M. Briggs

November 23, 2020

1 Summary

Survey data was collected from individuals in Wisconsin, sampling those listed as not returning absentee ballots. The data was provided by Matt Braynard.

The survey asked respondents whether they (a) had ever requested an absentee ballot, and, if so, (b) whether they had in fact returned this ballot. From this sample I produce predictions of the total numbers of: **Error #1**, those who were recorded as receiving absentee ballots *without* requesting them; and **Error #2**, those who returned absentee ballots but whose votes went missing (i.e. marked as unreturned).

The sizes of both errors were large.

2 Analysis Description

The analysis used (a) the number of absentee ballots recorded as unreturned, (b) the total responding to the survey, (c) the total of those saying they did not request a ballot, (d) the total of those saying they did request a ballot, and of these (e) the number saying they returned their ballots. I assume survery respondents are representative and the data is accurate.

From these data a simple parameter-free predictive model was used to calculate the probability of all possible outcomes. Pictures of these probabilities were derived, and the 95% prediction interval of the relevant numbers was calculated. The pictures appear in the Appendix at the end. They are summarized here with their 95% prediction intervals.

Error #1: being recorded as sent an absentee ballot without requesting one.

Error #2: sending back an absentee ballot and having it recorded as not returned.

State	Unreturned ballots	Error #1	Error #2
Wisconsin	96,771	16,316–19,273	13,991–16,757

Ballots that were not requested, and ballots returned and marked as not returned were classed as *troublesome*. The estimated average number of troublesome ballots were then calculated using the table above and are presented next.

State	Unreturned ballots	Estimated average troublesome ballots	Percent
Wisconsin	96,771	29,594	31%

3 Conclusion

There are clearly a large number of troublesome ballots in Wisconsin. Ballots marked as not returned that were never requested are clearly an error of some kind. The error is not small as a percent of the total recorded unreturned ballots.

Ballots sent back and unrecorded is a separate error. These represent votes that have gone missing, a serious mistake. The number of these missing ballots is also large.

Survey respondents were not asked if they received an unrequested ballot whether they sent these ballots back. This is clearly a lively possibility, and represents a third possible source of error, including the potential of voting twice (once by absentee and once at the polls). No estimates or likelihood can be calculated for this potential error due to absence of data.

4 Declaration of William M. Briggs, PhD

1. My name is William M. Briggs. I am over 18 years of age and am competent to testify in this action. All of the facts stated herein are true and based on my personal knowledge.
2. I received a Ph.D of Statistics from Cornell University in 2004.
3. I am currently a statistical consultant. I make this declaration in my personal capacity.
4. I have analyzed data regarding responses to questions relating to mail ballot requests, returns and related issues.

5. I attest to a reasonable degree of professional certainty that the resulting analysis are accurate.

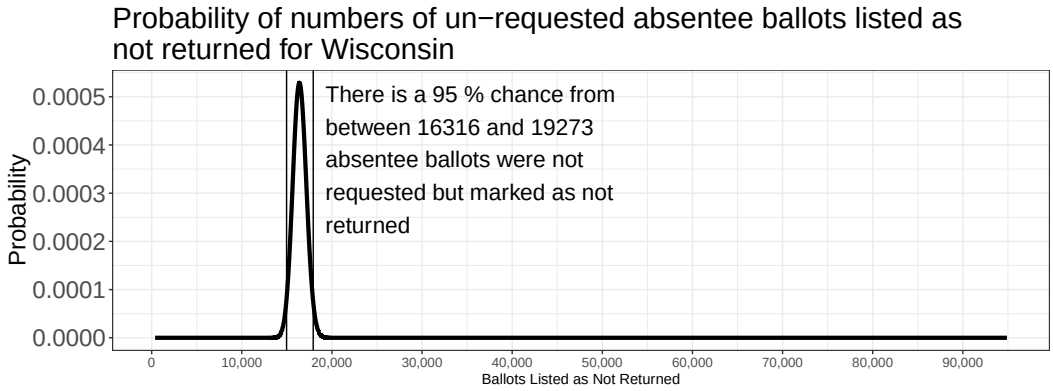
I declare under the penalty of perjury that the foregoing is true and correct.

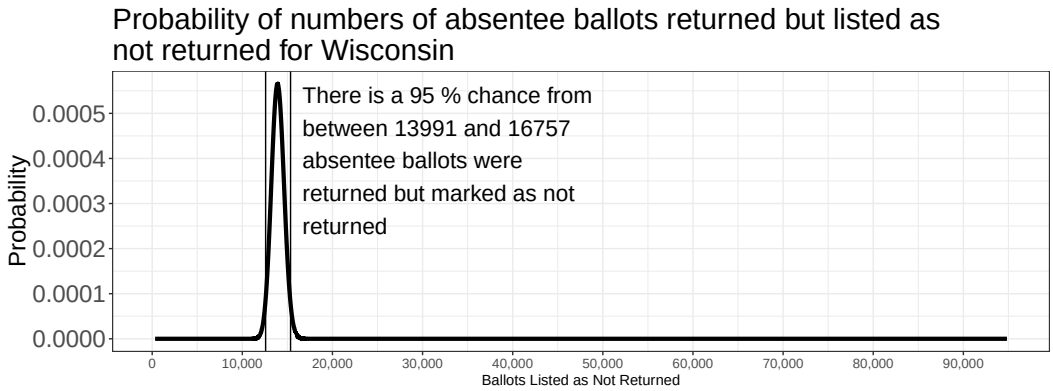
23 November 2020

William M. Briggs

5 Appendix

The probability pictures for Wisconsin for each outcome as mentioned above.





0270 PA Absentee Live ID Topline

			11/9/2020	11/10/2020	11/11/2020
18037	**Completes**		**4419**	**13618**	**0**
834	**survey** - Q4=01**	status = C	178	656	
14,203	**Machines**	status = AM	3465	10738	
3,000	**Hang up/RC**	status = R, IR, RC, DC	776	2224	
3,521	**Numbers/Languag**	status = D, BC,WN, NE	556	2965	
0	**MA**	status = MA			
87.70%	**List Penetration**				
24,581	**Data Loads**		24,581		

Q1 - May I please speak to <lead on screen>?		**Response**	**9-Nov**	**10-Nov**	**11-Nov**
2,262	75.86%	1. Reached Target [Go to Q2].	593	1,669	
422	14.15%	Q2].	102	320	
298	9.99%	X = Refused <Go to CLOSE A>	77	221	
739	24.78%	Q = Hangup <Go to CLOSE A>	160	579	
2,982	**100.00%**	**Sum of All Responses**	**932**	**2789**	**0**

Q2 - Did you request an absentee ballot?		**Response**	**9-Nov**	**10-Nov**	**11-Nov**
1,114	43.91%	1. Yes. [Go to Go to Q3].	331	783	
531	20.93%	2. No. [Go to Q4].	131	400	

36	1.42%	confirmed “Yes” [Go to Q3]	12	24	
25	0.99%	confirmed “No” [Go to Q4]	9	16	
91	3.59%	5. Unsure. [Go to Q3].	25	66	
89	3.51%	moment. [Go to Close A]	17	72	
544	21.44%	A]	105	439	
107	4.22%	X = Refused <Go to CLOSE A>	29	78	
147	5.79%	Q = Hangup <Go to CLOSE A>	36	111	
2,537	**100.00%**	**Sum of All Responses**	**695**	**1989**	**0**

Q3 - Did you mail back that ballot?		**Response**	**9-Nov**	**10-Nov**	**11-Nov**
452	39.75%	1. Yes. [Go to Go to Q4].	90	362	
632	55.58%	2. No. [Go to Close A].	229	403	
11	0.97%	confirmed “Yes” [Go to Q4]	1	10	
11	0.97%	confirmed “No” [Go to Close A]	4	7	
15	1.32%	5. Unsure. [Go to Close A].	6	9	
2	0.18%	moment. [Go to Close A]	0	2	
14	1.23%	X = Refused <Go to CLOSE A>	5	9	
13	1.14%	Q = Hangup <Go to CLOSE A>	8	5	
1,137	**100.00%**	**Sum of All Responses**	**343**	**807**	**0**

Q4 - Can you please give us the best phone number to reach you at?		**Response**	**9-Nov**	**10-Nov**	**11-Nov**
834	87.61%	01 = Yes <Go to CLOSE B>	178	656	
118	12.39%	X = Refused <Go to CLOSE A>	36	82	
67	7.04%	Q = Hangup <Go to CLOSE A>	17	50	
952	**100.00%**	**Sum of All Responses**	**231**	**788**	**0**

WI Unreturned Live Agent - Mass Markets

			11/15/2020	11/16/2020	11/17/2020
4,614	**Completes**		**-**	**3,483**	**1,131**
433	**Completed survey** - Q4=0**	1-Completed Survey	-	300	133
1,053	**VM Message Left**	2-Message Delivered VM	-	804	249
3,128	**Refused/Early Hang up/RC**	3-Refused	-	2,379	749
50,712	**No Answer**	4-No Answer	-	40,391	10,321
1,944	**Bad/Wrong Numbers/Langu**	5-Bad Number	-	1,289	655
100.00%	**List Penetration**				
57,271	**Data Loads**				

Q1 - May I please speak to <lead on screen>?		**Response**	**11/15/2020**	**11/16/2020**	**11/17/2020**
2,261	64.69%	A-Reached Target + B-What Is This About? / Uncertain	-	1,343	475
1,677	47.98%	X = Refused	-	1,202	475
0	0.00%				
3,495	**100.00%**	**Sum of All Responses**	**-**	**2,545**	**950**

Q2 - Did you request Absentee Ballot in state of WI?		**Response**	**11/15/2020**	**11/16/2020**	**11/17/2020**
1,699	62.39%	A-Yes [Go to Q3]	-	1,374	325

379	13.92%	B-No [Go to Q4]	-	240	139
32	1.18%	C-Yes (per Spouse/family Member) [Go to Q3]	-	16	16
4	0.15%	D-No (per Spouse/family Member) [Go to Q4]	-	-	4
44	1.62%	E-Unsure [Go to Close A]	-	25	19
4	0.15%	F-Not Available At The Moment [Go to Close A]	-	2	2
561	20.60%	X = Refused	-	405	156
2,723	**100.00%**	**Sum of All Responses**	**-**	**2,062**	**661**

Q3 - Did you mail your ballot back?		**Response**	**11/15/2020**	**11/16/2020**	**11/17/2020**
316	14.67%	A-Yes [Go to Q4]	-	238	78
1,286	59.70%	B-No [Go to Close A]	-	1,069	217
9	0.42%	C-Yes (per Spouse/family Member) [Go to Q4]	-	4	5
15	0.70%	D-No (per Spouse/family Member) [Go to Close A]	-	8	7
28	1.30%	E-Unsure / Refused [Go to Close A]	-	24	4
500	23.21%	X = Refused	-	314	186
			-		
2,154	**100.00%**	**Sum of All Responses**	**-**	**1,657**	**497**

Q4 - Can you please give us the best phone number to reach you at?		Response	11/15/2020	11/16/2020	11/17/2020
432	80.00%	A-Yes (Capture Number) [Go to Q5]	-	300	132
108	20.00%	B-Refused [Go to Q5]	-	77	31
0	0.00%				
0	0.00%				
540	**100.00%**	**Sum of All Responses**	**-**	**377**	**163**

Q5 - Can you provide us your email address?		Response	11/15/2020	11/16/2020	11/17/2020
50	11.55%	01-Yes [Go to Close B]	-	37	13
383	88.45%	02-No [Go to Close B]	-	263	120
0	0.00%				
433	**100.00%**	**Sum of All Responses**	**-**	**300**	**133**

0276 GA Unreturned_Absentee Live ID Topl

15179	**Completes**
184	**Completed survey** - Q5=01 or 02**
13,479	**Answering Machines**
1,516	**Refused/Early Hang up/RC**
4,902	**Bad/Wrong Numbers/Language Barrier**
0	**MA**
58.45%	**List Penetration**
34,355	**Data Loads**

Q1 - May I please speak to <lead on screen>?	
767	65.28%
255	21.70%
153	13.02%
385	32.77%
1,175	**100.00%**

Q2 - Did you request an absentee ballot?	
591	61.31%
128	13.28%

39	4.05%
14	1.45%
40	4.15%
82	8.51%
70	7.26%
58	6.02%
964	**100.00%**

Q3 - Did you mail back that ballot?	
240	38.52%
317	50.88%
17	2.73%
9	1.44%
24	3.85%
11	1.77%
5	0.80%
7	1.12%
623	**100.00%**

Q4 - Can you please give us the best phone number to reach you at?	
313	82.15%
49	12.86%
19	4.99%
18	4.72%
381	**100.00%**

Q5 - May we please have an email address to follow-up as well?	
99	28.86%
229	66.76%
15	4.37%
19	5.54%
343	**100.00%**

ine

	11/16/2020	11/17/2020
	8143	**7036**
status = C	64	120
status = AM	7090	6389
status = R, IR, RC, DC	989	527
status = D, BC,WN, NE	2436	2466
status = MA	0	0
	34,355	

Response	**16-Nov**	**17-Nov**
1. Reached Target [Go to Q2].	446	321
2. “What is this about?”/Uncertain [Go to Q2].	165	90
X = Refused <Go to CLOSE A>	104	49
Q = Hangup <Go to CLOSE A>	267	118
Sum of All Responses	**982**	**578**

Response	**16-Nov**	**17-Nov**
1. Yes. [Go to Go to Q3].	343	248
2. No. [Go to Q4].	84	44

3. Spouse/other household member confirmed “Yes” [Go to Q3]	24	15
4. Spouse/other household member confirmed “No” [Go to Q4]	11	3
5. Unsure. [Go to Q3].	26	14
6. Actual target not available at the moment. [Go to Close A]	48	34
X = Refused <Go to CLOSE A>	42	28
Q = Hangup <Go to CLOSE A>	33	25
Sum of All Responses	**611**	**411**

Response	**16-Nov**	**17-Nov**
1. Yes. [Go to Go to Q4].	149	91
2. No. [Go to Close A].	174	143
3. Spouse/other household member confirmed “Yes” [Go to Q4]	10	7
4. Spouse/other household member confirmed “No” [Go to Close A	4	5
5. Unsure. [Go to Close A].	14	10
6. Actual target not available at the moment. [Go to Close A]	8	3
X = Refused <Go to CLOSE A>	5	0
Q = Hangup <Go to CLOSE A>	3	4
Sum of All Responses	**367**	**263**

Response	**16-Nov**	**17-Nov**
01 = Yes <Go to Q5>	205	108
02 = No <Go to Q5>	26	23
X = Refused <Go to CLOSE A>	13	6
Q = Hangup <Go to CLOSE A>	10	8
Sum of All Responses	**254**	**145**

Response	16-Nov	17-Nov
01 = Yes <Go to CLOSE B>	64	35
02 = No <Go to CLOSE B>	144	85
X = Refused <Go to CLOSE A>	11	4
Q = Hangup <Go to CLOSE A>	12	7
Sum of All Responses	**231**	**131**

William M. Briggs, PhD
Statistician to the Stars!
matt@wmbriggs.com
917-392-0691

1. Experience

(1) 2016: Author of *Uncertainty: The Soul of Modeling, Probability & Statistics*, a book which argues for a complete and fundamental change in the philosophy and practice of probability and statistics. Eliminate hypothesis testing and estimation, and move to verifiable predictions. This includes AI and machine learning. Call this The Great Reset, but a good one.

(2) 2004-2016 Adjunct Professor of Statistical Science, Cornell University, Ithaca, New York
I taught a yearly Masters course to people who (rightfully) hate statistics. Interests: philosophy of science & probability, epistemology, epidemiology (ask me about the all-too-common epidemiologist fallacy), Bayesian statistics, medicine, climatology & meteorology, goodness of forecasts, overconfidence in science; public understanding of science, limitations of science, scientism; scholastic metaphysics (as it relates to epistemology).

(3) 1998-present. Statistical consultant, Various companies
Most of my time is spent coaxing people out of their money to tell them they are too sure of themselves. All manner of analyses cheerfully undertaken. Example: Fraud analysis; I created the *Wall Street Journal's* College Rankings. I consultant regularly at Methodist and other hospitals, start-ups, start-downs, and with any instition willing to fork it over.

(4) 2003-2010. Research Scientist, New York Methodist Hospital, New York
Besides the usual, I sit/sat on the Institutional Review Committee to assess the statistics of proposed research. I was an Associate Editor for *Monthly Weather Review* (through 2011). Also a member of the American Meteorological Society's Probability and Statistics Committee (through 2011). At a hospital? Yes, sir; at a hospital. It rains there, too, you know.

(5) Fall 2007, Fall 2010 Visiting Professor of Statistics, Department of Mathematics, Central Michigan University, Mt. Pleasant, MI
Who doesn't love a visit from a statistician? Ask me about the difference between "a degree" and "an education."

(6) 2003-2007, Assistant Professor Statistics, Weill Medical College of Cornell University, New York, New York
Working here gave me a sincere appreciation of the influences of government money; grants galore.

(7) 2002-2003. Gotham Risk Management, New York
A start-up then, after Enron's shenanigans, a start-down. We set future weather derivative and weather insurance contract prices that incorporated information from medium- and long-range weather and climate forecasts.

(8) 1998-2002. DoubleClick, New York
Lead statistician. Lot of computer this and thats; enormous datasets.

(9) 1993-1998. Graduate student, Cornell University

Meteorology, applied climatology, and finally statistics. Was Vice Chair of the graduate student government; probably elected thanks to a miracle.

(10) 1992-1993. National Weather Service, Sault Ste. Marie, MI
Forecast storms o' the day and launched enormous balloons in the name of Science. My proudest moment came when I was able to convince an ancient IBM-AT machine to talk to an *analog*, 110 baud, phone-coupled modem, all using BASIC!

(11) 1989-1992. Undergraduate student, Central Michigan University
Meteorology and mathematics. Started the local student meteorology group to chase tornadoes. Who knew Michigan had so few? Spent a summer at U Michigan playing with a (science-fiction-sounding) lidar.

(12) 1983-1989. United States Air Force
Cryptography and other secret stuff. Shot things; learned pinochle. I adopted and became proficient with a fascinating and versatile vocabulary. Irritate me for examples. TS/SCI, etc. security clearance (now inactive).

2. Education

(1) Ph.D., 2004, Cornell University. Statistics.
(2) M.S., 1995, Cornell University. Atmospheric Science.
(3) B.S., Summa Cum Laude, 1992, Central Michigan University. Meteorology and Math.

3. Publications

3.0.1. *Popular.*

(1) Op-eds in various newspapers; articles in *Stream*, *Crisis Magazine*, *The Remnant*, *Quadrant*, *Quirks*; blog with ∼70,000 monthly readers. Various briefs submitted to government agencies, such as California Air Resources Board, Illinois Department of Natural Resources. Talks and holding-forths of all kinds.

3.0.2. *Books.*

(1) Richards, JW, WM Briggs, and D Axe, 2020. *UThe Price of Panic: How the Tyranny of Experts Turned a Pandemic into a Catastrophe*. Regnery. Professors Jay Richards, William Briggs, and Douglas Axe take a deep dive into the crucial questions on the minds of millions of Americans during one of the most jarring and unprecedented global events in a generation.

(2) Briggs, WM., 2016. *Uncertainty: The Soul of Modeling, Probability & Statistics*. Springer. Philosophy of probability and statistics. A new (old) way to view and to use statistics, a way that doesn't lead to heartbreak and pandemic over-certainty, like current methods do.

(3) Briggs, WM., 2008 *Breaking the Law of Averages: Real Life Probability and Statistics in Plain English*. Lulu Press, New York. Free text for undergraduates.

(4) Briggs, WM., 2006 *So You Think You're Psychic?* Lulu Press, New York. Hint: I'll bet you're not.

3.0.3. *Methods.*

(1) Briggs, WM and J.C. Hanekamp, 2020. Uncertainty In The MAN Data Calibration & Trend Estimates. *Atmospheric Environment,* In review.
(2) Briggs, WM and J.C. Hanekamp, 2020. Adjustments to the Ryden & McNeil Ammonia Flux Model. *Soil Use and Management,* In review.
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(11) Briggs, WM, 2017. The Substitute for p-Values. *JASA*, 112, 897–898.
(12) J.C. Hanekamp, M. Crok, M. Briggs, 2017. Ammoniak in Nederland. *Enkele kritische wetenschappelijke kanttekeningen.* V-focus, Wageningen.
(13) Briggs, WM, 2017. Math: Old, New, and Equalitarian. *Academic Questions*, 30(4), 508–513.
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(15) Briggs, WM, JC Hanekamp, M Crok, 2017. Comment on Goedhart and Huijsmans. *Soil Use and Management*, 33(4), 603–604.
(16) Briggs, WM, JC Hanekamp, M Crok, 2017. Response to van Pul, van Zanten and Wichink Kruit. *Soil Use and Management*, 33(4), 609–610.
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(18) Christopher Monckton of Brenchley, Willie Soon, David Legates, William Briggs, 2015. Keeping it simple: the value of an irreducibly simple climate model. *Science Bulletin*. August 2015, Volume 60, Issue 15, pp 1378–1390.
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No._____

In the Supreme Court of Wisconsin

The Wisconsin Voters Alliance, Ronald H. Heuer, William Joseph Laurent, Richard Kucksdorf, James Fitzgerald, Kelly Ruh, William Berglund, John Jaconi, Donna Utschig, Jeff Wellhouse, Kurt Johnson, Thomas Reczek, Linda Sinkula, Atilla Thorbjorsson, Jeff Kleiman, Navin Jarugumilli, Jonathan Hunt, Suzanne Vlach, Jacob Blazkovec, Donald Utschig, Carol Aldinger, Jay Plaumann, Deborah Gorman, Robert R. Liebeck, Valerie M. Bruns Liebeck, Edward Hudak, Ron Cork, Charles Risch, Karl Lehrke, Arnet Holty and Joseph McGrath, PETITIONERS,

v.

Wisconsin Elections Commission, and its members Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity, RESPONDENTS

On Petition For Original Action
Before this Court

EXPERT REPORT OF MATTHEW BRAYNARD

I. INTRODUCTION

I have been retained as an expert witness on behalf of Petitioners in the above captioned proceeding. I expect to testify on the following subject matters: (i) analysis of the database for the November 3, 2020 election for the selection of Presidential Electors in the State of Wisconsin ("State"); (ii) render opinions regarding whether individuals identified in the State's voter database actually voted; and (iii) render opinions regarding whether individuals identified in the State's voter database were actually qualified to vote on election day.

This is a statement of my relevant opinions and an outline of the factual basis for these opinions. The opinions and facts contained herein are based on the information made available to me in this case prior to preparation of this report, as well as my professional experience as an election data analyst.

I reserve the right to supplement or amend this statement on the basis of further information obtained prior to the time of trial or in order to clarify or correct the information contained herein.

II. DOCUMENTS REVIEWED

I reviewed the following documents in arriving at my opinions.

1. The voter records and election returns as maintained on the State's election database;

2. Records maintained by the National Change of Address Source which is maintained by the United States Postal Service and which is available for licensed users on the internet. I am a licensed member.

3. Records developed by the staff of my call centers and social media researchers; and

4. A national voter database maintained by L2 Political;

In addition, I discussed the facts of this matter with Petitioner's attorney Erick G. Kaardal and members of his legal team.

III. PROFESSIONAL QUALIFICATIONS

I have attached hereto as Exhibit 1 a true and correct copy of my resume. As detailed in the resume, I graduated from George Washington University in 2000 with a degree in business administration with a concentration in finance and management information systems. I have been working in the voter data and election administration field since 1996. I have worked building and deploying voter databases for the Republican National Committee, five Presidential campaigns, and no less than one-hundred different campaigns and election-related organizations in all fifty states and the U.S. Virgin Islands. I worked for eight years as a senior analyst at the nation's premier redistricting and election administration firm, Election Data Services, where I worked with states and municipalities on voter databases, delineation, and litigation support related to these matters. Also, while at Election Data Services, I worked under our contract with the US Census Bureau analyzing voting age population. Since 2004, I have worked for my own business, now known as External Affairs, Inc., providing

statistical and data analysis for local, state, and federal candidates and policy organizations in the areas of voter targeting, polling/research, fundraising, branding, and online development and strategy. My firm has worked for over two-hundred candidates from president to town council and over a dozen DC-based policy/advocacy organizations.

With respect to publications I have authored in the last 10 years, I have not authored any publications in the last ten years.

IV. COMPENSATION

I have been retained as an expert witness for Petitioners. I am being compensated for a flat fee of $40,000.

V. PRIOR TESTIMONY

I have not provided testimony as an expert either at trial or in deposition in the last four years.

VI. STATEMENT OF OPINIONS

As set forth above, I have been engaged to provide expert opinions regarding analysis in the November 3, 2020 election of Presidential electors. Based on my review of the documents set forth above, my discussions with statisticians and analysts working with me and at my direction, my discussions with the attorneys representing the Petitioners, I have the following opinions:

1. It is my opinion, to a reasonable degree of scientific certainty, that in the State, the State's database for the November 3, 2020 election show 96,711 voters whom the state marks as having requested and been sent an absentee ballot did not return it. It is my opinion, to a reasonable degree of scientific certainty, that in my sample

of this universe, 18.12% of these absentee voters in the State did not request an absentee ballot.

2. From the State's database for the November 3, 2020 election and our call center results, it is my opinion to a reasonable degree of scientific certainty that 96,771 individuals whom the State's database identifies as having not returned an absentee ballot, that in my sample of this universe, 15.37% of those absentee voters did in fact mail back an absentee ballot to the clerk's office.

3. From the State's database for the November 3, 2020 election, the NCOA database, and our call center results, it is my opinion to a reasonable degree of scientific certainty that out of the 26,673 individuals had changed their address before the election, that in my sample of this universe, 1.11% of those individuals denied casting a ballot.

4. From the State's database for the November 3, 2020 election and the NCOA database and other state's voter databases, it is my opinion to a reasonable degree of scientific certainty, that at least 6,848 absentee or early voters were not residents of the State when they voted.

5. From the State's database for the November 3, 2020 election and my staff's review of social media for voters who applied for indefinitely confined absentee voting status, it is my opinion to a reasonable degree of scientific certainty, that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

6. From the State's database for the November 3, 2020 election and comparing that data to other states voting data and identifying individuals who cast early/absentee ballots in multiple states, it is my opinion to a reasonable degree of scientific certainty, that at least 234 individuals in the State voted in multiple states.

VII. BASIS AND REASONS SUPPORTING OPINIONS.

First, State maintains a database for the November 3, 2020 election which I obtained from L2 Political and which L2 Political obtained from the State's records on, among other things, voters who applied for an absentee or early voter status. I received this database from L2 Political in a table format with columns and rows which can be searched, sorted and filtered. Each row sets forth data on an individual voter. Each

column contained information such as the name of the voter, the voter's address, whether the voter applied for an absentee ballot, whether the voter voted and whether the voter voted indefinitely confined status.

Second, we are able to obtain other data from other sources such as the National Change of Address Database maintained by the United States Postal Service and licensed by L2 Political. This database also in table format shows the name of an individual, the individual's new address, the individual's old address and the date that the change of address became effective.

Third, I conducted randomized surveys of data obtained from the State's database by having my staff or the call center's staff make phone calls to and ask questions of individuals identified on the State's database by certain categories such as absentee voters who did not return a ballot. Our staff, if they talked to any of these individuals, would then ask a series of questions beginning with a confirmation of the individual's name to ensure it matched the name of the voter identified in the State's database. The staff would then ask additional questions of the individuals and record the answers.

Fourth, I had this staff survey a random sample I obtained from the State's database on indefinitely confined voters. The staff conducted research on the internet and social media postings by these individuals. Staff would undertake to determine if the individual was the individual listed on the database meant the State's definition of indefinitely confined. Staff would then attempt to determine if the individuals had posted photos, images or other information demonstrating that the individuals were not indefinitely confined. For instance, if the individual's social media showed a photo on or

near election day of the individual doing something inconsistent with indefinitely confined status such as riding a bike. Staff would then record the results as either "not indefinitely confined," "confirmed indefinitely confined," or "inconclusive."

Fifth, attached as Exhibits 2 is my written analysis of the data obtained.

Below are the opinions I rendered and the basis of the reasons for those opinions.

1. It is my opinion, to a reasonable degree of scientific certainty, that in the State, the State's database for the November 3, 2020 election show 96,711 voters whom the state marks as having requested and been sent an absentee ballot did not return it. It is my opinion, to a reasonable degree of scientific certainty, that in my sample of this universe, 18.12% of these absentee voters in the State did not request an absentee ballot.

I obtained this data from the State via L2 Political after the November 3, 2020, Election Day. This data identified 96,771 absentee voters who were sent an absentee ballot but who failed to return the absentee ballot.

I then had my staff make phone calls to a sample of this universe. When contacted, I had my staff confirm the individual's identity by name. Once the name was confirmed, I then had staff ask if the person requested an absentee ballot or not. Staff then recorded the number of persons who answered yes. My staff then recorded that of the 2,114 individuals who answered the question, 1,731 individuals answered yes to the question whether they requested an absentee ballot. My staff recorded that 383 individuals answered no to the question whether they requested an absentee ballot. Attached as Exhibit 2 is my written analysis containing information from the data above on absentee voters. Paragraph 2 of Exhibit 2 presents this information.

Next, I then had staff ask the individuals who answered yes, they requested an absentee ballot, whether the individual mailed back the absentee ballot or did not mail back the absentee ballot. Staff then recorded that of the 1,626 individuals who answered the question, 325 individuals answered yes, they mailed back the absentee ballot. Staff recorded 1301 individuals answered no, they did not mail back the absentee ballot. Paragraph 2 of Exhibit 2 presents this information.

Based on these results, 18.12% of our sample of these absentee voters in the State did not request an absentee ballot.

2. From the State's database for the November 3, 2020 election and our call center results, it is my opinion to a reasonable degree of scientific certainty that 96,771 individuals whom the State's database identifies as having not returned an absentee ballot, that in my sample of this universe, 15.37% of those absentee voters did in fact mail back an absentee ballot to the clerk's office.

This opinion includes the analysis set forth above. Among the 1,626 who told our call center that they did request an absentee ballot and answered the second question, 325 told our staff that they mailed the absentee ballot back, which is 15.37% of those whom the State identified as having not returned the absentee ballot the State sent them. Paragraph 2 of Exhibit 2 presents this information.

3. From the State's database for the November 3, 2020 election, the NCOA database, and our call center results, it is my opinion to a reasonable degree of scientific certainty that out of the 26,673 individuals had changed their address before the election, that in my sample of this universe, 1.11% of those individuals denied casting a ballot.

On Exhibit 2, in paragraph 4, I took the State's database of all absentee or early voters and matched those voters to the NCOA database for the day after election day.

This data identified 26,673 individuals whose address on the State's database did not match the address on the NCOA database on election day. Next, I had my staff call the persons identified and ask these individuals whether they had voted. My call center staff identified 1,607 individuals who confirmed that they had casted a ballot. My call center staff identified 18 individuals who denied casting a ballot. Our analysis shows that 1.11% of our sample of these individuals who changed address did not vote despite the State's data recorded that the individuals did vote.

4. From the State's database for the November 3, 2020 election and the NCOA data and other state's voter data, it is my opinion to a reasonable degree of scientific certainty, that at least 6,848 absentee or early voters were not residents of the State when they voted.

On Exhibit 2, in paragraph 1, I took the State's database of all absentee or early voters and matched those voters to the NCOA database for the day after Election Day. This data identified 6,207 individuals who had moved of the State prior to Election Day. Further, by comparing the other 49 states voter databases to the State's database, I identified 765 who registered to vote in a state other than the State subsequent to the date they registered to vote in the State. When merging these two lists and removing the duplicates, and accounting for moves that would not cause an individual to lose their residency and eligibility to vote under State law, these voters total 6,848.

5. From the State's database for the November 3, 2020 election and my staff's review of social media for voters who applied for indefinitely confined absentee voting status, it is my opinion to a reasonable degree of scientific certainty, that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

This opinion is taken from data developed on Exhibit 3. For this determination, I had my staff investigate using the internet and social media the individuals the State's data identified as claiming indefinitely confined status in their absentee ballot applications. The staff conducted research on the internet and social media postings by these individuals. Staff would undertake to determine if the individual was the individual listed on the database as indefinitely confined. Staff would then attempt to determine if the individuals had posted photos, images or other information demonstrating that the individuals were not indefinitely confined. For instance, if the individual's social media showed a photo on or near election day doing something inconsistent with indefinitely confined status such as riding a bike. Staff would then record the results as either "not indefinitely confined," "confirmed indefinitely confined," or "inconclusive."

These results showed that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

6. From the State's database for the November 3, 2020 election and comparing that data to other states voting data and identifying individuals who cast early/absentee ballots in multiple states, it is my opinion to a reasonable degree of scientific certainty, that at least 234 individuals in the State voted in multiple states.

On Exhibit 2, in paragraph 2, I had my staff compare the State's early and absentee voters to other states voting data and identified individuals who cast early/absentee ballots in multiple states. My staff located 234 individuals who voted in the State and in other states for the November 3, 2020 general election.

VIII. EXHIBITS TO BE USED AT TRIAL TO SUMMARIZE OR EXPLAIN OPINIONS

At the present time, I intend to rely on the documents produced set forth above as possible exhibits.

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Dated: 11/22/2020

Matthew Braynard

No._____

In the Supreme Court of Wisconsin

The Wisconsin Voters Alliance, Ronald H. Heuer, William Joseph Laurent, Richard Kucksdorf, James Fitzgerald, Kelly Ruh, William Berglund, John Jaconi, Donna Utschig, Jeff Wellhouse, Kurt Johnson, Thomas Reczek, Linda Sinkula, Atilla Thorbjorsson, Jeff Kleiman, Navin Jarugumilli, Jonathan Hunt, Suzanne Vlach, Jacob Blazkovec, Donald Utschig, Carol Aldinger, Jay Plaumann, Deborah Gorman, Robert R. Liebeck, Valerie M. Bruns Liebeck, Edward Hudak, Ron Cork, Charles Risch, Karl Lehrke, Arnet Holty and Joseph McGrath, PETITIONERS,

v.

Wisconsin Elections Commission, and its members Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity, RESPONDENTS

On Petition For Original Action
Before this Court

EXPERT REPORT OF MATTHEW BRAYNARD

I. INTRODUCTION

I have been retained as an expert witness on behalf of Petitioners in the above captioned proceeding. I expect to testify on the following subject matters: (i) analysis of the database for the November 3, 2020 election for the selection of Presidential Electors in the State of Wisconsin ("State"); (ii) render opinions regarding whether individuals identified in the State's voter database actually voted; and (iii) render opinions regarding whether individuals identified in the State's voter database were actually qualified to vote on election day.

This is a statement of my relevant opinions and an outline of the factual basis for these opinions. The opinions and facts contained herein are based on the information made available to me in this case prior to preparation of this report, as well as my professional experience as an election data analyst.

I reserve the right to supplement or amend this statement on the basis of further information obtained prior to the time of trial or in order to clarify or correct the information contained herein.

II. DOCUMENTS REVIEWED

I reviewed the following documents in arriving at my opinions.

1. The voter records and election returns as maintained on the State's election database;

2. Records maintained by the National Change of Address Source which is maintained by the United States Postal Service and which is available for licensed users on the internet. I am a licensed member.

3. Records developed by the staff of my call centers and social media researchers; and

4. A national voter database maintained by L2 Political;

In addition, I discussed the facts of this matter with Petitioner's attorney Erick G. Kaardal and members of his legal team.

III. PROFESSIONAL QUALIFICATIONS

I have attached hereto as Exhibit 1 a true and correct copy of my resume. As detailed in the resume, I graduated from George Washington University in 2000 with a degree in business administration with a concentration in finance and management information systems. I have been working in the voter data and election administration field since 1996. I have worked building and deploying voter databases for the Republican National Committee, five Presidential campaigns, and no less than one-hundred different campaigns and election-related organizations in all fifty states and the U.S. Virgin Islands. I worked for eight years as a senior analyst at the nation's premier redistricting and election administration firm, Election Data Services, where I worked with states and municipalities on voter databases, delineation, and litigation support related to these matters. Also, while at Election Data Services, I worked under our contract with the US Census Bureau analyzing voting age population. Since 2004, I have worked for my own business, now known as External Affairs, Inc., providing

statistical and data analysis for local, state, and federal candidates and policy organizations in the areas of voter targeting, polling/research, fundraising, branding, and online development and strategy. My firm has worked for over two-hundred candidates from president to town council and over a dozen DC-based policy/advocacy organizations.

With respect to publications I have authored in the last 10 years, I have not authored any publications in the last ten years.

IV. COMPENSATION

I have been retained as an expert witness for Petitioners. I am being compensated for a flat fee of $40,000.

V. PRIOR TESTIMONY

I have not provided testimony as an expert either at trial or in deposition in the last four years.

VI. STATEMENT OF OPINIONS

As set forth above, I have been engaged to provide expert opinions regarding analysis in the November 3, 2020 election of Presidential electors. Based on my review of the documents set forth above, my discussions with statisticians and analysts working with me and at my direction, my discussions with the attorneys representing the Petitioners, I have the following opinions:

1. It is my opinion, to a reasonable degree of scientific certainty, that in the State, the State's database for the November 3, 2020 election show 96,711 voters whom the state marks as having requested and been sent an absentee ballot did not return it. It is my opinion, to a reasonable degree of scientific certainty, that in my sample

of this universe, 18.12% of these absentee voters in the State did not request an absentee ballot.

2. From the State's database for the November 3, 2020 election and our call center results, it is my opinion to a reasonable degree of scientific certainty that 96,771 individuals whom the State's database identifies as having not returned an absentee ballot, that in my sample of this universe, 15.37% of those absentee voters did in fact mail back an absentee ballot to the clerk's office.

3. From the State's database for the November 3, 2020 election, the NCOA database, and our call center results, it is my opinion to a reasonable degree of scientific certainty that out of the 26,673 individuals had changed their address before the election, that in my sample of this universe, 1.11% of those individuals denied casting a ballot.

4. From the State's database for the November 3, 2020 election and the NCOA database and other state's voter databases, it is my opinion to a reasonable degree of scientific certainty, that at least 6,848 absentee or early voters were not residents of the State when they voted.

5. From the State's database for the November 3, 2020 election and my staff's review of social media for voters who applied for indefinitely confined absentee voting status, it is my opinion to a reasonable degree of scientific certainty, that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

6. From the State's database for the November 3, 2020 election and comparing that data to other states voting data and identifying individuals who cast early/absentee ballots in multiple states, it is my opinion to a reasonable degree of scientific certainty, that at least 234 individuals in the State voted in multiple states.

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Fourth, I had this staff survey a random sample I obtained from the State's database on indefinitely confined voters. The staff conducted research on the internet and social media postings by these individuals. Staff would undertake to determine if the individual was the individual listed on the database meant the State's definition of indefinitely confined. Staff would then attempt to determine if the individuals had posted photos, images or other information demonstrating that the individuals were not indefinitely confined. For instance, if the individual's social media showed a photo on or

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This opinion includes the analysis set forth above. Among the 1,626 who told our call center that they did request an absentee ballot and answered the second question, 325 told our staff that they mailed the absentee ballot back, which is 15.37% of those whom the State identified as having not returned the absentee ballot the State sent them. Paragraph 2 of Exhibit 2 presents this information.

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This opinion is taken from data developed on Exhibit 3. For this determination, I had my staff investigate using the internet and social media the individuals the State's data identified as claiming indefinitely confined status in their absentee ballot applications. The staff conducted research on the internet and social media postings by these individuals. Staff would undertake to determine if the individual was the individual listed on the database as indefinitely confined. Staff would then attempt to determine if the individuals had posted photos, images or other information demonstrating that the individuals were not indefinitely confined. For instance, if the individual's social media showed a photo on or near election day doing something inconsistent with indefinitely confined status such as riding a bike. Staff would then record the results as either "not indefinitely confined," "confirmed indefinitely confined," or "inconclusive."

These results showed that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

6. From the State's database for the November 3, 2020 election and comparing that data to other states voting data and identifying individuals who cast early/absentee ballots in multiple states, it is my opinion to a reasonable degree of scientific certainty, that at least 234 individuals in the State voted in multiple states.

On Exhibit 2, in paragraph 2, I had my staff compare the State's early and absentee voters to other states voting data and identified individuals who cast early/absentee ballots in multiple states. My staff located 234 individuals who voted in the State and in other states for the November 3, 2020 general election.

VIII. EXHIBITS TO BE USED AT TRIAL TO SUMMARIZE OR EXPLAIN OPINIONS

At the present time, I intend to rely on the documents produced set forth above as possible exhibits.

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Dated: 11/22/2020

Matthew Braynard

[redacted]

Pursuant to 28 U.S.C Section 1746, I, [redacted], make the following declaration.

1. I am over the age of 21 years and am a resident of Monroe County, Florida.
2. I am under no legal disability that would prevent me from giving this declaration.
3. I hold a Bachelor of Science degree in Mathematics and a Master of Science degree in Statistics.
4. For thirty years, I have conducted statistical data analysis for companies in various industries, including aerospace, consumer packaged goods, disease detection and tracking, and fraud detection.
5. From November 13th, 2020 through November 28th, 2020, I conducted in-depth statistical analysis of publicly available data on the 2020 U.S. Presidential Election. This data included vote counts for each county in the United States, U.S. Census data, and type of voting machine data provided by the U.S. Election Assistance Committee.
6. The analysis yielded several "red flags" concerning the percentage of votes won by candidate Biden in counties using voting machines provided by Dominion Voting Systems. These red flags occurred in several States in the country, including Wisconsin.
7. I began by using Chi-Squared Automatic Interaction Detection (CHAID), which treats the data in an agnostic way—that is, it imposes no parametric assumptions that could otherwise introduce bias. Here, I posed the following question: "Do any voting machine

types appear to have unusual results?" The answer provided by the statistical technique/algorithm was that machines from Dominion Voting Systems (Dominion) produced abnormal results.

8. Subsequent graphical and statistical analysis shows the unusual pattern involving machines from Dominion occurs in at least 100 counties and multiple States, including Wisconsin.

9. The results from most, if not all counties using the Dominion machines is three to five point six percentage points higher in favor of candidate Biden than the results should be. This pattern is seen easily in graphical form when the results from "Dominion" counties are overlaid against results from "non-Dominion" counties. The results from "Dominion" counties do not match the results from the rest of the counties in the United States. The results are certainly statistically significant, with a p-value of < 0.00004. This translates into a statistical impossibility that something unusual involving Dominion machines is *not* occurring. This pattern appears in multiple States, including Wisconsin, and the margin of votes implied by the unusual activity would easily sway the election results.

10. The following graph shows the pattern. The large red dots are counties in Wisconsin that use Dominion voting machines. Almost all of them are above the blue prediction line, when in normal situations approximately half of them would be below the prediction line (as evidence by approximately half the counties in the U.S. (blue dots) that are below the blue centerline). The p-value of statistical analysis regarding the centerline for the red dots (Wisconsin counties

with Dominion machines) is 0.000000049, pointing to a statistical impossibility that this is a "random" statistical anomaly. Some external force caused this anomaly

11. To confirm that Dominion machines were the source of the pattern/anomaly, I conducted further analysis using propensity scoring using U.S. census variables (Including ethnicities, income, professions, population density and other social/economic data) , which was used to place counties into paired groups. Such an analysis is important because one concern could be that counties with Dominion systems are systematically different from their counterparts, so abnormalities in the margin for Biden are driven by other characteristics unrelated to the election.

12. After matching counties using propensity score analysis, the only difference between the groups was the presence of Dominion machines. This approach again showed a highly statistically significant difference between the two groups, with candidate Biden again averaging three percentage points higher in Dominion counties than in the associated paired county. The associated p-value is < 0.00005, against indicating a statistical impossibility that something unusual is not occurring involving Dominion machines.

13. The results of the analysis and the pattern seen in the included graph strongly suggest a systemic, system-wide algorithm was enacted by an outside agent, causing the results of Wisconsin's vote tallies to be inflated by somewhere between three and five point six percentage points. Statistical estimating yields that in Wisconsin, the best estimate of the number of impacted votes is 181,440. However, a 95% confidence interval calculation yields that as many as 236,520 votes may have been impacted.

I declare under penalty of perjury that the forgoing is true and correct. Executed this November 28th, 2020.

[redacted],

/s/

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
ADAMS COUNTY - 01	CITY OF ADAMS - 01201	ES&S DS200	ES&S AutoMARK
ADAMS COUNTY - 01	TOWN OF ADAMS - 01002	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF BIG FLATS - 01004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF COLBURN - 01006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF DELL PRAIRIE - 01008	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF EASTON - 01010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF JACKSON - 01012	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF LEOLA - 01014	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF LINCOLN - 01016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF MONROE - 01018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF NEW CHESTER - 01020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF NEW HAVEN - 01022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF PRESTON - 01024	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF QUINCY - 01026	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF RICHFIELD - 01028	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF ROME - 01030	ES&S DS200	ES&S AutoMARK
ADAMS COUNTY - 01	TOWN OF SPRINGVILLE - 01032	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF STRONGS PRAIRIE - 01034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	VILLAGE OF FRIENDSHIP - 01126	None	Vote Pad
ASHLAND COUNTY - 02	CITY OF ASHLAND - MAIN - 02201	ES&S M100	ES&S AutoMARK
ASHLAND COUNTY - 02	CITY OF MELLEN - 02251	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF AGENDA - 02002	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF ASHLAND - 02004	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF CHIPPEWA - 02006	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF GINGLES - 02008	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF GORDON - 02010	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF JACOBS - 02012	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF LA POINTE - 02014	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF MARENGO - 02016	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF MORSE - 02018	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF PEEKSVILLE - 02020	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF SANBORN - 02022	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF SHANAGOLDEN - 02024	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF WHITE RIVER - 02026	None	ES&S AutoMARK
ASHLAND COUNTY - 02	VILLAGE OF BUTTERNUT - 02106	None	ES&S AutoMARK
BARRON COUNTY - 03	CITY OF BARRON - 03206	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	CITY OF CHETEK - 03211	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	CITY OF CUMBERLAND - 03212	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	CITY OF RICE LAKE - 03276	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF ALMENA - 03002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF ARLAND - 03004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF BARRON - 03006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF BEAR LAKE - 03008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF CEDAR LAKE - 03010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF CHETEK - 03012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
BARRON COUNTY - 03	TOWN OF CLINTON - 03014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF CRYSTAL LAKE - 03016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF CUMBERLAND - 03018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF DALLAS - 03020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF DOVRE - 03022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF DOYLE - 03024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF LAKELAND - 03026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF MAPLE GROVE - 03028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF MAPLE PLAIN - 03030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF OAK GROVE - 03032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF PRAIRIE FARM - 03034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF PRAIRIE LAKE - 03036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF RICE LAKE - 03038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF SIOUX CREEK - 03040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF STANFOLD - 03042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF STANLEY - 03044	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF SUMNER - 03046	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF TURTLE LAKE - 03048	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF VANCE CREEK - 03050	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF ALMENA - 03101	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF CAMERON - 03111	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF DALLAS - 03116	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF HAUGEN - 03136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF PRAIRIE FARM - 03171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF TURTLE LAKE - MAIN - 03186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BAYFIELD COUNTY - 04	CITY OF BAYFIELD - 04206	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	CITY OF WASHBURN - 04291	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF BARKSDALE - 04002	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF BARNES - 04004	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF BAYFIELD - 04006	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF BAYVIEW - 04008	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF BELL - 04010	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF CABLE - 04012	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF CLOVER - 04014	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF DELTA - 04016	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF DRUMMOND - 04018	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF EILEEN - 04020	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF GRAND VIEW - 04021	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF HUGHES - 04022	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF IRON RIVER - 04024	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF KELLY - 04026	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF KEYSTONE - 04028	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF LINCOLN - 04030	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF MASON - 04032	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF NAMAKAGON - 04034	None	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
BAYFIELD COUNTY - 04	TOWN OF ORIENTA - 04036	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF OULU - 04038	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF PILSEN - 04040	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF PORT WING - 04042	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF RUSSELL - 04046	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF TRIPP - 04048	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF WASHBURN - 04050	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	VILLAGE OF MASON - 04151	None	ES&S AutoMARK
BROWN COUNTY - 05	CITY OF DE PERE - 05216	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	CITY OF GREEN BAY - 05231	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF EATON - 05010	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF GLENMORE - 05012	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF GREEN BAY - 05014	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF HOLLAND - 05018	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF HUMBOLDT - 05022	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF LAWRENCE - 05024	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF LEDGEVIEW - 05025	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF MORRISON - 05026	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF NEW DENMARK - 05028	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF PITTSFIELD - 05030	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF ROCKLAND - 05034	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF SCOTT - 05036	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF WRIGHTSTOWN - 05040	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF ALLOUEZ - 05102	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF ASHWAUBENON - 05104	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF BELLEVUE - 05106	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF DENMARK - 05116	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF HOBART - 05126	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF HOWARD - MAIN - 05136	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF PULASKI - MAIN - 05171	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF SUAMICO - 05178	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF WRIGHTSTOWN - MAIN - 05191	ES&S DS200	ES&S ExpressVote
BUFFALO COUNTY - 06	CITY OF ALMA - 06201	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	CITY OF BUFFALO CITY - 06206	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	CITY OF FOUNTAIN CITY - 06226	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	CITY OF MONDOVI - 06251	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF ALMA - 06002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF BELVIDERE - 06004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF BUFFALO - 06006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF CANTON - 06008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF CROSS - 06010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF DOVER - 06012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF GILMANTON - 06014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF GLENCOE - 06016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF LINCOLN - 06018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
BUFFALO COUNTY - 06	TOWN OF MAXVILLE - 06020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF MILTON - 06022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF MODENA - 06024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF MONDOVI - 06026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF MONTANA - 06028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF NAPLES - 06030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF NELSON - 06032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF WAUMANDEE - 06034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	VILLAGE OF COCHRANE - 06111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	VILLAGE OF NELSON - 06154	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF ANDERSON - 07002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF BLAINE - 07004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF DANIELS - 07006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF DEWEY - 07008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF GRANTSBURG - 07010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF JACKSON - 07012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF LA FOLLETTE - 07014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF LINCOLN - 07016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF MEENON - 07018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF OAKLAND - 07020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF ROOSEVELT - 07022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF RUSK - 07024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF SAND LAKE - 07026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF SCOTT - 07028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF SIREN - 07030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF SWISS - 07032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF TRADE LAKE - 07034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF UNION - 07036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF WEBB LAKE - 07038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF WEST MARSHLAND - 07040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF WOOD RIVER - 07042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	VILLAGE OF GRANTSBURG - 07131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	VILLAGE OF SIREN - 07181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	VILLAGE OF WEBSTER - 07191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CALUMET COUNTY - 08	CITY OF BRILLION - 08206	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	CITY OF CHILTON - 08211	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	CITY OF NEW HOLSTEIN - 08261	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF BRILLION - 08002	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF BROTHERTOWN - 08004	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF CHARLESTOWN - 08006	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF CHILTON - 08008	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF HARRISON - 08010	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF NEW HOLSTEIN - 08012	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF RANTOUL - 08014	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF STOCKBRIDGE - 08016	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
CALUMET COUNTY - 08	TOWN OF WOODVILLE - 08018	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	VILLAGE OF HARRISON - MAIN - 08131	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	VILLAGE OF HILBERT - 08136	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	VILLAGE OF POTTER - 08160	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	VILLAGE OF SHERWOOD - 08179	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	VILLAGE OF STOCKBRIDGE - 08181	ES&S DS200	ES&S ExpressVote
CHIPPEWA COUNTY - 09	CITY OF BLOOMER - 09206	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	CITY OF CHIPPEWA FALLS - 09211	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	CITY OF CORNELL - 09213	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	CITY OF STANLEY - MAIN - 09281	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF ANSON - 09002	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF ARTHUR - 09004	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF AUBURN - 09006	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF BIRCH CREEK - 09008	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF BLOOMER - 09010	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF CLEVELAND - 09012	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF COLBURN - 09014	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF COOKS VALLEY - 09016	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF DELMAR - 09018	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF EAGLE POINT - 09020	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF EDSON - 09022	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF ESTELLA - 09024	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF GOETZ - 09026	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF HALLIE - 09028	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF HOWARD - 09032	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF LAFAYETTE - 09034	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF LAKE HOLCOMBE - 09035	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF RUBY - 09036	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF SAMPSON - 09038	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF SIGEL - 09040	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF TILDEN - 09042	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF WHEATON - 09044	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF WOODMOHR - 09046	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	VILLAGE OF BOYD - 09106	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	VILLAGE OF CADOTT - 09111	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	VILLAGE OF LAKE HALLIE - 09128	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	VILLAGE OF NEW AUBURN - MAIN - 09161	ClearCount 2.0.1	ClearAccess 2.0.1
CLARK COUNTY - 10	CITY OF ABBOTSFORD - MAIN - 10201	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF COLBY - MAIN - 10211	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF GREENWOOD - 10231	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF LOYAL - 10246	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF NEILLSVILLE - 10261	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF OWEN - 10265	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF THORP - 10286	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF BEAVER - 10002	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
CLARK COUNTY - 10	TOWN OF BUTLER - 10004	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF COLBY - 10006	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF DEWHURST - 10008	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF EATON - 10010	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF FOSTER - 10012	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF FREMONT - 10014	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF GRANT - 10016	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF GREEN GROVE - 10018	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF HENDREN - 10020	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF HEWETT - 10022	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF HIXON - 10024	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF HOARD - 10026	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF LEVIS - 10028	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF LONGWOOD - 10030	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF LOYAL - 10032	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF LYNN - 10034	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF MAYVILLE - 10036	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF MEAD - 10038	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF MENTOR - 10040	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF PINE VALLEY - 10042	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF RESEBURG - 10044	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF SEIF - 10046	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF SHERMAN - 10048	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF SHERWOOD - 10050	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF THORP - 10052	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF UNITY - 10054	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF WARNER - 10056	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF WASHBURN - 10058	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF WESTON - 10060	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF WITHEE - 10062	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF WORDEN - 10064	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF YORK - 10066	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	VILLAGE OF CURTISS - 10111	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	VILLAGE OF DORCHESTER - MAIN - 10116	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	VILLAGE OF GRANTON - 10131	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	VILLAGE OF WITHEE - 10191	ES&S DS200	ES&S ExpressVote
COLUMBIA COUNTY - 11	CITY OF COLUMBUS - MAIN - 11211	ES&S DS200	ES&S ExpressVote
COLUMBIA COUNTY - 11	CITY OF LODI - 11246	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	CITY OF PORTAGE - 11271	ES&S DS200	ES&S ExpressVote
COLUMBIA COUNTY - 11	CITY OF WISCONSIN DELLS - MAIN - 11291	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF ARLINGTON - 11002	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF CALEDONIA - 11004	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF COLUMBUS - 11006	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF COURTLAND - 11008	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF DEKORRA - 11010	ES&S DS200	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
COLUMBIA COUNTY - 11	TOWN OF FORT WINNEBAGO - 11012	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF FOUNTAIN PRAIRIE - 11014	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF HAMPDEN - 11016	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF LEEDS - 11018	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF LEWISTON - 11020	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF LODI - 11022	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF LOWVILLE - 11024	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF MARCELLON - 11026	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF NEWPORT - 11028	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF OTSEGO - 11030	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF PACIFIC - 11032	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF RANDOLPH - 11034	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF SCOTT - 11036	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF SPRINGVALE - 11038	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF WEST POINT - 11040	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF WYOCENA - 11042	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF ARLINGTON - 11101	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF CAMBRIA - 11111	ES&S DS200	ES&S ExpressVote
COLUMBIA COUNTY - 11	VILLAGE OF DOYLESTOWN - 11116	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF FALL RIVER - 11126	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF FRIESLAND - 11127	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF PARDEEVILLE - 11171	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF POYNETTE - 11172	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF RIO - 11177	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF WYOCENA - 11191	ES&S DS200	ES&S AutoMARK
CRAWFORD COUNTY - 12	CITY OF PRAIRIE DU CHIEN - 12271	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
CRAWFORD COUNTY - 12	TOWN OF BRIDGEPORT - 12002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
CRAWFORD COUNTY - 12	TOWN OF CLAYTON - 12004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF EASTMAN - 12006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF FREEMAN - 12008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF HANEY - 12010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF MARIETTA - 12012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF PRAIRIE DU CHIEN - 12014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF SCOTT - 12016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF SENECA - 12018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF UTICA - 12020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF WAUZEKA - 12022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF BELL CENTER - 12106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF DE SOTO -	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF EASTMAN - 12121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF FERRYVILLE - 12126	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF GAYS MILLS - 12131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF LYNXVILLE - 12146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF MT. STERLING - 12151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF SOLDIERS GROVE - 12181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
CRAWFORD COUNTY - 12	VILLAGE OF STEUBEN - 12182	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF WAUZEKA - 12191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DANE COUNTY - 13	CITY OF FITCHBURG - 13225	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF MADISON - 13251	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF MIDDLETON - 13255	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF MONONA - 13258	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF STOUGHTON - 13281	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF SUN PRAIRIE - 13282	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF VERONA - 13286	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF ALBION - 13002	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BERRY - 13004	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BLACK EARTH - 13006	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BLOOMING GROVE - 13008	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BLUE MOUNDS - 13010	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BRISTOL - 13012	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BURKE - 13014	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF CHRISTIANA - 13016	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF COTTAGE GROVE - 13018	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF CROSS PLAINS - 13020	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF DANE - 13022	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF DEERFIELD - 13024	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF DUNKIRK - 13026	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF DUNN - 13028	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF MADISON - 13032	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF MAZOMANIE - 13034	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF MEDINA - 13036	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF MIDDLETON - 13038	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF MONTROSE - 13040	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF OREGON - 13042	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF PERRY - 13044	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF PLEASANT SPRINGS - 13046	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF PRIMROSE - 13048	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF ROXBURY - 13050	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF RUTLAND - 13052	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF SPRINGDALE - 13054	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF SPRINGFIELD - 13056	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF SUN PRAIRIE - 13058	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF VERMONT - 13060	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF VERONA - 13062	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF VIENNA - 13064	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF WESTPORT - 13066	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF WINDSOR - 13068	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF YORK - 13070	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF BELLEVILLE - MAIN - 13106	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF BLACK EARTH - 13107	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
DANE COUNTY - 13	VILLAGE OF BLUE MOUNDS - 13108	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF BROOKLYN - MAIN - 13109	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF CAMBRIDGE - MAIN - 13111	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF COTTAGE GROVE - 13112	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF CROSS PLAINS - 13113	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF DANE - 13116	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF DEERFIELD - 13117	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF DEFOREST - 13118	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF MAPLE BLUFF - 13151	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF MARSHALL - 13152	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF MAZOMANIE - 13153	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF MCFARLAND - 13154	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF MOUNT HOREB - 13157	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF OREGON - 13165	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF ROCKDALE - 13176	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF SHOREWOOD HILLS - 13181	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF WAUNAKEE - 13191	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF BEAVER DAM - 14206	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF FOX LAKE - 14226	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF HORICON - 14236	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF JUNEAU - 14241	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF MAYVILLE - 14251	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF WAUPUN - MAIN - 14292	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF ASHIPPUN - 14002	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF BEAVER DAM - 14004	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF BURNETT - 14006	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF CALAMUS - 14008	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF CHESTER - 14010	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF CLYMAN - 14012	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF ELBA - 14014	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF EMMET - 14016	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF FOX LAKE - 14018	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF HERMAN - 14020	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF HUBBARD - 14022	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF HUSTISFORD - 14024	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF LEBANON - 14026	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF LEROY - 14028	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF LOMIRA - 14030	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF LOWELL - 14032	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF OAK GROVE - 14034	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF PORTLAND - 14036	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF RUBICON - 14038	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF SHIELDS - 14040	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF THERESA - 14042	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF TRENTON - 14044	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
DODGE COUNTY - 14	TOWN OF WESTFORD - 14046	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF WILLIAMSTOWN - 14048	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF BROWNSVILLE - 14106	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF CLYMAN - 14111	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF HUSTISFORD - 14136	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF IRON RIDGE - 14141	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF KEKOSKEE - 14143	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF LOMIRA - 14146	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF LOWELL - 14147	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF NEOSHO - 14161	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF RANDOLPH - MAIN - 14176	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF REESEVILLE - 14177	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF THERESA - 14186	ES&S DS200	ES&S ExpressVote
DOOR COUNTY - 15	CITY OF STURGEON BAY - 15281	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF BAILEYS HARBOR - 15002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF BRUSSELS - 15004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF CLAY BANKS - 15006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF EGG HARBOR - 15008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF FORESTVILLE - 15010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF GARDNER - 15012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF GIBRALTAR - 15014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF JACKSONPORT - 15016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF LIBERTY GROVE - 15018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF NASEWAUPEE - 15020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF SEVASTOPOL - 15022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF STURGEON BAY - 15024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF UNION - 15026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF WASHINGTON - 15028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	VILLAGE OF EGG HARBOR - 15118	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	VILLAGE OF EPHRAIM - 15121	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	VILLAGE OF FORESTVILLE - 15127	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	VILLAGE OF SISTER BAY - 15181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOUGLAS COUNTY - 16 as of 8/2018	CITY OF SUPERIOR - 16281	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF AMNICON - 16002	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF BENNETT - 16004	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF BRULE - 16006	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF CLOVERLAND - 16008	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF DAIRYLAND - 16010	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF GORDON - 16012	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF HAWTHORNE - 16014	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF HIGHLAND - 16016	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF LAKESIDE - 16018	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF MAPLE - 16020	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF OAKLAND - 16022	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF PARKLAND - 16024	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
DOUGLAS COUNTY - 16	TOWN OF SOLON SPRINGS - 16026	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF SUMMIT - 16028	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF SUPERIOR - 16030	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF WASCOTT - 16032	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	VILLAGE OF LAKE NEBAGAMON - 16146	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	VILLAGE OF OLIVER - 16165	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	VILLAGE OF POPLAR - 16171	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	VILLAGE OF SOLON SPRINGS - 16181	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	VILLAGE OF SUPERIOR - 16182	ES&S DS200	ES&S ExpressVote
DUNN COUNTY - 17	CITY OF MENOMONIE - 17251	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF COLFAX - 17002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF DUNN - 17004	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF EAU GALLE - 17006	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF ELK MOUND - 17008	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF GRANT - 17010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF HAY RIVER - 17012	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF LUCAS - 17014	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF MENOMONIE - 17016	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF NEW HAVEN - 17018	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF OTTER CREEK - 17020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF PERU - 17022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF RED CEDAR - 17024	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF ROCK CREEK - 17026	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF SAND CREEK - 17028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF SHERIDAN - 17030	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF SHERMAN - 17032	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF SPRING BROOK - 17034	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF STANTON - 17036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF TAINTER - 17038	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF TIFFANY - 17040	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF WESTON - 17042	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF WILSON - 17044	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF BOYCEVILLE - 17106	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF COLFAX - 17111	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF DOWNING - 17116	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF ELK MOUND - 17121	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF KNAPP - 17141	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF RIDGELAND - 17176	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF WHEELER - 17191	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
EAU CLAIRE COUNTY - 18	CITY OF ALTOONA - 18201	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	CITY OF AUGUSTA - 18202	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	CITY OF EAU CLAIRE - MAIN - 18221	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF BRIDGE CREEK - 18002	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF BRUNSWICK - 18004	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF CLEAR CREEK - 18006	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
EAU CLAIRE COUNTY - 18	TOWN OF DRAMMEN - 18008	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF FAIRCHILD - 18010	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF LINCOLN - 18012	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF LUDINGTON - 18014	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF OTTER CREEK - 18016	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF PLEASANT VALLEY - 18018	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF SEYMOUR - 18020	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF UNION - 18022	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF WASHINGTON - 18024	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF WILSON - 18026	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	VILLAGE OF FAIRCHILD - 18126	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	VILLAGE OF FALL CREEK - 18127	ES&S DS200	ES&S ExpressVote
FLORENCE COUNTY - 19	TOWN OF AURORA - 19002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF COMMONWEALTH - 19004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF FENCE - 19006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF FERN - 19008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF FLORENCE - 19010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF HOMESTEAD - 19012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF LONG LAKE - 19014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF TIPLER - 19016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOND DU LAC COUNTY - 20	CITY OF FOND DU LAC - 20226	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	CITY OF RIPON - 20276	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	CITY OF WAUPUN - 14292	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF ALTO - 20002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF ASHFORD - 20004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF AUBURN - 20006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF BYRON - 20008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF CALUMET - 20010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF EDEN - 20012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF ELDORADO - 20014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF EMPIRE - 20016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF FOND DU LAC - 20018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF FOREST - 20020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF FRIENDSHIP - 20022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF LAMARTINE - 20024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF MARSHFIELD - 20026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF METOMEN - 20028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF OAKFIELD - 20030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF OSCEOLA - 20032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF RIPON - 20034	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF ROSENDALE - 20036	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF SPRINGVALE - 20038	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF TAYCHEEDAH - 20040	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF WAUPUN - 20042	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF BRANDON - 20106	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
FOND DU LAC COUNTY - 20	VILLAGE OF CAMPBELLSPORT - 20111	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF EDEN - 20121	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF FAIRWATER - 20126	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF MOUNT CALVARY - 20151	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF NORTH FOND DU LAC - 20161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF OAKFIELD - 20165	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF ROSENDALE - 20176	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF ST. CLOUD - 20181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOREST COUNTY - 21	CITY OF CRANDON - 21211	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF ALVIN - 21002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF ARGONNE - 21004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF ARMSTRONG CREEK - 21006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF BLACKWELL - 21008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF CASWELL - 21010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF CRANDON - 21012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF FREEDOM - 21014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF HILES - 21016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF LAONA - 21018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF LINCOLN - 21020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF NASHVILLE - 21022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF POPPLE RIVER - 21024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF ROSS - 21026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF WABENO - 21028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	CITY OF BOSCOBEL - 22206	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	CITY OF CUBA CITY - MAIN - 22211	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	CITY OF FENNIMORE - 22226	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	CITY OF LANCASTER - 22246	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	CITY OF PLATTEVILLE - 22271	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF BEETOWN - 22002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF BLOOMINGTON - 22004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF BOSCOBEL - 22006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF CASSVILLE - 22008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF CASTLE ROCK - 22010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF CLIFTON - 22012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF ELLENBORO - 22014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF FENNIMORE - 22016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF GLEN HAVEN - 22018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF HARRISON - 22020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF HAZEL GREEN - 22022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF HICKORY GROVE - 22024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF JAMESTOWN - 22026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF LIBERTY - 22028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF LIMA - 22030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF LITTLE GRANT - 22032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF MARION - 22034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
GRANT COUNTY - 22	TOWN OF MILLVILLE - 22036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF MOUNT HOPE - 22038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF MOUNT IDA - 22040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF MUSCODA - 22042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF NORTH LANCASTER - 22044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF PARIS - 22046	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF PATCH GROVE - 22048	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF PLATTEVILLE - 22050	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF POTOSI - 22052	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF SMELSER - 22054	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF SOUTH LANCASTER - 22056	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF WATERLOO - 22058	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF WATTERSTOWN - 22060	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF WINGVILLE - 22062	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF WOODMAN - 22064	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF WYALUSING - 22066	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF BAGLEY - 22106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF BLOOMINGTON - 22107	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF BLUE RIVER - 22108	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF CASSVILLE - 22111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF DICKEYVILLE - 22116	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF HAZEL GREEN - MAIN - 22136	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF LIVINGSTON - MAIN - 22147	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF MONTFORT - MAIN - 22151	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF MOUNT HOPE - 22152	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF MUSCODA - MAIN - 22153	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF PATCH GROVE - 22171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF POTOSI - 22172	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF TENNYSON - 22186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF WOODMAN - 22191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN COUNTY - 23	CITY OF BRODHEAD - MAIN - 23206	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	CITY OF MONROE - 23251	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF ADAMS - 23002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF ALBANY - 23004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF BROOKLYN - 23006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF CADIZ - 23008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF CLARNO - 23010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF DECATUR - 23012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF EXETER - 23014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF JEFFERSON - 23016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF JORDAN - 23018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF MONROE - 23020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF MOUNT PLEASANT - 23022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF NEW GLARUS - 23024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF SPRING GROVE - 23026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
GREEN COUNTY - 23	TOWN OF SYLVESTER - 23028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF WASHINGTON - 23030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF YORK - 23032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	VILLAGE OF ALBANY - 23101	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	VILLAGE OF BROWNTOWN - 23110	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	VILLAGE OF MONTICELLO - 23151	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	VILLAGE OF NEW GLARUS - 23161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN LAKE COUNTY - 24	CITY OF BERLIN - MAIN - 24206	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	CITY OF GREEN LAKE - 24231	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	CITY OF MARKESAN - 24251	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	CITY OF PRINCETON - 24271	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF BERLIN - 24002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF BROOKLYN - 24004	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF GREEN LAKE - 24006	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF KINGSTON - 24008	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF MACKFORD - 24010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF MANCHESTER - 24012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF MARQUETTE - 24014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF PRINCETON - 24016	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF SENECA - 24020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF ST. MARIE - 24018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	VILLAGE OF KINGSTON - 24141	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	VILLAGE OF MARQUETTE - 24154	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	CITY OF DODGEVILLE - 25216	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	CITY OF MINERAL POINT - 25251	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF ARENA - 25002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF BRIGHAM - 25004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF CLYDE - 25006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF DODGEVILLE - 25008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF EDEN - 25010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF HIGHLAND - 25012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF LINDEN - 25014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF MIFFLIN - 25016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF MINERAL POINT - 25018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF MOSCOW - 25020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF PULASKI - 25022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF RIDGEWAY - 25024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF WALDWICK - 25026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF WYOMING - 25028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF ARENA - 25101	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF AVOCA - 25102	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF BARNEVELD - 25106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF COBB - 25111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF HIGHLAND - 25136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF HOLLANDALE - 25137	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
IOWA COUNTY - 25	VILLAGE OF LINDEN - 25146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF REWEY - 25176	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF RIDGEWAY - 25177	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	CITY OF HURLEY - 26236	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	CITY OF MONTREAL - 26251	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF ANDERSON - 26002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF CAREY - 26004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF GURNEY - 26006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF KIMBALL - 26008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF KNIGHT - 26010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF MERCER - 26012	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF OMA - 26014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF PENCE - 26016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF SAXON - 26018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF SHERMAN - 26020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	CITY OF BLACK RIVER FALLS - 27206	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF ADAMS - 27002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF ALBION - 27004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF ALMA - 27006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF BEAR BLUFF - 27008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF BROCKWAY - 27010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF CITY POINT - 27012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF CLEVELAND - 27014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF CURRAN - 27016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF FRANKLIN - 27018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF GARDEN VALLEY - 27020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF GARFIELD - 27022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF HIXTON - 27024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF IRVING - 27026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF KNAPP - 27028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF KOMENSKY - 27030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF MANCHESTER - 27032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF MELROSE - 27034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF MILLSTON - 27036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF NORTH BEND - 27038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF NORTHFIELD - 27040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF SPRINGFIELD - 27042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	VILLAGE OF ALMA CENTER - 27101	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	VILLAGE OF HIXTON - 27136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	VILLAGE OF MELROSE - 27151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	VILLAGE OF MERRILLAN - 27152	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	VILLAGE OF TAYLOR - 27186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JEFFERSON COUNTY - 28	CITY OF FORT ATKINSON - 28226	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	CITY OF JEFFERSON - 28241	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	CITY OF LAKE MILLS - 28246	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
JEFFERSON COUNTY - 28	CITY OF WATERLOO - 28290	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	CITY OF WATERTOWN - MAIN - 28291	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF AZTALAN - 28002	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF COLD SPRING - 28004	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF CONCORD - 28006	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF FARMINGTON - 28008	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF HEBRON - 28010	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF IXONIA - 28012	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF JEFFERSON - 28014	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF KOSHKONONG - 28016	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF LAKE MILLS - 28018	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF MILFORD - 28020	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF OAKLAND - 28022	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF PALMYRA - 28024	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF SULLIVAN - 28026	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF SUMNER - 28028	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF WATERLOO - 28030	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF WATERTOWN - 28032	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	VILLAGE OF JOHNSON CREEK - 28141	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	VILLAGE OF PALMYRA - 28171	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	VILLAGE OF SULLIVAN - 28181	ES&S DS200	ES&S ExpressVote
JUNEAU COUNTY - 29	CITY OF ELROY - 29221	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	CITY OF MAUSTON - 29251	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	CITY OF NEW LISBON - 29261	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF ARMENIA - 29002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF CLEARFIELD - 29004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
JUNEAU COUNTY - 29	TOWN OF CUTLER - 29006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF FINLEY - 29008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF FOUNTAIN - 29010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF GERMANTOWN - 29012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF KILDARE - 29014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF KINGSTON - 29016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF LEMONWEIR - 29018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF LINDINA - 29020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF LISBON - 29022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
JUNEAU COUNTY - 29	TOWN OF LYNDON - 29024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
JUNEAU COUNTY - 29	TOWN OF MARION - 29026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF NECEDAH - 29028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
JUNEAU COUNTY - 29	TOWN OF ORANGE - 29030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF PLYMOUTH - 29032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF SEVEN MILE CREEK - 29034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF SUMMIT - 29036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF WONEWOC - 29038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	VILLAGE OF CAMP DOUGLAS - 29111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	VILLAGE OF HUSTLER - 29136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
JUNEAU COUNTY - 29	VILLAGE OF LYNDON STATION - 29146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	VILLAGE OF NECEDAH - 29161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
JUNEAU COUNTY - 29	VILLAGE OF UNION CENTER - 29186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	VILLAGE OF WONEWOC - 29191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KENOSHA COUNTY - 30	CITY OF KENOSHA - 30241	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF BRIGHTON - 30002	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF PARIS - 30006	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF RANDALL - 30010	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF SALEM - 30012	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF SOMERS - 30014	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF WHEATLAND - 30016	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF BRISTOL - 30104	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF PADDOCK LAKE - 30171	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF PLEASANT PRAIRIE - 30174	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF SILVER LAKE - 30181	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF SOMERS - 30182	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF TWIN LAKES - 30186	ES&S DS200	ES&S ExpressVote
KEWAUNEE COUNTY - 31	CITY OF ALGOMA - 31201	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	CITY OF KEWAUNEE - 31241	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF AHNAPEE - 31002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF CARLTON - 31004	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF CASCO - 31006	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF FRANKLIN - 31008	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF LINCOLN - 31010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF LUXEMBURG - 31012	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF MONTPELIER - 31014	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF PIERCE - 31016	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF RED RIVER - 31018	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF WEST KEWAUNEE - 31020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	VILLAGE OF CASCO - 31111	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	VILLAGE OF LUXEMBURG - 31146	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LA CROSSE COUNTY - 32	CITY OF LA CROSSE - 32246	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	CITY OF ONALASKA - 32265	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF BANGOR - 32002	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF BARRE - 32004	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF BURNS - 32006	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF CAMPBELL - 32008	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF FARMINGTON - 32010	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF GREENFIELD - 32012	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF HAMILTON - 32014	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF HOLLAND - 32016	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF MEDARY - 32018	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF ONALASKA - 32020	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF SHELBY - 32022	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF WASHINGTON - 32024	ES&S DS200	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
LA CROSSE COUNTY - 32	VILLAGE OF BANGOR - 32106	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	VILLAGE OF HOLMEN - 32136	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	VILLAGE OF ROCKLAND - 32176	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	VILLAGE OF WEST SALEM - 32191	ES&S DS200	ES&S AutoMARK
LAFAYETTE COUNTY - 33	CITY OF DARLINGTON - 33216	ES&S DS200	ES&S AutoMARK
LAFAYETTE COUNTY - 33	CITY OF SHULLSBURG - 33281	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF ARGYLE - 33002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF BELMONT - 33004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF BENTON - 33006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF BLANCHARD - 33008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF DARLINGTON - 33010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF ELK GROVE - 33012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF FAYETTE - 33014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF GRATIOT - 33016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF KENDALL - 33018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF LAMONT - 33020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF MONTICELLO - 33022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF NEW DIGGINGS - 33024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF SEYMOUR - 33026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF SHULLSBURG - 33028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF WAYNE - 33030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF WHITE OAK SPRINGS - 33032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF WILLOW SPRINGS - 33034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF WIOTA - 33036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF ARGYLE - 33101	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF BELMONT - 33106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF BENTON - 33107	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF BLANCHARDVILLE - MAIN - 33108	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF GRATIOT - 33131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF SOUTH WAYNE - 33181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	CITY OF ANTIGO - 34201	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF ACKLEY - 34002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF AINSWORTH - 34004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF ANTIGO - 34006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF ELCHO - 34008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF EVERGREEN - 34010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF LANGLADE - 34012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF NEVA - 34014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF NORWOOD - 34016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF PARRISH - 34018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF PECK - 34020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF POLAR - 34022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF PRICE - 34024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF ROLLING - 34026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF SUMMIT - 34028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
LANGLADE COUNTY - 34	TOWN OF UPHAM - 34030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF VILAS - 34032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF WOLF RIVER - 34034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	VILLAGE OF WHITE LAKE - 34191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LINCOLN COUNTY - 35	CITY OF MERRILL - 35251	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LINCOLN COUNTY - 35	CITY OF TOMAHAWK - 35286	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF BIRCH - 35002	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF BRADLEY - 35004	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF CORNING - 35006	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF HARDING - 35008	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF HARRISON - 35010	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF KING - 35012	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF MERRILL - 35014	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF PINE RIVER - 35016	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF ROCK FALLS - 35018	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF RUSSELL - 35020	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF SCHLEY - 35022	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF SCOTT - 35024	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF SKANAWAN - 35026	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF SOMO - 35028	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF TOMAHAWK - 35030	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF WILSON - 35032	ES&S DS200	ES&S AutoMARK
MANITOWOC COUNTY - 36	CITY OF KIEL - MAIN - 36241	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	CITY OF MANITOWOC - 36251	ES&S DS200	ES&S ExpressVote
MANITOWOC COUNTY - 36	CITY OF TWO RIVERS - 36286	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF CATO - 36002	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF CENTERVILLE - 36004	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF COOPERSTOWN - 36006	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF EATON - 36008	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF FRANKLIN - 36010	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF GIBSON - 36012	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF KOSSUTH - 36014	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF LIBERTY - 36016	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF MANITOWOC - 36018	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF MANITOWOC RAPIDS - 36020	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF MAPLE GROVE - 36022	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF MEEME - 36024	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF MISHICOT - 36026	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF NEWTON - 36028	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF ROCKLAND - 36030	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF SCHLESWIG - 36032	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF TWO CREEKS - 36034	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF TWO RIVERS - 36036	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF CLEVELAND - 36112	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF FRANCIS CREEK - 36126	ES&S M100	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
MANITOWOC COUNTY - 36	VILLAGE OF KELLNERSVILLE - 36132	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF MARIBEL - 36147	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF MISHICOT - 36151	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF REEDSVILLE - 36176	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF ST. NAZIANZ - 36181	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF VALDERS - 36186	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF WHITELAW - 36191	ES&S M100	ES&S AutoMARK
MARATHON COUNTY - 37	CITY OF MOSINEE - 37251	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	CITY OF SCHOFIELD - 37281	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	CITY OF WAUSAU - 37291	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF BERGEN - 37002	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF BERLIN - 37004	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF BERN - 37006	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF BEVENT - 37008	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF BRIGHTON - 37010	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF CASSEL - 37012	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF CLEVELAND - 37014	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF DAY - 37016	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF EASTON - 37018	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF EAU PLEINE - 37020	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF ELDERON - 37022	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF EMMET - 37024	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF FRANKFORT - 37026	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF FRANZEN - 37028	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF GREEN VALLEY - 37030	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF GUENTHER - 37032	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HALSEY - 37034	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HAMBURG - 37036	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HARRISON - 37038	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HEWITT - 37040	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HOLTON - 37042	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HULL - 37044	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF JOHNSON - 37046	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF KNOWLTON - 37048	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF MAINE - 37052	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF MARATHON - 37054	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF MCMILLAN - 37056	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF MOSINEE - 37058	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF NORRIE - 37060	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF PLOVER - 37062	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF REID - 37064	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF RIB FALLS - 37066	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF RIB MOUNTAIN - 37068	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF RIETBROCK - 37070	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF RINGLE - 37072	ES&S DS200	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
MARATHON COUNTY - 37	TOWN OF SPENCER - 37074	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF STETTIN - 37076	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF TEXAS - 37078	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF WAUSAU - 37080	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF WESTON - 37082	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF WIEN - 37084	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF ATHENS - 37102	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF BROKAW - 37106	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF EDGAR - 37121	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF ELDERON - 37122	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF FENWOOD - 37126	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF HATLEY - 37136	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF KRONENWETTER - 37145	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF MARATHON CITY - 37151	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF ROTHSCHILD - 37176	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF SPENCER - 37181	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF STRATFORD - 37182	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF UNITY - MAIN - 37186	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF WESTON - 37192	ES&S DS200	ES&S AutoMARK
MARINETTE COUNTY - 38	CITY OF MARINETTE - 38251	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	CITY OF NIAGARA - 38261	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	CITY OF PESHTIGO - 38271	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF AMBERG - 38002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF ATHELSTANE - 38004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF BEAVER - 38006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF BEECHER - 38008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF DUNBAR - 38010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF GOODMAN - 38012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF GROVER - 38014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF LAKE - 38016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF MIDDLE INLET - 38018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF NIAGARA - 38020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF PEMBINE - 38022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF PESHTIGO - 38024	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF PORTERFIELD - 38026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF POUND - 38028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF SILVER CLIFF - 38030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF STEPHENSON - 38032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF WAGNER - 38034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF WAUSAUKEE - 38036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	VILLAGE OF COLEMAN - 38111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	VILLAGE OF CRIVITZ - 38121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	VILLAGE OF POUND - 38171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	VILLAGE OF WAUSAUKEE - 38191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	CITY OF MONTELLO - 39251	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
MARQUETTE COUNTY - 39	TOWN OF BUFFALO - 39002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF CRYSTAL LAKE - 39004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF DOUGLAS - 39006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF HARRIS - 39008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF MECAN - 39010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF MONTELLO - 39012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF MOUNDVILLE - 39014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF NESHKORO - 39016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF NEWTON - 39018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF OXFORD - 39020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF PACKWAUKEE - 39022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF SHIELDS - 39024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF SPRINGFIELD - 39026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF WESTFIELD - 39028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	VILLAGE OF ENDEAVOR - 39121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	VILLAGE OF NESHKORO - 39161	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	VILLAGE OF OXFORD - 39165	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	VILLAGE OF WESTFIELD - 39191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MENOMINEE COUNTY - 40	TOWN OF MENOMINEE - 40001	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF CUDAHY - 41211	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF FRANKLIN - 41226	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF GLENDALE - 41231	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF GREENFIELD - 41236	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF MILWAUKEE - MAIN - 41251	ES&S DS200/ES&S DS850	ES&S AutoMARK/ES&S ExpressVote
MILWAUKEE COUNTY - 41	CITY OF OAK CREEK - 41265	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF SOUTH MILWAUKEE - 41282	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF ST. FRANCIS - 41281	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF WAUWATOSA - 41291	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF WEST ALLIS - 41292	ES&S DS200	ES&S AutoMARK/ES&S ExpressVote
MILWAUKEE COUNTY - 41	VILLAGE OF BAYSIDE - MAIN - 41106	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF BROWN DEER - 41107	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF FOX POINT - 41126	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF GREENDALE - 41131	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF HALES CORNERS - 41136	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF RIVER HILLS - 41176	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF SHOREWOOD - 41181	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF WEST MILWAUKEE - 41191	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF WHITEFISH BAY - 41192	ES&S DS200	ES&S AutoMARK
MONROE COUNTY - 42	CITY OF SPARTA - 42281	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	CITY OF TOMAH - 42286	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF ADRIAN - 42002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF ANGELO - 42004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF BYRON - 42006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF CLIFTON - 42008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF GLENDALE - 42010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
MONROE COUNTY - 42	TOWN OF GRANT - 42012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF GREENFIELD - 42014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF JEFFERSON - 42016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF LA GRANGE - 42020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF LAFAYETTE - 42018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF LEON - 42022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF LINCOLN - 42024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF LITTLE FALLS - 42026	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF NEW LYME - 42028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF OAKDALE - 42030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF PORTLAND - 42032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF RIDGEVILLE - 42034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF SCOTT - 42036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF SHELDON - 42038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF SPARTA - 42040	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF TOMAH - 42042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF WELLINGTON - 42044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF WELLS - 42046	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF WILTON - 42048	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF CASHTON - 42111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF KENDALL - 42141	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF MELVINA - 42151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF NORWALK - 42161	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF OAKDALE - 42165	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF WARRENS - 42185	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF WILTON - 42191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF WYEVILLE - 42192	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
OCONTO COUNTY - 43	CITY OF GILLETT - 43231	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	CITY OF OCONTO - 43265	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	CITY OF OCONTO FALLS - 43266	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF ABRAMS - 43002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF BAGLEY - 43006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF BRAZEAU - 43008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF BREED - 43010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF CHASE - 43012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF DOTY - 43014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF GILLETT - 43016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF HOW - 43018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
OCONTO COUNTY - 43	TOWN OF LAKEWOOD - 43019	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF LENA - 43020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF LITTLE RIVER - 43022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF LITTLE SUAMICO - 43024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF MAPLE VALLEY - 43026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF MORGAN - 43028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF MOUNTAIN - 43029	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
OCONTO COUNTY - 43	TOWN OF OCONTO - 43030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF OCONTO FALLS - 43032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF PENSAUKEE - 43034	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF RIVERVIEW - 43036	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF SPRUCE - 43038	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF STILES - 43040	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF TOWNSEND - 43042	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF UNDERHILL - 43044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
OCONTO COUNTY - 43	VILLAGE OF LENA - 43146	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	VILLAGE OF SURING - 43181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
ONEIDA COUNTY - 44	CITY OF RHINELANDER - 44276	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF CASSIAN - 44002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF CRESCENT - 44004	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF ENTERPRISE - 44006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
ONEIDA COUNTY - 44	TOWN OF HAZELHURST - 44008	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF LAKE TOMAHAWK - 44010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF LITTLE RICE - 44012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF LYNNE - 44014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF MINOCQUA - 44016	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF MONICO - 44018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF NEWBOLD - 44020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF NOKOMIS - 44022	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF PELICAN - 44024	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF PIEHL - 44026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF PINE LAKE - 44028	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF SCHOEPKE - 44030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF STELLA - 44032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF SUGAR CAMP - 44034	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF THREE LAKES - 44036	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF WOODBORO - 44038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF WOODRUFF - 44040	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
OUTAGAMIE COUNTY - 45	CITY OF APPLETON - MAIN - 45201	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	CITY OF KAUKAUNA - MAIN - 45241	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	CITY OF SEYMOUR - 45281	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF BLACK CREEK - 45002	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF BOVINA - 45004	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF BUCHANAN - 45006	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF CENTER - 45008	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF CICERO - 45010	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF DALE - 45012	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF DEER CREEK - 45014	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF ELLINGTON - 45016	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF FREEDOM - 45018	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF GRAND CHUTE - 45020	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF GREENVILLE - 45022	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
OUTAGAMIE COUNTY - 45	TOWN OF HORTONIA - 45024	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF KAUKAUNA - 45026	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF LIBERTY - 45028	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF MAINE - 45030	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF MAPLE CREEK - 45032	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF ONEIDA - 45034	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF OSBORN - 45036	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF SEYMOUR - 45038	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF VANDENBROEK - 45040	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF BEAR CREEK - 45106	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF BLACK CREEK - 45107	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF COMBINED LOCKS - 45111	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF HORTONVILLE - 45136	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF KIMBERLY - 45141	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF LITTLE CHUTE - 45146	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF NICHOLS - 45155	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF SHIOCTON - 45181	ES&S DS200	ES&S ExpressVote
OZAUKEE COUNTY - 46	CITY OF CEDARBURG - 46211	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	CITY OF MEQUON - 46255	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	CITY OF PORT WASHINGTON - 46271	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF BELGIUM - 46002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF CEDARBURG - 46004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF FREDONIA - 46006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF GRAFTON - 46008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF PORT WASHINGTON - 46012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF SAUKVILLE - 46014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF BAYSIDE - 41106	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF BELGIUM - 46106	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF FREDONIA - 46126	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF GRAFTON - 46131	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF NEWBURG - 67161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF SAUKVILLE - 46181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF THIENSVILLE - 46186	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PEPIN COUNTY - 47	CITY OF DURAND - 47216	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF ALBANY - 47002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF DURAND - 47004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF FRANKFORT - 47006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF LIMA - 47008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF PEPIN - 47010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF STOCKHOLM - 47012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF WATERVILLE - 47014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF WAUBEEK - 47016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	VILLAGE OF PEPIN - 47171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	VILLAGE OF STOCKHOLM - 47181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	CITY OF PRESCOTT - 48271	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
PIERCE COUNTY - 48	CITY OF RIVER FALLS - MAIN - 48276	ES&S DS200	ES&S ExpressVote
PIERCE COUNTY - 48	TOWN OF CLIFTON - 48002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF DIAMOND BLUFF - 48004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF EL PASO - 48008	ES&S DS200	ES&S ExpressVote
PIERCE COUNTY - 48	TOWN OF ELLSWORTH - 48006	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF GILMAN - 48010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF HARTLAND - 48012	ES&S DS200	ES&S ExpressVote
PIERCE COUNTY - 48	TOWN OF ISABELLE - 48014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF MAIDEN ROCK - 48016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF MARTELL - 48018	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF OAK GROVE - 48020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF RIVER FALLS - 48022	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF ROCK ELM - 48024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF SALEM - 48026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF SPRING LAKE - 48028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF TRENTON - 48030	ES&S DS200	ES&S ExpressVote
PIERCE COUNTY - 48	TOWN OF TRIMBELLE - 48032	ES&S DS200	ES&S ExpressVote
PIERCE COUNTY - 48	TOWN OF UNION - 48034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF BAY CITY - 48106	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF ELLSWORTH - 48121	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF ELMWOOD - 48122	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF MAIDEN ROCK - 48151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF PLUM CITY - 48171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF SPRING VALLEY - MAIN - 48181	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	CITY OF AMERY - 49201	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	CITY OF ST. CROIX FALLS - 49281	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF ALDEN - 49002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF APPLE RIVER - 49004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF BALSAM LAKE - 49006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF BEAVER - 49008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF BLACK BROOK - 49010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF BONE LAKE - 49012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF CLAM FALLS - 49014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF CLAYTON - 49016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF CLEAR LAKE - 49018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF EUREKA - 49020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF FARMINGTON - 49022	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF GARFIELD - 49024	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF GEORGETOWN - 49026	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF JOHNSTOWN - 49028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF LAKETOWN - 49030	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF LINCOLN - 49032	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF LORAIN - 49034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF LUCK - 49036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF MCKINLEY - 49038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
POLK COUNTY - 49	TOWN OF MILLTOWN - 49040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF OSCEOLA - 49042	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF ST. CROIX FALLS - 49044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF STERLING - 49046	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF WEST SWEDEN - 49048	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF BALSAM LAKE - 49106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF CENTURIA - 49111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF CLAYTON - 49112	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF CLEAR LAKE - 49113	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF DRESSER - 49116	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF FREDERIC - 49126	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF LUCK - 49146	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF MILLTOWN - 49151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF OSCEOLA - 49165	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PORTAGE COUNTY - 50	CITY OF STEVENS POINT - 50281	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF ALBAN - 50002	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF ALMOND - 50004	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF AMHERST - 50006	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF BELMONT - 50008	None	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF BUENA VISTA - 50010	ES&S M100	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF CARSON - 50012	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF DEWEY - 50014	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF EAU PLEINE - 50016	None	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF GRANT - 50018	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF HULL - 50020	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF LANARK - 50022	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF LINWOOD - 50024	None	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF NEW HOPE - 50026	None	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF PINE GROVE - 50028	None	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF PLOVER - 50030	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF SHARON - 50032	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF STOCKTON - 50034	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF ALMOND - 50101	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF AMHERST - 50102	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF AMHERST JUNCTION - 50103	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF JUNCTION CITY - 50141	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF NELSONVILLE - 50161	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF PARK RIDGE - 50171	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF PLOVER - 50173	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF ROSHOLT - 50176	ES&S M100	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF WHITING - 50191	ES&S M100	ES&S AutoMARK
PRICE COUNTY - 51	CITY OF PARK FALLS - 51271	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	CITY OF PHILLIPS - 51272	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF CATAWBA - 51002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF EISENSTEIN - 51004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
PRICE COUNTY - 51	TOWN OF ELK - 51006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF EMERY - 51008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF FIFIELD - 51010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF FLAMBEAU - 51012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF GEORGETOWN - 51014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF HACKETT - 51016	None	Sequoia Voting - AVC Edge
PRICE COUNTY - 51	TOWN OF HARMONY - 51018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF HILL - 51020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF KENNAN - 51022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF KNOX - 51024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF LAKE - 51026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF OGEMA - 51028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF PRENTICE - 51030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF SPIRIT - 51032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF WORCESTER - 51034	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	VILLAGE OF CATAWBA - 51111	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	VILLAGE OF KENNAN - 51141	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	VILLAGE OF PRENTICE - 51171	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	CITY OF BURLINGTON - MAIN - 52206	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	CITY OF RACINE - 52276	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF BURLINGTON - 52002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF DOVER - 52006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF NORWAY - 52010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF RAYMOND - 52012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF WATERFORD - 52016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF YORKVILLE - 52018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF CALEDONIA - 52104	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF ELMWOOD PARK - 52121	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF MOUNT PLEASANT - 52151	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF NORTH BAY - 52161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF ROCHESTER - 52176	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF STURTEVANT - 52181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF UNION GROVE - 52186	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF WATERFORD - 52191	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF WIND POINT - 52192	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF YORKVILLE - 52194	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RICHLAND COUNTY - 53	CITY OF RICHLAND CENTER - 53276	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF AKAN - 53002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF BLOOM - 53004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF BUENA VISTA - 53006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF DAYTON - 53008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF EAGLE - 53010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF FOREST - 53012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF HENRIETTA - 53014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF ITHACA - 53016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
RICHLAND COUNTY - 53	TOWN OF MARSHALL - 53018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF ORION - 53020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF RICHLAND - 53022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF RICHWOOD - 53024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF ROCKBRIDGE - 53026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF SYLVAN - 53028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF WESTFORD - 53030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF WILLOW - 53032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	VILLAGE OF BOAZ - 53106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	VILLAGE OF CAZENOVIA - MAIN - 53111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	VILLAGE OF LONE ROCK - 53146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	VILLAGE OF VIOLA - MAIN - 53186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	VILLAGE OF YUBA - 53196	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ROCK COUNTY - 54	CITY OF BELOIT - 54206	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	CITY OF EDGERTON - MAIN - 54221	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	CITY OF EVANSVILLE - 54222	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	CITY OF JANESVILLE - 54241	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	CITY OF MILTON - 54257	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF AVON - 54002	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF BELOIT - 54004	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF BRADFORD - 54006	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF CENTER - 54008	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF CLINTON - 54010	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF FULTON - 54012	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF HARMONY - 54014	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF JANESVILLE - 54016	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF JOHNSTOWN - 54018	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF LA PRAIRIE - 54020	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF LIMA - 54022	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF MAGNOLIA - 54024	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF MILTON - 54026	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF NEWARK - 54028	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF PLYMOUTH - 54030	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF PORTER - 54032	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF ROCK - 54034	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF SPRING VALLEY - 54036	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF TURTLE - 54038	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF UNION - 54040	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	VILLAGE OF CLINTON - 54111	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	VILLAGE OF FOOTVILLE - 54126	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	VILLAGE OF ORFORDVILLE - 54165	ES&S DS200	ES&S ExpressVote
RUSK COUNTY - 55	CITY OF LADYSMITH - 55246	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RUSK COUNTY - 55	TOWN OF ATLANTA - 55002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF BIG BEND - 55004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF BIG FALLS - 55006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
RUSK COUNTY - 55	TOWN OF CEDAR RAPIDS - 55008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF DEWEY - 55010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF FLAMBEAU - 55012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF GRANT - 55014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF GROW - 55016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF HAWKINS - 55018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF HUBBARD - 55020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF LAWRENCE - 55022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF MARSHALL - 55024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF MURRY - 55026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF RICHLAND - 55028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF RUSK - 55030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF SOUTH FORK - 55032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF STRICKLAND - 55034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF STUBBS - 55036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF THORNAPPLE - 55038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF TRUE - 55040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF WASHINGTON - 55042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF WILKINSON - 55044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF WILLARD - 55046	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF WILSON - 55048	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF BRUCE - 55106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF CONRATH - 55111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF GLEN FLORA - 55131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF HAWKINS - 55136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF INGRAM - 55141	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF SHELDON - 55181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF TONY - 55186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF WEYERHAEUSER - 55191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAUK COUNTY - 57	CITY OF BARABOO - 57206	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	CITY OF REEDSBURG - 57276	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF BARABOO - 57002	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF BEAR CREEK - 57004	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF DELLONA - 57006	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF DELTON - 57008	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF EXCELSIOR - 57010	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF FAIRFIELD - 57012	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF FRANKLIN - 57014	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF FREEDOM - 57016	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF GREENFIELD - 57018	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF HONEY CREEK - 57020	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF IRONTON - 57022	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF LA VALLE - 57024	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF MERRIMAC - 57026	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF PRAIRIE DU SAC - 57028	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
SAUK COUNTY - 57	TOWN OF REEDSBURG - 57030	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF SPRING GREEN - 57032	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF SUMPTER - 57034	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF TROY - 57036	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF WASHINGTON - 57038	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF WESTFIELD - 57040	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF WINFIELD - 57042	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF WOODLAND - 57044	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF IRONTON - 57141	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF LAKE DELTON - 57146	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF LAVALLE - 57147	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF LIME RIDGE - 57148	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF LOGANVILLE - 57149	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF MERRIMAC - 57151	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF NORTH FREEDOM - 57161	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF PLAIN - 57171	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF PRAIRIE DU SAC - 57172	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF ROCK SPRINGS - 57176	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF SAUK CITY - 57181	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF SPRING GREEN - 57182	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF WEST BARABOO - 57191	ES&S DS200	ES&S ExpressVote
SAWYER COUNTY - 58	CITY OF HAYWARD - 58236	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF BASS LAKE - 58002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
SAWYER COUNTY - 58	TOWN OF COUDERAY - 58004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF DRAPER - 58006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF EDGEWATER - 58008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF HAYWARD - 58010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF HUNTER - 58012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF LENROOT - 58014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
SAWYER COUNTY - 58	TOWN OF MEADOWBROOK - 58016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF METEOR - 58018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF OJIBWA - 58020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF RADISSON - 58022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF ROUND LAKE - 58024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF SAND LAKE - 58026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF SPIDER LAKE - 58028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF WEIRGOR - 58030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF WINTER - 58032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	VILLAGE OF COUDERAY - 58111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	VILLAGE OF EXELAND - 58121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	VILLAGE OF RADISSON - 58176	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	VILLAGE OF WINTER - 58190	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	CITY OF SHAWANO - 59281	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF ALMON - 59002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF ANGELICA - 59004	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
SHAWANO COUNTY - 59	TOWN OF ANIWA - 59006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF BARTELME - 59008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF BELLE PLAINE - 59010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF BIRNAMWOOD - 59012	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF FAIRBANKS - 59014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF GERMANIA - 59016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF GRANT - 59018	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF GREEN VALLEY - 59020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF HARTLAND - 59022	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF HERMAN - 59024	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF HUTCHINS - 59026	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF LESSOR - 59028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF MAPLE GROVE - 59030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF MORRIS - 59032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF NAVARINO - 59034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF PELLA - 59036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF RED SPRINGS - 59038	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF RICHMOND - 59040	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF SENECA - 59042	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF WASHINGTON - 59044	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF WAUKECHON - 59046	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF WESCOTT - 59048	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF WITTENBERG - 59050	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF ANIWA - 59101	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF BIRNAMWOOD - MAIN - 59106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF BONDUEL - 59107	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF BOWLER - 59108	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF CECIL - 59111	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF ELAND - 59121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF GRESHAM - 59131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF MATTOON - 59151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF TIGERTON - 59186	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF WITTENBERG - 59191	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHEBOYGAN COUNTY - 60	CITY OF PLYMOUTH - 60271	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	CITY OF SHEBOYGAN - 60281	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	CITY OF SHEBOYGAN FALLS - 60282	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF GREENBUSH - 60002	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF HERMAN - 60004	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF HOLLAND - 60006	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF LIMA - 60008	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF LYNDON - 60010	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF MITCHELL - 60012	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF MOSEL - 60014	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF PLYMOUTH - 60016	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF RHINE - 60018	ClearCount 2.0.1	ClearAccess 2.0.1

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
SHEBOYGAN COUNTY - 60	TOWN OF RUSSELL - 60020	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF SCOTT - 60022	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF SHEBOYGAN - 60024	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF SHEBOYGAN FALLS - 60026	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF SHERMAN - 60028	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF WILSON - 60030	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF ADELL - 60101	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF CASCADE - 60111	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF CEDAR GROVE - 60112	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF ELKHART LAKE - 60121	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF GLENBEULAH - 60131	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF HOWARDS GROVE - 60135	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF KOHLER - 60141	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF OOSTBURG - 60165	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF RANDOM LAKE - 60176	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF WALDO - 60191	ClearCount 2.0.1	ClearAccess 2.0.1
ST. CROIX COUNTY - 56	CITY OF GLENWOOD CITY - 56231	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	CITY OF HUDSON - 56236	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	CITY OF NEW RICHMOND - 56261	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF BALDWIN - 56002	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF CADY - 56004	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF CYLON - 56006	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF EAU GALLE - 56008	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF EMERALD - 56010	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF ERIN PRAIRIE - 56012	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF FOREST - 56014	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF GLENWOOD - 56016	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF HAMMOND - 56018	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF HUDSON - 56020	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF KINNICKINNIC - 56022	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF PLEASANT VALLEY - 56024	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF RICHMOND - 56026	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF RUSH RIVER - 56028	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF SOMERSET - 56032	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF SPRINGFIELD - 56034	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF ST. JOSEPH - 56030	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF STANTON - 56036	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF STAR PRAIRIE - 56038	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF TROY - 56040	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF WARREN - 56042	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF BALDWIN - 56106	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF DEER PARK - 56116	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF HAMMOND - 56136	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF NORTH HUDSON - 56161	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF ROBERTS - 56176	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
ST. CROIX COUNTY - 56	VILLAGE OF SOMERSET - 56181	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF STAR PRAIRIE - 56182	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF WILSON - 56191	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF WOODVILLE - 56192	ES&S DS200	ES&S ExpressVote
TAYLOR COUNTY - 61	CITY OF MEDFORD - 61251	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF AURORA - 61002	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF BROWNING - 61004	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF CHELSEA - 61006	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF CLEVELAND - 61008	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF DEER CREEK - 61010	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF FORD - 61012	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF GOODRICH - 61014	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF GREENWOOD - 61016	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF GROVER - 61018	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF HAMMEL - 61020	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF HOLWAY - 61022	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF JUMP RIVER - 61024	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF LITTLE BLACK - 61026	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF MAPLEHURST - 61028	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF MCKINLEY - 61030	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF MEDFORD - 61032	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF MOLITOR - 61034	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF PERSHING - 61036	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF RIB LAKE - 61038	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF ROOSEVELT - 61040	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF TAFT - 61042	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF WESTBORO - 61044	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	VILLAGE OF GILMAN - 61131	None	ES&S iVotronic
TAYLOR COUNTY - 61	VILLAGE OF LUBLIN - 61146	None	ES&S iVotronic
TAYLOR COUNTY - 61	VILLAGE OF RIB LAKE - 61176	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	VILLAGE OF STETSONVILLE - 61181	None	ES&S iVotronic
TREMPEALEAU COUNTY - 62	CITY OF ARCADIA - 62201	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
TREMPEALEAU COUNTY - 62	CITY OF BLAIR - 62206	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	CITY OF GALESVILLE - 62231	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	CITY OF INDEPENDENCE - 62241	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	CITY OF OSSEO - 62265	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	CITY OF WHITEHALL - 62291	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF ALBION - 62002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF ARCADIA - 62004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF BURNSIDE - 62006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF CALEDONIA - 62008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF CHIMNEY ROCK - 62010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF DODGE - 62012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF ETTRICK - 62014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF GALE - 62016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
TREMPEALEAU COUNTY - 62	TOWN OF HALE - 62018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF LINCOLN - 62020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF PIGEON - 62022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF PRESTON - 62024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF SUMNER - 62026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF TREMPEALEAU - 62028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF UNITY - 62030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	VILLAGE OF ELEVA - 62121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	VILLAGE OF ETTRICK - 62122	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	VILLAGE OF PIGEON FALLS - 62173	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	VILLAGE OF STRUM - 62181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	VILLAGE OF TREMPEALEAU - 62186	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	CITY OF HILLSBORO - 63236	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	CITY OF VIROQUA - 63286	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	CITY OF WESTBY - 63291	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF BERGEN - 63002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF CHRISTIANA - 63004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF CLINTON - 63006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF COON - 63008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF FOREST - 63010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF FRANKLIN - 63012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF GENOA - 63014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF GREENWOOD - 63016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF HAMBURG - 63018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF HARMONY - 63020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF HILLSBORO - 63022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF JEFFERSON - 63024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF KICKAPOO - 63026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF LIBERTY - 63028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF STARK - 63030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF STERLING - 63032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF UNION - 63034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF VIROQUA - 63036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF WEBSTER - 63038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF WHEATLAND - 63040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF WHITESTOWN - 63042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF CHASEBURG - 63111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF COON VALLEY - 63112	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF DE SOTO - MAIN - 63116	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF GENOA - 63131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF LA FARGE - 63146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF ONTARIO - 63165	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF READSTOWN - 63176	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF STODDARD - 63181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VILAS COUNTY - 64	CITY OF EAGLE RIVER - 64221	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
VILAS COUNTY - 64	TOWN OF ARBOR VITAE - 64002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF BOULDER JUNCTION - 64004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF CLOVERLAND - 64006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF CONOVER - 64008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF LAC DU FLAMBEAU - 64010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF LAND O-LAKES - 64012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF LINCOLN - 64014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF MANITOWISH WATERS - 64016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF PHELPS - 64018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF PLUM LAKE - 64020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF PRESQUE ISLE - 64022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF ST. GERMAIN - 64024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF WASHINGTON - 64026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF WINCHESTER - 64028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	CITY OF DELAVAN - 65216	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	CITY OF ELKHORN - 65221	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	CITY OF LAKE GENEVA - 65246	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	CITY OF WHITEWATER - MAIN - 65291	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF BLOOMFIELD - 65002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF DARIEN - 65004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF DELAVAN - 65006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF EAST TROY - 65008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF GENEVA - 65010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF LA GRANGE - 65014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF LAFAYETTE - 65012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF LINN - 65016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF LYONS - 65018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF RICHMOND - 65020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF SHARON - 65022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF SPRING PRAIRIE - 65024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF SUGAR CREEK - 65026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF TROY - 65028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF WALWORTH - 65030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF WHITEWATER - 65032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF BLOOMFIELD - 65115	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF DARIEN - 65116	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF EAST TROY - 65121	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF FONTANA - 65126	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF GENOA CITY - MAIN - 65131	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF SHARON - 65181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF WALWORTH - 65191	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF WILLIAMS BAY - 65192	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHBURN COUNTY - 66	CITY OF SHELL LAKE - 66282	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	CITY OF SPOONER - 66281	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF BARRONETT - 66002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
WASHBURN COUNTY - 66	TOWN OF BASHAW - 66004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF BASS LAKE - 66006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF BEAVER BROOK - 66008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF BIRCHWOOD - 66010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF BROOKLYN - 66012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF CASEY - 66014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF CHICOG - 66016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF CRYSTAL - 66018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF EVERGREEN - 66020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF FROG CREEK - 66022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF GULL LAKE - 66024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF LONG LAKE - 66026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF MADGE - 66028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF MINONG - 66030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF SARONA - 66032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF SPOONER - 66034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF SPRINGBROOK - 66036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF STINNETT - 66038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF STONE LAKE - 66040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF TREGO - 66042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	VILLAGE OF BIRCHWOOD - 66106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	VILLAGE OF MINONG - 66151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHINGTON COUNTY - 67	CITY OF HARTFORD - MAIN - 67236	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	CITY OF WEST BEND - 67291	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF ADDISON - 67002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF BARTON - 67004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF ERIN - 67006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF FARMINGTON - 67008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF GERMANTOWN - 67010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF HARTFORD - 67012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF JACKSON - 67014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF KEWASKUM - 67016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF POLK - 67018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF TRENTON - 67022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF WAYNE - 67024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF WEST BEND - 67026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF GERMANTOWN - 67131	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF JACKSON - 67141	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF KEWASKUM - MAIN - 67142	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF NEWBURG - MAIN - 67161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF RICHFIELD - 67166	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF SLINGER - 67181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WAUKESHA COUNTY - 68	CITY OF BROOKFIELD - 68206	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	CITY OF DELAFIELD - 68216	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	CITY OF MUSKEGO - 68251	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
WAUKESHA COUNTY - 68	CITY OF NEW BERLIN - 68261	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	CITY OF OCONOMOWOC - 68265	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	CITY OF PEWAUKEE - 68270	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	CITY OF WAUKESHA - 68291	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF BROOKFIELD - 68002	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF DELAFIELD - 68004	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF EAGLE - 68006	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF GENESEE - 68008	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF LISBON - 68010	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF MERTON - 68014	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF MUKWONAGO - 68016	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF OCONOMOWOC - 68022	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF OTTAWA - 68024	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF VERNON - 68030	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF WAUKESHA - 68032	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF BIG BEND - 68106	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF BUTLER - 68107	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF CHENEQUA - 68111	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF DOUSMAN - 68116	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF EAGLE - 68121	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF ELM GROVE - 68122	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF HARTLAND - 68136	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF LAC LA BELLE - MAIN - 68146	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF LANNON - 68147	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF MENOMONEE FALLS - 68151	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF MERTON - 68152	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF MUKWONAGO - MAIN - 68153	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF NASHOTAH - 68158	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF NORTH PRAIRIE - 68161	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF OCONOMOWOC LAKE - 68166	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF PEWAUKEE - 68171	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF SUMMIT - 68172	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF SUSSEX - 68181	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF WALES - 68191	ES&S DS200	ES&S ExpressVote
WAUPACA COUNTY - 69	CITY OF CLINTONVILLE - 69211	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WAUPACA COUNTY - 69	CITY OF MANAWA - 69251	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	CITY OF MARION - MAIN - 69252	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	CITY OF NEW LONDON - MAIN - 69261	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WAUPACA COUNTY - 69	CITY OF WAUPACA - 69291	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	CITY OF WEYAUWEGA - 69292	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF BEAR CREEK - 69002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF CALEDONIA - 69004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WAUPACA COUNTY - 69	TOWN OF DAYTON - 69006	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF DUPONT - 69008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF FARMINGTON - 69010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
WAUPACA COUNTY - 69	TOWN OF FREMONT - 69012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF HARRISON - 69014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF HELVETIA - 69016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF IOLA - 69018	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF LARRABEE - 69020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF LEBANON - 69022	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF LIND - 69024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF LITTLE WOLF - 69026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WAUPACA COUNTY - 69	TOWN OF MATTESON - 69028	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF MUKWA - 69030	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF ROYALTON - 69032	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF SAINT LAWRENCE - 69034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF SCANDINAVIA - 69036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF UNION - 69038	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF WAUPACA - 69040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF WEYAUWEGA - 69042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF WYOMING - 69044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF BIG FALLS - 69106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF EMBARRASS - 69121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF FREMONT - 69126	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF IOLA - 69141	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF OGDENSBURG - 69165	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF SCANDINAVIA - 69181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	CITY OF WAUTOMA - 70291	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF AURORA - 70002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF BLOOMFIELD - 70004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF COLOMA - 70006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF DAKOTA - 70008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF DEERFIELD - 70010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF HANCOCK - 70012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF LEON - 70014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF MARION - 70016	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF MOUNT MORRIS - 70018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF OASIS - 70020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF PLAINFIELD - 70022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF POY SIPPI - 70024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF RICHFORD - 70026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF ROSE - 70028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF SAXEVILLE - 70030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF SPRINGWATER - 70032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF WARREN - 70034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF WAUTOMA - 70036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	VILLAGE OF COLOMA - 70111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	VILLAGE OF HANCOCK - 70136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	VILLAGE OF LOHRVILLE - 70146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
WAUSHARA COUNTY - 70	VILLAGE OF PLAINFIELD - 70171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	VILLAGE OF REDGRANITE - 70176	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	VILLAGE OF WILD ROSE - 70191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WINNEBAGO COUNTY - 71	CITY OF MENASHA - MAIN - 71251	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	CITY OF NEENAH - 71261	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	CITY OF OMRO - 71265	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	CITY OF OSHKOSH - 71266	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF ALGOMA - 71002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF BLACK WOLF - 71004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF CLAYTON - 71006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF MENASHA - 71008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF NEENAH - 71010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF NEKIMI - 71012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF NEPEUSKUN - 71014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF OMRO - 71016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF OSHKOSH - 71018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF POYGAN - 71020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF RUSHFORD - 71022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF UTICA - 71024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF VINLAND - 71026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF WINCHESTER - 71028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF WINNECONNE - 71030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF WOLF RIVER - 71032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	VILLAGE OF FOX CROSSING - 71121	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	VILLAGE OF WINNECONNE - 71191	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WOOD COUNTY - 72	CITY OF MARSHFIELD - MAIN - 72251	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	CITY OF NEKOOSA - 72261	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	CITY OF PITTSVILLE - 72271	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	CITY OF WISCONSIN RAPIDS - 72291	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF ARPIN - 72002	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF AUBURNDALE - 72004	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF CAMERON - 72006	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF CARY - 72008	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF CRANMOOR - 72010	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF DEXTER - 72012	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF GRAND RAPIDS - 72014	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF HANSEN - 72016	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF HILES - 72018	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF LINCOLN - 72020	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF MARSHFIELD - 72022	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF MILLADORE - 72024	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF PORT EDWARDS - 72026	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF REMINGTON - 72028	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF RICHFIELD - 72030	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF ROCK - 72032	ES&S DS200	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
WOOD COUNTY - 72	TOWN OF RUDOLPH - 72034	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF SARATOGA - 72036	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF SENECA - 72038	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF SHERRY - 72040	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF SIGEL - 72042	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF WOOD - 72044	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF ARPIN - 72100	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF AUBURNDALE - 72101	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF BIRON - 72106	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF HEWITT - 72122	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF MILLADORE - MAIN - 72151	None	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF PORT EDWARDS - 72171	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF RUDOLPH - 72178	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF VESPER - 72186	ES&S DS200	ES&S AutoMARK

STATE OF COLORADO)
)ss.
County of Douglas)

COMES NOW, Affiant Joseph T. Oltmann, being first duly sworn, under oath, and states under penalty of perjury that the following information is true and accurate within his personal knowledge and belief:

My name Joseph Oltmann. I am over eighteen years of age. I am not suffering under any mental disability and am competent to give this worn affidavit. I am able to read and write and to give this affidavit voluntarily and on my own free will and accord. No one has used any threats, force, pressure, or intimidation to male me sign this affidavit. I make this affidavit in support of the truth.

I am the CEO of a tech company based just outside of Denver, Colorado. I am also the founder of an organization called FEC United. [Fecunited.com] The goal of this organization is to restore constitutional integrity to our community and empower those in our community to stand up to state and national leadership that intends to suppress the rights of individuals holistically.

Through this organization "FEC" I became a target of journalists who began to slander both me and my organization. I became the topic of Antifa and extremists through my involvement in a movement to resist the narrative that police are bad and our society represented the rhetoric shared by these extremists. As a result of these attacks, I started researching Antifa, BLM, Inc. and their connection to violence and unrest inside of our communities. As a result, I set out to infiltrate Antifa meetings and de-mask those Antifa members who are journalists in the mainstream media in Colorado specifically.

On or about the week of September 27, 2020, I was able to attend an Antifa meeting which appeared to be between Antifa members in Colorado Springs and in Denver Colorado. I cannot verify the connection between the two or the leadership as they were disorganized. Discussions of Our Revolution and Antifa were discussed. Rhetoric of "eliminating fascists" and frustration as to the dwindling of support to rally in the street was evident.

Then I honed in among other conversations key actors in the organization who work for local and state news publications. One such person of interest was Heidi Beedle, identified leader of Our Revolution in El Paso County (Southern Colorado) and Antifa leader of the same area.

Heidi's name is actually Sean Beedle. She is a journalist at Colorado Springs Independent, Colorado Springs Business Journal and a freelance writer for several online publications. Others to remain unnamed in this were present.

The conversation went like this:

Someone identified as "Eric" began to speak. Someone asked who Eric was, and someone else replied "he is the Dominion guy" [paraphrased].

Eric then began to speak after being told to continue, but was interrupted and asked by someone, "What are we going to do if Trump wins this fucking election?"

Eric responded, "Don't worry about the election. Trump is not going to win. I made fucking sure of that.. Hahaha"

Someone responded, "Fucking right."

Eric continued with fortifying the groups and recruiting. I would describe his tone as eccentric and boisterous. I wrote down his name and started to do some research into him.

At the time, I thought that they were so disconnected with reality that they think they can "make sure Trump is not elected."

I started with a simple google search: Keywords: "Eric," "Dominion," "Denver Colorado." The fifth result in organic search returned:

Dominion Voting Systems | Employee Profiles, Emails, Mutual ...

www.leadcandy.io › company › Dominion-Voting-Syst...

Find people working at Dominion Voting Systems. LeadCandy provides Full ... Denver, Colorado. VIEW FULL PROFILE ... FULL PROFILE. Eric Coomer's photo ...

Above that were results for Eric Schussler- Old Dominion University and Eric E Johnson, Attorney - Sherman & Howard. The first two on organic search however was as follows:

Dominion - Colorado Secretary of State

www.sos.state.co.us › elections › files › projectPlans

PDF

Sep 9, 2016 — our most recent pilots in the City and County of Denver and Mesa County. ... 1 Democracy Suite is a registered trademark of Dominion Voting Systems. ... Eric Coomer graduated from the University of California, Berkeley in ...

And

Eric Coomer's email & phone | Dominion Voting Systems's ...

rocketreach.co › eric-coomer-email_7112825

Location, **Denver, Colorado**, United States. Work, Director, Market Strategy @ **Dominion** Voting Systems Member, Board of Directors @ Friends of Levitt Pavilion ...

I began doing research on Eric Coomer and discovered that Colorado Secretary of state link the following about Dr. Eric Coomer on page 26:

"Eric Coomer graduated from the University of California, Berkeley in 1997 with a Ph.D. in Nuclear Physics. After working in IT consulting for several years, Eric entered the elections industry in 2005 with Sequoia Voting Systems as Chief Software Architect. After three years with the company, Eric took over all development operations as Vice President of Engineering. When Sequoia was acquired by Dominion Voting Systems in 2010, Eric joined the DVS team as Vice President of US Engineering overseeing development in the Denver, Colorado office.

Recently, Eric has taken over as the Director of Product Strategy driving the creation of next generation products through close collaboration with customers, combined with a deep understanding of technology and the needs of Elections departments throughout the United States and abroad. Eric has been an active participant in the development of the IEEE common data format for Elections systems, as well as the working group for developing standards for Risk-Limiting Audits for elections results. When not designing new products, Eric supports large and small scale customers during Election season."

I did some cursory research on Eric, but my conclusion was that he was either a part of the government or not relevant to the conversation. In other words, this was not a target I would

identify as being influential in Antifa. My conclusion was based on his credentials of having a PhD in Nuclear Physics. Did not add up for someone with that intelligence. I set it aside and concentrated my focus on the activist journalist who were actually Antifa members.

On October 15, 2020 I spoke at an FEC meeting in Bandimere Speedway. It was a rally around the unconstitutional actions of Jefferson County, Colorado government leadership to hurt Bandimere Speedway. I spoke and before the event started they escorted a suspected Antifa Journalist Erik Maulbetsch [Colorado Recorder] off the premises. In that meeting I talked about outing activist journalists who were Antifa and holding them accountable in our community for attacking organizations like FEC United that serve the community.

These activist journalists frequently slander people of faith, conservatives and call them names that defame them in the community. I had enough and warned that we would call them out by name. Maulbetsch wrote and article reflecting this as he was listening in online and decided to omit details about the meeting, causing the entire journalistic community to wonder if they were on the list. It had a positive effect contrary to their intentions.

On Friday November 6th, I received a forwarded a article about Georgia irregularities on the election day. I normally do not read many of these articles because I am inundated with information both from FEC, and my company. I started reading it and noticed Eric Coomer was the spokesperson for a company called Dominion Voting Systems. I immediately stopped and started to go back through my notes to find the info on Eric Coomer. I then started research Dominion Voting Systems. The information became rather scary as everywhere I looked I found Eric's name. Some listing him as VP of Security and others calling him Director of Strategy and Security. I began my search for everything Eric Coomer, Dr. Eric Coomer and any information related to legal filings, RFPs, states using Dominion, Colorado uses and even areas in Colorado that do not use Dominion.

I then turned my attention to Eric Coomer's Facebook profile and page while I gathered information on correlating email addresses, profiles, screen names, etc. Searching Twitter, Reddit, Facebook, 4Chan, etc etc.

I was able to get screenshots of Eric Coomer's Facebook posts going back to 2016. What I discovered was disturbing. Anti-Trump rhetoric, posts referring to: Fuck USA, Fuck the Police, A.C.A.B., posts that were anti Conservative, and even posts being happy someone died. Then the bigger shocker. He reposted the Antifa "Manifesto" letter to Donald Trump. I knew that I had the right guy and someone that was clearly mentally unstable and radical. I started digging into the

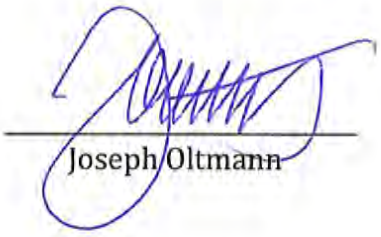
code irregularities and tying all of the pieces together with the irregularities and the Dominion uses in the disputed states. The correlation was astonishing. I then found the information related to justifying voting machines being online and his justification that they had "hardware and IP address protection". This statement by itself is FALSE.

I then attempted to reach out to all sources to bring this information to light. Calling major news stations and attempting to connect with the DOJ.

I took the information to the listeners of an organization that I also own called Conservative Daily. We have a podcast that we do on weekdays. I felt I had enough information and was confident that the Eric on the conference call was the same Eric Coomer that worked for Dominion. I was also confident that given the Facebook and other information I was able to collect that Eric Coomer was interfering with the election and as he admits in one of his posts that people at his company think and feel the same way he does. I began to research his patents, who owns them, the pattern of states they acquired as clients.

I began to research the connection to Diane Feinstein, her husband, campaign manager, Clinton Foundation and became worried that the finger of radicals had taken away the voice of the American people in deciding the election. I used ARIMA analysis to show me trends on data and probability models to prove that they were in fact using code and technology to ghost votes, switch votes or even remove probable ballots completely. Code is random unless it is not. Since we are a data company and understand artificial intelligence and use of neural networks, we understand the capabilities of creating chaos in outcome based on weighted density of probable voters.

These statements are true and accurate to the best of my knowledge.



Joseph Oltmann

STATE OF COLORADO
COUNTY OF Douglas

Personally appeared before me, LYNN KIEFFER, a Notary Public in and for the aforesaid State and County, JOSEPH T OLTMANN, the within named bargainer, with whom I am personally acquainted and who, after being duly sworn, acknowledged that she executed the foregoing Agreement for the purposes contained therein.

JOSEPH T OLTMANN

Sworn to and subscribed before me this 17th day of November, 2020.

My Commission Expires:

07-24-2021

NOTARY PUBLIC

LYNN KIEFFER
Notary Public
State of Colorado
Notary ID # 20174030818
My Commission Expires 07-24-2021

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION**
vs.	)	
	)	**FILE NO. 1:17-cv-2989-AT**
BRAD RAFFENSPERGER, ET AL.,	)	
	)	
	)	
Defendants.	)	

DECLARATION OF HARRI HURSTI

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

1. My name is Harri Hursti. I am over the age of 21 and competent to give this testimony. The facts stated in this declaration are based on my personal knowledge, unless stated otherwise.

2. My background and qualifications in voting system cybersecurity are set forth in my December 16, 2019 declaration. (Doc. 680-1, pages 37 *et seq*). I stand by everything in that declaration and in my August 21, 2020 declaration. (Doc. 800-2).

3. I am also an expert in ballot scanning because of extensive background in digital imaging prior by work researching election systems. In addition, in 2005 I started an open source project for scanning and auditing paper ballots from images. As a result, I am familiar with different scanner types, how scanner settings and image processing features change the images, and how file format choices affect the quality and accuracy of the ballots.

4. I am engaged as an expert in this case by Coalition for Good Governance.

5. In developing this declaration and opinion, I visited Atlanta to observe certain operations of the June 9, 2020 statewide primary, and the August 11 runoff. During the June 9 election, I was an authorized poll watcher in some locations and was a public observer in others. On August 11, I was authorized as an expert inspecting and observing under the Coalition for Good Governance's Rule 34 Inspection request in certain polling places and the Fulton County Election Preparation Center. As I will explain below in this declaration, my extensive experience in the area of voting system security and my observations of these elections lead to additional conclusions beyond those in my December 16, 2019 declaration. Specifically:

a) the scanner and tabulation software settings being employed to determine which votes to count on hand marked paper ballots are likely causing clearly intentioned votes not to be counted;

b) the voting system is being operated in Fulton County in a manner that escalates the security risk to an extreme level; and

c) voters are not reviewing their BMD printed ballots, which causes BMD generated results to be un-auditable due to the untrustworthy audit trail.

Polling Place Observations

6. Election observation on Peachtree Christian Church. The ballot marking devices were installed so that 4 out of 8 touchscreen devices were clearly visible from the pollbook check in desk. Voter's selections could be effortlessly seen from over 50 ft away.

7. Over period of about 45 minutes, I only observed one voter who appeared to be studying the ballot after picking it up from the printer before casting it in the scanner. When voters do not fully verify their ballot prior to casting, the ballots cannot be considered a reliable auditable record.

8. The scanner would reject some ballots and then accept them after they were rotated to a different orientation. I noted that the scanner would vary in the amount of time that it took to accept or reject a ballot. The delay varied between 3

and 5 seconds from the moment the scanner takes the ballot until the scanner either accepts the ballot or rejects it. This kind of behavior is normal on general purpose operating systems multitasking between multiple applications, but a voting system component should be running only a single application without outside dependencies causing variable execution times.

9. Further research is necessary to determine the cause of the unexpected scanning delays. A system that is dedicated to performing one task repeatedly should not have unexplained variation in processing time. As security researcher, we are always suspicious about any unexpected variable delays, as those are common telltale signs of many issues, including a possibility of unauthorized code being executed. So, in my opinion changes of behaviors between supposedly identical machines performing identical tasks should always be investigated.

When ballots are the same and are produced by a ballot marking device, there should be no time difference whatsoever in processing the bar codes. Variations in time can be the result of many things - one of them is that the scanner encounters an error reading the bar code and needs to utilize error correcting algorithms to recover from that error. Further investigation is

necessary to determine the root cause of these delays, the potential impact of the error correcting algorithms if those are found to be the cause, and whether the delay has any impact upon the vote.

10. Election observation in Central Park Recreation Center. The Poll place manager told me that no Dominion trained technician had reported on location to help them that morning.

11. The ballot marking devices were originally installed in a way that voter privacy was not protected, as anyone could observe across the room how people are voting on about 2/3 devices.

12. The ballot scanner took between 4 and 6 seconds to accept the ballot. I observed only one ballot being rejected.

13. Generally, voters did not inspect the ballots after taking it from the printer and casting it into the scanner.

14. Election observation in Fanplex location. Samantha Whitley and Harrison Thweatt were poll watchers at the Fanplex polling location. They contacted me at approximately 9:10am about problems they were observing with the operation of the BMDs and Poll Pads and asked me to come to help them

understand the anomalies they were observing. I arrived at FanPlex at approximately 9:30am.

15. I observed that the ballot scanner located by a glass wall whereby standing outside of the building observe the scanning, would take between 6 and 7 seconds to either accept or reject the ballot.

16. For reasons unknown, on multiple machines, while voters were attempting to vote, the ballot marking devices sometimes printed "test" ballots. I was not able to take a picture of the ballot from the designated observation area, but I overheard the poll worker by the scanner explaining the issue to a voter which was sent back to the Ballot-Marking Device to pick up another ballot from the printer tray. Test ballots are intended to be used to test the system but without being counted by the system during an election. The ballot scanner in election settings rejects test ballots, as the scanners at FanPlex did. This caused confusion as the voters needed to return to the ballot-marking device to retrieve the actual ballot. Some voters returned the test ballot into the printer tray, potentially confusing the next voter. Had voters been reviewing the ballots at all before taking them to the scanner, they would have noticed the "Test Ballot" text on the ballot. I observed no voter really questioning a poll worker why a "Test" ballot was printed in the first place.

17. Obviously, during the election day, the ballot marking device should not be processing or printing any ballot other than the one the voter is voting. While the cause of the improper printing of ballots should be examined, the fact that this was happening at all is likely indicative of a wrong configuration given to the BMD, which in my professional opinion raises another question: Why didn't the device print only test ballots? And how can the device change its behavior in the middle of the election day? Is the incorrect configuration originating from the Electronic Pollbook System? What are the implications for the reliability of the printed ballot and the QR code being counted?

18. Election observation Park Tavern. The scanner acceptance delay did not vary as it had in previous locations and was consistently about 5 seconds from the moment the scanner takes the ballot, to the moment the scanner either accepts the ballot or rejects it. The variation between scanners at different locations is concerning because these are identical physical devices and should not behave differently while performing the identical task of scanning a ballot.

19. The vast majority of voters at Park Tavern did not inspect the ballots after taking them from the printer and before casting them in the scanner.

Fulton Tabulation Center Operation-Election Night, August 11, 2020

20. In Fulton County Election Preparation Center ("EPC") on election night I reviewed certain operations as authorized by Rule 34 inspection.

21. I was permitted to view the operations of the upload of the memory devices coming in from the precincts to the Dominion Election Management System ("EMS") server. The agreement with Fulton County was that I could review only for a limited period of time; therefore, I did not review the entire evening's process. Also, Dominion employees asked me to move away from the monitors containing the information and messages from the upload process and error messages, limiting my ability to give a more detailed report with documentation and photographs of the screens. However, my vantage point was more than adequate to observe that system problems were recurring and the Dominion technicians operating the system were struggling with the upload process.

22. It is my understanding the same EMS equipment and software had been used in Fulton County's June 9, 2020 primary election.

23. It is my understanding that the Dominion technician ("Dominic") charged with operating the EMS server for Fulton County had been performing

these duties at Fulton County for several months, including during the June 9 primary.

24. During my August 11 visit, and a follow-up visit on August 17, I observed that the EMS server was operated almost exclusively by Dominion personnel, with little interaction with EPC management, even when problems were encountered. In my conversations with Derrick Gilstrap and other Fulton County Elections Department EPC personnel, they professed to have limited knowledge of or control over the EMS server and its operations.

25. Outsourcing the operation of the voting system components directly to the voting system vendors' personnel is highly unusual in my experience and of grave concern from a security and conflict of interest perspective. Voting system vendors' personnel have a conflict of interest because they are not inclined to report on, or address, defects in the voting systems. The dangers this poses is aggravated by the absence of any trained County personnel to oversee and supervise the process.

26. In my professional opinion, the role played by Dominion personnel in Fulton County, and other counties with similar arrangements, should be considered an elevated risk factor when evaluating the security risks of Georgia's voting system.

27. Based on my observations on August 11 and August 17, Dell computers running the EMS that is used to process Fulton county votes appeared not to have been hardened.

28. In essence, hardening is the process of securing a system by reducing its surface of vulnerability, which is larger when a system performs more functions; in principle it is to the reduce the general purpose system into a single-function system which is more secure than a multipurpose one. Reducing available ways of attack typically includes changing default passwords, the removal of unnecessary software, unnecessary usernames or logins, grant accounts and programs with the minimum level of privileges needed for the tasks and create separate accounts for privileged operations as needed, and the disabling or removal of unnecessary services.

29. Computers performing any sensitive and mission critical tasks such as elections should unquestionably be hardened. Voting system are designated by the Department of Homeland Security as part of the critical infrastructure and certainly fall into the category of devices which should be hardened as the most fundamental security measure. In my experience, it is unusual, and I find it unacceptable for an EMS server not to have been hardened prior to installation.

30. The Operating System version in the Dominion Election Management computer, which is positioned into the rack and by usage pattern appears to be the main computer, is Windows 10 Pro 10.0.14393. This version is also known as the Anniversary Update version 1607 and it was released August 2, 2016. Exhibit A is a true and correct copy of a photograph that I took of this computer.

31. When a voting system is certified by the EAC, the Operating System is specifically defined, as Windows 10 Pro was for the Dominion 5.5-A system. Unlike consumer computers, voting systems do not and should not receive automatic "upgrades" to newer versions of the Operating System. without undergoing tests for conflicts with the new operating system software.

32. That computer and other computers used in Georgia's system for vote processing appear to have home/small business companion software packages included. Exhibits B and C are true and correct copies of photographs that I took of the computer located in the rack and the computer located closest to the rack on the table to the right. The Start Menu shows a large number of game and entertainment software icons. As stated before, one of the first procedures of hardening is removal of all unwanted software, and removal of those game icons and the associated games and installers alongside with all other software which is not absolutely needed in the computer for election processing purposes would be

one of the first and most basic steps in the hardening process. In my professional opinion, independent inquiry should be promptly made of all 159 counties to determine if the Dominion systems statewide share this major deficiency.

33. Furthermore, when I asked the Dominion employee Dominic assigned to the Fulton County election server operation about the origin of the Windows operating system, he answered that he believed that "it has been provided by the State."

34. Since Georgia's Dominion system is new, it is a reasonable assumption that all machines in the Fulton County election network had the same version of Windows installed. However, not only the two computers displayed different entertainment software icons, but additionally one of the machines in Fulton's group of election servers had an icon of computer game called "*Homescapes"* which is made by Playrix Holding Ltd., founded by Dmitry and Igor Bukham in Vologda, Russia. Attached as Exhibit C is a true and correct copy of a photograph that I took of the Fulton voting system computer" Client 02". The icon for Homescapes is shown by the arrow on Exhibit C.

35. The *Homescapes* game was released in August 2017, one year after Fulton County's operating system release. If the *Homescapes* game came with the operating system it would be unusual, because at the time of the release of

Homescapes, Microsoft had already released 3 major Microsoft Windows 10 update releases after build 14393 and before the release of that game. This calls into question whether all Georgia Dominion system computers have the same operating system version, or how the game has come to be having a presence in Fulton's Dominion voting system.

36. Although this Dominion voting system is new to Georgia, the Windows 10 operating system of at least the 'main' computer in the rack has not been updated for 4 years and carries a wide range of well-known and publicly disclosed vulnerabilities. At the time of this writing, The National Vulnerability Database maintained by National Institute of Standards and Technology lists 3,177 vulnerabilities mentioning "Windows 10 Pro" and 203 vulnerabilities are specifically mentioning "Windows 10 Pro 1607" which is the specific version number of the build 14393 that Dominion uses.

37. Even without internet connectivity, unhardened computers are at risk when those are used to process removable media. It was clear that when Compact Flash storage media containing the ballot images, audit logs and results from the precinct scanners were connected to the server, the media was automounted by the operating system. When the operating system is automounting a storage media, the operating system starts automatically to interact with the device. The zero-day

vulnerabilities exploiting this process has been recurringly discovered from all operating systems, including Windows. Presence of automount calls also into question presence of another setting which is always disabled in hardening process. It is autorun, which automatically executes some content on the removable media. While this is convenient for consumers, it poses extreme security risk.

38. Based on my experience and mental impression observing the Dominion technician's activities, Fulton County's EMS server management seems to be an *ad hoc* operation with no formalized process. This was especially clear on the manual processing of the memory cards storage devices coming in from the precincts on election night and the repeated access of the operating system to directly access filesystem, format USB devices, etc. This kind of operation in naturally prone to human errors. I observed personnel calling on the floor asking if all vote carrying compact flash cards had been delivered from the early voting machines for processing, followed by later finding additional cards which had been overlooked in apparent human error. Later, I heard again one technician calling on the floor asking if all vote carrying compact flashes had been delivered. This clearly demonstrates lack of inventory management which should be in place to ensure, among other things, that no rogue storage devices would be inserted into the computer. In response, 3 more compact flash cards were hand-delivered. Less

than 5 minutes later, I heard one of the county workers say that additional card was found and was delivered for processing. All these devices were trusted by printed label only and no comparison to an inventory list of any kind was performed.

39. In addition, operations were repeatedly performed directly on the operating system. Election software has no visibility into the operations performed directly on the operating system, and therefore those are not included in election system event logging. Those activities can only be partially reconstructed from operating system logs – and as these activities included copying election data files, election software log may create false impression that the software is accessing the same file over a period of time, while in reality the file could had been replaced with another file with the same name by activities commanded to the operating system. Therefore, any attempt to audit the election system operated in this manner must include through analysis of all operating system logs, which complicates the auditing process. Unless the system is configured properly to collect file system auditing data is not complete. As the system appears not to be hardened, it is unlikely that the operating system has been configured to collect auditing data.

40. A human error when operating live election system from the operating system can result in a catastrophic event destroying election data or even rendering the system unusable. Human error is likely given the time pressure involved and,

at least in Fulton County, no formal check lists or operating procedures were followed to mitigate the human error risk. The best practice is to automate trivial tasks to reduce risk of human error, increase the quality assurance of overall operations and provide auditability and transparency by logging.

41. Uploading of memory cards had already started before I arrived at EPC. While one person was operating the upload process, the two other Dominion employees were troubleshooting issues which seemed to be related to ballot images uploads. I repeatedly observed error messages appearing on the screen of the EMS server. I was not able to get picture of the errors on August 11th, I believe the error was the same or similar that errors recurring August 17th as shown on Exhibit D and discussed later in this declaration. Dominion employees were troubleshooting the issue with 'trial-and-error' approach. As part of this effort they accessed "Computer Management" application of Windows 10 and experimented with trouble shooting the user account management feature. This demonstrates that they had complete access to the computer. This means there are no meaningful access separation and privileges and roles controls protecting the county's primary election servers. This also greatly amplifies the risk of catastrophic human error and malicious program execution.

42. I overheard the Dominion technician's conversation that they had issues with file system structure and "need 5 files out of EMS server and paste. Delete everything out of there and put it there." To communicate the gravity of the situation to each other they added "Troubleshooting in the live environment". These conversations increased the mental image that they were not familiar the issue they were troubleshooting.

43. After about 45 minutes of trying to solve the issue by instructions received over the phone, the two Dominion employees' (who had been troubleshooting) behavior changed. The Dominion staff member walked behind the server rack and made manual manipulations which could not be observed from my vantage point. After that they moved with their personal laptops to a table physically farther away from the election system and stopped trying different ways to work around the issue in front of the server, and no longer talked continuously with their remote help over phone.

44. In the follow-up-calls I overheard them ask people on the other end of the call to check different things, and they only went to a computer and appeared to test something and subsequently take a picture of the computer screen with a mobile phone and apparently send it to a remote location.

45. Based on my extensive experience, this all created a strong mental impression that the troubleshooting effort was being done remotely over remote access to key parts of the system. Additionally, new wireless access point with a hidden SSID access point name appeared in the active Wi-Fi stations list that I was monitoring, but it may have been co-incidental. Hidden SSIDs are used to obscure presence of wireless networking from casual observers, although they do not provide any real additional security.

46. If in fact remote access was arranged and granted to the server, this has gravely serious implications for the security of the new Dominion system. Remote access, regardless how it is protected and organized is always a security risk, but furthermore it is transfer of control out of the physical perimeters and deny any ability to observe the activities.

47. I also observed USB drives marked with the Centon DataStick Pro Logo with no visible inventory control numbering system being taken repeatedly from the EMS server rack to the Fulton managers' offices and back. The Dominion employee told me that the USB drives were being taken to the Election Night Reporting Computer in another office. This action was repeated several times during the time of my observation. Carrying generic unmarked and therefore unidentifiable media out-of-view and back is a security risk – especially when the

exact same type of devices was piled on the desk near the computer. During the election night, the Dominion employees reached to storage box and introduced more unmarked storage devices into the ongoing election process. I saw no effort made to maintain a memory card inventory control document or chain of custody accounting for memory cards from the precincts.

48. I also visited the EPC on August 17. During that visit, the staff working on uploading ballots for adjudication experienced an error which appeared similar to the one on election night. This error was repeated with multitude of ballots and at the time we left the location, the error appeared to be ignored, rather that resolved. (EXHIBIT D - the error message and partial explanation of the error being read by the operator.).

49. The security risks outlined above – operating system risks, the failure to harden the computers, performing operations directly on the operating systems, lax control of memory cards, lack of procedures, and potential remote access, are extreme and destroy the credibility of the tabulations and output of the reports coming from a voting system.

50. Such a risk could be overcome if the election were conducted using hand marked paper ballots, with proper chain of custody controls. For elections conducted with hand marked paper ballots, any malware or human error involved

in the server security deficiencies or malfunctions could be overcome with a robust audit of the hand marked paper ballots and in case of irregularities detected, remedied by a recount. However, given that BMD ballots are computer marked, and the ballots therefore unauditable for determining the result, no recovery from system security lapses is possible for providing any confidence in the reported outcomes.

Ballot Scanning and Tabulation of Vote Marks

51. I have been asked to evaluate the performance and reliability of Georgia's Dominion precinct and central count scanners in the counting of votes on hand marked paper ballots.

52. On or about June 10th, Jeanne Dufort and Marilyn Marks called me to seek my perspective on what Ms. Dufort said she observed while serving as a Vote Review Panel member in Morgan County. Ms. Dufort told me that she observed votes that were not counted as votes nor flagged by the Dominion adjudication software.

53. Because of the ongoing questions this raised related to the reliability of the Dominion system tabulation of hand marked ballots, I was asked by Coalition Plaintiffs to conduct technical analysis of the scanner and tabulation accuracy. That analysis is still in its early stages.

54. Before addressing the particulars of my findings and research into the accuracy of Dominion's scanning and tabulation, I will address the basic process by which an image on a voted hand marked paper ballot is processed by scanner and tabulation software generally. It is important to understand that the Dominion scanners are Canon off the shelf scanners and their embedded software were designed for different applications than ballot scanning which is best conducted with scanners specifically designed for detecting hand markings on paper ballots.

55. Contrary of public belief, the scanner is not taking a picture of the paper. The scanner is illuminating the paper with a number of narrow spectrum color lights, typically 3, and then using software to produce an approximation what the human eye would be likely to see if there would had been a single white wide-spectrum light source. This process takes place in partially within the scanner and embedded software in the (commercial off the shelf) scanner and partially in the driver software in the host computer. It is guided by number of settings and configurations, some of which are stored in the scanner and some in the driver software. The scanner sensors gather more information than will be saved into the resulting file and another set of settings and configurations are used to drive that part of the process. The scanners also produce anomalies which are automatically removed from the images by the software. All these activities are performed

outside of the Dominion election software, which is relying on the end product of this process as the input.

56. I began reviewing Dominion user manuals in the public domain to further investigate the Dominion process.

57. On August 14, I received 2 sample Fulton County August 11 ballots of high-speed scanned ballot from Rhonda Martin, who stated that she obtained them from Fulton County during Coalition Plaintiff's discovery. The image characteristics matched the file details I had seen on the screen in EPC. The image is TIFF format, about 1700 by 2200 pixels with 1-bit color depth (= strictly black or white pixels only) with 200 by 200 dots per square inch ("dpi") resolution resulting in files that are typically about 64 or 73 kilo bytes in size for August 11 ballots. With this resolution, the outer dimension of the oval voting target is about 30 by 25 pixels. The oval itself (that is, the oval line that encircles the voting target) is about 2 pixels wide. The target area is about 450 pixels; the area of the target a tight bounding box would be 750 pixels and the oval line encircling the target is 165 pixels. In these images, the oval itself represented about 22% value in the bounding box around the vote target oval.

58. Important image processing decisions are done in scanner software and before election software threshold values are applied to the image. These

scanner settings are discussed in an excerpt Dominion's manual for ICC operations My understanding is that the excerpt of the Manual was received from Marilyn Marks who stated that she obtained it from a Georgia election official in response to an Open Records request. Attached as Exhibit E is page 9 of the manual. Box number 2 on Exhibit E shows that the settings used are not neutral factory default settings.

59. Each pixel of the voters' marks on a hand marked paper ballot will be either in color or gray when the scanner originally measures the markings. The scanner settings affect how image processing turns each pixel from color or gray to either black or white in the image the voting software will later process. This processing step is responsible for major image manipulation and information reduction before the election software threshold values are calculated. This process has a high risk of having an impact upon how a voter mark is interpreted by the tabulation software when the information reduction erases markings from the scanned image before the election software processes it.

60. In my professional opinion, any decision by Georgia's election officials about adopting or changing election software threshold values is premature before the scanner settings are thoroughly tested, optimized and locked.

61. The impact of the scanner settings is minimal for markings made with a black felt pen but can be great for markings made with any color ballpoint pens. To illustrate this, I have used standard color scanning settings and applied then standard conversion from a scanned ballot vote target with widely used free and open source image processing software "GNU Image Manipulation Program version 2.10.18" EXHIBIT G shows the color image being converted with the software's default settings from color image to Black-and-White only. The red color does not meet the internal conversion algorithm criteria for black, therefore it gets erased to white instead.

62. Dominion manual for ICC operations clearly show that the scanner settings are changed from neutral factory default settings. EXHIBIT H shows how these settings applied different ways alter how a blue marking is converted into Black-and-White only image.

63. The optimal scanner settings are different for each model of scanner and each type of paper used to print ballots. Furthermore, because scanners are inherently different, the manufacturers use hidden settings and algorithms to cause neutral factory settings to produce similar baseline results across different makes and models. This is well-studied topic; academic and image processing studies published as early as 1979 discuss the brittleness of black-or-white images in

conversion. Subsequently, significance for ballot counting has been discussed in academic USENIX conference peer-reviewed papers.

64. On the August 17th at Fulton County Election Preparation Center Professor Richard DeMillo and I participated in a scan test of August 11 test ballots using a Fulton County owned Dominion precinct scanner. Two different ballot styles were tested, one with 4 races and one with 5 races. Attached as Exhibits I and J show a sample ballots with test marks.

65. A batch of 50 test ballots had been marked by Rhonda Martin with varying types of marks and varying types of writing instruments that a voter might use at home to mark an absentee ballot. Professor DeMillo and I participated in marking a handful of ballots.

66. Everything said here concerning the August 17 test is based on a very preliminary analysis. The scanner took about 6 seconds to reject the ballots, and one ballot was only acceptable "headfirst" while another ballot only "tail first." Ballot scanners are designed to read ballots "headfirst" or "tail first," and front side and backside and therefore there should not be ballots which are accepted only in one orientation. I observed the ballots to make sure that both ballots had been cleanly separated from the stub and I could not identify any defects of any kind on the ballots.

67. There was a 15 second cycle from the time the precinct scanner accepted a ballot to the time it was ready for the next ballot. Therefore, the maximum theoretical capacity with the simple 5 race ballot is about 4 ballots per minute if the next ballot is ready to be fed into the scanner as soon as the scanner was ready to take it. In a real-world voting environment, it takes considerably longer because voters move away from the scanner, the next voter must move in and subsequently figure where to insert the ballot. The Dominion precinct scanner that I observed was considerably slower than the ballot scanners I have tested over the last 15 years. This was done with a simple ballot, and we did not test how increase of the number of races or vote targets on the ballot would affect the scanning speed and performance.

68. Though my analysis is preliminary, this test reveals that a significant percentage of filled ovals that would to a human clearly show voter's intent failed to register as a vote on the precinct count scanner.

69. The necessary testing effort has barely begun at the time of this writing, as only limited access to equipment has been made available. I have not had access to the high-volume mail ballot scanner that is expected to process millions of mail ballots in Georgia's upcoming elections. However, initial results suggest that significant revisions must be made in the scanning settings to avoid a

widespread failure to count certain valid votes that are not marked as filled in ovals. Without testing, it is impossible to know, if setting changes alone are sufficient to cure the issue.

Scanned Ballot Tabulation Software Threshold Settings

70. Georgia is employing a Dominion tabulation software tool called "Dual Threshold Technology" for "marginal marks." (See Exhibit M) The intent of the tool is to detect voter marks that could be misinterpreted by the software and flag them for review. While the goal is admirable, the method of achieving this goal is quite flawed.

71. While it is compelling from development cost point of view to use commercial off the shelf COTS scanners and software, it requires additional steps to ensure that the integration of the information flow is flawless. In this case, the software provided by the scanner manufacturer and with settings and configurations have great impact in how the images are created and what information is removed from the images before the election software processes it. In recent years, many defective scanner software packages have been found. These software flaws include 'image enhancement' features which have remained enabled even when the feature has been chosen to be disabled from the scanner software provided by the manufacturer. An example of dangerous feature to keep

enabled is 'Punch Hole Removal', intended to make images of documents removed from notebook binders to look more aesthetically pleasing. The software can and in many cases will misinterpret a voted oval as a punch hole and erase the vote from the image file and to make this worse, the punch holes are expected to be found only in certain places near the edge of the paper, and therefore it will erase only votes from candidates whose targets are in those target zones.

72. Decades ago, when computing and storage capacity were expensive black-and-white image commonly meant 1-bit black-or-white pixel images like used by Dominion system. As computer got faster and storage space cheaper during the last 2-3 decades black-and-white image has become by default meaning 255 shades of gray grayscale images. For the purposes of reliable digitalization of physical documents, grayscale image carries more information from the original document for reliable processing and especially when colored markings are being processed. With today's technology, the difference in processing time and storage prices between grayscale and 1-bit images has become completely meaningless, and the benefits gained in accuracy are undeniable.

73. I am aware that the Georgia Secretary of State's office has stated that Georgia threshold settings are national industry standards for ballot scanners (Exhibit K). This is simply untrue. If, there were an industry standard for that, it

would be part of EAC certification. There is no EAC standard for such threshold settings. As mentioned before, the optimal settings are products of many elements. The type of the scanner used, the scanner settings and configuration, the type of the paper used, the type of the ink printer has used in printing the ballots, color dropout settings, just to name few. Older scanner models, which were optical mark recognitions scanners, used to be calibrated using calibration sheet – similar process is needed to be established for digital imaging scanners used this way as the ballot scanners.

74. Furthermore, the software settings in Exhibit E box 2 show that the software is instructed to ignore all markings in red color ("Color drop-out: Red"), This clearly indicates that the software was expecting the oval to be printed in Red and therefore it will be automatically removed from the calculation. The software does not anticipate printed black ovals as used in Fulton County. Voters have likely not been properly warned that any pen they use which ink contains high concentration of red pigment particles is at risk of not counting, even if to the human eye the ink looks very dark.

75. I listened to the August 10 meeting of the State Board of Elections as they approved a draft rule related to what constitutes a vote, incorporating the following language:

> *Ballot scanners that are used to tabulate optical scan ballots marked by hand shall be set so that:*
>
> *1. Detection of 20% or more fill-in of the target area surrounded by the oval shall be considered a vote for the selection;*
>
> *2. Detection of less than 10% fill-in of the target area surrounded by the oval shall not be considered a vote for that selection;*
>
> *3. Detection of at least 10% but less than 20% fill-in of the target area surrounded by the oval shall flag the ballot for adjudication by a vote review panel as set forth in O.C.G.A. 21-2-483(g). In reviewing any ballot flagged for adjudication, the votes shall be counted if, in the opinion of the vote review panel, the voter has clearly and without question indicated the candidate or candidates and answers to questions for which such voter desires to vote.*

76. The settings discussed in the rule are completely subject to the scanner settings. How the physical marking is translated into the digital image is determined by those values and therefore setting the threshold values without at the same time setting the scanner settings carries no value or meaning. If the ballots will be continuing to be printed with black only, there is no logic in having any drop-out colors.

77. Before the State sets threshold standards for the Dominion system, extensive testing is needed to establish optimal configuration and settings for each step of the process. Also, the scanners are likely to have settings additional configuration and settings which are not visible menus shown in the manual excerpt. All those should be evaluated and tested for all types of scanners approved for use in Georgia, including the precinct scanners

78. As temporary solution, after initial testing, the scanner settings and configuration should be locked and then a low threshold values should be chosen. All drop-out colors should be disabled. This will increase the number of ballots chosen for human review and reduce the number of valid votes not being counted as cast.

Logic and Accuracy Testing

79. Ballot-Marking Device systems inherits the same well-documented systemic security issues embedded in direct-recording electronic (DRE) voting machine design. Such design flaws eventually are causing the demise of DRE voting system across the country as it did in Georgia. In essence the Ballot Marking Device is a general-purpose computer running a general-purpose operating system with touchscreen that is utilized as a platform to run a software, very similar to DRE by displaying a ballot to the voter and recording the voter's intents. The main difference is that instead of recording those internally digitally, it prints out a ballot summary card of voter's choices.

80. Security properties of this approach would be positively different from DREs if the ballot contained only human-readable information and all voters are required to and were capable of verifying their choices from the paper ballot summary. That of course is unrealistic.

81. When voter fails to inspect the paper ballot and significant portion of the information is not in human readable from as a QR barcode, Ballot-Marking Device based voting effectively inherits most of the negative and undesirable security and reliability properties directly from DRE paradigm, and therefore should be subject to the same testing requirements and mitigation strategies as DREs.

82. In response to repeating myriad of issues with DREs, which have been attributed to causes from screen calibration issues to failures in ballot definition configuration distribution, a robust Logic & Accuracy testing regulation have been established. These root causes are present in BMDs and therefore should be evaluated in the same way as DREs have been.

I received the Georgia Secretary of State's manual "Logic and Accuracy Procedures "Version 1.0 January 2020 from Rhonda Martin. Procedure described in section D "Testing the BMD and Printer" is taking significant shortcuts, presumably to cut the labor work required. (Section D is attached as Exhibit L) These shortcuts significantly weaken the security and reliability posture of the system and protections against already known systemic pitfalls, usability predicaments and security inadequacies.

CONCLUSIONS

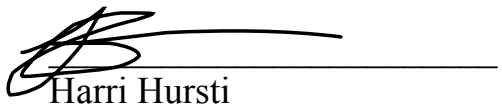
83. The scanner software and tabulation software settings and configurations being employed to determine which votes to count on hand marked paper ballots are likely causing clearly intentioned votes not to be counted as cast.

84. The method of using 1-bit images and calculated relative darkness values from such pre-reduced information to determine voter marks on ballots is severely outdated and obsolete. It artificially and unnecessarily increases the failure rates to recognize votes on hand-marked paper ballots. As a temporary mitigation, optimal configurations and settings for all steps of the process should be established after robust independent testing to mitigate the design flaw and augment it with human assisted processes, but that will not cure the root cause of the software deficiency which needs to be addressed.

85. The voting system is being deployed, configured and operated in Fulton County in a manner that escalates the security risk to an extreme level and calls into question the accuracy of the election results. The lack of well-defined process and compliance testing should be addressed immediately using independent experts. The use and the supervision of the Dominion personnel operating Fulton County's Dominion Voting System should be evaluated.

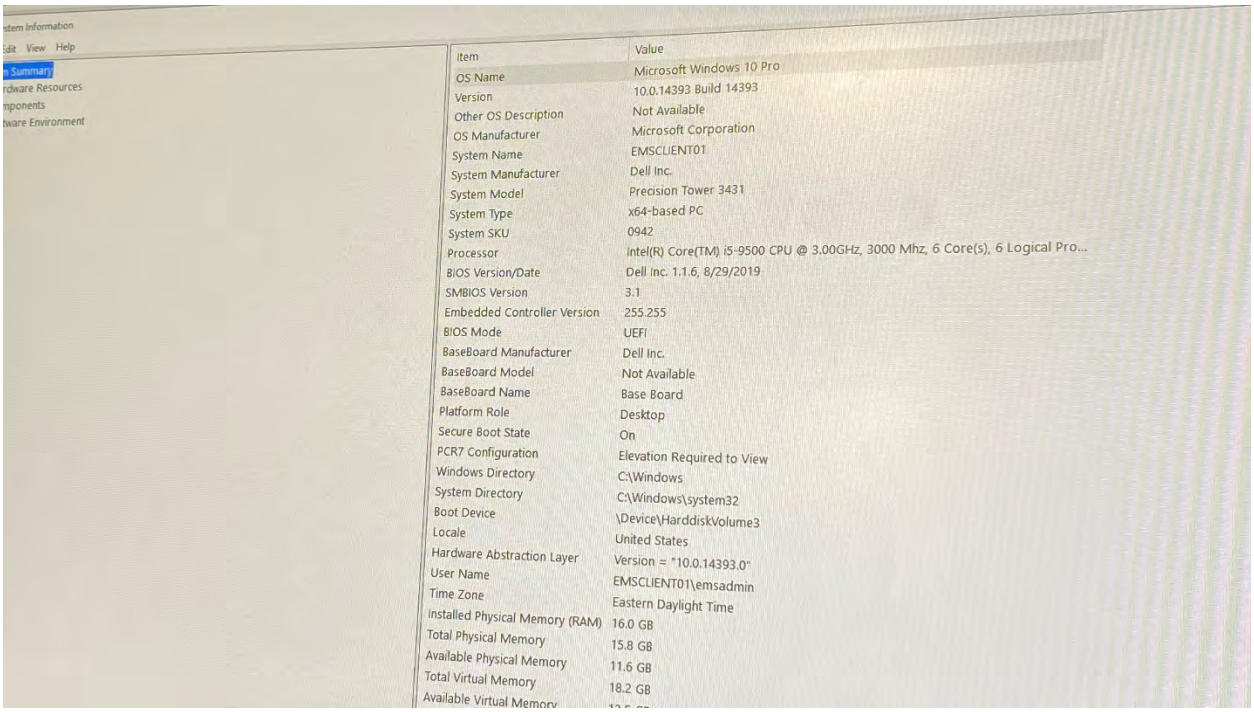
86. Voters are not reviewing their BMD printed ballots before scanning and casting them, which causes BMD-generated results to be un-auditable due to the untrustworthy audit trail. Furthermore, because BMDs are inheriting known fundamental architectural deficiencies from DREs, no mitigation and assurance measures can be weakened, including but not limited to Logic and Accuracy Testing procedures.

This 24th day of August 2020.



Harri Hursti

EXHIBIT A:


stem Information
Edit View Help
Summary
rdware Resources
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Item
Value
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Version
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Other OS Description
Not Available
OS Manufacturer
Microsoft Corporation
System Name
EMSCLIENT01
System Manufacturer
Dell Inc.
System Model
Precision Tower 3431
System Type
x64-based PC
System SKU
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Processor
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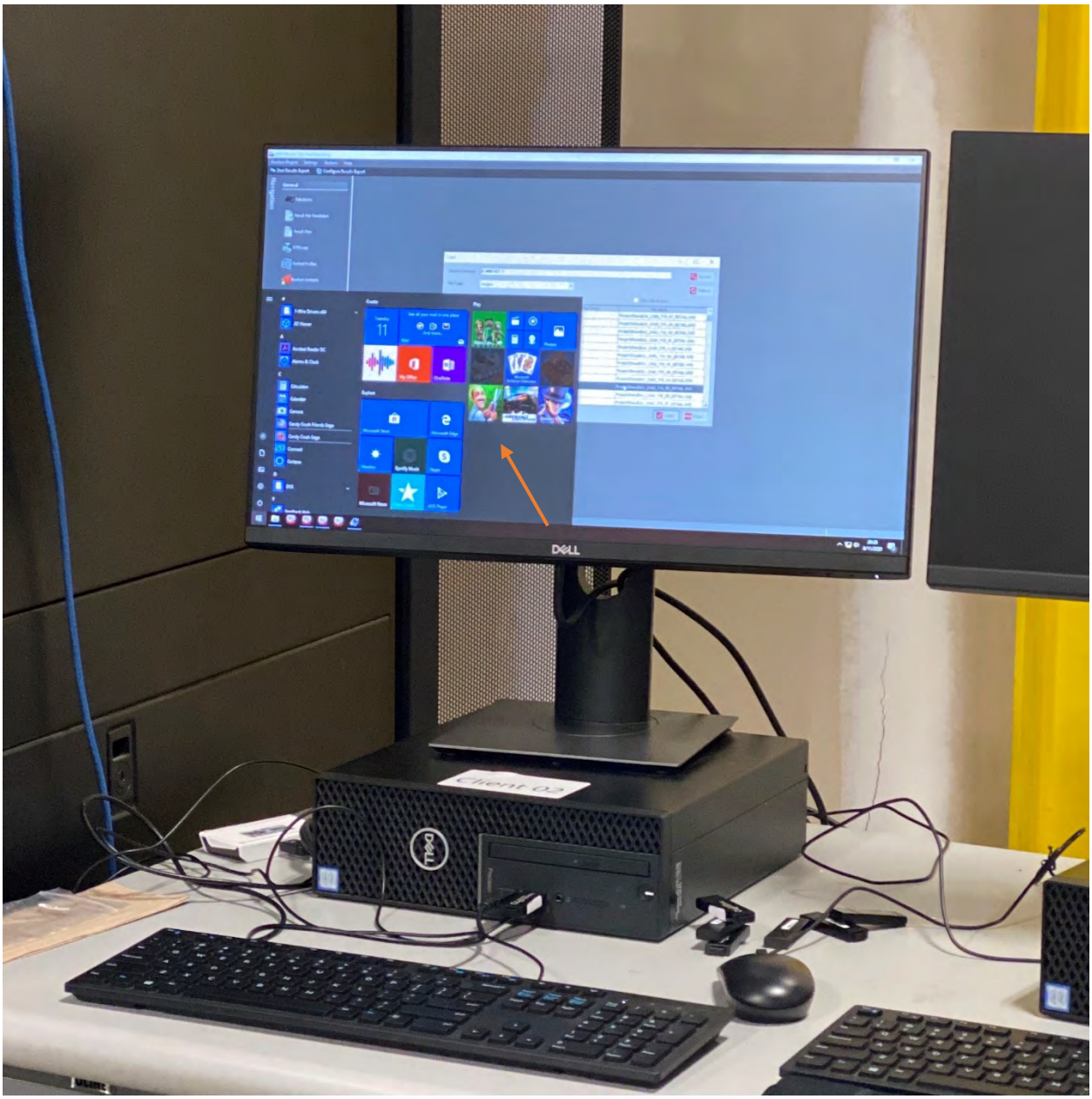
BIOS Version/Date
Dell Inc. 1.1.6, 8/29/2019
SMBIOS Version
3.1
Embedded Controller Version
255.255
BIOS Mode
UEFI
BaseBoard Manufacturer
Dell Inc.
BaseBoard Model
Not Available
BaseBoard Name
Base Board
Platform Role
Desktop
Secure Boot State
On
PCR7 Configuration
Elevation Required to View
Windows Directory
C:\Windows
System Directory
C:\Windows\system32
Boot Device
\Device\HarddiskVolume3
Locale
United States
Hardware Abstraction Layer
Version = "10.0.14393.0"
User Name
EMSCLIENT01\emsadmin
Time Zone
Eastern Daylight Time
Installed Physical Memory (RAM)
16.0 GB
Total Physical Memory
15.8 GB
Available Physical Memory
11.6 GB
Total Virtual Memory
18.2 GB
Available Virtual Memory

EXHIBIT B:


MOCK
Most used
EMS Election Event Designer
File Explorer
EMS Results Tally and Reporting
Notepad
ImageCast® Adjudication
Calculator
1-Wire Drivers x64
3D Builder
Acrobat Reader DC
Alarms & Clock
Calculator
Calendar
Camera
Life at a glance
Monday
17
Get all your mail in one place
Mail
Microsoft Edge
Photos
Weather
Skype Preview
Microsoft News
Store
Play and explore
Xbox
Groove Music
Movies & TV
Paint 3D
SODA
WinZip Univer...
Fallout Shelter
Get Office
OneNote

EXHIBIT C:



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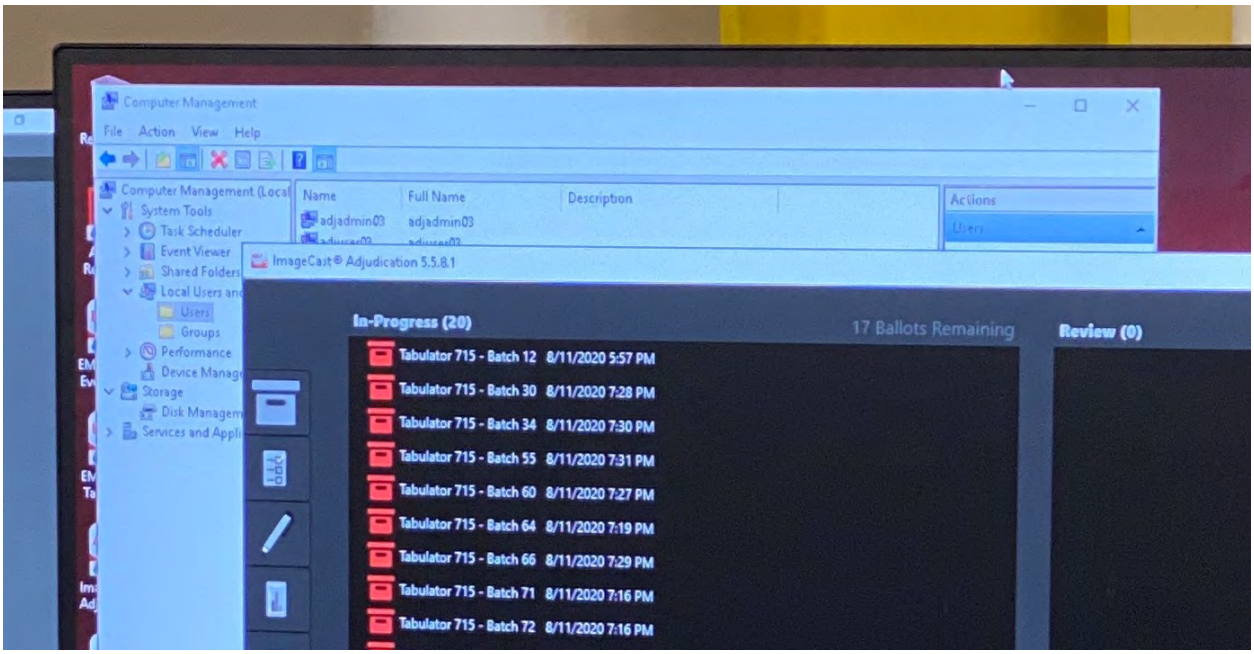
Computer Management
File Action View Help
Computer Management (Local
System Tools
Task Scheduler
Event Viewer
Shared Folders
Local Users and
Users
Groups
Performance
Device Manager
Storage
Disk Management
Services and Applications
Name
Full Name
Description
adjadmin03
adjadmin03
Actions
Users
ImageCast® Adjudication 5.5.8.1
In-Progress (20)
17 Ballots Remaining
Review (0)
Tabulator 715 - Batch 12 8/11/2020 5:57 PM
Tabulator 715 - Batch 30 8/11/2020 7:28 PM
Tabulator 715 - Batch 34 8/11/2020 7:30 PM
Tabulator 715 - Batch 55 8/11/2020 7:31 PM
Tabulator 715 - Batch 60 8/11/2020 7:27 PM
Tabulator 715 - Batch 64 8/11/2020 7:19 PM
Tabulator 715 - Batch 66 8/11/2020 7:29 PM
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Tabulator 715 - Batch 72 8/11/2020 7:16 PM

EXHIBIT E:

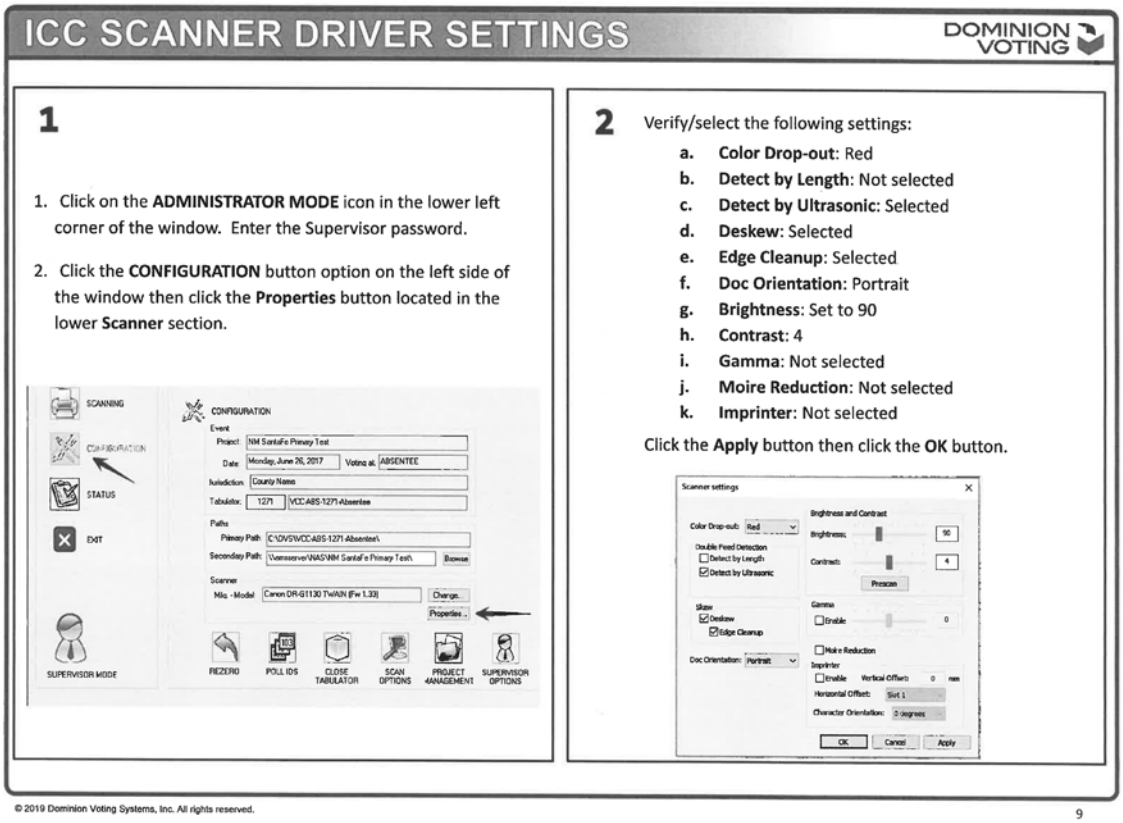

ICC SCANNER DRIVER SETTINGS
DOMINION VOTING
1
1. Click on the ADMINISTRATOR MODE icon in the lower left corner of the window. Enter the Supervisor password.
2. Click the CONFIGURATION button option on the left side of the window then click the Properties button located in the lower Scanner section.
SCANNING
CONFIGURATION
STATUS
EXIT
SUPERVISOR MODE
REZERO
POLL IDS
CLOSE TABULATOR
SCAN OPTIONS
PROJECT MANAGEMENT
SUPERVISOR OPTIONS
2
Verify/select the following settings:
a. Color Drop-out: Red
b. Detect by Length: Not selected
c. Detect by Ultrasonic: Selected
d. Deskew: Selected
e. Edge Cleanup: Selected
f. Doc Orientation: Portrait
g. Brightness: Set to 90
h. Contrast: 4
i. Gamma: Not selected
j. Moire Reduction: Not selected
k. Imprinter: Not selected
Click the Apply button then click the OK button.
Scanner settings
OK
Cancel
Apply
© 2019 Dominion Voting Systems, Inc. All rights reserved.
9

EXHIBIT F:

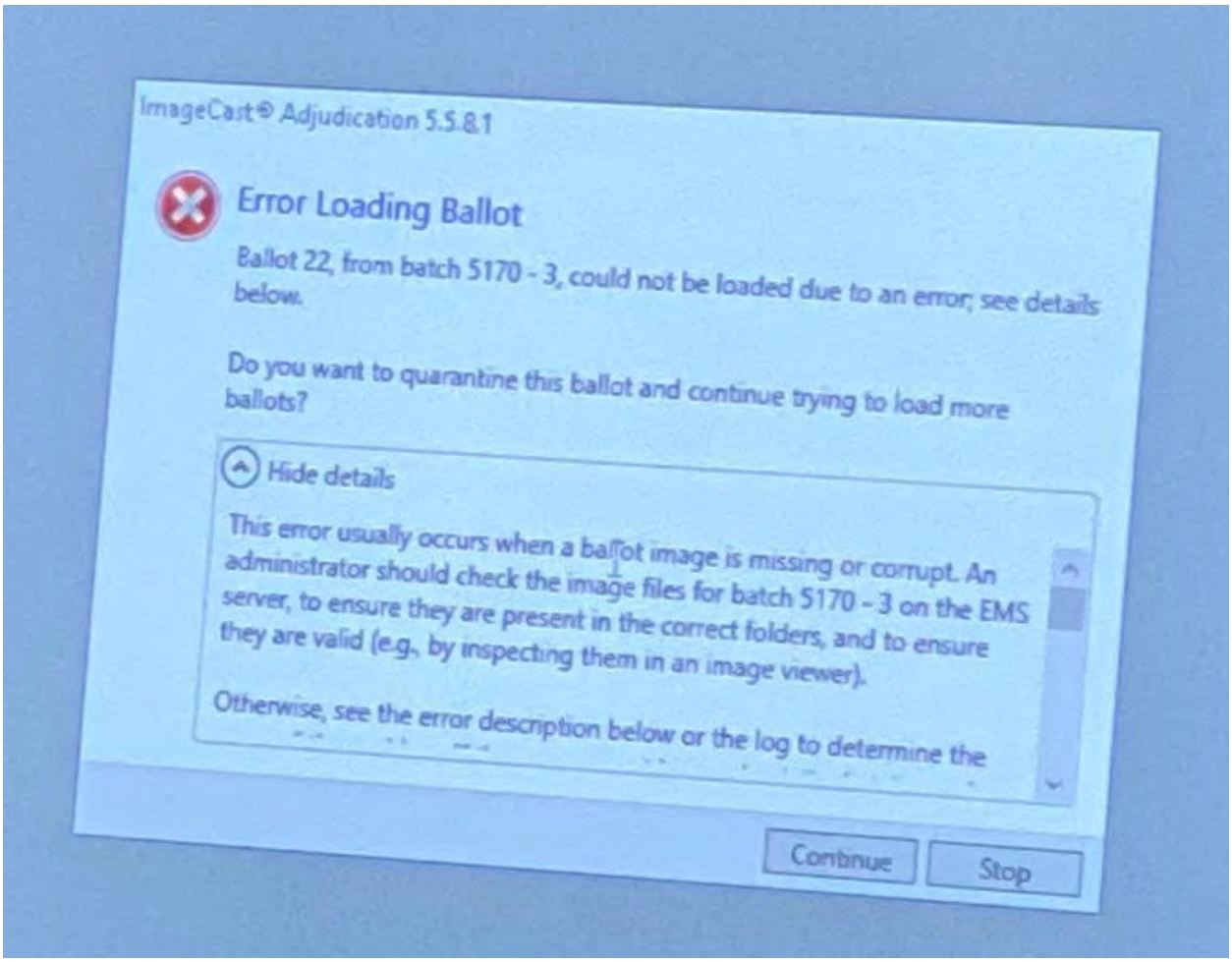
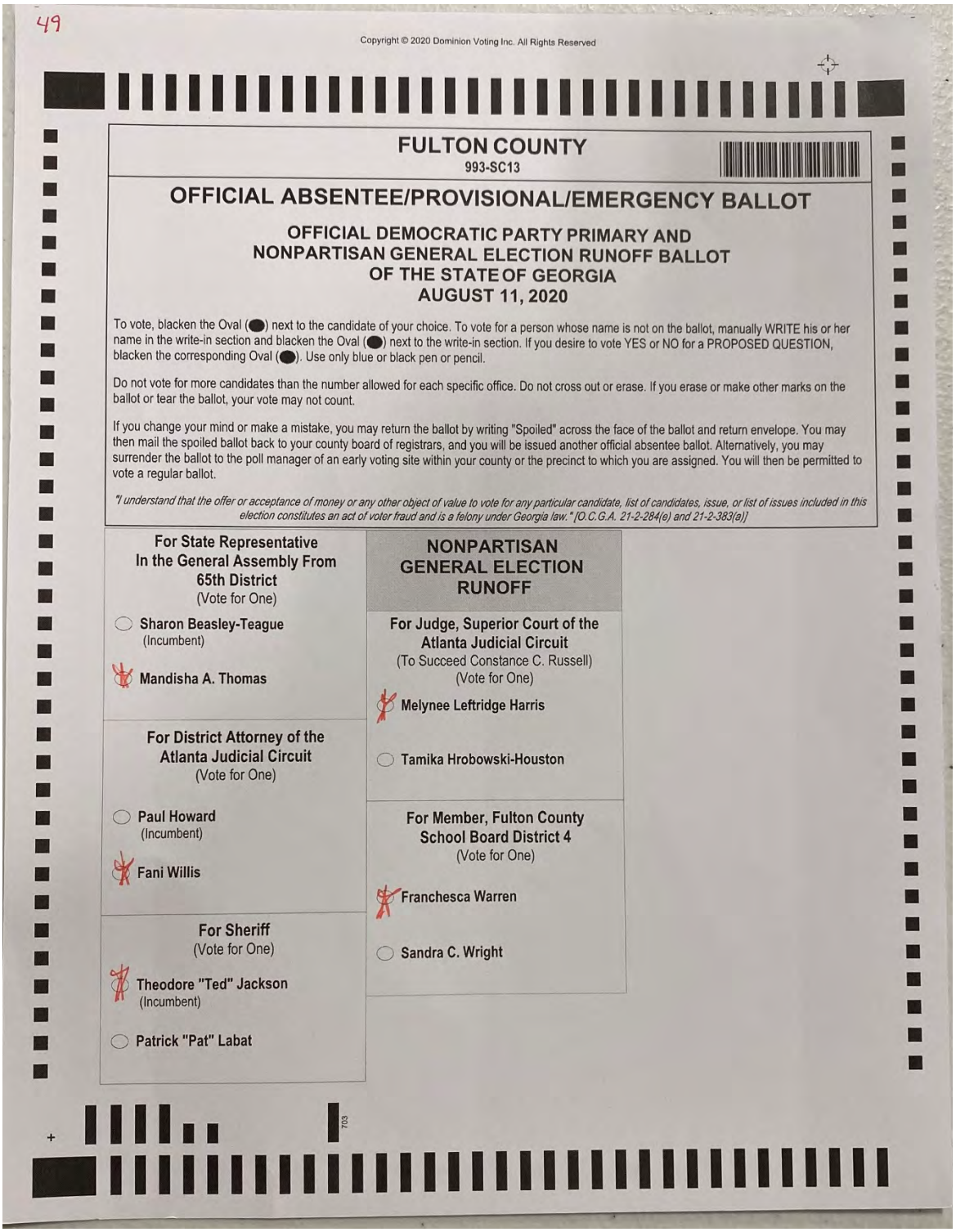

ImageCast® Adjudication 5.5.8.1
Error Loading Ballot
Ballot 22, from batch 5170 - 3, could not be loaded due to an error; see details below.
Do you want to quarantine this ballot and continue trying to load more ballots?
Hide details
This error usually occurs when a ballot image is missing or corrupt. An administrator should check the image files for batch 5170 - 3 on the EMS server, to ensure they are present in the correct folders, and to ensure they are valid (e.g., by inspecting them in an image viewer).
Otherwise, see the error description below or the log to determine the
Continue
Stop

EXHIBIT G:

EXHIBIT H:

EXHIBIT I:



49

FULTON COUNTY
993-SC13

OFFICIAL ABSENTEE/PROVISIONAL/EMERGENCY BALLOT

OFFICIAL DEMOCRATIC PARTY PRIMARY AND
NONPARTISAN GENERAL ELECTION RUNOFF BALLOT
OF THE STATE OF GEORGIA
AUGUST 11, 2020

To vote, blacken the Oval (●) next to the candidate of your choice. To vote for a person whose name is not on the ballot, manually WRITE his or her name in the write-in section and blacken the Oval (●) next to the write-in section. If you desire to vote YES or NO for a PROPOSED QUESTION, blacken the corresponding Oval (●). Use only blue or black pen or pencil.

Do not vote for more candidates than the number allowed for each specific office. Do not cross out or erase. If you erase or make other marks on the ballot or tear the ballot, your vote may not count.

If you change your mind or make a mistake, you may return the ballot by writing "Spoiled" across the face of the ballot and return envelope. You may then mail the spoiled ballot back to your county board of registrars, and you will be issued another official absentee ballot. Alternatively, you may surrender the ballot to the poll manager of an early voting site within your county or the precinct to which you are assigned. You will then be permitted to vote a regular ballot.

"I understand that the offer or acceptance of money or any other object of value to vote for any particular candidate, list of candidates, issue, or list of issues included in this election constitutes an act of voter fraud and is a felony under Georgia law." [O.C.G.A. 21-2-284(e) and 21-2-383(e)]

For State Representative In the General Assembly From 65th District
(Vote for One)

- ○ Sharon Beasley-Teague (Incumbent)
- ✗ Mandisha A. Thomas

For District Attorney of the Atlanta Judicial Circuit
(Vote for One)

- ○ Paul Howard (Incumbent)
- ✗ Fani Willis

For Sheriff
(Vote for One)

- ✗ Theodore "Ted" Jackson (Incumbent)
- ○ Patrick "Pat" Labat

NONPARTISAN GENERAL ELECTION RUNOFF

For Judge, Superior Court of the Atlanta Judicial Circuit
(To Succeed Constance C. Russell)
(Vote for One)

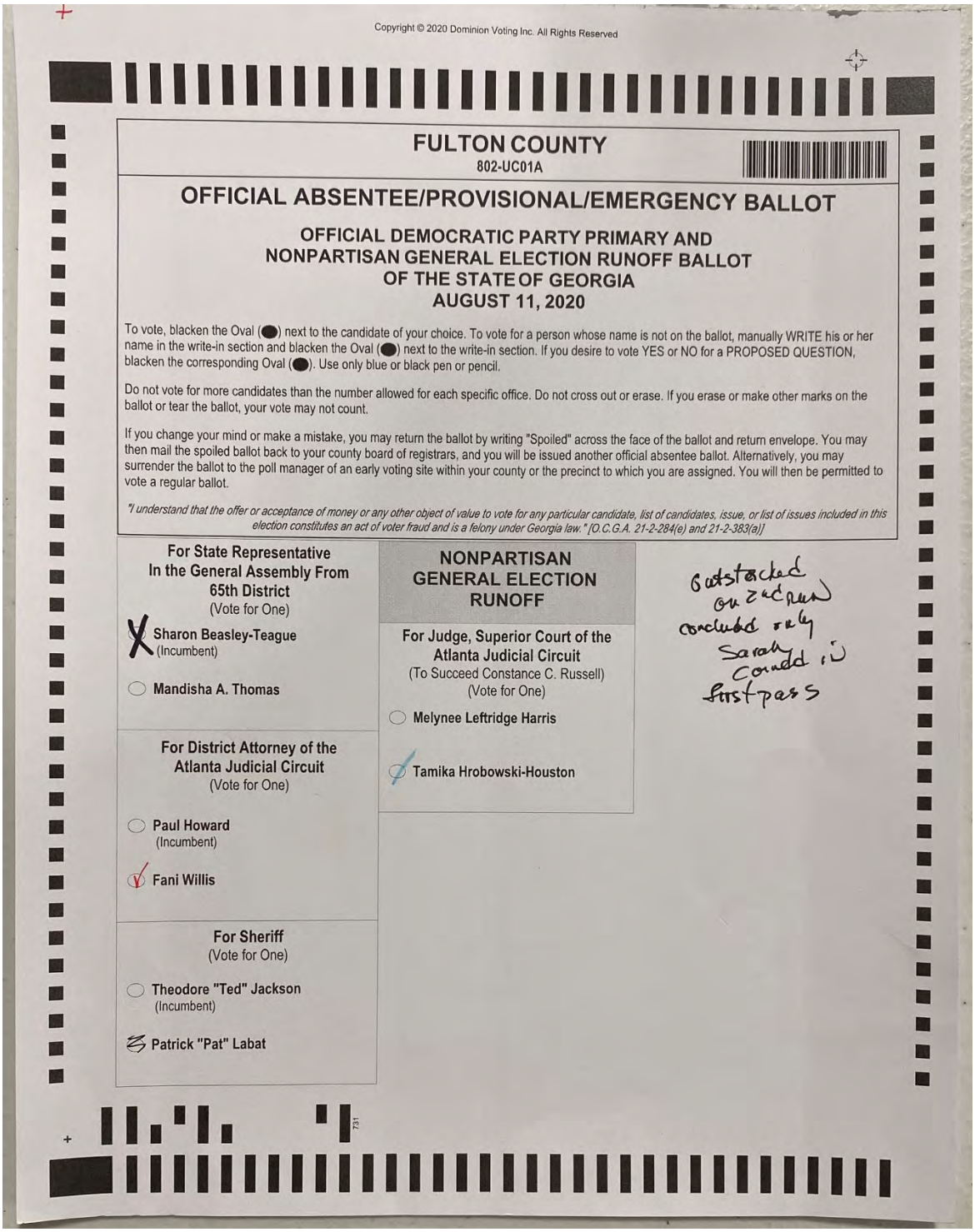
- ✗ Melynee Leftridge Harris
- ○ Tamika Hrobowski-Houston

For Member, Fulton County School Board District 4
(Vote for One)

- ✗ Franchesca Warren
- ○ Sandra C. Wright

703

EXHIBIT J:



FULTON COUNTY
802-UC01A

OFFICIAL ABSENTEE/PROVISIONAL/EMERGENCY BALLOT

OFFICIAL DEMOCRATIC PARTY PRIMARY AND
NONPARTISAN GENERAL ELECTION RUNOFF BALLOT
OF THE STATE OF GEORGIA
AUGUST 11, 2020

To vote, blacken the Oval (●) next to the candidate of your choice. To vote for a person whose name is not on the ballot, manually WRITE his or her name in the write-in section and blacken the Oval (●) next to the write-in section. If you desire to vote YES or NO for a PROPOSED QUESTION, blacken the corresponding Oval (●). Use only blue or black pen or pencil.

Do not vote for more candidates than the number allowed for each specific office. Do not cross out or erase. If you erase or make other marks on the ballot or tear the ballot, your vote may not count.

If you change your mind or make a mistake, you may return the ballot by writing "Spoiled" across the face of the ballot and return envelope. You may then mail the spoiled ballot back to your county board of registrars, and you will be issued another official absentee ballot. Alternatively, you may surrender the ballot to the poll manager of an early voting site within your county or the precinct to which you are assigned. You will then be permitted to vote a regular ballot.

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For State Representative In the General Assembly From 65th District
(Vote for One)

- [X] Sharon Beasley-Teague (Incumbent)
- [ ] Mandisha A. Thomas

For District Attorney of the Atlanta Judicial Circuit
(Vote for One)

- [ ] Paul Howard (Incumbent)
- [✓] Fani Willis

For Sheriff
(Vote for One)

- [ ] Theodore "Ted" Jackson (Incumbent)
- [S] Patrick "Pat" Labat

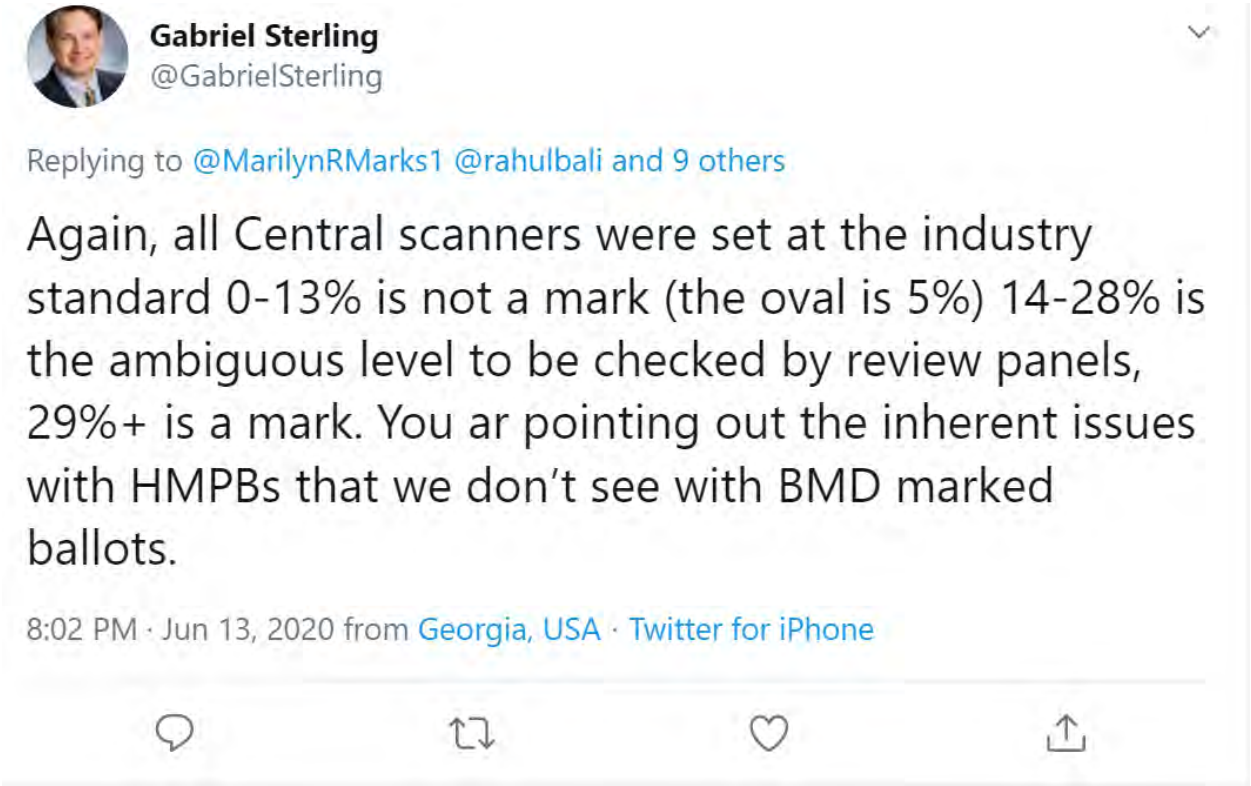
NONPARTISAN GENERAL ELECTION RUNOFF

For Judge, Superior Court of the Atlanta Judicial Circuit
(To Succeed Constance C. Russell)
(Vote for One)

- [ ] Melynee Leftridge Harris
- [✓] Tamika Hrobowski-Houston

Outstacked on 2nd pass concluded only Sarah counted in first pass

EXHIBIT K:



Gabriel Sterling
@GabrielSterling

Replying to @MarilynRMarks1 @rahulbali and 9 others

Again, all Central scanners were set at the industry standard 0-13% is not a mark (the oval is 5%) 14-28% is the ambiguous level to be checked by review panels, 29%+ is a mark. You ar pointing out the inherent issues with HMPBs that we don't see with BMD marked ballots.

8:02 PM · Jun 13, 2020 from Georgia, USA · Twitter for iPhone

EXHIBIT L:

- Create a voter card from Poll Pad for each unique ballot style within the designated Polling Location
  - Recommend labels be placed on card identifying what ballot style will be displayed by BMD once card is inserted
  - BMD removes the activation code from the Voter Card once used, therefore create the card again from Poll Pad after each use by a BMD

D. Testing the BMD and Printer

Use a combination of Poll Worker Card with Ballot Activation Codes for the polling location, and Voter Cards created from a Poll Pad loaded with the LA/Advance Voting dataset to bring up ballots on the BMD

- Produce at least one printed ballot from each BMD assigned to the polling location
- Produce a test deck from the BMDs assigned to the polling location for each unique ballot style within the polling location. The test deck must contain at least one vote for each candidate listed in each race within the unique ballot style
  - **Example**: Ballot from BMD 1 contains a vote for only the first candidate in each race listed on Ballot Style 1, Ballot from BMD 2 contains a vote only for the second candidate in each race on Ballot Style 1, and continue through the line of devices until all candidates in all races within the unique ballot style have received a single vote
  - **If Number of BMDs outnumber the number of vote positions on the unique ballot style**, start the vote pattern over until all BMDs have produced one printed ballot
  - **If Number of unique ballot styles in the polling place is greater than 1,** once the vote pattern is complete for a unique ballot style, proceed to the next BMD in line to start the review of the next unique Ballot Style
  - **All unique ballot styles do not have to be tested on each BMD**
- Review BMD-generated Test Deck and confirm the vote content before placing in the designated Polling Place Scanner

E. Testing the Polling Place Scanner

- Scan the BMD-generated Test Deck into the Polling Place Scanner
- Scan one blank optical scan ballot style(s) associated to the Polling Place to verify the Polling Place Scanner will recognize the ballot style in case of emergency
- Verify Scanner(s) shows a number of Ballot Cast equal to the number of ballots in the BMD-generated test deck plus the scanned blank Optical Scan ballot styles
- Firmly place the Security Key Tab in the Security Key Slot
- Touch Close Polls
- Enter the passcode
- Touch Enter
- Touch Yes
- Touch No for additional tapes (Scanner will automatically produce 3 copies of the closing tape)

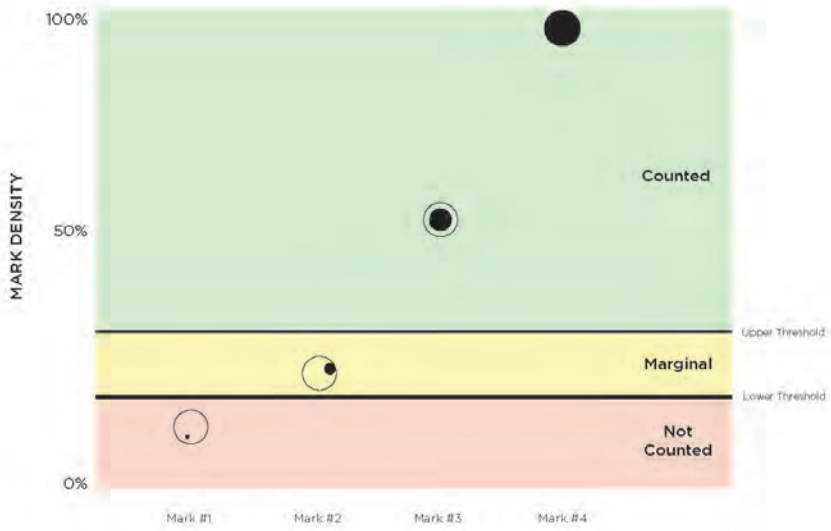
EXHIBIT M:

THE DOMINION DIFFERENCE

DUAL THRESHOLD TECHNOLOGY (MARGINAL MARKS)

From its early beginnings, Dominion Voting has emphasized the use of digital scanning, and continues to set the standard in digital image acquisition and analysis in the tabulation of digitally scanned ballots. When a ballot is fed into an ImageCast® tabulator – at the precinct level or centrally - a complete duplex image is created and then analyzed for tabulation by evaluating the pixel count of a voter mark. The pixel count of each mark is compared with two thresholds (which can be defined through the Election Management System) to determine what constitutes a vote. If a mark falls above the upper threshold, it's a valid vote. If a mark falls below the lower threshold, it will not be counted as a vote.

However, if a mark falls between the two thresholds (known as the "ambiguous zone"), it will be deemed as a marginal mark and the ballot will be returned to the voter for corrective action (please see diagram below). With this feature, the voter is given the ability to determine his or her intent, not an inspection or recount board after the fact, when it is too late. The chart below illustrates the Marginal Mark threshold interpretation.



THE DOMINION DIFFERENCE DUAL THRESHOLD TECHNOLOGY DOMINION VOTING

STATEMENT BY ANA MERCEDES DÍAZ CARDOZO

I, Ana Mercedes Díaz Cardozo, hereby declare the following:

1. My name is Ana Mercedes Díaz Cardozo. I'm known as Ana Diaz by many. I am an adult of the sound mine and was born in Caracas, Venezuela on March 24, 1960. I'm a naturalized American citizen. I reside at 923 Gulf Stream Court, Weston, Florida 33327.

2. I make this statement voluntarily and on my own initiative. I have not been promised, nor do I expect to receive anything in exchange for my testimony and give this statement. I have no expectation of any benefit or reward and understand that there are those who can try to hurt me for what I say in this statement.

3. I moved from Venezuela to the United States in 2004 due to political corruption and rapid decline in my home country of Venezuela. I want to alert the public and let the world know the truth about corruption, manipulation, and lies committed through a conspiracy of individuals and businesses with the intention of betraying the honest people of the United States and its legally constituted institutions and fundamental rights as citizens. This conspiracy began more than a decade ago in Venezuela and has spread to countries around the world. It is a conspiracy to unjustly gain and maintain power and wealth. These are political leaders, powerful companies, and others whose purpose is to gain and maintain power by changing people's free will and subverting the proper course of governing.

4. After graduating from high school, I attended the University of Santa Maria in Caracas, Venezuela and graduated as a lawyer in 1987. Then I studied a postgraduate degree in administrative law at the University of Central Venezuela. Before I could submit my thesis for a Master's degree in Administrative Law, I moved to the United States. I'm certified as an arbiter of international trade.

5. I was a career official for 25 years at the Supreme Electoral Council of Venezuela, which is the name that it was called in the 1970's. It is currently called the National Electoral Council. This is the highest electoral administrative agency in Venezuela and oversees all elections in Venezuela. In 1979, at the age of 19, I began my career at the Supreme Electoral Council of Venezuela as secretary in the regional delegation of the federal district. When I graduated from the university as a lawyer, my position on the Supreme Electoral Council changes to the position as an adviser to the Judicial Council of the Supreme Council Electoral. In 1991, I was appointed Assistant Director General of Political Parties, where I served until Hugo Chavez came to power in 1998. Also during this time, I served for seven years as a member of the Legislative Commission of the Venezuelan Electoral Council. It was the role of the Legislative Commission to review and identify any issues related to candidates

for elected positions. The Legislative Commission and my office had access to many resources within the various departments of the Electoral Council, including an information technology section that had experts in computers, computer programming, computer systems and telecommunications features such as modems, telephone lines. I was regularly in communication with the various departments of the Electoral Body for my daily duties. In the last years of my work for the Electoral Counsel, a little of my activities and duties were to learn about electronic voting systems and their functioning by Council experts.

6. As Deputy Director General of Political Parties in the Supreme Electoral Council, it was my duty to oversee everything related to political parties in Venezuela, particularly the participation of political parties in elections and the selection and qualifications of candidates for political office. My office reviewed everything to do with the ability of political parties to participate in the electoral process. Before a political party could be formed, it had to undergo a process for approval. This included legal approval of the party name, its colors and a list of its members. The proposed party had to have a certain percentage of Venezuela's population depending on whether it wanted to be a regional or national party. It could not be constituted as a political party until it was approved by the Supreme Electoral Council. My office also oversaw the creation of ballots that bore the name of the candidates and any party symbol or color that the candidate would like to use. When our office approved these matters, we sent the ballot for printing and circulation. Any conflict over which group could be a political party, which would be a candidate for elected office, how that candidate would be included in the vote, were decided by my office. I was a signatory to all decisions taken by the Political Parties office at the Supreme Electoral Council.

7. After Hugo Chavez was elected, he changed the Venezuelan Constitution. One such change was in the Supreme Electoral Council, now the Electoral Power. In February 2009, a national referendum was passed to change Venezuela's Constitution to end mandate limits for elected officials, including the President of Venezuela. This change allowed Hugo Chavez to be re-elected an unlimited number of times.

8. In 2003, I was appointed Director General of Political Parties at the National Electoral Council. At the end of that year there was a national effort to hold a referendum to remove Hugo Chavez from the post of President. In 2004 I was appointed to the Validation Committee that was responsible for reviewing petitions, the requirements of the signatories were their name, their signature, their fingerprint and their identification number. I discovered many ways that the party in power was trying to override requests. One was the change of forms to reflect that the petition was a referendum on the removal of members of the Venezuelan Congress

rather than the removal of the Venezuelan president. The purpose of manipulating petitions was to prevent a referendum to remove President Chavez from office. I investigated the allegations of fraud with the referendum petitions and lobbied for the fraudulent changes to be rectified. Because of my resistance and protests to this voter fraud, I received a letter in March 2004 stating that my position was trusted and trust had been lost in me and I was fired from the service.

9. After my dismissal, I decided to commit to the study of electoral processes both within Venezuela and in other countries, particularly in South American countries that were experiencing electoral unrest and government manipulation of constitutions, laws and elections. I joined a small group of highly educated and informed people who had access to information about the Venezuelan government and its activities. This group and I conduct interviews with Venezuelan citizens, read news publications and specialized treaties, and write evaluating the political, economic, legal and electoral changes taking place in Venezuela, South American countries, and other parts of the world controlled by socialist dictators and oligarchies. I read these treatises, studies, and publications to educate myself on how elections were manipulated and the use of empirical analysis to detect and identify the manipulation of elections and their results. In addition, I have collected copies of official Venezuelan government documents.

10. Official documents of the Venezuelan government include documents showing the bidding process for the implementation of a new electronic voting system in March 2004 and the award of the contract for that new system to Smartmatic. A true and authentic copy of the venezuelan National Electoral Council's tender documents, internal memorandums and contract signed between the Venezuelan government and the SBC Consortium (Smartmatic) are labeled Exhibit 1 and this statement is attached. I received the documents that constitute Exhibit 1 from a reliable person who had taken some notes on the documents and highlighted some parts for my attention. I have not made any alterations to what I have received, and the substantive content of the documents is authentic. For convenience, I've had the Bates document tagged at the bottom right of each page.

11. I have studied the documents contained in Exhibit 1 and have several observations. Exhibit 1 says that it is a contract between the National Electoral Council and the SBC Consortium (Smartmatic) and is dated 15 March 2004. It has a stamp that says Bolivarian Republic of Venezuela, Secretary General of the National Electoral Council. That is the official seal of the Secretary of the National Electoral Council. The initials at the bottom right side confirm the document's authenticity.

12. You would notice that page DIAZ 00002 is important because it shows that the contract is being made on February 16, 2004. Page DIAZ 00027, reflects that on February 14, 2004 at 11:50 a.m., in the Council's session room, Francisco Carrasquero López, Ezequiel Zamora Presilla, Jorge Rodríguez Gómez (Jorge Rodríguez), Sobella Mejías, and William Pacheco Medina, Vice President, the directors of the Secretary General of Electoral Voters respectively, in order to proceed with the delivery to the technical commissions, designated at the meeting dated 13 February 2004, they opened the tender envelopes containing the tenders of the companies that wanted to be awarded a contract for the automation of Venezuela's voting system and the processes used to carry out the 2004 referendum on the revocation of Hugo Chavez's election. Below you can read the amounts of offers made by Smartmatic SBC, Diebold and other bidders.

13. Then, on page DIAZ 000031, there is an internal note from the Director General of Administration, Mr. Medina. It was dated 14 February 2004 and said that a report on the research and evaluation of companies bidding for the automation of the voting system needed to be prepared.

14. It would then draw attention to the page marked DIAZ 000029. It is a document made on February 13, 2004. While this page is out of sequence, it shows the speed at which the decision was made to award the electoral system contract. The tender began on February 13 and had ended on February 16th -- a three-day period to review contracts and evaluate the specifications and performance of bidders' systems, including software, hardware, security, performance and bidding costs for the procurement, installation, training and operation of the systems. By February 16th, a decision to choose Smartmatic was made. This is convincing evidence that there was no genuine competition for the electoral system contract or serious consideration for alternative contracts. There was no due diligence and the bidding was rigged. It is not possible that within three or four days to do the formal investigation to evaluate the bids and award a contract of this size and important. The impropriety of this action is confirmed by the fact that the contract with Smartmatic was signed a month later, on 15 March 2004.

15. After the contract was awarded to Smartmatic, it was learned that Smartmatic had no previous experience in conducting elections and electoral tabulations. More importantly, it was discovered that the Smartmatic voting system contained two-way communication functions that allowed voting data not only to be sent to a central system of operation and voting, but the central voting system in operation and tabulation to send operational instructions and data to voting machines. It is not mentioned in the contract documents and specifications that the system would be bidirectional and would allow the transmission of data and instructions from the central operating system directly to voting machines. One

simply has to examine the system diagram on page DIAZ 000057 of Exhibit 1. If this feature of the Smartmatic system had been disclosed to the Electoral Council, it could not have adequately accepted Smartmatic's offer because it would allow the Smartmatic voting system to be handled in a way that manipulated votes and interfered with the legitimate voting and electoral process by impersonating the will to govern officials with the will of the electorate: the citizens of Venezuela. It was not surprising that Hugo Chávez and his successors then constantly won the election through the use and manipulation of the Smartmatic voting system.

16. In the 16 years since I left my post as Director General of Political Parties at the National Electoral Council of Venezuela, I have studied the electoral systems of Bolivia, Colombia, Ecuador, Guatemala, Honduras and Nicaragua and have observed elections and participated in pro-democratic forums in Colombia, Ecuador, Honduras and Nicaragua. I have also studied and researched electoral processes in Europe, participating in public academic conferences in Spain and Italy on the subject of democratic electoral processes.

17. Based on my specialized experiences with electoral systems, I have a firm view that no legitimate electronic voting system should be allowed to have the ability of two-way communications to send data and instructions between central tabulation operations and voting machines over telephone lines or the Internet. Having such characteristics compromise the integrity of the entire voting process by allowing injection of data and instructions to manipulate voting before, during and after an election and to avoid detection of processes and mechanisms designed to prevent voting manipulation and fraud.

I declare under penalty of perjury that the above is true and correct and that this Statement was prepared in Dallas County, Texas, and executed on November 20, 2020.

Ana Mercedes Díaz Cardozo

Declaration of Seth Keshel

Pursuant to 28 U.S.C Section 1746, I, Seth Keshel, make the following declaration.

1. I am over the age of 21 years and I am under no legal disability, which would prevent me from giving this declaration.
2. I am a trained data analyst with experience in multiple fields, including service in the United States Army as a Captain of Military Intelligence, with a one-year combat tour in Afghanistan. My experience includes political involvement requiring a knowledge of election trends and voting behavior.
3. I reside at 233 Muir Hill Dr., Aledo, TX 76008.
4. My declaration highlights substantial deviance from statistical norms and results regarding voting patterns in Wisconsin.
5. All 2020-related voting totals are taken from the Decision Desk HQ unofficial tracker, are not certified, and are subject to change from the time of the creation of this declaration.
6. Wisconsin has shown a steady decrease for support in Democratic presidential nominees since Barack Obama won the state by 13.91% in 2008. He won Wisconsin again in 2012, but only by a margin of 6.94%, and Republican Donald Trump won the state by 0.77% in 2016.
7. As part of an overall working-class voter shift, Wisconsin has moved in the same manner as Pennsylvania, Ohio, Michigan, and Minnesota – decreasing levels of support for Democratic nominees, and by consequence of this shift, increasing levels of support for Republican

nominees. This shift is captured in visual form in Exhibit A to this declaration.

8. The following counties have cast more Democratic presidential votes than cast for Obama in 2008, when he won the state by 13.91%:
    a. Ozaukee – 26,515 Biden votes, a 31.5% increase from 2016, and 28.8% more than cast for Obama in 2008. President Trump has increased his vote share by 11.3%, receiving 33,912 votes. Democratic vote shifts were -6.9% in 2012 and +5.3% in 2016.
    b. Dane – 260,157 Biden votes, a 19.5% increase from 2016, and 26.3% more than cast for Obama in 2008. President Trump has increased his vote share by 10.5%, receiving 78,789 votes. Democratic vote shifts were +4.9% in 2012 and +0.8% in 2016. Dane County is home to the University of Wisconsin. President Obama had record support, turnout, and enthusiasm among college-age students and did not have to navigate pandemic-related challenges to turn out these voters, which makes Biden's total extremely suspicious.
    c. Waukesha – 103,867 Biden votes, a 31.1% increase from 2016, and 21.7% more than cast for Obama in 2008. President Trump has increased his vote share by 12.0%, receiving 159,633 votes. Democratic vote shifts were -7.7% in 2012 and +0.6% in 2016.
    d. St. Croix - 23,190 Biden votes, a 32.7% increase from 2016, and 9.5% more than cast for Obama in 2008. President Trump has increased his vote share by 22.8%, receiving 32,190 votes. Democratic vote shifts were -6.0% in 2012 and -12.2% in 2016,

making such a sharp Democratic turnabout in the face of a strong President Trump vote increase extremely suspect.

e. Washington - 26,647 Biden votes, a 27.8% increase from 2016, and 3.6% more than cast for Obama in 2008. President Trump has increased his vote share by 16.4%, receiving 60,235 votes. Democratic vote shifts were -9.9% in 2012 and -10.0% in 2016. A rebound of 27.8% for Democrats from two consecutive cycles of heavy losses, particularly with President Trump reconsolidating the Republican Party base and lost third-party voters, seems unlikely.

f. Bayfield - 6,155 Biden votes, a 24.3% increase from 2016, and 3.1% more than cast for Obama in 2008. President Trump has increased his vote share by 12.0%, receiving 4,617 votes. Democratic vote shifts were +1.0% in 2012 and -18.9% in 2016.

9. Milwaukee County's voter rolls shrank from 2016 to 2020, after losing 13.1% of President Obama's Democratic vote total from 2012; however, this year, Milwaukee County has surged in Democratic votes to nearly equal Obama re-election levels with 317,251 votes, even as President Trump has made an increase of 6.6% in votes. With a declining voter roll, Milwaukee County was likely on track to cast less than 275,000 Democratic ballots this year. Combining these resurgent totals with the transparency issues experienced on the early morning hours of November 4, their current total of 317,251 is strikingly suspect.

10. *New York Times* live vote reporting shows a dump of 168,541 votes at 3:42:20 (a.m.) on November 4, 2020. Of those votes, 143,378

(85.07%) went for Biden, and just 25,163 (14.93%) went for Trump. This dump was enough to flip the race with almost no transparency to the viewing public. The live graph showing this vote dump (circled) is attached as Exhibit D to this document.

11. President Trump has vastly increased his vote share in the entirety of Wisconsin, and also in the rural parts of the state, including the counties he flipped from Democratic to Republican in 2016; however, against the trends of the previous election, the Democrats have increased at greater margins than Trump has, thereby erasing margin gain, and allowing for suspicious vote totals in Milwaukee, Dane, Ozaukee, Waukesha, St. Croix, and other counties with strikingly high Democratic vote totals to overwhelm Trump's totals. A county classification of Wisconsin is available in Exhibit B to this declaration, and a full analysis of Wisconsin's voter irregularities is available in Exhibit C.

Seth Keshel

17 Nov. 2020

Aledo, Texas

Improbable Voting Trend Reversals in Wisconsin

Seth Keshel, MBA

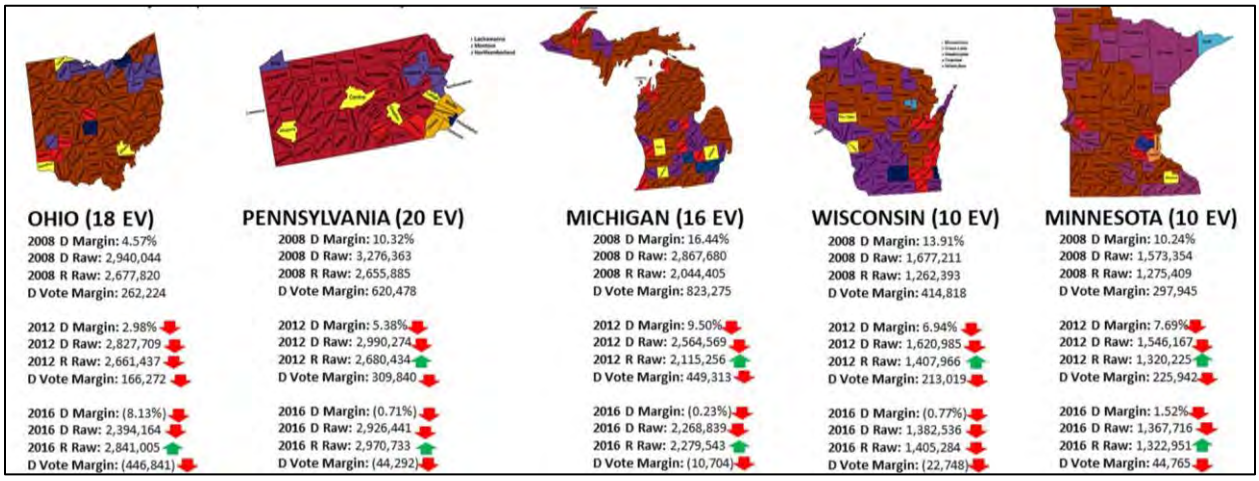
Executive Summary

Wisconsin is showing the same pattern of potential widespread fraud as observed in Pennsylvania, Michigan, Georgia, and North Carolina. While Milwaukee County is focal for transparency and observation violations, including reporting statistically impossible vote counts in the early morning hours away from scrutiny, Dane County has surged far past support totals for President Obama, despite expected difficulties mobilizing student voters to polls. President Trump has reconsolidated the Republican base in suburban Milwaukee and far surpassed his 2016 support levels but has been limited in margin growth by historically improbable Democratic support in these strongholds, which defy years of data in Wisconsin in which the Republican party surged as the Democratic Party plunged. Finally, in strong Trump counties showing a double inversion cycle (one party up, the other down), particularly in rural and exurban Wisconsin, Trump's totals are soaring, and against established trends, Biden's totals are at improbable levels of support despite lacking registration population growth.

The entire vote must be recanvassed and audited for both electronic vote fraud and mail/absentee fraud.

Opening

Since President Obama swept through the Midwest ("Rust Belt") region in 2008, winning Pennsylvania by 10 percent, Michigan by 16 percent, and Wisconsin by 14 percent, the Democratic Party has declined steadily in all successive Presidential elections in not only share of the vote, but in raw votes overall, without exception (pending the final results of the 2020 election). Pennsylvania is the only state mentioned in this paragraph which registers voters by party, and it has trended three percentage points in favor of Republicans since the 2016 election. The raw vote trends and results in these three states, plus Ohio and Minnesota, are pictured below.



These trends show the Democrats losing raw votes in every election since 2008, with the Republicans gaining in eight of 10 samples, and with the margins moving in favor of Republicans each time. This is a product of limited or stagnant population growth in these states, which given stable turnout numbers, means one party is typically going down if another is going up. In fast-growing states such as Florida, Texas, or Arizona, it should be expected for both parties to make substantial gains in a "horse race" scenario.

Wisconsin

President Obama's margin of victory in Wisconsin from 2008 fell from 13.91% to 6.94% in his reelection campaign, and that margin moved 7.71% toward Republicans in 2016 as the working-class communities that historically favored Democrats moved to support then-candidate Donald Trump. Declining voting power from these working class counties beginning and 2012, and then from Milwaukee County in 2016 was an instrumental part of this shift, as was the substantial movement of northern Wisconsin toward the Republican Party. President Trump was able to win Wisconsin in 2016 thanks to substantially decreased support for Democrats, and even overcame less than optimal support from the Republican strongholds of southeastern Wisconsin.

The consistent characteristic in the shift in Wisconsin's political landscape is the declining Democratic Party raw vote totals, and the increasing Republican totals. Thus far, according to the Decision Desk unofficial vote tally, President Trump is substantially adding to his vote totals in every Wisconsin County, while his opponent adds votes at a greater percentage, often in counties that have trended steadily away from Democrats since at least 2008. The following counties, which have mostly lost Democratic votes since 2008, have now contributed more Biden votes than Obama received in 2008, when he won the state by 13.91%. Green font represents growth in raw votes. Red font represents decrease in raw votes.

County	Rep '08	Dem '08	Rep '12	Dem '12	Rep '16	Dem '16	Rep '20	Dem '20	Dem Percentage of Obama 2008 Votes
Ozaukee	32,172	20,579	36,077	19,159	30,464	20,170	33,912	26,515	128.8%
% Increase	N/A	N/A	12.1%	(6.9%)	(15.6%)	5.3%	11.3%	31.5%	

Dane	73,065	205,984	83,644	216,071	71,275	217,697	78,789	260,157	126.3%
% Increase	N/A	N/A	14.5%	4.9%	(14.8%)	0.8%	10.5%	19.5%	

Waukesha	145,152	85,339	162,798	78,779	142,543	79,224	159,633	103,867	121.7%
% Increase	N/A	N/A	12.2%	(7.7%)	(12.4%)	0.6%	12.0%	31.1%	

Racine	45,954	53,408	49,347	53,008	46,681	42,641	54,475	50,154	117.6%
% Increase	N/A	N/A	7.4%	(0.7%)	(5.4%)	(19.6%)	16.7%	17.6%	

St. Croix	22,837	21,177	25,503	19,910	26,222	17,482	32,190	23,190	109.5%
% Increase	N/A	N/A	11.7%	(6.0%)	2.8%	(12.2%)	22.8%	32.7%	

Wash'ton	47,729	25,719	54,765	23,166	51,740	20,852	60,235	26,647	103.6%
% Increase	N/A	N/A	14.7%	(9.9%)	(5.5%)	(10.0%)	16.4%	27.8%	

Bayfield	3,365	5,972	3,603	6,033	4,124	4,953	4,617	6,155	103.1%
% Increase	N/A	N/A	7.1%	1.0%	14.5%	(18.9%)	12.0%	24.3%	

OTHER NOTABLE COUNTIES

County	Rep '08	Dem '08	Rep '12	Dem '12	Rep '16	Dem '16	Rep '20	Dem '20	Dem Percentage of Obama 2008 Votes
Milwaukee	149,445	319,819	154,924	332,438	126,069	288,822	134,355	317,251	99.2%
% Increase	N/A	N/A	3.7%	3.9%	(18.6%)	(13.1%)	6.6%	9.8%	

La Crosse	23,701	38,524	25,751	36,693	26,378	32,406	28,661	37,817	98.5%
% Increase	N/A	N/A	8.6%	(4.8%)	2.4%	(11.7%)	8.7%	16.7%	

Brown	55,854	67,269	64,836	62,526	67,210	53,382	75,865	65,509	97.4%
% Increase	N/A	N/A	16.1%	(7.1%)	3.7%	(14.6%)	12.9%	22.7%	

Eau Claire	20,959	33,146	23,256	30,666	23,331	27,340	25,339	31,617	95.6%
% Increase	N/A	N/A	11.0%	(7.5%)	0.3%	(10.8%)	8.6%	15.6%	

Outagamie	39,667	50,294	47,372	45,659	49,879	38,068	58,379	47,659	94.8%
% Increase	N/A	N/A	19.4%	(9.2%)	5.3%	(16.4%)	17.0%	25.2%	

Walworth	25,485	24,117	29,006	22,552	28,863	18,710	33,844	22,783	94.2%
% Increase	N/A	N/A	13.8%	(6.7%)	(0.5%)	(17.0%)	17.3%	21.8%	

Rock	27,364	50,529	30,517	49,219	31,493	39,339	37,133	46,649	92.3%
% Increase	N/A	N/A	11.5%	(2.6%)	3.2%	(20.1%)	17.9%	18.6%	

Kenosha	31,609	45,836	34,977	44,867	36,037	35,799	44,972	42,191	92.0%
% Increase	N/A	N/A	10.6%	(2.1%)	3.0%	(20.2%)	24.8%	17.9%	

Winnebago	37,946	48,167	42,122	45,449	43,445	37,047	47,795	44,060	91.5%
% Increase	N/A	N/A	11.0%	(5.6%)	3.1%	(18.5%)	10.0%	18.9%	

Sheboygan	30,801	30,395	34,072	27,918	32,514	23,000	37,624	27,109	89.2%
% Increase	N/A	N/A	10.6%	(8.1%)	(4.6%)	(17.6%)	15.7%	17.9%	

Fond D.L.	28,164	23,463	30,355	22,379	31,022	17,387	35,754	20,588	87.7%
% Increase	N/A	N/A	7.8%	(4.6%)	2.1%	(22.3%)	15.3%	18.4%	

Marathon	30,345	36,367	36,617	32,363	39,014	26,481	44,623	30,807	84.7%
% Increase	N/A	N/A	20.7%	(11.0%)	6.5%	(18.2%)	14.4%	16.3%	

Findings

The most suspicious counties are those that showed two consecutive elections trending upward for the Republican candidate and downward for the Democratic candidate. These show a similar pattern to counties in Pennsylvania trending heavily Republican in registration, with a significant increase for President Trump in raw votes in 2020, but a smaller than expected margin due to an unexpected sharp reversal of votes for Biden in counties showing inverse trends for parties in recent elections. The only counties not showing two consecutive cycles of decline for Democrats are Waukesha, Bayfield, and Milwaukee. Wisconsin had several Republican counties in 2016 with fewer votes for Trump and higher third-party vote shares (hence 2,682 fewer votes for Trump than Romney), but based on 2020 returns to this point, that has been overcome in every single county.

Dane County is clearly associated with a major university, with student turnout thought to be reaching record lows due to campus shutdowns and lack of mobilization. This county is over 2008 Obama levels by 26.3% (54,173 votes), when that candidate drew record support from young voters, and up 19.5% since 2016, after two consecutive elections of sparse growth in Democrat votes. This county is one of few counties Obama overperformed in for his reelection, and 2020's total is still 20.4% over that number. The same mathematical improbability given the circumstances of 2020 was also seen in Washtenaw County, Michigan (home county of the University of Michigan). Dane County should be audited and recanvassed significantly, particularly for mail and absentee ballot fraud.

Trump slightly underperformed Romney's 2012 vote totals statewide because he lagged in total votes from suburban counties Waukesha, Racine, Washington, Ozaukee, and Walworth. This year, he has reconsolidated the Republican base and improved at a minimum of 11.3% (Ozaukee) in raw votes in these counties, and at a high of 17.3% (Walworth). President Trump has grown his share of raw votes in Wisconsin by a minimum of 4.1% (Menominee) in all counties, and at a high of 24.8% (Kenosha).

Among the largest counties in the state, the largest spikes in growth since 2016 by the Democratic candidate came in St. Croix (32.7%), Ozaukee (31.5%), Waukesha (31.1%), Washington (27.7%), placing them ahead of President Obama's total of votes in those counties in 2008, a year in

which he won the state by 13.91%. This could be feasible if the inverse pattern of "one party up, one party down" were present, suggesting the transfer of voters from one party to the next, but President Trump has also greatly overperformed his 2016 vote totals and does not exhibit the collapse in support seen by Democrats in 2012 and 2016, especially in known Republican strongholds. While it is plausible that Democrats should add votes in those counties based on observed party registration trends in the Philadelphia area, it is unfathomable that those counties would overperform their 2008 Obama vote numbers by such margins, while still adding substantial increases in raw votes to President Trump in 2020.

Despite ranking 67th in the state in percentage increase in voter registrations, Milwaukee County increased its share of Democratic votes by 9.8%, even as President Trump increased by 6.6% while supposedly securing a higher share of minority votes than any Republican since 1960. Biden's total is nearly equal to Obama's 2008 performance and reverses a massive loss of Democratic votes in 2016 in a post-Obama environment, despite a decreasing voter roll (more than 3% decrease in registrations since 2016). Strangely, Milwaukee's turnout dwarfs other regional counterparts like Cleveland, Gary, and Indianapolis. This county is reported to have had many flagrant abuses of transparency regulations and is also known to have reported results without observation in the early morning hours of November 4, 2020, which was just enough to overcome a once formidable lead in the state by President Trump. The best course of action in Milwaukee is to recanvass and audit every mail-in and absentee ballot for massive fraud. The trend in Cleveland, Detroit, Milwaukee, and Philadelphia recently has suggested decreasing vote totals from one election to the next and is supported by the aforementioned significant decrease in the voter rolls in Milwaukee. This year's reported vote totals necessitate and improbable turnout level and suggest illegality in reporting and mail balloting.

All counties showing two consecutive cycles of inverse party trend (Republican up twice, Democrat down twice), with Democrats substantially up this year, may be subject to counting errors, or "glitches," like those reported in Antrim County, Michigan, or even recently in Rock County, Wisconsin. These voting machines and their associated software should be audited and examined by coding professionals, especially if the recent newsworthy events regarding corrupted voting software are widespread. It is highly possible that tampered or corrupted software in known Trump strongholds may be responsible for reducing margins of raw vote victory in counties that have massively left the Democratic Party since 2008.

The entire vote in Wisconsin is suspect against recent trends and should be subject to recanvass and audit, not just a recount of hundreds of thousands of illegal ballots. It appears that the major case in the state is that in spite of substantially growing his vote share in strong-Trump counties, and surging in votes in urban and suburban counties, Trump's margin is substantially limited, even after two consecutive inverse party trends. In urban or suburban areas, Democratic vote share is soaring to record numbers, even over Obama's totals after a 13.91% win, all while Trump surges in votes in those counties as well. Urban areas have issues with transparency and should be fully audited for mail and absentee fraud.

Ballot-Marking Devices (BMDs) Cannot Assure the Will of the Voters

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December 27, 2019

Abstract

The complexity of U.S. elections usually requires computers to count ballots—but computers can be hacked, so election integrity requires a voting system in which paper ballots can be recounted by hand. However, paper ballots provide no assurance unless they accurately record the vote as the voter expresses it.

Voters can express their intent by indelibly hand-marking ballots, or using computers called ballot-marking device (BMDs). Voters can make mistakes in expressing their intent in either technology, but only BMDs are also subject to hacking, bugs, and misconfiguration of the software that prints the marked ballots. Most voters do not review BMD-printed ballots, and those who do often fail to notice when the printed vote is not what they expressed on the touchscreen. Furthermore, there is no action a voter can take to demonstrate to election officials that a BMD altered their expressed votes, nor is there a corrective action that election officials can take if notified by voters—there is no way to deter, contain, or correct computer hacking in BMDs. These are the essential security flaws of BMDs.

Risk-limiting audits can assure that the votes recorded on paper ballots are tabulated correctly, but no audit can assure that the votes on paper are the ones expressed by the voter on a touchscreen: Elections conducted on current BMDs cannot be confirmed by audits. We identify two properties of voting systems, *contestability* and *defensibility*, necessary for audits to confirm election outcomes. No available EAC-certified BMD is contestable or defensible.

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1 Introduction: Criteria for Voting Systems

Elections for public office and on public questions in the United States or any democracy must produce outcomes based on the votes that voters *express* when they indicate their choices on a paper ballot or on a machine. Computers have become indispensable to conducting elections, but computers are vulnerable. They can be hacked—compromised by insiders or external adversaries who can replace their software with fraudulent software that deliberately miscounts votes—and they can contain design errors and bugs—hardware or software flaws or configuration errors that result in mis-recording or mis-tabulating votes. Hence there must be some way, *independent* of any software in any computers, to ensure that reported election outcomes are correct, i.e., consistent with the expressed votes as intended by the voters.

Voting systems should be *software independent*, meaning that "an undetected change or error in its software cannot cause an undetectable change or error in an election outcome" [29, 30, 31]. Software independence is similar to tamper-evident packaging: if somebody opens the container and disturbs the contents, it will leave a trace.

The use of software-independent voting systems is supposed to ensure that if someone fraudulently hacks the voting machines to steal votes, we'll know about it. But we also want to know *the true outcome* in order to avoid a do-over election.[1] A voting system is *strongly software independent* if it is software independent and, moreover, a detected change or error in an election outcome (due to change or error in the software) can be corrected using only the ballots and ballot records of the current election [29, 30]. Strong software independence combines tamper evidence with a kind of resilience: there's a way to tell whether faulty software caused a problem, and a way to recover from the problem if it did.

Software independence and *strong software independence* are now standard terms in the analysis of voting systems, and it is widely accepted that voting systems should be software independent. Indeed, version 2.0 of the Voluntary Voting System Guidelines (VVSG 2.0) incorporates this principle [10].

But as we will show, these standard definitions are incomplete and inadequate, because in the word *undetectable* they hide several important questions: *Who* detects the change or error in an election outcome? How can a person *prove* that she has detected

[1] Do-overs are expensive; they may delay the inauguration of an elected official; there is no assurance that the same voters will vote in the do-over election as voted in the original; they decrease public trust. And if the do-over election is conducted with the same voting system that can only detect but not correct errors, then there may need to be a do-over of the do-over, *ad infinitum.*

an error? *What happens* when someone detects an error—does the election outcome remain erroneous? Or conversely: How can an election administrator *prove* that the election outcome not been altered, or prove that the correct outcome was recovered if a software malfunction was detected? The standard definition does not distinguish evidence available to an election official, to the public, or just to a single voter; nor does it consider the possibility of false alarms.

Those questions are not merely academic, as we show with an analysis of ballot-marking devices. Even if some *voters* "detect" that the printed output is not what they expressed to the BMD—even if some of *those* voters report their detection to election officials—there is no mechanism by which the *election official* can "detect" whether a BMD has been hacked to alter election outcomes. The questions of *who detects, and then what happens,* are critical—but unanswered by the standard definitions.

We will define the terms *contestable* and *defensible* to better characterize properties of voting systems that make them acceptable for use in public elections.[2]

A voting system is *contestable* if an undetected change or error in its software that causes a change or error in an election outcome can always produce *public* evidence that the outcome is untrustworthy. For instance, if a voter selected candidate A on the touchscreen of a BMD, but the BMD prints candidate B on the paper ballot, then this A-vs-B evidence is available to the individual voter, but the voter cannot demonstrate this evidence to anyone else, since nobody else saw—nor should have seen—where the voter touched the screen.[3] Thus, the voting system does not provide a way for the voter who observed the misbehavior to prove to anyone else that there was a problem, even if the problems altered the reported outcome. Such a system is therefore not *contestable*.

While the definition of software independence might allow evidence available only to individual voters as "detection," such evidence does not suffice for a system to be contestable. Contestibility is software independence, plus the requirement that "detect" implies "can generate public evidence." "Trust me" does not count as public evidence. If a voting system is not contestable, then problems voters "detect" might never see the light of day, much less be addressed or corrected.[4]

[2]There are other notions connected to contestability and defensibility, although essentially different: Benaloh et al. [6] define a *P-resilient canvass framework*, *personally verifiable P-resilient canvass framework*, and *privacy-perserving personally verifiable P-resilient canvass frameworks*.

[3]See footnote 18.

[4]If voters are the only means of detecting and quantifying the effect of those problems—as they are for BMDs—then in practice the system is not strongly software independent. The reason is that, as we will show, such claims by (some) voters *cannot* correct software-dependent changes to other voters' ballots, and *cannot* be used as the basis to invalidate or correct an election outcome. Thus, BMD-based

Similarly, while strong software independence demands that a system be able to report the correct outcome even if there was an error or alteration of the software, it does not require *public evidence* that the (reconstructed) reported outcome is correct. We believe, therefore, that voting systems must also be *defensible*. We say that a voting system is defensible if, when the reported electoral outcome is correct, it is possible to generate convincing public evidence that the reported electoral outcome is correct—despite any malfunctions, software errors, or software alterations that might have occurred. If a voting system is not defensible, then it is vulnerable to "crying wolf": malicious actors could claim that the system malfunctioned when in fact it did not, and election officials will have no way to prove otherwise.

By analogy with *strong software independence*, we define: A voting system is *strongly defensible* if it is defensible and, moreover, a detected change or error in an election outcome (due to change or error in the software) can be corrected (with convincing public evidence) using only the ballots and ballot records of the current election.

In short, a system is contestable if it can generate public evidence of a problem whenever a reported outcome is wrong, while a system is defensible if it can generate public evidence whenever a reported outcome is correct—despite any problems that might have occurred. Contestable systems are publicly tamper-evident; defensible systems are publicly, demonstrably resilient.

Defensibility is a key requirement for *evidence-based elections* [38]: defensibility makes it possible in principle for election officials to generate convincing evidence that the reported winners really won—if the reported winners did really win. (We say an election *system* may be defensible, and an *election* may be evidence-based; there's much more *process* to an election than just the choice of system.)

Examples. The only known practical technology for contestable, strongly defensible voting is a system of *hand-marked paper ballots*, kept demonstrably physically secure, counted by machine, audited manually, and recountable by hand.[5] In a hand-marked paper ballot election, ballot-marking software cannot be the source of an error or change-of-election-outcome, because no software is used in marking ballots. Ballot-scanning-and-counting software can be the source of errors, but such errors can be

election systems are not even (weakly) software independent, unless one takes "detection" to mean "somebody claimed there was a problem, with no evidence to support that claim."

[5]The election must also generate convincing evidence that physical security of the ballots was not compromised, and the audit must generate convincing public evidence that the audit itself was conducted correctly.

detected and corrected by audits.

That system is *contestable:* if an optical scan voting machine reports the wrong outcome because it miscounted (because it was hacked, misprogrammed, or miscalibrated), the evidence is *public*: the paper ballots, recounted before witnesses, will not match the claimed results, also witnessed. It is *strongly defensible:* a recount before witnesses can demonstrate that the reported outcome is correct, or can find the correct outcome if it was wrong—and provide public evidence that the (reconstructed) outcome is correct.

Some other paper-based systems such as Prêt-à-Voter [32] and Scantegrity [9] are also contestable and strongly defensible (provided the marked ballots are kept demonstrably secure through tabulation and posting). Scantegrity inherits these properties from the fact that it amounts to a cryptographic enhancement of hand-marked paper ballots. Prêt-à-Voter has these properties if the blank ballots are audited appropriately before the election.

Paper-based systems that rely on the "Benaloh challenge"—to ensure that the encryption of the vote printed on the ballot (by an electronic device) is correct—generally are neither contestable nor defensible.[6] The reason is that, while the challenge can produce public evidence that a machine did not accurately encrypt the plaintext vote on the ballot, if the machine prints the wrong plaintext vote and a correct encryption of that incorrect vote, there is no evidence the voter can use to prove that to anyone else. STAR-Vote [5] is an example of such a system.

Over 40 states now use some form of paper ballot for most voters [18]. Most of the remaining states are taking steps to adopt paper ballots. But *not all voting systems that use paper ballots are equally secure*.

Some are not even software independent. Some are software independent, but not strongly software independent, contestable, or defensible. In this report we explain:

- *Hand-marked paper ballot* systems are the only practical technology for contestable, strongly defensible voting systems.
- *Some ballot-marking devices (BMDs)* can be software independent, but they not strongly software independent, contestable, or defensible. Hacked or misprogrammed BMDs can alter election outcomes undetectably, so elections conducted using BMDs cannot provide public evidence that reported outcomes are correct. If BMD malfunctions are detected, there is no way to determine who

[6] Nor are they strongly software independent.

really won. Therefore BMDs should not be used by voters who are able to mark an optical-scan ballot with a pen.

- *All-in-one BMD or DRE+VVPAT voting machines* are not software independent, contestable, or defensible. They should not be used in public elections.

2 Background

We briefly review the kinds of election equipment in use, their vulnerability to computer hacking (or programming error), and in what circumstances risk-limiting audits can mitigate that vulnerability.

Voting equipment

Although a voter may form an intention to vote for a candidate or issue days, minutes, or seconds before actually casting a ballot, that intention is a psychological state that cannot be directly observed by anyone else. Others can have access to that intention through what the voter (privately) *expresses* to the voting technology by interacting with it, e.g., by making selections on a BMD or marking a ballot by hand.[7] Voting systems must accurately record the vote as the voter *expressed* it.

With a *hand-marked paper ballot optical-scan* system, the voter is given a paper ballot on which all choices (candidates) in each contest are listed; next to each candidate is a *target* (typically an oval or other shape) which the voter marks with a pen to indicate a vote. Ballots may be either preprinted or printed (unvoted) at the polling place using *ballot on demand* printers. In either case, the voter creates a tamper-evident record of intent by marking the printed paper ballot with a pen.

Such hand-marked paper ballots may be scanned and tabulated at the polling place using a *precinct-count optical scanner* (PCOS), or may be brought to a central place to

[7] We recognize that voters make mistakes in expressing their intentions. For example, they may misunderstand the layout of a ballot or express an unintended choice through a perceptual error, inattention, or lapse of memory. The use of touchscreen technology does not necessarily correct for such user errors, as every smartphone user who has mistyped an important text message knows. Poorly designed ballots, poorly designed touchscreen interfaces, and poorly designed assistive interfaces increase the rate of error in voters' expressions of their votes. For the purposes of this report, we assume that properly engineered systems seek to minimize such usability errors.

be scanned and tabulated by a *central-count optical scanner* (CCOS). Mail-in ballots are typically counted by CCOS machines.

After scanning a ballot, a PCOS machine deposits the ballot in a secure, sealed ballot box for later use in recounts or audits; this is *ballot retention*. Ballots counted by CCOS are also retained for recounts or audits.[8]

Paper ballots can also be hand counted, but in most jurisdictions (especially where there are many contests on the ballot) this is hard to do quickly; Americans expect election-night reporting of unofficial totals. Hand counting—i.e., manually determining votes directly from the paper ballots—is appropriate for audits and recounts.

A *ballot-marking device* (BMD) provides a computerized user interface that presents the ballot to voters and captures their expressed selections—for instance, a touchscreen interface or an assistive interface that enables voters with disabilities to vote independently. Voter inputs (expressed votes) are recorded electronically. When a voter indicates that the ballot is complete and ready to be cast, the BMD prints a paper version of the electronically marked ballot. We use the term *BMD* for devices that mark ballots but do not tabulate or retain them, and *all-in-one* for devices that combine ballot marking, tabulation, and retention into the same paper path.

The paper ballot printed by a BMD may be in the same format as an optical-scan form (e.g., with ovals filled as if by hand) or it may list just the names of the candidate(s) selected in each contest. The BMD may also encode these selections into barcodes or QR codes for optical scanning. We discuss issues with barcodes later in this report.

An *all-in-one touchscreen voting machine* combines computerized ballot marking, tabulation, and retention in the same paper path. All-in-one machines come in several configurations:

- DRE+VVPAT machines—direct-recording electronic (DRE) voting machines with a voter-verifiable paper audit trail (VVPAT)—provide the voter a touchscreen (or other) interface, then print a paper ballot that is displayed to the voter under glass. The voter is expected to review this ballot and approve it, after which the machine deposits it into a ballot box. DRE+VVPAT machines do not contain optical scanners; that is, they do not read what is marked on the paper ballot; instead, they tabulate the vote directly from inputs to the touchscreen or other interface.

[8] Regulations and procedures governing custody and physical security of ballots are uneven and in many cases inadequate, but straightforward to correct because of decades of development of best practices.

- BMD+Scanner all-in-one machines[9] provide the voter a touchscreen (or other) interface to input ballot choices and print a paper ballot that is ejected from a slot for the voter to inspect. The voter then reinserts the ballot into the slot, after which the all-in-one BMD+scanner scans it and deposits it into a ballot box. Or, some BMD+Scanner all-in-one machines display the paper ballot behind plexiglass for the voter to inspect, before mechanically depositing it into a ballot box.

Opscan+BMD with separate paper paths. At least one model of voting machine (the Dominion ICP320) contains an optical scanner (opscan) and a BMD in the same cabinet,[10] so that the optical scanner and BMD-printer are not in the same paper path; no possible configuration of the software could cause a BMD-marked ballot to be deposited in the ballot box without human handling of the ballot. We do not classify this as an *all-in-one* machine.

Hacking

There are many forms of computer hacking. In this analysis of voting machines we focus on the alteration of voting machine software so that it miscounts votes or mismarks ballots to alter election outcomes. There are many ways to alter the software of a voting machine: a person with physical access to the computer can open it and directly access the memory; one can plug in a special USB thumbdrive that exploits bugs and vulnerabilities in the computer's USB drivers; one can connect to its WiFi port or Bluetooth port or telephone modem (if any) and exploit bugs in those drivers, or in the operating system.

"Air-gapping" a system (i.e., never connecting it to the Internet nor to any other network) does not automatically protect it. Before each election, election administrators must transfer a *ballot definition* into the voting machine by inserting a *ballot definition cartridge* that was programmed on election-administration computers that may have been connected previously to various networks; it has been demonstrated that vote-changing viruses can propagate via these ballot-definition cartridges [17].

Hackers might be corrupt insiders with access to a voting-machine warehouse; corrupt insiders with access to a county's election-administration computers; outsiders who can gain remote access to election-administration computers; outsiders who can

[9] Some voting machines, such as the ES&S ExpressVote, can be configured as either a BMD or a BMD+Scanner all-in-one. Others, such as the ExpressVoteXL, work only as all-in-one machines.

[10] More precisely, the ICP320 optical scanner and the BMD audio+buttons interface are in the same cabinet, but the printer is a separate box.

gain remote access to voting-machine manufacturers' computers (and "hack" the firmware installed in new machines, or the firmware updates supplied for existing machines), and so on. Supply-chain hacks are also possible: the hardware installed by a voting system vendor may have malware pre-installed by the vendor's component suppliers.[11]

Computer systems (including voting machines) have so many layers of software that it is impossible to make them perfectly secure [23, pp. 89–91]. When manufacturers of voting machines use the best known security practices, adversaries may find it more difficult to hack a BMD or optical scanner—but not impossible. Every computer in every critical system is vulnerable to compromise through hacking, insider attacks or exploiting design flaws.

Election assurance through risk-limiting audits

To ensure that the reported electoral outcome of each contest corresponds to what the voters expressed, the most practical known technology is a *risk-limiting audit* (RLA) of trustworthy paper ballots [34, 35, 22]. The National Academies of Science, Engineering, and Medicine, recommend routine RLAs after every election [23], as do many other organizations and entities concerned with election integrity.[12]

The *risk limit* of a risk-limiting audit is the maximum chance that the audit will not correct the reported electoral outcome, if the reported outcome is wrong. "Electoral outcome" means the political result—who or what won—not the exact tally. "Wrong" means that the outcome does not correspond to what the voters expressed.

A RLA involves manually inspecting randomly selected paper ballots following a rigorous protocol. The audit stops if and when the sample provides convincing evidence that the reported outcome is correct; otherwise, the audit continues until every ballot has been inspected manually, which reveals the correct electoral outcome if the paper trail is trustworthy. RLAs protect against vote-tabulation errors, whether those errors are caused by failures to follow procedures, misconfiguration, miscalibration, faulty

[11] Given that many chips and other components are manufactured in China and elsewhere, this is a serious concern. Carsten Schürmann has found Chinese pop songs on the internal memory of voting machines (C. Schürmann, personal communication, 2018). Presumably those files were left there accidentally—but this shows that malicious code *could* have been pre-installed deliberately, and that neither the vendor's nor the election official's security and quality control measures discovered and removed the extraneous files.

[12] Among them are the Presidential Commission on Election Administration, the American Statistical Association, the League of Women Voters, and Verified Voting Foundation.

engineering, bugs, or malicious hacking.[13]

The risk limit should be determined as a matter of policy or law. For instance, a 5% risk limit means that, if a reported outcome is wrong solely because of tabulation errors, there is at least a 95% chance that the audit procedure will correct it. Smaller risk limits give higher confidence in election outcomes, but require inspecting more ballots, other things being equal. RLAs never revise a correct outcome.

RLAs can be very efficient, depending in part on how the voting system is designed and how jurisdictions organize their ballots. If the computer results are accurate, an efficient RLA with a risk limit of 5% requires examining just a few—about 7 divided by the margin—ballots selected randomly from the contest.[14] For instance, if the margin of victory is 10% and the results are correct, the RLA would need to examine about $7/10\% = 70$ ballots to confirm the outcome at 5% risk. For a 1% margin, the RLA would need to examine about $7/1\% = 700$ ballots. The sample size does not depend much on the total number of ballots cast in the contest, only on the margin of the winning candidate's victory.

RLAs assume that a full hand tally of the paper trail would reveal the correct electoral outcomes: the paper trail must be trustworthy. Other kinds of audits, such as *compliance audits* [6, 22, 38, 36] are required to establish whether the paper trail itself is trustworthy. Applying an RLA procedure to an untrustworthy paper trail cannot limit the risk that a wrong reported outcome goes uncorrected.

Properly preserved hand-marked paper ballots ensure that expressed votes are identical to recorded votes. But BMDs might not record expressed votes accurately, for instance, if BMD software has bugs, was misconfigured, or was hacked: BMD printout is not a trustworthy record of the expressed votes. Neither a compliance audit nor a RLA can possibly check whether errors in recording expressed votes altered election outcomes. RLAs that rely on BMD output therefore cannot limit the risk that an incorrect reported election outcome will go uncorrected.

A paper-based voting system (such as one that uses optical scanners) is systematically more secure than a paperless system (such as DREs) *only if the paper trail is trustworthy and the results are checked against the paper trail using a rigorous method such as an RLA or full manual tally*. If it is possible that error, hacking, bugs, or mis-

[13] RLAs do not protect against problems that cause BMDs to print something other than what was shown to the voter on the screen, nor do they protect against problems with ballot custody.

[14] Technically, it is the *diluted margin* that enters the calculation. The diluted margin is the number of votes that separate the winner with the fewest votes from the loser with the most votes, divided by the number of ballots cast, including undervotes and invalid votes.

calibration caused the recorded-on-paper votes to differ from the expressed votes, an RLA or even a full hand recount cannot not provide convincing public evidence that election outcomes are correct: such a system cannot be *defensible*. In short, paper ballots provide little assurance against hacking if they are never examined or if the paper might not accurately reflect the votes expressed by the voters.

3 (Non)Contestability/Defensibility of BMDs

A BMD-generated paper trail is not a reliable record of the vote expressed by the voter. Like any computer, a BMD (or a DRE+VVPAT) is vulnerable to bugs, misconfiguration, hacking, installation of unauthorized (fraudulent) software, and alteration of installed software.

If a hacker sought to steal an election by altering BMD software, what would the hacker program the BMD to do? In cybersecurity practice, we call this the *threat model*.

The simplest threat model is this one: In some contests, not necessarily top-of-the-ticket, change a small percentage of the votes (such as 5%).

In recent national elections, analysts have considered a candidate who received 60% of the vote to have won by a landslide. Many contests are decided by less than a 10% margin. Changing 5% of the votes can change the margin by 10%, because "flipping" a vote for one candidate into a vote for a different candidate changes the difference in their tallies—i.e., the margin—by 2 votes. If hacking or bugs or misconfiguration could change 5% of the votes, that would be a very significant threat.

Although public and media interest often focus on top-of-the-ticket races such as President and Governor, elections for lower offices such as state representatives, who control legislative agendas and redistricting, and county officials, who manage elections and assess taxes, are just as important in our democracy. Altering the outcome of smaller contests requires altering fewer votes, so fewer voters are in a position to notice that their ballots were misprinted. And most voters are not as familiar with the names of the candidates for those offices, so they might be unlikely to notice if their ballots were misprinted, even if they checked.

Research in a real polling place in Tennessee during the 2018 election, found that half the voters *didn't look at all* at the paper ballot printed by a BMD, even when they were holding it in their hand and directed to do so while carrying it from the BMD to the optical scanner [13]. Those voters who did look at the BMD-printed ballot

spent *an average of 4 seconds* examining it to verify that the eighteen or more choices they made were correctly recorded. That amounts to 222 milliseconds per contest, barely enough time for the human eye to move and refocus under perfect conditions and not nearly enough time for perception, comprehension, and recall [27]. A study by other researchers [7], in a simulated polling place using real BMDs deliberately hacked to alter one vote on each paper ballot, found that only 6.6% of voters told a pollworker something was wrong.[15][16] The same study found that among voters who examined their hand-marked ballots, half were unable to recall key features of ballots cast moments before, a prerequisite step for being able to recall their own ballot choices. This finding is broadly consistent with studies of effects like "change blindness" or "choice blindness," in which human subjects fail to notice changes made to choices made only seconds before [19].

Suppose, then, that 10% of voters examine their paper ballots carefully enough to even *see* the candidate's name recorded as their vote for legislator or county commissioner. Of those, perhaps only half will remember the name of the candidate they intended to vote for.[17]

Of those who notice that the vote printed is not the candidate they intended to vote for, what will they think, and what will they do? Will they think, "Oh, I must have made a mistake on the touchscreen," or will they think, "Hey, the machine is cheating or malfunctioning!" There's no way for the voter to know for sure—voters do make mistakes—and there's *absolutely* no way for the voter to prove to a pollworker or election official that a BMD printed something other than what the voter entered on the

[15] You might think, "the voter really *should* carefully review their BMD-printed ballot." But because the scientific evidence shows that voters *do not* [13] and cognitively *cannot* [16] perform this task well, legislators and election administrators should provide a voting system that counts the votes *as voters express them*.

[16] Studies of voter confidence about their ability to verify their ballots are not relevant: in typical situations, subjective confidence and objective accuracy are at best weakly correlated. The relationship between confidence and accuracy has been studied in contexts ranging from eyewitness accuracy [8, 12, 40] to confidence in psychological clinical assessments [14] and social predictions [15]. The disconnect is particularly severe at high confidence. Indeed, this is known as "the overconfidence effect." For a lay discussion, see *Thinking, Fast and Slow* by Nobel economist Daniel Kahnemann [20].

[17] We ask the reader, "do you know the name of the most recent losing candidate for county commissioner?" We recognize that some readers of this document *are* county commissioners, so we ask those readers to imagine the frame of mind of their constituents.

screen.[18][19]

Either way, polling-place procedures generally advise voters to ask a pollworker for a new ballot if theirs does not show what they intended. Pollworkers should void that BMD-printed ballot, and the voter should get another chance to mark a ballot. Anecdotal evidence suggests that many voters are too timid to ask, or don't know that they have the right to ask, or are not sure whom to ask. Even if a voter asks for a new ballot, training for pollworkers is uneven, and we are aware of no formal procedure for resolving disputes if a request for a new ballot is refused. Moreover, there is no sensible protocol for ensuring that BMDs that misbehave are investigated—nor can there be, as we argue below.

Let's summarize. If a machine alters votes on 5% of the ballots (enabling it to change the margin by 10%), and 10% of voters check their ballots carefully and 50% of the voters who check notice the error, then optimistically we might expect $5\% \times 10\% \times 50\%$ or 0.25% of the voters to request a new ballot and correct their vote.[20] This means that the machine will change the margin by 9.75% and get away with it.

In this scenario, 0.25% of the voters, one in every 400 voters, has requested a new ballot. You might think, "that's a form of *detection* of the hacking." But is isn't, as a practical matter: a few individual voters may have detected that there was a problem, but there's no procedure by which this translates into any action that election administrators can take to correct the outcome of the election. Polling-place procedures *cannot correct or deter hacking, or even reliably detect it*, as we discuss next. This is essentially the distinction between a system that is merely software independent and one that is contestable: a change to the software that alters the outcome might generate evidence for an alert, conscientious, individual voter, but it does not generate public evidence that an election official can rely on to conclude there is a problem.

Even if some voters notice that BMDs are altering votes, there's no way to correct the election outcome. That is, BMD voting systems are *not contestable*, *not defen-*

[18] You might think, "the voter can prove it by showing someone that the vote on the paper doesn't match the vote onscreen." But that won't work. On a typical BMD, by the time a paper record is printed and ejected for the voter to hold and examine, the touchscreen no longer shows the voter's choice. You might think, "BMDs should be designed so that the choices still show on the screen for the voter to compare with the paper." But a hacked BMD could easily alter the on-screen choices to match the paper, *after* the voter hits the "print" button.

[19] Voters should *certainly not* videorecord themselves voting! That would defeat the privacy of the secret ballot and is illegal in most jurisdictions.

[20] This calculation assumes that the 10% of voters who check are in effect a random sample of voters: voters' propensity to check BMD printout is not associated with their political preferences.

sible (and therefore *not strongly defensible*), and *not strongly software independent*. Suppose a state election official wanted to detect whether the BMDs are cheating, and correct election results, based on actions by those few alert voters who notice the error. What procedures could possibly work against the manipulation we are considering?

1. How about, "If at least 1 in 400 voters claims that the machine misrepresented their vote, void the entire election."[21] No responsible authority would implement such a procedure. A few dishonest voters could collaborate to invalidate entire elections simply by falsely claiming that BMDs changed their votes.
2. How about, "If at least 1 in 400 voters claims that the machine misrepresented their vote, then investigate." Investigations are fine, but then what? The only way an investigation can ensure that the outcome accurately reflects what voters expressed to the BMDs is to void an election in which the BMDs have altered votes and conduct a new election. But how do you know whether the BMDs have altered votes, except based the claims of the voters?[22] Furthermore, the investigation itself would suffer from the same problem as above: how can one distinguish between voters who detected BMD hacking or bugs from voters who just want to interfere with an election?

This is the essential security flaw of BMDs: few voters will notice and promptly report discrepancies between what they saw on the screen and what is on the BMD printout, and even when they do notice, there's nothing appropriate that can be done. Even if election officials are convinced that BMDs malfunctioned, *there is no way to determine who really won*.

Therefore, BMDs should not be used by most voters.

Why can't we rely on pre-election and post-election logic and accuracy testing, or parallel testing? Most, if not all, jurisdictions perform some kind of *logic and accuracy testing* (LAT) of voting equipment before elections. LAT generally involves voting on the equipment using various combinations of selections, then checking whether the

[21] Note that in many jurisdictions, far fewer than 400 voters use a given machine on election day: BMDs are typically expected to serve fewer than 300 voters per day. (The vendor ES&S recommended 27,000 BMDs to serve Georgia's 7 million voters, amounting to 260 voters per BMD [33].) Recall also that the rate 1 in 400 is tied to the amount of manipulation. What if the malware flipped only one vote in 50, instead of 1 vote in 20? That could still change the margin by 4%, but—in this hypothetical—would be noticed by only one voter in 1,000, rather than one in 400. The smaller the margin, the less manipulation it would have taken to alter the electoral outcome.

[22] Forensic examination of the BMD might show that it *was* hacked or misconfigured, but it cannot prove that the BMD *was not* hacked or misconfigured.

equipment tabulated the votes correctly. As the Volkswagen/Audi "Dieselgate" scandal shows, devices can be programmed to behave properly when they are tested but misbehave in use [11]. Therefore, LAT can never prove that voting machines performed properly in practice.

Parallel or "live" testing involves pollworkers or election officials using some BMDs at random times on election day to mark (but not cast) ballots with test patterns, then check whether the marks match the patterns. The idea is that the testing is not subject to the "Dieselgate" problem, because the machines cannot "know" they are being tested on election day.[23] As a practical matter, the number of tests required to provide a reasonable chance of detecting outcome-changing errors is prohibitive: it would leave no time for actual voting [37]. Moreover, it would require additional staff, infrastructure, and other resources.

Suppose, counterfactually, that it was practical to perform enough parallel testing to guarantee a large chance of detecting a problem if BMD hacking or malfunction altered electoral outcomes. Suppose, counterfactually, that election officials were required to conduct that amount of parallel testing during every election, and that the required equipment, staffing, infrastructure, and other resources were provided. Even then, the system would not be *strongly defensible*; that is, if testing detected a problem, there would be no way to to determine who really won. The only remedy would be a new election.

Don't voters need to check hand-marked ballots, too? It is always a good idea to check one's work, but there is a substantial body of research (e.g., [28]) suggesting that preventing error as a ballot is being marked is a fundamentally different cognitive task than detecting an error on a previously marked ballot. In cognitively similar tasks, such as proof reading for non-spelling errors, ten percent rates of error detection are common [28, pp 167ff], whereas by carefully attending to the task of correctly marking their ballots, voters apparently can largely avoid marking errors.

A fundamental difference between hand-marked paper ballots and ballot-marking devices is that, with hand-marked paper ballots, voters are responsible for catching and

[23] BMDs do "know" their own settings and other aspects of each voting session, so malware can use that information to target sessions that use the audio interface, increase the font size, use the sip-and-puff interface, set the language to something other than English, or take much longer than average to vote. (Voters who use those settings might be less likely to be believed if they report that the equipment altered their votes.) For parallel testing to have a good chance of detecting all outcome-changing problems, the tests must have a large chance of probing *every* combination of settings and voting patterns that includes enough ballots to change any contest result. It is not practical.

correcting *their own errors*, while if BMDs are used, voters are also responsible for catching *machine errors, bugs, and hacking*. Voters are the *only* people who can detect such problems with BMDs—but, as explained above, if voters do find problems, there's no way they can prove to poll workers or election officials that there were problems and no way to ensure that election officials take appropriate remedial action.

4 Other tradeoffs, BMDs versus hand-marked opscan

Supporters of ballot-marking devices advance several other arguments for their use.

- **Mark legibility.** A common argument is that a properly functioning BMD will generate clean, error-free, unambiguous marks, while hand-marked paper ballots may contain mistakes and stray marks that make it impossible to discern a voter's intent. However appealing this argument seems at first blush, the data are not nearly so compelling. Experience with statewide recounts in Minnesota and elsewhere suggest that truly ambiguous handmade marks are very rare.[24] For instance, 2.9 million hand-marked ballots were cast in the 2008 Minnesota race between Al Franken and Norm Coleman for the U.S. Senate. In a manual recount, between 99.95% and 99.99% of ballots were unambiguously marked.[25] [26] In addition, usability studies of hand-marked bubble ballots—the kind in most common use in U.S. elections—indicate a *voter* error rate of 0.6%, much lower than the 2.5–3.7% error rate for machine-marked ballots [16].[27] Moreover, modern image-based opscan equipment (*digital scan* machinery) is better than older

[24] States do need clear and complete regulations for interpreting voter marks.

[25] "During the recount, the Coleman and Franken campaigns initially challenged a total of 6,655 ballot-interpretation decisions made by the human recounters. The State Canvassing Board asked the campaigns to voluntarily withdraw all but their most serious challenges, and in the end approximately 1,325 challenges remained. That is, approximately 5 ballots in 10,000 were ambiguous enough that one side or the other felt like arguing about it. The State Canvassing Board, in the end, classified all but 248 of these ballots as votes for one candidate or another. That is, approximately 1 ballot in 10,000 was ambiguous enough that the bipartisan recount board could not determine an intent to vote." [1] See also [25]

[26] We have found that some local election officials consider marks to be ambiguous if *machines* cannot read the marks. That is a different issue from *humans* being unable to interpret the marks. Errors in machine interpretation of voter intent can be dealt with by manual audits: if the reported outcome is wrong because machines misinterpreted handmade marks, a RLA has a known, large chance of correcting the outcome.

[27] Better designed user interfaces (UI) might reduce the error rate for machine-marked ballots below the historical rate for DREs; however, UI improvements cannot keep BMDs from printing something other than what the voter is shown on the screen.

"marksense" machines at interpreting imperfect marks. Thus, mark legibility is not a good reason to adopt BMDs for all voters.

- **Undervotes, overvotes.** Another argument offered for BMDs is that the machines can alert voters to undervotes and prevent overvotes. That is true, but modern PCOS systems can also alert a voter to overvotes and undervotes, allowing a voter to eject the ballot and correct it.
- **Bad ballot design.** Ill-designed paper ballots, just like ill-designed touchscreen interfaces, may lead to unintentional undervotes [24]. For instance, the 2006 Sarasota, Florida, touchscreen ballot was badly designed. The 2018 Broward County, Florida, opscan ballot was badly designed: it violated three separate guidelines from the EAC's 2007 publication, "Effective Designs for the Administration of Federal Elections, Section 3: Optical scan ballots." [39] In both of these cases (touchscreens in 2006, hand-marked optical-scan in 2018), undervote rates were high. The solution is to follow standard, published ballot-design guidelines and other best practices, both for touchscreens and for hand-marked ballots [3, 24].
- **Low-tech paper-ballot fraud.** All paper ballots, however they are marked, are vulnerable to *loss*, *ballot-box stuffing*, *alteration*, and *substitution* between the time they are cast and the time they are recounted. That's why it is so important to make sure that ballot boxes are always in multiple-person (preferably bipartisan) custody whenever they are handled, and that appropriate physical security measures are in place. Strong, verifiable chain-of-custody protections are essential.

  Hand-marked paper ballots are vulnerable to alteration by anyone with a pen. Both hand-marked and BMD-marked paper ballots are vulnerable to substitution: anyone who has poorly supervised access to a legitimate BMD during election day can create fraudulent ballots, not necessarily to deposit them in the ballot box immediately (in case the ballot box is well supervised on election day) but with the hope of substituting it later in the chain of custody.[28]

  All those attacks (on hand-marked and on BMD-marked paper ballots) are fairly low-tech. There are also higher-tech ways of producing ballots indistinguishable from BMD-marked ballots for substitution into the ballot box if there is inadequate chain-of-custody protection.
- **Accessible voting technology.** When hand-marked paper ballots are used with PCOS, there is (as required by law) also an accessible voting technology available in the polling place for voters unable to mark a paper ballot with a pen. This

[28] Some BMDs print a barcode indicating when and where the ballot was produced, but that does not prevent such a substitution attack against currently EAC-certified, commercially available BMDs. We understand that systems under development might make ballot-substitution attacks against BMDs more difficult.

is typically a BMD or a DRE. When the accessible voting technology is not the same as what most voters vote on—when it is used by very few voters—it may happen that the accessible technology is ill-maintained or even (in some polling places) not even properly set up by pollworkers. This is a real problem. One proposed solution is to require all voters to use the same BMD or all-in-one technology. But the failure of some election officials to properly maintain their accessible equipment is not a good reason to adopt BMDs for *all* voters. Among other things, it would expose all voters to the security flaws described above.[29] Other advocates object to the idea that disabled voters must use a different method of marking ballots, arguing that their rights are thereby violated. Both HAVA and ADA require reasonable accommodations for voters with physical and cognitive impairments, but neither law requires that those accommodations must be used by all voters. To best enable and facilitate participation by all voters, each voter should be provided with a means of casting a vote best suited to their abilities.

- **Ballot printing costs.** Preprinted optical-scan ballots cost 20–50 cents each.[30] Blank cards for BMDs cost up to 15 cents each, depending on the make and model of BMD.[31] But optical-scan ballots must be preprinted for as many voters as *might* show up, whereas blank BMD cards are consumed in proportion to how many voters *do* show up. The Open Source Election Technology Institute (OSET) conducted an independent study of total life cycle costs[32] for hand-marked paper ballots and BMDs in conjunction with the 2019 Georgia legislative debate regarding BMDs [26]. OSET concluded that, even in the most optimistic (i.e., lowest cost) scenario for BMDs and the most pessimistic (i.e, highest cost) scenario for hand-marked paper ballots and ballot-on-demand (BOD) printers—which can print unmarked ballots as needed—the total lifecycle costs for BMDs would be higher than the corresponding costs for hand-marked paper ballots.[33]
- **Vote centers.** To run a vote center that serves many election districts with different ballot styles, one must be able to provide each voter a ballot containing

[29] Also, some accessibility advocates argue that requiring disabled voters to use BMDs compromises their privacy since hand-marked ballots are easily distinguishable from machine marked ballots. That issue can be addressed without BMDs-for-all: Accessible BMDs are already available and in use that mark ballots with marks that cannot easily be distinguished from hand-marked ballots.

[30] Single-sheet (one- or two-side) ballots cost 20-28 cents; double-sheet ballots needed for elections with many contests cost up to 50 cents.

[31] Ballot cards for ES&S ExpressVote cost about 15 cents. New Hampshire's (One4All / Prime III) BMDs used by sight-impaired voters use plain paper that is less expensive.

[32] They include not only the cost of acquiring and implementing systems but also the ongoing licensing, logistics, and operating (purchasing paper stock, printing, and inventory management) costs.

[33] BOD printers currently on the market arguably are best suited for vote centers, but less expensive options suited for polling places could be developed. Indeed, BMDs that print full-face ballots could be re-purposed as BOD printers for polling place use, with modest changes to the programming.

the contests that voter is eligible to vote in, possibly in a number of different languages. This is easy with BMDs, which can be programmed with all the appropriate ballot definitions. With preprinted optical-scan ballots, the PCOS can be programmed to *accept* many different ballot styles, but the vote center must still maintain *inventory* of many different ballots. BOD printers are another economical alternative for vote centers.[34]

- **Paper/storage.** BMDs that print summary cards rather than full-face ballots can save paper and storage space. However, many BMDs print full-face ballots—so they do not save storage—while many BMDs that print summary cards (which could save storage) use thermal printers and paper that is fragile and can fade in a few months.[35]

Advocates of hand-marked paper ballot systems advance these additional arguments.

- **Cost.** Using BMDs for all voters substantially increases the cost of acquiring, configuring, and maintaining the voting system. One PCOS can serve 1200 voters in a day, while one BMD can serve only about 260 [33]—though both these numbers vary greatly depending on the length of the ballot and the length of the day. OSET analyzed the relative costs of acquiring BMDs for Georgia's nearly seven million registered voters versus a system of hand-marked paper ballots, scanners, and BOD printers [26]. A BMD solution for Georgia would cost taxpayers between 3 and 5 times more than a system based on hand-marked paper ballots. Open-source systems might eventually shift the economics, but current commercial universal-use BMD systems are more expensive than systems that use hand-marked paper ballots for most voters.
- **Mechanical reliability and capacity.** Pens are likely to have less downtime than BMDs. It is easy and inexpensive to get more pens and privacy screens when additional capacity is needed. If a precinct-count scanner goes down, people can still mark ballots with a pen; if the BMD goes down, voting stops. Thermal

[34] Ballot-on-demand printers *may* require maintenance such as replacement of toner cartridges. This is readily accomplished at a vote center with a professional staff. Ballot-on-demand printers may be a less attractive option for many small precincts on election day, where there is no professional staff—but on the other hand, they are less necessary, since far fewer ballot styles will be needed in any one precinct.

[35] The California Top-To-Bottom Review (TTBR) of voting systems found that thermal paper can also be covertly spoiled wholesale using common household chemicals https://votingsystems.cdn.sos.ca.gov/oversight/ttbr/red-diebold.pdf, last visited 8 April 2019. The fact that thermal paper printing can fade or deteriorate rapidly might mean it does not satisfy the federal requirement to preserve voting materials for 22 months. http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title52-section20701&num=0&edition=prelim, last visited 8 April 2019.

printers used in DREs with VVPAT are prone to jams; those in BMDs might have similar flaws.

These secondary pros and cons of BMDs do not outweigh the primary security and accuracy concern: BMDs, if hacked or erroneously programmed, can change votes in a way that is not correctable. BMD voting systems are not contestable or defensible. Audits that rely on BMD printout cannot make up for this defect in the paper trail: they cannot reliably detect or correct problems that altered election outcomes.

Barcodes

A controversial feature of some BMDs allows them to print 1-dimensional or 2-dimensional barcodes on the paper ballots. A 1-dimensional barcode resembles the pattern of vertical lines used to identify products by their universal product codes. A 2-dimensional barcode or QR code is a rectangular area covered in coded image *modules* that encode more complex patterns and information. BMDs print barcodes on the same paper ballot that contains human-readable ballot choices. Voters using BMDs are expected to verify the human-readable printing on the paper ballot card, but the presence of barcodes with human-readable text poses some significant problems.

- **Barcodes are not human readable.** The whole purpose of a paper ballot is to be able to recount (or audit) the *voters'* votes in a way independent of any (possibly hacked or buggy) computers. If the official vote on the ballot card is the barcode, then it is impossible for the voters to verify that the official vote they cast is the vote they expressed. Therefore, before a state even *considers* using BMDs that print barcodes (and we do not recommend doing so), the State must ensure by statute that recounts and audits are based *only* on the human-readable portion of the paper ballot. Even so, audits based on untrustworthy paper trails suffer from the verifiability the problems outlined above.
- **Ballot cards with barcodes contain two different votes.** Suppose a state does ensure by statute that recounts and audits are based on the human-readable portion of the paper ballot. Now a BMD-marked ballot card with both barcodes and human-readable text contains two different votes in each contest: the barcode (used for electronic tabulation), and the human-readable selection printout (official for audits and recounts). In few (if any) states has there even been a discussion of the legal issues raised when the official markings to be counted differ between the original count and a recount.
- **Barcodes pose technical risks.** Any coded input into a computer system—including wired network packets, WiFi, USB thumbdrives, *and barcodes*—pose

the risk that the input-processing software can be vulnerable to attack via deliberately ill-formed input. Over the past two decades, many such vulnerabilities have been documented on *each* of these channels (including barcode readers) that, in the worst case, give the attacker complete control of a system.[36] If an attacker were able to compromise a BMD, the barcodes are an attack vector for the attacker to take over an optical scanner (PCOS or CCOS), too. Since it is good practice to close down all such unneeded attack vectors into PCOS or CCOS voting machines (e.g., don't connect your PCOS to the Internet!), it is also good practice to avoid unnecessary attack channels such as barcodes.

End-to-End Verifiable BMDs

In all BMD systems currently on the market, and in all BMD systems certified by the EAC, the printed ballot or ballot summary is the only channel by which voters can verify the correct recording of their ballots, independently of the computers. The analysis in this paper applies to all of those BMD systems.

There is a class of voting systems called "end-to-end verifiable" (E2E-V), which provide an alternate mechanism for voters to verify their votes [2]. Some E2E-V systems incorporate BMDs, for instance STAR-Vote[37] [5]. As we discuss above in Section 1, such systems are not contestable, defensible, or strongly software independent. In any event, no E2E-V system is currently certified by the EAC, nor to our knowledge is any such system under review for certification, nor are any of the 5 major voting-machine vendors offering such a system for sale.[38]

[36] An example of a barcode attack is based on the fact that many commercial barcode-scanner components (which system integrators use to build cash registers or voting machines) treat the barcode scanner using the same operating-system interface as if it were a keyboard device; and then some operating systems allow "keyboard escapes" or "keyboard function keys" to perform unexpected operations.

[37] The STAR-Vote system is actually a DRE+VVPAT system with a smart ballot box, rather than a BMD system: voters interact with a device that captures their votes electronically and prints a paper record that voters can inspect, but the electronic votes are held "in limbo" until the paper ballot is deposited in the smart ballot box. The ballot box does not read the votes from the ballot; rather, depositing the ballot tells the system that it has permission to cast the vote that it had already recorded from the touchscreen.

[38] Some vendors, notably Scytl, have sold systems advertised as E2E-V in other countries. Those systems were not in fact E2E-V. Moreover, serious security flaws have been found in their implementations. See, e.g., [21].

5 Insecurity of All-in-One BMDs

Some voting machines incorporate a BMD interface, printer, and optical scanner into the same cabinet. Other DRE+VVPAT voting machines incorporate ballot-marking, tabulation, and paper-printout retention, but without scanning. These are often called "all-in-one" voting machines. To use an all-in-one machine, the voter makes choices on a touchscreen or through a different accessible interface. When the selections are complete, the BMD prints the completed ballot for the voter to review and verify, before depositing the ballot in a ballot box attached to the machine.

Such machines are especially unsafe: like any BMD described in Section 3 they are not contestable or defensible, but in addition, if hacked they can print votes onto the ballot *after* the voter last inspects the ballot.

- The ES&S ExpressVote (in all-in-one mode) allows the voter to mark a ballot by touchscreen or audio interface, then prints a paper ballot card and ejects it from a slot. The voter has the opportunity to review the ballot, then the voter redeposits the ballot into the same slot, where it is scanned and deposited into a ballot box.
- The ES&S ExpressVoteXL allows the voter to mark a ballot by touchscreen or audio interface, then prints a paper ballot and displays it under glass. The voter has the opportunity to review the ballot, then the voter touches the screen to indicate "OK," and the machine pulls paper ballot up (still under glass) and into the integrated ballot box.
- The Dominion ImageCast Evolution (ICE) allows the voter to deposit a hand-marked paper ballot, which it scans and drops into the attached ballot box. *Or*, a voter can use a touchscreen or audio interface to direct the marking of a paper ballot, which the voting machine ejects through a slot for review; then the voter redeposits the ballot into the slot, where it is scanned and dropped into the ballot box.

In all three of these machines, the ballot-marking printer is in the same paper path as the mechanism to deposit marked ballots into an attached ballot box. This opens up a very serious security vulnerability: the voting machine can mark the paper ballot (to add votes or spoil already-cast votes) after the last time the voter sees the paper, and then deposit that marked ballot into the ballot box without the possibility of detection.

Vote-stealing software could easily be constructed that looks for *undervotes* on the ballot, and marks those unvoted spaces for the candidate of the hacker's choice. This is very straightforward to do on optical-scan bubble ballots (as on the Dominion ICE) where undervotes are indicated by no mark at all. On machines such as the ExpressVote

and ExpressVoteXL, the normal software indicates an undervote with the words NO SELECTION MADE on the ballot summary card. Hacked software could simply leave a blank space there (most voters wouldn't notice the difference), and then fill in that space and add a matching bar code after the voter has clicked "cast this ballot."

An even worse feature of the ES&S ExpressVote and the Dominion ICE is the *auto-cast* configuration setting (in the manufacturer's standard software) that allows the voter to indicate, "don't eject the ballot for my review, just print it and cast it without me looking at it." If fraudulent software were installed in the ExpressVote, it could change *all* the votes of any voter who selected this option, because the voting machine software would know *in advance of printing* that the voter had waived the opportunity to inspect the printed ballot. We call this auto-cast feature "permission to cheat" [4].

Regarding these all-in-one machines, we conclude:

- Any machine with ballot printing in the same paper path with ballot deposit is not *software independent*; it is *not* the case that "an error or fault in the voting system software or hardware cannot cause an undetectable change in election results." Therefore such all-in-one machines do not comply with the VVSG 2.0 (the Election Assistance Commission's Voluntary Voting Systems Guidelines). Such machines are not contestable or defensible, either.
- All-in-one machines on which all voters use the BMD interface to mark their ballots (such as the ExpressVote and ExpressVoteXL) *also* suffer from the same serious problem as ordinary BMDs: most voters do not review their ballots effectively, and elections on these machines are not contestable or defensible.
- The auto-cast option for a voter to allow the paper ballot to be cast without human inspection is particularly dangerous, and states must insist that vendors disable or eliminate this mode from the software. However, even disabling the auto-cast feature does not eliminate the risk of undetected vote manipulation.

Remark. The Dominion ImageCast Precinct ICP320 is a precinct-count optical scanner (PCOS) that also contains an audio+buttons ballot-marking interface for disabled voters. This machine can be configured to cast electronic-only ballots from the BMD interface, or an external printer can be attached to print paper optical-scan ballots from the BMD interface. When the external printer is used, that printer's paper path is *not* connected to the scanner+ballot-box paper path (a person must take the ballot from the printer and deposit it into the scanner slot). Therefore this machine is as safe to use as any PCOS with a separate external BMD.

6 Conclusion

Ballot-Marking Devices produce ballots that do not necessarily record the vote expressed by the voter when they enter their selections on the touchscreen: hacking, bugs, and configuration errors can cause the BMDs to print votes that differ from what the voter entered and verified electronically. Because outcome-changing errors in BMD printout do not produce public evidence, BMD systems are not *contestable*. Because there is no way to generate convincing public evidence that reported outcomes are correct despite any BMD malfunctions that might have occurred, BMD systems are not *defensible*. Therefore, BMDs should not be used by voters who can hand mark paper ballots.

All-in-one voting machines, which combine ballot-marking and ballot-box-deposit into the same paper path, are even worse. They have all the disadvantages of BMDs (they are not contestable or defensible), and they can mark the ballot after the voter has inspected it. Therefore they are not even *software independent*, and should not be used by those voters who are capable of marking, handling, and visually inspecting a paper ballot.

When computers are used to record votes, the original transaction (the voter's expression of the votes) is not documented in a verifiable way.[39] When pen-and-paper is used to record the vote, the original expression of the vote *is* documented in a verifiable way (if demonstrably secure chain of custody of the paper ballots is maintained). Audits of elections conducted with hand-marked paper ballots, counted by optical scanners, can ensure that reported election outcomes are correct. Audits of elections conducted with BMDs *cannot* ensure that reported outcomes are correct.

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[35] P.B. Stark. Risk-limiting post-election audits: P-values from common probability inequalities. *IEEE Transactions on Information Forensics and Security*, 4:1005–1014, 2009.

[36] P.B. Stark. An introduction to risk-limiting audits and evidence-based elections, 2018. Testimony prepared for the California Little Hoover Commission, https://www.stat.berkeley.edu/~stark/Preprints/lhc18.pdf.

[37] P.B. Stark. There is no reliable way to detect hacked ballot-marking devices. https://arxiv.org/abs/1908.08144, 2019.

[38] P.B. Stark and D.A. Wagner. Evidence-based elections. *IEEE Security and Privacy*, 10:33–41, 2012.

[39] U. S. Election Assistance Commission. Effective designs for the administration of federal elections, June 2007. https://www.eac.gov/assets/1/1/EAC_Effective_Election_Design.pdf.

[40] J.T. Wixted and G.L. Wells. The relationship between eyewitness confidence and identification accuracy: A new synthesis. *Psychological Science in the Public Interest*, 2017.

The State of Texas

Elections Division
P.O. Box 12060
Austin, Texas 78711-2060
www.sos.texas.gov

Phone: 512-463-5650
Fax: 512-475-2811
Dial 7-1-1 For Relay Services
(800) 252-VOTE (8683)

Ruth R. Hughs
Secretary of State

REPORT OF REVIEW OF DOMINION VOTING SYSTEMS DEMOCRACY SUITE 5.5-A

PRELIMINARY STATEMENT

On October 2-3, 2019, Dominion Voting Systems ("Dominion" or the "Vendor") presented the Democracy Suite 5.5-A system for examination and certification. The examination was conducted in Austin, Texas. Pursuant to Sections 122.035(a) and (b) of the Texas Election Code, the Secretary of State appointed the following examiners:

1. Mr. Tom Watson, an expert in electronic data communication systems;
2. Mr. Brian Mechler, an expert in electronic data communication systems;
3. Mr. Brandon Hurley, an expert in election law and procedure; and
4. Mr. Charles Pinney, an expert in election law and procedure.

Pursuant to Section 122.035(a), the Texas Attorney General appointed the following examiners:

1. Dr. Jim Sneeringer, an expert in electronic data communication systems; and
2. Mr. Ryan Vassar, an employee of the Texas Attorney General.

On October 2, 2019, Mr. Pinney, Mr. Mechler, and Dr. Sneeringer witnessed the installation of the Democracy Suite 5.5-A software and firmware that the Office of the Texas Secretary of State (the "Office") received directly from the Independent Testing Authority. The next day, Mr. Pinney examined the accessibility components of the ImageCast X Ballot Marking Device.

On October 3, 2019, the Vendor demonstrated the Democracy Suite 5.5-A system and answered questions presented by the examiners. Test ballots were then processed on each voting device. The results were accumulated and later verified for accuracy by staff of the Secretary of State.

Examiner reports regarding the Democracy Suite 5.5-A system are attached hereto and incorporated herein by this reference.

BRIEF DESCRIPTION OF DEMOCRACY SUITE 5.5-A

The Democracy Suite 5.5-A system is an updated version of the Democracy Suite 5.5 system, which was denied certification by the Office on June 20, 2019. The Democracy Suite 5.5-A system includes certain software and hardware updates to the Suite 5.5 version.

Democracy Suite 5.5-A has been evaluated at an accredited independent voting system laboratory for conformance to the 2005 Voluntary Voting System Guidelines (VVSG). Democracy Suite 5.5-A was certified by the Election Assistance Commission (EAC) on January 30, 2019.

The components of Democracy Suite 5.5-A are as follows:

Component	Version	Description
EMS – Election Management System	5.5.12.1	Election Management System
ADJ – Adjudication	5.5.8.1	
ICC – ImageCast Central	5.5.3.0002	Central scanner
ICX – ImageCast X BMD	5.5.10.30	Ballot marking device
ICP – ImageCast Precinct	5.5.3-0002	Precinct scanner

FINDINGS

The following are the findings, based on written evidence submitted by the Vendor in support of its application for certification, oral evidence presented at the examination, and the findings of the voting system examiners as set out in their written reports.

The examiner reports identified multiple hardware and software issues that preclude the Office of the Texas Secretary of State from determining that the Democracy Suite 5.5-A system satisfies each of the voting-system requirements set forth in the Texas Election Code. Specifically, the examiner reports raise concerns about whether the Democracy Suite 5.5-A system is suitable for its intended purpose; operates efficiently and accurately; and is safe from fraudulent or unauthorized manipulation. Therefore, the Democracy Suite 5.5-A system and corresponding hardware devices do not meet the standards for certification prescribed by Section 122.001 of the Texas Election Code.

CONCLUSION

Accordingly, based upon the foregoing, I hereby deny certification of Dominion Voting Systems' Democracy Suite 5.5-A system for use in Texas elections.

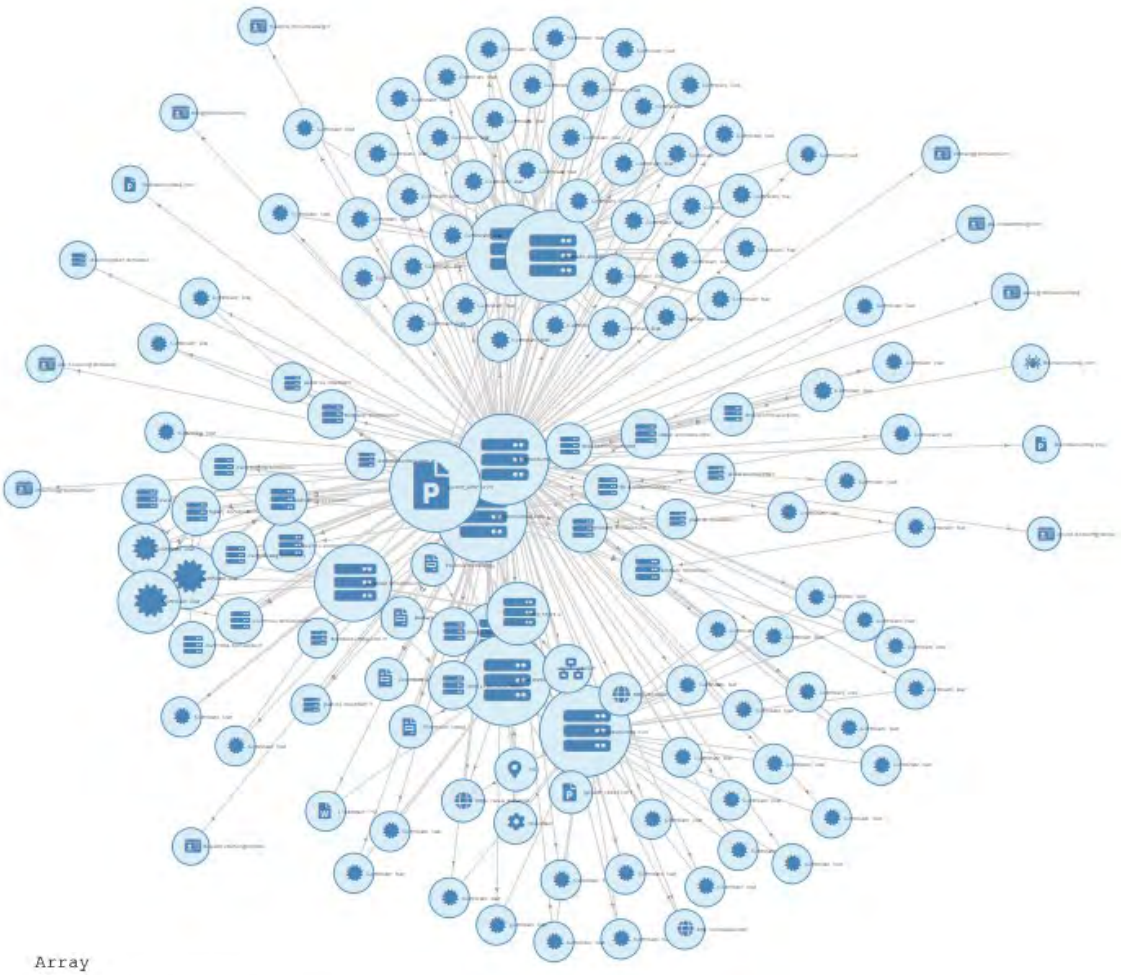
Signed under my hand and seal of office, this 24th day of January 2020.

JOSE A. ESPARZA
DEPUTY SECRETARY OF STATE

Declaration of [redacted]

Pursuant to 28 U.S.C Section 1746, [redacted] make the following declaration.

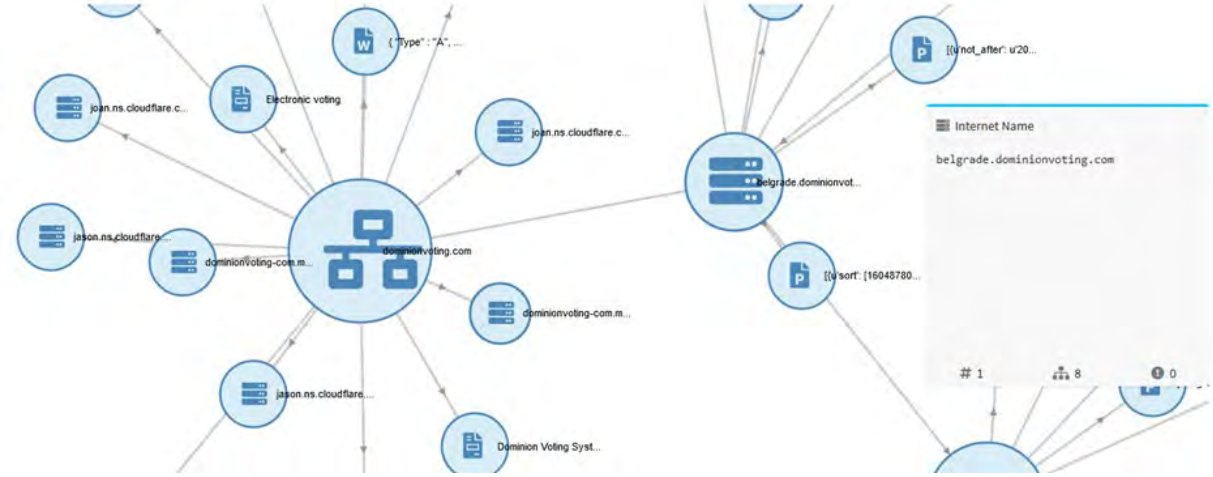
1. I am over the age of 21 years and I am under no legal disability, which would prevent me from giving this declaration.
2. I was an electronic intelligence analyst under 305th Military Intelligence with experience gathering SAM missile system electronic intelligence. I have extensive experience as a white hat hacker used by some of the top election specialists in the world. The methodologies I have employed represent industry standard cyber operation toolkits for digital forensics and OSINT, which are commonly used to certify connections between servers, network nodes and other digital properties and probe to network system vulnerabilities.
3. I am a US citizen and I reside [redacted] location in the United States of America.
4. Whereas the Dominion and Edison Research systems exist in the internet of things, and whereas this makes the network connections between the Dominion, Edison Research and related network nodes available for scanning,
5. And whereas Edison Research's primary job is to report the tabulation of the count of the ballot information as received from the tabulation software, to provide to Decision HQ for election results,
6. And whereas Spiderfoot and Robtex are industry standard digital forensic tools for evaluation network security and infrastructure, these tools were used to conduct public security scans of the aforementioned Dominion and Edison Research systems,
7. A public network scan of Dominionvoting.com on 2020-11-08 revealed the following inter-relationships and revealed 13 unencrypted passwords for dominion employees, and 75 hashed passwords available in TOR nodes:

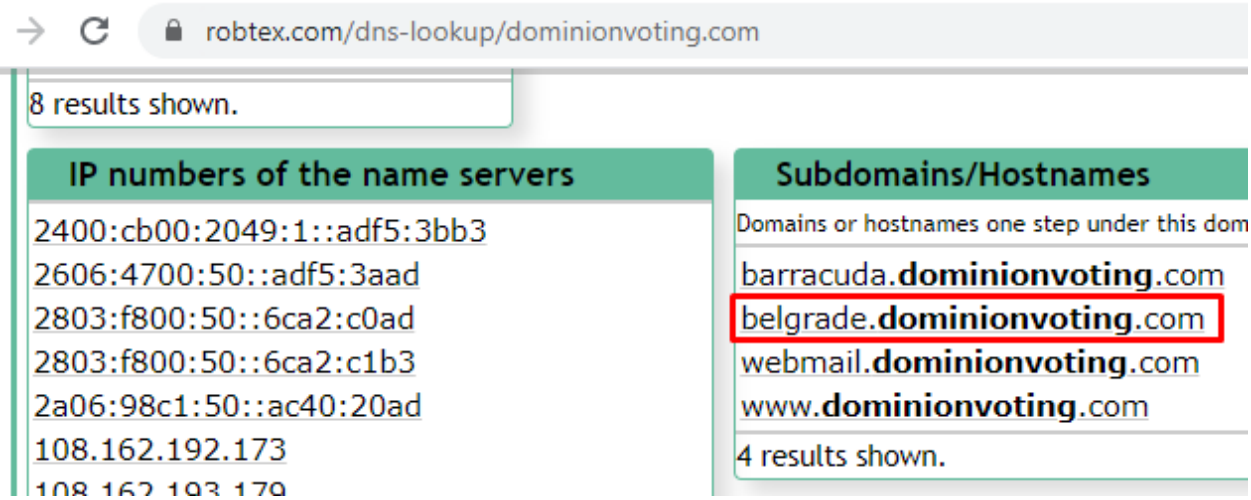


```
Array
(
    [id] => 544167324
    [luser] => ian.macvicar
    [domain] => dominionvoting.com
    [password] => jamley
)

7
Array
(
    [id] => 599400504
    [luser] => jelena.tanaskovic
    [domain] => dominionvoting.com
```

8. The same public scan also showed a direct connection to the group in Belgrade as highlighted below:





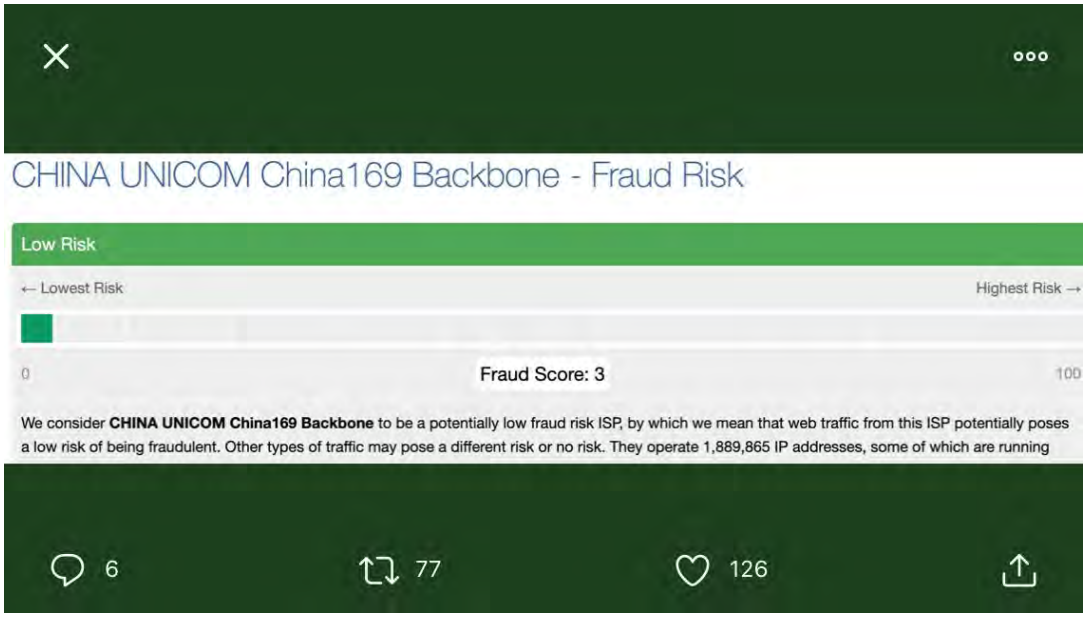
9. A cursory search on LinkedIn of "dominion voting" on 11/19/2020 confirms the numerous employees in Serbia:

10. An additional search of Edison Research on 2020-11-08 showed that Edison Research has an Iranian server seen here:

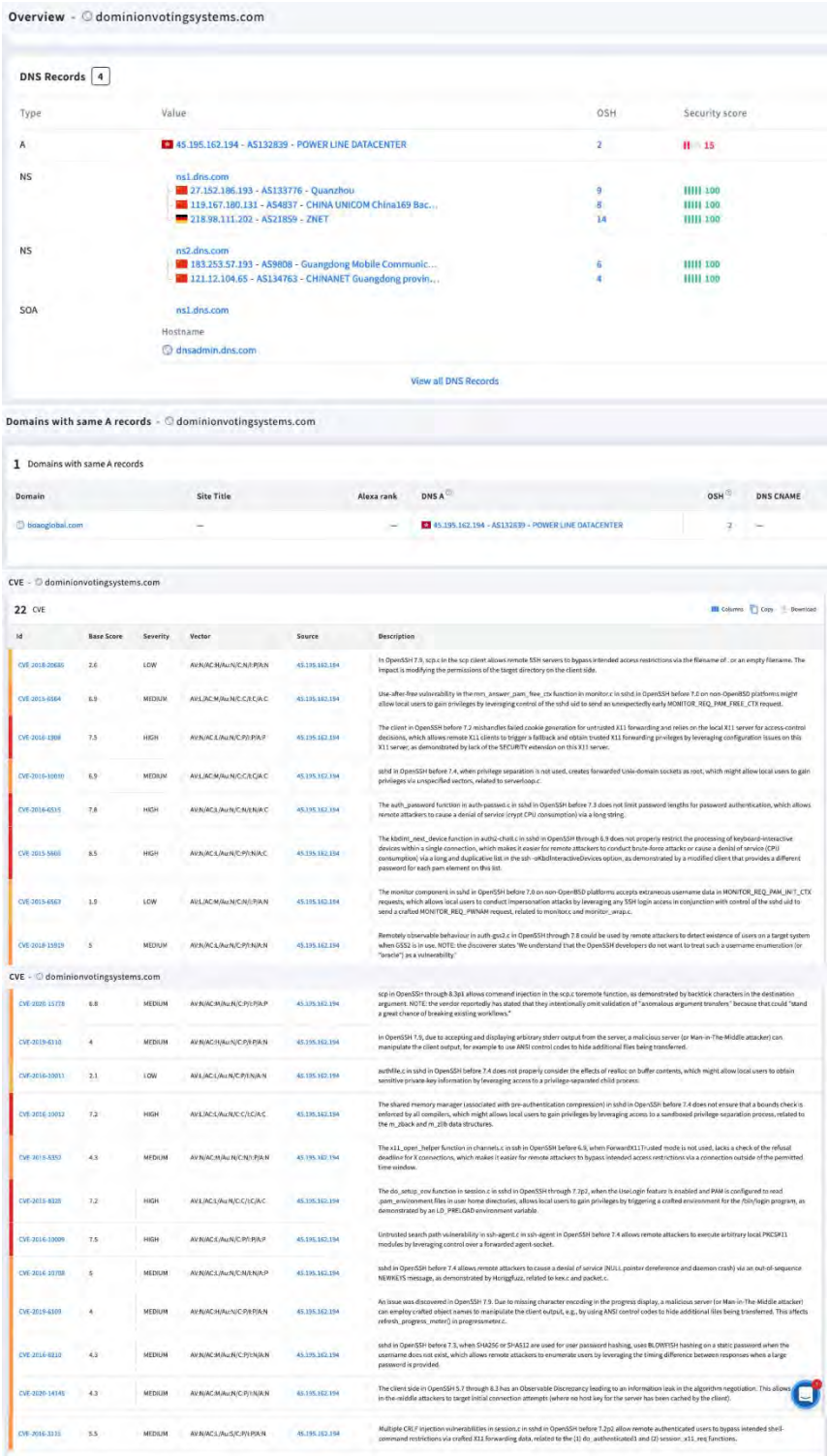
Inputting the Iranian IP into Robtex confirms the direct connection into the "edisonresearch" host from the perspective of the Iranian domain also. This means that it is not possible that the connection was a unidirectional reference.

A deeper search of the ownership of Edison Research "edisonresearch.com" shows a connection to BMA Capital Management, where shareofear.com and bmacapital.com are both connected to edisonresearch.com via a VPS or Virtual Private Server, as denoted by the "vps" at the start of the internet name:

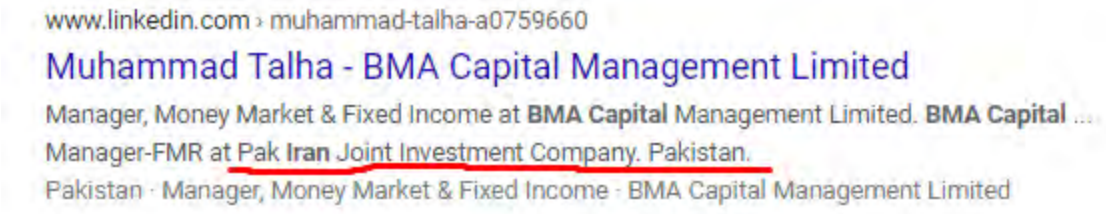
Dominionvoting is also dominionvotingsystems.com, of which there are also many more examples, including access of the network from China. The records of China accessing the server are reliable.



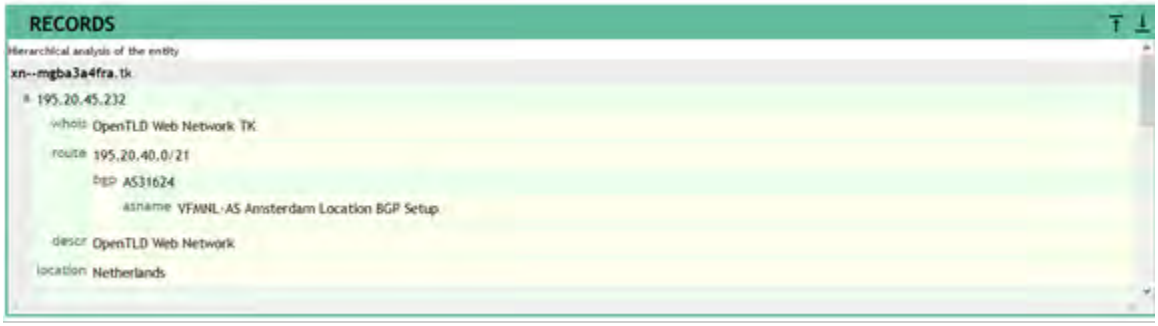
Domain Name: dominionvotingsystems.com
Registry Domain ID: 2530599738_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2020-05-26T15:48:58Z
Creation Date: 2020-05-26T15:48:57Z
Registrar Registration Expiration Date: 2021-05-26T15:48:57Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization:
Registrant State/Province: Hunan
Registrant Country: CN
Registrant Email: Select Contact Domain Holder link at
https://www.godaddy.com/whois/results.aspx?domain=dominionvotingsystems.com
Admin Email: Select Contact Domain Holder link at
https://www.godaddy.com/whois/results.aspx?domain=dominionvotingsystems.com
Tech Email: Select Contact Domain Holder link at
https://www.godaddy.com/whois/results.aspx?domain=dominionvotingsystems.com
Name Server: NS1.DNS.COM
Name Server: NS2.DNS.COM
DNSSEC: unsigned



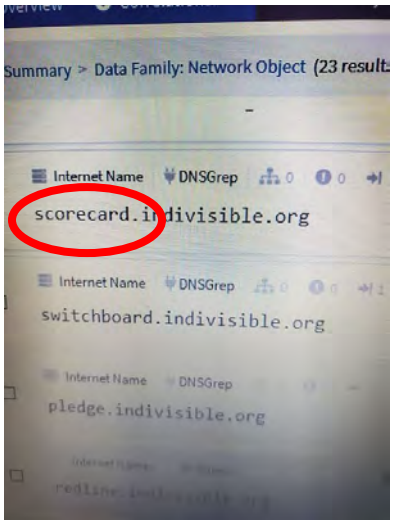
11. BMA Capital Management is known as a company that provides Iran access to capital markets with direct links publicly discoverable on LinkedIn (found via google on 11/19/2020):



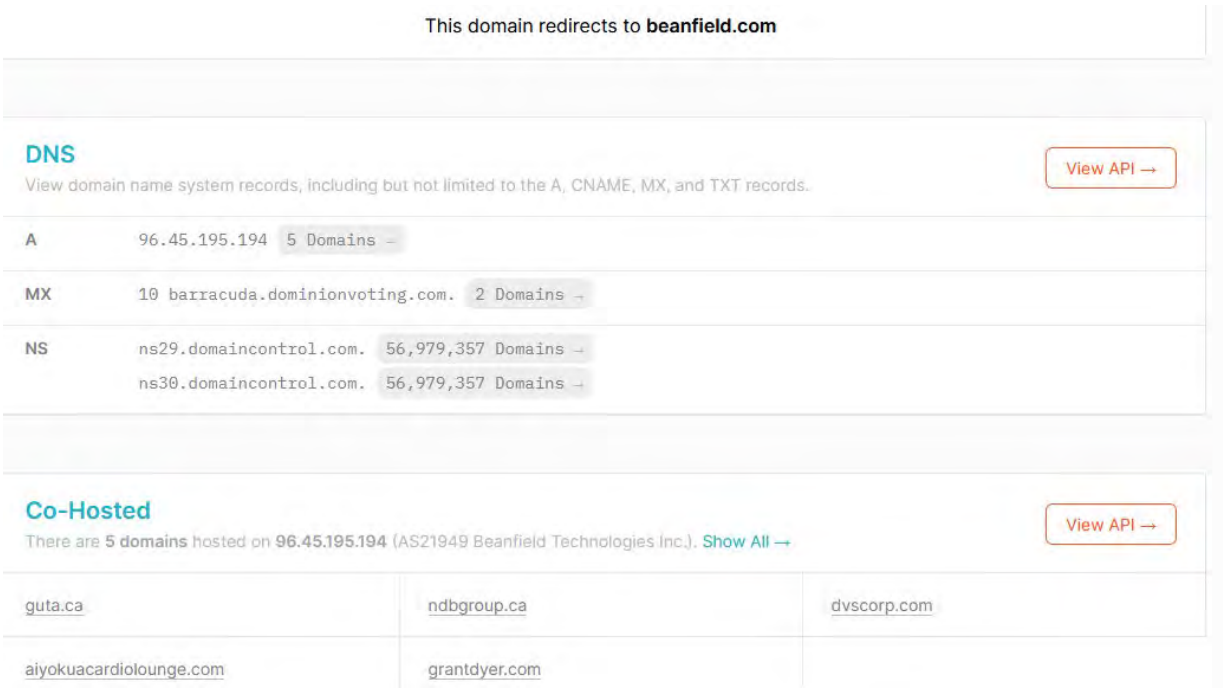
The same Robtex search confirms the Iranian address is tied to the server in the Netherlands, which correlates to known OSINT of Iranian use of the Netherlands as a remote server (See Advanced Persistent Threats: APT33 and APT34):



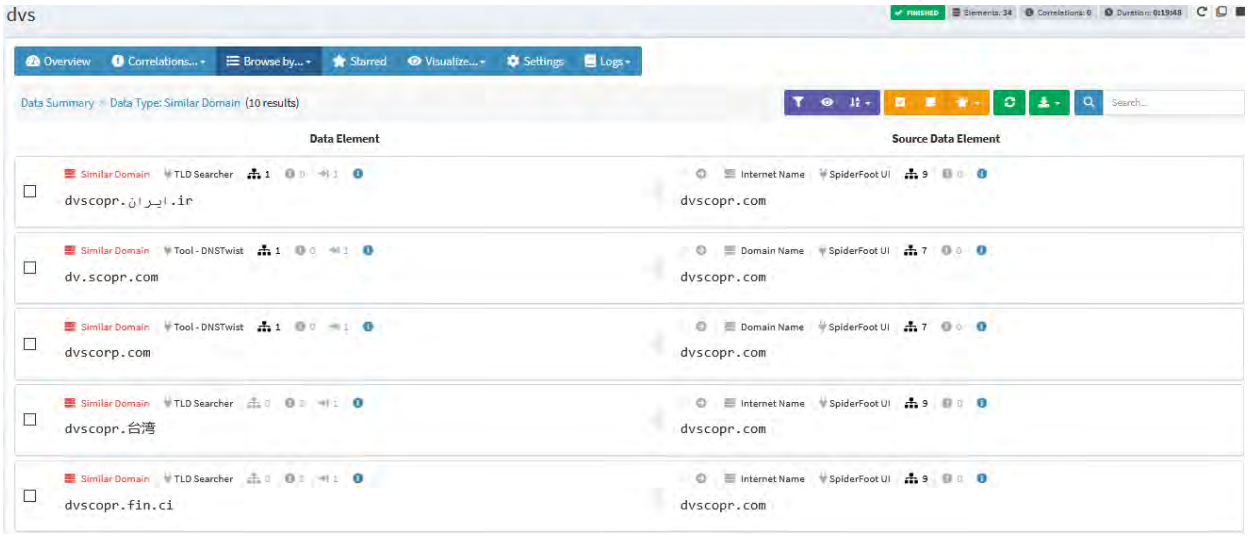
12. A search of the indivisible.org network showed a subdomain which evidences the existence of scorecard software in use as part of the Indivisible (formerly ACORN) political group for Obama:

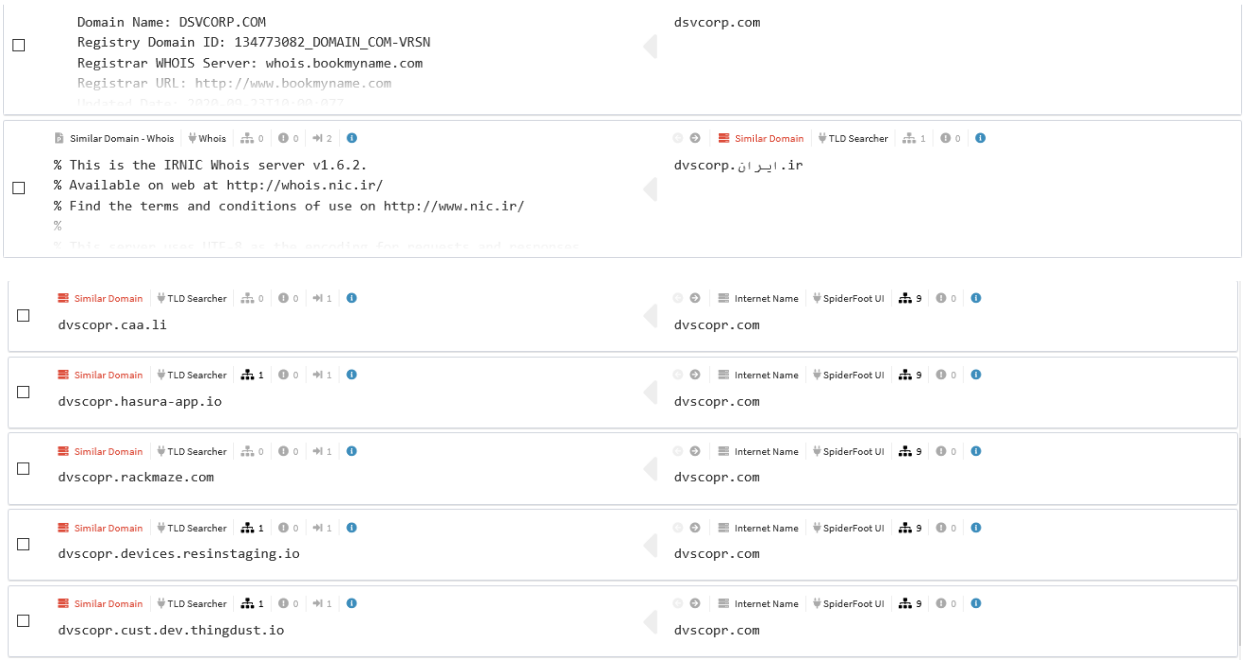


13. Each of the tabulation software companies have their own central reporting "affiliate". Edison Research is the affiliate for Dominion.
14. Beanfield.com out of Canada shows the connections via co-hosting related sites, including dvscorp.com:



This Dominion partner domain “dvscorp” also includes an auto discovery feature, where new in-network devices automatically connect to the system. The following diagram shows some of the related dvscopr.com mappings, which mimic the infrastructure for Dominion and are an obvious typo derivation of the name. Typo derivations are commonly purchased to catch redirect traffic and sometimes are used as honeypots. The diagram shows that infrastructure spans multiple different servers as a methodology.





The above diagram shows how these domains also show the connection to Iran and other places, including the following Chinese domain, highlighted below:

15. The auto discovery feature allows programmers to access any system while it is connected to the internet once it's a part of the constellation of devices (see original Spiderfoot graph).
16. Dominion Voting Systems Corporation in 2019 sold a number of their patents to China (via HSBC Bank in Canada):

Assignment details for assignee "HSBC BANK CANADA, AS COLLATERAL AGENT"

Assignments (1 total)

Assignment 1

Reel/frame	Execution date	Date recorded	Pages
050500/0236	Sep 25, 2019	Sep 26, 2019	7

Conveyance

SECURITY AGREEMENT

Assignors	Correspondent	Attorney docket
DOMINION VOTING SYSTEMS CORPORATION	CHAPMAN & CUTLER LLP 1270 AVENUE OF THE AMERICAS, 30TH FLOOR ATTN: SOREN SCHWARTZ NEW YORK, NY 10020	

Assignee

HSBC BANK CANADA, AS COLLATERAL AGENT

4TH FLOOR, 70 YORK STREET

TORONTO M5J 1S9

CANADA

Properties (18)

Patent	Publication	Application	PCT	International registration
8844813	20130306724	13476836		
8913787	20130301873	13470091		
9202113	20150071501	14539684		
8195505	20050247783	11121997		
9870666	20120232963	13463536		
9710988	20120259680	13525187		
9870667	20120259681	13525208		
7111782	20040238632	10811969		
7422151	20070012767	11526028		
D599131		29324281		

View all

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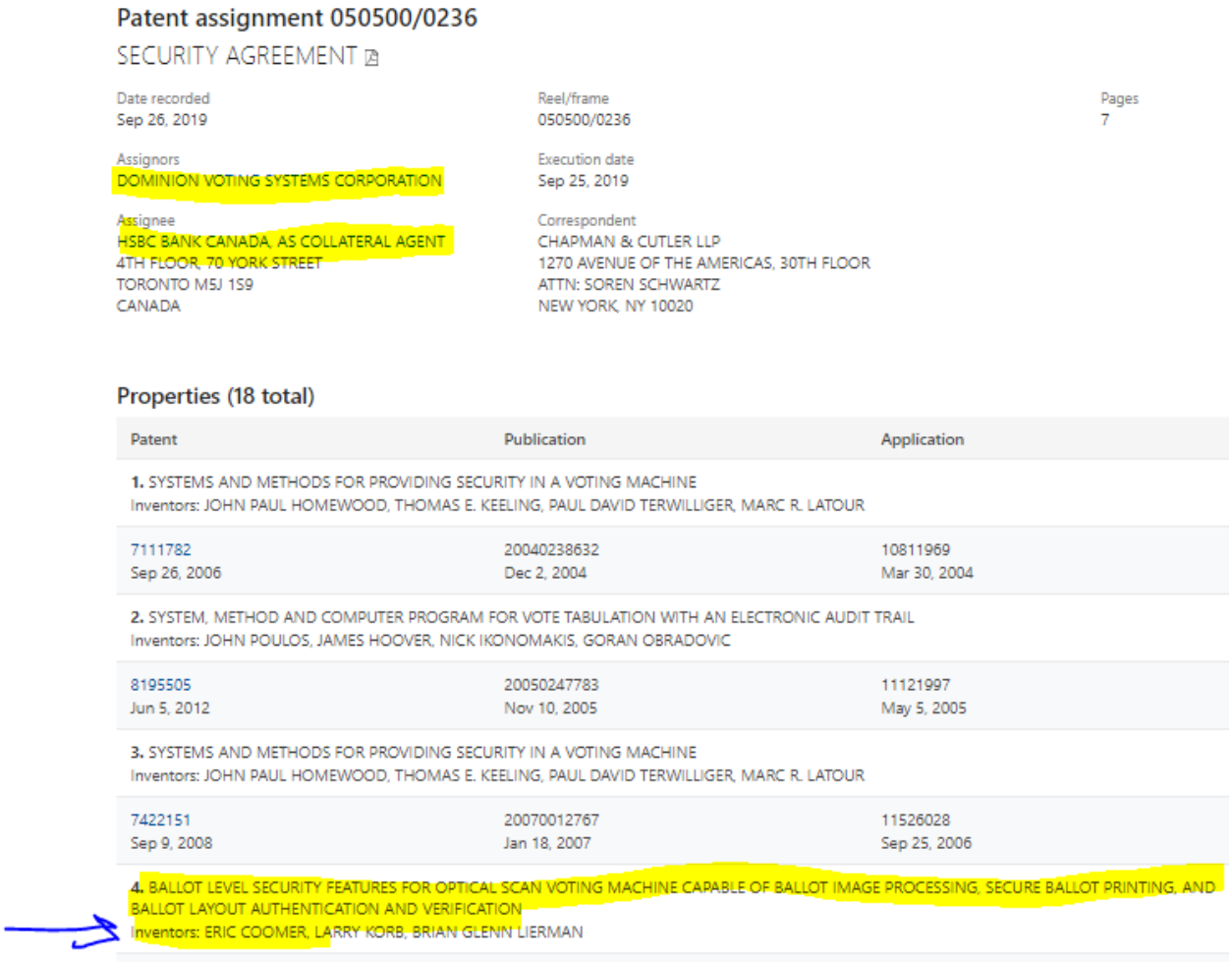
Release 2.0.0 | Release Notes | Send Feedback | Legacy Patent Assignment Search | Legacy Trademark Assignment Search

Of particular interest is a section of the document showing aspects of the nature of the patents dealing with authentication:



Patent assignment 050500/0236

SECURITY AGREEMENT

Date recorded	Reel/frame	Pages
Sep 26, 2019	050500/0236	7

Assignors
DOMINION VOTING SYSTEMS CORPORATION

Execution date
Sep 25, 2019

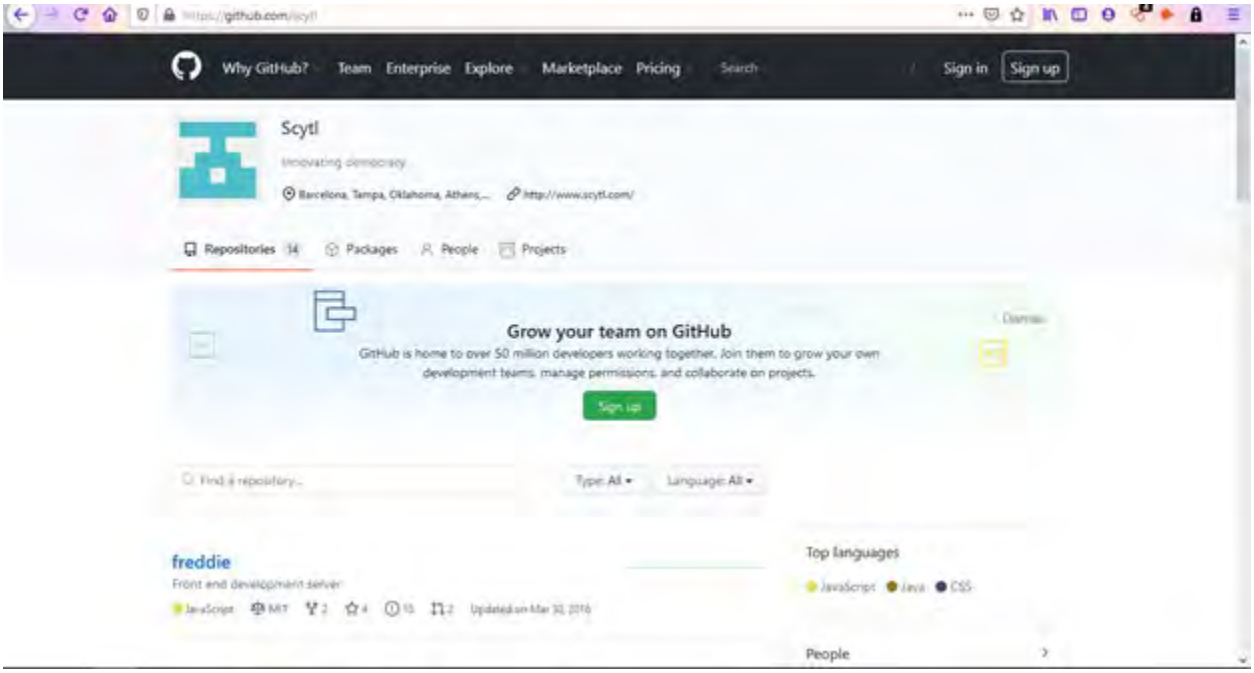
Assignee
HSBC BANK CANADA, AS COLLATERAL AGENT
4TH FLOOR, 70 YORK STREET
TORONTO M5J 1S9
CANADA

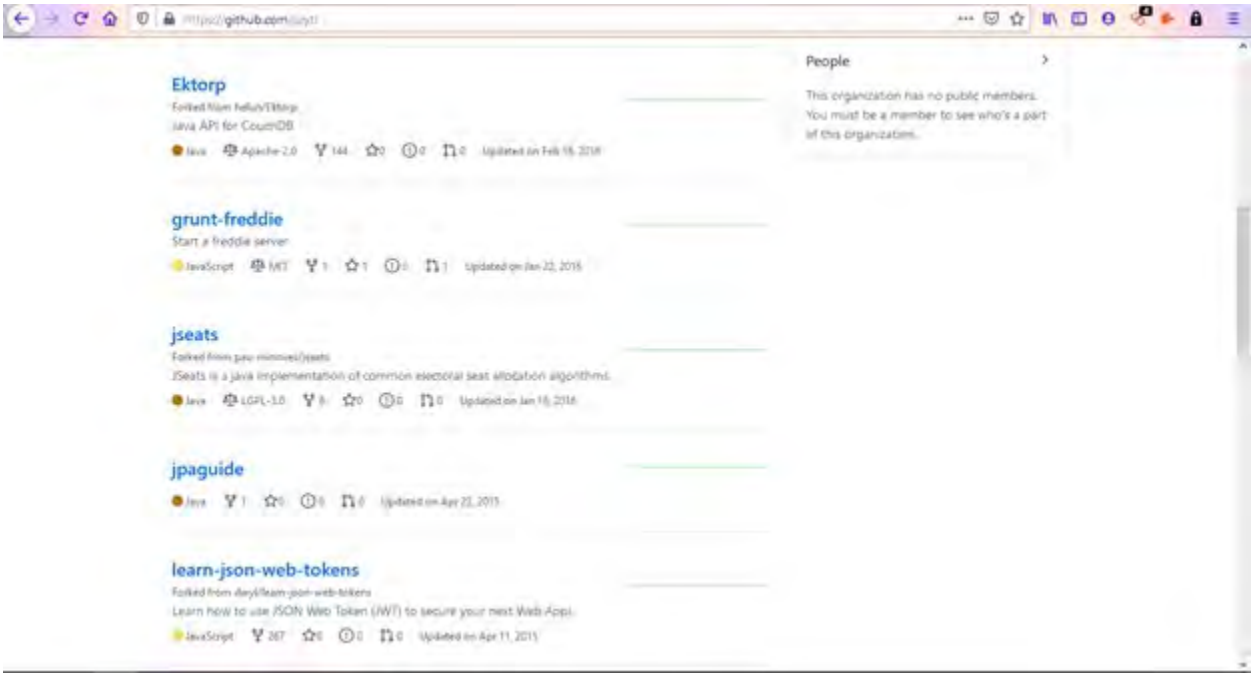
Correspondent
CHAPMAN & CUTLER LLP
1270 AVENUE OF THE AMERICAS, 30TH FLOOR
ATTN: SOREN SCHWARTZ
NEW YORK, NY 10020

Properties (18 total)

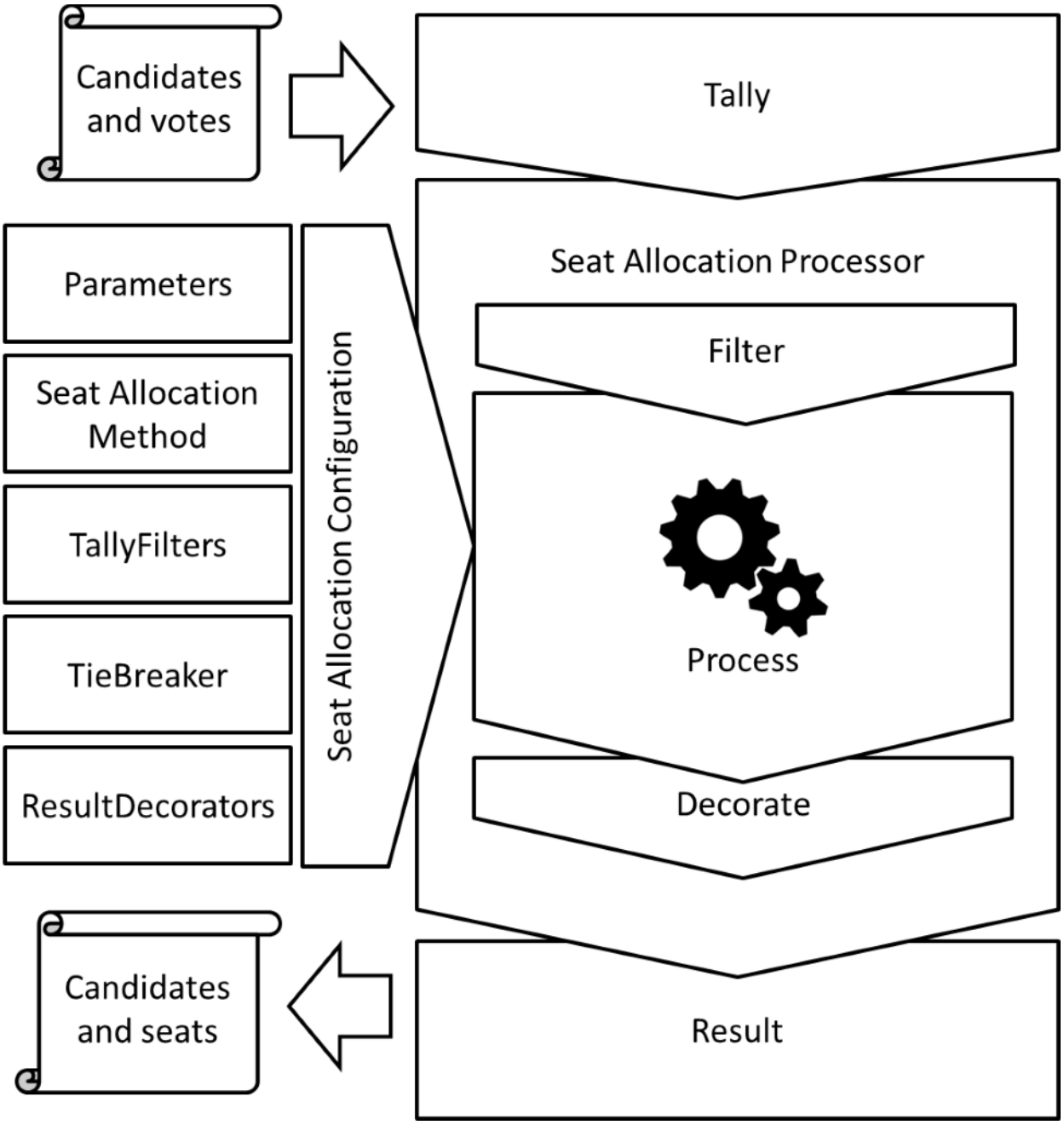
Patent	Publication	Application
1. SYSTEMS AND METHODS FOR PROVIDING SECURITY IN A VOTING MACHINE Inventors: JOHN PAUL HOMEWOOD, THOMAS E. KEELING, PAUL DAVID TERWILLIGER, MARC R. LATOUR		
7111782 Sep 26, 2006	20040238632 Dec 2, 2004	10811969 Mar 30, 2004
2. SYSTEM, METHOD AND COMPUTER PROGRAM FOR VOTE TABULATION WITH AN ELECTRONIC AUDIT TRAIL Inventors: JOHN POULOS, JAMES HOOVER, NICK IKONOMAKIS, GORAN OBRADOVIC		
8195505 Jun 5, 2012	20050247783 Nov 10, 2005	11121997 May 5, 2005
3. SYSTEMS AND METHODS FOR PROVIDING SECURITY IN A VOTING MACHINE Inventors: JOHN PAUL HOMEWOOD, THOMAS E. KEELING, PAUL DAVID TERWILLIGER, MARC R. LATOUR		
7422151 Sep 9, 2008	20070012767 Jan 18, 2007	11526028 Sep 25, 2006
4. BALLOT LEVEL SECURITY FEATURES FOR OPTICAL SCAN VOTING MACHINE CAPABLE OF BALLOT IMAGE PROCESSING, SECURE BALLOT PRINTING, AND BALLOT LAYOUT AUTHENTICATION AND VERIFICATION Inventors: ERIC COOMER, LARRY KORB, BRIAN GLENN LIERMAN		

17. Smartmatic creates the backbone (like the cloud). SCYTL is responsible for the security within the election system.

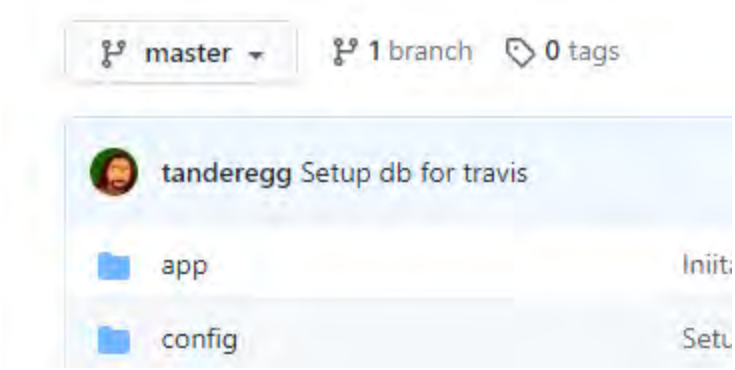




18. In the GitHub account for Scytl, Scytl Jseats has some of the programming necessary to support a much broader set of election types, including a decorator process where the data is smoothed, see the following diagram provided in their source code:



19. Unrelated, but also a point of interest is CTCL or Center for Tech and Civic Life funded by Mark Zuckerberg. Within their github page (https://github.com/ctcl), one of the programmers holds a government position. The Bipcoop repo shows tanderegg as one of the developers, and he works at the Consumer Financial Protection Bureau:



20. As seen in included document titled "AA20-304A-Iranian_Advanced_Persistent_Threat_Actor_Identified_Obtaining_Voter_Registration_Data " that was authored by the Cybersecurity & Infrastructure Security Agency (CISA) with a Product ID of AA20-304A on a specified date of October 30, 2020, CISA and the FBI reports that Iranian APT teams were seen using ACUTENIX, a website scanning software, to find vulnerabilities within Election company websites, confirmed to be used by the Iranian APT teams buy seized cloud storage that I had personally captured and reported to higher authorities. These scanning behaviors showed that foreign agents of aggressor nations had access to US voter lists, and had done so recently.
21. In my professional opinion, this affidavit presents unambiguous evidence that Dominion Voter Systems and Edison Research have been accessible and were certainly compromised by rogue actors, such as Iran and China. By using servers and employees connected with rogue actors and hostile foreign influences combined with numerous easily discoverable leaked credentials, these organizations neglectfully allowed foreign adversaries to access data

and intentionally provided access to their infrastructure in order to monitor and manipulate elections, including the most recent one in 2020. This represents a complete failure of their duty to provide basic cyber security. This is not a technological issue, but rather a governance and basic security issue: if it is not corrected, future elections in the United States and beyond will not be secure and citizens will not have confidence in the results.

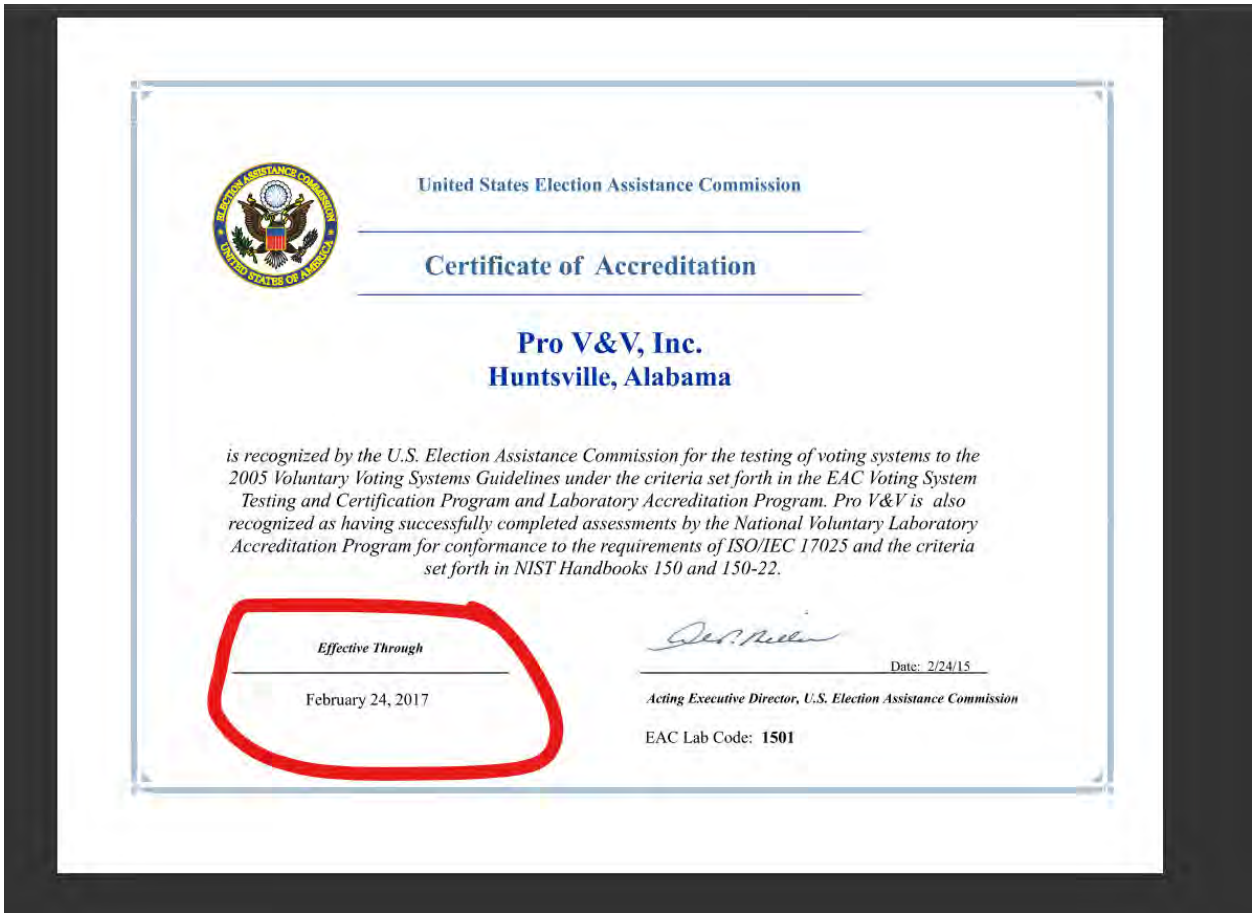
I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed this November 23th, 2020.

Declaration of [redacted]

Pursuant to 28 U.S.C Section 1746, I, [redacted], make the following declaration.

1. I am over the age of 21 years and I am under no legal disability, which would prevent me from giving this declaration.
2. I have been a private contractor with experience gathering and analyzing foreign intelligence and acted as a LOCALIZER during the deployment of projects and operations both OCONUS and CONUS. I am a trained Cryptolinguist, hold a completed degree in Molecular and Cellular Physiology and have FORMAL training in other sciences such as Computational Linguistics, Game Theory, Algorithmic Aspects of Machine Learning, Predictive Analytics among others.
3. I have operational experience in sources and methods of implementing operations during elections both CONUS and OCONUS
4. I am an amateur network tracer and cryptographer and have over two decades of mathematical modeling and pattern analysis.
5. In my position from 1999-2014 I was responsible for delegating implementation via other contractors sub-contracting with US or 9 EYES agencies identifying connectivity, networking and subcontractors that would manage the micro operations.
6. My information is my personal knowledge and ability to detect relationships between the companies and validate that with the cryptographic knowledge I know and attest to as well as evidence of these relationships.
7. In addition, I am WELL versed due to my assignments during my time as a private contractor of how elections OCONUS (for countries I have had an assignment at) and CONUS (well versed in HAVA ACT) and more.
8. On or about October 2017 I had reached out to the US Senate Majority Leader with an affidavit claiming that our elections in 2017 may be null and void due to lack of EAC certifications. In fact Sen. Wyden sent a letter to Jack Cobb on 31 OCT 2017 advising discreetly pointing out the importance of being CERTIFIED EAC had issued a certificate to

Pro V & V and that expired on Feb 24, 2017. No other certification has been located.



United States Election Assistance Commission

Certificate of Accreditation

Pro V&V, Inc.
Huntsville, Alabama

is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the 2005 Voluntary Voting Systems Guidelines under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. Pro V&V is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22.

Effective Through

February 24, 2017

Date: 2/24/15

Acting Executive Director, U.S. Election Assistance Commission

EAC Lab Code: **1501**

9. Section 231(b) of the Help America Vote Act (HAVA) of 2002 (42 U.S.C. §15371(b)) requires that the EAC provide for the accreditation and revocation of accreditation of independent, non-federal laboratories qualified to test voting systems to Federal standards. Generally, the EAC considers for accreditation those laboratories evaluated and recommended by the National Institute of Standards and Technology (NIST) pursuant to HAVA Section 231(b)(1). However, consistent with HAVA Section 231(b)(2)(B), the Commission may also vote to accredit laboratories outside of those recommended by NIST upon publication of an explanation of the reason for any such accreditation.

10. 

United States Department of Commerce
National Institute of Standards and Technology

NVLAP®

Certificate of Accreditation to ISO/IEC 17025:2017

NVLAP LAB CODE: 200978-0

Pro V&V
Huntsville, AL

is accredited by the National Voluntary Laboratory Accreditation Program for specific services, listed on the Scope of Accreditation, for:

Voting System Testing

This laboratory is accredited in accordance with the recognized International Standard ISO/IEC 17025:2017. This accreditation demonstrates technical competence for a defined scope and the operation of a laboratory quality management system (refer to joint ISO-ILAC-IAF Communique dated January 2009).

2020-03-26 through 2021-03-31
Effective Dates

For the National Voluntary Laboratory Accreditation Program

11. VSTL's are VERY important because equipment vulnerabilities allow for deployment of algorithms and scripts to intercept, alter and adjust voting tallies.
12. There are only TWO accredited VSTLs (VOTING SYSTEM TEST LABORATORIES). In order to meet its statutory requirements under HAVA §15371(b), the EAC has developed the EAC's Voting System Test Laboratory Accreditation Program. The procedural requirements of the program are established in the proposed information collection, the EAC **Voting System Test Laboratory Accreditation Program Manual**. Although participation in the program is voluntary, adherence to the program's procedural requirements is mandatory for participants. The procedural requirements of this Manual will supersede any prior laboratory accreditation requirements issued by the EAC. This manual shall be read in conjunction with the EAC's **Voting System Testing and Certification Program Manual** (OMB 3265-0019).

MICHIGAN

State Participation:	**Requires Testing by an Independent Testing Authority.** MI requires that voting systems are certified by an independent testing authority accredited by NASED and the board of state canvassers.
Applicable Statute(s):	"An electronic voting system shall not be used in an election unless it is approved by the board of state canvassers … and unless it meets 1 of the following conditions: (a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers. (b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers." MICH. COMP. LAWS ANN § 168.795a (2009).
Applicable Regulation(s):	MI does not have a regulation regarding the federal certification process.
State Certification Process:	The Secretary of State accepts requests from persons/corporations wishing to have their voting system examined. The requestor must pay the Secretary of State an application fee of $1,500.00, file a report listing all of the states in which the voting system has been approved and any reports that these states have made regarding the performance of the voting system. The Board of State Canvassers conducts a field test involving Michigan electors and election officials in simulated election day conditions. The Board of State Canvassers shall approve the voting system if it meets all of the state requirements. MICH. COMP. LAWS ANN § 168.795a (2009).
Fielded Voting Systems:	*[After the EAC completes and issues the 2008 Election Administration and Voting Survey, information about fielded voting systems will be added to this document. In the meantime, readers may find information on the voting systems at the following website (if available)].* http://www.michigan.gov/sos/0,1607,7-127-1633_8716_45458---,00.html

13.

WISCONSIN

State Participation:	**Requires Testing by a Federally Accredited Laboratory.** WI requires that its voting systems receive approval from an independent testing authority accredited by NASED verifying that the voting systems meet all of the recommended FEC standards.
Applicable Statute(s):	"No ballot, voting device, automatic tabulating equipment or relating equipment and materials to be used in an electronic voting system may be utilized in this state unless it is approved by the board [of election commissioners]." WIS. STAT.ANN. § 5.91 (West 2009).
Applicable Regulation(s):	"An application for approval of an electronic voting system shall be accompanied by all of the following … [r]eports from an independent testing authority accredited by the national association of state election directors (NASED) demonstrating that the voting system conforms to all the standards recommended by the federal elections commission." WIS. ADMIN. CODE GAB § 7.01 (2009).
State Certification Process:	The Board of Election Commissioners accepts applications for the approval of electronic voting systems. Once the application is completed, the vendor must set up the voting system for three mock elections using; (1) offices, (2) referenda questions and (3) candidates. A panel of local election officials can assist the Board in the review of the voting system. The Board conducts the test using a mock election for the partisan primary, general election, and nonpartisan election. The Board may also require that the voting system be used in an actual election as a condition of the approval. WIS. ADMIN. CODE GAB §§ 7.01, 7.02 (2009).
Fielded Voting Systems:	*[After the EAC completes and issues the 2008 Election Administration and Voting Survey, information about fielded voting systems will be added to this document. In the meantime, readers may find information on the voting systems at the following website (if available)].* http://elections.state.wi.us/section.asp?linkid=643&locid=47

14.

U.S. Election Assistance Commission

GEORGIA

State Participation:

Requires Federal Certification. GA requires that its voting systems are tested to EAC standards by EAC accredited labs and certified by the EAC.

Applicable Statute(s):

"Any person or organization owning, manufacturing, or selling, or being interested in the manufacture or sale of, any voting machine may request the Secretary of State to examine the machine. Any ten or more electors of this state may, at any time, request the Secretary of State to reexamine any voting machine previously examined and approved by him or her. Before any such examination or reexamination, the person, persons, or organization requesting such examination or reexamination shall pay to the Secretary of State the reasonable expenses of such examination; provided, however, that in the case of a request by ten or more electors the examination fee shall be $ 250.00. The Secretary of State may, at any time, in his or her discretion, reexamine any voting machine." GA CODE ANN. § 21-2-324 (2008).

Applicable Regulation(s):

"Prior to submitting a voting system for certification by the State of Georgia, the proposed voting system's hardware, firmware, and software must have been issued Qualification Certificates from the EAC. These EAC Qualification Certificates must indicate that the proposed voting system has successfully completed the EAC Qualification testing administered by EAC approved ITAs. If for any reason, this level of testing is not available, the Qualification tests shall be conducted by an agency designated by the Secretary of State. In either event, the Qualification tests shall comply with the specifications of the *Voting Systems Standards* published by the EAC." GA. COMP. R. & RES. 590-8-1-.01 (2009).

State Certification Process:

After the voting system has passed EAC Qualification testing, the vendor of the voting system submits a letter to the Office of the Secretary of State requesting certification for the voting system along with a technical data package to the certification agent. An evaluation proposal is created by the certification agent after a preliminary view of the Technical Data Package and sent to the vendor. Any additional EAC ITA testing identified in the evaluation proposal is arranged by the vendor and the certification agent will perform all other tests identified in the evaluation proposal. The certification agent submits a report of their findings to the Secretary of State. Based on these findings the Secretary of State will make a final determination on whether to certify the voting system. GA. COMP. R. & RES. 590-8-1-.01 (2009).

Fielded Voting Systems:

[After the EAC completes and issues the 2008 Election Administration and Voting Survey, information about fielded voting systems will be added to this document. In the meantime, readers may find information on the voting systems at the following website (if available)].
http://www.sos.georgia.gov/Elections/

15.

U.S. Election Assistance Commission

PENNSYVANIA

State Participation:	**Requires Testing by a Federally Accredited Laboratory.** PA requires that its voting systems are approved by a federally recognized independent testing laboratory as meeting federal voting system standards.
Applicable Statute(s):	"Any person or corporation owning, manufacturing or selling, or being interested in the manufacture or sale of, any electronic voting system, may request the Secretary of the Commonwealth to examine such system if the voting system has been examined and approved by a federally recognized independent testing authority and if it meets any voting system performance and test standards established by the Federal Government." 25 PA. CONS. STAT. ANN. Code § 3031.5 (West 2008).
Applicable Regulation(s):	PA does not have a regulation regarding the federal certification process.
State Certification Process:	The Secretary of State examines voting systems, upon request, once the voting systems have received approval by a federally recognized independent testing authority. The person(s) requesting the examination of the voting system are responsible for the cost of the examination. After the examination, the Secretary of State issues a report stating whether or not the voting systems are safe and compliant with state and federal requirements. If the voting systems are deemed safe and compliant by the Secretary of State then the systems may be adopted and approved for use in elections by each county through a majority vote of its qualified electors. 25 PA. CONS. STAT. ANN. Code §§ 3031.5, 3031.2 (West 2008).
Fielded Voting Systems:	*[After the EAC completes and issues the 2008 Election Administration and Voting Survey, information about fielded voting systems will be added to this document. In the meantime, readers may find information on the voting systems at the following website (if available)].* http://www.votespa.com/HowtoVote/tabid/74/language/en-US/Default.aspx

16.

U.S. Election Assistance Commission

ARIZONA

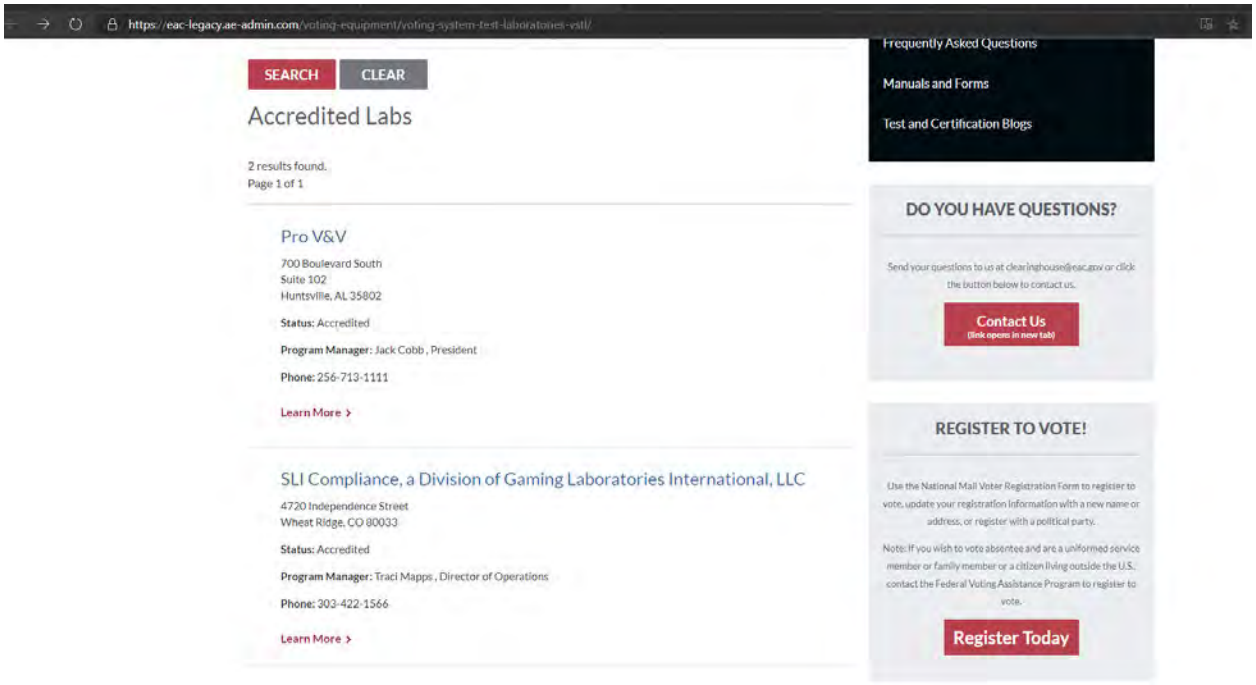
State Participation:	**Requires Testing by a Federally Accredited Laboratory.** AZ requires that its voting systems are HAVA compliant and approved by a laboratory that is accredited pursuant to HAVA.
Applicable Statute(s):	"On completion of acquisition of machines or devices that comply with HAVA, machines or devices used at any election for federal, state or county offices may only be certified for use in this state and may only be used in this state if they comply with HAVA and if those machines or devices have been tested and approved by a laboratory that is accredited pursuant to HAVA." ARIZ. REV. STAT. § 16-442(B) (2008).
Applicable Regulation(s):	AZ does not have a regulation regarding the federal certification process.
State Certification Process:	The Secretary of State appoints a committee of three people that test different voting systems. This committee is required to submit their recommendations to the Secretary of State who then makes the final decision on which voting system(s) to adopt. ARIZ. REV. STAT. § 16-442(A) and (C) (2008).
Fielded Voting Systems:	*[After the EAC completes and issues the 2008 Election Administration and Voting Survey, information about fielded voting systems will be added to this document. In the meantime, readers may find information on the voting systems at the following website (if available)].* http://www.azsos.gov/election/equipment/default.htm

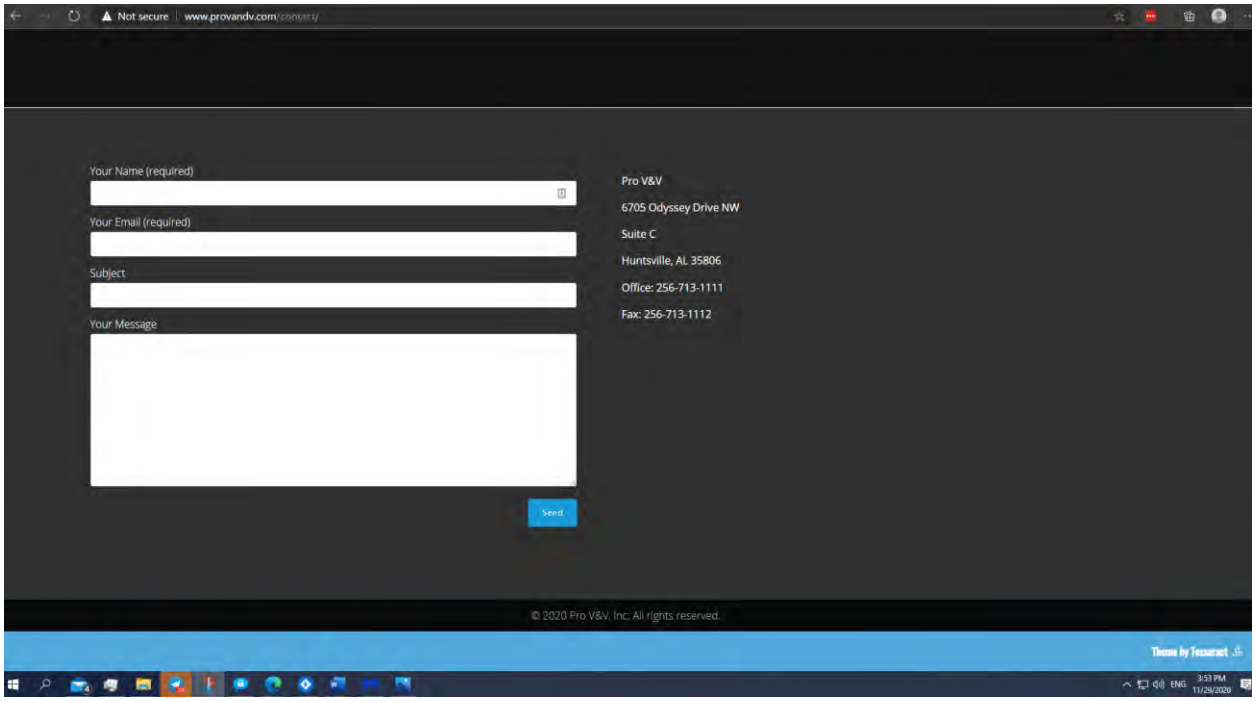
State Participation in EAC Voting System Certification Program 9

17.

18. **Pro V& V** and **SLI Gaming** both lack evidence of EAC Accreditation as per the Voting System Testing and Certification Manual.

19. **Pro V& V** is owned and Operated by Jack Cobb. Real name is Ryan Jackson Cobb. The company ProV&V was founded and run by Jack Cobb who formerly worked under the entity of Wyle Laboratories which is an AEROSPACE DEFENSE CONTRACTING ENTITY. The address information on the EAC, NIST and other entities for Pro V& V are different than that of what is on ProV&V website. The EAC and NIST (ISO CERT) issuers all have another address.





20. VSTLs are the most important component of the election machines as they examine the use of COTS (Commercial Off–The-Shelf)
21. "Wyle became involved with the testing of electronic voting systems in the early 1990's and has tested over 150 separate voting systems. Wyle was the first company to obtain accreditation by the National Association of State Election Directors (NASED). Wyle is accredited by the Election Assistance Commission (EAC) as a Voting System Testing Laboratory (VSTL). Our scope of accreditation as a VSTL encompasses all aspects of the hardware and software of a voting machine. Wyle also received NVLAP accreditation to ISO/IEC 17025:2005 from NIST." Testimony of Jack Cobb 2009
22. COTS are preferred by many because they have been tried and tested in the open market and are most economic and readily available. COTS are also the SOURCE of vulnerability therefore VSTLs are VERY important. COTS components by voting system machine manufacturers can be used as a "Black Box" and changes to their specs and hardware make up change continuously. Some changes can be simple upgrades to make them more efficient in operation, cost efficient for production, end of life (EOL) and even complete reworks to meet new standards. They key issue in this is that MOST of the COTS used by Election Machine Vendors like Dominion, ES&S, Hart Intercivic, Smartmatic and others is that such manufacturing for COTS have been outsourced to China which if implemented in our Election Machines make us vulnerable to BLACK BOX antics and backdoors due to hardware changes that can go undetected. This is why VSTL's are VERY important.
23. The proprietary voting system software is done so and created with cost efficiency in mind and therefore relies on 3rd party software that is AVAILABLE and HOUSED on the HARDWARE. This is a vulnerability. Exporting system reporting using software like Crystal Reports, or PDF software allows for vulnerabilities with their constant updates.
24. As per the COTS hardware components that are fixed, and origin may be cloaked under proprietary information a major vulnerability exists since once again third-party support software is dynamic and requires FREQUENT updates. The hardware components of the computer components, and election machines that are COTS may have slight updates that can be overlooked as they may be like those designed that support the other third -party software. COTS origin is important and the US Intelligence Community report in 2018 verifies that.
25. The Trump Administration made it clear that there is an absence of a major U.S. alternative to foreign suppliers of networking equipment. This highlights the growing dominance of

Chinese manufacturers like Huawei that are the world's LARGEST supplier of telecom and other equipment that endangers national security.

26. China, is not the only nation involved in COTS provided to election machines or the networking but so is Germany via a LAOS founded Chinese linked cloud service company that works with SCYTL named Akamai Technologies that have offices in China and are linked to the server that Dominion Software.

28 046 Madrid

Asian offices

Akamai Technologies - India
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Koramangala Industrial Area
Bangalore 560 095, India

Telephone: 91-80-575-99222
Fax: 91-80-575-99209
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Fax: 86-10-8523-3001
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81-3-3216-7300 (Akamai direct)
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Driving directions

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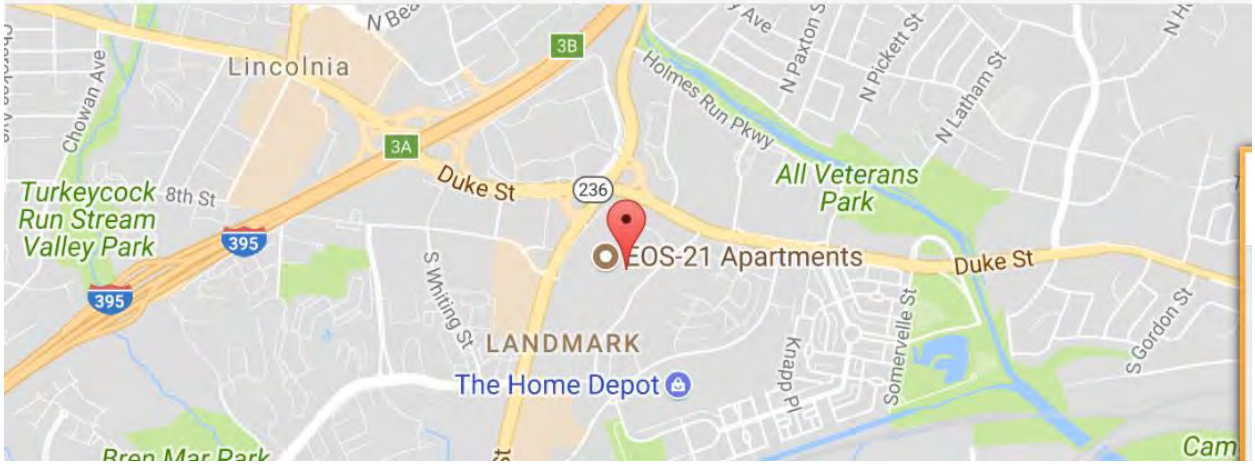
Sydney, NSW 2000, Australia
info@au.akamai.com

Telephone: 61 2 9006 1325
Fax: 61 2 9475 0343
Regional Manager: Stuart Spiteri

ptt.gov resolves to 4.30.228.74. According to our data this IP address belongs to *Level 3 Communications* and is located in *Alexandria, Virginia, United States*. Please have a look at the information provided below for further details.

4.30.228.74	
ISP/Organization	Level 3 Communications
Location	Alexandria 22304, Virginia (VA), United States (US)
Latitude	38.8115 / 38°48'41" N
Longitude	-77.1285 / 77°7'42" W
Timezone	America/New_York
Local Time	Thu, 12 Jul 2018 19:27:40 -0400

27. 

28. L3 Level Communications is federal contractor that is partially owned by foreign lobbyist George Soros. An article that AP ran in 2010 – spoke out about the controversy of this that has been removed. (LINK) "As for the company's other political connections, it also appears that none other than George Soros, the billionaire funder of the country's liberal political infrastructure, owns 11,300 shares of OSI Systems Inc., the company that owns Rapiscan. Not surprisingly, OSI's stock has appreciated considerably over the course of the year. Soros certainly is a savvy investor." Washington Examiner re-write.

29.


a23-78-81-34.deploy.static.akamaitechnologies.com (23.78.81.34)
4.15.168.158
ae-11.edge2.Chicago10.Level3.net
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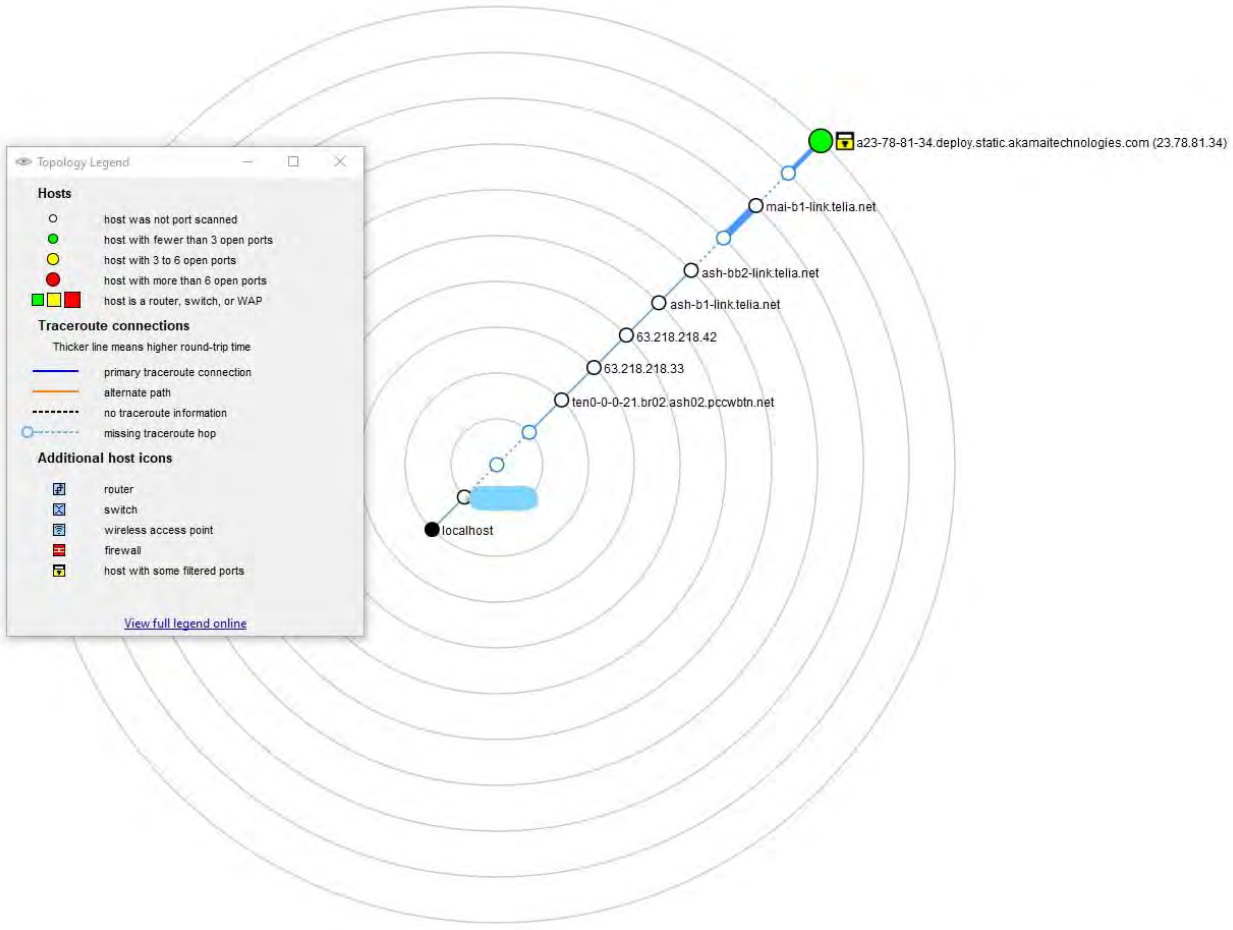


30.

31. **L-3 Communication** Systems-East designs, develops, produces and integrates communication systems and support equipment for space, air, ground, and naval applications, including C4I systems and products; integrated Navy communication systems; integrated space communications and RF payloads; recording systems; secure communications, and information security systems. In addition, their site claims that MARCOM is an integrated communications system and The Marcom® is the foundation of the Navy's newest digital integrated voice / data switching system for affordable command and control equipment supporting communications and radio room automation. The MarCom® uses the latest **COTS** digital technology and open systems standards to offer the command and control user a low cost, user friendly, solution to the complex voice, video and data communications needs of present and future joint / allied missions. Built in reliability, rugged construction, and fail-safe circuits ensure your call and messages will go through. Evidently a HUGE vulnerability.

32. Michigan's government site is thumped off Akamai Technologies servers which are housed on **TELIA AB** a foreign server located in Germany.
33. Scytl, who is contracted with AP that receives the results tallied BY Scytl on behalf of Dominion – During the elections the AP reporting site had a disclaimer.
    AP – powered by SCYTL.

Advertisements	Basic Tracking Info	
	Domain:	Michigan.gov [Whois Lookup - Domain Country - Domain To IP]
	IP Address:	23.78.81.34 [IP Blacklist Check]
	Reverse DNS:	34.81.78.23.in-addr.arpa
	Hostname:	a23-78-81-34.deploy.static.akamaitechnologies.com
	Nameservers:	a12-67.akam.net >> 184.26.160.67 a11-66.akam.net >> 84.53.139.66 a1-35.akam.net >> 193.108.91.35 a5-66.akam.net >> 95.100.168.66 a18-64.akam.net >> 95.101.36.64 a24-65.akam.net >> 2.16.130.65
	Location For an IP: Michigan.gov	
	Continent:	North America (NA)
	Country:	United States (US)
	Capital:	Washington
	State:	Unknown
	City Location:	Unknown
	ISP:	Akamai Technologies
	Organization:	Akamai Technologies
	AS Number:	AS1299 Telia Company AB
	something went wrong!	something went wrong!
Geolocation on IP Map	Time Zone:	America/North_Dakota/Center
	Local Time:	13:48:46
	Timezone GMT offset:	-21600
	Sunrise / Sunset:	07:27 / 17:12
	Extra Information for an IP: Michigan.gov	
	Continent Lat/Lon:	46.07305 / -100.546
	Country Lat/Lon:	38 / -98
	City Lat/Lon:	(37.751) / (-97.822)
	IP Language:	English

34. “Scytl was selected by the Federal Voting Assistance Program of the U.S. Department of Defense to provide a secure online ballot delivery and onscreen marking systems under a program to support overseas military and civilian voters for the 2010 election cycle and beyond. Scytl was awarded 9 of the 20 States that agreed to participate in the program (New York, Washington, Missouri, Nebraska, Kansas, New Mexico, South Carolina, Mississippi and Indiana), making it the provider with the highest number of participating States.” PDF
35. According to DOMINION : 1.4.1Software and Firmware The software and firmware employed by Dominion D-Suite 5.5-Aconsists of 2 types, custom and commercial off the shelf (COTS). COTS applications were verified to be pristine or were subjected to source code review for analysis of any modifications and verification of meeting the pertinent standards.
36. The concern is the HARDWARE and the NON – ACCREDITED VSTLs as by their own admittance use COTS.
37. The purpose of VSTL’s being accredited and their importance in ensuring that there is no foreign interference/ bad actors accessing the tally data via backdoors in equipment software. The core software used by ALL SCYTL related Election Machine/Software manufacturers ensures “anonymity” .
38. Algorithms within the area of this “shuffling” to maintain anonymity allows for setting values to achieve a desired goal under the guise of “encryption” in the trap-door.
39. The actual use of trapdoor commitments in Bayer-Groth proofs demonstrate the implications for the verifiability factor. This means that no one can SEE what is going on during the process of the “shuffling” therefore even if you deploy an algorithms or manual scripts to fractionalize or distribute pooled votes to achieve the outcome you wish – you cannot prove they are doing it! See STUDY : “The use of trapdoor commitments in Bayer-Groth proofs and the implications for the verifiability of the Scytl-SwissPost Internet voting system”
40. **Key Terms**
41. **UNIVERSAL VERIFIABILITY**: Votes cast are the votes counted and integrity of the vote is verifiable (the vote was tallied for the candidate selected) . **SCYTL FAILS UNIVERSAL VERIFIABILITY** because no mathematical proofs can determine if any votes have been manipulated.
42. **INDIVIDUAL VERIFIABILITY**: Voter cannot verify if their ballot got correctly counted. Like, if they cast a vote for ABC they want to verify it was ABC. That notion clearly discounts the need for anonymity in the first place.

43. To understand what I observed during the 2020 I will walk you through the process of one ballot cast by a voter.
44. STEP 1 |Config Data | All non e-voting data is sent to Scytl (offshore) for configuration of data. All e-voting is sent to CONFIGURATION OF DATA then back to the e-voting machine and then to the next phase called CLEANSING. **CONCERNS**: Here we see an "OR PROOF" as coined by mathematicians – an "or proof" is that votes that have been pre-tallied parked in the system and the algorithm then goes back to set the outcome it is set for and seeks to make adjustments if there is a partial pivot present causing it to fail demanding manual changes such as block allocation and narrowing of parameters or self-adjusts to ensure the predetermined outcome is achieved.
45. STEP 2|CLEANSING | The Process is when all the votes come in from the software run by Dominion and get "cleansed" and put into 2 categories: invalid votes and valid votes.
46. STEP 3|Shuffling /Mixing | This step is the most nefarious and exactly where the issues arise and carry over into the decryption phase. Simply put, the software takes all the votes, literally mixes them a and then re-encrypts them. This is where if ONE had the commitment key- TRAPDOOR KEY – one would be able to see the parameters of the algorithm deployed as the votes go into this mixing phase, and how algorithm redistributes the votes.
47. This published PAPER FROM University College London depicts how this shuffle works. In essence, when this mixing/shuffling occurs, then one doesn't have the ability to know that vote coming out on the other end is actually their vote; therefore, ZERO integrity of the votes when mixed.

48.

Background - ElGamal encryption

- Setup: Group $\mathcal{G}$ of prime order q with generator g
- Public key: $pk = y = g^x$
- Encryption: $\mathcal{E}_{pk}(m; r) = (g^r, y^r m)$
- Decryption: $\mathcal{D}_x(u, v) = vu^{-x}$
- Homomorphic:

$$\mathcal{E}_{pk}(m; r) \times \mathcal{E}_{pk}(M; R) = \mathcal{E}_{pk}(mM; r + R)$$

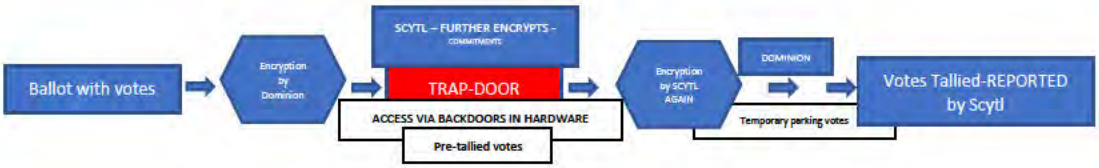
- Re-encryption:

$$\mathcal{E}_{pk}(m; r) \times \mathcal{E}_{pk}(1; R) = \mathcal{E}_{pk}(m; r + R)$$

UCL

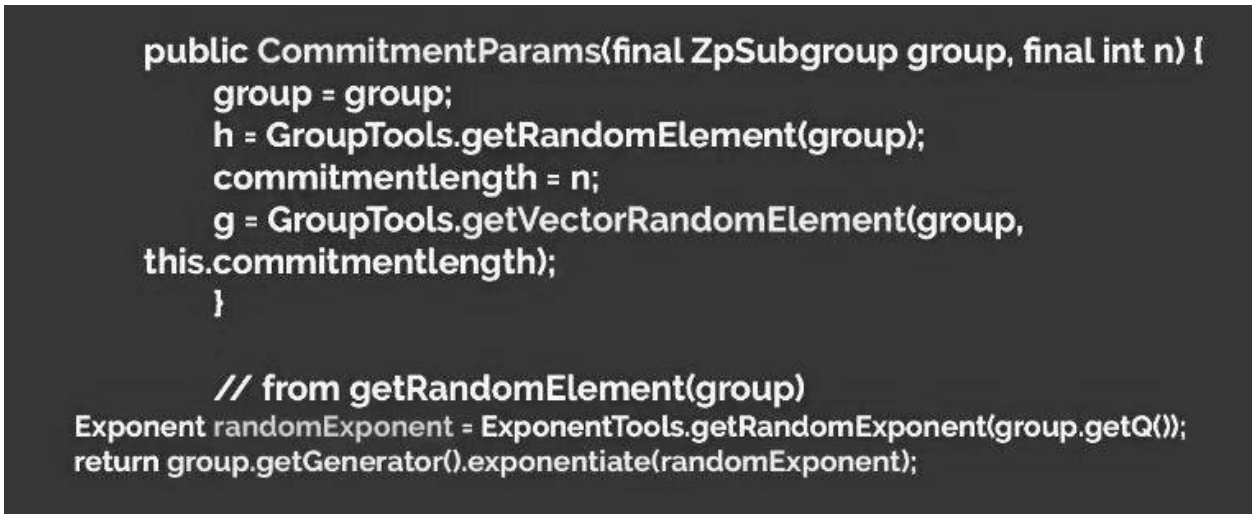
49. When this mixing/shuffling occurs, then one doesn't have the ability to know that vote coming out on the other end is actually their vote; therefore, ZERO integrity of the votes.
50. When the votes are sent to Scytl via Dominion Software EMS (Election Management System) the Trap Door is accessed by Scytl or TRAP DOOR keys (Commitment Parameters).

51.



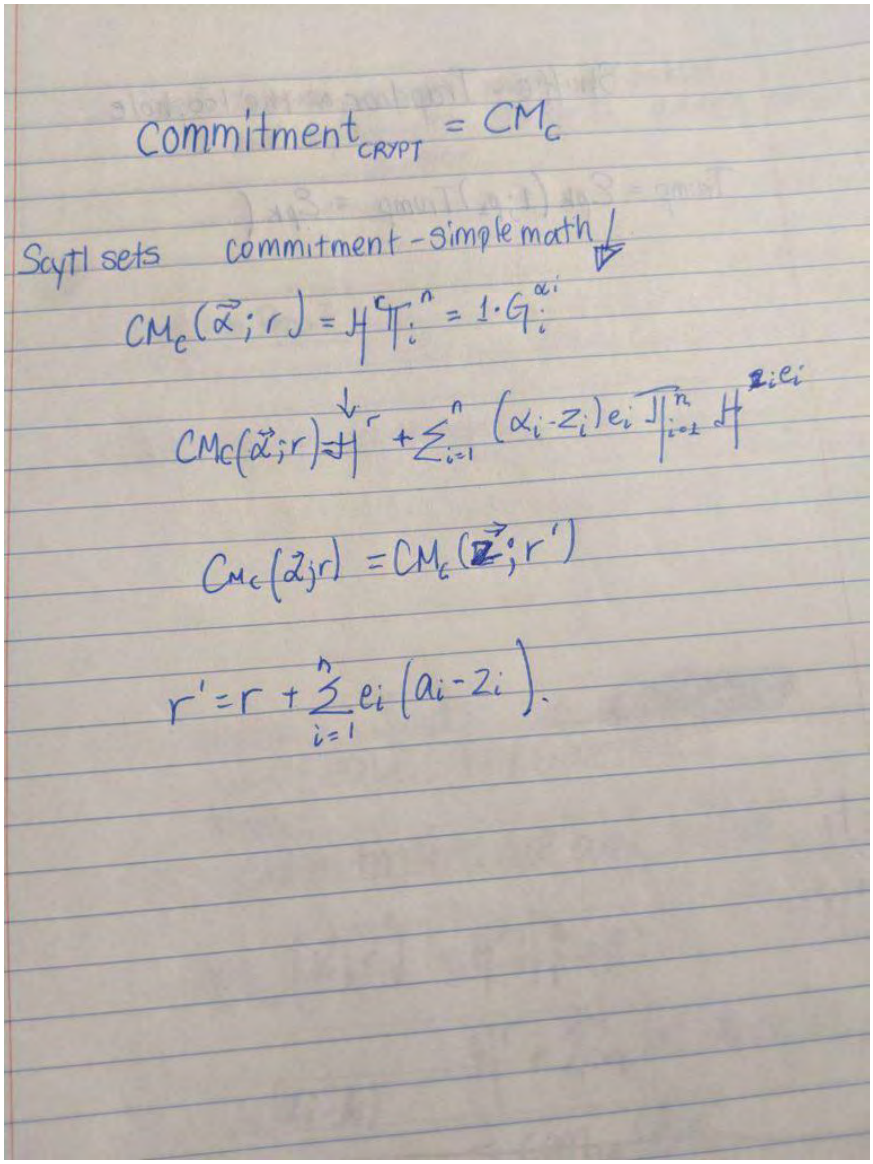
52. The encrypted data is shifted into Scytl's platform in the form of ciphertexts – this means it is encrypted and a key based on commitments is needed to read the data. The ballot data can only be read if the person has a key that is set on commitments.
53. A false sense of security is provided to both parties that votes are not being "REPLACED" during the mixing phase. Basically, Scytl re-encrypts the ballot data that comes in from Dominion (or any other voting software company) as ciphertexts. Scytl is supposed to prove that votes A, B, C are indeed X, Y, Z under their new re-encryption when sending back the votes that are tallied coding them respectively. This is done by Scytl and the Election Software company that agrees to certain

"Generators" and therefore together build "commitments."



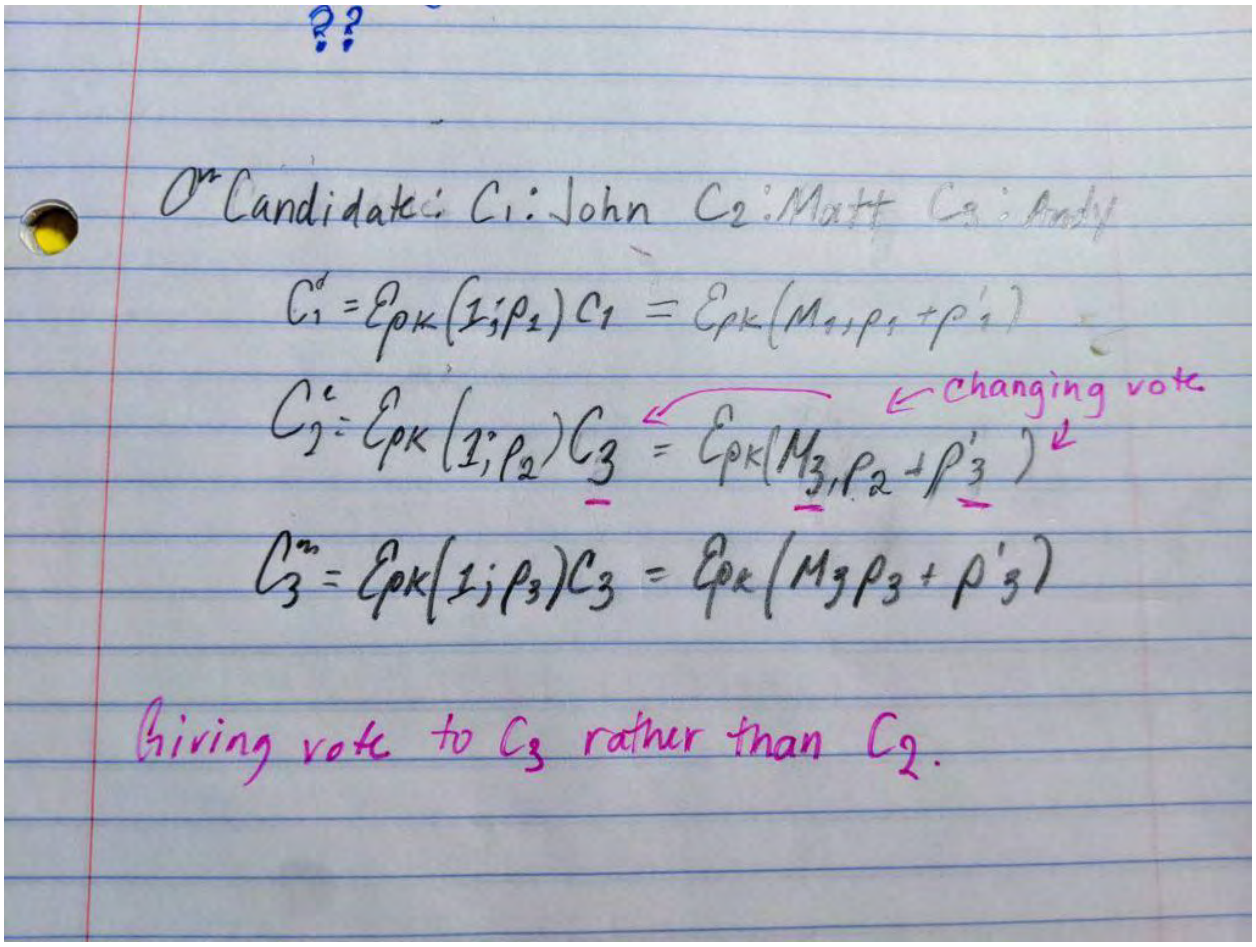
```
public CommitmentParams(final ZpSubgroup group, final int n) {
        group = group;
        h = GroupTools.getRandomElement(group);
        commitmentlength = n;
        g = GroupTools.getVectorRandomElement(group,
this.commitmentlength);
        }

        // from getRandomElement(group)
Exponent randomExponent = ExponentTools.getRandomExponent(group.getQ());
return group.getGenerator().exponentiate(randomExponent);
```

54. Scytl and Dominion have an agreement – only the two would know the parameters. This means that access is able to occur through backdoors in hardware if the parameters of the commitments are known in order to alter the range of the algorithm deployed to satisfy the outcome sought in the case of algorithm failure.
55. Trapdoor is a cryptotech term that describes a state of a program that knows the commitment parameters and therefore is able change the value of the commitments however it likes. In other words, Scytl or anyone that knows the commitment parameters can take all the votes and give them to any one they want. If they have a total of 1000 votes an algorithm can distribute them among all races as it deems necessary to achieve the goals it wants. (Case Study: Estonia)

56. 

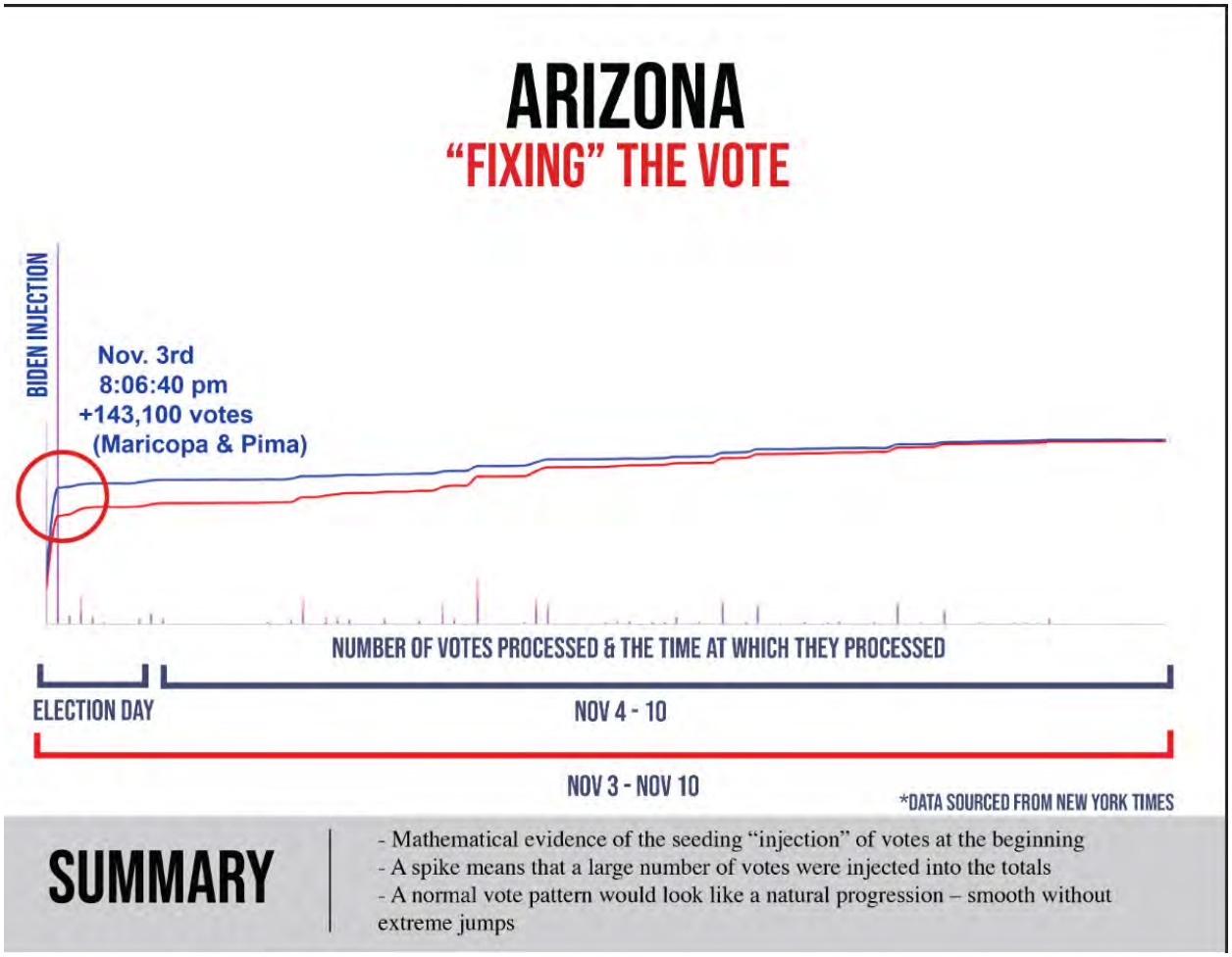
57. Within the trapdoor this is how the algorithm behaves to move the goal posts in elections without being detected by this proof . During the mixing phase this is the algorithm you would use to

"reallocate" votes via an algorithm to achieve the goal set.

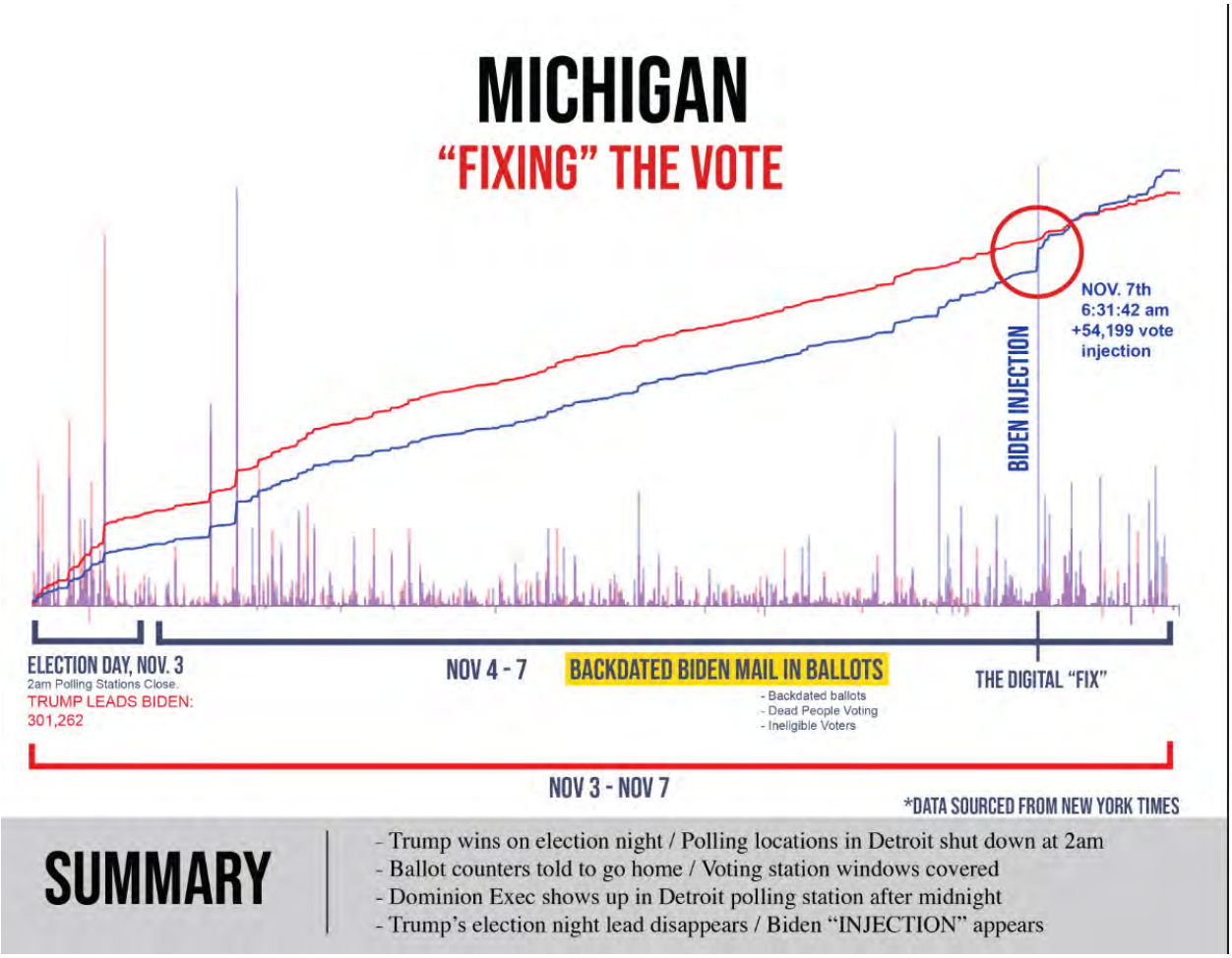


58. STEP 4|Decryption would be the decryption phase and temporary parking of vote tallies before reporting. In this final phase before public release the tallies are released from encrypted format into plain text. As previously explained, those that know the trapdoor can easily change any votes that the randomness is applied and used to generate the tally vote ciphertext. Thus in this case, Scytl who is the mixer can collude with their vote company clients or an agency (-------) to change votes and get away with it. This is because the receiver doesn't have the decryption key so they rely solely on Scytl to be ***honest*** or free from any foreign actors within their backdoor or the Election Company (like Dominion) that can have access to the key.
59. In fact, a study from the University of Bristol made claim that interference can be seen when there is a GREAT DELAY in reporting and finalizing numbers University of Bristol : How not to Prove Yourself: Pitfalls of the Fiat-Shamir Heuristic and Applications to Helios
60. "Zero-knowledge proofs of knowledge allow a prover to convince a verifier that she holds information satisfying some desirable properties without revealing anything else." David Bernhard, Olivier Pereira,and Bogdan Warinschi.

61. Hence, you can't prove anyone manipulated anything. The TRAP DOOR KEY HOLDERS can offer you enough to verify to you what you need to see without revealing anything and once again indicating the inability to detect manipulation. **ZERO PROOF of INTEGRITY OF THE VOTE.**
62. Therefore, if decryption is challenged, the administrator or software company that knows the trap door key can provide you proof that would be able to pass verification (blind). This was proven to be factually true in the case study by The University of Melbourne in March. White Hat Hackers purposely altered votes by knowing the parameters set in the commitments and there was no way to prove they did it – or any way to prove they didn't.
63. IT'S THE PERFECT THREE CARD MONTY. That's just how perfect it is. They fake a proof of ciphertexts with KNOWN "RANDOMNESS" .This rolls back to the integrity of the VOTE. The vote is not safe using these machines not only because of the method used for ballot "cleansing" to maintain anonymity but the EXPOSURE to foreign interference and possible domestic bad actors.
64. In many circumstances, manipulation of the algorithm is NOT possible in an undetectable fashion. This is because it is one point heavy. Observing the elections in 2020 confirm the deployment of an algorithm due to the BEHAVIOR which is indicative of an algorithm in play that had no pivoting parameters applied.
65. The behavior of the algorithm is that one point (B) is the greatest point within the allocated set. It is the greatest number within the A B points given. Point A would be the smallest. Any points outside the A B points are not necessarily factored in yet can still be applied.
66. The points outside the parameters can be utilized to a certain to degree such as in block allocation.
67. The algorithm geographically changed the parameters of the algorithm to force blue votes and ostracize red.
68. Post block allocation of votes the two points of the algorithm were narrowed ensuring a BIDEN win hence the observation of NO Trump Votes and some BIDEN votes for a period of time.

69. 
ARIZONA
"FIXING" THE VOTE
BIDEN INJECTION
Nov. 3rd
8:06:40 pm
+143,100 votes
(Maricopa & Pima)
NUMBER OF VOTES PROCESSED & THE TIME AT WHICH THEY PROCESSED
ELECTION DAY
NOV 4 - 10
NOV 3 - NOV 10
*DATA SOURCED FROM NEW YORK TIMES
SUMMARY
- Mathematical evidence of the seeding "injection" of votes at the beginning
- A spike means that a large number of votes were injected into the totals
- A normal vote pattern would look like a natural progression – smooth without extreme jumps

70. Gaussian Elimination without pivoting explains how the algorithm would behave and the election results and data from Michigan confirm FAILURE of algorithm.



71. The "Digital Fix" observed with an increased spike in VOTES for Joe Biden can be determined as evidence of a pivot. Normally it would be assumed that the algorithm had a Complete Pivot. Wilkinson's demonstrated the guarantee as :

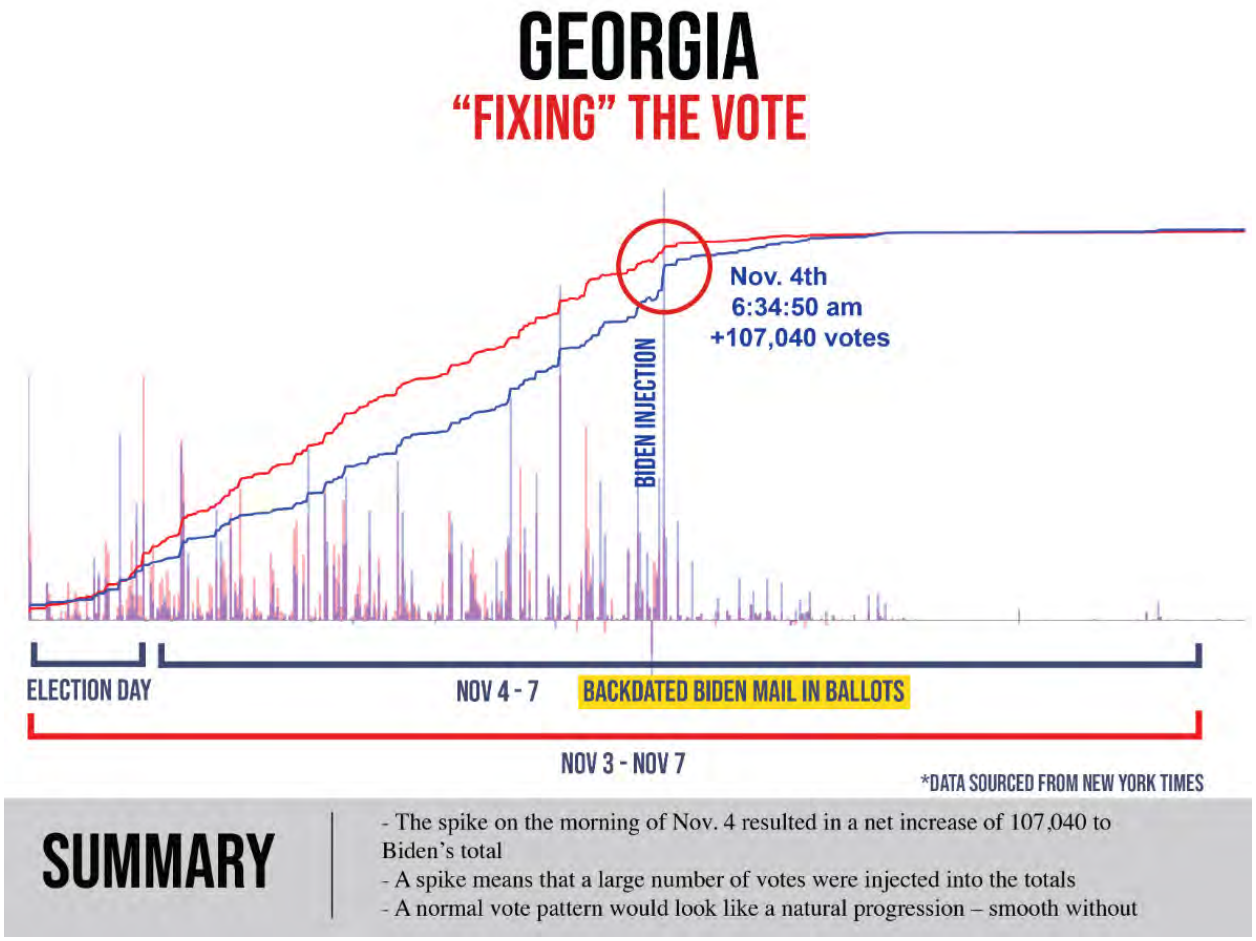
$$\frac{\|U\|_\infty}{\|A\|_\infty} \leq n^{\frac{1}{2}\log(n)}$$

72.

73. Such a conjecture allows the growth factor the ability to be upper bound by values closer to n. Therefore, complete pivoting can't be observed because there would be too many floating points. Nor can partial as the partial pivoting would overwhelm after the "injection" of votes. Therefore, external factors were used which is evident from the "DIGITAL FIX"

74. Observing the elections, after a review of Michigan's data a spike of 54,199 votes to Biden. Because it is pushing and pulling and keeping a short distance between the 2 candidates; but then a spike, which is how an algorithm presents; - and this spike means there was a pause and an insert was made, where they insert an algorithm. Block spikes in votes for JOE BIDEN were NOT paper

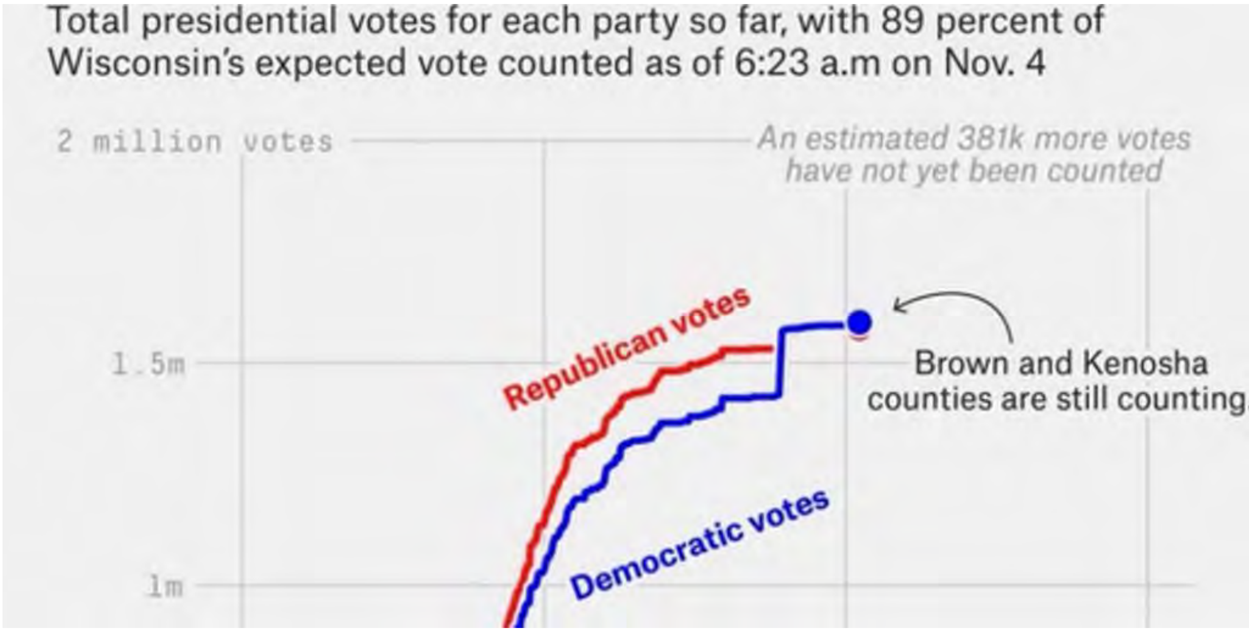
ballots being fed or THUMB DRIVES. The algorithm block adjusted itself and the PEOPLE were creating the evidence to BACK UP the block allocation.

75. I have witnessed the same behavior of the election software in countries outside of the United States and within the United States. In -------, the elections conducted behaved in the same manner by allocating BLOCK votes to the candidate "chosen" to win.
76. Observing the data of the contested states (and others) the algorithm deployed is identical to that which was deployed in 2012 providing Barack Hussein Obama a block allocation to win the 2012 Presidential Elections.
77. The algorithm looks to have been set to give Joe Biden a 52% win even with an initial 50K+ vote block allocation was provided initially as tallying began (as in case of Arizona too). In the am of November 4, 2020 the algorithm stopped working, therefore another "block allocation" to remedy the failure of the algorithm. This was done manually as ALL the SYSTEMS shut down NATIONWIDE to avoid detection.
78. 

79. In Georgia during the 2016 Presidential Elections a failed attempt to deploy the scripts to block allocate votes from a centralized location where the "trap-door" key lay an attempt by someone using

the DHS servers was detected by the state of GA. The GA leadership assumed that it was "Russians" but later they found out that the IP address was that of DHS.

80. In the state of Wisconsin, we observed a considerable BLOCK vote allocation by the algorithm at the SAME TIME it happened across the nation. All systems shut down at around the same time.

81. 

82. In Wisconsin there are also irregularities in respect to BALLOT requests. (names AND address Hidden for privacy)

83.

F	G	H	V	W	X	Y	AB	AC	AD	AG	AH	AI	AJ	AK	AL	AM
Active	Registered	Military	Brown County	11/01/2020	Online	Military		Official	Active	Not Returned	Online	11/01/2020				
Active	Registered	Regular	Brown County	10/23/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	10/23/2020	10/23/2020			
Active	Registered	Military	Brown County	11/01/2020	Online	Military		Official	Active	Not Returned	Online	11/01/2020				
Active	Registered	Regular	Brown County	11/01/2020	Online											
Active	Registered	Regular	Brown County	11/01/2020	Email	Regular		Official	Active	Returned	Mail	10/31/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/01/2020	Email	Regular		Official	Active	Returned	Mail	10/31/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Online											
Active	Registered	Regular	Brown County	11/02/2020	Received In Persor	Hospitaliz		Official	Active	Returned	Appointed Agent	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Email	Hospitaliz		Official	Active	Returned	Appointed Agent	11/02/2020	11/02/2020			
Active	Registered	Military	Brown County	11/02/2020	Mail											
Active	Registered	Regular	Brown County	11/02/2020	Mail	Regular		Official	Active	Returned	Appointed Agent	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Mail	Regular		Official	Active	Returned	Appointed Agent		11/02/2020			
Active	Registered	Military	Brown County	11/02/2020	Online	Military		Official	Active	Not Returned	Online	11/02/2020				
Active	Registered	Military	Brown County	11/02/2020	Online	Military		Official	Active	Not Returned	Online	11/02/2020				
Active	Registered	Regular	Brown County	11/02/2020	Online											
Active	Registered	Military	Brown County	11/02/2020	FPCA	Military		Official	Active	Not Returned	Mail	11/02/2020				
Active	Registered	Military	Brown County	11/02/2020	FPCA	Military		Official	Active	Returned	Email	11/02/2020	11/03/2020			
Active	Registered	Regular	Brown County	11/03/2020	Voted in Person	Regular		Official	Inactive	Voter Spoiled	Voted In Person	11/03/2020	11/03/2020			
Active	Registered	Military	Brown County	11/03/2020	Mail	Military	Certification insufficient	Federal Absent	Active	Returned, to be Rejected	Mail	11/03/2020	11/03/2020			
Active	Registered	Military	Brown County	11/03/2020	Mail	Military		Official	Active	Not Returned	Mail	11/03/2020				
Active	Registered	Military	Brown County	11/03/2020	Online											
Active	Registered	Regular	Brown County	11/03/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
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Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											

84.

Active	Registered	Regular	Brown County	11/03/2020	Online
Active	Registered	Regular	Brown County	11/04/2020	Online
Active	Registered	Regular	Brown County	11/04/2020	Online
Active	Registered	Regular	Brown County	11/04/2020	Online
Active	Registered	Regular	Brown County	11/04/2020	Online
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Active	Registered	Regular	Brown County	11/05/2020	Online
Active	Registered	Regular	Brown County	11/05/2020	Online
Active	Registered	Regular	Brown County	11/05/2020	Online
Active	Registered	Regular	Brown County	11/05/2020	Online
Active	Registered	Regular	Brown County	11/06/2020	Online
Active	Registered	Regular	Brown County	11/06/2020	Online

85. I can personally attest that in 2013 discussions by the Obama / Biden administration were being had with various agencies in the deployment of such election software to be deployed in ----- in 2013.
86. On or about April 2013 a one year plan was set to fund and usher elections in -----.
87. Joe Biden was designated by Barack Hussein Obama to ensure the ----- accepted assistance.
88. John Owen Brennan and James (Jim) Clapper were responsible for the ushering of the intelligence surrounding the elections in -----.
89. Under the guise of Crisis support the US Federal Tax Payers funded the deployment of the election software and machines in ------ signing on with Scytl.

The White House

Office of the Press Secretary

For Immediate Release April 21, 2014

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FACT SHEET: U.S. Crisis Support Package for Ukraine

President Obama and Vice President Biden have made U.S. support for Ukraine an urgent priority as the Ukrainian government works to establish security and stability, pursue democratic elections and constitutional reform, revive its economy, and ensure government institutions are transparent and accountable to the Ukrainian people. Ukraine embarks on this reform path in the face of severe challenges to its sovereignty and territorial integrity, which we are working to address together with Ukraine and our partners in the international community. The United States is committed to ensuring that Ukrainians alone are able to determine their country's future without intimidation or coercion from outside forces. To support Ukraine, we are today announcing a new package of assistance totaling **$50 million** to help Ukraine pursue political and economic reform and strengthen the partnership between the United States and Ukraine.

90.

91. Right before the ----- elections it was alleged that CyberBerkut a pro-Russia group infiltrated --- central election computers and **deleted key files**. These actions supposedly rendered the vote-tallying system inoperable.
92. In fact, the KEY FILES were the Commitment keys to allow Scytl to tally the votes rather than the election machines. The group had disclosed emails and other documents proving that their election was rigged and that they tried to avoid a fixed election.
93. The elections were held on May 25, 2014 but in the early AM hours the election results were BLOCKED and the final tally was DELAYED flipping the election in favor of -----.
94. The claim was that there was a DDoS attack by Russians when in actual fact it was a mitigation of the algorithm to inject block votes as we observed was done for Joe Biden because the KEYS were unable to be deployed. In the case of -----, the trap-door key was "altered"/deleted/ rendered ineffective. In the case of the US elections, representatives of Dominion/ ES&S/ Smartmatic/ Hart Intercivic would have to manually deploy them since if the entry points into the systems seemed to have failed.
95. The vote tallying of all states NATIONWIDE stalled and hung for days – as in the case of Alaska that has about 300K registered voters but was stuck at 56% reporting for almost a week.
96. This "hanging" indicates a failed deployment of the scripts to block allocate remotely from one location as observed in ------ on May 26, 2014.
97. This would justify the presence of the election machine software representatives making physical appearances in the states where the election results are currently being contested.
98. A Dominion Executive appeared at the polling center in Detroit after midnight.
99. Considering that the hardware of the machines has NOT been examined in Michigan since 2017 by Pro V& V according to Michigan's own reporting. COTS are an avenue that hackers and bad actors seek to penetrate in order to control operations. Their software updates are the reason vulnerabilities to foreign interference in all operations exist.
100. The importance of VSTLs in underrated to protect up from foreign interference by way of open access via COTS software. Pro V& V who's EAC certification EXPIRED on 24 FEB 2017 was contracted with the state of WISCONSIN.
101. In the United States each state is tasked to conduct and IV& V (Independent Verification and Validation) to provide assurance of the integrity of the votes.
102. If the "accredited" non-federal entities have NOT received EAC accreditation this is a failure of the states to uphold their own states standards that are federally regulated.
103. In addition, if the entities had NIST certificates they are NOT sufficing according the HAVA ACT 2002 as the role of NIST is clear.
104. Curiously, both companies PRO V&V and SLI GAMING received NIST certifications OUTSIDE the 24 month scope.

105. PRO V& V received a NIST certification on 26MAR2020 for ONE YEAR. Normally the NIST certification is good for two years to align with that of EAC certification that is good for two years.

106.

United States Department of Commerce
National Institute of Standards and Technology

NVLAP®

Certificate of Accreditation to ISO/IEC 17025:2017

NVLAP LAB CODE: 200978-0

Pro V&V
Huntsville, AL

is accredited by the National Voluntary Laboratory Accreditation Program for specific services, listed on the Scope of Accreditation, for:

Voting System Testing

This laboratory is accredited in accordance with the recognized International Standard ISO/IEC 17025:2017. This accreditation demonstrates technical competence for a defined scope and the operation of a laboratory quality management system (refer to joint ISO-ILAC-IAF Communique dated January 2009).

2020-03-26 through 2021-03-31
Effective Dates

DEPARTMENT OF COMMERCE * UNITED STATES OF AMERICA

For the National Voluntary Laboratory Accreditation Program

107. The last PRO V& V EAC accreditation certificate (Item 8) of this declaration expired in February 2017 which means that the IV & V conducted by Michigan claiming that they were accredited is false.

108. The significance of VSTLs being accredited and examining the HARDWARE is key. COTS software updates are the avenues of entry.

109. As per DOMINION'S own petition, the modems they use are COTS therefore failure to have an accredited VSTL examine the hardware for points of entry by their software is key.

*Compact Flash Cards	***SanDisk Ultra: SDCFHS-004G SDCFHS-008G RiData: CFC-14A RDF8G-233XMCB2-1 RDF16G-233XMCB2-1 RDF32G-233XMCB2-1 SanDisk Extreme: SDCFX-016G SDCFX-032G SanDisk: SDFAA-008G		Memory device for ICP and ICE tabulators.
*Modems	Verizon USB Modem Pantech UMW190NCD USB Modem MultiTech MT9234MU CellGo Cellular Modem E-Device 3GPUSUS AT&T USB Modem MultiTech GSM MTD-H5 Fax Modem US Robotics 56K V.92.		Analog and wireless modems for transmitting unofficial election night results.

110.

111. For example and update of Verizon USB Modem Pantech undergoes multiple software updates a year for it's hardware. That is most likely the point of entry into the systems.

112. During the 2014 elections in ---- it was the modems that gave access to the systems where the commitment keys were deleted.

113. SLI Gaming is the other VSTL "accredited" by the EAC BUT there is no record of their accreditation. In fact, SLI was NIST ISO Certified 27 days before the election which means that PA IV&V was conducted without NIST cert for SLI being valid.

114. 

United States Department of Commerce
National Institute of Standards and Technology

NVLAP®

Certificate of Accreditation to ISO/IEC 17025:2017

NVLAP LAB CODE: 200733-0

SLI Compliance
Wheat Ridge, CO

is accredited by the National Voluntary Laboratory Accreditation Program for specific services, listed on the Scope of Accreditation, for:

Voting System Testing

This laboratory is accredited in accordance with the recognized International Standard ISO/IEC 17025:2017. This accreditation demonstrates technical competence for a defined scope and the operation of a laboratory quality management system (refer to joint ISO-ILAC-IAF Communique dated January 2009).

2020-10-07 through 2020-12-31
Effective Dates

DEPARTMENT OF COMMERCE · UNITED STATES OF AMERICA

For the National Voluntary Laboratory Accreditation Program

115. In fact SLI was NIST ISO Certified for less than 90 days.

116. I can personally attest that high-level officials of the Obama/Biden administration and large private contracting firms met with a software company called GEMS which is ultimately the software ALL election machines run now running under the flag of DOMINION.

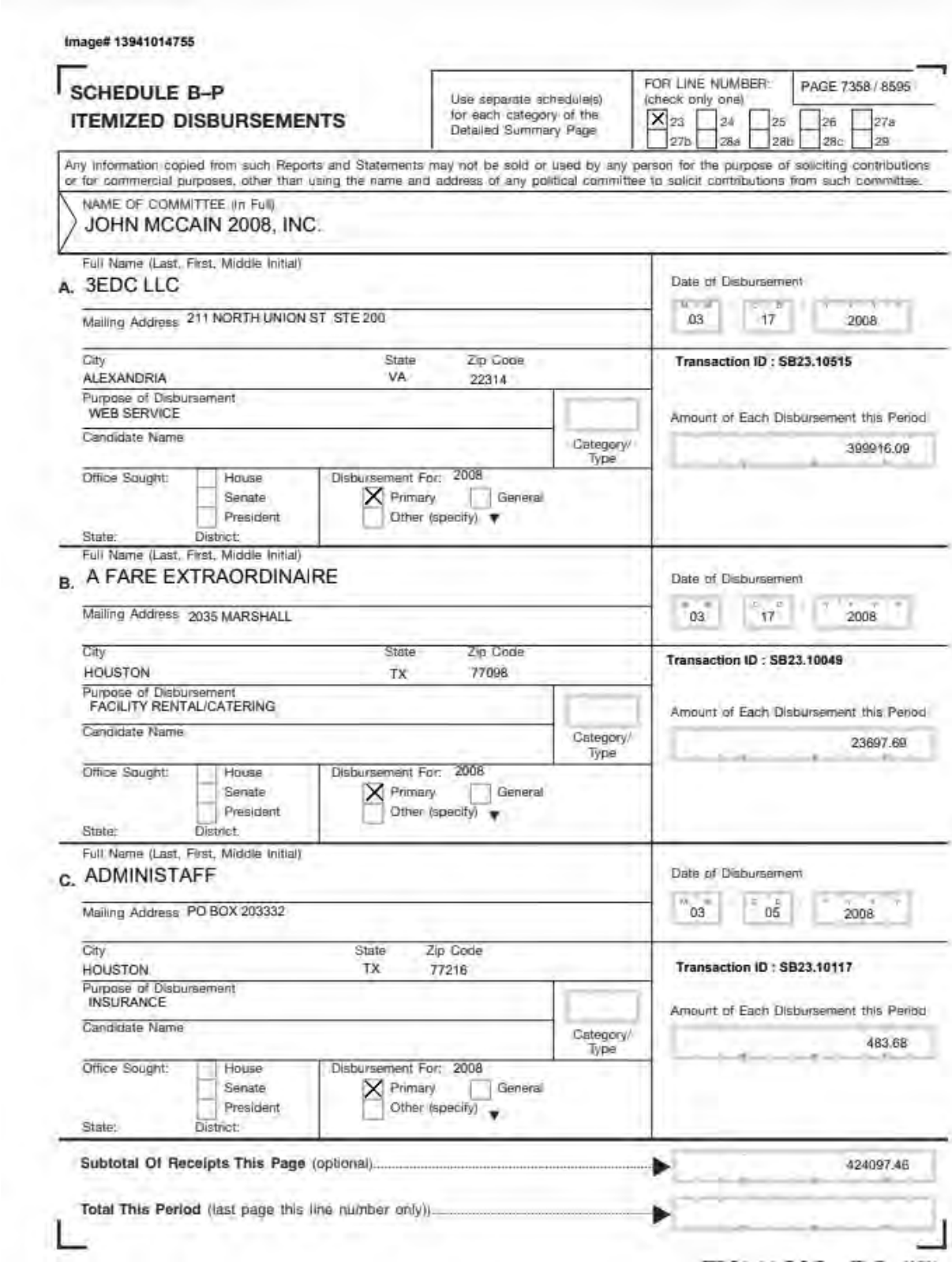
117. GEMS was manifested from SOE software purchased by SCYTL developers and US Federally Funded persons to develop it.

118. The only way GEMS can be deployed across ALL machines is IF all counties across the nation are housed under the same server networks.

119. GEMS was tasked in 2009 to a contractor in Tampa, Fl.

120. GEMS was also fine-tuned in Latvia, Belarus, Serbia and Spain to be localized for EU deployment as observed during the Swissport election debacle.

121. John McCain's campaign assisted in FUNDING the development of GEMS web monitoring via WEB Services with 3EDC and Dynology.



Image# 13941014755

SCHEDULE B–P
ITEMIZED DISBURSEMENTS

Use separate schedule(s) for each category of the Detailed Summary Page

FOR LINE NUMBER: (check only one)
☒ 23 ☐ 24 ☐ 25 ☐ 26 ☐ 27a
☐ 27b ☐ 28a ☐ 28b ☐ 28c ☐ 29

PAGE 7358 / 8595

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NAME OF COMMITTEE (In Full)
JOHN MCCAIN 2008, INC.

A. Full Name (Last, First, Middle Initial)
3EDC LLC
Mailing Address 211 NORTH UNION ST STE 200
City ALEXANDRIA State VA Zip Code 22314
Purpose of Disbursement WEB SERVICE
Candidate Name
Category/ Type
Office Sought: ☐ House ☐ Senate ☐ President
State: District:
Disbursement For: 2008 ☒ Primary ☐ General ☐ Other (specify)
Date of Disbursement 03 17 2008
Transaction ID : SB23.10515
Amount of Each Disbursement this Period 399916.09

B. Full Name (Last, First, Middle Initial)
A FARE EXTRAORDINAIRE
Mailing Address 2035 MARSHALL
City HOUSTON State TX Zip Code 77098
Purpose of Disbursement FACILITY RENTAL/CATERING
Candidate Name
Category/ Type
Office Sought: ☐ House ☐ Senate ☐ President
State: District:
Disbursement For: 2008 ☒ Primary ☐ General ☐ Other (specify)
Date of Disbursement 03 17 2008
Transaction ID : SB23.10049
Amount of Each Disbursement this Period 23697.69

C. Full Name (Last, First, Middle Initial)
ADMINISTAFF
Mailing Address PO BOX 203332
City HOUSTON State TX Zip Code 77216
Purpose of Disbursement INSURANCE
Candidate Name
Category/ Type
Office Sought: ☐ House ☐ Senate ☐ President
State: District:
Disbursement For: 2008 ☒ Primary ☐ General ☐ Other (specify)
Date of Disbursement 03 05 2008
Transaction ID : SB23.10117
Amount of Each Disbursement this Period 483.68

Subtotal Of Receipts This Page (optional) ▶ 424097.46

Total This Period (last page this line number only) ▶

122.

123.

124. AKAMAI Technologies services SCYTL.

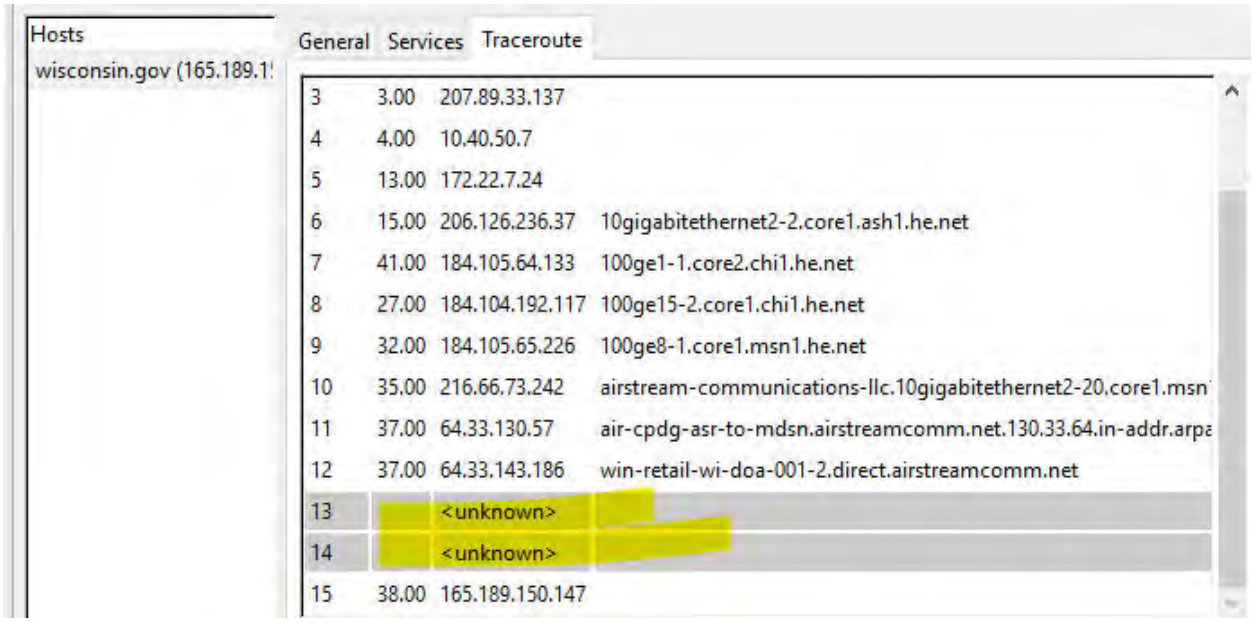
125. AKAMAI Technologies Houses ALL foreign government sites. (Please see White Paper by Akamai.)

126. AKAMAI Technologies houses ALL .gov state sites. (ref Item 123 Wisconsin.gov Example)

127. 

128. Wisconsin has EDGE GATEWAY port which is AKAMAI TECHNOLOGIES based out of GERMANY.

129. Using AKAMAI Technologies is allowing .gov sites to obfuscate and mask their systems by way of HURRICANE ELECTRIC (he.net) Kicking it to anonymous (AKAMAI Technologies) offshore servers.

130. 

131. AKAMAI Technologies has locations around the world.

132. AKAMAI Technologies has locations in China (ref item 22)

133. AKAMAI Technologies has locations in Iran as of 2019.

134. AKAMAI Technologies merged with UNICOM (CHINESE TELECOMM) in 2018.

135. AKAMAI Technologies house all state .gov information in GERMANY via TELIA AB.

136. In my professional opinion, this affidavit presents unambiguous evidence:

137. That there was Foreign interference, complicit behavior by the previous administrations from 1999 up until today to hinder the voice of the people and US persons knowingly and willingly colluding with foreign powers to steer our 2020 elections that can be named in a classified setting.

138. Foreign interference is present in the 2020 election in various means namely,

139. Foreign nationals assisted in the creation of GEMS (Dominion Software Foundation)

140. Akamai Technologies merged with a Chinese company that makes the COTS components of the election machines providing access to our electronic voting machines.

141. Foreign investments and interests in the creation of the GEMS software.

142. US persons holding an office and private individuals knowingly and willingly oversaw fail safes to secure our elections.

143. The EAC failed to abide by standards set in HAVA ACT 2002.

144. The IG of the EAC failed to address complaints since their appointment regarding vote integrity

145. Christy McCormick of the EAC failed to ensure that EAC conducted their duties as set forth by HAVA ACT 2002

146. Both Patricia Layfield (IG of EAC) and Christy McCormick (Chairwoman of EAC) were appointed by Barack Hussein Obama and have maintained their positions since then.

147. The EAC failed to have a quorum for over a calendar year leading to the inability to meet the standards of the EAC.

148. AKAMAI Technologies and Hurricane Electric raise serious concerns for NATSEC due to their ties with foreign hostile nations.

149. For all the reasons above a complete failure of duty to provide safe and just elections are observed.

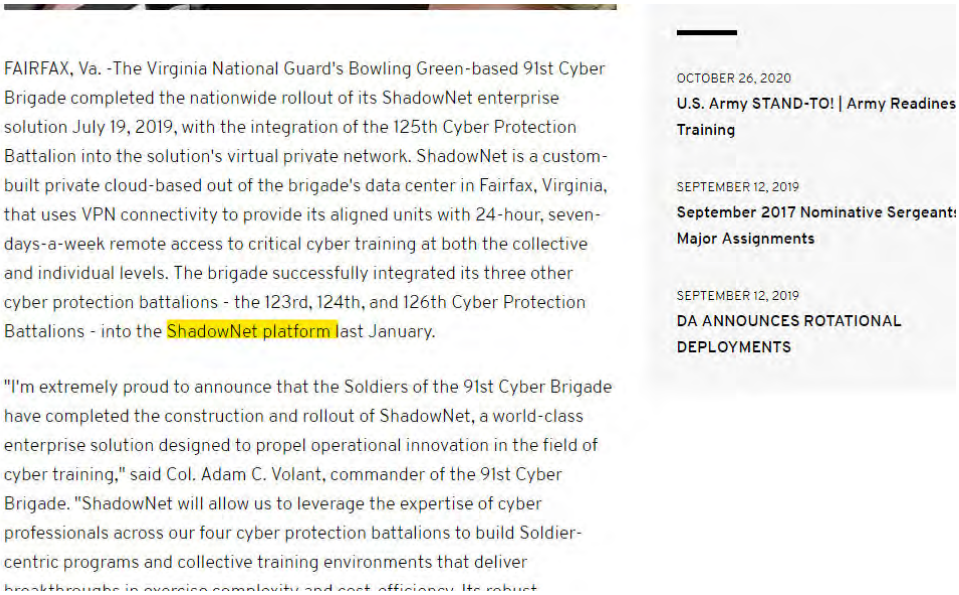
150. For the people of the United States to have confidence in their elections our cybersecurity standards should not be in the hands of foreign nations.

151. Those responsible within the Intelligence Community directly and indirectly by way of procurement of services should be held accountable for assisting in the development, implementation and promotion of GEMS.

152. GEMS ------- General Hayden.

153. In my opinion and from the data and events I have observed ---------- with the assistance of SHADOWNET under the guise of L3-Communications which is MPRI. This is also confirmed by us.army.mil making the statement that shadownet has been deployed to 30 states which all

happen to be using Dominion Machines.



FAIRFAX, Va. -The Virginia National Guard's Bowling Green-based 91st Cyber Brigade completed the nationwide rollout of its ShadowNet enterprise solution July 19, 2019, with the integration of the 125th Cyber Protection Battalion into the solution's virtual private network. ShadowNet is a custom-built private cloud-based out of the brigade's data center in Fairfax, Virginia, that uses VPN connectivity to provide its aligned units with 24-hour, seven-days-a-week remote access to critical cyber training at both the collective and individual levels. The brigade successfully integrated its three other cyber protection battalions - the 123rd, 124th, and 126th Cyber Protection Battalions - into the ShadowNet platform last January.

"I'm extremely proud to announce that the Soldiers of the 91st Cyber Brigade have completed the construction and rollout of ShadowNet, a world-class enterprise solution designed to propel operational innovation in the field of cyber training," said Col. Adam C. Volant, commander of the 91st Cyber Brigade. "ShadowNet will allow us to leverage the expertise of cyber professionals across our four cyber protection battalions to build Soldier-centric programs and collective training environments that deliver

OCTOBER 26, 2020
U.S. Army STAND-TO! | Army Readines
Training

SEPTEMBER 12, 2019
September 2017 Nominative Sergeants
Major Assignments

SEPTEMBER 12, 2019
DA ANNOUNCES ROTATIONAL
DEPLOYMENTS

154. Based on my research of voter data – it appears that there are approximately 23,000 residents of a Department of Corrections Prison with requests for absentee ballot in Wisconsin. We are currently reviewing and verifying the data and will supplement.

155.

	23230	Gutierrez	Mary	Jane		(262)994-9050	
23231	23231	Hansen	Luann	M		(262)994-9050	
23232	23232	Neberman	John	C		(262)994-9050	
23233	23233	Reynolds	Devi	J		(262)994-9050	
23234	23234	Rieckhoff	Kathryn	Susan		(262)994-9050	
23235	23235	Edwards	Mark	Landon		(262)994-9050	
23236	23236	Pfeiffer	Joseph	Patrick		(262)994-9050	
23237	23237	Hines	Dianna	K		(262)994-9050	
23238	23238	Beachem	Janice	F		(262)994-9050	
23239	23239	Blackstone	Thomas	Wayne		(262)994-9050	
23240	23240	Braun	Patricia	Ann		(262)994-9050	
23241	23241	Smith	Raymond	L		(262)994-9050	
23242	23242	Meyer	Steven	R		(262)994-9050	
23243	23243	Vincent	Herbert			(262)994-9050	
23244	23244	Guajardo	Juan	P		(262)994-9050	
23245	23245	Wallace	Kirk	R		(262)994-9050	
23246	23246	Kaplan	Bernard	L		(262)994-9050	
23247	23247	Bahrs	Michelle	M		(262)994-9050	
23248	23248	Shattuck	Elizabeth	L		(262)994-9050	
23249	23249	Munoz	Rosalio	S	JR	(262)994-9050	
23250	23250	Strunk	Amy	C		(262)994-9050	
23251	23251	Schendel	Michael	P	JR	(262)994-9050	
23252	23252	Mack	Kimberly	N		(262)994-9050	
23253	23253	Spikes	Debra	A		(262)994-9050	
23254	23254	Busarow	Suzanne	M		(262)994-9050	
23255	23255	Oliver	Timmy			(262)994-9050	
23256	23256	Wember	Jimmy	Dean		(262)994-9050	
23257	23257	Kosterman	Michael	Richard		(262)994-9050	
23258	23258	Szaradowski	Paul	M		(262)994-9050	
23259	23259	Oliver	Dale			(262)994-9050	
23260	23260	Derango	Nancy			(262)994-9050	
23261	23261	Smith	Arthur	J		(262)994-9050	SMITH24.3059@YAHOO
23262	23262	Brown	Michael	Edward		(262)994-9050	

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.
Executed this November 29th, 2020.

DECLARATION OF RONALD WATKINS

I, Ronald Watkins, hereby state the following:

1. My name is Ronald Watkins. I am a United States citizen currently residing in Japan.

2. I am an adult of sound mind. All statements in this declaration are based on my personal knowledge and are true and correct. I am making this statement voluntarily and on my own initiative. I have not been promised, nor do I expect to receive, anything in exchange for my testimony and giving this statement. I have no expectation of any profit or reward and understand that there are those who may seek to harm me for what I say in this statement.

3. I make this declaration because I want to alert the public and let the world know the truth about the insecurity of actual voting tabulation software used in various states for administering the 2020 Presidential and other elections. The software is designed, whether with malicious intent or through plain incompetence, in such a way so as to facilitate digital ballot stuffing via simple vote result manipulation and abuse of the digital adjudication manual review system. Specifically, the Dominion Democracy Suite both enables voter fraud by unethical officials out to undermine the will of the people and facilitates tabulation errors by honest officials making simple, nearly untraceable mistakes.

4. I believe voting is a fundamental manifestation of our right to self-government, including our right to free speech. Under no circumstance should we allow a conspiracy of people and companies to subvert and destroy our most sacred rights.

5. I am a network and information security expert with nine years of experience as a network and information defense analyst and a network security engineer. In my nine years of network and information security experience, I have successfully defended large websites and complex networks against powerful cyberattacks. I have engaged in extensive training and education and learned through experience how to secure websites and networks.

6. In preparation for making this declaration, I have reviewed extensive technical materials relating to the Dominion Voting Democracy Suite, including those cited herein.

7. The Dominion Voting Systems ImageCast Central system is a software and hardware workstation system designed to work with just a common "Windows 10 Pro"[12] computer

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[1] Dominion Voting, *Democracy Suite®ImageCast® Central User Guide*, p3, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020) https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive]

[2] Georgia State Certification Testing, Dominion Voting Systems D-Suite 5.5-A Voting System, p5, table 2-1, [online document] https://sos.ga.gov/admin/uploads/Dominion_Test_Cert_Report.pdf (accessed November, 23,

paired via data cable[3] to an off- the-shelf document scanner[4] "for high speed scanning and counting of paper ballots."[5]

8. When bulk ballot scanning and tabulation begins, the "ImageCast Central" workstation operator will load a batch of ballots into the scanner feed tray and then start the scanning procedure within the software menu.[6] The scanner then begins to scan the ballots which were loaded into the feed tray while the "ImageCast Central" software application

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2020), https://web.archive.org/web/20201106055006/https://sos.ga.gov/admin/uploads/Dominion_Test_Cert_Report.pdf [archive].

[3] Dominion Voting, *Democracy Suite®ImageCast® Central User Guide*, p2, s2.1, [online document, https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020) https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[4] Michigan.gov, DOMINION VOTING SYSTEMS CONTRACT No. 071B7700117, p6, 1.1.E.1, [online document], https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf (accessed November 23, 2020), https://web.archive.org/web/20201115084004/https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf [archive]

[5] Commonwealth of Pennsylvania Department of State, Report Concerning the Examination Results of Dominion Voting Systems Democracy Suite 5.5A p6, s2.4, [online document], https://www.dos.pa.gov/VotingElections/Documents/Voting%20Systems/Dominion%20Democracy%20Suite%205.5-A/Dominion%20Democracy%20Suite%20Final%20Report%20scanned%20with%20signature%20011819.pdf (accessed November 23, 2020), https://web.archive.org/web/20201016161321/https://www.dos.pa.gov/VotingElections/Documents/Voting%20Systems/Dominion%20Democracy%20Suite%205.5-A/Dominion%20Democracy%20Suite%20Final%20Report%20scanned%20with%20signature%20011819.pdf [archive]

[6] Dominion Voting, ImageCast Central, p2, [online document], https://www.edcgov.us/Government/Elections/Documents/ImageCast%20Central%20Brochure%202018%20FINAL.pdf (accessed November 23, 2020) https://web.archive.org/web/20201017175507/https://www.edcgov.us/Government/Elections/Documents/ImageCast%20Central%20Brochure%202018%20FINAL.pdf [archive]

tabulates votes in real-time. Information about scanned ballots can be tracked inside the "ImageCast Central" software application.[7]

9. After all of the ballots loaded into the scanner's feed tray have been through the scanner, the "ImageCast Central" operator will remove the ballots from the tray and then will have the option to "Accept Batch" on the scanning menu.[8] Accepting the batch saves the results into the local file system within the "Windows 10 Pro" machine.[9] Any "problem ballots" that may need to be examined or adjudicated at a later time can be found as ballot scans saved as image files into a standard Windows folder named "NotCastImages".[10] These "problem ballots" are automatically detected during the scanning phase and digitally set aside for manual review based on exception criteria.[11] Examples of exceptions may include: overvotes, undervotes, blank contests, blank ballots, write-in selections, and marginal

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[7] Dominion Voting, Democracy Suite®ImageCast® Central User Guide, p25, s4.1.2, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[8] Dominion Voting, ImageCast Central, [website], https://www.dominionvoting.com/imagecast-central/ (Accessed November 23, 2020) https://web.archive.org/web/20201101203418/https://www.dominionvoting.com/imagecast-central/ [archive].

[9] Dominion Voting, Democracy Suite®ImageCast® Central User Guide, p25, s4.1.2, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[10] Dominion Voting, Democracy Suite®ImageCast® Central User Guide, p25, s4.1.2, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[11] Michigan.gov, DOMINION VOTING SYSTEMS CONTRACT No. 071B7700117, p21, 1.3.B.6, [online document], https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf (accessed November 23, 2020), https://web.archive.org/web/20201115084004/https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf [archive].

marks."[12] Customizable outstack conditions and marginal mark detection lets [Dominion's Customers] decide which ballots are sent for Adjudication.[13]

10. During the ballot scanning process, the "ImageCast Central" software will detect how much of a percent coverage of the oval was filled in by the voter.[14] The Dominion customer determines the thresholds of which the oval needs to be covered by a mark in order to qualify as a valid vote.[1516] If a ballot has a marginal mark which did not meet the specific thresholds set by the customer, then the ballot is considered a "problem ballot" and may be set aside into a folder named "NotCastImages."[17] "The ImageCast Central's advanced

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[12] [11] MASTER SOLUTION PURCHASE AND SERVICES AGREEMENT BY AND BETWEEN DOMINION VOTING SYSTEMS, INC. as Contractor, and SECRETARY OF STATE OF THE STATE OF GEORGIA as State, p52, s1.3, [online document], https://georgiaelections.weebly.com/uploads/1/0/8/5/108591015/contract.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201122213728/https://georgiaelections.weebly.com/uploads/1/0/8/5/108591015/contract.pdf [archive].

[13] Dominion Voting, ImageCast Central, [website], https://www.dominionvoting.com/imagecast-central/ (Accessed November 23, 2020) https://web.archive.org/web/20201101203418/https://www.dominionvoting.com/imagecast-central/ [archive].

[14] Michigan.gov, DOMINION VOTING SYSTEMS CONTRACT No. 071B7700117, p3, 1.1.A.22, [online document], https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf (accessed November 23, 2020), https://web.archive.org/web/20201115084004/https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf [archive].

[15] Calhoun County, MI, ImageCast Central (ICC) 5.5 Operations, p19, [online document], https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf (accessed November 23, 2020), https://web.archive.org/web/20200802003507/https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf [archive].

[16] IMAGECAST® CENTRAL Brochure, [website], https://www.edcgov.us/Government/Elections/Documents/ImageCast%20Central%20Brochure%202018%20FINAL.pdf (accessed November 23, 2020), https://web.archive.org/web/20201017175507/https://www.edcgov.us/Government/Elections/Documents/ImageCast%20Central%20Brochure%202018%20FINAL.pdf [archive].

[17] Dominion Voting, Democracy Suite®ImageCast® Central User Guide, p25, s4.1.2, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/

settings allow for adjustment of the scanning properties to "[set] the clarity levels at which the ballot should be scanned at." Levels can be set as a combination of brightness and contrast values, or as a gamma value."[18]

11. Based on my review of these materials, I conclude the system is designed in such a way that it allows a dishonest or otherwise unethical election administrator to creatively tweak the oval coverage threshold settings and advanced settings on the ImageCast Central scanners to set thresholds in such a way that a non-trivial amount of properly-marked ballots are marked as "problem ballots" and sent to the "NotCastImages" folder.

12. The administrator of the ImageCast Central work-station may view all images of scanned ballots which were deemed "problem ballots" by simply navigating via the standard "Windows File Explorer" to the folder named "NotCastImages" which holds ballot scans of "problem ballots."[1920] Under this system, it is possible for an administrator of the "ImageCast Central" workstation to view and delete any individual ballot scans from the "NotCastImages" folder by simply using the standard Windows delete and recycle bin functions provided by the Windows 10 Pro operating system. Adjudication is "the process of examining voted ballots to determine, and, in the judicial sense, adjudicate voter intent."[21]

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elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[18] Dominion Voting, Democracy Suite®ImageCast® Central User Guide, pp20-21, s3.22, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[19] Dominion Voting, Democracy Suite® Use Procedures, p433, F.3.11, [online document] https://votingsystems.cdn.sos.ca.gov/vendors/dominion/ds510-use-proc-jan.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201101173723/https://votingsystems.cdn.sos.ca.gov/vendors/dominion/ds510-use-proc-jan.pdf [archive].

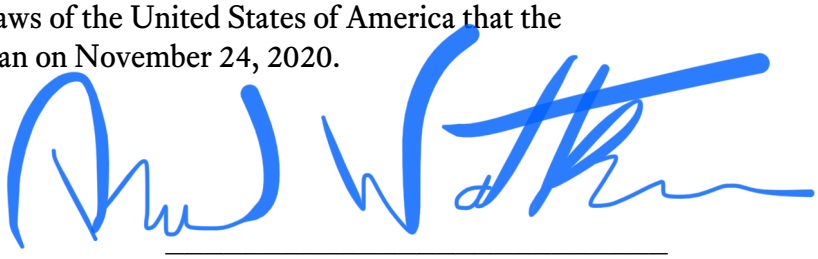
[20] Calhoun County, MI, ImageCast Central (ICC) 5.5 Operations, p27, [online document], https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf (accessed November 23, 2020), https://web.archive.org/web/20200802003507/https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf [archive].

[21] Dominion Voting, Democracy Suite® Use Procedures, p9, [online document] https://votingsystems.cdn.sos.ca.gov/vendors/dominion/ds510-use-proc-jan.pdf (Accessed November 23, 2020),

13. Based on my review of these materials, I conclude that a biased poll worker without sufficient and honest oversight could abuse the adjudication system to fraudulently switch votes for a specific candidate.

14. After the tabulation process, the ImageCast Central software saves a copy of the tabulation results locally to the "Windows 10 Pro" machine's internal storage. The results data is located in an easy-to-find path which is designed to easily facilitate the uploading of tabulation results to flash memory cards. The upload process is just a simple copying of a "Results" folder containing vote tallies to a flash memory card connected to the "Windows 10 Pro" machine. The copy process uses the standard drag-and-drop or copy/paste mechanisms within "Windows File Explorer."[22] It is my conclusion that while this is a simple procedure, the report results process is subject to user errors and is very vulnerable to corrupt manipulation by a malicious administrator. It is my conclusion that, before delivering final tabulation results to the county, it is possible for an administrator to mistakenly copy the wrong "Results" folder or even maliciously copy a false "Results" folder, which could contain a manipulated data set, to the flash memory card and deliver those false "Results" as the outcome of the election.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Japan on November 24, 2020.



Ronald Watkins

https://web.archive.org/web/20201101173723/https://votingsystems.cdn.sos.ca.gov/vendors/dominion/ds510-use-proc-jan.pdf [archive].

[22] Calhoun County, MI, ImageCast Central (ICC) 5.5 Operations, pp25-28, [online document], https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf (accessed November 23, 2020),https://web.archive.org/web/20200802003507/https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf [archive].

Congress of the United States

Washington, DC 20515

October 6, 2006

Henry M. Paulson, Jr.
Secretary
Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

Dear Mr. Secretary:

I am writing to follow up on my letter of May 4, 2006, to Secretary Snow, seeking review by the Committee on Foreign Investment in the United States of the acquisition of Sequoia Voting Systems by Smartmatic, a foreign-owned company. I believe this transaction raises exactly the sort of foreign ownership issues that CFIUS is best positioned to examine for national security concerns. As discussed below, publicly reported information about Smartmatic's ownership and about the vulnerability of electronic voting machines to tampering raises serious concerns. I strongly urge CFIUS to independently verify the information provided to American officials and the public by Sequoia/Smartmatic, and to take all appropriate measures to safeguard our national security.

It is undisputed that Smartmatic is foreign-owned and it has acquired Sequoia, one of the three major voting machine companies doing business in the U.S. According to a Sequoia press release in May 2006 (copy attached) Sequoia voting machines were used to record over 125 million votes during the 2004 Presidential election in the United States. As we confront another election, Americans deserve to know that the Administration has made sure that any foreign ownership of voting machines poses no national security threat.

Although many press reports have tried, it appears that it is not possible to discern the true owners of Smartmatic from information available to the public. Smartmatic now acknowledges that Antonio Mugica, a Venezuelan businessman, has a controlling interest in Smartmatic, but the company has not revealed who all the other Smartmatic owners are. According to the press, Smartmatic's owners are hidden through a web of off-shore private entities. (See attached articles.)

The opaque nature of Smartmatic's ownership is particularly troubling since Smartmatic has been associated by the press with the Venezuelan government led by Hugo Chavez, which is openly hostile to the United States. According to press reports, Smartmatic shared a founder, officers, directors and a principal place of business with Bizta, a company in which, according to Smartmatic, the Venezuelan government previously held a 28% stake. Mugica is also a director of Bizta.

According to Smartmatic press releases, (copies attached) Smartmatic and Bizta were part of the consortium that received the government contract to provide the voting machines for the 2004 referendum election to recall Chavez as Venezuela's president, and have since been awarded other contracts by the Venezuelan government.

Smartmatic's possible connection to the Venezuelan government poses a potential national security concern in the context of its acquisition of Sequoia because electronic voting machines are susceptible to tampering and insiders are in the best position to engage in such tampering. The 2005 Government Accountability Office Report on electronic voting, GAO-05-956, and other private sector studies consistently support this conclusion. Thus, the reports that Sequoia brought Venezuelan nationals to the United States to work on the Chicago 2006 primary election raises questions about whether these individuals are subject to direction from a foreign interest that might pose a threat to the integrity of the election. Similarly, the use of Smartmatic software and machines developed in Venezuela, such as the HAAT software that was at issue in Chicago, raises questions as to whether this software is susceptible to manipulation by its unknown creators. Reportedly, Smartmatic may soon be introducing into the United States the type of electronic voting machines that were used (with Bizta software) in the controversial 2004 Venezuelan recall election, under the label AVC Edge II Plus.

In reviewing the Smartmatic acquisition of Sequoia, it is important that CFIUS understand the products and services that are of Venezuelan origin and evaluate Smartmatic's ownership to determine who could have influence and control over these and other Sequoia products and services that are in use or intended for use in U.S. elections. In light of Smartmatic's failure fully to answer these questions to date, this issue demands the most thorough independent investigation by CFIUS.

Thank you for your consideration of this letter.

Sincerely,

Carolyn B. Maloney

Carolyn B. Maloney
Member of Congress

Attachments

Congress of the United States

Washington, DC 20510

December 6, 2019

Sami Mnaymneh
Founder and Co-Chief Executive Officer
H.I.G. Capital, LLC
[redacted]

Tony Tamer
Founder and Co-Chief Executive Officer
H.I.G. Capital, LLC
[redacted]

Dear Messrs. Mnaymneh and Tamer:

We are writing to request information regarding H.I.G. Capital's (H.I.G.) investment in Hart InterCivic Inc. (Hart InterCivic) one of three election technology vendors responsible for developing, manufacturing and maintaining the vast majority of voting machines and software in the United States, and to request information about your firm's structure and finances as it relates to this company.

Some private equity funds operate under a model where they purchase controlling interests in companies and implement drastic cost-cutting measures at the expense of consumers, workers, communities, and taxpayers. Recent examples include Toys "R" Us and Shopko.[1] For that reason, we have concerns about the spread and effect of private equity investment in many sectors of the economy, including the election technology industry—an integral part of our nation's democratic process. We are particularly concerned that secretive and "trouble-plagued companies,"[2] owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, "have long skimped on security in favor of convenience," leaving voting systems across the country "prone to security problems."[3] In light of these concerns, we request that you provide information about your firm, the portfolio

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[1] Atlantic, "The Demise of Toys 'R' Us Is a Warning," Bryce Covert, July/August 2018 issue, https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/; Axios, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," Dan Primack, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," June 11, 2019, https://www.axios.com/shopko-bankruptcy-sun-capital-547b97ba-901c-4201-92cc-6d3168357fa3.html.

[2] ProPublica, "The Market for Voting Machines Is Broken. This Company Has Thrived in It.," Jessica Huseman, October 28, 2019, https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it.

[3] Associated Press News, "US Election Integrity Depends on Security-Challenged Firms," Frank Bajak, October 28, 2019, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c.

companies in which it has invested, the performance of those investments, and the ownership and financial structure of your funds.

Over the last two decades, the election technology industry has become highly concentrated, with a handful of consolidated vendors controlling the vast majority of the market. In the early 2000s, almost twenty vendors competed in the election technology market.[4] Today, three large vendors—Election Systems & Software, Dominion Voting Systems, and Hart InterCivic—collectively provide voting machines and software that facilitate voting for over 90% of all eligible voters in the United States.[5] Private equity firms reportedly own or control each of these vendors, with very limited "information available in the public domain about their operations and financial performance."[6] While experts estimate that the total revenue for election technology vendors is about $300 million, there is no publicly available information on how much those vendors dedicate to research and development, maintenance of voting systems, or profits and executive compensation.[7]

Concentration in the election technology market and the fact that vendors are often "more seasoned in voting machine and technical services contract negotiations" than local election officials, give these companies incredible power in their negotiations with local and state governments. As a result, jurisdictions are often caught in expensive agreements in which the same vendor both sells or leases, and repairs and maintains voting systems–leaving local officials dependent on the vendor, and the vendor with little incentive to substantially overhaul and improve its products.[8] In fact, the Election Assistance Commission (EAC), the primary federal body responsible for developing voluntary guidance on voting technology standards, advises state and local officials to consider "the cost to purchase or lease, operate, and maintain a voting system over its life span … [and to] know how the vendor(s) plan to be profitable" when signing contracts, because vendors typically make their profits by ensuring "that they will be around to maintain it after the sale." The EAC has warned election officials that "[i]f you do not manage the vendors, they will manage you."[9]

Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat. In January 2017, the U.S. Department of Homeland Security designated the United States' election infrastructure as "critical infrastructure" in order to prioritize the protection of our elections and to more effectively assist state and local election

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[4] Bloomberg, "Private Equity Controls the Gatekeepers of American Democracy," Anders Melin and Reade Pickert, November 3, 2018, https://www.bloomberg.com/news/articles/2018-11-03/private-equity-controls-the-gatekeepers-of-american-democracy.

[5] Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[6] Id.

[7] Id.

[8] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[9] U.S. Election Assistance Commission, "Ten Things to Know About Selecting a Voting System," October 14, 2017, https://www.eac.gov/documents/2017/10/14/ten-things-to-know-about-selecting-a-voting-system-cybersecurity-voting-systems-voting-technology/.

officials in addressing these risks.[10] However, voting machines are reportedly falling apart across the country, as vendors neglect to innovate and improve important voting systems, putting our elections at avoidable and increased risk.[11] In 2015, election officials in at least 31 states, representing approximately 40 million registered voters, reported that their voting machines needed to be updated, with almost every state "using some machines that are no longer manufactured."[12] Moreover, even when state and local officials work on replacing antiquated machines, many continue to "run on old software that will soon be outdated and more vulnerable to hackers."[13]

In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana."[14] In addition, researchers recently uncovered previously undisclosed vulnerabilities in "nearly three dozen backend election systems in 10 states."[15] And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem."[16] These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

H.I.G. reportedly owns or has had investments in Hart InterCivic, a major election technology vendor. In order to help us understand your firm's role in this sector, we ask that you provide answers to the following questions no later than December 20, 2019.

1. Please provide the disclosure documents and information enumerated in Sections 501 and 503 of the *Stop Wall Street Looting Act*.[17]

2. Which election technology companies, including all affiliates or related entities, does H.I.G. have a stake in or own? Please provide the name of and a brief description of the services each company provides.

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[10] Department of Homeland Security, "Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector," January 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.
[11] AP News, "US election integrity depends on security-challenged firms," Frank Bajak, October 29, 2018, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[12] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf.
[13] Associated Press, "AP Exclusive: New election systems use vulnerable software," Tami Abdollah, July 13, 2019, https://apnews.com/e5e070c31f3c497fa9e6875f426ccde1.
[14] Vice, "Here's Why All the Voting Machines Are Broken and the Lines Are Extremely Long," Jason Koebler and Matthew Gault, November 6, 2018, https://www.vice.com/en_us/article/59vzgn/heres-why-all-the-voting-machines-are-broken-and-the-lines-are-extremely-long.
[15] Vice, "Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials," Kim Zetter, August 8, 2019, https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.
[16] New York Times, "A Pennsylvania Country's Election Day Nightmare Underscores Voting Machine Concerns," Nick Corasaniti, November 30, 2019, https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.
[17] Stop Wall Street Looting Act, S.2155, https://www.congress.gov/bill/116th-congress/senate-bill/2155.

a. Which election technology companies, including all affiliates or related entities, has H.I.G. had a stake in or owned in the past twenty years? Please provide the name of and a brief description of the services each company provides or provided.

b. For each election technology company H.I.G. had a stake in or owned in the past twenty years, including all affiliates or related entities, please provide the following information for each year that the firm has had a stake in or owned this company and the five years preceding the firm's investment.
   i. The name of the company
   ii. Ownership stake
   iii. Total revenue
   iv. Net income
   v. Percentage of revenue dedicated to research and development
   vi. Total number of employees
   vii. A list of all state and local jurisdictions with which the company has a contract to provide election related products or services
   viii. Other private-equity firms that own a stake in the company

3. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with the EAC's Voluntary Voting System Guidelines? If so, please provide a copy of each EAC noncompliance notice received by the company and a description of what steps the company took to resolve each issue.

4. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with any state or local voting system guidelines or practices? If so, please provide a list of all such instances and a description of what steps the company took to resolve each issue.

5. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have violated any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such violations.

6. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, reached a settlement with any federal or state law enforcement entity related to a potential violation of any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such settlements.

7. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the past twenty years, reached a settlement with any state or local jurisdiction related to a potential violation of or breach of contract? If so, please provide a complete list, including the date and description, of all such settlements.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Amy Klobuchar
United States Senator

Ron Wyden
United States Senator

Mark Pocan
Member of Congress

Congress of the United States

Washington, DC 20510

December 6, 2019

Michael McCarthy
Chairman
McCarthy Group, LLC
[redacted]

Dear Mr. McCarthy:

We are writing to request information regarding McCarthy Group, LLC's (McCarthy Group) investment in Election Systems & Software (ES&S), one of three election technology vendors responsible for developing, manufacturing and maintaining the vast majority of voting machines and software in the United States, and to request information about your firm's structure and finances as it relates to this company.

Some private equity funds operate under a model where they purchase controlling interests in companies and implement drastic cost-cutting measures at the expense of consumers, workers, communities, and taxpayers. Recent examples include Toys "R" Us and Shopko.[1] For that reason, we have concerns about the spread and effect of private equity investment in many sectors of the economy, including the election technology industry—an integral part of our nation's democratic process. We are particularly concerned that secretive and "trouble-plagued companies,"[2] owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, "have long skimped on security in favor of convenience," leaving voting systems across the country "prone to security problems."[3] In light of these concerns, we request that you provide information about your firm, the portfolio companies in which it has invested, the performance of those investments, and the ownership and financial structure of your funds.

Over the last two decades, the election technology industry has become highly concentrated, with a handful of consolidated vendors controlling the vast majority of the market. In the early

[1] Atlantic, "The Demise of Toys 'R' Us Is a Warning," Bryce Covert, July/August 2018 issue, https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/; Axios, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," Dan Primack, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," June 11, 2019, https://www.axios.com/shopko-bankruptcy-sun-capital-547b97ba-901c-4201-92cc-6d3168357fa3.html.

[2] ProPublica, "The Market for Voting Machines Is Broken. This Company Has Thrived in It.," Jessica Huseman, October 28, 2019, https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it.

[3] Associated Press News, "US Election Integrity Depends on Security-Challenged Firms," Frank Bajak, October 28, 2019, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c.

2000s, almost twenty vendors competed in the election technology market.[4] Today, three large vendors—ES&S, Dominion Voting Systems, and Hart InterCivic—collectively provide voting machines and software that facilitate voting for over 90% of all eligible voters in the United States.[5] Private equity firms reportedly own or control each of these vendors, with very limited "information available in the public domain about their operations and financial performance."[6] While experts estimate that the total revenue for election technology vendors is about $300 million, there is no publicly available information on how much those vendors dedicate to research and development, maintenance of voting systems, or profits and executive compensation.[7]

Concentration in the election technology market and the fact that vendors are often "more seasoned in voting machine and technical services contract negotiations" than local election officials, give these companies incredible power in their negotiations with local and state governments. As a result, jurisdictions are often caught in expensive agreements in which the same vendor both sells or leases, and repairs and maintains voting systems–leaving local officials dependent on the vendor, and the vendor with little incentive to substantially overhaul and improve its products.[8] In fact, the Election Assistance Commission (EAC), the primary federal body responsible for developing voluntary guidance on voting technology standards, advises state and local officials to consider "the cost to purchase or lease, operate, and maintain a voting system over its life span … [and to] know how the vendor(s) plan to be profitable" when signing contracts, because vendors typically make their profits by ensuring "that they will be around to maintain it after the sale." The EAC has warned election officials that "[i]f you do not manage the vendors, they will manage you."[9]

Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat. In January 2017, the U.S. Department of Homeland Security designated the United States' election infrastructure as "critical infrastructure" in order to prioritize the protection of our elections and to more effectively assist state and local election officials in addressing these risks.[10] However, voting machines are reportedly falling apart across the country, as vendors neglect to innovate and improve important voting systems, putting our

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[4] Bloomberg, "Private Equity Controls the Gatekeepers of American Democracy," Anders Melin and Reade Pickert, November 3, 2018, https://www.bloomberg.com/news/articles/2018-11-03/private-equity-controls-the-gatekeepers-of-american-democracy.

[5] Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[6] Id.

[7] Id.

[8] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[9] U.S. Election Assistance Commission, "Ten Things to Know About Selecting a Voting System," October 14, 2017, https://www.eac.gov/documents/2017/10/14/ten-things-to-know-about-selecting-a-voting-system-cybersecurity-voting-systems-voting-technology/.

[10] Department of Homeland Security, "Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector," January 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.

elections at avoidable and increased risk.[11] In 2015, election officials in at least 31 states, representing approximately 40 million registered voters, reported that their voting machines needed to be updated, with almost every state "using some machines that are no longer manufactured."[12] Moreover, even when state and local officials work on replacing antiquated machines, many continue to "run on old software that will soon be outdated and more vulnerable to hackers."[13]

In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana."[14] In addition, researchers recently uncovered previously undisclosed vulnerabilities in "nearly three dozen backend election systems in 10 states."[15] And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem."[16] These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

McCarthy Group reportedly owns or has had investments in ES&S, a major election technology vendor. In order to help us understand your firm's role in this sector, we ask that you provide answers to the following questions no later than December 20, 2019.

1. Please provide the disclosure documents and information enumerated in Sections 501 and 503 of the *Stop Wall Street Looting Act*.[17]

2. Which election technology companies, including all affiliates or related entities, does McCarthy Group have a stake in or own? Please provide the name of and a brief description of the services each company provides.

    a. Which election technology companies, including all affiliates or related entities, has McCarthy Group had a stake in or owned in the past twenty

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[11] AP News, "US election integrity depends on security-challenged firms," Frank Bajak, October 29, 2018, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[12] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf.

[13] Associated Press, "AP Exclusive: New election systems use vulnerable software," Tami Abdollah, July 13, 2019, https://apnews.com/e5e070c31f3c497fa9e6875f426ccde1.

[14] Vice, "Here's Why All the Voting Machines Are Broken and the Lines Are Extremely Long," Jason Koebler and Matthew Gault, November 6, 2018, https://www.vice.com/en_us/article/59vzgn/heres-why-all-the-voting-machines-are-broken-and-the-lines-are-extremely-long.

[15] Vice, "Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials," Kim Zetter, August 8, 2019, https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.

[16] New York Times, "A Pennsylvania Country's Election Day Nightmare Underscores Voting Machine Concerns," Nick Corasaniti, November 30, 2019, https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.

[17] Stop Wall Street Looting Act, S.2155, https://www.congress.gov/bill/116th-congress/senate-bill/2155.

years? Please provide the name of and a brief description of the services each company provides or provided.

b. For each election technology company McCarthy Group had a stake in or owned in the past twenty years, including all affiliates or related entities, please provide the following information for each year that the firm has had a stake in or owned this company and the five years preceding the firm's investment.
   i. The name of the company
   ii. Ownership stake
   iii. Total revenue
   iv. Net income
   v. Percentage of revenue dedicated to research and development
   vi. Total number of employees
   vii. A list of all state and local jurisdictions with which the company has a contract to provide election related products or services
   viii. Other private-equity firms that own a stake in the company

3. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with the EAC's Voluntary Voting System Guidelines? If so, please provide a copy of each EAC noncompliance notice received by the company and a description of what steps the company took to resolve each issue.

4. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with any state or local voting system guidelines or practices? If so, please provide a list of all such instances and a description of what steps the company took to resolve each issue.

5. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, been found to have violated any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such violations.

6. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, reached a settlement with any federal or state law enforcement entity related to a potential violation of any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such settlements.

7. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the

past twenty years, reached a settlement with any state or local jurisdiction related to a potential violation of or breach of contract? If so, please provide a complete list, including the date and description, of all such settlements.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Amy Klobuchar
United States Senator

Ron Wyden
United States Senator

Mark Pocan
Member of Congress

Congress of the United States

Washington, DC 20510

December 6, 2019

Stephen D. Owens
Managing Director
Staple Street Capital Group, LLC
[redacted]

Hootan Yaghoobzadeh
Managing Director
Staple Street Capital Group, LLC
[redacted]

Dear Messrs. Owens and Yaghoobzadeh:

We are writing to request information regarding Staple Street Capital Group, LLC's (Staple Street) investment in Dominion Voting System (Dominion) one of three election technology vendors responsible for developing, manufacturing and maintaining the vast majority of voting machines and software in the United States, and to request information about your firm's structure and finances as it relates to this company.

Some private equity funds operate under a model where they purchase controlling interests in companies and implement drastic cost-cutting measures at the expense of consumers, workers, communities, and taxpayers. Recent examples include Toys "R" Us and Shopko.[1] For that reason, we have concerns about the spread and effect of private equity investment in many sectors of the economy, including the election technology industry—an integral part of our nation's democratic process. We are particularly concerned that secretive and "trouble-plagued companies,"[2] owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, "have long skimped on security in favor of convenience," leaving voting systems across the country "prone to security problems."[3] In light of these concerns, we request that you provide information about your firm, the portfolio

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[2] ProPublica, "The Market for Voting Machines Is Broken. This Company Has Thrived in It.," Jessica Huseman, October 28, 2019, https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it.

[3] Associated Press News, "US Election Integrity Depends on Security-Challenged Firms," Frank Bajak, October 28, 2019, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c.

companies in which it has invested, the performance of those investments, and the ownership and financial structure of your funds.

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Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat. In January 2017, the U.S. Department of Homeland Security designated the United States' election infrastructure as "critical infrastructure" in order to prioritize the protection of our elections and to more effectively assist state and local election

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[4] Bloomberg, "Private Equity Controls the Gatekeepers of American Democracy," Anders Melin and Reade Pickert, November 3, 2018, https://www.bloomberg.com/news/articles/2018-11-03/private-equity-controls-the-gatekeepers-of-american-democracy.
[5] Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[6] Id.
[7] Id.
[8] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[9] U.S. Election Assistance Commission, "Ten Things to Know About Selecting a Voting System," October 14, 2017, https://www.eac.gov/documents/2017/10/14/ten-things-to-know-about-selecting-a-voting-system-cybersecurity-voting-systems-voting-technology/.

officials in addressing these risks.[10] However, voting machines are reportedly falling apart across the country, as vendors neglect to innovate and improve important voting systems, putting our elections at avoidable and increased risk.[11] In 2015, election officials in at least 31 states, representing approximately 40 million registered voters, reported that their voting machines needed to be updated, with almost every state "using some machines that are no longer manufactured."[12] Moreover, even when state and local officials work on replacing antiquated machines, many continue to "run on old software that will soon be outdated and more vulnerable to hackers."[13]

In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana."[14] In addition, researchers recently uncovered previously undisclosed vulnerabilities in "nearly three dozen backend election systems in 10 states."[15] And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem."[16] These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

Staple Street reportedly owns or has had investments in Dominion, a major election technology vendor. In order to help us understand your firm's role in this sector, we ask that you provide answers to the following questions no later than December 20, 2019.

1. Please provide the disclosure documents and information enumerated in Sections 501 and 503 of the *Stop Wall Street Looting Act*.[17]

2. Which election technology companies, including all affiliates or related entities, does Staple Street have a stake in or own? Please provide the name of and a brief description of the services each company provides.

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[10] Department of Homeland Security, "Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector," January 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.
[11] AP News, "US election integrity depends on security-challenged firms," Frank Bajak, October 29, 2018, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[12] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf.
[13] Associated Press, "AP Exclusive: New election systems use vulnerable software," Tami Abdollah, July 13, 2019, https://apnews.com/e5e070c31f3c497fa9e6875f426ccde1.
[14] Vice, "Here's Why All the Voting Machines Are Broken and the Lines Are Extremely Long," Jason Koebler and Matthew Gault, November 6, 2018, https://www.vice.com/en_us/article/59vzgn/heres-why-all-the-voting-machines-are-broken-and-the-lines-are-extremely-long.
[15] Vice, "Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials," Kim Zetter, August 8, 2019, https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.
[16] New York Times, "A Pennsylvania Country's Election Day Nightmare Underscores Voting Machine Concerns," Nick Corasaniti, November 30, 2019, https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.
[17] Stop Wall Street Looting Act, S.2155, https://www.congress.gov/bill/116th-congress/senate-bill/2155.

a. Which election technology companies, including all affiliates or related entities, has Staple Street had a stake in or owned in the past twenty years? Please provide the name of and a brief description of the services each company provides or provided.

b. For each election technology company Staple Street had a stake in or owned in the past twenty years, including all affiliates or related entities, please provide the following information for each year that the firm has had a stake in or owned this company and the five years preceding the firm's investment.
   i. The name of the company
   ii. Ownership stake
   iii. Total revenue
   iv. Net income
   v. Percentage of revenue dedicated to research and development
   vi. Total number of employees
   vii. A list of all state and local jurisdictions with which the company has a contract to provide election related products or services
   viii. Other private-equity firms that own a stake in the company

3. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with the EAC's Voluntary Voting System Guidelines? If so, please provide a copy of each EAC noncompliance notice received by the company and a description of what steps the company took to resolve each issue.

4. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with any state or local voting system guidelines or practices? If so, please provide a list of all such instances and a description of what steps the company took to resolve each issue.

5. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the last twenty years, been found to have violated any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such violations.

6. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the last twenty years, reached a settlement with any federal or state law enforcement entity related to a potential violation of any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such settlements.

7. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the past twenty years, reached a settlement with any state or local jurisdiction related to a potential violation of or breach of contract? If so, please provide a complete list, including the date and description, of all such settlements.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Amy Klobuchar
United States Senator

Ron Wyden
United States Senator

Mark Pocan
Member of Congress

Declaration of Russell James Ramsland, Jr.

1. My name is Russell James Ramsland, Jr., and I am a resident of Dallas County, Texas. I make this declaration pursuant to 28 USC sec 1746. I am over 18 years of age. I hold an MBA from Harvard University, and a political science degree from Duke University. I have worked with the National Aeronautics and Space Administration (NASA) and the Massachusetts Institute of Technology (MIT), among other organizations, and have run businesses all over the world, many of which are highly technical in nature. I have served on technical government panels.

2. I am part of the management team of Allied Security Operations Group, LLC, (ASOG). ASOG is a group of globally engaged professionals who come from various disciplines to include Department of Defense, Secret Service, Department of Homeland Security, and the Central Intelligence Agency. It provides a range of security services, but has a particular emphasis on cybersecurity, open source investigation and penetration testing of networks. We employ a wide variety of cyber and cyber forensic analysts. We have patents pending in a variety of applications from novel network security applications to SCADA (Supervisory Control and Data Acquisition) protection and safe browsing solutions for the dark and deep web. For this report, I have relied on these experts and resources.

3. In November 2018, ASOG analyzed audit logs for the central tabulation server of the ES&S Election Management System (EMS) for the Dallas, Texas, General Election of 2018. Our team was surprised at the enormous number of error messages that should not have been there. They numbered in the thousands, and the operator ignored and overrode all of them. This led to various legal challenges in that election, and we provided evidence and analysis in some of them.

4. As a result, ASOG initiated an 18-month study into the major EMS providers in the United States, among which is Election Systems and Software ("ES&S") that provides EMS services for Wisconsin. We did thorough background research of the literature and discovered there is confirmed evidence from both Democrat and Republican stakeholders in the vulnerability of ES&S. Next, we began doing passive penetration testing into the vulnerabilities described in the literature and confirmed for ourselves that in many cases, past vulnerabilities already identified were still left open to exploit in the November 2020 elections. We also noticed a striking similarity between the approach to software and EMS systems of ES&S and Dominion. This was logical since they share a common ancestry in the Diebold voting system.

5. Over the past three decades, almost all of the states have shifted from a relatively low-technology format to a high-technology format that relies heavily on a handful of private services companies. These private companies supply the hardware and software, often handle voter registrations, hold the voter records, partially manage the elections, program counting the votes and report the outcomes. Wisconsin is one of those states.

6. These systems contain a large number of known vulnerabilities to hacking and tampering, both when voters express their voting intention by marking an electronic ballot using ballot marking devices (BMDs), and at the back end where the votes are stored, tabulated, and reported by election officials. These vulnerabilities are well known, and experts in the field have written extensively about them.. This is not surprising as there are no federal standards for security in voting system software. EAC 2.0 was to be written to address this issue, but was never done.

7. Below is a screenshot from the ES&S Security Test Report Electionware 5.2.1.0 – 8/28/17 – Freeman, Craft, McGregor Group. It shows an incredible number of vulnerabilities in the system by which inside and external threats can manipulate the outcomes in a variety of ways.

Electionware Servers

Missing Operating System Patches	
Critical	17
Important	49
Moderate	2
Unrated	8

SCAP Misconfigurations	
Windows 2008 R2 STIG[3]	46
Firewall STIG Configuration	3
.NET Framework 4 STIG Configuration	2
Internet Explorer 9 STIG Configuration	13

Electionware Clients

Missing Operating System Patches	
Critical	24
Important	51
Moderate	1
Unrated	9

SCAP Misconfigurations	
Windows 7 STIG	51
Firewall STIG Configuration	3
.NET Framework 4 STIG Configuration	2
Internet Explorer 9 STIG Configuration	3
Windows 7 USGCB[4] Configuration	45
Firewall USGCB Configuration	8

Screenshot

Recently ES&S moved many of its systems into the cloud behind cloudfare, but ASOG determined that this protection can still be easily circumvented by gaining access through its FTP site ESSVotes.

7. Election Systems and Software ("ES&S") is a privately held company that provides election technologies and services to government jurisdictions. Almost all the counties of Wisconsin use the ES&S Election Management System with the exception of Sheboygan County. ES&S systems have options to be an electronic, paperless voting system with no permanent record of the voter's choices, or a paper ballot-based system or hybrid of those two.

9. The overwhelming vulnerabilities of the ES&S system were on full display in Dallas County where ES&S is used, during the 2020 General Election. Data has been provided by the Dallas County Election Department. The Voter Registration Database was received October 13, 2020 following an Open Records Request by The Dallas Examiner. The Mail-In and Early Voting Rosters were downloaded daily from the County's computers. All Texas counties are required by law to publish daily voting rosters.

10. In that election, the voter records during early voting were captured each day for those voters who cast ballots either in person or by mail-in and catalogued using the hash totals to provide an absolute unique identifier. As required by state law, the Dallas County Elections Department published the Daily Vote Roster for all voters who cast ballots during Absentee and In-Person Early Voting. The Roster contained the VoterID, name, address, type of vote, and various dates associated with every Early-Voting vote cast.

Dallas County claims its source of roster data was the In-Person Electronic Poll Books, and the Absentee Ballot scanners. Dallas County has claimed that entry into the Vote Roster can only be done by a registered Dallas County voter who either appeared In-Person or by Absentee Ballot. The computer that generated the roster was apparently hacked between October 7 and October 30. During that period tens of thousands of vote records were purged, added, or edited from the ES&S generated Vote Roster.

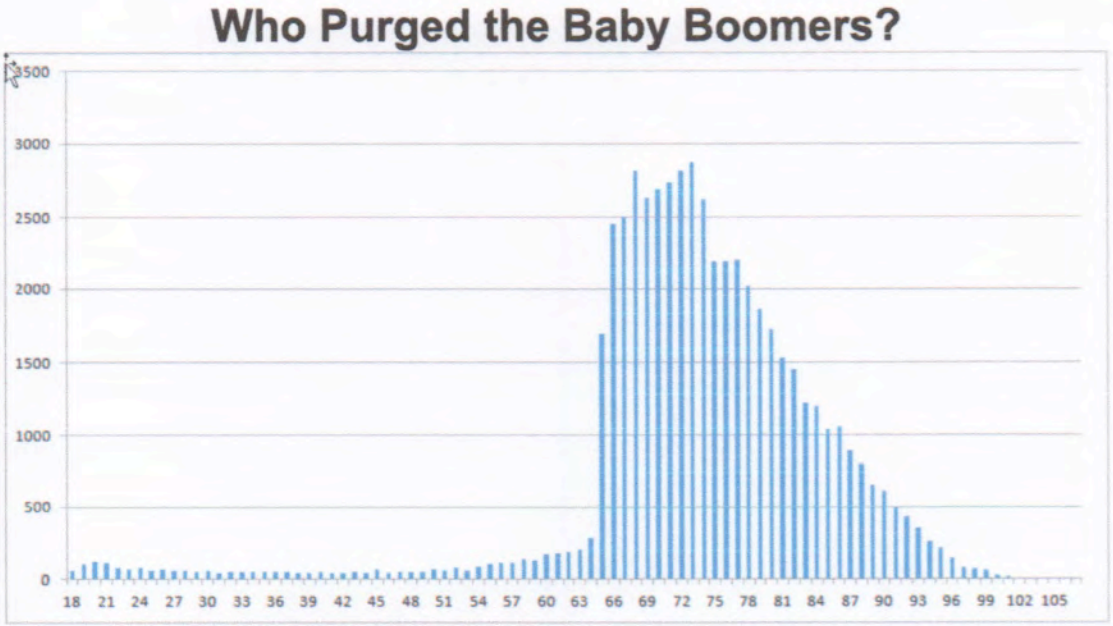
Specifically, over this period, 56,974 voter records had their hash identifier changed, meaning the vote was tampered with after it was cast and recorded in the system. In most cases, this tampering took the form of purging the vote, and then re-constituting it in some form or fashion, but with a change in the hash total meaning the vote was somehow changed. Currently it appears 5,690 votes disappeared completely after voting in person. All in all, this translates into approximately 107,000 hacked votes in Dallas County alone for ES&S. Ten blocks of voters on Westminster Street in Highland Park had their votes purged and then some of them were selectively re-instated at a later date with changes. People who double voted were catalogued as well as dead people who voted, people with no VUID voted (approximately 800 of them), unregistered university students voted, and *people living abroad who claim a Dallas Residence for voting purposes, but who, in a spot check are unknown to the residences they list* in the ES&S system. A short list of them includes:

Country	Voters Who Voted
Mexico	118
Guatemala	9
Nicaragua	4
Kenya	18
Canada	154
Ireland	34
China	62
Australia	105

In plain English, at the instant before a voter casts a ballot there is a one-to-one relationship between the voter and their ballot as well as a one-to-one association between the voter and their votes.

At the instant that ballot is cast, the one-to-one relationship between the voter and ballot still exist, but the relationship between the voter and their votes is gone. No one can know how they voted. The key security check on voting integrity is the absolute match between the number of voters in the Vote Roster and the number of ballots counted in that voting district or precinct. If these numbers do not match, either physical ballots were added or removed from the Ballot Counter or "voters" were added or removed from the Vote Roster. In either case, the election has been compromised and the election is nothing more than a lottery. With tens of thousands of Vote Roster entries purged and other tens of thousand of entries apparently created out of thin air, using the ES&S EMS system, Dallas County Elections Department is definitely in the lottery business.

11. Equally troubling with the ES&S System is the apparent ease of targeting within the system of certain groups for purging. In Dallas, over 92% of PURGED In-Person and Absentee voters were over 65. This is statistically impossible and makes clear the system is easily manipulated by inside or outside actors.



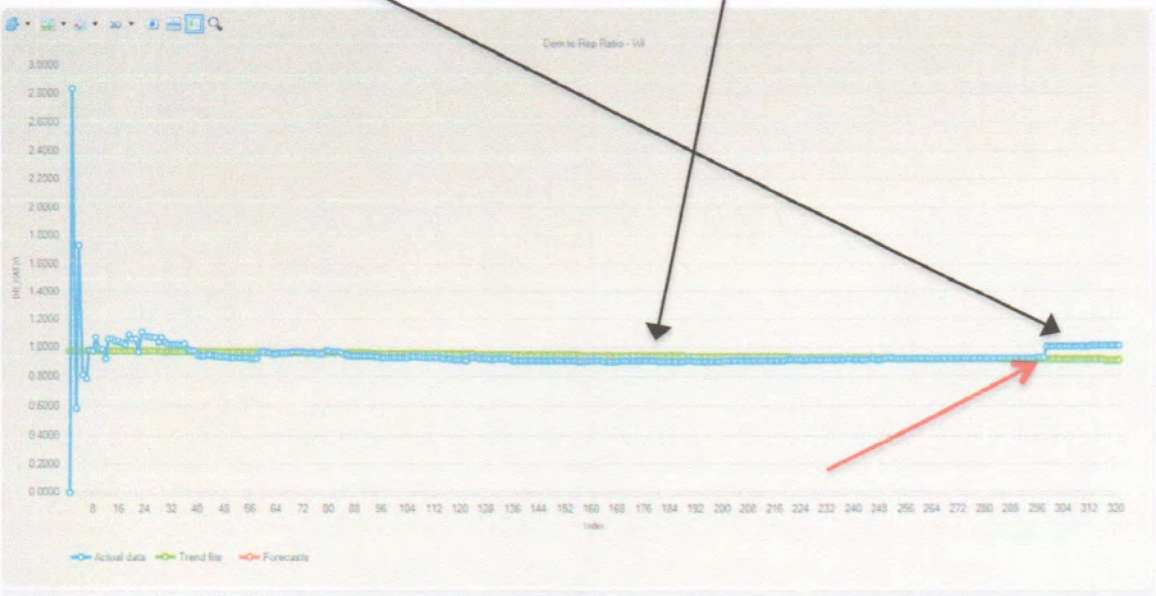
Purged Voters by Age *Source: Dallas County Election Department Vote Rosters Oct 7-Oct 30*

12. My colleagues and I at ASOG have studied the information that is publicly available concerning the November 3, 2020, election results from Wisconsin. Based on the significant anomalies and red flags that we have observed, I believe to a reasonable degree of professional certainty that election results have been

manipulated within the ES&S system in Wisconsin. We list below a few of the red flags that our team has uncovered.

13. Where ES&S is concerned, a statistically unlikely event (red arrow) occurred in the Wisconsin General Election at 09:42:30 Z (3:42 AM local) on 11/4/2020 according to Edison data reported to the NYT. For this analysis we focused on the key ratio of the cumulative Democrat (Biden) votes divided by the cumulative Republican (Trump) votes.

1. A ratio greater than 1.00 is an indicator of Democrat victory
2. A ratio less than 1.00 is an indicator of Republican victory
3. The time series plot shows the trend over time of the cumulative votes.
4. The trend analysis shows the time series but adds a statistically estimated trend line (in green)
5. Where anomalies are observed, the record is pulled out and a proportion test included that tests the probability that that batch of votes was drawn at random from the population of that state, based on the final counts.
6. Randomization is a reasonable assumption because the mail system acts as a randomizer as it mixes the ballots, and the later votes are the mail ballots.
7. The event outline below shifted what had been a settled, unarguable D/R ratio (cumulative to this point) of .912. Suddenly, this event occurs and is of such magnitude it shifts the entire election ratio to 1.0123.



Preview Record

	RECNUM	STATE	TIMESTAMP	VOTES	EEVP	TRUMPD	BIDENJ	TRUMP_CUM	BIDEN_CUM	DATE	TIME	DR_RATIO	D_VOTES	R_VOTES	LOG_D	LOG_R
1	8721	wisconsin	2020-11-04T09:42:20Z	3186598	89	0.490	0.493	1561433	1570993	2020-11-04	09:42:20	1.0061	143379	25163	5.1565	4.4008

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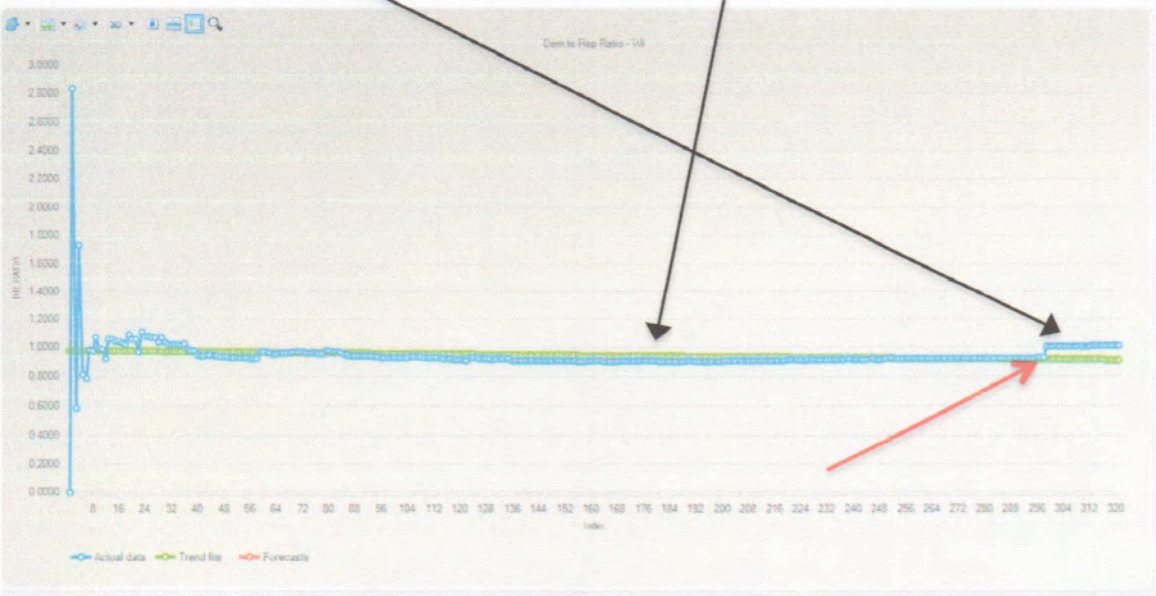

Preview Record

	RECNUM	STATE	TIMESTAMP	VOTES	EEVP	TRUMPD	BIDENJ	TRUMP_CUM	BIDEN_CUM	DATE	TIME	DR_RATIO	D_VOTES	R_VOTES	LOG_D	LOG_R
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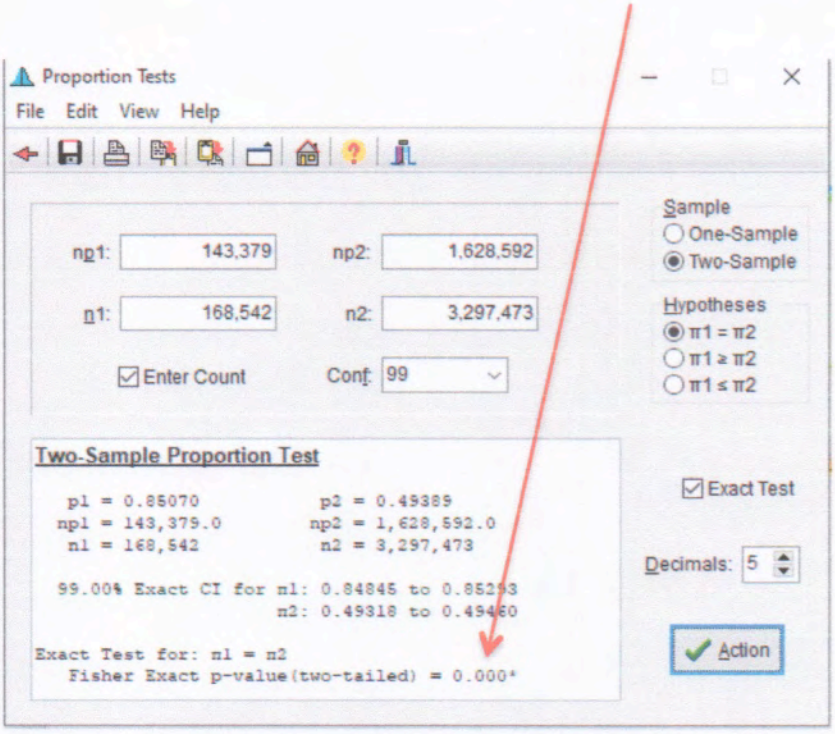
P-Test (two-sample proportion test) shows that there is a 0.0% probability that this vote drop came from a random population of Wisconsin votes as shown in the outcome screenshot below. As shown above, Biden suddenly gets 143,379 votes out of 168,542 or 85%, which itself is outside any percentage before or after.



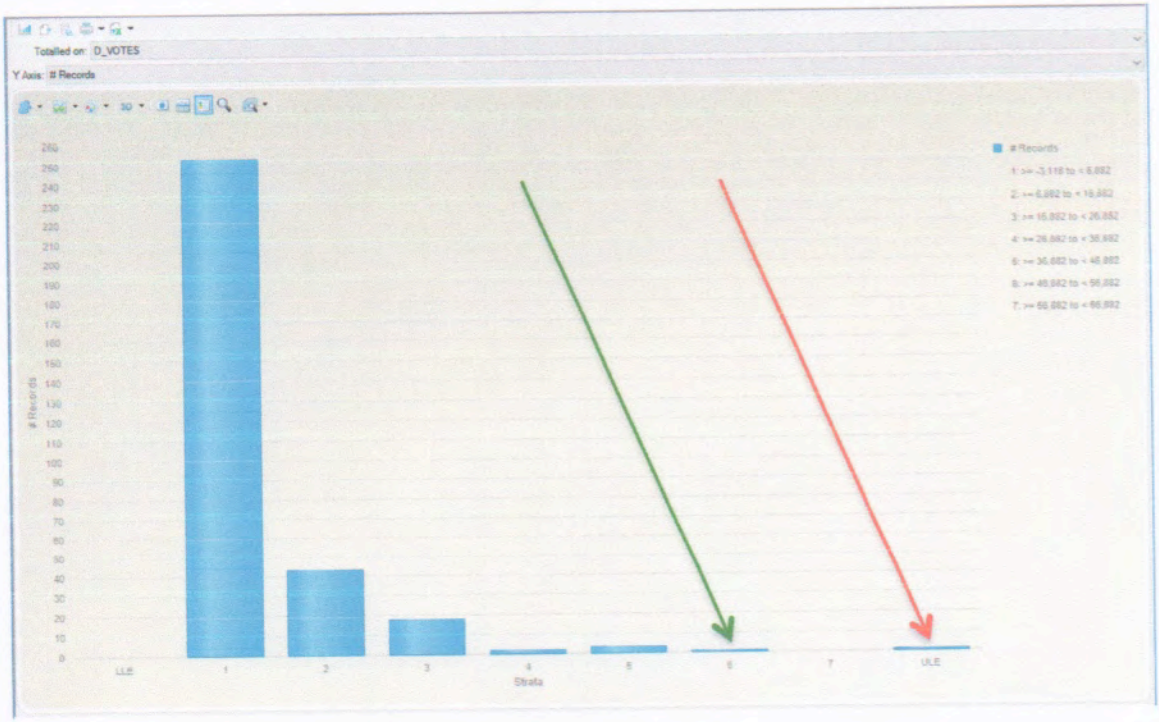
This event changed the final outcome. If this statistically impossible event were removed, the final outcome would be:

Biden:	1,485,573
Trump:	1,584,004

This reveals a shift of approximately 119,430 votes from Biden to Trump would be expected were the election not tampered with.

14. A further red flag is raised when an analysis is done by voting batch. Here we can clearly see the magnitude of the Wisconsin batch dropped at 09:42:30Z on 11/4/2020 vastly exceeds every other Democrat vote total.

This batch shows up as an upper limit exception, meaning it is outside the realm of any expected outcome. A stratification bar chart (below) will indicate visually where the probabilities lie relevant to this event. At 6 standard deviations the chart shows very little chance of this occurring (green arrow). However, in this case, the event occurs at 12.93 standard deviations from the mean (red arrow), showing the probability even smaller at less than 3 in 1,000. Any fraud examiner would instantly flag this for a fraud audit and our Internal Auditor contractor did so immediately.



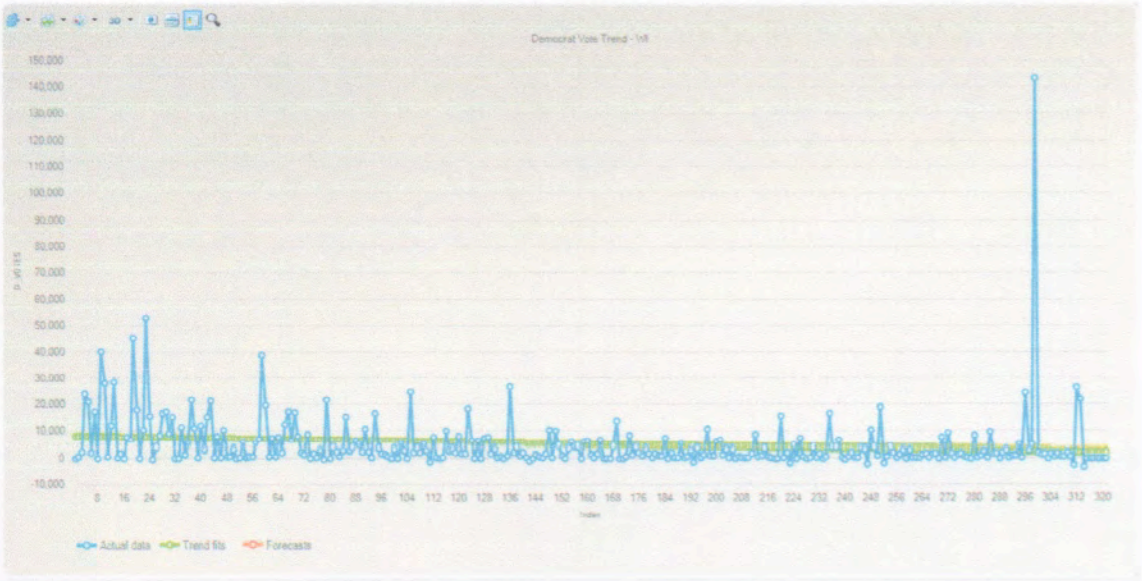
All of these are clear indications of fraud.

15. Another key red flag appears after inspecting voter turnout figures by county. Out of 72 counties, 69 of them exhibited voter turnout figures higher than 80%, a threshold generally considered to be the maximum expected. An amazing 59 of them were above 90%. When the public data votes were normalized to 80% turnout, the excess votes are at least 384,085 over the maximum that could be expected. A sample of this is shown in the table below.

County	Turnout %
Sheboygan County	270%
Shawano County	195%
Taylor County	95%
Marquette County	95%
Price County	94%
Juneau County	94%
Burnett County	94%
Rusk County	94%
Pepin County	94%
Waushara County	94%
Oconto County	94%
Washington County	93%
Kewaunee County	93%
Fond du Lac County	93%
Calumet County	93%
Buffalo County	93%
Lafayette County	93%
Green County	93%
Waupaca County	93%
Polk County	93%
Crawford County	93%
Green Lake County	93%
Dodge County	92%
Chippewa County	92%
Grant County	92%
Clark County	92%
Adams County	92%
Iowa County	92%
Ozaukee County	92%
Bayfield County	92%
Door County	92%
Richland County	92%
Monroe County	92%
Oneida County	92%
Manitowoc County	92%
Washburn County	92%

Trempealeau County	92%
Columbia County	92%
Lincoln County	92%
Waukesha County	92%
Florence County	92%
Barron County	92%
Vernon County	92%
Jefferson County	92%
Langlade County	92%
Outagamie County	91%
Wood County	91%
Marathon County	91%
Iron County	91%
Dunn County	91%
Jackson County	90%
Walworth County	90%
Douglas County	90%
Portage County	90%
Winnebago County	90%
Vilas County	90%
Pierce County	90%
Marinette County	90%
Ashland County	90%

15. Returning to the spike chart presented earlier, a time series crossed with a location specific analysis would determine whether the equipment on hand at any location would have even been capable of processing this many votes in the time represented. In Michigan, we have already observed this phenomenon and the analysis made clear it was physically impossible for the equipment on hand to process this many votes in the time represented.



Preview Record

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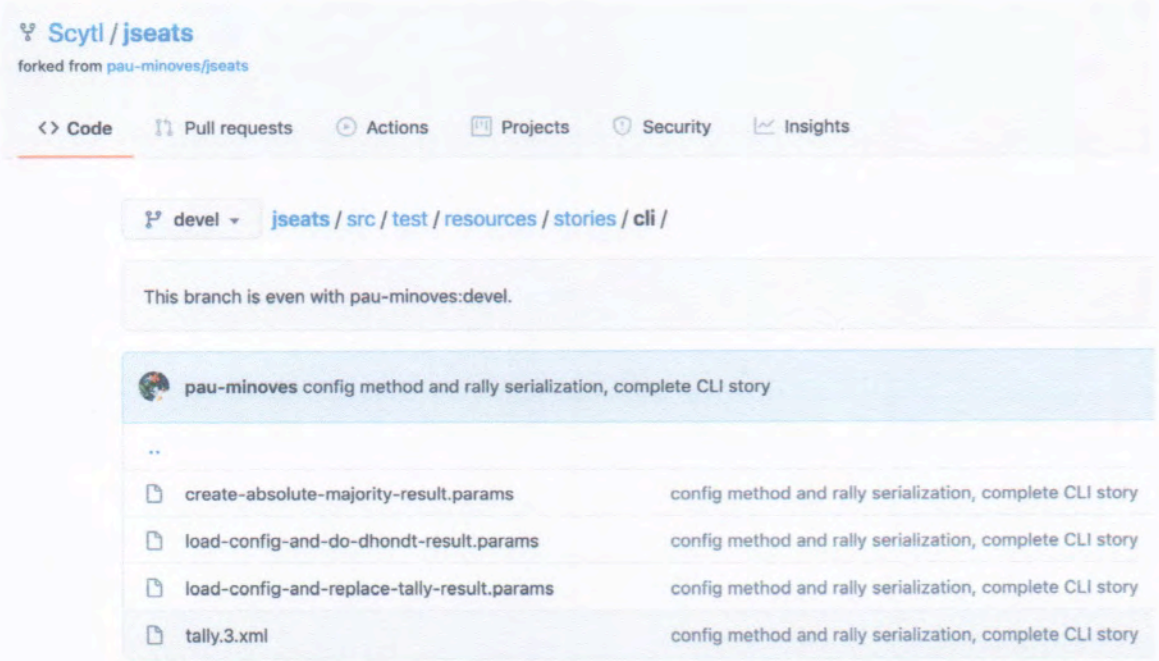
This spike, cast largely for Biden, (143,379-Biden, 25,163-Trump) could easily be produced in the ES&S EMS control system by pre-loading batches of blank ballots in files such as Write-Ins or other adjudication-type files then casting them almost all for Biden using the Override Procedure (to cast Write-In, Blank, or Error ballots) that is available to the operator of the system.

16. ES&S uses Scytl via Clarity Elections to accomplish the actual tabulation. Scytl has in its source code the ability to use a common, additive electoral seat allocation algorithm (JSeats) in order to award points based on percentages that are input into the system by the operator in order to determine (or appoint) a winner, as opposed to simply counting votes. Various parameters, weighting percentages, etc. can be set up. Thus, the winner is selected based on "points" that the algorithm computes, not actual voter votes. Below is a screenshot



The fact that we observed raw vote data coming directly that includes decimal places establishes selection by an algorithm, and not individual voter's choice. Otherwise, votes would be solely represented as whole numbers (votes cannot possibly be added up and have decimal places reported). Below is an excerpt from the direct feed to news outlets showing actual calculated votes with decimals.

state	timestamp	eevp	trump	biden	TV	BV
wisconsin	2020-11-04T03:22:01Z	32	0.511	0.472	593876.535	548551.32
wisconsin	2020-11-04T03:24:08Z	33	0.511	0.472	601617.163	555701.176
wisconsin	2020-11-04T03:27:32Z	34	0.5	0.483	615621.5	594690.369

wisconsin	2020-11-04T03:28:57Z	35	0.5	0.483	635870.5	614250.903
wisconsin	2020-11-04T03:30:09Z	35	0.5	0.483	636620.5	614975.403
wisconsin	2020-11-04T03:30:28Z	36	0.502	0.481	649562.9	622389.95
wisconsin	2020-11-04T03:30:52Z	36	0.503	0.481	651861.844	623350.988
wisconsin	2020-11-04T03:35:25Z	37	0.503	0.48	661114.026	630884.16

14. Based on the foregoing, I believe these statistical anomalies and impossibilities compels the conclusion to a reasonable degree of professional certainty that the vote count in Wisconsin, in particular for candidates for President, contain at least 119,430 (Para. 13) up to 384,085 (Para. 15) illegal votes that must be disregarded. In my opinion, it is not possible at this time to determine the true results of the Wisconsin vote for President of the United States.

I declare, under the penalty of perjury, that the forgoing is correct.

Russell James Ramsland, Jr.

11/30/2020
Date

JOINT CYBERSECURITY ADVISORY

TLP:WHITE

Product ID: AA20-304A

October 30, 2020

Iranian Advanced Persistent Threat Actor Identified Obtaining Voter Registration Data

SUMMARY

This advisory uses the MITRE Adversarial Tactics, Techniques, and Common Knowledge (ATT&CK®) framework. See the ATT&CK for Enterprise framework for all referenced threat actor techniques.

This joint cybersecurity advisory was coauthored by the Cybersecurity and Infrastructure Security Agency (CISA) and the Federal Bureau of Investigation (FBI). CISA and the FBI are aware of an Iranian advanced persistent threat (APT) actor targeting U.S. state websites—to include election websites. CISA and the FBI assess this actor is responsible for the mass dissemination of voter intimidation emails to U.S. citizens and the dissemination of U.S. election-related disinformation in mid-October 2020.[1] (Reference FBI FLASH message ME-000138-TT, disseminated October 29, 2020). Further evaluation by CISA and the FBI has identified the targeting of U.S. state election websites was an intentional effort to influence and interfere with the 2020 U.S. presidential election.

TECHNICAL DETAILS

Analysis by CISA and the FBI indicates this actor scanned state websites, to include state election websites, between September 20 and September 28, 2020, with the Acunetix vulnerability scanner (*Active Scanning: Vulnerability Scanning* [T1595.002]). Acunetix is a widely used and legitimate web scanner, which has been used by threat actors for nefarious purposes. Organizations that do not regularly use Acunetix should monitor their logs for any activity from the program that originates from IP addresses provided in this advisory and consider it malicious reconnaissance behavior.

Additionally, CISA and the FBI observed this actor attempting to exploit websites to obtain copies of voter registration data between September 29 and October 17, 2020 (*Exploit Public-Facing*

[1] See FBI FLASH, ME-000138-TT, disseminated 10/29/20, https://www.ic3.gov/Media/News/2020/201030.pdf. This disinformation (hereinafter, "the propaganda video") was in the form of a video purporting to misattribute the activity to a U.S. domestic actor and implies that individuals could cast fraudulent ballots, even from overseas. https://www.odni.gov/index.php/newsroom/press-releases/item/2162-dni-john-ratcliffe-s-remarks-at-press-conference-on-election-security.

Application [T1190]). This includes attempted exploitation of known vulnerabilities, directory traversal, Structured Query Language (SQL) injection, web shell uploads, and leveraging unique flaws in websites.

CISA and the FBI can confirm that the actor successfully obtained voter registration data in at least one state. The access of voter registration data appeared to involve the abuse of website misconfigurations and a scripted process using the cURL tool to iterate through voter records. A review of the records that were copied and obtained reveals the information was used in the propaganda video.

CISA and FBI analysis of identified activity against state websites, including state election websites, referenced in this product cannot all be fully attributed to this Iranian APT actor. FBI analysis of the Iranian APT actor's activity has identified targeting of U.S. elections' infrastructure (*Compromise Infrastructure* [T1584]) within a similar timeframe, use of IP addresses and IP ranges – including numerous virtual private network (VPN) service exit nodes – which correlate to this Iran APT actor (*Gather Victim Host Information* [T1592])), and other investigative information.

Reconnaissance

The FBI has information indicating this Iran-based actor attempted to access PDF documents from state voter sites using advanced open-source queries (*Search Open Websites and Domains* [T1539]). The actor demonstrated interest in PDFs hosted on URLs with the words "vote" or "voter" and "registration." The FBI identified queries of URLs for election-related sites.

The FBI also has information indicating the actor researched the following information in a suspected attempt to further their efforts to survey and exploit state election websites.

- YOURLS exploit
- Bypassing ModSecurity Web Application Firewall
- Detecting Web Application Firewalls
- SQLmap tool

Acunetix Scanning

CISA's analysis identified the scanning of multiple entities by the Acunetix Web Vulnerability scanning platform between September 20 and September 28, 2020 (*Active Scanning: Vulnerability Scanning* [T1595.002]).

The actor used the scanner to attempt SQL injection into various fields in `/registration/registration/details` with status codes 404 or 500:

```
/registration/registration/details?addresscity=-1 or 3*2<(0+5+513-513) --
&addressstreet1=xxxxx&btnbeginregistration=begin voter
registration&btnnextelectionworkerinfo=next&btnnextpersonalinfo=next&btnnextresde
tails=next&btnnextvoterinformation=next&btnsubmit=submit&chkageverno=on&chkagever
yes=on&chkcitizenno=on&chkcitizenyes=on&chkdisabledvoter=on&chkelectionworker=on&
chkresprivate=1&chkstatecancel=on&dlnumber=1&dob=xxxx/x/x&email=sample@email.tst&
```

```
firstname=xxxxx&gender=radio&hdnaddresscity=&hdngender=&last4ssn=xxxxx&lastname=x
xxxxinjjeuee&mailaddresscountry=sample@xxx.xxx&mailaddressline1=sample@email.tst&
mailaddressline2=sample@xxx.xxx&mailaddressline3=sample@xxx.xxx&mailaddressstate=
aa&mailaddresszip=sample@xxxx.xxx&mailaddresszipex=sample@xxx.xxx&middlename=xxxx
x&overseas=1&partycode=a&phoneno1=xxx-xxx-xxxx&phoneno2=xxx-xxx-
xxxx&radio=consent&statecancelcity=xxxxxxx&statecancelcountry=usa&statecancelstat
e=XXaa&statecancelzip=xxxxx&statecancelzipext=xxxxx&suffixname=esq&txtmailaddress
city=sample@xxx.xxx
```

Requests

The actor used the following requests associated with this scanning activity.

```
2020-09-26 13:12:56 x.x.x.x GET /x/x v[$acunetix]=1 443 - x.x.x.x
Mozilla/5.0+(Windows+NT+6.1;+WOW64)+AppleWebKit/537.21+(KHTML,+like+Gecko)+Chrome/41.
0.2228.0+Safari/537.21 - 200 0 0 0
```

```
2020-09-26 13:13:19 X.X.x.x GET /x/x voterid[$acunetix]=1 443 - x.x.x.x
Mozilla/5.0+(Windows+NT+6.1;+WOW64)+AppleWebKit/537.21+(KHTML,+like+Gecko)+Chrome/41.
0.2228.0+Safari/537.21 - 200 0 0 1375
```

```
2020-09-26 13:13:18 .X.x.x GET /x/x voterid=;print(md5(acunetix_wvs_security_test));
443 - X.X.x.x
```

User Agents Observed

CISA and FBI have observed the following user agents associated with this scanning activity.

```
Mozilla/5.0+(Windows+NT+6.1;+WOW64)+AppleWebKit/537.21+(KHTML,+like+Gecko)+Chrome
/41.0.2228.0+Safari/537.21 - 500 0 0 0
```

```
Mozilla/5.0+(X11;+U;+Linux+x86_64;+en-
US;+rv:1.9b4)+Gecko/2008031318+Firefox/3.0b4
```

```
Mozilla/5.0+(X11;+U;+Linux+i686;+en-
US;+rv:1.8.1.17)+Gecko/20080922+Ubuntu/7.10+(gutsy)+Firefox/2.0.0.17
```

Exfiltration

Obtaining Voter Registration Data

Following the review of web server access logs, CISA analysts, in coordination with the FBI, found instances of the cURL and FDM User Agents sending GET requests to a web resource associated with voter registration data. The activity occurred between September 29 and October 17, 2020. Suspected scripted activity submitted several hundred thousand queries iterating through voter

identification values, and retrieving results with varying levels of success [*Gather Victim Identity Information* (T1589)]. A sample of the records identified by the FBI reveals they match information in the aforementioned propaganda video.

Requests

The actor used the following requests.

```
2020-10-17 13:07:51 x.x.x.x GET /x/x voterid=XXXX1 443 - x.x.x.x curl/7.55.1 -
200 0 0 1406
```

```
2020-10-17 13:07:55 x.x.x.x GET /x/x voterid=XXXX2 443 - x.x.x.x curl/7.55.1 - 200 0
0 1390
```

```
2020-10-17 13:07:58 x.x.x.x GET /x/x voterid=XXXX3 443 - x.x.x.x curl/7.55.1 - 200 0
0 1625
```

```
2020-10-17 13:08:00 x.x.x.x GET /x/x voterid=XXXX4 443 - x.x.x.x curl/7.55.1 - 200 0
0 1390
```

Note: incrementing `voterid` values in `cs_uri_query field`

User Agents

CISA and FBI have observed the following user agents.

```
FDM+3.x
```

```
curl/7.55.1
```

```
Mozilla/5.0+(Windows+NT+6.1;+WOW64)+AppleWebKit/537.21+(KHTML,+like+Gecko)+Chrome
/41.0.2228.0+Safari/537.21 - 500 0 0 0
Mozilla/5.0+(X11;+U;+Linux+x86_64;+en-US;+rv:1.9b4)+Gecko/2008031318+Firefox/3.0b4
```

See figure 1 below for a timeline of the actor's malicious activity.

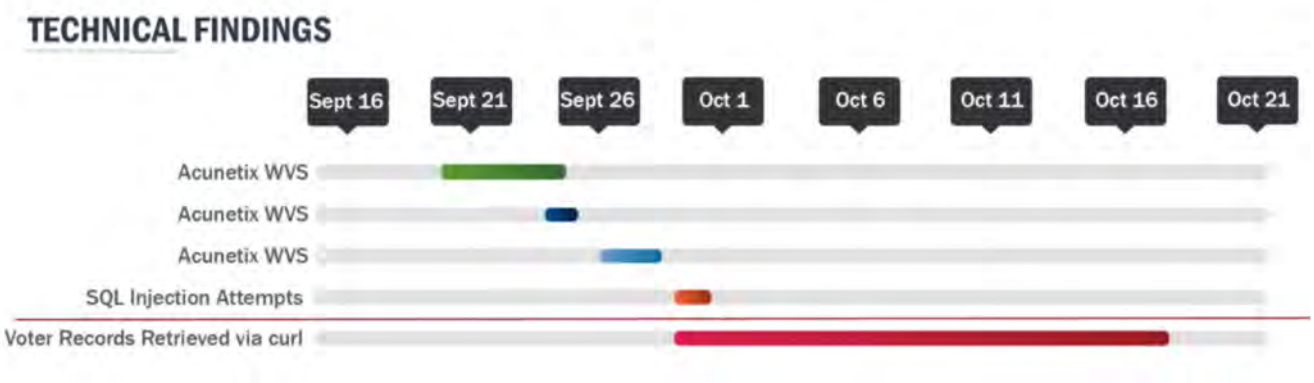


Figure 1: Overview of malicious activity

MITIGATIONS

Detection

Acunetix Scanning

Organizations can identify Acunetix scanning activity by using the following keywords while performing log analysis.

- `$acunetix`
- `acunetix_wvs_security_test`

Indicators of Compromise

For a downloadable copy of IOCs, see AA20-304A.stix.

Disclaimer: *Many of the IP addresses included below likely correspond to publicly available VPN services, which can be used by individuals all over the world. Although this creates the potential for false positives, any activity listed should warrant further investigation. The actor likely uses various IP addresses and VPN services.*

The following IPs have been associated with this activity.

- 102.129.239[.]185 (Acunetix Scanning)
- 143.244.38[.]60 (Acunetix Scanning and cURL requests)
- 45.139.49[.]228 (Acunetix Scanning)
- 156.146.54[.]90 (Acunetix Scanning)
- 109.202.111[.]236 (cURL requests)
- 185.77.248[.]17 (cURL requests)
- 217.138.211[.]249 (cURL requests)
- 217.146.82[.]207 (cURL requests)
- 37.235.103[.]85 (cURL requests)
- 37.235.98[.]64 (cURL requests)
- 70.32.5[.]96 (cURL requests)

- 70.32.6[.]20 (cURL requests)
- 70.32.6[.]8 (cURL requests)
- 70.32.6[.]97 (cURL requests)
- 70.32.6[.]98 (cURL requests)
- 77.243.191[.]21 (cURL requests and FDM+3.x (Free Download Manager v3) enumeration/iteration)
- 92.223.89[.]73 (cURL requests)

CISA and the FBI are aware the following IOCs have been used by this Iran-based actor. These IP addresses facilitated the mass dissemination of voter intimidation email messages on October 20, 2020.

- 195.181.170[.]244 (Observed September 30 and October 20, 2020)
- 102.129.239[.]185 (Observed September 30, 2020)
- 104.206.13[.]27 (Observed September 30, 2020)
- 154.16.93[.]125 (Observed September 30, 2020)
- 185.191.207[.]169 (Observed September 30, 2020)
- 185.191.207[.]52 (Observed September 30, 2020)
- 194.127.172[.]98 (Observed September 30, 2020)
- 194.35.233[.]83 (Observed September 30, 2020)
- 198.147.23[.]147 (Observed September 30, 2020)
- 198.16.66[.]139(Observed September 30, 2020)
- 212.102.45[.]3 (Observed September 30, 2020)
- 212.102.45[.]58 (Observed September 30, 2020)
- 31.168.98[.]73 (Observed September 30, 2020)
- 37.120.204[.]156 (Observed September 30, 2020)
- 5.160.253[.]50 (Observed September 30, 2020)
- 5.253.204[.]74 (Observed September 30, 2020)
- 64.44.81[.]68 (Observed September 30, 2020)
- 84.17.45[.]218 (Observed September 30, 2020)
- 89.187.182[.]106 (Observed September 30, 2020)
- 89.187.182[.]111 (Observed September 30, 2020)
- 89.34.98[.]114 (Observed September 30, 2020)
- 89.44.201[.]211 (Observed September 30, 2020)

Recommendations

The following list provides recommended self-protection mitigation strategies against cyber techniques used by advanced persistent threat actors:

- Validate input as a method of sanitizing untrusted input submitted by web application users. Validating input can significantly reduce the probability of successful exploitation by providing

protection against security flaws in web applications. The types of attacks possibly prevented include SQL injection, Cross Site Scripting (XSS), and command injection.

- Audit your network for systems using Remote Desktop Protocol (RDP) and other internet-facing services. Disable unnecessary services and install available patches for the services in use. Users may need to work with their technology vendors to confirm that patches will not affect system processes.
- Verify all cloud-based virtual machine instances with a public IP, and avoid using open RDP ports, unless there is a valid need. Place any system with an open RDP port behind a firewall and require users to use a VPN to access it through the firewall.
- Enable strong password requirements and account lockout policies to defend against brute-force attacks.
- Apply multi-factor authentication, when possible.
- Maintain a good information back-up strategy by routinely backing up all critical data and system configuration information on a separate device. Store the backups offline, verify their integrity, and verify the restoration process.
- Enable logging and ensure logging mechanisms capture RDP logins. Keep logs for a minimum of 90 days and review them regularly to detect intrusion attempts.
- When creating cloud-based virtual machines, adhere to the cloud provider's best practices for remote access.
- Ensure third parties that require RDP access follow internal remote access policies.
- Minimize network exposure for all control system devices. Where possible, critical devices should not have RDP enabled.
- Regulate and limit external to internal RDP connections. When external access to internal resources is required, use secure methods, such as a VPNs. However, recognize the security of VPNs matches the security of the connected devices.
- Use security features provided by social media platforms; use strong passwords, change passwords frequently, and use a different password for each social media account.
- See CISA's Tip on Best Practices for Securing Election Systems for more information.

General Mitigations

Keep applications and systems updated and patched

Apply all available software updates and patches and automate this process to the greatest extent possible (e.g., by using an update service provided directly from the vendor). Automating updates and patches is critical because of the speed of threat actors to create new exploits following the release of a patch. These "N-day" exploits can be as damaging as zero-day exploits. Ensure the authenticity and integrity of vendor updates by using signed updates delivered over protected links. Without the rapid and thorough application of patches, threat actors can operate inside a defender's patch cycle.[2]

[2] NSA "NSA'S Top Ten Cybersecurity Mitigation Strategies" https://www.nsa.gov/Portals/70/documents/what-we-do/cybersecurity/professional-resources/csi-nsas-top10-cybersecurity-mitigation-strategies.pdf

Additionally, use tools (e.g., the OWASP Dependency-Check Project tool[3]) to identify the publicly known vulnerabilities in third-party libraries depended upon by the application.

Scan web applications for SQL injection and other common web vulnerabilities

Implement a plan to scan public-facing web servers for common web vulnerabilities (e.g., SQL injection, cross-site scripting) by using a commercial web application vulnerability scanner in combination with a source code scanner.[4] Fixing or patching vulnerabilities after they are identified is especially crucial for networks hosting older web applications. As sites get older, more vulnerabilities are discovered and exposed.

Deploy a web application firewall

Deploy a web application firewall (WAF) to prevent invalid input attacks and other attacks destined for the web application. WAFs are intrusion/detection/prevention devices that inspect each web request made to and from the web application to determine if the request is malicious. Some WAFs install on the host system and others are dedicated devices that sit in front of the web application. WAFs also weaken the effectiveness of automated web vulnerability scanning tools.

Deploy techniques to protect against web shells

Patch web application vulnerabilities or fix configuration weaknesses that allow web shell attacks, and follow guidance on detecting and preventing web shell malware.[5] Malicious cyber actors often deploy web shells—software that can enable remote administration—on a victim's web server. Malicious cyber actors can use web shells to execute arbitrary system commands commonly sent over HTTP or HTTPS. Attackers often create web shells by adding or modifying a file in an existing web application. Web shells provide attackers with persistent access to a compromised network using communications channels disguised to blend in with legitimate traffic. Web shell malware is a long-standing, pervasive threat that continues to evade many security tools.

Use multi-factor authentication for administrator accounts

Prioritize protection for accounts with elevated privileges, remote access, or used on high-value assets.[6] Use physical token-based authentication systems to supplement knowledge-based factors such as passwords and personal identification numbers (PINs).[7] Organizations should migrate away from single-factor authentication, such as password-based systems, which are subject to poor user

[3] https://owasp.org/www-project-dependency-check/
[4] NSA "Defending Against the Exploitation of SQL Vulnerabilities to Compromise a Network" https://apps.nsa.gov/iaarchive/library/ia-guidance/tech-briefs/defending-against-the-exploitation-of-sql-vulnerabilities-to.cfm
[5] NSA & ASD "CyberSecurity Information: Detect and Prevent Web Shell Malware" https://media.defense.gov/2020/Jun/09/2002313081/-1/-1/0/CSI-DETECT-AND-PREVENT-WEB-SHELL-MALWARE-20200422.PDF
[6] https://us-cert.cisa.gov/cdm/event/Identifying-and-Protecting-High-Value-Assets-Closer-Look-Governance-Needs-HVAs
[7] NSA "NSA'S Top Ten Cybersecurity Mitigation Strategies" https://www.nsa.gov/Portals/70/documents/what-we-do/cybersecurity/professional-resources/csi-nsas-top10-cybersecurity-mitigation-strategies.pdf

choices and more susceptible to credential theft, forgery, and password reuse across multiple systems.

Remediate critical web application security risks

First, identify and remediate critical web application security risks. Next, move on to other less critical vulnerabilities. Follow available guidance on securing web applications.[8,9,10]

How do I respond to unauthorized access to election-related systems?

Implement your security incident response and business continuity plan

It may take time for your organization's IT professionals to isolate and remove threats to your systems and restore normal operations. In the meantime, take steps to maintain your organization's essential functions according to your business continuity plan. Organizations should maintain and regularly test backup plans, disaster recovery plans, and business continuity procedures.

Contact CISA or law enforcement immediately

To report an intrusion and to request incident response resources or technical assistance, contact CISA (Central@cisa.gov or 888-282-0870) or the FBI through a local field office or the FBI's Cyber Division (CyWatch@ic.fbi.gov or 855-292-3937).

RESOURCES

- CISA Tip: Best Practices for Securing Election Systems
- CISA Tip: Securing Voter Registration Data
- CISA Tip: Website Security
- CISA Tip: Avoiding Social Engineering and Phishing Attacks
- CISA Tip: Securing Network Infrastructure Devices
- Joint Advisory: Technical Approaches to Uncovering and Remediating Malicious Activity
- CISA Insights: Actions to Counter Email-Based Attacks on Election-related Entities
- FBI and CISA Public Service Announcement (PSA): Spoofed Internet Domains and Email Accounts Pose Cyber and Disinformation Risks to Voters
- FBI and CISA PSA: Foreign Actors Likely to Use Online Journals to Spread Disinformation Regarding 2020 Elections
- FBI and CISA PSA: Distributed Denial of Service Attacks Could Hinder Access to Voting Information, Would Not Prevent Voting
- FBI and CISA PSA: False Claims of Hacked Voter Information Likely Intended to Cast Doubt on Legitimacy of U.S. Elections FBI and CISA PSA: Cyber Threats to Voting Processes Could Slow But Not Prevent Voting

[8] NSA "Building Web Applications – Security for Developers" https://apps.nsa.gov/iaarchive/library/ia-guidance/security-tips/building-web-applications-security-recommendations-for.cfm
[9] https://owasp.org/www-project-top-ten/
[10] https://cwe.mitre.org/top25/archive/2020/2020_cwe_top25.html

- FBI and CISA PSA: Foreign Actors and Cybercriminals Likely to Spread Disinformation Regarding 2020 Election Results

Declaration of [redacted] Ph.D

November 30, 2020

Pursuant to 28 U.S.C Section 1746, I, [redacted], make the following declaration.

1. I am over the age of 21 years and I am under no legal disability, which would prevent me from giving this declaration.
2. [redacted] has a Ph.D in Electrical Engineering from the University of California at Davis and a Masters degree in Mathematics from the University of California at Berkeley. I have been employed, for over 28 years, in the signal processing and wireless signal processing domain, with an emphasis on statistical signal processing. I have published numerous journal and conference articles. Additionally, I have held Top Secret and SAP clearances and I am an inventor of nearly 30 patents, one of which has over 1000 citations in the field of MIMO communications (Multiple Input Multiple Output).
3. I reside at [redacted].
4. Given the data sources referenced in this document, I assert that in Georgia, Pennsylvania and the city of Milwaukee, a simple statistical model of vote fraud is a better fit to the sudden jump in Biden vote percentages among absentee ballots received later in the counting process of the 2020 presidential election. It is also a better fit when constrained to a single large Metropolitan area such as Milwaukee..
5. Given the same data sources, I also assert that Milwaukee precincts exhibit statistical anomalies that are not normally present in fair elections.. The fraud model hypothesis in Milwaukee has a posterior probability of 100% to machine precision. This model predicts 105,639 fraudulent Biden ballots in Milwaukee.
6. I assert that the data suggests aberrant statistical anomalies in the vote counts in Michigan, when observed as a function of time.

Signature:

Supporting evidence for the assertions in (4) and 5 is provided in the following pages.

1 Impact of Fraud on the Election

In the analysis that follows, it is possible to obtain rough estimates on how vote fraud could possibly have effected the election. In Georgia, there is evidence that votes were actually switched from Trump to Biden. As many as 51,110 Biden votes were fraudulent and as many as 51,110 votes could be added to Trump. An audit to determine vote switching will be more difficult, since it is likely the Trump ballots have been destroyed in Georgia, based on reports of ballots being shredded there. If instead we presume that Bidens fraudulent votes were simply added to the totals, then we estimate that 104,107 ballots should be removed from Biden's totals.

In Pennsylvania, from just one batch of absentee ballots, approximately 72668 of them are estimated to be fraudulent Biden votes. Our analysis of Milwaukee shows that 105,639 Biden ballots could be fraudulent. Moreover there is evidence of vote switching here, which might give as many as 42365 additional ballots to Trump, and remove the same from Biden.

Michigan yields an estimate of 237,140 fraudulent Biden votes added to the total, using conservative estimates of the Biden percentage among the new ballots.

2 Statistical Model

The simplest statistical model for computing the probabilities for an election outcome is a binomial distribution, which assigns a probability p for a given person within the population to select a candidate. If we assume that each person chooses their candidate independently, then we obtain the Binomial distribution in the form,

$$P(k|N) \equiv {}_NC_k p^k \left(1-p\right)^{N-k}, \tag{1}$$

where $P(k|N)$ is the probability that you observe k votes for a candidate in a population of N voters, and where ${}_NC_k$ is the number of ways to choose k people out of a group of N people.

For larger N, the binomial distribution can be approximated by a Gaussian distribution, which is used in the election fraud analysis in [1]. The chief reason for this is the difficulty of computing $P(k|N)$ for large N and k. However this problem can be overcome by computing the probabilities in the log domain and using the log beta function to compute ${}_NC_k$.

For this analysis it is more useful to compute the probabilities as a function of f the observed fraction of the candidate's votes. In this formulation we have $k = Nf$, and $N - k = N\left(1-f\right)$, and therefore we define the fractional probability as,

$$B_N(f) \equiv {}_NC_{Nf}\, p^{Nf} \left(1-p\right)^{N(1-f)}. \tag{2}$$

2.1 Fraud Model

To model voting fraud we assume a fixed fraction α of votes are given to the cheater. The pool of available voters who actually voted is now $N(1-\alpha)$. The fraction who actually voted for the cheater is given by $f-\alpha$. The probability that the fraction f voters reported for the cheater, with the fraction α stolen, can therefore be written as,

$$C_{N,\alpha}(f) \equiv B_{N(1-\alpha)}(f-\alpha). \tag{3}$$

This is similar to the fraud model used in the election fraud analysis given in [1]. We use the Binomial distribution directly, rather than the Gaussian distribution, since it should be more accurate for small N, k or f.

2.2 Posterior Probability of Fraud Model

A hypothesis test can now be set up between the standard voting statistics of (2) vs the statistics of the fraud model (3). If we use Bayesian inference we can compute an estimate of the posterior probability of the fraud model. This can be written as,

$$P(F|f) = \frac{C_{N,\alpha}(f)p_F}{C_{N,\alpha}(f)p_F + B_N(f)(1-p_F)},$$

where p_F is the prior probability of fraud. In our investigation we assume fraud is unlikely and set $p_F = 0.01$.

3 Analysis of Absentee Ballots in the 2020 Election

For this analysis we extracted data from the all_states_timeseries.csv file, which can be found at the internet url: https://wiki.audittheelection.com/index.php/Datasets. We look at the absentee ballot results near the beginning of the time series and then compare it to the end or the middle of the period, after a sufficient enough ballots were added.

For the models in Section 2 we assign the probability p of a Biden vote using the final data. This assumption is actually more favorable to the cheater. As mentioned earlier we set the prior probability of fraud to $p_F = 0.01$, and the cheating fraction, α, is set to $\alpha = f - p$, where f is the observed Biden fraction in the newly added ballots. This isolates the statistics of the added ballots from the final observed statistics.

We focus on the absentee ballots, because they are dominated by large democratic cities and there is no obvious reason why those statistics should change appreciably over time. Furthermore it should be noted that the start time for this data, mid day Nov. 4., was well after some of the larger absentee ballot dumps occured.

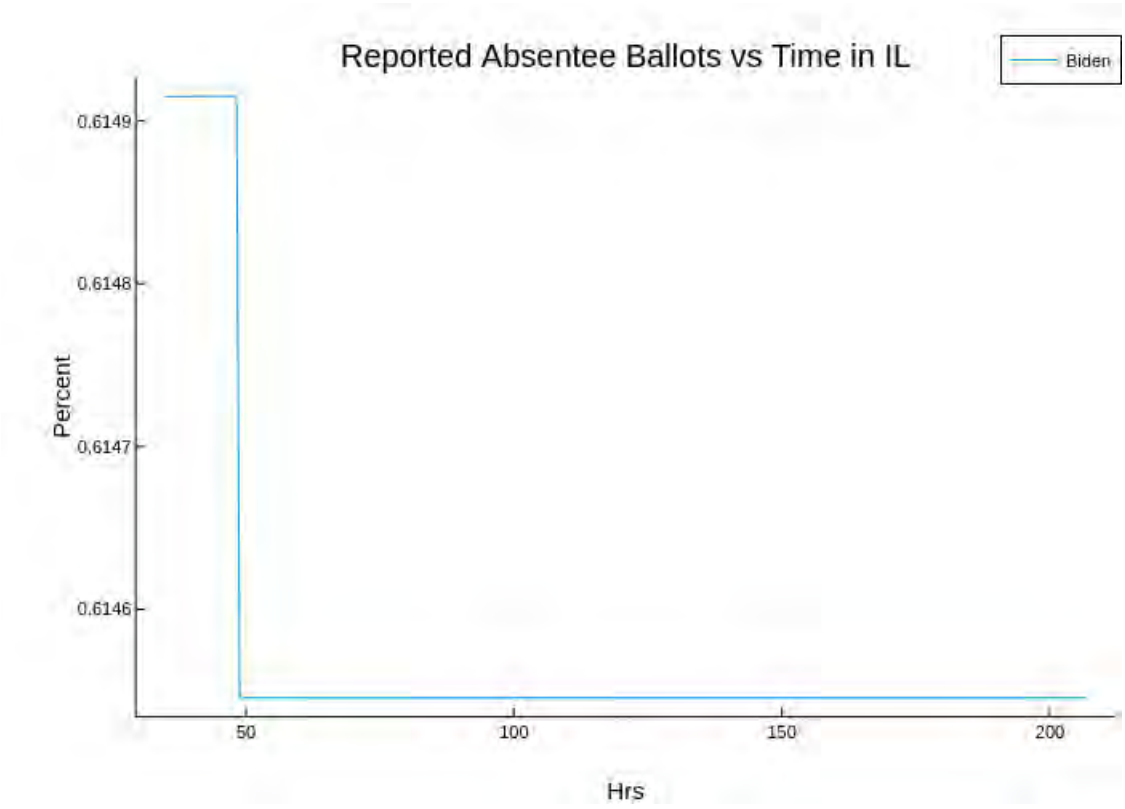


Figure 1: Reported Biden Fraction In Illinois vs Time

3.1 Control Case Illinois

We choose Illinois as a control case, since it has a significant number of absentee ballots that were counted later and provides a fairly clean baseline. The reported Biden fraction vs time is given in Figure 1.

As we can see there is not much change in the Biden statistics from the initial 601,714 absentee ballots when compared with the 54,117 ballots that were added. This is further shown by the bar chart in Figure 2.

Using our formula for the posterior probability of fraud in (3) we obtain the probability that the fraud model is correct of 6.5%. This lends good support to the idea that the Illinois absentee ballots were counted fairly.

3.2 Analysis of Georgia Absentee Ballots

The Georgia absentee ballot count started at 3,701,005 and 303,988 ballots were added. The Biden fraction among absentee ballots as a function of time is shown in Figure (3). This plot shows a statistical abnormality in that the

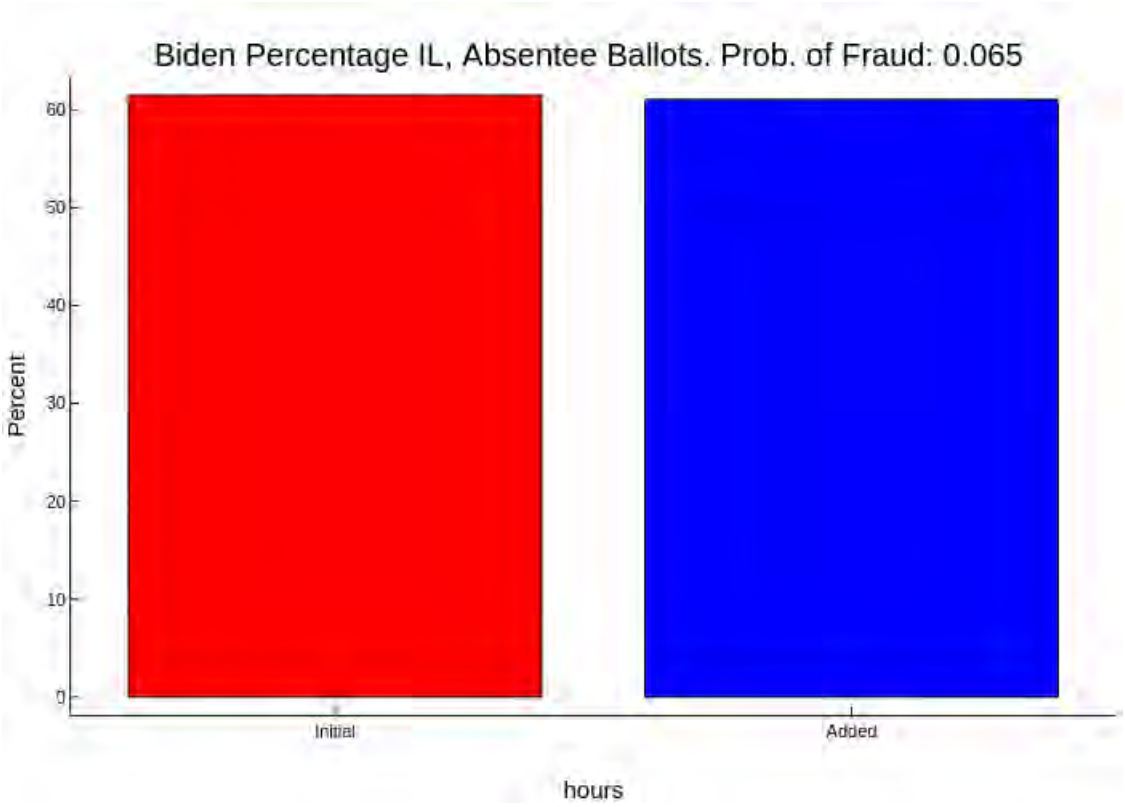


Figure 2: Before and Added Biden Fraction

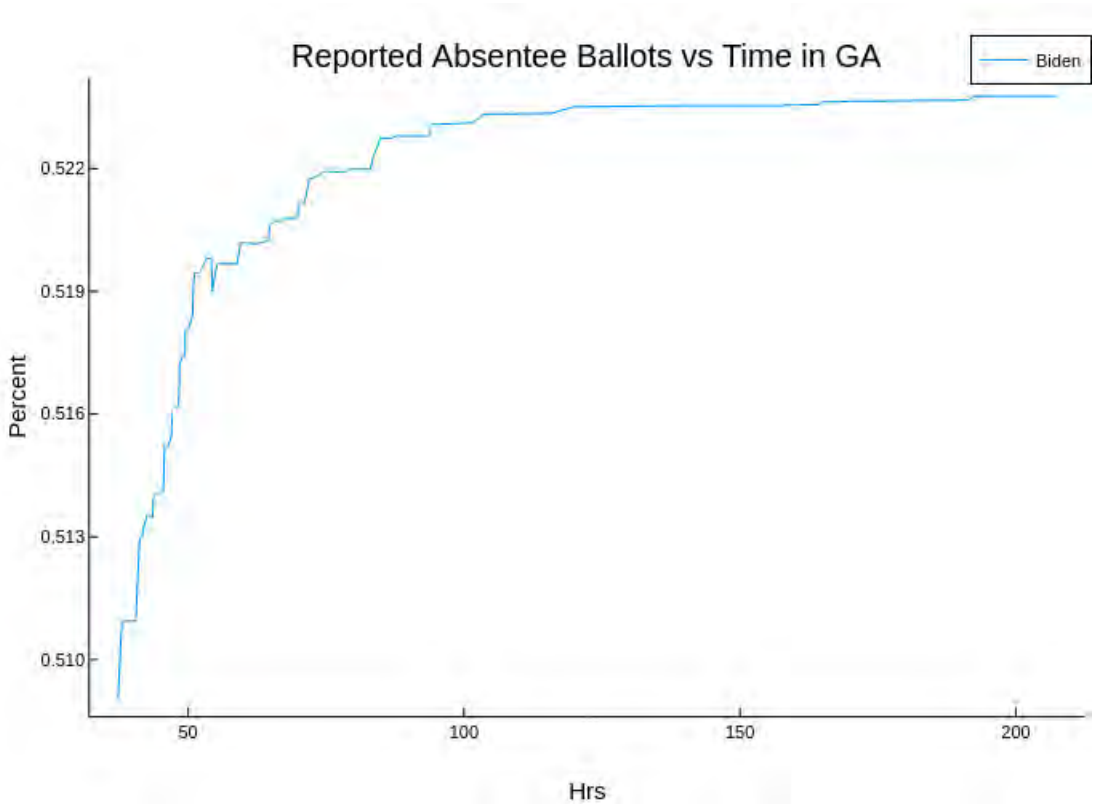


Figure 3: Georgia Absentee Ballots vs Time: (Biden Fraction)

Biden fraction appears to always be increasing. This is statistically unlikely and is not typically seen in fair elections. Normally you would see a mixture of votes of Biden and his opponents, and would see random deviation around the asymptote.

We investigate this phenomenon more fully in Figure (4). The added ballots have a Biden percentage of around 70%, while the initial statitics were at 50%. This is a very large jump for such a large sample size and seems very unlikely. Indeed the probability that the fraud model is correct is 100%, up to the precision of double floating point arithmetic.

Assuming that the prior absentee ballot distribution is the correct one, we can form a simple prediction for how many of Biden's ballots were fraudulent. Let $N_1 = 303,988$, the number of ballots added, and let $B = 189,497$ be the number of Biden votes in this new batch. If the fraction of Biden votes should actually be $f = 0.509$. Let x be the proposed number of fraudulent Biden votes,

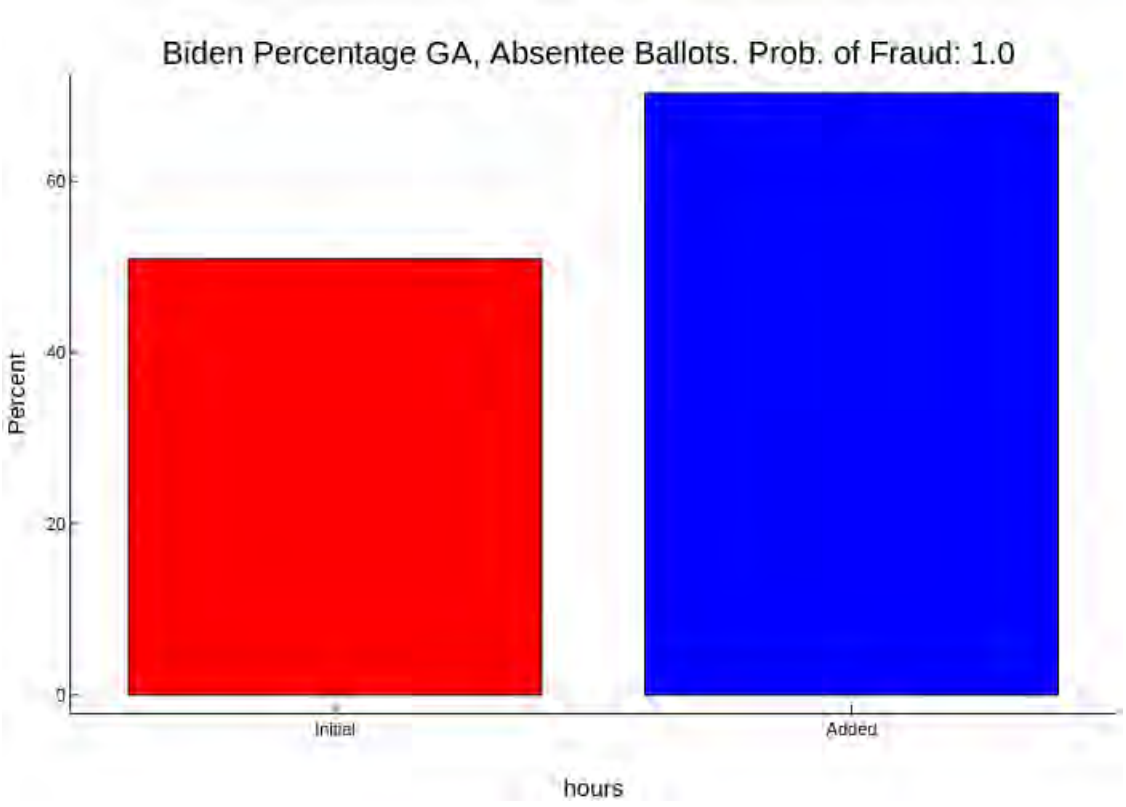


Figure 4: Before and After Biden Fraction in Georgia

then we have,

$$\frac{B-x}{N_1-x} = f$$
$$x = \frac{B-N_1 f}{1-f}. \tag{4}$$

In the case that votes were actually switched from Trump to Biden, then the formula becomes,

$$\frac{B-x}{N_1} = f$$
$$x = B - N_1 f$$

This would suggest that 104,107 ballots were fraudulently manufactured for Biden. If we presume that actually those ballots were switched from Trump to Biden then as many as 19% of the new absentee ballots for Biden were fraudulent, which totals around 51,110 ballots that should be removed from Biden's totals and added to Trump. We shall see in Section 6, that there is substantial evidence that some Trump votes were actually switched to Biden votes.

3.3 Analysis of Pennsylvania Absentee Ballots

The Pennsylvania absentee ballot count started at 785,473 and 319,741 ballots were added at 39 hours after the start of the data record. The Biden fraction among absentee ballots as a function of time is shown in Figure (5). This plot shows some oddities in that the Biden fraction fluctuates with large deviations.

In Figure (6) we see the initial Biden percentage compared with the Biden percentage of the added ballots over the first 39 hours. The added ballots have a Biden percentage of around 83%, while the initial statistics were at 78%. This is a very large jump for such a large sample size and seems very unlikely. Indeed the probability that the fraud model is correct is 100%, up to the precision of double floating point arithmetic.

If we just examine the initial large batch of votes among the absentee ballots, we see an unexplained jump of 5% for Biden. Although it is likely that most of the fraud, if any, occurred earlier in the vote count, just this batch of ballots suggests that approximately 72668 Biden ballots are fraudulent. If we presume that the votes were stolen from Trumps votes, then 15987 Biden ballots are fraudulent and should be added to Trump's total.

4 Analysis of Milwaukee County in Wisconsin

We now switch our analysis to a data set that contains precinct data for Milwaukee county. The data was obtained from the twitter acount of @shylockh, who derived his sources from the New York Times and in some cases from

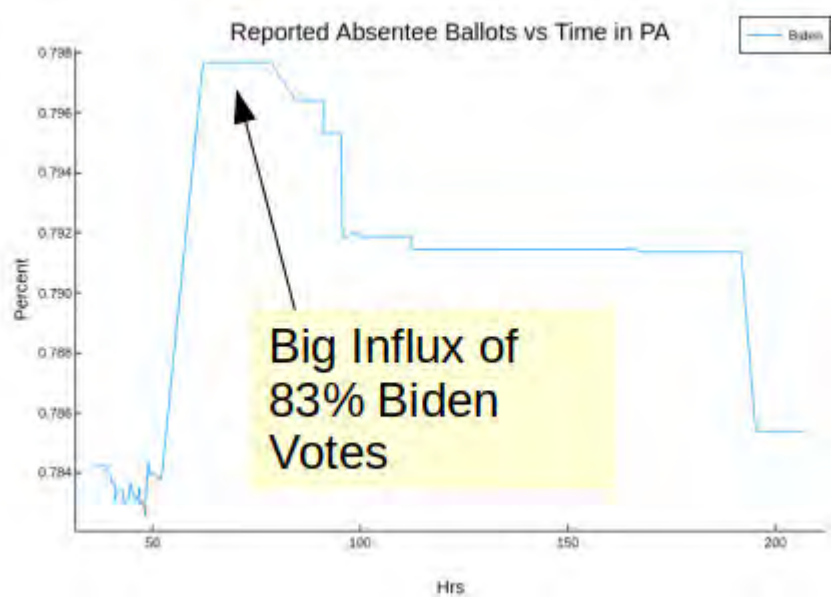


Figure 5: Pennsylvania Absentee Ballots vs Time: (Biden Fraction)

the unofficial precinct reports from the Wisconsin elections commision website. We examine vote percentages for ballots added between Wednesday morning, 11/04/2020 and Thursday night 11/05/2020.

This data set gives the total vote count by party affiliation. Because the data set is confined to Milwaukee, we can assume that the statistics should not be time varying. The voting pool here is highly partisan in favor of democrats and we don't expect any significant difference in the voting percentage, especially since a large number of absentee ballots were already counted by Wednesday morning.

4.1 Analysis of Milwaukee County Democrat results

The percentage of democrat voters increases by 15% among the ballots added on Wednesday and Thursday. On Wednesday morning Milwaukee had received 165,776 ballots. By Thursday evening 458,935 ballots were received, adding 293,159 ballots.

In Figure 7 we see the large deviation in democrat percentage between the Wednesday morning and those added by Thursday evening. This too causes the posterior probability of the fraud model to be 100% to machine precision.

Assuming that there was fraud, we estimate that 105,639 fraudulent Biden ballots were added between Wednesday and Thursday of 11/05/2020 in Milwaukee alone. However as we shall see below, many of these votes may well have been switched from Trump to Biden, which would also give Trump an additional

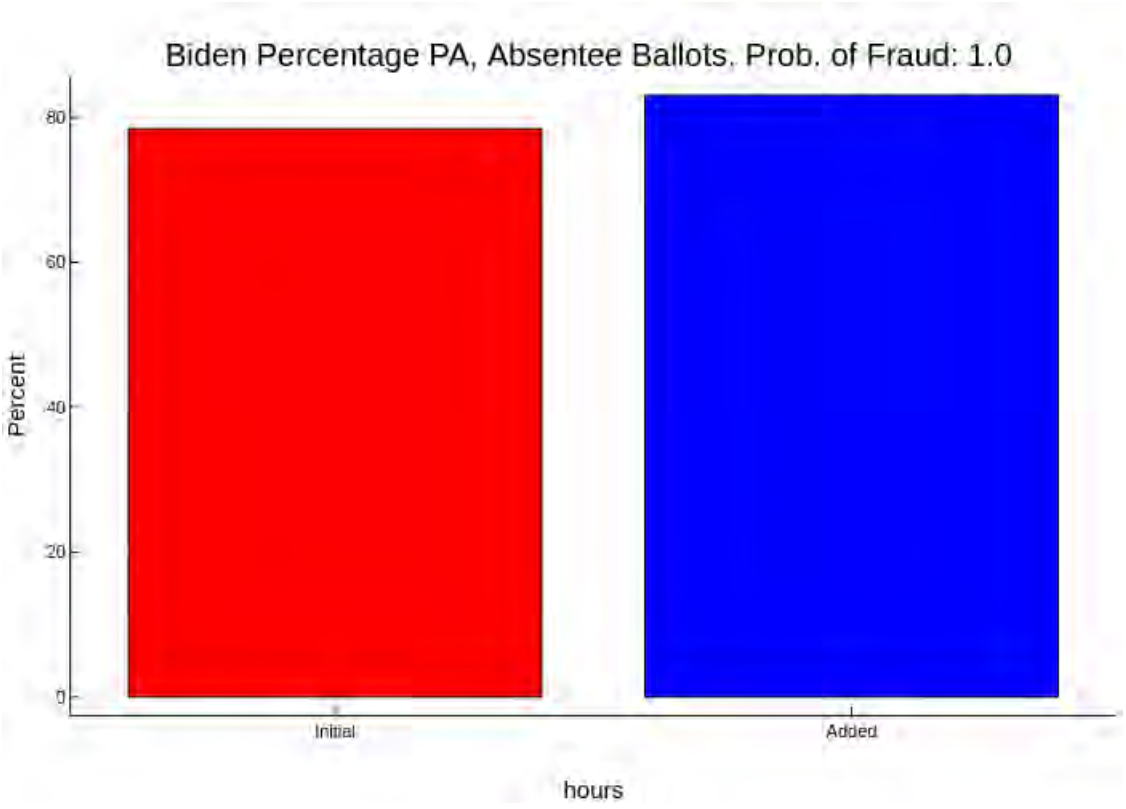


Figure 6: Before and After Biden Fraction in Pennsylvania

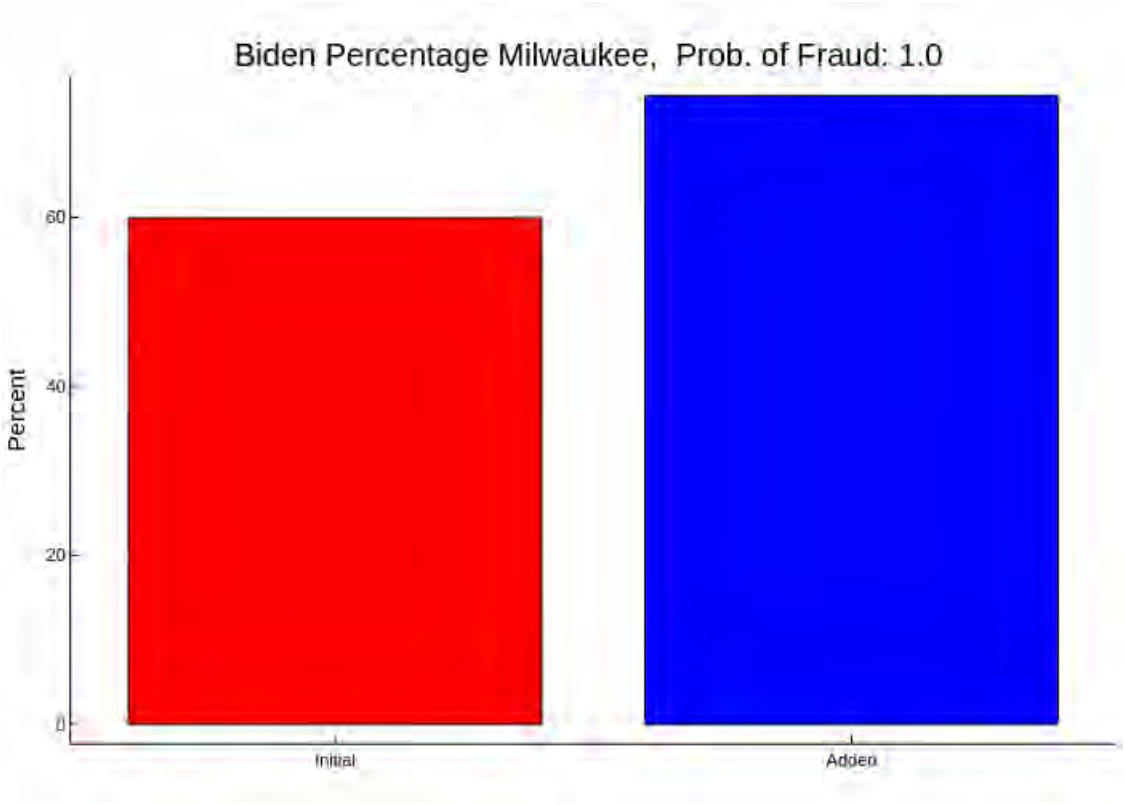


Figure 7: Before and After Democrat Fraction in Milwaukee

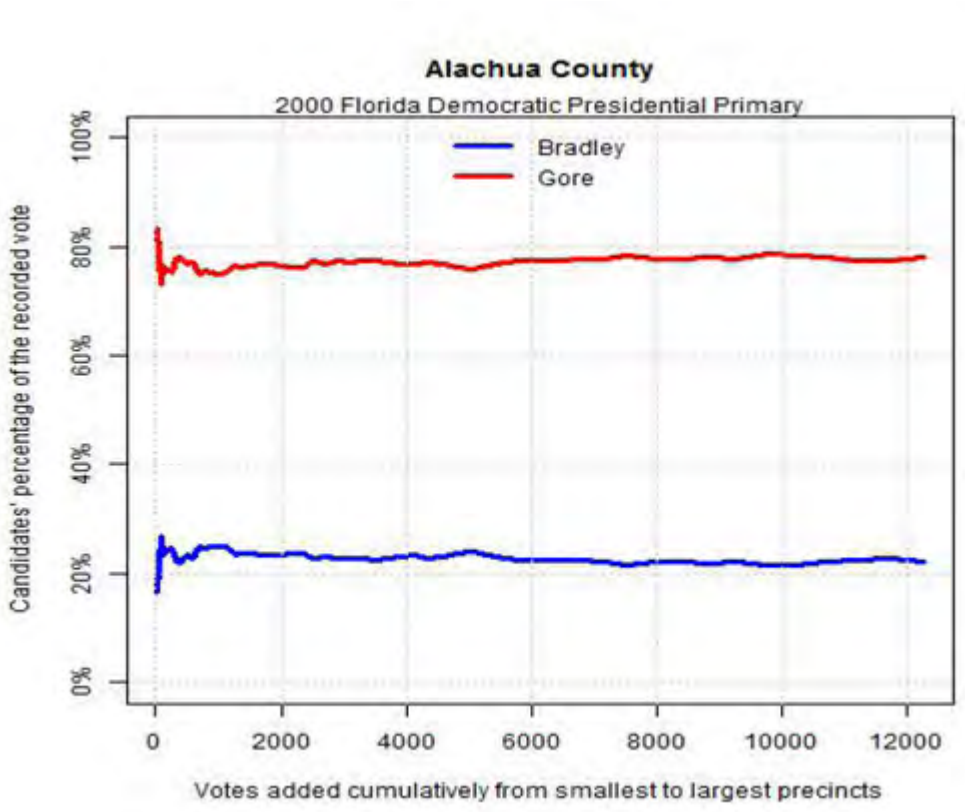


Figure 8: Baseline Cumulative Fractions Sorted by Precinct Size

42365 votes and remove 42365 votes from Biden.

4.2 Candidate Percentages Sorted by Ward Size

Another useful tool for evaluating fraud is to look at the cumulative vote percentages sorted by an independent input factor. An easy factor to use is ward or precinct size. This concept was used throughout the report on voter irregularities in [2]. In that report there was an anomalous dependency on precinct size in many of the 2016 primary elections. The larger precincts had introduced the use of voting machines. But one could also theorize the opportunity for cheaters to cheat in small precincts, where there may be less oversight.

Normally we would expect the cumulative vote percentage to converge to an asymptote, and bounce around the mean until convergence. An example of this can be found from the 2000 Florida Democratic presidential primary between Gore and Bradley. This is shown in Figure 8, and is taken from [2].

However when one sorts the Milwaukee, Thursday night data, by precinct

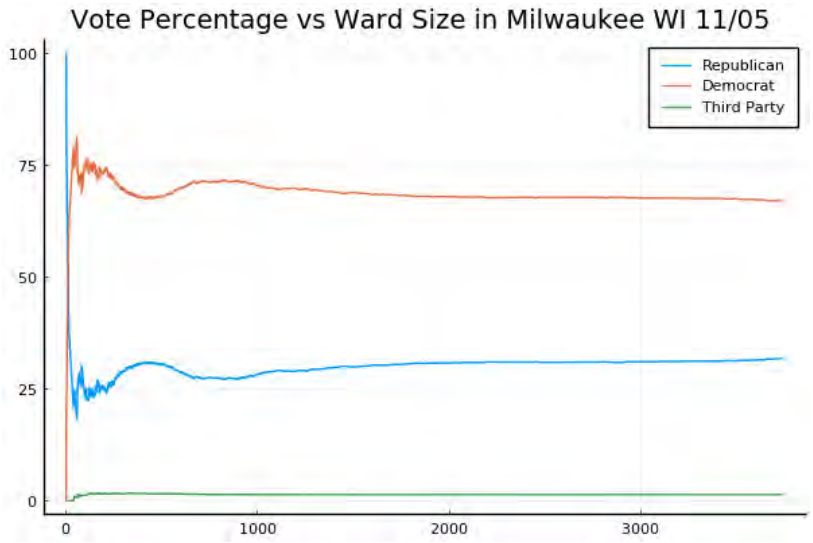


Figure 9: Milwaukee Democrat Ballots Percentage vs Ward Size

size, you will see trendlines that do not converge to an asymptote, as shown in Figure 9. It appears that smaller precincts almost uniformly have higher Democrat percentages. There is no obvious reason for this. It was certainly not seen in the control case in Figure 8. Furthermore the third party percentages quickly converge to their asymptote as would be expected in a fair election. One possible model for this would be vote switching from Trump to Biden, which would show up more strongly in the smaller precincts.

5 Analysis of Third Party Vote Count

Third party voters offer another way to examine a possible fraud mechanism. Votes could either be switched from third party candidates to the cheater, or fraudulent ballots that are added to benefit the cheater, may not include third party choices. For the control example, we look at absentee ballots in the state of Massachusetts. In Massachusetts the initial absentee ballot count was 117,618, and the number of added absentee ballots is 10,281.

The reported 3rd party percentage of absentee ballots vs time in Massachusetts is shown in Figure 10 and the comparison of the inital and added 3rd party ballots in MA is shown in Figure 11. There is only a small change in party preference, relative to the size of the added ballots. Therefore the probability of the fraud model is only 22%.

When we look at the total 3rd party percentages in Milwaukee, between Wednesday morning and Thursday night, we see a significant drop from 1.9 percent to 1.4% for the newly added ballots. But this is among 293,159 added

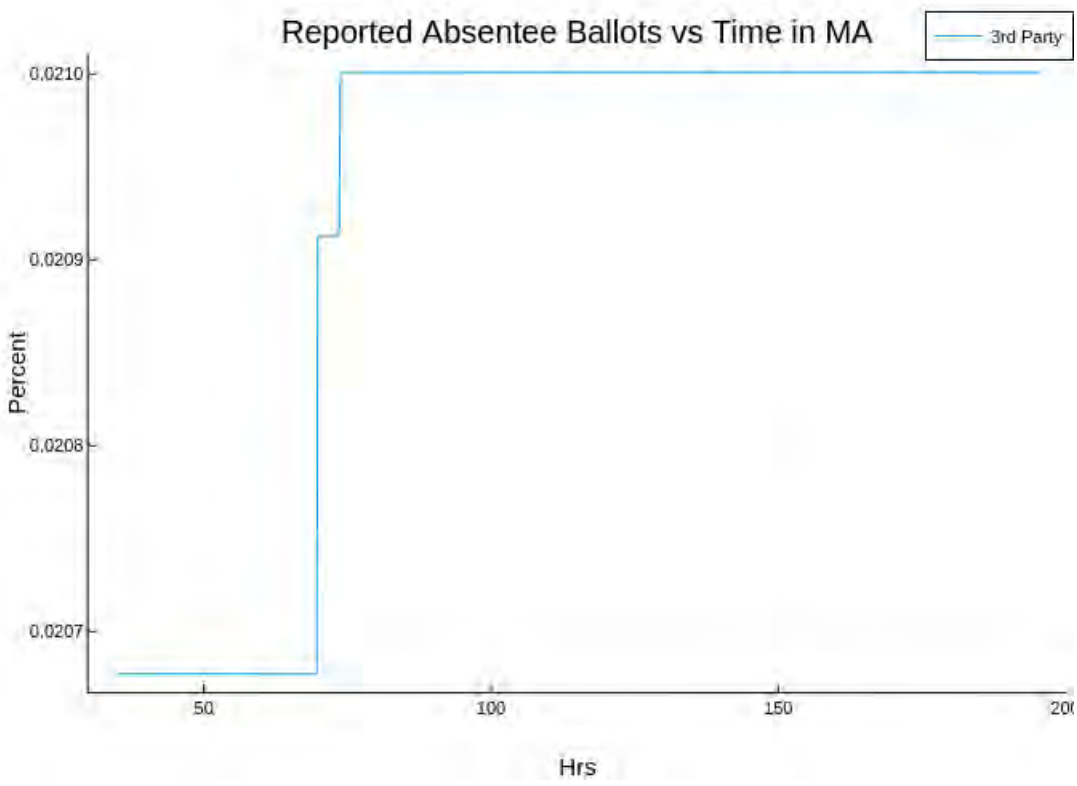


Figure 10: MA 3rd Party Absentee Votes vs Time

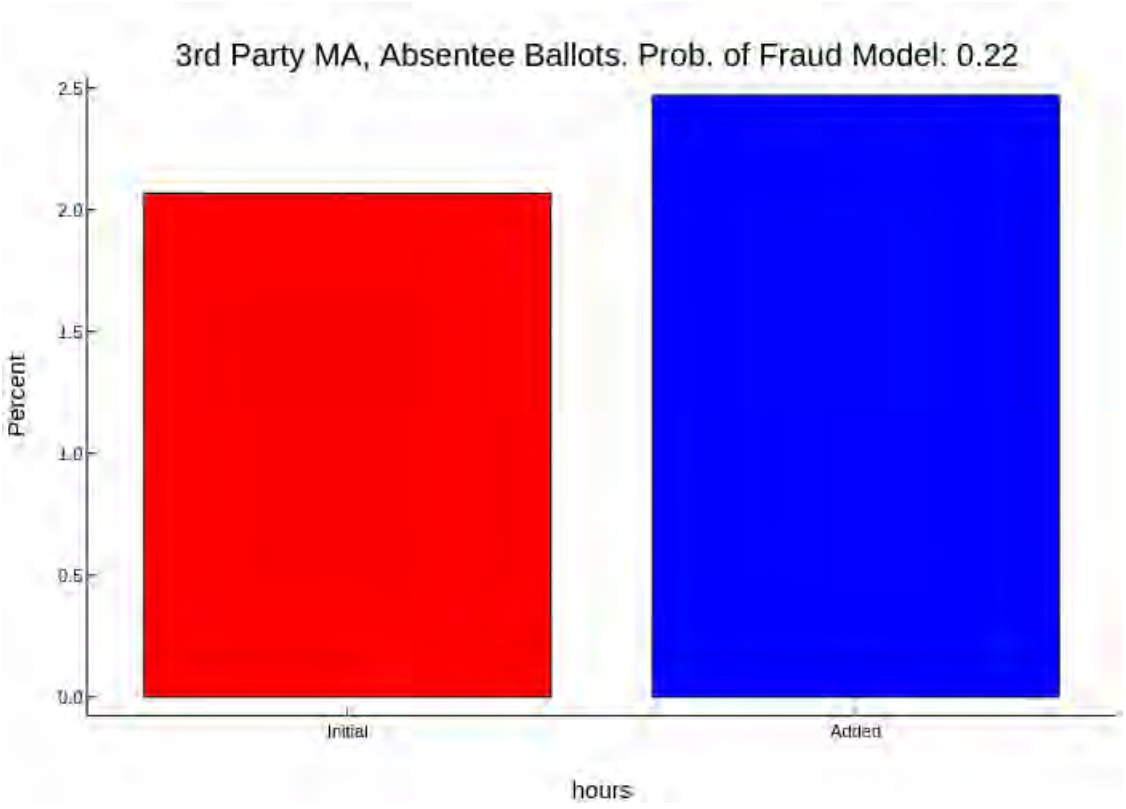


Figure 11: MA 3rd Party Percentage Initial and Added

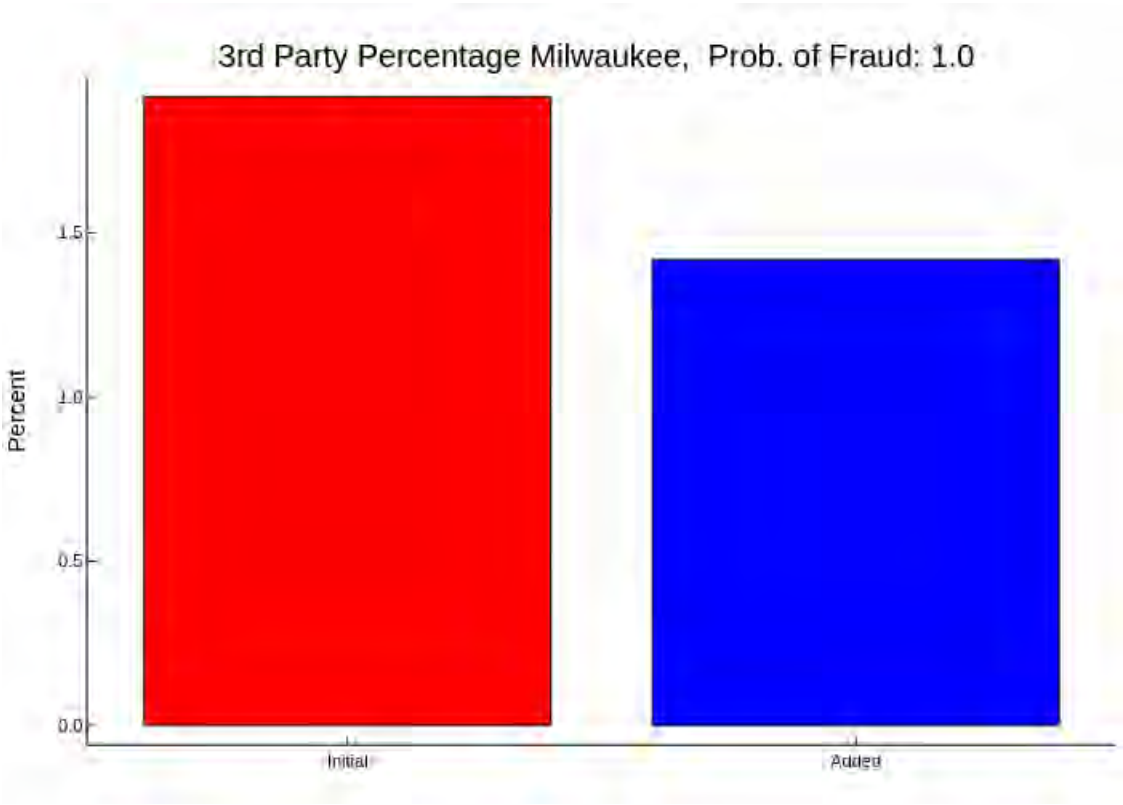


Figure 12: Milwaukee 3rd Party Percentages between Wednesday and Added

ballots. This is illustrated in Figure 12. Again in this case the fraud model has a posterior probability of 100% to machine precision.

6 Analysis of Fulton and DeKalb Counties in Georgia

We perform a precinct level analysis of Fulton and DeKalb counties in Georgia based on an aggregate data set likely culled from the New York Times. The Fulton data was collected on 11/08/2020 and the DeKalb data was collected on 11/09/2020. As in Milwaukee we look at the cumulative vote percentages as a function of precinct size. A plot of this for DeKalb county is shown in Figure 13.

Although there are somewhat concerning trendlines in the beginning, after the size 600 precinct mark, thereafter the overall picture is what one would expect of an election where the voter preferences are not dependent on precinct size. Both DeKalb and Fulton counties are in predominantly urban Atlanta,

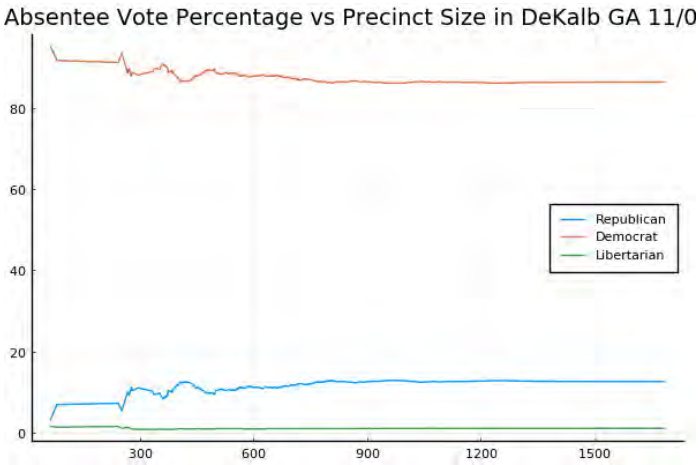


Figure 13: Dekalb County Absentee Ballots: Percentages vs Precinct Size

neighbor one another, and have similar voting preferences across precincts. DeKalb county is still suspect, however, due to the irregularites observed prior to the Ward 600 mark.

A different story emerges when we plot the absentee vote percentages for Fulton county as a function of precinct size, as can be seen in Figure 14. Here the trendlines for the Democrat and Republican percentages are quite pronounced, amounting to a difference of 8 percent from the halfway mark.

We divide the Fulton county data into a group of smaller precincts and larger precincts. One group has precincts less than 308 and another larger than 308. The total absentee ballots for the small group is 24,575, and the large group is 120,029. The small group has a Democrat percentage of 85% and the large group has a percentage of 77%, for a change of 8%. The fraud model is preferred in this scenario again with probability of 100% to machine precision.

One might presume that small precincts generally favor Democrats over large precincts, biasing the results. However take a closer look at the Libertarian party results in Fulton county in Figure 15. The percentages are exactly what we would expect if there were no bias in precinct size. The percentages bounce around a mean, not trending in any direction.

So if there were a bias favoring the democrats in small precincts, we would expect that to effect both the Republican and Libertarian totals. However it appears to only effect Republican totals, as if the Republican ballots were switched over to Democrat in a higher percentage in the smaller precincts. Indeed if a fixed number of ballots are switched in each district, it would have a larger effect in the smaller districts and then show up as trend lines in these percentage plots. At a minimum the data suggests a statistical anomaly that is not normally present in a fair election.

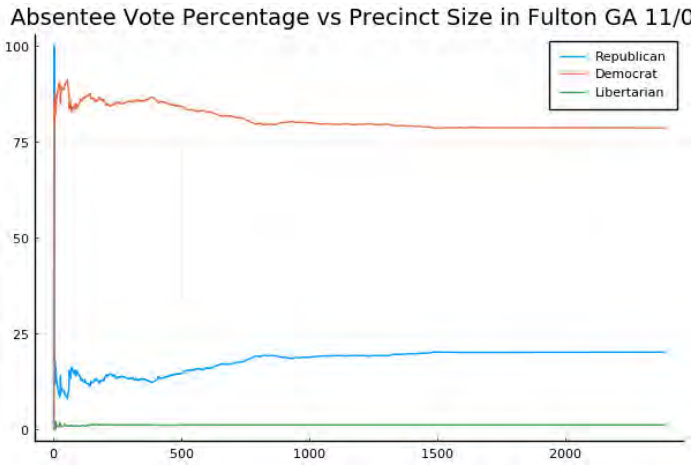


Figure 14: Fulton County Absentee Ballots: Percentages vs Precinct Size

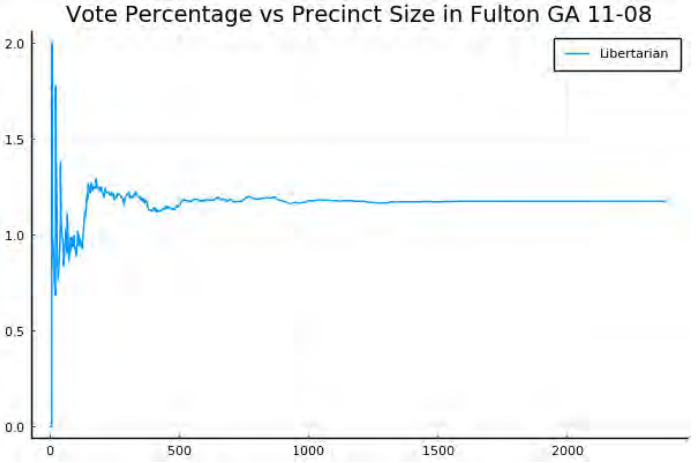


Figure 15: Fulton County Absentee Ballots: Libertarian Percentage vs Precinct Size

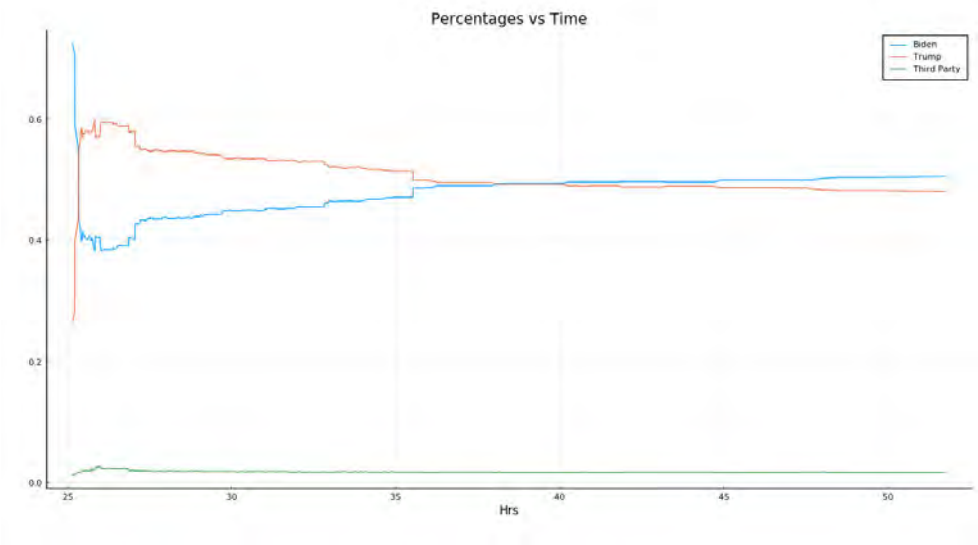


Figure 16: Michigan Vote Percentage vs Time

7 Michigan Analysis

We now due a time series analysis for Michigan. The data was culled from Edison Research. We first show, Trump, Biden and 3rd party voting percentages vs hours after the start of the election in Figure 16. The third party votes shows the proper convergence to an asymptote that we would expect from the law of large numbers. However the Trump and Biden percentages are vastly different You can see large discrete jumps in the percentages as very large Biden ballot dumps occur over time. You also see that the Biden percentages are mostly always increasing after hour 27, which is statistically unlikely in a fair election.

Note also that almost a million of the ballots are received by hour 27, and we use this as our starting point. At that point we have a total of 970,119 votes cast. At the end of 167 hours we have 5,531,222 votes cast. At our initial point the Biden percentage is 38%, but the new ballots have a Biden percentage totaling 53% as seen in Figure 17. The fraud model has posterior likelihood of 100% to machine precision.

For Michigan we compute the estimated amount of fraudulent Biden ballots conservatively, assuming that the 50.5 percent seen at the end of the count should have been the correct percentage among the newly added ballots. From this and (4) we obtain an estimate of 237,140 fraudulent votes added for Biden.

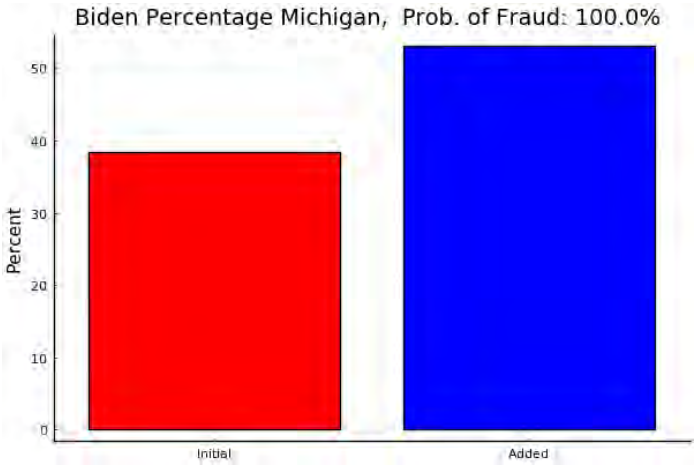


Figure 17: Biden Percentage Before and Added

References

[1] Peter Klimek, Yuri Yegorov, Rudolf Hanel, and Stefan Thurner. Statistical detection of systematic election irregularities. 2, 2.1

[2] lulu Fries'dat and Anselmo Sampietro. An electoral system in crisis. http://www.electoralsystemincrisis.org/. 4.2

JS 44 (Rev. 10/20)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

Place an "X" in the appropriate box (required): ☐ Green Bay Division ☒ Milwaukee Division

I. (a) PLAINTIFFS
WILLIAM FEEHAN, DERRICK VAN ORDEN

(b) County of Residence of First Listed Plaintiff LaCrosse
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
See Attachment

DEFENDANTS
WISCONSIN ELECTIONS COMMISSION,
See Attachment

County of Residence of First Listed Defendant Dane
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☒ 1	☒ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☒ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
42 U.S.C. s. 1983 Seeking Declaratory and Injunctive Relief

Brief description of cause:
Denial of Voting Rights

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):
JUDGE _____ DOCKET NUMBER _____

DATE
11/30/2020

SIGNATURE OF ATTORNEY OF RECORD
Michael D. Dean (see attachment)

FOR OFFICE USE ONLY
RECEIPT # 399 AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked**.** (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs.

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARLC L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

CASE NO. 2:20-cv-1771

PLAINTIFFS' MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF

Pursuant to FRCP 65 and Civil L. R. 7, COMES NOW Plaintiffs, William Feehan and Derrick Van Orden, by and through their undersigned counsel, and file this Emergency Motion for Temporary Restraining Order and Permanent Injunctive Relief.

The specific relief requested by Plaintiff is set forth in the proposed form of Order is attached. The basis for the Motion is set forth in Plaintiffs Memorandum submitted in support.

Respectfully submitted, this 30th day of November 2020.

/s Sidney Powell*
Sidney Powell PC
Texas Bar No. 16209700

2911 Turtle Creek Blvd, Suite 300
Dallas, Texas 75219

*Application for admission forthcoming

CERTIFICATE OF SERVICE

This is to certify that I have on this day e-filed the foregoing Plaintiffs' Motion To File Affidavits Under Seal and For In Camera Review with the Clerk of Court using the CM/ECF system, and that I have delivered the filing to the Defendants by email and FedEx at the following addresses:

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs.

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARLC L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

CASE NO. 2:20-cv-1771

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF

FACTS

The facts relevant to this motion are set forth in the Complaint and its accompanying exhibits, all of which are respectfully incorporated herein by reference. We present only a summary.

After a general election and recount, Joe Biden has been declared the winner of Georgia's General Election for President by a difference of 20,585 votes, while Plaintiff Derrick Van Orden lost his race for the House of Representatives seat for Wisconsin's Third Congressional District

by approximately 10,000 votes. But the vote count certified by defendants on November 30, 2020 fails to recognize the votes are steeped in fraud. Tens of thousands of votes counted toward Mr. Biden's final tally were the product of fraudulent, illegal, ineligible and outright fictitious ballots. Plaintiffs support this claim through the evidence laid out in the Complaint which includes the following conclusions:

The Complaint details a pervasive pattern of illegal conduct by Defendants where they systematically ignored, or acted in direct contravention of, the express requirements of Wisconsin Election Code provisions specifically intended to prevent voter fraud such as voter Photo ID, witness, signature, eligibility and address verification requirements, supported by witness affidavits and even written guidance from Defendant Wisconsin Elections Commission ("WEC") instructing election workers to violate the Wisconsin Election Code. *See* Compl., Section I.

In Section II and III of the Complaint, Plaintiffs demonstrate through statistical analysis of voting results and technical analysis of voting machines and software that each of several distinct categories of voting fraud or batches of fraudulent ballots were larger than Biden's 20,585 margin.

The Affidavit of Russell James Ramsland, Jr. first examines the widely reported and "statistically impossible" Biden "spike" on November 4 where Biden, trailing Trump by a few percent, suddenly received 143,379 votes in a single five-minute interval, causing his relatively flat vote tally to make a vertical jump up and over Trump to take the lead by about one percent. *See* Compl., Ex. 17 ¶13. Another red flag identified by Mr. Ramsland is the historically unprecedented turnout levels (not just for Wisconsin, but for anywhere except for countries like North Korea): 69 out of 72 Wisconsin counties had "voter turnout figures higher than 80%, a

threshold generally considered to be the maximum expected," 59 were above 90%, and two were nearly 200% or more. *Id.* ¶15. Mr. Ramsland concludes "to a reasonable degree of professional certainty" that the Biden spike included at least 119,430 illegal votes for Biden, while the total illegal votes from the fraudulent turnout figures was at least 384,085. *Id.* ¶14.

The Complaint provides testimony from several other experts who provided the estimates for illegal votes that should be discarded due to other categories of voting fraud:

- The report of William M. Briggs, Ph.D. finding that the average sum of two types of errors or fraud (either by Wisconsin election officials or third parties) – (1) absentee voters who were recorded as receiving ballots without requesting them and (2) absentee voters who returned ballots that were recorded as unreturned – was 29,594 votes (or nearly 31% of total). (*See id.*, Ex 2).

- Matt Braynard used the National Change of Address database to identify votes by persons that moved out of state or subsequently registered to vote in another state for the 2020 election, and found a total of 6,966 ineligible votes. (*See id.*, Ex 3).

- A separate analysis by Mr. Braynard of the likely number of votes that were improperly relying on the "indefinitely confined" exemption to voter ID to be 96,437 (*See id.*, Ex 3).

- Another expert witness, whose testimony has been redacted for his safety, estimates excess votes arising from the statistically significant outperformance of Dominion machines on behalf of Joe Biden to be 181,440. (*See id.*, Ex 3)

Thus each of these sources of fraudulent votes (with the exception of the still substantial number of illegal out-of-state voters) is larger than Biden's margin of victory, and if any of these categories of illegal voters were thrown out, it would change the result of the election, and give President Trump a second term – and Plaintiff Van Order a first term as a Congressman.

Section III of the Complaint also provides testimony from experts regarding the security flaws in Wisconsin voting machines, in particular, Dominion Voting Systems ("Dominion") that allow Dominion, as well domestic and foreign actors, to alter, destroy, manipulate or exfiltrate ballot and other voting data, and potentially to do so without a trace due to Dominion's

unprotected logs. For example, the Complaint includes an analysis of the Dominion software system by a former US Military Intelligence expert concludes that the system and software have been accessible and were certainly compromised by rogue actors, such as Iran and China. (*See* Compl., Ex.105). By using servers and employees connected with rogue actors and hostile foreign influences combined with numerous easily discoverable leaked credentials, Dominion neglectfully allowed foreign adversaries to access data and intentionally provided access to their infrastructure in order to monitor and manipulate elections, including the most recent one in 2020. The substantial likelihood that hostile foreign governments, with or without active collusion or collaboration with the Defendants, is a separate and independent ground to grant the declaratory and injunctive relief requested in the Complaint and this Motion.

DISCUSSION

Plaintiffs Have Standing

Plaintiff William Feehan**,** is a registered Wisconsin voter and a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin. The Plaintiff Derrick Van Orden was the 2020 Republican nominee for Wisconsin's Third Congressional District Seat for the United States House of Representatives. As a candidate for elective office, each Plaintiff "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing to challenge actions of Secretary of State in implementing or modifying State election laws); *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam).

Plaintiffs are Entitled to Injunctive Relief.

"To obtain a preliminary injunction, a plaintiff must show three things: (1) without such relief, he will suffer irreparable harm before his claim is finally resolved; (2) he has no adequate remedy at law; and (3) he has some likelihood of success on the merits. *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017) (*citing Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am*., Inc., 549 F.3d 1079, 1086 (7th Cir. 2008)." "If the plaintiff can do that much, the court must then weigh the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Harlin*, 866 F.3d at 758 (*citing Ty, Inc. v. Jones Grp., Inc*., 237 F.3d 891, 895 (7th Cir. 2001). In addition, the court must ask whether the preliminary injunction is in the public interest. *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1058 (7th Cir. 2016).

All elements are met here.

"When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (emphasis added). The evidence shows not only that Defendants failed to administer the November 3, 2020 election in compliance with the manner prescribed by the Georgia legislature, but that Defendants committed a scheme and artifice to fraudulently and illegally manipulate the vote count to make certain the election of Joe Biden as President of the United States. This conduct violated Plaintiffs' equal protection and due process rights as well their rights under Wisconsin law.

Plaintiffs have a substantial likelihood of success.

The Plaintiff does not need to demonstrate a likelihood of absolute success on the merits. "Instead, [it] must only show that [its] chances to succeed on his claims are 'better than negligible.'

" Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1046 (7th Cir. 2017). (quoting Cooper v. Salazar, 196 F.3d 809, 813 (7th Cir. 1999)). "This is a low threshold," *id.*, that Plaintiffs have easily passed.

Through detailed fact and expert testimony including documentary evidence contained in the Complaint and its exhibits, Plaintiffs have made a compelling showing that Defendants' intentional actions jeopardized the rights of Wisconsin citizens to select their leaders under the process set out by the Wisconsin Legislature through the commission of election frauds that violated state laws and the Equal Protection Clause in the United States Constitution. And pursuant to 42 U.S.C. § 1983, plaintiffs must demonstrate by a preponderance of the evidence that their constitutional rights to equal protection or fundamental right to vote were violated. *See, e.g., Radentz v. Marion Cty*., 640 F.3d 754, 756-757 (7th Cir. 2011).

The tally of ballots certified by Defendants giving Mr. Biden the lead with 20,800 votes cannot possibly stand in light of the thousands of illegal mail-in ballots that were improperly counted and the vote manipulation caused by the Dominion software.

Plaintiffs' equal protection claim is straightforward. The right of qualified citizens to vote in a state election involving federal candidates is recognized as a fundamental right under the Fourteenth Amendment of the United States Constitution. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). *See also Reynolds v. Sims,* 377 U.S. 533, 554 (1964) (The Fourteenth Amendment protects the "the right of all qualified citizens to vote, in state as well as in federal elections."). Indeed, ever since the Slaughter-House Cases, 83 U.S. 36 (1873), the United States Supreme Court has held that the Privileges or Immunities Clause of the Fourteenth Amendment protects certain rights of federal citizenship from state interference, including the right of citizens to directly elect members of Congress. *See Twining v. New Jersey*, 211 U.S. 78,

97 (1908) (citing Ex parte Yarbrough, 110 U.S. 651, 663-64 (1884)). *See also Oregon v. Mitchell*, 400 U.S. 112, 148-49 (1970) (Douglas, J., concurring) (collecting cases).

The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it "is preservative of other basic civil and political rights." *Reynolds*, 377 U.S. at 562; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463,476 (6th Cir. 2008) ("The right to vote is a fundamental right, preservative of all rights."). Voters have a "right to cast a ballot in an election free from the taint of intimidation and fraud," *Burson v. Freeman*, 504 U.S. 191, 211 (1992), and "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

"Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted" if they are validly cast. *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted" means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555, n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

"Every voter in a federal . . . election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson v. United States,* 417 U.S. 211, 227 (1974); *see also Baker v. Carr,* 369 U.S. 186, 208 (1962). Invalid or fraudulent votes "debase[]" and "dilute" the weight of each validly cast vote. *See Anderson*, 417 U.S. at 227.

The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the

free exercise of a right or privilege secured to him by the laws and Constitution of the United States." *Anderson*, 417 U.S. at 226 (*quoting Prichard v. United States*, 181 F.2d 326, 331 (6th Cir.), *aff'd due to absence of quorum*, 339 U.S. 974 (1950)).

Practices that promote the casting of illegal or unreliable ballots or fail to contain basic minimum guarantees against such conduct, can violate the Fourteenth Amendment by leading to the dilution of validly cast ballots. *See Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). States may not, by arbitrary action or other unreasonable impairment, burden a citizen's right to vote. *See Baker v. Carr*, 369 U.S. 186, 208 (1962) ("citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution").

"Having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104-05. Among other things, this requires "specific rules designed to ensure uniform treatment" in order to prevent "arbitrary and disparate treatment of voters." *Id*. at 106-07; *see also Dunn v. Bloomstein*, 405 U.S. 330, 336 (1972) (providing that each citizen "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction"). Similarly, equal protection needs to be recognized in this case where many Wisconsin's citizens' lawful votes remained uncounted, and many were diluted by unlawful votes in violation of the Equal Protection clause.

The Plaintiffs will suffer Irreparable Harm

"Where, as here, plaintiff has demonstrated a likelihood of success on the merits as to a constitutional claim, such an injury has been held to constitute irreparable harm." *Democratic*

Nat'l Comm. v. Bostelmann, 447 F.Supp.3d 757, 769 (W.D. Wis. 2020) (*citing Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (where plaintiff had proven a probability of success on the merits, the threatened loss of First Amendment freedoms "unquestionably constitutes irreparable injury"); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.4 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm.").

Moreover, courts have specifically held that infringement on the fundamental right to vote constitutes irreparable injury. *See Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) ("A restriction on the fundamental right to vote ... constitutes irreparable injury."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (holding that plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon")." \

"Additionally, traditional legal remedies would be inadequate, since infringement on a citizens' constitutional right to vote cannot be redressed by money damages." *Bostelmann*, 447 F.Supp.3d at 769 (*citing Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate."); *League of Women* Voters *of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress.")."

The Balance of Harms & Public Interest

Under Seventh Circuit law, a "sliding scale" approach is used for balancing of harms: "[t]he more likely it is that [the movant] will win its case on the merits, the less the balance of harms need weigh in its favor." *Girl Scouts of Manitou Council v. Girl Scouts of United States of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). Plaintiffs above have shown their strong

likelihood of success on the merits above. The low costs to Defendants and high potential harm to Plaintiffs make this a case with a substantial net harm that an immediate and emergency injunctive relief can prevent.

In this regard, Plaintiffs would highlight a recent Eleventh Circuit decision addressed a claim in 2018 related to Georgia's voting system and Dominion Voting Systems that bears on the likelihood of Plaintiffs' success on the merits and the balance of harms in the absence of injunctive relief:

> In summary, while further evidence will be necessary in the future, the Court finds that the combination of the statistical evidence and witness declarations in the record here (and the expert witness evidence in the related *Curling* case which the Court takes notice of) persuasively demonstrates the likelihood of Plaintiff succeeding on its claims. Plaintiff has shown a substantial likelihood of proving that the Secretary's failure to properly maintain a reliable and secure voter registration system has and will continue to result in the infringement of the rights of the voters to cast their **vote** and have their **votes** counted.

Common Cause Georgia v. Kemp, 347 F. Supp. 3d 1270, 1294-1295, (11th Cir. 2018).

Therefore, it is respectfully requested that the Court grant Plaintiffs' Motion and enter the proposed Order submitted therewith.

Respectfully submitted, this 30th day of November 2020.

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*Application for admission forthcoming

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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN, DERRICK VAN ORDEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

CASE NO. 2:20-cv-1771

PLAINTIFFS' DISCLOSURE STATEMENT

The undersigned, as counsel of record for Plaintiffs William Feehan and Derrick Van Orden provide the following information in compliance with Federal Rule of Civil Procedure 7.1 and Civil L.R. 7.1:

1. Full name of every party the attorneys represents in this matter:

   All Plaintiffs: William Feehan and Derrick Van Orden

2. Parent corporations and stockholders:

   a. Parent corporations, if any:

      Not applicable.

   b. List of corporate stockholders that are publicly held companies owning 10 percent or more of the stock of the party or amicus:

      Not applicable.

3. The name of all law firms whose partners or associates appear for a party or are expected to appear for the party in this court:

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Dated December 1, 2020

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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs.

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARLC L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

CASE NO. 2:20-cv-1771

PLAINTIFFS' CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF

Pursuant to FRCP 65 and Civil L. R. 7, COME NOW Plaintiffs, William Feehan and Derrick Van Orden, by and through their undersigned counsel, and file this Amended Motion for Declaratory, Emergency, and Permanent Injunctive Relief.

This Corrected Motion is to correct the Motion filed earlier this same day, which was a draft Motion inadvertently filed as the original Motion without attaching the Proposed Order pursuant to the Court's Electronic Case Filing Policies and Procedures Manual.

.

The specific relief requested by Plaintiff is set forth in the proposed Order is attached. The basis for the Motion is set forth in Plaintiffs' Memorandum submitted in support.

Respectfully submitted, this 1st day of December, 2020.

LEAD COUNSEL FOR PLAINTIFFS

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CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to FRCP 65, this is to certify that upon filing of this Motion, Plaintiffs will provide electronic notice to Defendants of this Action and Motion as follows:

Defendants Wisconsin Elections Commission and
Wisconsin Elections Commissioners:
elections@wi.gov

Defendant Governor Tony Evers
eversinfo@wisconsin.gov

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN, DERRICK VAN ORDEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

CASE NO. 2:20-cv-1771

ORDER GRANTING EMERGENCY INJUNCTIVE RELIEF

THE COURT has before it Plaintiffs' Emergency Motion for Injunctive Relief filed December 1, 2020, seeking:

1. An order directing the Defendants Wisconsin Elections Commission and Governor Tony Evers not to certify or to de-certify the 2020 election results in the Presidential and District 3 Congressional races;

2. An order enjoining Defendants from transmitting the currently certified Presidential election results to the Electoral College;

3. An order requiring Governor Evers to transmit certified Presidential election results that state that President Donald Trump is the winner of the election;

4. An immediate emergency order to seize and impound all servers, software, voting machines, tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images,

paper ballots, and all "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11. related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiffs;

5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;

6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;

7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. CONST. Amend. XIV;

8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with an individual manual recount or statistically valid sampling that properly verifies a ballot application for each absentee ballot, that verifies the signatures on absentee ballot envelopes, and that invalidates the certified results in the Presidential and District 3 Congressional races if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;

9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under Wisconsin state law; and

10. A permanent injunction prohibiting the Governor and the Wisconsin Elections Commission from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering.

Plaintiffs also contend that any recalibration or reset of voting machines, tabulations machines, or other election-related mechanisms, servers, software, voting machines, tabulators, printers, portable media, logs, or processes, and any alteration or destruction of ballot applications, ballot return envelopes, ballot images, paper ballots, registration lists, poll lists, or any other "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11. related to the November 3, 2020

Wisconsin election, whether pursuant to § 7.23, Wisconsin Statutes, or otherwise, will make it impossible to conduct a valid recount or inspection by Plaintiffs' experts or others.

Plaintiffs contend any such act and any like it must be immediately enjoined across the state of Wisconsin pursuant to 52 U.S.C. § 20701 (preservation of voting records) because resetting the machines or other alteration or destruction of election equipment, records, or other materials would destroy the evidence or alter evidence and make impossible any forensic computer audit of the election computer systems for the November 3, 2020 General Election.

Plaintiffs therefore ask for an injunction to prevent any wiping or alteration of data or other records or materials, and to ensure forensic analysis can take place.

Plaintiffs further ask for emergency injunctive to expedite the flow of discovery material and to preserve all voting-related computer data information.

The Court has reviewed the terms and conditions of this Emergent Injunctive Relief Order, and for good cause shown IT IS HEREBY ORDERED THAT:

1. A Temporary Restraining Order is immediately in effect to preserve the voting machines in the State of Wisconsin, and to prevent any wiping or alteration of data or other records or materials, until such time as a full computer audit is completed;

2. Governor Evers and the Wisconsin Elections Commission are to de-certify the election results;

3. Governor Evers is hereby enjoined from transmitting the currently certified election results to the Electoral College;

4. Governor Evers is required to transmit certified election results that state that President Donald Trump is the winner of the election;

5. It is hereby Ordered that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;

6. It is hereby declared and ordered that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;

7. It is hereby declared and ordered that the currently certified election results violate the Due Process Clause, U.S. CONST. Amend. XIV;

8. It is hereby declared and ordered that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies a ballot application for each absentee ballot, that verifies the signatures on absentee ballot envelopes, and that invalidates the certified results in the Presidential and District 3 Congressional races if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;

9. It is hereby declared that absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under Wisconsin state law; and

10. It is hereby declared and ordered that Governor Evers and the Wisconsin Elections Commission are enjoined from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;

It is so Ordered, this ___ day of December, 2020.

_____

Hon. Pamela Pepper
District Court Judge
Eastern District of Wisconsin, Milwaukee Division

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,
and DERRICK VAN ORDEN,

Plaintiffs,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants.

ORDER REGARDING AMENDED MOTION FOR INJUNCTIVE RELIEF (DKT. NO. 6)

On the morning of December 1, 2020, the plaintiffs filed a complaint (Dkt. No. 1) and a motion for declaratory, emergency and permanent injunctive relief (Dkt. No. 2). The complaint is not verified.

The motion indicated that the specific relief the plaintiffs were requesting was laid out in an attached order. Dkt. No. 2 at 1. This language was highlighted and in a larger font than the rest of the motion. There was no order attached. At the end of the motion, under the words "Certificate of Service," the following statement appeared (also highlighted): "This is to certify that I have on this day e-filed the foregoing Plaintiffs' Motion to File Affidavits Under Seal and For In Camera Review with the Clerk of Court using the CM/ECF system, and that I have delivered the filing to the Defendants by email and FedEx at the following addresses:". Id. at 2. No addresses were listed below this statement

and no documents were filed under seal. There was no request for *in camera* review.

Under Federal Rule of Civil Procedure 65(b), a court cannot issue a temporary restraining order without written or oral notice to the adverse party or that party's attorney unless the moving party (a) files an affidavit or "verified complaint" containing specific facts that clearly show that immediate and irreparable injury, loss or damage will result to the movant before the adverse party has a chance to be heard in opposition, and (b) the movant's attorney certifies in writing any efforts made to give notice and the reasons why notice should not be required. There was no indication that the plaintiffs gave notice to the adverse parties of the morning's motion, there was no affidavit filed with the motion, the complaint is not verified and there was no certification from counsel about the efforts made to give notice to the adverse parties or why notice should not be required.

At 3:15 that afternoon, the plaintiffs filed another document. It appears on the docket as a motion to amend or correct, but the document itself is captioned, "Plaintiffs' Corrected Motion for Declaratory, Emergency, and Permanent Injunctive Relief." Dkt. No. 6. This motion indicates that the earlier motion was an inadvertently filed draft and acknowledges that the referenced proposed order had not been attached. Id. at 1. At the end of the "corrected," or amended, motion, under the heading "Certificate of Electronic Service," the motion states,

> Pursuant to FRCP 65, this is to certify that upon filing of this Motion, Plaintiffs will provide electronic notice to Defendants of this Action and Motion as follows:
>
> > Defendants Wisconsin Elections Commission and Wisconsin Elections Commissioners:
> > elections@wi.gov
> >
> > Defendant Governor Tony Evers
> > eversinfo@wisconsin.gov

Id. at 3.

There is a proposed order attached to the afternoon's amended motion. Dkt. No. 6-1. The proposed order asks various injunctions, declarations and orders. It does not ask for a hearing.

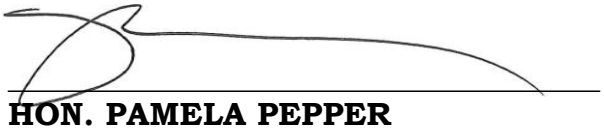
Because the afternoon motion indicates that the plaintiffs "will" provide electronic notice to the adverse parties, the court does not know whether the plaintiffs have yet provided notice to the adverse parties or when they will do so. Until the plaintiffs notify the court that they have provided notice to the adverse parties, the court will not take any action because the motion does not comply with the requirements of Rule 65(b).

If the plaintiffs *have* provided notice to the adverse parties, under Civil Local Rule 7(b) (E.D. Wis.) those parties have twenty-one days to respond to the motion and under Civil L.R. 7(c) the plaintiffs have fourteen days to reply. While the caption of the motion includes the word "emergency" and the attached proposed order seeks an "expedited" injunction, neither the motion nor the proposed order indicate whether the plaintiffs are asking the court to act more quickly or why. As indicated, the motion does not request a hearing. It does not propose a briefing schedule.

If the plaintiffs believe an expedited briefing schedule is necessary or warranted, they may contact chambers, with representatives of the adverse parties on the line, and request a telephone hearing. Otherwise, the court will await the defendants' opposition brief.

Dated in Milwaukee, Wisconsin this 2nd day of December, 2020.

BY THE COURT:



HON. PAMELA PEPPER
Chief United States District Judge

UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

WILLIAM FEEHAN, DERRICK VAN ORDEN *Plaintiff* v. WISCONSIN ELECTIONS COMMISSION, *Defendant*	)	Case No.

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

_____ .

Date: _____

_____
Attorney's signature

_____
Printed name and bar number

_____
Address

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E-mail address

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Telephone number

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FAX number

Print Save As... Reset

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff, **CASE NO. 2:20-cv-1771**

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF

NATURE OF THE ACTION

1. This civil action brings to light a massive election fraud, multiple violations of Wisconsin Statutes Chapters 5 – 12 (hereafter, "Wisconsin Election Code"), *see, e.g.,* Wis. Stat. §§ 5.03, *et. seq.*, in addition to the Election and Electors Clauses and Equal Protection Clause of the U.S. Constitution. These violations occurred during the 2020 General Election in the City of Milwaukee, southeastern Wisconsin counties, and throughout the State of Wisconsin, as set forth in the affidavits of dozens of eyewitnesses and the statistical anomalies and mathematical impossibilities detailed in the affidavits of expert witnesses. *See* Exh. 19, Declaration of affiant presenting statistical analysis prediction of 105,639 fraudulent ballots cast for Joe Biden in the

City of Milwaukee and Exh. 17, Declaration of Russell James Ramsland, Jr. wherein he demonstrates it is statistically impossible for Joe Biden to have won Wisconsin.

2. The scheme and artifice to defraud was for the purpose of illegally and fraudulently manipulating the vote count to manufacture an election of Joe Biden as President of the United States, and also of various down ballot democrat candidates in the 2020 election cycle. The fraud was executed by many means, but the most fundamentally troubling, insidious, and egregious ploy was the systemic adaptation of old-fashioned "ballot-stuffing" techniques. *See* Exh. 16, U. S. Senator Elizabeth Warren (D. Mass.) letter of December 6, 2019 concerning the dangers of private equity control and censorship of election technology in the United States.

3. The fraud has now been amplified and rendered virtually invisible by computer software created and run by domestic and foreign actors for that very purpose. *See* Exh. 18, Joint Cybersecurity Advisory issued on October 30, 2020 by the U.S. Department of Justice Federal Bureau of Investigation (FBI) and the Cybersecurity & Infrastructure Security Agency (CISA) warning election officials about actual election system hacking events by Iranian agents in an attempt to manipulate the November 3, 2020 election. This Amended Complaint details an especially egregious range of conduct in Milwaukee County and the City of Milwaukee, along with Dane County, La Crosse County, Waukesha County, St. Croix County, Washington County, Bayfield County, Ozaukee County and various other counties throughout Wisconsin employing Dominion Systems, though this conduct occurred throughout the State at the direction of Wisconsin state election officials.

4. The multifaceted schemes and artifices implemented by Defendants and their collaborators to defraud resulted in the unlawful counting, or fabrication, of hundreds of thousands of illegal, ineligible, duplicate or purely fictitious ballots in the State of Wisconsin, that collectively

add up to multiples of Biden's purported lead in the State of 20,565 votes.

5. While this Amended Complaint, and the eyewitness and expert testimony incorporated herein, identify with specificity sufficient ballots required to set aside the 2020 General Election results, the entire process is so riddled with fraud, illegality, and statistical impossibility that this Court, and Wisconsin's voters, courts, and legislators, cannot rely on, or certify, any numbers resulting from this election. Accordingly, this Court must set aside the results of the 2020 General Election and grant the declaratory and injunctive relief requested herein.

Dominion Voting Systems Fraud and Manipulation

6. The fraud begins with the election software and hardware from Dominion Voting Systems Corporation ("Dominion") used by the Wisconsin Elections Commission. The Dominion systems derive from the software designed by Smartmatic Corporation, which became Sequoia in the United States.

7. Smartmatic and Dominion were founded by foreign oligarchs and dictators to ensure computerized ballot-stuffing and vote manipulation to whatever level was needed to make certain Venezuelan dictator Hugo Chavez never lost another election. See Exh. 1, Redacted Declaration of Dominion Venezuela Whistleblower ("Dominion Whistleblower Report") and Exh. 8, Statement by Ana Mercedes Diaz Cardozo outlining actual examples of election manipulation by hacking and misuse of technology in Venezuelan elections. Notably, Chavez "won" every election thereafter.

8. As set forth in the Dominion Whistleblower Report, the Smartmatic software was contrived through a criminal conspiracy to manipulate Venezuelan elections in favor of dictator Hugo Chavez:

> Importantly, I was a direct witness to the creation and operation of an electronic voting system in a conspiracy between a company known as Smartmatic and the

> leaders of conspiracy with the Venezuelan government. This conspiracy specifically involved President Hugo Chavez Frias, the person in charge of the National Electoral Council named Jorge Rodriguez, and principals, representatives, and personnel from Smartmatic. The purpose of this conspiracy was to create and operate a voting system that could change the votes in elections from votes against persons running the Venezuelan government to votes in their favor in order to maintain control of the government. In mid-February of 2009, there was a national referendum to change the Constitution of Venezuela to end term limits for elected officials, including the President of Venezuela. The referendum passed. This permitted Hugo Chavez to be re-elected an unlimited number of times. . . .
>
> Smartmatic's electoral technology was called "Sistema de Gestión Electoral" (the "Electoral Management System"). Smartmatic was a pioneer in this area of computing systems. Their system provided for transmission of voting data over the internet to a computerized central tabulating center. The voting machines themselves had a digital display, fingerprint recognition feature to identify the voter, and printed out the voter's ballot. The voter's thumbprint was linked to a computerized record of that voter's identity. Smartmatic created and operated the entire system. *Id.* ¶¶ 10 & 14.

9. A core requirement of the Smartmatic software design ultimately adopted by Dominion for Wisconsin's elections was the software's ability to hide its manipulation of votes from any audit. As the whistleblower explains:

> Chavez was most insistent that Smartmatic design the system in a way that the system could change the vote of each voter without being detected. He wanted the software itself to function in such a manner that if the voter were to place their thumb print or fingerprint on a scanner, then the thumbprint would be tied to a record of the voter's name and identity as having voted, but that voter would not tracked to the changed vote. He made it clear that the system would have to be setup to not leave any evidence of the changed vote for a specific voter and that there would be no evidence to show and nothing to contradict that the name or the fingerprint or thumb print was going with a changed vote. Smartmatic agreed to create such a system and produced the software and hardware that accomplished that result for President Chavez. *Id.* ¶15.

10. The design and features of the Dominion software do not permit a simple audit to reveal its misallocation, redistribution, or deletion of votes. First, the system's central accumulator does not include a protected real-time audit log that maintains the date and time stamps of all significant election events. Key components of the system utilize unprotected logs. Essentially this allows

an unauthorized user the opportunity to arbitrarily add, modify, or remove log entries, causing the machine to log election events that do not reflect actual voting tabulations—or more specifically, do not reflect the actual votes of or the will of the people.[1] *See* Exh. 14, Declaration of Ronald Watkins regarding manipulation of Dominion software and built-in optical ballot scanning systems to contrive an election outcome in multiple states.

11. This Amended Complaint will show that Dominion violated physical security standards by connecting voting machines to the Internet, allowing Dominion, domestic third parties or hostile foreign actors to access the system and manipulate election results, and moreover potentially to cover their tracks due to Dominion's unprotected log. Accordingly, a thorough forensic examination of Dominion's machines and source code (pursuant to Wisconsin Statute § 5.905) is required to document these instances of voting fraud, as well as Dominion's systematic violations of the Voting Rights Act record retention requirements through manipulation, alteration, destruction and likely foreign exfiltration of voting records. *See* 52 U.S.C. § 20701.

12. These and other problems with Dominion's software have been widely reported in the press and been the subject of investigations. In certifying Dominion Voting Systems Democracy Suite, Wisconsin officials disregarded all the concerns that caused Dominion software to be rejected by the Texas Board of elections in 2020 because it was deemed vulnerable to undetected and non-auditable manipulation. Texas denied Certification because of concerns that it was not safe from fraud or unauthorized manipulation. *See* Exh. 11.

13. An industry expert, Dr. Andrew Appel, Princeton Professor of Computer Science and

[1] *See* Ex. 7, August 24, 2020 Declaration of Harri Hursti, ¶¶45-48 (expert testimony in Case 1:17-cv-02989 in the U.S. District Court for the Northern District of Georgia). The Texas Secretary of State refused to certify Dominion for similar reasons as those cited by Mr. Hursti. *See* Ex. 9, State of Texas Secretary of State, Elections Division, Report of Review of Dominion Voting Systems Democracy Suite 5.5-A at 2 (Jan. 24, 2020).

Election Security Expert has recently observed, with reference to Dominion Voting machines: "I figured out how to make a slightly different computer program that just before the polls were closed, it switches some votes around from one candidate to another. I wrote that computer program into a memory chip and now to hack a voting machine you just need 7 minutes alone with a screwdriver."[2]

14. In addition to the Dominion computer fraud, this Amended Complaint identifies several additional categories of "traditional" voting fraud that occurred as a direct result of Defendant Wisconsin Election Commission ("WEC") and other Defendants directing Wisconsin clerks and other election officials to ignore or violate the express requirements of the Wisconsin Election Code. First, the WEC issued "guidance" to county and municipal clerks not to reject "indefinitely confined" absentee voters, even if the clerks possess "reliable information" that the voter is no longer indefinitely confined, in direct contravention of Wisconsin Statute § 6.86(2)(6), which states that clerks must remove such voters. Second, the WEC issued further guidance directing clerks – in violation of Wisconsin Statute § 6.87(6)(d), which states that an absentee envelope certification "is missing the address of a witness, the ballot may not be counted" – to instead fill in the missing address information.

15. This Amended Complaint presents expert witness testimony demonstrating that several hundred thousand illegal, ineligible, duplicate or purely fictitious votes must be thrown out, in particular:

A. A report from Dr. William Briggs, showing that there were approximately 29,594 absentee ballots listed as "unreturned" by voters that either never requested them, or that requested and returned their ballots;

B. Reports from Redacted Expert Witnesses who can show an algorithm was used

[2] Andrew W. Appel, *et al.*, "Ballot Marking Devices (BMDs) Cannot Assure the Will of the Voters" at (Dec. 27, 2019),(attached hereto as Exh. 10 ("Appel Study")).

to pick a winner.

16. In the accompanying redacted declaration of a former electronic intelligence analyst with 305th Military Intelligence with experience gathering SAM missile system electronic intelligence, the Dominion software was accessed by agents acting on behalf of China and Iran in order to monitor and manipulate elections, including the most recent US general election in 2020. *See* Exh. 12 (copy of redacted witness affidavit).

17. These and other "irregularities" demonstrate that at least 318,012 illegal ballots were counted in Wisconsin. This provides the Court with sufficient grounds to set aside the results of the 2020 General Election and provide the other declaratory and injunctive relief requested herein.

JURISDICTION AND VENUE

18. This Court has subject matter under 28 U.S.C. § 1331 which provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

19. This Court also has subject matter jurisdiction under 28 U.S.C. § 1343 because this action involves a federal election for President of the United States. "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring); *Smiley v. Holm*, 285 U.S. 355, 365 (1932).

20. The jurisdiction of the Court to grant declaratory relief is conferred by 28 U.S.C. §§ 2201 and 2202 and by Rule 57, Fed. R. Civ. P.

21. This Court has jurisdiction over the related Wisconsin constitutional claims and state-law claims under 28 U.S.C. § 1367.

22. Venue is proper because a substantial part of the events or omissions giving rise to the

claim occurred in the Eastern District. 28 U.S.C. § 1391(b) & (c).

23. Because the United States Constitution reserves for state legislatures the power to set the time, place, and manner of holding elections for the President, state executive officers have no authority to unilaterally exercise that power, much less flout existing legislation.

THE PARTIES

24. Plaintiff William Feehan, is a registered Wisconsin voter and a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin. Mr. Feehan is a resident of the City of La Crosse and La Crosse County, Wisconsin.

25. Presidential Electors "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing to challenge actions of state officials implementing or modifying State election laws); *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam).

26. Plaintiff Feehan has standing to bring this action as a voter and as a candidate for the office of Elector under Wis. Stat. §§ 5.10, et seq (election procedures for Wisconsin electors). As such, Presidential Electors "have a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing to challenge actions of state officials in implementing or modifying State election laws); *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000)

(per curiam).

27. Plaintiff brings this action to prohibit certification of the election results for the Office of President of the United States in the State of Wisconsin and to obtain the other declaratory and injunctive relief requested herein. Those results were certified by Defendants on November 30, 2020, indicating a plurality for Mr. Biden of 20,565 votes out of 3,240,867 cast.

28. The Defendants are Wisconsin Elections Commission ("WEC"), a state agency, and its members Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, and Robert F. Spindell, Jr., in their official capacities

29. Defendant Governor Tony Evers is named as a defendant in his official capacity as Wisconsin's governor.

30. Defendant WEC was created in 2015 by the Wisconsin Legislature as an independent agency under the Executive branch to administer Wisconsin's election laws. Wis. Stat. §§ 5.03 & 15.61. The WEC is authorized to adopt administrative rules pursuant to Chapter 227 of the Wisconsin Statutes, but nothing under Wisconsin's election laws authorizes the WEC to issue any documents, make any oral determinations or instruct governmental officials administering elections to perform any act contrary to Wisconsin law governing elections.

31. Furthermore, the Wisconsin Legislature also created municipal elections commissions for municipalities with a population greater than 500,000 and a county elections commissions for counties with a population greater than 750,000. Wis Stat. § 7.20. As a result, the City of Milwaukee Elections Commission was created as well as the Milwaukee County Elections Commission and the Dane County Elections Commission. These county and municipal elections commissions are responsible for administering the elections in their respective jurisdictions.

STATEMENT OF FACTS

32. Plaintiff brings this action under 42 U.S.C. §§ 1983 and 1988, to remedy deprivations of rights, privileges, or immunities secured by the Constitution and laws of the United States and to contest the election results, and the corollary provisions under the Wisconsin Constitution.

33. The United States Constitution sets forth the authority to regulate federal elections. With respect to the appointment of presidential electors, the Constitution provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.
>
> U.S. CONST. art. II, § 1 ("Electors Clause").

34. None of Defendants is a "Legislature" as required under the Elections Clause or Electors Clause to set the rules governing elections. The Legislature is "'the representative body which ma[kes] the laws of the people.'" *Smiley*, 285 U.S. 365. Regulations of presidential elections, thus, "must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 135 S. Ct. 2652, 2668 (U.S. 2015).

35. The WEC certified the Presidential Election results on November 30, 2020. The Presidential election results in Wisconsin show a difference of 20,565 "tallied" votes in favor of former Vice-President Joe Biden over President Trump.

36. Based upon all the allegations of fraud, statutory violations, and other misconduct, as stated herein and in the attached affidavits, it is necessary to enjoin the certification of the election results pending a full investigation and court hearing, and to order an independent audit of the November 3, 2020 election to ensure the accuracy and integrity of the election.

I. VIOLATIONS OF WISCONSIN ELECTION CODE

A. WEC Directed Clerks to Violate Wisconsin Election Code Requirements for Absentee Voting by "Indefinitely Confined" without Photo ID.

37. The Wisconsin State Legislature adopted Act 23 in 2011 to require Wisconsin electors to present an identification containing a photograph, such as a driver's license, to either a municipal or county clerk, when registering to vote and when voting. Wis. Stat. §§ 6.34; 6.79 (2). The Wisconsin State Legislature adopted the photo ID requirement to deter the casting of ballots by persons either not eligible to vote or persons fraudulently casting multiple ballots. *League of Women Voters of Wisconsin Education Network, Inc. v. Walker,* 851 N.W.2d 302, 314 (Wis. 2014).

38. Wisconsin's absentee voting is governed by Wisconsin Statutes § 6.84 - § 6.89. Under Wisconsin Statutes §6.86, every absentee elector applicant must present a photo ID when registering to vote absentee except absentee voters who registered as "indefinitely confined," Wis. Stat. §6.86 (ac), meaning someone confined "because of age, physical illness or infirmity or is disabled for an indefinite period." Wis. Stat. § 6.86(2)(a). As a result, Wisconsin election procedures for voting absentee based on "indefinitely confined" status circumvent the photo ID requirement, creating an avenue for fraudulent voting.

39. In order to ensure that only those who are "indefinitely confined" may use the "indefinitely confined" absentee ballot in an election, Wisconsin Statutes §6.86 provides that any elector who files an application for an absentee ballot based on indefinitely confined status may not use the absentee ballot if the electoral is no longer "indefinitely confined." Wisconsin Statutes § 6.86 (2)(b) further provides that the municipal clerk "shall remove the name of any other elector from the list upon request of the elector or upon receipt of reliable information that an elector no longer qualifies for the service."

40. Despite this clear statutory requirement, the Administrator of the Wisconsin Election

Commission, Meagan Wolfe, issued a written directive on May 13, 2020 to the clerks across the State of Wisconsin stating that the clerks cannot remove an allegedly "indefinitely confined" absentee voter from the absentee voter register if the clerk had "reliable information" that an allegedly "indefinitely confined" absentee voter is no longer "indefinitely confined." The directive specifically stated:

> Can I deactivate an absentee request if I believe the voter is not indefinitely confined? No. All changes to status must be made in writing and by the voter's request. Not all medical illnesses or disabilities are visible or may only impact the voter intermittently. (*See* WEC May 13, 2020 Guidance Memorandum).

41. The WEC's directive thus directly contradicts Wisconsin law, which specifically provides that clerks "shall" remove an indefinitely confined voter from the absentee voter list if the clerk obtains "reliable information" that the voter is no longer indefinitely confined.

42. As a result of the directive, clerks did not remove from the absentee voter lists maintained by their jurisdictions the absentee voters who claimed "indefinitely confined" status but who in fact were no longer "indefinitely confined." This resulted in electors who were allegedly "indefinitely confined" absentee voters casting ballots as "indefinitely confined" absentee voters who were not actually "indefinitely confined" absentee voters.

B. WEC Directed Clerks to Violate Wisconsin Law Prohibiting Counting of Absentee Ballot Certificates Missing Witness Addresses.

43. In 2015, the Wisconsin Legislature passed Act 261, amending Wisconsin's election laws, including a requirement, codified as Wisconsin Statute § 6.87(d), that absentee ballots include both elector and witness certifications, which must include the address of the witness. If the address of the witness is missing from the witness certification, however, "the ballot may not be counted." *Id.*

44. On October 18, 2016, WEC reacted to this legislation by issuing a memorandum, which,

among other things, permitted clerks to write in the witness address onto the absentee ballot certificate itself, effectively nullifying this express requirement. (*See* WEC October 18, 2016 Guidance Memorandum). Wisconsin election officials reiterated this unlawful directive in publicly posted training videos. For example, in a Youtube video posted before the November 3, 2020 General Election by Clarie Woodall-Voog of the Milwaukee Elections Commission, Ms. Woodall-Voog advised clerks that missing items "like witness address may be written in red."[3]

C. WEC Directed Clerks to Illegally Cure Absentee Ballots by Filling in Missing Information on Absentee Ballot Certificates and Envelopes.

45. On October 19, 2020, WEC instructed its clerks that, without any legal basis in the Wisconsin Election Code, they could simply fill in missing witness or voter certification information using, e.g., personal knowledge, voter registration information, or calling the voter or witness. The WEC further advised that voters or witnesses could cure any missing information at the polling place, again without citing any authority to do so under Wisconsin Election Code.

II. EXPERT WITNESS TESTIMONY: EVIDENCE OF WIDESPREAD VOTER FRAUD

A. Approximately 15,000 Wisconsin Mail-In Ballots Were Lost, and Approximately 18,000 More Were Fraudulently Recorded for Voters who Never Requested Mail-In Ballots.

46. The attached report of William M. Briggs, Ph.D., Exh. 2 ("Dr. Briggs Report") summarizes the multi-state phone survey that includes a survey of Wisconsin voters collected by Matt Braynard, which was conducted from November 15-17, 2020. *See* Exh. 3 ("Braynard Survey"). The Briggs analysis identified two specific errors involving unreturned mail-in ballots that are indicative of voter fraud, namely: "**Error #1:** those who were recorded as receiving absentee ballots ***without*** requesting them;" and "**Error #2:** those who returned absentee ballots

[3] *See* https://www.youtube.com/watch?v=hbm-pPaYiqk (video a 10:43 to 11:07).

but whose votes went missing (*i.e.*, marked as unreturned)." Exh. 2. Dr. Briggs then conducted a parameter-free predictive model to estimate, within 95% confidence or prediction intervals, the number of ballots affected by these errors out of a total of 96,771 unreturned mail-in ballots for the State of Wisconsin.

47. With respect to **Error #1**, Dr. Briggs' analysis estimated that **16,316-19,273 ballots** out of the total 96,771 unreturned ballots were recorded for voters who had **not** requested them. *Id.* With respect to **Error #2**, he found **13,991 – 16,757 ballots** out of 96,771 unreturned ballots recorded for voters who **did return their ballots were recorded as being unreturned.** *Id.* Taking the average of the two types of errors together, **29,594 ballots, or 31% of the total, are "troublesome."**

48. These errors are not only conclusive evidence of widespread fraud by the State of Wisconsin, but they are fully consistent with the fact witness statements cited above regarding the evidence about Dominion presented below insofar as **these unreturned absentee ballots represent a pool of blank ballots that could be filled in by third parties to shift the election to Joe Biden,** and also present the obvious conclusion that there must be absentee ballots unlawfully ordered by third parties that were returned.

49. With respect to **Error #1**, Dr. Briggs' analysis demonstrates that approximately **17,795 absentee ballots were sent to someone besides the registered voter named in the request**, and thus could have been filled out by anyone and then submitted in the name of another voter. Regarding ballots ordered by third parties that were voted, those would no longer be in the unreturned pool and therefore cannot be estimated from this data set.

50. With respect to **Error #2**, Dr. Briggs' analysis indicates that approximately **15,374 absentee ballots were either lost or destroyed** (consistent with allegations of Trump ballot

destruction) **and/or were replaced with blank ballots filled out by election workers, Dominion or other third parties.** Dr. Briggs' analysis shows that 31% of "unreturned ballots" suffer from one of the two errors above – which is consistent with his findings in the four other States analyzed (Arizona 58%, Georgia 39%, Pennsylvania 37%, and Wisconsin 45%) – and provides further support that these widespread "irregularities" or anomalies were one part of a much larger multi-state fraudulent scheme to rig the 2020 General Election for Joe Biden.

B. Nearly 7,000 Ineligible Voters Who Have Moved Out-of-State Illegally Voted in Wisconsin.

51. Evidence compiled by Matt Braynard using the National Change of Address ("NCOA") Database shows that 6,207 Wisconsin voters in the 2020 General Election moved out-of-state prior to voting, and therefore were ineligible. Exh. 3. Mr. Braynard also identified 765 Wisconsin voters who subsequently registered to vote in another state and were therefore ineligible to vote in the 2020 General Election. The merged number is 6,966 ineligible voters whose votes must be removed from the total for the 2020 General Election.[4] *Id.*

C. A Statistical Study Reveals that Biden Overperformed in those Precincts that Relied on Dominion Voting Machines

52. From November 13th, 2020 through November 28th, 2020, the Affiant conducted in-depth statistical analysis of publicly available data on the 2020 U.S. Presidential Election. This data included vote counts for each county in the United States, U.S. Census data, and type of voting machine data provided by the U.S. Election Assistance Committee. The Affiant's analysis yielded several "red flags" concerning the percentage of votes won by candidate Biden in counties using voting machines provided by Dominion Voting Systems. These red flags occurred in several

[4] Mr. Braynard posted the results of his analysis on Twitter. *See* https://twitter.com/MattBraynard/status/1329700178891333634?s=20. This Complaint includes a copy of his Report, (attached hereto as Exh. 3).

States in the country, including Wisconsin. (*See* attached hereto as Exh. 4, copy of redacted Affiant, B.S. Mathematics and M.S. Statistics).

53. The Affiant began by using Chi-Squared Automatic Interaction Detection (CHAID), which treats the data in an agnostic way—that is, it imposes no parametric assumptions that could otherwise introduce bias. Affiant posed the following question: "Do any voting machine types appear to have unusual results?" The answer provided by the statistical technique/algorithm was that machines from Dominion Voting Systems (Dominion) produced abnormal results. *Id.*

54. Subsequent graphical and statistical analysis shows the unusual pattern involving machines from Dominion occurs in at least 100 counties and multiple States, including Wisconsin. The results from the vast majority of counties using the Dominion machines is 3 to 5.6 percentage points higher in favor of candidate Biden. This pattern is seen easily in graphical form when the results from "Dominion" counties are overlaid against results from "non-Dominion" counties. The results from "Dominion" counties do not match the results from the rest of the counties in the United States. The results are clearly statistically significant, with a p-value of < 0.00004. This translates into a statistical impossibility that something unusual involving Dominion machines is *not* occurring. This pattern appears in multiple States, including Wisconsin, and the margin of votes implied by the unusual activity would easily sway the election results. *Id.*

55. The following graph shows the pattern. The large red dots are counties in Wisconsin that use Dominion voting machines. Almost all of them are above the blue prediction line, when in normal situations approximately half of them would be below the prediction line (as evidence by approximately half the counties in the U.S. (blue dots) that are below the blue centerline). The p-value of statistical analysis regarding the centerline for the red dots (Wisconsin counties with Dominion machines) is 0.000000049, pointing to a statistical impossibility that this is a "random"

statistical anomaly. Some external force caused this anomaly:

Id.

56. To confirm that Dominion machines were the source of the pattern/anomaly, Affiant conducted further analysis using propensity scoring using U.S. census variables (including ethnicities, income, professions, population density and other social/economic data) , which was used to place counties into paired groups. Such an analysis is important because one concern could be that counties with Dominion systems are systematically different from their counterparts, so abnormalities in the margin for Biden are driven by other characteristics unrelated to the election. *Id.*

57. After matching counties using propensity score analysis, the only difference between the groups was the presence of Dominion machines. This approach again showed a highly statistically

significant difference between the two groups, with candidate Biden again averaging three percentage points higher in Dominion counties than in the associated paired county. The associated p-value is < 0.00005, against indicating a statistical impossibility that something unusual is not occurring involving Dominion machines. *Id.*

58. The results of the analysis and the pattern seen in the included graph strongly suggest a systemic, system-wide algorithm was enacted by an outside agent, causing the results of Wisconsin's vote tallies to be inflated by somewhere between three and five point six percentage points. **Statistical estimating yields that in Wisconsin, the best estimate of the number of impacted votes is 181,440.** *Id.*

59. The summation of sections A through C above provide the following conclusions for the reports cited above, respectively.

- returned ballots that were deemed unreturned by the state: 15,374
- unreturned mail ballots unlawfully ordered by third parties: 17,795
- votes by persons that moved out of state or subsequently registered to vote in another state for the 2020 election: 6,966
- Votes that were improperly relying on the "indefinitely confined" exemption to voter ID: 96,437
- And excess votes arising from the statistically significant outperformance of Dominion machines on behalf of Joe Biden: 181,440

In Conclusion, the Reports cited above show a total amount of illegal votes identified that amount to 318,012 or over 15 times the margin by which candidate Biden leads President Trump in the state of Wisconsin.

III. FACTUAL ALLEGATIONS REGARDING DOMINION VOTING SYSTEMS

60. The State of Wisconsin, in many locations, used either Sequoia, a subsidiary of Dominion Systems, and or Dominion Systems, Democracy Suite 4.14-D first, and then included Dominion

Systems Democracy Suite 5.0-S on or about January 27, 2017, which added a fundamental modification: "dial-up and wireless results transmission capabilities to the ImageCast Precinct and results transmission using the Democracy Suite EMS Results Transfer Manager module." (*See* Exh. 5, attached hereto, a copy of the Equipment for WI election systems).

A. Dominion's Results for 2020 General Election Demonstrate Dominion Manipulated Election Results.

61. Affiant Keshel's findings that reflect the discussion cited above:

> While Milwaukee County is focal for transparency and observation violations, including reporting statistically impossible vote counts in the early morning hours away from scrutiny, Dane County has surged far past support totals for President Obama, despite expected difficulties mobilizing student voters to polls. President Trump has reconsolidated the Republican base in suburban Milwaukee and far surpassed his 2016 support levels but has been limited in margin growth by historically improbable Democratic support in these strongholds, which defy years of data in Wisconsin in which the Republican party surged as the Democratic Party plunged. Finally, in strong Trump counties showing a double inversion cycle (one party up, the other down), particularly in rural and exurban Wisconsin, Trump's totals are soaring, and against established trends, Biden's totals are at improbable levels of support despite lacking registration population
> (*See* attached hereto, Exh. 9, Aff. of Seth Keshel, MBA)

County	Rep '08	Dem '08	Rep '12	Dem '12	Rep '16	Dem '16	Rep '20	Dem '20	Dem Percentage of Obama 2008 Votes
Ozaukee	32,172	20,579	36,077	19,159	30,464	20,170	33,912	26,515	128.8%
% Increase	N/A	N/A	12.1%	(6.9%)	(15.6%)	5.3%	11.3%	31.5%	

Dane	73,065	205,984	83,644	216,071	71,275	217,697	78,789	260,157	126.3%
% Increase	N/A	N/A	14.5%	4.9%	(14.8%)	0.8%	10.5%	19.5%	

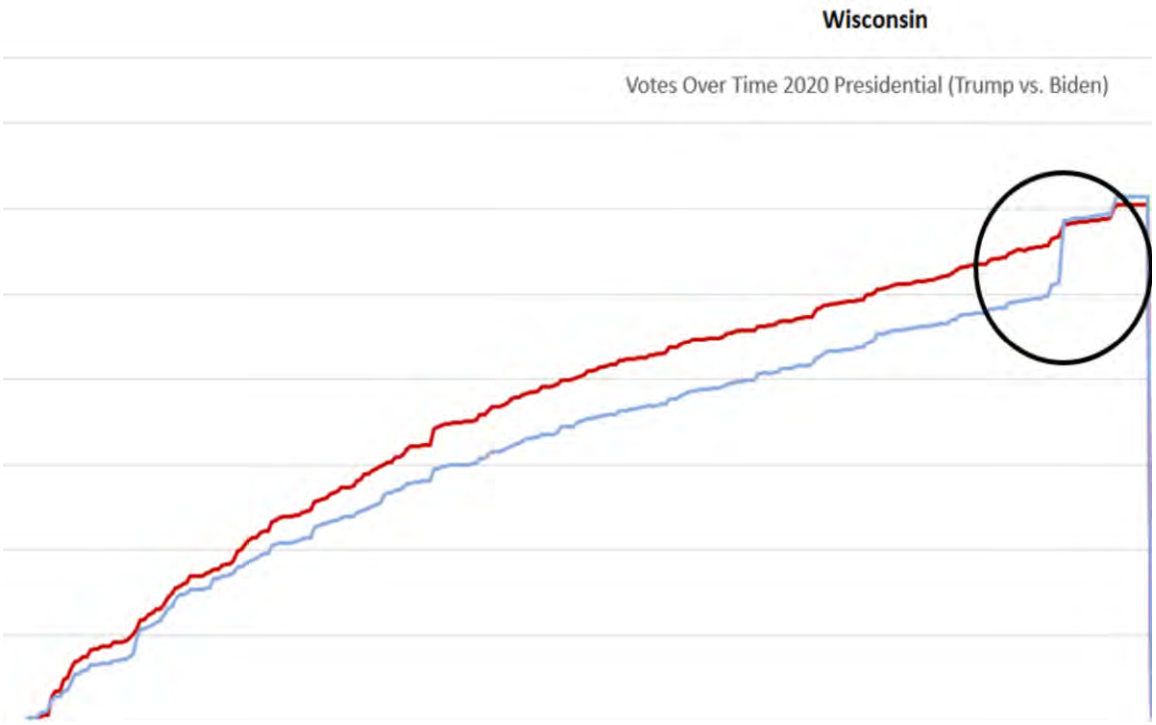
Waukesha	145,152	85,339	162,798	78,779	142,543	79,224	159,633	103,867	121.7%
% Increase	N/A	N/A	12.2%	(7.7%)	(12.4%)	0.6%	12.0%	31.1%	

Racine	45,954	53,408	49,347	53,008	46,681	42,641	54,475	50,154	117.6%
% Increase	N/A	N/A	7.4%	(0.7%)	(5.4%)	(19.6%)	16.7%	17.6%	

Id.

62. Keshel provides a graph reflecting the voter returns in a time-series. The highly unlikely

and remarkably convenient attainment of this block of votes provides for a stunning depiction of the election and generates many questions. The analysis provided by Plaintiff's multiple experts, including data, statistics and cyber, will reveal clear evidence of the multiple frauds that combined to change the outcome of the 2020 election.



See Id.

B. Administrative and Judicial Decisions Regarding Dominion's Security Flaws.

63. **Wisconsin.** In 2018, Jill Stein was in litigation with Dominion Voting Systems ("DVS") after her 2016 recount request pursuant to WISCONSIN STAT.§5.905(4) wherein DVS obtained a Court Order requiring confidentiality on information including *voting counting source code*, which Dominion claims is proprietary – and must be kept secret from the public. (*See* unpublished decision, Wisconsin Court of Appeals, No. 2019AP272 issued April 30, 2020). Rather than engaging in an open and transparent process to give credibility to Wisconsin's

Dominion-Democracy Suite voting system, the processes were hidden during the receipt, review, opening, and tabulation of those votes in direct contravention of Wisconsin's Election Code and Federal law.

64. **Texas.** The same Dominion Democracy Suite was denied certification in Texas by the Secretary of State on January 24, 2020, specifically because the "examiner reports raise concerns about whether Democracy Suite 5.5-A system … **is safe from fraudulent or unauthorized manipulation**."[5]

65. **Georgia.** Substantial evidence of this vulnerability was discussed in Judge Amy Totenberg's October 11, 2020 Order in the USDC N.D. Ga. case of *Curling, et al. v. Kemp, et. al*, Case No. 1:17-cv-02989 Doc. No. 964. *See*, p. 22-23 ("This array of experts and subject matter specialists provided a huge volume of significant evidence regarding the security risks and deficits in the system as implemented in both witness declarations and live testimony at the preliminary injunction hearing."); p. 25 ("In particular, Dr. Halderman's testing indicated the practical feasibility through a cyber attack of causing the swapping or deletion of specific votes cast and the compromise of the system through different cyber attack strategies, including through access to and alteration or manipulation of the QR barcode.") The full order should be read, for it is eye-opening and refutes many of Dominion's erroneous claims and talking points.

66. A District Judge found that Dominion's BMD ballots are not voter verifiable, and they cannot be audited in a software independent way. The credibility of a BMD ballot can be no greater than the credibility of Dominion's systems, which copious expert analysis has shown is deeply compromised. Similar to the issues in Wisconsin, Judge Totenberg of the District Court of Georgia

[5] See attached hereto, as Exh. 11, State of Texas Secretary of State, Elections Division, *Report of Review of Dominion Voting Systems Democracy Suite 5.5-A* at 2 (Jan. 24, 2020) (emphasis added).

Northern District held:

> Georgia's Election Code mandates the use of the BMD system as the uniform mode of voting for all in-person voters in federal and statewide elections. O.C.G.A. § 21-2-300(a)(2). The statutory provisions mandate voting on "electronic ballot markers" that: (1) use "electronic technology to independently and privately mark a paper ballot at the direction of an elector, interpret ballot selections, ... such interpretation **for elector verification**, and print **an elector verifiable paper ballot**;" and (2) "produce paper ballots which are marked with the elector's choices **in a format readable by the elector**" O.C.G.A. § 21-2-2(7.1); O.C.G.A. § 21-2-300(a)(2). Plaintiffs and other voters who wish to vote in-person are required to vote on **a system that does none of those things**. Rather, the evidence shows that the Dominion BMD system does **not produce a voter-verifiable paper ballot or a paper ballot marked with the voter's choices in a format readable by the voter because the votes are tabulated solely from the unreadable QR code**.
>
> *See* Order, pp. 81-82. (Emphasis added).

67. This case was later affirmed in a related case, in the Eleventh Circuit in 2018 related to Georgia's voting system in *Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270 (11th Cir. 2018). The Court found,

> **In summary, while further evidence will be necessary in the future, the Court finds that the combination of the statistical evidence and witness declarations in the record here (and the expert witness evidence in the related *Curling* case which the Court takes notice of) persuasively demonstrates the likelihood of Plaintiff succeeding on its claims. Plaintiff has shown a substantial likelihood of proving that the Secretary's failure to properly maintain a reliable and secure voter registration system has and will continue to result in the infringement of the rights of the voters to cast their vote and have their votes counted.**
>
> *Id.at* 1294-1295.

68. The expert witness in the above litigation in the United States District Court of Georgia, Case 1:17-cv-02989-AT, Harri Hursti, specifically testified to the acute security vulnerabilities, *see* Exh. 107, wherein he testified or found:

> A. "The scanner and tabulation software settings being employed to determine which votes to count on hand marked paper ballots are likely causing clearly intentioned votes to be counted" "The voting system is being operated in Fulton County in a manner that escalates

the security risk to an extreme level" "Votes are not reviewing their BMD printed ballots, which causes BMD generated results to be un-auditable due to the untrustworthy audit trail." 50% or more of voter selections in some counties were visible to poll workers. Dominion employees maintain near exclusive control over the EMS servers. "In my professional opinion, the role played by Dominion personnel in Fulton County, and other counties with similar arrangements, should be considered an elevated risk factor when evaluating the security risks of Georgia's voting system." *Id.* ¶26.

B. A video game download was found on one Georgia Dominion system laptop, suggesting that multiple Windows updates have been made on that respective computer.

C. There is evidence of remote access and remote troubleshooting which presents a grave security implication.

D. Certified identified vulnerabilities should be considered an "extreme security risk."

E. There is evidence of transfer of control the systems out of the physical perimeters and place control with a third party off site.

F. USB drives with vote tally information were observed to be removed from the presence of poll watchers during a recent election.

G. "The security risks outlined above – operating system risks, the failure to harden the computers, performing operations directly on the operating systems, lax control of memory cards, lack of procedures, and potential remote access are extreme and destroy the credibility of the tabulations and output of the reports coming from a voting system." *Id.* ¶49.

C. Foreign Interference/Hacking and/or Manipulation of Dominion Results.

1. Evidence of Vulnerability to Foreign Hackers.

69. In October of 2020 The FBI and CISA issued a JOINT CYBERSECURITY ADVISORY ON October 30, 2020 titled: **Iranian Advanced Persistent Threat Actor Identified Obtained Voter Registration Data**

This joint cybersecurity advisory was coauthored by the Cybersecurity and Infrastructure Security Agency (CISA) and the Federal Bureau of Investigation (FBI). CISA and the FBI are aware of an Iranian advanced persistent threat (APT)

> actor targeting U.S. state websites to include election websites. CISA and the FBI assess this actor is responsible for the mass dissemination of voter intimidation emails to U.S. citizens and the dissemination of U.S. election-related disinformation in mid-October 2020.[1] (Reference FBI FLASH message ME-000138-TT, disseminated October 29, 2020). Further evaluation by CISA and the FBI has identified the targeting of U.S. state election websites was an intentional effort to influence and interfere with the 2020 U.S. presidential election.

(*See* CISA and FBI Joint Cyber Security Advisory of October 30, 2020, a copy attached hereto as Exh. 18.)

70. An analysis of the Dominion software system by a former US Military Intelligence expert subsequently found that the Dominion Voting system and software are accessible - and was compromised by rogue actors, including foreign interference by Iran and China. (*See* Exh. 12, Spider Declaration, (who remains redacted for security reasons).)

71. The expert does an analysis and explains how by using servers and employees connected with rogue actors and hostile foreign influences combined with numerous easily discoverable leaked credentials, Dominion allowed foreign adversaries to access data and intentionally provided access to Dominion's infrastructure in order to monitor and manipulate elections, including the most recent one in 2020. (*See* Exh. 12, Spider Declaration. Several facts are set forth related to foreign members of Dominion Voting Systems and foreign servers as well as foreign interference.).

72. Another Declarant first explains the foundations of her opinion and then addresses the concerns of foreign interference in our elections through hardware components from companies based in foreign countries with adverse interests. She explains that Dominion Voting Systems works with SCYTL, and that votes on route, before reporting, go to SCYTL in foreign countries. On the way, they get mixed and an algorithm is applied, which is done through a secretive process.

> The core software used by ALL SCYTL related Election Machine/Software manufacturers ensures "anonymity" Algorithms within the area of this "shuffling"

> to maintain anonymity allows for setting values to achieve a desired goal under the guise of "encryption" in the trap-door…
>
> (*See* Exh. 13, Aff. of Computer analysis, at par. 32).

73. The Affiant goes on to explain the foreign relationships in the hardware used by Dominion Voting Systems and its subsidiary Sequoia and explains specifically the port that Wisconsin uses, which is called Edge Gateway and that is a part of Akamai Technologies based in Germany:

> "Wisconsin has EDGE GATEWAY port which is AKAMAI TECHNOLOGIES based out of GERMANY. Using AKAMAI Technologies is allowing .gov sites to obfuscate and mask their systems by way of HURRICANE ELECTRIC (he.net)"

74. This Declarant further explains the foundations of her opinion and then addresses the concerns of foreign interference in our elections through hardware components from companies based in foreign countries with adverse interests.

> The concern is the HARDWARE and the NON – ACCREDITED VSTLs as by their own admittance use COTS. The purpose of VSTL's being accredited and their importance is ensuring that there is no foreign interference / bad actors accessing the tally data via backdoors in equipment software. The core software used by ALL SCYTL related Election Machine/Software manufacturers ensures "anonymity". **Algorithms within the area of this "shuffling" to maintain anonymity allows for setting values to achieve a desired goal under the guise of "encryption" in the trap-door…**
>
> (*See Id.* at ¶32).

75. This Declarant goes on to explain the foreign relationships in the hardware used by Dominion Voting Systems and its subsidiary Sequoia and specifically the port that Wisconsin uses:

> "Wisconsin has EDGE GATEWAY port which is AKAMAI TECHNOLOGIES based out of GERMANY. Using AKAMAI Technologies is allowing .gov sites to obfuscate and mask their systems by way of HURRICANE ELECTRIC (he.net) Kicking it to anonymous (AKAMAI Technologies) offshore servers.
> Wisconsin Port.
>
> China is not the only nation involved in COTS provided to election machines or the networking but so is Germany via a LAOS founded Chinese linked cloud service

company that works with SCYTL named Akamai Technologies that have offices in China and are linked to the server [for] Dominion Software.

(*See Id.* at par. 21).

76. The Affiant explains the use of an algorithm and how it presents throughout the statement, but specifically concludes that,

> **The "Digital Fix" observed with an increased spike in VOTES for Joe Biden can be determined as evidence of a pivot**. Normally it would be assumed that the algorithm had a Complete Pivot. Wilkinson's demonstrated the guarantee as:
>
> $$\frac{\|U\|_\infty}{\|A\|_\infty} \leq n^{\frac{1}{2}\log(n)}$$
>
> Such a conjecture allows the growth factor the ability to be upper bound by values closer to n. Therefore, complete pivoting can't be observed because there would be too many floating points. Nor can partial as the partial pivoting would overwhelm after the "injection" of votes. Therefore, external factors were used which is evident from the "DIGITAL FIX." (*See Id.* at pars. 67-69)
>
> "The algorithm looks to have been set to give Joe Biden a 52% win even with an initial 50K+ vote block allocation was provided initially as tallying began (as in case of Arizona too). In the am of November 4, 2020 the algorithm stopped working, therefore another "block allocation" to remedy the failure of the algorithm. This was done manually as ALL the SYSTEMS shut down NATIONWIDE to avoid detection."
>
> (*See Id.* at par. 73)

2. Background of Dominion Connections to Smartmatic and Hostile Foreign Governments.

77. An expert analysis by Russ Ramsland agrees with the data reflecting the use of an algorithm that causes the spike in the data feed, which is shown to be an injection of votes to change the outcome, because natural reporting does not appear in such a way.

78. And Russ Ramsland can support that further by documenting the data feed that came from Dominion Voting Systems to Scytl -- and was reported with decimal points, which is contrary to one vote as one ballot: **"The fact that we observed raw vote data coming directly that includes**

decimal places establishes selection by an algorithm, and not individual voter's choice. Otherwise, votes would be solely represented as whole numbers (votes cannot possibly be added up and have decimal places reported)."

79. The report concludes that **"**Based on the foregoing, I believe these statistical anomalies and impossibilities compels the conclusion to a reasonable degree of professional certainty that the vote count in Wisconsin, in particular for candidates for President contain at least 119,430 (Para. 13) up to 384,085 (Para. 15) illegal votes that must be disregarded. In my opinion, it is not possible at this time to determine the true results of the Wisconsin vote for President of the United States."

The History of Dominion Voting Systems

80. Plaintiff can also show Smartmatic's incorporation and inventors who have backgrounds evidencing their foreign connections, including Serbia, specifically its identified inventors:

> Applicant: SMARTMATIC, CORP.
>
> Inventors**:** Lino Iglesias, Roger Pinate, Antonio Mugica, Paul Babic, Jeffrey Naveda, Dany Farina, Rodrigo Meneses, Salvador Ponticelli, Gisela Goncalves, Yrem Caruso[6]

81. Another Affiant witness testifies that in Venezuela, she was in official position related to elections and witnessed manipulations of petitions to prevent a removal of President Chavez and because she protested, she was summarily dismissed. She explains the vulnerabilities of the electronic voting system and Smartmatica to such manipulations. (*See* Exh. 17, Cardozo Aff. ¶8).

[6] *See* Patents Assigned to Smartmatic Corp., *available at:* https://patents.justia.com/assignee/smartmatic-corp

3. US Government Warnings Regarding Hacking by Hostile Foreign Governments.

82. In October of 2020 The FBI and CISA issued a JOINT CYBERSECURITY ADVISORY ON October 30, 2020 titled: **Iranian Advanced Persistent Threat Actor Identified Obtained Voter Registration Data**

> This joint cybersecurity advisory was coauthored by the Cybersecurity and Infrastructure Security Agency (CISA) and the Federal Bureau of Investigation (FBI). CISA and the FBI are aware of an Iranian advanced persistent threat (APT) actor targeting U.S. state websites to include election websites. CISA and the FBI assess this actor is responsible for the mass dissemination of voter intimidation emails to U.S. citizens and the dissemination of U.S. election-related disinformation in mid-October 2020.1 (Reference FBI FLASH message ME-000138-TT, disseminated October 29, 2020). Further evaluation by CISA and the FBI has identified the targeting of U.S. state election websites was an intentional effort to influence and interfere with the 2020 U.S. presidential election.

(*See* Exh. 18, CISA and FBI Joint Cyber Security Advisory of October 30, 2020)

D. Additional Independent Findings of Dominion Flaws.

83. Further supportive of this pattern of incidents, reflecting an absence of mistake, Plaintiff has since learned that the "glitches" in the Dominion system, that have the uniform effect of hurting Trump and helping Biden, have been widely reported in the press and confirmed by the analysis of independent experts.

1. Central Operator Can Remove, Discard or Manipulate Votes.

84. Mr. Watkins further explains **that the central operator can remove or discard batches of votes.** "After all of the ballots loaded into the scanner's feed tray have been through the scanner, the "ImageCast Central" operator will remove the ballots from the tray then have the option to either "Accept Batch" or "Discard Batch" on the scanning menu …. " (Exh. 106, Watkins aff. ¶11). ¶8.

85. Mr. Watkins further testifies that the user manual makes clear that the system allows for

threshold settings to be set to find all ballots get marked as "problem ballots" for discretionary determinations on where the vote goes stating:

> 9. During the ballot scanning process, the "ImageCast Central" software will detect how much of a percent coverage of the oval was filled in by the voter. The Dominion customer determines the thresholds of which the oval needs to be covered by a mark in order to qualify as a valid vote. If a ballot has a marginal mark which did not meet the specific thresholds set by the customer, then the ballot is considered a "problem ballot" and may be set aside into a folder named "NotCastImages".
>
> 10. Through creatively tweaking the oval coverage threshold settings, and advanced settings on the ImageCase Central scanners, it may be possible to set thresholds in such a way that a non-trivial amount of ballots are marked "problem ballots" and sent to the "NotCastImages" folder.
>
> 11. The administrator of the ImageCast Central work station may view all images of scanned ballots which were deemed "problem ballots" by simply navigating via the standard "Windows File Explorer" to the folder named "NotCastImages" which holds ballot scans of "problem ballots". It may be possible for an administrator of the "ImageCast Central" workstation to view and delete any individual ballot scans from the "NotCastImages" folder by simply using the standard Windows delete and recycle bin functions provided by the Windows 10 Pro operating system. *Id.* ¶¶ 9-11.

2. Dominion – By Design – Violates Federal Election & Voting Record Retention Requirements.

86. The Dominion System put in place by its own design violates the intent of Federal law on the requirement to preserve and retain records – which clearly requires preservation of all records requisite to voting in such an election.

> **§ 20701.** Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation
>
> Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, **all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election,** except that, when required by law, such records and papers may be delivered to another officer of election and except that,

> if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

See 52 USC § 20701.

3. Dominion Vulnerabilities to Hacking.

87. Plaintiff has since learned that the "glitches" in the Dominion system -- that have the uniform effect of hurting Trump and helping Biden -- have been widely reported in the press and confirmed by the analysis of independent experts, a partial summary of which is included below.

> (1) Users on the ground have full admin privileges to machines and software. The Dominion system is designed to facilitate vulnerability and allow a select few to determine which votes will be counted in any election. Workers were responsible for moving ballot data from polling place to the collector's office and inputting it into the correct folder. Any anomaly, such as pen drips or bleeds, is not counted and is handed over to a poll worker to analyze and decide if it should count. This creates massive opportunity for improper vote adjudication. (Exh. 106 Watkins aff. ¶¶8 & 11).
>
> (2) Affiant witness (name redacted for security reasons), in his sworn testimony explains he was selected for the national security guard detail of the President of Venezuela, and that he witnessed the creation of Smartmatic for the purpose of election vote manipulation:
>
> I was witness to the creation and operation of a sophisticated electronic voting system that permitted the leaders of the Venezuelan government to manipulate the tabulation of votes for national and local elections and select the winner of those elections in order to gain and maintain their power. Importantly, I was a direct witness to the creation and operation of an electronic voting system in a conspiracy between a company known as Smartmatic and the leaders of conspiracy with the Venezuelan government. This conspiracy specifically involved President Hugo Chavez Frias, the person in charge of the National Electoral Council named Jorge Rodriguez, and principals, representatives, and personnel from Smartmatic which included … The purpose of this conspiracy was

to create and operate a voting system that could change the votes in elections from votes against persons running the Venezuelan government to votes in their favor in order to maintain control of the government. (*Id.* ¶¶6, 9, 10).

88. Specific vulnerabilities of the systems in question that have been well documented or reported include:

A. Barcodes can override the voters' vote: As one University of California, Berkeley study shows, "In all three of these machines [including Dominion Voting Systems] the ballot marking printer is in the same paper path as the mechanism to deposit marked ballots into an attached ballot box. This opens up a very serious security vulnerability: the voting machine can make the paper ballot (to add votes or spoil already-case votes) after the last time the voter sees the paper, and then deposit that marked ballot into the ballot box without the possibility of detection." (*See* Exh. 2, Appel Study).

B. Voting machines were able to be connected to the internet by way of laptops that were obviously internet accessible. If one laptop was connected to the internet, the entire precinct was compromised.

C. October 6, 2006 – **Congresswoman Carolyn Maloney calls on Secretary of Treasury Henry Paulson to conduct an investigation into Smartmatic based on its foreign ownership and ties to Venezuela.** (*See* Exh. 15). Congresswoman Maloney wrote that "It is undisputed that Smartmatic is foreign owned and it has acquired Sequoia … Smartmatic now acknowledged that Antonio Mugica, a Venezuelan businessman has a controlling interest in Smartmatica, but the company has not revealed who all other Smartmatic owners are. *Id.*

D. Dominion "got into trouble" with several subsidiaries it used over alleged cases of fraud. One subsidiary is Smartmatic, a company "that has played a significant role in the U.S. market over the last decade."[7] Dominion entered into a 2009 contract with Smartmatic and provided Smartmatic with the PCOS machines (optical scanners) that were used in the 2010 Philippine election, the biggest automated election run by a private company. The automation of that first election in the Philippines was hailed by the international community and by the critics of the automation. The results transmission reached 90% of votes four hours after polls closed and Filipinos knew for the first time who would be

[7] *Voting Technology Companies in the U.S. – Their Histories and Present Contributions,* Access Wire, (Aug. 10, 2017), *available at:* https://www.accesswire.com/471912/Voting-Technology-Companies-in-the-US--Their-Histories.

their new president on Election Day. In keeping with local Election law requirements, Smartmatic and Dominion were required to provide the source code of the voting machines prior to elections so that it could be independently verified. *Id.*

E. Litigation over Smartmatic "glitches" alleges they impacted the 2010 and 2013 mid-term elections in the Philippines, raising questions of cheating and fraud. An independent review of the source codes used in the machines found multiple problems, which concluded, "The software inventory provided by Smartmatic is inadequate, … which brings into question the software credibility."[8]

F. Dominion acquired Sequoia Voting Systems as well as Premier Election Solutions (formerly part of Diebold, which sold Premier to ES&S in 2009, until antitrust issues forced ES&S to sell Premier, which then was acquired by Dominion). This map illustrates 2016 voting machine data—meaning, these data do not reflect geographic aggregation at the time of acquisition, but rather the machines that retain the Sequoia or Premier/Diebold brand that now fall under Dominion's market share. Penn Wharton Study at 16.

G. In late December of 2019, three Democrat Senators, Warren, Klobuchar, Wyden and House Member Mark Pocan wrote about their 'particularized concerns that secretive & "trouble -plagued companies"' "have long skimped on security in favor of convenience," in the context of how they described the voting machine systems that three large vendors – Election Systems & Software, Dominion Voting Systems, & Hart InterCivic – collectively provide voting machines & software that facilitate voting for over 90% of all eligible voters in the U.S." (*See* Exh. 16).

H. Senator Ron Wyden (D-Oregon) said the findings [insecurity of voting systems] are "yet another damning indictment of the profiteering election vendors, who care more about the bottom line than protecting our democracy." It's also an indictment, he said, "of the notion that important cybersecurity decisions should be left entirely to county election offices, many of whom do not employ a single cybersecurity specialist."[9]

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[8] *Smartmatic-TIM Running Out of Time to Fix Glitche*s, ABS-CBN News (May 4, 2010), *available at*: https://news.abs-cbn.com/nation/05/04/10/smartmatic-tim-running-out-time-fix-glitches.

[9] Kim Zetter, *Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials*, VICE (Aug. 8, 2019) ("VICE Election Article"), *available at:*

89. The House of Representatives passed H.R. 2722 in an attempt to address these very risks on June 27, 2019:

> This bill addresses election security through grant programs and requirements for voting systems and paper ballots.
>
> The bill establishes requirements for voting systems, including that systems (1) use individual, durable, voter-verified paper ballots; (2) make a voter's marked ballot available for inspection and verification by the voter before the vote is cast; (3) ensure that individuals with disabilities are given an equivalent opportunity to vote, including with privacy and independence, in a manner that produces a voter-verified paper ballot; (4) be manufactured in the United States; and (5) meet specified cybersecurity requirements, including the prohibition of the connection of a voting system to the internet.
>
> *See* H.R. 2722.

E. Because Dominion Senior Management Has Publicly Expressed Hostility to Trump and Opposition to His Election, Dominion Is Not Entitled to Any Presumption of Fairness, Objectivity or Impartiality, and Should Instead Be Treated as a Hostile Partisan Political Actor.

90. Dr. Eric Coomer is listed as the co-inventor for several patents on ballot adjudication and voting machine-related technology, all of which were assigned to Dominion.[10] He joined Dominion in 2010, and most recently served as Voting Systems

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https://www.vice.com/en/article/3kxzk9/exclusive-critical-us-election-systems have-been-left-exposed-online-despite-official-denials.

[10] *See* "Patents by Inventor Eric Coomer," *available at:* https://patents.justia.com/inventor/eric-coomer. This page lists the following patents issued to Dr. Coomer and his co-inventors: (1) U.S. Patent No. 9,202,113, Ballot Adjudication in Voting Systems Utilizing Ballot Images (issued Dec. 1, 2015); (2) U.S. Patent No. 8,913,787, Ballot Adjudication in Voting Systems Utilizing Ballot Images (issued Dec. 16, 2014); (3) U.S. Patent No. 8,910,865, Ballot Level Security Features for Optical Scan Voting Machine Capable of Ballot Image Processing, Secure Ballot Printing, and Ballot Layout Authentication and Verification (issued Dec. 16, 2014); (4) U.S. Patent No. 8,876,002, Systems for Configuring Voting Machines, Docking Device for Voting Machines, Warehouse Support and Asset Tracking of Voting Machines (issued Nov. 4, 2014); (5) U.S. Patent No. 8,864,026, Ballot Image Processing System and

Officer of Strategy and Director of Security for Dominion. Dr. Coomer first joined Sequoia Voting Systems in 2005 as Chief Software Architect and became Vice President of Engineering before Dominion Voting Systems acquired Sequoia. Dr. Coomer's patented ballot adjudication technology into Dominion voting machines sold throughout the United States, including those used in Wisconsin. *See* Exh. 6 (Jo Oltmann Affidavit).

91. In 2016, Dr. Coomer admitted to the State of Illinois that Dominion Voting machines can be manipulated remotely.[11] He has also publicly posted videos explaining how Dominion voting machines can be remotely manipulated. *See Id.*[12]

92. Dr. Coomer has emerged as Dominion's principal defender, both in litigation alleging that Dominion rigged elections in Georgia and in the media. An examination of his previous public statements has revealed that Dr. Coomer is highly partisan and even more anti-Trump, precisely the opposite of what would expect from the management of a company charged with fairly and impartially counting votes (which is presumably why he tried to scrub his social media history). (*See Id.*)

93. Unfortunately for Dr. Coomer, however, a number of these posts have been captured for perpetuity. Below are quotes from some of his greatest President Trump and Trump voter hating hits to show proof of motive and opportunity. (*See* Id).

Method for Voting Machines (issued Oct. 21, 2014); (6) U.S. Patent No. 8,714,450, Systems and Methods for Transactional Ballot Processing, and Ballot Auditing (issued May 6, 2014), available at: https://patents.justia.com/inventor/eric-coomer.

[11] Jose Hermosa, *Electoral Fraud: Dominion's Vice President Warned in 2016 That Vote-Counting Systems Are Manipulable*, The BL (Nov. 13, 2020), *available at*: https://thebl.com/us-news/electoral-fraud-dominions-vice-president-warned-in-2016-that-vote-counting-systems-are-manipulable.html.

[12] See, *e.g.,* "Eric Coomer Explains How to Alter Votes in the Dominion Voting System" (Nov. 24, 2020) (excerpt of presentation delivered in Chicago in 2017), *available at:* https://www.youtube.com/watch?v=UtB3tLaXLJE.

> If you are planning to vote for that autocratic, narcissistic, fascist ass-hat blowhard and his Christian jihadist VP pic, UNFRIEND ME NOW! No, I'm not joking. … Only an absolute F[**]KING IDIOT could ever vote for that wind-bag fuck-tard FASCIST RACIST F[**]K! … I don't give a damn if you're friend, family, or random acquaintance, pull the lever, mark an oval, touch a screen for that carnival barker … UNFRIEND ME NOW! I have no desire whatsoever to ever interact with you. You are beyond hope, beyond reason. You are controlled by fear, reaction and bullsh[*]t. Get your shit together. F[**]K YOU! Seriously, this f[**]king ass-clown stands against everything that makes this country awesome! You want in on that? You [Trump voters] deserve nothing but contempt. *Id.* (July 21, 2016 Facebook post).[13]

94. In a rare moment of perhaps unintentional honesty, Dr. Coomer anticipates this Amended Complaint and many others, by slandering those seeking to hold election riggers like Dominion to account and to prevent the United States' descent into Venezuelan levels of voting fraud and corruption out of which Dominion was born:

> Excerpts in stunning Trump-supporter logic, "I know there is a lot of voter fraud. I don't know who is doing it, or how much is happening, but I know it is going on a lot." This beautiful statement was followed by, "It happens in third world countries, this the US, we can't let it happen here." *Id.* (October 29, 2016 Facebook post); (*See* also Exh. 6)

95. Dr. Coomer, who invented the technology for Dominion's voting fraud and has publicly explained how it can be used to alter votes, seems to be extremely hostile to those who would attempt to stop it and uphold the integrity of elections that underpins the legitimacy of the United States government:

> And in other news… There be some serious fuckery going on right here fueled by our Cheeto-in-Chief stoking lie after lie on the flames of [Kris] Kobach… [Linking Washington Post article discussing the Presidential Advisory Commission on Election Integrity, of which former Kansas Secretary of State Kris Kobach was a member, entitled, "The voting commission is a fraud itself. Shut it down."] *Id.* (September 14, 2017 Facebook post.] (*Id.*)

[13] In this and other quotations from Dr. Coomer's social media, Plaintiff has redacted certain profane terms.

96. Dr. Coomer also keeps good company, supporting and reposting ANTIFA statements slandering President Trump as a "fascist" and by extension his supporters, voters and the United States military (which he claims, without evidence, Trump will make into a "fascist tool"). *Id.* (June 2, 2020 Facebook post). Lest someone claims that these are "isolated statements" "taken out of context", Dr. Coomer has affirmed that he shares ANTIFA's taste in music and hatred of the United States of America, *id.* (May 31, 2020 Facebook post linking "F[**]k the USA" by the exploited), and the police. *Id.* (separate May 31, 2020 Facebook posts linking N.W.A. "F[**]k the Police" and a post promoting phrase "Dead Cops"). *Id.* at 4-5.

97. Affiant and journalist Joseph Oltmann researched ANTIFA in Colorado. *Id.* at 1. "On or about the week of September 27, 2020," he attended an Antifa meeting which appeared to be between Antifa members in Colorado Springs and Denver Colorado," where Dr. Coomer was present. In response to a question as to what Antifa would do "if Trump wins this … election?", Dr. Coomer responded "Don't worry about the election. Trump is not going to win. I made f[**]king sure of that … Hahaha." *Id.* at 2.

98. By putting an anti-Trump zealot like Dr. Coomer in charge of election "Security," and using his technology for what should be impartial "ballot adjudication," Dominion has given the fox the keys to the hen house ***and has forfeited any presumption of objectivity, fairness, or even propriety***. It appears that Dominion does not care about even an appearance of impropriety, as its most important officer has his fingerprints all over a highly partisan, vindictive, and personal vendetta against the Republican nominee both in 2016 and 2020, President Donald Trump. Dr. Coomer's highly partisan anti-Trump rages show clear motive on the part of Dominion to rig the election in favor of Biden, and may well explain why for each of the so-called "glitches"

uncovered, it is always Biden receiving the most votes on the favorable end of such a "glitch." (*Id.*)

99. In sum, as set forth above, for a host of independent reasons, the Wisconsin election results concluding that Joe Biden received 20,608 more votes that President Donald Trump must be set aside.

COUNT I

Defendants Violated the Elections and Electors Clauses and 42 U.S.C. § 1983.

100. Plaintiff realleges all preceding paragraphs as if fully set forth herein.

101. The Electors Clause states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President. U.S. Const. art. II, §1, cl. 2 (emphasis added). Likewise, the Elections Clause of the U.S. Constitution states that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by *the Legislature* thereof." U.S. Const. art. I, § 4, cl. 1 (emphasis added).

102. The Legislature is "'the representative body which ma[kes] the laws of the people.'" *Smiley v. Holm,* 285 U.S. 355, 365 (1932). Regulations for presidential elections, thus, "must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015).

103. Defendants are not part of the Wisconsin Legislature and cannot exercise legislative power. Because the United States Constitution reserves for the Wisconsin Legislature the power to set the time, place, and manner of holding elections for the President and Congress, county boards of elections and state executive officers have no authority to unilaterally exercise that power, much less to hold them in ways that conflict

with existing legislation.

104. Section I details three separate instances where Defendants violated the Wisconsin Election Code. First, WEC May 23, 2020 "guidance" on the treatment of "indefinitely confined" voters, who are exempt from Wisconsin's photo ID requirement for absentee ballot application, that directly contravened the express requirement in Wisconsin Election Code that clerks "shall" remove an allegedly "indefinitely confined" voter if the clerk has "reliable information" that that voter is not, or is no longer, "indefinitely confined."

105. Second, the WEC's October 18, 2016 guidance directed clerks to violate the express requirements of Wisconsin Statutes § 6.87(6)(d), which states "[i]f a certificate is missing the address of a witness the ballot may not be counted," when it directed clerks to fill in missing information on absentee ballot envelopes.

106. Third, WEC and Wisconsin election officials violated Wisconsin Election Code, or acted *ultra vires*, insofar as they filled in missing witness or voter information on absentee ballots and permitted voters to cure ballots without statutory authorization. Section II provides expert witness testimony quantifying the number of illegal or ineligible ballots that were counted, and lawful ballots that were not, as a result of these and Defendants' other violations.

107. A report from Dr. William Briggs, shows that there were approximately 29,594 absentee ballots listed as "unreturned" by voters that either never requested them, or that requested and returned their ballots.

108. Evidence compiled by Matt Braynard, Exh. 3, using the National Change of Address ("NCOA") Database shows that 6,207 Wisconsin voters in the 2020 General Election moved out-

of-state prior to voting, and therefore were ineligible. Mr. Braynard also identified 765 Wisconsin voters who subsequently registered to vote in another state and were therefore ineligible to vote in the 2020 General Election. The merged number is 6,966 ineligible voters whose votes must be removed from the total for the 2020 General Election.

109. Plaintiff has no adequate remedy at law and will suffer serious and irreparable harm unless the injunctive relief requested herein is granted. Defendants have acted and, unless enjoined, will act under color of state law to violate the Elections Clause.

110. Accordingly, the results for President in the November 3, 2020 election must be set aside, the State of Wisconsin should be enjoined from transmitting the certified the results thereof, and this Court should grant the other declaratory and injunctive relief requested herein.

COUNT II

Governor Evers and Other Defendants Violated The Equal Protection Clause of the Fourteenth Amendment U.S. Const. Amend. XIV & 42 U.S.C. § 1983

Invalid Enactment of Regulations & Disparate Treatment of Absentee vs. Mail-In Ballots

111. Plaintiff refers to and incorporate by reference each of the prior paragraphs of this Amended Complaint as though the same were repeated at length herein.

112. The Fourteenth Amendment of the United States Constitution provides "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *See also Bush v. Gore*, 531 U.S. 98, 104 (2000) (having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over the value of another's). *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) ("Once the

franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). The Court has held that to ensure equal protection, a problem inheres in the absence of specific standards to ensure its equal application. *Bush*, 531 U.S. at 106 ("The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.").

113. The equal enforcement of election laws is necessary to preserve our most basic and fundamental rights. The requirement of equal protection is particularly stringently enforced as to laws that affect the exercise of fundamental rights, including the right to vote.

114. The disparate treatment of Wisconsin voters, in subjecting one class of voters to greater burdens or scrutiny than another, violates Equal Protection guarantees because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Rice v. McAlister*, 268 Ore. 125, 128, 519 P.2d 1263, 1265 (1975); *Heitman v. Brown Grp., Inc.,* 638 S.W.2d 316, 319, 1982 Mo. App. LEXIS 3159, at *4 (Mo. Ct. App. 1982); *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 41, 56 P.3d 524, 536-37 (Utah 2002).

115. In statewide and federal elections conducted in the State of Wisconsin, including without limitation the November 3, 2020 General Election, all candidates, political parties, and voters, including without limitation Plaintiff, in having the election laws enforced fairly and uniformly.

116. As set forth in Section I above, Defendants failed to comply with the requirements

of the Wisconsin Election Code and thereby diluted the lawful ballots of the Plaintiff and of other Wisconsin voters and electors in violation of the United States Constitution guarantee of Equal Protection. Further, Defendants enacted regulations, or issued guidance, that had the intent and effect of favoring one class of voters – Democratic absentee voters – over Republican voters. Further, all of these invalidly enacted rules by Defendant Wisconsin executive and administrative agencies, had the intent and effect of eliminating protections against voter fraud, and thereby enabled and facilitated the counting of fraudulent, unlawful and ineligible votes, which were quantified in Section II. Finally, Section III details the additional voting fraud and manipulation enabled by the use Dominion voting machines, which had the intent and effect of favoring Biden and Democratic voters and discriminating against Trump and Republican voters.

117. Defendants have acted and will continue to act under color of state law to violate Plaintiff's right to be present and have actual observation and access to the electoral process as secured by the Equal Protection Clause of the United States Constitution. Defendants thus failed to conduct the general election in a uniform manner as required by the Equal Protection Clause of the Fourteenth Amendment, the corollary provisions of the Wisconsin Constitution, and the Wisconsin Election Code.

118. Plaintiff seeks declaratory and injunctive relief forbidding Defendants from certifying a tally that includes any ballots that were not legally cast, or that were switched from Trump to Biden through the unlawful use of Dominion Democracy Suite software and devices.

119. The Briggs analysis identified two specific errors involving unreturned mail-in ballots that are indicative of voter fraud, namely: "**Error #1:** those who were recorded as receiving

absentee ballots ***without*** requesting them;" and "**Error #2:** those who returned absentee ballots but whose votes went missing (*i.e.*, marked as unreturned)." Clearly the dilution of lawful votes violates the Equal Protection clause; and the counting of unlawful votes violates the rights of lawful Citizens.

120. In addition, Plaintiff asks this Court to order that no ballot processed by a counting board in the Wisconsin Counties can be included in the final vote tally unless a challenger was allowed to meaningfully observe the process and handling and counting of the ballot, or that were unlawfully switched from Trump to Biden.

121. Plaintiff has no adequate remedy at law and will suffer serious and irreparable harm unless the declaratory and injunctive relief requested herein is granted. Indeed, the setting aside of an election in which the people have chosen their representative is a drastic remedy that should not be undertaken lightly, but instead should be reserved for cases in which a person challenging an election has clearly established a violation of election procedures and has demonstrated that the violation has placed the result of the election in doubt. Wisconsin law allows elections to be contested through litigation, both as a check on the integrity of the election process and as a means of ensuring the fundamental right of citizens to vote and to have their votes counted accurately.

COUNT III

Fourteenth Amendment, Amend. XIV & 42 U.S.C. § 1983

Denial of Due Process On The Right to Vote

122. Plaintiff refers to and incorporate by reference each of the prior paragraphs of this Amended Complaint as though the same were repeated at length herein.

123. The right of qualified citizens to vote in a state election involving federal

candidates is recognized as a fundamental right under the Fourteenth Amendment of the United States Constitution. *Harper,* 383 U.S. at 665. *See also Reynolds*, 377 U.S. at 554 (The Fourteenth Amendment protects the "the right of all qualified citizens to vote, in state as well as in federal elections."). Indeed, ever since the Slaughter-House Cases, 83 U.S. 36 (1873), the United States Supreme Court has held that the Privileges and Immunities Clause of the Fourteenth Amendment protects certain rights of federal citizenship from state interference, including the right of citizens to vote in federal elections. *See Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (*citing Ex parte Yarbrough*, 110 U.S. 651, 663-64 (1884)). *See also Oregon v. Mitchell*, 400 U.S. 112, 148-49 (1970) (Douglas, J., concurring) (collecting cases).

124. The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it "is preservative of other basic civil and political rights." *Reynolds*, 377 U.S. at 562. Voters have a "right to cast a ballot in an election free from the taint of intimidation and fraud," *Burson v. Freeman*, 504 U.S. 191, 211 (1992), and "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

125. "Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted" if they are validly cast. *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted" means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555, n.29 (*quoting South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

"Every voter in a federal . . . election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson v. United States*, 417 U.S. 211, 227 (1974); *see also Baker v. Carr*, 369 U.S. 186, 208 (1962). Invalid or fraudulent votes debase and dilute the weight of each validly cast vote. *Reynolds*, 377 U.S. at 555.

126. The right to vote includes not just the right to cast a ballot, but also the right to have it fairly counted if it is legally cast. The right to vote is infringed if a vote is cancelled or diluted by a fraudulent or illegal vote, including without limitation when a single person votes multiple times. The Supreme Court of the United States has made this clear in case after case. *See, e.g., Gray v. Sanders*, 372 U.S. 368, 380 (1963) (every vote must be "protected from the diluting effect of illegal ballots."); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op. of Stevens, J.) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *accord Reynolds v. Sims*, 377 U.S. 533, 554-55 & n.29 (1964).

127. The right to an honest count is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States. *Anderson*, 417 U.S. at 226 (*quoting Prichard v. United States*, 181 F.2d 326, 331 (6th Cir.), *aff'd due to absence of quorum*, 339 U.S. 974 (1950)).

128. Practices that promote the casting of illegal or unreliable ballots or fail to contain basic minimum guarantees against such conduct, can violate the Fourteenth Amendment by leading to the dilution of validly cast ballots. *See Reynolds*, 377 U.S. at 555 ("the right

of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

129. Section I details the Defendants violations of the Wisconsin Election Code. Section II provides estimates of the number of fraudulent, illegal or ineligible votes counted, and demonstrates that this number is many times larger than Biden's margin of victory.

130. Plaintiff seeks declaratory and injunctive relief enjoining Defendants from certifying the results of the General Election, or in the alternative, conduct a recount or recanvas in which they allow a reasonable number of challengers to meaningfully observe the conduct of the Wisconsin Board of State Canvassers and the Wisconsin county Boards of Canvassers and that these canvassing boards exercise their duty and authority under Wisconsin law, which forbids certifying a tally that includes any ballots that were not legally cast, or that were switched from Trump to Biden through the unlawful use of Dominion Democracy Suite software and devices.

COUNT IV

Wide-Spread Ballot Fraud

131. Plaintiff realleges all preceding paragraphs as if fully set forth herein.

132. The scheme of civil fraud can be shown with the pattern of conduct that includes motive and opportunity, as exhibited by the high level official at Dominion Voting Systems, Eric Coomer, and his visceral and public rage against the current U.S. President.

133. Opportunity appears with the secretive nature of the voting source code, and the feed of votes that make clear that an algorithm is applied, that reports in decimal points despite the law requiring one vote for one ballot.

134. The results of the analysis and the pattern seen in the included graph strongly suggest a systemic, system-wide algorithm was enacted by an outside agent, causing the results of Wisconsin's vote tallies to be inflated by somewhere between 3 and 5.6 percentage points. Statistical estimating yields that in Wisconsin, the best estimate of the number of impacted votes is 181,440. *Id.*

135. The Reports cited above show a total amount of illegal votes identified that amount to 318,012 or over 15 times the margin by which candidate Biden leads President Trump in the state of Wisconsin.

136. The right to vote includes not just the right to cast a ballot, but also the right to have it fairly counted if it is legally cast. The right to vote is infringed if a vote is cancelled or diluted by a fraudulent or illegal vote, including without limitation when a single person votes multiple times. The Supreme Court of the United States has made this clear in case after case. *See*, e.g., *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (every vote must be "protected from the diluting effect of illegal ballots."); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op. of Stevens, J.) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *accord Reynolds v. Sims*, 377 U.S. 533, 554-55 & n.29 (1964).

137. Plaintiff has no adequate remedy at law. Plaintiff contests the results of Wisconsin's 2020 General Election because it is fundamentally corrupted by fraud. Defendants intentionally violated multiple provisions of the Wisconsin Election Code to elect Biden and other Democratic candidates and defeat President Trump and other Republican candidates.

PRAYER FOR RELIEF

138. Accordingly, Plaintiff seeks temporary restraining order instructing Defendants to de-certify the results of the General Election for the Office of President.

139. Alternatively, Plaintiff seeks an order instructing the Defendants to certify the results of the General Election for Office of the President in favor of President Donald Trump.

140. In the alternative, Plaintiff seeks a temporary restraining order prohibiting Defendants from including in any certified results from the General Election the tabulation of absentee and mailing ballots which do not comply with the Wisconsin Election Code, including, without limitation, the tabulation of absentee and mail-in ballots Trump Campaign's watchers were prevented from observing or based on the tabulation of invalidly cast absentee and mail-in ballots which (i) lack a secrecy envelope, or contain on that envelope any text, mark, or symbol which reveals the elector's identity, political affiliation, or candidate preference, (ii) do not include on the outside envelope a completed declaration that is dated and signed by the elector, (iii) are delivered in-person by third parties for non-disabled voters, or (iv) any of the other Wisconsin Election Code violations set forth in Section II of this Amended Complaint.

141. Order production of all registration data, ballot applications, ballots, envelopes, etc. required to be maintained by law. When we consider the harm of these uncounted votes, and ballots not ordered by the voters themselves, and the potential that many of these unordered ballots may in fact have been improperly voted and also prevented proper voting at the polls, the mail ballot system has clearly failed in the state of Wisconsin and did so on a large scale and widespread basis. The size of the voting failures, whether accidental or intentional, are multiples larger than the margin in the state. For these reasons, Wisconsin cannot reasonably rely on the results of the

mail vote. Relief sought is the elimination of the mail ballots from counting in the 2020 election. Alternatively, the electors for the State of Wisconsin should be disqualified from counting toward the 2020 election. Alternatively, the electors of the State of Wisconsin should be directed to vote for President Donald Trump.

142. For these reasons, Plaintiff asks this Court to enter a judgment in his favor and provide the following emergency relief:

1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results;

2. An order enjoining Governor Evers from transmitting the currently certified election results the Electoral College;

3. An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election;

4. An immediate temporary restraining order to seize and impound all servers, software, voting machines, tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11. related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiff;

5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;

6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;

7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. CONST. Amend. XIV;

8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that invalidates the certified results if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;

9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;

10. A permanent injunction prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;

11. Immediate production of 48 hours of security camera recordings of all voting central count facilities and processes in Milwaukee and Dane Counties for November 3, 2020 and November 4, 2020.

12. Plaintiff further requests the Court grant such other relief as is just and proper, including but not limited to, the costs of this action and his reasonable attorney fees and expenses pursuant to 42 U.S.C. 1988.

Respectfully submitted, this 3rd day of December, 2020.

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DECLARATION OF [redacted]

I, [redacted], hereby state the following:

1. [redacted]

2. I am an adult of sound mine. All statements in this declaration are based on my personal knowledge and are true and correct.

3. I am making this statement voluntarily and on my own initiative. I have not been promised, nor do I expect to receive, anything in exchange for my testimony and giving this statement. I have no expectation of any profit or reward and understand that there are those who may seek to harm me for what I say in this statement. I have not participated in any political process in the United States, have not supported any candidate for office in the United States, am not legally permitted to vote in the United States, and have never attempted to vote in the United States.

4. I want to alert the public and let the world know the truth about the corruption, manipulation, and lies being committed by a conspiracy of people and companies intent upon betraying the honest people of the United States and their legally constituted institutions and fundamental rights as citizens. This conspiracy began more than a decade ago in Venezuela and has spread to countries all over the world. It is a conspiracy to wrongfully gain and keep power and wealth. It involves political leaders, powerful companies, and other persons whose purpose is to gain and keep power by changing the free will of the people and subverting the proper course of governing.

5. [redacted] Over the course of my career, I specialized in the marines [redacted]

6. Due to my training in special operations and my extensive military and academic formations, I was selected for the national security guard detail of the President of Venezuela. [redacted]

[redacted]

7. [redacted] Señor Cabello was a long-time confederate of President Chavez and instrumental in his gaining power. In 2002, Señor Cabello had very briefly taken over the duties of the presidency while Hugo Chavez was imprisoned. Within hours of Señor Cabello taking over the presidency, Hugo Chavez was released from prison and regained the office of President. On December 11, 2011, Cabello was installed as the Vice-President of the United Socialist Party – the party of President Chávez and became the second most powerful figure in the party after Hugo Chávez. Cabello was appointed president of the National Assembly in early 2012 and was re-elected to that post in January 2013. After Hugo Chávez's death, Cabello was next in line for the presidency of the country, but he remained president of the National Assembly and yielded to Nicolás Maduro holding the position of President of Venezuela.

8. [redacted] President Chavez was very precise and exacting in his instructions in the details about meetings he wanted, where the meeting was to occur, who was to attend, what was to be done. [redacted]

9. [redacted] I was witness to the creation and operation of a

sophisticated electronic voting system that permitted the leaders of the Venezuelan government to manipulate the tabulation of votes for national and local elections and select the winner of those elections in order to gain and maintain their power.

10. Importantly, I was a direct witness to the creation and operation of an electronic voting system in a conspiracy between a company known as Smartmatic and the leaders of conspiracy with the Venezuelan government. This conspiracy specifically involved President Hugo Chavez Frias, the person in charge of the National Electoral Council named Jorge Rodriguez, and principals, representatives, and personnel from Smartmatic which included [redacted]. The purpose of this conspiracy was to create and operate a voting system that could change the votes in elections from votes *against* persons running the Venezuelan government to votes *in their favor* in order to maintain control of the government.

11. In mid-February of 2009, there was a national referendum to change the Constitution of Venezuela to end term limits for elected officials, including the President of Venezuela. The referendum passed. This permitted Hugo Chavez to be re-elected an unlimited number of times.

12. After passage of the referendum, President Chavez instructed me to make arrangements for him to meet with Jorge Rodriguez, then President of the National Electoral Council, and three executives from Smartmatic. Among the three Smartmatic representatives were [redacted] President Chavez had multiple meetings with Rodriguez and the Smartmatic team at which I was present. In the first of four meetings, Jorge Rodriguez promoted the idea to create software that would manipulate elections. Chavez was very excited and made it clear that he would provide whatever Smartmatic needed. He wanted them immediately to create a voting system which would ensure that any time anything was going to be voted on the voting system would guarantee results that Chavez wanted. Chavez offered Smartmatic many inducements, including large sums of money, for Smartmatic to create or modify the voting system so that it would guarantee Chavez would win every election cycle. Smartmatic's team agreed to create such a system and did so.

13. I arranged and attended three more meetings between President Chavez and the representatives from Smartmatic at which details of the new

voting system were discussed and agreed upon. For each of these meetings, I communicated directly with [redacted] on details of where and when to meet, where the participants would be picked up and delivered to the meetings, and what was to be accomplished. At these meetings, the participants called their project the "Chavez revolution." From that point on, Chavez never lost any election. In fact, he was able to ensure wins for himself, his party, Congress persons and mayors from townships.

14. Smartmatic's electoral technology was called "Sistema de Gestión Electoral" (the "Electoral Management System"). Smartmatic was a pioneer in this area of computing systems. Their system provided for transmission of voting data over the internet to a computerized central tabulating center. The voting machines themselves had a digital display, fingerprint recognition feature to identify the voter, and printed out the voter's ballot. The voter's thumbprint was linked to a computerized record of that voter's identity. Smartmatic created and operated the entire system.

15. Chavez was most insistent that Smartmatic design the system in a way that the system could change the vote of each voter without being detected. He wanted the software itself to function in such a manner that if the voter were to place their thumb print or fingerprint on a scanner, then the thumbprint would be tied to a record of the voter's name and identity as having voted, but that voter would not tracked to the changed vote. He made it clear that the system would have to be setup to not leave any evidence of the changed vote for a specific voter and that there would be no evidence to show and nothing to contradict that the name or the fingerprint or thumb print was going with a changed vote. Smartmatic agreed to create such a system and produced the software and hardware that accomplished that result for President Chavez.

16. After the Smartmatic Electoral Management System was put in place, I closely observed several elections where the results were manipulated using Smartmatic software. One such election was in December 2006 when Chavez was running against Rosales. Chavez won with a landslide over Manuel Rosales - a margin of nearly 6 million votes for Chavez versus 3.7 million for Rosales.

17. On April 14, 2013, I witnessed another Venezuelan national election in which the Smartmatic Electoral Management System was used to manipulate and change the results for the person to succeed Hugo Chávez

as President. In that election, Nicolás Maduro ran against Capriles Radonsky. [redacted] Inside that location was a control room in which there were multiple digital display screens – TV screens – for results of voting in each state in Venezuela. The actual voting results were fed into that room and onto the displays over an internet feed, which was connected to a sophisticated computer system created by Smartmatic. People in that room were able to see in "real time" whether the vote that came through the electronic voting system was in their favor or against them. If one looked at any particular screen, they could determine that the vote from any specific area or as a national total was going against either candidate. Persons controlling the vote tabulation computer had the ability to change the reporting of votes by moving votes from one candidate to another by using the Smartmatic software.

18. By two o'clock in the afternoon on that election day Capriles Radonsky was ahead of Nicolás Maduro by two million votes. When Maduro and his supporters realized the size of Radonsky's lead they were worried that they were in a crisis mode and would lose the election. The Smartmatic machines used for voting in each state were connected to the internet and reported their information over the internet to the Caracas control center in real-time. So, the decision was made to reset the entire system. Maduro's and his supporters ordered the network controllers to take the internet itself offline in practically all parts in Venezuela and to change the results.

19. It took the voting system operators approximately two hours to make the adjustments in the vote from Radonsky to Maduro. Then, when they turned the internet back on and the on-line reporting was up and running again, they checked each screen state by state to be certain where they could see that each vote was changed in favor of Nicholas Maduro. At that moment the Smartmatic system changed votes that were for Capriles Radonsky to Maduro. By the time the system operators finish, they had achieved a convincing, but narrow victory of 200,000 votes for Maduro.

20. After Smartmatic created the voting system President Chavez wanted, he exported the software and system all over Latin America. It was sent to Bolivia, Nicaragua, Argentina, Ecuador, and Chile – countries that were in alliance with President Chavez. This was a group of leaders who wanted to be able to guarantee they maintained power in their countries. When Chavez died, Smartmatic was in a position of being the only

company that could guarantee results in Venezuelan elections for the party in power.

21. I want to point out that the software and fundamental design of the electronic electoral system and software of Dominion and other election tabulating companies relies upon software that is a descendant of the Smartmatic Electoral Management System. In short, the Smartmatic software is in the DNA of every vote tabulating company's software and system.

22. Dominion is one of three major companies that tabulates votes in the United States. Dominion uses the same methods and fundamentally same software design for the storage, transfer and computation of voter identification data and voting data. Dominion and Smartmatic did business together. The software, hardware and system have the same fundamental flaws which allow multiple opportunities to corrupt the data and mask the process in a way that the average person cannot detect any fraud or manipulation. The fact that the voting machine displays a voting result that the voter intends and then prints out a paper ballot which reflects that change does not matter. It is the software that counts the digitized vote and reports the results. The software itself is the one that changes the information electronically to the result that the operator of the software and vote counting system intends to produce that counts. That's how it is done. So the software, the software itself configures the vote and voting result -- changing the selection made by the voter. The software decides the result regardless of what the voter votes.

23. All of the computer controlled voting tabulation is done in a closed environment so that the voter and any observer cannot detect what is taking place unless there is a malfunction or other event which causes the observer to question the process. I saw first-hand that the manipulation and changing of votes can be done in real-time at the secret counting center which existed in Caracas, Venezuela. For me it was something very surprising and disturbing. I was in awe because I had never been present to actually see it occur and I saw it happen. So, I learned first-hand that it doesn't matter what the voter decides or what the paper ballot says. It's the software operator and the software that decides what counts – not the voter.

24. If one questions the reliability of my observations, they only have to read the words of [redacted] a time period in

which Smartmatic had possession of all the votes and the voting, the votes themselves and the voting information at their disposition in Venezuela. [redacted] he was assuring that the voting system implemented or used by Smartmatic was completely secure, that it could not be compromised, was not able to be altered.

25. But later, in 2017 when there were elections where Maduro was running and elections for legislators in Venezuela, [redacted] and Smartmatic broke their secrecy pact with the government of Venezuela. He made a public announcement through the media in which he stated that all the Smartmatic voting machines used during those elections were totally manipulated and they were manipulated by the electoral council of Venezuela back then. [redacted] stated that all of the votes for Nicholas Maduro and the other persons running for the legislature were manipulated and they actually had lost. So I think that's the greatest proof that the fraud can be carried out and will be denied by the software company that [redacted] admitted publicly that Smartmatic had created, used and still uses vote counting software that can be manipulated or altered.

26. I am alarmed because of what is occurring in plain sight during this 2020 election for President of the United States. The circumstances and events are eerily reminiscent of what happened with Smartmatic software electronically changing votes in the 2013 presidential election in Venezuela. What happened in the United States was that the vote counting was abruptly stopped in five states using Dominion software. At the time that vote counting was stopped, Donald Trump was significantly ahead in the votes. Then during the wee hours of the morning, when there was no voting occurring and the vote count reporting was off-line, something significantly changed. When the vote reporting resumed the very next morning there was a very pronounced change in voting in favor of the opposing candidate, Joe Biden.

27. [redacted] I have worked in gathering information, researching, and working with information technology. That's what I know how to do and the special knowledge that I have. Due to these recent election events, I contacted a number of reliable and intelligent ex-co-workers of mine that are still informants and work with the intelligence community. I asked for them to give me information that was up-to-date information in as far as how all these businesses are acting, what actions they are taking.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was prepared in Dallas County, State of Texas, and executed on November 15, 2020.

[redacted]

An Analysis of Surveys Regarding Absentee Ballots Across Several States

William M. Briggs

November 23, 2020

1 Summary

Survey data was collected from individuals in several states, sampling those who the states listed as not returning absentee ballots. The data was provided by Matt Braynard.

The survey asked respondents whether they (a) had ever requested an absentee ballot, and, if so, (b) whether they had in fact returned this ballot. From this sample I produce predictions of the total numbers of: **Error #1**, those who were recorded as receiving absentee ballots *without* requesting them; and **Error #2**, those who returned absentee ballots but whose votes went missing (i.e. marked as unreturned).

The sizes of both errors were large in each state. The states were Georgia, Michigan, Wisconsin, and Arizona where ballots were across parties. Pennsylvania data was for Republicans only.

2 Analysis Description

Each analysis was carried out separately for each state. The analysis used (a) the number of absentee ballots recorded as unreturned, (b) the total responding to the survey, (c) the total of those saying they did not request a ballot, (d) the total of those saying they did request a ballot, and of these (e) the number saying they returned their ballots. I assume survery respondents are representative and the data is accurate.

From these data a simple parameter-free predictive model was used to calculate the probability of all possible outcomes. Pictures of these probabilities were derived, and the 95% prediction interval of the relevant numbers was calculated. The pictures appear in the Appendix at the end. They are summarized here with their 95% prediction intervals.

Error #1: being recorded as sent an absentee ballot without requesting one.

Error #2: sending back an absentee ballot and having it recorded as not returned.

State	Unreturned ballots	Error #1	Error #2
Georgia	138,029	16,938–22,771	31,559–38,866
Michigan	139,190	29,611–36,529	27,928–34,710
Pennsylvania*	165,412	32,414–37,444	26,954–31,643
Wisconsin	96,771	16,316–19,273	13,991–16,757
Arizona	518,560	208,333–229,937	78,714–94,975

*Number for Pennsylvania represent Republican ballots only.

Ballots that were not requested, and ballots returned and marked as not returned were classed as *troublesome*. The estimated average number of troublesome ballots for each state were then calculated using the table above and are presented next.

State	Unreturned ballots	Estimated average troublesome ballots	Percent
Georgia	138,029	53,489	39%
Michigan	139,190	62,517	45%
Pennsylvania*	165,412	61,780	37%
Wisconsin	96,771	29,594	31%
Arizona	518,560	303,305	58%

*Number for Pennsylvania represent Republican ballots only.

3 Conclusion

There are clearly a large number of troublesome ballots in each state investigated. Ballots marked as not returned that were never requested are clearly an error of some kind. The error is not small as a percent of the total recorded unreturned ballots.

Ballots sent back and unrecorded is a separate error. These represent votes that have gone missing, a serious mistake. The number of these missing ballots is also large in each state.

Survey respondents were not asked if they received an unrequested ballot whether they sent these ballots back. This is clearly a lively possibility, and represents a third possible source of error, including the potential of voting twice (once by absentee and once at the polls). No estimates or likelihood can be calculated for this potential error due to absence of data.

4 Declaration of William M. Briggs, PhD

1. My name is William M. Briggs. I am over 18 years of age and am competent to testify in this action. All of the facts stated herein are true and based on my personal knowledge.
2. I received a Ph.D of Statistics from Cornell University in 2004.
3. I am currently a statistical consultant. I make this declaration in my personal capacity.
4. I have analyzed data regarding responses to questions relating to mail ballot requests, returns and related issues.
5. I attest to a reasonable degree of professional certainty that the resulting analysis are accurate.

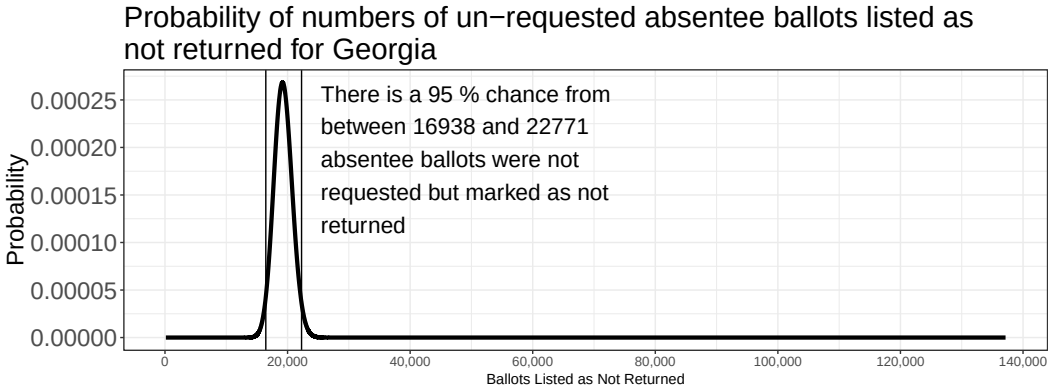
I declare under the penalty of perjury that the foregoing is true and correct.

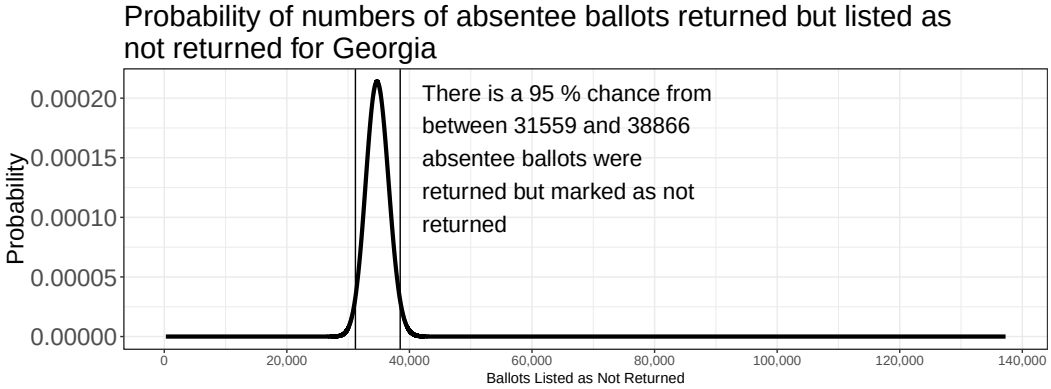
23 November 2020

William M. Briggs

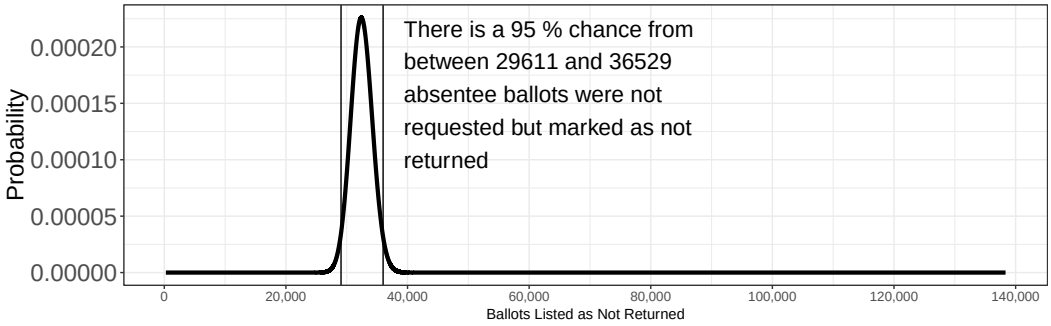
5 Appendix

The probability pictures for each state for each outcome as mentioned above.

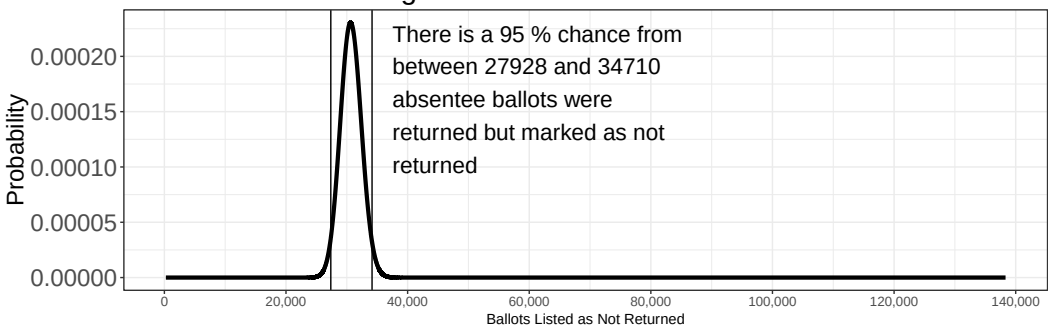




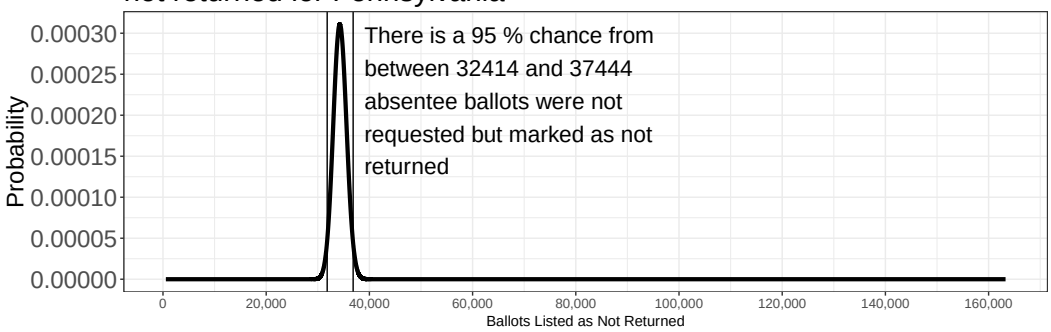
Probability of numbers of un−requested absentee ballots listed as not returned for Michigan



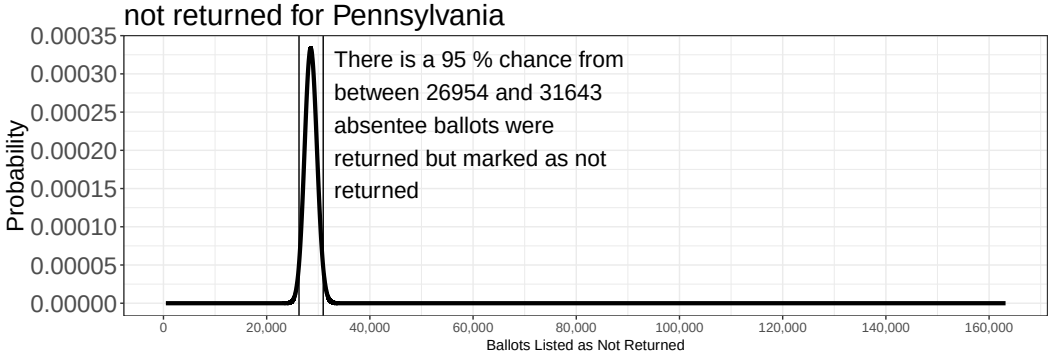
Probability of numbers of absentee ballots returned but listed as not returned for Michigan



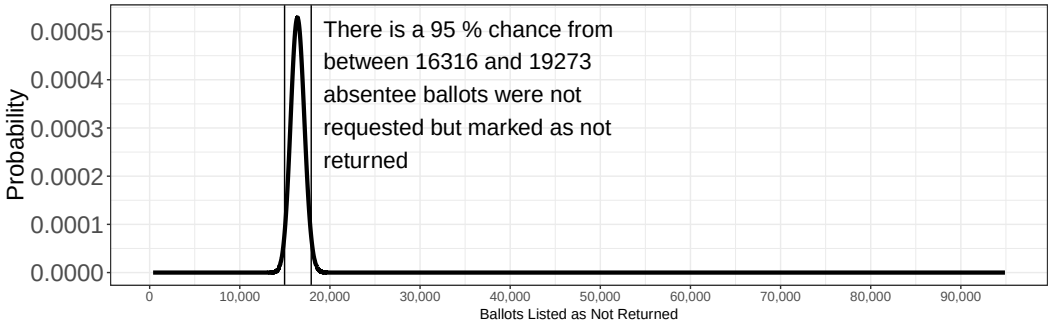
Probability of numbers of un−requested absentee ballots listed as not returned for Pennsylvania



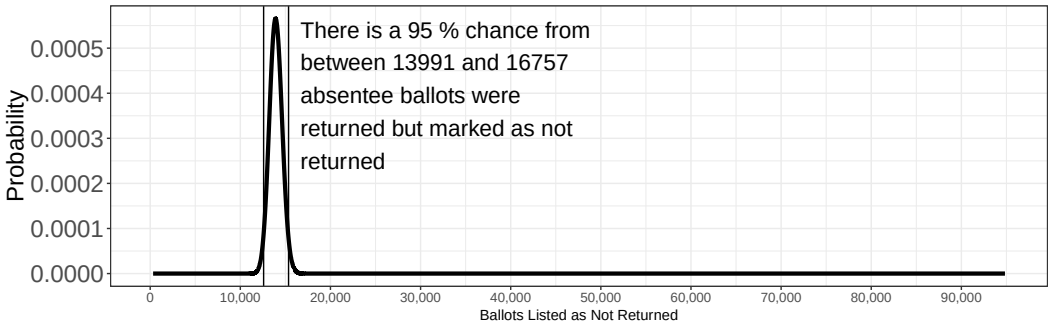
Probability of numbers of absentee ballots returned but listed as not returned for Pennsylvania



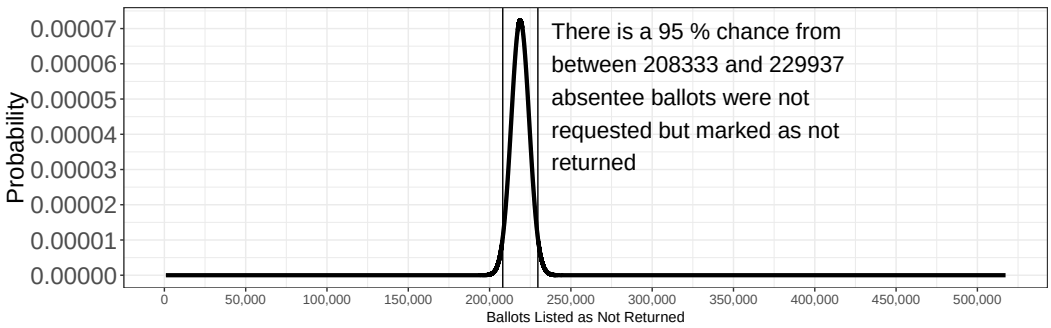
Probability of numbers of un−requested absentee ballots listed as not returned for Wisconsin



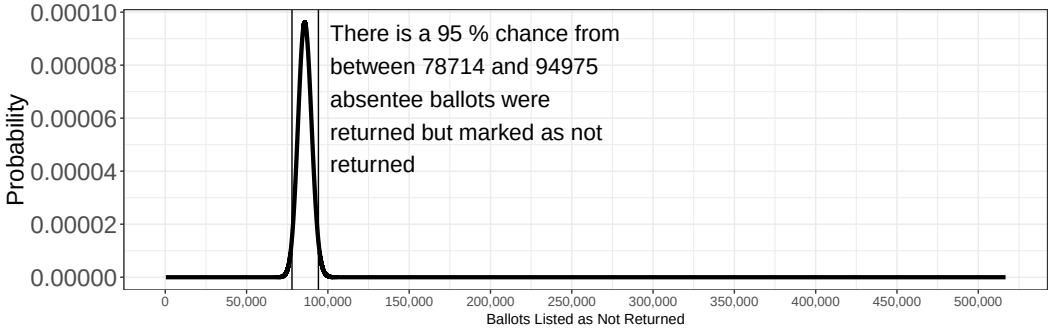
Probability of numbers of absentee ballots returned but listed as not returned for Wisconsin



Probability of numbers of un−requested absentee ballots listed as not returned for Arizona



Probability of numbers of absentee ballots returned but listed as not returned for Arizona



WI Unreturned Live Agent - Mass Markets

			11/15/2020	11/16/2020	11/17/2020
4,614	**Completes**		**-**	**3,483**	**1,131**
433	**Completed survey** - Q4=0**	1-Completed Survey	-	300	133
1,053	**VM Message Left**	2-Message Delivered VM	-	804	249
3,128	**Refused/Early Hang up/RC**	3-Refused	-	2,379	749
50,712	**No Answer**	4-No Answer	-	40,391	10,321
1,944	**Bad/Wrong Numbers/Langu**	5-Bad Number	-	1,289	655
100.00%	**List Penetration**				
57,271	**Data Loads**				

Q1 - May I please speak to <lead on screen>?		**Response**	11/15/2020	11/16/2020	11/17/2020
2,261	64.69%	A-Reached Target + B-What Is This About? / Uncertain	-	1,343	475
1,677	47.98%	X = Refused	-	1,202	475
0	0.00%				
3,495	**100.00%**	**Sum of All Responses**	**-**	**2,545**	**950**

Q2 - Did you request Absentee Ballot in state of WI?		**Response**	11/15/2020	11/16/2020	11/17/2020
1,699	62.39%	A-Yes [Go to Q3]	-	1,374	325

379	13.92%	B-No [Go to Q4]	-	240	139
32	1.18%	C-Yes (per Spouse/family Member) [Go to Q3]	-	16	16
4	0.15%	D-No (per Spouse/family Member) [Go to Q4]	-	-	4
44	1.62%	E-Unsure [Go to Close A]	-	25	19
4	0.15%	F-Not Available At The Moment [Go to Close A]	-	2	2
561	20.60%	X = Refused	-	405	156
2,723	**100.00%**	**Sum of All Responses**	**-**	**2,062**	**661**

Q3 - Did you mail your ballot back?		**Response**	**11/15/2020**	**11/16/2020**	**11/17/2020**
316	14.67%	A-Yes [Go to Q4]	-	238	78
1,286	59.70%	B-No [Go to Close A]	-	1,069	217
9	0.42%	C-Yes (per Spouse/family Member) [Go to Q4]	-	4	5
15	0.70%	D-No (per Spouse/family Member) [Go to Close A]	-	8	7
28	1.30%	E-Unsure / Refused [Go to Close A]	-	24	4
500	23.21%	X = Refused	-	314	186
			-		
2,154	**100.00%**	**Sum of All Responses**	**-**	**1,657**	**497**

Q4 - Can you please give us the best phone number to reach you at?		Response	11/15/2020	11/16/2020	11/17/2020
432	80.00%	A-Yes (Capture Number) [Go to Q5]	-	300	132
108	20.00%	B-Refused [Go to Q5]	-	77	31
0	0.00%				
0	0.00%				
540	**100.00%**	**Sum of All Responses**	**-**	**377**	**163**

Q5 - Can you provide us your email address?		Response	11/15/2020	11/16/2020	11/17/2020
50	11.55%	01-Yes [Go to Close B]	-	37	13
383	88.45%	02-No [Go to Close B]	-	263	120
0	0.00%				
433	**100.00%**	**Sum of All Responses**	**-**	**300**	**133**

William M. Briggs, PhD
Statistician to the Stars!
matt@wmbriggs.com
917-392-0691

1. Experience

(1) 2016: Author of *Uncertainty: The Soul of Modeling, Probability & Statistics*, a book which argues for a complete and fundamental change in the philosophy and practice of probability and statistics. Eliminate hypothesis testing and estimation, and move to verifiable predictions. This includes AI and machine learning. Call this The Great Reset, but a good one.

(2) 2004-2016 Adjunct Professor of Statistical Science, Cornell University, Ithaca, New York
I taught a yearly Masters course to people who (rightfully) hate statistics. Interests: philosophy of science & probability, epistemology, epidemiology (ask me about the all-too-common epidemiologist fallacy), Bayesian statistics, medicine, climatology & meteorology, goodness of forecasts, overconfidence in science; public understanding of science, limitations of science, scientism; scholastic metaphysics (as it relates to epistemology).

(3) 1998-present. Statistical consultant, Various companies
Most of my time is spent coaxing people out of their money to tell them they are too sure of themselves. All manner of analyses cheerfully undertaken. Example: Fraud analysis; I created the *Wall Street Journal's* College Rankings. I consultant regularly at Methodist and other hospitals, start-ups, start-downs, and with any instition willing to fork it over.

(4) 2003-2010. Research Scientist, New York Methodist Hospital, New York
Besides the usual, I sit/sat on the Institutional Review Committee to assess the statistics of proposed research. I was an Associate Editor for *Monthly Weather Review* (through 2011). Also a member of the American Meteorological Society's Probability and Statistics Committee (through 2011). At a hospital? Yes, sir; at a hospital. It rains there, too, you know.

(5) Fall 2007, Fall 2010 Visiting Professor of Statistics, Department of Mathematics, Central Michigan University, Mt. Pleasant, MI
Who doesn't love a visit from a statistician? Ask me about the difference between "a degree" and "an education."

(6) 2003-2007, Assistant Professor Statistics, Weill Medical College of Cornell University, New York, New York
Working here gave me a sincere appreciation of the influences of government money; grants galore.

(7) 2002-2003. Gotham Risk Management, New York
A start-up then, after Enron's shenanigans, a start-down. We set future weather derivative and weather insurance contract prices that incorporated information from medium- and long-range weather and climate forecasts.

(8) 1998-2002. DoubleClick, New York
Lead statistician. Lot of computer this and thats; enormous datasets.

(9) 1993-1998. Graduate student, Cornell University

Meteorology, applied climatology, and finally statistics. Was Vice Chair of the graduate student government; probably elected thanks to a miracle.

(10) 1992-1993. National Weather Service, Sault Ste. Marie, MI
Forecast storms o' the day and launched enormous balloons in the name of Science. My proudest moment came when I was able to convince an ancient IBM-AT machine to talk to an *analog*, 110 baud, phone-coupled modem, all using BASIC!

(11) 1989-1992. Undergraduate student, Central Michigan University
Meteorology and mathematics. Started the local student meteorology group to chase tornadoes. Who knew Michigan had so few? Spent a summer at U Michigan playing with a (science-fiction-sounding) lidar.

(12) 1983-1989. United States Air Force
Cryptography and other secret stuff. Shot things; learned pinochle. I adopted and became proficient with a fascinating and versatile vocabulary. Irritate me for examples. TS/SCI, etc. security clearance (now inactive).

2. Education

(1) Ph.D., 2004, Cornell University. Statistics.
(2) M.S., 1995, Cornell University. Atmospheric Science.
(3) B.S., Summa Cum Laude, 1992, Central Michigan University. Meteorology and Math.

3. Publications

3.0.1. *Popular.*

(1) Op-eds in various newspapers; articles in *Stream*, *Crisis Magazine*, *The Remnant*, *Quadrant*, *Quirks*; blog with ∼70,000 monthly readers. Various briefs submitted to government agencies, such as California Air Resources Board, Illinois Department of Natural Resources. Talks and holding-forths of all kinds.

3.0.2. *Books.*

(1) Richards, JW, WM Briggs, and D Axe, 2020. *UThe Price of Panic: How the Tyranny of Experts Turned a Pandemic into a Catastrophe*. Regnery. Professors Jay Richards, William Briggs, and Douglas Axe take a deep dive into the crucial questions on the minds of millions of Americans during one of the most jarring and unprecedented global events in a generation.

(2) Briggs, WM., 2016. *Uncertainty: The Soul of Modeling, Probability & Statistics*. Springer. Philosophy of probability and statistics. A new (old) way to view and to use statistics, a way that doesn't lead to heartbreak and pandemic over-certainty, like current methods do.

(3) Briggs, WM., 2008 *Breaking the Law of Averages: Real Life Probability and Statistics in Plain English*. Lulu Press, New York. Free text for undergraduates.

(4) Briggs, WM., 2006 *So You Think You're Psychic?* Lulu Press, New York. Hint: I'll bet you're not.

3.0.3. *Methods.*

(1) Briggs, WM and J.C. Hanekamp, 2020. Uncertainty In The MAN Data Calibration & Trend Estimates. *Atmospheric Environment,* In review.
(2) Briggs, WM and J.C. Hanekamp, 2020. Adjustments to the Ryden & McNeil Ammonia Flux Model. *Soil Use and Management,* In review.
(3) Briggs, William M., 2020. Parameter-Centric Analysis Grossly Exaggerates Certainty. In *Data Science for Financial Econometrics*, V Kreinovich, NN Thach, ND Trung, DV Thanh (eds.), In press.
(4) Briggs, WM, HT Nguyen, D Trafimow, 2019. Don't Test, Decide. In *Behavioral Predictive Modeling in Econometrics*, Springer, V Kreinovich, S Sriboonchitta (eds.). In press.
(5) Briggs, William M. and HT Nguyen, 2019. Clarifying ASA's view on p-values in hypothesis testing. *Asian Journal of Business and Economics*, 03(02), 1–16.
(6) Briggs, William M., 2019. Reality-Based Probability & Statistics: Solving The Evidential Crisis (invited paper). *Asian Journal of Business and Economics*, 03(01), 37–80.
(7) Briggs, William M., 2019. Everything Wrong with P-Values Under One Roof. *In Beyond Traditional Probabilistic Methods in Economics*, V Kreinovich, NN Thach, ND Trung, DV Thanh (eds.), pp 22—44.
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(9) Trafimow, D, V Amrhein, CN Areshenkoff, C Barrera-Causil, ..., WM Briggs, (45 others), 2018. Manipulating the alpha level cannot cure significance testing. *Frontiers in Psychology*, *9*, 699. doi.org/10.3389/ fpsyg.2018.00699.
(10) Briggs, WM, 2018. Testing, Prediction, and Cause in Econometric Models. In *Econometrics for Financial Applications*, ed. Anh, Dong, Kreinovich, and Thach. Springer, New York, pp 3–19.
(11) Briggs, WM, 2017. The Substitute for p-Values. *JASA*, 112, 897–898.
(12) J.C. Hanekamp, M. Crok, M. Briggs, 2017. Ammoniak in Nederland. *Enkele kritische wetenschappelijke kanttekeningen.* V-focus, Wageningen.
(13) Briggs, WM, 2017. Math: Old, New, and Equalitarian. *Academic Questions*, 30(4), 508–513.
(14) Monckton, C, W Soon, D Legates, ... (several others), WM Briggs 2018. On an error in applying feedback theory to climate. In submission (currently *J. Climate*).
(15) Briggs, WM, JC Hanekamp, M Crok, 2017. Comment on Goedhart and Huijsmans. *Soil Use and Management*, 33(4), 603–604.
(16) Briggs, WM, JC Hanekamp, M Crok, 2017. Response to van Pul, van Zanten and Wichink Kruit. *Soil Use and Management*, 33(4), 609–610.
(17) Jaap C. Hanekamp, William M. Briggs, and Marcel Crock, 2016. A volatile discourse - reviewing aspects of ammonia emissions, models, and atmospheric concentrations in The Netherlands. *Soil Use and Management*, 33(2), 276–287.

(18) Christopher Monckton of Brenchley, Willie Soon, David Legates, William Briggs, 2015. Keeping it simple: the value of an irreducibly simple climate model. *Science Bulletin*. August 2015, Volume 60, Issue 15, pp 1378–1390.
(19) Briggs, WM, 2015. The Third Way Of Probability & Statistics: Beyond Testing and Estimation To Importance, Relevance, and Skill. *arxiv.org/abs/1508.02384*.
(20) Briggs, WM, 2015. The Crisis Of Evidence: Why Probability And Statistics Cannot Discover Cause. *arxiv.org/abs/1507.07244*.
(21) David R. Legates, Willie Soon, William M. Briggs, Christopher Monckton of Brenchley, 2015. Climate Consensus and 'Misinformation': A Rejoinder to Agnotology, Scientific Consensus, and the Teachingand Learning of Climate Change. *Science and Education*, 24, 299–318, DOI 10.1007/s11191-013-9647-9.
(22) Briggs, WM, 2014. The Problem Of Grue Isn't. *arxiv.org/abs/1501.03811*.
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No._____

In the Supreme Court of Wisconsin

The Wisconsin Voters Alliance, Ronald H. Heuer, William Joseph Laurent, Richard Kucksdorf, James Fitzgerald, Kelly Ruh, William Berglund, John Jaconi, Donna Utschig, Jeff Wellhouse, Kurt Johnson, Thomas Reczek, Linda Sinkula, Atilla Thorbjorsson, Jeff Kleiman, Navin Jarugumilli, Jonathan Hunt, Suzanne Vlach, Jacob Blazkovec, Donald Utschig, Carol Aldinger, Jay Plaumann, Deborah Gorman, Robert R. Liebeck, Valerie M. Bruns Liebeck, Edward Hudak, Ron Cork, Charles Risch, Karl Lehrke, Arnet Holty and Joseph McGrath, PETITIONERS,

v.

Wisconsin Elections Commission, and its members Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity, RESPONDENTS

On Petition For Original Action
Before this Court

EXPERT REPORT OF MATTHEW BRAYNARD

I. INTRODUCTION

I have been retained as an expert witness on behalf of Petitioners in the above captioned proceeding. I expect to testify on the following subject matters: (i) analysis of the database for the November 3, 2020 election for the selection of Presidential Electors in the State of Wisconsin ("State"); (ii) render opinions regarding whether individuals identified in the State's voter database actually voted; and (iii) render opinions regarding whether individuals identified in the State's voter database were actually qualified to vote on election day.

This is a statement of my relevant opinions and an outline of the factual basis for these opinions. The opinions and facts contained herein are based on the information made available to me in this case prior to preparation of this report, as well as my professional experience as an election data analyst.

I reserve the right to supplement or amend this statement on the basis of further information obtained prior to the time of trial or in order to clarify or correct the information contained herein.

II. DOCUMENTS REVIEWED

I reviewed the following documents in arriving at my opinions.

1. The voter records and election returns as maintained on the State's election database;

2. Records maintained by the National Change of Address Source which is maintained by the United States Postal Service and which is available for licensed users on the internet. I am a licensed member.

3. Records developed by the staff of my call centers and social media researchers; and

4. A national voter database maintained by L2 Political;

In addition, I discussed the facts of this matter with Petitioner's attorney Erick G. Kaardal and members of his legal team.

III. PROFESSIONAL QUALIFICATIONS

I have attached hereto as Exhibit 1 a true and correct copy of my resume. As detailed in the resume, I graduated from George Washington University in 2000 with a degree in business administration with a concentration in finance and management information systems. I have been working in the voter data and election administration field since 1996. I have worked building and deploying voter databases for the Republican National Committee, five Presidential campaigns, and no less than one-hundred different campaigns and election-related organizations in all fifty states and the U.S. Virgin Islands. I worked for eight years as a senior analyst at the nation's premier redistricting and election administration firm, Election Data Services, where I worked with states and municipalities on voter databases, delineation, and litigation support related to these matters. Also, while at Election Data Services, I worked under our contract with the US Census Bureau analyzing voting age population. Since 2004, I have worked for my own business, now known as External Affairs, Inc., providing

statistical and data analysis for local, state, and federal candidates and policy organizations in the areas of voter targeting, polling/research, fundraising, branding, and online development and strategy. My firm has worked for over two-hundred candidates from president to town council and over a dozen DC-based policy/advocacy organizations.

With respect to publications I have authored in the last 10 years, I have not authored any publications in the last ten years.

IV. COMPENSATION

I have been retained as an expert witness for Petitioners. I am being compensated for a flat fee of $40,000.

V. PRIOR TESTIMONY

I have not provided testimony as an expert either at trial or in deposition in the last four years.

VI. STATEMENT OF OPINIONS

As set forth above, I have been engaged to provide expert opinions regarding analysis in the November 3, 2020 election of Presidential electors. Based on my review of the documents set forth above, my discussions with statisticians and analysts working with me and at my direction, my discussions with the attorneys representing the Petitioners, I have the following opinions:

1. It is my opinion, to a reasonable degree of scientific certainty, that in the State, the State's database for the November 3, 2020 election show 96,711 voters whom the state marks as having requested and been sent an absentee ballot did not return it. It is my opinion, to a reasonable degree of scientific certainty, that in my sample

of this universe, 18.12% of these absentee voters in the State did not request an absentee ballot.

2. From the State's database for the November 3, 2020 election and our call center results, it is my opinion to a reasonable degree of scientific certainty that 96,771 individuals whom the State's database identifies as having not returned an absentee ballot, that in my sample of this universe, 15.37% of those absentee voters did in fact mail back an absentee ballot to the clerk's office.

3. From the State's database for the November 3, 2020 election, the NCOA database, and our call center results, it is my opinion to a reasonable degree of scientific certainty that out of the 26,673 individuals had changed their address before the election, that in my sample of this universe, 1.11% of those individuals denied casting a ballot.

4. From the State's database for the November 3, 2020 election and the NCOA database and other state's voter databases, it is my opinion to a reasonable degree of scientific certainty, that at least 6,848 absentee or early voters were not residents of the State when they voted.

5. From the State's database for the November 3, 2020 election and my staff's review of social media for voters who applied for indefinitely confined absentee voting status, it is my opinion to a reasonable degree of scientific certainty, that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

6. From the State's database for the November 3, 2020 election and comparing that data to other states voting data and identifying individuals who cast early/absentee ballots in multiple states, it is my opinion to a reasonable degree of scientific certainty, that at least 234 individuals in the State voted in multiple states.

VII. BASIS AND REASONS SUPPORTING OPINIONS.

First, State maintains a database for the November 3, 2020 election which I obtained from L2 Political and which L2 Political obtained from the State's records on, among other things, voters who applied for an absentee or early voter status. I received this database from L2 Political in a table format with columns and rows which can be searched, sorted and filtered. Each row sets forth data on an individual voter. Each

column contained information such as the name of the voter, the voter's address, whether the voter applied for an absentee ballot, whether the voter voted and whether the voter voted indefinitely confined status.

Second, we are able to obtain other data from other sources such as the National Change of Address Database maintained by the United States Postal Service and licensed by L2 Political. This database also in table format shows the name of an individual, the individual's new address, the individual's old address and the date that the change of address became effective.

Third, I conducted randomized surveys of data obtained from the State's database by having my staff or the call center's staff make phone calls to and ask questions of individuals identified on the State's database by certain categories such as absentee voters who did not return a ballot. Our staff, if they talked to any of these individuals, would then ask a series of questions beginning with a confirmation of the individual's name to ensure it matched the name of the voter identified in the State's database. The staff would then ask additional questions of the individuals and record the answers.

Fourth, I had this staff survey a random sample I obtained from the State's database on indefinitely confined voters. The staff conducted research on the internet and social media postings by these individuals. Staff would undertake to determine if the individual was the individual listed on the database meant the State's definition of indefinitely confined. Staff would then attempt to determine if the individuals had posted photos, images or other information demonstrating that the individuals were not indefinitely confined. For instance, if the individual's social media showed a photo on or

near election day of the individual doing something inconsistent with indefinitely confined status such as riding a bike. Staff would then record the results as either "not indefinitely confined," "confirmed indefinitely confined," or "inconclusive."

Fifth, attached as Exhibits 2 is my written analysis of the data obtained.

Below are the opinions I rendered and the basis of the reasons for those opinions.

1. It is my opinion, to a reasonable degree of scientific certainty, that in the State, the State's database for the November 3, 2020 election show 96,711 voters whom the state marks as having requested and been sent an absentee ballot did not return it. It is my opinion, to a reasonable degree of scientific certainty, that in my sample of this universe, 18.12% of these absentee voters in the State did not request an absentee ballot.

I obtained this data from the State via L2 Political after the November 3, 2020, Election Day. This data identified 96,771 absentee voters who were sent an absentee ballot but who failed to return the absentee ballot.

I then had my staff make phone calls to a sample of this universe. When contacted, I had my staff confirm the individual's identity by name. Once the name was confirmed, I then had staff ask if the person requested an absentee ballot or not. Staff then recorded the number of persons who answered yes. My staff then recorded that of the 2,114 individuals who answered the question, 1,731 individuals answered yes to the question whether they requested an absentee ballot. My staff recorded that 383 individuals answered no to the question whether they requested an absentee ballot. Attached as Exhibit 2 is my written analysis containing information from the data above on absentee voters. Paragraph 2 of Exhibit 2 presents this information.

Next, I then had staff ask the individuals who answered yes, they requested an absentee ballot, whether the individual mailed back the absentee ballot or did not mail back the absentee ballot. Staff then recorded that of the 1,626 individuals who answered the question, 325 individuals answered yes, they mailed back the absentee ballot. Staff recorded 1301 individuals answered no, they did not mail back the absentee ballot. Paragraph 2 of Exhibit 2 presents this information.

Based on these results, 18.12% of our sample of these absentee voters in the State did not request an absentee ballot.

2. From the State's database for the November 3, 2020 election and our call center results, it is my opinion to a reasonable degree of scientific certainty that 96,771 individuals whom the State's database identifies as having not returned an absentee ballot, that in my sample of this universe, 15.37% of those absentee voters did in fact mail back an absentee ballot to the clerk's office.

This opinion includes the analysis set forth above. Among the 1,626 who told our call center that they did request an absentee ballot and answered the second question, 325 told our staff that they mailed the absentee ballot back, which is 15.37% of those whom the State identified as having not returned the absentee ballot the State sent them. Paragraph 2 of Exhibit 2 presents this information.

3. From the State's database for the November 3, 2020 election, the NCOA database, and our call center results, it is my opinion to a reasonable degree of scientific certainty that out of the 26,673 individuals had changed their address before the election, that in my sample of this universe, 1.11% of those individuals denied casting a ballot.

On Exhibit 2, in paragraph 4, I took the State's database of all absentee or early voters and matched those voters to the NCOA database for the day after election day.

This data identified 26,673 individuals whose address on the State's database did not match the address on the NCOA database on election day. Next, I had my staff call the persons identified and ask these individuals whether they had voted. My call center staff identified 1,607 individuals who confirmed that they had casted a ballot. My call center staff identified 18 individuals who denied casting a ballot. Our analysis shows that 1.11% of our sample of these individuals who changed address did not vote despite the State's data recorded that the individuals did vote.

4. From the State's database for the November 3, 2020 election and the NCOA data and other state's voter data, it is my opinion to a reasonable degree of scientific certainty, that at least 6,848 absentee or early voters were not residents of the State when they voted.

On Exhibit 2, in paragraph 1, I took the State's database of all absentee or early voters and matched those voters to the NCOA database for the day after Election Day. This data identified 6,207 individuals who had moved of the State prior to Election Day. Further, by comparing the other 49 states voter databases to the State's database, I identified 765 who registered to vote in a state other than the State subsequent to the date they registered to vote in the State. When merging these two lists and removing the duplicates, and accounting for moves that would not cause an individual to lose their residency and eligibility to vote under State law, these voters total 6,848.

5. From the State's database for the November 3, 2020 election and my staff's review of social media for voters who applied for indefinitely confined absentee voting status, it is my opinion to a reasonable degree of scientific certainty, that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

This opinion is taken from data developed on Exhibit 3. For this determination, I had my staff investigate using the internet and social media the individuals the State's data identified as claiming indefinitely confined status in their absentee ballot applications. The staff conducted research on the internet and social media postings by these individuals. Staff would undertake to determine if the individual was the individual listed on the database as indefinitely confined. Staff would then attempt to determine if the individuals had posted photos, images or other information demonstrating that the individuals were not indefinitely confined. For instance, if the individual's social media showed a photo on or near election day doing something inconsistent with indefinitely confined status such as riding a bike. Staff would then record the results as either "not indefinitely confined," "confirmed indefinitely confined," or "inconclusive."

These results showed that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

6. From the State's database for the November 3, 2020 election and comparing that data to other states voting data and identifying individuals who cast early/absentee ballots in multiple states, it is my opinion to a reasonable degree of scientific certainty, that at least 234 individuals in the State voted in multiple states.

On Exhibit 2, in paragraph 2, I had my staff compare the State's early and absentee voters to other states voting data and identified individuals who cast early/absentee ballots in multiple states. My staff located 234 individuals who voted in the State and in other states for the November 3, 2020 general election.

VIII. EXHIBITS TO BE USED AT TRIAL TO SUMMARIZE OR EXPLAIN OPINIONS

At the present time, I intend to rely on the documents produced set forth above as possible exhibits.

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SIGNATURE PAGE TO FOLLOW

Dated: 11/22/2020

Matthew Braynard

[redacted]

Pursuant to 28 U.S.C Section 1746, I, [redacted], make the following declaration.

1. I am over the age of 21 years and am a resident of Monroe County, Florida.
2. I am under no legal disability that would prevent me from giving this declaration.
3. I hold a Bachelor of Science degree in Mathematics and a Master of Science degree in Statistics.
4. For thirty years, I have conducted statistical data analysis for companies in various industries, including aerospace, consumer packaged goods, disease detection and tracking, and fraud detection.
5. From November 13th, 2020 through November 28th, 2020, I conducted in-depth statistical analysis of publicly available data on the 2020 U.S. Presidential Election. This data included vote counts for each county in the United States, U.S. Census data, and type of voting machine data provided by the U.S. Election Assistance Committee.
6. The analysis yielded several "red flags" concerning the percentage of votes won by candidate Biden in counties using voting machines provided by Dominion Voting Systems. These red flags occurred in several States in the country, including Wisconsin.
7. I began by using Chi-Squared Automatic Interaction Detection (CHAID), which treats the data in an agnostic way—that is, it imposes no parametric assumptions that could otherwise introduce bias. Here, I posed the following question: "Do any voting machine

types appear to have unusual results?" The answer provided by the statistical technique/algorithm was that machines from Dominion Voting Systems (Dominion) produced abnormal results.

8. Subsequent graphical and statistical analysis shows the unusual pattern involving machines from Dominion occurs in at least 100 counties and multiple States, including Wisconsin.

9. The results from most, if not all counties using the Dominion machines is three to five point six percentage points higher in favor of candidate Biden than the results should be. This pattern is seen easily in graphical form when the results from "Dominion" counties are overlaid against results from "non-Dominion" counties. The results from "Dominion" counties do not match the results from the rest of the counties in the United States. The results are certainly statistically significant, with a p-value of < 0.00004. This translates into a statistical impossibility that something unusual involving Dominion machines is *not* occurring. This pattern appears in multiple States, including Wisconsin, and the margin of votes implied by the unusual activity would easily sway the election results.

10. The following graph shows the pattern. The large red dots are counties in Wisconsin that use Dominion voting machines. Almost all of them are above the blue prediction line, when in normal situations approximately half of them would be below the prediction line (as evidence by approximately half the counties in the U.S. (blue dots) that are below the blue centerline). The p-value of statistical analysis regarding the centerline for the red dots (Wisconsin counties

with Dominion machines) is 0.000000049, pointing to a statistical impossibility that this is a "random" statistical anomaly. Some external force caused this anomaly

11. To confirm that Dominion machines were the source of the pattern/anomaly, I conducted further analysis using propensity scoring using U.S. census variables (Including ethnicities, income, professions, population density and other social/economic data) , which was used to place counties into paired groups. Such an analysis is important because one concern could be that counties with Dominion systems are systematically different from their counterparts, so abnormalities in the margin for Biden are driven by other characteristics unrelated to the election.

12. After matching counties using propensity score analysis, the only difference between the groups was the presence of Dominion machines. This approach again showed a highly statistically significant difference between the two groups, with candidate Biden again averaging three percentage points higher in Dominion counties than in the associated paired county. The associated p-value is < 0.00005, against indicating a statistical impossibility that something unusual is not occurring involving Dominion machines.

13. The results of the analysis and the pattern seen in the included graph strongly suggest a systemic, system-wide algorithm was enacted by an outside agent, causing the results of Wisconsin's vote tallies to be inflated by somewhere between three and five point six percentage points. Statistical estimating yields that in Wisconsin, the best estimate of the number of impacted votes is 181,440. However, a 95% confidence interval calculation yields that as many as 236,520 votes may have been impacted.

I declare under penalty of perjury that the forgoing is true and correct. Executed this November 28th, 2020.

[redacted],

/s/

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
ADAMS COUNTY - 01	CITY OF ADAMS - 01201	ES&S DS200	ES&S AutoMARK
ADAMS COUNTY - 01	TOWN OF ADAMS - 01002	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF BIG FLATS - 01004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF COLBURN - 01006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF DELL PRAIRIE - 01008	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF EASTON - 01010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF JACKSON - 01012	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF LEOLA - 01014	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF LINCOLN - 01016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF MONROE - 01018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF NEW CHESTER - 01020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF NEW HAVEN - 01022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	TOWN OF PRESTON - 01024	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF QUINCY - 01026	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF RICHFIELD - 01028	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF ROME - 01030	ES&S DS200	ES&S AutoMARK
ADAMS COUNTY - 01	TOWN OF SPRINGVILLE - 01032	None	Vote Pad
ADAMS COUNTY - 01	TOWN OF STRONGS PRAIRIE - 01034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ADAMS COUNTY - 01	VILLAGE OF FRIENDSHIP - 01126	None	Vote Pad
ASHLAND COUNTY - 02	CITY OF ASHLAND - MAIN - 02201	ES&S M100	ES&S AutoMARK
ASHLAND COUNTY - 02	CITY OF MELLEN - 02251	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF AGENDA - 02002	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF ASHLAND - 02004	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF CHIPPEWA - 02006	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF GINGLES - 02008	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF GORDON - 02010	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF JACOBS - 02012	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF LA POINTE - 02014	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF MARENGO - 02016	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF MORSE - 02018	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF PEEKSVILLE - 02020	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF SANBORN - 02022	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF SHANAGOLDEN - 02024	None	ES&S AutoMARK
ASHLAND COUNTY - 02	TOWN OF WHITE RIVER - 02026	None	ES&S AutoMARK
ASHLAND COUNTY - 02	VILLAGE OF BUTTERNUT - 02106	None	ES&S AutoMARK
BARRON COUNTY - 03	CITY OF BARRON - 03206	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	CITY OF CHETEK - 03211	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	CITY OF CUMBERLAND - 03212	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	CITY OF RICE LAKE - 03276	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF ALMENA - 03002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF ARLAND - 03004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF BARRON - 03006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF BEAR LAKE - 03008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF CEDAR LAKE - 03010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF CHETEK - 03012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
BARRON COUNTY - 03	TOWN OF CLINTON - 03014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF CRYSTAL LAKE - 03016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF CUMBERLAND - 03018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF DALLAS - 03020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF DOVRE - 03022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF DOYLE - 03024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF LAKELAND - 03026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF MAPLE GROVE - 03028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF MAPLE PLAIN - 03030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF OAK GROVE - 03032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF PRAIRIE FARM - 03034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF PRAIRIE LAKE - 03036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF RICE LAKE - 03038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF SIOUX CREEK - 03040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF STANFOLD - 03042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF STANLEY - 03044	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF SUMNER - 03046	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF TURTLE LAKE - 03048	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	TOWN OF VANCE CREEK - 03050	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF ALMENA - 03101	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF CAMERON - 03111	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF DALLAS - 03116	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF HAUGEN - 03136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF PRAIRIE FARM - 03171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BARRON COUNTY - 03	VILLAGE OF TURTLE LAKE - MAIN - 03186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BAYFIELD COUNTY - 04	CITY OF BAYFIELD - 04206	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	CITY OF WASHBURN - 04291	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF BARKSDALE - 04002	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF BARNES - 04004	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF BAYFIELD - 04006	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF BAYVIEW - 04008	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF BELL - 04010	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF CABLE - 04012	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF CLOVER - 04014	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF DELTA - 04016	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF DRUMMOND - 04018	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF EILEEN - 04020	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF GRAND VIEW - 04021	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF HUGHES - 04022	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF IRON RIVER - 04024	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF KELLY - 04026	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF KEYSTONE - 04028	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF LINCOLN - 04030	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF MASON - 04032	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF NAMAKAGON - 04034	None	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
BAYFIELD COUNTY - 04	TOWN OF ORIENTA - 04036	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF OULU - 04038	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF PILSEN - 04040	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF PORT WING - 04042	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF RUSSELL - 04046	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF TRIPP - 04048	None	ES&S AutoMARK
BAYFIELD COUNTY - 04	TOWN OF WASHBURN - 04050	ES&S M100	ES&S AutoMARK
BAYFIELD COUNTY - 04	VILLAGE OF MASON - 04151	None	ES&S AutoMARK
BROWN COUNTY - 05	CITY OF DE PERE - 05216	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	CITY OF GREEN BAY - 05231	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF EATON - 05010	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF GLENMORE - 05012	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF GREEN BAY - 05014	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF HOLLAND - 05018	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF HUMBOLDT - 05022	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF LAWRENCE - 05024	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF LEDGEVIEW - 05025	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF MORRISON - 05026	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF NEW DENMARK - 05028	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF PITTSFIELD - 05030	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF ROCKLAND - 05034	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF SCOTT - 05036	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	TOWN OF WRIGHTSTOWN - 05040	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF ALLOUEZ - 05102	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF ASHWAUBENON - 05104	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF BELLEVUE - 05106	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF DENMARK - 05116	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF HOBART - 05126	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF HOWARD - MAIN - 05136	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF PULASKI - MAIN - 05171	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF SUAMICO - 05178	ES&S DS200	ES&S ExpressVote
BROWN COUNTY - 05	VILLAGE OF WRIGHTSTOWN - MAIN - 05191	ES&S DS200	ES&S ExpressVote
BUFFALO COUNTY - 06	CITY OF ALMA - 06201	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	CITY OF BUFFALO CITY - 06206	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	CITY OF FOUNTAIN CITY - 06226	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	CITY OF MONDOVI - 06251	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF ALMA - 06002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF BELVIDERE - 06004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF BUFFALO - 06006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF CANTON - 06008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF CROSS - 06010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF DOVER - 06012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF GILMANTON - 06014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF GLENCOE - 06016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF LINCOLN - 06018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
BUFFALO COUNTY - 06	TOWN OF MAXVILLE - 06020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF MILTON - 06022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF MODENA - 06024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF MONDOVI - 06026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF MONTANA - 06028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF NAPLES - 06030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF NELSON - 06032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	TOWN OF WAUMANDEE - 06034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	VILLAGE OF COCHRANE - 06111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BUFFALO COUNTY - 06	VILLAGE OF NELSON - 06154	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF ANDERSON - 07002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF BLAINE - 07004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF DANIELS - 07006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF DEWEY - 07008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF GRANTSBURG - 07010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF JACKSON - 07012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF LA FOLLETTE - 07014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF LINCOLN - 07016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF MEENON - 07018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF OAKLAND - 07020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF ROOSEVELT - 07022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF RUSK - 07024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF SAND LAKE - 07026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF SCOTT - 07028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF SIREN - 07030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF SWISS - 07032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF TRADE LAKE - 07034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF UNION - 07036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF WEBB LAKE - 07038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF WEST MARSHLAND - 07040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	TOWN OF WOOD RIVER - 07042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	VILLAGE OF GRANTSBURG - 07131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	VILLAGE OF SIREN - 07181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
BURNETT COUNTY - 07	VILLAGE OF WEBSTER - 07191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CALUMET COUNTY - 08	CITY OF BRILLION - 08206	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	CITY OF CHILTON - 08211	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	CITY OF NEW HOLSTEIN - 08261	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF BRILLION - 08002	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF BROTHERTOWN - 08004	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF CHARLESTOWN - 08006	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF CHILTON - 08008	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF HARRISON - 08010	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF NEW HOLSTEIN - 08012	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF RANTOUL - 08014	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	TOWN OF STOCKBRIDGE - 08016	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
CALUMET COUNTY - 08	TOWN OF WOODVILLE - 08018	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	VILLAGE OF HARRISON - MAIN - 08131	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	VILLAGE OF HILBERT - 08136	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	VILLAGE OF POTTER - 08160	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	VILLAGE OF SHERWOOD - 08179	ES&S DS200	ES&S ExpressVote
CALUMET COUNTY - 08	VILLAGE OF STOCKBRIDGE - 08181	ES&S DS200	ES&S ExpressVote
CHIPPEWA COUNTY - 09	CITY OF BLOOMER - 09206	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	CITY OF CHIPPEWA FALLS - 09211	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	CITY OF CORNELL - 09213	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	CITY OF STANLEY - MAIN - 09281	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF ANSON - 09002	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF ARTHUR - 09004	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF AUBURN - 09006	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF BIRCH CREEK - 09008	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF BLOOMER - 09010	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF CLEVELAND - 09012	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF COLBURN - 09014	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF COOKS VALLEY - 09016	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF DELMAR - 09018	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF EAGLE POINT - 09020	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF EDSON - 09022	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF ESTELLA - 09024	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF GOETZ - 09026	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF HALLIE - 09028	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF HOWARD - 09032	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF LAFAYETTE - 09034	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF LAKE HOLCOMBE - 09035	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF RUBY - 09036	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF SAMPSON - 09038	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF SIGEL - 09040	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF TILDEN - 09042	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF WHEATON - 09044	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	TOWN OF WOODMOHR - 09046	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	VILLAGE OF BOYD - 09106	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	VILLAGE OF CADOTT - 09111	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	VILLAGE OF LAKE HALLIE - 09128	ClearCount 2.0.1	ClearAccess 2.0.1
CHIPPEWA COUNTY - 09	VILLAGE OF NEW AUBURN - MAIN - 09161	ClearCount 2.0.1	ClearAccess 2.0.1
CLARK COUNTY - 10	CITY OF ABBOTSFORD - MAIN - 10201	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF COLBY - MAIN - 10211	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF GREENWOOD - 10231	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF LOYAL - 10246	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF NEILLSVILLE - 10261	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF OWEN - 10265	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	CITY OF THORP - 10286	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF BEAVER - 10002	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
CLARK COUNTY - 10	TOWN OF BUTLER - 10004	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF COLBY - 10006	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF DEWHURST - 10008	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF EATON - 10010	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF FOSTER - 10012	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF FREMONT - 10014	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF GRANT - 10016	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF GREEN GROVE - 10018	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF HENDREN - 10020	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF HEWETT - 10022	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF HIXON - 10024	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF HOARD - 10026	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF LEVIS - 10028	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF LONGWOOD - 10030	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF LOYAL - 10032	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF LYNN - 10034	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF MAYVILLE - 10036	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF MEAD - 10038	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF MENTOR - 10040	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF PINE VALLEY - 10042	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF RESEBURG - 10044	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF SEIF - 10046	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF SHERMAN - 10048	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF SHERWOOD - 10050	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF THORP - 10052	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF UNITY - 10054	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF WARNER - 10056	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF WASHBURN - 10058	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF WESTON - 10060	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF WITHEE - 10062	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF WORDEN - 10064	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	TOWN OF YORK - 10066	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	VILLAGE OF CURTISS - 10111	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	VILLAGE OF DORCHESTER - MAIN - 10116	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	VILLAGE OF GRANTON - 10131	ES&S DS200	ES&S ExpressVote
CLARK COUNTY - 10	VILLAGE OF WITHEE - 10191	ES&S DS200	ES&S ExpressVote
COLUMBIA COUNTY - 11	CITY OF COLUMBUS - MAIN - 11211	ES&S DS200	ES&S ExpressVote
COLUMBIA COUNTY - 11	CITY OF LODI - 11246	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	CITY OF PORTAGE - 11271	ES&S DS200	ES&S ExpressVote
COLUMBIA COUNTY - 11	CITY OF WISCONSIN DELLS - MAIN - 11291	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF ARLINGTON - 11002	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF CALEDONIA - 11004	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF COLUMBUS - 11006	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF COURTLAND - 11008	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF DEKORRA - 11010	ES&S DS200	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
COLUMBIA COUNTY - 11	TOWN OF FORT WINNEBAGO - 11012	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF FOUNTAIN PRAIRIE - 11014	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF HAMPDEN - 11016	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF LEEDS - 11018	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF LEWISTON - 11020	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF LODI - 11022	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF LOWVILLE - 11024	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF MARCELLON - 11026	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF NEWPORT - 11028	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF OTSEGO - 11030	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF PACIFIC - 11032	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF RANDOLPH - 11034	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF SCOTT - 11036	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF SPRINGVALE - 11038	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF WEST POINT - 11040	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	TOWN OF WYOCENA - 11042	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF ARLINGTON - 11101	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF CAMBRIA - 11111	ES&S DS200	ES&S ExpressVote
COLUMBIA COUNTY - 11	VILLAGE OF DOYLESTOWN - 11116	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF FALL RIVER - 11126	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF FRIESLAND - 11127	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF PARDEEVILLE - 11171	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF POYNETTE - 11172	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF RIO - 11177	ES&S DS200	ES&S AutoMARK
COLUMBIA COUNTY - 11	VILLAGE OF WYOCENA - 11191	ES&S DS200	ES&S AutoMARK
CRAWFORD COUNTY - 12	CITY OF PRAIRIE DU CHIEN - 12271	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
CRAWFORD COUNTY - 12	TOWN OF BRIDGEPORT - 12002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
CRAWFORD COUNTY - 12	TOWN OF CLAYTON - 12004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF EASTMAN - 12006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF FREEMAN - 12008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF HANEY - 12010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF MARIETTA - 12012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF PRAIRIE DU CHIEN - 12014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF SCOTT - 12016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF SENECA - 12018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF UTICA - 12020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	TOWN OF WAUZEKA - 12022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF BELL CENTER - 12106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF DE SOTO -	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF EASTMAN - 12121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF FERRYVILLE - 12126	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF GAYS MILLS - 12131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF LYNXVILLE - 12146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF MT. STERLING - 12151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF SOLDIERS GROVE - 12181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
CRAWFORD COUNTY - 12	VILLAGE OF STEUBEN - 12182	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
CRAWFORD COUNTY - 12	VILLAGE OF WAUZEKA - 12191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DANE COUNTY - 13	CITY OF FITCHBURG - 13225	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF MADISON - 13251	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF MIDDLETON - 13255	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF MONONA - 13258	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF STOUGHTON - 13281	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF SUN PRAIRIE - 13282	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	CITY OF VERONA - 13286	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF ALBION - 13002	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BERRY - 13004	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BLACK EARTH - 13006	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BLOOMING GROVE - 13008	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BLUE MOUNDS - 13010	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BRISTOL - 13012	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF BURKE - 13014	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF CHRISTIANA - 13016	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF COTTAGE GROVE - 13018	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF CROSS PLAINS - 13020	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF DANE - 13022	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF DEERFIELD - 13024	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF DUNKIRK - 13026	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF DUNN - 13028	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF MADISON - 13032	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF MAZOMANIE - 13034	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF MEDINA - 13036	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF MIDDLETON - 13038	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF MONTROSE - 13040	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF OREGON - 13042	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF PERRY - 13044	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF PLEASANT SPRINGS - 13046	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF PRIMROSE - 13048	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF ROXBURY - 13050	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF RUTLAND - 13052	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF SPRINGDALE - 13054	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF SPRINGFIELD - 13056	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF SUN PRAIRIE - 13058	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF VERMONT - 13060	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF VERONA - 13062	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF VIENNA - 13064	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF WESTPORT - 13066	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF WINDSOR - 13068	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	TOWN OF YORK - 13070	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF BELLEVILLE - MAIN - 13106	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF BLACK EARTH - 13107	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
DANE COUNTY - 13	VILLAGE OF BLUE MOUNDS - 13108	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF BROOKLYN - MAIN - 13109	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF CAMBRIDGE - MAIN - 13111	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF COTTAGE GROVE - 13112	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF CROSS PLAINS - 13113	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF DANE - 13116	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF DEERFIELD - 13117	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF DEFOREST - 13118	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF MAPLE BLUFF - 13151	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF MARSHALL - 13152	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF MAZOMANIE - 13153	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF MCFARLAND - 13154	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF MOUNT HOREB - 13157	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF OREGON - 13165	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF ROCKDALE - 13176	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF SHOREWOOD HILLS - 13181	ES&S DS200	ES&S ExpressVote
DANE COUNTY - 13	VILLAGE OF WAUNAKEE - 13191	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF BEAVER DAM - 14206	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF FOX LAKE - 14226	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF HORICON - 14236	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF JUNEAU - 14241	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF MAYVILLE - 14251	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	CITY OF WAUPUN - MAIN - 14292	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF ASHIPPUN - 14002	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF BEAVER DAM - 14004	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF BURNETT - 14006	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF CALAMUS - 14008	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF CHESTER - 14010	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF CLYMAN - 14012	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF ELBA - 14014	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF EMMET - 14016	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF FOX LAKE - 14018	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF HERMAN - 14020	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF HUBBARD - 14022	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF HUSTISFORD - 14024	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF LEBANON - 14026	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF LEROY - 14028	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF LOMIRA - 14030	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF LOWELL - 14032	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF OAK GROVE - 14034	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF PORTLAND - 14036	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF RUBICON - 14038	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF SHIELDS - 14040	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF THERESA - 14042	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF TRENTON - 14044	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
DODGE COUNTY - 14	TOWN OF WESTFORD - 14046	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	TOWN OF WILLIAMSTOWN - 14048	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF BROWNSVILLE - 14106	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF CLYMAN - 14111	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF HUSTISFORD - 14136	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF IRON RIDGE - 14141	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF KEKOSKEE - 14143	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF LOMIRA - 14146	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF LOWELL - 14147	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF NEOSHO - 14161	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF RANDOLPH - MAIN - 14176	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF REESEVILLE - 14177	ES&S DS200	ES&S ExpressVote
DODGE COUNTY - 14	VILLAGE OF THERESA - 14186	ES&S DS200	ES&S ExpressVote
DOOR COUNTY - 15	CITY OF STURGEON BAY - 15281	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF BAILEYS HARBOR - 15002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF BRUSSELS - 15004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF CLAY BANKS - 15006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF EGG HARBOR - 15008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF FORESTVILLE - 15010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF GARDNER - 15012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF GIBRALTAR - 15014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF JACKSONPORT - 15016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF LIBERTY GROVE - 15018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF NASEWAUPEE - 15020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF SEVASTOPOL - 15022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF STURGEON BAY - 15024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF UNION - 15026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	TOWN OF WASHINGTON - 15028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	VILLAGE OF EGG HARBOR - 15118	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	VILLAGE OF EPHRAIM - 15121	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	VILLAGE OF FORESTVILLE - 15127	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOOR COUNTY - 15	VILLAGE OF SISTER BAY - 15181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
DOUGLAS COUNTY - 16 as of 8/2018	CITY OF SUPERIOR - 16281	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF AMNICON - 16002	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF BENNETT - 16004	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF BRULE - 16006	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF CLOVERLAND - 16008	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF DAIRYLAND - 16010	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF GORDON - 16012	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF HAWTHORNE - 16014	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF HIGHLAND - 16016	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF LAKESIDE - 16018	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF MAPLE - 16020	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF OAKLAND - 16022	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF PARKLAND - 16024	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
DOUGLAS COUNTY - 16	TOWN OF SOLON SPRINGS - 16026	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF SUMMIT - 16028	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF SUPERIOR - 16030	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	TOWN OF WASCOTT - 16032	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	VILLAGE OF LAKE NEBAGAMON - 16146	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	VILLAGE OF OLIVER - 16165	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	VILLAGE OF POPLAR - 16171	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	VILLAGE OF SOLON SPRINGS - 16181	ES&S DS200	ES&S ExpressVote
DOUGLAS COUNTY - 16	VILLAGE OF SUPERIOR - 16182	ES&S DS200	ES&S ExpressVote
DUNN COUNTY - 17	CITY OF MENOMONIE - 17251	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF COLFAX - 17002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF DUNN - 17004	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF EAU GALLE - 17006	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF ELK MOUND - 17008	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF GRANT - 17010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF HAY RIVER - 17012	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF LUCAS - 17014	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF MENOMONIE - 17016	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF NEW HAVEN - 17018	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF OTTER CREEK - 17020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF PERU - 17022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF RED CEDAR - 17024	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF ROCK CREEK - 17026	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF SAND CREEK - 17028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF SHERIDAN - 17030	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF SHERMAN - 17032	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF SPRING BROOK - 17034	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF STANTON - 17036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF TAINTER - 17038	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF TIFFANY - 17040	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF WESTON - 17042	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	TOWN OF WILSON - 17044	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF BOYCEVILLE - 17106	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF COLFAX - 17111	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF DOWNING - 17116	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF ELK MOUND - 17121	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF KNAPP - 17141	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF RIDGELAND - 17176	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
DUNN COUNTY - 17	VILLAGE OF WHEELER - 17191	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
EAU CLAIRE COUNTY - 18	CITY OF ALTOONA - 18201	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	CITY OF AUGUSTA - 18202	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	CITY OF EAU CLAIRE - MAIN - 18221	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF BRIDGE CREEK - 18002	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF BRUNSWICK - 18004	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF CLEAR CREEK - 18006	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
EAU CLAIRE COUNTY - 18	TOWN OF DRAMMEN - 18008	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF FAIRCHILD - 18010	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF LINCOLN - 18012	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF LUDINGTON - 18014	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF OTTER CREEK - 18016	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF PLEASANT VALLEY - 18018	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF SEYMOUR - 18020	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF UNION - 18022	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF WASHINGTON - 18024	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	TOWN OF WILSON - 18026	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	VILLAGE OF FAIRCHILD - 18126	ES&S DS200	ES&S ExpressVote
EAU CLAIRE COUNTY - 18	VILLAGE OF FALL CREEK - 18127	ES&S DS200	ES&S ExpressVote
FLORENCE COUNTY - 19	TOWN OF AURORA - 19002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF COMMONWEALTH - 19004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF FENCE - 19006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF FERN - 19008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF FLORENCE - 19010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF HOMESTEAD - 19012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF LONG LAKE - 19014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FLORENCE COUNTY - 19	TOWN OF TIPLER - 19016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOND DU LAC COUNTY - 20	CITY OF FOND DU LAC - 20226	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	CITY OF RIPON - 20276	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	CITY OF WAUPUN - 14292	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF ALTO - 20002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF ASHFORD - 20004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF AUBURN - 20006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF BYRON - 20008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF CALUMET - 20010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF EDEN - 20012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF ELDORADO - 20014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF EMPIRE - 20016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF FOND DU LAC - 20018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF FOREST - 20020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF FRIENDSHIP - 20022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF LAMARTINE - 20024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF MARSHFIELD - 20026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF METOMEN - 20028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF OAKFIELD - 20030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF OSCEOLA - 20032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF RIPON - 20034	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF ROSENDALE - 20036	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF SPRINGVALE - 20038	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF TAYCHEEDAH - 20040	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	TOWN OF WAUPUN - 20042	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF BRANDON - 20106	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
FOND DU LAC COUNTY - 20	VILLAGE OF CAMPBELLSPORT - 20111	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF EDEN - 20121	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF FAIRWATER - 20126	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF MOUNT CALVARY - 20151	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF NORTH FOND DU LAC - 20161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF OAKFIELD - 20165	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF ROSENDALE - 20176	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOND DU LAC COUNTY - 20	VILLAGE OF ST. CLOUD - 20181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
FOREST COUNTY - 21	CITY OF CRANDON - 21211	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF ALVIN - 21002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF ARGONNE - 21004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF ARMSTRONG CREEK - 21006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF BLACKWELL - 21008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF CASWELL - 21010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF CRANDON - 21012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF FREEDOM - 21014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF HILES - 21016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF LAONA - 21018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF LINCOLN - 21020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF NASHVILLE - 21022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF POPPLE RIVER - 21024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF ROSS - 21026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
FOREST COUNTY - 21	TOWN OF WABENO - 21028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	CITY OF BOSCOBEL - 22206	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	CITY OF CUBA CITY - MAIN - 22211	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	CITY OF FENNIMORE - 22226	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	CITY OF LANCASTER - 22246	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	CITY OF PLATTEVILLE - 22271	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF BEETOWN - 22002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF BLOOMINGTON - 22004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF BOSCOBEL - 22006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF CASSVILLE - 22008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF CASTLE ROCK - 22010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF CLIFTON - 22012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF ELLENBORO - 22014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF FENNIMORE - 22016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF GLEN HAVEN - 22018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF HARRISON - 22020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF HAZEL GREEN - 22022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF HICKORY GROVE - 22024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF JAMESTOWN - 22026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF LIBERTY - 22028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF LIMA - 22030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF LITTLE GRANT - 22032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF MARION - 22034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
GRANT COUNTY - 22	TOWN OF MILLVILLE - 22036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF MOUNT HOPE - 22038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF MOUNT IDA - 22040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF MUSCODA - 22042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF NORTH LANCASTER - 22044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF PARIS - 22046	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF PATCH GROVE - 22048	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF PLATTEVILLE - 22050	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF POTOSI - 22052	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF SMELSER - 22054	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF SOUTH LANCASTER - 22056	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	TOWN OF WATERLOO - 22058	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF WATTERSTOWN - 22060	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF WINGVILLE - 22062	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF WOODMAN - 22064	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	TOWN OF WYALUSING - 22066	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF BAGLEY - 22106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF BLOOMINGTON - 22107	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF BLUE RIVER - 22108	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF CASSVILLE - 22111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF DICKEYVILLE - 22116	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF HAZEL GREEN - MAIN - 22136	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF LIVINGSTON - MAIN - 22147	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF MONTFORT - MAIN - 22151	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF MOUNT HOPE - 22152	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF MUSCODA - MAIN - 22153	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GRANT COUNTY - 22	VILLAGE OF PATCH GROVE - 22171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF POTOSI - 22172	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF TENNYSON - 22186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GRANT COUNTY - 22	VILLAGE OF WOODMAN - 22191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN COUNTY - 23	CITY OF BRODHEAD - MAIN - 23206	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	CITY OF MONROE - 23251	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF ADAMS - 23002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF ALBANY - 23004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF BROOKLYN - 23006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF CADIZ - 23008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF CLARNO - 23010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF DECATUR - 23012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF EXETER - 23014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF JEFFERSON - 23016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF JORDAN - 23018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF MONROE - 23020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF MOUNT PLEASANT - 23022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF NEW GLARUS - 23024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF SPRING GROVE - 23026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
GREEN COUNTY - 23	TOWN OF SYLVESTER - 23028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF WASHINGTON - 23030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	TOWN OF YORK - 23032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	VILLAGE OF ALBANY - 23101	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	VILLAGE OF BROWNTOWN - 23110	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	VILLAGE OF MONTICELLO - 23151	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN COUNTY - 23	VILLAGE OF NEW GLARUS - 23161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
GREEN LAKE COUNTY - 24	CITY OF BERLIN - MAIN - 24206	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	CITY OF GREEN LAKE - 24231	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	CITY OF MARKESAN - 24251	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	CITY OF PRINCETON - 24271	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF BERLIN - 24002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF BROOKLYN - 24004	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF GREEN LAKE - 24006	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF KINGSTON - 24008	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF MACKFORD - 24010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF MANCHESTER - 24012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF MARQUETTE - 24014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF PRINCETON - 24016	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF SENECA - 24020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	TOWN OF ST. MARIE - 24018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	VILLAGE OF KINGSTON - 24141	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
GREEN LAKE COUNTY - 24	VILLAGE OF MARQUETTE - 24154	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	CITY OF DODGEVILLE - 25216	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	CITY OF MINERAL POINT - 25251	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF ARENA - 25002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF BRIGHAM - 25004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF CLYDE - 25006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF DODGEVILLE - 25008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF EDEN - 25010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF HIGHLAND - 25012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF LINDEN - 25014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF MIFFLIN - 25016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF MINERAL POINT - 25018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF MOSCOW - 25020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF PULASKI - 25022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF RIDGEWAY - 25024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF WALDWICK - 25026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	TOWN OF WYOMING - 25028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF ARENA - 25101	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF AVOCA - 25102	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF BARNEVELD - 25106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF COBB - 25111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF HIGHLAND - 25136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF HOLLANDALE - 25137	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
IOWA COUNTY - 25	VILLAGE OF LINDEN - 25146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF REWEY - 25176	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IOWA COUNTY - 25	VILLAGE OF RIDGEWAY - 25177	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	CITY OF HURLEY - 26236	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	CITY OF MONTREAL - 26251	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF ANDERSON - 26002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF CAREY - 26004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF GURNEY - 26006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF KIMBALL - 26008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF KNIGHT - 26010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF MERCER - 26012	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF OMA - 26014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF PENCE - 26016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF SAXON - 26018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
IRON COUNTY - 26	TOWN OF SHERMAN - 26020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	CITY OF BLACK RIVER FALLS - 27206	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF ADAMS - 27002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF ALBION - 27004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF ALMA - 27006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF BEAR BLUFF - 27008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF BROCKWAY - 27010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF CITY POINT - 27012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF CLEVELAND - 27014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF CURRAN - 27016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF FRANKLIN - 27018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF GARDEN VALLEY - 27020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF GARFIELD - 27022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF HIXTON - 27024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF IRVING - 27026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF KNAPP - 27028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF KOMENSKY - 27030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF MANCHESTER - 27032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF MELROSE - 27034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF MILLSTON - 27036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF NORTH BEND - 27038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF NORTHFIELD - 27040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	TOWN OF SPRINGFIELD - 27042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	VILLAGE OF ALMA CENTER - 27101	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	VILLAGE OF HIXTON - 27136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	VILLAGE OF MELROSE - 27151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	VILLAGE OF MERRILLAN - 27152	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JACKSON COUNTY - 27	VILLAGE OF TAYLOR - 27186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JEFFERSON COUNTY - 28	CITY OF FORT ATKINSON - 28226	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	CITY OF JEFFERSON - 28241	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	CITY OF LAKE MILLS - 28246	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
JEFFERSON COUNTY - 28	CITY OF WATERLOO - 28290	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	CITY OF WATERTOWN - MAIN - 28291	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF AZTALAN - 28002	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF COLD SPRING - 28004	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF CONCORD - 28006	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF FARMINGTON - 28008	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF HEBRON - 28010	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF IXONIA - 28012	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF JEFFERSON - 28014	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF KOSHKONONG - 28016	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF LAKE MILLS - 28018	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF MILFORD - 28020	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF OAKLAND - 28022	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF PALMYRA - 28024	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF SULLIVAN - 28026	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF SUMNER - 28028	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF WATERLOO - 28030	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	TOWN OF WATERTOWN - 28032	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	VILLAGE OF JOHNSON CREEK - 28141	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	VILLAGE OF PALMYRA - 28171	ES&S DS200	ES&S ExpressVote
JEFFERSON COUNTY - 28	VILLAGE OF SULLIVAN - 28181	ES&S DS200	ES&S ExpressVote
JUNEAU COUNTY - 29	CITY OF ELROY - 29221	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	CITY OF MAUSTON - 29251	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	CITY OF NEW LISBON - 29261	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF ARMENIA - 29002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF CLEARFIELD - 29004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
JUNEAU COUNTY - 29	TOWN OF CUTLER - 29006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF FINLEY - 29008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF FOUNTAIN - 29010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF GERMANTOWN - 29012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF KILDARE - 29014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF KINGSTON - 29016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF LEMONWEIR - 29018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF LINDINA - 29020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF LISBON - 29022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
JUNEAU COUNTY - 29	TOWN OF LYNDON - 29024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
JUNEAU COUNTY - 29	TOWN OF MARION - 29026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF NECEDAH - 29028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
JUNEAU COUNTY - 29	TOWN OF ORANGE - 29030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF PLYMOUTH - 29032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF SEVEN MILE CREEK - 29034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF SUMMIT - 29036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	TOWN OF WONEWOC - 29038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	VILLAGE OF CAMP DOUGLAS - 29111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	VILLAGE OF HUSTLER - 29136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
JUNEAU COUNTY - 29	VILLAGE OF LYNDON STATION - 29146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	VILLAGE OF NECEDAH - 29161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
JUNEAU COUNTY - 29	VILLAGE OF UNION CENTER - 29186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
JUNEAU COUNTY - 29	VILLAGE OF WONEWOC - 29191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KENOSHA COUNTY - 30	CITY OF KENOSHA - 30241	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF BRIGHTON - 30002	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF PARIS - 30006	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF RANDALL - 30010	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF SALEM - 30012	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF SOMERS - 30014	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	TOWN OF WHEATLAND - 30016	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF BRISTOL - 30104	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF PADDOCK LAKE - 30171	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF PLEASANT PRAIRIE - 30174	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF SILVER LAKE - 30181	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF SOMERS - 30182	ES&S DS200	ES&S ExpressVote
KENOSHA COUNTY - 30	VILLAGE OF TWIN LAKES - 30186	ES&S DS200	ES&S ExpressVote
KEWAUNEE COUNTY - 31	CITY OF ALGOMA - 31201	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	CITY OF KEWAUNEE - 31241	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF AHNAPEE - 31002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF CARLTON - 31004	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF CASCO - 31006	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF FRANKLIN - 31008	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF LINCOLN - 31010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF LUXEMBURG - 31012	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF MONTPELIER - 31014	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF PIERCE - 31016	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF RED RIVER - 31018	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	TOWN OF WEST KEWAUNEE - 31020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	VILLAGE OF CASCO - 31111	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
KEWAUNEE COUNTY - 31	VILLAGE OF LUXEMBURG - 31146	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LA CROSSE COUNTY - 32	CITY OF LA CROSSE - 32246	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	CITY OF ONALASKA - 32265	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF BANGOR - 32002	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF BARRE - 32004	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF BURNS - 32006	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF CAMPBELL - 32008	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF FARMINGTON - 32010	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF GREENFIELD - 32012	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF HAMILTON - 32014	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF HOLLAND - 32016	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF MEDARY - 32018	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF ONALASKA - 32020	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF SHELBY - 32022	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	TOWN OF WASHINGTON - 32024	ES&S DS200	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
LA CROSSE COUNTY - 32	VILLAGE OF BANGOR - 32106	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	VILLAGE OF HOLMEN - 32136	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	VILLAGE OF ROCKLAND - 32176	ES&S DS200	ES&S AutoMARK
LA CROSSE COUNTY - 32	VILLAGE OF WEST SALEM - 32191	ES&S DS200	ES&S AutoMARK
LAFAYETTE COUNTY - 33	CITY OF DARLINGTON - 33216	ES&S DS200	ES&S AutoMARK
LAFAYETTE COUNTY - 33	CITY OF SHULLSBURG - 33281	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF ARGYLE - 33002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF BELMONT - 33004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF BENTON - 33006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF BLANCHARD - 33008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF DARLINGTON - 33010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF ELK GROVE - 33012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF FAYETTE - 33014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF GRATIOT - 33016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF KENDALL - 33018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF LAMONT - 33020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF MONTICELLO - 33022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF NEW DIGGINGS - 33024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF SEYMOUR - 33026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF SHULLSBURG - 33028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF WAYNE - 33030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF WHITE OAK SPRINGS - 33032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF WILLOW SPRINGS - 33034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	TOWN OF WIOTA - 33036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF ARGYLE - 33101	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF BELMONT - 33106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF BENTON - 33107	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF BLANCHARDVILLE - MAIN - 33108	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF GRATIOT - 33131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LAFAYETTE COUNTY - 33	VILLAGE OF SOUTH WAYNE - 33181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	CITY OF ANTIGO - 34201	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF ACKLEY - 34002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF AINSWORTH - 34004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF ANTIGO - 34006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF ELCHO - 34008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF EVERGREEN - 34010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF LANGLADE - 34012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF NEVA - 34014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF NORWOOD - 34016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF PARRISH - 34018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF PECK - 34020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF POLAR - 34022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF PRICE - 34024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF ROLLING - 34026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF SUMMIT - 34028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
LANGLADE COUNTY - 34	TOWN OF UPHAM - 34030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF VILAS - 34032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	TOWN OF WOLF RIVER - 34034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LANGLADE COUNTY - 34	VILLAGE OF WHITE LAKE - 34191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LINCOLN COUNTY - 35	CITY OF MERRILL - 35251	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
LINCOLN COUNTY - 35	CITY OF TOMAHAWK - 35286	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF BIRCH - 35002	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF BRADLEY - 35004	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF CORNING - 35006	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF HARDING - 35008	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF HARRISON - 35010	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF KING - 35012	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF MERRILL - 35014	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF PINE RIVER - 35016	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF ROCK FALLS - 35018	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF RUSSELL - 35020	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF SCHLEY - 35022	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF SCOTT - 35024	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF SKANAWAN - 35026	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF SOMO - 35028	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF TOMAHAWK - 35030	ES&S DS200	ES&S AutoMARK
LINCOLN COUNTY - 35	TOWN OF WILSON - 35032	ES&S DS200	ES&S AutoMARK
MANITOWOC COUNTY - 36	CITY OF KIEL - MAIN - 36241	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	CITY OF MANITOWOC - 36251	ES&S DS200	ES&S ExpressVote
MANITOWOC COUNTY - 36	CITY OF TWO RIVERS - 36286	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF CATO - 36002	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF CENTERVILLE - 36004	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF COOPERSTOWN - 36006	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF EATON - 36008	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF FRANKLIN - 36010	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF GIBSON - 36012	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF KOSSUTH - 36014	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF LIBERTY - 36016	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF MANITOWOC - 36018	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF MANITOWOC RAPIDS - 36020	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF MAPLE GROVE - 36022	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF MEEME - 36024	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF MISHICOT - 36026	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF NEWTON - 36028	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF ROCKLAND - 36030	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF SCHLESWIG - 36032	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF TWO CREEKS - 36034	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	TOWN OF TWO RIVERS - 36036	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF CLEVELAND - 36112	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF FRANCIS CREEK - 36126	ES&S M100	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
MANITOWOC COUNTY - 36	VILLAGE OF KELLNERSVILLE - 36132	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF MARIBEL - 36147	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF MISHICOT - 36151	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF REEDSVILLE - 36176	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF ST. NAZIANZ - 36181	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF VALDERS - 36186	ES&S M100	ES&S AutoMARK
MANITOWOC COUNTY - 36	VILLAGE OF WHITELAW - 36191	ES&S M100	ES&S AutoMARK
MARATHON COUNTY - 37	CITY OF MOSINEE - 37251	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	CITY OF SCHOFIELD - 37281	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	CITY OF WAUSAU - 37291	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF BERGEN - 37002	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF BERLIN - 37004	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF BERN - 37006	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF BEVENT - 37008	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF BRIGHTON - 37010	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF CASSEL - 37012	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF CLEVELAND - 37014	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF DAY - 37016	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF EASTON - 37018	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF EAU PLEINE - 37020	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF ELDERON - 37022	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF EMMET - 37024	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF FRANKFORT - 37026	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF FRANZEN - 37028	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF GREEN VALLEY - 37030	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF GUENTHER - 37032	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HALSEY - 37034	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HAMBURG - 37036	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HARRISON - 37038	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HEWITT - 37040	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HOLTON - 37042	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF HULL - 37044	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF JOHNSON - 37046	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF KNOWLTON - 37048	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF MAINE - 37052	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF MARATHON - 37054	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF MCMILLAN - 37056	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF MOSINEE - 37058	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF NORRIE - 37060	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF PLOVER - 37062	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF REID - 37064	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF RIB FALLS - 37066	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF RIB MOUNTAIN - 37068	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF RIETBROCK - 37070	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF RINGLE - 37072	ES&S DS200	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
MARATHON COUNTY - 37	TOWN OF SPENCER - 37074	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF STETTIN - 37076	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF TEXAS - 37078	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF WAUSAU - 37080	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF WESTON - 37082	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	TOWN OF WIEN - 37084	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF ATHENS - 37102	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF BROKAW - 37106	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF EDGAR - 37121	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF ELDERON - 37122	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF FENWOOD - 37126	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF HATLEY - 37136	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF KRONENWETTER - 37145	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF MARATHON CITY - 37151	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF ROTHSCHILD - 37176	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF SPENCER - 37181	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF STRATFORD - 37182	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF UNITY - MAIN - 37186	ES&S DS200	ES&S AutoMARK
MARATHON COUNTY - 37	VILLAGE OF WESTON - 37192	ES&S DS200	ES&S AutoMARK
MARINETTE COUNTY - 38	CITY OF MARINETTE - 38251	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	CITY OF NIAGARA - 38261	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	CITY OF PESHTIGO - 38271	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF AMBERG - 38002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF ATHELSTANE - 38004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF BEAVER - 38006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF BEECHER - 38008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF DUNBAR - 38010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF GOODMAN - 38012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF GROVER - 38014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF LAKE - 38016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF MIDDLE INLET - 38018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF NIAGARA - 38020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF PEMBINE - 38022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF PESHTIGO - 38024	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF PORTERFIELD - 38026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF POUND - 38028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF SILVER CLIFF - 38030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF STEPHENSON - 38032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF WAGNER - 38034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	TOWN OF WAUSAUKEE - 38036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	VILLAGE OF COLEMAN - 38111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	VILLAGE OF CRIVITZ - 38121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	VILLAGE OF POUND - 38171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARINETTE COUNTY - 38	VILLAGE OF WAUSAUKEE - 38191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	CITY OF MONTELLO - 39251	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
MARQUETTE COUNTY - 39	TOWN OF BUFFALO - 39002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF CRYSTAL LAKE - 39004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF DOUGLAS - 39006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF HARRIS - 39008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF MECAN - 39010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF MONTELLO - 39012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF MOUNDVILLE - 39014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF NESHKORO - 39016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF NEWTON - 39018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF OXFORD - 39020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF PACKWAUKEE - 39022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF SHIELDS - 39024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF SPRINGFIELD - 39026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	TOWN OF WESTFIELD - 39028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	VILLAGE OF ENDEAVOR - 39121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	VILLAGE OF NESHKORO - 39161	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	VILLAGE OF OXFORD - 39165	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MARQUETTE COUNTY - 39	VILLAGE OF WESTFIELD - 39191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MENOMINEE COUNTY - 40	TOWN OF MENOMINEE - 40001	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF CUDAHY - 41211	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF FRANKLIN - 41226	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF GLENDALE - 41231	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF GREENFIELD - 41236	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF MILWAUKEE - MAIN - 41251	ES&S DS200/ES&S DS850	ES&S AutoMARK/ES&S ExpressVote
MILWAUKEE COUNTY - 41	CITY OF OAK CREEK - 41265	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF SOUTH MILWAUKEE - 41282	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF ST. FRANCIS - 41281	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF WAUWATOSA - 41291	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	CITY OF WEST ALLIS - 41292	ES&S DS200	ES&S AutoMARK/ES&S ExpressVote
MILWAUKEE COUNTY - 41	VILLAGE OF BAYSIDE - MAIN - 41106	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF BROWN DEER - 41107	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF FOX POINT - 41126	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF GREENDALE - 41131	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF HALES CORNERS - 41136	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF RIVER HILLS - 41176	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF SHOREWOOD - 41181	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF WEST MILWAUKEE - 41191	ES&S DS200	ES&S AutoMARK
MILWAUKEE COUNTY - 41	VILLAGE OF WHITEFISH BAY - 41192	ES&S DS200	ES&S AutoMARK
MONROE COUNTY - 42	CITY OF SPARTA - 42281	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	CITY OF TOMAH - 42286	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF ADRIAN - 42002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF ANGELO - 42004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF BYRON - 42006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF CLIFTON - 42008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF GLENDALE - 42010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
MONROE COUNTY - 42	TOWN OF GRANT - 42012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF GREENFIELD - 42014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF JEFFERSON - 42016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF LA GRANGE - 42020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF LAFAYETTE - 42018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF LEON - 42022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF LINCOLN - 42024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF LITTLE FALLS - 42026	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF NEW LYME - 42028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF OAKDALE - 42030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF PORTLAND - 42032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF RIDGEVILLE - 42034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF SCOTT - 42036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF SHELDON - 42038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF SPARTA - 42040	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF TOMAH - 42042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF WELLINGTON - 42044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF WELLS - 42046	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	TOWN OF WILTON - 42048	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF CASHTON - 42111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF KENDALL - 42141	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF MELVINA - 42151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF NORWALK - 42161	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF OAKDALE - 42165	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF WARRENS - 42185	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF WILTON - 42191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
MONROE COUNTY - 42	VILLAGE OF WYEVILLE - 42192	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
OCONTO COUNTY - 43	CITY OF GILLETT - 43231	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	CITY OF OCONTO - 43265	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	CITY OF OCONTO FALLS - 43266	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF ABRAMS - 43002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF BAGLEY - 43006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF BRAZEAU - 43008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF BREED - 43010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF CHASE - 43012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF DOTY - 43014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF GILLETT - 43016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF HOW - 43018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
OCONTO COUNTY - 43	TOWN OF LAKEWOOD - 43019	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF LENA - 43020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF LITTLE RIVER - 43022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF LITTLE SUAMICO - 43024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF MAPLE VALLEY - 43026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF MORGAN - 43028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF MOUNTAIN - 43029	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
OCONTO COUNTY - 43	TOWN OF OCONTO - 43030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF OCONTO FALLS - 43032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF PENSAUKEE - 43034	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF RIVERVIEW - 43036	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF SPRUCE - 43038	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF STILES - 43040	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF TOWNSEND - 43042	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	TOWN OF UNDERHILL - 43044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
OCONTO COUNTY - 43	VILLAGE OF LENA - 43146	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OCONTO COUNTY - 43	VILLAGE OF SURING - 43181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
ONEIDA COUNTY - 44	CITY OF RHINELANDER - 44276	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF CASSIAN - 44002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF CRESCENT - 44004	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF ENTERPRISE - 44006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
ONEIDA COUNTY - 44	TOWN OF HAZELHURST - 44008	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF LAKE TOMAHAWK - 44010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF LITTLE RICE - 44012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF LYNNE - 44014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF MINOCQUA - 44016	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF MONICO - 44018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF NEWBOLD - 44020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF NOKOMIS - 44022	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF PELICAN - 44024	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF PIEHL - 44026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF PINE LAKE - 44028	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF SCHOEPKE - 44030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF STELLA - 44032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF SUGAR CAMP - 44034	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF THREE LAKES - 44036	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF WOODBORO - 44038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ONEIDA COUNTY - 44	TOWN OF WOODRUFF - 44040	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
OUTAGAMIE COUNTY - 45	CITY OF APPLETON - MAIN - 45201	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	CITY OF KAUKAUNA - MAIN - 45241	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	CITY OF SEYMOUR - 45281	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF BLACK CREEK - 45002	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF BOVINA - 45004	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF BUCHANAN - 45006	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF CENTER - 45008	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF CICERO - 45010	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF DALE - 45012	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF DEER CREEK - 45014	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF ELLINGTON - 45016	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF FREEDOM - 45018	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF GRAND CHUTE - 45020	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF GREENVILLE - 45022	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
OUTAGAMIE COUNTY - 45	TOWN OF HORTONIA - 45024	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF KAUKAUNA - 45026	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF LIBERTY - 45028	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF MAINE - 45030	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF MAPLE CREEK - 45032	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF ONEIDA - 45034	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF OSBORN - 45036	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF SEYMOUR - 45038	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	TOWN OF VANDENBROEK - 45040	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF BEAR CREEK - 45106	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF BLACK CREEK - 45107	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF COMBINED LOCKS - 45111	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF HORTONVILLE - 45136	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF KIMBERLY - 45141	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF LITTLE CHUTE - 45146	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF NICHOLS - 45155	ES&S DS200	ES&S ExpressVote
OUTAGAMIE COUNTY - 45	VILLAGE OF SHIOCTON - 45181	ES&S DS200	ES&S ExpressVote
OZAUKEE COUNTY - 46	CITY OF CEDARBURG - 46211	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	CITY OF MEQUON - 46255	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	CITY OF PORT WASHINGTON - 46271	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF BELGIUM - 46002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF CEDARBURG - 46004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF FREDONIA - 46006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF GRAFTON - 46008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF PORT WASHINGTON - 46012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	TOWN OF SAUKVILLE - 46014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF BAYSIDE - 41106	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF BELGIUM - 46106	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF FREDONIA - 46126	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF GRAFTON - 46131	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF NEWBURG - 67161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF SAUKVILLE - 46181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
OZAUKEE COUNTY - 46	VILLAGE OF THIENSVILLE - 46186	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PEPIN COUNTY - 47	CITY OF DURAND - 47216	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF ALBANY - 47002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF DURAND - 47004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF FRANKFORT - 47006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF LIMA - 47008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF PEPIN - 47010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF STOCKHOLM - 47012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF WATERVILLE - 47014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	TOWN OF WAUBEEK - 47016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	VILLAGE OF PEPIN - 47171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PEPIN COUNTY - 47	VILLAGE OF STOCKHOLM - 47181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	CITY OF PRESCOTT - 48271	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
PIERCE COUNTY - 48	CITY OF RIVER FALLS - MAIN - 48276	ES&S DS200	ES&S ExpressVote
PIERCE COUNTY - 48	TOWN OF CLIFTON - 48002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF DIAMOND BLUFF - 48004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF EL PASO - 48008	ES&S DS200	ES&S ExpressVote
PIERCE COUNTY - 48	TOWN OF ELLSWORTH - 48006	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF GILMAN - 48010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF HARTLAND - 48012	ES&S DS200	ES&S ExpressVote
PIERCE COUNTY - 48	TOWN OF ISABELLE - 48014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF MAIDEN ROCK - 48016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF MARTELL - 48018	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF OAK GROVE - 48020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF RIVER FALLS - 48022	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF ROCK ELM - 48024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF SALEM - 48026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF SPRING LAKE - 48028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	TOWN OF TRENTON - 48030	ES&S DS200	ES&S ExpressVote
PIERCE COUNTY - 48	TOWN OF TRIMBELLE - 48032	ES&S DS200	ES&S ExpressVote
PIERCE COUNTY - 48	TOWN OF UNION - 48034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF BAY CITY - 48106	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF ELLSWORTH - 48121	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF ELMWOOD - 48122	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF MAIDEN ROCK - 48151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF PLUM CITY - 48171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PIERCE COUNTY - 48	VILLAGE OF SPRING VALLEY - MAIN - 48181	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	CITY OF AMERY - 49201	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	CITY OF ST. CROIX FALLS - 49281	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF ALDEN - 49002	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF APPLE RIVER - 49004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF BALSAM LAKE - 49006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF BEAVER - 49008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF BLACK BROOK - 49010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF BONE LAKE - 49012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF CLAM FALLS - 49014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF CLAYTON - 49016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF CLEAR LAKE - 49018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF EUREKA - 49020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF FARMINGTON - 49022	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF GARFIELD - 49024	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF GEORGETOWN - 49026	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF JOHNSTOWN - 49028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF LAKETOWN - 49030	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF LINCOLN - 49032	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF LORAIN - 49034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF LUCK - 49036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF MCKINLEY - 49038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
POLK COUNTY - 49	TOWN OF MILLTOWN - 49040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF OSCEOLA - 49042	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF ST. CROIX FALLS - 49044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF STERLING - 49046	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	TOWN OF WEST SWEDEN - 49048	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF BALSAM LAKE - 49106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF CENTURIA - 49111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF CLAYTON - 49112	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF CLEAR LAKE - 49113	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF DRESSER - 49116	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF FREDERIC - 49126	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF LUCK - 49146	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF MILLTOWN - 49151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
POLK COUNTY - 49	VILLAGE OF OSCEOLA - 49165	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
PORTAGE COUNTY - 50	CITY OF STEVENS POINT - 50281	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF ALBAN - 50002	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF ALMOND - 50004	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF AMHERST - 50006	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF BELMONT - 50008	None	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF BUENA VISTA - 50010	ES&S M100	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF CARSON - 50012	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF DEWEY - 50014	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF EAU PLEINE - 50016	None	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF GRANT - 50018	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF HULL - 50020	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF LANARK - 50022	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF LINWOOD - 50024	None	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF NEW HOPE - 50026	None	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF PINE GROVE - 50028	None	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF PLOVER - 50030	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF SHARON - 50032	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	TOWN OF STOCKTON - 50034	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF ALMOND - 50101	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF AMHERST - 50102	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF AMHERST JUNCTION - 50103	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF JUNCTION CITY - 50141	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF NELSONVILLE - 50161	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF PARK RIDGE - 50171	None	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF PLOVER - 50173	ES&S DS200	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF ROSHOLT - 50176	ES&S M100	ES&S AutoMARK
PORTAGE COUNTY - 50	VILLAGE OF WHITING - 50191	ES&S M100	ES&S AutoMARK
PRICE COUNTY - 51	CITY OF PARK FALLS - 51271	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	CITY OF PHILLIPS - 51272	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF CATAWBA - 51002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF EISENSTEIN - 51004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
PRICE COUNTY - 51	TOWN OF ELK - 51006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF EMERY - 51008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF FIFIELD - 51010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF FLAMBEAU - 51012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF GEORGETOWN - 51014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF HACKETT - 51016	None	Sequoia Voting - AVC Edge
PRICE COUNTY - 51	TOWN OF HARMONY - 51018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF HILL - 51020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF KENNAN - 51022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF KNOX - 51024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF LAKE - 51026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF OGEMA - 51028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF PRENTICE - 51030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF SPIRIT - 51032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	TOWN OF WORCESTER - 51034	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	VILLAGE OF CATAWBA - 51111	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	VILLAGE OF KENNAN - 51141	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
PRICE COUNTY - 51	VILLAGE OF PRENTICE - 51171	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	CITY OF BURLINGTON - MAIN - 52206	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	CITY OF RACINE - 52276	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF BURLINGTON - 52002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF DOVER - 52006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF NORWAY - 52010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF RAYMOND - 52012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF WATERFORD - 52016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	TOWN OF YORKVILLE - 52018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF CALEDONIA - 52104	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF ELMWOOD PARK - 52121	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF MOUNT PLEASANT - 52151	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF NORTH BAY - 52161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF ROCHESTER - 52176	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF STURTEVANT - 52181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF UNION GROVE - 52186	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF WATERFORD - 52191	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF WIND POINT - 52192	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RACINE COUNTY - 52	VILLAGE OF YORKVILLE - 52194	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RICHLAND COUNTY - 53	CITY OF RICHLAND CENTER - 53276	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF AKAN - 53002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF BLOOM - 53004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF BUENA VISTA - 53006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF DAYTON - 53008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF EAGLE - 53010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF FOREST - 53012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF HENRIETTA - 53014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF ITHACA - 53016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
RICHLAND COUNTY - 53	TOWN OF MARSHALL - 53018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF ORION - 53020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF RICHLAND - 53022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF RICHWOOD - 53024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF ROCKBRIDGE - 53026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF SYLVAN - 53028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF WESTFORD - 53030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	TOWN OF WILLOW - 53032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	VILLAGE OF BOAZ - 53106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	VILLAGE OF CAZENOVIA - MAIN - 53111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	VILLAGE OF LONE ROCK - 53146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	VILLAGE OF VIOLA - MAIN - 53186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RICHLAND COUNTY - 53	VILLAGE OF YUBA - 53196	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
ROCK COUNTY - 54	CITY OF BELOIT - 54206	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	CITY OF EDGERTON - MAIN - 54221	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	CITY OF EVANSVILLE - 54222	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	CITY OF JANESVILLE - 54241	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	CITY OF MILTON - 54257	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF AVON - 54002	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF BELOIT - 54004	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF BRADFORD - 54006	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF CENTER - 54008	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF CLINTON - 54010	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF FULTON - 54012	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF HARMONY - 54014	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF JANESVILLE - 54016	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF JOHNSTOWN - 54018	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF LA PRAIRIE - 54020	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF LIMA - 54022	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF MAGNOLIA - 54024	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF MILTON - 54026	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF NEWARK - 54028	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF PLYMOUTH - 54030	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF PORTER - 54032	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF ROCK - 54034	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF SPRING VALLEY - 54036	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF TURTLE - 54038	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	TOWN OF UNION - 54040	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	VILLAGE OF CLINTON - 54111	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	VILLAGE OF FOOTVILLE - 54126	ES&S DS200	ES&S ExpressVote
ROCK COUNTY - 54	VILLAGE OF ORFORDVILLE - 54165	ES&S DS200	ES&S ExpressVote
RUSK COUNTY - 55	CITY OF LADYSMITH - 55246	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
RUSK COUNTY - 55	TOWN OF ATLANTA - 55002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF BIG BEND - 55004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF BIG FALLS - 55006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
RUSK COUNTY - 55	TOWN OF CEDAR RAPIDS - 55008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF DEWEY - 55010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF FLAMBEAU - 55012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF GRANT - 55014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF GROW - 55016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF HAWKINS - 55018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF HUBBARD - 55020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF LAWRENCE - 55022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF MARSHALL - 55024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF MURRY - 55026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF RICHLAND - 55028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF RUSK - 55030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF SOUTH FORK - 55032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF STRICKLAND - 55034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF STUBBS - 55036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF THORNAPPLE - 55038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF TRUE - 55040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF WASHINGTON - 55042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF WILKINSON - 55044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF WILLARD - 55046	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	TOWN OF WILSON - 55048	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF BRUCE - 55106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF CONRATH - 55111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF GLEN FLORA - 55131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF HAWKINS - 55136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF INGRAM - 55141	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF SHELDON - 55181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF TONY - 55186	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
RUSK COUNTY - 55	VILLAGE OF WEYERHAEUSER - 55191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAUK COUNTY - 57	CITY OF BARABOO - 57206	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	CITY OF REEDSBURG - 57276	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF BARABOO - 57002	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF BEAR CREEK - 57004	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF DELLONA - 57006	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF DELTON - 57008	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF EXCELSIOR - 57010	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF FAIRFIELD - 57012	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF FRANKLIN - 57014	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF FREEDOM - 57016	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF GREENFIELD - 57018	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF HONEY CREEK - 57020	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF IRONTON - 57022	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF LA VALLE - 57024	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF MERRIMAC - 57026	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF PRAIRIE DU SAC - 57028	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
SAUK COUNTY - 57	TOWN OF REEDSBURG - 57030	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF SPRING GREEN - 57032	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF SUMPTER - 57034	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF TROY - 57036	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF WASHINGTON - 57038	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF WESTFIELD - 57040	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF WINFIELD - 57042	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	TOWN OF WOODLAND - 57044	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF IRONTON - 57141	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF LAKE DELTON - 57146	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF LAVALLE - 57147	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF LIME RIDGE - 57148	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF LOGANVILLE - 57149	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF MERRIMAC - 57151	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF NORTH FREEDOM - 57161	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF PLAIN - 57171	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF PRAIRIE DU SAC - 57172	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF ROCK SPRINGS - 57176	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF SAUK CITY - 57181	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF SPRING GREEN - 57182	ES&S DS200	ES&S ExpressVote
SAUK COUNTY - 57	VILLAGE OF WEST BARABOO - 57191	ES&S DS200	ES&S ExpressVote
SAWYER COUNTY - 58	CITY OF HAYWARD - 58236	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF BASS LAKE - 58002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
SAWYER COUNTY - 58	TOWN OF COUDERAY - 58004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF DRAPER - 58006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF EDGEWATER - 58008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF HAYWARD - 58010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF HUNTER - 58012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF LENROOT - 58014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
SAWYER COUNTY - 58	TOWN OF MEADOWBROOK - 58016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF METEOR - 58018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF OJIBWA - 58020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF RADISSON - 58022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF ROUND LAKE - 58024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF SAND LAKE - 58026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF SPIDER LAKE - 58028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF WEIRGOR - 58030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	TOWN OF WINTER - 58032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	VILLAGE OF COUDERAY - 58111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	VILLAGE OF EXELAND - 58121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	VILLAGE OF RADISSON - 58176	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SAWYER COUNTY - 58	VILLAGE OF WINTER - 58190	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	CITY OF SHAWANO - 59281	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF ALMON - 59002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF ANGELICA - 59004	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
SHAWANO COUNTY - 59	TOWN OF ANIWA - 59006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF BARTELME - 59008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF BELLE PLAINE - 59010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF BIRNAMWOOD - 59012	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF FAIRBANKS - 59014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF GERMANIA - 59016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF GRANT - 59018	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF GREEN VALLEY - 59020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF HARTLAND - 59022	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF HERMAN - 59024	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF HUTCHINS - 59026	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF LESSOR - 59028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF MAPLE GROVE - 59030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF MORRIS - 59032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF NAVARINO - 59034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF PELLA - 59036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF RED SPRINGS - 59038	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF RICHMOND - 59040	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF SENECA - 59042	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF WASHINGTON - 59044	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF WAUKECHON - 59046	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF WESCOTT - 59048	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	TOWN OF WITTENBERG - 59050	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF ANIWA - 59101	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF BIRNAMWOOD - MAIN - 59106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF BONDUEL - 59107	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF BOWLER - 59108	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF CECIL - 59111	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF ELAND - 59121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF GRESHAM - 59131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF MATTOON - 59151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF TIGERTON - 59186	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHAWANO COUNTY - 59	VILLAGE OF WITTENBERG - 59191	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
SHEBOYGAN COUNTY - 60	CITY OF PLYMOUTH - 60271	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	CITY OF SHEBOYGAN - 60281	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	CITY OF SHEBOYGAN FALLS - 60282	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF GREENBUSH - 60002	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF HERMAN - 60004	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF HOLLAND - 60006	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF LIMA - 60008	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF LYNDON - 60010	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF MITCHELL - 60012	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF MOSEL - 60014	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF PLYMOUTH - 60016	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF RHINE - 60018	ClearCount 2.0.1	ClearAccess 2.0.1

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
SHEBOYGAN COUNTY - 60	TOWN OF RUSSELL - 60020	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF SCOTT - 60022	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF SHEBOYGAN - 60024	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF SHEBOYGAN FALLS - 60026	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF SHERMAN - 60028	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	TOWN OF WILSON - 60030	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF ADELL - 60101	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF CASCADE - 60111	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF CEDAR GROVE - 60112	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF ELKHART LAKE - 60121	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF GLENBEULAH - 60131	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF HOWARDS GROVE - 60135	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF KOHLER - 60141	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF OOSTBURG - 60165	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF RANDOM LAKE - 60176	ClearCount 2.0.1	ClearAccess 2.0.1
SHEBOYGAN COUNTY - 60	VILLAGE OF WALDO - 60191	ClearCount 2.0.1	ClearAccess 2.0.1
ST. CROIX COUNTY - 56	CITY OF GLENWOOD CITY - 56231	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	CITY OF HUDSON - 56236	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	CITY OF NEW RICHMOND - 56261	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF BALDWIN - 56002	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF CADY - 56004	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF CYLON - 56006	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF EAU GALLE - 56008	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF EMERALD - 56010	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF ERIN PRAIRIE - 56012	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF FOREST - 56014	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF GLENWOOD - 56016	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF HAMMOND - 56018	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF HUDSON - 56020	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF KINNICKINNIC - 56022	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF PLEASANT VALLEY - 56024	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF RICHMOND - 56026	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF RUSH RIVER - 56028	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF SOMERSET - 56032	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF SPRINGFIELD - 56034	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF ST. JOSEPH - 56030	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF STANTON - 56036	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF STAR PRAIRIE - 56038	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF TROY - 56040	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	TOWN OF WARREN - 56042	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF BALDWIN - 56106	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF DEER PARK - 56116	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF HAMMOND - 56136	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF NORTH HUDSON - 56161	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF ROBERTS - 56176	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
ST. CROIX COUNTY - 56	VILLAGE OF SOMERSET - 56181	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF STAR PRAIRIE - 56182	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF WILSON - 56191	ES&S DS200	ES&S ExpressVote
ST. CROIX COUNTY - 56	VILLAGE OF WOODVILLE - 56192	ES&S DS200	ES&S ExpressVote
TAYLOR COUNTY - 61	CITY OF MEDFORD - 61251	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF AURORA - 61002	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF BROWNING - 61004	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF CHELSEA - 61006	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF CLEVELAND - 61008	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF DEER CREEK - 61010	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF FORD - 61012	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF GOODRICH - 61014	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF GREENWOOD - 61016	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF GROVER - 61018	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF HAMMEL - 61020	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF HOLWAY - 61022	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF JUMP RIVER - 61024	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF LITTLE BLACK - 61026	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF MAPLEHURST - 61028	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF MCKINLEY - 61030	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF MEDFORD - 61032	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF MOLITOR - 61034	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF PERSHING - 61036	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF RIB LAKE - 61038	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF ROOSEVELT - 61040	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF TAFT - 61042	None	ES&S iVotronic
TAYLOR COUNTY - 61	TOWN OF WESTBORO - 61044	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	VILLAGE OF GILMAN - 61131	None	ES&S iVotronic
TAYLOR COUNTY - 61	VILLAGE OF LUBLIN - 61146	None	ES&S iVotronic
TAYLOR COUNTY - 61	VILLAGE OF RIB LAKE - 61176	ES&S M100	ES&S iVotronic
TAYLOR COUNTY - 61	VILLAGE OF STETSONVILLE - 61181	None	ES&S iVotronic
TREMPEALEAU COUNTY - 62	CITY OF ARCADIA - 62201	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
TREMPEALEAU COUNTY - 62	CITY OF BLAIR - 62206	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	CITY OF GALESVILLE - 62231	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	CITY OF INDEPENDENCE - 62241	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	CITY OF OSSEO - 62265	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	CITY OF WHITEHALL - 62291	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF ALBION - 62002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF ARCADIA - 62004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF BURNSIDE - 62006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF CALEDONIA - 62008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF CHIMNEY ROCK - 62010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF DODGE - 62012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF ETTRICK - 62014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF GALE - 62016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
TREMPEALEAU COUNTY - 62	TOWN OF HALE - 62018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF LINCOLN - 62020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF PIGEON - 62022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF PRESTON - 62024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF SUMNER - 62026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF TREMPEALEAU - 62028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	TOWN OF UNITY - 62030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	VILLAGE OF ELEVA - 62121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	VILLAGE OF ETTRICK - 62122	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	VILLAGE OF PIGEON FALLS - 62173	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	VILLAGE OF STRUM - 62181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
TREMPEALEAU COUNTY - 62	VILLAGE OF TREMPEALEAU - 62186	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	CITY OF HILLSBORO - 63236	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	CITY OF VIROQUA - 63286	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	CITY OF WESTBY - 63291	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF BERGEN - 63002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF CHRISTIANA - 63004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF CLINTON - 63006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF COON - 63008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF FOREST - 63010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF FRANKLIN - 63012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF GENOA - 63014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF GREENWOOD - 63016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF HAMBURG - 63018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF HARMONY - 63020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF HILLSBORO - 63022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF JEFFERSON - 63024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF KICKAPOO - 63026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF LIBERTY - 63028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF STARK - 63030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF STERLING - 63032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF UNION - 63034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF VIROQUA - 63036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF WEBSTER - 63038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF WHEATLAND - 63040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	TOWN OF WHITESTOWN - 63042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF CHASEBURG - 63111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF COON VALLEY - 63112	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF DE SOTO - MAIN - 63116	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF GENOA - 63131	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF LA FARGE - 63146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF ONTARIO - 63165	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF READSTOWN - 63176	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VERNON COUNTY - 63	VILLAGE OF STODDARD - 63181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
VILAS COUNTY - 64	CITY OF EAGLE RIVER - 64221	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
VILAS COUNTY - 64	TOWN OF ARBOR VITAE - 64002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF BOULDER JUNCTION - 64004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF CLOVERLAND - 64006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF CONOVER - 64008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF LAC DU FLAMBEAU - 64010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF LAND O-LAKES - 64012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF LINCOLN - 64014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF MANITOWISH WATERS - 64016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF PHELPS - 64018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF PLUM LAKE - 64020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF PRESQUE ISLE - 64022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF ST. GERMAIN - 64024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF WASHINGTON - 64026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
VILAS COUNTY - 64	TOWN OF WINCHESTER - 64028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	CITY OF DELAVAN - 65216	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	CITY OF ELKHORN - 65221	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	CITY OF LAKE GENEVA - 65246	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	CITY OF WHITEWATER - MAIN - 65291	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF BLOOMFIELD - 65002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF DARIEN - 65004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF DELAVAN - 65006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF EAST TROY - 65008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF GENEVA - 65010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF LA GRANGE - 65014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF LAFAYETTE - 65012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF LINN - 65016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF LYONS - 65018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF RICHMOND - 65020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF SHARON - 65022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF SPRING PRAIRIE - 65024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF SUGAR CREEK - 65026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF TROY - 65028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF WALWORTH - 65030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	TOWN OF WHITEWATER - 65032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF BLOOMFIELD - 65115	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF DARIEN - 65116	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF EAST TROY - 65121	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF FONTANA - 65126	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF GENOA CITY - MAIN - 65131	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF SHARON - 65181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF WALWORTH - 65191	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WALWORTH COUNTY - 65	VILLAGE OF WILLIAMS BAY - 65192	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHBURN COUNTY - 66	CITY OF SHELL LAKE - 66282	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	CITY OF SPOONER - 66281	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF BARRONETT - 66002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
WASHBURN COUNTY - 66	TOWN OF BASHAW - 66004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF BASS LAKE - 66006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF BEAVER BROOK - 66008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF BIRCHWOOD - 66010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF BROOKLYN - 66012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF CASEY - 66014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF CHICOG - 66016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF CRYSTAL - 66018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF EVERGREEN - 66020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF FROG CREEK - 66022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF GULL LAKE - 66024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF LONG LAKE - 66026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF MADGE - 66028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF MINONG - 66030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF SARONA - 66032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF SPOONER - 66034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF SPRINGBROOK - 66036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF STINNETT - 66038	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF STONE LAKE - 66040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	TOWN OF TREGO - 66042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	VILLAGE OF BIRCHWOOD - 66106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHBURN COUNTY - 66	VILLAGE OF MINONG - 66151	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WASHINGTON COUNTY - 67	CITY OF HARTFORD - MAIN - 67236	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	CITY OF WEST BEND - 67291	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF ADDISON - 67002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF BARTON - 67004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF ERIN - 67006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF FARMINGTON - 67008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF GERMANTOWN - 67010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF HARTFORD - 67012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF JACKSON - 67014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF KEWASKUM - 67016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF POLK - 67018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF TRENTON - 67022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF WAYNE - 67024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	TOWN OF WEST BEND - 67026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF GERMANTOWN - 67131	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF JACKSON - 67141	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF KEWASKUM - MAIN - 67142	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF NEWBURG - MAIN - 67161	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF RICHFIELD - 67166	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WASHINGTON COUNTY - 67	VILLAGE OF SLINGER - 67181	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WAUKESHA COUNTY - 68	CITY OF BROOKFIELD - 68206	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	CITY OF DELAFIELD - 68216	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	CITY OF MUSKEGO - 68251	ES&S DS200	ES&S ExpressVote

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
WAUKESHA COUNTY - 68	CITY OF NEW BERLIN - 68261	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	CITY OF OCONOMOWOC - 68265	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	CITY OF PEWAUKEE - 68270	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	CITY OF WAUKESHA - 68291	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF BROOKFIELD - 68002	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF DELAFIELD - 68004	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF EAGLE - 68006	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF GENESEE - 68008	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF LISBON - 68010	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF MERTON - 68014	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF MUKWONAGO - 68016	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF OCONOMOWOC - 68022	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF OTTAWA - 68024	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF VERNON - 68030	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	TOWN OF WAUKESHA - 68032	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF BIG BEND - 68106	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF BUTLER - 68107	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF CHENEQUA - 68111	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF DOUSMAN - 68116	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF EAGLE - 68121	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF ELM GROVE - 68122	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF HARTLAND - 68136	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF LAC LA BELLE - MAIN - 68146	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF LANNON - 68147	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF MENOMONEE FALLS - 68151	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF MERTON - 68152	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF MUKWONAGO - MAIN - 68153	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF NASHOTAH - 68158	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF NORTH PRAIRIE - 68161	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF OCONOMOWOC LAKE - 68166	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF PEWAUKEE - 68171	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF SUMMIT - 68172	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF SUSSEX - 68181	ES&S DS200	ES&S ExpressVote
WAUKESHA COUNTY - 68	VILLAGE OF WALES - 68191	ES&S DS200	ES&S ExpressVote
WAUPACA COUNTY - 69	CITY OF CLINTONVILLE - 69211	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WAUPACA COUNTY - 69	CITY OF MANAWA - 69251	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	CITY OF MARION - MAIN - 69252	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	CITY OF NEW LONDON - MAIN - 69261	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WAUPACA COUNTY - 69	CITY OF WAUPACA - 69291	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	CITY OF WEYAUWEGA - 69292	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF BEAR CREEK - 69002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF CALEDONIA - 69004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WAUPACA COUNTY - 69	TOWN OF DAYTON - 69006	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF DUPONT - 69008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF FARMINGTON - 69010	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
WAUPACA COUNTY - 69	TOWN OF FREMONT - 69012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF HARRISON - 69014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF HELVETIA - 69016	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF IOLA - 69018	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF LARRABEE - 69020	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF LEBANON - 69022	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF LIND - 69024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF LITTLE WOLF - 69026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WAUPACA COUNTY - 69	TOWN OF MATTESON - 69028	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF MUKWA - 69030	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF ROYALTON - 69032	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF SAINT LAWRENCE - 69034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF SCANDINAVIA - 69036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF UNION - 69038	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF WAUPACA - 69040	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF WEYAUWEGA - 69042	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	TOWN OF WYOMING - 69044	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF BIG FALLS - 69106	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF EMBARRASS - 69121	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF FREMONT - 69126	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF IOLA - 69141	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF OGDENSBURG - 69165	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUPACA COUNTY - 69	VILLAGE OF SCANDINAVIA - 69181	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	CITY OF WAUTOMA - 70291	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF AURORA - 70002	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF BLOOMFIELD - 70004	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF COLOMA - 70006	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF DAKOTA - 70008	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF DEERFIELD - 70010	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF HANCOCK - 70012	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF LEON - 70014	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF MARION - 70016	Sequoia Voting - Optech Insight	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF MOUNT MORRIS - 70018	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF OASIS - 70020	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF PLAINFIELD - 70022	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF POY SIPPI - 70024	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF RICHFORD - 70026	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF ROSE - 70028	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF SAXEVILLE - 70030	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF SPRINGWATER - 70032	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF WARREN - 70034	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	TOWN OF WAUTOMA - 70036	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	VILLAGE OF COLOMA - 70111	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	VILLAGE OF HANCOCK - 70136	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	VILLAGE OF LOHRVILLE - 70146	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
WAUSHARA COUNTY - 70	VILLAGE OF PLAINFIELD - 70171	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	VILLAGE OF REDGRANITE - 70176	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WAUSHARA COUNTY - 70	VILLAGE OF WILD ROSE - 70191	None	Sequoia Voting - AVC Edge with VeriVote Printer DRE system
WINNEBAGO COUNTY - 71	CITY OF MENASHA - MAIN - 71251	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	CITY OF NEENAH - 71261	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	CITY OF OMRO - 71265	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	CITY OF OSHKOSH - 71266	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF ALGOMA - 71002	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF BLACK WOLF - 71004	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF CLAYTON - 71006	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF MENASHA - 71008	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF NEENAH - 71010	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF NEKIMI - 71012	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF NEPEUSKUN - 71014	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF OMRO - 71016	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF OSHKOSH - 71018	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF POYGAN - 71020	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF RUSHFORD - 71022	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF UTICA - 71024	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF VINLAND - 71026	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF WINCHESTER - 71028	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF WINNECONNE - 71030	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	TOWN OF WOLF RIVER - 71032	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	VILLAGE OF FOX CROSSING - 71121	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WINNEBAGO COUNTY - 71	VILLAGE OF WINNECONNE - 71191	Dominion Voting - ImageCast Evolution (ICE)	Dominion Voting - ImageCast Evolution (ICE)
WOOD COUNTY - 72	CITY OF MARSHFIELD - MAIN - 72251	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	CITY OF NEKOOSA - 72261	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	CITY OF PITTSVILLE - 72271	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	CITY OF WISCONSIN RAPIDS - 72291	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF ARPIN - 72002	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF AUBURNDALE - 72004	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF CAMERON - 72006	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF CARY - 72008	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF CRANMOOR - 72010	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF DEXTER - 72012	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF GRAND RAPIDS - 72014	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF HANSEN - 72016	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF HILES - 72018	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF LINCOLN - 72020	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF MARSHFIELD - 72022	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF MILLADORE - 72024	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF PORT EDWARDS - 72026	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF REMINGTON - 72028	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF RICHFIELD - 72030	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF ROCK - 72032	ES&S DS200	ES&S AutoMARK

County	Municipality	Optical/Digital Scan Tabulator (Vendor/Dealer-Model)	Accessible Voting Equipment Vendor/Dealer-Model
WOOD COUNTY - 72	TOWN OF RUDOLPH - 72034	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF SARATOGA - 72036	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF SENECA - 72038	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF SHERRY - 72040	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF SIGEL - 72042	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	TOWN OF WOOD - 72044	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF ARPIN - 72100	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF AUBURNDALE - 72101	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF BIRON - 72106	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF HEWITT - 72122	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF MILLADORE - MAIN - 72151	None	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF PORT EDWARDS - 72171	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF RUDOLPH - 72178	ES&S DS200	ES&S AutoMARK
WOOD COUNTY - 72	VILLAGE OF VESPER - 72186	ES&S DS200	ES&S AutoMARK

STATE OF COLORADO)
)ss.
County of Douglas)

COMES NOW, Affiant Joseph T. Oltmann, being first duly sworn, under oath, and states under penalty of perjury that the following information is true and accurate within his personal knowledge and belief:

My name Joseph Oltmann. I am over eighteen years of age. I am not suffering under any mental disability and am competent to give this worn affidavit. I am able to read and write and to give this affidavit voluntarily and on my own free will and accord. No one has used any threats, force, pressure, or intimidation to male me sign this affidavit. I make this affidavit in support of the truth.

I am the CEO of a tech company based just outside of Denver, Colorado. I am also the founder of an organization called FEC United. [Fecunited.com] The goal of this organization is to restore constitutional integrity to our community and empower those in our community to stand up to state and national leadership that intends to suppress the rights of individuals holistically.

Through this organization "FEC" I became a target of journalists who began to slander both me and my organization. I became the topic of Antifa and extremists through my involvement in a movement to resist the narrative that police are bad and our society represented the rhetoric shared by these extremists. As a result of these attacks, I started researching Antifa, BLM, Inc. and their connection to violence and unrest inside of our communities. As a result, I set out to infiltrate Antifa meetings and de-mask those Antifa members who are journalists in the mainstream media in Colorado specifically.

On or about the week of September 27, 2020, I was able to attend an Antifa meeting which appeared to be between Antifa members in Colorado Springs and in Denver Colorado. I cannot verify the connection between the two or the leadership as they were disorganized. Discussions of Our Revolution and Antifa were discussed. Rhetoric of "eliminating fascists" and frustration as to the dwindling of support to rally in the street was evident.

Then I honed in among other conversations key actors in the organization who work for local and state news publications. One such person of interest was Heidi Beedle, identified leader of Our Revolution in El Paso County (Southern Colorado) and Antifa leader of the same area.

Heidi's name is actually Sean Beedle. She is a journalist at Colorado Springs Independent, Colorado Springs Business Journal and a freelance writer for several online publications. Others to remain unnamed in this were present.

The conversation went like this:

Someone identified as "Eric" began to speak. Someone asked who Eric was, and someone else replied "he is the Dominion guy" [paraphrased].

Eric then began to speak after being told to continue, but was interrupted and asked by someone, "What are we going to do if Trump wins this fucking election?"

Eric responded, "Don't worry about the election. Trump is not going to win. I made fucking sure of that.. Hahaha"

Someone responded, "Fucking right."

Eric continued with fortifying the groups and recruiting. I would describe his tone as eccentric and boisterous. I wrote down his name and started to do some research into him.

At the time, I thought that they were so disconnected with reality that they think they can "make sure Trump is not elected."

I started with a simple google search: Keywords: "Eric," "Dominion," "Denver Colorado." The fifth result in organic search returned:

Dominion Voting Systems | Employee Profiles, Emails, Mutual ...

www.leadcandy.io › company › Dominion-Voting-Syst...

Find people working at Dominion Voting Systems. LeadCandy provides Full ... Denver, Colorado. VIEW FULL PROFILE ... FULL PROFILE. Eric Coomer's photo ...

Above that were results for Eric Schussler- Old Dominion University and Eric E Johnson, Attorney - Sherman & Howard. The first two on organic search however was as follows:

Dominion - Colorado Secretary of State

www.sos.state.co.us › elections › files › projectPlans

PDF

Sep 9, 2016 — our most recent pilots in the City and County of Denver and Mesa County. ... 1 Democracy Suite is a registered trademark of Dominion Voting Systems. ... Eric Coomer graduated from the University of California, Berkeley in ...

And

Eric Coomer's email & phone | Dominion Voting Systems's ...

rocketreach.co › eric-coomer-email_7112825

Location, **Denver, Colorado**, United States. Work, Director, Market Strategy @ **Dominion** Voting Systems Member, Board of Directors @ Friends of Levitt Pavilion ...

I began doing research on Eric Coomer and discovered that Colorado Secretary of state link the following about Dr. Eric Coomer on page 26:

"Eric Coomer graduated from the University of California, Berkeley in 1997 with a Ph.D. in Nuclear Physics. After working in IT consulting for several years, Eric entered the elections industry in 2005 with Sequoia Voting Systems as Chief Software Architect. After three years with the company, Eric took over all development operations as Vice President of Engineering. When Sequoia was acquired by Dominion Voting Systems in 2010, Eric joined the DVS team as Vice President of US Engineering overseeing development in the Denver, Colorado office.

Recently, Eric has taken over as the Director of Product Strategy driving the creation of next generation products through close collaboration with customers, combined with a deep understanding of technology and the needs of Elections departments throughout the United States and abroad. Eric has been an active participant in the development of the IEEE common data format for Elections systems, as well as the working group for developing standards for Risk-Limiting Audits for elections results. When not designing new products, Eric supports large and small scale customers during Election season."

I did some cursory research on Eric, but my conclusion was that he was either a part of the government or not relevant to the conversation. In other words, this was not a target I would

identify as being influential in Antifa. My conclusion was based on his credentials of having a PhD in Nuclear Physics. Did not add up for someone with that intelligence. I set it aside and concentrated my focus on the activist journalist who were actually Antifa members.

On October 15, 2020 I spoke at an FEC meeting in Bandimere Speedway. It was a rally around the unconstitutional actions of Jefferson County, Colorado government leadership to hurt Bandimere Speedway. I spoke and before the event started they escorted a suspected Antifa Journalist Erik Maulbetsch [Colorado Recorder] off the premises. In that meeting I talked about outing activist journalists who were Antifa and holding them accountable in our community for attacking organizations like FEC United that serve the community.

These activist journalists frequently slander people of faith, conservatives and call them names that defame them in the community. I had enough and warned that we would call them out by name. Maulbetsch wrote and article reflecting this as he was listening in online and decided to omit details about the meeting, causing the entire journalistic community to wonder if they were on the list. It had a positive effect contrary to their intentions.

On Friday November 6th, I received a forwarded a article about Georgia irregularities on the election day. I normally do not read many of these articles because I am inundated with information both from FEC, and my company. I started reading it and noticed Eric Coomer was the spokesperson for a company called Dominion Voting Systems. I immediately stopped and started to go back through my notes to find the info on Eric Coomer. I then started research Dominion Voting Systems. The information became rather scary as everywhere I looked I found Eric's name. Some listing him as VP of Security and others calling him Director of Strategy and Security. I began my search for everything Eric Coomer, Dr. Eric Coomer and any information related to legal filings, RFPs, states using Dominion, Colorado uses and even areas in Colorado that do not use Dominion.

I then turned my attention to Eric Coomer's Facebook profile and page while I gathered information on correlating email addresses, profiles, screen names, etc. Searching Twitter, Reddit, Facebook, 4Chan, etc etc.

I was able to get screenshots of Eric Coomer's Facebook posts going back to 2016. What I discovered was disturbing. Anti-Trump rhetoric, posts referring to: Fuck USA, Fuck the Police, A.C.A.B., posts that were anti Conservative, and even posts being happy someone died. Then the bigger shocker. He reposted the Antifa "Manifesto" letter to Donald Trump. I knew that I had the right guy and someone that was clearly mentally unstable and radical. I started digging into the

code irregularities and tying all of the pieces together with the irregularities and the Dominion uses in the disputed states. The correlation was astonishing. I then found the information related to justifying voting machines being online and his justification that they had "hardware and IP address protection". This statement by itself is FALSE.

I then attempted to reach out to all sources to bring this information to light. Calling major news stations and attempting to connect with the DOJ.

I took the information to the listeners of an organization that I also own called Conservative Daily. We have a podcast that we do on weekdays. I felt I had enough information and was confident that the Eric on the conference call was the same Eric Coomer that worked for Dominion. I was also confident that given the Facebook and other information I was able to collect that Eric Coomer was interfering with the election and as he admits in one of his posts that people at his company think and feel the same way he does. I began to research his patents, who owns them, the pattern of states they acquired as clients.

I began to research the connection to Diane Feinstein, her husband, campaign manager, Clinton Foundation and became worried that the finger of radicals had taken away the voice of the American people in deciding the election. I used ARIMA analysis to show me trends on data and probability models to prove that they were in fact using code and technology to ghost votes, switch votes or even remove probable ballots completely. Code is random unless it is not. Since we are a data company and understand artificial intelligence and use of neural networks, we understand the capabilities of creating chaos in outcome based on weighted density of probable voters.

These statements are true and accurate to the best of my knowledge.

Joseph Oltmann

STATE OF COLORADO
COUNTY OF Douglas

Personally appeared before me, LYNN KIEFFER, a Notary Public in and for the aforesaid State and County, JOSEPH T OLTMANN, the within named bargainer, with whom I am personally acquainted and who, after being duly sworn, acknowledged that she executed the foregoing Agreement for the purposes contained therein.

JOSEPH T OLTMANN

Sworn to and subscribed before me this 17th day of November, 2020.

My Commission Expires:

07-24-2021

NOTARY PUBLIC

LYNN KIEFFER
Notary Public
State of Colorado
Notary ID # 20174030818
My Commission Expires 07-24-2021

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	**CIVIL ACTION**
vs.	)	
	)	**FILE NO. 1:17-cv-2989-AT**
BRAD RAFFENSPERGER, ET AL.,	)	
	)	
	)	
Defendants.	)	

DECLARATION OF HARRI HURSTI

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

1. My name is Harri Hursti. I am over the age of 21 and competent to give this testimony. The facts stated in this declaration are based on my personal knowledge, unless stated otherwise.

2. My background and qualifications in voting system cybersecurity are set forth in my December 16, 2019 declaration. (Doc. 680-1, pages 37 *et seq*). I stand by everything in that declaration and in my August 21, 2020 declaration. (Doc. 800-2).

3. I am also an expert in ballot scanning because of extensive background in digital imaging prior by work researching election systems. In addition, in 2005 I started an open source project for scanning and auditing paper ballots from images. As a result, I am familiar with different scanner types, how scanner settings and image processing features change the images, and how file format choices affect the quality and accuracy of the ballots.

4. I am engaged as an expert in this case by Coalition for Good Governance.

5. In developing this declaration and opinion, I visited Atlanta to observe certain operations of the June 9, 2020 statewide primary, and the August 11 runoff. During the June 9 election, I was an authorized poll watcher in some locations and was a public observer in others. On August 11, I was authorized as an expert inspecting and observing under the Coalition for Good Governance's Rule 34 Inspection request in certain polling places and the Fulton County Election Preparation Center. As I will explain below in this declaration, my extensive experience in the area of voting system security and my observations of these elections lead to additional conclusions beyond those in my December 16, 2019 declaration. Specifically:

a) the scanner and tabulation software settings being employed to determine which votes to count on hand marked paper ballots are likely causing clearly intentioned votes not to be counted;

b) the voting system is being operated in Fulton County in a manner that escalates the security risk to an extreme level; and

c) voters are not reviewing their BMD printed ballots, which causes BMD generated results to be un-auditable due to the untrustworthy audit trail.

Polling Place Observations

6. Election observation on Peachtree Christian Church. The ballot marking devices were installed so that 4 out of 8 touchscreen devices were clearly visible from the pollbook check in desk. Voter's selections could be effortlessly seen from over 50 ft away.

7. Over period of about 45 minutes, I only observed one voter who appeared to be studying the ballot after picking it up from the printer before casting it in the scanner. When voters do not fully verify their ballot prior to casting, the ballots cannot be considered a reliable auditable record.

8. The scanner would reject some ballots and then accept them after they were rotated to a different orientation. I noted that the scanner would vary in the amount of time that it took to accept or reject a ballot. The delay varied between 3

and 5 seconds from the moment the scanner takes the ballot until the scanner either accepts the ballot or rejects it. This kind of behavior is normal on general purpose operating systems multitasking between multiple applications, but a voting system component should be running only a single application without outside dependencies causing variable execution times.

9. Further research is necessary to determine the cause of the unexpected scanning delays. A system that is dedicated to performing one task repeatedly should not have unexplained variation in processing time. As security researcher, we are always suspicious about any unexpected variable delays, as those are common telltale signs of many issues, including a possibility of unauthorized code being executed. So, in my opinion changes of behaviors between supposedly identical machines performing identical tasks should always be investigated.

When ballots are the same and are produced by a ballot marking device, there should be no time difference whatsoever in processing the bar codes. Variations in time can be the result of many things - one of them is that the scanner encounters an error reading the bar code and needs to utilize error correcting algorithms to recover from that error. Further investigation is

necessary to determine the root cause of these delays, the potential impact of the error correcting algorithms if those are found to be the cause, and whether the delay has any impact upon the vote.

10. Election observation in Central Park Recreation Center. The Poll place manager told me that no Dominion trained technician had reported on location to help them that morning.

11. The ballot marking devices were originally installed in a way that voter privacy was not protected, as anyone could observe across the room how people are voting on about 2/3 devices.

12. The ballot scanner took between 4 and 6 seconds to accept the ballot. I observed only one ballot being rejected.

13. Generally, voters did not inspect the ballots after taking it from the printer and casting it into the scanner.

14. Election observation in Fanplex location. Samantha Whitley and Harrison Thweatt were poll watchers at the Fanplex polling location. They contacted me at approximately 9:10am about problems they were observing with the operation of the BMDs and Poll Pads and asked me to come to help them

understand the anomalies they were observing. I arrived at FanPlex at approximately 9:30am.

15. I observed that the ballot scanner located by a glass wall whereby standing outside of the building observe the scanning, would take between 6 and 7 seconds to either accept or reject the ballot.

16. For reasons unknown, on multiple machines, while voters were attempting to vote, the ballot marking devices sometimes printed "test" ballots. I was not able to take a picture of the ballot from the designated observation area, but I overheard the poll worker by the scanner explaining the issue to a voter which was sent back to the Ballot-Marking Device to pick up another ballot from the printer tray. Test ballots are intended to be used to test the system but without being counted by the system during an election. The ballot scanner in election settings rejects test ballots, as the scanners at FanPlex did. This caused confusion as the voters needed to return to the ballot-marking device to retrieve the actual ballot. Some voters returned the test ballot into the printer tray, potentially confusing the next voter. Had voters been reviewing the ballots at all before taking them to the scanner, they would have noticed the "Test Ballot" text on the ballot. I observed no voter really questioning a poll worker why a "Test" ballot was printed in the first place.

17. Obviously, during the election day, the ballot marking device should not be processing or printing any ballot other than the one the voter is voting. While the cause of the improper printing of ballots should be examined, the fact that this was happening at all is likely indicative of a wrong configuration given to the BMD, which in my professional opinion raises another question: Why didn't the device print only test ballots? And how can the device change its behavior in the middle of the election day? Is the incorrect configuration originating from the Electronic Pollbook System? What are the implications for the reliability of the printed ballot and the QR code being counted?

18. Election observation Park Tavern. The scanner acceptance delay did not vary as it had in previous locations and was consistently about 5 seconds from the moment the scanner takes the ballot, to the moment the scanner either accepts the ballot or rejects it. The variation between scanners at different locations is concerning because these are identical physical devices and should not behave differently while performing the identical task of scanning a ballot.

19. The vast majority of voters at Park Tavern did not inspect the ballots after taking them from the printer and before casting them in the scanner.

Fulton Tabulation Center Operation-Election Night, August 11, 2020

20. In Fulton County Election Preparation Center ("EPC") on election night I reviewed certain operations as authorized by Rule 34 inspection.

21. I was permitted to view the operations of the upload of the memory devices coming in from the precincts to the Dominion Election Management System ("EMS") server. The agreement with Fulton County was that I could review only for a limited period of time; therefore, I did not review the entire evening's process. Also, Dominion employees asked me to move away from the monitors containing the information and messages from the upload process and error messages, limiting my ability to give a more detailed report with documentation and photographs of the screens. However, my vantage point was more than adequate to observe that system problems were recurring and the Dominion technicians operating the system were struggling with the upload process.

22. It is my understanding the same EMS equipment and software had been used in Fulton County's June 9, 2020 primary election.

23. It is my understanding that the Dominion technician ("Dominic") charged with operating the EMS server for Fulton County had been performing

these duties at Fulton County for several months, including during the June 9 primary.

24. During my August 11 visit, and a follow-up visit on August 17, I observed that the EMS server was operated almost exclusively by Dominion personnel, with little interaction with EPC management, even when problems were encountered. In my conversations with Derrick Gilstrap and other Fulton County Elections Department EPC personnel, they professed to have limited knowledge of or control over the EMS server and its operations.

25. Outsourcing the operation of the voting system components directly to the voting system vendors' personnel is highly unusual in my experience and of grave concern from a security and conflict of interest perspective. Voting system vendors' personnel have a conflict of interest because they are not inclined to report on, or address, defects in the voting systems. The dangers this poses is aggravated by the absence of any trained County personnel to oversee and supervise the process.

26. In my professional opinion, the role played by Dominion personnel in Fulton County, and other counties with similar arrangements, should be considered an elevated risk factor when evaluating the security risks of Georgia's voting system.

27. Based on my observations on August 11 and August 17, Dell computers running the EMS that is used to process Fulton county votes appeared not to have been hardened.

28. In essence, hardening is the process of securing a system by reducing its surface of vulnerability, which is larger when a system performs more functions; in principle it is to the reduce the general purpose system into a single-function system which is more secure than a multipurpose one. Reducing available ways of attack typically includes changing default passwords, the removal of unnecessary software, unnecessary usernames or logins, grant accounts and programs with the minimum level of privileges needed for the tasks and create separate accounts for privileged operations as needed, and the disabling or removal of unnecessary services.

29. Computers performing any sensitive and mission critical tasks such as elections should unquestionably be hardened. Voting system are designated by the Department of Homeland Security as part of the critical infrastructure and certainly fall into the category of devices which should be hardened as the most fundamental security measure. In my experience, it is unusual, and I find it unacceptable for an EMS server not to have been hardened prior to installation.

30. The Operating System version in the Dominion Election Management computer, which is positioned into the rack and by usage pattern appears to be the main computer, is Windows 10 Pro 10.0.14393. This version is also known as the Anniversary Update version 1607 and it was released August 2, 2016. Exhibit A is a true and correct copy of a photograph that I took of this computer.

31. When a voting system is certified by the EAC, the Operating System is specifically defined, as Windows 10 Pro was for the Dominion 5.5-A system. Unlike consumer computers, voting systems do not and should not receive automatic "upgrades" to newer versions of the Operating System. without undergoing tests for conflicts with the new operating system software.

32. That computer and other computers used in Georgia's system for vote processing appear to have home/small business companion software packages included. Exhibits B and C are true and correct copies of photographs that I took of the computer located in the rack and the computer located closest to the rack on the table to the right. The Start Menu shows a large number of game and entertainment software icons. As stated before, one of the first procedures of hardening is removal of all unwanted software, and removal of those game icons and the associated games and installers alongside with all other software which is not absolutely needed in the computer for election processing purposes would be

one of the first and most basic steps in the hardening process. In my professional opinion, independent inquiry should be promptly made of all 159 counties to determine if the Dominion systems statewide share this major deficiency.

33. Furthermore, when I asked the Dominion employee Dominic assigned to the Fulton County election server operation about the origin of the Windows operating system, he answered that he believed that "it has been provided by the State."

34. Since Georgia's Dominion system is new, it is a reasonable assumption that all machines in the Fulton County election network had the same version of Windows installed. However, not only the two computers displayed different entertainment software icons, but additionally one of the machines in Fulton's group of election servers had an icon of computer game called "*Homescapes"* which is made by Playrix Holding Ltd., founded by Dmitry and Igor Bukham in Vologda, Russia. Attached as Exhibit C is a true and correct copy of a photograph that I took of the Fulton voting system computer" Client 02". The icon for Homescapes is shown by the arrow on Exhibit C.

35. The *Homescapes* game was released in August 2017, one year after Fulton County's operating system release. If the *Homescapes* game came with the operating system it would be unusual, because at the time of the release of

Homescapes, Microsoft had already released 3 major Microsoft Windows 10 update releases after build 14393 and before the release of that game. This calls into question whether all Georgia Dominion system computers have the same operating system version, or how the game has come to be having a presence in Fulton's Dominion voting system.

36. Although this Dominion voting system is new to Georgia, the Windows 10 operating system of at least the 'main' computer in the rack has not been updated for 4 years and carries a wide range of well-known and publicly disclosed vulnerabilities. At the time of this writing, The National Vulnerability Database maintained by National Institute of Standards and Technology lists 3,177 vulnerabilities mentioning "Windows 10 Pro" and 203 vulnerabilities are specifically mentioning "Windows 10 Pro 1607" which is the specific version number of the build 14393 that Dominion uses.

37. Even without internet connectivity, unhardened computers are at risk when those are used to process removable media. It was clear that when Compact Flash storage media containing the ballot images, audit logs and results from the precinct scanners were connected to the server, the media was automounted by the operating system. When the operating system is automounting a storage media, the operating system starts automatically to interact with the device. The zero-day

vulnerabilities exploiting this process has been recurringly discovered from all operating systems, including Windows. Presence of automount calls also into question presence of another setting which is always disabled in hardening process. It is autorun, which automatically executes some content on the removable media. While this is convenient for consumers, it poses extreme security risk.

38. Based on my experience and mental impression observing the Dominion technician's activities, Fulton County's EMS server management seems to be an *ad hoc* operation with no formalized process. This was especially clear on the manual processing of the memory cards storage devices coming in from the precincts on election night and the repeated access of the operating system to directly access filesystem, format USB devices, etc. This kind of operation in naturally prone to human errors. I observed personnel calling on the floor asking if all vote carrying compact flash cards had been delivered from the early voting machines for processing, followed by later finding additional cards which had been overlooked in apparent human error. Later, I heard again one technician calling on the floor asking if all vote carrying compact flashes had been delivered. This clearly demonstrates lack of inventory management which should be in place to ensure, among other things, that no rogue storage devices would be inserted into the computer. In response, 3 more compact flash cards were hand-delivered. Less

than 5 minutes later, I heard one of the county workers say that additional card was found and was delivered for processing. All these devices were trusted by printed label only and no comparison to an inventory list of any kind was performed.

39. In addition, operations were repeatedly performed directly on the operating system. Election software has no visibility into the operations performed directly on the operating system, and therefore those are not included in election system event logging. Those activities can only be partially reconstructed from operating system logs – and as these activities included copying election data files, election software log may create false impression that the software is accessing the same file over a period of time, while in reality the file could had been replaced with another file with the same name by activities commanded to the operating system. Therefore, any attempt to audit the election system operated in this manner must include through analysis of all operating system logs, which complicates the auditing process. Unless the system is configured properly to collect file system auditing data is not complete. As the system appears not to be hardened, it is unlikely that the operating system has been configured to collect auditing data.

40. A human error when operating live election system from the operating system can result in a catastrophic event destroying election data or even rendering the system unusable. Human error is likely given the time pressure involved and,

at least in Fulton County, no formal check lists or operating procedures were followed to mitigate the human error risk. The best practice is to automate trivial tasks to reduce risk of human error, increase the quality assurance of overall operations and provide auditability and transparency by logging.

41. Uploading of memory cards had already started before I arrived at EPC. While one person was operating the upload process, the two other Dominion employees were troubleshooting issues which seemed to be related to ballot images uploads. I repeatedly observed error messages appearing on the screen of the EMS server. I was not able to get picture of the errors on August 11th, I believe the error was the same or similar that errors recurring August 17th as shown on Exhibit D and discussed later in this declaration. Dominion employees were troubleshooting the issue with 'trial-and-error' approach. As part of this effort they accessed "Computer Management" application of Windows 10 and experimented with trouble shooting the user account management feature. This demonstrates that they had complete access to the computer. This means there are no meaningful access separation and privileges and roles controls protecting the county's primary election servers. This also greatly amplifies the risk of catastrophic human error and malicious program execution.

42. I overheard the Dominion technician's conversation that they had issues with file system structure and "need 5 files out of EMS server and paste. Delete everything out of there and put it there." To communicate the gravity of the situation to each other they added "Troubleshooting in the live environment". These conversations increased the mental image that they were not familiar the issue they were troubleshooting.

43. After about 45 minutes of trying to solve the issue by instructions received over the phone, the two Dominion employees' (who had been troubleshooting) behavior changed. The Dominion staff member walked behind the server rack and made manual manipulations which could not be observed from my vantage point. After that they moved with their personal laptops to a table physically farther away from the election system and stopped trying different ways to work around the issue in front of the server, and no longer talked continuously with their remote help over phone.

44. In the follow-up-calls I overheard them ask people on the other end of the call to check different things, and they only went to a computer and appeared to test something and subsequently take a picture of the computer screen with a mobile phone and apparently send it to a remote location.

45. Based on my extensive experience, this all created a strong mental impression that the troubleshooting effort was being done remotely over remote access to key parts of the system. Additionally, new wireless access point with a hidden SSID access point name appeared in the active Wi-Fi stations list that I was monitoring, but it may have been co-incidental. Hidden SSIDs are used to obscure presence of wireless networking from casual observers, although they do not provide any real additional security.

46. If in fact remote access was arranged and granted to the server, this has gravely serious implications for the security of the new Dominion system. Remote access, regardless how it is protected and organized is always a security risk, but furthermore it is transfer of control out of the physical perimeters and deny any ability to observe the activities.

47. I also observed USB drives marked with the Centon DataStick Pro Logo with no visible inventory control numbering system being taken repeatedly from the EMS server rack to the Fulton managers' offices and back. The Dominion employee told me that the USB drives were being taken to the Election Night Reporting Computer in another office. This action was repeated several times during the time of my observation. Carrying generic unmarked and therefore unidentifiable media out-of-view and back is a security risk – especially when the

exact same type of devices was piled on the desk near the computer. During the election night, the Dominion employees reached to storage box and introduced more unmarked storage devices into the ongoing election process. I saw no effort made to maintain a memory card inventory control document or chain of custody accounting for memory cards from the precincts.

48. I also visited the EPC on August 17. During that visit, the staff working on uploading ballots for adjudication experienced an error which appeared similar to the one on election night. This error was repeated with multitude of ballots and at the time we left the location, the error appeared to be ignored, rather that resolved. (EXHIBIT D - the error message and partial explanation of the error being read by the operator.).

49. The security risks outlined above – operating system risks, the failure to harden the computers, performing operations directly on the operating systems, lax control of memory cards, lack of procedures, and potential remote access, are extreme and destroy the credibility of the tabulations and output of the reports coming from a voting system.

50. Such a risk could be overcome if the election were conducted using hand marked paper ballots, with proper chain of custody controls. For elections conducted with hand marked paper ballots, any malware or human error involved

in the server security deficiencies or malfunctions could be overcome with a robust audit of the hand marked paper ballots and in case of irregularities detected, remedied by a recount. However, given that BMD ballots are computer marked, and the ballots therefore unauditable for determining the result, no recovery from system security lapses is possible for providing any confidence in the reported outcomes.

Ballot Scanning and Tabulation of Vote Marks

51. I have been asked to evaluate the performance and reliability of Georgia's Dominion precinct and central count scanners in the counting of votes on hand marked paper ballots.

52. On or about June 10th, Jeanne Dufort and Marilyn Marks called me to seek my perspective on what Ms. Dufort said she observed while serving as a Vote Review Panel member in Morgan County. Ms. Dufort told me that she observed votes that were not counted as votes nor flagged by the Dominion adjudication software.

53. Because of the ongoing questions this raised related to the reliability of the Dominion system tabulation of hand marked ballots, I was asked by Coalition Plaintiffs to conduct technical analysis of the scanner and tabulation accuracy. That analysis is still in its early stages.

54. Before addressing the particulars of my findings and research into the accuracy of Dominion's scanning and tabulation, I will address the basic process by which an image on a voted hand marked paper ballot is processed by scanner and tabulation software generally. It is important to understand that the Dominion scanners are Canon off the shelf scanners and their embedded software were designed for different applications than ballot scanning which is best conducted with scanners specifically designed for detecting hand markings on paper ballots.

55. Contrary of public belief, the scanner is not taking a picture of the paper. The scanner is illuminating the paper with a number of narrow spectrum color lights, typically 3, and then using software to produce an approximation what the human eye would be likely to see if there would had been a single white wide-spectrum light source. This process takes place in partially within the scanner and embedded software in the (commercial off the shelf) scanner and partially in the driver software in the host computer. It is guided by number of settings and configurations, some of which are stored in the scanner and some in the driver software. The scanner sensors gather more information than will be saved into the resulting file and another set of settings and configurations are used to drive that part of the process. The scanners also produce anomalies which are automatically removed from the images by the software. All these activities are performed

outside of the Dominion election software, which is relying on the end product of this process as the input.

56. I began reviewing Dominion user manuals in the public domain to further investigate the Dominion process.

57. On August 14, I received 2 sample Fulton County August 11 ballots of high-speed scanned ballot from Rhonda Martin, who stated that she obtained them from Fulton County during Coalition Plaintiff's discovery. The image characteristics matched the file details I had seen on the screen in EPC. The image is TIFF format, about 1700 by 2200 pixels with 1-bit color depth (= strictly black or white pixels only) with 200 by 200 dots per square inch ("dpi") resolution resulting in files that are typically about 64 or 73 kilo bytes in size for August 11 ballots. With this resolution, the outer dimension of the oval voting target is about 30 by 25 pixels. The oval itself (that is, the oval line that encircles the voting target) is about 2 pixels wide. The target area is about 450 pixels; the area of the target a tight bounding box would be 750 pixels and the oval line encircling the target is 165 pixels. In these images, the oval itself represented about 22% value in the bounding box around the vote target oval.

58. Important image processing decisions are done in scanner software and before election software threshold values are applied to the image. These

scanner settings are discussed in an excerpt Dominion's manual for ICC operations My understanding is that the excerpt of the Manual was received from Marilyn Marks who stated that she obtained it from a Georgia election official in response to an Open Records request. Attached as Exhibit E is page 9 of the manual. Box number 2 on Exhibit E shows that the settings used are not neutral factory default settings.

59. Each pixel of the voters' marks on a hand marked paper ballot will be either in color or gray when the scanner originally measures the markings. The scanner settings affect how image processing turns each pixel from color or gray to either black or white in the image the voting software will later process. This processing step is responsible for major image manipulation and information reduction before the election software threshold values are calculated. This process has a high risk of having an impact upon how a voter mark is interpreted by the tabulation software when the information reduction erases markings from the scanned image before the election software processes it.

60. In my professional opinion, any decision by Georgia's election officials about adopting or changing election software threshold values is premature before the scanner settings are thoroughly tested, optimized and locked.

61. The impact of the scanner settings is minimal for markings made with a black felt pen but can be great for markings made with any color ballpoint pens. To illustrate this, I have used standard color scanning settings and applied then standard conversion from a scanned ballot vote target with widely used free and open source image processing software "GNU Image Manipulation Program version 2.10.18" EXHIBIT G shows the color image being converted with the software's default settings from color image to Black-and-White only. The red color does not meet the internal conversion algorithm criteria for black, therefore it gets erased to white instead.

62. Dominion manual for ICC operations clearly show that the scanner settings are changed from neutral factory default settings. EXHIBIT H shows how these settings applied different ways alter how a blue marking is converted into Black-and-White only image.

63. The optimal scanner settings are different for each model of scanner and each type of paper used to print ballots. Furthermore, because scanners are inherently different, the manufacturers use hidden settings and algorithms to cause neutral factory settings to produce similar baseline results across different makes and models. This is well-studied topic; academic and image processing studies published as early as 1979 discuss the brittleness of black-or-white images in

conversion. Subsequently, significance for ballot counting has been discussed in academic USENIX conference peer-reviewed papers.

64. On the August 17th at Fulton County Election Preparation Center Professor Richard DeMillo and I participated in a scan test of August 11 test ballots using a Fulton County owned Dominion precinct scanner. Two different ballot styles were tested, one with 4 races and one with 5 races. Attached as Exhibits I and J show a sample ballots with test marks.

65. A batch of 50 test ballots had been marked by Rhonda Martin with varying types of marks and varying types of writing instruments that a voter might use at home to mark an absentee ballot. Professor DeMillo and I participated in marking a handful of ballots.

66. Everything said here concerning the August 17 test is based on a very preliminary analysis. The scanner took about 6 seconds to reject the ballots, and one ballot was only acceptable "headfirst" while another ballot only "tail first." Ballot scanners are designed to read ballots "headfirst" or "tail first," and front side and backside and therefore there should not be ballots which are accepted only in one orientation. I observed the ballots to make sure that both ballots had been cleanly separated from the stub and I could not identify any defects of any kind on the ballots.

67. There was a 15 second cycle from the time the precinct scanner accepted a ballot to the time it was ready for the next ballot. Therefore, the maximum theoretical capacity with the simple 5 race ballot is about 4 ballots per minute if the next ballot is ready to be fed into the scanner as soon as the scanner was ready to take it. In a real-world voting environment, it takes considerably longer because voters move away from the scanner, the next voter must move in and subsequently figure where to insert the ballot. The Dominion precinct scanner that I observed was considerably slower than the ballot scanners I have tested over the last 15 years. This was done with a simple ballot, and we did not test how increase of the number of races or vote targets on the ballot would affect the scanning speed and performance.

68. Though my analysis is preliminary, this test reveals that a significant percentage of filled ovals that would to a human clearly show voter's intent failed to register as a vote on the precinct count scanner.

69. The necessary testing effort has barely begun at the time of this writing, as only limited access to equipment has been made available. I have not had access to the high-volume mail ballot scanner that is expected to process millions of mail ballots in Georgia's upcoming elections. However, initial results suggest that significant revisions must be made in the scanning settings to avoid a

widespread failure to count certain valid votes that are not marked as filled in ovals. Without testing, it is impossible to know, if setting changes alone are sufficient to cure the issue.

Scanned Ballot Tabulation Software Threshold Settings

70. Georgia is employing a Dominion tabulation software tool called "Dual Threshold Technology" for "marginal marks." (See Exhibit M) The intent of the tool is to detect voter marks that could be misinterpreted by the software and flag them for review. While the goal is admirable, the method of achieving this goal is quite flawed.

71. While it is compelling from development cost point of view to use commercial off the shelf COTS scanners and software, it requires additional steps to ensure that the integration of the information flow is flawless. In this case, the software provided by the scanner manufacturer and with settings and configurations have great impact in how the images are created and what information is removed from the images before the election software processes it. In recent years, many defective scanner software packages have been found. These software flaws include 'image enhancement' features which have remained enabled even when the feature has been chosen to be disabled from the scanner software provided by the manufacturer. An example of dangerous feature to keep

enabled is 'Punch Hole Removal', intended to make images of documents removed from notebook binders to look more aesthetically pleasing. The software can and in many cases will misinterpret a voted oval as a punch hole and erase the vote from the image file and to make this worse, the punch holes are expected to be found only in certain places near the edge of the paper, and therefore it will erase only votes from candidates whose targets are in those target zones.

72. Decades ago, when computing and storage capacity were expensive black-and-white image commonly meant 1-bit black-or-white pixel images like used by Dominion system. As computer got faster and storage space cheaper during the last 2-3 decades black-and-white image has become by default meaning 255 shades of gray grayscale images. For the purposes of reliable digitalization of physical documents, grayscale image carries more information from the original document for reliable processing and especially when colored markings are being processed. With today's technology, the difference in processing time and storage prices between grayscale and 1-bit images has become completely meaningless, and the benefits gained in accuracy are undeniable.

73. I am aware that the Georgia Secretary of State's office has stated that Georgia threshold settings are national industry standards for ballot scanners (Exhibit K). This is simply untrue. If, there were an industry standard for that, it

would be part of EAC certification. There is no EAC standard for such threshold settings. As mentioned before, the optimal settings are products of many elements. The type of the scanner used, the scanner settings and configuration, the type of the paper used, the type of the ink printer has used in printing the ballots, color dropout settings, just to name few. Older scanner models, which were optical mark recognitions scanners, used to be calibrated using calibration sheet – similar process is needed to be established for digital imaging scanners used this way as the ballot scanners.

74. Furthermore, the software settings in Exhibit E box 2 show that the software is instructed to ignore all markings in red color ("Color drop-out: Red"), This clearly indicates that the software was expecting the oval to be printed in Red and therefore it will be automatically removed from the calculation. The software does not anticipate printed black ovals as used in Fulton County. Voters have likely not been properly warned that any pen they use which ink contains high concentration of red pigment particles is at risk of not counting, even if to the human eye the ink looks very dark.

75. I listened to the August 10 meeting of the State Board of Elections as they approved a draft rule related to what constitutes a vote, incorporating the following language:

> *Ballot scanners that are used to tabulate optical scan ballots marked by hand shall be set so that:*
>
> *1. Detection of 20% or more fill-in of the target area surrounded by the oval shall be considered a vote for the selection;*
>
> *2. Detection of less than 10% fill-in of the target area surrounded by the oval shall not be considered a vote for that selection;*
>
> *3. Detection of at least 10% but less than 20% fill-in of the target area surrounded by the oval shall flag the ballot for adjudication by a vote review panel as set forth in O.C.G.A. 21-2-483(g). In reviewing any ballot flagged for adjudication, the votes shall be counted if, in the opinion of the vote review panel, the voter has clearly and without question indicated the candidate or candidates and answers to questions for which such voter desires to vote.*

76. The settings discussed in the rule are completely subject to the scanner settings. How the physical marking is translated into the digital image is determined by those values and therefore setting the threshold values without at the same time setting the scanner settings carries no value or meaning. If the ballots will be continuing to be printed with black only, there is no logic in having any drop-out colors.

77. Before the State sets threshold standards for the Dominion system, extensive testing is needed to establish optimal configuration and settings for each step of the process. Also, the scanners are likely to have settings additional configuration and settings which are not visible menus shown in the manual excerpt. All those should be evaluated and tested for all types of scanners approved for use in Georgia, including the precinct scanners

78. As temporary solution, after initial testing, the scanner settings and configuration should be locked and then a low threshold values should be chosen. All drop-out colors should be disabled. This will increase the number of ballots chosen for human review and reduce the number of valid votes not being counted as cast.

Logic and Accuracy Testing

79. Ballot-Marking Device systems inherits the same well-documented systemic security issues embedded in direct-recording electronic (DRE) voting machine design. Such design flaws eventually are causing the demise of DRE voting system across the country as it did in Georgia. In essence the Ballot Marking Device is a general-purpose computer running a general-purpose operating system with touchscreen that is utilized as a platform to run a software, very similar to DRE by displaying a ballot to the voter and recording the voter's intents. The main difference is that instead of recording those internally digitally, it prints out a ballot summary card of voter's choices.

80. Security properties of this approach would be positively different from DREs if the ballot contained only human-readable information and all voters are required to and were capable of verifying their choices from the paper ballot summary. That of course is unrealistic.

81. When voter fails to inspect the paper ballot and significant portion of the information is not in human readable from as a QR barcode, Ballot-Marking Device based voting effectively inherits most of the negative and undesirable security and reliability properties directly from DRE paradigm, and therefore should be subject to the same testing requirements and mitigation strategies as DREs.

82. In response to repeating myriad of issues with DREs, which have been attributed to causes from screen calibration issues to failures in ballot definition configuration distribution, a robust Logic & Accuracy testing regulation have been established. These root causes are present in BMDs and therefore should be evaluated in the same way as DREs have been.

I received the Georgia Secretary of State's manual "Logic and Accuracy Procedures "Version 1.0 January 2020 from Rhonda Martin. Procedure described in section D "Testing the BMD and Printer" is taking significant shortcuts, presumably to cut the labor work required. (Section D is attached as Exhibit L) These shortcuts significantly weaken the security and reliability posture of the system and protections against already known systemic pitfalls, usability predicaments and security inadequacies.

CONCLUSIONS

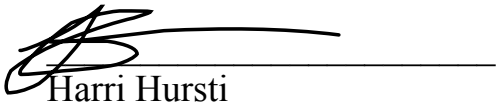
83. The scanner software and tabulation software settings and configurations being employed to determine which votes to count on hand marked paper ballots are likely causing clearly intentioned votes not to be counted as cast.

84. The method of using 1-bit images and calculated relative darkness values from such pre-reduced information to determine voter marks on ballots is severely outdated and obsolete. It artificially and unnecessarily increases the failure rates to recognize votes on hand-marked paper ballots. As a temporary mitigation, optimal configurations and settings for all steps of the process should be established after robust independent testing to mitigate the design flaw and augment it with human assisted processes, but that will not cure the root cause of the software deficiency which needs to be addressed.

85. The voting system is being deployed, configured and operated in Fulton County in a manner that escalates the security risk to an extreme level and calls into question the accuracy of the election results. The lack of well-defined process and compliance testing should be addressed immediately using independent experts. The use and the supervision of the Dominion personnel operating Fulton County's Dominion Voting System should be evaluated.

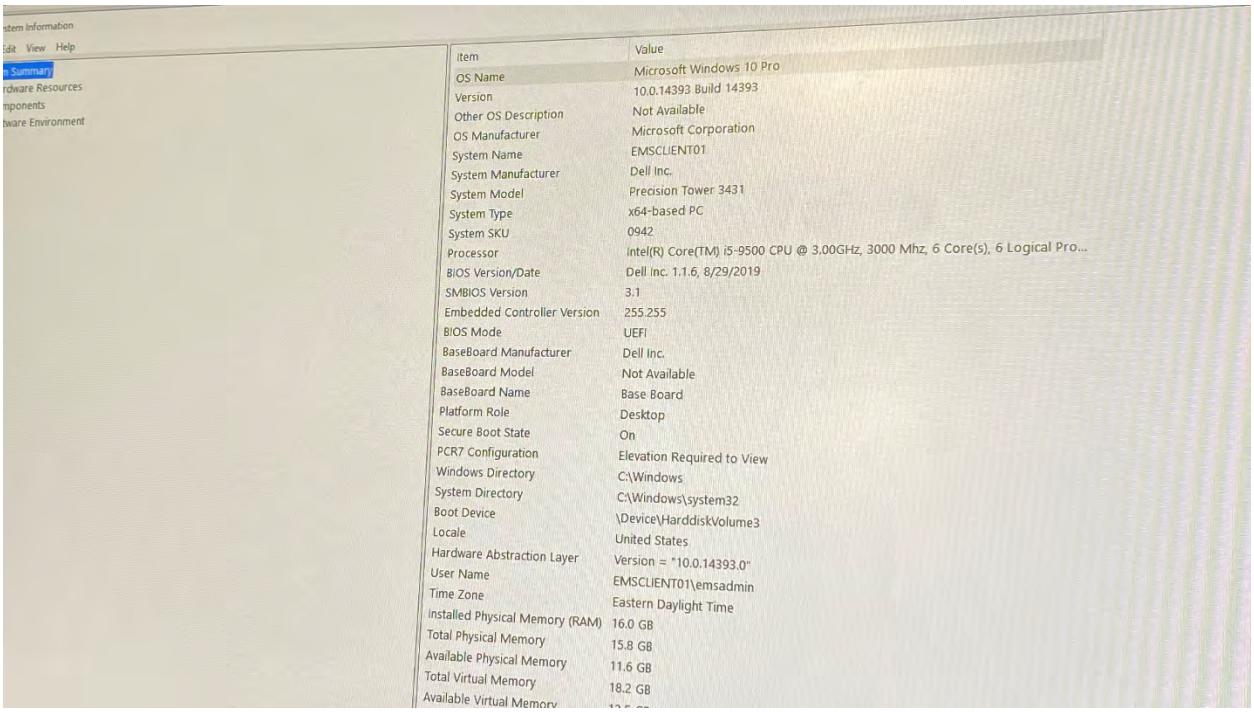
86. Voters are not reviewing their BMD printed ballots before scanning and casting them, which causes BMD-generated results to be un-auditable due to the untrustworthy audit trail. Furthermore, because BMDs are inheriting known fundamental architectural deficiencies from DREs, no mitigation and assurance measures can be weakened, including but not limited to Logic and Accuracy Testing procedures.

This 24th day of August 2020.



Harri Hursti

EXHIBIT A:


stem Information
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Summary
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OS Name
Microsoft Windows 10 Pro
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10.0.14393 Build 14393
Other OS Description
Not Available
OS Manufacturer
Microsoft Corporation
System Name
EMSCLIENT01
System Manufacturer
Dell Inc.
System Model
Precision Tower 3431
System Type
x64-based PC
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0942
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Intel(R) Core(TM) i5-9500 CPU @ 3.00GHz, 3000 Mhz, 6 Core(s), 6 Logical Pro...
BIOS Version/Date
Dell Inc. 1.1.6, 8/29/2019
SMBIOS Version
3.1
Embedded Controller Version
255.255
BIOS Mode
UEFI
BaseBoard Manufacturer
Dell Inc.
BaseBoard Model
Not Available
BaseBoard Name
Base Board
Platform Role
Desktop
Secure Boot State
On
PCR7 Configuration
Elevation Required to View
Windows Directory
C:\Windows
System Directory
C:\Windows\system32
Boot Device
\Device\HarddiskVolume3
Locale
United States
Hardware Abstraction Layer
Version = "10.0.14393.0"
User Name
EMSCLIENT01\emsadmin
Time Zone
Eastern Daylight Time
Installed Physical Memory (RAM)
16.0 GB
Total Physical Memory
15.8 GB
Available Physical Memory
11.6 GB
Total Virtual Memory
18.2 GB
Available Virtual Memory

EXHIBIT B:


Most used
EMS Election Event Designer
File Explorer
EMS Results Tally and Reporting
Notepad
ImageCast® Adjudication
Calculator
1-Wire Drivers x64
3D Builder
Acrobat Reader DC
Alarms & Clock
Calculator
Calendar
Camera
Life at a glance
Monday
17
Get all your mail in one place
Mail
Microsoft Edge
Photos
Weather
Skype Preview
Microsoft News
Store
Play and explore
Xbox
Groove Music
Movies & TV
Paint 3D
WinZip Univer...
Get Office
OneNote
Fallout Shelter

EXHIBIT C:

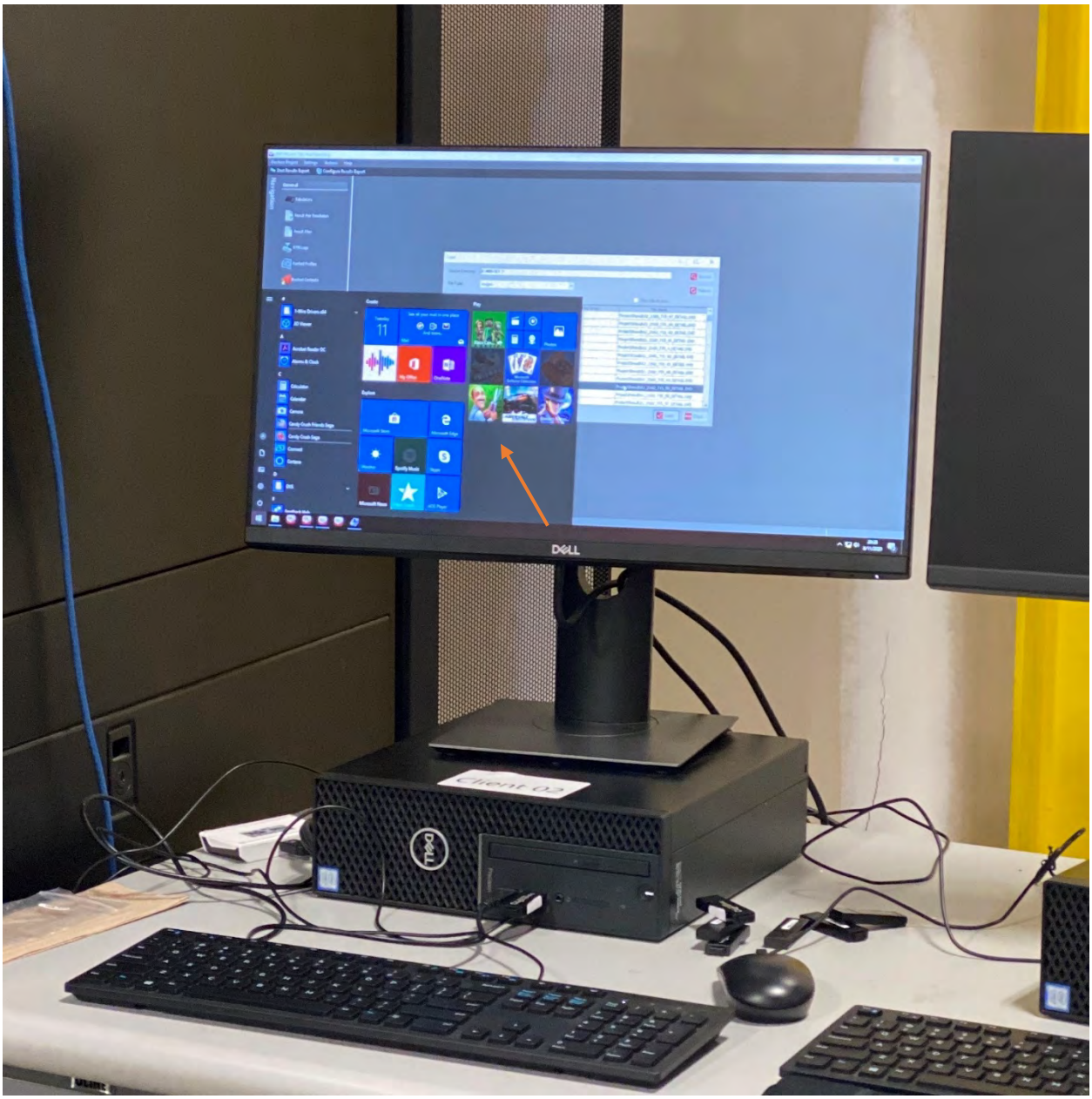


EXHIBIT D:

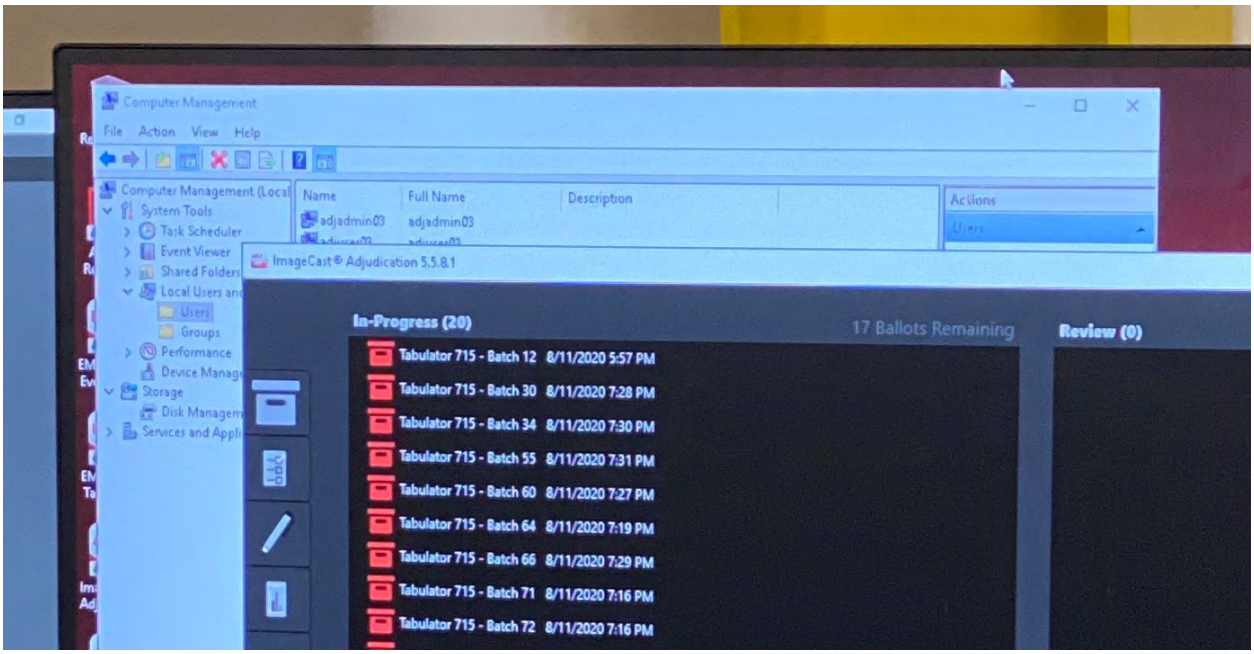
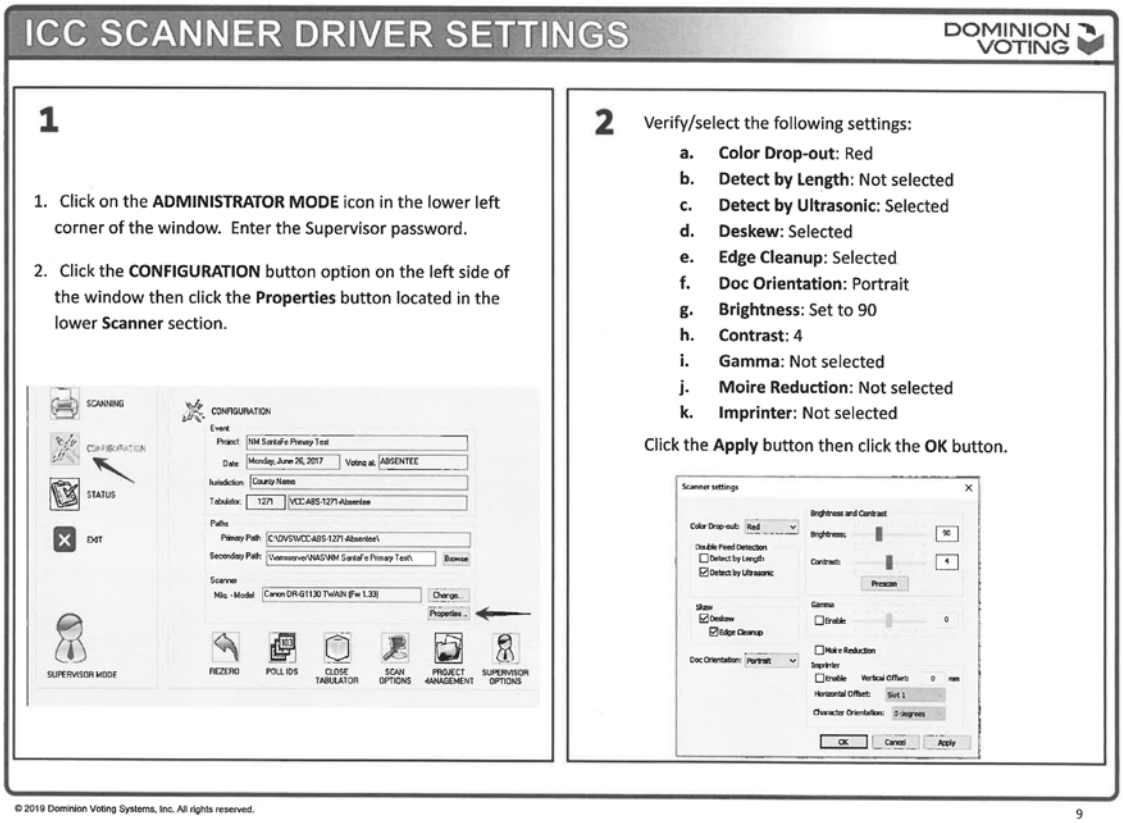

Computer Management
File Action View Help
Computer Management (Local
System Tools
Task Scheduler
Event Viewer
Shared Folders
Local Users and
Users
Groups
Performance
Device Manager
Storage
Disk Management
Services and Applications
Name
Full Name
Description
adjadmin03
adjadmin03
Actions
Users
ImageCast® Adjudication 5.5.8.1
In-Progress (20)
17 Ballots Remaining
Review (0)
Tabulator 715 - Batch 12 8/11/2020 5:57 PM
Tabulator 715 - Batch 30 8/11/2020 7:28 PM
Tabulator 715 - Batch 34 8/11/2020 7:30 PM
Tabulator 715 - Batch 55 8/11/2020 7:31 PM
Tabulator 715 - Batch 60 8/11/2020 7:27 PM
Tabulator 715 - Batch 64 8/11/2020 7:19 PM
Tabulator 715 - Batch 66 8/11/2020 7:29 PM
Tabulator 715 - Batch 71 8/11/2020 7:16 PM
Tabulator 715 - Batch 72 8/11/2020 7:16 PM

EXHIBIT E:


ICC SCANNER DRIVER SETTINGS
DOMINION VOTING
1
1. Click on the ADMINISTRATOR MODE icon in the lower left corner of the window. Enter the Supervisor password.
2. Click the CONFIGURATION button option on the left side of the window then click the Properties button located in the lower Scanner section.
SCANNING
CONFIGURATION
STATUS
EXIT
SUPERVISOR MODE
REZERO
POLL IDS
CLOSE TABULATOR
SCAN OPTIONS
PROJECT MANAGEMENT
SUPERVISOR OPTIONS
2
Verify/select the following settings:
a. Color Drop-out: Red
b. Detect by Length: Not selected
c. Detect by Ultrasonic: Selected
d. Deskew: Selected
e. Edge Cleanup: Selected
f. Doc Orientation: Portrait
g. Brightness: Set to 90
h. Contrast: 4
i. Gamma: Not selected
j. Moire Reduction: Not selected
k. Imprinter: Not selected
Click the Apply button then click the OK button.
Scanner settings
OK
Cancel
Apply
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9

EXHIBIT F:

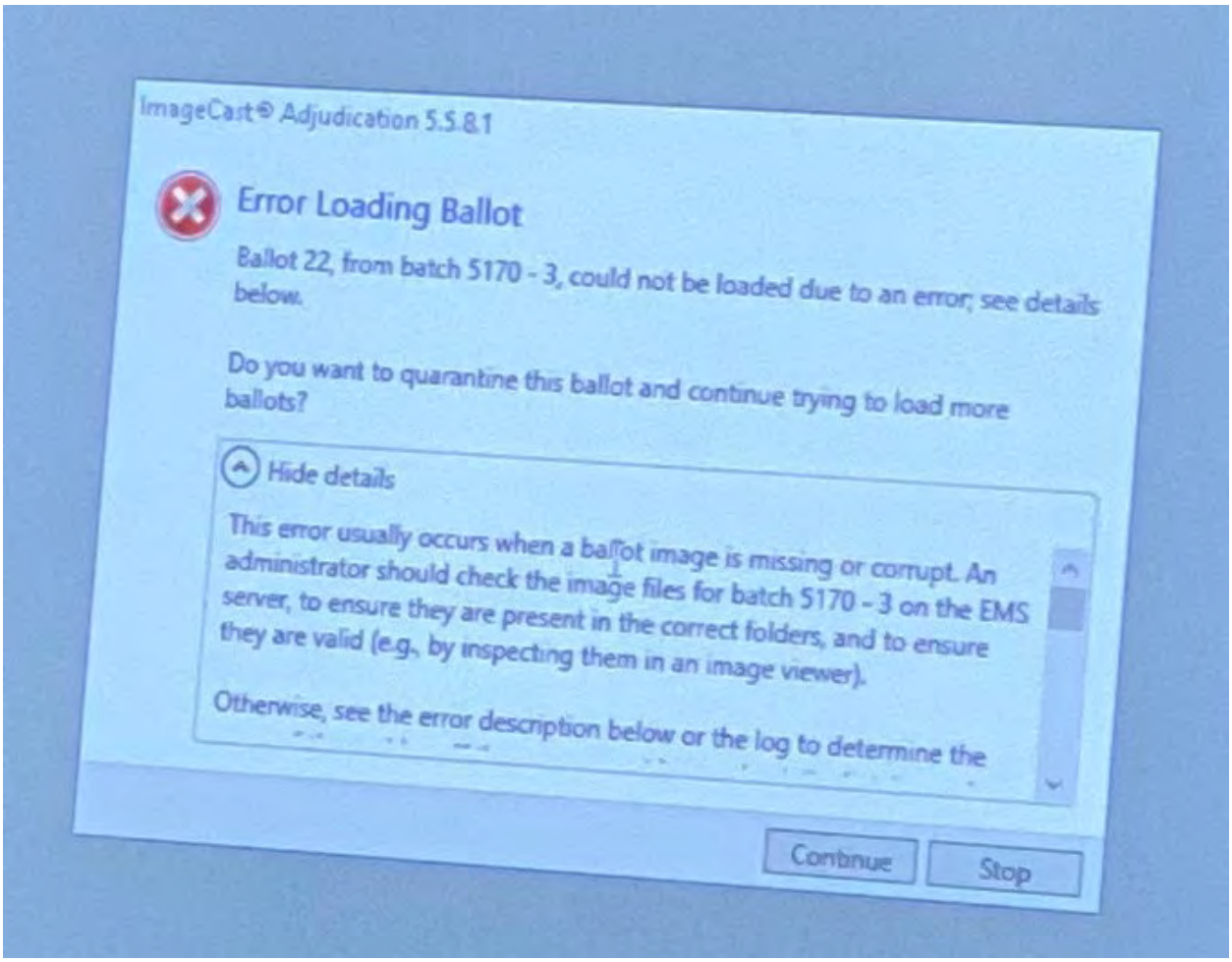
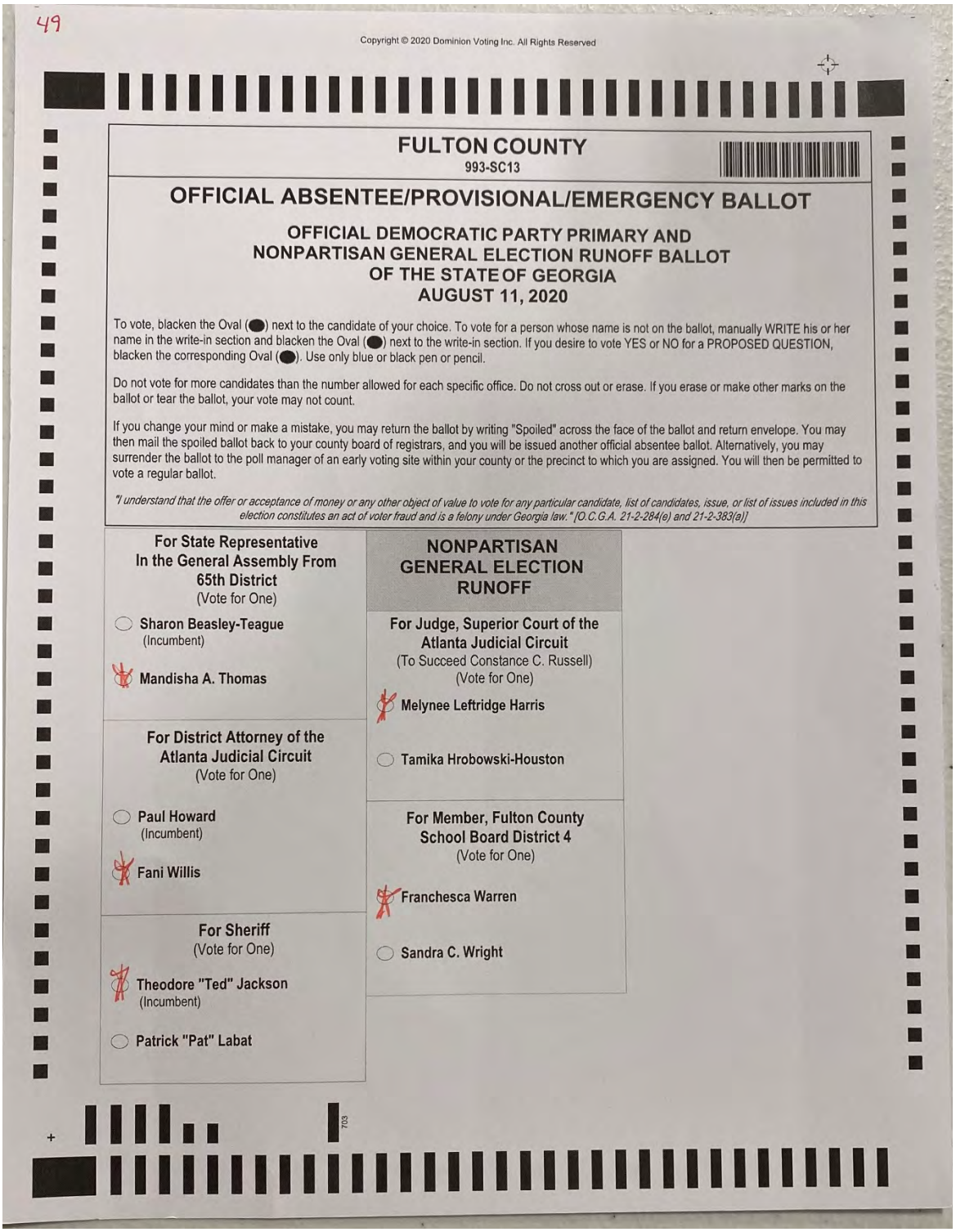

ImageCast® Adjudication 5.5.8.1
Error Loading Ballot
Ballot 22, from batch 5170 - 3, could not be loaded due to an error; see details below.
Do you want to quarantine this ballot and continue trying to load more ballots?
Hide details
This error usually occurs when a ballot image is missing or corrupt. An administrator should check the image files for batch 5170 - 3 on the EMS server, to ensure they are present in the correct folders, and to ensure they are valid (e.g., by inspecting them in an image viewer).
Otherwise, see the error description below or the log to determine the
Continue
Stop

EXHIBIT G:

EXHIBIT H:

EXHIBIT I:



49

FULTON COUNTY
993-SC13

OFFICIAL ABSENTEE/PROVISIONAL/EMERGENCY BALLOT

OFFICIAL DEMOCRATIC PARTY PRIMARY AND
NONPARTISAN GENERAL ELECTION RUNOFF BALLOT
OF THE STATE OF GEORGIA
AUGUST 11, 2020

To vote, blacken the Oval (●) next to the candidate of your choice. To vote for a person whose name is not on the ballot, manually WRITE his or her name in the write-in section and blacken the Oval (●) next to the write-in section. If you desire to vote YES or NO for a PROPOSED QUESTION, blacken the corresponding Oval (●). Use only blue or black pen or pencil.

Do not vote for more candidates than the number allowed for each specific office. Do not cross out or erase. If you erase or make other marks on the ballot or tear the ballot, your vote may not count.

If you change your mind or make a mistake, you may return the ballot by writing "Spoiled" across the face of the ballot and return envelope. You may then mail the spoiled ballot back to your county board of registrars, and you will be issued another official absentee ballot. Alternatively, you may surrender the ballot to the poll manager of an early voting site within your county or the precinct to which you are assigned. You will then be permitted to vote a regular ballot.

"I understand that the offer or acceptance of money or any other object of value to vote for any particular candidate, list of candidates, issue, or list of issues included in this election constitutes an act of voter fraud and is a felony under Georgia law." [O.C.G.A. 21-2-284(e) and 21-2-383(e)]

For State Representative In the General Assembly From 65th District
(Vote for One)
- ○ Sharon Beasley-Teague (Incumbent)
- ✗ Mandisha A. Thomas

For District Attorney of the Atlanta Judicial Circuit
(Vote for One)
- ○ Paul Howard (Incumbent)
- ✗ Fani Willis

For Sheriff
(Vote for One)
- ✗ Theodore "Ted" Jackson (Incumbent)
- ○ Patrick "Pat" Labat

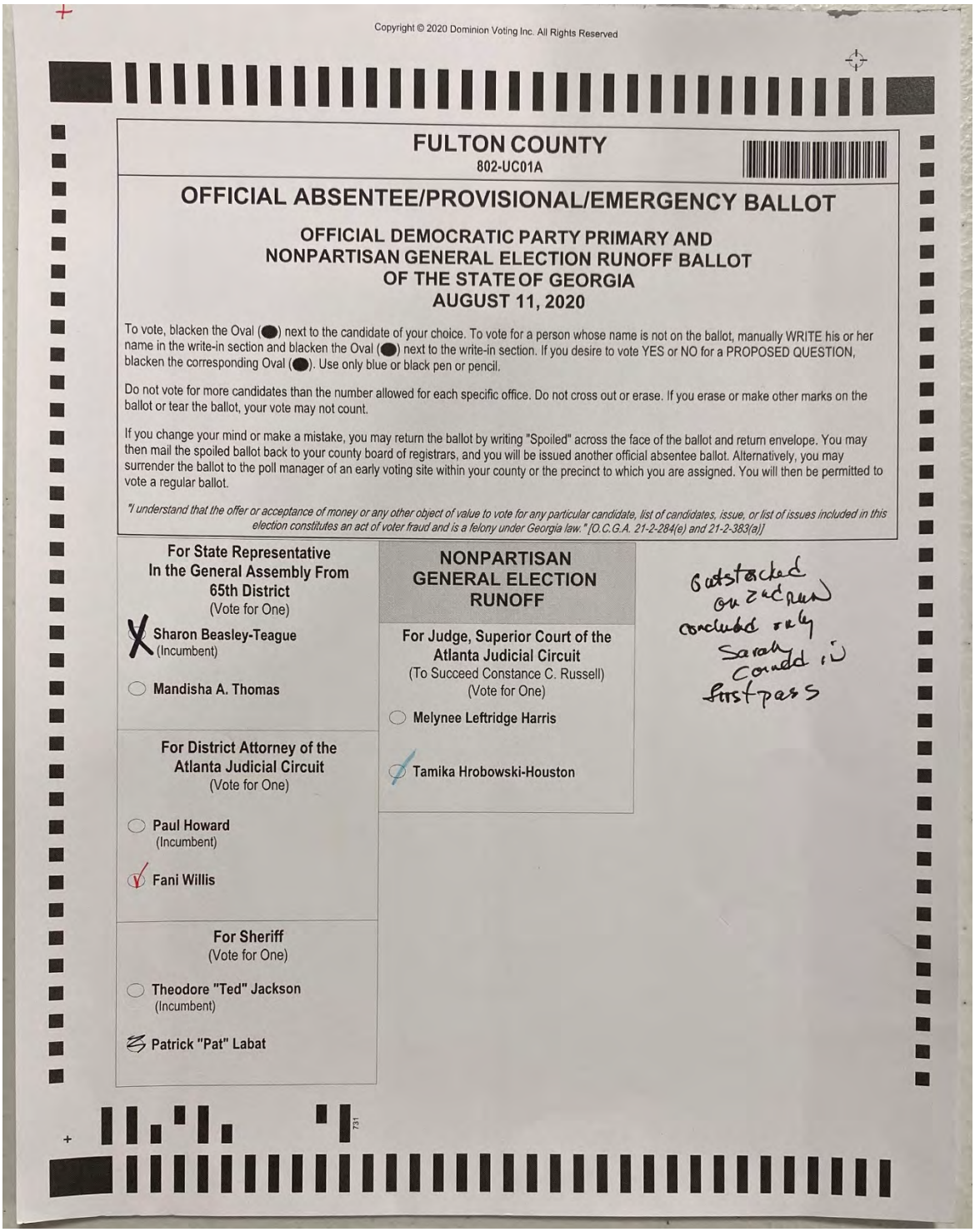
NONPARTISAN GENERAL ELECTION RUNOFF

For Judge, Superior Court of the Atlanta Judicial Circuit
(To Succeed Constance C. Russell)
(Vote for One)
- ✗ Melynee Leftridge Harris
- ○ Tamika Hrobowski-Houston

For Member, Fulton County School Board District 4
(Vote for One)
- ✗ Franchesca Warren
- ○ Sandra C. Wright

703

EXHIBIT J:



FULTON COUNTY
802-UC01A

OFFICIAL ABSENTEE/PROVISIONAL/EMERGENCY BALLOT

OFFICIAL DEMOCRATIC PARTY PRIMARY AND
NONPARTISAN GENERAL ELECTION RUNOFF BALLOT
OF THE STATE OF GEORGIA
AUGUST 11, 2020

To vote, blacken the Oval (●) next to the candidate of your choice. To vote for a person whose name is not on the ballot, manually WRITE his or her name in the write-in section and blacken the Oval (●) next to the write-in section. If you desire to vote YES or NO for a PROPOSED QUESTION, blacken the corresponding Oval (●). Use only blue or black pen or pencil.

Do not vote for more candidates than the number allowed for each specific office. Do not cross out or erase. If you erase or make other marks on the ballot or tear the ballot, your vote may not count.

If you change your mind or make a mistake, you may return the ballot by writing "Spoiled" across the face of the ballot and return envelope. You may then mail the spoiled ballot back to your county board of registrars, and you will be issued another official absentee ballot. Alternatively, you may surrender the ballot to the poll manager of an early voting site within your county or the precinct to which you are assigned. You will then be permitted to vote a regular ballot.

"I understand that the offer or acceptance of money or any other object of value to vote for any particular candidate, list of candidates, issue, or list of issues included in this election constitutes an act of voter fraud and is a felony under Georgia law." [O.C.G.A. 21-2-284(e) and 21-2-383(a)]

For State Representative In the General Assembly From 65th District
(Vote for One)

- [X] Sharon Beasley-Teague (Incumbent)
- [ ] Mandisha A. Thomas

For District Attorney of the Atlanta Judicial Circuit
(Vote for One)

- [ ] Paul Howard (Incumbent)
- [✓] Fani Willis

For Sheriff
(Vote for One)

- [ ] Theodore "Ted" Jackson (Incumbent)
- [S] Patrick "Pat" Labat

NONPARTISAN GENERAL ELECTION RUNOFF

For Judge, Superior Court of the Atlanta Judicial Circuit
(To Succeed Constance C. Russell)
(Vote for One)

- [ ] Melynee Leftridge Harris
- [✓] Tamika Hrobowski-Houston

Outstacked on 2nd pass concluded only Sarah counted in first pass

731

EXHIBIT K:

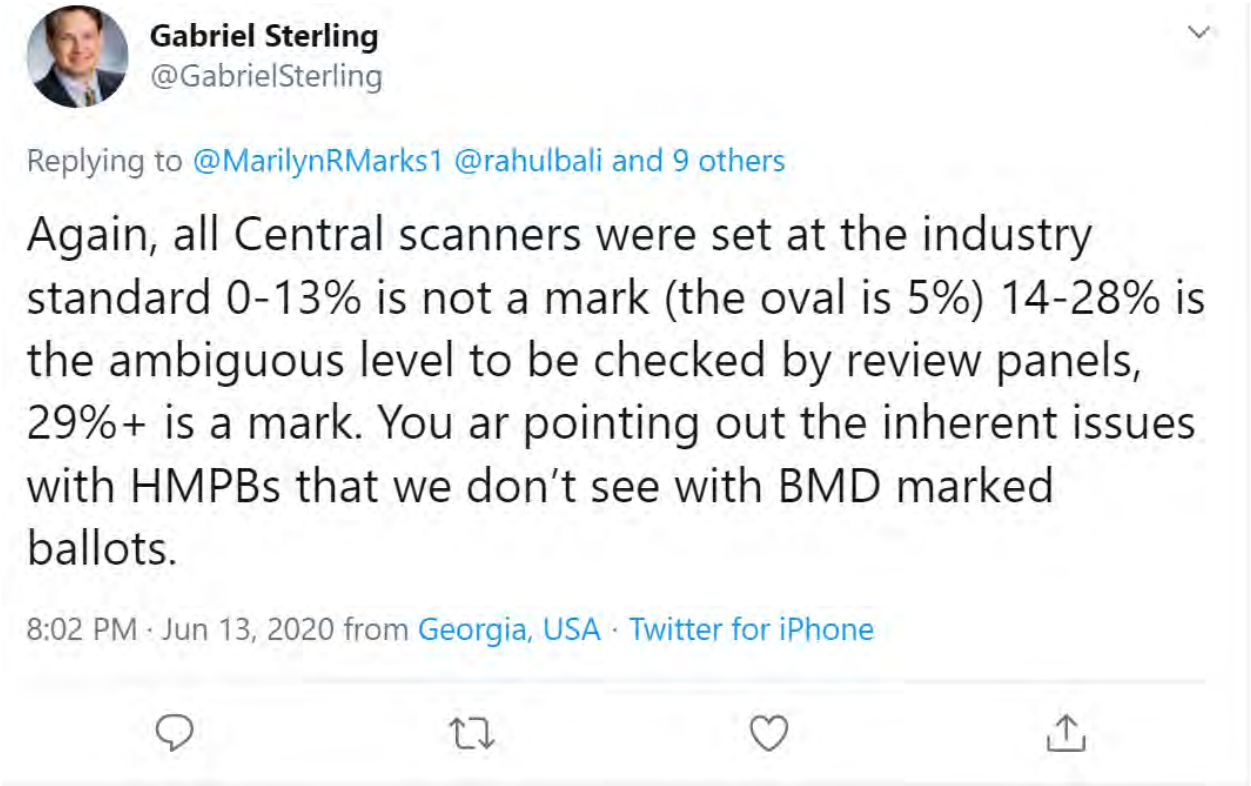

Gabriel Sterling
@GabrielSterling
Replying to @MarilynRMarks1 @rahulbali and 9 others
Again, all Central scanners were set at the industry standard 0-13% is not a mark (the oval is 5%) 14-28% is the ambiguous level to be checked by review panels, 29%+ is a mark. You ar pointing out the inherent issues with HMPBs that we don't see with BMD marked ballots.
8:02 PM · Jun 13, 2020 from Georgia, USA · Twitter for iPhone

EXHIBIT L:

- Create a voter card from Poll Pad for each unique ballot style within the designated Polling Location
  - Recommend labels be placed on card identifying what ballot style will be displayed by BMD once card is inserted
  - BMD removes the activation code from the Voter Card once used, therefore create the card again from Poll Pad after each use by a BMD

D. Testing the BMD and Printer

Use a combination of Poll Worker Card with Ballot Activation Codes for the polling location, and Voter Cards created from a Poll Pad loaded with the LA/Advance Voting dataset to bring up ballots on the BMD

- Produce at least one printed ballot from each BMD assigned to the polling location
- Produce a test deck from the BMDs assigned to the polling location for each unique ballot style within the polling location. The test deck must contain at least one vote for each candidate listed in each race within the unique ballot style
  - **Example**: Ballot from BMD 1 contains a vote for only the first candidate in each race listed on Ballot Style 1, Ballot from BMD 2 contains a vote only for the second candidate in each race on Ballot Style 1, and continue through the line of devices until all candidates in all races within the unique ballot style have received a single vote
  - **If Number of BMDs outnumber the number of vote positions on the unique ballot style**, start the vote pattern over until all BMDs have produced one printed ballot
  - **If Number of unique ballot styles in the polling place is greater than 1,** once the vote pattern is complete for a unique ballot style, proceed to the next BMD in line to start the review of the next unique Ballot Style
  - **All unique ballot styles do not have to be tested on each BMD**
- Review BMD-generated Test Deck and confirm the vote content before placing in the designated Polling Place Scanner

E. Testing the Polling Place Scanner

- Scan the BMD-generated Test Deck into the Polling Place Scanner
- Scan one blank optical scan ballot style(s) associated to the Polling Place to verify the Polling Place Scanner will recognize the ballot style in case of emergency
- Verify Scanner(s) shows a number of Ballot Cast equal to the number of ballots in the BMD-generated test deck plus the scanned blank Optical Scan ballot styles
- Firmly place the Security Key Tab in the Security Key Slot
- Touch Close Polls
- Enter the passcode
- Touch Enter
- Touch Yes
- Touch No for additional tapes (Scanner will automatically produce 3 copies of the closing tape)

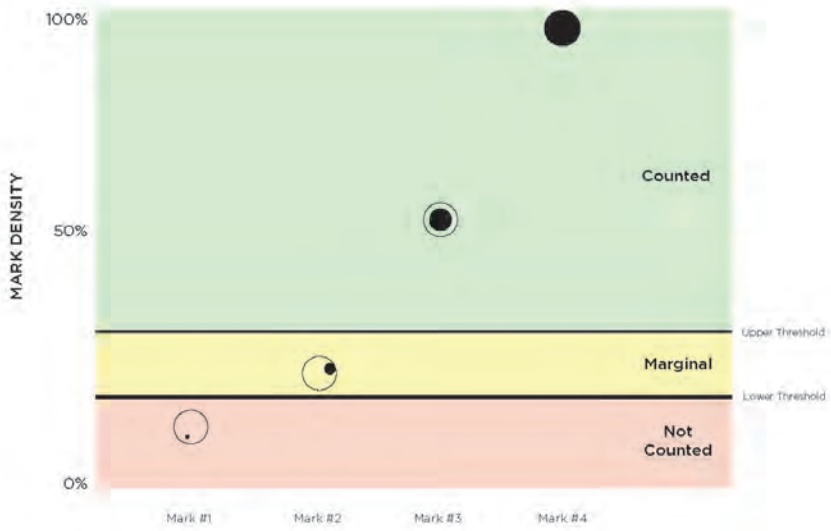
EXHIBIT M:

THE DOMINION DIFFERENCE

DUAL THRESHOLD TECHNOLOGY (MARGINAL MARKS)

From its early beginnings, Dominion Voting has emphasized the use of digital scanning, and continues to set the standard in digital image acquisition and analysis in the tabulation of digitally scanned ballots. When a ballot is fed into an ImageCast® tabulator – at the precinct level or centrally - a complete duplex image is created and then analyzed for tabulation by evaluating the pixel count of a voter mark. The pixel count of each mark is compared with two thresholds (which can be defined through the Election Management System) to determine what constitutes a vote. If a mark falls above the upper threshold, it's a valid vote. If a mark falls below the lower threshold, it will not be counted as a vote.

However, if a mark falls between the two thresholds (known as the "ambiguous zone"), it will be deemed as a marginal mark and the ballot will be returned to the voter for corrective action (please see diagram below). With this feature, the voter is given the ability to determine his or her intent, not an inspection or recount board after the fact, when it is too late. The chart below illustrates the Marginal Mark threshold interpretation.



THE DOMINION DIFFERENCE DUAL THRESHOLD TECHNOLOGY DOMINION VOTING

STATEMENT BY ANA MERCEDES DÍAZ CARDOZO

I, Ana Mercedes Díaz Cardozo, hereby declare the following:

1. My name is Ana Mercedes Díaz Cardozo. I'm known as Ana Diaz by many. I am an adult of the sound mine and was born in Caracas, Venezuela on March 24, 1960. I'm a naturalized American citizen. I reside at 923 Gulf Stream Court, Weston, Florida 33327.

2. I make this statement voluntarily and on my own initiative. I have not been promised, nor do I expect to receive anything in exchange for my testimony and give this statement. I have no expectation of any benefit or reward and understand that there are those who can try to hurt me for what I say in this statement.

3. I moved from Venezuela to the United States in 2004 due to political corruption and rapid decline in my home country of Venezuela. I want to alert the public and let the world know the truth about corruption, manipulation, and lies committed through a conspiracy of individuals and businesses with the intention of betraying the honest people of the United States and its legally constituted institutions and fundamental rights as citizens. This conspiracy began more than a decade ago in Venezuela and has spread to countries around the world. It is a conspiracy to unjustly gain and maintain power and wealth. These are political leaders, powerful companies, and others whose purpose is to gain and maintain power by changing people's free will and subverting the proper course of governing.

4. After graduating from high school, I attended the University of Santa Maria in Caracas, Venezuela and graduated as a lawyer in 1987. Then I studied a postgraduate degree in administrative law at the University of Central Venezuela. Before I could submit my thesis for a Master's degree in Administrative Law, I moved to the United States. I'm certified as an arbiter of international trade.

5. I was a career official for 25 years at the Supreme Electoral Council of Venezuela, which is the name that it was called in the 1970's. It is currently called the National Electoral Council. This is the highest electoral administrative agency in Venezuela and oversees all elections in Venezuela. In 1979, at the age of 19, I began my career at the Supreme Electoral Council of Venezuela as secretary in the regional delegation of the federal district. When I graduated from the university as a lawyer, my position on the Supreme Electoral Council changes to the position as an adviser to the Judicial Council of the Supreme Council Electoral. In 1991, I was appointed Assistant Director General of Political Parties, where I served until Hugo Chavez came to power in 1998. Also during this time, I served for seven years as a member of the Legislative Commission of the Venezuelan Electoral Council. It was the role of the Legislative Commission to review and identify any issues related to candidates

for elected positions. The Legislative Commission and my office had access to many resources within the various departments of the Electoral Council, including an information technology section that had experts in computers, computer programming, computer systems and telecommunications features such as modems, telephone lines. I was regularly in communication with the various departments of the Electoral Body for my daily duties. In the last years of my work for the Electoral Counsel, a little of my activities and duties were to learn about electronic voting systems and their functioning by Council experts.

6. As Deputy Director General of Political Parties in the Supreme Electoral Council, it was my duty to oversee everything related to political parties in Venezuela, particularly the participation of political parties in elections and the selection and qualifications of candidates for political office. My office reviewed everything to do with the ability of political parties to participate in the electoral process. Before a political party could be formed, it had to undergo a process for approval. This included legal approval of the party name, its colors and a list of its members. The proposed party had to have a certain percentage of Venezuela's population depending on whether it wanted to be a regional or national party. It could not be constituted as a political party until it was approved by the Supreme Electoral Council. My office also oversaw the creation of ballots that bore the name of the candidates and any party symbol or color that the candidate would like to use. When our office approved these matters, we sent the ballot for printing and circulation. Any conflict over which group could be a political party, which would be a candidate for elected office, how that candidate would be included in the vote, were decided by my office. I was a signatory to all decisions taken by the Political Parties office at the Supreme Electoral Council.

7. After Hugo Chavez was elected, he changed the Venezuelan Constitution. One such change was in the Supreme Electoral Council, now the Electoral Power. In February 2009, a national referendum was passed to change Venezuela's Constitution to end mandate limits for elected officials, including the President of Venezuela. This change allowed Hugo Chavez to be re-elected an unlimited number of times.

8. In 2003, I was appointed Director General of Political Parties at the National Electoral Council. At the end of that year there was a national effort to hold a referendum to remove Hugo Chavez from the post of President. In 2004 I was appointed to the Validation Committee that was responsible for reviewing petitions, the requirements of the signatories were their name, their signature, their fingerprint and their identification number. I discovered many ways that the party in power was trying to override requests. One was the change of forms to reflect that the petition was a referendum on the removal of members of the Venezuelan Congress

rather than the removal of the Venezuelan president. The purpose of manipulating petitions was to prevent a referendum to remove President Chavez from office. I investigated the allegations of fraud with the referendum petitions and lobbied for the fraudulent changes to be rectified. Because of my resistance and protests to this voter fraud, I received a letter in March 2004 stating that my position was trusted and trust had been lost in me and I was fired from the service.

9. After my dismissal, I decided to commit to the study of electoral processes both within Venezuela and in other countries, particularly in South American countries that were experiencing electoral unrest and government manipulation of constitutions, laws and elections. I joined a small group of highly educated and informed people who had access to information about the Venezuelan government and its activities. This group and I conduct interviews with Venezuelan citizens, read news publications and specialized treaties, and write evaluating the political, economic, legal and electoral changes taking place in Venezuela, South American countries, and other parts of the world controlled by socialist dictators and oligarchies. I read these treatises, studies, and publications to educate myself on how elections were manipulated and the use of empirical analysis to detect and identify the manipulation of elections and their results. In addition, I have collected copies of official Venezuelan government documents.

10. Official documents of the Venezuelan government include documents showing the bidding process for the implementation of a new electronic voting system in March 2004 and the award of the contract for that new system to Smartmatic. A true and authentic copy of the venezuelan National Electoral Council's tender documents, internal memorandums and contract signed between the Venezuelan government and the SBC Consortium (Smartmatic) are labeled Exhibit 1 and this statement is attached. I received the documents that constitute Exhibit 1 from a reliable person who had taken some notes on the documents and highlighted some parts for my attention. I have not made any alterations to what I have received, and the substantive content of the documents is authentic. For convenience, I've had the Bates document tagged at the bottom right of each page.

11. I have studied the documents contained in Exhibit 1 and have several observations. Exhibit 1 says that it is a contract between the National Electoral Council and the SBC Consortium (Smartmatic) and is dated 15 March 2004. It has a stamp that says Bolivarian Republic of Venezuela, Secretary General of the National Electoral Council. That is the official seal of the Secretary of the National Electoral Council. The initials at the bottom right side confirm the document's authenticity.

12. You would notice that page DIAZ 00002 is important because it shows that the contract is being made on February 16, 2004. Page DIAZ 00027, reflects that on February 14, 2004 at 11:50 a.m., in the Council's session room, Francisco Carrasquero López, Ezequiel Zamora Presilla, Jorge Rodríguez Gómez (Jorge Rodríguez), Sobella Mejías, and William Pacheco Medina, Vice President, the directors of the Secretary General of Electoral Voters respectively, in order to proceed with the delivery to the technical commissions, designated at the meeting dated 13 February 2004, they opened the tender envelopes containing the tenders of the companies that wanted to be awarded a contract for the automation of Venezuela's voting system and the processes used to carry out the 2004 referendum on the revocation of Hugo Chavez's election. Below you can read the amounts of offers made by Smartmatic SBC, Diebold and other bidders.

13. Then, on page DIAZ 000031, there is an internal note from the Director General of Administration, Mr. Medina. It was dated 14 February 2004 and said that a report on the research and evaluation of companies bidding for the automation of the voting system needed to be prepared.

14. It would then draw attention to the page marked DIAZ 000029. It is a document made on February 13, 2004. While this page is out of sequence, it shows the speed at which the decision was made to award the electoral system contract. The tender began on February 13 and had ended on February 16th -- a three-day period to review contracts and evaluate the specifications and performance of bidders' systems, including software, hardware, security, performance and bidding costs for the procurement, installation, training and operation of the systems. By February 16th, a decision to choose Smartmatic was made. This is convincing evidence that there was no genuine competition for the electoral system contract or serious consideration for alternative contracts. There was no due diligence and the bidding was rigged. It is not possible that within three or four days to do the formal investigation to evaluate the bids and award a contract of this size and important. The impropriety of this action is confirmed by the fact that the contract with Smartmatic was signed a month later, on 15 March 2004.

15. After the contract was awarded to Smartmatic, it was learned that Smartmatic had no previous experience in conducting elections and electoral tabulations. More importantly, it was discovered that the Smartmatic voting system contained two-way communication functions that allowed voting data not only to be sent to a central system of operation and voting, but the central voting system in operation and tabulation to send operational instructions and data to voting machines. It is not mentioned in the contract documents and specifications that the system would be bidirectional and would allow the transmission of data and instructions from the central operating system directly to voting machines. One

simply has to examine the system diagram on page DIAZ 000057 of Exhibit 1. If this feature of the Smartmatic system had been disclosed to the Electoral Council, it could not have adequately accepted Smartmatic's offer because it would allow the Smartmatic voting system to be handled in a way that manipulated votes and interfered with the legitimate voting and electoral process by impersonating the will to govern officials with the will of the electorate: the citizens of Venezuela. It was not surprising that Hugo Chávez and his successors then constantly won the election through the use and manipulation of the Smartmatic voting system.

16. In the 16 years since I left my post as Director General of Political Parties at the National Electoral Council of Venezuela, I have studied the electoral systems of Bolivia, Colombia, Ecuador, Guatemala, Honduras and Nicaragua and have observed elections and participated in pro-democratic forums in Colombia, Ecuador, Honduras and Nicaragua. I have also studied and researched electoral processes in Europe, participating in public academic conferences in Spain and Italy on the subject of democratic electoral processes.

17. Based on my specialized experiences with electoral systems, I have a firm view that no legitimate electronic voting system should be allowed to have the ability of two-way communications to send data and instructions between central tabulation operations and voting machines over telephone lines or the Internet. Having such characteristics compromise the integrity of the entire voting process by allowing injection of data and instructions to manipulate voting before, during and after an election and to avoid detection of processes and mechanisms designed to prevent voting manipulation and fraud.

I declare under penalty of perjury that the above is true and correct and that this Statement was prepared in Dallas County, Texas, and executed on November 20, 2020.

Ana Mercedes Díaz Cardozo

Declaration of Seth Keshel

Pursuant to 28 U.S.C Section 1746, I, Seth Keshel, make the following declaration.

1. I am over the age of 21 years and I am under no legal disability, which would prevent me from giving this declaration.
2. I am a trained data analyst with experience in multiple fields, including service in the United States Army as a Captain of Military Intelligence, with a one-year combat tour in Afghanistan. My experience includes political involvement requiring a knowledge of election trends and voting behavior.
3. I reside at 233 Muir Hill Dr., Aledo, TX 76008.
4. My declaration highlights substantial deviance from statistical norms and results regarding voting patterns in Wisconsin.
5. All 2020-related voting totals are taken from the Decision Desk HQ unofficial tracker, are not certified, and are subject to change from the time of the creation of this declaration.
6. Wisconsin has shown a steady decrease for support in Democratic presidential nominees since Barack Obama won the state by 13.91% in 2008. He won Wisconsin again in 2012, but only by a margin of 6.94%, and Republican Donald Trump won the state by 0.77% in 2016.
7. As part of an overall working-class voter shift, Wisconsin has moved in the same manner as Pennsylvania, Ohio, Michigan, and Minnesota – decreasing levels of support for Democratic nominees, and by consequence of this shift, increasing levels of support for Republican

nominees. This shift is captured in visual form in Exhibit A to this declaration.

8. The following counties have cast more Democratic presidential votes than cast for Obama in 2008, when he won the state by 13.91%:
    a. Ozaukee – 26,515 Biden votes, a 31.5% increase from 2016, and 28.8% more than cast for Obama in 2008. President Trump has increased his vote share by 11.3%, receiving 33,912 votes. Democratic vote shifts were -6.9% in 2012 and +5.3% in 2016.
    b. Dane – 260,157 Biden votes, a 19.5% increase from 2016, and 26.3% more than cast for Obama in 2008. President Trump has increased his vote share by 10.5%, receiving 78,789 votes. Democratic vote shifts were +4.9% in 2012 and +0.8% in 2016. Dane County is home to the University of Wisconsin. President Obama had record support, turnout, and enthusiasm among college-age students and did not have to navigate pandemic-related challenges to turn out these voters, which makes Biden's total extremely suspicious.
    c. Waukesha – 103,867 Biden votes, a 31.1% increase from 2016, and 21.7% more than cast for Obama in 2008. President Trump has increased his vote share by 12.0%, receiving 159,633 votes. Democratic vote shifts were -7.7% in 2012 and +0.6% in 2016.
    d. St. Croix - 23,190 Biden votes, a 32.7% increase from 2016, and 9.5% more than cast for Obama in 2008. President Trump has increased his vote share by 22.8%, receiving 32,190 votes. Democratic vote shifts were -6.0% in 2012 and -12.2% in 2016,

making such a sharp Democratic turnabout in the face of a strong President Trump vote increase extremely suspect.

e. Washington - 26,647 Biden votes, a 27.8% increase from 2016, and 3.6% more than cast for Obama in 2008. President Trump has increased his vote share by 16.4%, receiving 60,235 votes. Democratic vote shifts were -9.9% in 2012 and -10.0% in 2016. A rebound of 27.8% for Democrats from two consecutive cycles of heavy losses, particularly with President Trump reconsolidating the Republican Party base and lost third-party voters, seems unlikely.

f. Bayfield - 6,155 Biden votes, a 24.3% increase from 2016, and 3.1% more than cast for Obama in 2008. President Trump has increased his vote share by 12.0%, receiving 4,617 votes. Democratic vote shifts were +1.0% in 2012 and -18.9% in 2016.

9. Milwaukee County's voter rolls shrank from 2016 to 2020, after losing 13.1% of President Obama's Democratic vote total from 2012; however, this year, Milwaukee County has surged in Democratic votes to nearly equal Obama re-election levels with 317,251 votes, even as President Trump has made an increase of 6.6% in votes. With a declining voter roll, Milwaukee County was likely on track to cast less than 275,000 Democratic ballots this year. Combining these resurgent totals with the transparency issues experienced on the early morning hours of November 4, their current total of 317,251 is strikingly suspect.

10. *New York Times* live vote reporting shows a dump of 168,541 votes at 3:42:20 (a.m.) on November 4, 2020. Of those votes, 143,378

(85.07%) went for Biden, and just 25,163 (14.93%) went for Trump. This dump was enough to flip the race with almost no transparency to the viewing public. The live graph showing this vote dump (circled) is attached as Exhibit D to this document.

11. President Trump has vastly increased his vote share in the entirety of Wisconsin, and also in the rural parts of the state, including the counties he flipped from Democratic to Republican in 2016; however, against the trends of the previous election, the Democrats have increased at greater margins than Trump has, thereby erasing margin gain, and allowing for suspicious vote totals in Milwaukee, Dane, Ozaukee, Waukesha, St. Croix, and other counties with strikingly high Democratic vote totals to overwhelm Trump's totals. A county classification of Wisconsin is available in Exhibit B to this declaration, and a full analysis of Wisconsin's voter irregularities is available in Exhibit C.

Seth Keshel

17 Nov. 2020

Aledo, Texas

Improbable Voting Trend Reversals in Wisconsin

Seth Keshel, MBA

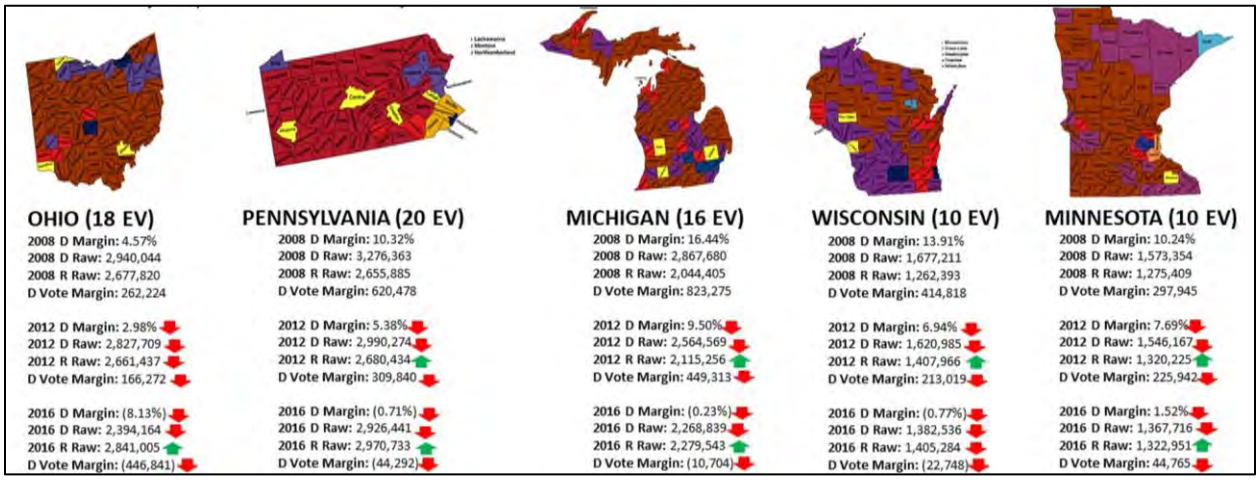
Executive Summary

Wisconsin is showing the same pattern of potential widespread fraud as observed in Pennsylvania, Michigan, Georgia, and North Carolina. While Milwaukee County is focal for transparency and observation violations, including reporting statistically impossible vote counts in the early morning hours away from scrutiny, Dane County has surged far past support totals for President Obama, despite expected difficulties mobilizing student voters to polls. President Trump has reconsolidated the Republican base in suburban Milwaukee and far surpassed his 2016 support levels but has been limited in margin growth by historically improbable Democratic support in these strongholds, which defy years of data in Wisconsin in which the Republican party surged as the Democratic Party plunged. Finally, in strong Trump counties showing a double inversion cycle (one party up, the other down), particularly in rural and exurban Wisconsin, Trump's totals are soaring, and against established trends, Biden's totals are at improbable levels of support despite lacking registration population growth.

The entire vote must be recanvassed and audited for both electronic vote fraud and mail/absentee fraud.

Opening

Since President Obama swept through the Midwest ("Rust Belt") region in 2008, winning Pennsylvania by 10 percent, Michigan by 16 percent, and Wisconsin by 14 percent, the Democratic Party has declined steadily in all successive Presidential elections in not only share of the vote, but in raw votes overall, without exception (pending the final results of the 2020 election). Pennsylvania is the only state mentioned in this paragraph which registers voters by party, and it has trended three percentage points in favor of Republicans since the 2016 election. The raw vote trends and results in these three states, plus Ohio and Minnesota, are pictured below.



These trends show the Democrats losing raw votes in every election since 2008, with the Republicans gaining in eight of 10 samples, and with the margins moving in favor of Republicans each time. This is a product of limited or stagnant population growth in these states, which given stable turnout numbers, means one party is typically going down if another is going up. In fast-growing states such as Florida, Texas, or Arizona, it should be expected for both parties to make substantial gains in a "horse race" scenario.

Wisconsin

President Obama's margin of victory in Wisconsin from 2008 fell from 13.91% to 6.94% in his reelection campaign, and that margin moved 7.71% toward Republicans in 2016 as the working-class communities that historically favored Democrats moved to support then-candidate Donald Trump. Declining voting power from these working class counties beginning and 2012, and then from Milwaukee County in 2016 was an instrumental part of this shift, as was the substantial movement of northern Wisconsin toward the Republican Party. President Trump was able to win Wisconsin in 2016 thanks to substantially decreased support for Democrats, and even overcame less than optimal support from the Republican strongholds of southeastern Wisconsin.

The consistent characteristic in the shift in Wisconsin's political landscape is the declining Democratic Party raw vote totals, and the increasing Republican totals. Thus far, according to the Decision Desk unofficial vote tally, President Trump is substantially adding to his vote totals in every Wisconsin County, while his opponent adds votes at a greater percentage, often in counties that have trended steadily away from Democrats since at least 2008. The following counties, which have mostly lost Democratic votes since 2008, have now contributed more Biden votes than Obama received in 2008, when he won the state by 13.91%. Green font represents growth in raw votes. Red font represents decrease in raw votes.

County	Rep '08	Dem '08	Rep '12	Dem '12	Rep '16	Dem '16	Rep '20	Dem '20	Dem Percentage of Obama 2008 Votes
Ozaukee	32,172	20,579	36,077	19,159	30,464	20,170	33,912	26,515	128.8%
% Increase	N/A	N/A	12.1%	(6.9%)	(15.6%)	5.3%	11.3%	31.5%	

Dane	73,065	205,984	83,644	216,071	71,275	217,697	78,789	260,157	126.3%
% Increase	N/A	N/A	14.5%	4.9%	(14.8%)	0.8%	10.5%	19.5%	

Waukesha	145,152	85,339	162,798	78,779	142,543	79,224	159,633	103,867	121.7%
% Increase	N/A	N/A	12.2%	(7.7%)	(12.4%)	0.6%	12.0%	31.1%	

Racine	45,954	53,408	49,347	53,008	46,681	42,641	54,475	50,154	117.6%
% Increase	N/A	N/A	7.4%	(0.7%)	(5.4%)	(19.6%)	16.7%	17.6%	

St. Croix	22,837	21,177	25,503	19,910	26,222	17,482	32,190	23,190	109.5%
% Increase	N/A	N/A	11.7%	(6.0%)	2.8%	(12.2%)	22.8%	32.7%	

Wash'ton	47,729	25,719	54,765	23,166	51,740	20,852	60,235	26,647	103.6%
% Increase	N/A	N/A	14.7%	(9.9%)	(5.5%)	(10.0%)	16.4%	27.8%	

Bayfield	3,365	5,972	3,603	6,033	4,124	4,953	4,617	6,155	103.1%
% Increase	N/A	N/A	7.1%	1.0%	14.5%	(18.9%)	12.0%	24.3%	

OTHER NOTABLE COUNTIES

County	Rep '08	Dem '08	Rep '12	Dem '12	Rep '16	Dem '16	Rep '20	Dem '20	Dem Percentage of Obama 2008 Votes
Milwaukee	149,445	319,819	154,924	332,438	126,069	288,822	134,355	317,251	99.2%
% Increase	N/A	N/A	3.7%	3.9%	(18.6%)	(13.1%)	6.6%	9.8%	

La Crosse	23,701	38,524	25,751	36,693	26,378	32,406	28,661	37,817	98.5%
% Increase	N/A	N/A	8.6%	(4.8%)	2.4%	(11.7%)	8.7%	16.7%	

Brown	55,854	67,269	64,836	62,526	67,210	53,382	75,865	65,509	97.4%
% Increase	N/A	N/A	16.1%	(7.1%)	3.7%	(14.6%)	12.9%	22.7%	

Eau Claire	20,959	33,146	23,256	30,666	23,331	27,340	25,339	31,617	95.6%
% Increase	N/A	N/A	11.0%	(7.5%)	0.3%	(10.8%)	8.6%	15.6%	

Outagamie	39,667	50,294	47,372	45,659	49,879	38,068	58,379	47,659	94.8%
% Increase	N/A	N/A	19.4%	(9.2%)	5.3%	(16.4%)	17.0%	25.2%	

Walworth	25,485	24,117	29,006	22,552	28,863	18,710	33,844	22,783	94.2%
% Increase	N/A	N/A	13.8%	(6.7%)	(0.5%)	(17.0%)	17.3%	21.8%	

Rock	27,364	50,529	30,517	49,219	31,493	39,339	37,133	46,649	92.3%
% Increase	N/A	N/A	11.5%	(2.6%)	3.2%	(20.1%)	17.9%	18.6%	

Kenosha	31,609	45,836	34,977	44,867	36,037	35,799	44,972	42,191	92.0%
% Increase	N/A	N/A	10.6%	(2.1%)	3.0%	(20.2%)	24.8%	17.9%	

Winnebago	37,946	48,167	42,122	45,449	43,445	37,047	47,795	44,060	91.5%
% Increase	N/A	N/A	11.0%	(5.6%)	3.1%	(18.5%)	10.0%	18.9%	

Sheboygan	30,801	30,395	34,072	27,918	32,514	23,000	37,624	27,109	89.2%
% Increase	N/A	N/A	10.6%	(8.1%)	(4.6%)	(17.6%)	15.7%	17.9%	

Fond D.L.	28,164	23,463	30,355	22,379	31,022	17,387	35,754	20,588	87.7%
% Increase	N/A	N/A	7.8%	(4.6%)	2.1%	(22.3%)	15.3%	18.4%	

Marathon	30,345	36,367	36,617	32,363	39,014	26,481	44,623	30,807	84.7%
% Increase	N/A	N/A	20.7%	(11.0%)	6.5%	(18.2%)	14.4%	16.3%	

Findings

The most suspicious counties are those that showed two consecutive elections trending upward for the Republican candidate and downward for the Democratic candidate. These show a similar pattern to counties in Pennsylvania trending heavily Republican in registration, with a significant increase for President Trump in raw votes in 2020, but a smaller than expected margin due to an unexpected sharp reversal of votes for Biden in counties showing inverse trends for parties in recent elections. The only counties not showing two consecutive cycles of decline for Democrats are Waukesha, Bayfield, and Milwaukee. Wisconsin had several Republican counties in 2016 with fewer votes for Trump and higher third-party vote shares (hence 2,682 fewer votes for Trump than Romney), but based on 2020 returns to this point, that has been overcome in every single county.

Dane County is clearly associated with a major university, with student turnout thought to be reaching record lows due to campus shutdowns and lack of mobilization. This county is over 2008 Obama levels by 26.3% (54,173 votes), when that candidate drew record support from young voters, and up 19.5% since 2016, after two consecutive elections of sparse growth in Democrat votes. This county is one of few counties Obama overperformed in for his reelection, and 2020's total is still 20.4% over that number. The same mathematical improbability given the circumstances of 2020 was also seen in Washtenaw County, Michigan (home county of the University of Michigan). Dane County should be audited and recanvassed significantly, particularly for mail and absentee ballot fraud.

Trump slightly underperformed Romney's 2012 vote totals statewide because he lagged in total votes from suburban counties Waukesha, Racine, Washington, Ozaukee, and Walworth. This year, he has reconsolidated the Republican base and improved at a minimum of 11.3% (Ozaukee) in raw votes in these counties, and at a high of 17.3% (Walworth). President Trump has grown his share of raw votes in Wisconsin by a minimum of 4.1% (Menominee) in all counties, and at a high of 24.8% (Kenosha).

Among the largest counties in the state, the largest spikes in growth since 2016 by the Democratic candidate came in St. Croix (32.7%), Ozaukee (31.5%), Waukesha (31.1%), Washington (27.7%), placing them ahead of President Obama's total of votes in those counties in 2008, a year in

which he won the state by 13.91%. This could be feasible if the inverse pattern of "one party up, one party down" were present, suggesting the transfer of voters from one party to the next, but President Trump has also greatly overperformed his 2016 vote totals and does not exhibit the collapse in support seen by Democrats in 2012 and 2016, especially in known Republican strongholds. While it is plausible that Democrats should add votes in those counties based on observed party registration trends in the Philadelphia area, it is unfathomable that those counties would overperform their 2008 Obama vote numbers by such margins, while still adding substantial increases in raw votes to President Trump in 2020.

Despite ranking 67th in the state in percentage increase in voter registrations, Milwaukee County increased its share of Democratic votes by 9.8%, even as President Trump increased by 6.6% while supposedly securing a higher share of minority votes than any Republican since 1960. Biden's total is nearly equal to Obama's 2008 performance and reverses a massive loss of Democratic votes in 2016 in a post-Obama environment, despite a decreasing voter roll (more than 3% decrease in registrations since 2016). Strangely, Milwaukee's turnout dwarfs other regional counterparts like Cleveland, Gary, and Indianapolis. This county is reported to have had many flagrant abuses of transparency regulations and is also known to have reported results without observation in the early morning hours of November 4, 2020, which was just enough to overcome a once formidable lead in the state by President Trump. The best course of action in Milwaukee is to recanvass and audit every mail-in and absentee ballot for massive fraud. The trend in Cleveland, Detroit, Milwaukee, and Philadelphia recently has suggested decreasing vote totals from one election to the next and is supported by the aforementioned significant decrease in the voter rolls in Milwaukee. This year's reported vote totals necessitate and improbable turnout level and suggest illegality in reporting and mail balloting.

All counties showing two consecutive cycles of inverse party trend (Republican up twice, Democrat down twice), with Democrats substantially up this year, may be subject to counting errors, or "glitches," like those reported in Antrim County, Michigan, or even recently in Rock County, Wisconsin. These voting machines and their associated software should be audited and examined by coding professionals, especially if the recent newsworthy events regarding corrupted voting software are widespread. It is highly possible that tampered or corrupted software in known Trump strongholds may be responsible for reducing margins of raw vote victory in counties that have massively left the Democratic Party since 2008.

The entire vote in Wisconsin is suspect against recent trends and should be subject to recanvass and audit, not just a recount of hundreds of thousands of illegal ballots. It appears that the major case in the state is that in spite of substantially growing his vote share in strong-Trump counties, and surging in votes in urban and suburban counties, Trump's margin is substantially limited, even after two consecutive inverse party trends. In urban or suburban areas, Democratic vote share is soaring to record numbers, even over Obama's totals after a 13.91% win, all while Trump surges in votes in those counties as well. Urban areas have issues with transparency and should be fully audited for mail and absentee fraud.

Ballot-Marking Devices (BMDs) Cannot Assure the Will of the Voters

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Abstract

The complexity of U.S. elections usually requires computers to count ballots—but computers can be hacked, so election integrity requires a voting system in which paper ballots can be recounted by hand. However, paper ballots provide no assurance unless they accurately record the vote as the voter expresses it.

Voters can express their intent by indelibly hand-marking ballots, or using computers called ballot-marking device (BMDs). Voters can make mistakes in expressing their intent in either technology, but only BMDs are also subject to hacking, bugs, and misconfiguration of the software that prints the marked ballots. Most voters do not review BMD-printed ballots, and those who do often fail to notice when the printed vote is not what they expressed on the touchscreen. Furthermore, there is no action a voter can take to demonstrate to election officials that a BMD altered their expressed votes, nor is there a corrective action that election officials can take if notified by voters—there is no way to deter, contain, or correct computer hacking in BMDs. These are the essential security flaws of BMDs.

Risk-limiting audits can assure that the votes recorded on paper ballots are tabulated correctly, but no audit can assure that the votes on paper are the ones expressed by the voter on a touchscreen: Elections conducted on current BMDs cannot be confirmed by audits. We identify two properties of voting systems, *contestability* and *defensibility*, necessary for audits to confirm election outcomes. No available EAC-certified BMD is contestable or defensible.

[†]Authors are listed alphabetically; they contributed equally to this work.

1 Introduction: Criteria for Voting Systems

Elections for public office and on public questions in the United States or any democracy must produce outcomes based on the votes that voters *express* when they indicate their choices on a paper ballot or on a machine. Computers have become indispensable to conducting elections, but computers are vulnerable. They can be hacked—compromised by insiders or external adversaries who can replace their software with fraudulent software that deliberately miscounts votes—and they can contain design errors and bugs—hardware or software flaws or configuration errors that result in mis-recording or mis-tabulating votes. Hence there must be some way, *independent* of any software in any computers, to ensure that reported election outcomes are correct, i.e., consistent with the expressed votes as intended by the voters.

Voting systems should be *software independent*, meaning that "an undetected change or error in its software cannot cause an undetectable change or error in an election outcome" [29, 30, 31]. Software independence is similar to tamper-evident packaging: if somebody opens the container and disturbs the contents, it will leave a trace.

The use of software-independent voting systems is supposed to ensure that if someone fraudulently hacks the voting machines to steal votes, we'll know about it. But we also want to know *the true outcome* in order to avoid a do-over election.[1] A voting system is *strongly software independent* if it is software independent and, moreover, a detected change or error in an election outcome (due to change or error in the software) can be corrected using only the ballots and ballot records of the current election [29, 30]. Strong software independence combines tamper evidence with a kind of resilience: there's a way to tell whether faulty software caused a problem, and a way to recover from the problem if it did.

Software independence and *strong software independence* are now standard terms in the analysis of voting systems, and it is widely accepted that voting systems should be software independent. Indeed, version 2.0 of the Voluntary Voting System Guidelines (VVSG 2.0) incorporates this principle [10].

But as we will show, these standard definitions are incomplete and inadequate, because in the word *undetectable* they hide several important questions: *Who* detects the change or error in an election outcome? How can a person *prove* that she has detected

[1] Do-overs are expensive; they may delay the inauguration of an elected official; there is no assurance that the same voters will vote in the do-over election as voted in the original; they decrease public trust. And if the do-over election is conducted with the same voting system that can only detect but not correct errors, then there may need to be a do-over of the do-over, *ad infinitum.*

an error? *What happens* when someone detects an error—does the election outcome remain erroneous? Or conversely: How can an election administrator *prove* that the election outcome not been altered, or prove that the correct outcome was recovered if a software malfunction was detected? The standard definition does not distinguish evidence available to an election official, to the public, or just to a single voter; nor does it consider the possibility of false alarms.

Those questions are not merely academic, as we show with an analysis of ballot-marking devices. Even if some *voters* "detect" that the printed output is not what they expressed to the BMD—even if some of *those* voters report their detection to election officials—there is no mechanism by which the *election official* can "detect" whether a BMD has been hacked to alter election outcomes. The questions of *who detects, and then what happens,* are critical—but unanswered by the standard definitions.

We will define the terms *contestable* and *defensible* to better characterize properties of voting systems that make them acceptable for use in public elections.[2]

A voting system is *contestable* if an undetected change or error in its software that causes a change or error in an election outcome can always produce *public* evidence that the outcome is untrustworthy. For instance, if a voter selected candidate A on the touchscreen of a BMD, but the BMD prints candidate B on the paper ballot, then this A-vs-B evidence is available to the individual voter, but the voter cannot demonstrate this evidence to anyone else, since nobody else saw—nor should have seen—where the voter touched the screen.[3] Thus, the voting system does not provide a way for the voter who observed the misbehavior to prove to anyone else that there was a problem, even if the problems altered the reported outcome. Such a system is therefore not *contestable*.

While the definition of software independence might allow evidence available only to individual voters as "detection," such evidence does not suffice for a system to be contestable. Contestibility is software independence, plus the requirement that "detect" implies "can generate public evidence." "Trust me" does not count as public evidence. If a voting system is not contestable, then problems voters "detect" might never see the light of day, much less be addressed or corrected.[4]

[2]There are other notions connected to contestability and defensibility, although essentially different: Benaloh et al. [6] define a *P-resilient canvass framework*, *personally verifiable P-resilient canvass framework*, and *privacy-perserving personally verifiable P-resilient canvass frameworks*.

[3]See footnote 18.

[4]If voters are the only means of detecting and quantifying the effect of those problems—as they are for BMDs—then in practice the system is not strongly software independent. The reason is that, as we will show, such claims by (some) voters *cannot* correct software-dependent changes to other voters' ballots, and *cannot* be used as the basis to invalidate or correct an election outcome. Thus, BMD-based

Similarly, while strong software independence demands that a system be able to report the correct outcome even if there was an error or alteration of the software, it does not require *public evidence* that the (reconstructed) reported outcome is correct. We believe, therefore, that voting systems must also be *defensible*. We say that a voting system is defensible if, when the reported electoral outcome is correct, it is possible to generate convincing public evidence that the reported electoral outcome is correct—despite any malfunctions, software errors, or software alterations that might have occurred. If a voting system is not defensible, then it is vulnerable to "crying wolf": malicious actors could claim that the system malfunctioned when in fact it did not, and election officials will have no way to prove otherwise.

By analogy with *strong software independence*, we define: A voting system is *strongly defensible* if it is defensible and, moreover, a detected change or error in an election outcome (due to change or error in the software) can be corrected (with convincing public evidence) using only the ballots and ballot records of the current election.

In short, a system is contestable if it can generate public evidence of a problem whenever a reported outcome is wrong, while a system is defensible if it can generate public evidence whenever a reported outcome is correct—despite any problems that might have occurred. Contestable systems are publicly tamper-evident; defensible systems are publicly, demonstrably resilient.

Defensibility is a key requirement for *evidence-based elections* [38]: defensibility makes it possible in principle for election officials to generate convincing evidence that the reported winners really won—if the reported winners did really win. (We say an election *system* may be defensible, and an *election* may be evidence-based; there's much more *process* to an election than just the choice of system.)

Examples. The only known practical technology for contestable, strongly defensible voting is a system of *hand-marked paper ballots*, kept demonstrably physically secure, counted by machine, audited manually, and recountable by hand.[5] In a hand-marked paper ballot election, ballot-marking software cannot be the source of an error or change-of-election-outcome, because no software is used in marking ballots. Ballot-scanning-and-counting software can be the source of errors, but such errors can be

election systems are not even (weakly) software independent, unless one takes "detection" to mean "somebody claimed there was a problem, with no evidence to support that claim."

[5]The election must also generate convincing evidence that physical security of the ballots was not compromised, and the audit must generate convincing public evidence that the audit itself was conducted correctly.

detected and corrected by audits.

That system is *contestable:* if an optical scan voting machine reports the wrong outcome because it miscounted (because it was hacked, misprogrammed, or miscalibrated), the evidence is *public*: the paper ballots, recounted before witnesses, will not match the claimed results, also witnessed. It is *strongly defensible:* a recount before witnesses can demonstrate that the reported outcome is correct, or can find the correct outcome if it was wrong—and provide public evidence that the (reconstructed) outcome is correct.

Some other paper-based systems such as Prêt-à-Voter [32] and Scantegrity [9] are also contestable and strongly defensible (provided the marked ballots are kept demonstrably secure through tabulation and posting). Scantegrity inherits these properties from the fact that it amounts to a cryptographic enhancement of hand-marked paper ballots. Prêt-à-Voter has these properties if the blank ballots are audited appropriately before the election.

Paper-based systems that rely on the "Benaloh challenge"—to ensure that the encryption of the vote printed on the ballot (by an electronic device) is correct—generally are neither contestable nor defensible.[6] The reason is that, while the challenge can produce public evidence that a machine did not accurately encrypt the plaintext vote on the ballot, if the machine prints the wrong plaintext vote and a correct encryption of that incorrect vote, there is no evidence the voter can use to prove that to anyone else. STAR-Vote [5] is an example of such a system.

Over 40 states now use some form of paper ballot for most voters [18]. Most of the remaining states are taking steps to adopt paper ballots. But *not all voting systems that use paper ballots are equally secure*.

Some are not even software independent. Some are software independent, but not strongly software independent, contestable, or defensible. In this report we explain:

- *Hand-marked paper ballot* systems are the only practical technology for contestable, strongly defensible voting systems.
- *Some ballot-marking devices (BMDs)* can be software independent, but they not strongly software independent, contestable, or defensible. Hacked or misprogrammed BMDs can alter election outcomes undetectably, so elections conducted using BMDs cannot provide public evidence that reported outcomes are correct. If BMD malfunctions are detected, there is no way to determine who

[6] Nor are they strongly software independent.

really won. Therefore BMDs should not be used by voters who are able to mark an optical-scan ballot with a pen.
- *All-in-one BMD or DRE+VVPAT voting machines* are not software independent, contestable, or defensible. They should not be used in public elections.

2 Background

We briefly review the kinds of election equipment in use, their vulnerability to computer hacking (or programming error), and in what circumstances risk-limiting audits can mitigate that vulnerability.

Voting equipment

Although a voter may form an intention to vote for a candidate or issue days, minutes, or seconds before actually casting a ballot, that intention is a psychological state that cannot be directly observed by anyone else. Others can have access to that intention through what the voter (privately) *expresses* to the voting technology by interacting with it, e.g., by making selections on a BMD or marking a ballot by hand.[7] Voting systems must accurately record the vote as the voter *expressed* it.

With a *hand-marked paper ballot optical-scan* system, the voter is given a paper ballot on which all choices (candidates) in each contest are listed; next to each candidate is a *target* (typically an oval or other shape) which the voter marks with a pen to indicate a vote. Ballots may be either preprinted or printed (unvoted) at the polling place using *ballot on demand* printers. In either case, the voter creates a tamper-evident record of intent by marking the printed paper ballot with a pen.

Such hand-marked paper ballots may be scanned and tabulated at the polling place using a *precinct-count optical scanner* (PCOS), or may be brought to a central place to

[7] We recognize that voters make mistakes in expressing their intentions. For example, they may misunderstand the layout of a ballot or express an unintended choice through a perceptual error, inattention, or lapse of memory. The use of touchscreen technology does not necessarily correct for such user errors, as every smartphone user who has mistyped an important text message knows. Poorly designed ballots, poorly designed touchscreen interfaces, and poorly designed assistive interfaces increase the rate of error in voters' expressions of their votes. For the purposes of this report, we assume that properly engineered systems seek to minimize such usability errors.

be scanned and tabulated by a *central-count optical scanner* (CCOS). Mail-in ballots are typically counted by CCOS machines.

After scanning a ballot, a PCOS machine deposits the ballot in a secure, sealed ballot box for later use in recounts or audits; this is *ballot retention*. Ballots counted by CCOS are also retained for recounts or audits.[8]

Paper ballots can also be hand counted, but in most jurisdictions (especially where there are many contests on the ballot) this is hard to do quickly; Americans expect election-night reporting of unofficial totals. Hand counting—i.e., manually determining votes directly from the paper ballots—is appropriate for audits and recounts.

A *ballot-marking device* (BMD) provides a computerized user interface that presents the ballot to voters and captures their expressed selections—for instance, a touchscreen interface or an assistive interface that enables voters with disabilities to vote independently. Voter inputs (expressed votes) are recorded electronically. When a voter indicates that the ballot is complete and ready to be cast, the BMD prints a paper version of the electronically marked ballot. We use the term *BMD* for devices that mark ballots but do not tabulate or retain them, and *all-in-one* for devices that combine ballot marking, tabulation, and retention into the same paper path.

The paper ballot printed by a BMD may be in the same format as an optical-scan form (e.g., with ovals filled as if by hand) or it may list just the names of the candidate(s) selected in each contest. The BMD may also encode these selections into barcodes or QR codes for optical scanning. We discuss issues with barcodes later in this report.

An *all-in-one touchscreen voting machine* combines computerized ballot marking, tabulation, and retention in the same paper path. All-in-one machines come in several configurations:

- DRE+VVPAT machines—direct-recording electronic (DRE) voting machines with a voter-verifiable paper audit trail (VVPAT)—provide the voter a touchscreen (or other) interface, then print a paper ballot that is displayed to the voter under glass. The voter is expected to review this ballot and approve it, after which the machine deposits it into a ballot box. DRE+VVPAT machines do not contain optical scanners; that is, they do not read what is marked on the paper ballot; instead, they tabulate the vote directly from inputs to the touchscreen or other interface.

[8] Regulations and procedures governing custody and physical security of ballots are uneven and in many cases inadequate, but straightforward to correct because of decades of development of best practices.

- BMD+Scanner all-in-one machines[9] provide the voter a touchscreen (or other) interface to input ballot choices and print a paper ballot that is ejected from a slot for the voter to inspect. The voter then reinserts the ballot into the slot, after which the all-in-one BMD+scanner scans it and deposits it into a ballot box. Or, some BMD+Scanner all-in-one machines display the paper ballot behind plexiglass for the voter to inspect, before mechanically depositing it into a ballot box.

Opscan+BMD with separate paper paths. At least one model of voting machine (the Dominion ICP320) contains an optical scanner (opscan) and a BMD in the same cabinet,[10] so that the optical scanner and BMD-printer are not in the same paper path; no possible configuration of the software could cause a BMD-marked ballot to be deposited in the ballot box without human handling of the ballot. We do not classify this as an *all-in-one* machine.

Hacking

There are many forms of computer hacking. In this analysis of voting machines we focus on the alteration of voting machine software so that it miscounts votes or mismarks ballots to alter election outcomes. There are many ways to alter the software of a voting machine: a person with physical access to the computer can open it and directly access the memory; one can plug in a special USB thumbdrive that exploits bugs and vulnerabilities in the computer's USB drivers; one can connect to its WiFi port or Bluetooth port or telephone modem (if any) and exploit bugs in those drivers, or in the operating system.

"Air-gapping" a system (i.e., never connecting it to the Internet nor to any other network) does not automatically protect it. Before each election, election administrators must transfer a *ballot definition* into the voting machine by inserting a *ballot definition cartridge* that was programmed on election-administration computers that may have been connected previously to various networks; it has been demonstrated that vote-changing viruses can propagate via these ballot-definition cartridges [17].

Hackers might be corrupt insiders with access to a voting-machine warehouse; corrupt insiders with access to a county's election-administration computers; outsiders who can gain remote access to election-administration computers; outsiders who can

[9] Some voting machines, such as the ES&S ExpressVote, can be configured as either a BMD or a BMD+Scanner all-in-one. Others, such as the ExpressVoteXL, work only as all-in-one machines.

[10] More precisely, the ICP320 optical scanner and the BMD audio+buttons interface are in the same cabinet, but the printer is a separate box.

gain remote access to voting-machine manufacturers' computers (and "hack" the firmware installed in new machines, or the firmware updates supplied for existing machines), and so on. Supply-chain hacks are also possible: the hardware installed by a voting system vendor may have malware pre-installed by the vendor's component suppliers.[11]

Computer systems (including voting machines) have so many layers of software that it is impossible to make them perfectly secure [23, pp. 89–91]. When manufacturers of voting machines use the best known security practices, adversaries may find it more difficult to hack a BMD or optical scanner—but not impossible. Every computer in every critical system is vulnerable to compromise through hacking, insider attacks or exploiting design flaws.

Election assurance through risk-limiting audits

To ensure that the reported electoral outcome of each contest corresponds to what the voters expressed, the most practical known technology is a *risk-limiting audit* (RLA) of trustworthy paper ballots [34, 35, 22]. The National Academies of Science, Engineering, and Medicine, recommend routine RLAs after every election [23], as do many other organizations and entities concerned with election integrity.[12]

The *risk limit* of a risk-limiting audit is the maximum chance that the audit will not correct the reported electoral outcome, if the reported outcome is wrong. "Electoral outcome" means the political result—who or what won—not the exact tally. "Wrong" means that the outcome does not correspond to what the voters expressed.

A RLA involves manually inspecting randomly selected paper ballots following a rigorous protocol. The audit stops if and when the sample provides convincing evidence that the reported outcome is correct; otherwise, the audit continues until every ballot has been inspected manually, which reveals the correct electoral outcome if the paper trail is trustworthy. RLAs protect against vote-tabulation errors, whether those errors are caused by failures to follow procedures, misconfiguration, miscalibration, faulty

[11] Given that many chips and other components are manufactured in China and elsewhere, this is a serious concern. Carsten Schürmann has found Chinese pop songs on the internal memory of voting machines (C. Schürmann, personal communication, 2018). Presumably those files were left there accidentally—but this shows that malicious code *could* have been pre-installed deliberately, and that neither the vendor's nor the election official's security and quality control measures discovered and removed the extraneous files.

[12] Among them are the Presidential Commission on Election Administration, the American Statistical Association, the League of Women Voters, and Verified Voting Foundation.

engineering, bugs, or malicious hacking.[13]

The risk limit should be determined as a matter of policy or law. For instance, a 5% risk limit means that, if a reported outcome is wrong solely because of tabulation errors, there is at least a 95% chance that the audit procedure will correct it. Smaller risk limits give higher confidence in election outcomes, but require inspecting more ballots, other things being equal. RLAs never revise a correct outcome.

RLAs can be very efficient, depending in part on how the voting system is designed and how jurisdictions organize their ballots. If the computer results are accurate, an efficient RLA with a risk limit of 5% requires examining just a few—about 7 divided by the margin—ballots selected randomly from the contest.[14] For instance, if the margin of victory is 10% and the results are correct, the RLA would need to examine about $7/10\% = 70$ ballots to confirm the outcome at 5% risk. For a 1% margin, the RLA would need to examine about $7/1\% = 700$ ballots. The sample size does not depend much on the total number of ballots cast in the contest, only on the margin of the winning candidate's victory.

RLAs assume that a full hand tally of the paper trail would reveal the correct electoral outcomes: the paper trail must be trustworthy. Other kinds of audits, such as *compliance audits* [6, 22, 38, 36] are required to establish whether the paper trail itself is trustworthy. Applying an RLA procedure to an untrustworthy paper trail cannot limit the risk that a wrong reported outcome goes uncorrected.

Properly preserved hand-marked paper ballots ensure that expressed votes are identical to recorded votes. But BMDs might not record expressed votes accurately, for instance, if BMD software has bugs, was misconfigured, or was hacked: BMD printout is not a trustworthy record of the expressed votes. Neither a compliance audit nor a RLA can possibly check whether errors in recording expressed votes altered election outcomes. RLAs that rely on BMD output therefore cannot limit the risk that an incorrect reported election outcome will go uncorrected.

A paper-based voting system (such as one that uses optical scanners) is systematically more secure than a paperless system (such as DREs) *only if the paper trail is trustworthy and the results are checked against the paper trail using a rigorous method such as an RLA or full manual tally*. If it is possible that error, hacking, bugs, or mis-

[13] RLAs do not protect against problems that cause BMDs to print something other than what was shown to the voter on the screen, nor do they protect against problems with ballot custody.

[14] Technically, it is the *diluted margin* that enters the calculation. The diluted margin is the number of votes that separate the winner with the fewest votes from the loser with the most votes, divided by the number of ballots cast, including undervotes and invalid votes.

calibration caused the recorded-on-paper votes to differ from the expressed votes, an RLA or even a full hand recount cannot not provide convincing public evidence that election outcomes are correct: such a system cannot be *defensible*. In short, paper ballots provide little assurance against hacking if they are never examined or if the paper might not accurately reflect the votes expressed by the voters.

3 (Non)Contestability/Defensibility of BMDs

A BMD-generated paper trail is not a reliable record of the vote expressed by the voter. Like any computer, a BMD (or a DRE+VVPAT) is vulnerable to bugs, misconfiguration, hacking, installation of unauthorized (fraudulent) software, and alteration of installed software.

If a hacker sought to steal an election by altering BMD software, what would the hacker program the BMD to do? In cybersecurity practice, we call this the *threat model*.

The simplest threat model is this one: In some contests, not necessarily top-of-the-ticket, change a small percentage of the votes (such as 5%).

In recent national elections, analysts have considered a candidate who received 60% of the vote to have won by a landslide. Many contests are decided by less than a 10% margin. Changing 5% of the votes can change the margin by 10%, because "flipping" a vote for one candidate into a vote for a different candidate changes the difference in their tallies—i.e., the margin—by 2 votes. If hacking or bugs or misconfiguration could change 5% of the votes, that would be a very significant threat.

Although public and media interest often focus on top-of-the-ticket races such as President and Governor, elections for lower offices such as state representatives, who control legislative agendas and redistricting, and county officials, who manage elections and assess taxes, are just as important in our democracy. Altering the outcome of smaller contests requires altering fewer votes, so fewer voters are in a position to notice that their ballots were misprinted. And most voters are not as familiar with the names of the candidates for those offices, so they might be unlikely to notice if their ballots were misprinted, even if they checked.

Research in a real polling place in Tennessee during the 2018 election, found that half the voters *didn't look at all* at the paper ballot printed by a BMD, even when they were holding it in their hand and directed to do so while carrying it from the BMD to the optical scanner [13]. Those voters who did look at the BMD-printed ballot

spent *an average of 4 seconds* examining it to verify that the eighteen or more choices they made were correctly recorded. That amounts to 222 milliseconds per contest, barely enough time for the human eye to move and refocus under perfect conditions and not nearly enough time for perception, comprehension, and recall [27]. A study by other researchers [7], in a simulated polling place using real BMDs deliberately hacked to alter one vote on each paper ballot, found that only 6.6% of voters told a pollworker something was wrong.[15][16] The same study found that among voters who examined their hand-marked ballots, half were unable to recall key features of ballots cast moments before, a prerequisite step for being able to recall their own ballot choices. This finding is broadly consistent with studies of effects like "change blindness" or "choice blindness," in which human subjects fail to notice changes made to choices made only seconds before [19].

Suppose, then, that 10% of voters examine their paper ballots carefully enough to even *see* the candidate's name recorded as their vote for legislator or county commissioner. Of those, perhaps only half will remember the name of the candidate they intended to vote for.[17]

Of those who notice that the vote printed is not the candidate they intended to vote for, what will they think, and what will they do? Will they think, "Oh, I must have made a mistake on the touchscreen," or will they think, "Hey, the machine is cheating or malfunctioning!" There's no way for the voter to know for sure—voters do make mistakes—and there's *absolutely* no way for the voter to prove to a pollworker or election official that a BMD printed something other than what the voter entered on the

[15] You might think, "the voter really *should* carefully review their BMD-printed ballot." But because the scientific evidence shows that voters *do not* [13] and cognitively *cannot* [16] perform this task well, legislators and election administrators should provide a voting system that counts the votes *as voters express them*.

[16] Studies of voter confidence about their ability to verify their ballots are not relevant: in typical situations, subjective confidence and objective accuracy are at best weakly correlated. The relationship between confidence and accuracy has been studied in contexts ranging from eyewitness accuracy [8, 12, 40] to confidence in psychological clinical assessments [14] and social predictions [15]. The disconnect is particularly severe at high confidence. Indeed, this is known as "the overconfidence effect." For a lay discussion, see *Thinking, Fast and Slow* by Nobel economist Daniel Kahnemann [20].

[17] We ask the reader, "do you know the name of the most recent losing candidate for county commissioner?" We recognize that some readers of this document *are* county commissioners, so we ask those readers to imagine the frame of mind of their constituents.

screen.[18][19]

Either way, polling-place procedures generally advise voters to ask a pollworker for a new ballot if theirs does not show what they intended. Pollworkers should void that BMD-printed ballot, and the voter should get another chance to mark a ballot. Anecdotal evidence suggests that many voters are too timid to ask, or don't know that they have the right to ask, or are not sure whom to ask. Even if a voter asks for a new ballot, training for pollworkers is uneven, and we are aware of no formal procedure for resolving disputes if a request for a new ballot is refused. Moreover, there is no sensible protocol for ensuring that BMDs that misbehave are investigated—nor can there be, as we argue below.

Let's summarize. If a machine alters votes on 5% of the ballots (enabling it to change the margin by 10%), and 10% of voters check their ballots carefully and 50% of the voters who check notice the error, then optimistically we might expect $5\% \times 10\% \times 50\%$ or 0.25% of the voters to request a new ballot and correct their vote.[20] This means that the machine will change the margin by 9.75% and get away with it.

In this scenario, 0.25% of the voters, one in every 400 voters, has requested a new ballot. You might think, "that's a form of *detection* of the hacking." But is isn't, as a practical matter: a few individual voters may have detected that there was a problem, but there's no procedure by which this translates into any action that election administrators can take to correct the outcome of the election. Polling-place procedures *cannot correct or deter hacking, or even reliably detect it*, as we discuss next. This is essentially the distinction between a system that is merely software independent and one that is contestable: a change to the software that alters the outcome might generate evidence for an alert, conscientious, individual voter, but it does not generate public evidence that an election official can rely on to conclude there is a problem.

Even if some voters notice that BMDs are altering votes, there's no way to correct the election outcome. That is, BMD voting systems are *not contestable*, *not defen-*

[18] You might think, "the voter can prove it by showing someone that the vote on the paper doesn't match the vote onscreen." But that won't work. On a typical BMD, by the time a paper record is printed and ejected for the voter to hold and examine, the touchscreen no longer shows the voter's choice. You might think, "BMDs should be designed so that the choices still show on the screen for the voter to compare with the paper." But a hacked BMD could easily alter the on-screen choices to match the paper, *after* the voter hits the "print" button.

[19] Voters should *certainly not* videorecord themselves voting! That would defeat the privacy of the secret ballot and is illegal in most jurisdictions.

[20] This calculation assumes that the 10% of voters who check are in effect a random sample of voters: voters' propensity to check BMD printout is not associated with their political preferences.

sible (and therefore *not strongly defensible*), and *not strongly software independent*. Suppose a state election official wanted to detect whether the BMDs are cheating, and correct election results, based on actions by those few alert voters who notice the error. What procedures could possibly work against the manipulation we are considering?

1. How about, "If at least 1 in 400 voters claims that the machine misrepresented their vote, void the entire election."[21] No responsible authority would implement such a procedure. A few dishonest voters could collaborate to invalidate entire elections simply by falsely claiming that BMDs changed their votes.
2. How about, "If at least 1 in 400 voters claims that the machine misrepresented their vote, then investigate." Investigations are fine, but then what? The only way an investigation can ensure that the outcome accurately reflects what voters expressed to the BMDs is to void an election in which the BMDs have altered votes and conduct a new election. But how do you know whether the BMDs have altered votes, except based the claims of the voters?[22] Furthermore, the investigation itself would suffer from the same problem as above: how can one distinguish between voters who detected BMD hacking or bugs from voters who just want to interfere with an election?

This is the essential security flaw of BMDs: few voters will notice and promptly report discrepancies between what they saw on the screen and what is on the BMD printout, and even when they do notice, there's nothing appropriate that can be done. Even if election officials are convinced that BMDs malfunctioned, *there is no way to determine who really won*.

Therefore, BMDs should not be used by most voters.

Why can't we rely on pre-election and post-election logic and accuracy testing, or parallel testing? Most, if not all, jurisdictions perform some kind of *logic and accuracy testing* (LAT) of voting equipment before elections. LAT generally involves voting on the equipment using various combinations of selections, then checking whether the

[21] Note that in many jurisdictions, far fewer than 400 voters use a given machine on election day: BMDs are typically expected to serve fewer than 300 voters per day. (The vendor ES&S recommended 27,000 BMDs to serve Georgia's 7 million voters, amounting to 260 voters per BMD [33].) Recall also that the rate 1 in 400 is tied to the amount of manipulation. What if the malware flipped only one vote in 50, instead of 1 vote in 20? That could still change the margin by 4%, but—in this hypothetical—would be noticed by only one voter in 1,000, rather than one in 400. The smaller the margin, the less manipulation it would have taken to alter the electoral outcome.

[22] Forensic examination of the BMD might show that it *was* hacked or misconfigured, but it cannot prove that the BMD *was not* hacked or misconfigured.

equipment tabulated the votes correctly. As the Volkswagen/Audi "Dieselgate" scandal shows, devices can be programmed to behave properly when they are tested but misbehave in use [11]. Therefore, LAT can never prove that voting machines performed properly in practice.

Parallel or "live" testing involves pollworkers or election officials using some BMDs at random times on election day to mark (but not cast) ballots with test patterns, then check whether the marks match the patterns. The idea is that the testing is not subject to the "Dieselgate" problem, because the machines cannot "know" they are being tested on election day.[23] As a practical matter, the number of tests required to provide a reasonable chance of detecting outcome-changing errors is prohibitive: it would leave no time for actual voting [37]. Moreover, it would require additional staff, infrastructure, and other resources.

Suppose, counterfactually, that it was practical to perform enough parallel testing to guarantee a large chance of detecting a problem if BMD hacking or malfunction altered electoral outcomes. Suppose, counterfactually, that election officials were required to conduct that amount of parallel testing during every election, and that the required equipment, staffing, infrastructure, and other resources were provided. Even then, the system would not be *strongly defensible*; that is, if testing detected a problem, there would be no way to to determine who really won. The only remedy would be a new election.

Don't voters need to check hand-marked ballots, too? It is always a good idea to check one's work, but there is a substantial body of research (e.g., [28]) suggesting that preventing error as a ballot is being marked is a fundamentally different cognitive task than detecting an error on a previously marked ballot. In cognitively similar tasks, such as proof reading for non-spelling errors, ten percent rates of error detection are common [28, pp 167ff], whereas by carefully attending to the task of correctly marking their ballots, voters apparently can largely avoid marking errors.

A fundamental difference between hand-marked paper ballots and ballot-marking devices is that, with hand-marked paper ballots, voters are responsible for catching and

[23] BMDs do "know" their own settings and other aspects of each voting session, so malware can use that information to target sessions that use the audio interface, increase the font size, use the sip-and-puff interface, set the language to something other than English, or take much longer than average to vote. (Voters who use those settings might be less likely to be believed if they report that the equipment altered their votes.) For parallel testing to have a good chance of detecting all outcome-changing problems, the tests must have a large chance of probing *every* combination of settings and voting patterns that includes enough ballots to change any contest result. It is not practical.

correcting *their own errors*, while if BMDs are used, voters are also responsible for catching *machine errors, bugs, and hacking*. Voters are the *only* people who can detect such problems with BMDs—but, as explained above, if voters do find problems, there's no way they can prove to poll workers or election officials that there were problems and no way to ensure that election officials take appropriate remedial action.

4 Other tradeoffs, BMDs versus hand-marked opscan

Supporters of ballot-marking devices advance several other arguments for their use.

- **Mark legibility.** A common argument is that a properly functioning BMD will generate clean, error-free, unambiguous marks, while hand-marked paper ballots may contain mistakes and stray marks that make it impossible to discern a voter's intent. However appealing this argument seems at first blush, the data are not nearly so compelling. Experience with statewide recounts in Minnesota and elsewhere suggest that truly ambiguous handmade marks are very rare.[24] For instance, 2.9 million hand-marked ballots were cast in the 2008 Minnesota race between Al Franken and Norm Coleman for the U.S. Senate. In a manual recount, between 99.95% and 99.99% of ballots were unambiguously marked.[25] [26] In addition, usability studies of hand-marked bubble ballots—the kind in most common use in U.S. elections—indicate a *voter* error rate of 0.6%, much lower than the 2.5–3.7% error rate for machine-marked ballots [16].[27] Moreover, modern image-based opscan equipment (*digital scan* machinery) is better than older

[24] States do need clear and complete regulations for interpreting voter marks.

[25] "During the recount, the Coleman and Franken campaigns initially challenged a total of 6,655 ballot-interpretation decisions made by the human recounters. The State Canvassing Board asked the campaigns to voluntarily withdraw all but their most serious challenges, and in the end approximately 1,325 challenges remained. That is, approximately 5 ballots in 10,000 were ambiguous enough that one side or the other felt like arguing about it. The State Canvassing Board, in the end, classified all but 248 of these ballots as votes for one candidate or another. That is, approximately 1 ballot in 10,000 was ambiguous enough that the bipartisan recount board could not determine an intent to vote." [1] See also [25]

[26] We have found that some local election officials consider marks to be ambiguous if *machines* cannot read the marks. That is a different issue from *humans* being unable to interpret the marks. Errors in machine interpretation of voter intent can be dealt with by manual audits: if the reported outcome is wrong because machines misinterpreted handmade marks, a RLA has a known, large chance of correcting the outcome.

[27] Better designed user interfaces (UI) might reduce the error rate for machine-marked ballots below the historical rate for DREs; however, UI improvements cannot keep BMDs from printing something other than what the voter is shown on the screen.

"marksense" machines at interpreting imperfect marks. Thus, mark legibility is not a good reason to adopt BMDs for all voters.

- **Undervotes, overvotes.** Another argument offered for BMDs is that the machines can alert voters to undervotes and prevent overvotes. That is true, but modern PCOS systems can also alert a voter to overvotes and undervotes, allowing a voter to eject the ballot and correct it.
- **Bad ballot design.** Ill-designed paper ballots, just like ill-designed touchscreen interfaces, may lead to unintentional undervotes [24]. For instance, the 2006 Sarasota, Florida, touchscreen ballot was badly designed. The 2018 Broward County, Florida, opscan ballot was badly designed: it violated three separate guidelines from the EAC's 2007 publication, "Effective Designs for the Administration of Federal Elections, Section 3: Optical scan ballots." [39] In both of these cases (touchscreens in 2006, hand-marked optical-scan in 2018), undervote rates were high. The solution is to follow standard, published ballot-design guidelines and other best practices, both for touchscreens and for hand-marked ballots [3, 24].
- **Low-tech paper-ballot fraud.** All paper ballots, however they are marked, are vulnerable to *loss*, *ballot-box stuffing*, *alteration*, and *substitution* between the time they are cast and the time they are recounted. That's why it is so important to make sure that ballot boxes are always in multiple-person (preferably bipartisan) custody whenever they are handled, and that appropriate physical security measures are in place. Strong, verifiable chain-of-custody protections are essential.

  Hand-marked paper ballots are vulnerable to alteration by anyone with a pen. Both hand-marked and BMD-marked paper ballots are vulnerable to substitution: anyone who has poorly supervised access to a legitimate BMD during election day can create fraudulent ballots, not necessarily to deposit them in the ballot box immediately (in case the ballot box is well supervised on election day) but with the hope of substituting it later in the chain of custody.[28]

  All those attacks (on hand-marked and on BMD-marked paper ballots) are fairly low-tech. There are also higher-tech ways of producing ballots indistinguishable from BMD-marked ballots for substitution into the ballot box if there is inadequate chain-of-custody protection.
- **Accessible voting technology.** When hand-marked paper ballots are used with PCOS, there is (as required by law) also an accessible voting technology available in the polling place for voters unable to mark a paper ballot with a pen. This

[28] Some BMDs print a barcode indicating when and where the ballot was produced, but that does not prevent such a substitution attack against currently EAC-certified, commercially available BMDs. We understand that systems under development might make ballot-substitution attacks against BMDs more difficult.

is typically a BMD or a DRE. When the accessible voting technology is not the same as what most voters vote on—when it is used by very few voters—it may happen that the accessible technology is ill-maintained or even (in some polling places) not even properly set up by pollworkers. This is a real problem. One proposed solution is to require all voters to use the same BMD or all-in-one technology. But the failure of some election officials to properly maintain their accessible equipment is not a good reason to adopt BMDs for *all* voters. Among other things, it would expose all voters to the security flaws described above.[29] Other advocates object to the idea that disabled voters must use a different method of marking ballots, arguing that their rights are thereby violated. Both HAVA and ADA require reasonable accommodations for voters with physical and cognitive impairments, but neither law requires that those accommodations must be used by all voters. To best enable and facilitate participation by all voters, each voter should be provided with a means of casting a vote best suited to their abilities.

- **Ballot printing costs.** Preprinted optical-scan ballots cost 20–50 cents each.[30] Blank cards for BMDs cost up to 15 cents each, depending on the make and model of BMD.[31] But optical-scan ballots must be preprinted for as many voters as *might* show up, whereas blank BMD cards are consumed in proportion to how many voters *do* show up. The Open Source Election Technology Institute (OSET) conducted an independent study of total life cycle costs[32] for hand-marked paper ballots and BMDs in conjunction with the 2019 Georgia legislative debate regarding BMDs [26]. OSET concluded that, even in the most optimistic (i.e., lowest cost) scenario for BMDs and the most pessimistic (i.e, highest cost) scenario for hand-marked paper ballots and ballot-on-demand (BOD) printers—which can print unmarked ballots as needed—the total lifecycle costs for BMDs would be higher than the corresponding costs for hand-marked paper ballots.[33]
- **Vote centers.** To run a vote center that serves many election districts with different ballot styles, one must be able to provide each voter a ballot containing

[29] Also, some accessibility advocates argue that requiring disabled voters to use BMDs compromises their privacy since hand-marked ballots are easily distinguishable from machine marked ballots. That issue can be addressed without BMDs-for-all: Accessible BMDs are already available and in use that mark ballots with marks that cannot easily be distinguished from hand-marked ballots.

[30] Single-sheet (one- or two-side) ballots cost 20-28 cents; double-sheet ballots needed for elections with many contests cost up to 50 cents.

[31] Ballot cards for ES&S ExpressVote cost about 15 cents. New Hampshire's (One4All / Prime III) BMDs used by sight-impaired voters use plain paper that is less expensive.

[32] They include not only the cost of acquiring and implementing systems but also the ongoing licensing, logistics, and operating (purchasing paper stock, printing, and inventory management) costs.

[33] BOD printers currently on the market arguably are best suited for vote centers, but less expensive options suited for polling places could be developed. Indeed, BMDs that print full-face ballots could be re-purposed as BOD printers for polling place use, with modest changes to the programming.

the contests that voter is eligible to vote in, possibly in a number of different languages. This is easy with BMDs, which can be programmed with all the appropriate ballot definitions. With preprinted optical-scan ballots, the PCOS can be programmed to *accept* many different ballot styles, but the vote center must still maintain *inventory* of many different ballots. BOD printers are another economical alternative for vote centers.[34]

- **Paper/storage.** BMDs that print summary cards rather than full-face ballots can save paper and storage space. However, many BMDs print full-face ballots—so they do not save storage—while many BMDs that print summary cards (which could save storage) use thermal printers and paper that is fragile and can fade in a few months.[35]

Advocates of hand-marked paper ballot systems advance these additional arguments.

- **Cost.** Using BMDs for all voters substantially increases the cost of acquiring, configuring, and maintaining the voting system. One PCOS can serve 1200 voters in a day, while one BMD can serve only about 260 [33]—though both these numbers vary greatly depending on the length of the ballot and the length of the day. OSET analyzed the relative costs of acquiring BMDs for Georgia's nearly seven million registered voters versus a system of hand-marked paper ballots, scanners, and BOD printers [26]. A BMD solution for Georgia would cost taxpayers between 3 and 5 times more than a system based on hand-marked paper ballots. Open-source systems might eventually shift the economics, but current commercial universal-use BMD systems are more expensive than systems that use hand-marked paper ballots for most voters.
- **Mechanical reliability and capacity.** Pens are likely to have less downtime than BMDs. It is easy and inexpensive to get more pens and privacy screens when additional capacity is needed. If a precinct-count scanner goes down, people can still mark ballots with a pen; if the BMD goes down, voting stops. Thermal

[34] Ballot-on-demand printers *may* require maintenance such as replacement of toner cartridges. This is readily accomplished at a vote center with a professional staff. Ballot-on-demand printers may be a less attractive option for many small precincts on election day, where there is no professional staff—but on the other hand, they are less necessary, since far fewer ballot styles will be needed in any one precinct.

[35] The California Top-To-Bottom Review (TTBR) of voting systems found that thermal paper can also be covertly spoiled wholesale using common household chemicals https://votingsystems.cdn.sos.ca.gov/oversight/ttbr/red-diebold.pdf, last visited 8 April 2019. The fact that thermal paper printing can fade or deteriorate rapidly might mean it does not satisfy the federal requirement to preserve voting materials for 22 months. http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title52-section20701&num=0&edition=prelim, last visited 8 April 2019.

printers used in DREs with VVPAT are prone to jams; those in BMDs might have similar flaws.

These secondary pros and cons of BMDs do not outweigh the primary security and accuracy concern: BMDs, if hacked or erroneously programmed, can change votes in a way that is not correctable. BMD voting systems are not contestable or defensible. Audits that rely on BMD printout cannot make up for this defect in the paper trail: they cannot reliably detect or correct problems that altered election outcomes.

Barcodes

A controversial feature of some BMDs allows them to print 1-dimensional or 2-dimensional barcodes on the paper ballots. A 1-dimensional barcode resembles the pattern of vertical lines used to identify products by their universal product codes. A 2-dimensional barcode or QR code is a rectangular area covered in coded image *modules* that encode more complex patterns and information. BMDs print barcodes on the same paper ballot that contains human-readable ballot choices. Voters using BMDs are expected to verify the human-readable printing on the paper ballot card, but the presence of barcodes with human-readable text poses some significant problems.

- **Barcodes are not human readable.** The whole purpose of a paper ballot is to be able to recount (or audit) the *voters'* votes in a way independent of any (possibly hacked or buggy) computers. If the official vote on the ballot card is the barcode, then it is impossible for the voters to verify that the official vote they cast is the vote they expressed. Therefore, before a state even *considers* using BMDs that print barcodes (and we do not recommend doing so), the State must ensure by statute that recounts and audits are based *only* on the human-readable portion of the paper ballot. Even so, audits based on untrustworthy paper trails suffer from the verifiability the problems outlined above.
- **Ballot cards with barcodes contain two different votes.** Suppose a state does ensure by statute that recounts and audits are based on the human-readable portion of the paper ballot. Now a BMD-marked ballot card with both barcodes and human-readable text contains two different votes in each contest: the barcode (used for electronic tabulation), and the human-readable selection printout (official for audits and recounts). In few (if any) states has there even been a discussion of the legal issues raised when the official markings to be counted differ between the original count and a recount.
- **Barcodes pose technical risks.** Any coded input into a computer system—including wired network packets, WiFi, USB thumbdrives, *and barcodes*—pose

the risk that the input-processing software can be vulnerable to attack via deliberately ill-formed input. Over the past two decades, many such vulnerabilities have been documented on *each* of these channels (including barcode readers) that, in the worst case, give the attacker complete control of a system.[36] If an attacker were able to compromise a BMD, the barcodes are an attack vector for the attacker to take over an optical scanner (PCOS or CCOS), too. Since it is good practice to close down all such unneeded attack vectors into PCOS or CCOS voting machines (e.g., don't connect your PCOS to the Internet!), it is also good practice to avoid unnecessary attack channels such as barcodes.

End-to-End Verifiable BMDs

In all BMD systems currently on the market, and in all BMD systems certified by the EAC, the printed ballot or ballot summary is the only channel by which voters can verify the correct recording of their ballots, independently of the computers. The analysis in this paper applies to all of those BMD systems.

There is a class of voting systems called "end-to-end verifiable" (E2E-V), which provide an alternate mechanism for voters to verify their votes [2]. Some E2E-V systems incorporate BMDs, for instance STAR-Vote[37] [5]. As we discuss above in Section 1, such systems are not contestable, defensible, or strongly software independent. In any event, no E2E-V system is currently certified by the EAC, nor to our knowledge is any such system under review for certification, nor are any of the 5 major voting-machine vendors offering such a system for sale.[38]

[36] An example of a barcode attack is based on the fact that many commercial barcode-scanner components (which system integrators use to build cash registers or voting machines) treat the barcode scanner using the same operating-system interface as if it were a keyboard device; and then some operating systems allow "keyboard escapes" or "keyboard function keys" to perform unexpected operations.

[37] The STAR-Vote system is actually a DRE+VVPAT system with a smart ballot box, rather than a BMD system: voters interact with a device that captures their votes electronically and prints a paper record that voters can inspect, but the electronic votes are held "in limbo" until the paper ballot is deposited in the smart ballot box. The ballot box does not read the votes from the ballot; rather, depositing the ballot tells the system that it has permission to cast the vote that it had already recorded from the touchscreen.

[38] Some vendors, notably Scytl, have sold systems advertised as E2E-V in other countries. Those systems were not in fact E2E-V. Moreover, serious security flaws have been found in their implementations. See, e.g., [21].

5 Insecurity of All-in-One BMDs

Some voting machines incorporate a BMD interface, printer, and optical scanner into the same cabinet. Other DRE+VVPAT voting machines incorporate ballot-marking, tabulation, and paper-printout retention, but without scanning. These are often called "all-in-one" voting machines. To use an all-in-one machine, the voter makes choices on a touchscreen or through a different accessible interface. When the selections are complete, the BMD prints the completed ballot for the voter to review and verify, before depositing the ballot in a ballot box attached to the machine.

Such machines are especially unsafe: like any BMD described in Section 3 they are not contestable or defensible, but in addition, if hacked they can print votes onto the ballot *after* the voter last inspects the ballot.

- The ES&S ExpressVote (in all-in-one mode) allows the voter to mark a ballot by touchscreen or audio interface, then prints a paper ballot card and ejects it from a slot. The voter has the opportunity to review the ballot, then the voter redeposits the ballot into the same slot, where it is scanned and deposited into a ballot box.
- The ES&S ExpressVoteXL allows the voter to mark a ballot by touchscreen or audio interface, then prints a paper ballot and displays it under glass. The voter has the opportunity to review the ballot, then the voter touches the screen to indicate "OK," and the machine pulls paper ballot up (still under glass) and into the integrated ballot box.
- The Dominion ImageCast Evolution (ICE) allows the voter to deposit a hand-marked paper ballot, which it scans and drops into the attached ballot box. *Or*, a voter can use a touchscreen or audio interface to direct the marking of a paper ballot, which the voting machine ejects through a slot for review; then the voter redeposits the ballot into the slot, where it is scanned and dropped into the ballot box.

In all three of these machines, the ballot-marking printer is in the same paper path as the mechanism to deposit marked ballots into an attached ballot box. This opens up a very serious security vulnerability: the voting machine can mark the paper ballot (to add votes or spoil already-cast votes) after the last time the voter sees the paper, and then deposit that marked ballot into the ballot box without the possibility of detection.

Vote-stealing software could easily be constructed that looks for *undervotes* on the ballot, and marks those unvoted spaces for the candidate of the hacker's choice. This is very straightforward to do on optical-scan bubble ballots (as on the Dominion ICE) where undervotes are indicated by no mark at all. On machines such as the ExpressVote

and ExpressVoteXL, the normal software indicates an undervote with the words NO SELECTION MADE on the ballot summary card. Hacked software could simply leave a blank space there (most voters wouldn't notice the difference), and then fill in that space and add a matching bar code after the voter has clicked "cast this ballot."

An even worse feature of the ES&S ExpressVote and the Dominion ICE is the *auto-cast* configuration setting (in the manufacturer's standard software) that allows the voter to indicate, "don't eject the ballot for my review, just print it and cast it without me looking at it." If fraudulent software were installed in the ExpressVote, it could change *all* the votes of any voter who selected this option, because the voting machine software would know *in advance of printing* that the voter had waived the opportunity to inspect the printed ballot. We call this auto-cast feature "permission to cheat" [4].

Regarding these all-in-one machines, we conclude:

- Any machine with ballot printing in the same paper path with ballot deposit is not *software independent*; it is *not* the case that "an error or fault in the voting system software or hardware cannot cause an undetectable change in election results." Therefore such all-in-one machines do not comply with the VVSG 2.0 (the Election Assistance Commission's Voluntary Voting Systems Guidelines). Such machines are not contestable or defensible, either.
- All-in-one machines on which all voters use the BMD interface to mark their ballots (such as the ExpressVote and ExpressVoteXL) *also* suffer from the same serious problem as ordinary BMDs: most voters do not review their ballots effectively, and elections on these machines are not contestable or defensible.
- The auto-cast option for a voter to allow the paper ballot to be cast without human inspection is particularly dangerous, and states must insist that vendors disable or eliminate this mode from the software. However, even disabling the auto-cast feature does not eliminate the risk of undetected vote manipulation.

Remark. The Dominion ImageCast Precinct ICP320 is a precinct-count optical scanner (PCOS) that also contains an audio+buttons ballot-marking interface for disabled voters. This machine can be configured to cast electronic-only ballots from the BMD interface, or an external printer can be attached to print paper optical-scan ballots from the BMD interface. When the external printer is used, that printer's paper path is *not* connected to the scanner+ballot-box paper path (a person must take the ballot from the printer and deposit it into the scanner slot). Therefore this machine is as safe to use as any PCOS with a separate external BMD.

6 Conclusion

Ballot-Marking Devices produce ballots that do not necessarily record the vote expressed by the voter when they enter their selections on the touchscreen: hacking, bugs, and configuration errors can cause the BMDs to print votes that differ from what the voter entered and verified electronically. Because outcome-changing errors in BMD printout do not produce public evidence, BMD systems are not *contestable*. Because there is no way to generate convincing public evidence that reported outcomes are correct despite any BMD malfunctions that might have occurred, BMD systems are not *defensible*. Therefore, BMDs should not be used by voters who can hand mark paper ballots.

All-in-one voting machines, which combine ballot-marking and ballot-box-deposit into the same paper path, are even worse. They have all the disadvantages of BMDs (they are not contestable or defensible), and they can mark the ballot after the voter has inspected it. Therefore they are not even *software independent*, and should not be used by those voters who are capable of marking, handling, and visually inspecting a paper ballot.

When computers are used to record votes, the original transaction (the voter's expression of the votes) is not documented in a verifiable way.[39] When pen-and-paper is used to record the vote, the original expression of the vote *is* documented in a verifiable way (if demonstrably secure chain of custody of the paper ballots is maintained). Audits of elections conducted with hand-marked paper ballots, counted by optical scanners, can ensure that reported election outcomes are correct. Audits of elections conducted with BMDs *cannot* ensure that reported outcomes are correct.

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Ruth R. Hughs
Secretary of State

REPORT OF REVIEW OF DOMINION VOTING SYSTEMS DEMOCRACY SUITE 5.5-A

PRELIMINARY STATEMENT

On October 2-3, 2019, Dominion Voting Systems ("Dominion" or the "Vendor") presented the Democracy Suite 5.5-A system for examination and certification. The examination was conducted in Austin, Texas. Pursuant to Sections 122.035(a) and (b) of the Texas Election Code, the Secretary of State appointed the following examiners:

1. Mr. Tom Watson, an expert in electronic data communication systems;
2. Mr. Brian Mechler, an expert in electronic data communication systems;
3. Mr. Brandon Hurley, an expert in election law and procedure; and
4. Mr. Charles Pinney, an expert in election law and procedure.

Pursuant to Section 122.035(a), the Texas Attorney General appointed the following examiners:

1. Dr. Jim Sneeringer, an expert in electronic data communication systems; and
2. Mr. Ryan Vassar, an employee of the Texas Attorney General.

On October 2, 2019, Mr. Pinney, Mr. Mechler, and Dr. Sneeringer witnessed the installation of the Democracy Suite 5.5-A software and firmware that the Office of the Texas Secretary of State (the "Office") received directly from the Independent Testing Authority. The next day, Mr. Pinney examined the accessibility components of the ImageCast X Ballot Marking Device.

On October 3, 2019, the Vendor demonstrated the Democracy Suite 5.5-A system and answered questions presented by the examiners. Test ballots were then processed on each voting device. The results were accumulated and later verified for accuracy by staff of the Secretary of State.

Examiner reports regarding the Democracy Suite 5.5-A system are attached hereto and incorporated herein by this reference.

BRIEF DESCRIPTION OF DEMOCRACY SUITE 5.5-A

The Democracy Suite 5.5-A system is an updated version of the Democracy Suite 5.5 system, which was denied certification by the Office on June 20, 2019. The Democracy Suite 5.5-A system includes certain software and hardware updates to the Suite 5.5 version.

Democracy Suite 5.5-A has been evaluated at an accredited independent voting system laboratory for conformance to the 2005 Voluntary Voting System Guidelines (VVSG). Democracy Suite 5.5-A was certified by the Election Assistance Commission (EAC) on January 30, 2019.

The components of Democracy Suite 5.5-A are as follows:

Component	Version	Description
EMS – Election Management System	5.5.12.1	Election Management System
ADJ – Adjudication	5.5.8.1	
ICC – ImageCast Central	5.5.3.0002	Central scanner
ICX – ImageCast X BMD	5.5.10.30	Ballot marking device
ICP – ImageCast Precinct	5.5.3-0002	Precinct scanner

FINDINGS

The following are the findings, based on written evidence submitted by the Vendor in support of its application for certification, oral evidence presented at the examination, and the findings of the voting system examiners as set out in their written reports.

The examiner reports identified multiple hardware and software issues that preclude the Office of the Texas Secretary of State from determining that the Democracy Suite 5.5-A system satisfies each of the voting-system requirements set forth in the Texas Election Code. Specifically, the examiner reports raise concerns about whether the Democracy Suite 5.5-A system is suitable for its intended purpose; operates efficiently and accurately; and is safe from fraudulent or unauthorized manipulation. Therefore, the Democracy Suite 5.5-A system and corresponding hardware devices do not meet the standards for certification prescribed by Section 122.001 of the Texas Election Code.

CONCLUSION

Accordingly, based upon the foregoing, I hereby deny certification of Dominion Voting Systems' Democracy Suite 5.5-A system for use in Texas elections.

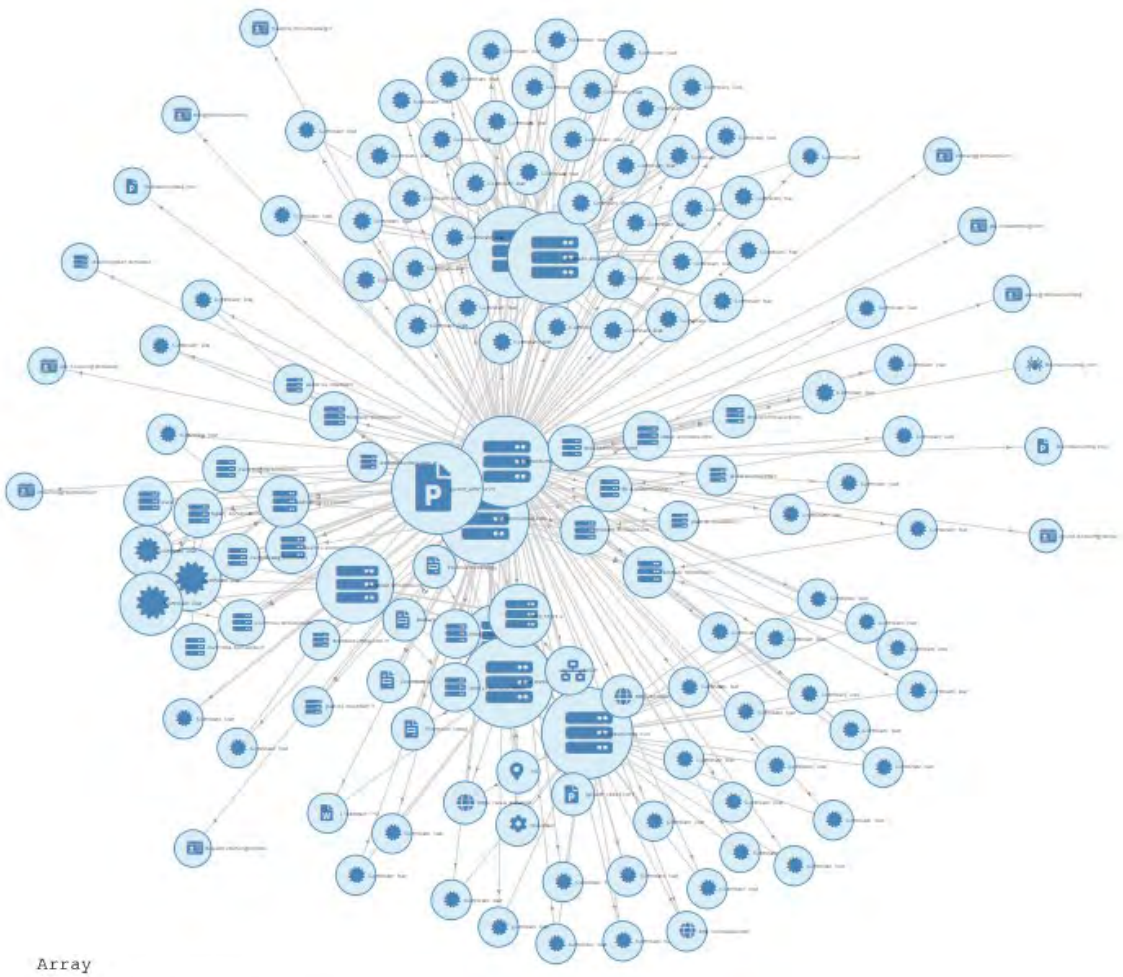
Signed under my hand and seal of office, this 24th day of January 2020.

JOSE A. ESPARZA
DEPUTY SECRETARY OF STATE

Declaration of [redacted]

Pursuant to 28 U.S.C Section 1746, [redacted] make the following declaration.

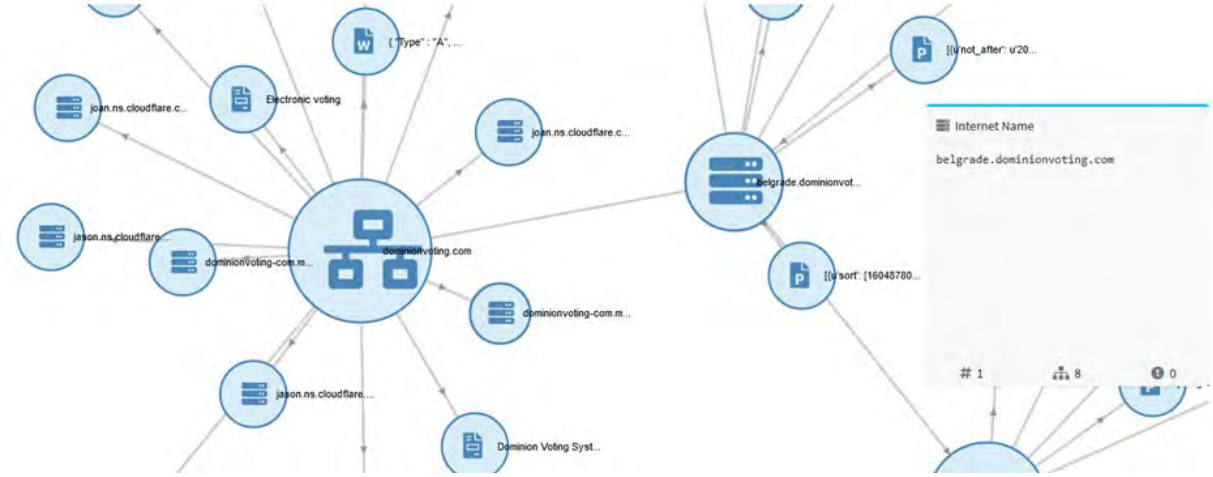
1. I am over the age of 21 years and I am under no legal disability, which would prevent me from giving this declaration.
2. I was an electronic intelligence analyst under 305th Military Intelligence with experience gathering SAM missile system electronic intelligence. I have extensive experience as a white hat hacker used by some of the top election specialists in the world. The methodologies I have employed represent industry standard cyber operation toolkits for digital forensics and OSINT, which are commonly used to certify connections between servers, network nodes and other digital properties and probe to network system vulnerabilities.
3. I am a US citizen and I reside [redacted] location in the United States of America.
4. Whereas the Dominion and Edison Research systems exist in the internet of things, and whereas this makes the network connections between the Dominion, Edison Research and related network nodes available for scanning,
5. And whereas Edison Research's primary job is to report the tabulation of the count of the ballot information as received from the tabulation software, to provide to Decision HQ for election results,
6. And whereas Spiderfoot and Robtex are industry standard digital forensic tools for evaluation network security and infrastructure, these tools were used to conduct public security scans of the aforementioned Dominion and Edison Research systems,
7. A public network scan of Dominionvoting.com on 2020-11-08 revealed the following inter-relationships and revealed 13 unencrypted passwords for dominion employees, and 75 hashed passwords available in TOR nodes:

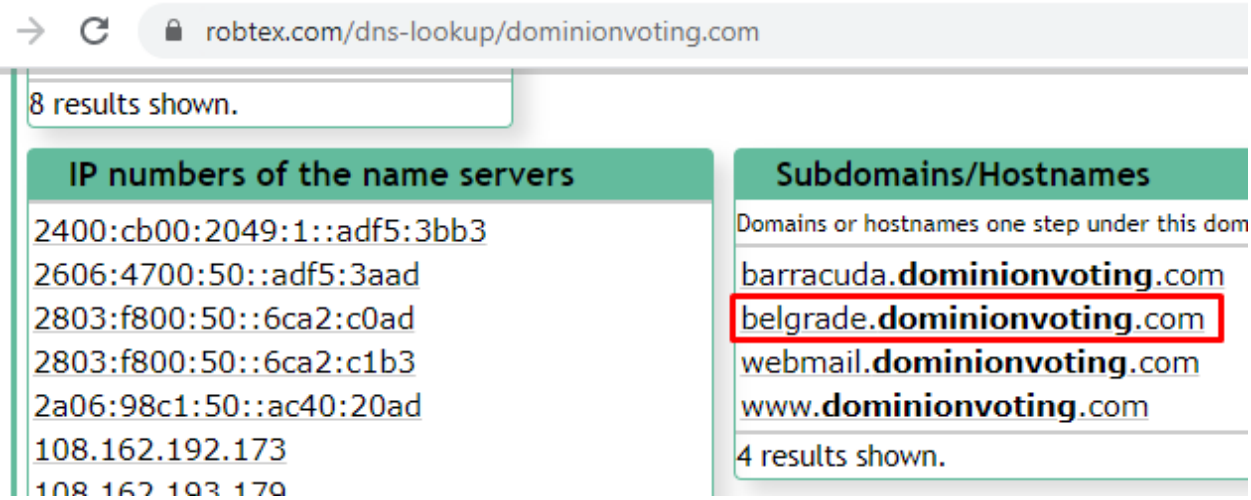


```
Array
(
    [id] => 544167324
    [luser] => ian.macvicar
    [domain] => dominionvoting.com
    [password] => jamley
)

7
Array
(
    [id] => 599400504
    [luser] => jelena.tanaskovic
    [domain] => dominionvoting.com
```

8. The same public scan also showed a direct connection to the group in Belgrade as highlighted below:





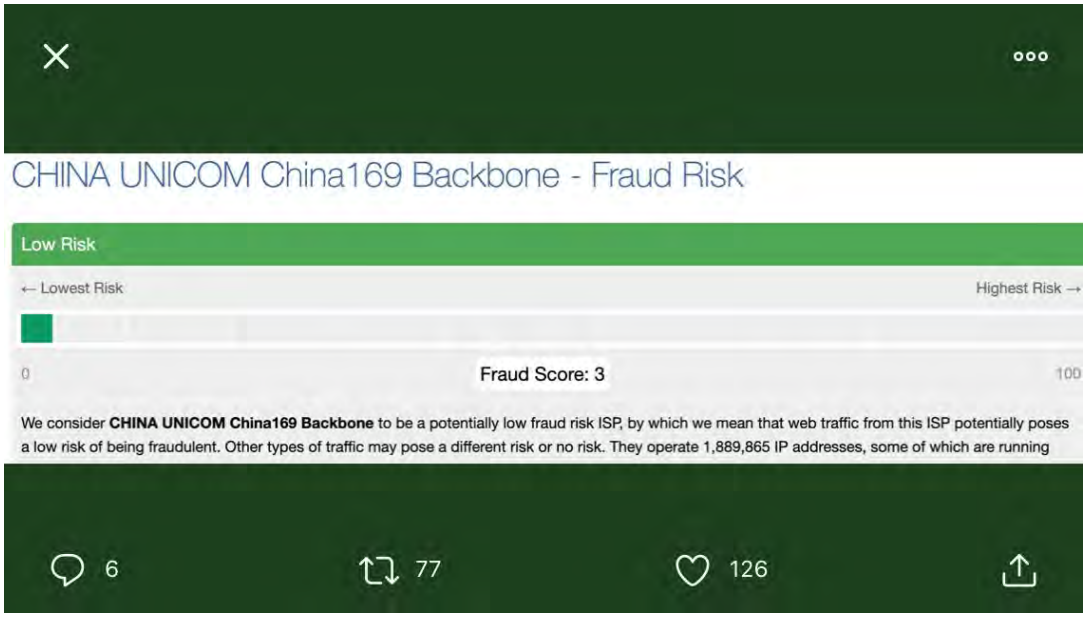
9. A cursory search on LinkedIn of "dominion voting" on 11/19/2020 confirms the numerous employees in Serbia:

10. An additional search of Edison Research on 2020-11-08 showed that Edison Research has an Iranian server seen here:

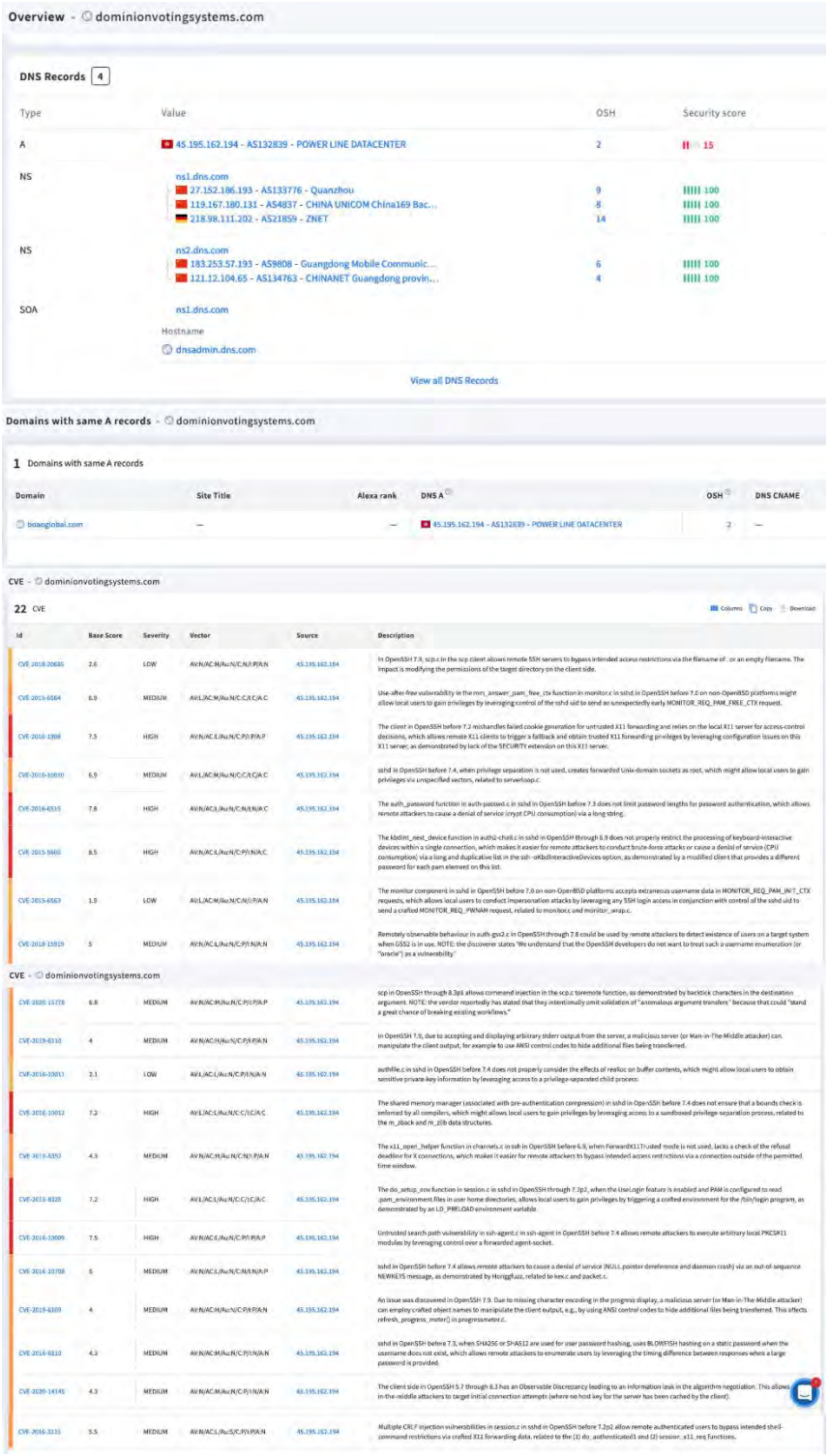
Inputting the Iranian IP into Robtex confirms the direct connection into the "edisonresearch" host from the perspective of the Iranian domain also. This means that it is not possible that the connection was a unidirectional reference.

A deeper search of the ownership of Edison Research "edisonresearch.com" shows a connection to BMA Capital Management, where shareofear.com and bmacapital.com are both connected to edisonresearch.com via a VPS or Virtual Private Server, as denoted by the "vps" at the start of the internet name:

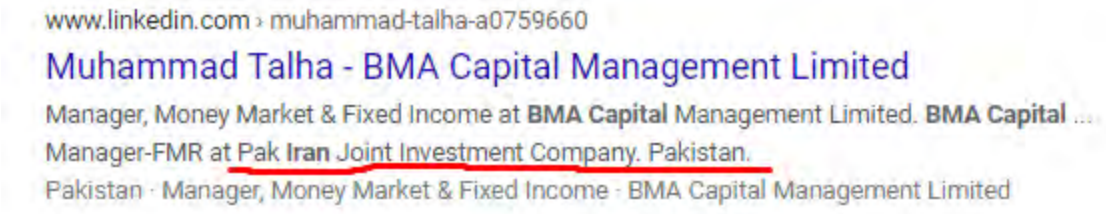
Dominionvoting is also dominionvotingsystems.com, of which there are also many more examples, including access of the network from China. The records of China accessing the server are reliable.



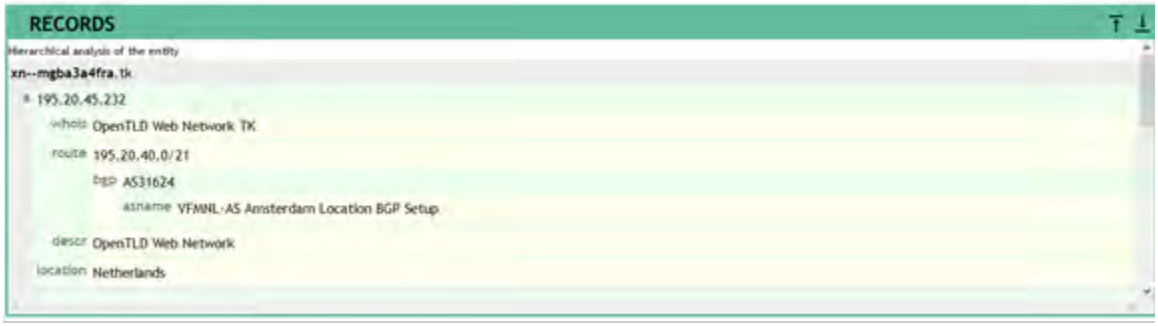
Domain Name: dominionvotingsystems.com
Registry Domain ID: 2530599738_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2020-05-26T15:48:58Z
Creation Date: 2020-05-26T15:48:57Z
Registrar Registration Expiration Date: 2021-05-26T15:48:57Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization:
Registrant State/Province: Hunan
Registrant Country: CN
Registrant Email: Select Contact Domain Holder link at
https://www.godaddy.com/whois/results.aspx?domain=dominionvotingsystems.com
Admin Email: Select Contact Domain Holder link at
https://www.godaddy.com/whois/results.aspx?domain=dominionvotingsystems.com
Tech Email: Select Contact Domain Holder link at
https://www.godaddy.com/whois/results.aspx?domain=dominionvotingsystems.com
Name Server: NS1.DNS.COM
Name Server: NS2.DNS.COM
DNSSEC: unsigned



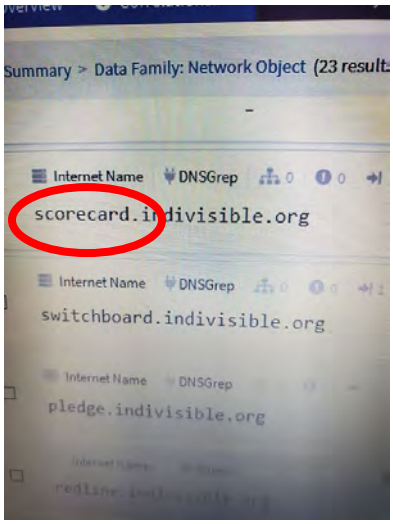
11. BMA Capital Management is known as a company that provides Iran access to capital markets with direct links publicly discoverable on LinkedIn (found via google on 11/19/2020):



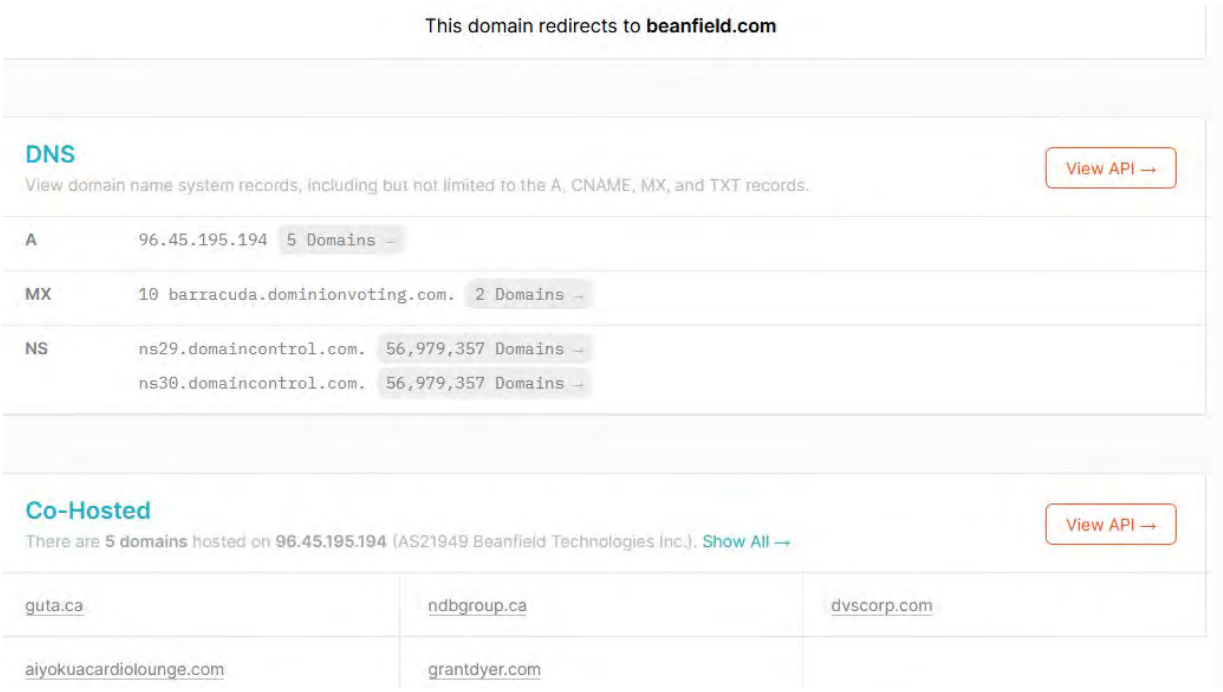
The same Robtex search confirms the Iranian address is tied to the server in the Netherlands, which correlates to known OSINT of Iranian use of the Netherlands as a remote server (See Advanced Persistent Threats: APT33 and APT34):



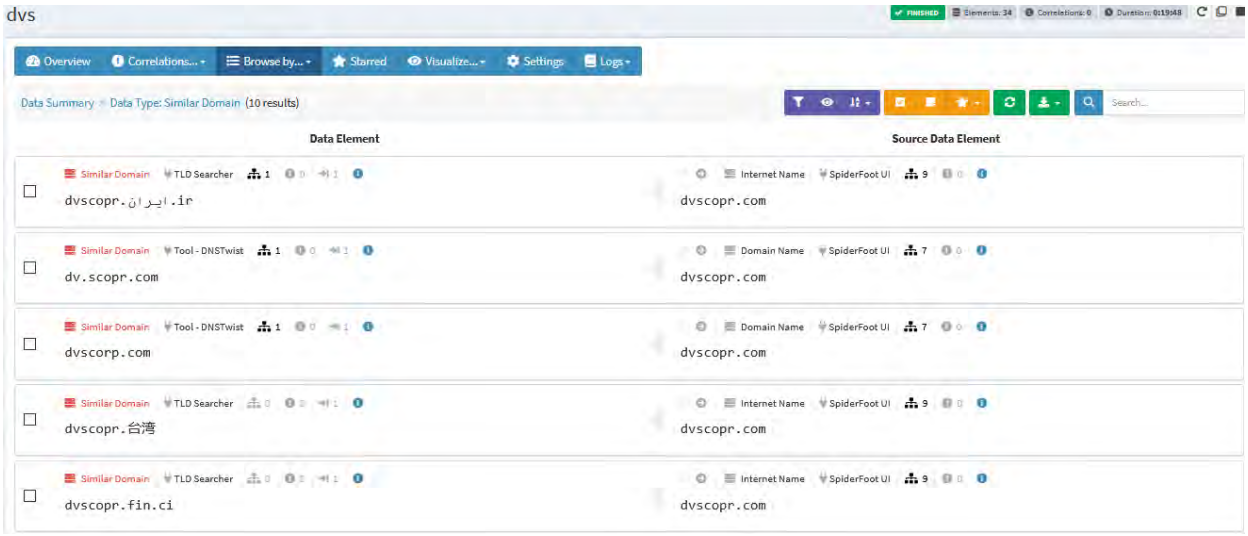
12. A search of the indivisible.org network showed a subdomain which evidences the existence of scorecard software in use as part of the Indivisible (formerly ACORN) political group for Obama:

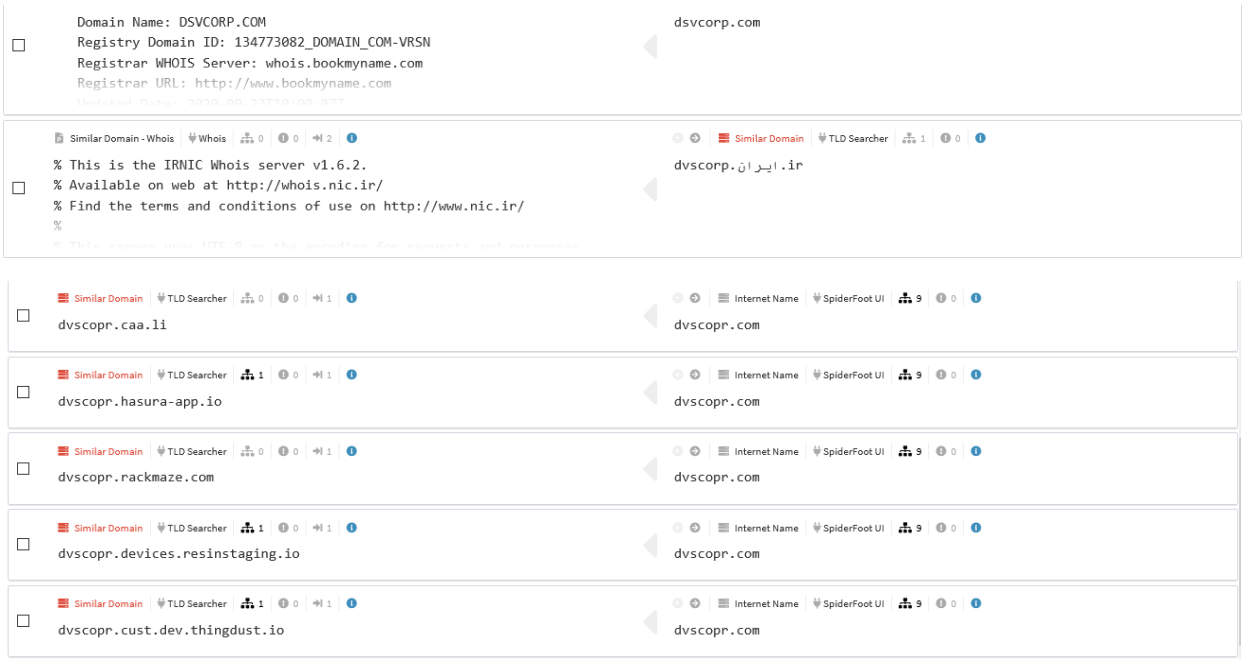


13. Each of the tabulation software companies have their own central reporting "affiliate". Edison Research is the affiliate for Dominion.
14. Beanfield.com out of Canada shows the connections via co-hosting related sites, including dvscorp.com:



This Dominion partner domain “dvscorp” also includes an auto discovery feature, where new in-network devices automatically connect to the system. The following diagram shows some of the related dvscopr.com mappings, which mimic the infrastructure for Dominion and are an obvious typo derivation of the name. Typo derivations are commonly purchased to catch redirect traffic and sometimes are used as honeypots. The diagram shows that infrastructure spans multiple different servers as a methodology.





The above diagram shows how these domains also show the connection to Iran and other places, including the following Chinese domain, highlighted below:

15. The auto discovery feature allows programmers to access any system while it is connected to the internet once it's a part of the constellation of devices (see original Spiderfoot graph).
16. Dominion Voting Systems Corporation in 2019 sold a number of their patents to China (via HSBC Bank in Canada):

Assignment details for assignee "HSBC BANK CANADA, AS COLLATERAL AGENT"

Assignments (1 total)

Assignment 1

Reel/frame	Execution date	Date recorded	Pages
050500/0236	Sep 25, 2019	Sep 26, 2019	7

Conveyance

SECURITY AGREEMENT

Assignors	Correspondent	Attorney docket
DOMINION VOTING SYSTEMS CORPORATION	CHAPMAN & CUTLER LLP 1270 AVENUE OF THE AMERICAS, 30TH FLOOR ATTN: SOREN SCHWARTZ NEW YORK, NY 10020	

Assignee

HSBC BANK CANADA, AS COLLATERAL AGENT

4TH FLOOR, 70 YORK STREET

TORONTO M5J 1S9

CANADA

Properties (18)

Patent	Publication	Application	PCT	International registration
8844813	20130306724	13476836		
8913787	20130301873	13470091		
9202113	20150071501	14539684		
8195505	20050247783	11121997		
9870666	20120232963	13463536		
9710988	20120259680	13525187		
9870667	20120259681	13525208		
7111782	20040238632	10811969		
7422151	20070012767	11526028		
D599131		29324281		

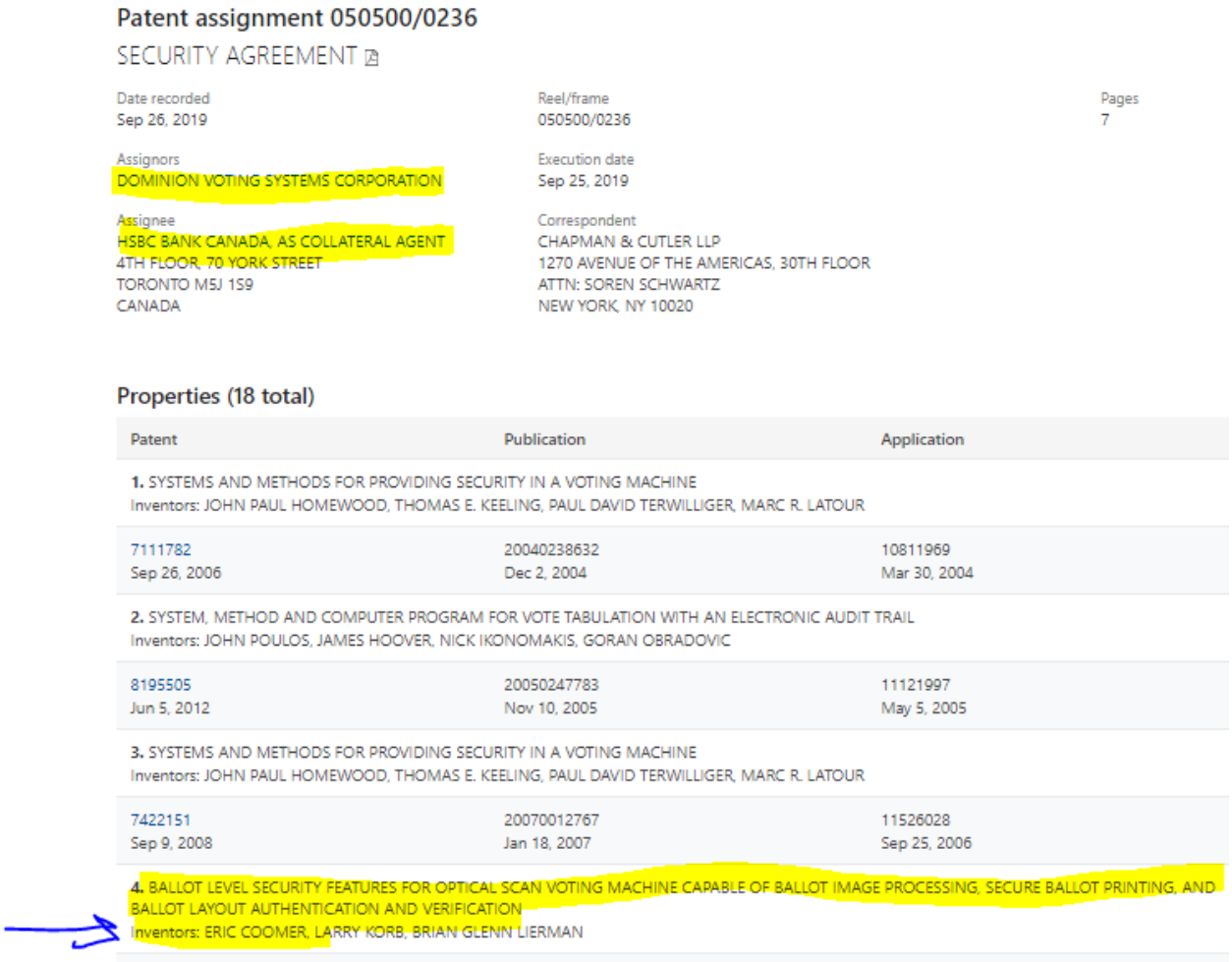
View all

This searchable database contains all recorded Patent Assignment information from August 1980 to the present.

When the USPTO receives relevant information for its assignment database, the USPTO puts the information in the public record and does not verify the validity of the information. Recordation is a ministerial function–the USPTO neither makes a determination of the legality of the transaction nor the right of the submitting party to take the action.

Release 2.0.0 | Release Notes | Send Feedback | Legacy Patent Assignment Search | Legacy Trademark Assignment Search

Of particular interest is a section of the document showing aspects of the nature of the patents dealing with authentication:



Patent assignment 050500/0236

SECURITY AGREEMENT

Date recorded	Reel/frame	Pages
Sep 26, 2019	050500/0236	7

Assignors
DOMINION VOTING SYSTEMS CORPORATION

Execution date
Sep 25, 2019

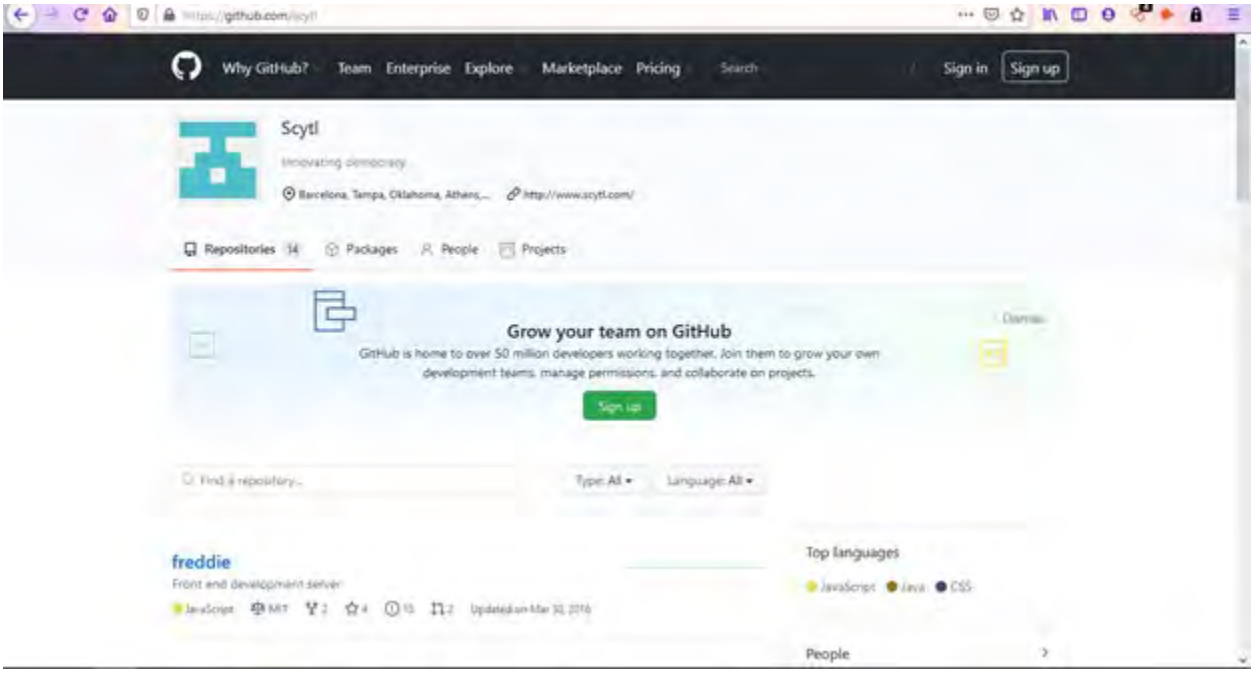
Assignee
HSBC BANK CANADA, AS COLLATERAL AGENT
4TH FLOOR, 70 YORK STREET
TORONTO M5J 1S9
CANADA

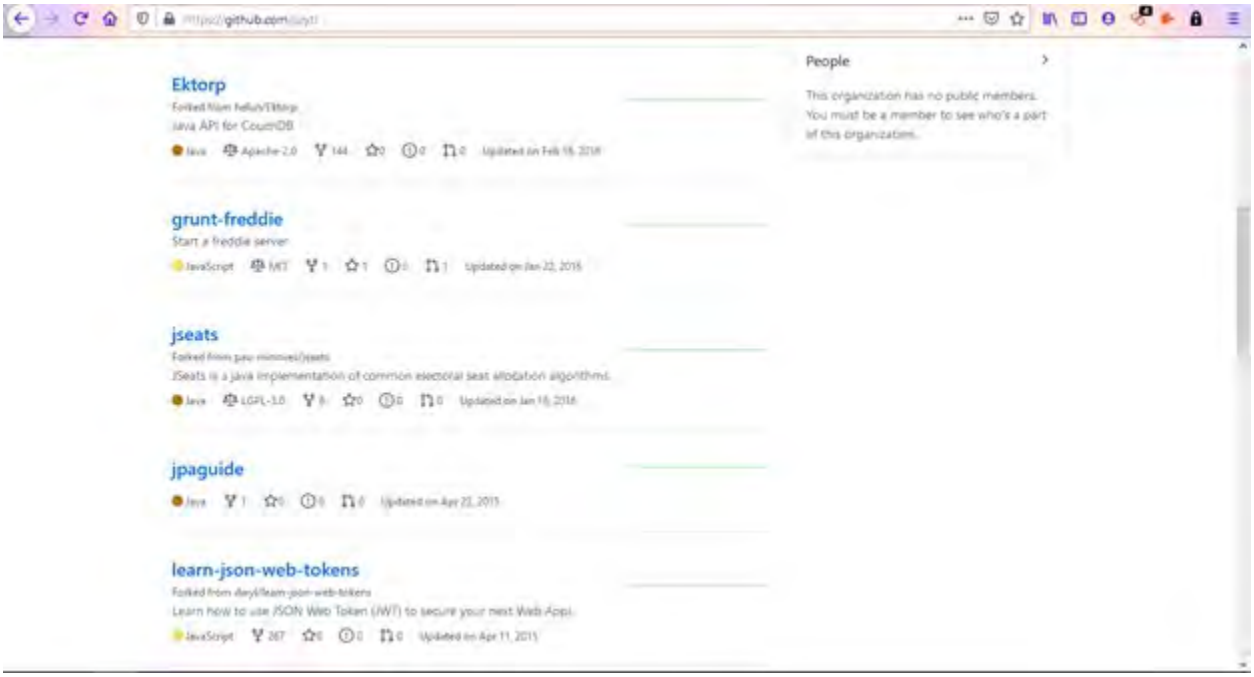
Correspondent
CHAPMAN & CUTLER LLP
1270 AVENUE OF THE AMERICAS, 30TH FLOOR
ATTN: SOREN SCHWARTZ
NEW YORK, NY 10020

Properties (18 total)

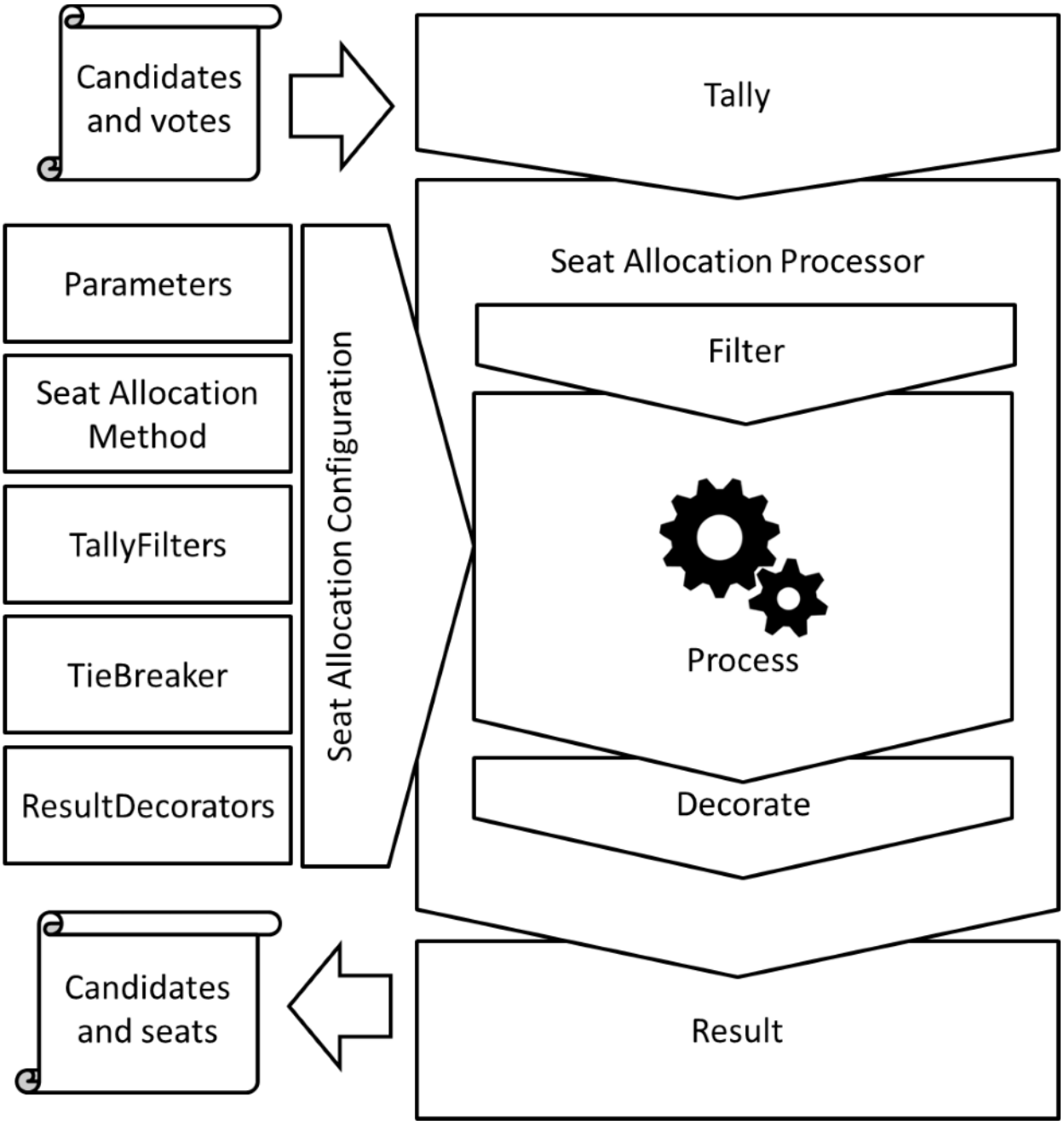
Patent	Publication	Application
1. SYSTEMS AND METHODS FOR PROVIDING SECURITY IN A VOTING MACHINE Inventors: JOHN PAUL HOMEWOOD, THOMAS E. KEELING, PAUL DAVID TERWILLIGER, MARC R. LATOUR		
7111782 Sep 26, 2006	20040238632 Dec 2, 2004	10811969 Mar 30, 2004
2. SYSTEM, METHOD AND COMPUTER PROGRAM FOR VOTE TABULATION WITH AN ELECTRONIC AUDIT TRAIL Inventors: JOHN POULOS, JAMES HOOVER, NICK IKONOMAKIS, GORAN OBRADOVIC		
8195505 Jun 5, 2012	20050247783 Nov 10, 2005	11121997 May 5, 2005
3. SYSTEMS AND METHODS FOR PROVIDING SECURITY IN A VOTING MACHINE Inventors: JOHN PAUL HOMEWOOD, THOMAS E. KEELING, PAUL DAVID TERWILLIGER, MARC R. LATOUR		
7422151 Sep 9, 2008	20070012767 Jan 18, 2007	11526028 Sep 25, 2006
4. BALLOT LEVEL SECURITY FEATURES FOR OPTICAL SCAN VOTING MACHINE CAPABLE OF BALLOT IMAGE PROCESSING, SECURE BALLOT PRINTING, AND BALLOT LAYOUT AUTHENTICATION AND VERIFICATION Inventors: ERIC COOMER, LARRY KORB, BRIAN GLENN LIERMAN		

17. Smartmatic creates the backbone (like the cloud). SCYTL is responsible for the security within the election system.

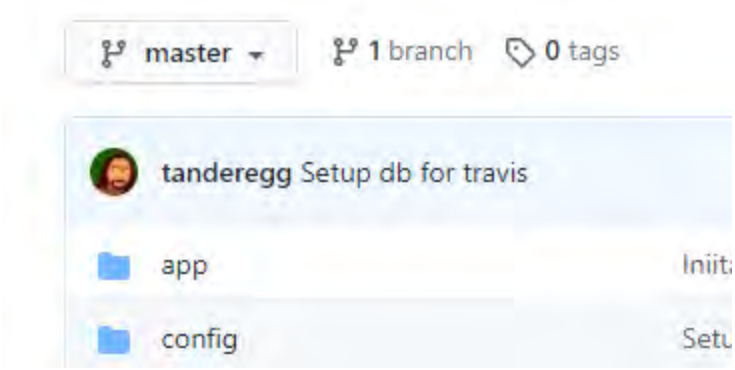




18. In the GitHub account for Scytl, Scytl Jseats has some of the programming necessary to support a much broader set of election types, including a decorator process where the data is smoothed, see the following diagram provided in their source code:



19. Unrelated, but also a point of interest is CTCL or Center for Tech and Civic Life funded by Mark Zuckerberg. Within their github page (https://github.com/ctcl), one of the programmers holds a government position. The Bipcoop repo shows tanderegg as one of the developers, and he works at the Consumer Financial Protection Bureau:



20. As seen in included document titled "AA20-304A-Iranian_Advanced_Persistent_Threat_Actor_Identified_Obtaining_Voter_Registration_Data " that was authored by the Cybersecurity & Infrastructure Security Agency (CISA) with a Product ID of AA20-304A on a specified date of October 30, 2020, CISA and the FBI reports that Iranian APT teams were seen using ACUTENIX, a website scanning software, to find vulnerabilities within Election company websites, confirmed to be used by the Iranian APT teams buy seized cloud storage that I had personally captured and reported to higher authorities. These scanning behaviors showed that foreign agents of aggressor nations had access to US voter lists, and had done so recently.
21. In my professional opinion, this affidavit presents unambiguous evidence that Dominion Voter Systems and Edison Research have been accessible and were certainly compromised by rogue actors, such as Iran and China. By using servers and employees connected with rogue actors and hostile foreign influences combined with numerous easily discoverable leaked credentials, these organizations neglectfully allowed foreign adversaries to access data

and intentionally provided access to their infrastructure in order to monitor and manipulate elections, including the most recent one in 2020. This represents a complete failure of their duty to provide basic cyber security. This is not a technological issue, but rather a governance and basic security issue: if it is not corrected, future elections in the United States and beyond will not be secure and citizens will not have confidence in the results.

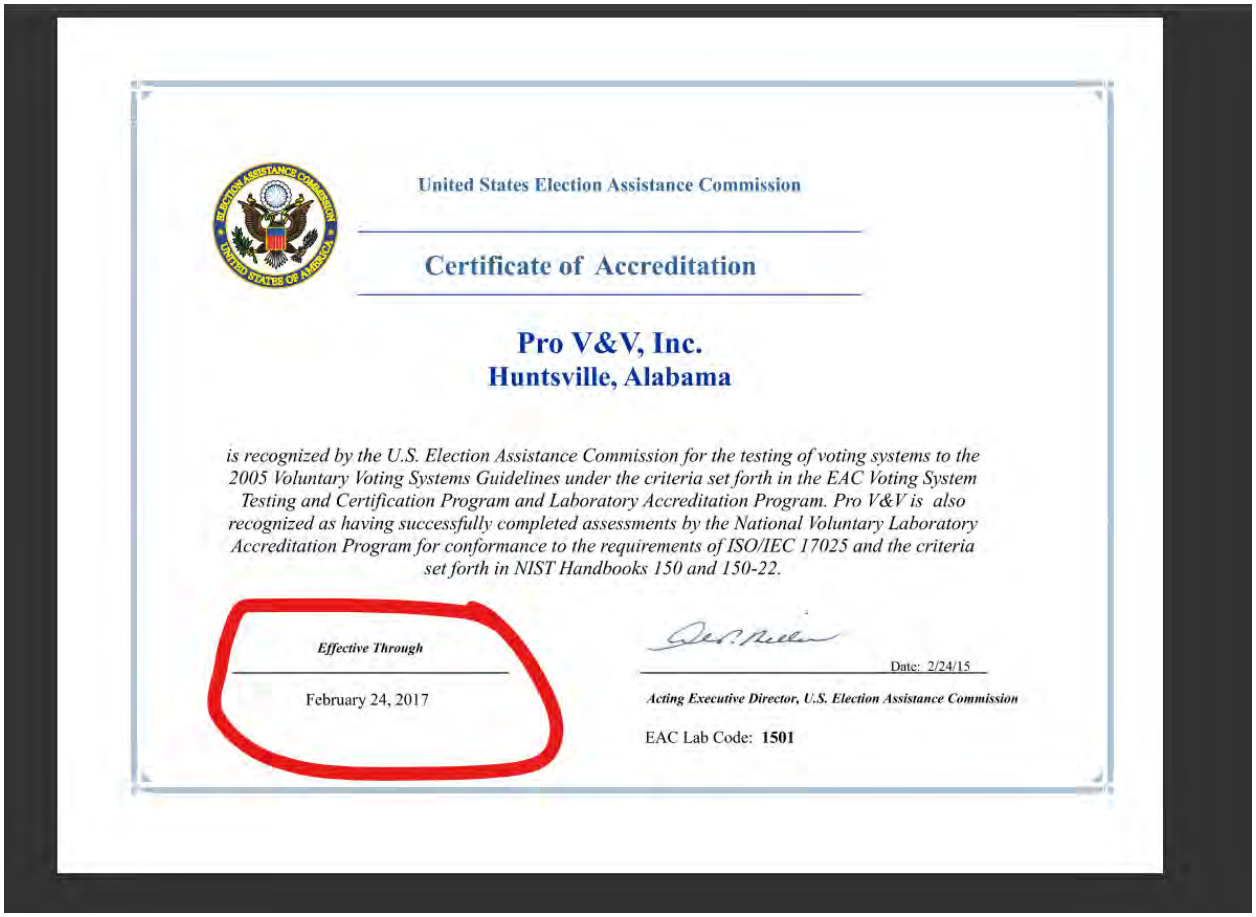
I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed this November 23th, 2020.

Declaration of [redacted]

Pursuant to 28 U.S.C Section 1746, I, [redacted], make the following declaration.

1. I am over the age of 21 years and I am under no legal disability, which would prevent me from giving this declaration.
2. I have been a private contractor with experience gathering and analyzing foreign intelligence and acted as a LOCALIZER during the deployment of projects and operations both OCONUS and CONUS. I am a trained Cryptolinguist, hold a completed degree in Molecular and Cellular Physiology and have FORMAL training in other sciences such as Computational Linguistics, Game Theory, Algorithmic Aspects of Machine Learning, Predictive Analytics among others.
3. I have operational experience in sources and methods of implementing operations during elections both CONUS and OCONUS
4. I am an amateur network tracer and cryptographer and have over two decades of mathematical modeling and pattern analysis.
5. In my position from 1999-2014 I was responsible for delegating implementation via other contractors sub-contracting with US or 9 EYES agencies identifying connectivity, networking and subcontractors that would manage the micro operations.
6. My information is my personal knowledge and ability to detect relationships between the companies and validate that with the cryptographic knowledge I know and attest to as well as evidence of these relationships.
7. In addition, I am WELL versed due to my assignments during my time as a private contractor of how elections OCONUS (for countries I have had an assignment at) and CONUS (well versed in HAVA ACT) and more.
8. On or about October 2017 I had reached out to the US Senate Majority Leader with an affidavit claiming that our elections in 2017 may be null and void due to lack of EAC certifications. In fact Sen. Wyden sent a letter to Jack Cobb on 31 OCT 2017 advising discreetly pointing out the importance of being CERTIFIED EAC had issued a certificate to

Pro V & V and that expired on Feb 24, 2017. No other certification has been located.



United States Election Assistance Commission

Certificate of Accreditation

Pro V&V, Inc.
Huntsville, Alabama

is recognized by the U.S. Election Assistance Commission for the testing of voting systems to the 2005 Voluntary Voting Systems Guidelines under the criteria set forth in the EAC Voting System Testing and Certification Program and Laboratory Accreditation Program. Pro V&V is also recognized as having successfully completed assessments by the National Voluntary Laboratory Accreditation Program for conformance to the requirements of ISO/IEC 17025 and the criteria set forth in NIST Handbooks 150 and 150-22.

Effective Through

February 24, 2017

Date: 2/24/15

Acting Executive Director, U.S. Election Assistance Commission

EAC Lab Code: **1501**

9. Section 231(b) of the Help America Vote Act (HAVA) of 2002 (42 U.S.C. §15371(b)) requires that the EAC provide for the accreditation and revocation of accreditation of independent, non-federal laboratories qualified to test voting systems to Federal standards. Generally, the EAC considers for accreditation those laboratories evaluated and recommended by the National Institute of Standards and Technology (NIST) pursuant to HAVA Section 231(b)(1). However, consistent with HAVA Section 231(b)(2)(B), the Commission may also vote to accredit laboratories outside of those recommended by NIST upon publication of an explanation of the reason for any such accreditation.

10. 

United States Department of Commerce
National Institute of Standards and Technology

NVLAP®

Certificate of Accreditation to ISO/IEC 17025:2017

NVLAP LAB CODE: 200978-0

Pro V&V
Huntsville, AL

is accredited by the National Voluntary Laboratory Accreditation Program for specific services, listed on the Scope of Accreditation, for:

Voting System Testing

This laboratory is accredited in accordance with the recognized International Standard ISO/IEC 17025:2017. This accreditation demonstrates technical competence for a defined scope and the operation of a laboratory quality management system (refer to joint ISO-ILAC-IAF Communique dated January 2009).

2020-03-26 through 2021-03-31
Effective Dates

For the National Voluntary Laboratory Accreditation Program

11. VSTL's are VERY important because equipment vulnerabilities allow for deployment of algorithms and scripts to intercept, alter and adjust voting tallies.
12. There are only TWO accredited VSTLs (VOTING SYSTEM TEST LABORATORIES). In order to meet its statutory requirements under HAVA §15371(b), the EAC has developed the EAC's Voting System Test Laboratory Accreditation Program. The procedural requirements of the program are established in the proposed information collection, the EAC **Voting System Test Laboratory Accreditation Program Manual**. Although participation in the program is voluntary, adherence to the program's procedural requirements is mandatory for participants. The procedural requirements of this Manual will supersede any prior laboratory accreditation requirements issued by the EAC. This manual shall be read in conjunction with the EAC's **Voting System Testing and Certification Program Manual** (OMB 3265-0019).

MICHIGAN

State Participation:	**Requires Testing by an Independent Testing Authority.** MI requires that voting systems are certified by an independent testing authority accredited by NASED and the board of state canvassers.
Applicable Statute(s):	"An electronic voting system shall not be used in an election unless it is approved by the board of state canvassers … and unless it meets 1 of the following conditions: (a) Is certified by an independent testing authority accredited by the national association of state election directors and by the board of state canvassers. (b) In the absence of an accredited independent testing authority, is certified by the manufacturer of the voting system as meeting or exceeding the performance and test standards referenced in subdivision (a) in a manner prescribed by the board of state canvassers." MICH. COMP. LAWS ANN § 168.795a (2009).
Applicable Regulation(s):	MI does not have a regulation regarding the federal certification process.
State Certification Process:	The Secretary of State accepts requests from persons/corporations wishing to have their voting system examined. The requestor must pay the Secretary of State an application fee of $1,500.00, file a report listing all of the states in which the voting system has been approved and any reports that these states have made regarding the performance of the voting system. The Board of State Canvassers conducts a field test involving Michigan electors and election officials in simulated election day conditions. The Board of State Canvassers shall approve the voting system if it meets all of the state requirements. MICH. COMP. LAWS ANN § 168.795a (2009).
Fielded Voting Systems:	*[After the EAC completes and issues the 2008 Election Administration and Voting Survey, information about fielded voting systems will be added to this document. In the meantime, readers may find information on the voting systems at the following website (if available)].* http://www.michigan.gov/sos/0,1607,7-127-1633_8716_45458---,00.html

13.

WISCONSIN

State Participation:

Requires Testing by a Federally Accredited Laboratory. WI requires that its voting systems receive approval from an independent testing authority accredited by NASED verifying that the voting systems meet all of the recommended FEC standards.

Applicable Statute(s):

"No ballot, voting device, automatic tabulating equipment or relating equipment and materials to be used in an electronic voting system may be utilized in this state unless it is approved by the board [of election commissioners]." WIS. STAT.ANN. § 5.91 (West 2009).

Applicable Regulation(s):

"An application for approval of an electronic voting system shall be accompanied by all of the following … [r]eports from an independent testing authority accredited by the national association of state election directors (NASED) demonstrating that the voting system conforms to all the standards recommended by the federal elections commission." WIS. ADMIN. CODE GAB § 7.01 (2009).

State Certification Process:

The Board of Election Commissioners accepts applications for the approval of electronic voting systems. Once the application is completed, the vendor must set up the voting system for three mock elections using; (1) offices, (2) referenda questions and (3) candidates. A panel of local election officials can assist the Board in the review of the voting system. The Board conducts the test using a mock election for the partisan primary, general election, and nonpartisan election. The Board may also require that the voting system be used in an actual election as a condition of the approval. WIS. ADMIN. CODE GAB §§ 7.01, 7.02 (2009).

Fielded Voting Systems:

[After the EAC completes and issues the 2008 Election Administration and Voting Survey, information about fielded voting systems will be added to this document. In the meantime, readers may find information on the voting systems at the following website (if available)].
http://elections.state.wi.us/section.asp?linkid=643&locid=47

14.

U.S. Election Assistance Commission

GEORGIA

State Participation:	**Requires Federal Certification.** GA requires that its voting systems are tested to EAC standards by EAC accredited labs and certified by the EAC.
Applicable Statute(s):	"Any person or organization owning, manufacturing, or selling, or being interested in the manufacture or sale of, any voting machine may request the Secretary of State to examine the machine. Any ten or more electors of this state may, at any time, request the Secretary of State to reexamine any voting machine previously examined and approved by him or her. Before any such examination or reexamination, the person, persons, or organization requesting such examination or reexamination shall pay to the Secretary of State the reasonable expenses of such examination; provided, however, that in the case of a request by ten or more electors the examination fee shall be $ 250.00. The Secretary of State may, at any time, in his or her discretion, reexamine any voting machine." GA CODE ANN. § 21-2-324 (2008).
Applicable Regulation(s):	"Prior to submitting a voting system for certification by the State of Georgia, the proposed voting system's hardware, firmware, and software must have been issued Qualification Certificates from the EAC. These EAC Qualification Certificates must indicate that the proposed voting system has successfully completed the EAC Qualification testing administered by EAC approved ITAs. If for any reason, this level of testing is not available, the Qualification tests shall be conducted by an agency designated by the Secretary of State. In either event, the Qualification tests shall comply with the specifications of the *Voting Systems Standards* published by the EAC." GA. COMP. R. & RES. 590-8-1-.01 (2009).
State Certification Process:	After the voting system has passed EAC Qualification testing, the vendor of the voting system submits a letter to the Office of the Secretary of State requesting certification for the voting system along with a technical data package to the certification agent. An evaluation proposal is created by the certification agent after a preliminary view of the Technical Data Package and sent to the vendor. Any additional EAC ITA testing identified in the evaluation proposal is arranged by the vendor and the certification agent will perform all other tests identified in the evaluation proposal. The certification agent submits a report of their findings to the Secretary of State. Based on these findings the Secretary of State will make a final determination on whether to certify the voting system. GA. COMP. R. & RES. 590-8-1-.01 (2009).
Fielded Voting Systems:	*[After the EAC completes and issues the 2008 Election Administration and Voting Survey, information about fielded voting systems will be added to this document. In the meantime, readers may find information on the voting systems at the following website (if available)].* http://www.sos.georgia.gov/Elections/

15.

PENNSYVANIA

State Participation:	**Requires Testing by a Federally Accredited Laboratory.** PA requires that its voting systems are approved by a federally recognized independent testing laboratory as meeting federal voting system standards.
Applicable Statute(s):	"Any person or corporation owning, manufacturing or selling, or being interested in the manufacture or sale of, any electronic voting system, may request the Secretary of the Commonwealth to examine such system if the voting system has been examined and approved by a federally recognized independent testing authority and if it meets any voting system performance and test standards established by the Federal Government." 25 PA. CONS. STAT. ANN. Code § 3031.5 (West 2008).
Applicable Regulation(s):	PA does not have a regulation regarding the federal certification process.
State Certification Process:	The Secretary of State examines voting systems, upon request, once the voting systems have received approval by a federally recognized independent testing authority. The person(s) requesting the examination of the voting system are responsible for the cost of the examination. After the examination, the Secretary of State issues a report stating whether or not the voting systems are safe and compliant with state and federal requirements. If the voting systems are deemed safe and compliant by the Secretary of State then the systems may be adopted and approved for use in elections by each county through a majority vote of its qualified electors. 25 PA. CONS. STAT. ANN. Code §§ 3031.5, 3031.2 (West 2008).
Fielded Voting Systems:	*[After the EAC completes and issues the 2008 Election Administration and Voting Survey, information about fielded voting systems will be added to this document. In the meantime, readers may find information on the voting systems at the following website (if available)].* http://www.votespa.com/HowtoVote/tabid/74/language/en-US/Default.aspx

16.

U.S. Election Assistance Commission

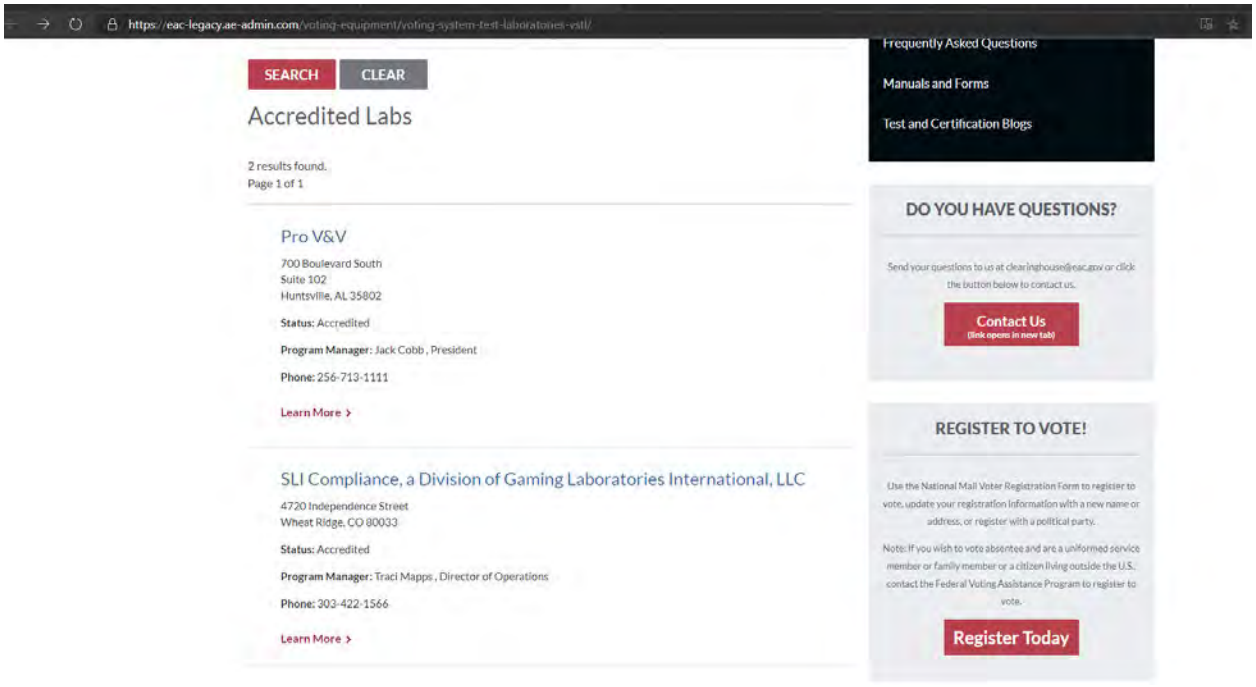
ARIZONA

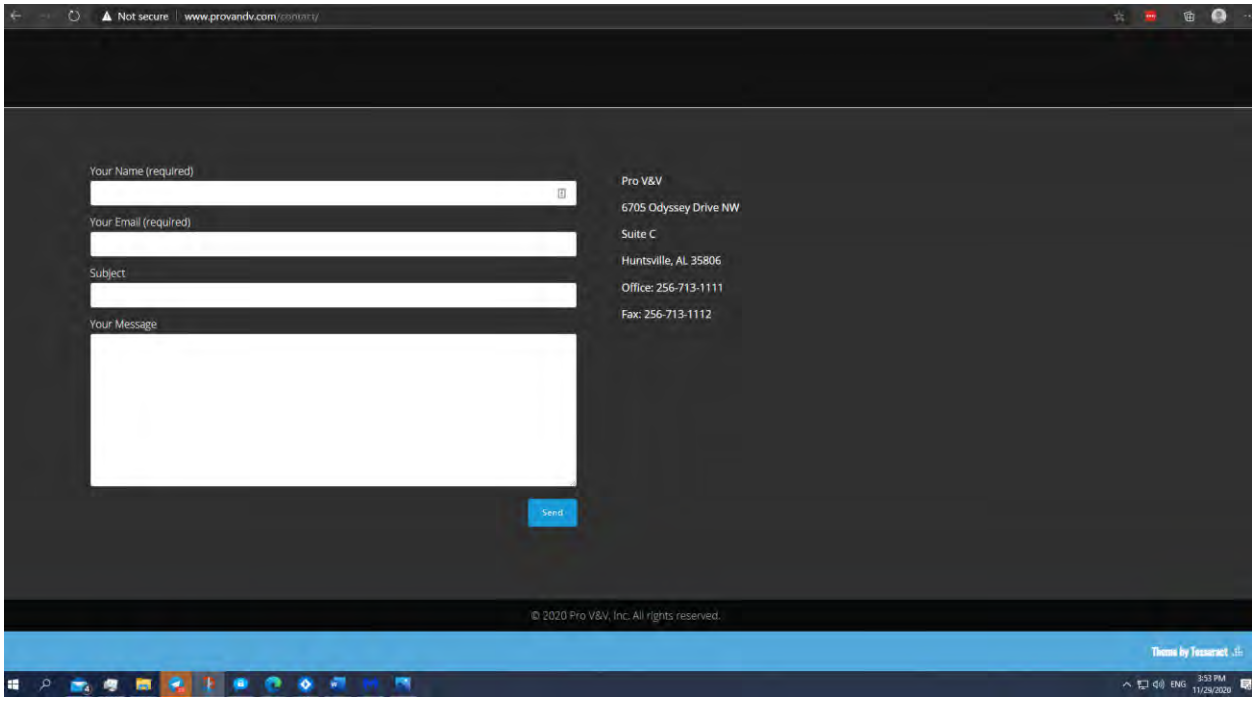
State Participation:	**Requires Testing by a Federally Accredited Laboratory.** AZ requires that its voting systems are HAVA compliant and approved by a laboratory that is accredited pursuant to HAVA.
Applicable Statute(s):	"On completion of acquisition of machines or devices that comply with HAVA, machines or devices used at any election for federal, state or county offices may only be certified for use in this state and may only be used in this state if they comply with HAVA and if those machines or devices have been tested and approved by a laboratory that is accredited pursuant to HAVA." ARIZ. REV. STAT. § 16-442(B) (2008).
Applicable Regulation(s):	AZ does not have a regulation regarding the federal certification process.
State Certification Process:	The Secretary of State appoints a committee of three people that test different voting systems. This committee is required to submit their recommendations to the Secretary of State who then makes the final decision on which voting system(s) to adopt. ARIZ. REV. STAT. § 16-442(A) and (C) (2008).
Fielded Voting Systems:	*[After the EAC completes and issues the 2008 Election Administration and Voting Survey, information about fielded voting systems will be added to this document. In the meantime, readers may find information on the voting systems at the following website (if available)].* http://www.azsos.gov/election/equipment/default.htm

17.

18. **Pro V& V** and **SLI Gaming** both lack evidence of EAC Accreditation as per the Voting System Testing and Certification Manual.

19. **Pro V& V** is owned and Operated by Jack Cobb. Real name is Ryan Jackson Cobb. The company ProV&V was founded and run by Jack Cobb who formerly worked under the entity of Wyle Laboratories which is an AEROSPACE DEFENSE CONTRACTING ENTITY. The address information on the EAC, NIST and other entities for Pro V& V are different than that of what is on ProV&V website. The EAC and NIST (ISO CERT) issuers all have another address.





20. VSTLs are the most important component of the election machines as they examine the use of COTS (Commercial Off–The-Shelf)
21. "Wyle became involved with the testing of electronic voting systems in the early 1990's and has tested over 150 separate voting systems. Wyle was the first company to obtain accreditation by the National Association of State Election Directors (NASED). Wyle is accredited by the Election Assistance Commission (EAC) as a Voting System Testing Laboratory (VSTL). Our scope of accreditation as a VSTL encompasses all aspects of the hardware and software of a voting machine. Wyle also received NVLAP accreditation to ISO/IEC 17025:2005 from NIST." Testimony of Jack Cobb 2009
22. COTS are preferred by many because they have been tried and tested in the open market and are most economic and readily available. COTS are also the SOURCE of vulnerability therefore VSTLs are VERY important. COTS components by voting system machine manufacturers can be used as a "Black Box" and changes to their specs and hardware make up change continuously. Some changes can be simple upgrades to make them more efficient in operation, cost efficient for production, end of life (EOL) and even complete reworks to meet new standards. They key issue in this is that MOST of the COTS used by Election Machine Vendors like Dominion, ES&S, Hart Intercivic, Smartmatic and others is that such manufacturing for COTS have been outsourced to China which if implemented in our Election Machines make us vulnerable to BLACK BOX antics and backdoors due to hardware changes that can go undetected. This is why VSTL's are VERY important.
23. The proprietary voting system software is done so and created with cost efficiency in mind and therefore relies on 3rd party software that is AVAILABLE and HOUSED on the HARDWARE. This is a vulnerability. Exporting system reporting using software like Crystal Reports, or PDF software allows for vulnerabilities with their constant updates.
24. As per the COTS hardware components that are fixed, and origin may be cloaked under proprietary information a major vulnerability exists since once again third-party support software is dynamic and requires FREQUENT updates. The hardware components of the computer components, and election machines that are COTS may have slight updates that can be overlooked as they may be like those designed that support the other third -party software. COTS origin is important and the US Intelligence Community report in 2018 verifies that.
25. The Trump Administration made it clear that there is an absence of a major U.S. alternative to foreign suppliers of networking equipment. This highlights the growing dominance of

Chinese manufacturers like Huawei that are the world's LARGEST supplier of telecom and other equipment that endangers national security.

26. China, is not the only nation involved in COTS provided to election machines or the networking but so is Germany via a LAOS founded Chinese linked cloud service company that works with SCYTL named Akamai Technologies that have offices in China and are linked to the server that Dominion Software.

28 046 Madrid

Asian offices

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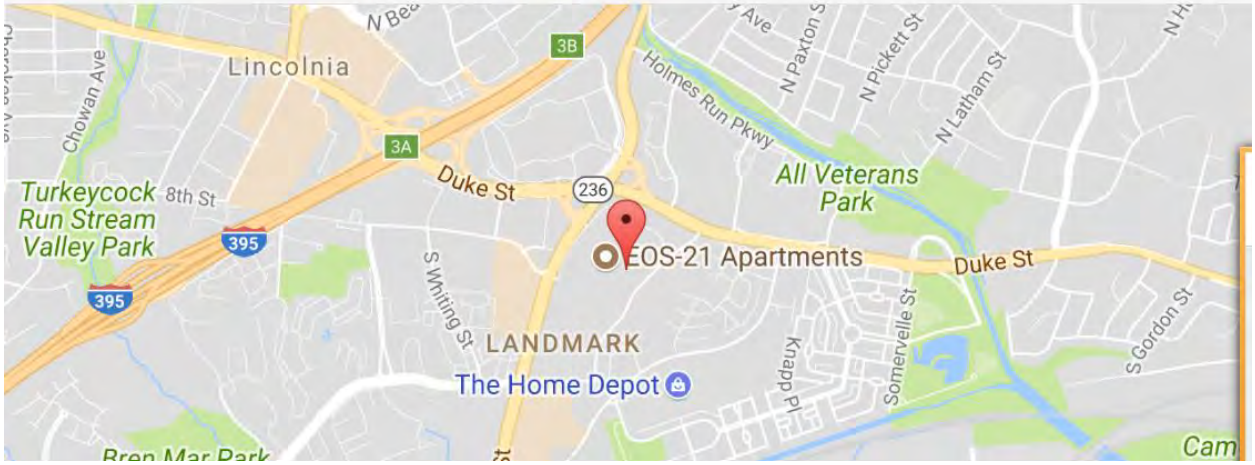
info@au.akamai.com

Telephone: 61 2 9006 1325
Fax: 61 2 9475 0343
Regional Manager: Stuart Spiteri

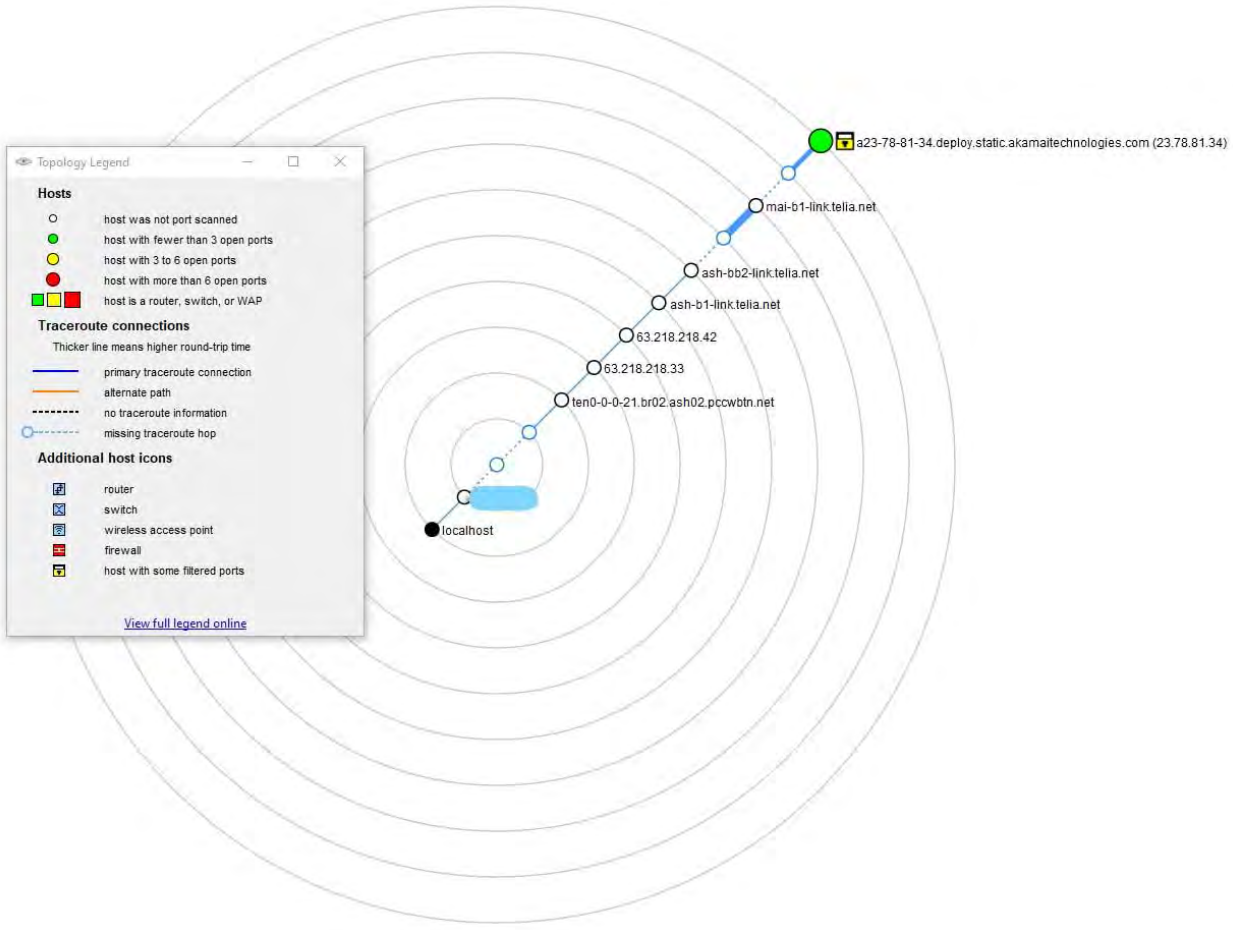
27. *ptt.gov* resolves to 4.30.228.74. According to our data this IP address belongs to *Level 3 Communications* and is located in *Alexandria, Virginia, United States*. Please have a look at the information provided below for further details.

4.30.228.74	
ISP/Organization	Level 3 Communications
Location	Alexandria 22304, Virginia (VA), United States (US)
Latitude	38.8115 / 38°48'41" N
Longitude	-77.1285 / 77°7'42" W
Timezone	America/New_York
Local Time	Thu, 12 Jul 2018 19:27:40 -0400



28. L3 Level Communications is federal contractor that is partially owned by foreign lobbyist George Soros. An article that AP ran in 2010 – spoke out about the controversy of this that has been removed. (LINK) "As for the company's other political connections, it also appears that none other than George Soros, the billionaire funder of the country's liberal political infrastructure, owns 11,300 shares of OSI Systems Inc., the company that owns Rapiscan. Not surprisingly, OSI's stock has appreciated considerably over the course of the year. Soros certainly is a savvy investor." Washington Examiner re-write.

29. 
a23-78-81-34.deploy.static.akamaitechnologies.com (23.78.81.34)
4.15.168.158
ae-11.edge2.Chicago10.Level3.net
cer-edge-20.inet.qwest.net
10.40.50.7
207.69.33.137
10.238.0.1
DeviceDHCP.Home
localhost
172.22.88.14
hu0-5-0-4.ccr21.ole04.atlas.cogentco.com
be2717.ccr41.ord01.atlas.cogentco.com
be2765.ccr41.ord03.atlas.cogentco.com
att.ord03.atlas.cogentco.com
cgcil22crs.ip.att.net
n54ny21crs.ip.att.net
12.122.115.105
12.244.79.30
michigan.gov (23.78.200.73)



30.

31. **L-3 Communication** Systems-East designs, develops, produces and integrates communication systems and support equipment for space, air, ground, and naval applications, including C4I systems and products; integrated Navy communication systems; integrated space communications and RF payloads; recording systems; secure communications, and information security systems. In addition, their site claims that MARCOM is an integrated communications system and The Marcom® is the foundation of the Navy's newest digital integrated voice / data switching system for affordable command and control equipment supporting communications and radio room automation. The MarCom® uses the latest **COTS** digital technology and open systems standards to offer the command and control user a low cost, user friendly, solution to the complex voice, video and data communications needs of present and future joint / allied missions. Built in reliability, rugged construction, and fail-safe circuits ensure your call and messages will go through. Evidently a HUGE vulnerability.

32. Michigan's government site is thumped off Akamai Technologies servers which are housed on **TELIA AB** a foreign server located in Germany.
33. Scytl, who is contracted with AP that receives the results tallied BY Scytl on behalf of Dominion – During the elections the AP reporting site had a disclaimer.
    AP – powered by SCYTL.

Advertisements	Basic Tracking Info	
	Domain:	Michigan.gov [Whois Lookup - Domain Country - Domain To IP]
	IP Address:	23.78.81.34 [IP Blacklist Check]
	Reverse DNS:	34.81.78.23.in-addr.arpa
	Hostname:	a23-78-81-34.deploy.static.akamaitechnologies.com
	Nameservers:	a12-67.akam.net >> 184.26.160.67 a11-66.akam.net >> 84.53.139.66 a1-35.akam.net >> 193.108.91.35 a5-66.akam.net >> 95.100.168.66 a18-64.akam.net >> 95.101.36.64 a24-65.akam.net >> 2.16.130.65
	Location For an IP: Michigan.gov	
	Continent:	North America (NA)
	Country:	United States (US)
	Capital:	Washington
	State:	Unknown
	City Location:	Unknown
	ISP:	Akamai Technologies
	Organization:	Akamai Technologies
	AS Number:	AS1299 Telia Company AB
	something went wrong!	something went wrong!
Geolocation on IP Map	Time Zone:	America/North_Dakota/Center
	Local Time:	13:48:46
	Timezone GMT offset:	-21600
	Sunrise / Sunset:	07:27 / 17:12
	Extra Information for an IP: Michigan.gov	
	Continent Lat/Lon:	46.07305 / -100.546
	Country Lat/Lon:	38 / -98
	City Lat/Lon:	(37.751) / (-97.822)
	IP Language:	English

34. “Scytl was selected by the Federal Voting Assistance Program of the U.S. Department of Defense to provide a secure online ballot delivery and onscreen marking systems under a program to support overseas military and civilian voters for the 2010 election cycle and beyond. Scytl was awarded 9 of the 20 States that agreed to participate in the program (New York, Washington, Missouri, Nebraska, Kansas, New Mexico, South Carolina, Mississippi and Indiana), making it the provider with the highest number of participating States.” PDF
35. According to DOMINION : 1.4.1Software and Firmware The software and firmware employed by Dominion D-Suite 5.5-Aconsists of 2 types, custom and commercial off the shelf (COTS). COTS applications were verified to be pristine or were subjected to source code review for analysis of any modifications and verification of meeting the pertinent standards.
36. The concern is the HARDWARE and the NON – ACCREDITED VSTLs as by their own admittance use COTS.
37. The purpose of VSTL’s being accredited and their importance in ensuring that there is no foreign interference/ bad actors accessing the tally data via backdoors in equipment software. The core software used by ALL SCYTL related Election Machine/Software manufacturers ensures “anonymity” .
38. Algorithms within the area of this “shuffling” to maintain anonymity allows for setting values to achieve a desired goal under the guise of “encryption” in the trap-door.
39. The actual use of trapdoor commitments in Bayer-Groth proofs demonstrate the implications for the verifiability factor. This means that no one can SEE what is going on during the process of the “shuffling” therefore even if you deploy an algorithms or manual scripts to fractionalize or distribute pooled votes to achieve the outcome you wish – you cannot prove they are doing it! See STUDY : “The use of trapdoor commitments in Bayer-Groth proofs and the implications for the verifiability of the Scytl-SwissPost Internet voting system”
40. **Key Terms**
41. **UNIVERSAL VERIFIABILITY**: Votes cast are the votes counted and integrity of the vote is verifiable (the vote was tallied for the candidate selected) . **SCYTL FAILS UNIVERSAL VERIFIABILITY** because no mathematical proofs can determine if any votes have been manipulated.
42. **INDIVIDUAL VERIFIABILITY**: Voter cannot verify if their ballot got correctly counted. Like, if they cast a vote for ABC they want to verify it was ABC. That notion clearly discounts the need for anonymity in the first place.

43. To understand what I observed during the 2020 I will walk you through the process of one ballot cast by a voter.
44. STEP 1 |Config Data | All non e-voting data is sent to Scytl (offshore) for configuration of data. All e-voting is sent to CONFIGURATION OF DATA then back to the e-voting machine and then to the next phase called CLEANSING. **CONCERNS**: Here we see an "OR PROOF" as coined by mathematicians – an "or proof" is that votes that have been pre-tallied parked in the system and the algorithm then goes back to set the outcome it is set for and seeks to make adjustments if there is a partial pivot present causing it to fail demanding manual changes such as block allocation and narrowing of parameters or self-adjusts to ensure the predetermined outcome is achieved.
45. STEP 2|CLEANSING | The Process is when all the votes come in from the software run by Dominion and get "cleansed" and put into 2 categories: invalid votes and valid votes.
46. STEP 3|Shuffling /Mixing | This step is the most nefarious and exactly where the issues arise and carry over into the decryption phase. Simply put, the software takes all the votes, literally mixes them a and then re-encrypts them. This is where if ONE had the commitment key- TRAPDOOR KEY – one would be able to see the parameters of the algorithm deployed as the votes go into this mixing phase, and how algorithm redistributes the votes.
47. This published PAPER FROM University College London depicts how this shuffle works. In essence, when this mixing/shuffling occurs, then one doesn't have the ability to know that vote coming out on the other end is actually their vote; therefore, ZERO integrity of the votes when mixed.

48.

Background - ElGamal encryption

- Setup: Group $\mathcal{G}$ of prime order q with generator g
- Public key: $pk = y = g^x$
- Encryption: $\mathcal{E}_{pk}(m; r) = (g^r, y^r m)$
- Decryption: $\mathcal{D}_x(u, v) = vu^{-x}$
- Homomorphic:

$$\mathcal{E}_{pk}(m; r) \times \mathcal{E}_{pk}(M; R) = \mathcal{E}_{pk}(mM; r + R)$$

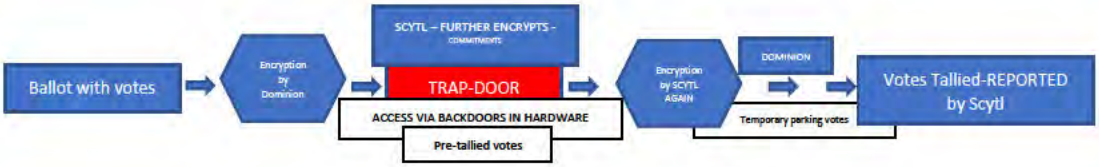
- Re-encryption:

$$\mathcal{E}_{pk}(m; r) \times \mathcal{E}_{pk}(1; R) = \mathcal{E}_{pk}(m; r + R)$$

UCL

49. When this mixing/shuffling occurs, then one doesn't have the ability to know that vote coming out on the other end is actually their vote; therefore, ZERO integrity of the votes.
50. When the votes are sent to Scytl via Dominion Software EMS (Election Management System) the Trap Door is accessed by Scytl or TRAP DOOR keys (Commitment Parameters).

51.

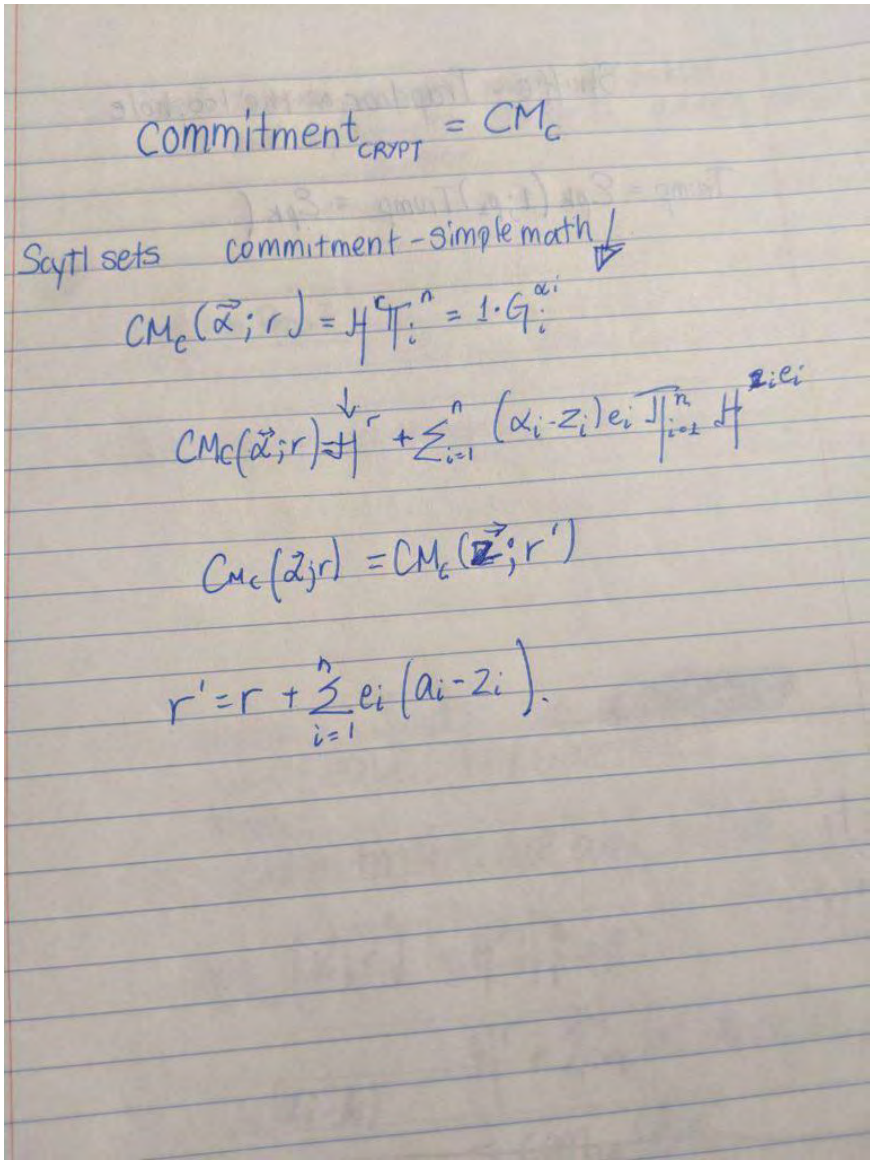


52. The encrypted data is shifted into Scytl's platform in the form of ciphertexts – this means it is encrypted and a key based on commitments is needed to read the data. The ballot data can only be read if the person has a key that is set on commitments.
53. A false sense of security is provided to both parties that votes are not being "REPLACED" during the mixing phase. Basically, Scytl re-encrypts the ballot data that comes in from Dominion (or any other voting software company) as ciphertexts. Scytl is supposed to prove that votes A, B, C are indeed X, Y, Z under their new re-encryption when sending back the votes that are tallied coding them respectively. This is done by Scytl and the Election Software company that agrees to certain

"Generators" and therefore together build "commitments."

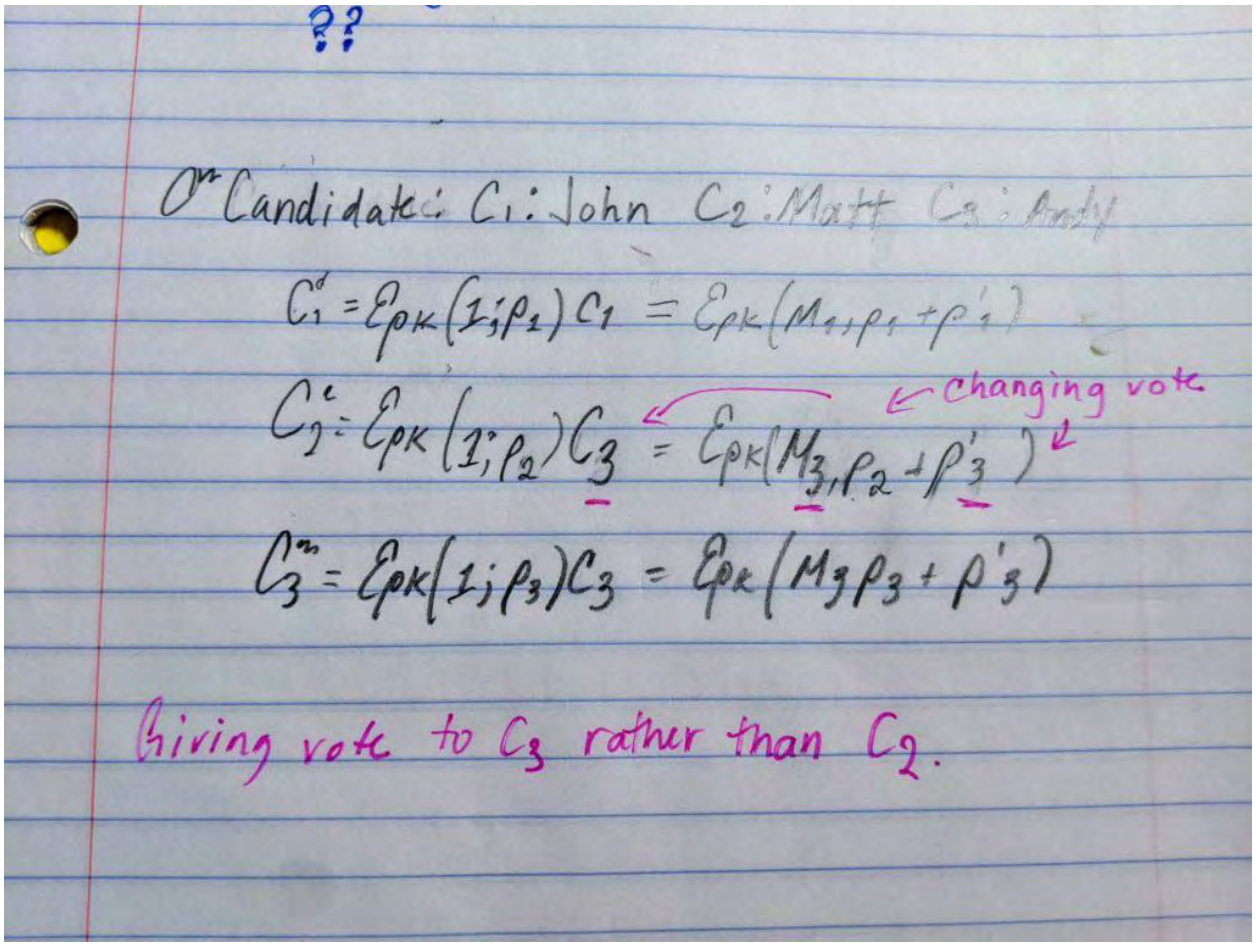
```
public CommitmentParams(final ZpSubgroup group, final int n) {
    group = group;
    h = GroupTools.getRandomElement(group);
    commitmentlength = n;
    g = GroupTools.getVectorRandomElement(group,
this.commitmentlength);
    }

    // from getRandomElement(group)
Exponent randomExponent = ExponentTools.getRandomExponent(group.getQ());
return group.getGenerator().exponentiate(randomExponent);
```

54. Scytl and Dominion have an agreement – only the two would know the parameters. This means that access is able to occur through backdoors in hardware if the parameters of the commitments are known in order to alter the range of the algorithm deployed to satisfy the outcome sought in the case of algorithm failure.
55. Trapdoor is a cryptotech term that describes a state of a program that knows the commitment parameters and therefore is able change the value of the commitments however it likes. In other words, Scytl or anyone that knows the commitment parameters can take all the votes and give them to any one they want. If they have a total of 1000 votes an algorithm can distribute them among all races as it deems necessary to achieve the goals it wants. (Case Study: Estonia)

56. 

57. Within the trapdoor this is how the algorithm behaves to move the goal posts in elections without being detected by this proof . During the mixing phase this is the algorithm you would use to

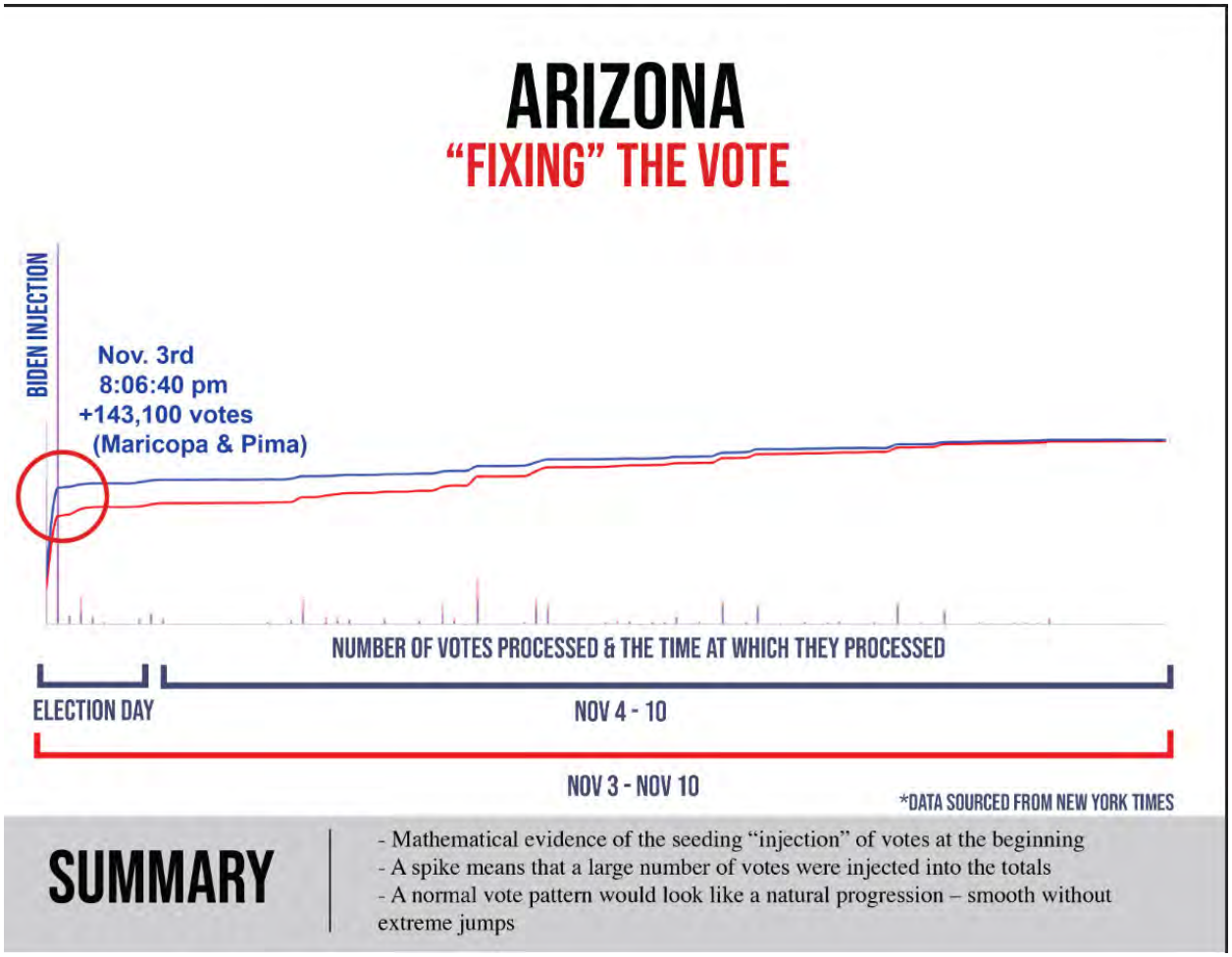
"reallocate" votes via an algorithm to achieve the goal set.



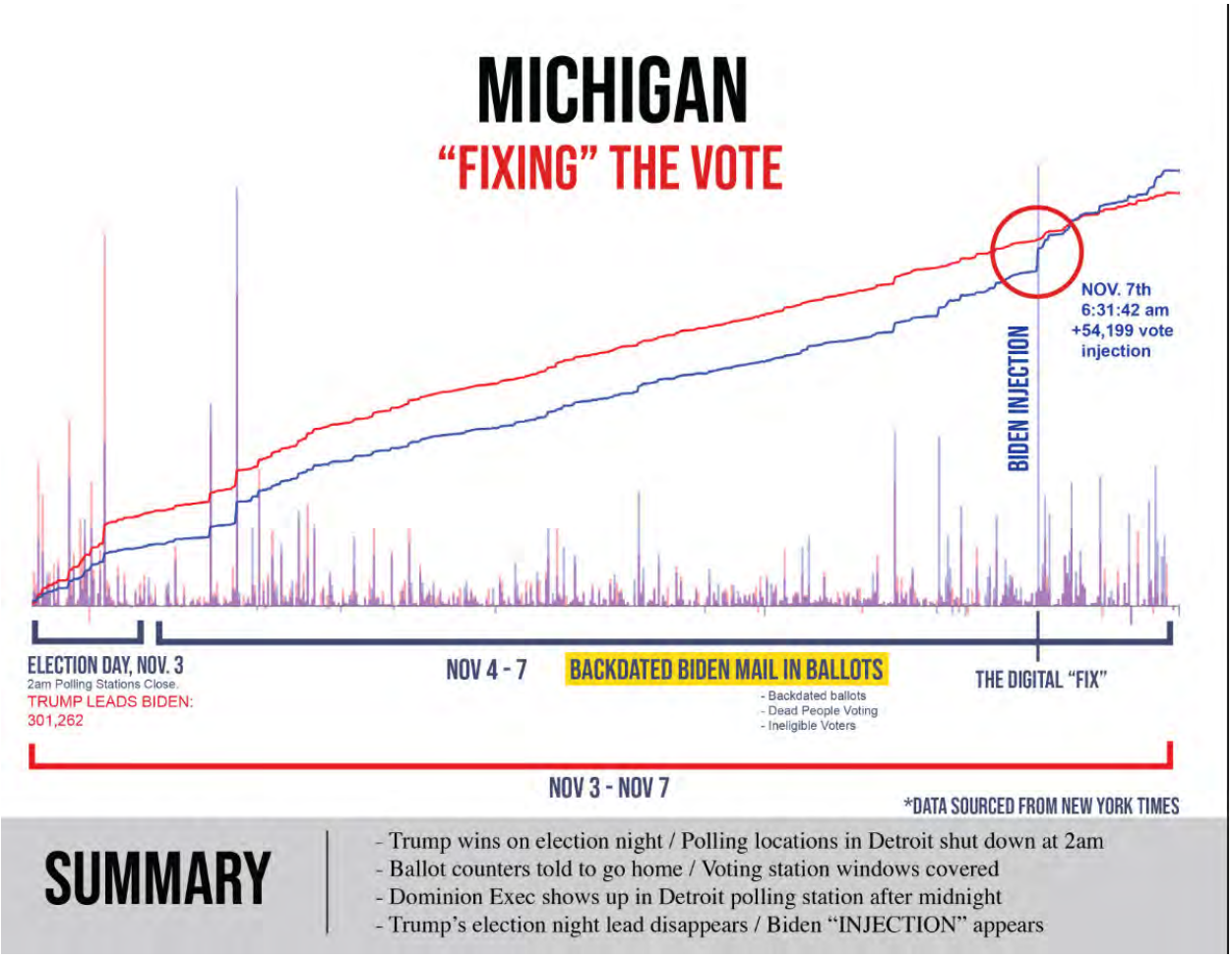
58. STEP 4|Decryption would be the decryption phase and temporary parking of vote tallies before reporting. In this final phase before public release the tallies are released from encrypted format into plain text. As previously explained, those that know the trapdoor can easily change any votes that the randomness is applied and used to generate the tally vote ciphertext. Thus in this case, Scytl who is the mixer can collude with their vote company clients or an agency (-------) to change votes and get away with it. This is because the receiver doesn't have the decryption key so they rely solely on Scytl to be ***honest*** or free from any foreign actors within their backdoor or the Election Company (like Dominion) that can have access to the key.
59. In fact, a study from the University of Bristol made claim that interference can be seen when there is a GREAT DELAY in reporting and finalizing numbers University of Bristol : How not to Prove Yourself: Pitfalls of the Fiat-Shamir Heuristic and Applications to Helios
60. "Zero-knowledge proofs of knowledge allow a prover to convince a verifier that she holds information satisfying some desirable properties without revealing anything else." David Bernhard, Olivier Pereira,and Bogdan Warinschi.

61. Hence, you can't prove anyone manipulated anything. The TRAP DOOR KEY HOLDERS can offer you enough to verify to you what you need to see without revealing anything and once again indicating the inability to detect manipulation. **ZERO PROOF of INTEGRITY OF THE VOTE.**
62. Therefore, if decryption is challenged, the administrator or software company that knows the trap door key can provide you proof that would be able to pass verification (blind). This was proven to be factually true in the case study by The University of Melbourne in March. White Hat Hackers purposely altered votes by knowing the parameters set in the commitments and there was no way to prove they did it – or any way to prove they didn't.
63. IT'S THE PERFECT THREE CARD MONTY. That's just how perfect it is. They fake a proof of ciphertexts with KNOWN "RANDOMNESS" .This rolls back to the integrity of the VOTE. The vote is not safe using these machines not only because of the method used for ballot "cleansing" to maintain anonymity but the EXPOSURE to foreign interference and possible domestic bad actors.
64. In many circumstances, manipulation of the algorithm is NOT possible in an undetectable fashion. This is because it is one point heavy. Observing the elections in 2020 confirm the deployment of an algorithm due to the BEHAVIOR which is indicative of an algorithm in play that had no pivoting parameters applied.
65. The behavior of the algorithm is that one point (B) is the greatest point within the allocated set. It is the greatest number within the A B points given. Point A would be the smallest. Any points outside the A B points are not necessarily factored in yet can still be applied.
66. The points outside the parameters can be utilized to a certain to degree such as in block allocation.
67. The algorithm geographically changed the parameters of the algorithm to force blue votes and ostracize red.
68. Post block allocation of votes the two points of the algorithm were narrowed ensuring a BIDEN win hence the observation of NO Trump Votes and some BIDEN votes for a period of time.

69.


ARIZONA
"FIXING" THE VOTE
BIDEN INJECTION
Nov. 3rd
8:06:40 pm
+143,100 votes
(Maricopa & Pima)
NUMBER OF VOTES PROCESSED & THE TIME AT WHICH THEY PROCESSED
ELECTION DAY
NOV 4 - 10
NOV 3 - NOV 10
*DATA SOURCED FROM NEW YORK TIMES
SUMMARY
- Mathematical evidence of the seeding "injection" of votes at the beginning
- A spike means that a large number of votes were injected into the totals
- A normal vote pattern would look like a natural progression – smooth without extreme jumps

70. Gaussian Elimination without pivoting explains how the algorithm would behave and the election results and data from Michigan confirm FAILURE of algorithm.



71. The "Digital Fix" observed with an increased spike in VOTES for Joe Biden can be determined as evidence of a pivot. Normally it would be assumed that the algorithm had a Complete Pivot. Wilkinson's demonstrated the guarantee as :

$$\frac{\|U\|_\infty}{\|A\|_\infty} \leq n^{\frac{1}{2}\log(n)}$$

72.

73. Such a conjecture allows the growth factor the ability to be upper bound by values closer to n. Therefore, complete pivoting can't be observed because there would be too many floating points. Nor can partial as the partial pivoting would overwhelm after the "injection" of votes. Therefore, external factors were used which is evident from the "DIGITAL FIX"

74. Observing the elections, after a review of Michigan's data a spike of 54,199 votes to Biden. Because it is pushing and pulling and keeping a short distance between the 2 candidates; but then a spike, which is how an algorithm presents; - and this spike means there was a pause and an insert was made, where they insert an algorithm. Block spikes in votes for JOE BIDEN were NOT paper

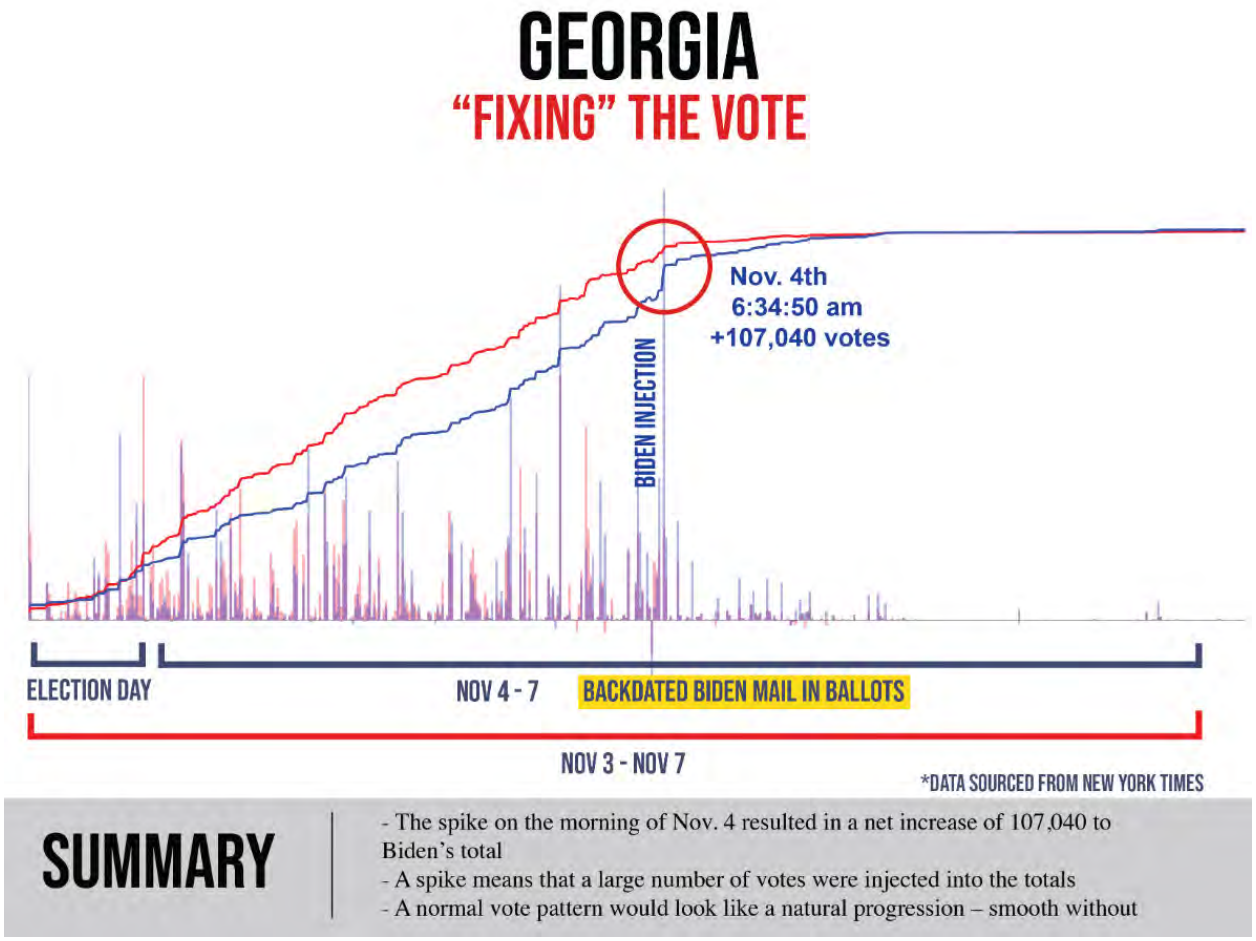
ballots being fed or THUMB DRIVES. The algorithm block adjusted itself and the PEOPLE were creating the evidence to BACK UP the block allocation.

75. I have witnessed the same behavior of the election software in countries outside of the United States and within the United States. In -------, the elections conducted behaved in the same manner by allocating BLOCK votes to the candidate "chosen" to win.

76. Observing the data of the contested states (and others) the algorithm deployed is identical to that which was deployed in 2012 providing Barack Hussein Obama a block allocation to win the 2012 Presidential Elections.

77. The algorithm looks to have been set to give Joe Biden a 52% win even with an initial 50K+ vote block allocation was provided initially as tallying began (as in case of Arizona too). In the am of November 4, 2020 the algorithm stopped working, therefore another "block allocation" to remedy the failure of the algorithm. This was done manually as ALL the SYSTEMS shut down NATIONWIDE to avoid detection.

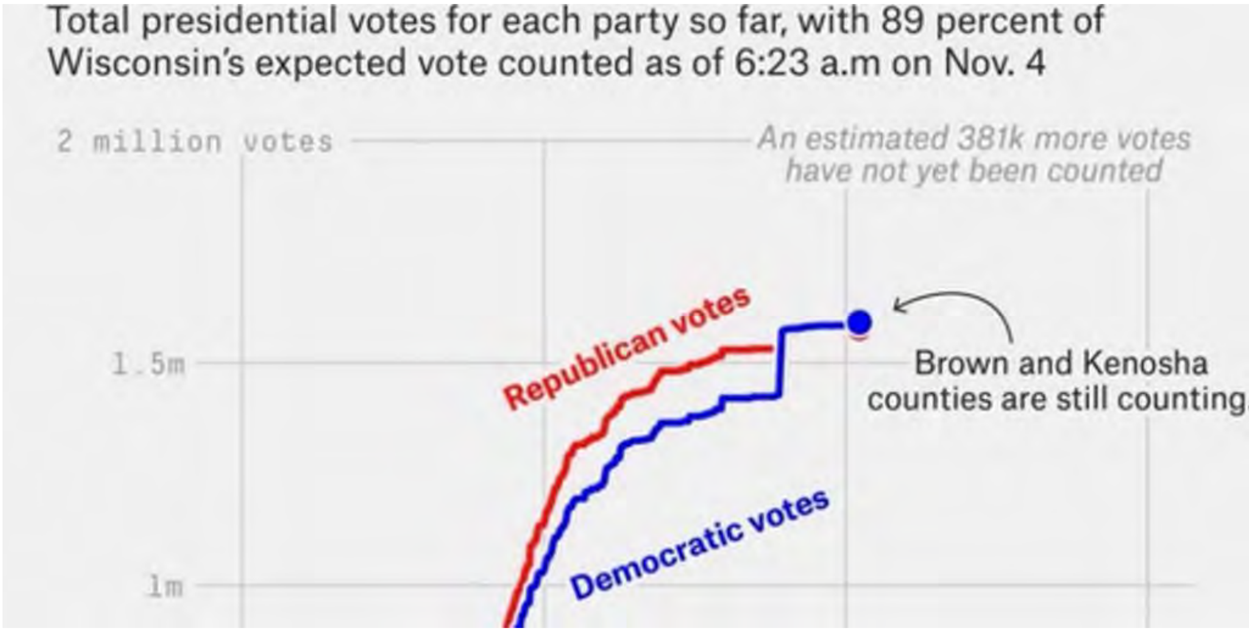
78.



79. In Georgia during the 2016 Presidential Elections a failed attempt to deploy the scripts to block allocate votes from a centralized location where the "trap-door" key lay an attempt by someone using

the DHS servers was detected by the state of GA. The GA leadership assumed that it was "Russians" but later they found out that the IP address was that of DHS.

80. In the state of Wisconsin, we observed a considerable BLOCK vote allocation by the algorithm at the SAME TIME it happened across the nation. All systems shut down at around the same time.

81. 

82. In Wisconsin there are also irregularities in respect to BALLOT requests. (names AND address Hidden for privacy)

83.

F	G	H	V	W	X	Y	AB	AC	AD	AG	AH	AI	AJ	AK	AL	AM
Active	Registered	Military	Brown County	11/01/2020	Online	Military		Official	Active	Not Returned	Online	11/01/2020				
Active	Registered	Regular	Brown County	10/23/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	10/23/2020	10/23/2020			
Active	Registered	Military	Brown County	11/01/2020	Online	Military		Official	Active	Not Returned	Online	11/01/2020				
Active	Registered	Regular	Brown County	11/01/2020	Online											
Active	Registered	Regular	Brown County	11/01/2020	Email	Regular		Official	Active	Returned	Mail	10/31/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/01/2020	Email	Regular		Official	Active	Returned	Mail	10/31/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Voted in Person	Regular		Official	Active	Returned	Voted In Person	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Online											
Active	Registered	Regular	Brown County	11/02/2020	Received In Persor	Hospitaliz		Official	Active	Returned	Appointed Agent	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Email	Hospitaliz		Official	Active	Returned	Appointed Agent	11/02/2020	11/02/2020			
Active	Registered	Military	Brown County	11/02/2020	Mail											
Active	Registered	Regular	Brown County	11/02/2020	Mail	Regular		Official	Active	Returned	Appointed Agent	11/02/2020	11/02/2020			
Active	Registered	Regular	Brown County	11/02/2020	Mail	Regular		Official	Active	Returned	Appointed Agent		11/02/2020			
Active	Registered	Military	Brown County	11/02/2020	Online	Military		Official	Active	Not Returned	Online	11/02/2020				
Active	Registered	Military	Brown County	11/02/2020	Online	Military		Official	Active	Not Returned	Online	11/02/2020				
Active	Registered	Regular	Brown County	11/02/2020	Online											
Active	Registered	Military	Brown County	11/02/2020	FPCA	Military		Official	Active	Not Returned	Mail	11/02/2020				
Active	Registered	Military	Brown County	11/02/2020	FPCA	Military		Official	Active	Returned	Email	11/02/2020	11/03/2020			
Active	Registered	Regular	Brown County	11/03/2020	Voted in Person	Regular		Official	Inactive	Voter Spoiled	Voted In Person	11/03/2020	11/03/2020			
Active	Registered	Military	Brown County	11/03/2020	Mail	Military	Certification insufficient	Federal Absent	Active	Returned, to be Rejected	Mail	11/03/2020	11/03/2020			
Active	Registered	Military	Brown County	11/03/2020	Mail	Military		Official	Active	Not Returned	Mail	11/03/2020				
Active	Registered	Military	Brown County	11/03/2020	Online											
Active	Registered	Regular	Brown County	11/03/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											
Active	Registered	Regular	Brown County	11/04/2020	Online											

84.

Active	Registered	Regular	Brown County	11/03/2020	Online
Active	Registered	Regular	Brown County	11/04/2020	Online
Active	Registered	Regular	Brown County	11/04/2020	Online
Active	Registered	Regular	Brown County	11/04/2020	Online
Active	Registered	Regular	Brown County	11/04/2020	Online
Active	Registered	Regular	Brown County	11/04/2020	Online
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Active	Registered	Regular	Brown County	11/05/2020	Online
Active	Registered	Regular	Brown County	11/05/2020	Online
Active	Registered	Regular	Brown County	11/06/2020	Online
Active	Registered	Regular	Brown County	11/06/2020	Online

85. I can personally attest that in 2013 discussions by the Obama / Biden administration were being had with various agencies in the deployment of such election software to be deployed in ----- in 2013.
86. On or about April 2013 a one year plan was set to fund and usher elections in -----.
87. Joe Biden was designated by Barack Hussein Obama to ensure the ----- accepted assistance.
88. John Owen Brennan and James (Jim) Clapper were responsible for the ushering of the intelligence surrounding the elections in -----.
89. Under the guise of Crisis support the US Federal Tax Payers funded the deployment of the election software and machines in ------ signing on with Scytl.

The White House

Office of the Press Secretary

For Immediate Release April 21, 2014

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FACT SHEET: U.S. Crisis Support Package for Ukraine

President Obama and Vice President Biden have made U.S. support for Ukraine an urgent priority as the Ukrainian government works to establish security and stability, pursue democratic elections and constitutional reform, revive its economy, and ensure government institutions are transparent and accountable to the Ukrainian people. Ukraine embarks on this reform path in the face of severe challenges to its sovereignty and territorial integrity, which we are working to address together with Ukraine and our partners in the international community. The United States is committed to ensuring that Ukrainians alone are able to determine their country's future without intimidation or coercion from outside forces. To support Ukraine, we are today announcing a new package of assistance totaling **$50 million** to help Ukraine pursue political and economic reform and strengthen the partnership between the United States and Ukraine.

90.

91. Right before the ----- elections it was alleged that CyberBerkut a pro-Russia group infiltrated --- central election computers and **deleted key files**. These actions supposedly rendered the vote-tallying system inoperable.
92. In fact, the KEY FILES were the Commitment keys to allow Scytl to tally the votes rather than the election machines. The group had disclosed emails and other documents proving that their election was rigged and that they tried to avoid a fixed election.
93. The elections were held on May 25, 2014 but in the early AM hours the election results were BLOCKED and the final tally was DELAYED flipping the election in favor of -----.
94. The claim was that there was a DDoS attack by Russians when in actual fact it was a mitigation of the algorithm to inject block votes as we observed was done for Joe Biden because the KEYS were unable to be deployed. In the case of -----, the trap-door key was "altered"/deleted/ rendered ineffective. In the case of the US elections, representatives of Dominion/ ES&S/ Smartmatic/ Hart Intercivic would have to manually deploy them since if the entry points into the systems seemed to have failed.
95. The vote tallying of all states NATIONWIDE stalled and hung for days – as in the case of Alaska that has about 300K registered voters but was stuck at 56% reporting for almost a week.
96. This "hanging" indicates a failed deployment of the scripts to block allocate remotely from one location as observed in ------ on May 26, 2014.
97. This would justify the presence of the election machine software representatives making physical appearances in the states where the election results are currently being contested.
98. A Dominion Executive appeared at the polling center in Detroit after midnight.
99. Considering that the hardware of the machines has NOT been examined in Michigan since 2017 by Pro V& V according to Michigan's own reporting. COTS are an avenue that hackers and bad actors seek to penetrate in order to control operations. Their software updates are the reason vulnerabilities to foreign interference in all operations exist.
100. The importance of VSTLs in underrated to protect up from foreign interference by way of open access via COTS software. Pro V& V who's EAC certification EXPIRED on 24 FEB 2017 was contracted with the state of WISCONSIN.
101. In the United States each state is tasked to conduct and IV& V (Independent Verification and Validation) to provide assurance of the integrity of the votes.
102. If the "accredited" non-federal entities have NOT received EAC accreditation this is a failure of the states to uphold their own states standards that are federally regulated.
103. In addition, if the entities had NIST certificates they are NOT sufficing according the HAVA ACT 2002 as the role of NIST is clear.
104. Curiously, both companies PRO V&V and SLI GAMING received NIST certifications OUTSIDE the 24 month scope.

105. PRO V& V received a NIST certification on 26MAR2020 for ONE YEAR. Normally the NIST certification is good for two years to align with that of EAC certification that is good for two years.

106.

United States Department of Commerce
National Institute of Standards and Technology

NVLAP®

Certificate of Accreditation to ISO/IEC 17025:2017

NVLAP LAB CODE: 200978-0

Pro V&V
Huntsville, AL

is accredited by the National Voluntary Laboratory Accreditation Program for specific services, listed on the Scope of Accreditation, for:

Voting System Testing

This laboratory is accredited in accordance with the recognized International Standard ISO/IEC 17025:2017. This accreditation demonstrates technical competence for a defined scope and the operation of a laboratory quality management system (refer to joint ISO-ILAC-IAF Communique dated January 2009).

2020-03-26 through 2021-03-31
Effective Dates

DEPARTMENT OF COMMERCE * UNITED STATES OF AMERICA

For the National Voluntary Laboratory Accreditation Program

107. The last PRO V& V EAC accreditation certificate (Item 8) of this declaration expired in February 2017 which means that the IV & V conducted by Michigan claiming that they were accredited is false.

108. The significance of VSTLs being accredited and examining the HARDWARE is key. COTS software updates are the avenues of entry.

109. As per DOMINION'S own petition, the modems they use are COTS therefore failure to have an accredited VSTL examine the hardware for points of entry by their software is key.

*Compact Flash Cards	***SanDisk Ultra: SDCFHS-004G SDCFHS-008G RiData: CFC-14A RDF8G-233XMCB2-1 RDF16G-233XMCB2-1 RDF32G-233XMCB2-1 SanDisk Extreme: SDCFX-016G SDCFX-032G SanDisk: SDFAA-008G		Memory device for ICP and ICE tabulators.
*Modems	Verizon USB Modem Pantech UMW190NCD USB Modem MultiTech MT9234MU CellGo Cellular Modem E-Device 3GPUSUS AT&T USB Modem MultiTech GSM MTD-H5 Fax Modem US Robotics 56K V.92.		Analog and wireless modems for transmitting unofficial election night results.

110.

111. For example and update of Verizon USB Modem Pantech undergoes multiple software updates a year for it's hardware. That is most likely the point of entry into the systems.

112. During the 2014 elections in ---- it was the modems that gave access to the systems where the commitment keys were deleted.

113. SLI Gaming is the other VSTL "accredited" by the EAC BUT there is no record of their accreditation. In fact, SLI was NIST ISO Certified 27 days before the election which means that PA IV&V was conducted without NIST cert for SLI being valid.

114. 

United States Department of Commerce
National Institute of Standards and Technology

NVLAP®

Certificate of Accreditation to ISO/IEC 17025:2017

NVLAP LAB CODE: 200733-0

SLI Compliance
Wheat Ridge, CO

is accredited by the National Voluntary Laboratory Accreditation Program for specific services, listed on the Scope of Accreditation, for:

Voting System Testing

This laboratory is accredited in accordance with the recognized International Standard ISO/IEC 17025:2017. This accreditation demonstrates technical competence for a defined scope and the operation of a laboratory quality management system (refer to joint ISO-ILAC-IAF Communique dated January 2009).

2020-10-07 through 2020-12-31
Effective Dates

For the National Voluntary Laboratory Accreditation Program

115. In fact SLI was NIST ISO Certified for less than 90 days.

116. I can personally attest that high-level officials of the Obama/Biden administration and large private contracting firms met with a software company called GEMS which is ultimately the software ALL election machines run now running under the flag of DOMINION.

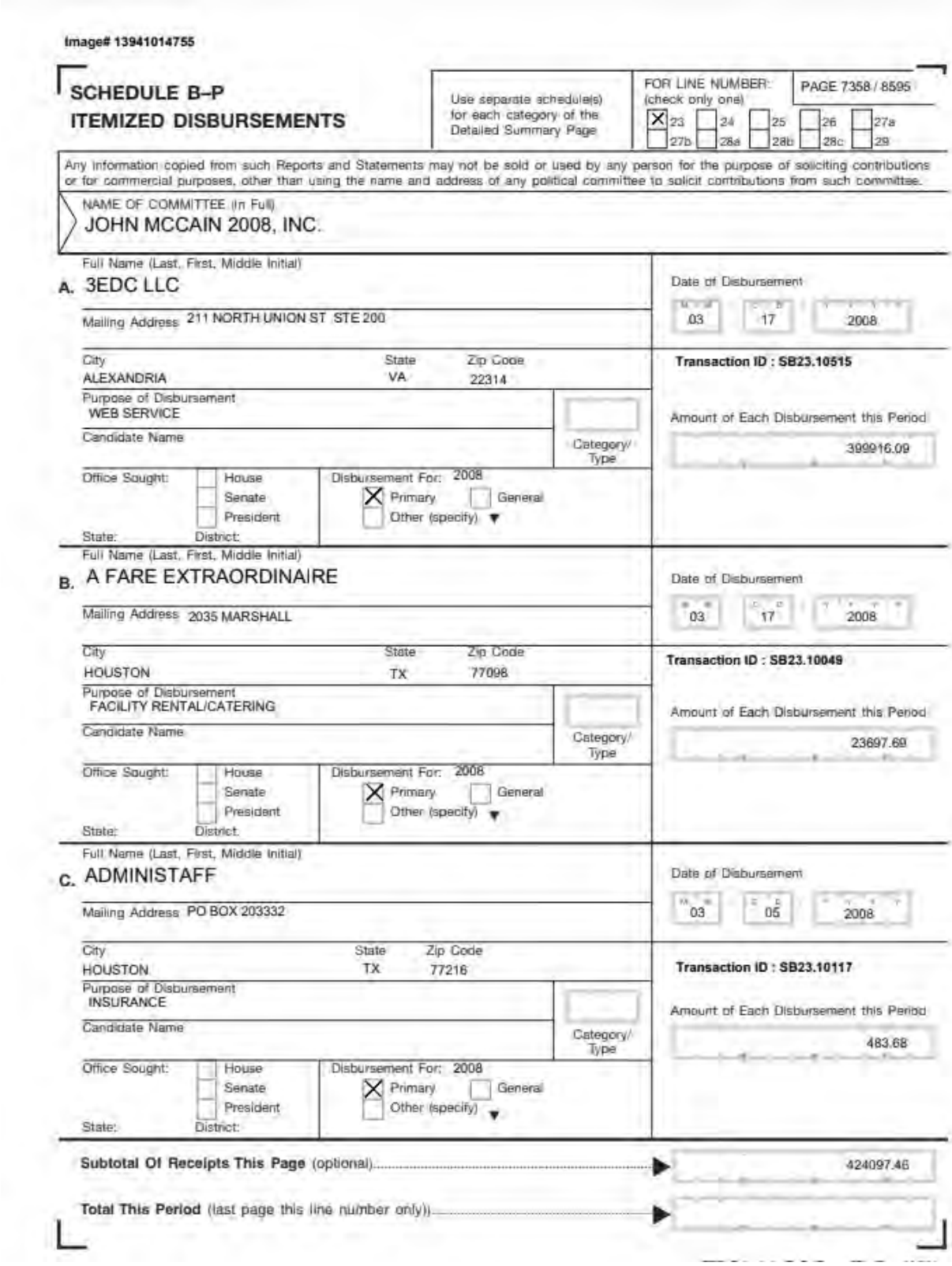
117. GEMS was manifested from SOE software purchased by SCYTL developers and US Federally Funded persons to develop it.

118. The only way GEMS can be deployed across ALL machines is IF all counties across the nation are housed under the same server networks.

119. GEMS was tasked in 2009 to a contractor in Tampa, Fl.

120. GEMS was also fine-tuned in Latvia, Belarus, Serbia and Spain to be localized for EU deployment as observed during the Swissport election debacle.

121. John McCain's campaign assisted in FUNDING the development of GEMS web monitoring via WEB Services with 3EDC and Dynology.



Image# 13941014755

SCHEDULE B–P
ITEMIZED DISBURSEMENTS

Use separate schedule(s) for each category of the Detailed Summary Page

FOR LINE NUMBER: (check only one)
☒ 23 ☐ 24 ☐ 25 ☐ 26 ☐ 27a
☐ 27b ☐ 28a ☐ 28b ☐ 28c ☐ 29

PAGE 7358 / 8595

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NAME OF COMMITTEE (In Full)
JOHN MCCAIN 2008, INC.

A. Full Name (Last, First, Middle Initial)
3EDC LLC
Mailing Address 211 NORTH UNION ST STE 200
City ALEXANDRIA State VA Zip Code 22314
Purpose of Disbursement: WEB SERVICE
Candidate Name
Category/ Type
Office Sought: ☐ House ☐ Senate ☐ President
State: District:
Disbursement For: 2008 ☒ Primary ☐ General ☐ Other (specify)
Date of Disbursement: 03 17 2008
Transaction ID : SB23.10515
Amount of Each Disbursement this Period: 399916.09

B. Full Name (Last, First, Middle Initial)
A FARE EXTRAORDINAIRE
Mailing Address 2035 MARSHALL
City HOUSTON State TX Zip Code 77098
Purpose of Disbursement: FACILITY RENTAL/CATERING
Candidate Name
Category/ Type
Office Sought: ☐ House ☐ Senate ☐ President
State: District:
Disbursement For: 2008 ☒ Primary ☐ General ☐ Other (specify)
Date of Disbursement: 03 17 2008
Transaction ID : SB23.10049
Amount of Each Disbursement this Period: 23697.69

C. Full Name (Last, First, Middle Initial)
ADMINISTAFF
Mailing Address PO BOX 203332
City HOUSTON State TX Zip Code 77216
Purpose of Disbursement: INSURANCE
Candidate Name
Category/ Type
Office Sought: ☐ House ☐ Senate ☐ President
State: District:
Disbursement For: 2008 ☒ Primary ☐ General ☐ Other (specify)
Date of Disbursement: 03 05 2008
Transaction ID : SB23.10117
Amount of Each Disbursement this Period: 483.68

Subtotal Of Receipts This Page (optional) ▶ 424097.46

Total This Period (last page this line number only) ▶

122.

123.

124. AKAMAI Technologies services SCYTL.

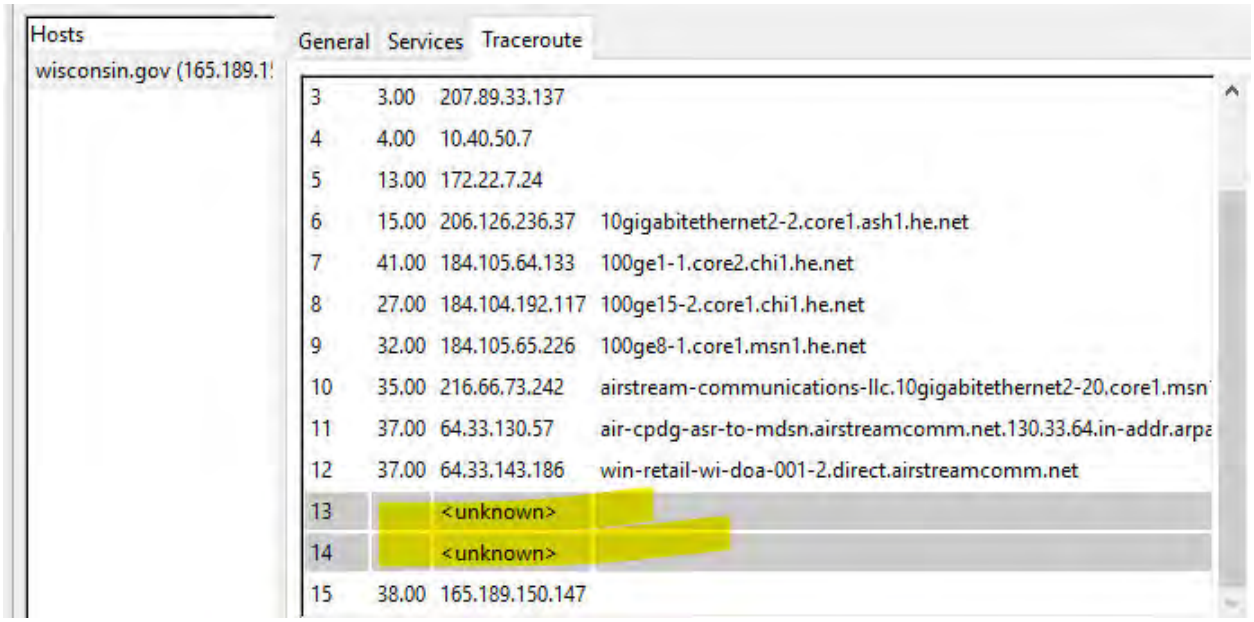
125. AKAMAI Technologies Houses ALL foreign government sites. (Please see White Paper by Akamai.)

126. AKAMAI Technologies houses ALL .gov state sites. (ref Item 123 Wisconsin.gov Example)

127. 

128. Wisconsin has EDGE GATEWAY port which is AKAMAI TECHNOLOGIES based out of GERMANY.

129. Using AKAMAI Technologies is allowing .gov sites to obfuscate and mask their systems by way of HURRICANE ELECTRIC (he.net) Kicking it to anonymous (AKAMAI Technologies) offshore servers.

130. 

131. AKAMAI Technologies has locations around the world.

132. AKAMAI Technologies has locations in China (ref item 22)

133. AKAMAI Technologies has locations in Iran as of 2019.

134. AKAMAI Technologies merged with UNICOM (CHINESE TELECOMM) in 2018.

135. AKAMAI Technologies house all state .gov information in GERMANY via TELIA AB.

136. In my professional opinion, this affidavit presents unambiguous evidence:

137. That there was Foreign interference, complicit behavior by the previous administrations from 1999 up until today to hinder the voice of the people and US persons knowingly and willingly colluding with foreign powers to steer our 2020 elections that can be named in a classified setting.

138. Foreign interference is present in the 2020 election in various means namely,

139. Foreign nationals assisted in the creation of GEMS (Dominion Software Foundation)

140. Akamai Technologies merged with a Chinese company that makes the COTS components of the election machines providing access to our electronic voting machines.

141. Foreign investments and interests in the creation of the GEMS software.

142. US persons holding an office and private individuals knowingly and willingly oversaw fail safes to secure our elections.

143. The EAC failed to abide by standards set in HAVA ACT 2002.

144. The IG of the EAC failed to address complaints since their appointment regarding vote integrity

145. Christy McCormick of the EAC failed to ensure that EAC conducted their duties as set forth by HAVA ACT 2002

146. Both Patricia Layfield (IG of EAC) and Christy McCormick (Chairwoman of EAC) were appointed by Barack Hussein Obama and have maintained their positions since then.

147. The EAC failed to have a quorum for over a calendar year leading to the inability to meet the standards of the EAC.

148. AKAMAI Technologies and Hurricane Electric raise serious concerns for NATSEC due to their ties with foreign hostile nations.

149. For all the reasons above a complete failure of duty to provide safe and just elections are observed.

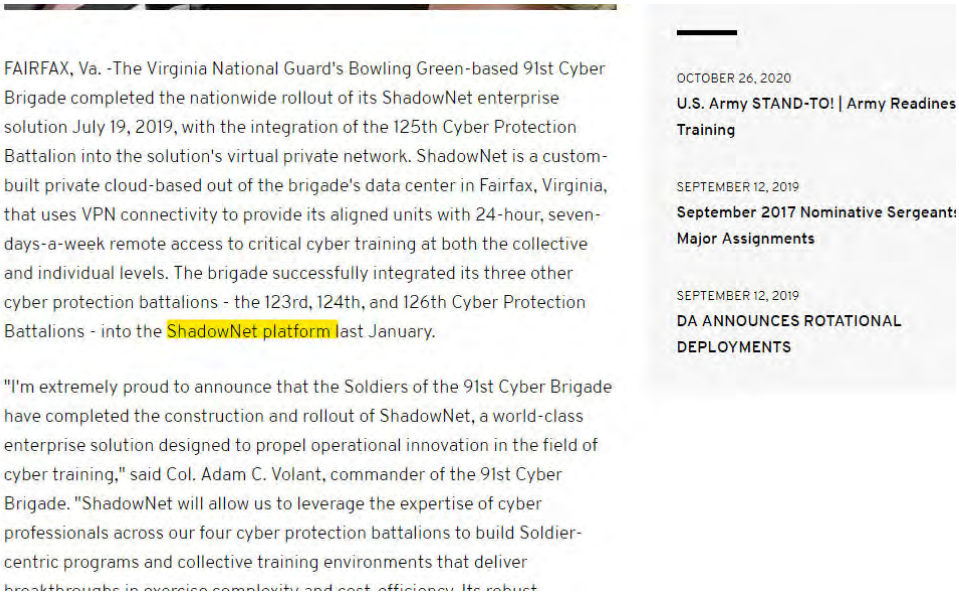
150. For the people of the United States to have confidence in their elections our cybersecurity standards should not be in the hands of foreign nations.

151. Those responsible within the Intelligence Community directly and indirectly by way of procurement of services should be held accountable for assisting in the development, implementation and promotion of GEMS.

152. GEMS ------- General Hayden.

153. In my opinion and from the data and events I have observed ---------- with the assistance of SHADOWNET under the guise of L3-Communications which is MPRI. This is also confirmed by us.army.mil making the statement that shadownet has been deployed to 30 states which all

happen to be using Dominion Machines.



FAIRFAX, Va. -The Virginia National Guard's Bowling Green-based 91st Cyber Brigade completed the nationwide rollout of its ShadowNet enterprise solution July 19, 2019, with the integration of the 125th Cyber Protection Battalion into the solution's virtual private network. ShadowNet is a custom-built private cloud-based out of the brigade's data center in Fairfax, Virginia, that uses VPN connectivity to provide its aligned units with 24-hour, seven-days-a-week remote access to critical cyber training at both the collective and individual levels. The brigade successfully integrated its three other cyber protection battalions - the 123rd, 124th, and 126th Cyber Protection Battalions - into the ShadowNet platform last January.

"I'm extremely proud to announce that the Soldiers of the 91st Cyber Brigade have completed the construction and rollout of ShadowNet, a world-class enterprise solution designed to propel operational innovation in the field of cyber training," said Col. Adam C. Volant, commander of the 91st Cyber Brigade. "ShadowNet will allow us to leverage the expertise of cyber professionals across our four cyber protection battalions to build Soldier-centric programs and collective training environments that deliver

OCTOBER 26, 2020
U.S. Army STAND-TO! | Army Readines
Training

SEPTEMBER 12, 2019
September 2017 Nominative Sergeants
Major Assignments

SEPTEMBER 12, 2019
DA ANNOUNCES ROTATIONAL
DEPLOYMENTS

154. Based on my research of voter data – it appears that there are approximately 23,000 residents of a Department of Corrections Prison with requests for absentee ballot in Wisconsin. We are currently reviewing and verifying the data and will supplement.

155.

23230	**23230**	Gutierrez	Mary	Jane		(262)994-9050	
23231	**23231**	Hansen	Luann	M		(262)994-9050	
23232	**23232**	Neberman	John	C		(262)994-9050	
23233	**23233**	Reynolds	Devi	J		(262)994-9050	
23234	**23234**	Rieckhoff	Kathryn	Susan		(262)994-9050	
23235	**23235**	Edwards	Mark	Landon		(262)994-9050	
23236	**23236**	Pfeiffer	Joseph	Patrick		(262)994-9050	
23237	**23237**	Hines	Dianna	K		(262)994-9050	
23238	**23238**	Beachem	Janice	F		(262)994-9050	
23239	**23239**	Blackstone	Thomas	Wayne		(262)994-9050	
23240	**23240**	Braun	Patricia	Ann		(262)994-9050	
23241	**23241**	Smith	Raymond	L		(262)994-9050	
23242	**23242**	Meyer	Steven	R		(262)994-9050	
23243	**23243**	Vincent	Herbert			(262)994-9050	
23244	**23244**	Guajardo	Juan	P		(262)994-9050	
23245	**23245**	Wallace	Kirk	R		(262)994-9050	
23246	**23246**	Kaplan	Bernard	L		(262)994-9050	
23247	**23247**	Bahrs	Michelle	M		(262)994-9050	
23248	**23248**	Shattuck	Elizabeth	L		(262)994-9050	
23249	**23249**	Munoz	Rosalio	S	JR	(262)994-9050	
23250	**23250**	Strunk	Amy	C		(262)994-9050	
23251	**23251**	Schendel	Michael	P	JR	(262)994-9050	
23252	**23252**	Mack	Kimberly	N		(262)994-9050	
23253	**23253**	Spikes	Debra	A		(262)994-9050	
23254	**23254**	Busarow	Suzanne	M		(262)994-9050	
23255	**23255**	Oliver	Timmy			(262)994-9050	
23256	**23256**	Wember	Jimmy	Dean		(262)994-9050	
23257	**23257**	Kosterman	Michael	Richard		(262)994-9050	
23258	**23258**	Szaradowski	Paul	M		(262)994-9050	
23259	**23259**	Oliver	Dale			(262)994-9050	
23260	**23260**	Derango	Nancy			(262)994-9050	
23261	**23261**	Smith	Arthur	J		(262)994-9050	SMITH24.3059@YAHOO
23262	**23262**	Brown	Michael	Edward		(262)994-9050	

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed this November 29th, 2020.

DECLARATION OF RONALD WATKINS

I, Ronald Watkins, hereby state the following:

1. My name is Ronald Watkins. I am a United States citizen currently residing in Japan.

2. I am an adult of sound mind. All statements in this declaration are based on my personal knowledge and are true and correct. I am making this statement voluntarily and on my own initiative. I have not been promised, nor do I expect to receive, anything in exchange for my testimony and giving this statement. I have no expectation of any profit or reward and understand that there are those who may seek to harm me for what I say in this statement.

3. I make this declaration because I want to alert the public and let the world know the truth about the insecurity of actual voting tabulation software used in various states for administering the 2020 Presidential and other elections. The software is designed, whether with malicious intent or through plain incompetence, in such a way so as to facilitate digital ballot stuffing via simple vote result manipulation and abuse of the digital adjudication manual review system. Specifically, the Dominion Democracy Suite both enables voter fraud by unethical officials out to undermine the will of the people and facilitates tabulation errors by honest officials making simple, nearly untraceable mistakes.

4. I believe voting is a fundamental manifestation of our right to self-government, including our right to free speech. Under no circumstance should we allow a conspiracy of people and companies to subvert and destroy our most sacred rights.

5. I am a network and information security expert with nine years of experience as a network and information defense analyst and a network security engineer. In my nine years of network and information security experience, I have successfully defended large websites and complex networks against powerful cyberattacks. I have engaged in extensive training and education and learned through experience how to secure websites and networks.

6. In preparation for making this declaration, I have reviewed extensive technical materials relating to the Dominion Voting Democracy Suite, including those cited herein.

7. The Dominion Voting Systems ImageCast Central system is a software and hardware workstation system designed to work with just a common "Windows 10 Pro"[12] computer

---

[1] Dominion Voting, *Democracy Suite®ImageCast® Central User Guide*, p3, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020) https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive]

[2] Georgia State Certification Testing, Dominion Voting Systems D-Suite 5.5-A Voting System, p5, table 2-1, [online document] https://sos.ga.gov/admin/uploads/Dominion_Test_Cert_Report.pdf (accessed November, 23,

paired via data cable[3] to an off- the-shelf document scanner[4] "for high speed scanning and counting of paper ballots."[5]

8. When bulk ballot scanning and tabulation begins, the "ImageCast Central" workstation operator will load a batch of ballots into the scanner feed tray and then start the scanning procedure within the software menu.[6] The scanner then begins to scan the ballots which were loaded into the feed tray while the "ImageCast Central" software application

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2020), https://web.archive.org/web/20201106055006/https://sos.ga.gov/admin/uploads/Dominion_Test_Cert_Report.pdf [archive].

[3] Dominion Voting, *Democracy Suite®ImageCast® Central User Guide*, p2, s2.1, [online document, https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020) https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[4] Michigan.gov, DOMINION VOTING SYSTEMS CONTRACT No. 071B7700117, p6, 1.1.E.1, [online document], https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf (accessed November 23, 2020), https://web.archive.org/web/20201115084004/https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf [archive]

[5] Commonwealth of Pennsylvania Department of State, Report Concerning the Examination Results of Dominion Voting Systems Democracy Suite 5.5A p6, s2.4, [online document], https://www.dos.pa.gov/VotingElections/Documents/Voting%20Systems/Dominion%20Democracy%20Suite%205.5-A/Dominion%20Democracy%20Suite%20Final%20Report%20scanned%20with%20signature%20011819.pdf (accessed November 23, 2020), https://web.archive.org/web/20201016161321/https://www.dos.pa.gov/VotingElections/Documents/Voting%20Systems/Dominion%20Democracy%20Suite%205.5-A/Dominion%20Democracy%20Suite%20Final%20Report%20scanned%20with%20signature%20011819.pdf [archive]

[6] Dominion Voting, ImageCast Central, p2, [online document], https://www.edcgov.us/Government/Elections/Documents/ImageCast%20Central%20Brochure%202018%20FINAL.pdf (accessed November 23, 2020) https://web.archive.org/web/20201017175507/https://www.edcgov.us/Government/Elections/Documents/ImageCast%20Central%20Brochure%202018%20FINAL.pdf [archive]

tabulates votes in real-time. Information about scanned ballots can be tracked inside the "ImageCast Central" software application.[7]

9. After all of the ballots loaded into the scanner's feed tray have been through the scanner, the "ImageCast Central" operator will remove the ballots from the tray and then will have the option to "Accept Batch" on the scanning menu.[8] Accepting the batch saves the results into the local file system within the "Windows 10 Pro" machine.[9] Any "problem ballots" that may need to be examined or adjudicated at a later time can be found as ballot scans saved as image files into a standard Windows folder named "NotCastImages".[10] These "problem ballots" are automatically detected during the scanning phase and digitally set aside for manual review based on exception criteria.[11] Examples of exceptions may include: overvotes, undervotes, blank contests, blank ballots, write-in selections, and marginal

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[7] Dominion Voting, Democracy Suite®ImageCast® Central User Guide, p25, s4.1.2, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[8] Dominion Voting, ImageCast Central, [website], https://www.dominionvoting.com/imagecast-central/ (Accessed November 23, 2020) https://web.archive.org/web/20201101203418/https://www.dominionvoting.com/imagecast-central/ [archive].

[9] Dominion Voting, Democracy Suite®ImageCast® Central User Guide, p25, s4.1.2, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[10] Dominion Voting, Democracy Suite®ImageCast® Central User Guide, p25, s4.1.2, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[11] Michigan.gov, DOMINION VOTING SYSTEMS CONTRACT No. 071B7700117, p21, 1.3.B.6, [online document], https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf (accessed November 23, 2020), https://web.archive.org/web/20201115084004/https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf [archive].

marks."[12] Customizable outstack conditions and marginal mark detection lets [Dominion's Customers] decide which ballots are sent for Adjudication.[13]

10. During the ballot scanning process, the "ImageCast Central" software will detect how much of a percent coverage of the oval was filled in by the voter.[14] The Dominion customer determines the thresholds of which the oval needs to be covered by a mark in order to qualify as a valid vote.[1516] If a ballot has a marginal mark which did not meet the specific thresholds set by the customer, then the ballot is considered a "problem ballot" and may be set aside into a folder named "NotCastImages."[17] "The ImageCast Central's advanced

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[12] [11] MASTER SOLUTION PURCHASE AND SERVICES AGREEMENT BY AND BETWEEN DOMINION VOTING SYSTEMS, INC. as Contractor, and SECRETARY OF STATE OF THE STATE OF GEORGIA as State, p52, s1.3, [online document], https://georgiaelections.weebly.com/uploads/1/0/8/5/108591015/contract.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201122213728/https://georgiaelections.weebly.com/uploads/1/0/8/5/108591015/contract.pdf [archive].

[13] Dominion Voting, ImageCast Central, [website], https://www.dominionvoting.com/imagecast-central/ (Accessed November 23, 2020) https://web.archive.org/web/20201101203418/https://www.dominionvoting.com/imagecast-central/ [archive].

[14] Michigan.gov, DOMINION VOTING SYSTEMS CONTRACT No. 071B7700117, p3, 1.1.A.22, [online document], https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf (accessed November 23, 2020), https://web.archive.org/web/20201115084004/https://www.michigan.gov/documents/sos/071B7700117_Dominion_Exhibit_2_to_Sch_A_Tech_Req_555357_7.pdf [archive].

[15] Calhoun County, MI, ImageCast Central (ICC) 5.5 Operations, p19, [online document], https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf (accessed November 23, 2020), https://web.archive.org/web/20200802003507/https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf [archive].

[16] IMAGECAST® CENTRAL Brochure, [website], https://www.edcgov.us/Government/Elections/Documents/ImageCast%20Central%20Brochure%202018%20FINAL.pdf (accessed November 23, 2020), https://web.archive.org/web/20201017175507/https://www.edcgov.us/Government/Elections/Documents/ImageCast%20Central%20Brochure%202018%20FINAL.pdf [archive].

[17] Dominion Voting, Democracy Suite®ImageCast® Central User Guide, p25, s4.1.2, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/

settings allow for adjustment of the scanning properties to "[set] the clarity levels at which the ballot should be scanned at." Levels can be set as a combination of brightness and contrast values, or as a gamma value."[18]

11. Based on my review of these materials, I conclude the system is designed in such a way that it allows a dishonest or otherwise unethical election administrator to creatively tweak the oval coverage threshold settings and advanced settings on the ImageCast Central scanners to set thresholds in such a way that a non-trivial amount of properly-marked ballots are marked as "problem ballots" and sent to the "NotCastImages" folder.

12. The administrator of the ImageCast Central work-station may view all images of scanned ballots which were deemed "problem ballots" by simply navigating via the standard "Windows File Explorer" to the folder named "NotCastImages" which holds ballot scans of "problem ballots."[1920] Under this system, it is possible for an administrator of the "ImageCast Central" workstation to view and delete any individual ballot scans from the "NotCastImages" folder by simply using the standard Windows delete and recycle bin functions provided by the Windows 10 Pro operating system. Adjudication is "the process of examining voted ballots to determine, and, in the judicial sense, adjudicate voter intent."[21]

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elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[18] Dominion Voting, Democracy Suite®ImageCast® Central User Guide, pp20-21, s3.22, [online document], https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide-5-11-CO.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201019175854/https://www.sos.state.co.us/pubs/elections/VotingSystems/DVS-DemocracySuite511/documentation/UG-ICC-UserGuide- 5-11-CO.pdf [archive].

[19] Dominion Voting, Democracy Suite® Use Procedures, p433, F.3.11, [online document] https://votingsystems.cdn.sos.ca.gov/vendors/dominion/ds510-use-proc-jan.pdf (Accessed November 23, 2020), https://web.archive.org/web/20201101173723/https://votingsystems.cdn.sos.ca.gov/vendors/dominion/ds510-use-proc-jan.pdf [archive].

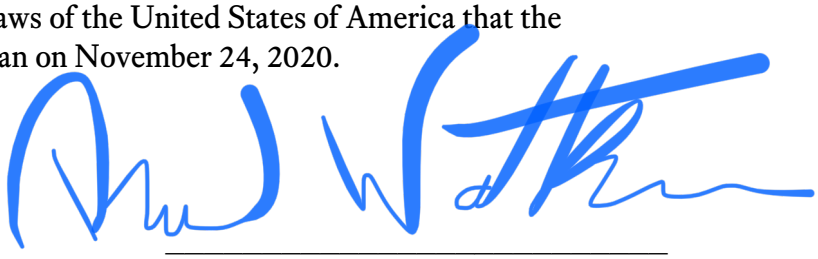
[20] Calhoun County, MI, ImageCast Central (ICC) 5.5 Operations, p27, [online document], https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf (accessed November 23, 2020), https://web.archive.org/web/20200802003507/https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf [archive].

[21] Dominion Voting, Democracy Suite® Use Procedures, p9, [online document] https://votingsystems.cdn.sos.ca.gov/vendors/dominion/ds510-use-proc-jan.pdf (Accessed November 23, 2020),

13. Based on my review of these materials, I conclude that a biased poll worker without sufficient and honest oversight could abuse the adjudication system to fraudulently switch votes for a specific candidate.

14. After the tabulation process, the ImageCast Central software saves a copy of the tabulation results locally to the "Windows 10 Pro" machine's internal storage. The results data is located in an easy-to-find path which is designed to easily facilitate the uploading of tabulation results to flash memory cards. The upload process is just a simple copying of a "Results" folder containing vote tallies to a flash memory card connected to the "Windows 10 Pro" machine. The copy process uses the standard drag-and-drop or copy/paste mechanisms within "Windows File Explorer."[22] It is my conclusion that while this is a simple procedure, the report results process is subject to user errors and is very vulnerable to corrupt manipulation by a malicious administrator. It is my conclusion that, before delivering final tabulation results to the county, it is possible for an administrator to mistakenly copy the wrong "Results" folder or even maliciously copy a false "Results" folder, which could contain a manipulated data set, to the flash memory card and deliver those false "Results" as the outcome of the election.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Japan on November 24, 2020.



Ronald Watkins

https://web.archive.org/web/20201101173723/https://votingsystems.cdn.sos.ca.gov/vendors/dominion/ds510-use-proc-jan.pdf [archive].

[22] Calhoun County, MI, ImageCast Central (ICC) 5.5 Operations, pp25-28, [online document], https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf (accessed November 23, 2020),https://web.archive.org/web/20200802003507/https://cms5.revize.com/revize/calhouncountymi/Clerk%20&%20Register%20of%20Deeds/local%20clerk%20resources/5_5_icc_operations_manual.pdf [archive].

Congress of the United States

Washington, DC 20515

October 6, 2006

Henry M. Paulson, Jr.
Secretary
Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

Dear Mr. Secretary:

I am writing to follow up on my letter of May 4, 2006, to Secretary Snow, seeking review by the Committee on Foreign Investment in the United States of the acquisition of Sequoia Voting Systems by Smartmatic, a foreign-owned company. I believe this transaction raises exactly the sort of foreign ownership issues that CFIUS is best positioned to examine for national security concerns. As discussed below, publicly reported information about Smartmatic's ownership and about the vulnerability of electronic voting machines to tampering raises serious concerns. I strongly urge CFIUS to independently verify the information provided to American officials and the public by Sequoia/Smartmatic, and to take all appropriate measures to safeguard our national security.

It is undisputed that Smartmatic is foreign-owned and it has acquired Sequoia, one of the three major voting machine companies doing business in the U.S. According to a Sequoia press release in May 2006 (copy attached) Sequoia voting machines were used to record over 125 million votes during the 2004 Presidential election in the United States. As we confront another election, Americans deserve to know that the Administration has made sure that any foreign ownership of voting machines poses no national security threat.

Although many press reports have tried, it appears that it is not possible to discern the true owners of Smartmatic from information available to the public. Smartmatic now acknowledges that Antonio Mugica, a Venezuelan businessman, has a controlling interest in Smartmatic, but the company has not revealed who all the other Smartmatic owners are. According to the press, Smartmatic's owners are hidden through a web of off-shore private entities. (See attached articles.)

The opaque nature of Smartmatic's ownership is particularly troubling since Smartmatic has been associated by the press with the Venezuelan government led by Hugo Chavez, which is openly hostile to the United States. According to press reports, Smartmatic shared a founder, officers, directors and a principal place of business with Bizta, a company in which, according to Smartmatic, the Venezuelan government previously held a 28% stake. Mugica is also a director of Bizta.

According to Smartmatic press releases, (copies attached) Smartmatic and Bizta were part of the consortium that received the government contract to provide the voting machines for the 2004 referendum election to recall Chavez as Venezuela's president, and have since been awarded other contracts by the Venezuelan government.

Smartmatic's possible connection to the Venezuelan government poses a potential national security concern in the context of its acquisition of Sequoia because electronic voting machines are susceptible to tampering and insiders are in the best position to engage in such tampering. The 2005 Government Accountability Office Report on electronic voting, GAO-05-956, and other private sector studies consistently support this conclusion. Thus, the reports that Sequoia brought Venezuelan nationals to the United States to work on the Chicago 2006 primary election raises questions about whether these individuals are subject to direction from a foreign interest that might pose a threat to the integrity of the election. Similarly, the use of Smartmatic software and machines developed in Venezuela, such as the HAAT software that was at issue in Chicago, raises questions as to whether this software is susceptible to manipulation by its unknown creators. Reportedly, Smartmatic may soon be introducing into the United States the type of electronic voting machines that were used (with Bizta software) in the controversial 2004 Venezuelan recall election, under the label AVC Edge II Plus.

In reviewing the Smartmatic acquisition of Sequoia, it is important that CFIUS understand the products and services that are of Venezuelan origin and evaluate Smartmatic's ownership to determine who could have influence and control over these and other Sequoia products and services that are in use or intended for use in U.S. elections. In light of Smartmatic's failure fully to answer these questions to date, this issue demands the most thorough independent investigation by CFIUS.

Thank you for your consideration of this letter.

Sincerely,

Carolyn B. Maloney

Carolyn B. Maloney
Member of Congress

Attachments

Congress of the United States

Washington, DC 20510

December 6, 2019

Sami Mnaymneh
Founder and Co-Chief Executive Officer
H.I.G. Capital, LLC
[redacted]

Tony Tamer
Founder and Co-Chief Executive Officer
H.I.G. Capital, LLC
[redacted]

Dear Messrs. Mnaymneh and Tamer:

We are writing to request information regarding H.I.G. Capital's (H.I.G.) investment in Hart InterCivic Inc. (Hart InterCivic) one of three election technology vendors responsible for developing, manufacturing and maintaining the vast majority of voting machines and software in the United States, and to request information about your firm's structure and finances as it relates to this company.

Some private equity funds operate under a model where they purchase controlling interests in companies and implement drastic cost-cutting measures at the expense of consumers, workers, communities, and taxpayers. Recent examples include Toys "R" Us and Shopko.[1] For that reason, we have concerns about the spread and effect of private equity investment in many sectors of the economy, including the election technology industry—an integral part of our nation's democratic process. We are particularly concerned that secretive and "trouble-plagued companies,"[2] owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, "have long skimped on security in favor of convenience," leaving voting systems across the country "prone to security problems."[3] In light of these concerns, we request that you provide information about your firm, the portfolio

[1] Atlantic, "The Demise of Toys 'R' Us Is a Warning," Bryce Covert, July/August 2018 issue, https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/; Axios, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," Dan Primack, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," June 11, 2019, https://www.axios.com/shopko-bankruptcy-sun-capital-547b97ba-901c-4201-92cc-6d3168357fa3.html.

[2] ProPublica, "The Market for Voting Machines Is Broken. This Company Has Thrived in It.," Jessica Huseman, October 28, 2019, https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it.

[3] Associated Press News, "US Election Integrity Depends on Security-Challenged Firms," Frank Bajak, October 28, 2019, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c.

companies in which it has invested, the performance of those investments, and the ownership and financial structure of your funds.

Over the last two decades, the election technology industry has become highly concentrated, with a handful of consolidated vendors controlling the vast majority of the market. In the early 2000s, almost twenty vendors competed in the election technology market.[4] Today, three large vendors—Election Systems & Software, Dominion Voting Systems, and Hart InterCivic—collectively provide voting machines and software that facilitate voting for over 90% of all eligible voters in the United States.[5] Private equity firms reportedly own or control each of these vendors, with very limited "information available in the public domain about their operations and financial performance."[6] While experts estimate that the total revenue for election technology vendors is about $300 million, there is no publicly available information on how much those vendors dedicate to research and development, maintenance of voting systems, or profits and executive compensation.[7]

Concentration in the election technology market and the fact that vendors are often "more seasoned in voting machine and technical services contract negotiations" than local election officials, give these companies incredible power in their negotiations with local and state governments. As a result, jurisdictions are often caught in expensive agreements in which the same vendor both sells or leases, and repairs and maintains voting systems–leaving local officials dependent on the vendor, and the vendor with little incentive to substantially overhaul and improve its products.[8] In fact, the Election Assistance Commission (EAC), the primary federal body responsible for developing voluntary guidance on voting technology standards, advises state and local officials to consider "the cost to purchase or lease, operate, and maintain a voting system over its life span … [and to] know how the vendor(s) plan to be profitable" when signing contracts, because vendors typically make their profits by ensuring "that they will be around to maintain it after the sale." The EAC has warned election officials that "[i]f you do not manage the vendors, they will manage you."[9]

Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat. In January 2017, the U.S. Department of Homeland Security designated the United States' election infrastructure as "critical infrastructure" in order to prioritize the protection of our elections and to more effectively assist state and local election

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[4] Bloomberg, "Private Equity Controls the Gatekeepers of American Democracy," Anders Melin and Reade Pickert, November 3, 2018, https://www.bloomberg.com/news/articles/2018-11-03/private-equity-controls-the-gatekeepers-of-american-democracy.

[5] Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[6] Id.

[7] Id.

[8] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[9] U.S. Election Assistance Commission, "Ten Things to Know About Selecting a Voting System," October 14, 2017, https://www.eac.gov/documents/2017/10/14/ten-things-to-know-about-selecting-a-voting-system-cybersecurity-voting-systems-voting-technology/.

officials in addressing these risks.[10] However, voting machines are reportedly falling apart across the country, as vendors neglect to innovate and improve important voting systems, putting our elections at avoidable and increased risk.[11] In 2015, election officials in at least 31 states, representing approximately 40 million registered voters, reported that their voting machines needed to be updated, with almost every state "using some machines that are no longer manufactured."[12] Moreover, even when state and local officials work on replacing antiquated machines, many continue to "run on old software that will soon be outdated and more vulnerable to hackers."[13]

In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana."[14] In addition, researchers recently uncovered previously undisclosed vulnerabilities in "nearly three dozen backend election systems in 10 states."[15] And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem."[16] These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

H.I.G. reportedly owns or has had investments in Hart InterCivic, a major election technology vendor. In order to help us understand your firm's role in this sector, we ask that you provide answers to the following questions no later than December 20, 2019.

1. Please provide the disclosure documents and information enumerated in Sections 501 and 503 of the *Stop Wall Street Looting Act*.[17]

2. Which election technology companies, including all affiliates or related entities, does H.I.G. have a stake in or own? Please provide the name of and a brief description of the services each company provides.

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[10] Department of Homeland Security, "Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector," January 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.
[11] AP News, "US election integrity depends on security-challenged firms," Frank Bajak, October 29, 2018, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.
[12] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf.
[13] Associated Press, "AP Exclusive: New election systems use vulnerable software," Tami Abdollah, July 13, 2019, https://apnews.com/e5e070c31f3c497fa9e6875f426ccde1.
[14] Vice, "Here's Why All the Voting Machines Are Broken and the Lines Are Extremely Long," Jason Koebler and Matthew Gault, November 6, 2018, https://www.vice.com/en_us/article/59vzgn/heres-why-all-the-voting-machines-are-broken-and-the-lines-are-extremely-long.
[15] Vice, "Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials," Kim Zetter, August 8, 2019, https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.
[16] New York Times, "A Pennsylvania Country's Election Day Nightmare Underscores Voting Machine Concerns," Nick Corasaniti, November 30, 2019, https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.
[17] Stop Wall Street Looting Act, S.2155, https://www.congress.gov/bill/116th-congress/senate-bill/2155.

a. Which election technology companies, including all affiliates or related entities, has H.I.G. had a stake in or owned in the past twenty years? Please provide the name of and a brief description of the services each company provides or provided.

b. For each election technology company H.I.G. had a stake in or owned in the past twenty years, including all affiliates or related entities, please provide the following information for each year that the firm has had a stake in or owned this company and the five years preceding the firm's investment.
   i. The name of the company
   ii. Ownership stake
   iii. Total revenue
   iv. Net income
   v. Percentage of revenue dedicated to research and development
   vi. Total number of employees
   vii. A list of all state and local jurisdictions with which the company has a contract to provide election related products or services
   viii. Other private-equity firms that own a stake in the company

3. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with the EAC's Voluntary Voting System Guidelines? If so, please provide a copy of each EAC noncompliance notice received by the company and a description of what steps the company took to resolve each issue.

4. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with any state or local voting system guidelines or practices? If so, please provide a list of all such instances and a description of what steps the company took to resolve each issue.

5. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have violated any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such violations.

6. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, reached a settlement with any federal or state law enforcement entity related to a potential violation of any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such settlements.

7. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the past twenty years, reached a settlement with any state or local jurisdiction related to a potential violation of or breach of contract? If so, please provide a complete list, including the date and description, of all such settlements.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Amy Klobuchar
United States Senator

Ron Wyden
United States Senator

Mark Pocan
Member of Congress

Congress of the United States

Washington, DC 20510

December 6, 2019

Michael McCarthy
Chairman
McCarthy Group, LLC
[redacted]

Dear Mr. McCarthy:

We are writing to request information regarding McCarthy Group, LLC's (McCarthy Group) investment in Election Systems & Software (ES&S), one of three election technology vendors responsible for developing, manufacturing and maintaining the vast majority of voting machines and software in the United States, and to request information about your firm's structure and finances as it relates to this company.

Some private equity funds operate under a model where they purchase controlling interests in companies and implement drastic cost-cutting measures at the expense of consumers, workers, communities, and taxpayers. Recent examples include Toys "R" Us and Shopko.[1] For that reason, we have concerns about the spread and effect of private equity investment in many sectors of the economy, including the election technology industry—an integral part of our nation's democratic process. We are particularly concerned that secretive and "trouble-plagued companies,"[2] owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, "have long skimped on security in favor of convenience," leaving voting systems across the country "prone to security problems."[3] In light of these concerns, we request that you provide information about your firm, the portfolio companies in which it has invested, the performance of those investments, and the ownership and financial structure of your funds.

Over the last two decades, the election technology industry has become highly concentrated, with a handful of consolidated vendors controlling the vast majority of the market. In the early

[1] Atlantic, "The Demise of Toys 'R' Us Is a Warning," Bryce Covert, July/August 2018 issue, https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/; Axios, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," Dan Primack, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," June 11, 2019, https://www.axios.com/shopko-bankruptcy-sun-capital-547b97ba-901c-4201-92cc-6d3168357fa3.html.

[2] ProPublica, "The Market for Voting Machines Is Broken. This Company Has Thrived in It.," Jessica Huseman, October 28, 2019, https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it.

[3] Associated Press News, "US Election Integrity Depends on Security-Challenged Firms," Frank Bajak, October 28, 2019, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c.

2000s, almost twenty vendors competed in the election technology market.[4] Today, three large vendors—ES&S, Dominion Voting Systems, and Hart InterCivic—collectively provide voting machines and software that facilitate voting for over 90% of all eligible voters in the United States.[5] Private equity firms reportedly own or control each of these vendors, with very limited "information available in the public domain about their operations and financial performance."[6] While experts estimate that the total revenue for election technology vendors is about $300 million, there is no publicly available information on how much those vendors dedicate to research and development, maintenance of voting systems, or profits and executive compensation.[7]

Concentration in the election technology market and the fact that vendors are often "more seasoned in voting machine and technical services contract negotiations" than local election officials, give these companies incredible power in their negotiations with local and state governments. As a result, jurisdictions are often caught in expensive agreements in which the same vendor both sells or leases, and repairs and maintains voting systems–leaving local officials dependent on the vendor, and the vendor with little incentive to substantially overhaul and improve its products.[8] In fact, the Election Assistance Commission (EAC), the primary federal body responsible for developing voluntary guidance on voting technology standards, advises state and local officials to consider "the cost to purchase or lease, operate, and maintain a voting system over its life span … [and to] know how the vendor(s) plan to be profitable" when signing contracts, because vendors typically make their profits by ensuring "that they will be around to maintain it after the sale." The EAC has warned election officials that "[i]f you do not manage the vendors, they will manage you."[9]

Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat. In January 2017, the U.S. Department of Homeland Security designated the United States' election infrastructure as "critical infrastructure" in order to prioritize the protection of our elections and to more effectively assist state and local election officials in addressing these risks.[10] However, voting machines are reportedly falling apart across the country, as vendors neglect to innovate and improve important voting systems, putting our

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[4] Bloomberg, "Private Equity Controls the Gatekeepers of American Democracy," Anders Melin and Reade Pickert, November 3, 2018, https://www.bloomberg.com/news/articles/2018-11-03/private-equity-controls-the-gatekeepers-of-american-democracy.

[5] Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[6] Id.

[7] Id.

[8] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[9] U.S. Election Assistance Commission, "Ten Things to Know About Selecting a Voting System," October 14, 2017, https://www.eac.gov/documents/2017/10/14/ten-things-to-know-about-selecting-a-voting-system-cybersecurity-voting-systems-voting-technology/.

[10] Department of Homeland Security, "Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector," January 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.

elections at avoidable and increased risk.[11] In 2015, election officials in at least 31 states, representing approximately 40 million registered voters, reported that their voting machines needed to be updated, with almost every state "using some machines that are no longer manufactured."[12] Moreover, even when state and local officials work on replacing antiquated machines, many continue to "run on old software that will soon be outdated and more vulnerable to hackers."[13]

In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana."[14] In addition, researchers recently uncovered previously undisclosed vulnerabilities in "nearly three dozen backend election systems in 10 states."[15] And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem."[16] These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

McCarthy Group reportedly owns or has had investments in ES&S, a major election technology vendor. In order to help us understand your firm's role in this sector, we ask that you provide answers to the following questions no later than December 20, 2019.

1. Please provide the disclosure documents and information enumerated in Sections 501 and 503 of the *Stop Wall Street Looting Act*.[17]

2. Which election technology companies, including all affiliates or related entities, does McCarthy Group have a stake in or own? Please provide the name of and a brief description of the services each company provides.

    a. Which election technology companies, including all affiliates or related entities, has McCarthy Group had a stake in or owned in the past twenty

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[11] AP News, "US election integrity depends on security-challenged firms," Frank Bajak, October 29, 2018, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[12] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf.

[13] Associated Press, "AP Exclusive: New election systems use vulnerable software," Tami Abdollah, July 13, 2019, https://apnews.com/e5e070c31f3c497fa9e6875f426ccde1.

[14] Vice, "Here's Why All the Voting Machines Are Broken and the Lines Are Extremely Long," Jason Koebler and Matthew Gault, November 6, 2018, https://www.vice.com/en_us/article/59vzgn/heres-why-all-the-voting-machines-are-broken-and-the-lines-are-extremely-long.

[15] Vice, "Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials," Kim Zetter, August 8, 2019, https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.

[16] New York Times, "A Pennsylvania Country's Election Day Nightmare Underscores Voting Machine Concerns," Nick Corasaniti, November 30, 2019, https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.

[17] Stop Wall Street Looting Act, S.2155, https://www.congress.gov/bill/116th-congress/senate-bill/2155.

years? Please provide the name of and a brief description of the services each company provides or provided.

b. For each election technology company McCarthy Group had a stake in or owned in the past twenty years, including all affiliates or related entities, please provide the following information for each year that the firm has had a stake in or owned this company and the five years preceding the firm's investment.
   i. The name of the company
   ii. Ownership stake
   iii. Total revenue
   iv. Net income
   v. Percentage of revenue dedicated to research and development
   vi. Total number of employees
   vii. A list of all state and local jurisdictions with which the company has a contract to provide election related products or services
   viii. Other private-equity firms that own a stake in the company

3. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with the EAC's Voluntary Voting System Guidelines? If so, please provide a copy of each EAC noncompliance notice received by the company and a description of what steps the company took to resolve each issue.

4. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with any state or local voting system guidelines or practices? If so, please provide a list of all such instances and a description of what steps the company took to resolve each issue.

5. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, been found to have violated any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such violations.

6. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the last twenty years, reached a settlement with any federal or state law enforcement entity related to a potential violation of any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such settlements.

7. Has any election technology company, including all affiliates or related entities, in which McCarthy Group has an ownership stake or has had an ownership stake in the

past twenty years, reached a settlement with any state or local jurisdiction related to a potential violation of or breach of contract? If so, please provide a complete list, including the date and description, of all such settlements.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Amy Klobuchar
United States Senator

Ron Wyden
United States Senator

Mark Pocan
Member of Congress

Congress of the United States

Washington, DC 20510

December 6, 2019

Stephen D. Owens
Managing Director
Staple Street Capital Group, LLC
[redacted]

Hootan Yaghoobzadeh
Managing Director
Staple Street Capital Group, LLC
[redacted]

Dear Messrs. Owens and Yaghoobzadeh:

We are writing to request information regarding Staple Street Capital Group, LLC's (Staple Street) investment in Dominion Voting System (Dominion) one of three election technology vendors responsible for developing, manufacturing and maintaining the vast majority of voting machines and software in the United States, and to request information about your firm's structure and finances as it relates to this company.

Some private equity funds operate under a model where they purchase controlling interests in companies and implement drastic cost-cutting measures at the expense of consumers, workers, communities, and taxpayers. Recent examples include Toys "R" Us and Shopko.[1] For that reason, we have concerns about the spread and effect of private equity investment in many sectors of the economy, including the election technology industry—an integral part of our nation's democratic process. We are particularly concerned that secretive and "trouble-plagued companies,"[2] owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, "have long skimped on security in favor of convenience," leaving voting systems across the country "prone to security problems."[3] In light of these concerns, we request that you provide information about your firm, the portfolio

[1] Atlantic, "The Demise of Toys 'R' Us Is a Warning," Bryce Covert, July/August 2018 issue, https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/; Axios, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," Dan Primack, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," June 11, 2019, https://www.axios.com/shopko-bankruptcy-sun-capital-547b97ba-901c-4201-92cc-6d3168357fa3.html.

[2] ProPublica, "The Market for Voting Machines Is Broken. This Company Has Thrived in It.," Jessica Huseman, October 28, 2019, https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it.

[3] Associated Press News, "US Election Integrity Depends on Security-Challenged Firms," Frank Bajak, October 28, 2019, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c.

companies in which it has invested, the performance of those investments, and the ownership and financial structure of your funds.

Over the last two decades, the election technology industry has become highly concentrated, with a handful of consolidated vendors controlling the vast majority of the market. In the early 2000s, almost twenty vendors competed in the election technology market.[4] Today, three large vendors—Election Systems & Software, Dominion, and Hart InterCivic—collectively provide voting machines and software that facilitate voting for over 90% of all eligible voters in the United States.[5] Private equity firms reportedly own or control each of these vendors, with very limited "information available in the public domain about their operations and financial performance."[6] While experts estimate that the total revenue for election technology vendors is about $300 million, there is no publicly available information on how much those vendors dedicate to research and development, maintenance of voting systems, or profits and executive compensation.[7]

Concentration in the election technology market and the fact that vendors are often "more seasoned in voting machine and technical services contract negotiations" than local election officials, give these companies incredible power in their negotiations with local and state governments. As a result, jurisdictions are often caught in expensive agreements in which the same vendor both sells or leases, and repairs and maintains voting systems–leaving local officials dependent on the vendor, and the vendor with little incentive to substantially overhaul and improve its products.[8] In fact, the Election Assistance Commission (EAC), the primary federal body responsible for developing voluntary guidance on voting technology standards, advises state and local officials to consider "the cost to purchase or lease, operate, and maintain a voting system over its life span … [and to] know how the vendor(s) plan to be profitable" when signing contracts, because vendors typically make their profits by ensuring "that they will be around to maintain it after the sale." The EAC has warned election officials that "[i]f you do not manage the vendors, they will manage you."[9]

Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat. In January 2017, the U.S. Department of Homeland Security designated the United States' election infrastructure as "critical infrastructure" in order to prioritize the protection of our elections and to more effectively assist state and local election

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[5] Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[6] Id.

[7] Id.

[8] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[9] U.S. Election Assistance Commission, "Ten Things to Know About Selecting a Voting System," October 14, 2017, https://www.eac.gov/documents/2017/10/14/ten-things-to-know-about-selecting-a-voting-system-cybersecurity-voting-systems-voting-technology/.

officials in addressing these risks.[10] However, voting machines are reportedly falling apart across the country, as vendors neglect to innovate and improve important voting systems, putting our elections at avoidable and increased risk.[11] In 2015, election officials in at least 31 states, representing approximately 40 million registered voters, reported that their voting machines needed to be updated, with almost every state "using some machines that are no longer manufactured."[12] Moreover, even when state and local officials work on replacing antiquated machines, many continue to "run on old software that will soon be outdated and more vulnerable to hackers."[13]

In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana."[14] In addition, researchers recently uncovered previously undisclosed vulnerabilities in "nearly three dozen backend election systems in 10 states."[15] And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem."[16] These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

Staple Street reportedly owns or has had investments in Dominion, a major election technology vendor. In order to help us understand your firm's role in this sector, we ask that you provide answers to the following questions no later than December 20, 2019.

1. Please provide the disclosure documents and information enumerated in Sections 501 and 503 of the *Stop Wall Street Looting Act*.[17]

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[10] Department of Homeland Security, "Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector," January 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.
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[13] Associated Press, "AP Exclusive: New election systems use vulnerable software," Tami Abdollah, July 13, 2019, https://apnews.com/e5e070c31f3c497fa9e6875f426ccde1.
[14] Vice, "Here's Why All the Voting Machines Are Broken and the Lines Are Extremely Long," Jason Koebler and Matthew Gault, November 6, 2018, https://www.vice.com/en_us/article/59vzgn/heres-why-all-the-voting-machines-are-broken-and-the-lines-are-extremely-long.
[15] Vice, "Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials," Kim Zetter, August 8, 2019, https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.
[16] New York Times, "A Pennsylvania Country's Election Day Nightmare Underscores Voting Machine Concerns," Nick Corasaniti, November 30, 2019, https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.
[17] Stop Wall Street Looting Act, S.2155, https://www.congress.gov/bill/116th-congress/senate-bill/2155.

a. Which election technology companies, including all affiliates or related entities, has Staple Street had a stake in or owned in the past twenty years? Please provide the name of and a brief description of the services each company provides or provided.

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7. Has any election technology company, including all affiliates or related entities, in which Staple Street has an ownership stake or has had an ownership stake in the past twenty years, reached a settlement with any state or local jurisdiction related to a potential violation of or breach of contract? If so, please provide a complete list, including the date and description, of all such settlements.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Amy Klobuchar
United States Senator

Ron Wyden
United States Senator

Mark Pocan
Member of Congress

Declaration of Russell James Ramsland, Jr.

1. My name is Russell James Ramsland, Jr., and I am a resident of Dallas County, Texas. I make this declaration pursuant to 28 USC sec 1746. I am over 18 years of age. I hold an MBA from Harvard University, and a political science degree from Duke University. I have worked with the National Aeronautics and Space Administration (NASA) and the Massachusetts Institute of Technology (MIT), among other organizations, and have run businesses all over the world, many of which are highly technical in nature. I have served on technical government panels.

2. I am part of the management team of Allied Security Operations Group, LLC, (ASOG). ASOG is a group of globally engaged professionals who come from various disciplines to include Department of Defense, Secret Service, Department of Homeland Security, and the Central Intelligence Agency. It provides a range of security services, but has a particular emphasis on cybersecurity, open source investigation and penetration testing of networks. We employ a wide variety of cyber and cyber forensic analysts. We have patents pending in a variety of applications from novel network security applications to SCADA (Supervisory Control and Data Acquisition) protection and safe browsing solutions for the dark and deep web. For this report, I have relied on these experts and resources.

3. In November 2018, ASOG analyzed audit logs for the central tabulation server of the ES&S Election Management System (EMS) for the Dallas, Texas, General Election of 2018. Our team was surprised at the enormous number of error messages that should not have been there. They numbered in the thousands, and the operator ignored and overrode all of them. This led to various legal challenges in that election, and we provided evidence and analysis in some of them.

4. As a result, ASOG initiated an 18-month study into the major EMS providers in the United States, among which is Election Systems and Software ("ES&S") that provides EMS services for Wisconsin. We did thorough background research of the literature and discovered there is confirmed evidence from both Democrat and Republican stakeholders in the vulnerability of ES&S. Next, we began doing passive penetration testing into the vulnerabilities described in the literature and confirmed for ourselves that in many cases, past vulnerabilities already identified were still left open to exploit in the November 2020 elections. We also noticed a striking similarity between the approach to software and EMS systems of ES&S and Dominion. This was logical since they share a common ancestry in the Diebold voting system.

5. Over the past three decades, almost all of the states have shifted from a relatively low-technology format to a high-technology format that relies heavily on a handful of private services companies. These private companies supply the hardware and software, often handle voter registrations, hold the voter records, partially manage the elections, program counting the votes and report the outcomes. Wisconsin is one of those states.

6. These systems contain a large number of known vulnerabilities to hacking and tampering, both when voters express their voting intention by marking an electronic ballot using ballot marking devices (BMDs), and at the back end where the votes are stored, tabulated, and reported by election officials. These vulnerabilities are well known, and experts in the field have written extensively about them.. This is not surprising as there are no federal standards for security in voting system software. EAC 2.0 was to be written to address this issue, but was never done.

7. Below is a screenshot from the ES&S Security Test Report Electionware 5.2.1.0 – 8/28/17 – Freeman, Craft, McGregor Group. It shows an incredible number of vulnerabilities in the system by which inside and external threats can manipulate the outcomes in a variety of ways.

Electionware Servers

Missing Operating System Patches	
Critical	17
Important	49
Moderate	2
Unrated	8

SCAP Misconfigurations	
Windows 2008 R2 STIG[3]	46
Firewall STIG Configuration	3
.NET Framework 4 STIG Configuration	2
Internet Explorer 9 STIG Configuration	13

Electionware Clients

Missing Operating System Patches	
Critical	24
Important	51
Moderate	1
Unrated	9

SCAP Misconfigurations	
Windows 7 STIG	51
Firewall STIG Configuration	3
.NET Framework 4 STIG Configuration	2
Internet Explorer 9 STIG Configuration	3
Windows 7 USGCB[4] Configuration	45
Firewall USGCB Configuration	8

Screenshot

Recently ES&S moved many of its systems into the cloud behind cloudfare, but ASOG determined that this protection can still be easily circumvented by gaining access through its FTP site ESSVotes.

7. Election Systems and Software ("ES&S") is a privately held company that provides election technologies and services to government jurisdictions. Almost all the counties of Wisconsin use the ES&S Election Management System with the exception of Sheboygan County. ES&S systems have options to be an electronic, paperless voting system with no permanent record of the voter's choices, or a paper ballot-based system or hybrid of those two.

9. The overwhelming vulnerabilities of the ES&S system were on full display in Dallas County where ES&S is used, during the 2020 General Election. Data has been provided by the Dallas County Election Department. The Voter Registration Database was received October 13, 2020 following an Open Records Request by The Dallas Examiner. The Mail-In and Early Voting Rosters were downloaded daily from the County's computers. All Texas counties are required by law to publish daily voting rosters.

10. In that election, the voter records during early voting were captured each day for those voters who cast ballots either in person or by mail-in and catalogued using the hash totals to provide an absolute unique identifier. As required by state law, the Dallas County Elections Department published the Daily Vote Roster for all voters who cast ballots during Absentee and In-Person Early Voting. The Roster contained the VoterID, name, address, type of vote, and various dates associated with every Early-Voting vote cast.

Dallas County claims its source of roster data was the In-Person Electronic Poll Books, and the Absentee Ballot scanners. Dallas County has claimed that entry into the Vote Roster can only be done by a registered Dallas County voter who either appeared In-Person or by Absentee Ballot. The computer that generated the roster was apparently hacked between October 7 and October 30. During that period tens of thousands of vote records were purged, added, or edited from the ES&S generated Vote Roster.

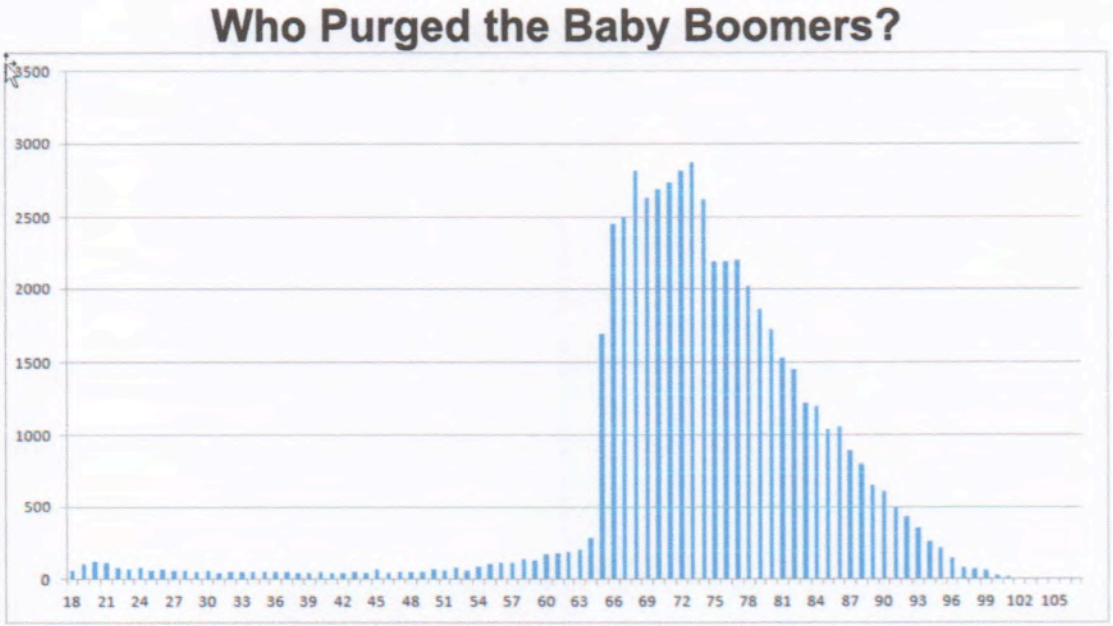
Specifically, over this period, 56,974 voter records had their hash identifier changed, meaning the vote was tampered with after it was cast and recorded in the system. In most cases, this tampering took the form of purging the vote, and then re-constituting it in some form or fashion, but with a change in the hash total meaning the vote was somehow changed. Currently it appears 5,690 votes disappeared completely after voting in person. All in all, this translates into approximately 107,000 hacked votes in Dallas County alone for ES&S. Ten blocks of voters on Westminster Street in Highland Park had their votes purged and then some of them were selectively re-instated at a later date with changes. People who double voted were catalogued as well as dead people who voted, people with no VUID voted (approximately 800 of them), unregistered university students voted, and *people living abroad who claim a Dallas Residence for voting purposes, but who, in a spot check are unknown to the residences they list* in the ES&S system. A short list of them includes:

Country	Voters Who Voted
Mexico	118
Guatemala	9
Nicaragua	4
Kenya	18
Canada	154
Ireland	34
China	62
Australia	105

In plain English, at the instant before a voter casts a ballot there is a one-to-one relationship between the voter and their ballot as well as a one-to-one association between the voter and their votes.

At the instant that ballot is cast, the one-to-one relationship between the voter and ballot still exist, but the relationship between the voter and their votes is gone. No one can know how they voted. The key security check on voting integrity is the absolute match between the number of voters in the Vote Roster and the number of ballots counted in that voting district or precinct. If these numbers do not match, either physical ballots were added or removed from the Ballot Counter or "voters" were added or removed from the Vote Roster. In either case, the election has been compromised and the election is nothing more than a lottery. With tens of thousands of Vote Roster entries purged and other tens of thousand of entries apparently created out of thin air, using the ES&S EMS system, Dallas County Elections Department is definitely in the lottery business.

11. Equally troubling with the ES&S System is the apparent ease of targeting within the system of certain groups for purging. In Dallas, over 92% of PURGED In-Person and Absentee voters were over 65. This is statistically impossible and makes clear the system is easily manipulated by inside or outside actors.



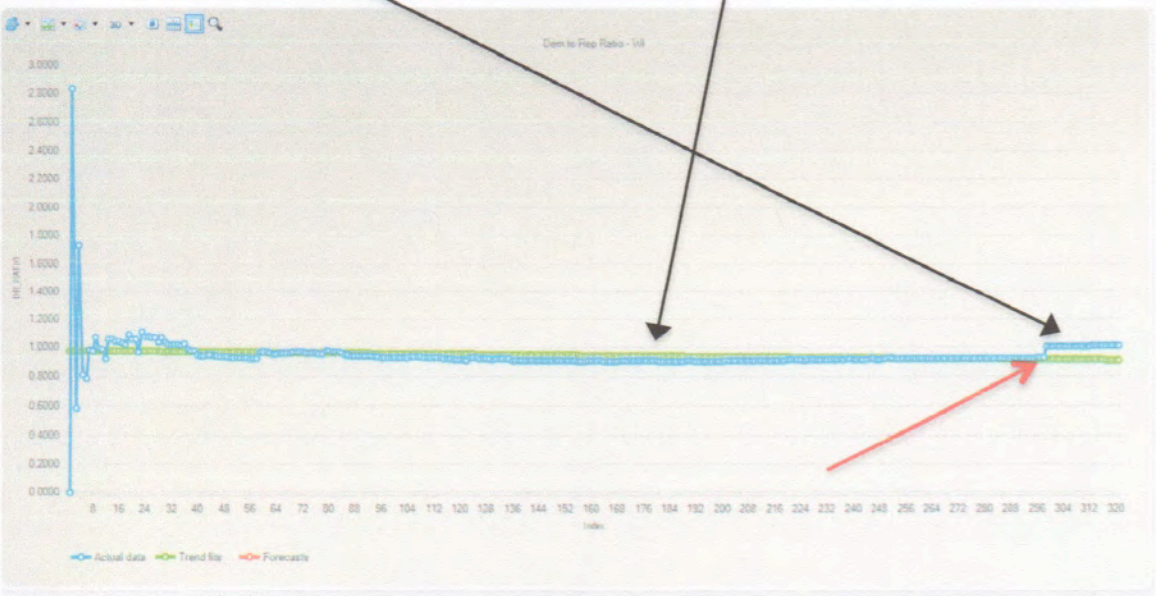
Purged Voters by Age *Source: Dallas County Election Department Vote Rosters Oct 7-Oct 30*

12. My colleagues and I at ASOG have studied the information that is publicly available concerning the November 3, 2020, election results from Wisconsin. Based on the significant anomalies and red flags that we have observed, I believe to a reasonable degree of professional certainty that election results have been

manipulated within the ES&S system in Wisconsin. We list below a few of the red flags that our team has uncovered.

13. Where ES&S is concerned, a statistically unlikely event (red arrow) occurred in the Wisconsin General Election at 09:42:30 Z (3:42 AM local) on 11/4/2020 according to Edison data reported to the NYT. For this analysis we focused on the key ratio of the cumulative Democrat (Biden) votes divided by the cumulative Republican (Trump) votes.

1. A ratio greater than 1.00 is an indicator of Democrat victory
2. A ratio less than 1.00 is an indicator of Republican victory
3. The time series plot shows the trend over time of the cumulative votes.
4. The trend analysis shows the time series but adds a statistically estimated trend line (in green)
5. Where anomalies are observed, the record is pulled out and a proportion test included that tests the probability that that batch of votes was drawn at random from the population of that state, based on the final counts.
6. Randomization is a reasonable assumption because the mail system acts as a randomizer as it mixes the ballots, and the later votes are the mail ballots.
7. The event outline below shifted what had been a settled, unarguable D/R ratio (cumulative to this point) of .912. Suddenly, this event occurs and is of such magnitude it shifts the entire election ratio to 1.0123.



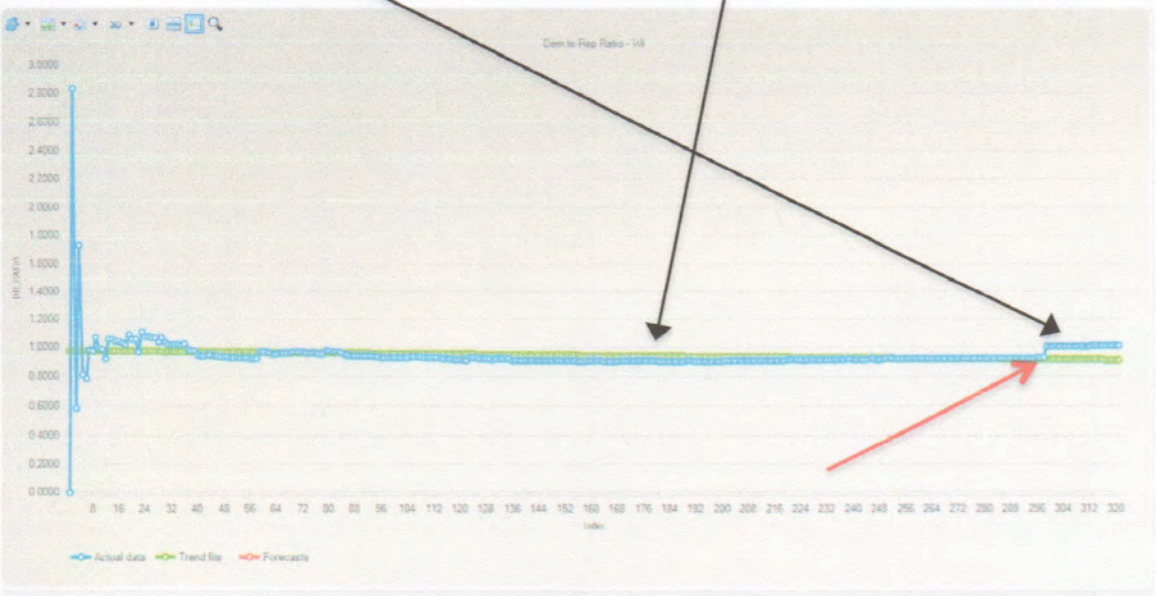
Preview Record

	RECNUM	STATE	TIMESTAMP	VOTES	EEVP	TRUMPD	BIDENJ	TRUMP_CUM	BIDEN_CUM	DATE	TIME	DR_RATIO	D_VOTES	R_VOTES	LOG_D	LOG_R
1	8721	wisconsin	2020-11-04T09:42:20Z	3186598	89	0.490	0.493	1561433	1570993	2020-11-04	09:42:20	1.0061	143379	25163	5.1565	4.4008

manipulated within the ES&S system in Wisconsin. We list below a few of the red flags that our team has uncovered.

13. Where ES&S is concerned, a statistically unlikely event (red arrow) occurred in the Wisconsin General Election at 09:42:30 Z (3:42 AM local) on 11/4/2020 according to Edison data reported to the NYT. For this analysis we focused on the key ratio of the cumulative Democrat (Biden) votes divided by the cumulative Republican (Trump) votes.

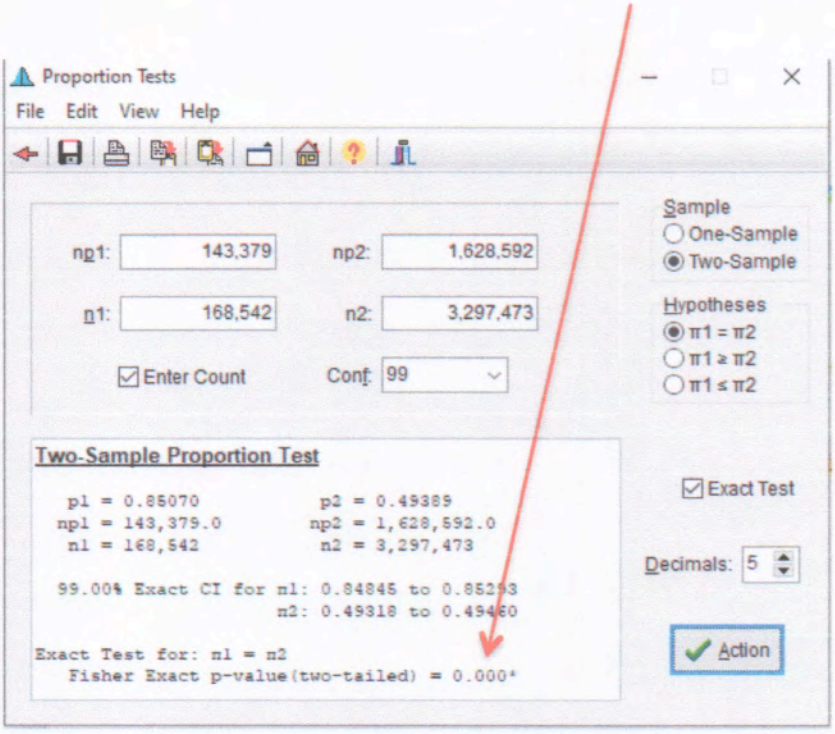
1. A ratio greater than 1.00 is an indicator of Democrat victory
2. A ratio less than 1.00 is an indicator of Republican victory
3. The time series plot shows the trend over time of the cumulative votes.
4. The trend analysis shows the time series but adds a statistically estimated trend line (in green)
5. Where anomalies are observed, the record is pulled out and a proportion test included that tests the probability that that batch of votes was drawn at random from the population of that state, based on the final counts.
6. Randomization is a reasonable assumption because the mail system acts as a randomizer as it mixes the ballots, and the later votes are the mail ballots.
7. The event outline below shifted what had been a settled, unarguable D/R ratio (cumulative to this point) of .912. Suddenly, this event occurs and is of such magnitude it shifts the entire election ratio to 1.0123.



Preview Record

	RECNUM	STATE	TIMESTAMP	VOTES	EEVP	TRUMPD	BIDENJ	TRUMP_CUM	BIDEN_CUM	DATE	TIME	DR_RATIO	D_VOTES	R_VOTES	LOG_D	LOG_R
1	8721	wisconsin	2020-11-04T09:42:20Z	3186598	89	0.490	0.493	1561433	1570993	2020-11-04	09:42:20	1.0061	143379	25163	5.1565	4.4008

P-Test (two-sample proportion test) shows that there is a 0.0% probability that this vote drop came from a random population of Wisconsin votes as shown in the outcome screenshot below. As shown above, Biden suddenly gets 143,379 votes out of 168,542 or 85%, which itself is outside any percentage before or after.



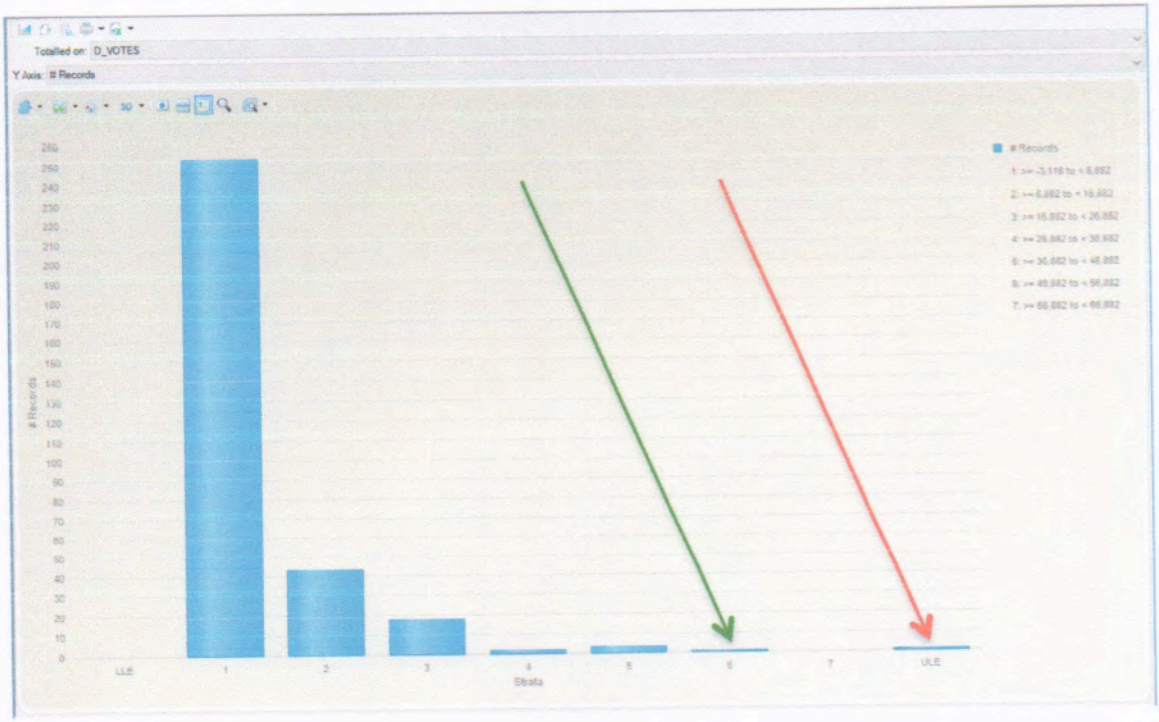
This event changed the final outcome. If this statistically impossible event were removed, the final outcome would be:

Biden:	1,485,573
Trump:	1,584,004

This reveals a shift of approximately 119,430 votes from Biden to Trump would be expected were the election not tampered with.

14. A further red flag is raised when an analysis is done by voting batch. Here we can clearly see the magnitude of the Wisconsin batch dropped at 09:42:30Z on 11/4/2020 vastly exceeds every other Democrat vote total.

This batch shows up as an upper limit exception, meaning it is outside the realm of any expected outcome. A stratification bar chart (below) will indicate visually where the probabilities lie relevant to this event. At 6 standard deviations the chart shows very little chance of this occurring (green arrow). However, in this case, the event occurs at 12.93 standard deviations from the mean (red arrow), showing the probability even smaller at less than 3 in 1,000. Any fraud examiner would instantly flag this for a fraud audit and our Internal Auditor contractor did so immediately.



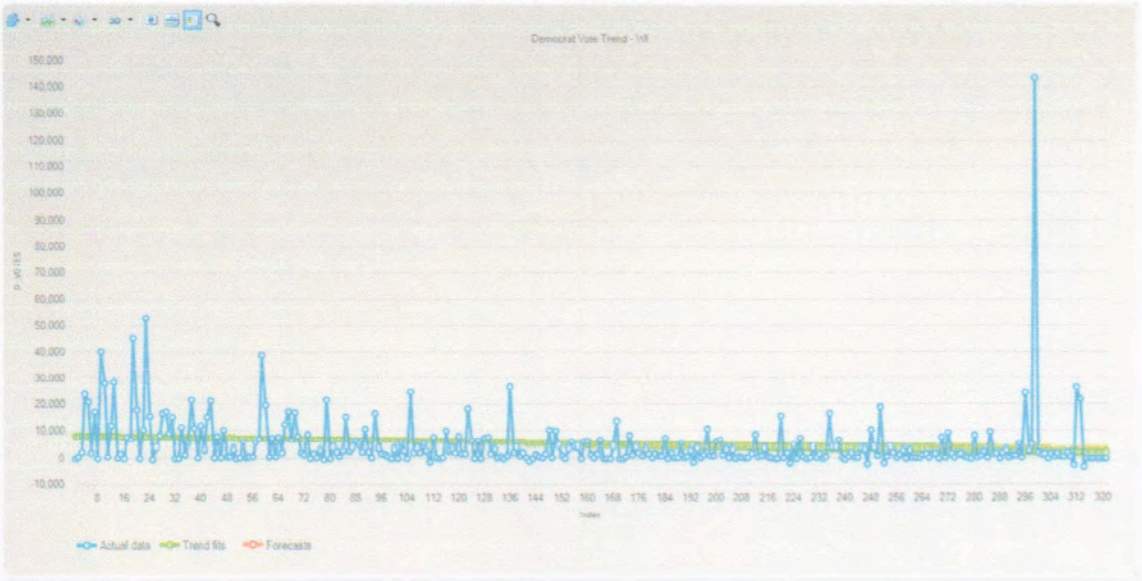
All of these are clear indications of fraud.

15. Another key red flag appears after inspecting voter turnout figures by county. Out of 72 counties, 69 of them exhibited voter turnout figures higher than 80%, a threshold generally considered to be the maximum expected. An amazing 59 of them were above 90%. When the public data votes were normalized to 80% turnout, the excess votes are at least 384,085 over the maximum that could be expected. A sample of this is shown in the table below.

County	Turnout %
Sheboygan County	270%
Shawano County	195%
Taylor County	95%
Marquette County	95%
Price County	94%
Juneau County	94%
Burnett County	94%
Rusk County	94%
Pepin County	94%
Waushara County	94%
Oconto County	94%
Washington County	93%
Kewaunee County	93%
Fond du Lac County	93%
Calumet County	93%
Buffalo County	93%
Lafayette County	93%
Green County	93%
Waupaca County	93%
Polk County	93%
Crawford County	93%
Green Lake County	93%
Dodge County	92%
Chippewa County	92%
Grant County	92%
Clark County	92%
Adams County	92%
Iowa County	92%
Ozaukee County	92%
Bayfield County	92%
Door County	92%
Richland County	92%
Monroe County	92%
Oneida County	92%
Manitowoc County	92%
Washburn County	92%

Trempealeau County	92%
Columbia County	92%
Lincoln County	92%
Waukesha County	92%
Florence County	92%
Barron County	92%
Vernon County	92%
Jefferson County	92%
Langlade County	92%
Outagamie County	91%
Wood County	91%
Marathon County	91%
Iron County	91%
Dunn County	91%
Jackson County	90%
Walworth County	90%
Douglas County	90%
Portage County	90%
Winnebago County	90%
Vilas County	90%
Pierce County	90%
Marinette County	90%
Ashland County	90%

15. Returning to the spike chart presented earlier, a time series crossed with a location specific analysis would determine whether the equipment on hand at any location would have even been capable of processing this many votes in the time represented. In Michigan, we have already observed this phenomenon and the analysis made clear it was physically impossible for the equipment on hand to process this many votes in the time represented.

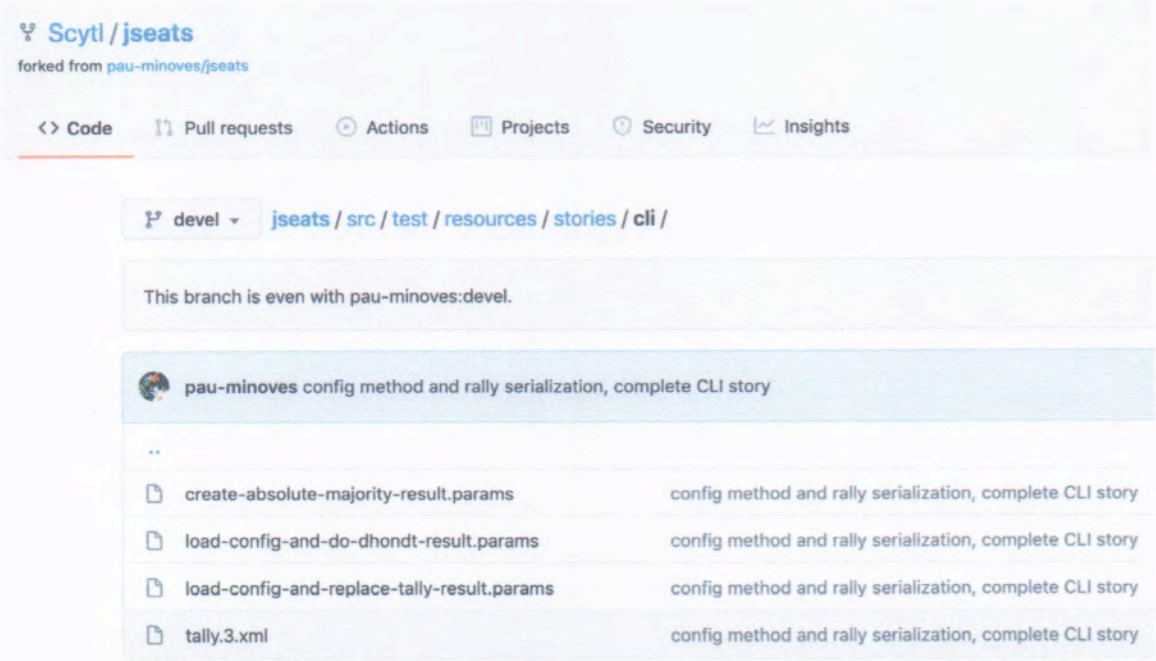


Preview Record

	RECNUM	STATE	TIMESTAMP	VOTES	EEVP	TRUMPD	BIDENJ	TRUMP_CUM	BIDEN_CUM	DATE	TIME	DR_RATIO	D_VOTES	R_VOTES	LOG_D	LOG_R
1	8721	wisconsin	2020-11-04T09:42:20Z	3186598	89	0.490	0.493	1561433	1570993	2020-11-04	09:42:20	1.0061	143379	25163	5.1565	4.4008

This spike, cast largely for Biden, (143,379-Biden, 25,163-Trump) could easily be produced in the ES&S EMS control system by pre-loading batches of blank ballots in files such as Write-Ins or other adjudication-type files then casting them almost all for Biden using the Override Procedure (to cast Write-In, Blank, or Error ballots) that is available to the operator of the system.

16. ES&S uses Scytl via Clarity Elections to accomplish the actual tabulation. Scytl has in its source code the ability to use a common, additive electoral seat allocation algorithm (JSeats) in order to award points based on percentages that are input into the system by the operator in order to determine (or appoint) a winner, as opposed to simply counting votes. Various parameters, weighting percentages, etc. can be set up. Thus, the winner is selected based on "points" that the algorithm computes, not actual voter votes. Below is a screenshot



The fact that we observed raw vote data coming directly that includes decimal places establishes selection by an algorithm, and not individual voter's choice. Otherwise, votes would be solely represented as whole numbers (votes cannot possibly be added up and have decimal places reported). Below is an excerpt from the direct feed to news outlets showing actual calculated votes with decimals.

state	timestamp	eevp	trump	biden	TV	BV
wisconsin	2020-11-04T03:22:01Z	32	0.511	0.472	593876.535	548551.32
wisconsin	2020-11-04T03:24:08Z	33	0.511	0.472	601617.163	555701.176
wisconsin	2020-11-04T03:27:32Z	34	0.5	0.483	615621.5	594690.369

wisconsin	2020-11-04T03:28:57Z	35	0.5	0.483	635870.5	614250.903
wisconsin	2020-11-04T03:30:09Z	35	0.5	0.483	636620.5	614975.403
wisconsin	2020-11-04T03:30:28Z	36	0.502	0.481	649562.9	622389.95
wisconsin	2020-11-04T03:30:52Z	36	0.503	0.481	651861.844	623350.988
wisconsin	2020-11-04T03:35:25Z	37	0.503	0.48	661114.026	630884.16

14. Based on the foregoing, I believe these statistical anomalies and impossibilities compels the conclusion to a reasonable degree of professional certainty that the vote count in Wisconsin, in particular for candidates for President, contain at least 119,430 (Para. 13) up to 384,085 (Para. 15) illegal votes that must be disregarded. In my opinion, it is not possible at this time to determine the true results of the Wisconsin vote for President of the United States.

I declare, under the penalty of perjury, that the forgoing is correct.

Russell James Ramsland, Jr.

11/30/2020
Date

JOINT
CYBERSECURITY
ADVISORY

TLP:WHITE

Product ID: AA20-304A

October 30, 2020

Iranian Advanced Persistent Threat Actor Identified Obtaining Voter Registration Data

SUMMARY

This advisory uses the MITRE Adversarial Tactics, Techniques, and Common Knowledge (ATT&CK®) framework. See the ATT&CK for Enterprise framework for all referenced threat actor techniques.

This joint cybersecurity advisory was coauthored by the Cybersecurity and Infrastructure Security Agency (CISA) and the Federal Bureau of Investigation (FBI). CISA and the FBI are aware of an Iranian advanced persistent threat (APT) actor targeting U.S. state websites—to include election websites. CISA and the FBI assess this actor is responsible for the mass dissemination of voter intimidation emails to U.S. citizens and the dissemination of U.S. election-related disinformation in mid-October 2020.[1] (Reference FBI FLASH message ME-000138-TT, disseminated October 29, 2020). Further evaluation by CISA and the FBI has identified the targeting of U.S. state election websites was an intentional effort to influence and interfere with the 2020 U.S. presidential election.

TECHNICAL DETAILS

Analysis by CISA and the FBI indicates this actor scanned state websites, to include state election websites, between September 20 and September 28, 2020, with the Acunetix vulnerability scanner (*Active Scanning: Vulnerability Scanning* [T1595.002]). Acunetix is a widely used and legitimate web scanner, which has been used by threat actors for nefarious purposes. Organizations that do not regularly use Acunetix should monitor their logs for any activity from the program that originates from IP addresses provided in this advisory and consider it malicious reconnaissance behavior.

Additionally, CISA and the FBI observed this actor attempting to exploit websites to obtain copies of voter registration data between September 29 and October 17, 2020 (*Exploit Public-Facing*

[1] See FBI FLASH, ME-000138-TT, disseminated 10/29/20, https://www.ic3.gov/Media/News/2020/201030.pdf. This disinformation (hereinafter, "the propaganda video") was in the form of a video purporting to misattribute the activity to a U.S. domestic actor and implies that individuals could cast fraudulent ballots, even from overseas. https://www.odni.gov/index.php/newsroom/press-releases/item/2162-dni-john-ratcliffe-s-remarks-at-press-conference-on-election-security.

Exhibit 18

Application [T1190]). This includes attempted exploitation of known vulnerabilities, directory traversal, Structured Query Language (SQL) injection, web shell uploads, and leveraging unique flaws in websites.

CISA and the FBI can confirm that the actor successfully obtained voter registration data in at least one state. The access of voter registration data appeared to involve the abuse of website misconfigurations and a scripted process using the cURL tool to iterate through voter records. A review of the records that were copied and obtained reveals the information was used in the propaganda video.

CISA and FBI analysis of identified activity against state websites, including state election websites, referenced in this product cannot all be fully attributed to this Iranian APT actor. FBI analysis of the Iranian APT actor's activity has identified targeting of U.S. elections' infrastructure (*Compromise Infrastructure* [T1584]) within a similar timeframe, use of IP addresses and IP ranges – including numerous virtual private network (VPN) service exit nodes – which correlate to this Iran APT actor (*Gather Victim Host Information* [T1592])), and other investigative information.

Reconnaissance

The FBI has information indicating this Iran-based actor attempted to access PDF documents from state voter sites using advanced open-source queries (*Search Open Websites and Domains* [T1539]). The actor demonstrated interest in PDFs hosted on URLs with the words "vote" or "voter" and "registration." The FBI identified queries of URLs for election-related sites.

The FBI also has information indicating the actor researched the following information in a suspected attempt to further their efforts to survey and exploit state election websites.

- YOURLS exploit
- Bypassing ModSecurity Web Application Firewall
- Detecting Web Application Firewalls
- SQLmap tool

Acunetix Scanning

CISA's analysis identified the scanning of multiple entities by the Acunetix Web Vulnerability scanning platform between September 20 and September 28, 2020 (*Active Scanning: Vulnerability Scanning* [T1595.002]).

The actor used the scanner to attempt SQL injection into various fields in `/registration/registration/details` with status codes 404 or 500:

```
/registration/registration/details?addresscity=-1 or 3*2<(0+5+513-513) --
&addressstreet1=xxxxx&btnbeginregistration=begin voter
registration&btnnextelectionworkerinfo=next&btnnextpersonalinfo=next&btnnextresde
tails=next&btnnextvoterinformation=next&btnsubmit=submit&chkageverno=on&chkagever
yes=on&chkcitizenno=on&chkcitizenyes=on&chkdisabledvoter=on&chkelectionworker=on&
chkresprivate=1&chkstatecancel=on&dlnumber=1&dob=xxxx/x/x&email=sample@email.tst&
```

Exhibit 18

```
firstname=xxxxx&gender=radio&hdnaddresscity=&hdngender=&last4ssn=xxxxx&lastname=x
xxxxinjjeuee&mailaddresscountry=sample@xxx.xxx&mailaddressline1=sample@email.tst&
mailaddressline2=sample@xxx.xxx&mailaddressline3=sample@xxx.xxx&mailaddressstate=
aa&mailaddresszip=sample@xxxx.xxx&mailaddresszipex=sample@xxx.xxx&middlename=xxxx
x&overseas=1&partycode=a&phoneno1=xxx-xxx-xxxx&phoneno2=xxx-xxx-
xxxx&radio=consent&statecancelcity=xxxxxxx&statecancelcountry=usa&statecancelstat
e=XXaa&statecancelzip=xxxxx&statecancelzipext=xxxxx&suffixname=esq&txtmailaddress
city=sample@xxx.xxx
```

Requests

The actor used the following requests associated with this scanning activity.

```
2020-09-26 13:12:56 x.x.x.x GET /x/x v[$acunetix]=1 443 - x.x.x.x
Mozilla/5.0+(Windows+NT+6.1;+WOW64)+AppleWebKit/537.21+(KHTML,+like+Gecko)+Chrome/41.
0.2228.0+Safari/537.21 - 200 0 0 0
```

```
2020-09-26 13:13:19 X.X.x.x GET /x/x voterid[$acunetix]=1 443 - x.x.x.x
Mozilla/5.0+(Windows+NT+6.1;+WOW64)+AppleWebKit/537.21+(KHTML,+like+Gecko)+Chrome/41.
0.2228.0+Safari/537.21 - 200 0 0 1375
```

```
2020-09-26 13:13:18 .X.x.x GET /x/x voterid=;print(md5(acunetix_wvs_security_test));
443 - X.X.x.x
```

User Agents Observed

CISA and FBI have observed the following user agents associated with this scanning activity.

```
Mozilla/5.0+(Windows+NT+6.1;+WOW64)+AppleWebKit/537.21+(KHTML,+like+Gecko)+Chrome
/41.0.2228.0+Safari/537.21 - 500 0 0 0
```

```
Mozilla/5.0+(X11;+U;+Linux+x86_64;+en-
US;+rv:1.9b4)+Gecko/2008031318+Firefox/3.0b4
```

```
Mozilla/5.0+(X11;+U;+Linux+i686;+en-
US;+rv:1.8.1.17)+Gecko/20080922+Ubuntu/7.10+(gutsy)+Firefox/2.0.0.17
```

Exfiltration

Obtaining Voter Registration Data

Following the review of web server access logs, CISA analysts, in coordination with the FBI, found instances of the cURL and FDM User Agents sending GET requests to a web resource associated with voter registration data. The activity occurred between September 29 and October 17, 2020. Suspected scripted activity submitted several hundred thousand queries iterating through voter

identification values, and retrieving results with varying levels of success [*Gather Victim Identity Information* (T1589)]. A sample of the records identified by the FBI reveals they match information in the aforementioned propaganda video.

Requests

The actor used the following requests.

```
2020-10-17 13:07:51 x.x.x.x GET /x/x voterid=XXXX1 443 - x.x.x.x curl/7.55.1 - 200 0 0 1406
```

```
2020-10-17 13:07:55 x.x.x.x GET /x/x voterid=XXXX2 443 - x.x.x.x curl/7.55.1 - 200 0 0 1390
```

```
2020-10-17 13:07:58 x.x.x.x GET /x/x voterid=XXXX3 443 - x.x.x.x curl/7.55.1 - 200 0 0 1625
```

```
2020-10-17 13:08:00 x.x.x.x GET /x/x voterid=XXXX4 443 - x.x.x.x curl/7.55.1 - 200 0 0 1390
```

Note: incrementing `voterid` values in `cs_uri_query field`

User Agents

CISA and FBI have observed the following user agents.

```
FDM+3.x
```

```
curl/7.55.1
```

```
Mozilla/5.0+(Windows+NT+6.1;+WOW64)+AppleWebKit/537.21+(KHTML,+like+Gecko)+Chrome/41.0.2228.0+Safari/537.21 - 500 0 0 0
Mozilla/5.0+(X11;+U;+Linux+x86_64;+en-US;+rv:1.9b4)+Gecko/2008031318+Firefox/3.0b4
```

See figure 1 below for a timeline of the actor's malicious activity.

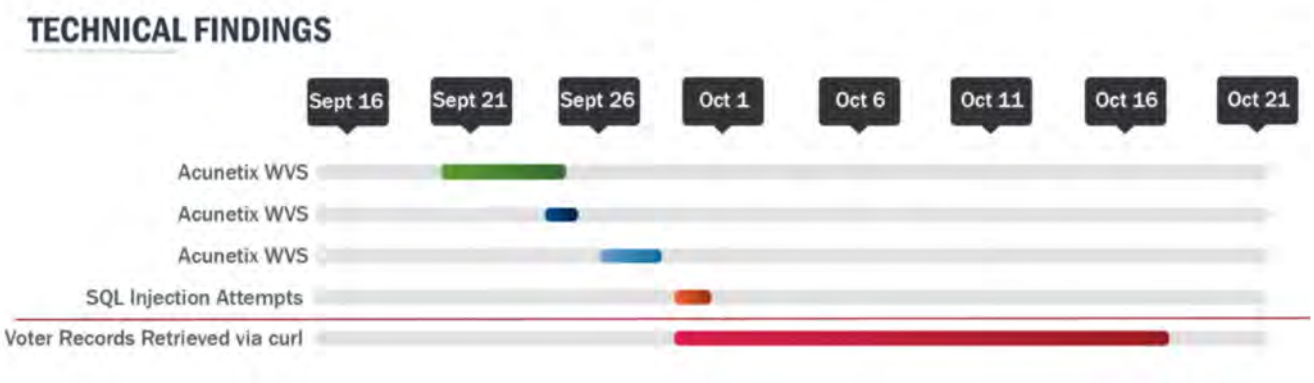


Figure 1: Overview of malicious activity

MITIGATIONS

Detection

Acunetix Scanning

Organizations can identify Acunetix scanning activity by using the following keywords while performing log analysis.

- `$acunetix`
- `acunetix_wvs_security_test`

Indicators of Compromise

For a downloadable copy of IOCs, see AA20-304A.stix.

Disclaimer: *Many of the IP addresses included below likely correspond to publicly available VPN services, which can be used by individuals all over the world. Although this creates the potential for false positives, any activity listed should warrant further investigation. The actor likely uses various IP addresses and VPN services.*

The following IPs have been associated with this activity.

- 102.129.239[.]185 (Acunetix Scanning)
- 143.244.38[.]60 (Acunetix Scanning and cURL requests)
- 45.139.49[.]228 (Acunetix Scanning)
- 156.146.54[.]90 (Acunetix Scanning)
- 109.202.111[.]236 (cURL requests)
- 185.77.248[.]17 (cURL requests)
- 217.138.211[.]249 (cURL requests)
- 217.146.82[.]207 (cURL requests)
- 37.235.103[.]85 (cURL requests)
- 37.235.98[.]64 (cURL requests)
- 70.32.5[.]96 (cURL requests)

- 70.32.6[.]20 (cURL requests)
- 70.32.6[.]8 (cURL requests)
- 70.32.6[.]97 (cURL requests)
- 70.32.6[.]98 (cURL requests)
- 77.243.191[.]21 (cURL requests and FDM+3.x (Free Download Manager v3) enumeration/iteration)
- 92.223.89[.]73 (cURL requests)

CISA and the FBI are aware the following IOCs have been used by this Iran-based actor. These IP addresses facilitated the mass dissemination of voter intimidation email messages on October 20, 2020.

- 195.181.170[.]244 (Observed September 30 and October 20, 2020)
- 102.129.239[.]185 (Observed September 30, 2020)
- 104.206.13[.]27 (Observed September 30, 2020)
- 154.16.93[.]125 (Observed September 30, 2020)
- 185.191.207[.]169 (Observed September 30, 2020)
- 185.191.207[.]52 (Observed September 30, 2020)
- 194.127.172[.]98 (Observed September 30, 2020)
- 194.35.233[.]83 (Observed September 30, 2020)
- 198.147.23[.]147 (Observed September 30, 2020)
- 198.16.66[.]139(Observed September 30, 2020)
- 212.102.45[.]3 (Observed September 30, 2020)
- 212.102.45[.]58 (Observed September 30, 2020)
- 31.168.98[.]73 (Observed September 30, 2020)
- 37.120.204[.]156 (Observed September 30, 2020)
- 5.160.253[.]50 (Observed September 30, 2020)
- 5.253.204[.]74 (Observed September 30, 2020)
- 64.44.81[.]68 (Observed September 30, 2020)
- 84.17.45[.]218 (Observed September 30, 2020)
- 89.187.182[.]106 (Observed September 30, 2020)
- 89.187.182[.]111 (Observed September 30, 2020)
- 89.34.98[.]114 (Observed September 30, 2020)
- 89.44.201[.]211 (Observed September 30, 2020)

Recommendations

The following list provides recommended self-protection mitigation strategies against cyber techniques used by advanced persistent threat actors:

- Validate input as a method of sanitizing untrusted input submitted by web application users. Validating input can significantly reduce the probability of successful exploitation by providing

Exhibit 18

protection against security flaws in web applications. The types of attacks possibly prevented include SQL injection, Cross Site Scripting (XSS), and command injection.

- Audit your network for systems using Remote Desktop Protocol (RDP) and other internet-facing services. Disable unnecessary services and install available patches for the services in use. Users may need to work with their technology vendors to confirm that patches will not affect system processes.
- Verify all cloud-based virtual machine instances with a public IP, and avoid using open RDP ports, unless there is a valid need. Place any system with an open RDP port behind a firewall and require users to use a VPN to access it through the firewall.
- Enable strong password requirements and account lockout policies to defend against brute-force attacks.
- Apply multi-factor authentication, when possible.
- Maintain a good information back-up strategy by routinely backing up all critical data and system configuration information on a separate device. Store the backups offline, verify their integrity, and verify the restoration process.
- Enable logging and ensure logging mechanisms capture RDP logins. Keep logs for a minimum of 90 days and review them regularly to detect intrusion attempts.
- When creating cloud-based virtual machines, adhere to the cloud provider's best practices for remote access.
- Ensure third parties that require RDP access follow internal remote access policies.
- Minimize network exposure for all control system devices. Where possible, critical devices should not have RDP enabled.
- Regulate and limit external to internal RDP connections. When external access to internal resources is required, use secure methods, such as a VPNs. However, recognize the security of VPNs matches the security of the connected devices.
- Use security features provided by social media platforms; use strong passwords, change passwords frequently, and use a different password for each social media account.
- See CISA's Tip on Best Practices for Securing Election Systems for more information.

General Mitigations

Keep applications and systems updated and patched

Apply all available software updates and patches and automate this process to the greatest extent possible (e.g., by using an update service provided directly from the vendor). Automating updates and patches is critical because of the speed of threat actors to create new exploits following the release of a patch. These "N-day" exploits can be as damaging as zero-day exploits. Ensure the authenticity and integrity of vendor updates by using signed updates delivered over protected links. Without the rapid and thorough application of patches, threat actors can operate inside a defender's patch cycle.[2]

[2] NSA "NSA'S Top Ten Cybersecurity Mitigation Strategies" https://www.nsa.gov/Portals/70/documents/what-we-do/cybersecurity/professional-resources/csi-nsas-top10-cybersecurity-mitigation-strategies.pdf

Exhibit 18

Additionally, use tools (e.g., the OWASP Dependency-Check Project tool[3]) to identify the publicly known vulnerabilities in third-party libraries depended upon by the application.

Scan web applications for SQL injection and other common web vulnerabilities

Implement a plan to scan public-facing web servers for common web vulnerabilities (e.g., SQL injection, cross-site scripting) by using a commercial web application vulnerability scanner in combination with a source code scanner.[4] Fixing or patching vulnerabilities after they are identified is especially crucial for networks hosting older web applications. As sites get older, more vulnerabilities are discovered and exposed.

Deploy a web application firewall

Deploy a web application firewall (WAF) to prevent invalid input attacks and other attacks destined for the web application. WAFs are intrusion/detection/prevention devices that inspect each web request made to and from the web application to determine if the request is malicious. Some WAFs install on the host system and others are dedicated devices that sit in front of the web application. WAFs also weaken the effectiveness of automated web vulnerability scanning tools.

Deploy techniques to protect against web shells

Patch web application vulnerabilities or fix configuration weaknesses that allow web shell attacks, and follow guidance on detecting and preventing web shell malware.[5] Malicious cyber actors often deploy web shells—software that can enable remote administration—on a victim's web server. Malicious cyber actors can use web shells to execute arbitrary system commands commonly sent over HTTP or HTTPS. Attackers often create web shells by adding or modifying a file in an existing web application. Web shells provide attackers with persistent access to a compromised network using communications channels disguised to blend in with legitimate traffic. Web shell malware is a long-standing, pervasive threat that continues to evade many security tools.

Use multi-factor authentication for administrator accounts

Prioritize protection for accounts with elevated privileges, remote access, or used on high-value assets.[6] Use physical token-based authentication systems to supplement knowledge-based factors such as passwords and personal identification numbers (PINs).[7] Organizations should migrate away from single-factor authentication, such as password-based systems, which are subject to poor user

[3] https://owasp.org/www-project-dependency-check/
[4] NSA "Defending Against the Exploitation of SQL Vulnerabilities to Compromise a Network" https://apps.nsa.gov/iaarchive/library/ia-guidance/tech-briefs/defending-against-the-exploitation-of-sql-vulnerabilities-to.cfm
[5] NSA & ASD "CyberSecurity Information: Detect and Prevent Web Shell Malware" https://media.defense.gov/2020/Jun/09/2002313081/-1/-1/0/CSI-DETECT-AND-PREVENT-WEB-SHELL-MALWARE-20200422.PDF
[6] https://us-cert.cisa.gov/cdm/event/Identifying-and-Protecting-High-Value-Assets-Closer-Look-Governance-Needs-HVAs
[7] NSA "NSA'S Top Ten Cybersecurity Mitigation Strategies" https://www.nsa.gov/Portals/70/documents/what-we-do/cybersecurity/professional-resources/csi-nsas-top10-cybersecurity-mitigation-strategies.pdf

Exhibit 18

choices and more susceptible to credential theft, forgery, and password reuse across multiple systems.

Remediate critical web application security risks

First, identify and remediate critical web application security risks. Next, move on to other less critical vulnerabilities. Follow available guidance on securing web applications.[8,9,10]

How do I respond to unauthorized access to election-related systems?

Implement your security incident response and business continuity plan

It may take time for your organization's IT professionals to isolate and remove threats to your systems and restore normal operations. In the meantime, take steps to maintain your organization's essential functions according to your business continuity plan. Organizations should maintain and regularly test backup plans, disaster recovery plans, and business continuity procedures.

Contact CISA or law enforcement immediately

To report an intrusion and to request incident response resources or technical assistance, contact CISA (Central@cisa.gov or 888-282-0870) or the FBI through a local field office or the FBI's Cyber Division (CyWatch@ic.fbi.gov or 855-292-3937).

RESOURCES

- CISA Tip: Best Practices for Securing Election Systems
- CISA Tip: Securing Voter Registration Data
- CISA Tip: Website Security
- CISA Tip: Avoiding Social Engineering and Phishing Attacks
- CISA Tip: Securing Network Infrastructure Devices
- Joint Advisory: Technical Approaches to Uncovering and Remediating Malicious Activity
- CISA Insights: Actions to Counter Email-Based Attacks on Election-related Entities
- FBI and CISA Public Service Announcement (PSA): Spoofed Internet Domains and Email Accounts Pose Cyber and Disinformation Risks to Voters
- FBI and CISA PSA: Foreign Actors Likely to Use Online Journals to Spread Disinformation Regarding 2020 Elections
- FBI and CISA PSA: Distributed Denial of Service Attacks Could Hinder Access to Voting Information, Would Not Prevent Voting
- FBI and CISA PSA: False Claims of Hacked Voter Information Likely Intended to Cast Doubt on Legitimacy of U.S. Elections FBI and CISA PSA: Cyber Threats to Voting Processes Could Slow But Not Prevent Voting

[8] NSA "Building Web Applications – Security for Developers" https://apps.nsa.gov/iaarchive/library/ia-guidance/security-tips/building-web-applications-security-recommendations-for.cfm
[9] https://owasp.org/www-project-top-ten/
[10] https://cwe.mitre.org/top25/archive/2020/2020_cwe_top25.html

- FBI and CISA PSA: Foreign Actors and Cybercriminals Likely to Spread Disinformation Regarding 2020 Election Results

Declaration of [redacted] Ph.D

November 30, 2020

Pursuant to 28 U.S.C Section 1746, I, [redacted], make the following declaration.

1. I am over the age of 21 years and I am under no legal disability, which would prevent me from giving this declaration.
2. [redacted] has a Ph.D in Electrical Engineering from the University of California at Davis and a Masters degree in Mathematics from the University of California at Berkeley. I have been employed, for over 28 years, in the signal processing and wireless signal processing domain, with an emphasis on statistical signal processing. I have published numerous journal and conference articles. Additionally, I have held Top Secret and SAP clearances and I am an inventor of nearly 30 patents, one of which has over 1000 citations in the field of MIMO communications (Multiple Input Multiple Output).
3. I reside at [redacted].
4. Given the data sources referenced in this document, I assert that in Georgia, Pennsylvania and the city of Milwaukee, a simple statistical model of vote fraud is a better fit to the sudden jump in Biden vote percentages among absentee ballots received later in the counting process of the 2020 presidential election. It is also a better fit when constrained to a single large Metropolitan area such as Milwaukee..
5. Given the same data sources, I also assert that Milwaukee precincts exhibit statistical anomalies that are not normally present in fair elections.. The fraud model hypothesis in Milwaukee has a posterior probability of 100% to machine precision. This model predicts 105,639 fraudulent Biden ballots in Milwaukee.
6. I assert that the data suggests aberrant statistical anomalies in the vote counts in Michigan, when observed as a function of time.

Signature:

Supporting evidence for the assertions in (4) and 5 is provided in the following pages.

1 Impact of Fraud on the Election

In the analysis that follows, it is possible to obtain rough estimates on how vote fraud could possibly have effected the election. In Georgia, there is evidence that votes were actually switched from Trump to Biden. As many as 51,110 Biden votes were fraudulent and as many as 51,110 votes could be added to Trump. An audit to determine vote switching will be more difficult, since it is likely the Trump ballots have been destroyed in Georgia, based on reports of ballots being shredded there. If instead we presume that Bidens fraudulent votes were simply added to the totals, then we estimate that 104,107 ballots should be removed from Biden's totals.

In Pennsylvania, from just one batch of absentee ballots, approximately 72668 of them are estimated to be fraudulent Biden votes. Our analysis of Milwaukee shows that 105,639 Biden ballots could be fraudulent. Moreover there is evidence of vote switching here, which might give as many as 42365 additional ballots to Trump, and remove the same from Biden.

Michigan yields an estimate of 237,140 fraudulent Biden votes added to the total, using conservative estimates of the Biden percentage among the new ballots.

2 Statistical Model

The simplest statistical model for computing the probabilities for an election outcome is a binomial distribution, which assigns a probability p for a given person within the population to select a candidate. If we assume that each person chooses their candidate independently, then we obtain the Binomial distribution in the form,

$$P(k|N) \equiv {}_NC_k p^k \left(1-p\right)^{N-k}, \tag{1}$$

where $P(k|N)$ is the probability that you observe k votes for a candidate in a population of N voters, and where ${}_NC_k$ is the number of ways to choose k people out of a group of N people.

For larger N, the binomial distribution can be approximated by a Gaussian distribution, which is used in the election fraud analysis in [1]. The chief reason for this is the difficulty of computing $P(k|N)$ for large N and k. However this problem can be overcome by computing the probabilities in the log domain and using the log beta function to compute ${}_NC_k$.

For this analysis it is more useful to compute the probabilities as a function of f the observed fraction of the candidate's votes. In this formulation we have $k = Nf$, and $N - k = N\left(1-f\right)$, and therefore we define the fractional probability as,

$$B_N(f) \equiv {}_NC_{Nf}\, p^{Nf} \left(1-p\right)^{N(1-f)}. \tag{2}$$

2.1 Fraud Model

To model voting fraud we assume a fixed fraction α of votes are given to the cheater. The pool of available voters who actually voted is now $N(1-\alpha)$. The fraction who actually voted for the cheater is given by $f-\alpha$. The probability that the fraction f voters reported for the cheater, with the fraction α stolen, can therefore be written as,

$$C_{N,\alpha}(f) \equiv B_{N(1-\alpha)}(f-\alpha). \tag{3}$$

This is similar to the fraud model used in the election fraud analysis given in [1]. We use the Binomial distribution directly, rather than the Gaussian distribution, since it should be more accurate for small N, k or f.

2.2 Posterior Probability of Fraud Model

A hypothesis test can now be set up between the standard voting statistics of (2) vs the statistics of the fraud model (3). If we use Bayesian inference we can compute an estimate of the posterior probability of the fraud model. This can be written as,

$$P(F|f) = \frac{C_{N,\alpha}(f)p_F}{C_{N,\alpha}(f)p_F + B_N(f)(1-p_F)},$$

where p_F is the prior probability of fraud. In our investigation we assume fraud is unlikely and set $p_F = 0.01$.

3 Analysis of Absentee Ballots in the 2020 Election

For this analysis we extracted data from the all_states_timeseries.csv file, which can be found at the internet url: https://wiki.audittheelection.com/index.php/Datasets. We look at the absentee ballot results near the beginning of the time series and then compare it to the end or the middle of the period, after a sufficient enough ballots were added.

For the models in Section 2 we assign the probability p of a Biden vote using the final data. This assumption is actually more favorable to the cheater. As mentioned earlier we set the prior probability of fraud to $p_F = 0.01$, and the cheating fraction, α, is set to $\alpha = f - p$, where f is the observed Biden fraction in the newly added ballots. This isolates the statistics of the added ballots from the final observed statistics.

We focus on the absentee ballots, because they are dominated by large democratic cities and there is no obvious reason why those statistics should change appreciably over time. Furthermore it should be noted that the start time for this data, mid day Nov. 4., was well after some of the larger absentee ballot dumps occured.

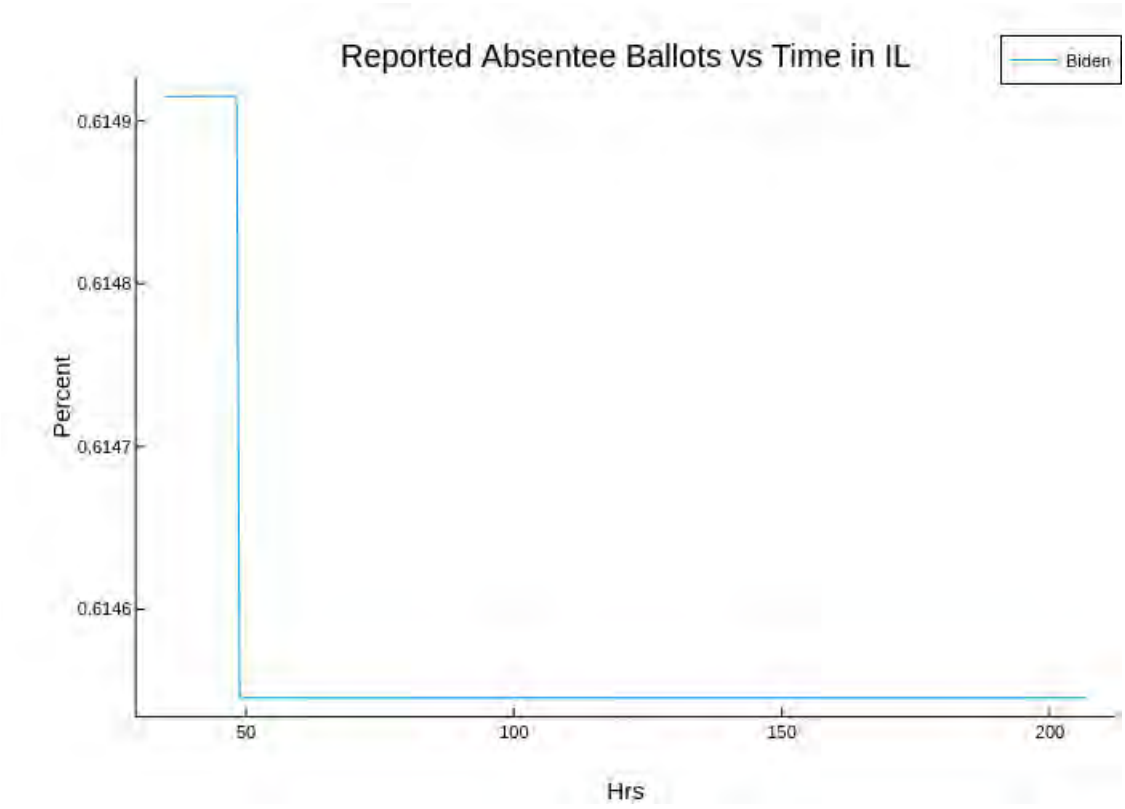


Figure 1: Reported Biden Fraction In Illinois vs Time

3.1 Control Case Illinois

We choose Illinois as a control case, since it has a significant number of absentee ballots that were counted later and provides a fairly clean baseline. The reported Biden fraction vs time is given in Figure 1.

As we can see there is not much change in the Biden statistics from the initial 601,714 absentee ballots when compared with the 54,117 ballots that were added. This is further shown by the bar chart in Figure 2.

Using our formula for the posterior probability of fraud in (3) we obtain the probability that the fraud model is correct of 6.5%. This lends good support to the idea that the Illinois absentee ballots were counted fairly.

3.2 Analysis of Georgia Absentee Ballots

The Georgia absentee ballot count started at 3,701,005 and 303,988 ballots were added. The Biden fraction among absentee ballots as a function of time is shown in Figure (3). This plot shows a statistical abnormality in that the

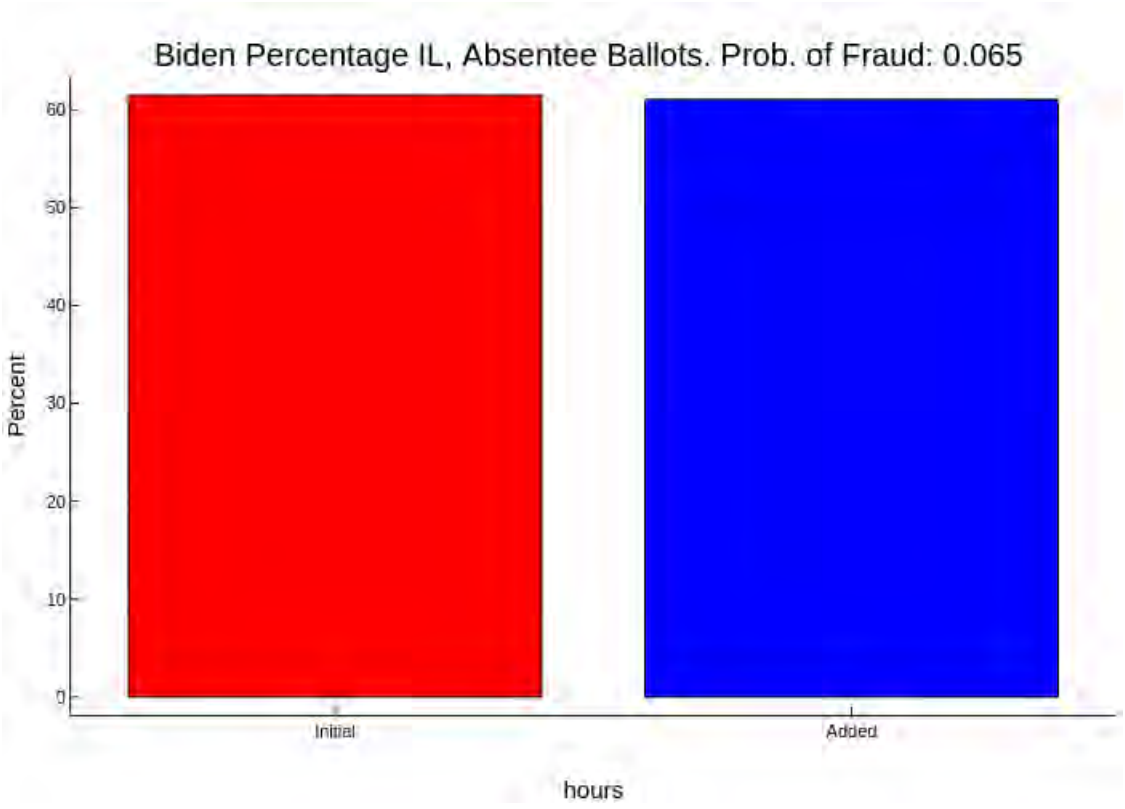


Figure 2: Before and Added Biden Fraction

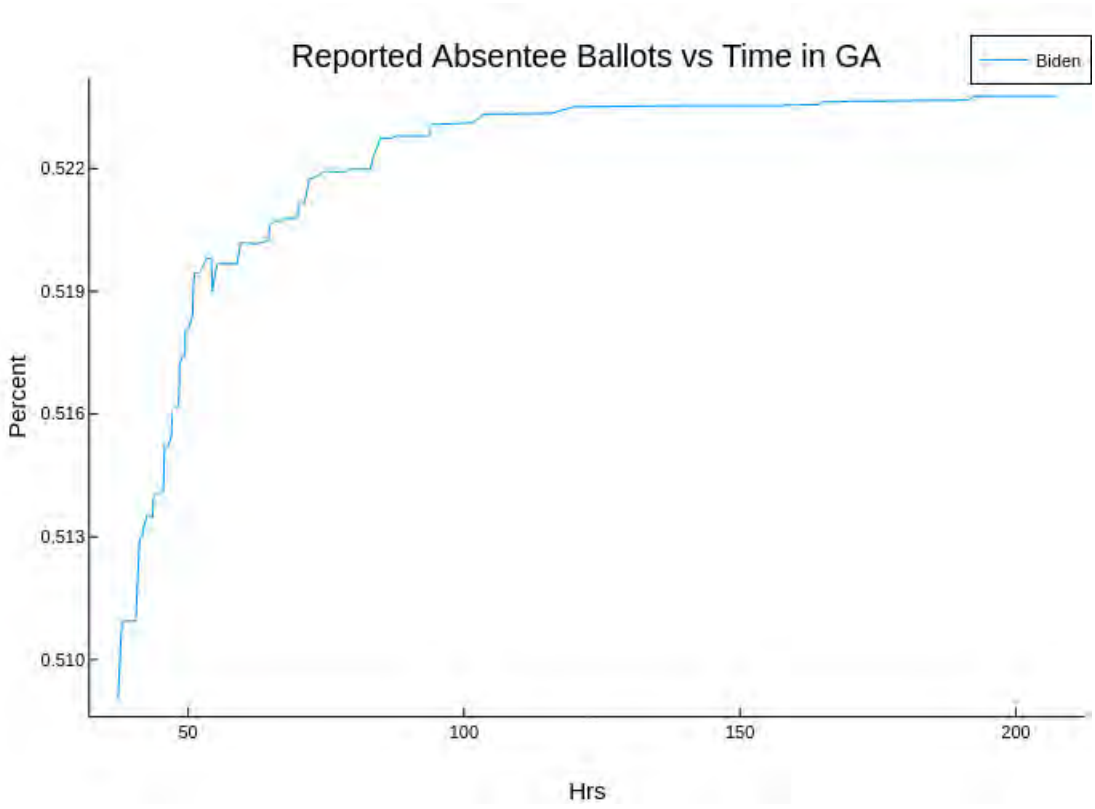


Figure 3: Georgia Absentee Ballots vs Time: (Biden Fraction)

Biden fraction appears to always be increasing. This is statistically unlikely and is not typically seen in fair elections. Normally you would see a mixture of votes of Biden and his opponents, and would see random deviation around the asymptote.

We investigate this phenomenon more fully in Figure (4). The added ballots have a Biden percentage of around 70%, while the initial statitics were at 50%. This is a very large jump for such a large sample size and seems very unlikely. Indeed the probability that the fraud model is correct is 100%, up to the precision of double floating point arithmetic.

Assuming that the prior absentee ballot distribution is the correct one, we can form a simple prediction for how many of Biden's ballots were fraudulent. Let $N_1 = 303,988$, the number of ballots added, and let $B = 189,497$ be the number of Biden votes in this new batch. If the fraction of Biden votes should actually be $f = 0.509$. Let x be the proposed number of fraudulent Biden votes,

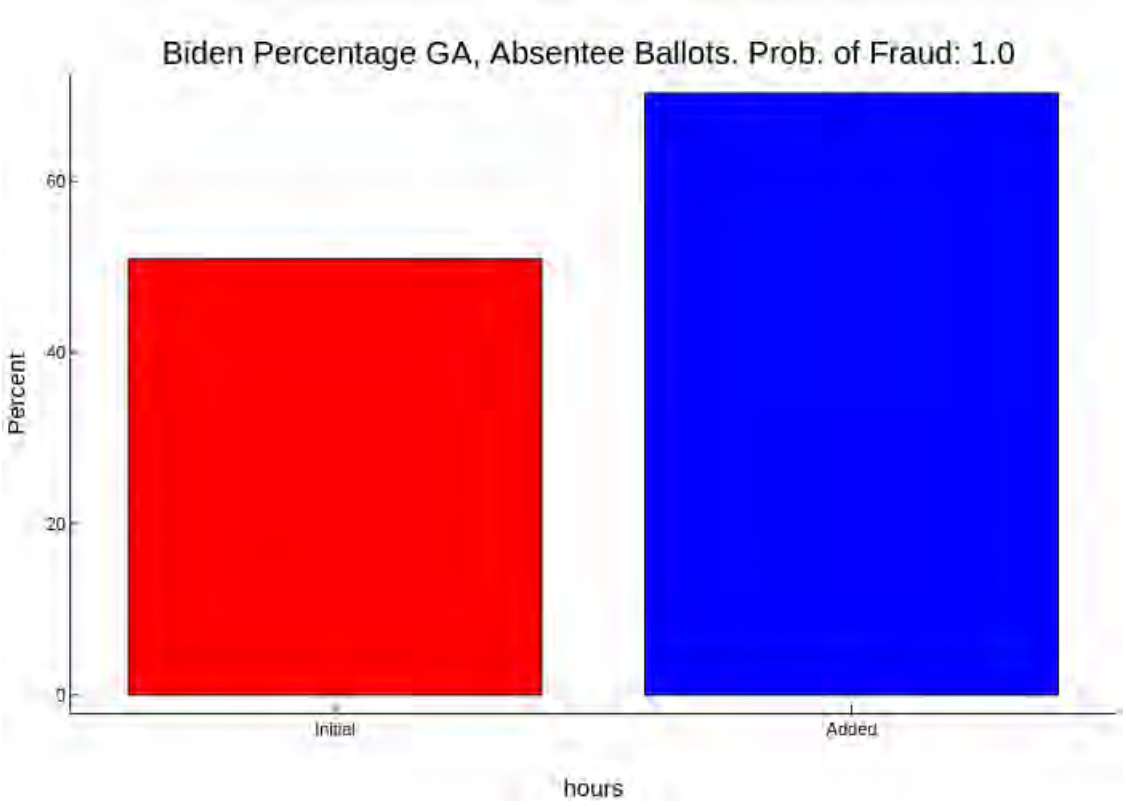


Figure 4: Before and After Biden Fraction in Georgia

then we have,

$$\frac{B-x}{N_1-x} = f$$
$$x = \frac{B-N_1 f}{1-f}. \tag{4}$$

In the case that votes were actually switched from Trump to Biden, then the formula becomes,

$$\frac{B-x}{N_1} = f$$
$$x = B - N_1 f$$

This would suggest that 104,107 ballots were fraudulently manufactured for Biden. If we presume that actually those ballots were switched from Trump to Biden then as many as 19% of the new absentee ballots for Biden were fraudulent, which totals around 51,110 ballots that should be removed from Biden's totals and added to Trump. We shall see in Section 6, that there is substantial evidence that some Trump votes were actually switched to Biden votes.

3.3 Analysis of Pennsylvania Absentee Ballots

The Pennsylvania absentee ballot count started at 785,473 and 319,741 ballots were added at 39 hours after the start of the data record. The Biden fraction among absentee ballots as a function of time is shown in Figure (5). This plot shows some oddities in that the Biden fraction fluctuates with large deviations.

In Figure (6) we see the initial Biden percentage compared with the Biden percentage of the added ballots over the first 39 hours. The added ballots have a Biden percentage of around 83%, while the initial statistics were at 78%. This is a very large jump for such a large sample size and seems very unlikely. Indeed the probability that the fraud model is correct is 100%, up to the precision of double floating point arithmetic.

If we just examine the initial large batch of votes among the absentee ballots, we see an unexplained jump of 5% for Biden. Although it is likely that most of the fraud, if any, occurred earlier in the vote count, just this batch of ballots suggests that approximately 72668 Biden ballots are fraudulent. If we presume that the votes were stolen from Trumps votes, then 15987 Biden ballots are fraudulent and should be added to Trump's total.

4 Analysis of Milwaukee County in Wisconsin

We now switch our analysis to a data set that contains precinct data for Milwaukee county. The data was obtained from the twitter acount of @shylockh, who derived his sources from the New York Times and in some cases from

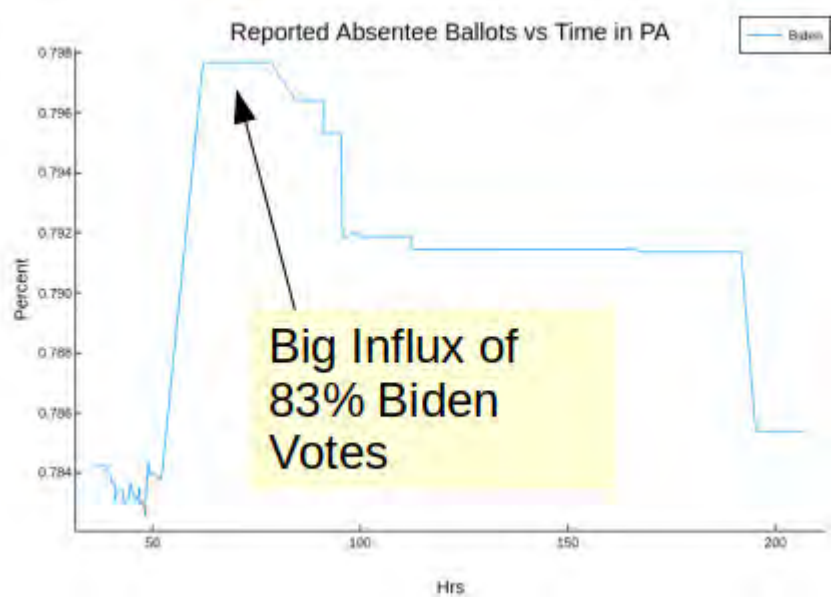


Figure 5: Pennsylvania Absentee Ballots vs Time: (Biden Fraction)

the unofficial precinct reports from the Wisconsin elections commision website. We examine vote percentages for ballots added between Wednesday morning, 11/04/2020 and Thursday night 11/05/2020.

This data set gives the total vote count by party affiliation. Because the data set is confined to Milwaukee, we can assume that the statistics should not be time varying. The voting pool here is highly partisan in favor of democrats and we don't expect any significant difference in the voting percentage, especially since a large number of absentee ballots were already counted by Wednesday morning.

4.1 Analysis of Milwaukee County Democrat results

The percentage of democrat voters increases by 15% among the ballots added on Wednesday and Thursday. On Wednesday morning Milwaukee had received 165,776 ballots. By Thursday evening 458,935 ballots were received, adding 293,159 ballots.

In Figure 7 we see the large deviation in democrat percentage between the Wednesday morning and those added by Thursday evening. This too causes the posterior probability of the fraud model to be 100% to machine precision.

Assuming that there was fraud, we estimate that 105,639 fraudulent Biden ballots were added between Wednesday and Thursday of 11/05/2020 in Milwaukee alone. However as we shall see below, many of these votes may well have been switched from Trump to Biden, which would also give Trump an additional

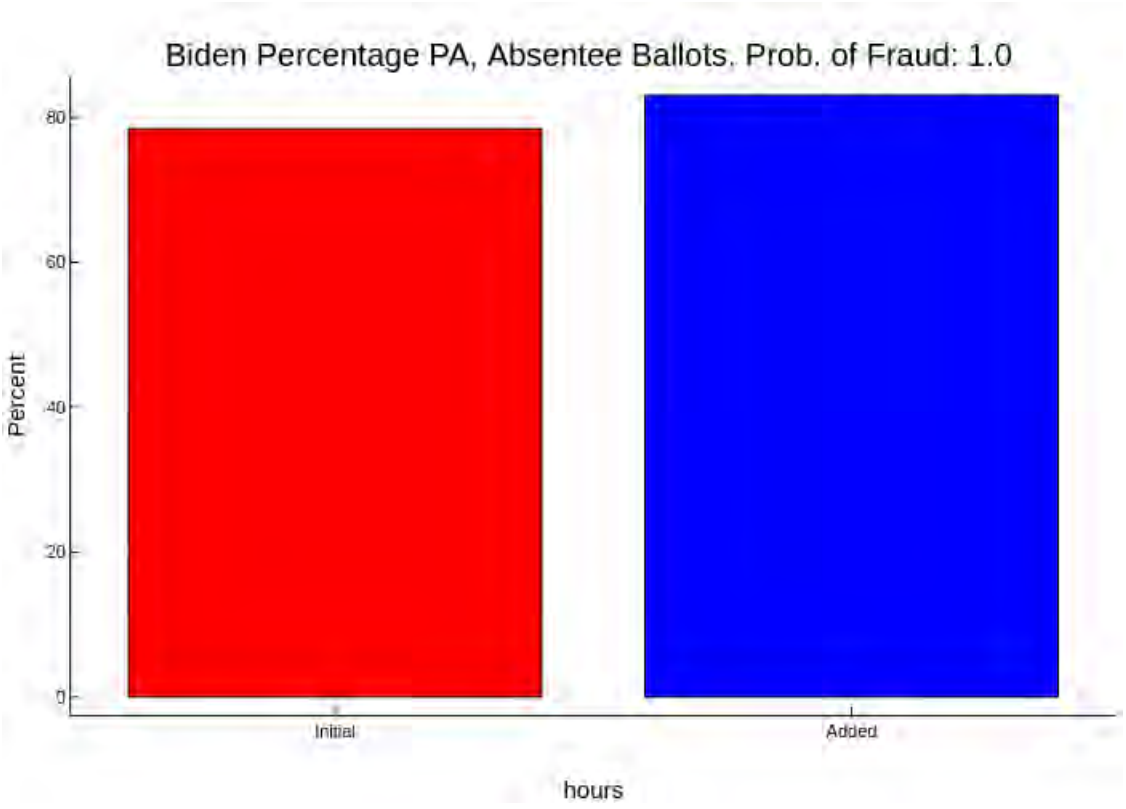


Figure 6: Before and After Biden Fraction in Pennsylvania

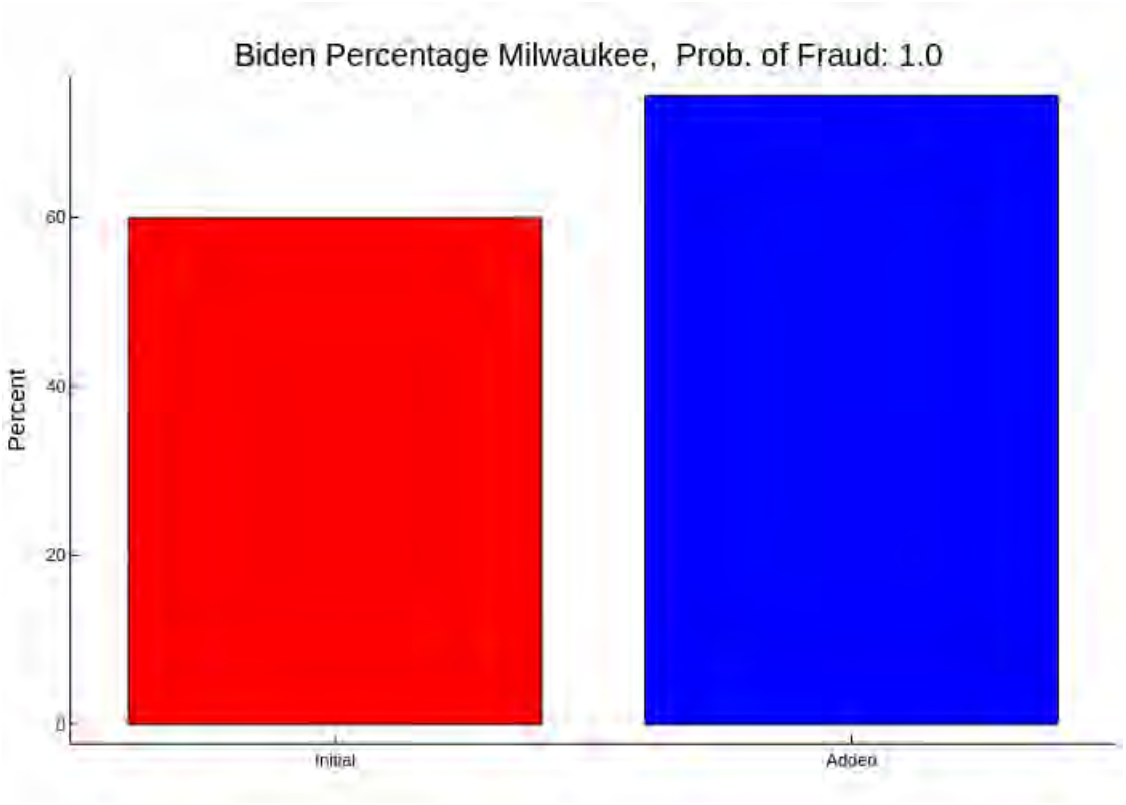


Figure 7: Before and After Democrat Fraction in Milwaukee

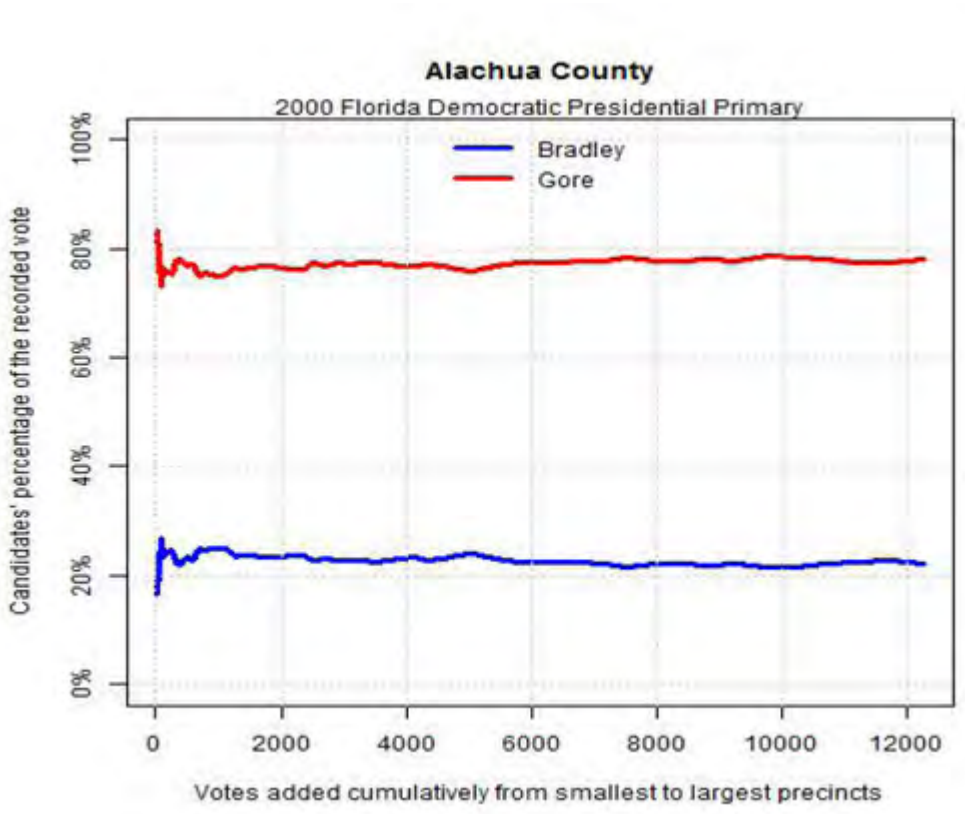


Figure 8: Baseline Cumulative Fractions Sorted by Precinct Size

42365 votes and remove 42365 votes from Biden.

4.2 Candidate Percentages Sorted by Ward Size

Another useful tool for evaluating fraud is to look at the cumulative vote percentages sorted by an independent input factor. An easy factor to use is ward or precinct size. This concept was used throughout the report on voter irregularities in [2]. In that report there was an anomalous dependency on precinct size in many of the 2016 primary elections. The larger precincts had introduced the use of voting machines. But one could also theorize the opportunity for cheaters to cheat in small precincts, where there may be less oversight.

Normally we would expect the cumulative vote percentage to converge to an asymptote, and bounce around the mean until convergence. An example of this can be found from the 2000 Florida Democratic presidential primary between Gore and Bradley. This is shown in Figure 8, and is taken from [2].

However when one sorts the Milwaukee, Thursday night data, by precinct

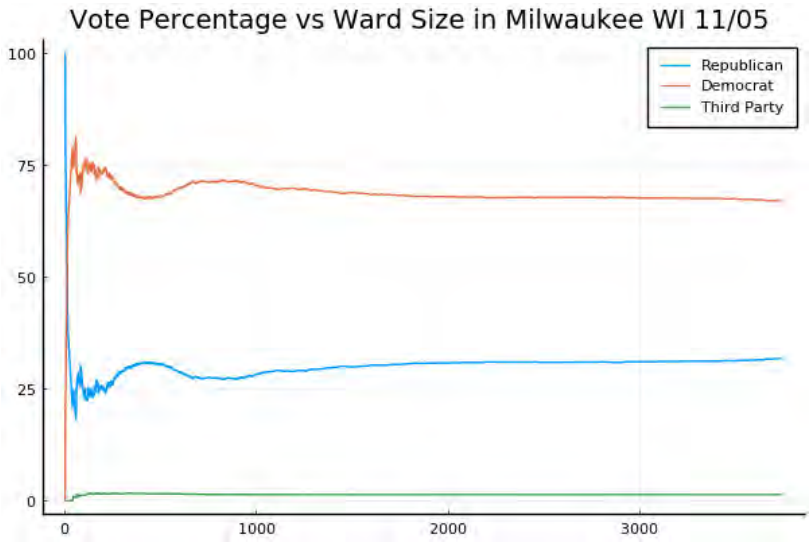


Figure 9: Milwaukee Democrat Ballots Percentage vs Ward Size

size, you will see trendlines that do not converge to an asymptote, as shown in Figure 9. It appears that smaller precincts almost uniformly have higher Democrat percentages. There is no obvious reason for this. It was certainly not seen in the control case in Figure 8. Furthermore the third party percentages quickly converge to their asymptote as would be expected in a fair election. One possible model for this would be vote switching from Trump to Biden, which would show up more strongly in the smaller precincts.

5 Analysis of Third Party Vote Count

Third party voters offer another way to examine a possible fraud mechanism. Votes could either be switched from third party candidates to the cheater, or fraudulent ballots that are added to benefit the cheater, may not include third party choices. For the control example, we look at absentee ballots in the state of Massachusetts. In Massachusetts the initial absentee ballot count was 117,618, and the number of added absentee ballots is 10,281.

The reported 3rd party percentage of absentee ballots vs time in Massachusetts is shown in Figure 10 and the comparison of the inital and added 3rd party ballots in MA is shown in Figure 11. There is only a small change in party preference, relative to the size of the added ballots. Therefore the probability of the fraud model is only 22%.

When we look at the total 3rd party percentages in Milwaukee, between Wednesday morning and Thursday night, we see a significant drop from 1.9 percent to 1.4% for the newly added ballots. But this is among 293,159 added

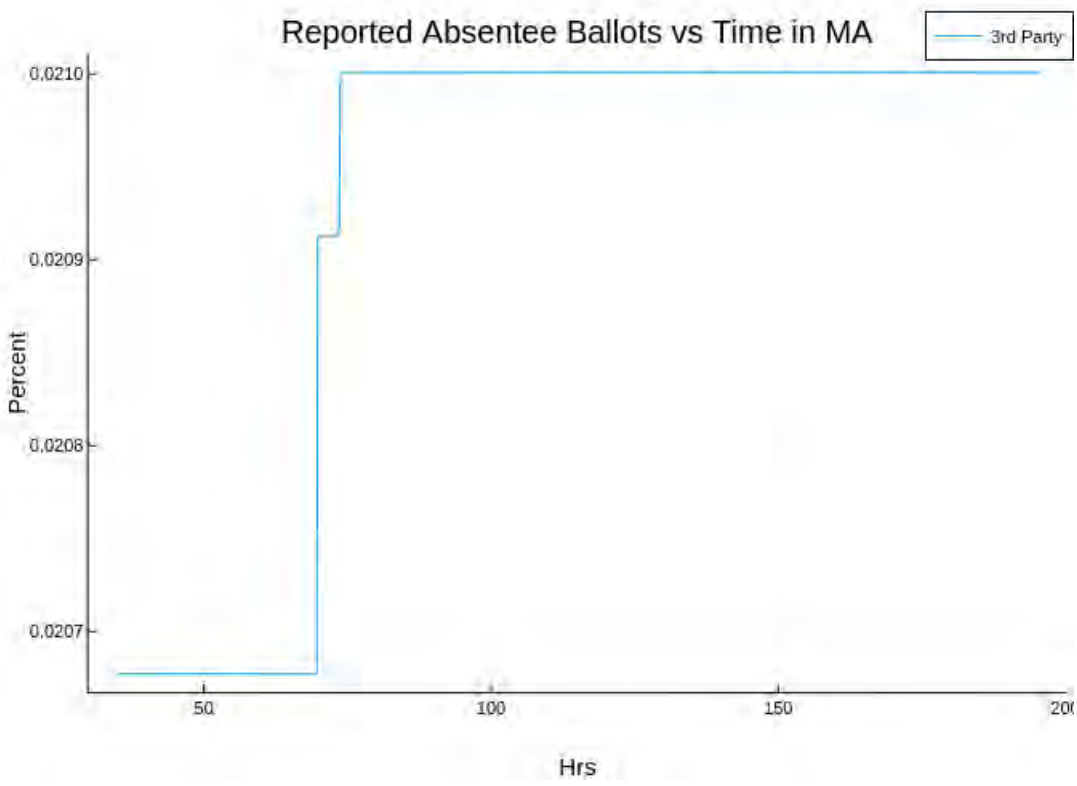


Figure 10: MA 3rd Party Absentee Votes vs Time

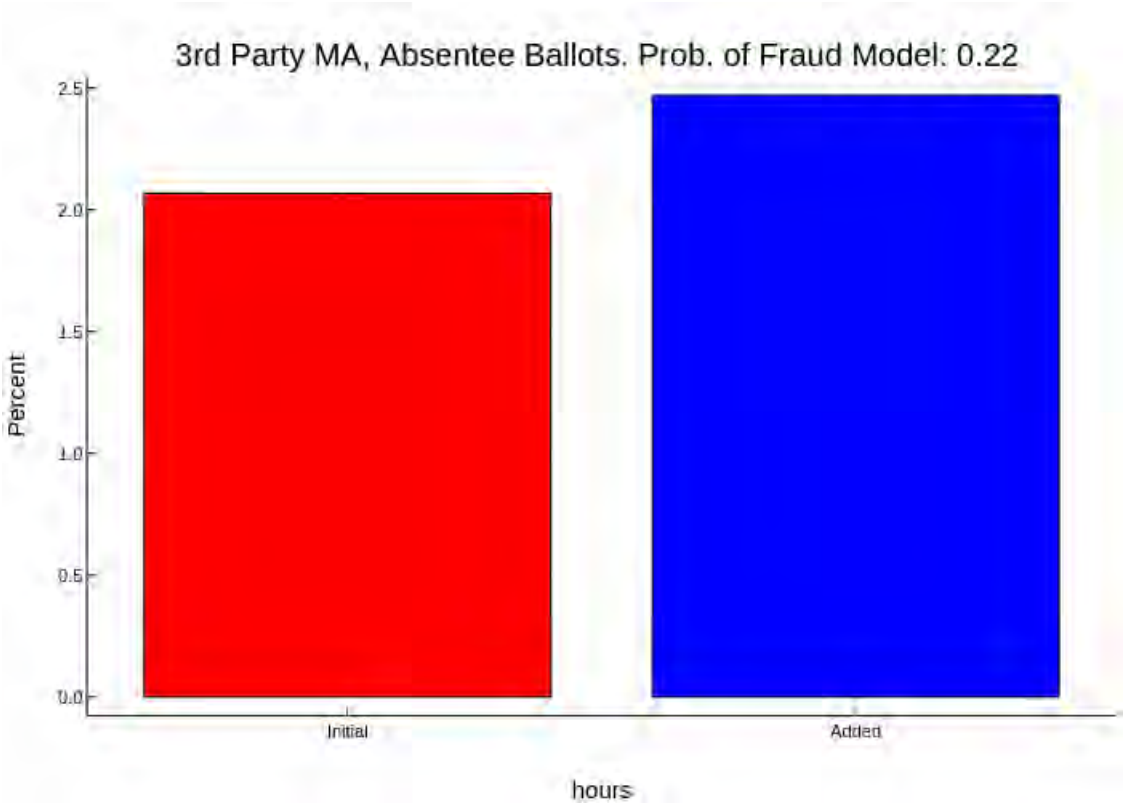


Figure 11: MA 3rd Party Percentage Initial and Added

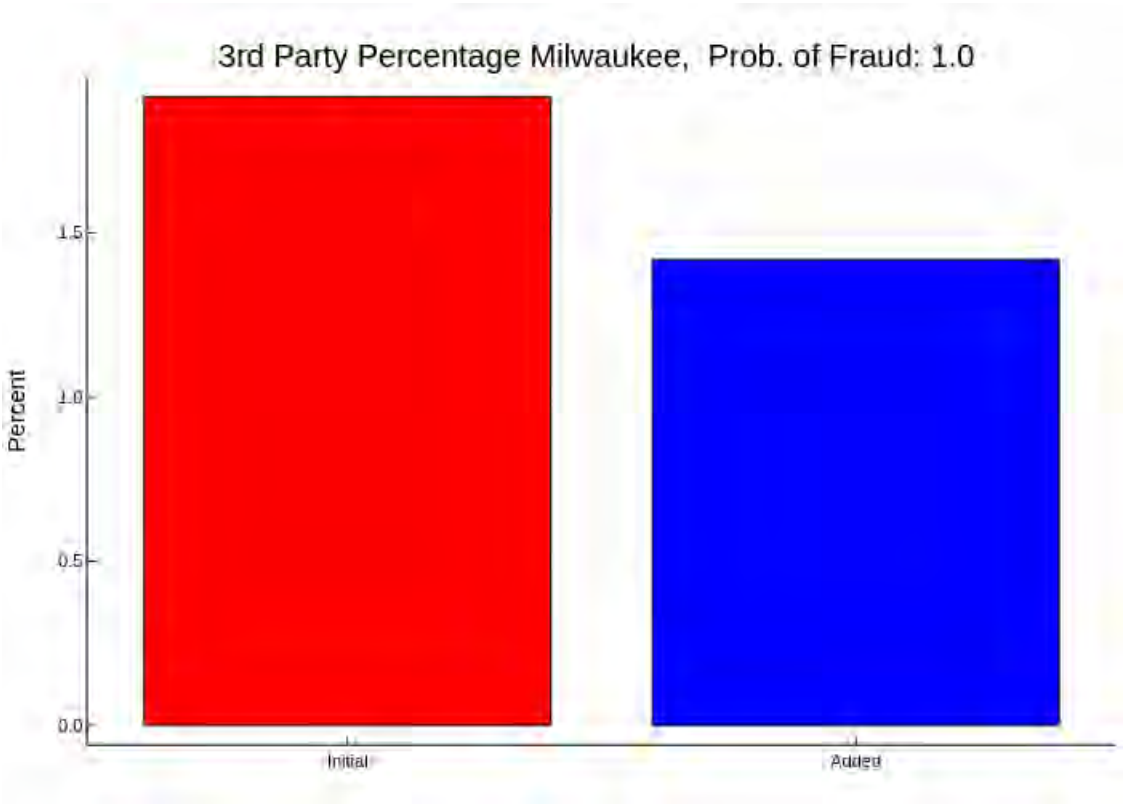


Figure 12: Milwaukee 3rd Party Percentages between Wednesday and Added

ballots. This is illustrated in Figure 12. Again in this case the fraud model has a posterior probability of 100% to machine precision.

6 Analysis of Fulton and DeKalb Counties in Georgia

We perform a precinct level analysis of Fulton and DeKalb counties in Georgia based on an aggregate data set likely culled from the New York Times. The Fulton data was collected on 11/08/2020 and the DeKalb data was collected on 11/09/2020. As in Milwaukee we look at the cumulative vote percentages as a function of precinct size. A plot of this for DeKalb county is shown in Figure 13.

Although there are somewhat concerning trendlines in the beginning, after the size 600 precinct mark, thereafter the overall picture is what one would expect of an election where the voter preferences are not dependent on precinct size. Both DeKalb and Fulton counties are in predominantly urban Atlanta,

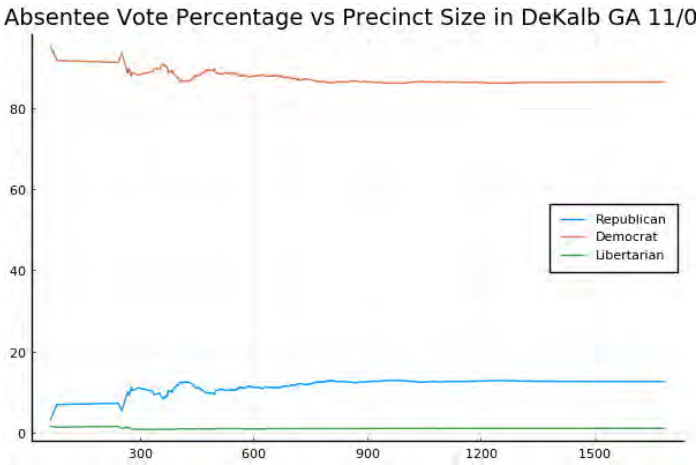


Figure 13: Dekalb County Absentee Ballots: Percentages vs Precinct Size

neighbor one another, and have similar voting preferences across precincts. DeKalb county is still suspect, however, due to the irregularites observed prior to the Ward 600 mark.

A different story emerges when we plot the absentee vote percentages for Fulton county as a function of precinct size, as can be seen in Figure 14. Here the trendlines for the Democrat and Republican percentages are quite pronounced, amounting to a difference of 8 percent from the halfway mark.

We divide the Fulton county data into a group of smaller precincts and larger precincts. One group has precincts less than 308 and another larger than 308. The total absentee ballots for the small group is 24,575, and the large group is 120,029. The small group has a Democrat percentage of 85% and the large group has a percentage of 77%, for a change of 8%. The fraud model is preferred in this scenario again with probability of 100% to machine precision.

One might presume that small precincts generally favor Democrats over large precincts, biasing the results. However take a closer look at the Libertarian party results in Fulton county in Figure 15. The percentages are exactly what we would expect if there were no bias in precinct size. The percentages bounce around a mean, not trending in any direction.

So if there were a bias favoring the democrats in small precincts, we would expect that to effect both the Republican and Libertarian totals. However it appears to only effect Republican totals, as if the Republican ballots were switched over to Democrat in a higher percentage in the smaller precincts. Indeed if a fixed number of ballots are switched in each district, it would have a larger effect in the smaller districts and then show up as trend lines in these percentage plots. At a minimum the data suggests a statistical anomaly that is not normally present in a fair election.

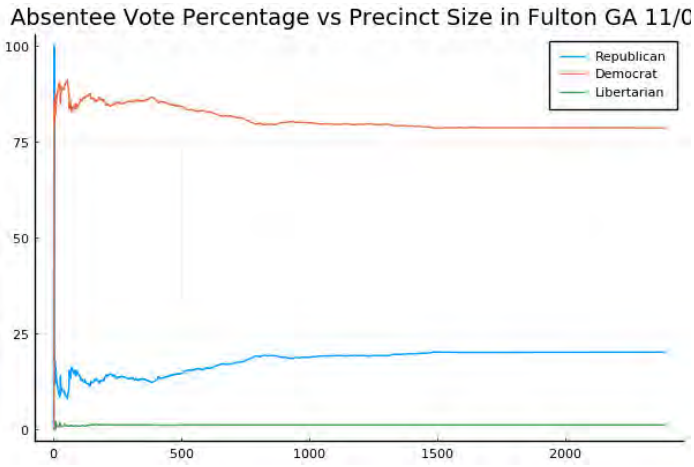


Figure 14: Fulton County Absentee Ballots: Percentages vs Precinct Size

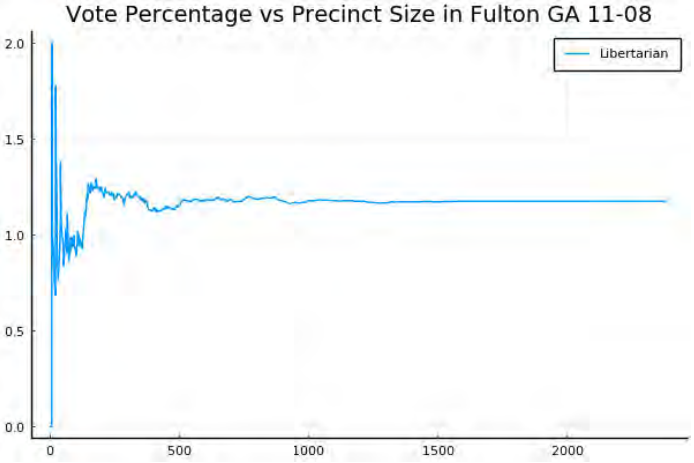


Figure 15: Fulton County Absentee Ballots: Libertarian Percentage vs Precinct Size

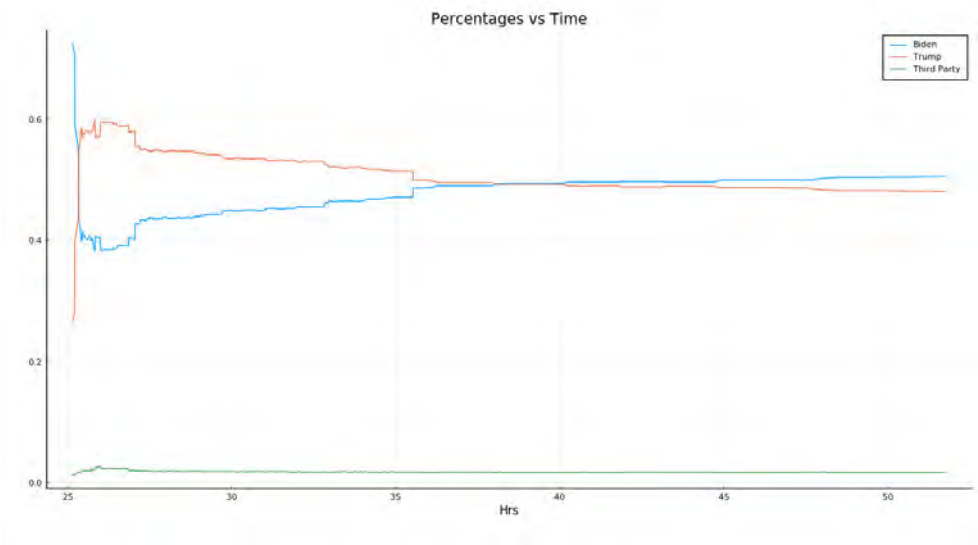


Figure 16: Michigan Vote Percentage vs Time

7 Michigan Analysis

We now due a time series analysis for Michigan. The data was culled from Edison Research. We first show, Trump, Biden and 3rd party voting percentages vs hours after the start of the election in Figure 16. The third party votes shows the proper convergence to an asymptote that we would expect from the law of large numbers. However the Trump and Biden percentages are vastly different You can see large discrete jumps in the percentages as very large Biden ballot dumps occur over time. You also see that the Biden percentages are mostly always increasing after hour 27, which is statistically unlikely in a fair election.

Note also that almost a million of the ballots are received by hour 27, and we use this as our starting point. At that point we have a total of 970,119 votes cast. At the end of 167 hours we have 5,531,222 votes cast. At our initial point the Biden percentage is 38%, but the new ballots have a Biden percentage totaling 53% as seen in Figure 17. The fraud model has posterior likelihood of 100% to machine precision.

For Michigan we compute the estimated amount of fraudulent Biden ballots conservatively, assuming that the 50.5 percent seen at the end of the count should have been the correct percentage among the newly added ballots. From this and (4) we obtain an estimate of 237,140 fraudulent votes added for Biden.

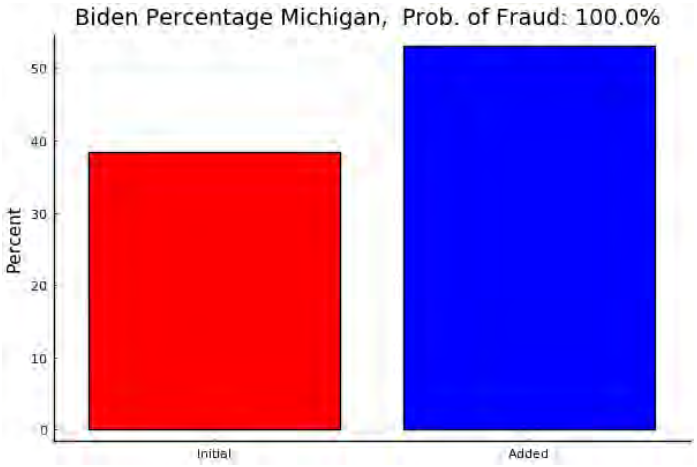


Figure 17: Biden Percentage Before and Added

References

[1] Peter Klimek, Yuri Yegorov, Rudolf Hanel, and Stefan Thurner. Statistical detection of systematic election irregularities. 2, 2.1

[2] lulu Fries'dat and Anselmo Sampietro. An electoral system in crisis. http://www.electoralsystemincrisis.org/. 4.2

It'IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff, **CASE NO. 2:20-cv-1771**

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PLAINTIFF'S AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO BE CONSIDERED IN AN EXPEDITED MANNER

COMES NOW Plaintiff, William Feehan by and through his undersigned counsel, and moves for a Temporary Restraining Order (TRO), or in the alternative, a preliminary injunction, to be considered in an expedited manner. This Motion is submitted pursuant to FRCP 65 and Civil L. R. 7.

In support of this Motion, Plaintiff has this day filed his Amended Complaint and supporting Exhibits. Plaintiff further states and shows:

Standards for a TRO and preliminary injunction are the same. *Local Lodge No. 1266, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Panoramic Corp.*, 668 F.2d 276, 291 (7th Cir. 1981). Plaintiff must make an initial showing that he (1) is likely to succeed on the merits, (2)

has no adequate remedy at law, and (3) will suffer irreparable harm if injunctive relief is not granted. *See, e.g., Hodgkins ex rel Hodgkins v. Peterson,* 355 F.3d 1048, 1054-55 (7th Cir.2004)**.** The Court then considers (4) whether the balance of harm to Plaintiff if the TRO not correctly granted outweighs the harm to the defendant if the TRO is wrongly granted, and (5) the public interest. *Cooper v. Salazar,* 196 F.3d 809, 813 (7th Cir.1999)**.**

Plaintiff Will Suffer Irreparable Harm If a TRO Is Not Granted

1. Plaintiff brings this action and has filed his Motion for TRO to enjoin Defendants' certification of the November 3, 2020, Presidential election in Wisconsin in order to prevent irreparable harm to Plaintiff and lawful voters of Wisconsin and other states across the nation who would suffer disenfranchisement of their election rights by improper and unlawful certification of the Wisconsin election results in favor of Presidential candidate Joe Biden.

2. An unlawful certification in one state, like Wisconsin, will necessarily harm the State of Wisconsin and all other states and their lawful voters by altering the Presidential election outcome, undermining both confidence in and integrity of the election process.

3. Absent granting the TRO requested, Plaintiff and similarly situated lawful voters will suffer irreparable harm because the conduct of the election and recount contrary to law undermines election integrity, debases and dilutes their votes, and effectively disenfranchises them.

4. Further, any recalibration, reset, wiping, or other alteration or destruction of election data or materials from voting machines, tabulations machines, or other election-related mechanisms, servers, software, voting machines, tabulators, printers, portable media, logs, or processes, and any alteration or destruction of ballot applications, ballot return envelopes, ballot images, paper ballots, registration lists, poll lists, or any other "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11. related to the November 3, 2020 Wisconsin election, whether pursuant to § 7.23,

Wisconsin Statutes, or otherwise, will make it impossible to conduct a valid inspection by Plaintiff's experts or others.

5. Plaintiff will be irreparably harmed if all such acts affecting election data or materials are not immediately enjoined across the state of Wisconsin pursuant to 52 U.S.C. § 20701 (preservation of voting records) to prevent destruction or alteration of evidence essential to individual and/or forensic examination and audit of the election computer systems and materials.

Plaintiff Is Likely to Prevail on the Merits

6. Plaintiff's Amended Complaint and Motion present material dispositive issues which are questions of law that may be resolved without factual investigation or determination.

7. Plaintiff is more likely to succeed on the merits of his claims than not due to substantial and multiple violations of Wisconsin election laws, including counting of unlawfully cast ballots, resulted in unfair advantage to some voters, discriminating against and denying equal protection to Plaintiff and other lawful Wisconsin voters, effectively disenfranchising them of their lawful rights of suffrage, all as provided in his Amended Complaint.

8. In further support is the WEC's illegal certification of the Statement of Canvas by Chair, Ann S. Jacobs, who directly violated the statutory guarantee of a 5 business day waiting period pursuant to Wis. Stat. § 9.01(6), by failing to wait the required time period and rushed to certify the canvas on the day it was completed November 30, 2020.

9. Governor Evers also illegally certified the *Statement of Canvas* that same day, thus foreclosing any opportunity for a candidate to challenge the recount. Wis. Stat. § 7.70(5)(a), explains "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 . . . .**"

The Balance of Equities Favors Plaintiff

10. The political advantage to either Presidential candidate created by unlawful certification is substantially less significant than the certification of an erroneous Presidential election result and loss of confidence and distrust that will be generated within the public at large if certification is not temporarily enjoined to consider the merits of Plaintiff's allegations of statistical anomalies, unlawful conduct of the election and recount, fraudulent manipulation of software and voting machines employed to tabulate votes, and other unlawful conduct alleged in his Amended Complaint.

11. Granting a TRO to halt the certification to permit consideration and determination of the grave issues presented by Plaintiff will thus prevent an erroneous certification of the Presidential election result and even further erosion of public confidence in the election's integrity and outcome.

Granting the TRO Is in the Public Interest

12. Wisconsin has a substantial obligation to its citizens and the rest of the nation to ensure that its electors are properly elected and legitimately certified. The process by which Wisconsin represents and pledges it electors must comply with state and federal constitutional and statutory requirements and cannot be a rushed, perfunctory, same-day certification.

13. Nothing is more sacred to a representative republic than the integrity of its elections. A TRO is essential to ensure the integrity of this and future elections for Wisconsin and the nation.

Respectfully submitted, this 3st day of December 2020.

LEAD COUNSEL FOR PLAINTIFF

/s Sidney Powell**
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**Application for admission forthcoming

Local Counsel for Plaintiffs

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NOTICE TO DEFENDANTS' COUNSEL

Plaintiff certifies that upon filing of this Motion that he provided notice of this action by email communication with Counsel for Defendants on December 4, 2020:

Wisconsin Elections Commission and Wisconsin Election Commissioners

Michael Murphy, Esq.
Assistant Attorney General
Special Litigation and Appeals Unit
Wisconsin Department of Justice
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Governor Tony Evers

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222 West Washington Avenue
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Madison, Wisconsin 53701-1784
(608) 210-6303
jmandell@staffordlaw.com

CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to FRCP 65, this is to certify that upon filing of this Motion for Temporary Restraining Order and Preliminary Injunction To Be Considered in an Expedited Manner with the Court through the ECF PACER System, Plaintiff will provide simultaneous electronic service to Defendants counsel as follows:

Wisconsin Elections Commission and Wisconsin Election Commissioners

Michael Murphy, Esq.
Assistant Attorney General
murphysm@doj.state.wi.us

Governor Tony Evers

Jeffrey A. Mandell, Esq.
Stafford Rosenbaum LLP
jmandell@staffordlaw.com

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff, **CASE NO. 2:20-cv-1771**

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PROPOSED BRIEFING SCHEDULE FOR

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO BE CONSIDERED IN AN EXPEDITED MANNER

Per the Court's Order of December 2, 2020 and FRCP 65, Plaintiff's counsel have communicated with counsel for all Defendants and anticipate speaking with them further this morning of December 3, 2020.

Plaintiff will propose the following briefing schedule and will advise the Court following discussion with Defendants' counsel.

- Friday, Dec. 4, 8:00 p.m. Defendants file response to Motion for TRO.
- Saturday, Dec. 5, 8:00 p.m. Plaintiff files reply to Defendants' response.
- _____ Hearing as directed by the Court. Plaintiff proposes to submit the matter on briefs without argument.

Respectfully submitted, this 3st day of December 2020.

LEAD COUNSEL FOR PLAINTIFF

/s Sidney Powell**
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Texas Bar No. 16209700
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2911 Turtle Creek Blvd.
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**Application for admission forthcoming

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Governor Tony Evers

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jmandell@staffordlaw.com

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Pursuant to FRCP 65, this is to certify that upon filing of this Proposed Briefing Schedule with the Court through the ECF PACER System, Plaintiff will provide simultaneous electronic service to Defendants counsel as follows:

Wisconsin Elections Commission and Wisconsin Election Commissioners

Michael Murphy, Esq.
Assistant Attorney General
murphysm@doj.state.wi.us

Governor Tony Evers

Jeffrey A. Mandell, Esq.
Stafford Rosenbaum LLP
jmandell@staffordlaw.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Jeffrey A. Mandell and Rachel E. Snyder of the law firm of Stafford Rosenbaum LLP have been retained by defendant Governor Tony Evers in this action. Please serve copies of all papers in this action on the undersigned at the address set forth below.

Respectfully submitted this 3rd day of December 2020.

/s/ Jeffrey A. Mandell
Jeffrey A. Mandell
Rachel E. Snyder
STAFFORD ROSENBAUM LLP
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Email: rnsyder@staffordlaw.com

Attorneys for Defendant, Governor Tony Evers

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

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Case No.: 20CV1771

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Respectfully submitted this 3rd day of December 2020.

/s/ Rachel E. Snyder
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Rachel E. Snyder
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Madison, WI 53701-1784
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Email: rnsyder@staffordlaw.com

Attorneys for Defendant, Governor Tony Evers

UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

William Feehan *Plaintiff*	)	
v.	)	Case No. 2:20-cv-1771
Wisconsin Election Commission *Defendant*	)	

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Plaintiff .

Date: 12-3-20

/s/ Howard Kleinhendler
Attorney's signature

Howard Kleinhendler
Printed name and bar number

369 Lexington Ave, NY, NY 10017
Address

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Telephone number

(732) 901-0832
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PP

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,
And DERRICK VAN ORDEN,

Plaintiff

Case No. 20-cv-1771

v.

Wisconsin Elections Commission, *et al.*,

Defendants

JAMES GESBECK'S MOTION TO INTERVENE

I, James Gesbeck, a citizen of the state of Wisconsin am seeking to participate as an intervening defendant in the above-captioned lawsuit pursuant to Federal Rule of Civil Procedure 24. I have a right under Rule 24(a)(2) to intervene for the reasons outlined in the attached memorandum. In the alternative, I seek permissive intervention pursuant to Rule 24(b).

I am a licensed attorney in the State of Wisconsin; however, I am not admitted to practice before the Eastern District Court of Wisconsin. As a result, I am appearing as a pro se party under General Local Rule 83(b) and pursuant to the limitations of General Local Rule 83(e) as I am a natural person. As I am not admitted to practice before the Eastern District Court of Wisconsin, I am filing via paper under General Local Rule 5(a)(2).

I respectfully request an expedited briefing schedule and decision regarding this motion. This request is being made to allow me the opportunity to protect my interests which are directly impacted by this litigation. This is particularly important as the plaintiffs are seeking "emergency injunctive relief"[1]. However, as the court noted in its Order Regarding Amended Motion for

[1] See Dkt. No. 1 titled "Complaint for declaratory, emergency, and permanent injunctive relief" and Dkt. No. 2 titled "Plaintiff's motion for declaratory, emergency and permanent injunctive relief.

Injunctive Relief, while using the word "emergency" neither the motion nor proposed order request the court to move more quickly and explain the basis for such a request.[2]

Therefore, I request that the Court grant me permission to intervene in the above-captioned matter. Further I request that the Court authorize me to file via ECF[3].

Dated: December 2nd, 2020

Respectfully submitted,

James Gesbeck (SBN #1079800)
608 335-2569
James@Gesbeck.Com
9302 Harvest Moon Lane
Verona, WI 53593
N.B.: Not admitted to practice before the United States District Court for the Eastern District of Wisconsin

[2] See Dkt. No. 6 "Order Regarding Amended Motion for Injunctive Relief (Dkt. No. 6).
[3] See https://www.wied.uscourts.gov/e-filing/ecf-policies-and-procedures I.A.1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,
And DERRICK VAN ORDEN,

Plaintiff

Case No. 20-cv-1771

v.

Wisconsin Elections Commission, *et al.*,

Defendants

INTERVENOR-DEFENDANT'S PROPOSED ANSWER TO COMPLAINT FOR DECLARATORY, EMERGENCY AND PERMANENT INJUCTIVE RELIEF.

Intervenor-Defendant James Gesbeck answers the Plaintiff's complaint as set forth below.

NATURE OF THE ACTION

1. Paragraph 1 contains characterizations, legal contentions, and opinions to which no response is required.
2. Paragraph 2 contains characterizations, legal contentions, and opinions to which no response is required.
3. Paragraph 3 contains characterizations, legal contentions, and opinions to which no response is required.
4. Paragraph 4 contains characterizations, legal contentions, and opinions to which no response is required.

DOMINION VOTING SYSTEMS FRAUD AND MANIPULATION

5. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 5.
6. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 6.
7. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 7.
8. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 8.
9. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 9.
10. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 10.
11. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 11.
12. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 12.
13. Upon information and belief, the WEC did issue guidance to municipal clerks as described. However, I disagree with the legal conclusion that such guidance was in violation of Wisconsin Statutes.
14. Upon reading the complaint, it does contain expert witness testimony as described, however I lack sufficient knowledge or information to form a belief as to the truth of the statements contained in that testimony.

15. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 15.

16. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 16. I further deny that the allegations, even if accepted as true, provide the court with grounds or even the ability to provide the relief requested.

JURISIDCTION AND VENUE

17. I deny that Federal Courts have jurisdiction to the extent this relates to the administration of elections as that authority was granted to State legislators via the U.S. Constitution as asserted in Paragraph 17 due to the Constitution delegating those rights to individual States.

18. I deny that Federal Courts have jurisdiction to the extent this relates to the administration of elections as that authority was granted to State legislators via the U.S. Constitution as asserted in Paragraph 18 due to the Constitution delegating those rights to individual States.

19. I deny that Federal Courts have jurisdiction to the extent this relates to the administration of elections as that authority was granted to State legislators via the U.S. Constitution as asserted in Paragraph 19 due to the Constitution delegating those rights to individual States.

20. I deny that Federal Courts have jurisdiction to the extent this relates to the administration of elections as that authority was granted to State legislators via the U.S. Constitution as asserted in Paragraph 18 due to the Constitution delegating those rights to individual States.

21. Admitted

22. Admitted

THE PARTIES

23. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 23.

24. Admitted.

25. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 25 as to the factual allegations.

26. Upon information and belief, Derrick Van Orden is not a plaintiff to this action. See https://twitter.com/derrickvanorden?lang=en (last accessed 5:02pm, 12/2/2020).

27. Upon information and belief, Derrick Van Orden is not a plaintiff to this action and therefore does not seek the remedy as represented. See https://twitter.com/derrickvanorden?lang=en (last accessed 5:02pm, 12/2/2020).

28. Upon information and belief, Derrick Van Orden is not a plaintiff to this action. See https://twitter.com/derrickvanorden?lang=en (last accessed 5:02pm, 12/2/2020).

29. Admitted.

30. Admitted.

31. Admitted.

32. Admitted.

33. Admitted.

STATEMENT OF FACTS

34. I deny that the cited United States Code provides the legal basis for contesting the election results as this subject matter has been reserved for individual States.

35. Admitted

36. Admitted

37. Admitted

38. Admitted

39. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 39. To the extent the plaintiffs seek a remedy of an independent audit and/or investigation, I concur.

VIOLATIONS OF WISCONSIN ELECTION CODE

40. Admitted

41. Admitted

42. Admitted

43. I contest the characterization of the word "belief" and "reliable information" being equivalent as portrayed. The guidance cited relates to "belief" not to "reliable information".

44. I deny that the directive is inapposite to Wisconsin law.

45. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 45.

46. Admitted.

47. I deny that the guidance as provided nullified Wis. Stat. § 6.87(d). I further deny that this guidance was unlawful.

48. I deny that the guidance conflicts with the statute.

EXPERT WITNESS TESTIMONY

49. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 49.

50. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 50.

51. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 51.

52. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 52.

53. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 53.

54. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 54.

55. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 55.

56. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 56.

57. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 57.

58. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 58.

59. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 59.

60. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 60.

61. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 61.

62. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 62.

FACTUAL ALLEGATIONS REGARDING DOMINION VOTING SYSTEMS

63. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 63.

64. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 64.

65. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 65.

66. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 66.

67. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 67.

68. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 68.

69. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 69.

70. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 70.

71. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 71.

72. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 72.

73. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 73.

74. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 74.

75. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 75

76. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 76.

77. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 77.

78. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 78.

79. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 79.

80. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 80.

81. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 81.

82. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 82.

83. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 83.

84. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 84.

85. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 85.

86. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 86.

87. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 87.

88. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 88.

89. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 89.

90. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 90.

91. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 91.

92. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 92.

93. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 93.

94. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 94.

95. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 95.

96. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 96.

97. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 97.

98. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 98.

99. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 99.

100. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 100.

101. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 101

COUNT I

102. No response required.

103. Admitted.

104. Admitted.

105. Admitted.

106. I deny that the instances described violate the Wisconsin Election Code.

107. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 107.

108. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 108.

109. I deny that the plaintiffs have no remedy. Challenges to the election should be brought before the Wisconsin Courts, see Wis. Stat. § 9.01(6).

110. I deny the court has the authority to grant such an extreme remedy.

COUNT II

111. No response required.

112. Admitted.

113. Admitted.

114. Admitted to the extent it is theoretical, denied if it is a factual allegation.

115. Admitted.

116. Denied.

117. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 117.

118. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 118.

119. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 119.

120. I admit the remedies requested would be proper if such violations existed.

121. I deny the plaintiffs have no remedy. Challenges to the election should be brought before the Wisconsin Courts, see Wis. Stat. § 9.01(6).

COUNT III

122. No response required.

123. Admitted.

124. Admitted.

125. Admitted.

126. Admitted.

127. Admitted.

128. Admitted.

129. Admitted.

130. Denied.

131. I deny that the requested relief sought is proper. The remedy for the plaintiffs lies in Wis. Stat. § 9.01(6).

COUNT IV

132. No response required.

133. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 133.

134. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 134.

135. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 135.

136. I lack sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 136.

137. Admitted.

138. I deny the plaintiffs have no remedy. Challenges to the election should be brought before the Wisconsin Courts, see Wis. Stat. § 9.01(6).

139. I deny that the requested relief sought is proper. The remedy for the plaintiffs lies in Wis. Stat. § 9.01(6).

140. I deny that the requested relief sought is proper. The remedy for the plaintiffs lies in Wis. Stat. § 9.01(6).

141. I deny that the requested relief sought is proper. The remedy for the plaintiffs lies in Wis. Stat. § 9.01(6).

142. I deny that the requested relief sought is proper. This is request seeks to discard my vote.

143. I deny that the requested relief sought is proper

AFFIRMATIVE DEFENSES

I assert the following affirmative defenses.

1. Plaintiffs lack standing to assert their claim.
2. Plaintiffs are not represented by the lawyers filing this action. See https://twitter.com/derrickvanorden?lang=en (last accessed 5:02pm, 12/2/2020).
3. The complaint fails to state a claim upon which relief be granted.
4. The court does not have jurisdiction over this action and the authority to grant the requested relief as it conflicts with the State's authority to regulate elections granted by the U.S. Constitution.

MY REQUEST FOR RELIEF

I request the court acts as follows:

1. Deny the plaintiffs request for wholesale disenfranchisement of Wisconsin voters and me specifically.
2. Dismiss the plaintiff's complaint with prejudice
3. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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N.B.: Not admitted to practice before the United States District Court for the Eastern District of Wisconsin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,
And DERRICK VAN ORDEN,

Plaintiff

Case No. 20-cv-1771

v.

Wisconsin Elections Commission, *et al.*,

Defendants

CERTIFICATE OF SERVICE

I, James Gesbeck, certify that I have sent a copying of the Motion to Intervene, Brief in Support of Motion to Intervene and Proposed Answer to the parties as follows electronically. Further, I certify that I will be mailing a copy to each of the parties but am providing an electronic copy on December 2, 2020, so they have notice of the included motion timelier.

Attorneys for Plaintiff William Feehan and Derrick Van Orden:
miked@michaelddeanllc.com
Defendant Wisconsin Election Commission and members:
elections@wi.gov
Defendant Governor Tony Evers
eversinfo@wisconsin.gov

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,
And DERRICK VAN ORDEN,

Plaintiff

Case No. 20-cv-1771

v.

Wisconsin Elections Commission, *et al.*,

Defendants

BRIEF IN SUPPORT OF MOTION TO INTERVENE

Pursuant to Federal Rule of Civil Procedure 24, I move to intervene as a defendant in this lawsuit. The relief being sought by the plaintiffs includes, inter alia, "an order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results" and an "order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election". I was a voter in the 2020 General Election in the State of Wisconsin. If the court grants the relief sought by plaintiffs, it will disenfranchise my vote.

BACKGROUND

This litigation centers around the 2020 General Election. As the court is likely aware, there are various theories and arguments being proffered that seek to have the election results in this State and other States rejected. This is one of those cases.

The plaintiffs allege that there is a massive election fraud to the scale that they believe requires this court to order the defendants to de-certify the election results and to order Governor Evers to transmit election results stating that President Donald Trump won the election.

I was a voter during the 2020 General Election in the State of Wisconsin. Specifically, I voted in Dane County, my county of residence, via absentee ballot. Dane County is specifically referenced in Paragraph 2 of the original complaint for having an "especially egregious range of conduct".[1]

ARGUMENT

I am entitled to intervene as a right.

I qualify for intervention as a right under Fed. R. Civ. P. 24(a)(2). I meet the criteria established by case law for intervention that were established by *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 746 (7th Cir. 2020).

The motion to intervene is timely

This motion is being timely filed. This lawsuit originated on December 1st, 2020. This motion and brief are being drafted on December 2nd, 2020. This motion and brief will be sent to the Clerk via overnight delivery and should arrive December 3rd, 2020. A motion to intervene filed within 2 days of a lawsuit should be considered timely. Additionally, there is not any pending briefing or motion schedule set in the court as of the day and time of drafting this memorandum at 3:40pm on December 2nd, 2020.

I have an interest in the outcome of this litigation

This litigation directly concerns my vote that was cased in the 2020 General Election in Wisconsin. The right to not only vote, but to have that voted counted is fundamental. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) and *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Further this interest is "individual and personal in nature". *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018)

[1] [1] See Dkt. No. 1 titled "Complaint for declaratory, emergency, and permanent injunctive relief" ¶ 2.

This interest would be impaired by disposition of this case

The plaintiff's proposed relief includes an order to the defendants requiring them to "de-certify the election results" and "order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election". This would disregard the results of the 2020 General Election in Wisconsin in which my vote was cast. A court order directing the outcome of the election would disenfranchise me by not counting my vote, nor the votes of millions of people. This directly harms and impairs my right to vote as it would exclude my vote from being counted. See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) and *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

My interests are not adequately represented by Defendants

The right to intervene can be denied if my interests are adequately represented by the defendants. This is a liberal rule which is satisfied by showing that the representation may be inadequate and that the burden of this showing should be treated as minimal. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742 (7th Cir. 2020).

My interest in this case is to defend my constitutional right to vote. Neither of the named defendants, Wisconsin Elections Commissions, its members, and Governor Tony Evers are tasked with protecting my right to vote. As a result, the existing Defendants do not and are not responsible for representing my interests.

The defendant's interest in this litigation is defined by their statutory duties and statutory roles. Additionally, the defendants are broadly responsible for representing the entire State of Wisconsin as a whole and not individual voters. See, e.g., *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001).

Additionally, protecting the interest of individual's voter right to vote should not be assumed to be role of either the Governor or the Wisconsin Elections Commission. The right to vote is an individual right. *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). There is no constitutional text nor statute making either the Governor or the Wisconsin Elections Commission responsible for protecting the right to vote. Additionally, at times the interest of those parties may be averse to the individual right to vote as occurs during lawsuits over felon disenfranchisement.

I am also entitled to permissive intervention

I also meet the requirements for permissive intervention under Rule 24(b). The Court has broad discretion to grant a motion for permissive intervention where: (1) the proposed intervenor's claim or defense and the main action have a question of law or fact in common, and (2) the intervention will not unduly delay or prejudice the adjudication of the original parties' rights. See Fed. R. Civ. P. 24(b)(1)(B) and (b)(3); Bond v. Ultreras, 585 F.3d 1061,1070–71 (7th Cir. 2009). Even in cases where courts have found that intervention is not available as a right, courts have allowed permissive intervention. See, e.g., *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 986 (7th Cir. 2011); see also *Solid Waste Agency*, 101 F.3d at 509.

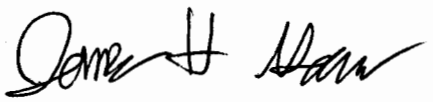
Should my vote be not counted, I would have a cause of action to seek a court order requiring these defendants to honor my vote. Such an additional court action would hamper judicial economy. Additionally, any such action would rely on the same facts and issues of law as this litigation.

I would be prepared and willing to proceed in accordance with any schedule, including expediated schedule that this court may set.

CONCLUSION

For the reasons states above, I am entitled to intervention as a right and in the alternative the court should grant me permissive intervention.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

MOTION TO REASIGN CASE PURSUANT TO CIVIL L.R. 3(b)

Defendant Tony Evers respectfully moves to have the foregoing case—*Trump v. Wisconsin Elections Commission, et al.*, No. 20-CV-1785—reassigned, as it is related to the instant action under Civil Local Rule 3(b). While judicial efficiency and a desire to avoid conflicting opinions underscore virtually every request to relate cases, that is especially true here with the federal safe-harbor date approaching on December 8 and the meeting of the Electoral College on December 14. *See* 3 U.S.C. §§ 5, 7 and Wis. Stat. § 7.75.

Civil Local Rule 3(b) provides that the factors to be considered in determining whether the actions are related include whether the actions: (i) arise from substantially the same transaction or events; (ii) involve substantially the same parties or property; or (iii) involve the same patent, trademark or copyright. It further provides that the judge to whom the action with the lower-case number is assigned will resolve any dispute as to whether the actions are related.

Promptly upon learning of the *Trump v. Wisconsin Elections Commission* action late yesterday evening, Defendant's counsel prepared and filed a notice of related case. That notice, which is attached hereto as Exhibit 1, explains that the *Feehan* and *Trump* actions arise form

substantially the same transaction or events (the administration of the November 3, 2020 Presidential election), and involve substantially the same parties (the Wisconsin Elections Commission, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelmann, Dean Knudson, Robert F. Spindell, Jr., and Governor Tony Evers are named defendants in both actions).[1] Both cases also seek similar relief: To overturn the results of the recent election and in so doing deny more than three million Wisconsinites of their fundamental right to vote.

Accordingly, the two cases are related within the meaning of Civil Local Rule 3(b), and Defendant Evers respectfully requests that the latter-filed action be reassigned to this Court.

Respectfully submitted this 3rd day of December 2020.

/s/ Jeffrey A. Mandell
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Attorneys for Defendant, Governor Tony Evers

[1] WEC Commissioner Julie M. Glancey is inexplicably not named as a defendant in this case, which also includes as defendants a number of other state and local officials.

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

DONALD J. TRUMP, Candidate for President of the United States of America,

Plaintiff,

v.

THE WISCONSIN ELECTIONS COMMISSION, and its members, ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, SCOTT MCDONELL in his official capacity as the Dane County Clerk, GEORGE L. CHRISTENSON in his official capacity as the Milwaukee County Clerk, JULIETTA HENRY in her official capacity as the Milwaukee Election Director, CLAIRE WOODALL-VOGG in her official capacity as the Executive Director of the Milwaukee Election Commission, MAYOR TOM BARRETT, JIM OWCZARSKI, MAYOR SATYA RHODES-CONWAY, MARIBETH WITZEL-BEHL, MAYOR CORY MASON, TARA COOLIDGE, MAYOR JOHN ANTARAMIAN, MATT KRAUTER, MAYOR ERIC GENRICH, KRIS TESKE, in their official capacities; DOUGLAS J. LA FOLLETTE, Wisconsin Secretary of State, in his official capacity, and TONY EVERS, Governor of Wisconsin, in his official capacity.

Defendants.

Case No.:20-CV-1785

CIVIL L. R. 3(b) NOTICE OF RELATED CASE AND REQUEST FOR ASSIGNMENT IN CONCERT WITH THAT RELATED CASE

TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN AND TO THE PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, in accordance with Civil Local Rule 3(b), the following action appears to be related to the above-entitled action: *William Feehan, et al. v. Wisconsin Elections Commission, et al.*, Case No. 2:20-CV-1771.

Civil Local Rule 3(b) provides that the factors to be considered in determining whether the actions are related include whether the actions: (i) arise from substantially the same transaction or events; (ii) involve substantially the same parties or property; or (iii) involve the same patent, trademark or copyright. It further provides that the judge to whom the action with the lower case number is assigned will resolve any dispute as to whether the actions are related.

The foregoing action arises from substantially the same transaction or events (the administration of the November 3, 2020 Presidential election), and involves substantially the same parties (the Wisconsin Elections Commission, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelmann, Dean Knudson, Robert F. Spindell, Jr., and Governor Tony Evers are named defendants in both actions).[1] Both cases also seek similar relief: To overturn the results of the recent election and in so doing deny more than three million Wisconsinites of their fundamental right to vote. Accordingly, this case is related within the meaning of Civil Local Rule 3(b).

PLEASE TAKE FURTHER NOTICE that this Notice of Related Case is also being served on counsel for the parties in the case listed.

Respectfully submitted this 3rd day of December 2020.

/s/ Jeffrey A. Mandell
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[1] WEC Commissioner Julie M. Glancey is inexplicably not named as a defendant in this case, which also includes as defendants a number of other state and local officials.

Email: rnsyder@staffordlaw.com

Attorneys for Defendant, Governor Tony Evers

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN, et al.,

Plaintiffs,

v. Case No. 20-CV-1771

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants.

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Defendants, Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Dean Knutson, and Robert F. Spindell, Jr., in their official capacities, appear in this matter by their attorneys, Joshua L. Kaul, Wisconsin Attorney General, and S. Michael Murphy, Colin. T. Roth, and Jody J. Schmelzer, Assistant Attorneys General, and request that service of all pleadings and other papers be made upon Assistant Attorneys General Murphy, Roth, and Schmelzer at 17 West Main Street, Madison, Wisconsin, 53703, by first class mail at Post Office Box 7857, Madison, Wisconsin, 53707-7857, or via the ECF system for the United States District Court for the Eastern District of Wisconsin.

Dated this 3rd day of December 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ S. Michael Murphy
S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff, **CASE NO. 2:20-cv-1771**

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PLAINTIFF'S OPPOSITION TO
DEFENDANT GOV. TONY EVERS' REQUEST TO REASSIGN

Defendant Gov. Tony Evers has filed a motion to reassign *Trump v. Wisconsin Elections Commission, et al.*, Case No. 20-CV-1785 to this action under Civil Local Rule 3(b). Plaintiff William Feehan opposes Defendant Evers' as follows.

1) **Defendant Evers' Seeks to Nullify Through Delay Over 1.6 Million Lawful Wisconsin Votes and Disenfranchise the Voters Who Cast Them.**

With the College of Electors scheduled to meet December 8, there could never be a clearer case of "justice delayed is justice denied."

Defendant proposes a trivial, wooden application of a simple local rule designed for efficiency to achieve exactly the opposite of its purpose, turning the rule on its head to deflect and fatally

delay consideration of the most monumental constitutional rights and issues that will ever come before this Court, disenfranchising Plaintiff and 1.6 Million lawful Wisconsin voters in the process.

Defendant's Motion to reassign is simply a transparent effort to clutter and bog down Plaintiff's action with multiple additional parties, procedural issues, and state law matters, the purpose of which is to consume time, slow-walk Plaintiff's action, and run out the clock.

The additional parties and issues are utterly unnecessary and distracting to consideration of Plaintiff's Amended Complaint and supporting Memorandum and determination of Plaintiff's TRO Motion.

Defendant Evers' Motion should be summarily denied and the Court should immediately order briefing and issue its decision no later than 5 p.m. Sunday evening, December 6 so that Plaintiff may have even a few hours to prepare for and seek whatever further relief may be then available in the one day left before the December 8 meeting of electors.

2) The Pleadings in Case No. 20-CV-1785 Do Not Relate in Any Way to the Gravamen of Plaintiff's Amended Complaint that Plaintiff and Over 1.6 Million Lawful Wisconsin Voters Were Disenfranchised by Massive Fraud, Hacking, Ballot-Stuffing, and Ballot-Changing by Dominion and Other Foreign and Domestic Actors Vehemently Antagonistic to the President.

The issues raised in the President's action in Case No. 20-CV-1785 reflect federal aspects of the state law issues raised in his Petition for Original Action just dismissed by the Wisconsin Supreme Court, *Trump v. Evers*, 2020 AP 001971-OA.

While the President's federal and state claims are obviously related to some of state law issues and actions of state officials that are included in Plaintiff's amended complaint, neither pleading in those cases addresses the central issue of Plaintiff's action here – foreign and domestic actors programming, manipulating, hacking, and tampering with election equipment and software to change votes and "elect" a candidate for which a majority of lawful Wisconsin voters did not cast their ballots.

The detailed technical pleadings and proof alleged by Plaintiff[1] are utterly absent in the President's pleadings, which do not relate whatsoever to the gravamen of Plaintiff's Amended Complaint that over 1.6 Million lawful Wisconsin votes were diluted and debased and that that Plaintiff and the other voters who cost them were effectively disenfranchised by massive electronic fraud, ballot-stuffing, and ballot-changing by Dominion and other foreign and domestic actors vehemently antagonistic to the President.

3) Defendants' Counsel Did Not Agree to or Propose a Briefing Schedule, so the Court Should Immediately Schedule Briefing and Rule on Plaintiff's TRO Motion no later than 5 p.m. Sunday evening, December 6.

As ordered by the Court December 2, the Parties' counsel met and conferred today regarding a briefing schedule. However, Defendants refused to agree to the schedule proposed by Plaintiffs, and in fact, refused to offer a proposed schedule of their own, stating that they were seeking reassignment of Case No. 20-CV-1785, which they have now done.

In fact, when Plaintiff's raised the issue of a stipulated TRO to preserve electronic and physical data, materials, and equipment (voting machines in particular) for inspection by Plaintiff's experts, Defendants asserted that they have no control or influence whatsoever over preservation of evidence by local jurisdictions and elections clerks, apparently implying that Plaintiff must implead all 1,912 individual municipalities that conduct voting operations in order to obtain relief.[2]

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[1] See Amended Complaint ¶¶ 6-17 (Dominion), 46-58 (statistical analysis by national experts), 60-99 (factual allegations regarding Dominion), 100-110 (statistical analysis), 131-137 (ballot fraud Dominion System); and all federal Exhibits 1 - 19.

[2] Cities, town and villages are individual municipalities charged with administering elections. Secs. 5.02(11), 5.25(2), Stats. According to the Wisconsin League of Municipalities and Wisconsin Dept. of Health Services, there are approximately 1,912 individual such municipalities.
https://www.lwm-info.org/590/Facts-About-Wisconsin-Municipalities;
https://www.lwm-info.org/590/Facts-About-Wisconsin-Municipalities

CONCLUSION

Again, the additional parties, procedural issues and delay proposed by Defendants are utterly unnecessary to consideration of Plaintiff's Amended Complaint and supporting Memorandum and determination of Plaintiff's TRO Motion, and are designed solely to deny through delay Plaintiff's access to the courts and remedies to which he and other lawful Wisconsin voters are entitled.

Plaintiff therefore requests the Court to summarily deny Defendant Evers' Motion, immediately order briefing on Plaintiff's TRO motion, and issue its decision no later than 5 p.m. Sunday evening, December 6 so that Plaintiff may have a few hours to prepare for and seek whatever further relief may be then available in the time left.

Respectfully submitted, this 3st day of December 2020.

LEAD COUNSEL FOR PLAINTIFF

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**Application for admission forthcoming

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,
and DERRICK VAN ORDEN,

Plaintiffs,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants.

ORDER DENYING MOTION TO REASSIGN CASE PURSUANT TO CIVIL L.R. 3(b) (DKT. NO. 16)

On December 1, 2020, plaintiffs William Feehan and Derrick Van Orden filed the complaint in this case, naming as defendants the Wisconsin Elections Commission, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr. and Governor Tony Evers. Id. at 1, 9. Two days later, before the defendants had answered, an amended complaint was filed naming only Feehan as plaintiff; the amended complaint names the same defendants. Dkt. No. 9.

On December 2, 2020, plaintiff Donald J. Trump filed a complaint in the Eastern District of Wisconsin, naming as defendants the Wisconsin Elections Commission, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Dean Knudson, Robert F. Spindell, Jr., Scott McDonell, George L. Christenson, Julietta Henry, Claire Woodall-Vogg, Tom Barrett, Jim Owczarski, Satya Rhodes-Conway, Maribeth Witzel-Behl, Cory Mason, Tara Coolidge, John

Antaramian, Matt Krauter, Eric Genrich, Kris Teske, Douglas J. La Follette and Tony Evers. Trump v. Wisconsin Elections Commission, *et al.*, Case No. 20-cv-1785 (E.D. Wis.). Section VIII of the Form JS 44 Civil Cover Sheet for Case No. 20-cv-1785 is blank; the plaintiff did not identify any related cases. Id. at Dkt. 1-1. Trump v. Wisconsin Elections Commission, *et al.*, Case No. 20-cv-1785 has been assigned to U.S. District Judge Brett H. Ludwig.

On December 3, 2020, Tony Evers—named as a defendant in both this case and Case No. 20-cv-1785—filed in this case a motion to reassign Case No. 20-cv-1785 to this court, citing Civil Local Rule 3(b) (E.D. Wis.). Dkt. No. 16. The defendant states that judicial efficiency and a desire to avoid conflicting opinions motivate the motion, because the "federal safe-harbor date [is] approaching on December 8 and the meeting of the Electoral College [is scheduled] for December 14." Id. at 1. The defendant refers the court to Civil Local Rule 3(b) for the factors to be considered in determining whether actions are related, noting that the rule provides that "the judge to whom the action with the lower-case number is assigned will resolve any dispute as to whether the actions are related." Id.

The defendant asserts that promptly upon learning late in the day on December 2, 2020 of the filing of Case No. 20-cv-1785, defense counsel in this case prepared and filed a notice of related case. Id. He asserts that the notice (attached to the motion) explains that Case No. 20-cv-1785 and this case arise from substantially the same transaction or events—"the administration of the November 3, 2020 Presidential election"—and involve substantially the same

parties.[1] Id. at 1-2. He asserts that both cases seek to overturn the results of the recent election "and in so doing deny more than three million Wisconsinites of their fundamental right to vote." Id. at 2. The defendant concludes by asserting that the two cases are related "within the meaning of Civil Local Rule 3(b)" and asks that the court reassign Case No. 20-cv-1785 to this court. Id.

The court will deny the motion. Civil L.R. 3 is titled "Commencing an Action." Rule 3(a) requires a party filing an action—the plaintiff—to file a Civil Cover Sheet (the Form JS 44). Rule 3(b) says that "[w]here the Civil Cover Sheet discloses a pending related civil action, the new civil action will be assigned to the same judge." The rule provides guidance to help the party who files the civil cover sheet—the plaintiff—determine whether cases are related; it instructs the plaintiff to consider whether the actions arise from substantially the same transaction or events or whether they involve substantially the same parties or property; it allows the plaintiff to identify on the Civil Cover Sheet any cases the plaintiff believes are related. Once the plaintiff has identified related cases, it provides that the clerk's office "will" assign the related cases to the same judge. It anticipates that some party other than the plaintiff might disagree that the cases are related, and provides that if any such disputes arise, the judge to whom the related cases are assigned will settle them. The rule does *not* provide a mechanism for any party other than the plaintiff to file a motion

[1] The two cases have different plaintiffs; among the twenty-two defendants in Case No. 20-cv-1785 are seven of the eight defendants named in this case.

asking for reassignment of cases based on the party's view that cases are related.

Contrast Criminal Local Rule 13 (E.D. Wis.), titled "Reassignment of Related Criminal Cases," which does provide a mechanism for reassignment. Rule 13(b) states that "[a] motion for reassignment based on relatedness may be filed by any party to a case." It requires the moving party to file the motion with the judge to whom the lowest numbered case of the claimed related set is assigned and requires that judge to decide the motion. Rule 13(a) lays out the conditions precedent to reassignment. While Criminal L.R. 13 expressly authorizes any party to file a motion seeking reassignment of cases that party believes to be related, there is no equivalent civil local rule.

Civil L.R. 3(b) does not authorize the relief the defendant requests.

The court **DENIES** the defendant's motion to reassign case pursuant to Civil L.R. 3(b). Dkt. No. 16.

Dated in Milwaukee, Wisconsin this 3rd day of December, 2020.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 2:20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants,

&.

DEMOCRATIC NATIONAL COMMITTEE,
Proposed Intervenor-Defendant.

NOTICE OF APPEARANCE OF CHARLES G. CURTIS, JR.

Attorney Charles G. Curtis, Jr. hereby enters his appearance as counsel for Proposed Intervenor-Defendant Democratic National Committee.

Attorney Curtis is an attorney in the law firm of Perkins Coie LLP, and his office address and telephone number are:

33 East Main Street
Suite 201
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Tel: (608) 663-7460
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Email: CCurtis@perkinscoie.com

Attorney Curtis is licensed to practice law in the State of Wisconsin and is admitted to practice before the District Court for the Eastern District of Wisconsin.

Dated: December 3, 2020

Respectfully Submitted,

By: s/ *Charles G. Curtis*

Charles G. Curtis, Jr.
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 2:20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants,

&.

DEMOCRATIC NATIONAL COMMITTEE,
Proposed Intervenor-Defendant.

NOTICE OF APPEARANCE OF MICHELLE M. UMBERGER

Attorney Michelle M. Umberger hereby enters her appearance as counsel for Proposed Intervenor-Defendant Democratic National Committee.

Attorney Umberger is an attorney in the law firm of Perkins Coie LLP, and her office address and telephone number are:

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Attorney Umberger is licensed to practice law in the State of Wisconsin and is admitted to practice before the District Court for the Eastern District of Wisconsin.

Dated: December 3, 2020

Respectfully Submitted,

By: s/ *Michelle M. Umberger*

Michelle M. Umberger
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

No. 2:20-cv-1771

MOTION TO INTERVENE OF PROPOSED INTERVENOR-DEFENDANT DEMOCRATIC SERVICES CORPORATION/DEMOCRATIC NATIONAL COMMITTEE (THE "DNC")

Proposed Intervenor-Defendant Democratic Services Corporation/Democratic National Committee ("DNC") respectfully moves for leave to intervene in this action to defend its interests against the claims asserted by Plaintiffs. For the reasons discussed in the accompanying memorandum in support, the DNC is entitled to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). In the alternative, the DNC requests permissive intervention pursuant to Rule 24(b). In accordance with Rule 24(c), a proposed answer to Plaintiff's complaint is attached as Exhibit 1.

WHEREFORE, the DNC requests that the court grant it leave to intervene in the above-captioned matter.

DATED: December 4, 2020

Respectfully Submitted,

s/Michelle M. Umberger

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** Application for admission pending*

Counsel for Proposed Intervenor-Defendant

CERTIFICATE OF SERVICE

I hereby certify that on Friday, December 4, 2020, I filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Michelle M. Umberger
Counsel for Proposed Intervenor

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 2:20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants,

&

DEMOCRATIC NATIONAL COMMITTEE,

Proposed Intervenor-Defendants.

PROPOSED INTERVENOR-DEFENDANT DEMOCRATIC NATIONAL COMMITTEE'S PROPOSED ANSWER TO AMENDED COMPLAINT FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF

Proposed Intervenor-Defendant Democratic Services Corporation/Democratic National Committee (the "DNC"), by and through its attorneys, answers Plaintiff's amended complaint for declaratory, emergency, and permanent injunctive relief ("complaint") as set forth below. Unless expressly admitted, each allegation in the complaint is denied, and DNC demands strict proof thereof.

Introduction

1. Paragraph 1 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 1.

2. Paragraph 2 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 2.

3. Paragraph 3 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 3.

4. Paragraph 4 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 4.

5. Paragraph 5 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 5.

6. Paragraph 6 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 6.

7. Paragraph 7 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 7.

8. Paragraph 8 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required,

DNC denies the allegations of Paragraph 8.

9. Paragraph 9 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 9.

10. Paragraph 10 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 10.

11. Paragraph 11 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 11.

12. Paragraph 12 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 12.

13. Paragraph 13 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 13.

14. Paragraph 14 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 14.

15. Paragraph 15 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 15.

16. Paragraph 16 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a

response is required, DNC denies the allegations of Paragraph 16.

17. Denied.

Jurisdiction and Venue

18. In response to Paragraph 18 of Plaintiff's complaint, DNC denies that this Court has subject-matter jurisdiction.

19. In response to Paragraph 19 of Plaintiff's complaint, DNC denies that this Court has subject-matter jurisdiction.

20. DNC denies Paragraph 20 of Plaintiff's complaint because the Court lacks subject-matter jurisdiction.

21. DNC denies Paragraph 21 of Plaintiff's complaint because the Court lacks subject-matter jurisdiction.

22. DNC denies that venue is proper in the Eastern District of Wisconsin.

23. Paragraph 23 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 22.

Parties

24. In response to paragraph 24 of Plaintiff's complaint, Intervenor DNC lacks knowledge or information sufficient to form a belief as to the truth of these allegations, and they are therefore denied.

25. DNC admits that Paragraph 24 quotes from *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020). The remainder of Paragraph 24 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the remaining allegations of

Paragraph 25.

26. Denied.

27. DNC admits that the results of the November 2020 Wisconsin election on November 30 indicated a plurality for President-Elect Biden. The remainder of Paragraph 27 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the remainder of allegations of Paragraph 27.

28. DNC admits the allegations of Paragraph 28.

29. DNC admits the allegations of Paragraph 29.

30. DNC admits that the Wisconsin Elections Commission was created in 2015. The remainder of Paragraph 30 contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the remainder of allegations of Paragraph 30.

31. In response to Paragraph 31, DNC admits that Wis Stat. § 7.20 governs the establishment of municipal and county boards of election commissioners in cities over 500,000 population and counties over 750,000 population, respectively. The remainder of Paragraph 31 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the remainder of allegations of Paragraph 31.

Statement of Facts

32. DNC admits that Plaintiff purports to bring this action under 42 U.S.C. §§ 1983 and 1988. The remainder of Paragraph 32 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 32.

33. DNC admits that Paragraph 33 of the complaint accurately quotes the United States constitution. The remainder of Paragraph 33 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 33.

34. Paragraph 34 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 34.

35. DNC denies the allegations of Paragraph 35. The margin of victory for President-Elect Biden was 20,682 votes.

36. Denied.

I. "VIOLATIONS OF WISCONSIN ELECTION CODE"

37. Paragraph 37 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 37.

38. Paragraph 38 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 38.

39. Paragraph 39 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 39.

40. Paragraph 40 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 40.

41. Paragraph 41 of Plaintiff's complaint contains mere characterizations, legal

contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 41.

42. Paragraph 42 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 42. DNC specifically denies that any Wisconsin voter in the 2020 Presidential Election claimed they were indefinitely confined in any way inconsistent with the Wisconsin's election laws.

43. Paragraph 43 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 43.

44. In response to paragraph 44 of Plaintiff's complaint, Intervenor DNC lacks knowledge or information sufficient to form a belief as to the truth of these allegations, and they are therefore denied. In addition, Paragraph 44 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required.

45. In response to paragraph 45 of Plaintiff's complaint, Intervenor DNC lacks knowledge or information sufficient to form a belief as to the truth of these allegations, and they are therefore denied. In addition, Paragraph 45 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required.

II. "EXPERT WITNESS TESTIMONY"

46. In response to paragraph 46 of Plaintiff's complaint, Intervenor DNC lacks knowledge or information sufficient to form a belief as to the truth of these allegations, and they are therefore denied. In addition, Paragraph 46 of Plaintiff's complaint contains mere

characterizations, legal contentions, conclusions, and opinions to which no response is required.

47. Paragraph 47 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 47.

48. Paragraph 48 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 48.

49. Paragraph 49 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 49.

50. Paragraph 50 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 50.

51. In response to Paragraph 51 of Plaintiff's complaint, Intervenor DNC lacks knowledge or information sufficient to form a belief as to the truth of these allegations, and they are therefore denied. In addition, Paragraph 51 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required.

52. In response to Paragraph 52 of Plaintiff's complaint, Intervenor DNC lacks knowledge or information sufficient to form a belief as to the truth of these allegations, and they are therefore denied. In addition, Paragraph 52 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required.

53. In response to Paragraph 53 of Plaintiff's complaint, Intervenor DNC lacks knowledge or information sufficient to form a belief as to the truth of these allegations, and they are therefore denied. In addition, Paragraph 53 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required.

54. Paragraph 54 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 54.

55. Paragraph 55 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 55.

56. Paragraph 56 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 56.

57. Paragraph 57 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 57.

58. Paragraph 58 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 58.

59. Paragraph 59 of Plaintiff's complaint contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 46.

III. "FACTUAL ALLEGATIONS REGARDING DOMINION VOTING SYSTEMS"

60. DNC lacks sufficient information to confirm or deny the contents of Paragraph 60, and they are therefore denied. Paragraph 60 of Plaintiff's complaint otherwise contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 60.

61. Paragraph 61 of Plaintiff's complaint otherwise contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 61.

62. Paragraph 62 of Plaintiff's complaint otherwise contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 62.

63. Paragraph 63 of Plaintiff's complaint otherwise contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 63.

64. DNC lacks sufficient information to confirm or deny the contents of Paragraph 64, and they are therefore denied. Paragraph 64 of Plaintiff's complaint otherwise contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 64.

65. Paragraph 65 of Plaintiff's complaint otherwise contains mere characterizations, legal contentions, conclusions, and opinions to which no response is required. Judge Amy Totenberg's October 11, 2020 Order in the USDC N.D. Ga. case of *Curling, et al. v. Kemp, et. al*, Case No. 1:17-cv-02989 Doc. No. 964, speaks for itself. To the extent a response is required, DNC denies the allegations of Paragraph 65.

66. Paragraph 66 of Plaintiff's complaint attempts to quote, paraphrase, and/or

interpret a judicial order. To the extent Plaintiff's interpretation differs from the text of the order, DNC denies the allegations. Paragraph 66 of Plaintiff's complaint otherwise contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 66.

67. Paragraph 67 of Plaintiff's complaint attempts to quote, paraphrase, and/or interpret a judicial opinion. To the extent Plaintiff's interpretation differs from the text of the opinion, DNC denies the allegations. Paragraph 67 of Plaintiff's complaint otherwise contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 67.

68. Paragraph 68 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 68.

69. Paragraph 69 of Plaintiff's complaint attempts to quote, paraphrase, and/or interpret a "security advisory." To the extent Plaintiff's interpretation differs from the text of the "advisory," DNC denies the allegations. Paragraph 69 of Plaintiff's complaint otherwise contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 67.

70. Paragraph 70 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 70. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 70, and they are therefore denied.

71. Paragraph 71 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is

required, DNC denies the allegations of Paragraph 71. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 71, and they are therefore denied.

72. Paragraph 72 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 72. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 72, and they are therefore denied.

73. Paragraph 73 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 73. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 73, and they are therefore denied.

74. Paragraph 74 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 74. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 74, and they are therefore denied.

75. Paragraph 75 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 75. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 75, and they are therefore denied.

76. Paragraph 76 of Plaintiff's complaint contains mere legal contentions,

characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 76. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 76, and they are therefore denied.

77. Paragraph 77 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 77.

78. DNC denies the allegations of Paragraph 78.

79. Paragraph 79 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 79. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 79, and they are therefore denied.

80. Paragraph 80 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 80. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 80, and they are therefore denied.

81. Paragraph 81 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 81. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 81, and they are therefore denied.

82. Paragraph 82 of Plaintiff's complaint contains mere legal contentions,

characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 82. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 82, and they are therefore denied.

83. Paragraph 83 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 83. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 83, and they are therefore denied.

84. Paragraph 84 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 84. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 84, and they are therefore denied.

85. Paragraph 85 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 85. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 85, and they are therefore denied.

86. Paragraph 86 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 86. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 86, and they are therefore denied.

87. Paragraph 87 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 87. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 87, and they are therefore denied.

88. Paragraph 88 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 88. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 88, and they are therefore denied.

89. Paragraph 89 of Plaintiff's complaint attempts to quote, paraphrase, and/or interpret H.R. 2722. To the extent Plaintiff's quotation differs from the text of the bill DNC denies the allegation in that respect. Paragraph 69 of Plaintiff's complaint otherwise contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 67.

90. Paragraph 90 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 90. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 90, and they are therefore denied.

91. Paragraph 91 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 91. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 91, and

they are therefore denied.

92. Paragraph 92 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 92. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 92, and they are therefore denied.

93. DNC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 93, and they are therefore denied.

94. Paragraph 94 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 94. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 94, and they are therefore denied.

95. Paragraph 95 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 95. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 95, and they are therefore denied.

96. Paragraph 96 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 96. DNC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 96, and they are therefore denied.

97. Paragraph 97 of Plaintiff's complaint contains mere legal contentions,

characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 97. DNC otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 97, and they are therefore denied.

98. Paragraph 98 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 98.

99. DNC denies the allegations of Paragraph 99.

COUNT I

100. DNC reincorporates all preceding paragraphs as if fully set forth herein.

101. Paragraph 101 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

102. Paragraph 102 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

103. Paragraph 103 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

104. DNC denies the allegations of Paragraph 104.

105. Paragraph 105 of Plaintiff's complaint contains mere legal conclusions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 105. DNC specifically denies that any Wisconsin voter in the 2020 Presidential Election claimed they were indefinitely confined in any way inconsistent with the Wisconsin's election laws.

106. Paragraph 106 of Plaintiff's complaint contains mere legal conclusions to which no response is required. To the extent a response is required, DNC denies the allegations of

Paragraph 106. DNC specifically denies that any Wisconsin voter in the 2020 Presidential Election claimed they were indefinitely confined in any way inconsistent with the Wisconsin's election laws.

107. DNC lacks sufficient information to confirm or deny the allegations of Paragraph 107 and therefore denies.

108. Paragraph 108 of Plaintiff's complaint contains mere legal contentions, characterizations, and opinions to which no response is required. To the extent a response is required, DNC denies the allegations of Paragraph 108. DNC otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 108, and they are therefore denied.

109. DNC denies the allegations in Paragraph 109.

110. DNC denies the allegations in Paragraph 110.

COUNT II

111. DNC reincorporates all preceding paragraphs as if fully set forth herein.

112. Paragraph 112 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

113. Paragraph 113 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

114. Paragraph 114 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

115. Paragraph 115 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

116. Paragraph 116 of Plaintiff's complaint contains mere legal conclusions to which no response is required. DNC denies the remaining allegations of Paragraph 116.

117. Paragraph 117 of Plaintiff's complaint contains mere legal conclusions to which no response is required. DNC denies the remaining allegations of Paragraph 117.

118. Paragraph 118 of Plaintiff's complaint contains mere legal conclusions to which no response is required. DNC denies that Plaintiff is entitled to any relief.

119. Paragraph 119 of Plaintiff's complaint contains mere legal conclusions to which no response is required. DNC denies the remaining allegations of Paragraph 119.

120. DNC denies that Plaintiff is entitled to any relief.

121. Paragraph 121 of Plaintiff's complaint contains mere legal conclusions to which no response is required. DNC denies the remaining allegations of Paragraph 121. DNC denies that Plaintiff is entitled to any relief.

COUNT III

122. DNC reincorporates all preceding paragraphs as if fully set forth herein.

123. Paragraph 123 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

124. Paragraph 124 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

125. Paragraph 125 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

126. Paragraph 126 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

127. Paragraph 127 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

128. Paragraph 128 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

129. DNC denies the allegations of Paragraph 129.

130. DNC denies the allegations of Paragraph 130.

COUNT III

131. DNC reincorporates all preceding paragraphs as if fully set forth herein.

132. DNC denies the allegations of Paragraph 132.

133. DNC denies the allegations of Paragraph 133.

134. DNC denies the allegations of Paragraph 134.

135. DNC denies the allegations of Paragraph 135.

136. Paragraph 136 of Plaintiff's complaint contains mere legal conclusions to which no response is required.

137. DNC denies the allegations of Paragraph 137.

Prayer for Relief

138-142. To the extent Plaintiff makes any factual allegations in paragraphs 138 to 142, DNC denies such allegations. DNC denies that Plaintiff are entitled to any relief.

AFFIRMATIVE DEFENSES

DNC asserts the following affirmative defenses without accepting any burdens regarding them and reserves the right to assert any further defenses that may become evident during the pendency of this matter:

First Affirmative Defense

Plaintiff lacks standing to assert their claims.

Second Affirmative Defense

The Complaint fails, in whole or in part, to state a claim upon which relief can be granted.

Third Affirmative Defense

Plaintiff's claims are barred by laches.

Fourth Affirmative Defense

The Complaint is barred in whole or in part by the doctrine of abstention.

Fifth Affirmative Defense

The Plaintiff is estopped and/or equitably estopped from bringing some or all of the claims asserted in the action.

Sixth Affirmative Defense

Plaintiff's complaint fails to state a claim for relief that is plausible on its face.

Seventh Affirmative Defense

Plaintiff's claims are barred by the doctrine of illegality.

Eighth Affirmative Defense

Plaintiff's have waived the right to bring some or all of their claims.

Ninth Affirmative Defense

Plaintiff's unclean hands preclude relief.

Tenth Affirmative Defense

Plaintiff's claims are barred in whole or in part by the doctrine of res judicata.

PROPOSED INTERVENOR'S REQUEST FOR RELIEF

Having answered Plaintiff's complaint, DNC requests that the Court:

1. Deny Plaintiff is entitled to any relief;
2. Dismiss Plaintiff's complaint in its entirety with prejudice;
3. Award DNC its costs and attorneys' fees incurred in defending against Plaintiff's claims in accordance with 42 U.S.C. § 1988; and
4. Grant such other and further relief as this Court deems just and proper.

DATED: December 4, 2020

Respectfully Submitted,

s/ Michelle M. Umberger

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** Application for admission pending*

CERTIFICATE OF SERVICE

I hereby certify that on Friday, December 4, 2020, I filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Michelle M. Umberger
Counsel for Proposed Intervenor

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

No. 2:20-cv-1771

[PROPOSED] ORDER GRANTING PROPOSED INTERVENOR-DEFENDANT DEMOCRATIC NATIONAL COMMITTEE'S MOTION TO INTERVENE

Before the Court is Proposed Intervenor-Defendant Democratic Services Corporation/Democratic National Committee's ("DNC") Motion to Intervene. Having reviewed the papers filed in support of and in opposition to (if any) this motion, and being fully advised, the Court finds that that the DNC has satisfied the elements of intervention as of right and the elements of permissive intervention. Accordingly, the DNC is entitled to intervene in this case, and the Court GRANTS the DNC's motion.

It is so **ORDERED.**

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN, Plaintiff, v. WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity, Defendants.	No. 2:20-cv-1771

PROPOSED INTERVENOR-DEFENDANT DEMOCRATIC NATIONAL COMMITTEE'S BRIEF IN SUPPORT OF MOTION TO INTERVENE

I. Introduction

Pursuant to Federal Rule of Civil Procedure 24, Proposed Intervenor Defendant DNC Services Corporation/Democratic National Committee ("DNC") moves to intervene as a defendant in this lawsuit. Through this lawsuit, Plaintiffs seek to undo Wisconsin's lawful certification of the election results. They base their requested relief on, among other things, speculation, questionable evidence, and flawed legal theories. The DNC represents a diverse group of Democrats, including elected officials, candidates, constituents, and voters. The extraordinary relief Plaintiffs request would deprive the DNC's members and constituents of their rights to have their votes counted, undermine the electoral prospects of the DNC's candidates, and divert the DNC's resources. The DNC's intervention in this lawsuit is necessary to protect those interests.

Pursuant to Rule 24(c) a conditional answer is attached to Exhibit 1.[1]

II. Argument

A. The DNC is entitled to intervene as of right.

The DNC is entitled to intervene as of right because (1) its "motion is timely"; (2) the DNC "has an interest relating to the property or transaction at issue in the litigation"; and (3) "that interest may, as a practical matter, be impaired or impeded by disposition of the case." *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 746 (7th Cir. 2020). Further, no "existing part[y] adequately represent[s]" the DNC's interests. *Id.* (emphasis omitted).

1. The motion to intervene is timely.

First, this motion is timely. In considering whether a motion to intervene is timely, courts consider, among other things, "(1) the length of time the intervenor knew or should have known of his interest in the case" and "(2) the prejudice caused

[1] The DNC intends to file a motion to dismiss. But to comply with Rule 24(c), and in the event this Court denies the DNC's forthcoming motion to dismiss, the DNC has submitted a proposed, conditional answer.

to the original parties by the delay." *State v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019) (quoting *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 797 (7th Cir. 2013)).

In this case, the DNC is filing its motion to intervene just two days after plaintiffs filed this lawsuit. The DNC has thus "move[d] to intervene as soon as it" knew "its interests might be adversely affected by the outcome of the litigation." *Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 701 (7th Cir. 2003). No defendant has yet filed a response to Plaintiffs' complaint. And the DNC is prepared to proceed in accordance with whatever schedule this Court sets. Thus, intervention by the DNC will neither delay the resolution of this matter nor prejudice any party. Under these circumstances, the motion is timely.

2. The DNC has significant interests at stake in this litigation.

Second, the DNC has a "direct, significant, and legally protectable" interest in this litigation that supports its intervention. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 101 F.3d 503, 506 (7th Cir. 1996). The rules for mandatory intervention "do[] not define 'interest.'" *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 391 (7th Cir. 2019). But, the "standing inquiry," gives content to its meaning, as the Seventh Circuit has "required 'more than the minimum Article III interest' for intervention.'" *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (quoting *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009)). At the same time, the Seventh Circuit has "interpreted 'statements of the Supreme Court as encouraging liberality in the definition of an interest.'" *Lopez-Aguilar*, 924 F.3d at 392 (quoting *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982)).

The DNC has several significant, protectable interests at stake in this lawsuit, each of which justify its intervention. First, Plaintiffs seek to disrupt the certification of Wisconsin's November 3, 2020 Presidential election results and to cast doubt on

the entitlement of the Democratic Party's candidates for President and Vice-President to Wisconsin's ten electoral votes. Interference with a political party's electoral prospects constitutes constitutional injury. *See, e.g.*, *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586–87 (5th Cir. 2006) (holding that a "basis for the [Texas Democratic Party's] direct standing is harm to its election prospects" and that "a political party's interest in a candidate's success is not merely an ideological interest"); *Owen v. Mulligan*, 640 F.2d 1130, 1132 (9th Cir. 1981) (holding that "the potential loss of an election" is sufficient injury to confer Article III standing). Courts have permitted political parties to intervene on these grounds. *See, e.g.*, *Issa v. Newsom*, No. 220CV01044MCECKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (granting intervention of state party where "Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates" (quoting *Paher v. Cegavske*, No. 320CV00243MMDWGC, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020))).

Further, Plaintiffs' requested relief of de-certifying the election would have significant disenfranchising effects on the DNC's constituents. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (agreeing with the unanimous view of the Seventh Circuit that the Indiana Democratic Party had Article III standing to challenge a voter identification law that risked disenfranchising its members). This, in turn, would require the DNC to divert resources to safeguard the timely certification of statewide results. *See Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (concluding that challenge law "injure[d] the Democratic Party by compelling the party to devote resources" that it would not have needed to devote absent new law), *aff'd*, 553 U.S. 181 (2008); *see also Issa*, 2020 WL 3074351, at *3 (granting intervention and citing this interest).

As a result, the DNC's injuries are direct and significant and support its intervention.

3. Denial of the motion to intervene would impair the DNC's ability to protect its interests.

Next, the DNC's interests "may, as a practical matter, be impaired or impeded by disposition of the case." *Driftless Area Land Conservancy*, 969 F.3d at 746. When, as here, a proposed intervenor has a protectable interest in the outcome of the litigation, courts have "little difficulty concluding" that its interests will be impaired. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006)). When considering this factor, courts examine the "practical consequences" of denying intervention. *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); Advisory Comm. to Fed. R. Civ. P. 24 1966 Amendment ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene. . . .").

As set forth above, there can be little doubt that if Plaintiffs were to succeed in decertifying the election, the DNC "would be directly rather than remotely harmed." *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009). The relief Plaintiffs seek—decertification of the election—would threaten the DNC's electoral prospects, disenfranchise the DNC's members, and otherwise harm the DNC's mission. Courts have frequently permitted political parties to intervene in similar circumstances. *See, e.g.*, *Paher v. Cegavske*, No. 20-00243-MMD-WGC, 2020 WL 2042365, at *4 (D. Nev. Apr. 28, 2020) (granting DNC intervention in election case regarding election procedures and recognizing impairment of DNC's interests); *see also Issa*, 2020 WL 3074351, at *3 (recognizing impairment of state party's interests in lawsuit regarding election procedures).

4. The DNC's interests are not adequately represented by the existing parties.

Finally, the DNC's interests are not adequately represented by the existing parties. *Driftless Area Land Conservancy*, 969 F.3d at 747. The Seventh Circuit

employs a tiered approach to "evaluating adequacy of representation." *Id.* at 747. "'The default rule . . . is a liberal one.'" *Id.* (quoting *Planned Parenthood of Wisconsin, Inc.*, 942 F.3d at 799). It requires a 'minimal" burden of showing that representation "'may be' inadequate." *Id.* (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). A more stringent showing is required "if the interest of the absentee is identical to that of an existing party, or if a governmental party is charged by law with representing the absentee's interest." *Id.* Ultimately, examination of this factor "calls for a contextual, case-specific analysis, and resolving questions about the adequacy of existing representation requires a discerning comparison of interests." *Id.* at 748.

In this case, the Defendants and the DNC have "interests and objectives that are materially different" from each other. *Id.* at 749. The Defendants have an interest in defending the actions of state officials. The DNC has different objectives: ensuing that the valid ballot of every Democratic voter in Wisconsin is counted and safeguarding the election of Democratic candidates. Ultimately, the DNC has specific interests and concerns—including the Democratic Party's overall electoral prospects and use of their limited resources—that none of the current Defendants share. Considering these material differences in objectives, no heightened burden of showing of inadequacy is required.[2] *Id.* And the DNC has met the "minimal" burden of showing that the Defendants' "representation 'may be' inadequate." *Id.* (quoting *Trbovich*, 404 U.S. at 538 n.10).

[2] Further, the Wisconsin Elections Commission and Governor are not "charged by law with protecting the interests of the proposed intervenors," the DNC. *Planned Parenthood of Wisconsin, Inc.*, 942 F.3d at 799; *see also Wisconsin Educ. Assn Council v. Walker*, 705 F.3d 640, 659 (7th Cir. 2013) (finding that, in challenge to constitutionality of statute related to unions, the Governor and other state officials were "not charged by law" with protecting interests of employees seeking to intervene in defense of the statute).

Indeed, other courts have held that such divergent interests between government defendants and others warrant intervention. *See, e.g.*, *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (recognizing that intervention may be appropriate when "an agency's views are necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor"); *see also, e.g.*, *Issa*, 2020 WL 3074351, at *3 (granting intervention and observing that the interests of officials were to "properly administer election laws," in contrast to the interests of a state party, which included "ensuring their party members and the voters they represent have the right to vote," "advancing their electoral prospects," and "allocating their limited resources"); *Paher*, 2020 WL 2042365, at *3 (granting intervention as of right where proposed intervenors, including the DNC, "may present arguments about the need to safeguard [the] right to vote that are distinct from [state defendants'] arguments").

B. The DNC is also entitled to permissive intervention.

If the Court does not grant intervention as a matter of right, the DNC respectfully requests that the Court exercise its discretion to allow it to intervene under Rule 24(b). The Court has discretion to grant a motion for permissive intervention when the Court determines that: (1) the proposed intervenor's claim or defense and the main action have a "common question of law or fact," and (2) the intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B) and (b)(3); *see also Planned Parenthood of Wisconsin, Inc.*, 942 F.3d at 803 (discussing the district court's broad discretion in granting permissive intervention).

The DNC meets the criteria for permissive intervention. The motion to intervene is timely and, given that this litigation is at a very early stage, intervention will not unduly delay or prejudice the adjudication of the original parties' rights. Moreover, the DNC will inevitably raise common questions of law and fact, including

challenging Plaintiffs' claims that the lawful votes of Wisconsin voters should be invalidated. The DNC would contribute to the complete development of the factual and legal issues before this Court and is "uniquely qualified to represent the 'mirror-image' interests" of the Plaintiff. *See Democratic Nat'l Comm. v. Bostelmann,* No. 20-CV-249-WMC, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020) (denying Republican National Committee's motion to intervene as a matter of right but granting permissive intervention because the RNC represented "the 'mirror-image' interests" of the plaintiffs).

III. Conclusion

For the reasons stated above, this Court should grant the DNC's motion to intervene as a matter of right. In the alternative, this Court should exercise its direction and grant the DNC permissive intervention.

DATED: December 4, 2020.

Respectfully Submitted,

s/Michelle M. Umberger

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** Application for admission pending*

Counsel for Proposed Intervenor-Defendant

CERTIFICATE OF SERVICE

I hereby certify that on Friday, December 4, 2020, I filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Michelle M. Umberger
Counsel for Proposed Intervenor

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 2:20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants,

&.

DEMOCRATIC NATIONAL COMMITTEE,
Proposed Intervenor-Defendant.

PROPOSED INTERVENOR-DEFENDANT DEMOCRATIC NATIONAL COMMITTEE'S DISCLOSURE STATEMENT

The undersigned, counsel of record for Proposed Intervenor-Defendant Democratic National Committee, furnishes the following in compliance with Civil L. R. 7.1 and Fed. R. Civ. P. 7.1.

The Democratic National Committee has no parent companies or publicly held companies with a 10% or greater ownership interest in it.

Dated: December 3, 2020

Respectfully Submitted,

By: *s/ Michelle M. Umberger*

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** Application for admission pending*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

DEFENDANT GOVERNOR EVERS'S REPLY TO PLAINTIFF'S PROPOSED BRIEFING SCHEDULE

On Thursday, December 3, 2020, Plaintiff William Feehan filed an Amended Motion for Temporary Restraining Order and Preliminary Injunction To Be Considered in an Expedited Manner (Dkt. 10), which included a Proposed Briefing Schedule (Dkt. 10-1). Several hours later, counsel met and conferred about the proposed schedule but were unable to reach agreement. Subsequent to that meet-and-confer session, one individual and one entity have moved to intervene in this matter.

In the absence of an agreed schedule among the parties, Defendant Tony Evers proposes the following expedited schedule:

Monday, Dec. 7 at 5:00 p.m. Defendants/Intervenors oppositions to TRO motion[1]

[1] Governor Evers's brief will address not only the merits of Plaintiff's motion, but also threshold questions of justiciability.

Tuesday, Dec. 8 at 5:00 p.m.	Plaintiff replies to opposition briefs
At the Court's discretion	Court holds an evidentiary hearing and legal argument (if deemed necessary)

This proposed schedule will significantly expedite resolution of Plaintiff's claims, though Plaintiff has no one to blame but himself for the time-crunch that he cites as justification for imposing impossible deadlines.[2] This proposed schedule also seeks to balance the resources to be devoted to this case with those necessary for litigating the parallel case filed in this Court by President Trump[3] and any state-court proceedings challenging the results of Wisconsin's election ongoing[4] or that may arise.

Should the Court wish to hear more on this topic, counsel for Governor Evers will gladly make themselves available at the Court's convenience for a scheduling conference.

Respectfully submitted this 4th day of December 2020.

/s/ Jeffrey A. Mandell
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Attorneys for Defendant, Governor Tony Evers

[2] Plaintiff asserts that his motion needs to be adjudicated before the electors meet. (Dkt. 18 at *2) Since that meeting is not until December 14, *see* 3 U.S.C. § 7 and Wis. Stat. § 7.75, the Governor's proposed schedule satisfies that measure.

[3] *Trump v. Wis. Elections Comm'n, et al.*, Case No. 2:2020-CV-1785 (E.D. Wis., filed December 2, 2020). Plaintiff in that case has also filed an emergency motion for preliminary injunctive relief. Judge Ludwig is convening a telephonic scheduling conference at 1:00 p.m. on Friday, December 4, 2020, to set deadlines in that matter.

[4] *Wis. Voters Alliance v. Wis. Elections Comm'n, et al.,* Case No. 2020AP1930-OA (Wis.) (petition for original jurisdiction in the Wisconsin Supreme Court pending).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

WISCONSIN ELECTIONS COMMISSION AND ITS MEMBERS' RESPONSE TO PLAINTIFF'S PROPOSED BRIEFING SCHEDULE

Defendants Wisconsin Elections Commission and its members submit this response to Plaintiff's proposed briefing schedule on its motion for a temporary restraining order or, in the alternative, a preliminary injunction. Plaintiff proposes that Defendants be ordered to file a response to the motion by Friday, December 4, at 8:00 p.m., that Plaintiff file a reply by Saturday, December 5, at 8:00 p.m., and that this Court issue a decision by Sunday, December 6, at 5:00 p.m. (Dkt. 10-1; 18.) To justify this incredibly short timeline, Plaintiff asserts that he needs a decision by no later than December

6 so that he can "prepare for and seek whatever further relief may be then available in the one day left before the December 8 meeting of electors." (Dkt. 18:2.)

But, even if that meeting had any relevance to this lawsuit, no such exigency would exist because the meeting of electors does not occur until December 14, 2020. *See* Wis. Stat. § 7.75(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."). In any event, any exigency is of the Plaintiff's own making, as they have chosen to wait to bring their claims until eleventh hour.

A more reasonable timeframe for Defendants to respond to Plaintiffs' voluminous filings—an amended complaint, exhibits, and TRO filings totaling nearly 400 pages—would be as follows:

- Defendants file a response brief by Tuesday, December 8, at 11:59 p.m.
- Plaintiff files a reply brief by Wednesday, December 9, at 11:59 p.m.

That schedule, while still extremely abbreviated, would at least give Defendants a reasonable time to respond to the amended complaint and accompanying documents that Plaintiff filed the morning of December 3, a day before he asks Defendants to file substantive responses.

Dated this 4th day of December, 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ S. Michael Murphy
S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

JODY J. SCHMELZER
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State Bar #1027796

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Justin A. Nelson of the law firm of Susman Godfrey LLP has been retained by defendant Governor Tony Evers in this action. Please serve copies of all papers in this action on the undersigned at the address set forth below.

Respectfully submitted this 4th day of December 2020.

/s/ Justin A. Nelson
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Attorneys for Defendant, Governor Tony Evers

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Davida Brook of the law firm of Susman Godfrey L.L.P. have been retained by defendant Governor Tony Evers in this action. Please serve copies of all papers in this action on the undersigned at the address set forth below.

Respectfully submitted this 4th day of December 2020.

/s/ Davida Brook
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Attorneys for Defendant, Governor Tony Evers

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants.

ORDER GRANTING IN PART AND DEFERRING RULING IN PART ON AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO BE HEARD IN AN EXPEDITED MANNER (DKT. NO. 10)

At 10:30 a.m. on December 3, 2020, the plaintiff filed an "Amended Motion For Temporary Restraining Order And Preliminary Injunction To Be Considered In An Expedited Manner." Dkt. No. 10. The amended motion seeks a temporary restraining order or, in the alternative, a preliminary injunction, "to be considered in an expedited manner." Id. at 1. It states that the motion is being submitted pursuant to Fed. R. Civ. P. 65 "and Civil L.R. 7." Id.

The motion asserts that the plaintiff will suffer irreparable harm if the court does not grant a temporary restraining order. Id. at 2. The plaintiff states that he will suffer irreparable harm if various actions he describes "are not immediately enjoined across the state of Wisconsin pursuant to 52 U.S.C. § 20701 (preservation of voting records)" to prevent destruction or alteration of evidence. Id. at ¶5. He asserts that the amended complaint (Dkt. No. 9, filed

the same day as this motion) and the motion present "material dispositive issues which are questions of law that may be resolved without factual investigation or determination." Id. at ¶6.

The plaintiff attached to the motion a proposed briefing schedule. Dkt. No. 10-1. The schedule indicates that the plaintiff's counsel had conferred with defense counsel (and planned to speak with them again later that day) and anticipated proposing that the defendants file their response to the motion for injunctive relief by 8:00 p.m. on Friday, December 4, 2020, that the plaintiff file his reply by 8:00 p.m. on Saturday, December 5, 2020 and that the schedule conclude with a "[h]earing as directed by the Court. Plaintiff proposes to submit the matter on briefs without argument." Id. at 1. Neither the amended motion nor the briefing schedule indicated whether the plaintiff needed a decision from the court by a date certain.

At 5:13 p.m. on December 3, the plaintiff filed a brief in opposition to defendant Tony Evers's motion to reassign Trump v. Wisconsin Elections Commission, *et al.*, Case No. 20-cv-1785, from U.S. District Court Judge Brett H. Ludwig to this court. Dkt. No. 18. The brief stated that "[w]ith the College of Electors scheduled to meet December 8, there could never be a clearer case of 'justice delayed is justice denied.'" Id. at 1. The plaintiff stated that the court should deny the motion to reassign and "immediately order briefing and issue its decision no later than 5 p.m. Sunday evening, December 6 so that Plaintiff may have even a few hours to prepare for and seek whatever further relief may

be then available in the one day left before the December 8 meeting of electors." Id. at 2.

The plaintiff reported that the parties had met and conferred regarding a briefing schedule for the motion for injunctive relief, but that the defendants had "refused to agree to the schedule proposed by Plaintiffs, and in fact, refused to offer a proposed schedule of their own," indicating that they would be seeking reassignment of Case No. 20-cv-1785. Id. at 3. The plaintiff said the defendants also indicated that they could not stipulate to a TRO "to preserve electronic and physical data, materials, and equipment (voting machines in particular) for inspection by Plaintiff's experts" because the defendants said they had "no control or influence whatsoever over preservation of evidence by local jurisdictions and elections clerks." Id. The plaintiff concluded the brief by reiterating his request that the court immediately order briefing and that the court issue its decision no later than 5:00 p.m. Sunday evening, December 6.

First thing on December 4, 2020, defendant Tony Evers responded to the request for an expedited briefing schedule. Dkt. No. 25. The defendant noted that although the plaintiff had asserted that the court needed to decide the motion before the electors meet, that meeting was not scheduled until December 14. Id. at 2 n.2. The defendant proposed an alternative schedule by which the defendants would file their briefs in opposition to the motion for injunctive relief by 5:00 p.m. on Monday, December 7; the plaintiff would file his reply brief by 5:00 p.m. on Tuesday, December 8; and the court could

exercise its discretion regarding whether to hold an evidentiary hearing or hear argument. Id. at 1-2.

Minutes later, defendants the Wisconsin Elections Commission and its members filed their brief in opposition to the request for an expedited briefing schedule. Dkt. No. 26. They, too, stated that the meeting of electors will not take place until December 14, 2020. Id. at 26. They propose a schedule whereby the defendants will file their opposition briefs to the motion for injunctive relief by 11:59 p.m. on Tuesday, December 8, 2020 and the plaintiff will file his reply brief by 11:59 p.m. on Wednesday, December 9, 2020. Id. at 2,

In seeking an expedited briefing schedule, the plaintiff's December 3, 2020 amended motion for injunctive relief cites Civil Local Rule 7 (E.D. Wis.), but identifies no subsection of that rule. Rule 7(b) gives a non-moving party twenty-one days to respond to a motion and Rule 7(c) gives the moving party fourteen days to reply. Given the plaintiff's repeated use of the word "expedited" and the briefing schedule he proposes, the court concludes that he is asking the court for shorter turnaround time than that provided in Rules 7(b) and (c).

There *is* a provision of Civil L.R. 7 that allows a party to seek expedited briefing. Civil L.R. 7(h), which allows a party to seek non-dispositive relief by expedited motion if the party designates the motion as a "Civil L.R. 7(h) Expedited Non-Dispositive Motion." When the court receives a motion with that designation, it may schedule the motion for a hearing or decide the motion on the papers and may order an expedited motion schedule. Civil L.R. 7(h)(1). The

rule limits such motions to three pages in length, requires the respondent to file its three-page opposition memorandum within seven days unless the court orders otherwise and allows the respondent to attach an affidavit or declaration of no more than two pages. Civil L.R. 7(h)(2).

Although the plaintiff did not designate it as such, the court construes the plaintiff's request for the motion for injunctive relief to be heard in an "expedited manner"—Dkt. No. 10—as a Civil L.R. 7(h) Expedited Non-Dispositive Motion for an Expedited Briefing Schedule. The court will grant that motion (although it will not order the briefing schedule the plaintiff suggests).

The other part of the plaintiff's motion seeks immediate temporary injunctive relief—a temporary restraining order or a preliminary injunction. The motion states that the amended complaint and the motion "present material dispositive issues which are questions of law that may be resolved without factual investigation or determination." Dkt. No. 10 at 3. The plaintiff never has requested a hearing, either in writing or by contacting chambers by phone with the adverse parties on the line. The anticipated briefing schedule the plaintiff attached to the amended motion for injunctive relief, while mentioning a hearing "as directed by the Court," states that the plaintiff proposes to "submit the matter on briefs without argument." Dkt. No. 10-1 at 1. In his brief in opposition to a motion to reassign another case, the plaintiff proposes briefing through the weekend and a ruling from this court on Sunday evening; because court generally is not in session on weekends, the court deduces that the plaintiff does not anticipate a hearing on the motion.

The United States Supreme Court has held that injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Nat. Res. Defense Counsel, Inc., 555 U.S. 7, 22 (2008) (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)). Because it is an extraordinary remedy, injunctive relief never is awarded as of right. Id. (citing Munaf v. Geren, 553 U.S. 674, 689-90 (2008)). Courts considering requests for such extraordinary relief must, in every case, "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Id. (quoting Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987)).

In this court's experience it is unusual for a party seeking the extraordinary remedy of preliminary injunctive relief to ask the court to issue a decision on the pleadings, without presentation of evidence or argument. But because that is what the plaintiff—the movant—has asked, the court will rule on the pleadings.

As for the expedited briefing schedule, the schedule the plaintiff has proposed severely limits the time available to the defendants to respond to his pleadings and to the court to rule. The plaintiff created this limitation by waiting two days to confer with defense counsel and by waiting until late yesterday afternoon to mention a date by which it appears he seeks a ruling from the court. The court disagrees that the plaintiff will be denied his right to redress if the court does not rule by Sunday evening, December 6.

The plaintiff stated in his opposition brief to the motion to reassign that time was of the essence because the College of Electors was scheduled to meet December 8. Dkt. No. 18 at 1. That is not correct. According to an October 22, 2020 white paper from the Congressional Research Service titled "The Electoral College: A 2020 Presidential Election Timeline," the electors will meet and vote on December 14, 2020. https://crsreports.congress.gov/product/pdf/IF/IF11641.

December 8, 2020—six days prior to the date the College of Electors is scheduled to meet—is the "safe harbor" deadline under 3 U.S.C. §5. That statute provides that if a state has provided, "by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State," and that final determination has been made "at least six days before the time fixed for the meeting of the electors," that determination—if it is made under the state's law at least six days prior to the day the electors meet—"shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution . . . ." Wisconsin has enacted such a law. It is Wis. Stat. §9.01. That statute provides for an aggrieved candidate to petition for a recount. It provides specific procedures for the recount, as well as appeal to the circuit court and the court of appeals. Wis. Stat. §9.01(11) states that it is "the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process."

It appears, therefore, that December 8 is a critical date for resolution of any *state court* litigation involving an aggrieved candidate who is contesting the outcome of an election. The state courts[1] either will or will not resolve allegations of violations of Wis. Stat. §9.01 by the December 8, 2020 "safe harbor" deadline. The plaintiff has not explained why it is necessary for this federal court to grant or deny the injunctive relief he seeks—orders requiring the defendants to de-certify the election results; enjoining defendant Evers from transmitting certified election results to the Electoral College; requiring defendant Evers to transmit certified election results stating that President Donald Trump is the winner of the election; seizing and impounding voting machines, ballots and other election materials; requiring production of security camera recordings for voting facilities—before the safe harbor deadline for *state* courts to resolve alleged violations of Wis. Stat. §9.01.

Because the electors do not meet and vote until December 14, 2020, the court will impose a less truncated briefing schedule than the one the plaintiff proposes, to give the defendants slightly more time to respond. The court will require the defendants to file their opposition brief to the Plaintiff's Amended Motion for Temporary Restraining Order and Preliminary Injunction to be Considered in an Expedited Manner (Dkt. No. 10) by 5:00 p.m. on **Monday, December 7, 2020.** The court will require the plaintiff to file his reply brief in support of the Plaintiff's Amended Motion for Temporary Restraining Order and

[1] The plaintiff has alleged in this federal suit that the defendants violated the "Wisconsin Election Code." Dkt. No. 9 at 11. This court has made no determination regarding whether it has jurisdiction to resolve that claim.

Preliminary Injunction to be Considered in an Expedited Manner (Dkt. No. 10) by 5:00 p.m. on **Tuesday, December 8, 2020.**

The court directs the parties' attention to Civil L.R. 7(f), which provides that memoranda in opposition to motions are limited to **thirty pages** and reply briefs in support of motions are limited to **fifteen pages**.

Finally, an administrative note: On December 2, 2020 a document was docketed as a notice of appearance for lead counsel Sidney Powell. Dkt. No. 8. The document is blank (except for the designation of the court); the court does not have a completed notice of appearance on file for Attorney Powell.

The court **GRANTS** the plaintiff's amended motion to the extent that it is a Civil L.R. 7(h) Expedited Non-Dispositive Motion for an Expedited Briefing Schedule. Dkt. No. 10.

The court **ORDERS** that the defendants' opposition brief to the Plaintiff's Amended Motion for Temporary Restraining Order and Preliminary Injunction to be Considered in an Expedited Manner (Dkt. No. 10) by must be filed by 5:00 p.m. on **Monday, December 7, 2020**.

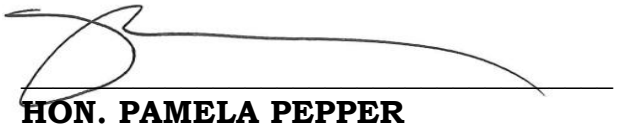
The court **ORDERS** that the plaintiff's reply brief in support of the Plaintiff's Amended Motion for Temporary Restraining Order and Preliminary Injunction to be Considered in an Expedited Manner (Dkt. No. 10) must be filed by 5:00 p.m. on **Tuesday, December 8, 2020**.

The court **DEFERS RULING** on the amended motion to the extent that it

asks the court to issue a temporary restraining order or a preliminary injunction.

Dated in Milwaukee, Wisconsin this 4th day of December, 2020.

BY THE COURT:



HON. PAMELA PEPPER
Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Stephen L. Shackelford, Jr. of the law firm of Susman Godfrey L.L.P. has been retained by defendant Governor Tony Evers in this action. Please serve copies of all papers in this action on the undersigned at the address set forth below.

Respectfully submitted this 4th day of December 2020.

/s/ Stephen L. Shackelford, Jr.

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Attorneys for Defendant, Governor Tony Evers

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Richard A. Manthe of the law firm of Stafford Rosenbaum LLP has been retained by defendant Governor Tony Evers in this action. Please serve copies of all papers in this action on the undersigned at the address set forth below.

Respectfully submitted this 4th day of December 2020.

/s/ Richard A. Manthe
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Attorneys for Defendant, Governor Tony Evers

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Paul M. Smith of the Campaign Legal Center has been retained by defendant Governor Tony Evers in this action. Please serve copies of all papers in this action on the undersigned at the address set forth below.

Respectfully submitted this 4th day of December 2020.

/s/ Paul M. Smith
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Attorneys for Defendant, Governor Tony Evers

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,
And DERRICK VAN ORDEN,

Plaintiff

Case No. 2:20-cv-1771

v.

Wisconsin Elections Commission, *et al.*,[1]

Defendants

INTERVENOR-DEFENDANT CIVIL L. R. 7(H) EXPEDITED NONDISPOSITIVE MOTION TO INTERVENE

I am seeking to participate as an intervening defendant in the above-captioned lawsuit pursuant to Federal Rule of Civil Procedure 24. I have a right under Rule 24(a)(2) to intervene as the outcome of this case directly impacts my constitutional right to vote. In the alternative, I seek permissive intervention pursuant to Rule 24(b). I am requesting this court rule on this motion in an expedited manner pursuant to Local Civil Rule 7(h).

I previously filed a Motion to Intervene[2] along with an accompanying brief and proposed answer the original complaint. At the time of filing that motion, no motions seeking an expedited ruling had been filed[3]. Additionally, the court indicated it was going to await the defendants' opposition brief[4] which the plaintiffs had 21 days to file. As a result, it was not necessary at that time for my motion to intervene be heard on an expedited basis pursuant to Civil L. R. 7(h).

[1] I note that the William Feehan filed an amended complaint removing Derrick Van Orden from the case and used a caption with only William Feehan. However, I was unable to locate a motion or order amending the case caption nor any local rules that automatically amend the caption upon filing of an amended complaint. Therefore, I have kept the case caption as it was originally filed. See Dkt. No. 9 for the Amended Complaint

[2] See Dkt. No. 14 and Dkt. No. 15.

[3] See Dkt. No. 6 "Order Regarding Amended Motion for Injunctive Relief (Dkt. No. 6).

[4] See Dkt. No. 6 "Order Regarding Amended Motion for Injunctive Relief (Dkt. No. 6).

However, plaintiff has since filed an expedited non-dispositive motion for a temporary restraining order and preliminary injunction[5]. Further that motion contains a proposed briefing schedule that would require responses and replies be filed by Dec. 4th and Dec. 5th respectively. At the time of drafting this motion, it is Dec 3rd and by the time this motion reaches the court it will already be Dec 4th. As a result, it has now become critically important that the court issue a ruling on this motion to intervene in an expedited manner pursuant to Local Civil Rule 7(h).

I seek to protect my legally protected constitutional rights to have my vote counted without delaying this case. If this motion to intervene is granted, I would ask to have until Dec. 5th at 8pm to file an Intervenor-Defendants opposition brief. Due to the court being closed at that time and needing to file outside of the ECF[6] I request permission to submit that brief via e-mail.

I sent copies of my motion to intervene, brief in support of motion to intervene and proposed answer to the plaintiffs' attorney at Sidney@federalappeals.com and miked@michaelddeanllc.com on December 2nd at 6:55pm. On December 3rd I sent paper copies of these documents to the defendants and plaintiff's attorneys via US Mail. When the attorneys for the defendants entered their appearance in this case, I sent electronic copies to Attorney Snyder at rsnyder@staffordlaw.com, Attorney Mandell at JMandel@staffordlaw.com and Attorney Murphy at Murphysm@doj.state.wi.us at 1:11pm on December 3rd.

In an e-mail sent to Attorney Murphy, Mandell, Snyder, Dean and Powell at 1:11pm on December 3rd, I asked the attorneys if they would be opposing my motion to intervene. I further asked if they would be opposed to me joining the briefing schedule as I outlined above if this

[5] While the "PLAINTIFF'S AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO BE CONSIDERED IN AN EXPEDITED MANNER" does not explicitly reference L. R. 7(h) and does not completely conform to the requirements of L. R. 7(h)(2), it appears to be the intent of the plaintiff that this motion be treated as such.

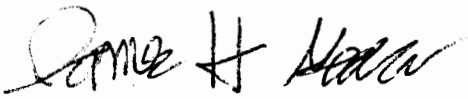
[6] I am unable to use the ECF system as I am not admitted to practice before the Eastern District of Wisconsin Federal Court.

motion is granted. As of 4:45pm I had received no e-mail response. I then called Attorneys Mandell, Murphy, Dean and Powell at the phone numbers listed in the filings. Attorney Mandell indicated that Governor Tony Evers will not be objecting to my intervention. I left voicemail messages for the other three attorneys but as of 5:58pm I have received no further response. Due to the need to overnight this document, I am unable to wait longer for a response from those attorneys.

Therefore, I request that the Court grant me permission to intervene in the above-captioned matter and enter such an order by 5pm on Friday December 4th. Further, if the court follows the plaintiffs proposed briefing schedule, I request the court to permit me to file, via e-mail, an Intervenor-Defendants opposition brief by 8pm on Saturday December 5th.

Dated: December 3rd, 2020

Respectfully submitted,



James Gesbeck (SBN #1079800)
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James@Gesbeck.Com
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Verona, WI 53593
N.B.: Not admitted to practice before the United States District Court for the Eastern District of Wisconsin

I hereby swear that all the factual allegations contained in this motion are true and correct to the best of my personal knowledge and upon my review of the ECF filing system records which I believe to be accurate as they are official court records.

James H Gesbeck

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,
And DERRICK VAN ORDEN,

Plaintiff

Case No. 2:20-cv-1771

v.

Wisconsin Elections Commission, *et al.*,

Defendants

CERTIFICATE OF SERVICE

I, James Gesbeck, certify that I have sent a copy of my Intervenor-Defendant Civil L. R. 7(h) Expedited Nondispositive Motion to Intervene to parties as follows below. I further certify I called an attorney for each party and either spoke with them or left them a voicemail indicating I would be filing this motion and seeking an expedited ruling:

Attorneys for Plaintiff William Feehan and Derrick Van Orden:
miked@michaelddeanllc.com, sidney@federalappeals.com

Attorney for Defendant Wisconsin Election Commission and members:
miked@michaelddeanllc.com

Attorneys for Governor Tony Evers
rnsyder@staffordlaw.com, jmandell@staffordlaw.com

Respectfully submitted,

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N.B.: Not admitted to practice before the United States District Court for the Eastern District of Wisconsin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

DEFENDANT GOVERNOR EVERS'S MOTION REQUESTING LEAVE TO FILE AN OVERSIZED MEMORANDUM

Earlier this afternoon, the Court issued an order granting in part Plaintiff's "Amended Motion for Temporary Restraining Order and Preliminary Injunction To Be Considered in an Expedited Manner." The Court's order establishes a briefing schedule on the merits of Plaintiff's request for injunctive relief, and it specifically reminds the parties of Civil Local Rule 7(f), which sets a default page limit of 30 pages for briefs supporting or opposing most motions: "No memorandum exceeding the page limitations may be filed *unless the Court has previously granted leave to file an oversized memorandum*." (emphasis added).

Defendant Governor Evers intends both to oppose Plaintiff's motion and to argue in support of a motion to dismiss Plaintiff's complaint. Governor Evers plans to address both motions in one brief. That approach will be more efficient for all parties and the Court. To facilitate this approach and to increase efficiency, Governor Evers respectfully requests, pursuant to Civil Local Rule 7(f), that the Court grant leave to file an oversized consolidated memorandum, not to exceed forty-five pages. Counsel will endeavor not to use the full amount of space unnecessarily.

Respectfully submitted this 4th day of December 2020.

/s/ Jeffrey A. Mandell
Jeffrey A. Mandell
Rachel E. Snyder
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UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

WILLIAM FEEHAN, DERRICK VAN ORDEN
Plaintiff

v.

WISCONSIN ELECTIONS COMMISSION,
Defendant

Case No.

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

_____ .

Date: _____

_____
Attorney's signature

_____
Printed name and bar number

_____
Address

_____
E-mail address

_____
Telephone number

_____
FAX number

Print Save As... Reset

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants.

ORDER ALLOWING JAMES GESBECK TO FILE AN *AMICUS* BRIEF

The plaintiff's amended complaint alleges that the 2020 election process "is so riddled with fraud, illegality, and statistical impossibility that this Court, and Wisconsin's voters, courts, and legislators, cannot rely on, or certify, any numbers resulting from this election." Dkt. No. 9 at ¶5. It states that the court "must set aside the results of the 2020 General Election and grant the declaratory and injunctive relief requested herein." Id.

The amended complaint first asserts that the election software and hardware used by defendant the Wisconsin Elections Commission were subject to hacking and manipulation and that "Wisconsin officials" disregarded widely reported concerns to this effect in utilizing the hardware and software. Id. at ¶¶6-13, 52-99. Next, it asserts that the Wisconsin Elections Commission issued improper guidance to clerks and election officials in violation of Wisconsin law. Id. at ¶¶14, 37-45. Third, it alleges that mail-in ballots either were lots or were fraudulently recorded for voters who did not request them. Id.

at ¶¶46-50. Fourth, it asserts that voters who were ineligible to vote because they were registered in other states nonetheless voted in Wisconsin. Id. at ¶51.

The plaintiff requests the following relief:

> 1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results;
>
> 2. An order enjoining Governor Evers from transmitting the currently certified election results [to] the Electoral College;
>
> 3. An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election;
>
> 4. An immediate temporary restraining order to seize and impound all servers, software, voting machines, tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11. related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiff;
>
> 5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;
>
> 6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;
>
> 7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. CONST. Amend. XIV;
>
> 8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that invalidates the certified results if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;
>
> 9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;

> 10. A permanent injunction prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;
>
> 11. Immediate production of 48 hours of security camera recordings of all voting central count facilities and processes in Milwaukee and Dane Counties for November 3, 2020 and November 4, 2020.

Id. at ¶142.

Two days after the complaint was filed, the court received a motion to intervene as a defendant from James Gesbeck. Dkt. No. 14. Mr. Gesbeck stated that he is a Wisconsin citizen who voted in the 2020 general election in Wisconsin. Dkt. No. 15 at 1. He indicated that he voted in Dane County via absentee ballot. Id. at 2. He asserted that if the court were to grant the plaintiff's request to decertify the election results and order defendant Evers to transmit certified election results stating that President Donald Trump is the winner of the election, it would "disregard the results of the 2020 General Election in Wisconsin in which [his] vote was cast." Id. at 3. He stated that a "court order directing the outcome of the election would disenfranchise [him] by not counting [his] vote, nor the votes of millions of people." Id. Mr. Gesbeck also said that his interest was in defending his right to vote, and that none of the defendants are tasked with defending that right and thus cannot defend his interests. Id. Mr. Gesbeck argued that he is entitled to intervention as of right but asserts in the alternative that he meets the standard for permissive intervention. Id. at 4.

Earlier on December 3, the court had received from the plaintiff an amended motion for injunctive relief and request for an expedited briefing schedule. Dkt. No. 10. It appears Mr. Gesbeck—who, while he is an attorney, is not admitted to practice before this court and is not an electronic filer (dkt. no. 10 at 1 and n.3)—was not aware of that motion at the time he filed his motion to intervene. When he became aware of that motion, and realized that the court might take briefing and reach the merits of the plaintiff's amended motion for injunctive relief before it ruled on his motion to intervene, Mr. Gesbeck filed a Civil Local Rule 7(h) (E.D. Wis.) expedited, non-dispositive motion to intervene. Dkt. No. 33. He asked the court to rule on his motion by 5:00 p.m. on Friday, December 4 so that he could file a brief in opposition to the plaintiff's amended motion for injunctive relief. Id. at 3.

The court received Mr. Gesbeck's Civil L.R. 7(h) motion at 4:12 p.m. on Friday, December 4. The court could not rule on his motion by 5:00 p.m. on December 4. The plaintiff has not responded (and Civil L.R. 7(h) does anticipate a non-moving party having an opportunity to respond). While Mr. Gesbeck asserts that he is entitled to intervene under Fed. R. Civ. P. 24(a) (or, in the alternative, that he qualifies for permissive intervention under Rule 24(b)), the court must consider issues such as whether the current defendants adequately represent his interests and whether he has standing. See, *e.g.*, Flying J., Inc. v. Van Hollen, 578 F.3d 569, 571 (7th Cir. 2009) ("[T]he interest required by Article III is not enough by itself to allow a person to intervene in a federal suit and thus become a party to it."); Planned Parenthood of Wis., Inc. v. Kaul, 942

F.3d 793, 803 n.5 (7th Cir. 2019) (noting that the Seventh Circuit has not yet addressed whether permissive intervention requires standing if the existing parties have a live case or controversy).

While the Federal Rules of Civil Procedure do not provide for the filing of *amicus curiae* briefs in the district court (as opposed to Fed. R. App. P. 29, which governs such filings in federal appellate courts), some district courts have held that they have inherent authority to appoint an amicus curiae—a "friend of the court." See, *e.g.*, Recht v. Justice, No. 5:20-CV-90, 2020 WL 6109426, at *1 (N.D. W. Va. June 9, 2020); Bounty Minerals, LLC v. Chesapeake Exploration, LLC, No. 5:17cv1695, 2019 WL 7048981, at *10 (N.D. Ohio Dec. 23, 2019); Jin v. Ministry of State Security, 557 F. Supp. 2d 131, 136 (D. D. C. 2008); NGV Gaming, Ltd. v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 20005).

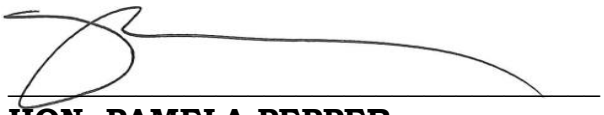
"The term 'amicus curiae' means friend of the court, not friend of a party." Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (citing United States v. Michigan, 940 F.2d 143, 164-65 (6th Cir. 1991)). "An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that maybe affected by the decision in the present case . . . or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." Id. (Citations omitted.)

Because the court cannot rule on Mr. Gesbeck's motion to intervene prior to the deadline for the defendants to oppose the plaintiff's amended motion for injunctive relief and because Mr. Gesbeck indicates that his interest is not represented in the litigation, the court will allow him to file an *amicus curiae* brief by 5:00 p.m. on Monday, December 7, 2020. The brief may not exceed thirty pages.

The court **ORDERS** that Mr. James Gesbeck may file an *amicus curiae* brief by 5:00 p.m. on Monday, December 7, 2020.

Dated in Milwaukee, Wisconsin this 4th day of December, 2020.

BY THE COURT:



HON. PAMELA PEPPER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

No. 2:20-cv-1771

EXPEDITED NONDISPOSITIVE MOTION TO INTERVENE OF PROPOSED INTERVENOR-DEFENDANT DEMOCRATIC SERVICES CORPORATION/DEMOCRATIC NATIONAL COMMITTEE (THE "DNC") PURSUANT TO CIVIL L. R. 7(h)

Proposed Intervenor-Defendant Democratic Services Corporation/Democratic National Committee ("DNC") respectfully moves for expedited consideration of its motion for leave to intervene in this action to defend its interests against the claims asserted by Plaintiff. For the reasons discussed in the Proposed Intervenor-Defendant DNC's Brief in Support of Motion to Intervene ("DNC Intervention Brief) filed on December 4, 2020 (Dkt. No. 23), the DNC is entitled to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). In the alternative, the DNC requests permissive intervention pursuant to Rule 24(b).

At the time the DNC filed its Motion to Intervene,[1] the Court had indicated it would await the Defendants' opposition brief, which Plaintiff had 21 days to file. Dkt. No. 7. Thereafter, this Court set an expedited briefing schedule requiring responses and replies to be filed by December 7 and 8, 2020, respectively. Today, December 5, 2020, the Court also set a deadline of December 28, 2020, for Plaintiff's response to the DNC's Motion to Intervene.

In order to protect Proposed Intervenor-Defendant DNC's rights and critical interests as set forth in the DNC Intervention Brief, the DNC respectfully requests that the Court consider the DNC's motion expeditiously and grant it permission to intervene in this case as soon as reasonably possible. The DNC is prepared to submit its response as an Intervenor-Defendant in accordance with this Court's schedule (i.e., by 5:00 p.m. on December 7, 2020).

Counsel for the DNC has asked counsel for both the Plaintiff and the Defendants if they oppose the DNC's motion to intervene. Plaintiff's counsel states that that it opposes the DNC's motion. None of the Defendants oppose the DNC's motion.

WHEREFORE, the DNC requests that the court grant it leave to intervene in the above-captioned matter so that it may file its response in accordance with the Court's expedited schedule in this matter.

DATED: December 5, 2020

[1] Dkt. No. 22. In accordance with Rule 24(c), a proposed answer to Plaintiff's complaint was attached as Exhibit 1 to the DNC's Motion to Intervene. *Id.*, Attachment 1.

Respectfully Submitted,

s/Michelle M. Umberger

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** Application for admission pending*

CERTIFICATE OF SERVICE

I hereby certify that on Saturday, December 5, 2020, I filed a copy of the foregoing with the Clerk of the Court using the CM/DKT. system, which will send notification of such filing to all counsel of record.

/s/ Michelle M. Umberger
Counsel for Proposed Intervenor

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants.

ORDER GRANTING REQUEST TO EXPEDITE RULING (DKT. NO. 40), DENYING MOTION TO INTERVENE OF PROPOSED INTERVENOR-DEFENDANT DEMOCRATIC SERVICES CORPORATION/DEMOCRATIC NATIONAL COMMITTEE (THE "DNC") (DKT. NO. 22) AND ALLOWING DNC TO FILE *AMICUS* BRIEF

The plaintiff's amended complaint alleges that the 2020 election process "is so riddled with fraud, illegality, and statistical impossibility that this Court, and Wisconsin's voters, courts, and legislators, cannot rely on, or certify, any numbers resulting from this election." Dkt. No. 9 at ¶5. It states that the court "must set aside the results of the 2020 General Election and grant the declaratory and injunctive relief requested herein." Id.

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Wisconsin law. Id. at ¶¶14, 37-45. Third, it alleges that mail-in ballots either were lost or were fraudulently recorded for voters who did not request them. Id. at ¶¶46-50. Fourth, it asserts that voters who were ineligible to vote because they were registered in other states nonetheless voted in Wisconsin. Id. at ¶51.

The plaintiff requests the following relief:

> 1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results;
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> 2. An order enjoining Governor Evers from transmitting the currently certified election results [to] the Electoral College;
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> 4. An immediate temporary restraining order to seize and impound all servers, software, voting machines, tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11. related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiff;
>
> 5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;
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> 6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;
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> 7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. CONST. Amend. XIV;
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> 8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that invalidates the certified results if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;

> 9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;
>
> 10. A permanent injunction prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;
>
> 11. Immediate production of 48 hours of security camera recordings of all voting central count facilities and processes in Milwaukee and Dane Counties for November 3, 2020 and November 4, 2020.

Id. at ¶142.

The day after the plaintiff filed the amended complaint, the movant—Democratic Services Corporation/Democratic National Committee (the "DNC")—filed a motion to intervene. Dkt. No. 2. The movant describes itself as "a diverse group of Democrats, including elected officials, candidates, constituents, and voters." Dkt. No. 23 at 2. It asserts that the amended complaint "seek[s] to undo Wisconsin's lawful certification of the election result" and maintains that "[t]he extraordinary relief Plaintiffs[1] request would deprive the DNC's members and constituents of their rights to have their votes counted, undermine the electoral prospects of the DNC's candidates, and divert the DNC's resources." Id.

The movant first argues that it is entitled to intervene as of right under Fed. R. Civ. P. 24(a). Id. It argues that its motion is timely filed, id. at 2-3, that it has significant interests at stake in the litigation, id. at 3-4, that denial of the

[1] The original complaint was filed by two plaintiffs—William Feehan and Derrick Van Orden. Dkt. No. 1. William Feehan is the only plaintiff named in the amended complaint; Van Orden no longer is a defendant. Dkt. No. 9.

motion would impair its ability to protect its interests, id. at 5, and that its interests are not adequately represented by the defendants, id. at 5-7. The movant next argues that if the court does not agree that it is entitled to intervene as of right, the court should exercise its discretion to permit it to intervene under Fed. R. Civ. P. 24(b). Id. at 7-8.

After the court extended the Civil Local Rule 7(b) (E.D. Wis.) deadline for the plaintiff to respond (because the twenty-one-day deadline would have fallen on December 25, 2020), dkt. no. 38, the movant filed a Civil L.R. 7(h) expedited, nondispositive motion asking the court to rule on the motion to intervene "as soon as reasonably possible," stating that it was prepared to file a response by the deadline the court has set for the defendants to respond (5:00 p.m. on Monday, December 7, 2020). Dkt. No. 40.

The court grants the request for an expedited ruling, denies the motion to intervene and authorizes the movant to file an *amicus* brief.

A. Intervention As of Right

Fed. R. Civ. P. 24(a) provides that "[o]n timely motion, the court *must* permit anyone to intervene" if the party seeking to intervene "claims an interest relating to the . . . transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." (Emphasis added.) The Seventh Circuit has described the rule as "straightforward:"

> [T]he court *must* permit intervention if (1) the motion is timely; (2) the moving party has an interest relating to the property or

> transaction at issue in the litigation; and (3) that interest may, as a practical matter, be impaired or impeded by disposition of the case. A proposed intervenor who satisfies these three elements is *entitled* to intervene *unless* existing parties adequately represent his interests.

Driftless Area Land Conservancy v. Huebsch, 969 F.3d 742, 746 (7th Cir. 2019) (emphasis in the original).

1. *Timeliness of the Motion*

"The test for timeliness is essentially one of reasonableness: 'potential intervenors need to be reasonably diligent in learning of a suit that might affect tehri rights, and upon so learning they need to act promptly.'" Reich v. ABC/York-Estes Corp., 64 F.3d 316, 321 (7th Cir. 1995 (quoting Nissei Sangyo America, Ltd. v. United States, 31 F.3d 435, 438 (7th Cir. 1994)). In determining whether the potential intervenor was reasonably diligent, courts "also consider the prejudice to the original party if intervention is permitted and the prejudice to the intervenor if his motion is denied." Id. The Seventh Circuit has expressed these concepts in the form of a four-factor test:

> (1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances.

State v. City of Chi., 912 F.3d 979, 984 (7th Cir. 2019) (quoting Grochinski v. Mayer Brown Rowe & Maw, LLP, 719 F.3d 785, 797-90 (7th Cir. 2013)).

The movant filed its motion to intervene three days after the original complaint was filed and a day after the amended complaint. There would be no prejudice to the original parties in allowing the movant to intervene, particularly as it says that it is prepared to oppose the plaintiff's motion for

injunctive relief by the December 7, 2020 deadline the court has set. The movant did not address the third and fourth factors—the prejudice to the movant if the court does not allow it to intervene and any other unusual circumstances. Because the movant filed its motion only a day after the plaintiff filed the original complaint, however, the court concludes that the motion is timely.

2. *The Moving Party's Interest*

The movant next must demonstrate that it has an interest relating to the property or transaction at issue in the litigation. The "transactions" at issue in this litigation are the decisions of defendants the Wisconsin Elections Commission and its members to sign the canvass statement for the 2020 general election and the recount in Dane and Milwaukee Counties and the action of defendant Governor Tony Evers in signing the Certificate of Ascertainment certifying the results of the 2020 general election.

The question of whether the movant, a self-described "diverse group of Democrats, including elected officials, candidates, constituents, and voters," has an "interest" in those transactions is not as straightforward as one might imagine.

> Rule 24(a)(2) requires that the applicant claim "an interest relating to the property or transaction that is the subject of the action." "Interest" is not defined, but the case law makes clear that more than the minimum Article III interest is required. Cases say for example that a mere "economic interest" is not enough. E.g., *In re Lease Oil Antitrust Litigation*, 570 F.3d 244, 250-52 (5th Cir. 2009); *Mountaintop Condominium Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995); cf. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322-23 (7th Cir. 1995). While that is a confusing

> formulation—most civil litigation is based on nothing more than an "economic interest"—all that the cases mean is that the fact that you might anticipate a benefit from a judgment in favor of one of the parties to the lawsuit—maybe you're a creditor of one of them—does not entitle you to intervene in their suit.

Flying J, Inc. v. Van Hollen, 578 F.3d 569, 571 (7th Cir. 2009).

The movant contends that it has an interest in preventing disruption of the certification of Wisconsin's November 3, 2020 Presidential election results and preserving the "entitlement of the Democratic Party's candidates for President and Vice-President to Wisconsin's ten electoral votes." Dkt. No. 23 at 3-4. It also asserts an interest in avoiding disenfranchisement of its constituents and in avoiding having to "divert resources to safeguard the timely certification of statewide results." Id. at 4. The movant could anticipate benefits from a judgment in favor of the defendants; because the defendants certified the movant's candidates for President and Vice-President as the winners of Wisconsin's 2020 general election, a judgment in the defendants' favor would leave intact that certification.

Related to—possibly entangled with—the concept of "interest" is the question of standing. The Seventh Circuit has held that "[n]o one can maintain an action in a federal court . . . unless he has standing to sue, in the sense required by Article III of the Constitution—that is, unless he can show injury . . . and that he would benefit from a decision in his favor." Flying J, Inc., 578 F.3d at 571. "Standing to sue" implies that it is only the plaintiff who must have standing. In most cases, the question of whether a defendant has standing does not arise because the plaintiff has sought relief against the

plaintiff. But a party who seeks to intervene as a *defendant* seeks to intervene in a lawsuit brought by a plaintiff who has not sought relief against it. See Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 Fordham L. Rev. 1539, 1552 (2012). Whether such a defendant—particularly when the defendant represents a broad public interest (as, arguably, the movant does)—must have Article III standing is unclear. See, *e.g.*, Diamond v. Charles, 476 U.S. 54, 68 (1986) (concluding that it need not decide whether a party seeking to intervene due to public concerns must have Article III standing); Gregory R. Manring, *It's Time for an Intervention: Resolving the Conflict Between Rule 24(a)(2) and Article III Standing*, 85 Fordham L. Rev. 2525 (2017).

The movant points to cases in which courts have found that political parties have standing to sue. It cites Tex. Democratic Party v. Benkiser, 459 F.3d 582 (5th Cir. 2006), in which the Fifth Circuit concluded that the Texas Democratic Party had standing to contest the party chair's declaration that Representative Tom DeLay was ineligible for election. It cites Owen v. Mulligan, 640 F.2d 1130, 1132 (9th Cir. 1981), in which the Ninth Circuit characterized the defendant's argument that "the only threatened injury to the plaintiffs is the potential loss of an election" as having been "uniformly rejected." It points to a recent case in which a district court found that partisan political groups were entitled to intervene as of right in litigation relating to the 2020 election. Issa v. Newsome, No. 2:20-cv-01044-MCD-CKD, 2020 WL 3074351 (E.D. Cal. June 10, 2020) (allowing the Democratic Congressional Campaign Committee

and the Democratic Party of California to intervene as defendants as a matter of right under Rule 24(a)(2) in a case seeking to enjoin enforcement of the governor's executive order requiring California counties to implement all-mail ballot elections for the November 3, 2020 general election.

The question of whether a defendant-intervenor must have Article III standing, and what that standing might look like when the potential defendant-intervenor represents a broad public interest, is fraught. Without deciding today whether a defendant-intervenor must have Article III standing or what would constitute such standing, the court assumes that the movant has an interest in the transactions that give rise to the litigation and will move to the next two factors.

3. *Impairment of the Movant's Interest*

"The existence of 'impairment' depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding." Meridian Homes Corp. v. Nicholas W. Prassas & Co., 683 F.2d 201, 204 (7th Cir. 1982). (Citation omitted). The "foreclosure" of the proposed intervenor's rights "is measured by the general standards of stare decisis." Id. (Citations omitted.) In other words, whether or not the defendants succeed in this suit, is the movant free to initiate its own suit? See, Shea v. Angulo, 19 F.3d 343, 347 (7th Cir. 1994).

Because the movant's interests are prevention of the disruption of the certification of Wisconsin's November 3, 2020 Presidential election results and

preservation of the "entitlement of the Democratic Party's candidates for President and Vice-President to Wisconsin's ten electoral votes," dkt. no. 23 at 3-4, as well as avoiding disenfranchisement of its constituents and in avoiding having to "divert resources to safeguard the timely certification of statewide results," Id. at 4, a decision granting the relief the plaintiff requests—decertifying the results of Wisconsin's 2020 general election and ordering the defendants to certify a different result—likely would foreclose the movant's rights in a subsequent suit. The movant cannot bring suit as a plaintiff because it has no complaint with the *status quo*. Because the electoral college will meet and vote in eight days, the movant likely would not have time to mount its own suit in the event this court rules in favor of the plaintiff.

The movant has demonstrated that as a practical matter, its interests may be impaired or impeded by disposition of case, depending on that disposition.

4. *Adequacy of Representation*

The movant asserts that its interests are not adequately represented by the existing parties. Dkt. No. 23 at 5. It says that while the defendants "have an interest in defending the actions of state officials," it is interested in "ensuring that the valid ballot of every Democratic voter in Wisconsin is counted and safeguarding the election of Democratic candidates." Id. at 6. It says that it has "specific interests and concerns—including the Democratic Party's overall electoral prospects and use of their limited resources—that none of the current Defendants share." Id.

The Seventh Circuit has spoken extensively on this factor of the Rule 24(a) test in the past year. Most recently, in Driftless, the court explained that

> "[t]he most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties." 7C CHARLES ALAN WRIGHT & ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1909 (3d ed. 2007). Our recent decision in *Planned Parenthood of Wisconsin, Inc. v. Kaul* describes our circuit's three-tiered methodology for evaluating adequacy of representation under Rule 24(a)(2). 942 F.3d 793, 799 (7th Cir. 2019). "The default rule," we explained, "is a liberal one." *Id.* It derives from the Supreme Court's decision in *Trbovich v. United Mine Workers of America*, which explained that "the requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." 404 U.S. 528, 538 n.10 . . . (1972).
>
> However, if the interest of the absentee is identical to that of an existing party, or if a governmental party is charged by law with representing the absentee's interest, then the standard for measuring adequacy of representation changes. In both situations—where the absentee and an existing party have identical interests, or the existing party is a governmental agency or official with a legal duty to represent the absentee's interest—a rebuttable presumption of adequate representation arises, and the prospective intervenor must carry a heightened burden to establish inadequacy of representation. The degree of this heightened burden varies.

Driftless Area Land Conservancy, 969 F.3d at 747.

So—if the movant's interest is not identical to that of an existing party or if there is no governmental party charged by law with representing the movant's interest, the movant has only the minimal burden of showing that the party's representation "may be" inadequate. But if the movant's interest is identical to that of an existing party, "there is a rebuttable presumption of adequate representation that requires a showing of 'some conflict' to warrant intervention." Planned Parenthood, 942 F.3d at 799 (quoting Wis. Ed. Ass'n

Council v. Walker ("WEAC"), 705 F.3d 640, 659 (7th Cir. 2013)). And if one of the existing parties is a governmental body charged by law with protecting the interests of the movant, the presumption is even stronger and the standard for rebutting the presumption higher. Id.

Defendant the Wisconsin Elections Commission is a governmental body; its members and defendant Governor Tony Evers are representatives of government bodies. The movant asserts, however, that none of them are charged by law with protecting its interests. Dkt. No. 23 at 6 n.2. The Wisconsin Elections Commission "administers and enforces Wisconsin elections law." https://elections.wi.gov/about. It appears that neither the WEC nor its members are charged with protecting the interests of a party or candidate. But its mission would appear to include ensuring that the valid ballot of every voter—Democratic, Republican or other—is counted. In the narrower context of the lawsuit, the court presumes the WEC's interest and that of its members is in defending its actions in administering and enforcing Wisconsin's election laws, particularly in signing the canvass statement for the 2020 Presidential general election results after the recount in Milwaukee and Dane Counties. And the interest of defendant Governor Evers presumably will be to defend his signing of the Certificate of Ascertainment certifying the results of that election.

The court agrees that none of the defendants are "charged by law with protecting the interests of the proposed intervenors," Planned Parenthood, 942 F.3d at 799, to the extent that the movant's interests go beyond its interest in

the proper administration and enforcement of state and federal election laws and procedures. This means the movant need not rebut the most heightened presumption of adequacy.

But the movant and the defendants have "the same goal." WEAC, 705 F.3d at 659 (citing Shea, 19 F.3d at 347). The movant and the defendants both seek to defend the results of the Wisconsin 2020 Presidential general election. Both oppose the relief the plaintiff seeks—the decertification of the election and the certification of a different result. Both seek to defend the certification on the ground that the election was lawful and the results valid.

The fact that the movant and the defendants share the same goal may not necessarily give rise to the presumption of adequate representation. In her concurrence in Planned Parenthood, now-Chief Judge Sykes explained that in WEAC, the court had stated that an intervenor's interest must be "unique;" Judge Sykes sought to clarify:

> *WEAC* cited *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985), as support for the uniqueness requirement. The relevant passage in *Keith*, however, doesn't use the term "unique." It says this: "The [intervenor's] interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit." *Id.* In other words, the intervenor's interest must be based on a right that is *direct* and *independent*. That much is clear from the immediately preceding sentence: "A proposed intervenor must demonstrate a direct, significant[,] and legally protectable interest in the property [or transaction] at issue in the lawsuit."
>
> "Unique" is a suitable word to describe the nature of the required interest, but as used in this context, "unique" means an interest that is *independent of* an existing party's, not *different from* an existing party's. If the intervenor has a significant independent interest but shares the same goal as an existing party (that is, if their interests align), then the standard for measuring the adequacy of existing

> representation changes, as WEAC later explains. 705 F.3d at 659 (explaining that a presumption of adequate representation arises when goals align). But sharing the same goal as an existing party doesn't defeat "uniqueness," properly understood.

Planned Parenthood, 942 F.3d at 806.

Given this clarification, Judge Sykes concluded that the Legislature had an independent right from the Attorney General because it had an independent, statutory right to intervene under Wis. Stat. §803.09(2m). Id.

The movant does not have a right, independent of the defendants, to defend the certification of the 2020 election results. It has different *reasons* for defending the certification. Its candidates were certified as the winners of the Presidential election; it and its constituents are pleased with the result. But the movant seeks to defend the certification because the movant believes it was lawful and because it asserts that decertification would result in valid votes being disregarded. The movant is more concerned about valid *Democratic* votes being disregarded. But its concern about *any* votes being disregarded aligns with the defendants' interests in defending the legality of the certification.

Because the movant has the same goal as the defendants and has identified no right independent of the defendants, the movant must rebut the presumption of adequate representation by "show[ing] that some conflict exists." WEAC, 705 F.3d at 659. The movant has not identified such a conflict.

5. *Conclusion*

The court concludes that because the movant has not rebutted the presumption that the defendants will adequately represent its interests and those of its constituents, it is not entitled to intervene as of right.

B. Permissive Intervention

In the alternative, the movant asks the court to exercise its discretion and allow it to intervene under Rule 24(b). Dkt. No. 23 at 7. It indicates that it will "inevitably raise common questions of law or fact," and that it would contribute to the complete development of the factual and legal issues before this Court . . . ." Id. at 7-8.

Rule 24(b)(1)(B) gives a court the discretion to allow a party to intervene if that party "has a claim or defense that shares with the main action a common question of law or fact." The Planned Parenthood decision sheds light on the distinction between Rules 24(a) and 24(b):

> Rule 24(b) is vague about the factors relevant to permissive intervention, but it is not just a repeat of Rule 24(a)(2). We have thus cautioned courts not to deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right. *See City of Chi. v. FEMA*, 660 F.3d 980, 987 (7th Cir. 2011); *Solid Waste Agency of N. Cook Cty. V. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996). Still, we have never gone so far as confining the district court's discretion to only the two mandatory factors in Rule 24(b)(3) or to prohibit consideration of the elements of intervention as of right as discretionary factors. Even when a district court "did not explicitly break out its reasoning" on the two requests, we have affirmed so long as the "decision shows a thorough consideration of the interests of all the parties." *Ligas [ex rel. Foster v. Maram*, 478 F.3d 771] at 776 [7th Cir. 2007)].

Planned Parenthood, 942 F.3d at 804.

The court will not exercise its discretion to grant permissive intervention. First, as the court has noted, the issue of standing for defendant-intervenors is murky. While the Seventh Circuit has speculated that permissive intervention may not require standing "if the existing parties present a case or controversy," it has not decided the question. Id. at 803 n.5. Second, the court has noted

that the movant has not identified any conflict that would prevent the current defendants from adequately representing its interests. Third, the movant says that it would contribute to the adequate development of the record. That may be a contribution, but the movant may do it in another way—by advising the court as an *amicus*.

C. *Amicus Curiae*

While the Federal Rules of Civil Procedure do not provide for the filing of *amicus curiae* briefs in the district court (as opposed to Fed. R. App. P. 29, which governs such filings in federal appellate courts), some district courts have held that they have inherent authority to appoint an *amicus curiae*—a "friend of the court." See, *e.g.*, Recht v. Justice, No. 5:20-CV-90, 2020 WL 6109426, at *1 (N.D. W. Va. June 9, 2020); Bounty Minerals, LLC v. Chesapeake Exploration, LLC, No. 5:17cv1695, 2019 WL 7048981, at *10 (N.D. Ohio Dec. 23, 2019); Jin v. Ministry of State Security, 557 F. Supp. 2d 131, 136 (D. D.C. 2008); NGV Gaming, Ltd. v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 20005).

In a federal circuit court, Fed. R. App. P. 29(1)(3) requires a party seeking to file an *amicus* brief to file a motion. The motion must state the movant's interest and why the *amicus* brief is desirable. The movant has not sought to file an *amicus* brief—it seeks to intervene as a party. The court has denied that relief but believes that the movant has demonstrated that it has an interest in the litigation.

The Seventh Circuit has cautioned that "[t]he term 'amicus curiae' means friend of the court, not friend of a party." Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (citing United States v. Michigan, 940 F.2d 143, 164-65 (6th Cir. 1991)). "An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that maybe affected by the decision in the present case . . . or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." Id. (Citations omitted.) The movant argues that it has unique information and a unique perspective that the defendants do not have.

The court will, *sua sponte*, allow the movant to file an *amicus* brief relating to the plaintiff's request for injunctive relief, so that the movant may do what it has said it has the ability to do—help to fully develop the record. The movant must file its brief by the deadline the court has set for the defendants to file their briefs in opposition—5:00 p.m. on Monday, December 7, 2020. The movant also must abide by the page limitation in Civil L.R. 7(f)—no more than thirty pages.

D. Conclusion

The court **GRANTS** the movant's Expedited Nondispositive Motion to Intervene to the extent that it asks the court to expedite its ruling of the original motion to intervene. Dkt. No. 40.

The court **DENIES** the movant's Motion to Intervene of Proposed Intervenor-Defendant Democratic Services Corporation/Democratic National Committee. Dkt. No. 22.

The court **ORDERS** that the movant may file an *amicus curiae* brief by 5:00 p.m. on Monday, December 7, 2020.

Dated in Milwaukee, Wisconsin this 6th day of December, 2020.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiffs. **CASE NO. 2:20-cv-1771**

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARLC L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

AMENDED PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF

To avoid possible confusion from removal of Mr. Van Orden is Plaintiff, this Amended Memorandum amends Plaintiff's original Memorandum in Support of Motion for Declaratory, Emergency, and Permanent Injunctive Relief, ECF Docket No. 3. It is identical to that original Memorandum except for amending references to Plaintiffs to refer to Mr. Meehan only and correcting several inadvertent references to the State of Georgia.

FACTS

The facts relevant to this motion are set forth in the Complaint and its accompanying exhibits, all of which are respectfully incorporated herein by reference. We present only a summary.

After a general election and recount, Joe Biden has been declared the winner of Wisconsin's General Election for President by a difference of 20,585 votes. But the vote count certified by

defendants on November 30, 2020 fails to recognize the votes are steeped in fraud. Tens of thousands of votes counted toward Mr. Biden's final tally were the product of fraudulent, illegal, ineligible and outright fictitious ballots. Plaintiff support this claim through the evidence laid out in the Complaint which includes the following conclusions:

The Complaint details a pervasive pattern of illegal conduct by Defendants where they systematically ignored, or acted in direct contravention of, the express requirements of Wisconsin Election Code provisions specifically intended to prevent voter fraud such as voter Photo ID, witness, signature, eligibility and address verification requirements, supported by witness affidavits and even written guidance from Defendant Wisconsin Elections Commission ("WEC") instructing election workers to violate the Wisconsin Election Code. *See* Compl., Section I.

In Section II and III of the Complaint, Plaintiff demonstrates through statistical analysis of voting results and technical analysis of voting machines and software that each of several distinct categories of voting fraud or batches of fraudulent ballots were larger than Biden's 20,585 margin.

The Affidavit of Russell James Ramsland, Jr. first examines the widely reported and "statistically impossible" Biden "spike" on November 4 where Biden, trailing Trump by a few percent, suddenly received 143,379 votes in a single five-minute interval, causing his relatively flat vote tally to make a vertical jump up and over Trump to take the lead in Wisconsin by about one percent. *See* Compl., Ex. 17 ¶13. Another red flag identified by Mr. Ramsland is the historically unprecedented turnout levels (not just for Wisconsin, but for anywhere except for countries like North Korea): 69 out of 72 Wisconsin counties had "voter turnout figures higher than 80%, a threshold generally considered to be the maximum expected," 59 were above 90%, and two were nearly 200% or more. *Id.* ¶15. Mr. Ramsland concludes "to a reasonable degree of

professional certainty" that the Biden spike included at least 119,430 illegal votes for Biden, while the total illegal votes from the fraudulent turnout figures was at least 384,085. *Id.* ¶14.

The Complaint provides testimony from several other experts who provided the estimates for illegal votes that should be discarded due to other categories of voting fraud:

- The report of William M. Briggs, Ph.D. finding that the average sum of two types of errors or fraud (either by Wisconsin election officials or third parties) – (1) absentee voters who were recorded as receiving ballots without requesting them and (2) absentee voters who returned ballots that were recorded as unreturned – was 29,594 votes (or nearly 31% of total). (*See id.*, Ex 2).

- Matt Braynard used the National Change of Address database to identify votes by persons that moved out of state or subsequently registered to vote in another state for the 2020 election, and found a total of 6,966 ineligible votes. (*See id.*, Ex 3).

- A separate analysis by Mr. Braynard of the likely number of votes that were improperly relying on the "indefinitely confined" exemption to voter ID to be 96,437 (*See id.*, Ex 3).

- Another expert witness, whose testimony has been redacted for his safety, estimates excess votes arising from the statistically significant outperformance of Dominion machines on behalf of Joe Biden to be 181,440. (*See id.*, Ex 3)

Thus each of these sources of fraudulent votes (with the exception of the still substantial number of illegal out-of-state voters) is larger than Biden's margin of victory, and if any of these categories of illegal voters were thrown out, it would change the result of the election, and give President Trump a second term.

Section III of the Complaint also provides testimony from experts regarding the security flaws in Wisconsin voting machines, in particular, Dominion Voting Systems ("Dominion") that allow Dominion, as well domestic and foreign actors, to alter, destroy, manipulate or exfiltrate ballot and other voting data, and potentially to do so without a trace due to Dominion's unprotected logs. For example, the Complaint includes an analysis of the Dominion software system by a former US Military Intelligence expert concludes that the system and software have been accessible and were

certainly compromised by rogue actors, such as Iran and China. (*See* Compl., Ex.105). By using servers and employees connected with rogue actors and hostile foreign influences combined with numerous easily discoverable leaked credentials, Dominion neglectfully allowed foreign adversaries to access data and intentionally provided access to their infrastructure in order to monitor and manipulate elections, including the most recent one in 2020. The substantial likelihood that hostile foreign governments, with or without active collusion or collaboration with the Defendants, is a separate and independent ground to grant the declaratory and injunctive relief requested in the Complaint and this Motion.

DISCUSSION

Plaintiff Has Standing

Plaintiff William Feehan**,** is a registered Wisconsin voter and a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin. "Electors have standing as candidates." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020). As a candidate for elective office, Plaintiff has "a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) (affirming that Presidential Electors have Article III and prudential standing to challenge actions of Secretary of State in implementing or modifying State election laws); *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (per curiam).

Plaintiff Is Entitled to Injunctive Relief.

"To obtain a preliminary injunction, a plaintiff must show three things: (1) without such relief, he will suffer irreparable harm before his claim is finally resolved; (2) he has no adequate remedy at law; and (3) he has some likelihood of success on the merits. *Harlan v. Scholz*, 866 F.3d 754,

758 (7th Cir. 2017) (*citing Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am*., Inc., 549 F.3d 1079, 1086 (7th Cir. 2008)." "If the plaintiff can do that much, the court must then weigh the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Harlin*, 866 F.3d at 758 (*citing Ty, Inc. v. Jones Grp., Inc*., 237 F.3d 891, 895 (7th Cir. 2001). In addition, the court must ask whether the preliminary injunction is in the public interest. *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1058 (7th Cir. 2016).

All elements are met here. "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (emphasis added). The evidence shows not only that Defendants failed to administer the November 3, 2020 election in compliance with the manner prescribed by the Wisconsin legislature, but that Defendants committed a scheme and artifice to fraudulently and illegally manipulate the vote count to make certain the election of Joe Biden as President of the United States. This conduct violated Plaintiffs' equal protection and due process rights as well their rights under Wisconsin law.

Plaintiff has a substantial likelihood of success.

The Plaintiff does not need to demonstrate a likelihood of absolute success on the merits. "Instead, [it] must only show that [its] chances to succeed on his claims are 'better than negligible.' " Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1046 (7th Cir. 2017). (quoting Cooper v. Salazar, 196 F.3d 809, 813 (7th Cir. 1999)). "This is a low threshold," *id.*, that Plaintiff has easily passed.

Through detailed fact and expert testimony including documentary evidence contained in the Complaint and its exhibits, Plaintiff has made a compelling showing that Defendants' intentional

actions jeopardized the rights of Wisconsin citizens to select their leaders under the process set out by the Wisconsin Legislature through the commission of election frauds that violated state laws and the Equal Protection Clause in the United States Constitution. And pursuant to 42 U.S.C. § 1983, a plaintiff must demonstrate by a preponderance of the evidence that his constitutional rights to equal protection or fundamental right to vote were violated. *See, e.g., Radentz v. Marion Cty*., 640 F.3d 754, 756-757 (7th Cir. 2011).

The tally of ballots certified by Defendants giving Mr. Biden the lead with 20,800 votes cannot possibly stand in light of the thousands of illegal mail-in ballots that were improperly counted and the vote manipulation caused by the Dominion software.

Plaintiffs' equal protection claim is straightforward. The right of qualified citizens to vote in a state election involving federal candidates is recognized as a fundamental right under the Fourteenth Amendment of the United States Constitution. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). *See also Reynolds v. Sims,* 377 U.S. 533, 554 (1964) (The Fourteenth Amendment protects the "the right of all qualified citizens to vote, in state as well as in federal elections."). Indeed, ever since the Slaughter-House Cases, 83 U.S. 36 (1873), the United States Supreme Court has held that the Privileges or Immunities Clause of the Fourteenth Amendment protects certain rights of federal citizenship from state interference, including the right of citizens to directly elect members of Congress. *See Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing Ex parte Yarbrough, 110 U.S. 651, 663-64 (1884)). *See also Oregon v. Mitchell*, 400 U.S. 112, 148-49 (1970) (Douglas, J., concurring) (collecting cases).

The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it "is preservative of other basic civil and political rights." *Reynolds*, 377 U.S. at 562; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463,476 (6th Cir. 2008) ("The

right to vote is a fundamental right, preservative of all rights."). Voters have a "right to cast a ballot in an election free from the taint of intimidation and fraud," *Burson v. Freeman*, 504 U.S. 191, 211 (1992), and "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

"Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted" if they are validly cast. *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted" means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555, n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

"Every voter in a federal . . . election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson v. United States,* 417 U.S. 211, 227 (1974); *see also Baker v. Carr,* 369 U.S. 186, 208 (1962). Invalid or fraudulent votes "debase[]" and "dilute" the weight of each validly cast vote. *See Anderson*, 417 U.S. at 227.

The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States." *Anderson*, 417 U.S. at 226 (*quoting Prichard v. United States*, 181 F.2d 326, 331 (6th Cir.), *aff'd due to absence of quorum*, 339 U.S. 974 (1950)).

Practices that promote the casting of illegal or unreliable ballots or fail to contain basic minimum guarantees against such conduct, can violate the Fourteenth Amendment by leading to the dilution of validly cast ballots. *See Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be

denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). States may not, by arbitrary action or other unreasonable impairment, burden a citizen's right to vote. *See Baker v. Carr*, 369 U.S. 186, 208 (1962) ("citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution").

"Having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104-05. Among other things, this requires "specific rules designed to ensure uniform treatment" in order to prevent "arbitrary and disparate treatment of voters." *Id*. at 106-07; *see also Dunn v. Bloomstein*, 405 U.S. 330, 336 (1972) (providing that each citizen "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction"). Similarly, equal protection needs to be recognized in this case where many Wisconsin's citizens' lawful votes remained uncounted, and many were diluted by unlawful votes in violation of the Equal Protection clause.

The Plaintiff Will Suffer Irreparable Harm

"Where, as here, plaintiff has demonstrated a likelihood of success on the merits as to a constitutional claim, such an injury has been held to constitute irreparable harm." *Democratic Nat'l Comm. v. Bostelmann*, 447 F.Supp.3d 757, 769 (W.D. Wis. 2020) (*citing Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (where plaintiff had proven a probability of success on the merits, the threatened loss of First Amendment freedoms "unquestionably constitutes irreparable injury"); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.4 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm.").

Moreover, courts have specifically held that infringement on the fundamental right to vote constitutes irreparable injury. *See Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) ("A restriction on the fundamental right to vote ... constitutes irreparable injury."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (holding that plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon")." \

"Additionally, traditional legal remedies would be inadequate, since infringement on a citizens' constitutional right to vote cannot be redressed by money damages." *Bostelmann*, 447 F.Supp.3d at 769 (*citing Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate."); *League of Women* Voters *of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress.")."

The Balance of Harms & Public Interest

Under Seventh Circuit law, a "sliding scale" approach is used for balancing of harms: "[t]he more likely it is that [the movant] will win its case on the merits, the less the balance of harms need weigh in its favor." *Girl Scouts of Manitou Council v. Girl Scouts of United States of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). Plaintiff above have shown his strong likelihood of success on the merits above. The low costs to Defendants and high potential harm to Plaintiff make this a case with a substantial net harm that an immediate and emergency injunctive relief can prevent.

In this regard, Plaintiff would highlight a recent Eleventh Circuit decision addressed a claim in 2018 related to Georgia's voting system and Dominion Voting Systems that bears on the likelihood of Plaintiffs' success on the merits and the balance of harms in the absence of injunctive relief:

> In summary, while further evidence will be necessary in the future, the Court finds that the combination of the statistical evidence and witness declarations in the record here (and the expert witness evidence in the related *Curling* case which the Court takes notice of) persuasively demonstrates the likelihood of Plaintiff succeeding on its claims. Plaintiff has shown a substantial likelihood of proving that the Secretary's failure to properly maintain a reliable and secure voter registration system has and will continue to result in the infringement of the rights of the voters to cast their **vote** and have their **votes** counted.

Common Cause Georgia v. Kemp, 347 F. Supp. 3d 1270, 1294-1295, (11th Cir. 2018).

Therefore, it is respectfully requested that the Court grant Plaintiffs' Motion and enter the proposed Order submitted therewith.

Respectfully submitted, this 6th day of December, 2020.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff, **CASE NO. 2:20-cv-1771**

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PLAINTIFF'S MOTION FOR LEAVE TO SUBMIT SEPARATE REPLIES TO MULTIPLE SUBMISSIONS BY DEFENDANTS AND AMICI OPPOSING PLAINTIFF'S AMDEND MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO BE CONSIDERED IN AN EXPEDITED MANNER

COMES NOW Plaintiff, William Feehan by and through his undersigned counsel, and moves the Court to permitting him to submit separate or consolidated replies of 15 pages each to each of the multiple submissions of Defendants and Amici in opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction to Be Considered in an Expedited Manner (Amended Motion).

In support, Plaintiff shows:

1) By Order dated December 4, ECF Docket No. 29, the Court referenced "Civil L.R. 7(f), which provides that memoranda in opposition to motions are limited to thirty pages and reply briefs in support of motions are limited to fifteen pages."

2) Civil Local Rule 7(f) further provides that briefs may not exceed those page limits "unless the Court has previously granted leave to file an oversized memorandum."

3) By the same Order, the Court directed Defendants Gov. Tony Evers and Wisconsin Elections Commission to file an "opposition brief" to Plaintiff's Amended Motion by 5:00 p.m. on Monday, December 7, 2020, and directed Plaintiff to file his reply by 5:00 p.m. on Tuesday, December 8.

4) While the reference is to a single brief, Defendants are represented by separate counsel, and Plaintiff anticipates that each Defendant will file a separate 30 page brief in opposition to Plaintiff's Amended Motion.

5) Subsequently on December 4, Defendant Gov. Tony Evers filed a Motion Requesting Leave to File an Oversized Memorandum of 45 pages in support of his proposed Motion to Dismiss and in response to Plaintiff's Amended Motion. ECF Docket No. 34.

6) By Text Order dated December 4, ECF Docket No. 36, the Court indicated the Court would allow Gov. Tony Evers leave to file "separate briefs opposing the plaintiff's amended motion and supporting his own." Pursuant to Civil L. R. 7(f), the separate brief apparently may be 30 pages as well.

7) By Order dated December 4, ECF Docket No. 37, the Court granted leave to proposed Intervenor James Gesbeck to file an *amicus* brief of 30 pages opposing Plaintiff's Amended Motion.

8) By Order dated December 6, ECF Docket No. 41, the Court granted leave to proposed Intervenor Democratic National Committee to file an *amicus* brief opposing Plaintiff's Amended Motion for Temporary Restraining Order, also presumably 30 pages, the same as *Amici* Gesbeck.

9) The total page limit of opposition to Plaintiff's Amended Motion may therefore total as many as 150 pages.

10) Under the Court's December 4 Order, Docket No. 29, Plaintiff is apparently limited, at present, to a single 15 page reply in response to the total 150 pages filed in opposition.

11) While Plaintiff may well not file a 15 page Reply to each and every submission, Plaintiff cannot anticipate all arguments raised by multiple Defendants and Amici, and in any event, a limit of 15 pages is inadequate to reply to up to 150 pages of opposing submissions by Defendants and *Amici.*

CONCLUSION

Based on the Court's stated preference that Gov. Evers file separate briefs supporting his Motion to Dismiss and opposing Plaintiff's Amended Motion, Plaintiff therefore requests leave to file a separate Reply to each opposing submission, each Reply not to exceed 15 pages.

Respectfully submitted, this 6th day of December, 2020.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff, **CASE NO. 2:20-cv-1771**

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PLAINTIFF'S MOTION FOR CONSOLIDATED EVIDENTIARY HEARING AND TRIAL ON THE MERITS

COMES NOW Plaintiff, William Feehan by and through his undersigned counsel, and moves the Court to schedule an evidentiary hearing on the merits at 9 a.m., Wednesday, December 9, 2020, or at the Court's earliest opportunity other than on Thursday, December 10, 2020. This Motion is brought pursuant to FRCP 65.

In support, Plaintiff shows:

1) FRCP 65(a) provides:

> **(a) Preliminary Injunction.**
>
> **(1)** ***Notice.*** The court may issue a preliminary injunction only on notice to the adverse party.
>
> **(2)** ***Consolidating the Hearing with the Trial on the Merits.*** Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

2) As the Court is likely aware, prior to filing this Case No. 2:20-cv-1771, Plaintiffs' Counsel commenced similar actions in several other jurisdictions, based upon evidence provided in the Affidavits and Declarations the same or similar to those of Plaintiff's expert witnesses supporting Plaintiff's Amended Complaint in this case.

3) Because Plaintiff's counsel had concluded that December 8 was the final date for determining injunctive relief and because Plaintiff's expert witnesses could not be available in multiple courts at once, Plaintiff proposed to proceed based on the expert witness and other documentary evidence provided in the Exhibits to his Complaint, which Plaintiff asserts satisfies the evidentiary standard for a Temporary Restraining Order in any event. Pl. Amended Memorandum at 5 – 8.

4) However, pursuant to its Order dated December 4, ECF Docket No. 29, the Court has determined that December 14 is the final date for determination rather than December 8. Further, except for Thursday, December 10, scheduling ordered in the other jurisdictions has now made it possible for Plaintiff's experts to appear before this Court on Wednesday, December 9 or thereafter.

5) Also, counsel who have appeared on behalf of Defendants and *amici* proposed intervenors in this action have appeared on behalf of similarly situated defendants in other jurisdictions. Based upon their filings in those jurisdictions and the responsive pleadings proposed by *amici* in this action, it is clear that defendants intend to argue, *inter alia*, that relief should not be granted apart from an evidentiary determination on the merits.

6) In its December 4 Order, the Court contemplated "exercis[ing] its discretion whether to hold an evidentiary hearing or hear argument." *Id.* at 3 – 4.

7) Plaintiff's reply briefing will be submitted by 5:00 p.m., Tuesday, December 8.

8) A consolidated hearing/trial on December 9 under Rule 65(a)(2) would provide the Court a more thorough basis for its decision than the documentary evidence available to date, and would make possible a final order with at least a minimal window of several days available for appeal.

9) Plaintiff would present three witnesses and estimates the entire hearing could be concluded in three hours.

CONCLUSION

Accordingly, the Plaintiff respectfully requests the Court to schedule a consolidated hearing/trial on the merits commencing at 9 a.m., December 9, 2020.

Respectfully submitted, this 6th day of December, 2020.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

DEFENDANTS WISCONSIN ELECTIONS COMMISSION AND ITS MEMBERS' RESPONSE TO TO PLAINTIFF'S MOTION FOR HEARING

This case should proceed on the schedule that has already been ordered. Plaintiff's delayed reversal of position and request for an evidentiary hearing this week with unidentified witnesses is prejudicial, impractical, and would not advance resolution of this case. For reasons detailed in the Commission's filings later today, the injunction and this entire case can and should be resolved on briefs. In any event, the Commission has already relied on the Plaintiff's request to not have a hearing when scheduling other cases, and a

hearing this week is impractical. Plaintiff's delayed scheduling request should be denied for four reasons.

First, this request represents quintessential sandbagging. Plaintiff initially filed his motion for a temporary restraining order and preliminary injunction on December 1 without asking for a hearing. (*See* Dkt. 2.) He then amended that motion later that day, again, without requesting a hearing (*see* Dkt. 6), which the Court acknowledged in its December 2 order (Dkt. 7). The next day, December 3, Plaintiff submitted a third amended motion and proposed a briefing schedule "to submit the matter on briefs without argument." (Dkt. 10-1:1.) Plaintiff's third amended motion expressly states that it "present material dispositive issues which are questions of law that may be resolved without factual investigation or determination." (Dkt. 10 ¶ 6.) The court granted that request and scheduled briefing. (Dkt. 29:6) ("But because that is what the plaintiff—the movant—has asked, the court will rule on the pleadings.") Now, at 9:00 p.m. on the Sunday evening before Defendants' briefs are due, Plaintiff decides to change his direction and requests an evidentiary hearing to present three mystery witnesses. This type of sandbagging is inexcusable.

Second, the Commission would be prejudiced by Plaintiff's sandbagging. It has relied on Plaintiff's prior request to *not* have a hearing when scheduling other hearings, and its witnesses cannot now reasonably prepare and may not

be available given other proceedings. This week, there is a pretrial hearing on Wednesday and a hearing on Thursday in another election case in federal court brought by Donald J. Trump. *Donald J. Trump v. The Wisconsin Elections Comm'n*, No. 20-cv-1785-bhl (E.D. Wis.) (*See* Dkt. 45 noting that a final pretrial conference is scheduled for Wednesday, December 9, 2020, at 3:00 p.m., and a final evidentiary hearing is scheduled on Thursday, December 10, 2020 at 9:00 a.m.) There is a hearing on Friday in a state-court case where Donald J. Trump brings election claims through the state procedures under Wis. Stat. § 9.01. *Donald J. Trump vs. Joseph R. Biden*, No. 20CV7092 (Wis. Cir. Ct. Milwaukee Cty.) (scheduling a hearing for Friday, December 11, 2020 at 9:00 a.m.). And Wisconsin Assembly Speaker Robin Vos and Majority Leader Rep. Jim Steineke have announced the Assembly Committee on Campaigns and Elections will host a public hearing on the 2020 presidential election scheduled for December 11, 2020, at 10:00 a.m. in the Wisconsin State Capitol.

An evidentiary hearing here will require the same Commission witness or witnesses who need to prepare for hearings on Thursday and Friday. Adding a hearing on Wednesday, or any other day this week, is unacceptably burdensome and prejudicial.

Further, the Commission relied on the Plaintiff's request to not have a hearing and has not requested expedited discovery or deposed any of Plaintiff's purported experts or other witnesses—some of which are not even identified in

their declarations. Astoundingly, Plaintiff fails to even identify which three witnesses he intends to present at a hearing he proposes to occur in days. Plaintiff's tactics are inexcusable and should not be entertained by the court. *See*, *Stern v. Marshall*, 564 U.S. 462, 482 (2011) (admonishing plaintiff's "sandbagging" and noting that the consequences "can be particularly severe.")

Third, no evidentiary hearing is necessary. As will be explained in detail in the Commission's response brief to be filed later today, Plaintiff's case has multiple threshold defects that require dismissal on the pleadings. Plaintiff lacks standing, his inexplicably late claim is barred by laches, and the relief he requests is barred by the Eleventh Amendment and Substantive Due Process Clause. Plaintiff's individual causes of action fair no better and he has not stated any constitutional claims as a matter of law.

Finally, what Plaintiff likely intends to present at any evidentiary hearing is inadmissible under *Daubert* and the Federal Rules of Evidence. The glaring unreliability, and inadmissibility of the evidence that Plaintiff filed in support of his injunction request will be further explained in the Commission's response brief to be filed later today. The documents filed with his Complaint and brief do not even meet basic evidentiary standards and cannot possibly support overturning the results of the election.

Plaintiff's late reversal of position does not warrant prejudicing the Commission with an evidentiary hearing the day after tomorrow. The

Commission requests that this case proceed on the schedule that is already established.

Dated this 7th day of December 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

Case No. 2:20-cv-1771

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*

Defendants.

JAMES GESBECK'S AMICUS BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF (DKT. NO. 10)

James Gesbeck files this *amicus*[1] brief in opposition to plaintiff's motion for injunctive relief. Dkt. No. 10. Plaintiff seeks a temporary restraining order or preliminary injunction "set[ting] aside the results of the 2020 General Election" and granting other relief. Id at ¶ 5. Among the relief requested by plaintiff are various orders directed at Governor Evers and the Wisconsin Elections Commission. One of the requested orders is "An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election". Dkt. No. 9 at ¶ 142. This would be an unprecedented order in the history of the United States of America. Even in the seminal Bush v Gore case, the court did not order Florida to transmit certified election results stating that Bush was the winner of the election. 531 U.S. 98, 111 (2000).

Plaintiff's motion for injunctive relief fails before even reaching the merits. Plaintiff has brought this case in Federal Court asserting a variety of Constitutional violations; however,

[1] Pursuant to Judge Pepper's Order. Dkt. No. 37.

plaintiff has not established this court has jurisdiction. Dkt. No. 9. Plaintiff was a nominee of the Republican Party to be a Presidential Elector for Wisconsin. Id. at ¶ 24. Plaintiff is not the correct party to be challenging the 2020 General Election results and this Federal Court is not the proper jurisdiction in which the challenge should be heard. The Constitution provides that the power to appoint Electors is vested in the Legislature of each State. U.S. CONST. art. II, § 1 ("Electors Clause"). The Wisconsin Legislature has directed that challenges to an election are to be brought in Wisconsin Circuit Courts by an aggrieved party. Wis. Stat. § 9.01(6). In the Presidential Election the aggrieved party is Donald Trump. Wis. Stat. § 9.01(1)(a)(5)(b). To the extent that the results of this election need to be challenged, Donald Trump is the correct plaintiff, and the Wisconsin Circuit Court is the correct venue. In fact, Donald Trump is the plaintiff in Milwaukee County Circuit Case 2020CV7092 which is an appeal of a recount brought under Wis. Stat. § 9.01.

The plaintiff further fails to meet any of the standards for a temporary restraining order or preliminary injunction.

Plaintiff fails to make an initial showing that plaintiff is likely to succeed on the merits. Plaintiff relies on numerous affidavits, including anonymous affidavits, as evidence of a "massive election fraud" Dkt. No. 9 at ¶ 1. But plaintiff's affidavits contain irrelevant information about elections occurring in other States and other Countries and contain no specific allegations of election misconduct occurring in Wisconsin during the 2020 General Election.

Plaintiff claims to have no adequate remedy at law, however plaintiff does not further argue how that is the case. Plaintiff's remedy for these alleged violations is to have the aggrieved party under Wis. Stat. § 9.01(1)(a)(5)(b) challenge the recount under Wis. Stat. § 9.01(6) which is exactly what is occurring in Milwaukee County Circuit Case 2020CV7092.

Plaintiff further will not suffer any harm, let alone, irreparable harm if the court denies plaintiff's motion. If the plaintiff's factual allegations and claim of a "massive election fraud" are true, then Trump will prevail in Milwaukee County Circuit Case 2020CV7092. If Trump prevails in that, then regardless of what occurs in this case, plaintiff will have suffered no harm. In fact, plaintiff would be one of the Wisconsin Electors voting for Donald Trump in the Electoral College.

Plaintiff argues that the balance of equities would favor plaintiff's proposed remedy. However, nothing could be further from the truth. Plaintiff's proposed remedy is unprecedented. It would result in this court ordering Governor Evers to certify that Donald Trump won the State of Wisconsin in contradiction to the outcome obtained by operation of Wisconsin's election law enacted by the legislature pursuant to Article II of the Constitution. This would disenfranchise every single individual who voted in the 2020 General Election. Plaintiff does not seek the exclusion of certain fraudulent ballots or the removal of certain fraudulent additions to the tallies, rather plaintiff seeks wholesale disenfranchisement of every single Wisconsin voter. The equitable outcome in this case is for this court to deny the plaintiff's motion for an injunction and allow the election challenge occurring pursuant to the process outlined by the Wisconsin legislature under the authority granted to it by Article 2 of the Constitution.

Plaintiff proposed order would be extraordinarily harmful to the citizens and voters of the State of Wisconsin and thus the public. If plaintiff's motion is granted, then this court, acting alone, would be dictating the results of this election. This court would be disenfranchising every single voter and discarding every single vote in the State of Wisconsin by ordering the Governor to certify an election result dictated by this court. There are no examples of a court deciding an election itself. Rather, courts have ruled on the application of election law to specific ballots or

sets of ballots. The election process then proceeds pursuant to election law and a winner is determined. Judges do not and should not declare electoral winners as opposed to changing the tallies.

BACKGROUND

FACTUAL BACKGROUND

It is undisputed that the 2020 General Election took place in Wisconsin on November 3rd, 2020. As part of that election, voters participated in selecting the winner of Wisconsin's 10 Electoral votes. Wis. Stat. Chapters 5-12. Joseph Biden and Donald Trump were the two highest vote getters in the election for the office of the President of the United States. The Wisconsin Elections Commission pre-recount canvass reported 1,630,673 for Joseph Biden and 1,610,065 for Donald Trump[2]. Based on that outcome, Wisconsin election law would dictate that the Wisconsin Elections Commission and Governor Evers certify the Electors for Joseph Biden. Id.

The 2020 General Election in Wisconsin was unique as far as General Elections in Wisconsin are concerned. The court can take judicial notice that there is a global health pandemic taking place caused by the COVID-19 virus. This resulted in "astronomically more ballots case by mail than in any previous fall election in Wisconsin"[3]. Further complicating the election were public safety precautions necessitated by COVID-19[4]. The Center for Disease Control recommends social distancing which includes keeping 6 feet away from other people[5]. This complicated the ballot counting process and voting process as elections staff worked to keep

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[2] https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf (last accessed December 5th).
[3] https://www.jsonline.com/story/news/politics/elections/2020/10/19/wisconsin-voter-turnout-more-than-half-2016-in-some-areas-due-absentee-ballots/3709355001/ (last accessed December 5th).
[4] See, e.g. https://bipartisanpolicy.org/report/counting-the-vote-during-the-2020-election/ (last accessed December 5th).
[5] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last accessed December 5th).

people 6 feet apart. Additionally, absentee ballots in Wisconsin cannot be counted until the day of the election. Wis. Stat. § 6.88.

The difference in votes between Trump and Biden was 20,608 votes. This is within the 1% margin of votes cast required for a recount. Wis. Stat. § 9.01(1)(a)(5)(b). On November 18th, President Trump filed a timely petition for a recount pursuant to Wis. Stat. § 9.01(1)(a)(1). Pursuant to Wis. Stat. § 9.01(1)(a)(3), Trump only requested a recount take place in Dane County and Milwaukee County[6]. That recount was conducted in both Dane County and Milwaukee County. Milwaukee County performed their recount by hand[7]. The partial recount led to a final canvass of Biden having 1,630,866 votes and Trump having 1,610,184 votes[8].

Following the recount, Trump filed a petition for Original Action in the Wisconsin Supreme Court as appeal number 2020AP1971-OA. The Wisconsin Supreme Court entered a December 3rd Order denying the petition for leave to commence an original action[9]. The Wisconsin Supreme Court specifically noted that Wis. Stat. § 9.01(6) required such an action be commenced in circuit court. Trump then filed two cases, one each in Dane County and Milwaukee County. These were ultimately consolidated into Milwaukee County Circuit Case 2020CV7092 before Judge Simanek. Further case filings are expected December 7th and 9th in advance of a December 10th or December 11th hearing.

PLAINTIFF'S ALLEGED FACTS

The plaintiff has alleged a massive election fraud that "occurred during the 2020 General Election in the City of Milwaukee, southeastern Wisconsin counties, and throughout the State of

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[6] https://elections.wi.gov/elections-voting/recount (last accessed December 5th).
[7] See https://www.wbay.com/2020/11/24/milwaukee-county-could-finish-recount-as-soon-as-wednesday/ (last accessed December 5th).
[8] https://elections.wi.gov/elections-voting/recount (last accessed December 5th).
[9] https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=311669

Wisconsin". Dkt. No. 9 at ¶ 1. Plaintiff's amended complaint contains numerous factual allegations and includes numerous exhibits. Dkt. No. 9-1 through 9-19. Those exhibits include various affidavits, although several affidavits have the name of the affiant redacted. E.g., Dkt. No. 9-1. While this could be cause for concern, most of the affidavits are wholly irrelevant to the matter before this court. For this court to find that massive election fraud during the 2020 General Election in Wisconsin, there must be a factual basis demonstrating that such fraud occurred. That evidence is simply missing from the plaintiff's pleadings. In fact, plaintiff fails to meet any of the requirements for a preliminary injunction even assuming the testimony of the affiants is true.

Dkt. No. 9-1 is an affidavit regarding elections occurring in Venezuela. However, the only connection between that affidavit and the 2020 General Election in the State of Wisconsin is that the same vendor may have supplied voting equipment in both Venezuela and in the State of Wisconsin. Id. Importantly, while the affidavit outlines electoral fraud that occurred in Venezuela, it does not allege any fraud in Wisconsin and is thus irrelevant. Dkt. No. 9-8 also contains more allegations regarding Venezuela that again are irrelevant to the Wisconsin election. The question of whether election fraud occurred in Venezuela is not relevant to the question presented before this court of whether there was election fraud in the Wisconsin 2020 General election.

Plaintiff's 2nd and 3rd exhibits reference various statistical analyses performed based on a poll of Wisconsin residents. Dkt. No. 9-1 and 9-2. The problem with this is that it relies on a poll conducted by the affiant's staff. Polls are simply not accurate as by definition they are limited to a sample size and further limited based on the individuals who respond to them. Individuals who respond are notably not under oath. Plaintiff's 9th exhibit similarly looks at voting trends and

concludes only there were "strikingly high Democratic vote totals". Dkt. No. 9-9. There is nothing inherently illegal or fraudulent in "strikingly high Democratic vote totals" and there is no allegation in that affidavit that these vote totals were the product of fraud.

As an example of inherent unreliability of polls, polls were inaccurate both in the 2016 General Election in Wisconsin and in this election. In 2016 the polls predicted a Clinton victory in Wisconsin which turned out to be inaccurate[10]. One 2020 poll had Biden winning Wisconsin by 17 points[11]. These limitations are the reason why we rely on holding actual elections and not selecting winners based on polling. This court should not and cannot order Governor Evers to declare a certain individual the winner of an election solely based on statistical analysis.

Plaintiff's 4th exhibit attempts to show "something unusual" occurring with Dominion Voting Systems machines based on a statistical analysis. Dkt. No. 9-4. However, missing from this is any evidence showing what this "something unusual" or even a suggestion of what "something unusual" might be. Given the other affidavits showing electoral fraud occurring in other countries using Dominion Voting System machines perhaps plaintiff wants the court to view the evidence in that manner. However, there are no facts to suggest, let alone prove, that something fraudulent occurred in Wisconsin.

Plaintiff's 5th exhibit simply outlines the hardware in use at each Wisconsin Municipality. Dkt. No. 9-5. Plaintiff's 6th exhibit concerns an individual named Eric Coomer who supposedly works at Dominion Voting System and is apparently biased against Trump. Dkt. No 9-6. In the light most favorable to the plaintiff, Eric Coomer made a statement that he made sure Trump was not going to win the election. Id. However, there is nothing in the affidavit to indicate that Eric

[10] https://www.nytimes.com/newsgraphics/2016/10/18/presidential-forecast-updates/newsletter.html
[11] https://abcnews.go.com/Politics/covid-surge-hurts-trump-wisconsin-biden-leads-closer/story?id=73834112

Coomer did anything, let alone something that would interfere specifically in the 2020 Wisconsin General election which is what plaintiff must prove.

Plaintiff's 7th, 8th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, and 18th exhibit describes vulnerabilities found in voting systems in various places, but notably none of them reference Wisconsin. Dkt. No. 9-7, 9-8, 9-10, 9-11, 9-12, 9-13, 9-14, 9-15, 9-16, and 9-18. Whether other Dominion Voting Systems are vulnerable is simply not relevant to what occurred in Wisconsin. Additionally, the mere presence of a security vulnerability in Wisconsin does not mean that it was exploited, and electoral fraud occurred. Plaintiff does not have any evidence in the affidavits that any election machines in Wisconsin were exploited and votes changed.

Plaintiff's 17th exhibit contains several factual statements which ends in a conclusion that fraud occurred. Dkt. No. 9-17. One of the supposed indicators of fraud are higher than normal voter turnout. Additionally, there was a spike of votes that did not come from a random population of votes. While these facts are interesting, and possibly grounds for further investigation, there is no factual allegation of fraud beyond pure conjecture that it occurred. This court cannot grant plaintiff's motion based on conjecture in the absence of facts demonstrating that election fraud actually occurred in Wisconsin during the 2020 General Election.

Plaintiff's 19th exhibit performs a statistical analysis of voting trends, and it purports the outcome of this analysis to be show "fraud". Dkt. 9-19. The problem is there are no further factual allegations to indicate that it was in fact fraud, what the fraud was, who carried out the fraud and other factually important questions. There may be other explanations, and this does appear to warrant further investigation. However, it is insufficient evidence for this court issue a preliminary injunction.

PLAINTIFF'S MISSING FACTS

It is important to examine the factual claims that are remarkably absent from plaintiff's affidavits. This court is being asked to apply the law to the facts that are present. However, it is the facts that are absent that truly demonstrate plaintiff's inability to succeed on the merits.

There is no allegation of fraudulent misconduct on the part of the named defendants or any person associated with conducting the Wisconsin election. For the plaintiff to succeed with a claim of "massive election fraud" there would need to be one or more persons who committed fraud. However, the plaintiff does not allege any specific individual committed fraud and does not allege with particularity the circumstances constitution fraud as required under Fed. R. Civ. P. 9(b).

There is further no evidence presented that votes were not counted, ballots were added, or that voters were denied the right to vote. At best the plaintiff's evidence demonstrates that fraud could be explanation for statistically significant events that occurred. So, at best, plaintiff shows there is a possibility of fraud. However, the mere possibility of harm (in this case fraud) is not even enough for Article 3 standing in Federal courts. See Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013). As a matter of law, it is certainly not enough to prove that massive election fraud occurred.

Further missing from the plaintiff's factual claims are an accounting of what the vote total should be. Plaintiff solely cites various statistical analysis for the proposition that Trump should have won the election in the State of Wisconsin. However, the plaintiff offers no method for calculating what accurate vote totals would even be. Instead, plaintiff requests that this court disenfranchise every single voter and declare by fiat who won the election for the office of the President of the United States.

LEGAL STANDARD

Plaintiff correctly cites the standard for a temporary restraining order or preliminary injunction[12]. "A preliminary injunction is an extraordinary remedy that is only granted where there is a clear showing of need." Cooper v. Salazar, 196 F.3d 809 (1999). "[Plaintiffs must show 1) a likelihood of success on the merits, 2) irreparable harm if the preliminary injunction is denied, and 3) the inadequacy of any remedy at law. Once this threshold showing is made, the court balances 4) the harm to plaintiffs if the preliminary injunction were wrongfully denied against the harm to the defendant if the injunction were wrongfully granted, and 5) the impact on persons not directly concerned in the dispute (the "public interest")" Id.

In addition to the legal standard for a preliminary injunction, it is important to consider the legal standard applicable to the Wisconsin Election Code. Wis. Stat. Chapters 5-12. The authority of Wisconsin to regulate its election is vested in its legislature by the United States Constitution. U.S. CONST. art. II, § 1 ("Electors Clause"). Therefore, in considering this challenge to a Wisconsin election this court must consider and analyze Wisconsin law.

Any analysis of Wisconsin election law must begin with Wis. Stat. § 5.01(1). "Construction of chs. 5 to 12. Except as otherwise provided, chs. 5 to 12 *shall be construed to give effect to the will of the electors*, if that can be ascertained from the proceedings, *notwithstanding informality or failure to fully comply with some of their provisions*". Id (emphasis added). The legislature has expressed its clear intent that its statutory regulation of election give effect to the will of the electors. Further, even the failure to fully comply with some of the provisions of chs. 5 to 12 should not prevent effect being given to the will of electors. Id.

[12] To the extent there may be a difference between a temporary restraining order or preliminary injunction, such differences are irrelevant in this case. Plaintiff seeks a nondispositive court order requiring defendants to take certain actions and abstain from taking other actions.

The legislature has specified an exception to certain absentee voting requirements as set out in 6.84(2) which instructs that those provisions should be treated as mandatory provisions as opposed to directory provisions. Wis Stat. § 6.84(2). This is relevant as the Wisconsin Supreme Court has held that directory provisions only require substantial compliance as opposed to strict compliance. See e.g., Sommerfeld v. Board of Canvassers, 269 Wis. 299, 69 N. W. (2d) 235 (1955) and Kaufmann v. La Crosse City Board of Canvassers, 8 Wis. 2d 182 (1959)

PLAINTIFF IS NOT ENTITLED TO A PRELIMINARY INJUNCTION

Plaintiff has not established the subject matter jurisdiction of this court

For plaintiff to succeed on the merits, plaintiff must show that this court properly has subject matter jurisdiction. Plaintiff claims this court has subject matter jurisdiction granted by 28 U.S.C. § 1343. Plaintiff further cites Bush v. Gore for the proposition that "A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring). This quote is taken from a concurring opinion, not the majority opinion. Additionally, the majority opinion said the decision was limited to the facts of the case before the Supreme Court. Id. at 109.

Notably, plaintiff does not allege a significant departure from the legislative scheme for appointing Presidential electors in Wisconsin. Plaintiff alleges perhaps a minor departure of the legislative scheme in two manners. First, that WEC guidance that indefinitely confined absentee requests should not be changed based on what a clerk "believes" departs from the legislative scheme that requires a clerk have "reliable information". Dkt. No. 9 at ¶ 40-41. As a legal matter, a subjective belief that someone does not meet the requirements for indefinitely confined status is not the same as having reliable information that someone does not meet the requirements for

the indefinitely confined status. Thus, there is no conflict between the guidance issued by the WEC and the legislative scheme for conducting elections.

Second, plaintiff alleges that addresses were added by clerks to the witness certification of absentee ballots. Id. at ¶ 43. Plaintiff alleges this departs because there is no explicit grant in the statutes for clerks to add this information and Wis. Stat. § 6.87(6d) requires the witness address be present. However, nothing in the statutory scheme requires that the witness be the individual to fill out the address. Rather the only requirement is that the certification be executed by the witness. Wis. Stat. § 6.88(3)(a). Plaintiff has not alleged and has not offered any evidence showing that any of the ballots did not contain the witness' address. Since there is no requirement that the witness write the address, there has been no violation of the election code.

Since there is no substantial departure from the legislative scheme as required by *Bush v. Gore* to assert standing under 28 U.S.C. § 1343, this court lacks subject matter jurisdiction over these claims. The court should therefore deny the plaintiff's request for a preliminary injunction as Federal Courts should not issue preliminary injunctions when they lack jurisdiction to even hear the case. Since the plaintiff cannot establish subject matter jurisdiction, plaintiff has no chance of succeeding on the merits as is required for a temporary injunction.

In the alternative, the court should defer to the Wisconsin courts pursuant to Article II of the Constitution

Even if the court has subject matter jurisdiction to hear this case, it should defer to the Wisconsin Courts to resolve these claims instead of using supplemental jurisdiction to hear claims of violations of Wisconsin Statutes. 28 U.S.C. § 1367. The authority to regulate elections is left to the legislature in each of the States by the Constitution. U.S. CONST. art. II, § 1 ("Electors Clause"). The Wisconsin legislature decided upon a method for resolving disputes in

Wis. Stat. § 9.01. In cases where a violation of the Wisconsin Election Code is claimed, the matter should be resolved in the Wisconsin Circuit Court. Id. This is already taking place in the form of Milwaukee County Case 2020CV7092.

The plaintiff has not advanced any argument as to why the statutory scheme adopted by the Wisconsin legislature pursuant to Article 2 is inadequate. In Bush v. Gore the case only reached the Federal Court System and the United States Supreme Court after it had been ruled on by the Florida Supreme Court. 531 U.S. 98 (2000). There is no reason offered by the plaintiff as to why such a process should not occur here.

Should Wisconsin courts fail to protect adequately the interests of the public and this plaintiff in having free and fair elections, then, and only then, should the Federal Courts invoke their authority under 28 U.S.C. § 1343. The prospect of a Federal Court usurping the role of a State to decide the identity of its Presidential Electors and order the Governor to appoint a certain slate of Electors would be unprecedented and lacking in Constitutional authorization. Even in Bush v. Gore, the US Supreme Court remanded the case back to the Florida Courts to have them enter further orders, as necessary. Article II of the Constitution does not provide authority for a Federal Court to order a State to appoint certain electors. There is an enormous difference between finding a State Court failed to follow its legislative scheme and requiring that State Court to follow its legislative scheme and what is being requested here which is that this court order a Governor to appoint certain electors.

The doctrine of abstention allows this District Court should decline to exercise its jurisdiction. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). The allegations against absentee ballots are the same in both this case and the pending case in Milwaukee County Circuit Court. Given that Article II of the Constitution grants authority for

creating the legislative scheme for selecting Electors to the individual State, this court should allow the State court to resolve the dispute. Plaintiff seeks to establish jurisdiction based on the Wisconsin Elections Commission alleged substantial departing from the legislative scheme for choosing Electors. That legislative scheme is based in State law and therefore should be heard in State court.

Plaintiff fails to establish he is likely to or even could prevail on the merits

Plaintiff alleges three separate violations of the Wisconsin Election Code. However, plaintiff fails to demonstrate how they would succeed on the merits with any of these claims.

First plaintiff claims clerks were given an unlawful directive that they should not "deactivate an absentee request if [they] believe the voter is not indefinitely confined". See WEC May 13, 2020 Guidance Memorandum. Plaintiff suggests this violates Wis. Stat. § 6.86(2)(b) which requires that an absentee voter be removed "upon the receipt of reliable information that an elector no longer qualifies". However, plaintiff makes no argument as to how the guidance violates the statute. There is a different between believing something and having reliable information. It is possible to believe in Santa Claus even in the absence of reliable information that he exists. A clerk could view an individual and form a belief that they are not indefinitely confined, however, viewing a person, by itself, is not sufficient to be reliable information. As the WEC guidance noted, "not all medical illnesses or disabilities are visible".

Second, plaintiff claims clerks do not have the authority to write the witness address onto the absentee ballot certificate. WEC October 18, 2016 Guidance Memorandum. Despite this guidance being in place for four years and multiple elections, the legislature did not adjust the statutory language. The statutory language neither permits, requires, nor prohibits the address information being added by the clerk. Wis. Stat. § 6.87(6d). There is nothing in the election code

requiring that the witness be the individual who completes the address. All that is required is the address be present. Wis. Stat. § 6.87(6d). Plaintiff does not allege any of the addresses were incorrect or missing. Plaintiff further does not allege that the clerk adding the witness address is fraudulent or in any manner changed the outcome of the election. Therefore, there is no violation of Wis. Stat. § 6.87(6d).

Third, plaintiff claims the Wisconsin Elections Commission and Governor Evers illegally certified the election results by not waiting for the time for an appeal under Wis. Stat. § 7.70(5)(a). However, plaintiff cites the wrong provision as this is an election for the Office of President. The correct statute is Wis. Stat. § 7.70(5)(b) which is specific to elections for presidential electors. There is no such time requirement present in Wis. Stat. § 7.70(5)(b).

Plaintiff fails to establish there is no remedy at law

Plaintiff fails to mention in his briefing that the Wisconsin Statutes have a mechanism for resolving election disputes, especially as it relates to claims of fraud or noncompliance with the election code. This is codified in Wis. Stat. 9.01. In fact, Trump, the proper party under 9.01(1)(a)(5)(b) is pursuing such a challenge. The plaintiff's remedy for not being named as an Elector as he believes should have occurred is to wait for his candidate's challenge brought under the Wisconsin Election Code to be heard. The Wisconsin Circuit Court is fully capable of remedying any election issues that have occurred pursuant to its statutory authority granted by the legislature. The Wisconsin Circuit Court has the authority to set aside or modify the determination of a board of canvassers based on an erroneous interpretation of law and can make factual determinations if necessary. Wis. Stat. § 9.01(8)(d). Further, the Circuit Court is aware of the time challenges involved due to the scheduled electoral vote on Wednesday December 14th

and should be trusted to rule on Trump's challenge pursuant to Wis. Stat. § 9.01(7)(b) which requires the matter "shall be summarily heard and determined".

Plaintiff fails to establish any harm, let alone irreparable harm

As mentioned above, for allegations of a massive election fraud, Wisconsin has a procedure for handling those allegations. Wis. Stat. § 9.01. The legislature duly enacted that process under its authority granted by the U.S. Constitution. The plaintiff's alleged harm of an invalid vote tally is being addressed through that process which is ongoing in Milwaukee County Circuit Court Case 2020CV7092. That Court has scheduled deadlines for briefing and scheduled an evidentiary hearing on December 10th with a backup date of December 11th in case the parties are in Federal Court on December 10th. The Milwaukee County Court has the authority to summarily hear and decide the matter. Wis. Stat. § 9.01(7)(b)

Regardless of the court's decision in this case, the challenge to the election in Milwaukee County Circuit Court Case 2020CV7092 will continue. That case can remedy any alleged wrongs committed during the 2020 General Election in Wisconsin. Should that occur, it would repair any harm suffered by plaintiff without needing any intervention from this court.

Plaintiff and Trump do have significant logistical and timing challenges in pursuing relief whether in this court or before the Milwaukee County Circuit Court. However, as it relates to the claims about the WEC guidance, that guidance has been in place since October 18th, 2016 and May 13, 2020, respectively. Plaintiff had ample opportunity to bring challenges with respect to that guidance prior to the election. Additionally, courts are and will continue to do everything they can to hear these cases in an expedited manner given the electoral voters are scheduled in vote in Wisconsin on December 14th, which is exactly 7 days from today.

Plaintiff fails to establish the balance of equities favors the plaintiff and goes against the public interest

The court must balance the equities when determining whether to grant a preliminary injunction. Everyone in Wisconsin, plaintiff, defendants, and amicus, desire a free and fair election. Based on that, the equities should be balanced in favor of a free and fair election.

With regards to this election, the statutorily mandated procedure for disputing an election should continue to proceed. The Wisconsin Legislature was aware that disputes could arise and in fact disputes have arisen in Wisconsin over the years. This is not the first case to challenge absentee ballots specifically for alleged noncompliance with the statutory provisions. See e.g., Sommerfeld v. Board of Canvassers, 269 Wis. 299, 69 N. W. (2d) 235. The public is served by allowing the statutory process to continue without interference from the Federal Courts.

Issuing the injunction requested by plaintiff would further moot the Wis. Stat. § 9.01 challenge occurring. If this court orders Governor Evers to certify that Trump won the State of Wisconsin, it would moot any outcome in the Wis. Stat. § 9.01 challenge occurring in Wisconsin by a State court. U.S. CONST. art. VI, § 2 ("Supremacy Clause"). In doing so, this court would be putting the insurmountable weight of the Federal Government on the election result in Wisconsin and would be unbalancing the scale created by system of checks and balances that have been maintained since the Constitution was adopted.

CONCLUSION

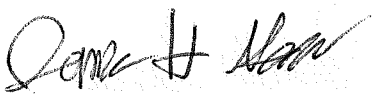
The plaintiff has failed to establish that this court should grant the requested injunction. Plaintiff has not sufficiently shown that this court has subject matter jurisdiction as there has not been a *substantial* departure from the legislative scheme for choosing electors. Additionally, even if this court has subject matter jurisdiction it should decline to issue the injunction in favor

of allowing the challenge filed pursuant to the legislative scheme to progress in Milwaukee County Circuit Court Case 2020CV7092 as required by Article II of the Constitution to continue. Wis. Stat. § 9.01(7)(b) allows that matter be "summarily heard and determined". To the extent an appeal is filed by either party, appellate courts can be expected to do everything in their power to rule in expedited manner given the upcoming electoral vote on December 14th.

The plaintiff meets none of the requirements for a preliminary injunction. The plaintiff has not shown evidence of fraud occurring in the 2020 Wisconsin General Election. At best plaintiff has shown statistical areas for concern and computer security concerns with some election software. However, absent from plaintiff's claims are any allegations that fraud occurred. Fed. R. Civ. P. 9(b) requires plaintiff's allegations "state with particularity the circumstances constituting fraud." There are no witnesses offered by plaintiff to any fraud or misconduct in Wisconsin. Plaintiff will not suffer any harm, let alone irreparable harm, from the court declining to issue this injunction. In absence of this court issuing an injunction, the allegations of fraud and election code violations will continue in Wisconsin Circuit Court; where such challenges belong pursuant to the legislative scheme enacted pursuant to Article II of the U.S. Constitution. The balancing of equities and public interest weigh against Federal intervention in a State election dispute. The Wisconsin Circuit Court should be given its opportunity to fulfill its obligation under Wis. Stat. § 9.01. The Wisconsin Circuit Court, not this court, should enter any necessary order to the board of canvassers to correct fraudulent or incorrect vote tallies.

For the reasons outlined in this brief, this court should deny plaintiff's motion for a temporary restraining order or preliminary injunction.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff

Case No. 2:20-cv-1771

v.

Wisconsin Elections Commission, *et al.*,

Defendants

CERTIFICATE OF SERVICE

I, James Gesbeck, certify that I have sent a copy of Amicus Brief in Opposition to Plaintiff's Motion for Injunctive relief as follows. Further the attorneys for all parties are ECF filers and will receive a copy of the brief via the e-filing system once received by the court:

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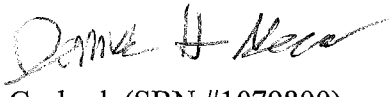
Respectfully submitted,



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UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

WILLIAM FEEHAN and DERRICK VAN ORDEN *Plaintiff*	)	
v.	)	Case No. 2:20-cv-01771-PP
WISCONSIN ELECTIONS COMMISSION, et al. *Defendant*	)	

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Intervenor - Democratic National Committee .

Date: 12/07/2020

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UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

WILLIAM FEEHAN and DERRICK VAN ORDEN *Plaintiff*	)	
v.	)	Case No. 2:20-cv-01771-PP
WISCONSIN ELECTIONS COMMISSION, et al. *Defendant*	)	

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Stephen E. Morrissey of the law firm of Susman Godfrey LLP has been retained by defendant Governor Tony Evers in this action. Please serve copies of all papers in this action on the undersigned at the address set forth below.

Respectfully submitted this 7th day of December 2020.

s/ *Stephen E. Morrissey*
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

DEFENDANT GOVERNOR TONY EVERS'S
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

The reasons for dismissing Plaintiff's complaint, with prejudice, are numerous. Glaringly, not only does Plaintiff lack standing to bring his claims, but his claims are also not justiciable before this Court. Therefore, the Court lacks subject matter jurisdiction and the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). Moreover, Plaintiff's claims are barred by the Eleventh Amendment of the U.S. Constitution. And, given Plaintiff's delay in filing his complaint, even if Plaintiff had standing and his claims were both justiciable and not constitutionally foreclosed, they are now foreclosed under the doctrine of laches. Finally, even if Plaintiff surmounts these jurisdictional, justiciability, and equitable objections, Plaintiff's claims should also be dismissed pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6) for failure to allege fraud with particularity and failure to state a claim upon which relief may be granted.

For all of these reasons, Defendant Governor Tony Evers moves this Court to dismiss Plaintiff's claims entirely and with prejudice without ever adjudicating Plaintiff's motion for injunctive relief.

This motion to dismiss must be heard before any motion for relief in this matter. Although styled as temporary or preliminary relief, Plaintiff's requested relief, namely overturning the results of Wisconsin's November 2020 presidential election, is effectively permanent. Moreover, Plaintiff's recent request for an evidentiary hearing makes clear that what he seeks—without any discovery or basic adversarial development of evidence—is a trial and final adjudication on the merits. Accordingly, Fed. R. Civ. P. 12(i) requires the Court to hear and decide this motion before reaching Plaintiff's request for injunctive relief.

The grounds for this motion are fully set forth in the accompanying brief.

Dated: December 7, 2020

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

DEFENDANT COMMISSION AND COMMISSIONERS' RESPONSE OPPOSING PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Wisconsin held its general election on November 3 after months of careful preparation and public announcement of election procedures. Since then, the votes have been counted, audited, and many were counted again. The results are now tallied and certified. The candidate who received the most votes for the office of President of the United States is Vice President Joe Biden.

Plaintiff was a nominee to be an electoral college elector for candidate President Donald Trump. He now, for the first time, alleges that the long-planned election procedures were unlawful and that the outcome is additionally tainted by a conspiracy dating back to the administration of Venezuelan president Hugo Chavez. He offers no direct evidence that even a single vote was miscounted in Wisconsin, and instead relies on conspiracy theories based on anonymous sources and inadmissible evidence. His claims are entirely meritless.

On this basis, he asks for disenfranchisement of hundreds of thousands Wisconsin voters and "an order instructing the Defendants to certify the results of the General Election for Office of the President in favor of President Donald Trump" in a preliminary ruling. (Dkt. 9 ¶ 139.) This unprecedented relief is unlawful, would take the election out of the hands of Wisconsin voters, and is fundamentally undemocratic. This Court should not reverse the outcome of the carefully planned and reliably executed Wisconsin election.

STATEMENT OF THE CASE

The November 2020 Wisconsin election was secure and reliable. Nearly 3.3 million Wisconsin voters cast ballots for the office of President of the United States.[1] Those votes have been counted, audited, and many have even been re-counted. There is *zero* indication of any fraud, or anything else that would call into question the reliability of the election results. To the contrary, every indication is that the outcome is correct.

A statewide audit of electronic voting machines used in the November election found no systematic problems.[2] To conduct this audit, the Commission randomly selected 5% of all reporting units statewide—a sample that included at least one piece of voting equipment in each of Wisconsin's 72 counties and each kind of voting equipment. It included 28 voting Dominion machines. (WEC Audit Memo 4.) The audit then hand-counted 4.2% of all ballots, more than 140,000, and the hand-counted results were compared to the results tabulated by each kind of voting machine. (WEC Audit Memo 2.) Members of the public could attend the audit. (WEC Procedures Memo 2.)

That audit did not "identif[y] any issues with the tabulation functionality of the voting equipment nor did [it] uncover any programing issues with the machines

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[1] Wisconsin Elections Commission, *WEC Canvass Reporting System*, Canvas Results for 2020 General Election 11/3/2020 6:00:00 AM https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf (Nov. 18, 2020).

[2] The Commission's Audit Memo is publicly available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-12/2020%20Audit%20Program%20Update%20for%2012_1_2020%20Meeting%20FINAL.pdf

on which results were audited." (WEC Audit Memo 4.) Instead, it showed that "the tabulation voting equipment"—including the challenged Dominion voting machines— "performed up to certification standards and accurately recorded and tabulated votes." (WEC Audit Memo 5.) Although some "minor discrepancies" were uncovered, the "vast majority . . . were due to human error . . . and only impacted one or two votes . . . and were not indicative of equipment malfunction or failure." (WEC Audit Memo 5.) The Commission concluded that "the results of the audit did not identify any programming errors that impacted how the voting equipment subject to audit counted votes . . . . This expanded audit and random selection process effectively confirmed the accuracy of voting equipment used in Wisconsin at the election." (WEC Audit Memo 8.)

Additionally, a recount confirmed that there were no errors in two major counties. President Donald Trump requested a recount of ballots cast in Dane and Milwaukee counties. That recount did not materially change the vote tallies for either President Trump or Vice President Biden.[3] More to the point, nothing uncovered during the recount pointed to widespread fraud through hacked or otherwise manipulated voting machines. President Trump, to be sure, identified various categories of ballots that he contends were cast illegally, but he did not identify any vote tallies maliciously altered.

[3] 2020 General Election Recount, https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/2020%20General%20Election%20Recount%2011-30-20%20final.xlsx (Nov. 30, 2020).

Moreover, the wild accusations of election unreliability, such as those in the Plaintiff's complaint, led federal agencies to investigate. That investigation revealed nothing to substantiate the allegations. U.S. Attorney General William Barr even specifically commented on the types of claims being made in this case, concluding:

> There's been one assertion that would be systemic fraud and that would be the claim that machines were programmed essentially to skew the election results. And the DHS and DOJ have looked into that, and so far, we haven't seen anything to substantiate that.[4]

These accusations were also denounced by Dominion itself, when it issued a public statement specifically addressing the claims brought by Plaintiff's counsel and further demonstrating the frivolity of these claims.[5]

From the initial canvassing, through the audit, recount, and federal investigation, there is no credible allegation of any material election irregularity. This Court, and the public, can be confident that votes were correctly recorded and counted.

ARGUMENT

I. Plaintiff has the burden to demonstrate that the Court should overturn the audited election results.

Plaintiff characterizes his request as preliminary, though the reality is that this Court's initial determination is likely to be effectively final for challenging

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[4] Balsamo, Michael, *Disrupting Trump, Barr says no widespread election fraud*, AP News, https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d (Dec. 1, 2020).

[5] Dominion's statement is available online. Dominion Voting, *Statement From Dominion on Sidney Powell's Charges* (Nov. 26, 2020), https://www.dominionvoting.com/dominion-statement-on-sidney-powell-charges/.

Wisconsin's presidential vote before inauguration. The type of immediate relief he seeks is already a drastic remedy and is never awarded as a matter of right. *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008). The timing reality here makes his request especially extraordinary.

Plaintiff carries the burden for his request. A preliminary injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat'l. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Goodman v. Ill. Dep't of Fin. & Prof'l Regulation*, 430 F.3d 432, 437 (7th Cir. 2005) "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020) (quoting *Winter*, 555 U.S. at 20).

II. Plaintiff has failed to demonstrate that he is likely to succeed on the merits of his claims.

Plaintiff has no likelihood of success on the merits. This case has multiple threshold defects that would require dismissal. Plaintiff lacks standing, his inexplicably late claim is barred by laches, and the relief he requests is barred by the Eleventh Amendment and Substantive Due Process Clause.

Turning to the individual causes of action, he has stated no constitutional claim as a matter of law. The Elections and Electors Clauses do not create federal claims for alleged vote-counting disputes and violations of state election law of the kind alleged here do not amount to federal equal protection or due process claims.

Even if Plaintiff had a claim, his purported evidence is shockingly unreliable, is unlikely to even meet basic evidentiary standards, and cannot possibly support overturning the results of the election. Finally, the relief he seeks is nothing short of mass disenfranchisement.

A. This case has fatal jurisdictional and procedural defects that would require dismissal.

1. Plaintiff lacks Article III standing to assert any of his claims.

Plaintiff is a registered voter and nominee to be a presidential elector for the Republican Party. (Dkt. 9 ¶ 24.) Neither his status as a registered voter nor an elector nominee establishes standing.

Plaintiff states that he is registered to vote in Wisconsin but does not even allege that he actually voted in the November 2020 election. (Dkt. 9 ¶ 24.) He cannot claim any injury by being simply registered. Even if he had voted, it is well established a voter cannot allege the particularized harm necessary to bring a claim based on alleged defects in other votes. This is so because the harm Plaintiff alleges to have suffered would, if proven, be experienced equally by all voters in the state. *Martel v. Condos*, No. 20-cv-131, 2020 WL 5755289, at *4 (D. Vt. 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *see also Moore v. Circosta*, No. 20CV911, 2020 WL 6063332 at *14 (M.D.N.C. 2020); *Donald J. Trump for Pres., Inc. v. Cegavske*, No. 20-cv-1445 JCM, 2020 WL 5626974, at *4–5 (D. Nev. 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020).

Plaintiff's status as a presidential elector likewise does not grant him standing. He cites *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), for the proposition, never recognized in the Seventh Circuit, that elector status grants one standing to challenge election results. But the dissent in *Carson* persuasively explained why it does not:

> Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president . . . . They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals.

Id. at 1063 (Kelly, J., dissenting). Electors therefore do not have a "particularized stake" in the election outcome beyond that of ordinary voters. *Id.* The Third Circuit rejected a similar standing argument, holding instead that a congressional candidate lacked Article III standing to assert nearly-identical claims to the ones Plaintiff pursues here, showing that *Carson* is an outlier. *See Bognet v. Sec'y Commonwealth of Pennsylvania*, No. 20-3214, 2020 WL 6686120, at *8 n.6 (3d. Cir. 2020). And just today, the Eastern District of Michigan rejected an identical claim. *King v. Whitmer,* No. 20-13134 (E.D. MI. December 7, 2020) (explaining that the court is unconvinced regarding elector-nominee standing). Plaintiff's elector status grants him no special standing privileges. Even if the Plaintiff had standing for some claims, he particularly lacks standing for any claim that violations of state elections law amount to a federal claim under the Electors Clause. For Electors Clause claims, even candidate-plaintiffs fare no better in the standing inquiry than other citizens. *See, e.g., Bognet*, 2020 WL 6686120 at *8. This is because every candidate, just like every other citizen, is in precisely the same position. *See id.* If an Electors Clause claim belongs to anyone,

it belongs "only to the [legislature]." *Id.* at *7. Here, for claimants like Plaintiff who are not the legislature, and bear not even a "conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the [legislature's] rights under the . . . Electors Clause[ ]." *Id.* at *7.

2. Laches bars Plaintiff's unreasonably late allegations.

Plaintiff inexplicitly waited until after the Wisconsin election, after the canvassing, after the recount, after the audit, after results were certified, and indeed until the eve of the electoral college vote, to bring his claim of state law violations and widespread fraud that allegedly originated years ago in the era of Hugo Chavez's Venezuelan presidency. If the doctrine of laches means anything, it is that Plaintiff here cannot overturn the results of a completed and certified election through preliminary relief in this late-filed case.

"Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice." *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060 (7th Cir. 2016) (citation omitted). "The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept." *Id.* at 1060–61. "In the context of elections, . . . any claim against a state electoral procedure must be expressed expeditiously." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990). Plaintiff's tardy claims meets every element laches.

Plaintiff waited to challenge widely-known procedures until after millions of voters cast their ballots in reliance on those procedures. That delay is unreasonable under both the law and common sense and this case should be dismissed *See Wood v.*

Raffensperger, No. 20-14418, 2020 WL 7094866, at *6 (11th Cir. Dec. 5, 2020) (Dismissing a case as moot where Plaintiff challenged vote certification after the election and after results were certified.); (*King,* No. 20-13134 Dkt. 62:19 ("Plaintiffs could have lodged their constitutional challenges much sooner than they did, and certainly not three weeks after Election Day and one week after certification of almost three million votes. The Court concludes that Plaintiffs' delay results in their claims being barred by laches").)

Just for example, on the issue of "indefinitely confined" voters, the legal issues were litigated in state court almost *eight months* ago. *See* Pet. for Original Action, date March 27, 2020, Supreme Court of Wisconsin, No. 2020AP000557-OA. Plaintiff obviously could have pressed this indefinite confinement issue in the many months between when it emerged and the November general election, thus allowing Wisconsin election officials to adjust accordingly.

The prejudice caused by Plaintiff's delay is profound. Plaintiff sat on his claims allowing millions of Wisconsinites to vote in reliance on those procedures, only to attack those decisions after they became irreversible. *See Fulani*, 917 F.2d at 1031 ("As time passes, the state's interest in proceeding with the election increases in importance as . . . irrevocable decisions are made."). This is precisely the type of prejudice the laches doctrine exists to prevent.

Nothing less than the right of every Wisconsinite to have their vote for President counted is at stake if Plaintiff's requests are granted. Indeed, as the U.S. Supreme Court explains, "[c]onfidence in the integrity of our electoral processes is

essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). One could not shake the public's confidence in our electoral process more vigorously than by allowing unforeseeable post-election legal challenges to invalidate hundreds of thousands of votes that were cast in reliance on election officials' guidance.

3. The Eleventh Amendment precludes Plaintiff's claims seeking this Court to order state officials to comply with state election law.

Plaintiff fundamentally asks this court for a declaration and injunction against state officials for alleged violations of state election law that he describes as "Violations of Wisconsin Election Code." (Dkt. 9:11.) Such a claim is barred by the Eleventh Amendment.

The Eleventh Amendment bars "relief against state officials on the basis of state law, whether prospective or retroactive." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984). The Supreme Court has explained that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id.*; *see also Rose v. Bd. of Election Comm'rs for City of Chi.*, 815 F.3d 372, 375 n.2 (7th Cir. 2016) ("[A]ny argument to the effect that the state did not follow its own laws is barred by the Eleventh Amendment.").

Plaintiff's federal constitutional claims turn almost entirely on his allegations about state election officials improperly administering state election law. His

Elections and Electors Clause claim turns on "three separate instances where Defendants violated the Wisconsin Election Code," (Dkt. 9 ¶¶ 104–06), just as his Equal Protection Clause claim rests on how "Defendants failed to comply with the requirements of the Wisconsin Election Code" (Dkt. 9 ¶ 116) and his due process claim relies on "Defendants['] violation of the Wisconsin Election Code" (Dkt. 9 ¶ 129). Just as in the parallel case from Michigan decided today, "the Eleventh Amendment bars Plaintiffs' claims against Defendants". (*King,* No. 20-13134, Dkt. 62:13.) Plaintiff fundamentally asks this Court to order state officials to follow state election law, relief that the Eleventh Amendment and *Pennhurst* squarely bars.

B. Plaintiff fails to state any valid federal claim.

1. Plaintiff fails to plead a claim under either the Election or Electors clauses.

In Count I of the Amended Complaint, Plaintiff alleges violations of the federal Constitution's Elections and Electors Clauses which vest authority in "the Legislature" of each state to regulate "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives", U.S. Const. art. I, § 4, cl. 1., and to direct the selection of presidential electors, U.S. Const. art. II, § 1, cl. 2, respectively. The cause of action rests entirely on allegations that three aspects of administrative guidance issued by the Commission were contrary to state election law. (Dkt. 9 ¶¶ 104–106.) Those claims fail as a matter of law because his disagreement with how state officials administered state elections law does not state a violation of the Elections and Electors Clause.

It is black-letter law that "'[a] violation of state law does not state a claim under § 1983,' and, more specifically, 'a deliberate violation of state election laws by state election officials does not transgress against the Constitution.'" *Shipley v. Chi. Bd. of Election Commissioners*, 947 F.3d 1056, 1062 (7th Cir. 2020) (citation omitted); *see also Bognet*, 2020 WL 6686120, *6 ("[F]ederal courts are not venues for plaintiffs to assert a bare right 'to have the Government act in accordance with law.'") (citation omitted); *Martinez v. Colon*, 54 F.3d 980, 989 (1st Cir. 1995) ("[T]he Constitution is not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations—no matter how egregious those violations may appear within the local legal framework.").

This non-interference principle rests on a "caution against excessive entanglement of federal courts in state election matters":

> The very nature of the federal union contemplates separate functions for the states. If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss.

Bodine v. Elkhart Cty. Election Bd., 788 F.2d 1270, 1272 (7th Cir. 1986).

Plaintiff's theory here violates this core federalism principle, as it rests solely on three aspects of administrative guidance issued by the Commission. (Dkt. 9 ¶¶ 104–106.) None of these alleged state law violations can support a federal constitutional claim under cases like *Shipley* and *Bodine*. The general rule that "[a] violation of state law does not state a claim under § 1983," *Shipley*, 947 F.3d at 1062,

would no longer have any teeth, and plaintiffs could evade it simply by alleging an Elections Clause violation. This would threaten to replace Wisconsin's "elaborate state election contest procedures" with federal court intervention in the "multitudinous questions that may arise in the electoral process," just as *Bodine* warned against. 788 F.2d at 1272 (citation omitted); (*see also King,* No. 20-13134, Dkt. 62:29–30 (holding in a nearly identical case that "Plaintiffs lack standing to sue under the Elections and Electors Clause").) Indeed, this collision between federal and state proceedings can be seen playing out here and now. This week, President Trump is litigating his challenge to Wisconsin's recount results through the state procedures under Wis. Stat. § 9.01. *Donald J. Trump v. Joseph R. Biden*, No. 20CV7092 (Wis. Cir. Ct. Milwaukee Cty.); *Donald J. Trump v. Joseph R. Biden*, No. 20CV2514 (Wis. Cir. Ct. Dane Cty.) (consolidated with Milwaukee County case No. 20CV007092.). Simultaneously, Plaintiff here is challenging the count in this Court. It would be hard to better illustrate the federalism concerns raised by opening the federal courthouse doors to Plaintiff's state election law grievances.

2. Plaintiff fails to state a claim for equal protection and due process because he asserts ordinary election irregularities that should be handled under state law.

In counts II and III, Plaintiff alleges constitutional equal protection and due process claims. But he states no constitutional claim; he merely makes state-law claims that are fully addressable through state procedures.

The federal "Constitution is not an election fraud statute." *Bodine*, 788 F.2d at 1271. "It is not every election irregularity . . . which will give rise to a constitutional

claim." *Id.* The federal constitution "is implicated only when there is 'willful conduct which undermines the organic processes by which candidates are elected.'" *Id.* at 1272 (emphasis omitted) (citation omitted). Therefore, "garden variety election irregularities that could have been adequately dealt with through the procedures set forth in [state] law" do not support constitutional due process claims. *Id.*; *see also Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) ("[G]arden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election.").

Plaintiff relies on a vote-dilution theory. (Dkt. 9 ¶¶ 114, 125–26.) This theory fails in its premise because he does not allege that he voted. (Dkt. 9 ¶ 24.) With no vote, there is nothing to dilute, and his voter-dilution claim fails in its premise.

Additionally, Plaintiffs' novel version of vote dilution could not support a federal claim, even if he had voted. Recognized vote dilution claims involve state laws that structurally disadvantage certain groups in the voting process. For instance, *Reynolds v. Sims*, 377 U.S. 533 (1964), held that state legislative districts must be apportioned by population to avoid diluting the votes of residents in disproportionately populous districts. Other vote dilution claims similarly target legislative apportionment schemes that disadvantage minorities in violation of either equal protection or the Voting Rights Act of 1965 ("VRA"). *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986) (multimember districts in North Carolina violated VRA by diluting black vote); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("[A] vote dilution claim alleges that the State has enacted a particular voting scheme as a

purposeful device '[t]o minimize or cancel out the voting potential of racial or ethnic minorities.'" (citation omitted)).)

Plaintiff's novel vote dilution theory, in contrast, rests on alleged vote counting violations and does not fit within this recognized malapportionment framework, as the Third Circuit held just days ago in *Bognet*, 2020 WL 6686210, at *11. There, individual voters alleged that votes arriving or cast after election day were unlawfully counted, thereby diluting the plaintiffs' votes in an unconstitutional manner. *Id.* at *9. The Third Circuit rejected this theory, explaining that "[c]ontrary to [this] conceptualization, vote dilution under the Equal Protection Clause is concerned with votes being weighed differently." *Id.* Recognizing this unprecedented kind of dilution claim would upset the delicate balance between state and federal authority over elections:

> [I]f dilution of lawfully cast ballots by the "unlawful" counting of invalidly cast ballots "were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity."

Bognet, 2020 WL 6686210, at *11 (citation omitted).

Plaintiffs' novel vote dilution claim would implicate practically *any* state election, because "[i]n just about every election, votes are counted, or discounted, when the state election code says they should not be. But the Constitution 'd[oes] not authorize federal courts to be state election monitors.'" *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-cv-966, 2020 WL 5997680, at *48 (Oct. 10, 2020) (second alteration in original) (citing *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir.

1980)). Yet state election monitors is exactly what federal courts would become, if unlawfully cast votes alone sufficed to state a constitutional claim.[6]

Plaintiff does not cite a single vote dilution case resting on allegedly illegal votes. Instead, Plaintiff relies primarily on *Reynolds*—again, a case about dilution caused by malapportionment. 377 U.S. at 555 (Dkt. 9 ¶ 114.). But *Reynolds* relied on cases involving whether Congress had the power to criminalize certain state election misconduct under federal law. *See Ex parte Siebold*, 100 U.S. 371 (1879), and *United States v. Saylor*, 322 U.S. 385 (1944). As the Third Circuit recognized, *Reynolds*' citation to those two criminal cases does not mean that individual voters may assert civil vote dilution claims based solely on illegal votes. *See Bognet*, 2020 WL 6686120, at *14. Plaintiff also cites *Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 WL 5810556 (Sept. 2020), but that case merely "assum[ed] such a claim exists" only to dismiss it based on a lack of evidence.

Rejecting Plaintiff's "illegal vote" dilution theory would not leave the integrity of Wisconsin's elections without safeguards. A wide range of regulations govern voter

[6] Many other federal courts have rejected these kinds of vote dilution claims. *See also, e.g.*, *Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 407 (E.D. Pa. 2016) ("[V]ote dilution cases do not extend to "speculation that fraudulent voters may be casting ballots elsewhere."); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *59 (W.D. Pa. Oct. 10, 2020) (rejecting vote dilution claim resting on potential fraud that did not involve "malapportionment, disenfranchisement, or intentional discrimination"); *Minnesota Voters All. v. Ritchie*, 720 F.3d 1029, 1033 (8th Cir. 2013) (rejecting vote dilution claim resting on "illegally cast votes" by election day registrants, absent allegations of "discriminatory or other intentional, unlawful misconduct" by election officials or "willful and illegal conduct [by] election officials [that] results in fraudulently obtained or fundamentally unfair voting results").

registration and absentee voting to ensure that only eligible residents receive and cast absentee ballots. *See generally* Wis. Stat. ch. 6. If those regulations are purposely evaded, state election fraud prosecutions may ensue. *See generally* Wis. Stat. § 12.13. And recounts are the ultimate backstop, where votes may be identified, challenged, and, if appropriate, invalidated. *See generally* Wis. Stat. § 9.01. The crucial point is that our system of federalism entrusts electoral integrity to these state-level protections, not to federal constitutional claims by individual voters. Plaintiff's vote dilution claim rests on a fatally flawed legal theory and fails as a matter of law.

3. Plaintiff's purported evidence is unpersuasive, unlikely to meet basic evidentiary standards, and does not support discarding the votes of millions of Wisconsin residents.

Count IV of the Amended Complaint alleges massive election fraud through an "insidious, and egregious ploy" to falsely report the outcome of the 2020 Wisconsin general election. (Dkt. 9 ¶¶ 2, 132–135.) The general theory is that foreign oligarchs and dictators created a voting system called "Smartmatic" to help Hugo Chavez in Venezuelan elections. (Dkt. 9 ¶¶ 7–8; 9-1 ¶¶ 13–20.) There is no allegation that Smartmatic is used in Wisconsin. Instead, an anonymous declarant says that "software of Dominion and other election tabulating companies relies upon software that is a descendant of . . . Smartmatic" and Plaintiffs allege that "Dominion Systems derive from the software designed by Smartmatic Corporation." (Dkt. 9 ¶ 7; 9-1 ¶ 21.)

Plaintiff then makes the incredible, and implausible, leap that Dominion machines in Wisconsin were hacked in 2020. He asks the court to overturn the

election results because anonymous declarants say that a different system, used in a different country, for a different election, was manipulated. This would not even pass Rule 9(b) pleadings standards, let alone support the unprecedented and extraordinary act of having a federal court reverse the outcome of a certified state election.

Things get even worse looking past the pleadings to the supporting documents. Even a facial review shows a complete lack of reliable evidence. Much of Plaintiff's purported evidence comes from undisclosed witnesses or is completely irrelevant to Wisconsin. What little even mentions Wisconsin is based on plainly unreliable data and reasoning. His purported evidence does not meet admissibility standards and is not in the ballpark of supporting his extraordinary request.

Of Plaintiff's 18 proffers of evidence, five are from anonymous declarants where the names of the witness or expert are redacted. (Dkt. 9-1; 9-4; 9-12; 9-13; 9-19.) This makes it impossible to evaluate the legitimacy or potential bias of the evidence and those declarations should be disregarded. Even hypothetically looking past the secret sources, the affidavits are astoundingly thin. Exhibit 1 propounds at length about the integrity of past elections in Venezuela but offers no information about the 2020 Wisconsin election. Exhibit 12 is from a self-proclaimed "white-hat hacker" who testifies to the unremarkable fact that Dominion's public website has internet interrelationships in other countries, but makes absolutely no connection to Wisconsin voting machines or data security. (Dkt. 9-12:1.) Exhibit 13 is from an anonymous source who purports to be an "amateur network tracer and typographer"

whose third-hand amateur opinions about corporate relationships amount to a conspiracy theory. (Dkt. 9-13:1.)

The documents include two anonymous expert reports. (Dkt. 9-4; 9-19.) Exhibit 4 offers a terse statistical analysis culminating in a graphic where the author identifies "large red dots" on a vote ratio chart where Biden overperformed predictions in counties using Dominion voting machines. (Dkt. 9-4:2–3.) It is difficult to discern what, if anything, the scatter plot shows, and the report notably leaves unexplained that nearly all of the graph's "large dot" indicators, red and blue, show overperformance, which is more consistent with the conclusion that more voters turned out and Biden overperformed everywhere, which is why he won the election. That one candidate received more than expected votes at a particular voting machine is entirely unremarkable in an election with high turnout where that candidate won. And anonymous expert report Exhibit 19 leads its analysis with the unhelpful statement that "it is possible to obtain rough estimates on how vote fraud could possibly have effected [sic] the election." (Dkt. 9-19:2.) As if that were not speculative enough, the report indicates that its Wisconsin "data was obtained from the twitter account of @shylockh, who derived his sources from the New York Times and in some cases from the unofficial precinct reports." (Dkt. 9-19:8–9.) Such anonymous, bare speculation on third- or fourth-hand information is unpersuasive.

Of the documents that are at least authored, many have nothing to do with the Wisconsin election. (Dkt. 9-6; 9-7; 9-8; 9-10; 9-11; 9-14; 9-15; 9-16; 9-18.) For example, Exhibit 6 is a statement from a Colorado resident who reports going to an Antifa

meeting and overhearing a conversation where he believes he heard a person named "Eric" state that he is making sure Trump does not win the election. (Dkt. 9-6:2.) Through a series of Google searches and listeners of his podcast, he opines that a former employee of Dominion named Eric has altered the election. (Dkt. 9-6:2–6.) This Googled evidence, based on hearsay at an alleged meeting in Colorado, is not reliable evidence of election fraud in Wisconsin.

Exhibit 7 is from a person who observed polls in Atlanta, Georgia, in June and August of 2020 and does not even mention Wisconsin. Exhibit 8 opines on the political status of Venezuela. Exhibit 14 is from a person who reports that he has reviewed materials about Dominion voting systems, all from public websites, but offers no information about Wisconsin election processes. And Exhibits 10, 11, 15, 16 and 18 are generalized articles or letters about election systems generally that do nothing to prove Plaintiff's claims that vote tabulating in Wisconsin is inaccurate.

The very few non-anonymous filings that even discuss the Wisconsin election are facially unpersuasive and likely do not even meet evidentiary reliability standards. Expert testimony is inadmissible unless it: will help the trier of fact to understand the evidence; is based on sufficient facts or data; is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. In assessing the admissibility of expert testimony, courts must ensure that the testimony is both reliable and relevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). District courts "must evaluate: (1) the proffered expert's qualifications; (2) the reliability of

the expert's methodology; and (3) the relevance of the expert's testimony." *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 779 (7th Cir. 2017). The party offering the expert testimony has the burden of establishing that the proffered testimony satisfies Fed. R. Evid. 702. *Id.* at 782.

Plaintiff offers four expert opinions in support of his request to overturn the Presidential election. (Dkt. 9-2; 9-3; 9-9; 9-17.) None meet the standard in Rule 702.

One is a re-filing of a report that was previously filed in a state court case, from Matthew Braynard. (Dkt. 9-3.) Braynard does not appear to be qualified to offer the opinions in his report. He offers statistical conclusions based on a purported sampling of voters in certain categories, which he opines are representative of various larger categories of voters. Braynard has no formal education in statistics or statistical surveys. Instead, his report indicates he has a degree in business administration. (Dkt. 9-3:3.) It is dubious whether Braynard's opinions are based on "sufficient facts and data" or whether his methods are reliable. Braynard says he used voter information provided by "L2 Political" (Dkt. 9-3:3), but it is unknown whether this data reliably reflects information on Wisconsin voters. He also purports to rely on a database of address changes, but it is unclear whether this database accurately reflects electors' correct addresses for voting purposes. Further, his conclusions are based on the results of telephone calls made by call centers and "social media researchers" that are of unknown quality. (Dkt. 9-3:3.) These telephone surveys could easily include bad data and unreliable methods, given that the report does not disclose exactly how these surveys were conducted. Plaintiff has not shown that

phone surveys like these can reliably obtain information about voters or that his limited sample of voters who responded is representative of the whole.

Next is the report of William Briggs, which exclusively used the flawed data from Braynard. (Dkt. 9-2:1.) Even apart from this flawed underlying data, Briggs's analyses are woeful. He concludes that thousands of people received absentee ballots who did not request one. (Dkt. 9-2:1.) His report fails to account for voters who have requested that absentee ballots be sent automatically for every election, which would fully explain his concern. Even setting aside whether that is even an indicia of fraud, one would assume that to reach this conclusion he identified people who received a ballot without requesting one. Not so. His report explains that he used phone survey results that asked, for example, whether a person requested an absentee ballot. (Dkt. 9-2:5.) His report indicates that only 433 people, out of the millions of Wisconsin voters, completed the survey. (Dkt. 9-2:5.) He assumes that this tiny sample was representative of the whole state and scaled the number up to predict the total number of people who requested ballots, and compared that to the number of people receiving ballots. (Dkt. 9-2:1.) What he did not do is the obvious analysis of asking anyone whether they received a ballot without asking for one. As he concedes in his report: "Survey respondents were not asked if they received an unrequested ballot . . . This is clearly a lively [sic] possibility . . . no estimates or likelihood can be calculated for this potential error due to absence of data." (Dkt. 9-2:2.) This type of methodology failure pervades his report.

The final two are the Keshel and Ramshland Jr. opinions, which are likewise unpersuasive. (Dkt. 9:9, 17.) Keshel is a data analysist with no apparent elections training but who reports that he has "political involvement requiring knowledge of election trends and voting behavior." (Dkt. 9-9:1.) He used uncertified information from an "unofficial tracker" to determine that the 2020 elections went "against the trends of the previous election" to elect a Democratic candidate. (Dkt. 9-9:1, 4.) But this is no more than acknowledging that a Republican won in 2016 and a Democrat won in 2020. Keshel refers to this as "suspicious vote totals" but it does not show any more than a different outcome in 2020 than in the past.

Ramshland Jr. does not disclose his data source other than "[m]y colleague and I . . . have studied the information that was publicly available." (Dkt. 9-17:4.) From this, he identifies "red flags" including a very high turnout in several Wisconsin counties. (Dkt. 9-17:9.) He concludes that fraud occurred because many votes for Biden were counted late in the tabulating process. (Dkt. 9-17:4–5.) But, as now been repeatedly publicly explained, this occurred because absentee ballots, which favored Democratic candidates, were counted together late in the election day. The report also "normalized" the turnout to a lower rate and found that "the excess votes are at least 384,085 over the maximum that could be expected. (Dkt. 9-17:9.) But this "normalization" is nothing more than lowering the vote count. He concludes on this analysis that there were up to 384,085 "illegal votes that must be disregarded." (Dkt. 9-17:12.) The idea that Wisconsin should discard votes because more people voted than normal is absurd.

This unpersuasive and unreliable evidence stands in contrast to an actual hand-count audit of the machines used in the election, which showed no fraud. Like in the parallel Michigan case, "With nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs' equal protection claim fails." (*King,* No. 20-13134, Dkt. 62:29–30.) This Court should not conclude, on Plaintiff's proffer of anonymous declarations, hearsay, and facially faulty analyses, that Wisconsin should disregard the outcome of the election for President.[7]

C. Plaintiff's requested remedy would unconstitutionally disenfranchise Wisconsin voters.

Regardless of all of the other reasons Plaintiff's claims fail, the remedy he seeks—the exclusion of hundreds of thousands of votes in Wisconsin—would violate these voter's federal due process rights by retroactively overriding election procedures that those voters relied on and nullifying votes cast for Vice President Biden based on a speculative and far-fetched conspiracy theory of voter fraud.

Once a state legislature has directed that the state's electors are to be appointed by popular election, the people's "right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). That fundamental right to vote includes "the right of qualified voters within a state to cast

[7] Plaintiff's request for the Court to "seize and impound" all equipment statewide, is also misdirected. (Dkt. 9 ¶ 48.) The Commission does not own or have custody over such election equipment. *See* Wis. Stat. 5.91; Wis. Admin. Code ch. EL 7; https://elections.wi.gov/elections-voting/security (explaining that municipalities purchase the equipment.)

their ballots and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941).

Due process is violated when voters rely on an established election procedure and significant disenfranchisement results from a change in the procedures post-election. *Bennett*, 140 F.3d at 1227*; Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016) (finding no reason to invalidate a ballot when there was no evidence of voter fraud.); *Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (retroactive invalidation of absentee ballots violated due process). Those conditions would be squarely met here by Plaintiff's requested relief.

Wisconsin voters who reasonably relied on the established voting procedures would be disenfranchised by the thousands, raising serious concerns of a due process violation. To throw out the votes of 181,440 Wisconsin voters based on an implausible conspiracy regarding voting machine would violate the constitutional rights of these voters.

III. Plaintiff has failed to show that he will suffer irreparable harm without a preliminary injunction.

Plaintiff has made no meaningful showing that state law violations or fraud conspiracies violated his voting rights or harmed his status as a nominated elector for an unsuccessful candidate. He faces no harm by denial of his injunction; indeed such order would only harm the millions of Wisconsin voters who determined the outcome of the election.

IV. The balance of equities and public interest favor denying an injunction.

The public would be severely harmed by Plaintiff's requested relief. Disenfranchising hundreds of thousands of Wisconsin voters on the basis of a flimsy conspiracy theory outweighs the scant chance that Plaintiff will succeed on his claims. It would also declare Donald Trump as the winner in Wisconsin—relief Plaintiff has made no attempt at proving would have occurred, even if all of his baseless and fanciful claims succeeded. (*See* Dkt. 9 ¶ 59.)

As explained by the Third Circuit, "[d]emocracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes." *Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522, at *9 (3d Cir. Nov. 27, 2020). The "public interest strongly favors finality, counting every lawful voter's vote, and not disenfranchising . . . voters who voted by mail." *Id.* That is because "[d]emocracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof." *Id.*

CONCLUSION

Plaintiff's request for a temporary restraining order and preliminary injunction should be denied.

Dated this 7th day of December 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ S. Michael Murphy
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

DEFENDANTS WISCONSIN ELECTIONS COMMISSION AND ITS MEMBERS' MOTION TO DISMISS

Defendants Wisconsin Elections Commission, Ann S. Jacob, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, and Robert F. Spindell, Jr., by their attorneys, hereby move the Court for an order as follows.

Pursuant to Federal Rules of Civil Procedure 12(b)(6), these Defendants move this court for an order dismissing the complaint against them. As a basis for this motion, these Defendants incorporate by reference their brief in support of the motion to dismiss, which is filed herewith.

Plaintiff is notified that pursuant to Civil L. R. 7(b) (E.D. Wis.), his response in opposition to this motion must be filed within 21 days of service of this motion.

Dated this 7th day of December 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ S. Michael Murphy
S. MICHAEL MURPHY
Assistant Attorney General
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IN THE UNITED STATES DISTRICT COURT
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Defendants.

DEFENDANTS WISCONSIN ELECTIONS COMMISSION AND ITS MEMBERS' BRIEF IN SUPPORT OF MOTION TO DISMISS

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Defendants Wisconsin Elections Commission, Ann S. Jacob, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, and Robert F. Spindell, Jr., in their official capacities, by their attorneys, hereby submit this brief in support of their motion to dismiss.

INTRODUCTION

Wisconsin held its general election on November 3 after months of careful preparation and public announcement of election procedures. Since then, the votes have been counted, audited, and many were counted again. The results are now tallied and certified. The candidate who received the most votes for the office of President of the United States is former Vice President Joe Biden.

Plaintiff William Feehan was a nominee to be an electoral college elector for candidate President Donald Trump. He now, for the first time, alleges that the long-planned election procedures were unlawful and that the outcome is additionally tainted by a conspiracy dating back to the administration of Venezuelan president Hugo Chavez. He relies on conspiracy theories based on anonymous sources and inadmissible evidence. On this basis, he asks for disenfranchisement of 318,012 Wisconsin voters and "an order instructing the Defendants to certify the results of the General Election for Office of the President in favor of President Donald Trump." (Dkt. 9 ¶ 139.)

Plaintiff Feehan lacks standing and asks for unlawful relief that is plainly barred by latches. Additionally, his claims fail as a matter of law. He states no federal cause of action and his fraud-based conspiracy theory is not pled with particularly, is

implausible, and is purportedly supported by inadmissible and unreliable evidence. This case should be dismissed.

MOTION TO DISMISS STANDARDS

A complaint must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure when as here, the plaintiff has failed to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a "complaint must contain 'enough facts to state a claim to relief that is plausible on its face' and also must state sufficient facts to raise a plaintiff's right to relief above the speculative level." *Bissessur v. Indiana Univ. Bd. of Trustees*, 581 F.3d 599, 602 (7th Cir. 2009) (citation omitted). "A claim has facial plausibility 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (citation omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* While detailed factual allegations are not required, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "An inadequate complaint will not survive a motion to dismiss simply because the defendants managed to figure out the basic factual or legal grounds for the claims." *Adams v. City of Indianapolis*, 742 F.3d 720, 729 (7th Cir. 2014). When, as here, "it

is 'clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law,' dismissal is appropriate." *Thompson v. Progressive Universal Ins. Co.*, 420 F. Supp. 3d 867, 869 (W.D. Wis. 2019) (quoting *Parungao v. Cmty. Health Sys., Inc.*, 858 F.3d 452, 457 (7th Cir. 2017).)

Where a complaint expressly alleges "fraud," Rule 9(b) requires pleading with "particularity." This pleading standard requires at a minimum that a plaintiff allege each of the "who, what, when, where, and how" of the alleged fraud. *Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730, 738 (7th Cir. 2019).

ARGUMENT

This case has multiple threshold defects that require dismissal. Plaintiff lacks standing, his inexplicably late claim is barred by laches, and the relief he requests is barred by the Eleventh Amendment and Substantive Due Process Clause.

Turning to the individual causes of action, he has stated no constitutional claim as a matter of law. The Elections and Electors Clauses do not create federal claims for alleged vote-counting disputes and violations of state election law of the kind alleged here do not amount to federal equal protection or due process claims. Even if Plaintiff had a claim, his purported evidence is shockingly unreliable, is unlikely to even meet basic evidentiary standards, and cannot possibly support overturning the results of the election. Finally, the relief he seeks is nothing short of mass disenfranchisement.

A. This case has fatal jurisdictional and procedural defects that require dismissal.

1. Plaintiff lacks Article III standing to assert any of his claims.

Plaintiff is a registered voter and nominee to be a presidential elector for the Republican Party. (Dkt. 9 ¶ 24.) Neither his status as a registered voter nor an elector nominee establishes standing.

Plaintiff states that he is registered to vote in Wisconsin but does not even allege that he actually voted in the November 2020 election. (Dkt. 9 ¶ 24.) He cannot claim any injury by being simply registered. Even if he had voted, it is well established a voter cannot allege the particularized harm necessary to bring a claim based on alleged defects in other votes. This is so because the harm Plaintiff alleges to have suffered would, if proven, be experienced equally by all voters in the state. *Martel v. Condos*, No. 20-cv-131, 2020 WL 5755289, at *4 (D. Vt. 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *see also Moore v. Circosta*, No. 20CV911, 2020 WL 6063332 at *14 (M.D.N.C. 2020); *Donald J. Trump for Pres., Inc. v. Cegavske*, No. 20-cv-1445 JCM, 2020 WL 5626974, at *4–5 (D. Nev. 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020).

Plaintiff's status as a presidential elector likewise does not grant him standing. He cites *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), for the proposition, never recognized in the Seventh Circuit, that elector status grants one standing to challenge election results. But the dissent in *Carson* persuasively explained why it does not:

> Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president . . . . They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals.

Id. at 1063 (Kelly, J., dissenting). Electors therefore do not have a "particularized stake" in the election outcome beyond that of ordinary voters. *Id.* The Third Circuit rejected a similar standing argument, holding instead that a congressional candidate lacked Article III standing to assert nearly-identical claims to the ones Plaintiff pursues here, showing that *Carson* is an outlier. *See Bognet v. Sec'y Commonwealth of Pennsylvania*, No. 20-3214, 2020 WL 6686120, at *8 n.6 (3d. Cir. 2020). And just today, the Eastern District of Michigan rejected an identical claim. *King v. Whitmer,* No. 20-13134 (E.D. MI. December 7, 2020) (explaining that the court is unconvinced regarding elector-nominee standing). Plaintiff's elector status grants him no special standing privileges. Even if the Plaintiff had standing for some claims, he particularly lacks standing for any claim that violations of state elections law amount to a federal claim under the Electors Clause. For Electors Clause claims, even candidate plaintiffs fare no better in the standing inquiry than other citizens. *See, e.g., Bognet*, 2020 WL 6686120 at *8. This is because every candidate, just like every other citizen, is in precisely the same position. *See id*. If an Electors Clause claim belongs to anyone, it belongs "only to the [legislature]." *Id.* at *7. Here, for claimants like Plaintiff who are not the legislature, and bear not even a "conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the [legislature's] rights under the . . . Electors Clause[ ]." *Id.* at *7.

2. Laches bars Plaintiff's unreasonably late allegations.

Plaintiff inexplicitly waited until after the Wisconsin election, after the canvassing, after the recount, after the audit, after results were certified, and indeed until the eve of the electoral college vote, to bring his claim of state law violations and widespread fraud that allegedly originated years ago in the era of Hugo Chavez's Venezuelan presidency. If the doctrine of laches means anything, it is that Plaintiff here cannot overturn the results of a completed and certified election through preliminary relief in this late-filed case.

"Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice." *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1060 (7th Cir. 2016) (citation omitted). "The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept." *Id.* at 1060–61. "In the context of elections, . . . any claim against a state electoral procedure must be expressed expeditiously." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990). Plaintiff's tardy claims meets every element laches.

Plaintiff waited to challenge widely-known procedures until after millions of voters cast their ballots in reliance on those procedures. That delay is unreasonable under both the law and common sense and this case should be dismissed *See Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, at *6 (11th Cir. Dec. 5, 2020) (Dismissing a case as moot where Plaintiff challenged vote certification after the election and after results were certified.); (*King,* No. 20-13134 Dkt. 62:19 ("Plaintiffs could have lodged their constitutional challenges much sooner than they did, and certainly not three weeks after Election Day and one week after certification of almost

three million votes. The Court concludes that Plaintiffs' delay results in their claims being barred by laches").)

Just for example, on the issue of "indefinitely confined" voters, the legal issues were litigated in state court almost *eight months* ago. *See* Pet. for Original Action, date March 27, 2020, Supreme Court of Wisconsin, No. 2020AP000557-OA. Plaintiff obviously could have pressed this indefinite confinement issue in the many months between when it emerged and the November general election, thus allowing Wisconsin election officials to adjust accordingly.

The prejudice caused by Plaintiff's delay is profound. Plaintiff sat on his claims allowing millions of Wisconsinites to vote in reliance on those procedures, only to attack those decisions after they became irreversible. *See Fulani*, 917 F.2d at 1031 ("As time passes, the state's interest in proceeding with the election increases in importance as . . . irrevocable decisions are made."). This is precisely the type of prejudice the laches doctrine exists to prevent.

Nothing less than the right of every Wisconsinite to have their vote for President counted is at stake if Plaintiff's requests are granted. Indeed, as the U.S. Supreme Court explains, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). One could not shake the public's confidence in our electoral process more vigorously than by allowing unforeseeable post-election legal challenges to invalidate hundreds of thousands of votes that were cast in reliance on election officials' guidance.

3. The Eleventh Amendment precludes Plaintiff's claims seeking this Court to order state officials to comply with state election law.

Plaintiff fundamentally asks this court for a declaration and injunction against state officials for alleged violations of state election law that he describes as "Violations of Wisconsin Election Code." (Dkt. 9:11.) Such a claim is barred by the Eleventh Amendment.

The Eleventh Amendment bars "relief against state officials on the basis of state law, whether prospective or retroactive." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984). The Supreme Court has explained that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id.*; *see also Rose v. Bd. of Election Comm'rs for City of Chi.*, 815 F.3d 372, 375 n.2 (7th Cir. 2016) ("[A]ny argument to the effect that the state did not follow its own laws is barred by the Eleventh Amendment.").

Plaintiff's federal constitutional claims turn almost entirely on his allegations about state election officials improperly administering state election law. His Elections and Electors Clause claim turns on "three separate instances where Defendants violated the Wisconsin Election Code," (Dkt. 9 ¶¶ 104–06), just as his Equal Protection Clause claim rests on how "Defendants failed to comply with the requirements of the Wisconsin Election Code" (Dkt. 9 ¶ 116) and his due process claim relies on "Defendants['] violation of the Wisconsin Election Code" (Dkt. 9 ¶ 129). Just as in the parallel case from Michigan decided today, "the Eleventh Amendment bars

Plaintiffs' claims against Defendants". (*King,* No. 20-13134, Dkt. 62:13.) Plaintiff fundamentally asks this Court to order state officials to follow state election law, relief that the Eleventh Amendment and *Pennhurst* squarely bars.

B. Plaintiff fails to state any valid federal claim.

1. Plaintiff fails to plead a claim under either the Election or Electors Clauses.

In Count I of the Amended Complaint, Plaintiff alleges violations of the federal Constitution's Elections and Electors Clauses which vest authority in "the Legislature" of each state to regulate "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives", U.S. Const. art. I, § 4, cl. 1., and to direct the selection of presidential electors, U.S. Const. art. II, § 1, cl. 2, respectively. The cause of action rests entirely on allegations that three aspects of administrative guidance issued by the Commission were contrary to state election law. (Dkt. 9 ¶¶ 104–106.) Those claims fail as a matter of law because his disagreement with how state officials administered state elections law does not state a violation of the Elections and Electors Clause.

It is black-letter law that "'[a] violation of state law does not state a claim under § 1983,' and, more specifically, 'a deliberate violation of state election laws by state election officials does not transgress against the Constitution.'" *Shipley v. Chi. Bd. of Election Commissioners*, 947 F.3d 1056, 1062 (7th Cir. 2020) (citation omitted); *see also Bognet*, 2020 WL 6686120, *6 ("[F]ederal courts are not venues for plaintiffs to assert a bare right 'to have the Government act in accordance with law.'") (citation omitted); *Martinez v. Colon*, 54 F.3d 980, 989 (1st Cir. 1995) ("[T]he Constitution is

not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations—no matter how egregious those violations may appear within the local legal framework.").

This non-interference principle rests on a "caution against excessive entanglement of federal courts in state election matters":

> The very nature of the federal union contemplates separate functions for the states. If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss.

Bodine v. Elkhart Cty. Election Bd., 788 F.2d 1270, 1272 (7th Cir. 1986).

Plaintiff's theory here violates this core federalism principle, as it rests solely on three aspects of administrative guidance issued by the Commission. (Dkt. 9 ¶¶ 104–106.) None of these alleged state law violations can support a federal constitutional claim under cases like *Shipley* and *Bodine*. The general rule that "[a] violation of state law does not state a claim under § 1983," *Shipley*, 947 F.3d at 1062, would no longer have any teeth, and plaintiffs could evade it simply by alleging an Elections Clause violation. This would threaten to replace Wisconsin's "elaborate state election contest procedures" with federal court intervention in the "multitudinous questions that may arise in the electoral process," just as *Bodine* warned against. 788 F.2d at 1272 (citation omitted); (*see also King,* No. 20-13134, Dkt. 62:29–30 (holding in a nearly identical case that "Plaintiffs lack standing to sue under the Elections and Electors Clause").) Indeed, this collision between federal and

state proceedings can be seen playing out here and now. This week, President Trump is litigating his challenge to Wisconsin's recount results through the state procedures under Wis. Stat. § 9.01. *Donald J. Trump v. Joseph R. Biden*, No. 20CV7092 (Wis. Cir. Ct. Milwaukee Cty.); *Donald J. Trump v. Joseph R. Biden*, No. 2020CV2514 (Wis. Cir. Ct. Dane Cty.) (consolidated with Milwaukee County case No. 20CV007092.) Simultaneously, Plaintiff here is challenging the count in this Court. It would be hard to better illustrate the federalism concerns raised by opening the federal courthouse doors to Plaintiff's state election law grievances.

2. Plaintiff fails to state a claim for equal protection and due process because he asserts ordinary election irregularities that should be handled under state law.

In counts II and III, Plaintiff alleges constitutional equal protection and due process claims. But he states no constitutional claim; he merely makes state-law claims that are fully addressable through state procedures.

The federal "Constitution is not an election fraud statute." *Bodine*, 788 F.2d at 1271. "It is not every election irregularity . . . which will give rise to a constitutional claim." *Id.* The federal constitution "is implicated only when there is 'willful conduct which undermines the organic processes by which candidates are elected.'" *Id.* at 1272 (emphasis omitted) (citation omitted). Therefore, "garden variety election irregularities that could have been adequately dealt with through the procedures set forth in [state] law" do not support constitutional due process claims. *Id.*; *see also Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) ("[G]arden variety election

irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election.").

Plaintiff relies on a vote-dilution theory. (Dkt. 9 ¶¶ 114, 125–26.) This theory fails in its premise because he does not allege that he voted. (Dkt. 9 ¶ 24.) With no vote, there is nothing to dilute, and his voter-dilution claim fails in its premise.

Additionally, Plaintiffs' novel version of vote dilution could not support a federal claim, even if he had voted. Recognized vote dilution claims involve state laws that structurally disadvantage certain groups in the voting process. For instance, *Reynolds v. Sims*, 377 U.S. 533 (1964), held that state legislative districts must be apportioned by population to avoid diluting the votes of residents in disproportionately populous districts. Other vote dilution claims similarly target legislative apportionment schemes that disadvantage minorities in violation of either equal protection or the Voting Rights Act of 1965 ("VRA"). *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986) (multimember districts in North Carolina violated VRA by diluting black vote); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("[A] vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device '[t]o minimize or cancel out the voting potential of racial or ethnic minorities.'" (citation omitted)).)

Plaintiff's novel vote dilution theory, in contrast, rests on alleged vote counting violations and does not fit within this recognized malapportionment framework, as the Third Circuit held just days ago in *Bognet*, 2020 WL 6686210, at *11. There, individual voters alleged that votes arriving or cast after election day were unlawfully

counted, thereby diluting the plaintiffs' votes in an unconstitutional manner. *Id.* at *9. The Third Circuit rejected this theory, explaining that "[c]ontrary to [this] conceptualization, vote dilution under the Equal Protection Clause is concerned with votes being weighed differently." *Id.* Recognizing this unprecedented kind of dilution claim would upset the delicate balance between state and federal authority over elections:

> [I]f dilution of lawfully cast ballots by the "unlawful" counting of invalidly cast ballots "were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity."

Bognet, 2020 WL 6686210, at *11 (citation omitted).

Plaintiffs' novel vote dilution claim would implicate practically *any* state election, because "[i]n just about every election, votes are counted, or discounted, when the state election code says they should not be. But the Constitution 'd[oes] not authorize federal courts to be state election monitors.'" *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-cv-966, 2020 WL 5997680, at *48 (Oct. 10, 2020) (second alteration in original) (citing *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1980)). Yet state election monitors are exactly what federal courts would become, if unlawfully cast votes alone sufficed to state a constitutional claim.[1]

[1] Many other federal courts have rejected these kinds of vote dilution claims. *See also, e.g.*, *Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d 396, 407 (E.D. Pa. 2016) ("[V]ote dilution cases do not extend to "speculation that fraudulent voters may be casting ballots elsewhere."); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *59 (W.D. Pa. Oct. 10, 2020)

Plaintiff does not cite a single vote dilution case resting on allegedly illegal votes. Instead, Plaintiff relies primarily on *Reynolds*—again, a case about dilution caused by malapportionment. 377 U.S. at 555 (Dkt. 9 ¶ 114.). But *Reynolds* relied on cases involving whether Congress had the power to criminalize certain state election misconduct under federal law. *See Ex parte Siebold*, 100 U.S. 371 (1879), and *United States v. Saylor*, 322 U.S. 385 (1944). As the Third Circuit recognized, *Reynolds's* citation to those two criminal cases does not mean that individual voters may assert civil vote dilution claims based solely on illegal votes. *See Bognet*, 2020 WL 6686120, at *14. Plaintiff also cites *Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 WL 5810556 (Sept. 2020), but that case merely "assum[ed] such a claim exists" only to dismiss it based on a lack of evidence.

Rejecting Plaintiff's "illegal vote" dilution theory would not leave the integrity of Wisconsin's elections without safeguards. A wide range of regulations govern voter registration and absentee voting to ensure that only eligible residents receive and cast absentee ballots. *See generally* Wis. Stat. ch. 6. If those regulations are purposely evaded, state election fraud prosecutions may ensue. *See generally* Wis. Stat. § 12.13. And recounts are the ultimate backstop, where votes may be identified, challenged, and, if appropriate, invalidated. *See generally* Wis. Stat. § 9.01. The crucial point is

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(rejecting vote dilution claim resting on potential fraud that did not involve "malapportionment, disenfranchisement, or intentional discrimination"); *Minnesota Voters All. v. Ritchie*, 720 F.3d 1029, 1033 (8th Cir. 2013) (rejecting vote dilution claim resting on "illegally cast votes" by election day registrants, absent allegations of "discriminatory or other intentional, unlawful misconduct" by election officials or "willful and illegal conduct [by] election officials [that] results in fraudulently obtained or fundamentally unfair voting results").

that our system of federalism entrusts electoral integrity to these state-level protections, not to federal constitutional claims by individual voters. Plaintiff's vote dilution claim rests on a fatally flawed legal theory and fails as a matter of law.

3. Plaintiff's purported evidence is unpersuasive, unlikely to meet basic evidentiary standards, and does not support discarding the votes of millions of Wisconsin residents.

Count IV of the Amended Complaint alleges massive election fraud through an "insidious, and egregious ploy" to falsely report the outcome of the 2020 Wisconsin general election. (Dkt. 9 ¶¶ 2, 132–135.) The general theory is that foreign oligarchs and dictators created a voting system called "Smartmatic" to help Hugo Chavez in Venezuelan elections. (Dkt. 9 ¶¶ 7–8; 9-1 ¶¶ 13–20.) There is no allegation that Smartmatic is used in Wisconsin. Instead, an anonymous declarant says that "software of Dominion and other election tabulating companies relies upon software that is a descendant of . . . Smartmatic" and Plaintiffs allege that "Dominion Systems derive from the software designed by Smartmatic Corporation." (Dkt. 9 ¶ 7; 9-1 ¶ 21.)

Plaintiff then makes the incredible, and implausible, leap that Dominion machines in Wisconsin were hacked in 2020. He asks this Court to overturn the election results because anonymous declarants say that a different system, used in a different country, for a different election, was manipulated. This would not even pass Rule 9(b) pleadings standards, let alone support the unprecedented and extraordinary act of having a federal court reverse the outcome of a certified state election.

Things get even worse looking past the pleadings to the supporting documents. Even a facial review shows a complete lack of reliable evidence. Much of Plaintiff's purported evidence comes from undisclosed witnesses or is completely irrelevant to Wisconsin. What little even mentions Wisconsin is based on plainly unreliable data and reasoning. His purported evidence does not meet admissibility standards and is not in the ballpark of supporting his extraordinary request.

Of Plaintiff's 18 proffers of evidence, five are from anonymous declarants where the names of the witness or expert are redacted. (Dkt. 9-1; 9-4; 9-12; 9-13; 9-19.) This makes it impossible to evaluate the legitimacy or potential bias of the evidence and those declarations should be disregarded. Even hypothetically looking past the secret sources, the affidavits are astoundingly thin. Exhibit 1 propounds at length about the integrity of past elections in Venezuela but offers no information about the 2020 Wisconsin election. Exhibit 12 is from a self-proclaimed "white-hat hacker" who testifies to the unremarkable fact that Dominion's public website has internet interrelationships in other countries, but makes absolutely no connection to Wisconsin voting machines or data security. (Dkt. 9-12:1.) Exhibit 13 is from an anonymous source who purports to be an "amateur network tracer and typographer" whose third-hand amateur opinions about corporate relationships amount to a conspiracy theory. (Dkt. 9-13:1.)

The documents include two anonymous expert reports. (Dkt. 9-4; 9-19.) Exhibit 4 offers a terse statistical analysis culminating in a graphic where the author identifies "large red dots" on a vote ratio chart where Biden overperformed

predictions in counties using Dominion voting machines. (Dkt. 9-4:2–3.) It is difficult to discern what, if anything, the scatter plot shows, and the report notably leaves unexplained that nearly all of the graph's "large dot" indicators, red and blue, show overperformance, which is more consistent with the conclusion that more voters turned out and Biden overperformed everywhere, which is why he won the election. That one candidate received more than expected votes at a particular voting machine is entirely unremarkable in an election with high turnout where that candidate won. And anonymous expert report Exhibit 19 leads its analysis with the unhelpful statement that "it is possible to obtain rough estimates on how vote fraud could possibly have effected [sic] the election." (Dkt. 9-19:2.) As if that were not speculative enough, the report indicates that its Wisconsin "data was obtained from the twitter account of @shylockh, who derived his sources from the New York Times and in some cases from the unofficial precinct reports." (Dkt. 9-19:8–9.) Such anonymous, bare speculation on third- or fourth-hand information is unpersuasive.

Of the documents that are at least authored, many have nothing to do with the Wisconsin election. (Dkt. 9-6; 9-7; 9-8; 9-10; 9-11; 9-14; 9-15; 9-16; 9-18.) For example, Exhibit 6 is a statement from a Colorado resident who reports going to an Antifa meeting and overhearing a conversation where he believes he heard a person named "Eric" state that he is making sure Trump does not win the election. (Dkt. 9-6:2.) Through a series of Google searches and listeners of his podcast, he opines that a former employee of Dominion named Eric has altered the election. (Dkt. 9-6:2–6.)

This Googled evidence, based on hearsay at an alleged meeting in Colorado, is not reliable evidence of election fraud in Wisconsin.

Exhibit 7 is from a person who observed polls in Atlanta, Georgia, in June and August of 2020 and does not even mention Wisconsin. Exhibit 8 opines on the political status of Venezuela. Exhibit 14 is from a person who reports that he has reviewed materials about Dominion voting systems, all from public websites, but offers no information about Wisconsin election processes. And Exhibits 10, 11, 15, 16 and 18 are generalized articles or letters about election systems generally that do nothing to prove Plaintiff's claims that vote tabulating in Wisconsin is inaccurate.

The very few non-anonymous filings that even discuss the Wisconsin election are facially unpersuasive and likely do not even meet evidentiary reliability standards. Expert testimony is inadmissible unless it: will help the trier of fact to understand the evidence; is based on sufficient facts or data; is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. In assessing the admissibility of expert testimony, courts must ensure that the testimony is both reliable and relevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). District courts "must evaluate: (1) the proffered expert's qualifications; (2) the reliability of the expert's methodology; and (3) the relevance of the expert's testimony." *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 779 (7th Cir. 2017). The party offering the expert testimony has the burden of establishing that the proffered testimony satisfies Fed. R. Evid. 702. *Id.* at 782.

Plaintiff offers four expert opinions in support of his request to overturn the Presidential election. (Dkt. 9-2; 9-3; 9-9; 9-17.) None meet the standard in Rule 702.

One is a re-filing of a report that was previously filed in a state court case, from Matthew Braynard. (Dkt. 9-3.) Braynard does not appear to be qualified to offer the opinions in his report. He offers statistical conclusions based on a purported sampling of voters in certain categories, which he opines are representative of various larger categories of voters. Braynard has no formal education in statistics or statistical surveys. Instead, his report indicates he has a degree in business administration. (Dkt. 9-3:3.) It is dubious whether Braynard's opinions are based on "sufficient facts and data" or whether his methods are reliable. Braynard says he used voter information provided by "L2 Political" (Dkt. 9-3:3), but it is unknown whether this data reliably reflects information on Wisconsin voters. He also purports to rely on a database of address changes, but it is unclear whether this database accurately reflects electors' correct addresses for voting purposes. Further, his conclusions are based on the results of telephone calls made by call centers and "social media researchers" that are of unknown quality. (Dkt. 9-3:3.) These telephone surveys could easily include bad data and unreliable methods, given that the report does not disclose exactly how these surveys were conducted. Plaintiff has not shown that phone surveys like these can reliably obtain information about voters or that his limited sample of voters who responded is representative of the whole.

Next is the report of William Briggs, which exclusively used the flawed data from Braynard. (Dkt. 9-2:1.) Even apart from this flawed underlying data, Briggs's

analyses are woeful. He concludes that thousands of people received absentee ballots who did not request one. (Dkt. 9-2:1.) His report fails to account for voters who have requested that absentee ballots be sent automatically for every election, which would fully explain his concern. Even setting aside whether that is even an indicia of fraud, one would assume that to reach this conclusion he identified people who received a ballot without requesting one. Not so. His report explains that he used phone survey results that asked, for example, whether a person requested an absentee ballot. (Dkt. 9-2:5.) His report indicates that only 433 people, out of the millions of Wisconsin voters, completed the survey. (Dkt. 9-2:5.) He assumes that this tiny sample was representative of the whole state and scaled the number up to predict the total number of people who requested ballots, and compared that to the number of people receiving ballots. (Dkt. 9-2:1.) What he did not do is the obvious analysis of asking anyone whether they received a ballot without asking for one. As he concedes in his report: "Survey respondents were not asked if they received an unrequested ballot . . . This is clearly a lively [sic] possibility . . . no estimates or likelihood can be calculated for this potential error due to absence of data." (Dkt. 9-2:2.) This type of methodology failure pervades his report.

The final two are the Keshel and Ramshland Jr. opinions, which are likewise unpersuasive. (Dkt. 9:9, 17.) Keshel is a data analysist with no apparent elections training but who reports that he has "political involvement requiring knowledge of election trends and voting behavior." (Dkt. 9-9:1.) He used uncertified information from an "unofficial tracker" to determine that the 2020 elections went "against the

trends of the previous election" to elect a Democratic candidate. (Dkt. 9-9:1, 4.) But this is no more than acknowledging that a Republican won in 2016 and a Democrat won in 2020. Keshel refers to this as "suspicious vote totals" but it does not show any more than a different outcome in 2020 than in the past.

Ramshland Jr. does not disclose his data source other than "[m]y colleague and I . . . have studied the information that was publicly available." (Dkt. 9-17:4.) From this, he identifies "red flags" including a very high turnout in several Wisconsin counties. (Dkt. 9-17:9.) He concludes that fraud occurred because many votes for Biden were counted late in the tabulating process. (Dkt. 9-17:4–5.) But, as now been repeatedly publicly explained, this occurred because absentee ballots, which favored Democratic candidates, were counted together late in the election day. The report also "normalized" the turnout to a lower rate and found that "the excess votes are at least 384,085 over the maximum that could be expected. (Dkt. 9-17:9.) But this "normalization" is nothing more than lowering the vote count. He concludes on this analysis that there were up to 384,085 "illegal votes that must be disregarded." (Dkt. 9-17:12.) The idea that Wisconsin should discard votes because more people voted than normal is absurd.

This unpersuasive and unreliable evidence stands in contrast to an actual hand-count audit of the machines used in the election, which showed no fraud. Like in the parallel Michigan case, "With nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs' equal protection claim fails." (*King,* No. 20-13134,

Dkt. 62:29–30.) This Court should not conclude, on Plaintiff's proffer of anonymous declarations, hearsay, and facially faulty analyses, that Wisconsin should disregard the outcome of the election for President.[2]

C. Plaintiff's requested remedy would unconstitutionally disenfranchise Wisconsin voters.

Regardless of all of the other reasons Plaintiff's claims fail, the remedy he seeks—the exclusion of hundreds of thousands of votes in Wisconsin—would violate these voter's federal due process rights by retroactively overriding election procedures that those voters relied on and nullifying votes cast for Vice President Biden based on a speculative and far-fetched conspiracy theory of voter fraud.

Once a state legislature has directed that the state's electors are to be appointed by popular election, the people's "right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). That fundamental right to vote includes "the right of qualified voters within a state to cast their ballots and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941).

Due process is violated when voters rely on an established election procedure and significant disenfranchisement results from a change in the procedures post-election. *Bennett*, 140 F.3d at 1227*; Northeast Ohio Coal. for the Homeless v. Husted*,

[2] Plaintiff's request for the Court to "seize and impound" all equipment statewide, is also misdirected. (Dkt. 9 ¶ 48.) The Commission does not own or have custody over such election equipment. *See* Wis. Stat. 5.91; Wis. Admin. Code ch. EL 7; https://elections.wi.gov/elections-voting/security (explaining that municipalities purchase the equipment.)

837 F.3d 612 (6th Cir. 2016) (finding no reason to invalidate a ballot when there was no evidence of voter fraud.); *Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (retroactive invalidation of absentee ballots violated due process). Those conditions would be squarely met here by Plaintiff's requested relief.

Wisconsin voters who reasonably relied on the established voting procedures would be disenfranchised by the thousands, raising serious concerns of a due process violation. To throw out the votes of 318,012 Wisconsin voters based on an implausible conspiracy regarding voting machine would violate the constitutional rights of these voters.

CONCLUSION

Defendants Wisconsin Elections Commission and its members request that this case be dismissed.

Dated this 7th day of December 2020.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

BRIEF OF GOVERNOR TONY EVERS IN OPPOSITION TO PLAINTIFF'S AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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December 7, 2020

INTRODUCTION

Plaintiff's motion seeks relief that is shockingly sweeping in scope. Wisconsin's Supreme Court recently called a similar request "the most dramatic invocation of judicial power [they] have ever seen." *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930-OA (Wis. Dec. 4, 2020) (Hagedorn, J., concurring on behalf of majority of Justices). Indeed, such a request would be unimaginable, except that it has already been proposed—and rejected—elsewhere.

In November's election, a record turnout of nearly 3.3 million Wisconsinites voted. Joe Biden and Kamala Harris won by 20,585 votes. President Trump sought a partial recount, confirming the result, which was then declared in the state canvass. As required by law, Governor Evers issued a certificate identifying Wisconsin's 10 participants in the Electoral College, who will soon convene and cast their votes in accord with the will of Wisconsin's voters.

Plaintiff's request in this Court is less a prayer for relief than a desperate plea for historical negation. His motion asks this Court to cast aside what has occurred, notwithstanding that the election results were checked and re-checked as required by Wisconsin law, that President Trump could—and did—request a recount, and that 5 percent of Wisconsin's voting machines were audited after the election. There is no basis, in fact or in law, for this Court to grant Plaintiff's requests, including, but not limited to:

- overturning and decertifying Wisconsin's election results, thereby disenfranchising nearly 3.3 million Wisconsin voters (Amend. Cmplt. ¶¶138, 142.1);
- requiring a statewide manual recount in the presidential election (*Id.* ¶142.8);
- impounding all election equipment, software, ballots, and other election materials maintained by non-party election officials in counties statewide (*Id.* ¶142.4); and
- declaring that President Trump won Wisconsin's Electoral College votes (*Id.* ¶142.3).

As the Wisconsin Supreme Court explained, "if there is a sufficient basis to invalidate an election, it must be established with evidence and arguments commensurate with the scale of the

claims and the relief sought." *Wis. Voters Alliance*, Order at *3 (Hagedorn, J., concurring). Here, as in that case, the record offered by the Plaintiff has "come nowhere close." *Id.*[1]

The Middle District of Pennsylvania, when confronted with analogous claims and requests, based on similarly scant evidence, also rebuked the plaintiffs:

> Plaintiffs ask this Court to disenfranchise almost seven million voters.… One might expect that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption, such that this Court would have no option but to regrettably grant the proposed injunctive relief despite the impact it would have on such a large group of citizens.
>
> That has not happened. Instead, this Court has been presented with strained legal arguments without merit and speculative accusations…. In the United States of America, this cannot justify the disenfranchisement of a single voter.

Donald J. Trump for President, Inc. v. Boockvar, No. 4:20-cv-02078-MWB, 2020 WL 6821992, at *1 (M.D. Pa. Nov. 21, 2020), *aff'd*, No. 20-3771, 2020 WL 7012522, at *1 (3d Cir. Nov. 27, 2020) ("Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and proof. We have neither here.").[2] *See also Wood v. Raffensperger*, No. 1:2020-cv-04651-SDG, 2020 WL 6817513, at *8 (N.D. Ga. Nov. 20, 2020), *aff'd*, No. 20-14418, 2020 WL 7094866 (11th Cir. Dec. 5, 2020) (denying motion for preliminary relief that "would disenfranchise a substantial portion of the electorate and erode public confidence in the electoral process").

Sifting through Plaintiff's Amended Complaint and its exhibits (which, rather than marshaling as part of his motion, Plaintiff instead purports to have "incorporate[d] herein by reference"), is itself a daunting task that complicates any response. Consider:

- The narrative strays far beyond Wisconsin's borders, travelling through Venezuela, Germany, and Serbia. (*See* Amend. Cmplt. ¶¶7-8, 73-75, 80-81)

[1] This was a similar case, requesting similar relief, and relying heavily on one of the experts, Matthew Braynard, Plaintiff cites in this case.

[2] Pursuant to Civil L. R. 7(j)(2), all unpublished cases, orders, and dispositions cited are filed in conjunction with this brief.

- The exhibits include declarations from individuals in Japan and Texas with no apparent expertise or first-hand knowledge of anything pertaining to the Wisconsin election. (*See id.* ¶¶61-62, 87-88 & Exhs. 9, 14)
- Five of the purported affiants are, for reasons unknown and unexplained—but which regardless could not provide any conceivable basis for finding relevance or admissibility—anonymous. (*See id.* Exhs. 1, 4, 12, 13, 19)

Much of Plaintiff's Amended Complaint consists of Q-Anon conspiracy theories that do not come close to satisfying federal-court pleading standards.

Nonetheless, a charitable reading of the complaint could be read to assert four theories of "widespread fraud" that, according to Plaintiff, call into question Wisconsin's election results:

(1) the notion that voting machines manufactured by "Dominion Voting Systems" were prone to manipulation and *could have been* manipulated in a manner that compromised the integrity of the Wisconsin election;

(2) the *ipse dixit* assertions of two so-called experts, Matt Braynard and William Briggs, that a "survey" of individuals supposedly associated with "unreturned absentee ballots" in Wisconsin somehow calls into question the election results;

(3) the characterization of Wisconsin's election results as a "statistical impossibility" that simply cannot be believed; and

(4) the theory that, by administering an election in accord with Wisconsin election law, the Wisconsin Elections Commission ("WEC") somehow violated Plaintiff's rights.

None of these theories is remotely plausible, let alone supported by evidence that would suggest Plaintiff has any likelihood whatsoever of prevailing on his claims.

Most glaringly, Dominion voting machines—the subject of endless pages of allegations and affidavits in Plaintiff's submission—*are not used in the relevant counties*. The Complaint alleges "egregious" conduct involving these machines in eight Wisconsin counties (Amend. Cmplt. ¶3), but materials, sourced from the WEC website and included in Plaintiff's own exhibits, show that Dominion machines are used in only two of those counties. And those two counties, Ozaukee and Washington, are both places where President Trump won. Plaintiff's other theories similarly wilt under the slightest scrutiny and cannot show a reasonable likelihood of success.

Moreover, Plaintiff cannot meet any other element of the test for granting preliminary injunctive relief. He cannot demonstrate any cognizable injury, much less irreparable harm. (*See* Def. Evers Br. in Supp. of Mot. to Dismiss at 5-8, 16-24) Nor can Plaintiff demonstrate that he has no alternative remedy, while President Trump is pursuing claims through the recount procedures prescribed as exclusive by the Wisconsin Legislature. And, even if Plaintiff could carry his burdens, the balance of harms indelibly tilts away from Plaintiff, because the relief he seeks would cause enormous prejudice to nearly 3.3 million Wisconsin voters by depriving them of their chosen representation in the Electoral College, as well as doing "indelible damage to every future election" and diminishing "public trust in our constitutional order." *Wis. Voters All.*, Order at *3 (Hagedorn, J., concurring).

For all of these reasons, as detailed below, Plaintiff's motion should be denied.

RELEVANT FACTS

In the face of a global pandemic, the WEC took extraordinary steps to ensure a safe and secure election. Since March 1, 2020, WEC has sent approximately 150 direct communications to the 1,850 municipal clerks and 72 county clerks who administer Wisconsin elections.[3] These communications address how to conduct an election in the middle of a global pandemic. The WEC met approximately 30 times between March 1 and the November 3rd election.[4] The WEC's carefully crafted guidance assisted election officials and helped ensure the safety of voters. For example, the WEC developed comprehensive guidelines, rooted in and consistent with Wisconsin law, about municipal drop boxes as a safe, convenient way for voters to return absentee ballots.[5]

[3] *See* https://elections.wi.gov/clerks/recent-communications (last visited Dec. 5, 2020).
[4] *See* https://elections.wi.gov/calendar (last visited Dec. 5, 2020).
[5] https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/Drop%20Box%20Final.pdf (last visited Dec. 5, 2020).

Throughout this year, Wisconsin election officials prepared for record turnout and unprecedented use of absentee ballots. In Wisconsin's April presidential primary and nonpartisan election, more than 70 percent of all votes cast (approximately 1,138,491 votes) were absentee.[6] In the August partisan primary, approximately 75 percent of votes cast were absentee.[7] By contrast, over the prior decade, Wisconsin averaged less than six percent of votes cast by absentee ballot.[8] In the November election, nearly 3.3 million Wisconsinites— approximately 72.66 percent of the voting-age population—voted.[9] Almost two million of those votes were cast by absentee ballot.[10]

All of this occurred consistent with Wisconsin law, which includes extensive safeguards. Prior to the election, local election officials must test the voting machines no more than ten days prior to the election to ensure the machines give an accurate vote count. Wis. Stat. § 5.84(1). That test is open to the public, and indeed the municipal clerk must provide the public notice of the test two days in advance. *Id.* After the clerk receives an accurate test result, the clerk then secures the machine until the election. Wis. Stat. § 5.84(2).

An absentee ballot may be requested only by a registered voter, and that voter must sign an affirmation on the ballot envelope in the presence of a witness, who also signs; both sign under penalty of perjury. *See* Wis. Stat. §§ 6.86, 6.87(2). Once the polls close, Wisconsin begins its canvassing process. Election inspectors conduct a local canvass at each polling place on election

[6] https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf at 3-5 (last visited Dec. 5, 2020).

[7] https://elections.wi.gov/sites/elections.wi.gov/files/2020-09/Election%20Statistics%20Report%202020%20Partisan%20Primary%20Election%202020-09-21.xlsx (last visited Dec. 5, 2020).

[8] https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf at 6 (last visited December 5, 2020).

[9] https://www.wispolitics.com/2020/wec-important-things-voters-should-know-after-the-election/ (last visited Dec. 5, 2020).

[10] *Id.*

night. Wis. Stat. § 7.51. The few dozen municipalities that count absentee ballots at a central count location proceed under the auspices of an absentee ballot board of canvassers. Wis. Stat. § 7.52.

Within a week of the election, every municipality has a three-member municipal board of canvass that publicly meets to reconcile the poll lists and canvass the returns. Wis. Stat. § 7.53. All municipal canvass results are reported to county clerks, each of whom convenes their county board of canvass to publicly meet and examine the returns for all municipalities in their county. Wis. Stat. § 7.60. Within two weeks of the election, county clerks report county canvass results to the WEC. Wis. Stat. § 7.60(5). Once the WEC has received all of the county canvass results, the chairperson reviews the results, publicly canvasses the returns, and prepares a statement certifying the results and indicating the names of persons who have been elected to state and national offices. Wis. Stat. § 7.70(3). Where a candidate in an election where more than 4,000 votes have been cast trails the leading candidate by less than 1 percent of the total votes cast, the trailing candidate may request a recount of the results. Wis. Stat. § 9.01(1). That recount occurs before the state canvass.

President Trump requested a recount of the canvasses in Dane and Milwaukee counties.[11] As part of the recount, the county board of canvassers compares the poll lists to determine the total number of voters, examines every absentee-ballot envelope and container, and then conducts a reconciliation process to ensure the number of ballots and the number of voters match. Wis. Stat. § 9.01(1)(b)1.-4. Election officials then recount the votes, ensuring tabulation machines provide accurate counts. Wis. Stat. § 9.01(1)(b)7.-8m., 10. Every step of the recount process is open to the public. Wis. Stat. § 9.01(1)(b)11. Once the recount is complete, the county board of canvassers certifies the results and provides them to the WEC chairperson, who must then complete the state

[11] "Completed Wisconsin recount confirms Joe Biden's win over Donald Trump," *Associated Press* (Nov. 30, 2020), available at https://madison.com/wsj/news/local/govt-and-politics/elections/completed-wisconsin-recount-confirms-joe-bidens-win-over-donald-trump/article_6335f4cb-4308-5108-ae71-88bf62ce90bf.html (last visited Dec. 5, 2020).

canvass using the recounted results. Wis. Stat. § 9.01(5)(c). After the recounts in Dane and Milwaukee Counties concluded, Joe Biden's statewide lead increased by 87 votes.[12]

After every general election, Wisconsin election officials conduct an audit of selected voting machines. Wis. Stat. § 7.08(6). Under federal law, no machine may demonstrate an error rate greater than 1 in 500,000 ballots (0.0002 percent). 52 U.S.C. § 21081(a)(5); Fed. Elections Comm'n, *Voting System Standards* § 3.2.1 (Apr. 2002).[13] The WEC established the following selection criteria for the audit following the November 2020 election:

1. Establish the audit sample as 5% of all reporting units statewide for a minimum of 184 total audits.
2. Ensure at least one piece of voting equipment is selected for audit in each of Wisconsin's 72 counties.
3. Ensure that a minimum of five reporting units are selected for every model of equipment certified for use in Wisconsin.

WEC, *Preliminary 2020 Post-Election Audit of Electronic Voting Equipment Report*, at 2 (Nov. 17, 2020).[14] The WEC audited 28 Dominion machines.[15] The audit found no programming errors, nor found any "identifiable bugs, errors, or failures of the tabulation voting equipment…."[16] At the WEC's most recent meeting, Commissioner Dean Knudson, a former Republican legislator and immediate-past chair of the WEC, said the audit showed "no evidence of systemic problems [or] hacking [or] of switched votes."[17] He specifically noted that the WEC had "audited 15 percent of the Dominion machines," and found "no evidence of any Dominion machines changing votes

[12] https://apnews.com/article/election-2020-joe-biden-donald-trump-madison-wisconsin-7aef88488e4a801545a13cf4319591b0 (last visited Dec. 5, 2020).

[13] Available at https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf (last visited Dec. 5, 2020).

[14] https://elections.wi.gov/sites/elections.wi.gov/files/202012/2020%20Audit%20Program%20Update%20for%2012_1_2020%20Meeting%20FINAL.pdf (last visited Dec. 5, 2020).

[15] *Id.* at 4.

[16] *Id* at 8.

[17] Video available at https://wiseye.org/2020/12/01/wisconsin-elections-commission-december-2020-meeting/ at 2:05:18.

or doing any of the like."[18] Noting that Wisconsin's "election equipment operated with great accuracy," he categorically asserted that he had "yet to see a credible claim of fraudulent activity during this election."[19]

Plaintiff waited until the day after Commissioner Knudson's public comments to file this lawsuit, alleging, without evidence, "massive fraud" in Wisconsin's election. Plaintiff's attorneys have filed lawsuits substantially identical to this one in three other states. *See King v. Whitmer*, No. 2:20-cv-13134 (E.D. Mich.); *Pearson v. Kemp*, No. 1:20-cv-04809-TCB (N.D. Ga.); *Bowyer v. Ducey*, No. 20-cv-02321 (D. Az.). All of these suits allege widespread fraud as part of a grand multi-national conspiracy to steal the election. None provides specific or even remotely reliable evidence to support those extravagant claims. Each suit is a last-ditch attempt to overturn election results and disenfranchise millions of voters without a shred of evidence. Just today the Eastern District of Michigan rejected Plaintiff's attorney's lawsuit on six separate grounds, including that the Eleventh Amendment barred relief, the claim was moot after Michigan certified the election results, laches barred relief, abstention, lack of standing, and that the plaintiff had no likelihood of success on the merits. *King v. Whitmer*, No. 2:20-cv-13134 (E.D. Mich. Dec. 7, 2020). A Georgia District Court dismissed an identical lawsuit in an oral decision, and the Arizona District Court on its own order put over an evidentiary hearing after receiving the defendants' motions to dismiss.

STANDARD OF REVIEW

The legal standard for a temporary restraining order is the same as a preliminary injunction. *Democratic Nat'l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 765 (W.D. Wis. 2020). The plaintiff "has the burden of making a threshold showing: (1) that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action; (2) inadequate remedies at law

[18] *Id.* at 2:08:16.
[19] *Id.* at 2:05:18, 2:06:52.

exist; and (3) he has a reasonable likelihood of success on the merits." *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). If the court finds the first three elements satisfied, it balances the relevant harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). The balancing process "takes into consideration the consequences to the public interest of granting or denying preliminary relief." *Id.*

ARGUMENT

I. Defendants are overwhelmingly likely to prevail on the merits.

A. There is no evidence of fraud in Wisconsin's election results.

The Dominion machines in Wisconsin have shown no evidence of irregularities. And they have been extensively audited. Dean Knudson, a Republican appointee to the WEC and former Republican member of the Wisconsin Assembly, publicly said this month that "the Dominion machines operated as they were designed to do within the specifications of our testing."[20] He specifically rejected the Dominion conspiracy theory: "We do not see problems with our voting machines. … And we have no evidence of any Dominion machines changing votes or doing any of the like."[21] Despite seemingly being aware of the theories underlying Plaintiff's Dominion allegations, Mr. Knudson definitively ruled out Dominion changing any votes. Nor is Commissioner Knudson alone. Jim Steineke, the Republican Majority Leader for Wisconsin's State Assembly, called allegations of widespread voter fraud "nonsense" and dismissed the notion of "widespread fraud large enough in numbers to overturn the result" of Wisconsin's presidential

[20] Video available at https://wiseye.org/2020/12/01/wisconsin-elections-commission-december-2020-meeting/ at 2:05:18.
[21] *Id.* at 2:08:16.

election.[22] And U.S. Attorney General William Barr, "one of the president's most ardent allies," said last week that U.S. Attorneys and FBI agents investigating claims of election irregularities "have not seen fraud on a scale that could have effected a different outcome in the election."[23]

Audit results in Wisconsin contravene Plaintiff's allegations. Wisconsin audited 60 Sequoia machines and 28 Dominion machines in the second half of November. Audits showed that the machines tabulated ballots correctly, "with no bugs, errors, or failures occurring between the individual cast vote record and the total tabulated vote record."[24] Recounts in Dane and Milwaukee Counties further underscore the lack of evidence of any fraud. After a full recount spanning more than a week, Dane County Clerk Scott McDonell, said, "what this recount showed was that there was absolutely no evidence of voter fraud in this election even after looking at over 300,000 ballots, over 254,000 envelopes."[25] As he noted, "this incredible level of transparency should provide reassurance to the public that the election was run properly and accurately and there was no fraud."[26] Milwaukee County's recount also found no evidence of fraud.[27]

Christopher Krebs, President Trump's chosen director for the Cybersecurity and Infrastructure Security Agency, the agency tasked with ensuring secure elections, characterized

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[22] Rob Mentzer, "GOP Leader Pushes Back Against Election 'Misinformation,' Says No Evidence Of Widespread Voter Fraud," *WPR* (Nov. 16, 2020), available at https://www.wpr.org/gop-leader-pushes-back-against-election-misinformation-says-no-evidence-widespread-voter-fraud (last visited Dec. 5, 2020).

[23] Michael Balsamo, "Disputing Trump, Barr says no widespread election fraud," *Associated Press* (Dec. 1, 2020), available at https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d (last visited Dec. 5, 2020).

[24] Audit available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-12/2020%20Audit%20Program%20Update%20for%2012_1_2020%20Meeting%20FINAL.pdf (last visited Dec. 6, 2020).

[25] Patrick Marley, "Biden gains 87 votes in Trump's $3 million Wisconsin recount as Dane County wraps up review. President plans lawsuit," *Milwaukee Journal Sentinel* (Nov. 29, 2020), available at https://www.jsonline.com/story/news/politics/2020/11/29/dane-county-recount-show-biden-won-wisconsin-trump-prepares-lawsuit/6455880002/ (last visited Dec. 4, 2020).

[26] *Id.*

[27] James Groh, "Milwaukee County election officials found "no instances of fraud" during recount," *TMJ4* (Nov. 27, 2020), available at https://www.tmj4.com/news/election-2020/milwaukee-county-election-officials-found-no-instances-of-fraud-during-recount (last visited Dec. 5, 2020).

the 2020 election as "the most secure in U.S. history."[28] Specifically with respect to Wisconsin, he noted that election administrators "worked overtime to ensure there was a paper trail that could be audited or recounted by hand, independent of any allegedly hacked software or hardware."[29] He explained that "Americans' confidence in the security of the 2020 election is entirely justified" because "[p]aper ballots and post-election checks ensured the accuracy of the count.[30] Mr. Krebs's comments could not be more apt: Wisconsin's recount of the ballots and audit of the machines ensured accuracy and inspires confidence. There is no evidence of fraud in Wisconsin's election; to the contrary, all evidence is that the election was free and fair. Nothing Plaintiff has offered—a mishmash of unattributed affidavits, hearsay, and extraordinary speculation—changes that.

B. Plaintiff's "witnesses" and "experts" should be ignored.

None of Plaintiff's "experts" are experts at all. They lack qualifications, and they fail to provide methodological information to show their opinions are reliable. Their opinions should be ignored. Plaintiff's fact witnesses fare no better. Their affidavits are unsupported, speculative and unhelpful. Many are anonymous. They are inadmissible and unworthy of the Court's attention.

1. Plaintiff's affiants are entirely unqualified.

"Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir. 2010). Most of the affidavits appended to the Amended Complaint purport to conduct expert analyses ranging from statistical tests to forensic assessments of electronic voting systems. Yet almost none of Plaintiff's

[28] Christopher Krebs, "Trump fired me for saying this, but I'll say it again: The election wasn't rigged," *Washington Post* (Dec. 1, 2020), available at https://www.washingtonpost.com/opinions/christopher-krebs-trump-election-wasnt-hacked/2020/12/01/88da94a0-340f-11eb-8d38-6aea1adb3839_story.html (last visited Dec. 6, 2020).

[29] *Id.*

[30] *Id.*

affiants have *any* identifiable experience or education in the fields in which they opine, let alone sufficient education and experience to qualify as an expert.

Exhibit 3 to the Amended Complaint is an affidavit from Matthew Braynard, who discusses a survey that he maintains uncovered assorted irregularities in Wisconsin's election results. But Braynard's only identified education is "a degree in business administration," and he identifies no other qualifications, experience, or publications in survey design, statistical methods in the social sciences, or political science. (Exh. 3) Exhibit 2, an affidavit from William Briggs, is an analysis based entirely on Braynard's survey results, but Briggs also fails to identify any relevant experience or qualifications in survey design. Neither Briggs nor Braynard is qualified to express the opinions identified in their affidavits.

The qualifications of Plaintiff's remaining affiants are equally infirm. Exhibits 4, 12, 13, and 19 are "expert" analyses conducted by anonymous individuals whose credentials—or even existence—cannot be tested or assessed. Even taken on their own terms, these affidavits do not disclose any remotely acceptable qualifications. Exhibit 12 purports to be a forensic analysis of various computer networks, but the anonymous author identifies no relevant qualifications or education, aside from "extensive experience as a white hat hacker." Exhibit 13 purports to be a technical analysis of certain voting technologies, but the author states that his degree is in physiology and that he is an "amateur network tracer." He does not identify any specific education or experience that would qualify him to analyze electronic voting systems. And Exhibit 19 is a statistical analysis conducted by an electrical engineer with no discernible experience in statistics.

Exhibit 8, a statement by Ana Mercedes Diaz Cardozo, expresses opinions about the security of electronic voting systems, but she is not a computer scientist or information security expert, nor does she possess any other relevant qualifications. Exhibit 9, the affidavit of Seth

Keshel, is a statistical analysis conducted by a "trained data analyst" who describes nothing about his education, experience, or other qualifications, aside from "political involvement requiring a knowledge of election trends and voting behavior." Exhibit 14, the declaration of Ronald Watkins, analyzes the security of electronic voting systems, but identifies only "experience as a network and information defense analyst and a network security engineer." Watkins does not describe what that experience is with any degree of detail, nor does he explain how this experience qualifies him to testify as to the security of electronic voting systems. In reality, Watkins operates the online message board 8kun and is a key propagator of the QAnon conspiracy theory.[31]

And Exhibit 17, the affidavit of Russell James Ramsland, Jr., contains both statistical "analysis" and a technical assessment of electronic voting systems, but Ramsland identifies no education, experience, publications, or other qualifications in any relevant field. Indeed, Ramsland concedes that he has relied on certain "experts and resources" (Exh. 17 at 1), but he does not identify who those experts are, what their qualifications are, how they performed their work, or how *he* relied on their work. The substance of his analysis is nonsensical. Ramsland claims that a "spike" in Biden returns in the early morning the day after the election was a "statistical impossibility" and evidence of fraud. (Amend. Cmplt. ¶¶77-79) Of course, this spike was just the City of Milwaukee, a traditional Democratic stronghold, reporting its city-wide absentee-ballot returns in one fell swoop when all counting at its central-count facility had concluded. It was anticipated this would happen, as Milwaukee had warned that it would deliver absentee results

[31] Drew Harwell, "To boost voter-fraud claims, Trump advocate Sidney Powell turns to unusual source: The longtime operator of QAnon's Internet home," *Washington Post* (Dec. 1, 2020), available at https://www.washingtonpost.com/technology/2020/12/01/powell-cites-qanon-watkins/ (last visited Dec. 6, 2020).

between 3:00 and 6:00 a.m. the morning after Election Day.[32] Rather than a statistical anomaly, this was an entirely expected development.[33]

2. Plaintiff's affiants fail to disclose a generally accepted methodology, or any methodology at all.

Expert testimony requires a reliable methodology. *Hartman v. EBSCO Indus., Inc.*, 758 F.3d 810, 817 (7th Cir. 2014). "An expert's methodology can be evaluated by considering its error rate, whether the methodology has been or is capable of being tested, whether it has been subject to peer review, and whether it is generally accepted in the relevant community of experts." *Id.* Even if Plaintiffs' "expert" affiants were qualified, none of them disclose any remotely reliable methodology in arriving at their conclusions—and most disclose no methodology whatsoever.

As an initial matter, the Briggs and Braynard affidavits (Exhs. 2-3) rely on Braynard's survey results—but Braynard made no effort to make his survey even appear scientific. "The criteria for the trustworthiness of survey evidence are that: (1) the 'universe' was properly defined; (2) a representative sample of that universe was selected; (3) the questions to be asked of interviewees were framed in a clear, precise and non-leading manner; (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted; (5) the data gathered was accurately reported; (6) the data was analyzed in accordance with accepted statistical principles[;] and (7) objectivity of the entire process was assured." *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 940, 952 (N.D. Ill. 2009); *see also Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 776 (7th

[32] Laurel White, "Wisconsin Election Officials Say Vote Counting Will Take Longer This Year. Here's What To Expect," *WPR* (Nov. 3, 2020), available at https://www.wpr.org/wisconsin-election-officials-say-vote-counting-will-take-longer-year-heres-what-expect (last visited Dec. 5, 2020).

[33] If the Court does determine an evidentiary hearing is necessary, Defendant would request the right to bring *Daubert* challenges to each of Plaintiff's experts.

Cir. 2007) ("But we emphasize that survey evidence … must comply with the principles of professional survey research; if it does not, it is not even admissible."). Braynard's affidavit identifies no sampling method, no telephone protocols, no scripts used by interviewers, no quality control steps, no information about who conducted the phone calls, and no information about how voter telephone numbers were located and verified. None of Braynard's estimates are presented with any measures of uncertainty, like confidence intervals or margins of error. Braynard's survey has none of the indicia of reliability necessary to admit survey evidence. And because the Briggs affidavit relies exclusively on the Braynard survey, it too should be ignored.

Braynard's affidavit also contains conclusions about voters who indicated they were indefinitely confined. But this discussion likewise lacks any meaningful methodology. Braynard purportedly had unidentified researchers look at social media profiles they believed matched specific voters to determine whether they were indefinitely confined on Election Day. No sampling methodology is identified; no objective standards used in determining whether an individual is indefinitely confined are identified; no information about how voter identities were verified is identified; no quality control measures are identified. The Court cannot accept Braynard's and Plaintiff's invitation to invalidate tens of thousands of votes based on subjective and unverifiable assessments of social media pages that may not even belong to the voters in question.

Moreover, several of Plaintiff's affidavits are statistical "analyses" that cloak their lack of a coherent methodology in pseudoscientific language. At a bare minimum, in addition to using generally accepted statistical tests, a reliable statistical methodology must contain an accounting of the sample tested and must "correct for potentially explanatory variables." *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) (expert was properly excluded where he arbitrarily excluded certain individuals from a sample and failed to account for potential

explanatory factors); *see also Elliott v. CFTC*, 202 F.3d 926, 934 (7th Cir. 2000) (expert statistical testimony was unreliable where it failed to conduct key analyses that weighed upon his conclusion). Plaintiffs' experts do not use any standard or accepted statistical methodologies, do not identify their data or even data sources, and fail to account for obvious explanatory factors.

Exhibit 4 is an anonymous statistical analysis purporting to show that counties using Dominion machines favored Biden, but there is no meaningful description of what data was used, when it was compiled, or where much of it was sourced from; no analysis or methodology described or identified beyond the assertion that the author used "Chi-Squared Automatic Interaction Detection," which the author fails to even try to explain; and no results from any efforts to control for confounding factors. The study also evidently ignores key confounding factors—for instance, the graph on which the report relies appears to demonstrate that *every* voting system used in Wisconsin yielded results favorable to Biden, and that a greater percentage of non-Dominion machines in Wisconsin are above the prediction line—in other words, it is Wisconsin, and not Dominion, that is more Biden-friendly than the overall sample.

The Keshel affidavit, Exhibit 9, is a statistical analysis of political trends that contains no methodology whatsoever—there is no testing, no controls, just stray observations that certain electoral outcomes seem odd to the author. The Ramsland affidavit, Exhibit 17, claims that it is statistically improbable that a large number of ballots favoring Biden would be reported at one time, but contains virtually every flaw a statistical analysis can have: it does not contain any controls; it ignores obvious explanations for the identified phenomenon (*i.e.*, it simply reflects the timing of Milwaukee County's reporting of absentee ballot results); uses a "random population of Wisconsin votes" as its comparison group notwithstanding significant and meaningful differences between different areas of the state; and fails to identify the sources of any of its data or

assumptions concerning expected voter turnout. Exhibit 19, an anonymous statistical analysis of vote reporting patterns, likewise contains virtually every error one can make: it does not identify the source of the overwhelming majority of the data used; there are no meaningful controls used, and no controls whatsoever used in the analysis related to Wisconsin; and it ignores obvious confounding factors, including that Wisconsin counted in-person ballots before absentee ballots, and that different parts of various states with substantial political differences reported results at different times. In short, Plaintiffs' statistical analyses are not analyses at all, and are instead just a series of observations not grounded in any identifiable data set or reliable statistical testing. They should be ignored.

So, too, with respect to the affidavits concerning the security of electronic voting systems and supposed connections between Dominion and a variety of foreign countries. Exhibit 12, which purports to be a forensic analysis of various websites and computer systems, employs no meaningful methodology and appears to just be a series of screenshots that the author, without any coherent explanation, maintains represents connections between various companies and certain foreign countries and/or unlawful activity. For instance, the author insists that the existence of the domain name "scorecard.indivisible.org" means that the organization Indivisible employed scorecard software to manipulate the results of the election. (Exh. 12 at 8) Like Exhibit 12, the anonymous analysis in Exhibit 13, which purportedly assesses the security of various electronic voting systems, contains a dizzying array of pseudo-technical representations that lack any coherent explanation or accepted methodology. These analyses too do not warrant the Court's consideration. *See Varlen Corp. v. Liberty Mut. Ins. Co.*, 924 F.3d 456, 460 (7th Cir. 2019) (expert properly excluded where he "offered no methodology to explain how he drew conclusions");

Bielskis v. Louisville Ladder, Inc., 663 F.3d 887, 895 (7th Cir. 2011) (expert testimony properly excluded where expert "used no particular methodology to reach his conclusions").

3. Plaintiff's affidavits are unsupported, speculative, and unhelpful.

In addition to Plaintiff's woefully insufficient expert affidavits, Plaintiff also offers fact affidavits unsupported by the affiants' personal knowledge and irrelevant to Wisconsin's election. The anonymous Exhibit 1 and the Cardozo affidavit, Exhibit 8, offer numerous observations about the years-old elections in Venezuela, but make no coherent connection between activity in Venezuela and the 2020 election in Wisconsin. The affidavit of Harri Hursti (Exh. 7) is a lengthy discussion of issues arising out of a primary election in Georgia—again with no connection to any Wisconsin election. This testimony should be disregarded as irrelevant.

Likewise, numerous affiants make factual representations for which they have no apparent firsthand knowledge. The anonymous author of Exhibit 1 makes observations about the timing of vote reporting in the 2020 election, but identifies no reason to believe she has firsthand knowledge of when votes were counted or reported in any jurisdiction, nor does she identify any sources on which she relied. (*See* Exh. 1 ¶26) The Cardozo affidavit contains numerous observations about Venezuela's purported contract with Smartmatic, but none of it is based on her personal experience with the contract; she is simply stating the contents of a document she saw years after the fact. The document was not included in Plaintiff's filing. Exhibit 13 contains a variety of outlandish representations with no reason to believe the author has firsthand knowledge of any of them—for instance, the affiant makes extensive representations that Joe Biden and Barack Obama in 2013 and 2014 conspired to manipulate an election in an unidentified foreign country. The testimony of these witnesses should be ignored. *See Zilisch v. R.J. Reynolds Tobacco Co.*, No. 10-cv-474-bbc, 2011 WL 7630628, at *1 (W.D. Wis. June 21, 2011) (statements in affidavit were "inadmissible because they are conclusory and not made on the basis of [affiant's] personal knowledge"); *Ross*

v. Bd. of Regents of Univ. of Wis. Sys., 655 F. Supp. 2d 895, 923 (E.D. Wis. 2009) (declining to consider portions of affidavit "not based upon the affiant's personal knowledge").

Finally, the affidavit of Eric Oltmann, Exhibit 6, purports to recreate a conversation the affiant purportedly overheard several months ago, in which someone Oltmann speculates was a Dominion employee makes representations about the 2020 election. Oltmann then proceeds to describe social media posts from a profile that he says belongs to the Dominion employee. Oltmann's affidavit layers speculation on top of hearsay to propagate a conspiracy theory about election manipulation. Like every other affidavit offered by Plaintiff, it is unreliable and unworthy of the Court's consideration.

4. Several affidavits are anonymous and therefore inadmissible.

Plaintiff offers five anonymous affidavits on a variety of topics, including elections in Venezuela (Exh. 1), statistical analysis of the 2020 election (Exhs. 4, 19), and analysis of electronic voting systems (Exhs. 12, 13). Because the affiants are anonymous, it is impossible to assess their credibility or qualifications; indeed, it is impossible to know whether their affidavits are even verified by the affiant as required by 28 U.S.C § 1746. *See also* Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."); *Consol. Water Power Co. v. 0.40 Acres of Land*, No. 10-CV-397-bbc, 2011 WL 1831608, at *5 (W.D. Wis. May 12, 2011) (affidavits should identify "the name of the affiant"). Anonymous affidavits should be excluded or ignored.

C. Plaintiff provides no evidence to support his preposterous claims.

Plaintiff alleges that Dominion voting machines *could be* compromised, but provides no evidence that proves, or even suggests, that Wisconsin machines actually *were* tampered with. Consider Exhibit 6: It begins by recreating a conversation the declarant allegedly overhead several months

ago, and then proceeds to weave an elaborate conspiracy theory based on who one of the participants might have been; this hodgepodge of rank speculation on top of hearsay is not evidence. Exhibit 12 is no more compelling in presenting an anonymous declarant's claims ("supported" by an impenetrable sequence of random screenshots) that Dominion is affiliated with China and Iran. Nor is Exhibit 1, which contains an unnamed declarant's opinions about elections in Venezuela. Exhibit 14's author's only conclusion is that voting machines could possibly be tampered with. None of this is relevant, probative, or compelling. Indeed, taken together, Plaintiff's proffered evidence fails to even connect his wild theories to Wisconsin. This is why the court in *King v. Whitmer*, found that all that Plaintiff's attorney alleged were "an amalgamation of theories, conjecture, and speculation that such alterations were *possible*." Op. & Order, at *34.

Paragraph 3 of the Amended Complaint promises an "egregious range of conduct" involving Dominion voting machines in Milwaukee, Dane, La Crosse, Waukesha, St. Croix, Washington, Bayfield, and Ozaukee Counties. Plaintiff's evidence shows that of those counties, only two—Ozaukee and Washington—use Dominion machines (Amend. Cmplt. Exh. 5); Trump won those counties with 55%[34] and 68%[35] of the vote. Despite pages of allegations and declarations relating to Dominion and its potential susceptibility to hacking, Plaintiff offers no actual facts.

Plaintiff's claim that approximately 7,000 voters moved from Wisconsin and voted illegally is also unavailing. Amend. Cmplt. ¶51. This analysis does not account for voters changing their addresses for reasons that still allow for voting in Wisconsin. For example, college students attending school out of state, or retirees temporarily travelling south prior to winter are common. Such voters retain the right to vote in Wisconsin. *See* Wis. Stat. § 6.10(1) ("The residence of a

[34] https://www.co.ozaukee.wi.us/DocumentCenter/View/14392/ElectionSummaryReport-11-3-20 (last visited Dec. 5, 2020).

[35] https://www.co.washington.wi.us/uploads/docs/electionsummaryreport1132020-Final.pdf (last visited Dec. 5, 2020).

person is the place where the person's habitation is fixed, without any present intent to move, and to which, when absent, the person intends to return."). Plaintiff provides no evidence that even one of these out of state voters should be disenfranchised. And Wisconsin law requires that a challenge to a ballot on the basis of the voter's eligibility must be raised on a ballot-by-ballot basis, at the time of voting or counting, and the challenge to any individual ballot must be for cause. *See* Wis. Stat. §§ 6.925-.93, 7.52(5); Wis. Admin. Code. § EL 9.02. Wisconsin law does not countenance Plaintiff's belated, *en masse* challenge to thousands of ballots based on (totally unreliable) statistical analysis.

D. Plaintiff has no valid claim under the Electors and Election Clauses because WEC's guidance is consistent with Wisconsin law.

Plaintiff has not asserted a valid claim for a violation of either the Electors Clause or the Election Clause of the U.S. Constitution. Even if such a claim were cognizable, *but see Bognet v. Secretary*, 2020 WL 6686120 (3d Cir. 2020), Plaintiff erroneously argues that WEC failed to follow Wisconsin's election laws by issuing contrary guidance. An actual reading of the statutes shows WEC's guidance comported with Wisconsin's election laws.

Consistent with the Electors and Elections Clauses, state legislatures can delegate authority to administer elections. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,* 576 U.S. 787, 814 (2015). Wisconsin has a detailed statutory framework governing elections, but the Legislature has delegated to the WEC authority to administer elections. *See* Wis. Stat. § 5.05(1) ("General authority. The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns…."). Plaintiff challenges guidance reflecting longstanding interpretations of Wisconsin election law. His challenges fail for several reasons.

First, Plaintiff, as a Wisconsin voter, is required to bring his challenges through a complaint to the WEC pursuant to Wis. Stat. § 5.06. This provision provides an administrative remedy to electors and allows WEC to investigate the complaint and potentially provide a hearing. Wis. Stat. § 5.06(1), (5). Critically, Wis. Stat. § 5.06(2) prohibits a voter from commencing a court action unless they complied with the administrative procedure. Because Plaintiff has failed to exhaust his administrative remedies, this Court cannot provide the extraordinary relief requested. *See Glisson v. U.S. Forest Serv.*, 55 F.3d 1325, 1326 (7th Cir. 1995).

Second, Plaintiff's claims are barred by the doctrine of laches and the Eleventh Amendment. (*See* Evers Br. in Supp. of Mot. to Dismiss at 12-16, 24-26)

Third, Plaintiff's claims are baseless and fail on the merits. Plaintiff raises two primary arguments under Wisconsin law—that election officials must discard any absentee ballot for which the witness provided incomplete address information and that ballots submitted by voters who designated themselves indefinitely confined should be discounted. Neither argument is correct.

1. Longstanding WEC guidance on witness address information is consistent with Wisconsin law.

Despite the WEC having longstanding guidance concerning election officials assisting with deficient witness addresses, Plaintiff now claims that guidance contravenes Wisconsin law. On October 18, 2016, the WEC advised all municipal clerks that, if an absentee-ballot envelope had a missing or incomplete witness address, clerks could make reasonable attempts to obtain the missing information.[36] Notably, the proposal to adopt this guidance was made by a Republican appointee to the WEC, was supported by the Wisconsin Department of Justice (under the leadership of a Republican Attorney General), and was unanimously adopted by the WEC. The

[36] https://elections.wi.gov/sites/elections.wi.gov/files/memo/20/guidance_insufficient_witness_address_amended_10_1_38089.pdf (last visited Dec. 5, 2020).

WEC has not changed its guidance since 2016, and it incorporated this recommendation into its Election Administration Manual.[37] The November 2020 election was the twelfth consecutive election for which this guidance has been in place.

The guidance on witness addresses is consistent with Wisconsin law, which encourages clerks to correct errors with witness addresses: clerks 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). This is not an exclusive remedy. Although a ballot without a witness address cannot be counted, nothing in the statute prohibits the clerk from taking steps to cure a missing address. Doing so is consistent with the statutory instruction that provisions of the elections code "shall be construed to give effect to the will of the electors, if that can be ascertained." Wis. Stat. § 5.01(1).[38] No statute commands that the witness is the only person who can fill in the address information. Thus, the WEC's longstanding guidance is entirely consistent with Wisconsin law. If the Legislature disagreed with that interpretation, it could have changed the statute any time within the last four years, but it did not.

2. The provision on "indefinitely confined" voters has been longstanding.

Plaintiff misconstrues Wisconsin law to argue that the WEC's guidance on indefinitely confined voters is unlawful. The text of the provision now numbered as Wis. Stat. § 6.86(2)(a) has existed in the Wisconsin Statutes for more than 40 years and has been unchanged since 1985. For three-and-a-half decades, that provision has provided an alternate method for voters to obtain a

[37] https://elections.wi.gov/sites/elections.wi.gov/files/202010/Election%20Administration%20Manual%20%282020-09%29.pdf at 99-100 (last visited Dec. 6, 2020).

[38] Arguably, Wis. Stat. § 6.84 overrides this legislative command by requiring that several provisions related to absentee voting be strictly applied. Assuming without conceding that section 6.84 is constitutional, by its own terms it does not apply to Wis. Stat. § 6.87(9).

mail-in absentee ballot if they are "indefinitely confined." Section 6.86(2)(a) recognizes that some electors are indefinitely confined in ways that preclude voting in person, and may complicate the typical process of obtaining an absentee ballot. The provision offers an alternative, based on an elector's statement that they are indefinitely confined.

Section 6.86(2)(a) does not excuse indefinitely confined voters from additional safeguards that apply to mail-in absentee ballots, including the requirement that each ballot be signed by the voter, witnessed by an adult U.S. citizen, and carefully opened, reviewed, and tabulated during a public canvas. Wis. Stat. §§ 6.87, 6.88. On March 29, 2020, the WEC issued guidance specifically addressing "Indefinitely Confined Absentee Applications."[39] In that guidance, the WEC stated that the statutory definition of "age, illness, infirmity or disability" does not require a voter to meet a particular qualification and "indefinitely confined status need not be permanent."[40] The guidance expressly notes that voters "self-certify" whether they are indefinitely confined.[41] The WEC also instructed municipal clerks to "remove the name of any elector from the list of indefinitely confined electors upon receipt of reliable information that an elector no longer qualifies for that designation and service."[42] The Wisconsin Supreme Court has reviewed the March 29 guidance and deemed it accurate. *See Jefferson v. Dane Cty.*, No. 2020AP557-OA, Order, at *2 (Wis. Mar. 31, 2020) (noting in context of order in response to temporary injunction motion that the WEC guidance "provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time").

[39] https://elections.wi.gov/sites/elections.wi.gov/files/202003/Clerk%20comm%20re.%20Indefinitely%20Confined%203.29.20.pdf (last visited Dec. 6, 2020).
[40] *Id.*
[41] *Id.*
[42] *Id.* at 3.

Plaintiff complains about additional WEC guidance, issued on May 13, 2020, that a clerk cannot remove a voter from the indefinitely confined list based on the clerk's unsupported *belief* that the elector is not indefinitely confined. This does not contradict the statute. The portion cited by Plaintiff was an instruction consistent with decades of interpretation and guidance that voters self-certify whether they are indefinitely confined; and it left in place the clear instruction that clerks should remove a voter from the indefinitely confined list upon receiving reliable information that the voter was no longer indefinitely confined. The WEC's March guidance, with the Wisconsin Supreme Court's imprimatur, still applies. There is no statutory basis for Plaintiff's belief that municipal clerks are obliged to investigate voters claiming to be indefinitely confined.

Notably, Plaintiff has not claimed or provided any evidence that a single voter who claimed indefinitely confined status did so improperly. Plaintiff asserts only his belief that it was odd so many people claimed this status during the COVID-19 pandemic. But it is imminently logical that the pandemic would increase the number of people who considered themselves indefinitely confined. And, because the *Jefferson* lawsuit brought increased attention to the indefinitely confined provision, more people may have known about and chosen to avail themselves of the law. The Jefferson case remains pending before the Wisconsin Supreme Court, where the merits were argued at the end of September. If that court had concerns about voters using (or misusing) the statute for the November election, it could and would have granted additional preliminary relief. It did not do so, and Plaintiff provides no basis for this Court to second-guess that decision.

E. Plaintiff makes no valid claim under the Fourteenth Amendment.

Plaintiff's Equal Protection and Due Process[43] claims, like the Elections and Electors claim, fails because WEC's guidance is entirely consistent with Wisconsin law. To the extent

[43] It is unclear whether Plaintiff is suing as a class of one or is arguing that he represents all Wisconsin voters. If his claim is based on "disparate treatment of Wisconsin voters" (Amend. Cmplt. ¶114) or "all

Plaintiff makes a claim for unequal treatment under Wisconsin's election laws, that also fails because there is no unequal treatment, or a rational basis exists for the laws.

The "rational-basis variant of substantive due process differs little, if at all, from the most deferential form of equal protection review." *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576 (7th Cir. 2014). "Unless a governmental practice encroaches on a fundamental right," substantive due process and equal protection "requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." *Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003). Substantive due process is "not a blanket protection against unjustifiable interferences with property." *Id.* at 467. "The rational-basis requirement sets the legal bar low and simply requires a rational relationship between the disparity of treatment and some legitimate governmental purpose." *D.B. ex rel. Kurtis B. v. Kopp*, 725 F.3d 681, 686 (7th Cir. 2013) (internal quotation marks omitted).

From the outset, it is important to note that the WEC's guidance treated all voters equally. Any voter had the opportunity to obtain an absentee ballot. Any voter believing themselves indefinitely confined could notify their municipal clerk.

Speculation and conjecture regarding switched votes cannot establish an equal protection or due process claim. *See King*, Op. & Order, at *34 ("with nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs' equal protection claim fails"); *Wood*, 2020 WL 6817513, at *9 ("Wood cannot transmute allegations that state officials violated state law into a claim that his vote was somehow weighted differently than others."); *Bognet*, 2020 WL 6686120, at *12 ("Put another way, a vote

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candidates, political parties, and voters" (*id.* ¶115), then there is no standing because that would be a general grievance as opposed to a concrete injury to Plaintiff. If his claim is individual, he has no injury.

Plaintiff does not specify whether he is making a procedural or substantive due process claim. However, it appears to be a substantive due process claim.

cast by fraud or mailed in by the wrong person through mistake, or otherwise counted illegally, has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged." (internal quotation marks omitted)). Plaintiff has not established that any votes were changed or provided any theory as to how votes were diluted.

Even if the Plaintiff had evidence to support his claims, this case would strongly resemble *Hennings v. Grafton*, where six electors requested a new election for several county officers because of "inaccurate tabulation of votes in fifty precincts and 'arbitrary' action by the defendant county clerk as chief election official, all stemming directly or indirectly from the malfunctioning of electronic voting devices." 523 F.2d 861, 862-63 (7th Cir. 1975). Despite the clear evidence of inaccurate vote counts, the court held that "not every election irregularity … will give rise to a constitutional claim and an action under § 1983. Mere violation of a state statute by an election official, for example, will not." *Id.* at 864. The Seventh Circuit continued:

> Voting device malfunction, the failure of election officials to take statutorily prescribed steps to diminish what was at most a theoretical possibility that the devices might be tampered with, and the refusal of those officials after the election to conduct a retabulation, assuming these events to have occurred, fall far short of constitutional infractions, absent aggravating circumstances of fraud or other wilful conduct….

Id. The Seventh Circuit further asserted that "errors and irregularities … are inevitable, and no constitutional guarantee exists to remedy them." *Id.* at 865. This controlling case alone would foreclose any of the claims brought by Plaintiff.

Nonetheless, even the merits show there are no constitutional claims. The Equal Protection Clause does not require uniform treatment, but only that any differences be rationally based on a legitimate government interest. Indefinitely confined voter laws ensure that vulnerable voters—any voter who is indefinitely confined due to "age, physical illness or infirmity or is disabled," Wis. Stat. § 6.86(2)(a)—can safely cast their ballots. Protecting such voters' safety while ensuring they can vote is a legitimate governmental interest.

Other guidance issued by the WEC serves the purpose of ensuring that elections account for the preferences of all eligible voters who choose to participate. Wis. Stat. § 5.01(1) provides that Wisconsin's election laws "shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." Wis. Stat. § 7.50(2) reiterates that point, stating that ballots "shall be counted for the person or referendum question for whom or for which they were intended, so far as the electors' intent can be ascertained from the ballots notwithstanding informality or failure to fully comply with other provisions of chs. 5 to 12." As Chief Justice Roggensack of the Wisconsin Supreme Court recently noted, "The right to vote is protected by Wis. Const. art. III, § 1. Therefore, a vote legally cast and received by the time the polls close on Election Day must be counted if the ballot expresses the will of the voter." *O'Bright v. Lynch*, No. 2020AP1761-OA, Order, at *3, ¶7 (Wis. Oct. 29, 2020) (Roggensack, C.J. concurring).

WEC guidance furthers that purpose while still remaining entirely consistent with absentee voting requirements. For example, the witness address guidance does not remove the requirement for an address, but allows clerks the discretion to help correct that error so a ballot is not discounted because of a technicality. There is nothing nefarious nor illegal with doing so. The WEC's guidance is rationally related to ensuring everyone who wants to safely vote, can.

II. An Adequate Remedy at Law Exists.

The recount procedures under Wis. Stat. § 9.01 unambiguously constitute the "exclusive remedy" for challenging any election results: "EXCLUSIVE REMEDY. This section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." Wis. Stat. § 9.01(11). Section 9.01 generally provides for a recount process for an aggrieved party following an election. Judicial review cannot occur until after a recount, and that appeal must go to state

circuit court. *See* Wis. Stat. § 9.01(6)(a); *Trump v. Wis. Elections Comm'n*, No. 2020AP1971-OA, Order at *2 (Wis. Dec. 3, 2020); *see also id.* (Hagedorn, J. concurring) ("[C]hallenges to election results are also governed by law. … [Section 9.01] provides that these actions should be filed in the circuit court, and spells out detailed procedures for ensuring their orderly and swift disposition. See § 9.01(6)-(8). Consequently, an adequate, and exclusive, state law remedy exists to challenge results of an election."). Given that President Trump is prosecuting an appeal in state court under this exclusive process, and given that Plaintiff has no cognizable interest here distinct from the President's, Plaintiff's motion necessarily fails to meet this prerequisite for a TRO.

III. Plaintiff Will Not Suffer Any Harm from Denial of Injunctive Relief.

Plaintiff must establish "that he will suffer irreparable harm absent preliminary injunctive relief during the pendency of his action." *Whitaker*, 858 F.3d at 1044. Plaintiff has not alleged any harm. Plaintiff asserts his vote has been diluted. However, a "vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential" groups, often racial or ethnic minorities in the context of redistricting. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). The WEC's guidance does not disenfranchise a single voter, nor has it minimized the influence of any groups, protected or otherwise. Plaintiff has not been disenfranchised, nor has he pleaded any specific harm except that his preferred candidate lost the election. This is a generalized grievance, not an actual harm. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam). Allowing the status quo to continue does not harm Plaintiff.

IV. By Contrast, the Requested Relief would Cause Enormous Prejudice to Defendants and Wisconsin Voters.

The relief requested by the Plaintiff would retroactively deprive millions of Wisconsin voters of their constitutional right to vote in the 2020 presidential election. Plaintiff's

unprecedented request would nullify the outcome of an entire election. That harm is unprecedented, and would crack the bedrock of representative democracy.

The U.S. Supreme Court has repeatedly emphasized the fundamental importance of the right to vote. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Voting is "one of the most fundamental rights of our citizens." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). Plaintiff's request undermines a belief this country was founded upon. A greater public harm can hardly be conceived.

Besides the obvious harm to the millions of Wisconsin voters, granting the Plaintiff's order would have other irreparable consequences. The State of Wisconsin and its 1,850 municipalities spent millions of dollars preparing for and conducting the November election. Governor Evers enlisted 400 members of the National Guard to ensure the election was properly staffed. All of the resources that went into protecting voters and election officials would be for naught if the Plaintiff obtains his requested relief. The relief, if granted, would also undermine the State's ability to conduct its own elections, and open the door to additional frivolous challenges in the future. Not only that, but the requested relief would raise serious federalism and separation of powers questions. Those harms heavily weigh against Plaintiff. Accordingly, the motion should be denied.

CONCLUSION

For the reasons above, Plaintiff's Amended Motion for Temporary Restraining Order and Preliminary Injunction to Be Considered in an Expedited Manner (Dkt. 10) should be denied.

Dated: December 7, 2020

Respectfully submitted,

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EXHIBIT 1

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You are hereby notified that the Court has entered the following order:

No. 2020AP1930-OA Wisconsin Voters Alliance v. Wisconsin Elections Commission

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70 and a supplement thereto, a supporting legal memorandum, and supporting expert reports have been filed on behalf of petitioners, Wisconsin Voters Alliance, et al. A response to the petition has been filed by respondents, Wisconsin Elections Commission, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudsen, and Robert F. Spindell, and a separate response has been filed by respondent Governor Tony Evers. Amicus briefs regarding the issue of whether to grant leave to commence an original action have been filed by (1) Christine Todd Whitman, et al; (2) the City of Milwaukee; (3) Wisconsin State Conference NAACP, et al.; and (4) the Center for Tech and Civic Life. In addition, a motion to intervene has been filed by proposed intervenor-respondent, Democratic National Committee.

After considering all of the filings, we conclude that this petition does not satisfy our standards for granting leave to commence an original action. Although the petition raises time-

sensitive questions of statewide significance, "issues of material fact [would] prevent the court from addressing the legal issues presented." State ex rel. Ozanne v. Fitzgerald, 2011 WI 43, ¶19, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser, J., concurring). It is therefore not an appropriate case in which to exercise our original jurisdiction. Accordingly,

IT IS ORDERED that the petition for leave to commence an original action is denied; and

IT IS FURTHER ORDERED that the motion to intervene is denied as moot.

BRIAN HAGEDORN, J., (*concurring*). The Wisconsin Voters Alliance and a group of Wisconsin voters bring a petition for an original action raising a variety of questions about the operation of the November 3, 2020 presidential election. Some of these legal issues may, under other circumstances, be subject to further judicial consideration. But the real stunner here is the sought-after remedy. We are invited to invalidate the entire presidential election in Wisconsin by declaring it "null"—yes, the whole thing. And there's more. We should, we are told, enjoin the Wisconsin Elections Commission from certifying the election so that Wisconsin's presidential electors can be chosen by the legislature instead, and then compel the Governor to certify those electors. At least no one can accuse the petitioners of timidity.

Such a move would appear to be unprecedented in American history. One might expect that this solemn request would be paired with evidence of serious errors tied to a substantial and demonstrated set of illegal votes. Instead, the evidentiary support rests almost entirely on the unsworn expert report[1] of a former campaign employee that offers statistical estimates based on call center samples and social media research.

This petition falls far short of the kind of compelling evidence and legal support we would undoubtedly need to countenance the court-ordered disenfranchisement of every Wisconsin voter. The petition does not even justify the exercise of our original jurisdiction.

As an initial matter, the Wisconsin Supreme Court is not a fact-finding tribunal. Yet the petition depends upon disputed factual claims. In other words, we couldn't just accept one side's description of the facts or one side's expert report even if we were inclined to believe them.[2] That alone means this case is not well-suited for an original action. The petition's legal support is no less wanting. For example, it does not explain why its challenge to various election processes

[1] After filing their petition for original action, the Petitioners submitted a second expert report. But the second report only provides additional computations based on the assumptions and calculations in the initial expert report.

[2] The Attorney General and Governor offer legitimate arguments that this report would not even be admissible evidence under Wis. Stat. § 907.02 (2017-18).

All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

comes after the election, and not before. Nor does it grapple with how voiding the presidential election results would impact every other race on the ballot, or consider the import of election statutes that may provide the "exclusive remedy."[3] These are just a few of the glaring flaws that render the petition woefully deficient. I therefore join the court's order denying the original action.

Nonetheless, I feel compelled to share a further observation. Something far more fundamental than the winner of Wisconsin's electoral votes is implicated in this case. At stake, in some measure, is faith in our system of free and fair elections, a feature central to the enduring strength of our constitutional republic. It can be easy to blithely move on to the next case with a petition so obviously lacking, but this is sobering. The relief being sought by the petitioners is the most dramatic invocation of judicial power I have ever seen. Judicial acquiescence to such entreaties built on so flimsy a foundation would do indelible damage to every future election. Once the door is opened to judicial invalidation of presidential election results, it will be awfully hard to close that door again. This is a dangerous path we are being asked to tread. The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable.

I do not mean to suggest this court should look the other way no matter what. But if there is a sufficient basis to invalidate an election, it must be established with evidence and arguments commensurate with the scale of the claims and the relief sought. These petitioners have come nowhere close. While the rough and tumble world of electoral politics may be the prism through which many view this litigation, it cannot be so for us. In these hallowed halls, the law must rule.

Our disposal of this case should not be understood as a determination or comment on the merits of the underlying legal issues; judicial review of certain Wisconsin election practices may be appropriate. But this petition does not merit further consideration by this court, much less grant us a license to invalidate every single vote cast in Wisconsin's 2020 presidential election.

I am authorized to state that Justices ANN WALSH BRADLEY, REBECCA FRANK DALLET, and JILL J. KAROFSKY join this concurrence.

ROGGENSACK, C.J. (*dissenting*). It is critical that voting in Wisconsin elections not only be fair, but that the public also perceives voting as having been fairly conducted.

This is the third time that a case filed in this court raised allegations about purely legal questions that concern Wisconsin Elections Commission (WEC) conduct during the November 3,

[3] See Wis. Stat. § 9.01(11) (providing that § 9.01 "constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process"); Wis. Stat. § 5.05(2m)(k) (describing "[t]he commission's power to initiate civil actions" under § 5.05(2m) as the "exclusive remedy for alleged civil violations of chs. 5 to 10 or 12").

2020, presidential election.[4] This is the third time that a majority of this court has turned its back on pleas from the public to address a matter of statewide concern that requires a declaration of what the statutes require for absentee voting. I dissent and write separately because I have concluded that the court has not meet its institutional responsibilities by repeatedly refusing to address legal issues presented in all three cases.

I agree with Justice Hagedorn that we are not a circuit court, and therefore, generally, we do not take cases for which fact-finding is required. Green for Wisconsin v. State Elections Bd., 2006 WI 120, 297 Wis. 2d 300, 301, 723 N.W.2d 418. However, when the legal issue that we wish to address requires it, we have taken cases that do require factual development, referring any necessary factual determinations to a referee or to a circuit court. State ex rel. LeFebre v. Israel, 109 Wis. 2d 337, 339, 325 N.W.2d 899 (1982); State ex rel White v. Gray, 58 Wis. 2d 285, 286, 206 N.W.163 (1973).

We also have taken cases where the issues we wish to address are purely legal questions for which no factual development is required in order to state what the law requires. Wisconsin Legislature v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. The statutory authority of WEC is a purely legal question. There is no factual development required for us to declare what the law requires in absentee voting.

Justice Hagedorn is concerned about some of the relief that Petitioners request. He begins his concurrence saying, "the real stunner here is the sought after remedy." He next relates, "The relief being sought by the petitioners is the most dramatic invocation of judicial power I have ever seen." Then, he concludes with, "this petition does not merit further consideration by this court, much less grant us a license to invalidate every single vote cast in Wisconsin's 2020 presidential election."[5]

Those are scary thoughts, but Justice Hagedorn has the cart before the horse in regard to our consideration of this petition for an original action. We grant petitions to exercise our jurisdiction based on whether the legal issues presented are of state wide concern, not based on the remedies requested. Petition of Heil, 230 Wis. 428, 284 N.W.42 (1938).

Granting a petition does not carry with it the court's view that the remedy sought is appropriate for the legal issues raised. Historically, we often do not provide all the relief requested. Bartlett v. Evers, 2020 WI 68, ¶9, 393 Wis. 2d 172, 945 N.W.2d 685 (upholding some but not all partial vetoes). There have been occasions when we have provided none of the relief requested by the petitioner, but nevertheless declared the law. See Sands v. Menard, Inc., 2010 WI 96, ¶46, 328 Wis. 2d 647, 787 N.W.2d 384 (concluding that while reinstatement is the preferred remedy under

[4] Trump v. Evers, No. 2020AP1971-OA, unpublished order (Wis. S. Ct. Dec. 3, 2020); Mueller v. WEC, No. 2020AP1958-OA, unpublished order (Wis. S. Ct. Dec. 3, 2020) and Wisconsin Voters Alliance v. WEC, No. 2020AP193-OA.

[5] Justice Hagedorn forgets to mention that one form of relief sought by Petitioners is, "Any other relief the Court deems appropriate."

Title VII, it is an equitable remedy that may or may not be appropriate); Coleman v. Percy, 96 Wis. 2d 578, 588-89, 292 N.W.2d 615 (1980) (concluding that the remedy Coleman sought was precluded).

We have broad subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction is grounded in the Wisconsin Constitution. Wis. Const., art. VII, Section 3(2); City of Eau Claire v. Booth, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738.

I dissent because I would grant the petition and address the people of Wisconsin's concerns about whether WEC's conduct during the 2020 presidential election violated Wisconsin statutes. As I said as I began, it is critical that voting in Wisconsin elections not only be fair, but that the public also perceives voting as having been fairly conducted. The Wisconsin Supreme Court should not walk away from its constitutional obligation to the people of Wisconsin for a third time.

I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER and REBECCA GRASSL BRADLEY join this dissent.

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EXHIBIT 2

2020 WL 6821992
Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

DONALD J. TRUMP FOR PRESIDENT, INC., et al., Plaintiffs,

v.

Kathy BOOCKVAR, et al., Defendants.

No. 4:20-CV-02078
|
Filed November 21, 2020

Synopsis

Background: Voters and President's reelection campaign brought action against Secretary of the Commonwealth of Pennsylvania and county boards of elections, seeking to invalidate millions of votes cast by Pennsylvanians in presidential election during COVID-19 pandemic based on allegations that Secretary's authorization of notice-and-cure procedure for procedurally defective mail-in ballots violated the Equal Protection Clause and that poll watchers were impermissibly excluded from canvass. Secretary and county boards of elections moved to dismiss.

Holdings: The District Court, Matthew W. Brann, J., held that:

voters lacked standing to pursue action;

campaign lacked associational standing to pursue action;

campaign lacked competitive standing to pursue action;

rational basis existed for Secretary's decision to provide counties with discretion to use notice-and-cure procedure for procedurally defective mail-in ballots, and thus, Secretary's decision did not violate voters' rights under the Equal Protection Clause; and

campaign failed to allege that its poll watchers were treated differently than opposing party presidential candidate's poll watchers, as required to state equal protection claim for allegedly excluding watchers from canvass.

Motion granted.

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MEMORANDUM OPINION

Matthew W. Brann, United States District Judge

***1** Pending before this Court are various motions to dismiss Plaintiffs' First Amended Complaint. Plaintiffs in this matter are Donald J. Trump for President, Inc. (the "Trump Campaign"), and two voters, John Henry and Lawrence Roberts (the "Individual Plaintiffs").[1] Defendants, who filed these motions to dismiss, include seven Pennsylvania counties (the "Defendant Counties"), as well as Secretary of the Commonwealth Kathy Boockvar.[2]

I. INTRODUCTION

In this action, the Trump Campaign and the Individual Plaintiffs (collectively, the "Plaintiffs") seek to discard millions of votes legally cast by Pennsylvanians from all corners – from Greene County to Pike County, and everywhere in between. In other words, Plaintiffs ask this Court to disenfranchise almost seven million voters. This Court has been unable to find any case in which a plaintiff has sought such a drastic remedy in the contest of an election, in terms of the sheer volume of votes asked to be invalidated. One might expect that when seeking such a startling outcome, a plaintiff would come formidably armed with compelling legal arguments and factual proof of rampant corruption, such that this Court would have no option but to regrettably grant the proposed injunctive relief despite the impact it would have on such a large group of citizens.

That has not happened. Instead, this Court has been presented with strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence. In the United States of America, this cannot justify the disenfranchisement of a single voter, let alone all the voters of its sixth most populated state. Our people, laws, and institutions demand more. At bottom, Plaintiffs have failed to meet their burden to state a claim upon which relief may be granted. Therefore, I grant Defendants' motions and dismiss Plaintiffs' action with prejudice.

II. BACKGROUND

A. Legal and Factual Background

The power to regulate and administer federal elections arises from the Constitution.[3] "Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power 'had to be delegated to, rather than reserved to by, the States.' "[4] Consequently, the Elections Clause "delegated to the States the power to regulate the 'Times, Places, and Manner of holding Elections for Senators and Representatives,' subject to a grant of authority to Congress to 'make or alter such Regulations.' "[5] Accordingly, States' power to "regulate the incidents of such elections, including balloting" is limited to "the exclusive delegation of power under the Elections Clause."[6]

Pennsylvania regulates the "times, places, and manner" of its elections through the Pennsylvania Election Code.[7] The Commonwealth's Constitution mandates that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[8] Recognizing this as a foundational principle, the Pennsylvania Supreme Court has declared that the purpose of the Election Code is to promote "freedom of choice, a fair election and an honest election return."[9]

***2** In October 2019, the General Assembly of Pennsylvania enacted Act 77, which, "for the first time in Pennsylvania," extended the opportunity for all registered voters to vote by mail.[10] Following the beginning of the COVID-19 outbreak in March 2020, the General Assembly enacted laws regulating the mail-in voting system.[11] Section 3150.16 of the Election Code sets forth procedural requirements that voters must follow in order for their ballot to be counted.[12] These procedures require, for example, that voters mark their ballots in pen or pencil, place them in secrecy envelopes, and that ballots be received by the county elections board on or before 8:00 P.M. on Election Day.[13]

Nowhere in the Election Code is any reference to "curing" ballots, or the related practice of "notice-and-cure." This practice involves notifying mail-in voters who submitted procedurally defective mail-in ballots of these deficiencies

and allowing those voters to cure their ballots.[14] Notified voters can cure their ballots and have their vote counted by requesting and submitting a provisional ballot.[15]

Recently, the Supreme Court of Pennsylvania in *Democratic Party of Pennsylvania v. Boockvar* addressed whether counties are *required* to adopt a notice-and-cure policy under the Election Code.[16] Holding that they are not, the court declined to explicitly answer whether such a policy is necessarily *forbidden*.[17]

Following this decision, Secretary Boockvar sent an email on November 2, 2020 encouraging counties to "provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected" so those ballots could be cured.[18] From the face of the complaint, it is unclear which counties were sent this email, which counties received this email, or which counties ultimately followed Secretary Boockvar's guidance.

Some counties chose to implement a notice-and-cure procedure while others did not.[19] Importantly, however, Plaintiffs allege only that Philadelphia County implemented such a policy.[20] In contrast, Plaintiffs also claim that Lancaster and York Counties (as well as others) did not adopt any cure procedures and thus rejected all ballots cast with procedural deficiencies instead of issuing these voters provisional ballots.[21]

Both Individual Plaintiffs had their ballots cancelled in the 2020 Presidential Election.[22] John Henry submitted his mail-in ballot to Lancaster County; however, it was cancelled on November 6, 2020 because he failed to place his ballot in the required secrecy envelope.[23] Similarly, after submitting his ballot to Fayette County, Lawrence Roberts discovered on November 9, 2020 that his ballot had been cancelled for an unknown reason.[24] Neither was given an opportunity to cure his ballot.[25]

B. The 2020 Election Results

In large part due to the coronavirus pandemic still plaguing our nation, the rate of mail-in voting in 2020 was expected to increase dramatically. As anticipated, millions more voted by mail this year than in past elections. For weeks before Election Day, ballots were cast and collected. Then, on November 3, 2020, millions more across Pennsylvania and the country descended upon their local voting precincts and cast ballots for their preferred candidates. When the votes were counted, the Democratic Party's candidate for President, Joseph R. Biden Jr., and his running-mate, Kamala D. Harris, were determined to have received more votes than the incumbent ticket, President Donald J. Trump and Vice President Michael R. Pence. As of the day of this Memorandum Opinion, the Biden/Harris ticket had received 3,454,444 votes, and the Trump/Pence ticket had received 3,373,488 votes, giving the Biden ticket a lead of more than 80,000 votes, per the Pennsylvania state elections return website.[26] These results will become official when counties certify their results to Secretary Boockvar on November 23, 2020 – the result Plaintiffs seek to enjoin with this lawsuit.

C. Procedural History

***3** Although this case was initiated less than two weeks ago, it has already developed its own tortured procedural history. Plaintiffs have made multiple attempts at amending the pleadings, and have had attorneys both appear and withdraw in a matter of seventy-two hours. There have been at least two perceived discovery disputes, one oral argument, and a rude and ill-conceived voicemail which distracted the Court's attention from the significant issues at hand.[27] The Court finds it helpful to place events in context before proceeding further.

In the evening of November 9, 2020, Plaintiffs filed suit in this Court against Secretary Boockvar, as well as the County Boards of Elections for the following counties: Allegheny, Centre, Chester, Delaware, Montgomery, Northampton, and Philadelphia.[28] The original complaint raised seven counts; two equal-protection claims, two due-process claims, and three claims under the Electors and Elections Clauses.[29]

The following day, I convened a telephonic status conference with the parties to schedule future proceedings. During that conference, I learned that several organizations, including the Democratic National Committee, sought to file intervention motions with the Court. Later that day, I set a briefing schedule.[30] Additionally, November 17, 2020 was set aside for oral argument on any motions to dismiss, and the Court further told the parties to reserve November 19, 2020 in their calendars in the event that the Court determined that an evidentiary hearing was necessary. Subsequent to the Court's scheduling order, the proposed-intervenors filed their motions, and the parties filed their briefings. Plaintiffs then

filed a motion for a preliminary injunction on November 12, 2020.[31]

On November 12, 2020, Plaintiffs also underwent their first change in counsel. Attorneys Ronald L. Hicks, Jr., and Carolyn B. McGee with Porter Wright Morris & Arthur LLP filed a motion seeking to withdraw from the case. The Court granted this motion, and Plaintiffs retained two attorneys from Texas, John Scott and Douglas Brian Hughes, to serve as co-counsel to their original attorney, Linda A. Kerns.

The next day, November 13, 2020, was a relatively quiet day on the docket for this case, but an important one for the parties. That day, the United States Court of Appeals for the Third Circuit issued a decision in *Bognet v. Secretary Commonwealth of Pennsylvania*.[32] This decision, though not factually connected to this matter, addressed issues of standing and equal protection relevant to the Plaintiffs' claims.[33]

Thereafter, on Sunday, November 15, 2020 – the day Plaintiffs' response to Defendants' motions to dismiss was due – Plaintiffs filed a First Amended Complaint (the "FAC") with the Court. This new complaint excised five of the seven counts from the original complaint, leaving just two claims: one equal-protection claim, and one Electors and Elections Clauses claim.[34] In addition, a review of the redline attached to the FAC shows that Plaintiffs deleted numerous allegations that were pled in the original complaint.

Plaintiffs acknowledge that under the Third Circuit's decision in *Bognet*, this Court cannot find that Plaintiffs have standing for their Elections and Electors Clauses claim in the FAC. Plaintiffs represent that they have included this claim in the FAC to preserve the argument for appellate review. Because Plaintiffs have made this concession, and because the Third Circuit's decision in *Bognet* is clear, this Court dismisses Count II for lack of standing without further discussion.

***4** Defendants filed new motions to dismiss and briefs in support thereof on November 16, 2020. That evening, less than 24 hours before oral argument was to begin, Plaintiffs instituted a second series of substitutions in counsel. Ms. Kerns, along with Mr. Scott and Mr. Hughes, requested this Court's permission to withdraw from the litigation. I granted the motions of the Texan attorneys because they had been involved with the case for approximately seventy-two hours. Because oral argument was scheduled for the following day, however, and because Ms. Kerns had been one of the original attorneys in this litigation, I denied her request. I believed it best to have some semblance of consistency in counsel ahead of the oral argument. That evening, attorney Marc A. Scaringi entered an appearance on behalf of Plaintiffs. Furthermore, Mr. Scaringi asked the Court to postpone the previously-scheduled oral argument and evidentiary hearing. The Court denied Mr. Scaringi's motion for a continuance; given the emergency nature of this proceeding, and the looming deadline for Pennsylvania counties to certify their election results, postponing those proceedings seemed imprudent.

On November 17, 2020, the Court prepared to address the parties in oral argument. That morning, attorney Rudolph W. Giuliani entered his appearance on behalf of Plaintiffs. With this last-minute appearance, Plaintiffs had made their final addition to their representation.[35] At the conclusion of the argument, I determined that an evidentiary hearing (previously scheduled to take place on November 19, 2020) was no longer needed and cancelled that proceeding. Instead, I imposed a new briefing schedule in light of the FAC's filing, which arguably mooted the initial motions to dismiss. The parties submitted briefing on the issues.[36]

D. Plaintiffs' Claims

Plaintiffs' only remaining claim alleges a violation of equal protection. This claim, like Frankenstein's Monster, has been haphazardly stitched together from two distinct theories in an attempt to avoid controlling precedent. The general thrust of this claim is that it is unconstitutional for Pennsylvania to give counties discretion to adopt a notice-and-cure policy. Invoking *Bush v. Gore*, Plaintiffs assert that such local control is unconstitutional because it creates an arbitrary system where some persons are allowed to cure procedurally defective mail-in ballots while others are not.

Apparently recognizing that such a broad claim is foreclosed under the Third Circuit's decision in *Bognet*, Plaintiffs try to merge it with a much simpler theory of harm based on the cancellation of Individual Plaintiffs' ballots in order to satisfy standing.[37] Because Individual Plaintiffs' votes were invalidated as procedurally defective, Individual Plaintiffs argue, for purposes of standing, that their claim is based on the denial of their votes. But on the merits, Plaintiffs appear to have abandoned this theory of harm and instead raise their broader argument that the lack of a uniform prohibition against notice-and-cure is unconstitutional.[38] They assert this

theory on behalf of both Individual Plaintiffs and the Trump Campaign.

***5** That Plaintiffs are trying to mix-and-match claims to bypass contrary precedent is not lost on the Court. The Court will thus analyze Plaintiffs' claims as if they had been raised properly and asserted as one whole for purposes of standing *and* the merits. Accordingly, the Court considers Plaintiffs as alleging two equal-protection claims. The first being on behalf of Individual Plaintiffs whose ballots were cancelled. And the second being on behalf of the Trump Campaign and raising the broad *Bush v. Gore* arguments that Plaintiffs allege is the main focus of this lawsuit.[39] The Court analyzes both claims separately for purposes of standing and the merits analysis.

III. STANDING

Plaintiffs lack standing to raise either of their claims. "Article III of the United States Constitution limits the power of the federal judiciary to 'cases' and 'controversies.' "[40] To satisfy the case-or-controversy requirement, a plaintiff must establish that they have standing.[41] Standing is a "threshold" issue.[42] It is an "irreducible constitutional minimum," without which a federal court lacks jurisdiction to rule on the merits of an action.[43] Consequently, federal courts are obligated to raise the issue of standing sua sponte.[44]

The plaintiff bears the burden of establishing standing.[45] To demonstrate standing, he must show: (1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.[46] "In assessing whether a plaintiff has carried this burden, [courts must] separate [the] standing inquiry from any assessment of the merits of the plaintiff's claim."[47] "To maintain this fundamental separation between standing and merits at the dismissal stage, [courts] assume for the purposes of [the] standing inquiry that a plaintiff has stated valid legal claims."[48] "While [the Court's] standing inquiry may necessarily reference the 'nature and source of the claims asserted,' [the Court's] focus remains on whether the plaintiff is the proper party to bring those claims."[49]

As discussed above, Plaintiffs allege two possible theories of standing. First, Individual Plaintiffs argue that their votes have been unconstitutionally denied. Under this theory, Individual Plaintiffs must show that Defendant Counties' use of the notice-and-cure procedure, as well as Secretary Boockvar's authorization of this procedure, denied Individual Plaintiffs the right to vote.[50] Second, the Trump Campaign maintains that it has competitive standing.[51]

***6** Both theories are unavailing. Assuming, as this Court must, that Plaintiffs state a valid equal-protection claim, the Court finds that Individual Plaintiffs have adequately established an injury-in-fact. However, they fail to establish that it was Defendants who caused these injuries and that their purported injury of vote-denial is adequately redressed by invalidating the votes of others. The Trump Campaign's theory also fails because neither competitive nor associational standing applies, and it does not assert another cognizable theory of standing.

A. Voters

1. Injury in Fact

Individual Plaintiffs have adequately demonstrated that they suffered an injury-in-fact. "[A] person's right to vote is 'individual and personal in nature.' "[52] Accordingly, the denial of a person's right to vote is typically always sufficiently concrete and particularized to establish a cognizable injury.[53] This is true regardless of whether such a harm is widely shared.[54] So long as an injury is concrete, courts will find that an injury in fact exists despite the fact that such harm is felt by many.[55]

This is precisely the situation presented here. Individual Plaintiffs have adequately pled that their votes were denied. As discussed above, the denial of a vote is a highly personal and concrete injury. That Individual Plaintiffs had their ballots cancelled and thus invalidated is sufficiently personal to establish an injury in fact. It is of no matter that many persons across the state might also have had their votes invalidated due to their county's failure to implement a curing procedure. Accordingly, the Court finds that Individual Plaintiffs have established injury in fact.

2. Causation

However, Individual Plaintiffs fail to establish that Defendant Counties or Secretary Boockvar actually caused their injuries. First, Defendant Counties, by Plaintiffs' own pleadings, had

nothing to do with the denial of Individual Plaintiffs' ability to vote. Individual Plaintiffs' ballots were rejected by Lancaster and Fayette Counties, neither of which is a party to this case. None of Defendant Counties received, reviewed, or discarded Individual Plaintiffs' ballots. Even assuming that Defendant Counties unconstitutionally allowed *other* voters to cure their ballots, that alone cannot confer standing on Plaintiffs who seek to challenge the denial of *their* votes.

Second, Individual Plaintiffs have not shown that their purported injuries are fairly traceable to Secretary Boockvar. Individual Plaintiffs have entirely failed to establish any causal relationship between Secretary Boockvar and the cancellation of their votes. The only connection the Individual Plaintiffs even attempt to draw is that Secretary Boockvar sent an email on November 2, 2020 to some number of counties, encouraging them to adopt a notice-and-cure policy. However, they fail to allege which counties received this email or what information was specifically included therein. Further, that this email encouraged counties to adopt a notice-and-cure policy does not suggest in any way that Secretary Boockvar intended or desired Individual Plaintiffs' votes to be cancelled. To the contrary, this email suggests that Secretary Boockvar encouraged counties to allow exactly these types of votes to be counted. Without more, this Court cannot conclude that Individual Plaintiffs have sufficiently established that their injuries are fairly traceable to Secretary Boockvar.[56]

3. Redressability

***7** In large part because the Individual Plaintiffs cannot establish that their injury is "fairly traceable" to the Defendants' conduct, they also cannot show that their injury could be redressed by a favorable decision from this Court.[57] Beyond that substantial hurdle, however, a review of the injury alleged and the relief sought plainly shows that the Individual Plaintiffs' injury would not be redressable. The Individual Plaintiffs base their equal-protection claim on the theory that their right to vote was denied. Their prayer for relief seeks, in pertinent part: (1) an order, declaration, or injunction from this Court prohibiting the Defendants from certifying the results of the 2020 General Election in Pennsylvania on a Commonwealth-wide basis; and (2) another order prohibiting Defendants from certifying the results which include ballots the Defendants permitted to be cured.

Neither of these orders would redress the injury the Individual Plaintiffs allege they have suffered. Prohibiting certification of the election results would not reinstate the Individual Plaintiffs' right to vote. It would simply deny more than 6.8 million people *their* right to vote. "Standing is measured based on the theory of harm and the specific relief requested."[58] It is not "dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."[59] Here, the answer to invalidated ballots is not to invalidate millions more. Accordingly, Plaintiffs have not shown that their injury would be redressed by the relief sought.

B. Trump Campaign

The standing inquiry as to the Trump Campaign is particularly nebulous because neither in the FAC nor in its briefing does the Trump Campaign clearly assert what its alleged injury is. Instead, the Court was required to embark on an extensive project of examining almost every case cited to by Plaintiffs to piece together the theory of standing as to this Plaintiff – the Trump Campaign.

The Trump Campaign first posits that "as a political committee for a federal candidate," it has "Article III standing to bring this action."[60] On its face, this claim is incorrect. Simply being a political committee does not obviate the need for an injury-in-fact, nor does it automatically satisfy the other two elements of standing.

For this proposition, the Trump Campaign relies on two federal cases where courts found associational standing by a political party's state committee. Therefore, the Court considers whether the Trump Campaign can raise associational standing, but finds that those cases are inapposite.[61] First, a candidate's political committee and a political party's state committee are not the same thing. Second, while the doctrine of associational standing is well established, the Trump Campaign overlooks a particularly relevant, very recent decision from another federal court – one where the Trump Campaign itself argued that it had associational standing. In *Donald J. Trump for President, Inc. v. Cegavske*,[62] the Trump Campaign asserted associational standing, and that court rejected this theory.

Associational standing allows an entity to bring suit on behalf of members upon a showing that: (1) "its members would otherwise have standing to sue in their own right;" (2) "the

interests it seeks to protect are germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[63]

***8** In *Cegavske* (another case in which the Trump Campaign alleged violations of equal protection), the court found that the Trump Campaign failed to satisfy the second prong of associational standing because it "represents only Donald J. Trump and his 'electoral and political goals' of reelection."[64] That court noted that while the Trump Campaign might achieve its purposes through its member voters, the "constitutional interests of those voters are wholly distinct" from that of the Trump Campaign.[65] No different here. Even if the Individual Plaintiffs attempted to vote for President Trump, their constitutional interests are different, precluding a finding of associational standing. In any event, because the Individual Plaintiffs lack standing in this case, the Trump Campaign cannot satisfy the first prong of associational standing either.

The Trump Campaign's second theory is that it has " 'competitive standing' based upon disparate state action leading to the 'potential loss of an election.' "[66] Pointing to a case from the United States Court of Appeals for the Ninth Circuit, *Drake v. Obama*,[67] the Trump Campaign claims this theory proves injury-in-fact. First, the Court finds it important to emphasize that the term "competitive standing" has specific meaning in this context. Second, the Trump Campaign's reliance on the theory of competitive standing under *Drake v. Obama* is, at best, misguided. Subsequent case law from the Ninth Circuit has explained that competitive standing "is the notion that 'a candidate or his political party has standing to challenge the *inclusion of an allegedly ineligible rival on the ballot*, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election.' "[68] In the present matter, there is no allegation that the Democratic Party's candidate for President, or any other candidate, was ineligible to appear on the ballot.

Examination of the other case law cited to by Plaintiffs contradicts their theory that competitive standing is applicable here for the same reason. For example, in *Texas Democratic Party v. Benkiser*, the United States Court of Appeals for the Fifth Circuit found competitive standing in a case in which the Democratic Party petitioned against the decision to deem a candidate ineligible and replace him with another.[69] Likewise, in *Schulz v. Williams*, the United States Court of Appeals for the Second Circuit found competitive standing where the Conservative party alleged an injury in fact by arguing that a candidate from the Libertarian Party of New York was improperly placed on the ballot for the Governor's race in 1994.[70] By way of yet another example, Plaintiffs' citation to *Fulani v. Hogsett* makes the same point; competitive standing applies to challenges regarding the eligibility of a candidate. There, the Indiana Secretary of State was required to certify the names of candidates for President by a certain date.[71] When the Secretary failed to certify the Democratic and Republican candidates by that date, the New Alliance party challenged the inclusion of those candidates on the ballot, arguing that allowing these ineligible candidates constituted an injury-in-fact.[72] Three other cases relied on by Plaintiffs illustrate separate grounds for stating an injury in fact, all still relating to ballot provisions.[73]

***9** It is telling that the only case from the Third Circuit cited to by Plaintiffs, *Marks v. Stinson*, does not contain a discussion of competitive standing or any other theory of standing applicable in federal court.[74] Simply pointing to another case where a competitor in an election was found to have standing does not establish *competitive standing* in this matter. Without more, this Court declines to take such an expansive view of the theory of competitive standing, particularly given the abundance of guidance from other Circuits, based on Plaintiffs' own citations, limiting the use of this doctrine.

The Trump Campaign has not offered another theory of standing, and therefore, cannot meet its burden of establishing Article III jurisdiction. To be clear, this Court is not holding that a political campaign can never establish standing to challenge the outcome of an election; rather, it merely finds that in this case, the Trump Campaign has not pled a cognizable theory.[75]

IV. MOTION TO DISMISS 12(b)(6)

A. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), the Court dismisses a complaint, in whole or in part, if the plaintiff has failed to "state a claim upon which relief can be granted." A motion to dismiss "tests the legal sufficiency of a claim"[76] and "streamlines litigation by dispensing with needless discovery and factfinding."[77] "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."[78]

This is true of any claim, "without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one."[79]

Following the Roberts Court's "civil procedure revival,"[80] the landmark decisions of *Bell Atlantic Corporation v. Twombly*[81] and *Ashcroft v. Iqbal*[82] tightened the standard that district courts must apply to 12(b)(6) motions.[83] These cases "retired" the lenient "no-set-of-facts test" set forth in *Conley v. Gibson* and replaced it with a more exacting "plausibility" standard.[84]

Accordingly, after *Twombly* and *Iqbal*, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' "[85] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[86] "Although the plausibility standard does not impose a probability requirement, it does require a pleading to show more than a sheer possibility that a defendant has acted unlawfully."[87] Moreover, "[a]sking for plausible grounds ... calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [wrongdoing]."[88]

***10** The plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[89] No matter the context, however, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' "[90]

When disposing of a motion to dismiss, the Court "accept[s] as true all factual allegations in the complaint and draw[s] all inferences from the facts alleged in the light most favorable to [the plaintiff]."[91] However, "the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions."[92] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[93]

As a matter of procedure, the Third Circuit has instructed that:

> Under the pleading regime established by *Twombly* and *Iqbal*, a court reviewing the sufficiency of a complaint must take three steps. First, it must tak[e] note of the elements [the] plaintiff must plead to state a claim. Second, it should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, [w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.[94]

B. Equal Protection

Even if Plaintiffs had standing, they fail to state an equal-protection claim. The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[95] The principle of equal protection is fundamental to our legal system because, at its core, it protects the People from arbitrary discrimination at the hands of the State.

But, contrary to Plaintiffs' assertions, not all "unequal treatment" requires Court intervention.[96] The Equal Protection Clause "does not forbid classifications."[97] It simply keeps governmental decisionmakers from treating similarly situated persons differently.[98] The government could not function if complete equality were required in all situations. Consequently, a classification resulting in "some inequality" will be upheld unless it is based on an inherently suspect characteristic or "jeopardizes the exercise of a fundamental right."[99]

One such fundamental right, at issue in this case, is the right to vote. Voting is one of the foundational building blocks of our democratic society, and that the Constitution firmly protects this right is "indelibly clear."[100] All citizens of the United States have a constitutionally protected right to vote.[101] And all citizens have a constitutionally protected right to have their votes counted.[102]

***11** With these background principles firmly rooted, the Court turns to the merits of Plaintiffs' equal-protection claims. The general gist of their claims is that Secretary Boockvar, by failing to prohibit counties from implementing a notice-and-cure policy, and Defendant Counties, by adopting such a policy, have created a "standardless" system and thus unconstitutionally discriminated against Individual Plaintiffs.

Though Plaintiffs do not articulate why, they also assert that this has unconstitutionally discriminated against the Trump Campaign.

As discussed above, the Court will address Individual Plaintiffs' and the Trump Campaign's claims separately. Because Individual Plaintiffs premised standing on the purported wrongful cancellation of their votes, the Court will only analyze whether Defendants have impermissibly burdened Individual Plaintiffs' ability to vote. Further, the Court will consider two issues raised by the Trump Campaign; the first being whether it has stated a valid claim alleging discrimination relating to its use of poll-watchers, and the second being whether the General Assembly's failure to uniformly prohibit (or permit) the notice-and-cure procedure is unconstitutional.

1. Individual Plaintiffs

States have "broad authority to regulate the conduct of elections, including federal ones."[103] "This authority includes 'broad powers to determine the conditions under which the right of suffrage may be exercised.' "[104] Because states must have freedom to regulate elections if "some sort of order, rather than chaos, is to accompany the democratic processes,"[105] such regulation is generally insulated from the stringent requirements of strict scrutiny.[106]

Instead, state regulation that burdens voting rights is normally subject to the *Anderson-Burdick* balancing test, which requires that a court "weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.' "[107] Under this test, "any 'law respecting the right to vote – whether it governs voter qualifications, candidate selection, or the voting process,' is subjected to 'a deferential "important regulatory interests" standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote.' "[108]

The *Anderson-Burdick* balancing test operates on a sliding scale.[109] Thus, more restrictive laws are subject to greater scrutiny. Conversely, "minimally burdensome and nondiscriminatory" regulations are subject to "a level of scrutiny 'closer to rational basis.' "[110] "And where the state imposes no burden on the 'right to vote' at all, true rational basis review applies."[111]

***12** Here, because Defendants' conduct "imposes no burden" on Individual Plaintiffs' right to vote, their equal-protection claim is subject to rational basis review.[112] Defendant Counties, by implementing a notice-and-cure procedure, have in fact *lifted* a burden on the right to vote, even if only for those who live in those counties. Expanding the right to vote for some residents of a state does not burden the rights of others.[113] And Plaintiffs' claim cannot stand to the extent that it complains that "the state is *not* imposing a restriction on *someone else's* right to vote."[114] Accordingly, Defendant Counties' use of the notice-and-cure procedure (as well as Secretary Boockvar's authorization of this procedure) will be upheld unless it has no rational basis.[115]

Individual Plaintiffs' claims fail because it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots. Though states may not discriminatorily sanction procedures that are likely to burden some persons' right to vote more than others, they need not expand the right to vote in perfect uniformity. All Plaintiffs have alleged is that Secretary Boockvar allowed counties to choose whether or not they wished to use the notice-and-cure procedure. No county was forced to adopt notice-and-cure; each county made a choice to do so, or not. Because it is not irrational or arbitrary for a state to allow counties to expand the right to vote if they so choose, Individual Plaintiffs fail to state an equal-protection claim.

Moreover, even if they could state a valid claim, the Court could not grant Plaintiffs the relief they seek. Crucially, Plaintiffs fail to understand the relationship between right and remedy. Though every injury must have its proper redress,[116] a court may not prescribe a remedy unhinged from the underlying right being asserted.[117] By seeking injunctive relief preventing certification of the Pennsylvania election results, Plaintiffs ask this Court to do exactly that. Even assuming that they can establish that their right to vote has been denied, which they cannot, Plaintiffs seek to remedy the denial of their votes by invalidating the votes of millions of others. Rather than requesting that their votes be counted, they seek to discredit scores of other votes, but only for one race.[118] This is simply not how the Constitution works.

When remedying an equal-protection violation, a court may either "level up" or "level down."[119] This means that a court may either extend a benefit to one that has been wrongfully denied it, thus leveling up and bringing that person on par with others who already enjoy the right,[120] or a court may level down by withdrawing the benefit from those who currently possess it.[121] Generally, "the preferred rule in a typical case is to extend favorable treatment" and to level up.[122] In fact, leveling down is impermissible where the withdrawal of a benefit would necessarily violate the Constitution.[123] Such would be the case if a court were to remedy discrimination by striking down a benefit that is constitutionally guaranteed.

***13** Here, leveling up to address the alleged cancellation of Plaintiffs' votes would be easy; the simple answer is that their votes would be counted. But Plaintiffs do not ask to level up. Rather, they seek to level down, and in doing so, they ask the Court to violate the rights of over 6.8 million Americans. It is not in the power of this Court to violate the Constitution.[124] "The disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter."[125] "To the extent that a citizen's right to vote is debased, he is that much less a citizen."[126]

Granting Plaintiffs' requested relief would necessarily require invalidating the ballots of every person who voted in Pennsylvania. Because this Court has no authority to take away the right to vote of even a single person, let alone millions of citizens, it cannot grant Plaintiffs' requested relief.

2. Trump Campaign

Plaintiffs' brief in opposition to the motions to dismiss spends only *one* paragraph discussing the merits of its equal-protection claim. Plaintiffs raise two arguments as to how equal protection was violated. The first is that "Defendants excluded Republican/Trump observers from the canvass so that they would not observe election law violations."[127] The second claims that the "use of notice/cure procedures violated equal protection because it was deliberately done in counties where defendants knew that mail ballots would favor Biden/Democrats."[128] The former finds no support in the operative pleading, and neither states an equal-protection violation.

Count I of the FAC makes no mention of disparity in treatment of observers based on which campaign they represented. Instead, Count I discusses the use of "standardless" procedures. These are two separate theories of an equal protection violation. That deficiency aside, to the extent this new theory is even pled, Plaintiffs fail to plausibly plead that there was "uneven treatment" of Trump and Biden watchers and representatives. Paragraphs 132-143 of the FAC are devoted to this alleged disparity. None of these paragraphs support Plaintiffs' argument. A selection below:

- "Defendants have not allowed *watchers and representatives* to be present ..."[129]
- "In Centre County, the central pre-canvassing location was a large ballroom. The set-up was such that the *poll watchers did not have meaningful access* to observe the canvassing and tabulation process of mail-in and absentee ballots, and in fact, the *poll watchers and observers* who were present could not actually observe the ballots such that they could confirm or object to the validity of the ballots."[130]
- "In Philadelphia County, *poll watchers and canvass representatives* were denied access altogether in some instances."[131]
- "In Delaware County, *observers* were denied access to a back room counting area ..."[132]

None of these allegations (or the others in this section) claim that the Trump Campaign's watchers were treated *differently* than the Biden campaign's watchers. Simply alleging that poll watchers did not have access or were denied access to some areas does not plausibly plead unequal treatment. Without actually alleging that one group was treated differently than another, Plaintiffs' first argument falls flat.

***14** Likewise, Plaintiffs cannot salvage their notice-and-cure theory by invoking *Bush v. Gore*.[133] Plaintiffs claim that the Equal Protection clause "imposes a 'minimum requirement for nonarbitrary treatment of voters' and forbids voting systems and practices that distribute resources in 'standardless' fashion, without 'specific rules designed to ensure uniform treatment.' "[134] Plaintiffs attempt to craft a legal theory from *Bush*, but they fail because: (1) they misapprehend the issues at play in that case; and (2) the facts of this case are distinguishable.

Plaintiffs' interpretation of *Bush v. Gore* would broaden the application of that case far beyond what the Supreme Court

of the United States endorsed. In *Bush*, the Supreme Court stopped a recount of votes in Florida in the aftermath of the 2000 Presidential Election. Despite Plaintiffs' assertions, *Bush* does not stand for the proposition that every rule or system must ensure uniform treatment. In fact, the Supreme Court explicitly said so, explaining: "[t]he question before the Court is *not* whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."[135] Instead, the Court explained that its holding concerned a "situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards."[136] Where a state court has ordered such a remedy, the Supreme Court held that "there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied."[137] In other words, the lack of guidance from a court constituted an equal-protection violation.

In the instant matter, Plaintiffs are not challenging any court action as a violation of equal protection, and they do not allege that Secretary Boockvar's guidance differed from county to county, or that Secretary Boockvar told some counties to cure ballots and others not to. That some counties may have chosen to implement the guidance (or not), or to implement it differently, does not constitute an equal-protection violation. "[M]any courts that have recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state."[138] "Arguable differences in how elections boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected, just as judges in sentencing-guidelines cases apply uniform standards with arguably different results."[139] Requiring that every single county administer elections in exactly the same way would impose untenable burdens on counties, whether because of population, resources, or a myriad of other reasonable considerations.

V. CONCLUSION

Defendants' motions to dismiss the First Amended Complaint are granted with prejudice. Leave to amend is denied. "Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility."[140] Given that: (1) Plaintiffs have already amended once as of right; (2) Plaintiffs seek to amend simply in order to effectively reinstate their initial complaint and claims; and (3) the deadline for counties in Pennsylvania to certify their election results to Secretary Boockvar is November 23, 2020, amendment would unduly delay resolution of the issues. This is especially true because the Court would need to implement a new briefing schedule, conduct a second oral argument, and then decide the issues.

***15** An appropriate Order follows.

ORDER

AND NOW, this 21st day of November 2020, in accordance with the accompanying Memorandum Opinion, **IT IS HEREBY ORDERED** that:

1. Defendants' motions to dismiss the First Amended Complaint (Docs. 127, 135, 140, 145, 161, and 165) are **GRANTED WITH PREJUDICE. NO LEAVE TO AMEND IS GRANTED**.

2. Defendants' motions to dismiss the original complaint (Docs. 81, 85, 90, 92, 96, and 98) are **DENIED AS MOOT**.

3. Plaintiffs' motion for leave to file a second amended complaint (Doc. 172) is **DENIED AS MOOT**.

4. Plaintiffs' motions for preliminary injunction (Docs. 89 and 182) are **DENIED AS MOOT.**

5. Plaintiffs' motions regarding discovery (Docs. 118 and 171) are **DENIED AS MOOT.**

6. Further motions regarding amicus briefing and intervention (Docs. 166, 180, and 200) are **DENIED AS MOOT**.

7. The case is dismissed and the Clerk of Court is directed to close the case file.

All Citations

--- F.Supp.3d ----, 2020 WL 6821992

Footnotes

1 Doc. 125.
2 *Id.* Since the filing of the initial complaint, there have also been several intervenors and amicus petitioners.
3 *Cook v. Gralike*, 531 U.S. 510, 522, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001).
4 *Id.* (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 804, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995)).
5 *Id.* (quoting U.S. Const. Art. I, § 4, cl. 1).
6 *Id.* at 523, 121 S.Ct. 1029.
7 25 P.S. §§ 2601, *et seq.*
8 *Pa. Democratic Party v. Boockvar*, —— Pa. ——, 238 A.3d 345, 356 (2020) (quoting Pa. Const., Art. I, § 5).
9 *Id.* (quoting *Perles v. Hoffman*, 419 Pa. 400, 213 A.2d 781, 783 (1965)).
10 *Id.* at 352 (citing 25 P.S. §§ 3150.11-3150.17). Prior to the enactment of Act 77, voters were only permitted to vote by mail if they could "demonstrate their absence from the voting district on Election Day." *Id.* (internal citations omitted).
11 *E.g.*, 25 P.S. § 3150.16.
12 *Id.*
13 *Id.*
14 *Pa. Democratic Party*, 238 A.3d at 372.
15 Doc. 93 at 9.
16 *Pa. Democratic Party*, 238 A.3d at 374.
17 *Id.* (holding only that the Election Code "does not provide for the 'notice and opportunity to cure' procedure sought by Petitioner").
18 Doc. 125 at ¶ 129.
19 *Id.* at ¶¶ 124-27.
20 *Id.* at ¶ 127.
21 *Id.* at ¶ 130.
22 *Id.* at ¶¶ 15-16.
23 *Id.* at ¶ 15.
24 *Id.* at ¶ 16.
25 *Id.* at ¶¶ 15-16.
26 Pa. Dep't of State, *Unofficial Returns, Statewide*, https://www.electionreturns.pa.gov/ (last visited on November 21, 2020).
27 Doc. 131 (denied).
28 *See* Doc. 1.
29 *Id.*
30 *See* Doc. 35.
31 Doc. 89.
32 No. 20-3214, —— F.3d ——, 2020 WL 6686120 (3d Cir. Nov. 13, 2020) (pending publication).
33 For example, *Bognet* held that only the General Assembly had standing to raise claims under the Elections and Electors Clauses. *Id.* at ——, 2020 WL 6686120, at *7. This ruling effectively shut the door on Plaintiffs' allegations under those clauses of the Constitution.
34 Doc. 125.
35 Ms. Kerns has since withdrawn from the case.
36 Separately, Plaintiffs filed a motion seeking leave to file a second amended complaint. Doc. 172. Having filed the FAC as of right, Plaintiffs may file a second amended complaint only with the opposing party's written consent or the court's leave. During the oral argument on November 17, 2020, Defendants indicated that they would not consent to the filing of a third pleading and did not concur in the motion for leave to file this second amended complaint.
37 Plaintiffs initially appeared to base their standing under the Equal Protection Clause on the theory that the notice-and-cure policy unlawfully allowed certain ballots to be counted, and that this inclusion of illegal ballots diluted Plaintiffs' legal votes. Doc. 1. After *Bognet* expressly rejected this theory of standing, however, Plaintiffs have since reversed course and now argue that their standing is based on the cancellation of Individual Plaintiffs' votes and the Trump Campaign's "competitive standing." —— F.3d at —— – ——, 2020 WL 6686120, at *9-10; Doc. 124 at 2. To the extent that Plaintiffs may still argue that votes have been unconstitutionally diluted (*see*, FAC ¶ 97), those claims are barred by the Third Circuit's decision in *Bognet.*

38 Plaintiffs essentially conceded that they were only setting forth the vote-denial theory for purposes of standing when they stated on the record at oral argument that they believed Individual Plaintiffs' votes were *lawfully* cancelled. Hr'g. Tr. 110:22-111:02.

39 In briefing, Plaintiffs attempt to revive their previously-dismissed poll-watcher claims. Count I does not seek relief for those allegations, but the Court considers them, *infra.*

40 *Pa. Voters All. v. Centre Cnty.*, No. 4:20-CV-01761, —— F.Supp.3d ——, ——, 2020 WL 6158309, at *3 (M.D. Pa. Oct. 21, 2020) (*quoting Cottrell v. Alcon Laboratories*, 874 F.3d 154, 161-62 (3d Cir. 2017)).

41 *Cottrell*, 874 F.3d at 161-62.

42 *Wayne Land & Mineral Grp., LLC v. Del. River Basin Comm'n*, 959 F.3d 569, 573-74 (3d Cir. 2020) (internal citations omitted).

43 *Id.* at 574 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

44 *Id.* (quoting *Seneca Reservation Corp. v. Twp. of Highland*, 863 F.3d 245, 252 (3d Cir. 2017).

45 *Cottrell*, 874 F.3d at 162 (quoting *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016)).

46 *Id.* (quoting *Spokeo*, 136 S. Ct. at 1547).

47 *Id.*

48 *Id.* (citing *Info. Handling Servs., Inc. v. Defense Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C. Cir. 2003)).

49 *Id.* (brackets and internal citations omitted).

50 As discussed above, to the extent that Plaintiffs would have premised standing on the theory that Pennsylvania's purportedly unconstitutional failure to uniformly prohibit the notice-and-cure procedure constitutes vote-dilution, such an assertion would be foreclosed under *Bognet,* —— F.3d at —— – ——, 2020 WL 6686120, at *9-10. Accordingly, the Court will only consider whether Individual Plaintiffs have standing under their vote-denial theory.

51 In the interest of comprehensiveness, the Court also addresses whether the Trump Campaign has associational standing.

52 *Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)).

53 *See Gomillion v. Lightfoot*, 364 U.S. 339, 349, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (Whittaker, J.) (noting the distinction between injuries caused by outright denial of the right to vote versus those caused by reducing the weight or power of an individual's vote). The Court notes that much of standing doctrine as it relates to voting rights arises from gerrymandering or vote-dilution cases, which often involve relatively abstract harms. *See, e.g., Gill*, 138 S. Ct. at 1929; *Gaffney v. Cummings*, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)).

54 *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 24, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (citing *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449-50, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989)).

55 *See id.* ("[W]here a harm is concrete, though widely shared, the [United States Supreme] Court has found 'injury in fact.' ") (quoting *Public Citizen*, 491 U.S. at 449-50, 109 S.Ct. 2558).

56 The Third Circuit has held that a party may have standing "to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347, 366 (3d Cir. 2014) (quoting *Bloomberg L.P. v. CFTC*, 949 F. Supp. 2d 91, 116 (D.D.C. 2013)). But in that case, standing was permitted to avoid a catch-22 situation where, absent standing against a third-party government actor, a plaintiff would not be able to bring suit against any responsible party. *Id.* at 367. Here, Plaintiffs allege that Secretary Boockvar is responsible for authorizing the unconstitutional actions of Defendant Counties. However, unlike the plaintiffs in *Aichele*, Plaintiffs are able to sue Defendant Counties for their allegedly unconstitutional actions. Moreover, because this Court has already concluded that Plaintiffs lack standing to sue Defendant Counties for their use of the notice-and-cure policy, it would be counterintuitive for Plaintiffs to have standing to challenge Secretary Boockvar's authorization of this policy, which is even further removed from any purported harm that Individual Plaintiffs have suffered.

57 *See, e.g., Newdow v. Roberts*, 603 F.3d 1002, 1011 (D.C. Cir. 2010) (noting that when an injury is caused by a third party not before the Court, courts cannot "redress injury ... that results from [such] independent action.") (ellipses and alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)).

58 *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, —— F.Supp.3d ——, ——, 2020 WL 5997680, at *37 (W.D. Pa. Oct. 10, 2020) (citing *Gill*, 138 S. Ct. at 1934).

59 *Gill*, 138 S. Ct. at 1934 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006)).

60 Doc. 170 at 11.

61 *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006); *Orloski v. Davis*, 564 F. Supp. 526 (M.D. Pa. 1983).
62 No. 2:20-CV-1445, —— F.Supp.3d ——, 2020 WL 5626974 (D. Nev. Sept. 18, 2020).
63 *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).
64 *Cegavske*, —— F.Supp.3d at ——, 2020 WL 5626974 at *4 (internal citations omitted).
65 *Id.*
66 Doc. 170 at 11 (citing *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011)).
67 664 F.3d at 783.
68 *Townley v. Miller*, 722 F.3d 1128, 1135 (9th Cir. 2013) (emphasis added) (quoting *Drake*, 664 F.3d at 782); *see also Mecinas v. Hobbs*, No. CV-19-05547, —— F.Supp.3d ——, —— – ——, 2020 WL 3472552, at *11-12 (D. Ariz. June 25, 2020) (explaining the current state of the doctrine of competitive standing and collecting cases).
69 459 F.3d at 586.
70 44 F.3d 48, 53 (2d Cir. 1994).
71 917 F.2d 1028, 1029-30 (7th Cir. 1990).
72 *Id.*
73 *See Green Party of Tennessee v. Hargett*, 767 F.3d 533, 542-43 (6th Cir. 2014) (finding that Plaintiffs had standing to challenge Tennessee's *ballot-access* laws); *see also Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020) (finding that Plaintiffs had standing to challenge the *ballot-ordering* provision in Minnesota); *Nelson v. Warner*, No. 3:19-0898, —— F.Supp.3d ——, ——, 2020 WL 4582414, at *3 (S.D. W. Va. Aug. 10, 2020) (same).
74 19 F.3d 873 (3d Cir. 1994).
75 Even assuming, however, that the Trump Campaign could establish that element of standing, it would still fail to satisfy the causation and redressability requirements for the same reasons that the Voter Plaintiffs do. To the extent the Trump Campaign alleges any injury at all, its injury is attenuated from the actions challenged.
76 *Richardson v. Bledsoe*, 829 F.3d 273, 289 n. 13 (3d Cir. 2016) (Smith, C.J.) (*citing Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (Easterbrook, J.)).
77 *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).
78 *Id.* at 326, 109 S.Ct. 1827 (internal citations omitted).
79 *Id.* at 327, 109 S.Ct. 1827.
80 Howard M. Wasserman, The Roberts Court and the Civil Procedure Revival, 31 Rev. Litig. 313, 316, 319-20 (2012).
81 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
82 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).
83 *Id.* at 670, 129 S.Ct. 1937.
84 *Id.*
85 *Id.* at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955).
86 *Id.*
87 *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786 (3d Cir. 2016) (Jordan, J.) (internal quotations and citations omitted).
88 *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955.
89 *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937.
90 *Id.* at 678, 129 S.Ct. 1937 (*quoting Twombly*, 550 U.S. at 557, 127 S.Ct. 1955).
91 *Phillips v. County. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008) (Nygaard, J.).
92 *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937;
93 *Id.* (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (Nygaard, J.) ("After *Iqbal*, it is clear that conclusory or 'bare-bones' allegations will no longer survive a motion to dismiss.").
94 *Connelly*, 809 F.3d at 787 (internal quotations and citations omitted).
95 U.S. Const. Amend. XIV, cl. 1.
96 Doc. 170 at 29.
97 *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)).
98 *Id.* (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)).
99 *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)).

100 *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).
101 *Id.* (citing *Ex parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884)).
102 *Id.* (citing *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915)).
103 *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (citing U.S. Const. Art. I, § 4, cl. 1).
104 *Donald J. Trump for President, Inc.*, —— F.Supp.3d at ——, 2020 WL 5997680, at *38 (quoting *Shelby County, Ala. v. Holder*, 570 U.S. 529, 543, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013)).
105 *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992)).
106 *Burdick*, 504 U.S. at 432-33, 112 S.Ct. 2059.
107 *Crawford v. Marion County Election Board*, 553 U.S. 181, 190, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (quoting *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059).
108 *Donald J. Trump for President*, —— F.Supp.3d at ——, 2020 WL 5997680, at *39 (quoting *Crawford*, 553 U.S. at 204, 128 S.Ct. 1610 (Scalia, J. concurring)).
109 *See id.* at ——, 2020 WL 5997680, at *40; *see also Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1090 (9th Cir. 2019); *Fish v. Schwab*, 957 F.3d 1105, 1124 (10th Cir. 2020).
110 *Donald J. Trump for President*, —— F.Supp.3d at ——, 2020 WL 5997680, at *39 (quoting *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016)).
111 *Id. (citing Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004)).
112 Even after questioning from this Court during oral argument regarding the appropriate standard of review for their equal-protection claim, Plaintiffs failed to discuss this key aspect of the claim in briefing. *See* Doc. 170.
113 *See, e.g., Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018).
114 *Donald J. Trump for President*, —— F.Supp.3d at ——, 2020 WL 5997680, at *44 (emphasis in original).
115 *Biener*, 361 F.3d at 215.
116 *Marbury v. Madison*, 5 U.S. 137, 147, 1 Cranch 137, 2 L.Ed. 60 (1803).
117 *Gill*, 138 S. Ct. at 1934 ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.") (citing *Cuno*, 547 U.S. at 353, 126 S.Ct. 1854).
118 Curiously, Plaintiffs now claim that they seek only to enjoin certification of the presidential election results. Doc. 183 at 1. They suggest that their requested relief would thus not interfere with other election results in the state. But even if it were logically possible to hold Pennsylvania's electoral system both constitutional and unconstitutional at the same time, the Court would not do so.
119 *Heckler v. Mathews*, 465 U.S. 728, 740, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984) (internal citations omitted).
120 *Id.* at 741, 104 S.Ct. 1387; *Califano v. Westcott*, 443 U.S. 76, 90-91, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979).
121 *E.g., Sessions v. Morales-Santana*, —— U.S. ——, 137 S. Ct. 1678, 1701, 198 L.Ed.2d 150 (2017).
122 *Id.* (internal citations omitted).
123 *See Palmer v. Thompson*, 403 U.S. 217, 226-27, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971) (addressing whether a city's decision to close pools to remedy racial discrimination violated the Thirteenth Amendment); *see also Reynolds*, 377 U.S. at 554, 84 S.Ct. 1362 (citing *Mosley*, 238 U.S. at 383, 35 S.Ct. 904).
124 *Marbury*, 5 U.S. at 147.
125 *Perles v. County Return Bd. of Northumberland County*, 415 Pa. 154, 202 A.2d 538, 540 (1964) (cleaned up).
126 *Id.* at 567.
127 Doc. 170 at 29. Count I makes no mention of the poll-watching allegations, nor does it seek relief for any violation of law on the basis of those allegations. Out of an abundance of caution, however, the Court considers whether these allegations state a claim.
128 *Id.*
129 Doc. 125 at ¶ 134 (emphasis added).
130 *Id.* at ¶ 135 (emphasis added).
131 *Id.* at ¶ 136 (emphasis added).
132 *Id.* at ¶ 137 (emphasis added).
133 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000).
134 Doc. 170 at 13.
135 *Bush*, 531 U.S. at 109, 121 S.Ct. 525 (emphasis added).
136 *Id.*

137 *Id.*
138 *Donald J. Trump for President*, —— F.Supp.3d at ——, 2020 WL 5997680, at *44.
139 *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 636 (6th Cir. 2016).
140 *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413–14 (3d Cir.1993).

EXHIBIT 3

2020 WL 6817513
Only the Westlaw citation is currently available.
United States District Court,
N.D. Georgia, Atlanta Division.

L. LIN WOOD, JR., Plaintiff,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia; REBECCA N. SULLIVAN, in her official capacity as Vice Chair of the Georgia State Election Board; DAVID J. WORLEY, in his official capacity as a Member of the Georgia State Election Board; MATTHEW MASHBURN, in his official capacity as a Member of the Georgia State Election Board; and ANH LE, in her official capacity as a Member of the Georgia State Election Board, Defendants.

Civil Action No. 1:20-cv-04651-SDG
|
11/20/2020

Steven D. Grimberg, United States District Court Judge

OPINION AND ORDER

***1** This matter is before the Court on a motion for temporary restraining order filed by Plaintiff L. Lin Wood, Jr. [ECF 6]. For the following reasons, and with the benefit of oral argument, Wood's motion is **DENIED**.

I. BACKGROUND

On November 3, 2020, the United States conducted a general election for various federal, state, and local political offices (the General Election).[1] However, the voting process in Georgia began in earnest before that date. On September 15, 2020, local election officials began mailing absentee ballots for the General Election to eligible voters.[2] On October 12, 2020, Georgia's in-person, early voting period started.[3] This entire process played out amidst the throes of a global health pandemic caused by the novel coronavirus SARS-CoV-2—colloquially known as COVID-19. Due in large part to the threat posed by COVID-19, an overwhelming number of Georgia voters—over 1 million of the 5 million votes cast by November 3—participated in the General Election through the use of absentee ballots.[4]

Wood, a registered voter in Fulton County, Georgia, believes Defendants— the elected officials tasked with conducting elections in the state—performed their roles in an unconstitutional manner. As such, Wood initiated this action on November 13, 2020, ten days after the conclusion of the General Election.[5] On November 16, Wood filed an Amended Complaint, asserting three claims against Defendants—all in their official capacities—for violation of: the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (Count I); the Electors and Elections Clause of the Constitution (Count II); and the Due Process Clause of the Fourteenth Amendment (Count III).[6]

Counts I and II seek extraordinary relief:

> As a result of Defendants' unauthorized actions and disparate treatment of defective absentee ballots, this Court should enter an order, declaration, and/or injunction that prohibits Defendants from certifying the results of the 2020 general election in Georgia on a statewide basis.
>
> Alternatively, this Court should enter an order, declaration, and/or injunction prohibiting Defendants from certifying the results of the General Election which include the tabulation of defective absentee ballots, regardless of whether said ballots were cured.
>
> Alternatively, this Court should enter an order, declaration, and/or injunction that the results of the 2020 general election in Georgia are defective as a result of the above-described constitutional violations, and that Defendants are required to cure said deficiencies in a manner consistent with federal and Georgia law, and without the taint of the procedures described in the Litigation Settlement.[7]

For Count III, Wood requests an order, declaration, and/or injunction requiring Defendants to perform a myriad of activities, including ordering a second recount prior to the certification of the election results and permitting monitors designated by the Republican Party to have special access to observe all election activity.[8]

***2** On November 17, 2020, Wood filed an emergency motion for a temporary restraining order.[9] Two sets of parties subsequently sought permission to intervene as defendants (collectively, the Intervenors): (1) the Democratic Party of Georgia, Inc. (DPG), DSCC, and DCCC; and (2) the Georgia State Conference of the NAACP (Georgia NAACP) and Georgia Coalition for the People's Agenda (GCPA).[10] On November 19, Defendants and Intervenors filed separate responses in opposition to Wood's motion for a temporary restraining order.[11] The Court held oral argument on Wood's motion the same day. At the conclusion of the oral argument, the Court denied Wood's request for a temporary restraining order. This Order follows and supplements this Court's oral ruling.

a. Georgia Statutory Law Regarding Absentee Ballots. Georgia law authorizes any eligible voter to cast his or her absentee ballot by mail without providing a reason. O.C.G.A. § 21-2-380(b). To initiate the absentee-voting process, a prospective voter must submit an application to the applicable registrar's or absentee ballot clerk's office. O.C.G.A. § 21-2-381(a)(1)(A). Upon receipt of a timely absentee ballot request, a registrar or absentee ballot clerk must enter the date the office received the application and compare the prospective voter's information and signature on the application with the information and signature on file in the registrar's or clerk's office. O.C.G.A. § 21-2-381(b)(1). If the prospective voter's eligibility is confirmed, the registrar or clerk must mail the voter an absentee ballot. O.C.G.A. § 21-2-381(b)(2)(A).

An absentee voter receives two envelopes along with the absentee ballot; the completed ballot is placed in the smaller envelope, which is then placed in the larger envelope, which contains the oath of the elector and a signature line. O.C.G.A. § 21-2-384(b). Upon receipt of a timely absentee ballot, a registrar or clerk is required to compare the identifying information and signature provided in the oath with the information and signature on file in the respective office. O.C.G.A. § 21-2-386(a)(1)(B). If the information and signature appear to match, the registrar or clerk signs his or her name below the voter's oath. *Id*. If the information or signature is missing or does not appear to match, the registrar or clerk is required to write "Rejected" across the envelope and provide the reason for the rejection. O.C.G.A. § 21-2-386(a)(1)(C). The board of registrars or absentee ballot clerk is required to "promptly notify" the elector of the rejection, who then has until the end of the period for verifying provisional ballots to cure the issue that resulted in the rejection. *Id*.

Secretary of State Raffensperger is "the state's chief election official." O.C.G.A. § 21-2-50(b). *See also* Ga. Op. Att'y Gen. No. 2005-3 (Apr. 15, 2005) ("Just as a matter of sheer volume and scope, it is clear that under both the Constitution and the laws of the State the Secretary is the state official with the power, duty, and authority to manage the state's electoral system. No other state official or entity is assigned the range of responsibilities given to the Secretary of State in the area of elections."). In this role, Raffensperger is required to, among other things, "promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials" and "formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections." O.C.G.A. § 21-3-31(1)-(2).

b. The Settlement Agreement

Wood does not challenge the underlying constitutionality of the absentee ballot framework enacted by the Georgia General Assembly. The genesis of his claims instead derive from a lawsuit filed over one year ago by the DPG against Raffensperger, the then-Members of the Georgia State Election Board, and the then-Members of the Gwinnett County Board of Registration and Elections.[12] In that action, the DPG, DSCC, and DCCC challenged several aspects of the process for rejecting absentee ballots based on a missing or mismatched signature.[13]

***3** On March 6, 2020, the DPG, DSCC, DCCC, Raffensperger, and the Members of the Georgia State Election Board executed—and filed on the public docket—a "Compromise Settlement Agreement and Release" (Settlement Agreement).[14] As part of the Settlement Agreement, Raffensperger agreed to issue an Official Election Bulletin containing certain procedures for the review of signatures on absentee ballot envelopes by county election officials for the March 24, 2020 Presidential Primary Election and subsequent General Election. In relevant part, the procedures stated:

> When reviewing an elector's signature on the mail-in absentee ballot envelope, the registrar or clerk must compare the signature on the mail-in absentee ballot

envelope to each signature contained in such elector's voter registration record in eNet and the elector's signature on the application for the mail-in absentee ballot. **If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file in eNet or on the absentee ballot application.** If a determination is made that the elector's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk shall write the names of the three elections officials who conducted the signature review across the face of the absentee ballot envelope, which shall be in addition to writing "Rejected" and the reason for the rejection as required under OCGA 21-2-386(a)(1)(C).[15]

No entity or individual sought permission to intervene and challenge the Settlement Agreement. United States District Judge William M. Ray closed the case on March 9.[16]

c. The Risk-Limiting Audit

Georgia law provides procedures for conducting a "risk-limiting audit" prior to the final certification of an election. O.C.G.A. § 21-2-498. Such an audit must be "[c]omplete[d]...in public view." O.C.G.A. § 21-2-498(c)(4). And the State Election Board is "authorized to promulgate rules, regulations, and procedures to implement and administer" an audit, including "security procedures to ensure that [the] collection of validly cast ballots is complete, accurate, and trustworthy throughout the audit." O.C.G.A. § 21-2-498(d). *See also* Ga. Comp. R. & Regs. 183-1-15-.04 (2020).

On November 11, 2020, Raffensperger announced a statewide risk-limiting audit (the Audit)—also referred to as a "full hand recount"—of all votes cast in the contest for President of the United States.[17] Every county in Georgia was required to begin the Audit at 9:00 am on November 13 and finish by 11:59 pm on November 18.[18] The statewide election results are set to be certified on November 20.[19] Raffensperger required the Audit to "be open to the public and the press" and required local election officials to "designate a viewing area from which members of the public and press may observe the audit for the purpose of good order and maintaining the integrity of the audit."[20] The two major political parties—Democratic and Republican—were permitted "the right to have one properly designated person as a monitor of the audit for each ten audit teams that are conducting the audit, with a minimum of two designated monitors in each county per party per room where the audit is being conducted."[21] The designated monitors were not required to remain in the public viewing areas, but were required to comply with the rules promulgated by Raffensperger and the local election officials.[22] The Audit process differs from that required by Georgia law for a recount requested by a unsuccessful candidate following the official certification of votes. *See* O.C.G.A. § 21-2-524.

II. LEGAL STANDARD

***4** The standard for the issuance of a temporary restraining order and a preliminary injunction are identical. *Windsor v. United States*, 379 F. App'x 912, 916–17 (11th Cir. 2010). A preliminary injunction is "an extraordinary remedy." *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). To obtain the relief he seeks, Wood must affirmatively demonstrate: "(1) substantial likelihood of success on the merits; (2) [that] irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to [him] outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). *See also Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) ("In this Circuit, a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four prerequisites.").

III. DISCUSSION

Wood's motion essentially boils down to two overarching claims:

that Defendants violated the Constitution by (1) executing and enforcing the Settlement Agreement to the extent it requires different procedures than the Georgia Election Code, and (2) not permitting designated monitors to have certain live viewing privileges of the Audit at the county locations.

Defendants and Intervenors posit a number of challenges to Wood's claims.

a. Standing

As a threshold matter, the Court finds Wood lacks standing to assert these claims. Article III limits federal courts to the consideration of "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. The doctrine of standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). It is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). *See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.") (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). The standing inquiry is threefold: "The litigant must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (citing *Lujan*, 504 U.S. at 561). Wood must "demonstrate standing for each claim he seeks to press and for each form of relief that is sought"—*Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017)—and shoulders "the burden of establishing [each] element[ ]." *Lujan*, 504 U.S. at 561.

Injury in fact is "the first and foremost of standing's three elements" and requires Wood to show that he suffered "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1547–48. To be "particularized," the alleged injury "must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 561 n.1. Wood must demonstrate "a personal stake in the outcome of the controversy," as a federal court "is not a forum for generalized grievances." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). This requires more than a mere "keen interest in the issue." *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). The alleged injury must be "distinct from a generally available grievance about government." *Gill*, 138 S. Ct. at 1923. *See also id.* at 1929 (explaining that a person's "right to vote is individual and personal in nature...[t]hus [only] voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage") (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964); *Baker v. Carr*, 369 U.S. 186, 206 (1962)). Claims premised on allegations that "the law...has not been followed...[are] precisely the kind of undifferentiated, generalized grievance about the conduct of government...[and] quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1332–33 (11th Cir. 2007) (citing *Baker*, 369 U.S. at 207–08). *See also Lance v. Coffman*, 549 U.S. 437, 440–41 (2007) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree. . . . [A] generalized grievance that is plainly undifferentiated and common to all members of the public" is not sufficient for standing).

***5** Wood alleges he has standing because he is "a qualified registered elector residing in Fulton County, Georgia" who has "made donations to various Republican candidates on the ballot for the November 3, 2020 elections, and his interests are aligned with those of the Georgia Republican Party for the purposes of the instant lawsuit."[23] These allegations fall far short of demonstrating that Wood has standing to assert these claims.

i. The Elections and Electors Clause

Starting with his claim asserted under the Elections and Electors Clause, Wood lacks standing as a matter of law. The law is clear: A generalized grievance regarding a state government's failure to properly follow the Elections Clause of the Constitution does not confer standing on a private citizen.[24] *Lance*, 549 U.S. at 442; *Bognet*, 2020 WL 6686120, at *6 ("[P]rivate plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause....Their relief would have no more directly benefitted them than the public at large."); *Dillard*, 495 F.3d at 1332–33.

ii. Equal Protection

For his equal protection claim, Wood relies on a theory of vote dilution, *i.e.*, because Defendants allegedly did not follow the correct processes, invalid absentee votes may have been cast and tabulated, thereby diluting Wood's in-person vote. But the same prohibition against generalized grievances applies to equal protection claims. *United States v. Hays*, 515 U.S. 737, 743 (1995) ("The rule against generalized grievances applies with as much force in the equal protection context as in any other.") Wood does not differentiate his alleged injury from any harm felt in precisely the same

manner by every Georgia voter. As Wood conceded during oral argument, under his theory any one of Georgia's more than seven million registered voters would have standing to assert these claims. This is a textbook generalized grievance. *Bognet*, 2020 WL 6686120, at *12 ("Voter Plaintiffs' dilution claim is a paradigmatic generalized grievance that cannot support standing....Put another way, a vote cast by fraud or mailed in by the wrong person through mistake, or otherwise counted illegally, has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged. Such an alleged dilution is suffered equally by all voters and is not particularized for standing purposes.") (internal punctuation omitted) (collecting cases); *Moore v. Circosta*, No. 1:20-cv-911, 2020 WL 6063332, a *14 (M.D.N.C. Oct. 14, 2020) ("[T]he notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing."). *See also Citizens for Fair Representation v. Padilla*, 815 F. App'x 120, 123 (9th Cir. 2020) (dismissing equal protection claim for lack of standing and stating "the Supreme Court has consistently held that a plaintiff raising only a generally available grievance...does not state an Article III case or controversy.").

iii. Due Process

6** For the same reasons, Wood also does not have standing to pursue his due process claim. Wood asserts that various election monitors appointed by the Republican Party "have been denied the opportunity to be present throughout the entire Hand Recount, and when allowed to be present, they were denied the opportunity to observe the Hand Recount in any meaningful way."[25] Yet, Wood does not allege that ***he attempted to participate as a designated monitor. Nor does he allege that, on behalf of the Republican Party, he himself designated monitors who were ultimately denied access. Wood's broad objection is that Defendants failed to conduct the Audit fairly and consistently under Georgia law. This is a generalized grievance.[26] *Lance*, 549 U.S. at 440–41. *See also Nolles v. State Comm. for Reorganization of Sch. Dists.*, 524 F.3d 892, 900 (8th Cir. 2008) (voters lacked standing because substantive due process claim that delay of implementation of new statute until after referendum election violated their right to fair election did not allege particularized injury).

iv. Alignment with Non-Parties

Wood further points to his status as a donor to the Republican Party whose interests are aligned with that party and its political candidates to support his standing argument. But this does not sufficiently differentiate his alleged injury from that which *any* voter might have suffered—no matter the party affiliation. Ostensibly, Wood believes he suffered a particularized injury because his preferred candidates—to whom he has contributed money—did not prevail in the General Election. This argument has been squarely rejected by the Eleventh Circuit. *Jacobson*, 974 F.3d at 1247 ("A candidate's electoral loss does not, by itself, injure those who voted for the candidate. Voters have no judicially enforceable interest in the outcome of an election. Instead, they have an interest in their ability to vote and in their vote being given the same weight as any other.") (internal citation omitted).

v. Lack of Relevant Authorities

Finally, the Court notes the futility of Wood's standing argument is particularly evident in that his sole relied-on authority—*Meek v. Metropolitan Dade County, Florida*, 985 F.2d 1471 (11th Cir. 1993)—is no longer good law. The Eleventh Circuit ***expressly abrogated*** its holding in that case over thirteen years ago. *Dillard*, 495 F.3d at 1331–32 ("We subsequently upheld *Meek's* reasoning against repeated challenges that it was wrongly decided in light of the Supreme Court's later decisions...[b]ut it is clear that we can no longer do so in light of the Supreme Court's most recent pronouncement on voter standing in *Lance*.").

During oral argument, Wood additionally pointed to *Roe v. State of Alabama by & through Evans*, 43 F.3d 574 (11th Cir. 1995), but that case does not support Wood's standing argument. For example, two plaintiffs in *Roe* were candidates for a political office decided in the challenged election. *Id.* at 579. Wood is a private citizen, not a candidate for any elected office. Moreover, the Eleventh Circuit found particularized harm in the post-election inclusion of absentee ballots that had been deemed invalid. *Id.* at 580. Wood here seeks to do the opposite—remove validly cast absentee ballots after completion of the election.

In sum, Wood lacks standing to pursue these claims in the first instance.

b. The Doctrine of Laches

***7** Even if the Court found Wood possessed standing to pursue his claims regarding the Settlement Agreement (Counts I and II), such claims would nonetheless be barred by

the doctrine of laches. To establish laches, Defendants must show "(1) there was a delay in asserting a right or a claim, (2) the delay was not excusable, and (3) the delay caused [them] undue prejudice." *United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005). *See also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1326 (11th Cir. 2019) ("To succeed on a laches claim, [defendant] must demonstrate that [p]laintiffs inexcusably delayed bringing their claim and that the delay caused it undue prejudice."). Courts apply laches in election cases. *E.g.*, *Sanders v. Dooly Cnty., Ga.*, 245 F.3d 1289, 1291 (11th Cir. 2001) ("[W]e conclude that the district court did not abuse its discretion in deeming the claims seeking injunctive relief to be laches-barred."). *See also, e.g., Detroit Unity Fund v. Whitmer*, 819 F. App'x 421, 422 (6th Cir. 2020) (holding district court did not err in finding that plaintiff's claims regarding deadline for local ballot initiatives "barred by laches, considering the unreasonable delay on the part of [p]laintiffs and the consequent prejudice to [d]efendants"). *Cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence. That is as true in election law cases as elsewhere.") (internal citation omitted). Defendants have established each element of laches.

i. Delay

First, Wood delayed considerably in asserting these claims. On March 6, 2020, the GDP, DSCC, DCCC, and Defendants executed the Settlement Agreement, which was entered on the public docket. It has since been in effect for at least three elections. Nearly eight months later—and ***after*** over one million voters cast their absentee ballots in the General Election—Wood challenges the terms of the Settlement Agreement as unconstitutional. Wood could have, and should have, filed his constitutional challenge much sooner than he did, and certainly not two weeks *after* the General Election.

ii. Excuse

Nor has Wood articulated any reasonable excuse for his prolonged delay. Wood failed to submit any evidence explaining why he waited to bring these claims until the eleventh hour. He instead relies solely on a representation from his legal counsel during oral argument, without evidence, that Wood did not vote in any election between the execution of the Settlement Agreement and the General Election. Even assuming this proffer to be true, it does not provide a reasonable justification for the delay. Wood's claims are constitutional challenges to Defendants' promulgation authority under state law. If valid, these claims should not depend on the outcome of any particular election, to wit, whether Wood's preferred candidates won or lost. Indeed, Wood's claims, even assuming his standing for bringing them could be established, were ripe the moment the parties executed the Settlement Agreement.

iii. Prejudice

Finally, Defendants, Intervenors, and the public at large would be significantly injured if the Court were to excuse Wood's delay. A bedrock principle of election law is that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006)). This is because a last-minute intervention by a federal court could "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5. *See also Democratic Nat'l Comm. v. Wisc. State Legislature*, No. 20A66, 2020 WL 6275871, at *4 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("The principle [of judicial restraint] also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process. For those reasons, among others, this Court has regularly cautioned that a federal court's last-minute interference with state election laws is ordinarily inappropriate.").

***8** Underscoring the exceptional nature of his requested relief, Wood's claims go much further; rather than changing the rules on the eve of an election, he wants the rules for the already concluded election declared unconstitutional and over one million absentee ballots called into question. Beyond merely causing confusion, Wood's requested relief could disenfranchise a substantial portion of the electorate and erode the public's confidence in the electoral process. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented.") (citation omitted); *Arkansas United v. Thurston*, No. 5:20-cv-5193, 2020 WL 6472651, at *5 (W.D. Ark. Nov. 3, 2020) ("[T]he equities do not favor intervention where the election is already in progress and the requested relief would change the rules of the game mid-play.").

Thus, Wood is not entitled to injunctive relief on Counts I and II for the additional reason that these claims are barred by the doctrine of laches.

c. The Merits of the Request for Injunctive Relief

Even assuming Wood possessed standing, and assuming Counts I and II are not barred by laches, the Court nonetheless finds Wood would not be entitled to the relief he seeks. The Court addresses each required element for a temporary restraining order in turn.

i. Substantial Likelihood of Success on the Merits

1. Equal Protection (Count I)

Wood argues the execution and enforcement of the Settlement Agreement burdens his right to vote in contravention of the Equal Protection Clause because the agreement sets forth additional voting safeguards not found in the Georgia Election Code. States retain the power to regulate their own elections. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing U.S. Const. Art. I, § 4, cl. 1). The Supreme Court has held that:

> Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.

Burdick, 504 U.S. at 433 (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Inevitably, most election laws will "impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. But the Equal Protection Clause only becomes applicable if "a state either classifies voters in disparate ways...or places restrictions on the right to vote." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012). As recently summarized by one federal district court:

> The Supreme Court has identified two theories of voting harms prohibited by the Fourteenth Amendment. First, the Court has identified a harm caused by debasement or dilution of the weight of a citizen's vote, also referred to [as] vote dilution....Second, the Court has found that the Equal Protection Clause is violated where the state, having once granted the right to vote on equal terms, through later arbitrary and disparate treatment, values one person's vote over that of another.

Moore, 2020 WL 6063332, at *12 (citing *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *Reynolds*, 377 U.S. at 554). A rationale basis standard of review applies if the plaintiff alleges "that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote." *Obama for Am.*, 697 F.3d at 429 (citing *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807–09 (1969)). If a fundamental right is implicated, the claim is governed by the flexible *Anderson/Burdick* balancing test. *Burdick*, 504 U.S. at 433–35; *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

***9** Wood's equal protection claim does not fit within this framework.[27] Wood does not articulate a cognizable harm that invokes the Equal Protection Clause. For example, to the extent Wood relies on a theory of disparate treatment, *Bush v. Gore* is inapplicable. Defendants applied the Settlement Agreement in a wholly uniform manner across the entire state.[28] In other words, no voter—including Wood—was treated any differently than any other voter. *E.g., Wise v. Circosta*, 978 F.3d 93, 100 (4th Cir. 2020); *Deutsch v. New York State Bd. of Elections*, No. 20 CIV. 8929 (LGS), 2020 WL 6384064, at *6 (S.D.N.Y. Oct. 30, 2020).

Wood fares no better with a vote dilution argument. According to Wood, his fundamental right to vote was burdened because the "rules and regulations set forth in the [Settlement Agreement] created an arbitrary, disparate, and ad hoc process for processing defective absentee ballots, and for determining which of such ballots should be 'rejected,' contrary to Georgia law."[29] At the starting gate, the additional safeguards on signature and identification match enacted by Defendants did not burden Wood's ability to cast his ballot at all. Wood, according to his legal counsel during oral argument, did not vote absentee during the General Election. And the "burden that [a state's] signature-match scheme imposes on the right to vote...falls on vote-by-mail and provisional voters' fundamental right to vote." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019).

This leaves Wood to speculate that, because the Settlement Agreement required three ballot clerks—as opposed to just one—to review an absentee ballot before it could be rejected, fewer ballots were ultimately rejected, invalid ballots were tabulated, and his in-person vote was diluted. In support of this argument, Wood relies on *Baker v. Carr*, where the Supreme Court found vote dilution in the context of apportionment of elected representatives. 369 U.S. at 204–208. But Wood cannot transmute allegations that state officials violated state law into a claim that his vote was somehow weighted differently than others. This theory has been squarely rejected. *Bognet*, 2020 WL 6686120, at

*11 ("[T]he Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity. That is not how the Equal Protection Clause works.").

***10** Even if Wood's claim were cognizable in the equal protection framework, it is not supported by the evidence at this stage. Wood's argument is that the procedures in the Settlement Agreement regarding information and signature match so overwhelmed ballot clerks that the rate of rejection plummeted and, ergo, invalid ballots were passed over and counted. This argument is belied by the record; the percentage of absentee ballots rejected for missing or mismatched information and signature is the exact same for the 2018 election and the General Election (.15%).[30] This is despite a substantial increase in the total number of absentee ballots submitted by voters during the General Election as compared to the 2018 election.[31]

In sum, there is insubstantial evidence supporting Wood's equal protection theory and he has not established a substantial likelihood of success on the merits as to Count I.

2. Electors and Elections Clauses (Count II)

In relevant part, the Constitution states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. This provision— colloquially known as the Elections Clause—vests authority in the states to regulate the mechanics of federal elections. *Foster v. Love*, 522 U.S. 67, 69 (1997). The "Electors Clause" of the Constitution similarly states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." U.S. Const. art. II, § 1, cl. 2.

Wood argues Defendants violated the Elections and Electors Clauses because the "procedures set forth in the [Settlement Agreement] for the handling of defective absentee ballots is not consistent with the laws of the State of Georgia, and thus, Defendants' actions...exceed their authority."[32] Put another way, Wood argues Defendants usurped the role of the Georgia General Assembly—and thereby violated the United States Constitution—by enacting additional safeguards regarding absentee ballots not found in the Georgia Election Code. In support, Wood points to Chief Justice Rehnquist's concurrence in *Bush v. Gore*, which states that "in a Presidential election the clearly expressed intent of the legislature must prevail." 531 U.S. at 120 (Rehnquist, C.J., concurring).

State legislatures—such as the Georgia General Assembly—possess the authority to delegate their authority over elections to state officials in conformity with the Elections and Electors Clauses. *Ariz. State Legislature*, 576 U.S. at 816 ("The Elections Clause [ ] is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands...it is characteristic of our federal system that States retain autonomy to establish their own governmental processes."). *See also Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) ("The Elections Clause, therefore, affirmatively grants rights to state legislatures, and under Supreme Court precedent, to other entities to which a state may, consistent with the Constitution, delegate lawmaking authority."). *Cf. Bullock*, 2020 WL 5810556, at *11 ("A survey of the relevant case law makes clear that the term 'Legislature' as used in the Elections Clause is not confined to a state's legislative body.").

Recognizing that Secretary Raffensperger is "the state's chief election official,"[33] the General Assembly enacted legislation permitting him (in his official capacity) to "formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections." O.C.G.A. § 21-2-31(2). The Settlement Agreement is a manifestation of Secretary Raffensperger's statutorily granted authority. It does not override or rewrite state law. It simply adds an additional safeguard to ensure election security by having more than one individual review an absentee ballot's information and signature for accuracy before the ballot is rejected. Wood does not articulate how the Settlement Agreement is not "consistent with law" other than it not being a verbatim recitation of the statutory code. Taking Wood's argument at face value renders O.C.G.A. § 21-2-31(2) superfluous. A state official—such as Secretary Raffensperger—could never wield his or her authority to make rules for conducting elections that had not otherwise already been adopted

by the Georgia General Assembly. The record in this case demonstrates that, if anything, Defendants' actions in entering into the Settlement Agreement sought to achieve consistency among the county election officials in Georgia, which ***furthers*** Wood's stated goals of conducting "[f]ree, fair, and transparent public elections."[34]

***11** Wood has not demonstrated a substantial likelihood of success as to Count II.

3. Due Process (Count III)

Under the Fourteenth Amendment, "[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Due Process Clause has two components: procedural and substantive. *DeKalb Stone, Inc. v. Cnty. of DeKalb, Ga.*, 106 F.3d 956, 959 (11th Cir. 1997). Wood alleges that Defendants have "fail[ed]...to ensure that the Hand Recount is conducted fairly and in compliance with the Georgia Election Code" by denying monitors "the opportunity to be present throughout the entire Hand Recount, and when allowed to be present, they were denied the opportunity to observe the Hand Recount in any meaningful way."[35] Although not articulated in his Amended Complaint or motion for temporary restraining order, Wood clarified during oral argument that he is pursing both a procedural and substantive due process claim. Each will be addressed in turn.

a) Procedural Due Process

A procedural due process claim raises two inquires: "(1) whether there exists a liberty or property interest which has been interfered with by the State and (2) whether the procedures attendant upon that deprivation were constitutionally sufficient." *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 229 (5th Cir. 2020) (citing *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). The party invoking the Due Process Clause's procedural protections bears the "burden...of establishing a cognizable liberty or property interest." *Richardson*, 978 F.3d at 229 (citing *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)). Wood bases his procedural due process claim on "a vested interest in being present and having meaningful access to observe and monitor the electoral process."[36] But Wood does not articulate how this "vested interest" fits within a recognized, cognizable interest protected by procedural due process. The Court is not persuaded that the right to monitor an audit or vote recount is a liberty or property right secured by the Constitution. For example, the Eleventh Circuit does "assume that the right to vote is a liberty interest protected by the Due Process Clause." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020). But the circuit court has expressly declined to extend the strictures of procedural due process to "a State's election procedures." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) ("The generalized due process argument that the plaintiffs argued for and the district court applied would stretch concepts of due process to their breaking point.").

More specifically, federal courts have rejected the very interest Wood claims has been violated, *i.e.*, the right to observe the electoral process. *See, e.g.*, *Republican Party of Penn. v. Cortes*, 218 F. Supp. 3d 396, 408 (E.D. Pa. 2016) ("[T]here is no individual constitutional right to serve as a poll watcher...but rather the right is conferred by statute."); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *67 (W.D. Pa. Oct. 10, 2020) (same); *Dailey v. Hands*, No. 14-423, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015) ("[P]oll watching is not a fundamental right."); *Turner v. Cooper*, 583 F. Supp. 1160, 1162 (N.D. Ill. 1983) (finding no authority "that supports the proposition that [plaintiff] had a first amendment right to act as a pollwatcher. Indeed, we would suggest that the state is not constitutionally required to permit pollwatchers for political parties and candidates to observe the conduct of elections."). Without such an interest, Wood cannot establish a substantial likelihood of success on the merits as to his procedural due process claim.

b) Substantive Due Process

***12** Wood's substantive due process claim fares no better. The types of voting rights covered by the substantive due process clause are considered narrow. *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986). Pursuant to the "functional structure embodied in the Constitution," a federal court must not "intervene to examine the validity of individual ballots or supervise the administrative details of a local election." *Id*. In only "extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation." *Id*. *See also Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) ("We have drawn a distinction between garden variety election irregularities and a pervasive error that undermines the integrity of the vote. In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election.") (citation and punctuation omitted) (collecting cases); *Duncan v. Poythress*, 657 F.2d 691, 700 (5th Cir. 1981) ("[T]he due

process clause of the fourteenth amendment prohibits action by state officials which seriously undermine the fundamental fairness of the electoral process."). It is well understood that "garden variety" election disputes, including "the ordinary dispute over the counting and marking of ballots" do not rise to the level of a constitutional deprivation.[37] *Curry*, 802 F.2d at 1314–15. *See also Serpentfoot v. Rome City Comm'n*, 426 F. App'x 884, 887 (11th Cir. 2011) ("[Plaintiff's] allegations show, at most, a single instance of vote dilution and not an election process that has reached the point of patent and fundamental unfairness indicative of a due process violation.").

Although Wood generally claims fundamental unfairness, and the declarations and testimony submitted in support of his motion speculate as to wide-spread impropriety, the actual harm alleged by Wood concerns merely a "garden variety" election dispute. Wood does not allege unfairness in counting the ballots; instead, he alleges that select non-party, partisan monitors were not permitted to observe the Audit in an ideal manner. Wood presents no authority, and the Court finds none, providing for a right to unrestrained observation or monitoring of vote counting, recounting, or auditing. Precedent militates against a finding of a due process violation regarding such an "ordinary dispute over the counting and marking of ballots." *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) ("If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute."). Wood has not satisfied his burden of establishing a substantial likelihood of success on the merits as to his substantive due process claim.

ii. Irreparable Harm

Because Wood cannot show a likelihood of success on the merits, an extensive discussion of the remaining factors for the issuance of a temporary restraining order is unnecessary. *Obama for Am.*, 697 F.3d at 436 ("When a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor."). *See also Bloedorn*, 631 F.3d at 1229 ("If [plaintiff] is unable to show a substantial likelihood of success on the merits, we need not consider the other requirements."). Nonetheless, for the second factor, Plaintiffs must show that "irreparable injury would result if no injunction were issued." *Siegel*, 234 F.3d at 1175–76 ("A showing of irreparable injury is the *sine qua non* of injunctive relief."). This factor also weighs in Defendants' favor. As discussed above, Wood's allegations are the quintessential generalized grievance. He has not presented any evidence demonstrating how he will suffer any particularized harm as a voter or donor by the denial of this motion. The fact that Wood's preferred candidates did not prevail in the General Election—for whom he may have voted or to whom he may have contributed financially—does not create a legally cognizable harm, much less an irreparable one. *Jacobson*, 974 F.3d at 1247.

iii. Balance of the Equities and Public Interest

***13** The Court finds that the threatened injury to Defendants as state officials and the public at large far outweigh any minimal burden on Wood. To reiterate, Wood seeks an extraordinary remedy: to prevent Georgia's certification of the votes cast in the General Election, after millions of people had lawfully cast their ballots. To interfere with the result of an election that has already concluded would be unprecedented and harm the public in countless ways. *See Sw. Voter Registration Educ. Project*, 344 F.3d at 919; *Arkansas United*, 2020 WL 6472651, at *5. Granting injunctive relief here would breed confusion, undermine the public's trust in the election, and potentially disenfranchise of over one million Georgia voters. Viewed in comparison to the lack of any demonstrable harm to Wood, this Court finds no basis in fact or in law to grant him the relief he seeks.

IV. CONCLUSION

Wood's motion for temporary restraining order [ECF 6] is **DENIED**. **SO ORDERED** this the 20th day of November 2020.

Steven D. Grimberg

United States District Court Judge

All Citations

Slip Copy, 2020 WL 6817513

Footnotes

1 *Elections and Voter Registration Calendars*, https://sos.ga.gov/index.php/electi

ons/elections_and_voter_registration_calendars (last accessed Nov. 19, 2020).

2 *Id*.

3 *Id*.

4 ECF 33-2; ECF 33-6; ECF 33-8.

5 ECF 1.

6 ECF 5.

7 *E.g.*, ECF 5, ¶¶ 81–83, 93–95. The Litigation Settlement—also referred to as the Settlement Agreement—is discussed *infra* in Section I.b.

8 ECF 5, ¶ 106.

9 ECF 6.

10 ECF 8; ECF 22.

11 ECF 31; ECF 34; ECF 39.

12 *Democratic Party of Ga., Inc. v. Raffensperger*, 1:19-cv-05028-WMR (ECF 1) (Compl.).

13 *Id*.

14 *Id.* at ECF 56 (Settlement Agreement).

15 *Id*. (emphasis added).

16 *Id.* at ECF 57.

17 ECF 33-1; ECF 33-2; ECF 33-3.

18 *Id*.

19 *Id*.

20 ECF 33-4.

21 *Id*.

22 *Id*.

23 ECF 5, ¶ 8.

24 Although separate constitutional provisions, the Electors Clause and Elections Clause share "considerably similarity" and may be interpreted in the same manner. *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting). *See also Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *7 (3d Cir. Nov. 13, 2020) (applying same test for standing under both Elections Clause and Electors Clause); *Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 WL 5810556, at *11 (D. Mont. Sept. 30, 2020) ("As an initial matter, the Court finds no need to distinguish between the term 'Legislature' as it is used in the Elections Clause as opposed to the Electors Clause.").

25 ECF 6, at 21.

26 To the extent Wood attempts to rely on a theory of third party standing, the Court disagrees; the doctrine is disfavored and Wood has not alleged or proven any of the required elements—that (1) he "suffered an injury-in-fact that gives [him] a sufficiently concrete interest in the dispute"; (2) he has "a close relationship to the third party"; and (3) there is "a hindrance to the third party's ability to protect its own interests." *Aaron Private Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1339 (11th Cir. 2019) (internal quotation marks omitted).

27 The Court notes that, in the Amended Complaint, Wood alludes to issues caused by Raffensperger's adoption of Ballot Trax—an electronic interface that permits an elector to track his or her ballot as it is being processed [ECF 5, ¶¶ 44–46]. Wood also alleges harm in that the Settlement Agreement permitted the DPG to submit "additional guidance and training materials" for identifying a signature mismatch, which Defendants "agree[d] to consider in good faith" [*id*. ¶ 47; *see also* ECF 5-1, ¶ 4]. Wood did not address how these items violated his constitutional rights—equal protection or otherwise—in either his motion or during oral argument. Therefore, the Court need not address them at this stage.

28 Wood concedes as much in the Amended Complaint. *See* ECF 5, ¶ 25 (alleging the Settlement Agreement "set[ ] forth different standards to be followed by the clerks and registrars in processing absentee ballots ***in the State of Georgia***.") (emphasis added).

29 ECF 6, at 18.

30 ECF 33-6.

31 *Id*.

32 ECF 5, ¶ 90.
33 O.C.G.A. § 21-2-50(b).
34 ECF 5, ¶ 11.
35 ECF 6, at 20–21.
36 ECF 5, ¶ 101.
37 In contrast, as Defendants note, it would be a violation of the constitutional rights of the millions of absentee voters who relied on the absentee ballot procedures in exercising their right to vote. *See e.g. Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (finding disenfranchisement of electorate who voted by absentee ballot a violation of substantive due process).

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EXHIBIT 4

2020 WL 7094866
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

L. Lin WOOD, Jr., Plaintiff-Appellant,

v.

Brad RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, Rebecca N. Sullivan, in her official capacity as Vice Chair of the Georgia State Election Board, et al., Defendants-Appellees.

No. 20-14418
|
(December 5, 2020)

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Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:20-cv-04651-SDG

Before WILLIAM PRYOR, Chief Judge, JILL PRYOR and LAGOA, Circuit Judges.

Opinion

WILLIAM PRYOR, Chief Judge:

***1** This appeal requires us to decide whether we have jurisdiction over an appeal from the denial of a request for emergency relief in a post-election lawsuit. Ten days after the presidential election, L. Lin Wood Jr., a Georgia voter, sued state election officials to enjoin certification of the general election results, to secure a new recount under different rules, and to establish new rules for an upcoming runoff election. Wood alleged that the extant absentee-ballot and recount procedures violated Georgia law and, as a result, his federal constitutional rights. After Wood moved for emergency relief, the district court denied his motion. We agree with the district court that Wood lacks standing to sue because he fails to allege a particularized injury. And because Georgia has already certified its election results and its slate of presidential electors, Wood's requests for emergency relief are moot to the extent they concern the 2020 election. The Constitution makes clear that federal courts are courts of limited jurisdiction, U.S. Const. art. III; we may not entertain post-election contests about garden-variety issues of vote counting and misconduct that may properly be filed in state courts. We affirm.

I. BACKGROUND

Secretary of State Brad Raffensperger is the "chief election official" of Georgia. Ga. Code Ann. § 21-2-50(b). He manages the state system of elections and chairs the State Election Board. *Id.* § 21-2-30(a), (d). The Board has the authority to promulgate rules and regulations to ensure uniformity in the practices of county election officials and, "consistent with law," to aid "the fair, legal, and orderly conduct of primaries and elections." *Id.* § 21-2-31(1)–(2). The Board may also publish and distribute to county election officials a compilation of Georgia's election laws and regulations. *Id.* § 21-2-31(3). Many of these laws and regulations govern absentee voting.

Any voter in Georgia may vote by absentee ballot. *Id.* § 21-2-380(b). State law prescribes the procedures by which a voter may request and submit an absentee ballot. *Id.* §§ 21-2-381; 21-2-384; 21-2-385. The ballot comes with an oath,

which the voter must sign and return with his ballot. *Id.* § 21-2-385(a). State law also prescribes the procedures for how county election officials must certify and count absentee ballots. *Id.* § 21-2-386(a). It directs the official to "compare the identifying information on the oath with the information on file" and "compare the signature or mark on the oath with the signature or mark" on file. *Id.* § 21-2-386(a)(1)(B). If everything appears correct, the official certifies the ballot. *Id.* But if there is a problem, such as a signature that does not match, the official is to "write across the face of the envelope 'Rejected.' " *Id.* § 21-2-386(a)(1)(C). The government must then notify the voter of this rejection, and the voter may cure the problem. *Id.*

In November 2019, the Democratic Party of Georgia, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee challenged Georgia's absentee ballot procedures as unconstitutional under the First and Fourteenth Amendments. They sued Secretary Raffensperger and members of the Board for declaratory and injunctive relief. Secretary Raffensperger and the Board maintained that the procedures were constitutional, but they agreed to promulgate regulations to ensure uniform practices across counties. In March 2020, the parties entered into a settlement agreement and dismissed the suit.

***2** In the settlement agreement, Secretary Raffensperger and the Board agreed to issue an Official Election Bulletin regarding the review of signatures on absentee ballots. The Bulletin instructed officials to review the voter's signature with the following process:

> If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file ..., the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail-in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file ....

Secretary Raffensperger and the Board also agreed to train county election officials to follow this process.

This procedure has been in place for at least three elections since March, including the general election on November 3, 2020. Over one million Georgians voted by absentee ballot in the general election. No one challenged the settlement agreement until the filing of this action. By then, the general election returns had been tallied and a statewide hand recount of the presidential election results was underway.

On November 13, L. Lin Wood Jr. sued Secretary Raffensperger and the members of the Board in the district court. Wood alleged that he sued "in his capacity as a private citizen." He is a registered voter in Fulton County, Georgia, and a donor to various 2020 Republican candidates. His amended complaint alleged that the settlement agreement violates state law. As a result, he contends, it violates the Election Clause of Article I; the Electors Clause of Article II; and the Equal Protection Clause of the Fourteenth Amendment. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2; *id.* amend. XIV, § 1. Wood also alleged that irregularities in the hand recount violated his rights under the Due Process Clause of the Fourteenth Amendment. *Id.* amend. XIV, § 1.

State law requires that such recounts be done in public view, and it permits the Board to promulgate policies that facilitate recounting. Ga. Code Ann. § 21-2-498(c)(4), (d). Secretary Raffensperger directed county election officials to designate viewing areas for members of the public and the news media to observe the recount. He also permitted the Democratic and Republican Parties to designate special recount monitors.

Wood alleged that officials ignored their own rules and denied Wood and President Donald Trump's campaign "meaningful access to observe and monitor the electoral process." Although Wood did not personally attempt to observe or monitor the recount, he alleged that Secretary Raffensperger and the Board violated his "vested interest in being present and having meaningful access to observe and monitor the electoral process to ensure that it is properly administered ... and ... otherwise free, fair, and transparent."

Wood submitted two affidavits from volunteer monitors. One monitor stated that she was not allowed to enter the counting area because there were too many monitors already present, and she could not be sure from a distance whether the recount was accurate. The other explained that the counting was hard for her to follow and described what she thought were possible tabulation errors.

***3** Wood moved for extraordinary relief. He asked that the district court take one of three steps: prohibit Georgia from certifying the results of the November election; prevent it from certifying results that include "defective absentee ballots, regardless of whether said ballots were cured"; or declare the entire election defective and order the state to fix

the problems caused by the settlement agreement. He also sought greater access for Republican election monitors, both at a new hand recount of the November election and in a runoff election scheduled for January 5, 2021.

Wood's lawsuit faced a quickly approaching obstacle: Georgia law requires the Secretary of State to certify its general election results by 5:00 p.m. on the seventeenth day after Election Day. Ga. Code Ann. § 21-2-499(b). And it requires the Governor to certify Georgia's slate of presidential electors by 5:00 p.m. on the eighteenth day after Election Day. *Id.* Secretary Raffensperger's deadline was November 20, and Governor Brian Kemp had a deadline of November 21.

To avoid these deadlines, Wood moved to bar officials from certifying the election results until a court could consider his lawsuit. His emergency motion reiterated many of the requests from his amended complaint, including requests for changes to the procedures for the January runoff. He also submitted additional affidavits and declarations in support of his motion.

The district court held a hearing on November 19 to consider whether it should issue a temporary restraining order. It heard from Wood, state officials, and two groups of intervenors. Wood also introduced testimony from Susan Voyles, a poll manager who participated in the hand recount. Voyles described her experience during the recount. She recalled that one batch of absentee ballots felt different from the rest, and that that batch favored Joe Biden to an unusual extent. At the end of the hearing, the district court orally denied Wood's motion.

On November 20, the district court issued a written opinion and order that explained its denial. It first ruled that Wood lacked standing because he had alleged only generalized grievances, instead of injuries that affected him in a personal and individual way. It next explained that, even if Wood had standing, the doctrine of laches prevented him from challenging the settlement agreement now: he could have sued eight months earlier, yet he waited until two weeks after the election. Finally, it explained why Wood would not be entitled to a temporary restraining order even if the district court could reach the merits of his claims. On the same day, Secretary Raffensperger certified the results of the general election and Governor Kemp certified a slate of presidential electors.

II. STANDARD OF REVIEW

"We are required to examine our jurisdiction *sua sponte*, and we review jurisdictional issues *de novo*." *United States v. Lopez*, 562 F.3d 1309, 1311 (11th Cir. 2009) (citation omitted).

III. DISCUSSION

This appeal turns on one of the most fundamental principles of the federal courts: our limited jurisdiction. Federal courts are not "constituted as free-wheeling enforcers of the Constitution and laws." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc). As the Supreme Court "ha[s] often explained," we are instead "courts of limited jurisdiction." *Home Depot U.S.A., Inc. v. Jackson*, —— U.S. ——, 139 S. Ct. 1743, 1746, 204 L.Ed.2d 34 (2019) (internal quotation marks omitted). Article III of the Constitution establishes that our jurisdiction —that is, our judicial power—reaches only "Cases" and "Controversies." U.S. Const. art. III, § 2. Absent a justiciable case or controversy between interested parties, we lack the "power to declare the law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

***4** When someone sues in federal court, he bears the burden of proving that his suit falls within our jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Wood had the choice to sue in state or federal court. Georgia law makes clear that post-election litigation may proceed in a state court. Ga. Code Ann. §§ 21-2-499(b), 21-2-524(a). But Wood chose to sue in federal court. In doing so, he had to prove that his suit presents a justiciable controversy under Article III of the Constitution. *See Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (listing examples of problems that preclude our jurisdiction). He failed to satisfy this burden.

We divide our discussion in two parts. We first explain why Wood lacks standing to sue. We then explain that, even if he had standing, his requests to recount and delay certification of the November election results are moot. Because this case is not justiciable, we lack jurisdiction. *Id.* And because we lack the power to entertain this appeal, we will not address the other issues the parties raise.

A. Wood Lacks Standing Because He Has Not Been Injured in a Particularized Way.

Standing is a threshold jurisdictional inquiry: the elements of standing are "an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To prove standing, Wood "must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020). If he cannot satisfy these requirements, then we may not decide the merits of his appeal. *Steel Co.*, 523 U.S. at 94, 118 S.Ct. 1003.

Wood lacks standing because he fails to allege the "first and foremost of standing's three elements": an injury in fact. *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (alteration adopted) (internal quotation marks omitted). An injury in fact is "an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020) (internal quotation marks omitted). Wood's injury is not particularized.

Wood asserts only a generalized grievance. A particularized injury is one that "affect[s] the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks omitted). For example, if Wood were a political candidate harmed by the recount, he would satisfy this requirement because he could assert a personal, distinct injury. *Cf. Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 579 (11th Cir. 1995). But Wood bases his standing on his interest in "ensur[ing that] ... only lawful ballots are counted." An injury to the right "to require that the government be administered according to the law" is a generalized grievance. *Chiles v. Thornburgh*, 865 F.2d 1197, 1205–06 (11th Cir. 1989) (alteration adopted) (internal quotation marks omitted). And the Supreme Court has made clear that a generalized grievance, "no matter how sincere," cannot support standing. *Hollingsworth v. Perry*, 570 U.S. 693, 706, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013).

A generalized grievance is "undifferentiated and common to all members of the public." *Lujan*, 504 U.S. at 575, 112 S.Ct. 2130 (internal quotation marks omitted). Wood cannot explain how his interest in compliance with state election laws is different from that of any other person. Indeed, he admits that any Georgia voter could bring an identical suit. But the logic of his argument sweeps past even that boundary. All Americans, whether they voted in this election or whether they reside in Georgia, could be said to share Wood's interest in "ensur[ing] that [a presidential election] is properly administered."

***5** Wood argues that he has two bases for standing, but neither satisfies the requirement of a distinct, personal injury. He first asserts that the inclusion of unlawfully processed absentee ballots diluted the weight of his vote. To be sure, vote dilution can be a basis for standing. *Cf. Jacobson*, 974 F.3d at 1247–48. But it requires a point of comparison. For example, in the racial gerrymandering and malapportionment contexts, vote dilution occurs when voters are harmed compared to "irrationally favored" voters from other districts. *See Baker v. Carr*, 369 U.S. 186, 207–08, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). By contrast, "no single voter is specifically disadvantaged" if a vote is counted improperly, even if the error might have a "mathematical impact on the final tally and thus on the proportional effect of every vote." *Bognet v. Sec'y Commonwealth of Pa.*, —— F.3d ——, ——, 2020 WL 6686120, at *12 (3d Cir. Nov. 13, 2020) (internal quotation marks omitted). Vote dilution in this context is a "paradigmatic generalized grievance that cannot support standing." *Id.* (internal quotation marks omitted).

Wood's second theory—that Georgia "value[d] one person's vote over that of another" through "arbitrary and disparate treatment"—fares no better. He argues that Georgia treats absentee voters as a "preferred class" compared to those who vote in person, both by the terms of the settlement agreement and in practice. In his view, all voters were bound by law before the settlement agreement, but the rules for absentee voting now run afoul of the law, while in-person voters remain bound by the law. And he asserts that in practice Georgia has favored absentee voters because there were "numerous irregularities" in the processing and recounting of absentee ballots. Setting aside the fact that "[i]t is an individual voter's *choice* whether to vote by mail or in person," *Bognet*, —— F.3d at ——, 2020 WL 6686120, at *15, these complaints are generalized grievances. Even if we assume that absentee voters are favored over in-person voters, that harm does not affect Wood as an individual—it is instead shared identically by the four million or so Georgians who voted in person this November. "[W]hen the asserted harm is ... shared in substantially equal measure by ... a large class of citizens," it is not a particularized injury. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). And irregularities

in the tabulation of election results do not affect Wood differently from any other person. His allegation, at bottom, remains "that the law ... has not been followed." *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1332 (11th Cir. 2007) (quoting *Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007)).

Wood's attempts to liken his injury to those we have found sufficient in other appeals fall short. In *Common Cause/Georgia v. Billups*, we ruled that "[r]equiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing." 554 F.3d 1340, 1351–52 (11th Cir. 2009). But the injury there was the burden of producing photo identification, not the existence of separate rules for in-person and absentee voters. *Id.* And the burden to produce photo identification affected each voter in a personal way. For example, some plaintiffs in *Common Cause* alleged that they "would be required to make a special trip" to obtain valid identification "that is not required of voters who have driver's licenses or passports." *Id.* at 1351 (internal quotation marks omitted). By contrast, even Wood agrees that he is affected by Georgia's alleged violations of the law in the same way as every other Georgia voter. "This injury is precisely the kind of undifferentiated, generalized grievance that the Supreme Court has warned must not be countenanced." *Dillard*, 495 F.3d at 1335 (internal quotation marks omitted).

Roe v. Alabama ex rel. Evans, 43 F.3d 574, also does not support Wood's argument for standing. In *Roe*, we ruled that the post-election inclusion of previously excluded absentee ballots would violate the substantive-due-process rights of Alabama voters and two political candidates. *Id.* at 579–81. But no party raised and we did not address standing in *Roe*, so that precedent provides no basis for Wood to establish standing. *Cf. Lewis v. Casey*, 518 U.S. 343, 352 n.2, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (noting that in cases where "standing was neither challenged nor discussed ... the existence of unaddressed jurisdictional defects has no precedential effect"). And Wood's purported injury is far more general than the voters' injury in *Roe*. The voters in *Roe* bore individual burdens—to obtain notarization or witness signatures if they wanted to vote absentee—that state courts post-election retroactively permitted other voters to ignore. *Roe*, 43 F.3d at 580–81. In contrast, Georgia applied uniform rules, established before the election, to all voters, who could choose between voting in person or by absentee ballot, and Wood asserts that the effect of those rules harmed the electorate collectively. That alleged harm is not a particularized injury.

***6** Wood suggested in his amended complaint that his status as a donor contributed to standing and aligned his interests with those of the Georgia Republican Party. But he forfeited this argument when he failed to raise it in his opening brief. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004); *see also Nat'l All. for the Mentally Ill v. Bd. of Cnty. Comm'rs*, 376 F.3d 1292, 1296 (11th Cir. 2004) (ruling standing claims forfeited for failure to comply with the Federal Rules of Appellate Procedure). And the donor argument fails on its own terms. True, a donor can establish standing based on injuries that flow from his status as a donor. *See, e.g.*, *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019). But donors, like voters, "have no judicially enforceable interest in the *outcome* of an election." *Jacobson*, 974 F.3d at 1246. Nor does a donation give the donor a legally cognizable interest in the proper administration of elections. Any injury to Wood based on election irregularities must flow from his status as a voter, unrelated to his donations. And that fact returns him to the stumbling block of particularization.

"[T]he 'injury in fact' test requires ... that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563, 112 S.Ct. 2130 (internal quotation marks omitted). Wood's allegations suggest that various nonparties might have a particularized injury. For example, perhaps a candidate or political party would have standing to challenge the settlement agreement or other alleged irregularities. Or perhaps election monitors would have standing to sue if they were denied access to the recount. But Wood cannot place himself in the stead of these groups, even if he supports them. *Cf. Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006) (explaining that "associational standing ... does not operate in reverse," so a member cannot represent an association). He is at most a "concerned bystander." *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004) (internal quotation marks omitted). So he is not "entitled to have the court[s] decide the merits of [his] dispute." *Warth*, 422 U.S. at 498, 95 S.Ct. 2197.

B. Wood's Requested Relief Concerning the 2020 General Election Is Moot.

Even if Wood had standing, several of his requests for relief are barred by another jurisdictional defect: mootness. We are

"not empowered to decide moot questions." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (internal quotation marks omitted). "An issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011) (alteration rejected) (internal quotation marks omitted). And an issue can become moot at any stage of litigation, even if there was a live case or controversy when the lawsuit began. *Id.* at 1189–90.

Wood asked for several kinds of relief in his emergency motion, but most of his requests pertained to the 2020 election results. He moved the district court to prohibit either the certification of the election results or certification that included the disputed absentee ballots. He also asked the district court to order a new hand recount and to grant Republican election monitors greater access during both the recount and the January runoff election. But after the district court denied Wood's motion, Secretary Raffensperger certified the election results on November 20. And Governor Kemp certified the slate of presidential electors later that day.

Because Georgia has already certified its results, Wood's requests to delay certification and commence a new recount are moot. "We cannot turn back the clock and create a world in which" the 2020 election results are not certified. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). And it is not possible for us to delay certification nor meaningful to order a new recount when the results are already final and certified. *Cf. Tropicana Prods. Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1582 (11th Cir. 1989) ("[A]n appeal from the denial of a motion for preliminary injunction is mooted when the requested effective end-date for the preliminary injunction has passed."). Nor can we reconstrue Wood's previous request that we temporarily prohibit certification into a new request that we undo the certification. A district court "must first have the opportunity to pass upon [every] issue," so we may not consider requests for relief made for the first time on appeal. *S.F. Residence Club, Inc. v. 7027 Old Madison Pike, LLC*, 583 F.3d 750, 755 (11th Cir. 2009).

***7** Wood's arguments reflect a basic misunderstanding of what mootness is. He argues that the certification does not moot anything "because this litigation is ongoing" and he remains injured. But mootness concerns the availability of relief, not the existence of a lawsuit or an injury. *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1304 (11th Cir. 2011). So even if post-election litigation is not always mooted by certification, *see, e.g.*, *Siegel v. LePore*, 234 F.3d 1163, 1172–73 (11th Cir. 2000) (en banc), Wood's particular requests are moot. Wood is right that certification does not moot his requests for relief concerning the 2021 runoff—although Wood's lack of standing still forecloses our consideration of those requests—but the pendency of other claims for relief cannot rescue the otherwise moot claims. *See, e.g.*, *Adler v. Duval Cnty. Sch. Bd.*, 112 F.3d 1475, 1478–79, 1481 (11th Cir. 1997) (instructing the district court to dismiss moot claims but resolving other claims on the merits). Wood finally tells us that President Trump has also requested a recount, but that fact is irrelevant to whether Wood's requests remain live.

Nor does any exception to mootness apply. True, we often review otherwise-moot election appeals because they are "capable of repetition yet evading review." *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1496 (11th Cir. 1993) (internal quotation marks omitted). We may apply this exception when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Nat'l Broad. Co. v. Commc'ns Workers of Am.*, 860 F.2d 1022, 1023 (11th Cir. 1988) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975)). But we will not apply this exception if there is "some alternative vehicle through which a particular policy may effectively be subject to" complete review. *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004).

The "capable of repetition yet evading review" exception does not save Wood's appeal because there is no "reasonable expectation" that Wood will again face the issues in this appeal. Based on the posture of this appeal, the challenged action is the denial of an emergency injunction against the certification of election results. *See Fleming*, 785 F.3d at 446 (explaining that whether the issues in an interlocutory appeal are "capable of repetition, yet evading review" is a separate question from whether the issues in the overall lawsuit are capable of doing so). That denial is the decision we would review but for the jurisdictional problems. But Wood cannot satisfy the requirement that there be a "reasonable expectation" that he will again seek to delay certification. Wood does not suggest that this situation might recur. *Cf. FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 463–64, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007). And we have no reason to think it would: he is a private citizen, so the possibility of a

recurrence is purely theoretical. *Cf. Hall v. Sec'y, Ala.*, 902 F.3d 1294, 1305 (11th Cir. 2018).

IV. CONCLUSION

We **AFFIRM** the denial of Wood's motion for emergency relief.

All Citations

--- F.3d ----, 2020 WL 7094866

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EXHIBIT 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KING, MARIAN ELLEN SHERIDAN, JOHN EARL HAGGARD, CHARLES JAMES RITCHARD, JAMES DAVID HOOPER, and DAREN WADE RUBINGH,

Plaintiffs,

v.

Civil Case No. 20-13134
Honorable Linda V. Parker

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, JOCELYN BENSON, in her official capacity as Michigan Secretary of State, and MICHIGAN BOARD OF STATE CANVASSERS,

Defendants,

and

CITY OF DETROIT, DEMOCRATIC NATIONAL COMMITTEE and MICHIGAN DEMOCRATIC PARTY, and ROBERT DAVIS,

Intervenor-Defendants.
_____/

OPINION AND ORDER DENYING PLAINTIFFS' "EMERGENCY MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF" (ECF NO. 7)

The right to vote is among the most sacred rights of our democracy and, in turn, uniquely defines us as Americans. The struggle to achieve the right to vote is

one that has been both hard fought and cherished throughout our country's history. Local, state, and federal elections give voice to this right through the ballot. And elections that count each vote celebrate and secure this cherished right.

These principles are the bedrock of American democracy and are widely revered as being woven into the fabric of this country. In Michigan, more than 5.5 million citizens exercised the franchise either in person or by absentee ballot during the 2020 General Election. Those votes were counted and, as of November 23, 2020, certified by the Michigan Board of State Canvassers (also "State Board"). The Governor has sent the slate of Presidential Electors to the Archivist of the United States to confirm the votes for the successful candidate.

Against this backdrop, Plaintiffs filed this lawsuit, bringing forth claims of widespread voter irregularities and fraud in the processing and tabulation of votes and absentee ballots. They seek relief that is stunning in its scope and breathtaking in its reach. If granted, the relief would disenfranchise the votes of the more than 5.5 million Michigan citizens who, with dignity, hope, and a promise of a voice, participated in the 2020 General Election. The Court declines to grant Plaintiffs this relief.

I. Background

In the weeks leading up to, and on, November 3, 2020, a record 5.5 million Michiganders voted in the presidential election ("2020 General Election"). (ECF

No. 36-4 at Pg ID 2622.) Many of those votes were cast by absentee ballot. This was due in part to the coronavirus pandemic and a ballot measure the Michigan voters passed in 2018 allowing for no-reason absentee voting. When the polls closed and the votes were counted, Former Vice President Joseph R. Biden, Jr. had secured over 150,000 more votes than President Donald J. Trump in Michigan. (*Id.*)

Michigan law required the Michigan State Board of Canvassers to canvass results of the 2020 General Election by November 23, 2020. Mich. Comp. Laws § 168.842. The State Board did so by a 3-0 vote, certifying the results "for the Electors of President and Vice President," among other offices. (ECF No. 36-5 at Pg ID 2624.) That same day, Governor Gretchen Whitmer signed the Certificates of Ascertainment for the slate of electors for Vice President Biden and Senator Kamala D. Harris. (ECF No. 36-6 at Pg ID 2627-29.) Those certificates were transmitted to and received by the Archivist of the United States. (*Id.*)

Federal law provides that if election results are contested in any state, and if the state, prior to election day, has enacted procedures to decide controversies or contests over electors and electoral votes, and if these procedures have been applied, and the decisions are made at least six days before the electors' meetings, then the decisions are considered conclusive and will apply in counting the electoral votes. 3 U.S.C. § 5. This date (the "Safe Harbor" deadline) falls on

December 8, 2020. Under the federal statutory timetable for presidential elections, the Electoral College must meet on "the first Monday after the second Wednesday in December," 3 U.S.C. § 7, which is December 14 this year.

Alleging widespread fraud in the distribution, collection, and counting of ballots in Michigan, as well as violations of state law as to certain election challengers and the manipulation of ballots through corrupt election machines and software, Plaintiffs filed the current lawsuit against Defendants at 11:48 p.m. on November 25, 2020—the eve of the Thanksgiving holiday. (ECF No. 1.) Plaintiffs are registered Michigan voters and nominees of the Republican Party to be Presidential Electors on behalf of the State of Michigan. (ECF No. 6 at Pg ID 882.) They are suing Governor Whitmer and Secretary of State Jocelyn Benson in their official capacities, as well as the Michigan Board of State Canvassers.

On November 29, a Sunday, Plaintiffs filed a First Amended Complaint (ECF No. 6), "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief and Memorandum in Support Thereof" (ECF No. 7), and Emergency Motion to Seal (ECF No. 8). In their First Amended Complaint, Plaintiffs allege three claims pursuant to 42 U.S.C. § 1983: (Count I) violation of the Elections and Electors Clauses; (Count II) violation of the Fourteenth Amendment Equal Protection Clause; and, (Count III) denial of the Fourteenth

Amendment Due Process Clause. (ECF No. 6.) Plaintiffs also assert one count alleging violations of the Michigan Election Code. (*Id*.)

By December 1, motions to intervene had been filed by the City of Detroit (ECF No. 15), Robert Davis (ECF No. 12), and the Democratic National Committee and Michigan Democratic Party ("DNC/MDP") (ECF No. 14). On that date, the Court entered a briefing schedule with respect to the motions. Plaintiffs had not yet served Defendants with their pleading or emergency motions as of December 1. Thus, on December 1, the Court also entered a text-only order to hasten Plaintiffs' actions to bring Defendants into the case and enable the Court to address Plaintiffs' pending motions. Later the same day, after Plaintiffs filed certificates of service reflecting service of the summons and Amended Complaint on Defendants (ECF Nos. 21), the Court entered a briefing schedule with respect to Plaintiffs' emergency motions, requiring response briefs by 8:00 p.m. on December 2, and reply briefs by 8:00 p.m. on December 3 (ECF No. 24).

On December 2, the Court granted the motions to intervene. (ECF No. 28.) Response and reply briefs with respect to Plaintiffs' emergency motions were thereafter filed. (ECF Nos. 29, 31, 32, 34, 35, 36, 37, 39, 49, 50.) Amicus curiae Michigan State Conference NAACP subsequently moved and was granted leave to file a brief in support of Defendants' position. (ECF Nos. 48, 55.) Supplemental briefs also were filed by the parties. (ECF Nos. 57, 58.)

In light of the limited time allotted for the Court to resolve Plaintiffs' emergency motion for injunctive relief—which Plaintiffs assert "must be granted in advance of December 8, 2020" (ECF No. 7 at Pg ID 1846)—the Court has disposed of oral argument with respect to their motion pursuant to Eastern District of Michigan Local Rule 7.1(f).[1]

II. Standard of Review

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted). The plaintiff bears the burden of demonstrating entitlement to preliminary injunctive relief. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Such relief will only be granted where "the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). "Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to

[1] "'[W]here material facts are not in dispute, or where facts in dispute are not material to the preliminary injunction sought, district courts generally need not hold an evidentiary hearing.'" *Nexus Gas Transmission, LLC v. City of Green, Ohio*, 757 Fed. Appx. 489, 496-97 (6th Cir. 2018) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007)) (citation omitted).

support or oppose a motion for a preliminary injunction." 11A Mary Kay Kane, Fed. Prac. & Proc. § 2949 (3d ed.).

Four factors are relevant in deciding whether to grant preliminary injunctive relief: "'(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.'" *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020) (quoting *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012)). "At the preliminary injunction stage, 'a plaintiff must show more than a mere possibility of success,' but need not 'prove his case in full.'" *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007)). Yet, "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion …." *Leary*, 228 F.3d at 739.

III. Discussion

The Court begins by discussing those questions that go to matters of subject matter jurisdiction or which counsel against reaching the merits of Plaintiffs' claims. While the Court finds that any of these issues, alone, indicate that Plaintiffs' motion should be denied, it addresses each to be thorough.

A. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This immunity extends to suits brought by citizens against their own states. *See, e.g., Ladd v. Marchbanks*, 971 F.3d 574, 578 (6th Cir. 2020) (citing *Hans v. Louisiana*, 134 U.S. 1, 18-19 (1890)). It also extends to suits against state agencies or departments, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (citations omitted), and "suit[s] against state officials when 'the state is the real, substantial party in interest[,]'" *id.* at 101 (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)).

A suit against a State, a state agency or its department, or a state official is in fact a suit against the State and is barred "regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 100-02 (citations omitted). "'The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.'" *Id*. at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)) (internal quotation marks omitted).

Eleventh Amendment immunity is subject to three exceptions: (1) congressional abrogation; (2) waiver by the State; and (3) "a suit against a state official seeking prospective injunctive relief to end a continuing violation of federal law." *See Carten v. Kent State Univ.*, 282 F.3d 391, 398 (6th Cir. 2002) (citations omitted). Congress did not abrogate the States' sovereign immunity when it enacted 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989). "The State of Michigan has not consented to being sued in civil rights actions in the federal courts." *Johnson v. Unknown Dellatifa*, 357 F.3d 539, 545 (6th Cir. 2004) (citing *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986)). The Eleventh Amendment therefore bars Plaintiffs' claims against the Michigan Board of State Canvassers. *See McLeod v. Kelly*, 7 N.W.2d 240, 242 (Mich. 1942) ("The board of State canvassers is a State agency …"); *see also Deleeuw v. State Bd. of Canvassers*, 688 N.W.2d 847, 850 (Mich. Ct. App. 2004). Plaintiffs' claims are barred against Governor Whitmer and Secretary Benson unless the third exception applies.

The third exception arises from the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908). But as the Supreme Court has advised:

> To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle … that Eleventh Amendment immunity represents a real

> limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997). Further, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 102. "'In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (quoting *Coeur d'Alene Tribe of Idaho*, 521 U.S. 296 (O'Connor, J., concurring)).

Ex parte Young does not apply, however, to *state law* claims against state officials, regardless of the relief sought. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 106 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."); *see also In re Ohio Execution Protocol Litig.*, 709 F. App'x 779, 787 (6th Cir. 2017) ("If the plaintiff sues a state official under state law

in federal court for actions taken within the scope of his authority, sovereign immunity bars the lawsuit regardless of whether the action seeks monetary or injunctive relief."). Unquestionably, Plaintiffs' state law claims against Defendants are barred by Eleventh Amendment immunity.

The Court then turns its attention to Plaintiffs' § 1983 claims against Defendants. Defendants and Intervenor DNC/MDP contend that these claims are not in fact federal claims as they are premised entirely on alleged violations of *state* law. (ECF No. 31 at Pg ID 2185 ("Here, each count of Plaintiffs' complaint—even Counts I, II, and III, which claim to raise violations of federal law—is predicated on the election being conducted contrary to Michigan law."); ECF No. 36 at Pg ID 2494 ("While some of [Plaintiffs'] allegations concern fantastical conspiracy theories that belong more appropriately in the fact-free outer reaches of the Internet[,] … what Plaintiffs assert at bottom are violations of the Michigan Election Code.") Defendants also argue that even if properly stated as federal causes of action, "it is far from clear whether Plaintiffs' requested injunction is actually prospective in nature, as opposed to retroactive." (ECF No. 31 at Pg ID 2186.)

The latter argument convinces this Court that *Ex parte Young* does not apply. As set forth earlier, "'[i]n order to fall with the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law.'"

Russell v. Lundergan-Grimes, 784 F.3d 1037, 1047 (6th Cir. 2015) (quoting *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013)). Unlike *Russell*, which Plaintiffs cite in their reply brief, this is not a case where a plaintiff is seeking to enjoin the continuing enforcement of a statute that is allegedly unconstitutional. *See id*. at 1044, 1047 (plaintiff claimed that Kentucky law creating a 300-foot no-political-speech buffer zone around polling location violated his free-speech rights). Instead, Plaintiffs are seeking to undo what has already occurred, as their requested relief reflects.[2] (*See* ECF No. 7 at Pg ID 1847; *see also* ECF No. 6 at Pg 955-56.)

Before this lawsuit was filed, the Michigan Board of State Canvassers had already certified the election results and Governor Whitmer had transmitted the State's slate of electors to the United States Archivist. (ECF Nos. 31-4, 31-5.) There is no continuing violation to enjoin. *See Rios v. Blackwell*, 433 F. Supp. 2d 848 (N.D. Ohio Feb. 7, 2006); *see also King Lincoln Bronzeville Neighborhood Ass'n v. Husted*, No. 2:06-cv-00745, 2012 WL 395030, at *4-5 (S.D. Ohio Feb. 7, 2012); *cf. League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 (6th Cir. 2008) (finding that the plaintiff's claims fell within the *Ex parte Young* doctrine

[2] To the extent Plaintiffs ask the Court to certify the results in favor of President Donald J. Trump, such relief is beyond its powers.

where it alleged that the problems that plagued the election "are chronic and will continue absent injunctive relief").

For these reasons, the Court concludes that the Eleventh Amendment bars Plaintiffs' claims against Defendants.

B. Mootness

This case represents well the phrase: "this ship has sailed." The time has passed to provide most of the relief Plaintiffs request in their Amended Complaint; the remaining relief is beyond the power of any court. For those reasons, this matter is moot.

"'Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.'" *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). A case may become moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 410 (1980) (internal quotation marks and citation omitted). Stated differently, a case is moot where the court lacks "the ability to give meaningful relief[.]" *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019). This lawsuit was moot well before it was filed on November 25.

In their prayer for relief, Plaintiffs ask the Court to: (a) order Defendants to decertify the results of the election; (b) enjoin Secretary Benson and Governor

Whitmer from transmitting the certified election results to the Electoral College; (c) order Defendants "to transmit certified election results that state that President Donald Trump is the winner of the election"; (d) impound all voting machines and software in Michigan for expert inspection; (e) order that no votes received or tabulated by machines not certified as required by federal and state law be counted; and, (f) enter a declaratory judgment that mail-in and absentee ballot fraud must be remedied with a manual recount or statistically valid sampling.[3] (ECF No. 6 at Pg ID 955-56, ¶ 233.) What relief the Court could grant Plaintiffs is no longer available.

Before this lawsuit was filed, all 83 counties in Michigan had finished canvassing their results for all elections and reported their results for state office races to the Secretary of State and the Michigan Board of State Canvassers in accordance with Michigan law. *See* Mich. Comp. Laws § 168.843. The State Board had certified the results of the 2020 General Election and Governor Whitmer had submitted the slate of Presidential Electors to the Archivists. (ECF

[3] Plaintiffs also seek an order requiring the impoundment of all voting machines and software in Michigan for expert inspection and the production of security camera footage from the TCF Center for November 3 and 4. (ECF No. 6 at Pg ID 956, ¶ 233.) This requested relief is not meaningful, however, where the remaining requests are no longer available. In other words, the evidence Plaintiffs seek to gather by inspecting voting machines and software and security camera footage only would be useful if an avenue remained open for them to challenge the election results.

No. 31-4 at Pg ID 2257-58; ECF No. 31-5 at Pg ID 2260-63.) The time for requesting a special election based on mechanical errors or malfunctions in voting machines had expired. *See* Mich. Comp. Laws §§ 168.831, 168.832 (petitions for special election based on a defect or mechanical malfunction must be filed "no later than 10 days after the date of the election"). And so had the time for requesting a recount for the office of President. *See* Mich. Comp. Laws § 168.879.

The Michigan Election Code sets forth detailed procedures for challenging an election, including deadlines for doing so. Plaintiffs did not avail themselves of the remedies established by the Michigan legislature. The deadline for them to do so has passed. Any avenue for this Court to provide meaningful relief has been foreclosed. As the Eleventh Circuit Court of Appeals recently observed in one of the many other post-election lawsuits brought to specifically overturn the results of the 2020 presidential election:

> "We cannot turn back the clock and create a world in which" the 2020 election results are not certified. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). And it is not possible for us to delay certification nor meaningful to order a new recount when the results are already final and certified.

Wood v. Raffensperger, -- F.3d -- , 2020 WL 7094866 (11th Cir. Dec. 5, 2020). And as one Justice of the Supreme Court of Pennsylvania advised in another 2020 post-election lawsuit: "there is no basis in law by which the courts may grant Petitioners' request to ignore the results of an election and recommit the choice to

the General Assembly to substitute its preferred slate of electors for the one chosen by a majority of Pennsylvania's voters." *Kelly v. Commonwealth*, No. 68 MAP 2020, 2020 WL 7018314, at *3 (Pa. Nov. 28, 2020) (Wecht, J., concurring); *see also Wood v. Raffensperger*, No. 1:20-cv-04651, 2020 WL 6817513, at *13 (N.D. Ga. Nov. 20, 2020) (concluding that "interfer[ing] with the result of an election that has already concluded would be unprecedented and harm the public in countless ways").

In short, Plaintiffs' requested relief concerning the 2020 General Election is moot.

C. Laches

Defendants argue that Plaintiffs are unlikely to succeed on the merits because they waited too long to knock on the Court's door. (ECF No. 31 at Pg ID 2175-79; ECF No. 39 at Pg ID 2844.) The Court agrees.

The doctrine of laches is rooted in the principle that "equity aids the vigilant, not those who slumber on their rights." *Lucking v. Schram*, 117 F.2d 160, 162 (6th Cir. 1941); *see also United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 9 (2008) ("A constitutional claim can become time-barred just as any other claim can."). An action may be barred by the doctrine of laches if: (1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant is prejudiced by this delay. *Brown-Graves Co. v. Central States, Se. and Sw. Areas Pension Fund*,

206 F.3d 680, 684 (6th Cir. 2000); *Ottawa Tribe of Oklahoma v. Logan*, 577 F.3d 634, 639 n.6 (6th Cir. 2009) ("Laches arises from an extended failure to exercise a right to the detriment of another party."). Courts apply laches in election cases. *Detroit Unity Fund v. Whitmer*, 819 F. App'x 421, 422 (6th Cir. 2020) (holding that the district court did not err in finding plaintiff's claims regarding deadline for local ballot initiatives "barred by laches, considering the unreasonable delay on the part of [p]laintiffs and the consequent prejudice to [d]efendants"). *Cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence. That is as true in election law cases as elsewhere.").

First, Plaintiffs showed no diligence in asserting the claims at bar. They filed the instant action on November 25—more than 21 days after the 2020 General Election—and served it on Defendants some five days later on December 1. (ECF Nos. 1, 21.) If Plaintiffs had legitimate claims regarding whether the treatment of election challengers complied with state law, they could have brought their claims well in advance of or on Election Day—but they did not. Michigan's 83 Boards of County Canvassers finished canvassing by no later than November 17 and, on November 23, both the Michigan Board of State Canvassers and Governor Whitmer certified the election results. Mich. Comp. Laws §§ 168.822, 168.842.0. If Plaintiffs had legitimate claims regarding the manner by which

ballots were processed and tabulated on or after Election Day, they could have brought the instant action on Election Day or during the weeks of canvassing that followed—yet they did not. Plaintiffs base the claims related to election machines and software on "expert and fact witness" reports discussing "glitches" and other alleged vulnerabilities that occurred as far back as 2010. (*See e.g.,* ECF No. 6 at Pg ID 927-933, ¶¶ 157(C)-(E), (G), 158, 160, 167.) If Plaintiffs had legitimate concerns about the election machines and software, they could have filed this lawsuit well before the 2020 General Election—yet they sat back and did nothing.

Plaintiffs proffer no persuasive explanation as to why they waited so long to file this suit. Plaintiffs concede that they "would have preferred to file sooner, but [] needed some time to gather statements from dozens of fact witnesses, retain and engage expert witnesses, and gather other data supporting their Complaint." (ECF No. 49 at Pg ID 3081.) But according to Plaintiffs themselves, "[m]anipulation of votes was apparent *shortly after the polls closed on November 3, 2020*." (ECF No. 7 at Pg ID 1837 (emphasis added).) Indeed, where there is no reasonable explanation, there can be no true justification. *See Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (identifying the "first and most essential" reason to issue a stay of an election-related injunction is plaintiff offering "no reasonable explanation for waiting so long to file this action"). Defendants satisfy the first element of their laches defense.

Second, Plaintiffs' delay prejudices Defendants. *See Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights.") This is especially so considering that Plaintiffs' claims for relief are not merely last-minute—they are after the fact. While Plaintiffs delayed, the ballots were cast; the votes were counted; and the results were certified. The rationale for interposing the doctrine of laches is now at its peak. *See McDonald v. Cnty. of San Diego*, 124 F. App'x 588 (9th Cir. 2005) (citing *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988)); *Soules*, 849 F.2d at 1180 (quoting *Hendon v. N.C. State Bd. Of Elections*, 710 F.2d 177, 182 (4th Cir. 1983)) (applying doctrine of laches in post-election lawsuit because doing otherwise would, "permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action").

Plaintiffs could have lodged their constitutional challenges much sooner than they did, and certainly not three weeks after Election Day and one week after certification of almost three million votes. The Court concludes that Plaintiffs' delay results in their claims being barred by laches.

D. Abstention

As outlined in several filings, when the present lawsuit was filed on November 25, 2020, there already were multiple lawsuits pending in Michigan state courts raising the same or similar claims alleged in Plaintiffs' Amended Complaint. (*See, e.g.*, ECF No. 31 at Pg ID 2193-98 (summarizing five state court lawsuits challenging President Trump's defeat in Michigan's November 3, 2020 General Election).) Defendants and the City of Detroit urge the Court to abstain from deciding Plaintiffs' claims in deference to those proceedings under various abstention doctrines. (*Id.* at Pg ID 2191-2203; ECF No. 39 at Pg ID 2840-44.) Defendants rely on the abstention doctrine outlined by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The City of Detroit relies on the abstention doctrines outlined in *Colorado River*, as well as those set forth in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500-01 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The City of Detroit maintains that abstention is particularly appropriate when resolving election disputes in light of the autonomy provided to state courts to initially settle such disputes.

The abstention doctrine identified in *Colorado River* permits a federal court to abstain from exercising jurisdiction over a matter in deference to parallel state-court proceedings. *Colorado River*, 424 U.S. at 813, 817. The exception is found

warranted "by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (quoting *Colorado River*, 424 U.S. at 817). The Sixth Circuit has identified two prerequisites for abstention under this doctrine. *Romine v. Compuserve Corp.*, 160 F.3d 337, 339-40 (6th Cir. 1998).

First, the court must determine that the concurrent state and federal actions are parallel. *Id*. at 339. Second, the court must consider the factors outlined by the Supreme Court in *Colorado River* and subsequent cases:

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; … (4) the order in which jurisdiction was obtained; … (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

Romine, 160 F.3d at 340-41 (internal citations omitted). "These factors, however, do not comprise a mechanical checklist. Rather, they require 'a careful balancing of the important factors as they apply in a give[n] case' depending on the particular facts at hand." *Id*. (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983)).

As summarized in Defendants' response brief and reflected in their exhibits (*see* ECF No. 31 at Pg ID 2193-97; *see also* ECF Nos. 31-7, 31-9, 31-11, 31-12,

31-14), the allegations and claims in the state court proceedings and the pending matter are, at the very least, substantially similar, *Romine*, 160 F.3d at 340 ("Exact parallelism is not required; it is enough if the two proceedings are substantially similar." (internal quotation marks and citation omitted)). A careful balancing of the factors set forth by the Supreme Court counsel in favor of deferring to the concurrent jurisdiction of the state courts.

The first and second factor weigh against abstention. *Id.* (indicating that the weight is against abstention where no property is at issue and neither forum is more or less convenient). While the Supreme Court has stated that "'the presence of federal law issues must always be a major consideration weighing against surrender of federal jurisdiction in deference to state proceedings[,]'" *id*. at 342 (quoting *Moses H. Cone*, 460 U.S. at 26), this "'factor has less significance where the federal courts' jurisdiction to enforce the statutory rights in question is concurrent with that of the state courts.'"[4] *Id*. (quoting *Moses H. Cone*, 460 U.S. at 25). Moreover, the Michigan Election Code seems to dominate even Plaintiffs' federal claims. Further, the remaining factors favor abstention.

"Piecemeal litigation occurs when different courts adjudicate the identical issue, thereby duplicating judicial effort and potentially rendering conflicting

[4] State courts have concurrent jurisdiction over § 1983 actions. *Felder v. Casey*, 487 U.S. 131, 139 (1988).

results." *Id.* at 341. The parallel proceedings are premised on similar factual allegations and many of the same federal and state claims. The state court proceedings were filed well before the present matter and at least three of those matters are far more advanced than this case. Lastly, as Congress conferred concurrent jurisdiction on state courts to adjudicate § 1983 claims, *Felder v. Casey*, 487 U.S. 131, 139 (1988), "[t]here can be no legitimate contention that the [Michigan] state courts are incapable of safeguarding [the rights protected under this statute]," *Romine*, 160 F.3d at 342.

For these reasons, abstention is appropriate under the *Colorado River* doctrine. The Court finds it unnecessary to decide whether abstention is appropriate under other doctrines.

E. Standing

Under Article III of the United States Constitution, federal courts can resolve only "cases" and "controversies." U.S. Const. art. III § 2. The case-or-controversy requirement is satisfied only where a plaintiff has standing to bring suit. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). Each plaintiff must demonstrate standing for each claim he seeks to press.[5]

[5] Plaintiffs assert a due process claim in their Amended Complaint and twice state in their motion for injunctive relief that Defendants violated their due process rights. (*See* ECF No. 7 at Pg ID 1840, 1844.) Plaintiffs do not pair either statement with anything the Court could construe as a developed argument. (*Id.*) The Court finds it unnecessary, therefore, to further discuss the due process claim.

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (citation omitted) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). To establish standing, a plaintiff must show that: (1) he has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992) (internal quotation marks and citations omitted).

1. Equal Protection Claim

Plaintiffs allege that Defendants engaged in "several schemes" to, among other things, "destroy," "discard," and "switch" votes for President Trump, thereby "devalu[ing] Republican votes" and "diluting" the influence of their individual votes. (ECF No. 49 at Pg ID 3079.) Plaintiffs contend that "the vote dilution resulting from this systemic and illegal conduct did not affect all Michigan voters equally; it had the intent and effect of inflating the number of votes for Democratic candidates and reducing the number of votes for President Trump and Republican candidates." (ECF No. 49 at Pg ID 3079.) Even assuming that Plaintiffs establish

McPherson v. Kelsey, 125 F.3d 989, 995 (6th Cir. 1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

injury-in-fact and causation under this theory,[6] their constitutional claim cannot stand because Plaintiffs fall flat when attempting to clear the hurdle of redressability.

Plaintiffs fail to establish that the alleged injury of vote-dilution can be redressed by a favorable decision from this Court. Plaintiffs ask this Court to de-certify the results of the 2020 General Election in Michigan. But an order de-certifying the votes of approximately 2.8 million people would not reverse the dilution of Plaintiffs' vote. To be sure, standing is not "dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill*, 138 S. Ct. at 1934 (citing *Cuno*, 547 U.S. at 353); *Cuno*, 547 U.S. at 353 ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Plaintiffs' alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others *their* right to vote. Accordingly, Plaintiffs have failed to show that their injury can be redressed by the relief they seek and thus possess no standing to pursue their equal protection claim.

[6] To be clear, the Court does not find that Plaintiffs satisfy the first two elements of the standing inquiry.

2. Elections Clause & Electors Clause Claims

The provision of the United States Constitution known as the Elections Clause states in part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]" U.S. Const. art. I, § 4, cl. 1. "The Elections Clause effectively gives state governments the 'default' authority to regulate the mechanics of federal elections, *Foster v. Love*, 522 U.S. 67, 69, 118 S. Ct. 464, 139 L.Ed.2d 369 (1997), with Congress retaining 'exclusive control' to 'make or alter' any state's regulations, *Colegrove v. Green*, 328 U.S. 549, 554, 66 S. Ct. 1198, 90 L.Ed. 1432 (1946)." *Bognet*, 2020 WL 6686120, *1. The "Electors Clause" of the Constitution states: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors …." U.S. Const. art. II, § 1, cl. 2.

Plaintiffs argue that, as "nominees of the Republican Party to be Presidential Electors on behalf of the State of Michigan, they have standing to allege violations of the Elections Clause and Electors Clause because "a vote for President Trump and Vice-President Pence in Michigan … is a vote for each Republican elector[], and … illegal conduct aimed at harming candidates for President similarly injures Presidential Electors." (ECF No. 7 at Pg ID 1837-38; ECF No. 49 at Pg ID 3076-78.)

But where, as here, the only injury Plaintiffs have alleged is that the Elections Clause has not been followed, the United States Supreme Court has made clear that "[the] injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance."[7] *Lance v. Coffman*, 549 U.S. 437, 442 (2007). Because Plaintiffs "assert no particularized stake in the litigation," Plaintiffs fail to establish injury-in-fact and thus standing to bring their Elections Clause and Electors Clause claims. *Id.*; *see also Johnson v. Bredesen*, 356 F. App'x 781, 784 (6th Cir. 2009) (citing *Lance*, 549 U.S. at 441-42) (affirming district court's conclusion that citizens did not allege injury-in-fact to support standing for claim that the state of Tennessee violated constitutional law).

[7] Although separate constitutional provisions, the Electors Clause and Elections Clause share "considerable similarity," *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839, (2015) (Roberts, C.J., dissenting), and Plaintiffs do not at all distinguish the two clauses in their motion for injunctive relief or reply brief (ECF No. 7; ECF No. 49 at Pg ID 3076-78). *See also Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *7 (3d Cir. Nov. 13, 2020) (applying same test for standing under both Elections Clause and Electors Clause); *Wood*, 2020 WL 6817513, at *1 (same); *Foster*, 522 U.S. at 69 (characterizing Electors Clause as Elections Clauses' "counterpart for the Executive Branch"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995) (noting that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause).

This is so because the Elections Clause grants rights to "the Legislature" of "each State." U.S. Const. art. I, § 4, cl. 1. The Supreme Court interprets the words "the Legislature," as used in that clause, to mean the lawmaking bodies of a state. *Ariz. State Legislature*, 135 S.Ct. at 2673. The Elections Clause, therefore, grants rights to state legislatures and to other entities to which a State may delegate lawmaking authority. *See id.* at 2668. Plaintiffs' Elections Clause claims thus belong, if to anyone, Michigan's state legislature. *Bognet v. Secy. Commonwealth of Pa.*, -- F.3d. --, 2020 WL 6686120, *7 (3d Cir. Nov. 13, 2020). Plaintiffs here are six presidential elector nominees; they are not a part of Michigan's lawmaking bodies nor do they have a relationship to them.

To support their contention that they have standing, Plaintiffs point to *Carson v. Simon*, 78 F.3d 1051 (8th Cir. 2020), a decision finding that electors had standing to bring challenges under the Electors Clause. (ECF No. 7 at Pg ID 1839 (citing *Carson*, 978 F.3d at 1057).) In that case, which was based on the specific content and contours of Minnesota state law, the Eighth Circuit Court of Appeals concluded that because "the plain text of Minnesota law treats prospective electors as candidates," it too would treat presidential elector nominees as candidates. *Carson*, 78 F.3d at 1057. This Court, however, is as unconvinced about the majority's holding in *Carson* as the dissent:

> I am not convinced the Electors have Article III standing to assert claims under the Electors Clause. Although

> Minnesota law at times refers to them as "candidates," *see, e.g.*, Minn. Stat. § 204B.03 (2020), the Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president. *Id*. § 208.04 subdiv. 1 ("[A] vote cast for the party candidates for president and vice president shall be deemed a vote for that party's electors."). They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals.

78 F.3d at 1063 (Kelly, J., dissenting).[8]

Plaintiffs contend that the Michigan Election Code and relevant Minnesota law are similar. (See ECF No. 49 at Pg ID 3076-78.) Even if the Court were to

[8] In addition, at least one Circuit Court, the Third Circuit Court of Appeals, has distinguished *Carson*'s holding, noting:

> Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots. . . . The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none.

Bognet, 2020 WL 6686120, at *8 n.6.

agree, it finds that Plaintiffs lack standing to sue under the Elections and Electors Clauses.

F. The Merits of the Request for Injunctive Relief

1. Likelihood of Success on the Merits

The Court may deny Plaintiffs' motion for injunctive relief for the reasons discussed above. Nevertheless, the Court will proceed to analyze the merits of their claims.

a. Violation of the Elections & Electors Clauses

Plaintiffs allege that Defendants violated the Elections Clause and Electors Clause by deviating from the requirements of the Michigan Election Code. (*See, e.g.,* ECF No. 6 at Pg ID 884-85, ¶¶ 36-40, 177-81, 937-38.) Even assuming Defendants did not follow the Michigan Election Code, Plaintiffs do not explain how or why such violations of state election procedures automatically amount to violations of the clauses. In other words, it appears that Plaintiffs' claims are in fact state law claims disguised as federal claims.

A review of Supreme Court cases interpreting these clauses supports this conclusion. In *Cook v. Gralike*, the Supreme Court struck down a Missouri law that required election officials to print warnings on the ballot next to the name of any congressional candidate who refused to support term limits after concluding that such a statute constituted a "'regulation' of congressional elections," as used in

the Elections Clause. 531 U.S. 510, 525-26 (2001) (quoting U.S. Const. art. I, § 4, cl. 1). In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court upheld an Arizona law that transferred redistricting power from the state legislature to an independent commission after concluding that "the Legislature," as used in the Elections Clause, includes any official body with authority to make laws for the state. 576 U.S. 787, 824 (2015). In each of these cases, federal courts measured enacted state election laws against the federal mandates established in the clauses—they did not measure *violations* of enacted state elections law against those federal mandates.

By asking the Court to find that they have made out claims under the clauses due to alleged violations of the Michigan Election Code, Plaintiffs ask the Court to find that any alleged deviation from state election law amounts to a modification of state election law and opens the door to federal review. Plaintiffs cite to no case—and this Court found none—supporting such an expansive approach.

b. Violation of the Equal Protection Clause

Most election laws will "impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). But "[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [to vote]." *Reynolds v. Sims*, 377 U.S. 533, 559 (1964) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964)). Voting rights can be impermissibly burdened "by a

debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id*. (quoting *Reynolds*, 377 U.S. at 555).

Plaintiffs attempt to establish an Equal Protection claim based on the theory that Defendants engaged in "several schemes" to, among other things, "destroy," "discard," and "switch" votes for President Trump, thereby "devalu[ing] Republican votes" and "diluting" the influence of their individual votes. (ECF No. 49 at Pg ID 3079.)

But, to be perfectly clear, Plaintiffs' equal protection claim is not supported by any allegation that Defendants' alleged schemes caused votes for President Trump to be changed to votes for Vice President Biden. For example, the closest Plaintiffs get to alleging that physical ballots were altered in such a way is the following statement in an election challenger's sworn affidavit: "I believe some of these workers were changing votes that had been cast for Donald Trump and other Republican candidates."[9] (ECF No. 6 at Pg ID 902 ¶ 91 (citing Aff. Articia

[9] Plaintiffs allege in several portions of the Amended Complaint that election officials improperly tallied, counted, or marked ballots. But some of these allegations equivocate with words such as "believe" and "may" and none of these allegations identify which presidential candidate the ballots were allegedly altered to favor. (*See, e.g.,* ECF No. 6 at Pg ID 902, ¶ 91 (citing Aff. Articia Bomer, ECF No. 6-3 at Pg ID 1008-10 ("I *believe* some of these ballots *may* not have been properly counted." (emphasis added))); Pg ID 902-03, ¶ 92 (citing Tyson Aff. ¶ 17) ("At least one challenger observed poll workers adding marks to a ballot where there was no mark for any candidate.").

Bomer, ECF No. 6-3 at Pg ID 1008-1010).) But of course, "[a] belief is not evidence" and falls far short of what is required to obtain any relief, much less the extraordinary relief Plaintiffs request. *United States v. O'Connor*, No. 96-2992, 1997 WL 413594, at *1 (7th Cir. 1997); *see Brown v. City of Franklin*, 430 F. App'x 382, 387 (6th Cir. 2011) ("Brown just submits his belief that Fox's 'protection' statement actually meant "protection from retaliation. . . . An unsubstantiated belief is not evidence of pretext."); *Booker v. City of St. Louis*, 309 F.3d 464, 467 (8th Cir. 2002) ("Booker's "belief" that he was singled out for testing is not evidence that he was.").[10] The closest Plaintiffs get to alleging that election machines and software changed votes for President Trump to Vice

[10] As stated by the Circuit Court for the District of Columbia Circuit:

> The statement is that the complainant believes and expects to prove some things. Now his belief and expectation may be in good faith; but it has been repeatedly held that suspicion is not proof; and it is equally true that belief and expectation to prove cannot be accepted as a substitute for fact. The complainant carefully refrains from stating that he has any information upon which to found his belief or to justify his expectation; and evidently he has no such information. But belief, without an allegation of fact either upon personal knowledge or upon information reasonably sufficient upon which to base the belief, cannot justify the extraordinary remedy of injunction.

Magruder v. Schley, 18 App. D.C. 288, 292, 1901 WL 19131, at *2 (D.C. Cir. 1901).

President Biden in Wayne County is an amalgamation of theories, conjecture, and speculation that such alterations were *possible*. (*See e.g.,* ECF No. 6 at ¶¶ 7-11, 17, 125, 129, 138-43, 147-48, 155-58, 160-63, 167, 171.) And Plaintiffs do not at all explain how the question of whether the treatment of election challengers complied with state law bears on the validity of votes, or otherwise establishes an equal protection claim.

With nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs' equal protection claim fails.[11] *See Wood*, 2020 WL 7094866 (quoting *Bognet*, 2020 WL 6686120, at *12) ("'[N]o single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'").

[11] "[T]he Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity. That is not how the Equal Protection Clause works." *Bognet*, 2020 WL 6686120, at *11.

2. Irreparable Harm & Harm to Others

Because "a finding that there is simply no likelihood of success on the merits is usually fatal[,]" *Gonzales v. Nat'l Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir. 2000) (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997), the Court will not discuss the remaining preliminary injunction factors extensively.

As discussed, Plaintiffs fail to show that a favorable decision from the Court would redress their alleged injury. Moreover, granting Plaintiffs' injunctive relief would greatly harm the public interest. As Defendants aptly describe, Plaintiffs' requested injunction would "upend the statutory process for election certification and the selection of Presidential Electors. Moreover, it w[ould] disenfranchise millions of Michigan voters in favor [of] the preferences of a handful of people who [are] disappointed with the official results." (ECF No. 31 at Pg ID 2227.)

In short, none of the remaining factors weigh in favor of granting Plaintiffs' request for an injunction.

IV. Conclusion

For these reasons, the Court finds that Plaintiffs are far from likely to succeed in this matter. In fact, this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic

process and their trust in our government. Plaintiffs ask this Court to ignore the orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do.

The People have spoken.

The Court, therefore, **DENIES** Plaintiffs' "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief" (ECF No. 7.)

IT IS SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: December 7, 2020

EXHIBIT 6

2011 WL 7630628
Only the Westlaw citation is currently available.
United States District Court,
W.D. Wisconsin.

Lorene ZILISCH, Plaintiff,

v.

R.J. REYNOLDS TOBACCO COMPANY, Defendant.

No. 10–cv–474–bbc.
|
June 21, 2011.

Attorneys and Law Firms

Peter J. Fox, Fox & Fox, S.C., Monona, WI, for Plaintiff.

Jonathan Matthew Linas, Michael Jeffrey Gray, Jones Day, Chicago, IL, for Defendant.

OPINION and ORDER

BARBARA B. CRABB, District Judge.

***1** In May 2008, plaintiff Lorene Zilisch was terminated by her former employer, defendant R.J. Reynolds Tobacco Company, after she signed a customer's name to a contract in violation of company policy. In this civil action brought under the Age Discrimination in Employment Act, 29 U.S.C. § 623, plaintiff contends that defendant fired her not because she violated company policy, but because of her age. Now before the court is defendant's motion for summary judgment in which defendant argues that plaintiff cannot establish a prima facie case that it discriminated against her on the basis of her age. Dkt. # 14. Plaintiff opposes the motion and has filed additional proposed findings of fact in conjunction with her opposition brief.

As an initial matter, several of plaintiff's proposed findings of fact rely on inadmissible evidence. Specifically, several statements in the affidavit of Carlo Fasciani, dkt. # 22, a former division manager for defendant, are inadmissible because they are conclusory and not made on the basis of Fasciani's personal knowledge. For example, plaintiff proposes as fact that "[Defendant] has always followed [its] progressive discipline practice .... ", citing the Fasciani's affidavit containing the same conclusory statement. Plt.'s PFOF, dkt. # 18, ¶ 14 (citing dkt. # 22 at ¶ 30). Also, Fasciani avers that defendant gave older employees "unreasonable goals, unjustly penalized them and gave them unfair performance reviews," *id.* at ¶ 12, while younger employees "were frequently promoted and allowed to perform poorly with less accountability." *Id.* at ¶ 14.

Fasciani worked in discrete divisions of the company and his affidavit provides no factual basis upon which he can make such sweeping conclusions about the disciplinary practices "always" utilized by defendant or statements about how employees were treated outside his own division, let alone in the Minneapolis Region or the Green Bay Division where plaintiff worked. In other words, Fasciani does not show that he has personal knowledge of the matters in his affidavit. Fed.R.Civ.P. 56(c)(4) (affidavits used in opposition to motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."). Additionally, much of Fasciani's testimony is vague and conclusory. *Hall v. Bodine Electric Co.,* 276 F.3d 345, 354 (7th Cir.2002) ("It is well-settled that conclusory allegations and self-serving affidavits, without support in the record, do not create a triable issue of fact."); *Drake v. Minnesota Mining & Manufacturing Co.,* 134 F.3d 878, 887 (7th Cir.1998) ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted."). Thus, I will not consider Fasciani's affidavit it or the statements of fact that rely on averments in the affidavit. *Watson v. Lithonia Lighting,* 304 F.3d 749, 752 (7th Cir.2002) (affidavits used to support or oppose summary judgment must be made on personal knowledge); *see also Haka v. Lincoln County,* 533 F.Supp.2d 895, 899 (W.D.Wis.2008) (disregarding proposed facts not properly supported by admissible evidence).

***2** After reviewing the parties' arguments and proposed facts, I conclude that defendant is entitled to summary judgment in its favor because plaintiff cannot establish a prima facie case of age discrimination. No reasonable jury could conclude that plaintiff lost her job because of her age; rather, the uncontradicted evidence shows that defendant terminated plaintiff because she violated company policy.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed.

UNDISPUTED FACTS

A. *Plaintiff's Employment with Defendant*

Plaintiff Lorene Zilisch was born in December 1957. She began her employment with defendant R.J. Reynolds Tobacco Co. in 2004 at the age of 46, following a merger between Brown & Williamson Tobacco Company, her previous employer, and defendant. In late 2007, plaintiff began working in the Green Bay Division as a Trade Marketing Representative, reporting directly to Brent Trader, the division manager, who reported to David Williams, the director of regional sales for the Minneapolis region.

As a trade marketing representative for defendant, plaintiff's duties included visiting stores to build customer relationships, negotiating and implementing contracts with defendant's customers, reviewing customer order books to insure that customers ordered the correct products according to their contracts and checking product distribution in customer stores. Defendant uses several different forms of written contracts that trade marking representatives can propose to retail store customers. The terms of these contracts vary in many respects and address issues such as pricing of defendant's products at the store, customer rebates and discounts, space and signage the retailer must make available for display in the store and configuration of defendants' products on merchandising displays.

When a trade marketing representative and a customer agree upon the terms of a contract, the trade marketing representative selects the appropriate contract from a list of electronic contracts on the representative's laptop computer. (Defendant does not use paper contracts with retailers.) The trade marketing representative and the customer then sign the contract using an electric pen on an electronic signature pad that is attached to the representative's laptop through a USB port. Defendant's "Contract Signatures" policy, which is included in the Trade Marketing Employee Handbook, provides:

> It is important that all agreements/contracts between the Company and its retail customers are properly executed. It is your responsibility to ensure that an authorized person signs the agreement/contract on behalf of the retailer. Therefore, ask the person if he or she has the authority to sign the Company agreement/contract. It is not acceptable for you to sign for the retailer under any circumstances. Make sure all agreements/contracts are properly dated and appropriately filed according to company guidelines.
>
> ***3 Signing for the retailer could lead to termination of employment.**

Dkt. # 19–3 at 15 (emphasis in original). The Trade Marketing Employee Handbook is distributed to all trade marketing representatives, including plaintiff. Plaintiff received the handbook at the start of her employment with defendant and signed an agreement stating that she had read and understood the policies contained within it.

Division managers sometimes accompany trade marketing representatives on visits to customers. On April 23, 2008, division manager Trader accompanied plaintiff on her visits to several customers. Plaintiff and Trader traveled together in plaintiff's car to their first appointment at Ace Oil Express, where they planned to meet with the owner of Ace Oil Express, Mary Lis, for the purpose of negotiating a contract between Ace Oil Express and defendant. During their meeting, the parties agreed to specific contract terms that would go into effect on June 2, 2008. Before the meeting concluded, both plaintiff and Lis signed a contract. However, plaintiff had presented the incorrect contract to Lis by mistake. Both plaintiff and Lis signed it without realizing that it did not reflect the terms upon which the parties had agreed.

After leaving Ace Oil Express, plaintiff and Trader proceeded to their next appointment at Stanley Travel Stop, where plaintiff and the manager of Stanley Travel Stop agreed upon the terms of a contract between defendant and the Travel Stop. When plaintiff searched on her laptop for the correct contract, she noticed that she and Mary Lis had signed the wrong contract at their meeting earlier that day. After noticing this error, plaintiff told Trader, "Hey, I made a mistake, I had [Mary Lis] sign, you know, the wrong addendum [to the contract]." Dep. of plaintiff, dkt. # 16–1, at 130, lns. 9–22. Plaintiff opened up a new contract on her laptop that she believed reflected the terms upon which she and Lis had agreed at their meeting. (This contract did not actually contain the correct terms that plaintiff and Lis had agreed upon.) Using the electronic pen and signature pad attached to her computer, plaintiff signed both her own and Lis's name on the new contract. Trader, who was standing a few feet away from plaintiff, saw her sign Lis's name on the signature pad. (The parties dispute whether plaintiff called Lis and asked for permission to sign the contract on her behalf. Plaintiff testified during her deposition that she did not call Lis before signing

Lis's name on the contract and Trader testified that he never saw plaintiff call Lis. However, plaintiff states in her affidavit that she talked to Lis at some point that day about signing her name. Lis also testifies in her affidavit that she talked with plaintiff on the phone and gave her permission to sign the contract. Neither plaintiff nor Lis says when the phone call took place.)

After finishing their business at Stanley Travel Stop, plaintiff and Trader went to plaintiff's car. After entering the car, plaintiff told Trader, "You didn't see me do that," referring to her act of signing Lis's name on the contract. Trader told plaintiff it was inappropriate for her to sign a contract for a retailer and that she should never do it again. He suggested that they return to Ace Oil Express that day to have Lis execute the correct contract on her own behalf. Plaintiff and Trader then went to lunch at a nearby restaurant, where they discussed again why plaintiff had signed Lis's name. Plaintiff told Trader that her previous managers told her that it was acceptable to sign for customers. Trader responded that he was her manager now and that it was not acceptable. After lunch, plaintiff and Trader drove back to Ace Oil Express, but Lis's vehicle was not in the parking lot, so they left. At the end of the day, Trader talked with plaintiff about her performance that day and plaintiff told him that she would never sign a retailer's name to a contract again. Trader told plaintiff to obtain a signature from Lis on the correct contract. He did not tell plaintiff to cancel the contract she had signed on Lis's behalf and did not cancel it himself. (Plaintiff avers that Trader gave her positive feedback about her performance that day, but defendant denies this.)

***4** Immediately after he finished working with plaintiff on April 23, 2008, Trader consulted with his human resources liaison, Jennifer Sanders, to determine whether a recommendation to terminate plaintiff would be fair and within the parameters of company policies. He also consulted with Sanders several times between that date and the date of plaintiff's termination, discussing company termination policies. Also, Trader consulted with his supervisor, David Williams, either on April 23 or 24, regarding termination of plaintiff.

Defendant has a corrective action policy stating that progressive discipline, including a series of oral and written warnings, is appropriate in some circumstances. Dkt. # 19–3 at 71–72. The policy states that

> [I]t is not possible to specify the corrective action step appropriate for each type of behavior. However, it is the responsibility of management *in consultation with Human Resources,* to determine on a case-by-case basis which of the following corrective action steps based on the particular facts and circumstances involved.... Some improper behavior, for example, justifies immediate discharge. The fact that a progressive corrective action system is utilized by the Company neither requires the use of prior corrective action before discharge nor alters the fact that employment with the Company is "atwill" and can be terminated at any time and for any reason by either the Company or the employee.

Id. (emphasis in original).

Additionally, defendant's policy regarding "Reasons for Immediate Termination" provides that "there may be instances where [progressive action] steps may be omitted, due to the nature or severity of the infraction." *Id.* at 73. That policy provides a non-inclusive "list of offenses that will normally result in immediate termination for the first offense," including "gross representation of information as it relates to business practices." *Id.* at 73–74.

Trader decided not to utilize progressive discipline in plaintiff's case because he believed she had engaged in a clear violation of company policy that was a terminable offense. In particular, he believed her actions fell into the category of "gross representation of information as it relates to business practices."

On May 5, 2008, Trader told plaintiff that he needed to meet with her the next day at a restaurant near her house. (Plaintiff had spoken to Trader on several occasions between April 23, 2008 and May 5, but Trader had not mentioned her signing the contract for Lis or any discipline or termination related to it.) After Trader's call, plaintiff went to Ace Oil Express to meet with Mary Lis. This was the first time since April 23, 2008 that plaintiff had attempted to meet with Lis. At their meeting, plaintiff apologized to Lis for signing Lis's name on the contract and Lis signed a contract that reflected the actual terms upon which Lis and plaintiff agreed previously. Lis was not upset that plaintiff had signed on her behalf and never complained to defendant about plaintiff's signing the contract for her.

***5** The following morning, May 6, 2008, plaintiff met with Trader and May Carroll, another division manager in the Minneapolis regions. Trader read from a document explaining that plaintiff was being terminated from employment because she had "forg[ed] the signature of May Li[s] ... in an attempt to

fix [her] contract mistake" in violation of defendant's Contract Signatures policy. Dkt. # 19–1. The letter stated that plaintiff's action amounted to "[g]ross misrepresentation of information as it relates to business practices ." *Id.*

Before May 6, 2008, plaintiff had never been disciplined for any performance or behavior deficiencies and no customer had complained about her to defendant. She felt comfortable with Trader and had a good working relationship with him. Trader had never made comments to plaintiff about her age and plaintiff had never reported any concerns to defendant's human resources department regarding Trader's treatment of her. In addition, Trader had evaluated plaintiff's performance as satisfactory in the past and had considered her a good performer.

Between January 1, 2006 and September 30, 2010, defendant terminated eight trade marketing representatives. Two of them were more than 40 and six were under 40. Dkt. # 26–6. Plaintiff was the oldest employee terminated during this period. Defendant replaced plaintiff with an employee who is under 30.

B. *Other Employees of Defendant*

While Megan Anderson was employed as a trade marketing representative for defendant, she hit a deer with a company car. Anderson had been talking on the company-issued cellular phone while driving, in violation of defendant's cell phone policy. She was approximately 23 years old at the time of the accident. Brent Trader, Anderson's supervisor at the time of the accident, instructed her to not talk on her cell phone anymore while driving. He did not discipline her otherwise.

While Molly Anderson was employed as a trade marketing representative for defendant, she left coupons with one of her customers. (It is not clear whether she left the coupons intentionally or by mistake.) It is a violation of defendant's policy and grounds for immediate termination to leave coupons at a store with a customer. Anderson was approximately 22 years old at the time and was not terminated for violating defendant's policy. Anderson has never been employed in the Green Bay Division and has never reported to Brent Trader.

(The parties dispute whether Brian Hietpas misrepresented the number of products available to a customer or ordered by him while Hietpas was employed as a trade marketing representative for defendant and when he was about 30. Plaintiff says that Hietpas falsified certain records in violation of defendant's policy, and she contends that she reported his behavior to Trader and David Williams but that they did not discipline him. Defendant denies that Hietpas violated company policy and says that even if he did, neither Trader nor Williams was ever made aware of any alleged misbehavior by Heitpas. It is undisputed that Trader was never Hietpas's supervisor.)

OPINION

***6** Under the Age Discrimination in Employment Act (ADEA), it is unlawful for an employer to "discharge any individual or otherwise discriminate against any individual" because of the individual's age. 29 U.S.C. § 623(a)(1). Traditionally, courts in this circuit have explained that a plaintiff asserting age discrimination may prove discrimination under a "direct" or "indirect" method of proof. Under the direct method proof, the plaintiff presents direct evidence of discrimination, such as such as an outright admission from the employer, or circumstantial evidence that points directly to a discriminatory reason for an adverse employment action. *Ptasznik v. St. Joseph Hospital,* 464 F.3d 691, 695 (7th Cir.2006). Under the indirect method, a plaintiff may prove discrimination using the burden-shifting approach in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Burks v. Wisconsin Department of Transportation,* 464 F.3d 744, 750–51 (7th Cir.2006).

The Supreme Court stated recently that to prevail in an action under the ADEA "[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that [an unlawful motive] was the 'but-for' cause of the challenged employer decision." *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 129 S.Ct. 2343, 2351 (2009); *see also Lindsey v. Walgreen Co.,* 615 F.3d 873, 876 (7th Cir.2010); *Senske v. Sybase, Inc.,* 588 F.3d 501, 508–09 (7th Cir.2009). Additionally, the Supreme Court noted that it "has not definitively decided whether the evidentiary framework of *McDonnell Douglas* [ ], utilized in Title VII cases is appropriate in the ADEA context." *Gross,* 129 S.Ct. at 2349, n. 2. The Seventh Circuit has noted that "[w]hether [the] burden shifting analysis survives the Supreme Court's declaration in *Gross* in non-Title VII cases, remains to be seen." *Kodish v. Oakbrook Terrace Fire Protection District,* 604 F.3d 490, 501 (7th Cir.2010).

Relying on *Gross* and *Kodish,* defendant contends that plaintiff must prove her case through the direct method. However, the Court of Appeals for the Seventh Circuit has long applied the indirect method of proof to ADEA claims, *e.g., Faas v. Sears, Roebuck, & Co.,* 532 F.3d 633, 641–42 (7th Cir.2008), and continues to do so in the wake of *Gross,* despite its comments in *Kodish. E.g., Van Antwerp v. City of Peoria, Illinois,* 627 F.3d 295, 298 (7th Cir.2010) (stating that plaintiff may prove ADEA claim through direct or indirect method); *Naik v. Boehringer Ingelheim Pharmaceuticals, Inc.,* 627 F.3d 596, 599 (7th Cir.2010) (applying *McDonnell Douglas* burden shifting approach to AEDA claim); *Mach v. Will County Sheriff,* 580 F.3d 495, 498 n. 3 (7th Cir.2009); *Martino v. MCI Communications Services, Inc.,* 574 F.3d 447, 452 (7th Cir.2009). Thus, I conclude that plaintiff may still attempt to prove her discrimination case using the indirect method of proof set forth in *McDonnell Douglas.*

A. *Direct Method of Proof*

***7** To survive summary judgment under the direct method, plaintiff must demonstrate "triable issues as to whether discrimination motivated the adverse employment action." *Kodish,* 604 F.3d at 501 (quoting *Darchak v. City of Chicago Board of Education,* 580 F.3d 622, 631 (7th Cir.2009)). "Direct" proof of discrimination is not limited to near-admissions by the employer that its decisions were based on a proscribed criterion (e.g., "You're too old to work here."), but also includes circumstantial evidence which suggests discrimination through a longer chain of inferences." *Id.* Circumstantial evidence can take many forms, including "suspicious timing, ambiguous oral or written statements, [ ] behavior toward or comments directed at other employees in the protected group [and] evidence showing that similarly situated employees outside the protected class received systematically better treatment." *Van Antwerp,* 627 F.3d at 298 (internal citations and quotations omitted). However, all circumstantial evidence must "point directly to a discriminatory reason for the employer's action." *Id.*

Plaintiff presents no evidence suggesting that the timing of her termination was "suspicious" or that the person who made the decision to discharge her, her supervisor Brent Trader, was biased against older workers. Plaintiff concedes that she had a good working relationship with Trader and that he never made comments about her age. She has presented no evidence of improper behavior toward her or any other trade marketing representative who was over 40 and worked in the same division or region. She has identified no improper comments made by Trader to her or to other female employees. Nonetheless, plaintiff contends that there is sufficient circumstantial evidence from which a jury could infer intentional discrimination under the direct method of proof. In particular, she contends that intentional discrimination can be inferred from (1) statistical evidence concerning defendant's hiring practices; and (2) evidence that other employees were treated better than she was.

Plaintiff contends that statistical evidence regarding defendant's hiring practices shows that defendant prefers younger workers. Specifically, she contends that in the last few years, nearly all of defendant's new trade marketing representatives are under the age of 40. However, plaintiff does not explain adequately why evidence concerning the *hiring* of employees has much bearing on defendant's reason for terminating her, particularly when the person who terminated her, Trader, did not have the authority to hire trade marketing representatives. Evidence concerning defendant's *termination* practices is more relevant to the issues in this case; such evidence shows that between January 1, 2006 and August 23, 2010, six out of eight trade marketing representatives who were terminated were *under* the age of 40. More important, plaintiff provides no analysis or context for the hiring statistics she provides. For example, plaintiff has provided no evidence of the age or experience of the applicant pool from which trade marketing representatives were hired in the Minneapolis region. The mere citation of statistics does not create a triable issue. *Barracks v. Eli Lilly & Co.,* 481 F.3d 556, 559 (7th Cir.2007) ("We have frequently discussed the dangers of relying on raw data without further analysis or context in employment discrimination disputes."); *see also Jarrells v. Select Publishing, Inc.,* 2003 WL 23221278, *5 (W.D.Wis. Feb. 19, 2003) ("Plaintiff has failed to present any evidence tying the statistical disparity to the decision not to hire her.").

***8** Additionally, plaintiff has identified no similarly situated trade marketing representative who was substantially younger and treated more favorably than she was. Plaintiff identifies three younger employees who she asserts committed policy violations comparable to hers: (1) Brian Hietpas, who allegedly falsified information; (2) Molly Anderson, who left coupons with a customer; and (3) Megan Anderson, who used her cell phone while driving. None of these employees, however, is similarly situated to plaintiff.

Similarly situated employees must be "directly comparable to the plaintiff in all material respects, which includes showing that the coworkers engaged in comparable rule or policy violations." *Patterson v. Indiana Newspapers, Inc.,* 589 F.3d 357, 365–66 (7th Cir.2009) (internal quotations and citation omitted). In the course of this inquiry, the court considers all of the relevant factors, including "whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications...." *Brummett v. Sinclair Broadcast Group, Inc.,* 414 F.3d 686, 692 (7th Cir.2005) (internal citation and quotation omitted).

Brian Hietpas and Molly Anderson were not supervised by plaintiff's supervisor, Brent Trader, the person who made the decision to terminate plaintiff's employment. *Radue,* 219 F.3d at 618 (noting importance of showing common supervisor because different supervisors make employment decisions in different ways). The only trade marketing representative that plaintiff identified who reported to Trader was Megan Anderson, who was reprimanded by Trader after she violated defendant's policy prohibiting employees from talking on their cell phones while driving. This policy violation is not comparable to a violation of the Contract Signatures policy. *Naik,* 627 F.3d at 600 (similarly situated employee must have violated comparable policy to plaintiff). Not only is it not the same violation, but according to the employee handbook, violation of the cell phone policy is not grounds for immediate termination, unlike the Contract Signatures policy that plaintiff violated.

In sum, plaintiff has produced no evidence "point[ing] directly to a discriminatory reason for [defendant's] actions," *Rhodes v. Illinois Department of Transportation,* 359 F.3d 498, 504 (7th Cir.2004), or that is "directly related to the employment decision" at issue. *Venturelli v. ARC Community Services, Inc.,* 350 F.3d 592, 602 (7th Cir.2003). Thus, plaintiff's claim fails under the direct method.

A. *Indirect Method of Proof*

Because plaintiff has failed to demonstrate any potential claim of direct discrimination, she must attempt to prove her case under the *McDonnell Douglas* burden-shifting approach. Under this approach, plaintiff must demonstrate that (1) she is a member of a protected class; (2) she was performing her job to defendant's legitimate expectations; (3) in spite of her meeting those legitimate expectations, she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who are substantially younger. *Naik,* 627 F.3d at 599–600; *Ransom v. CSC Consulting, Inc.,* 217 F.3d 467, 470 (7th Cir.2000). " 'Substantially younger' means at least a ten-year age difference." *Fisher v. Wayne Dalton Corp.,* 139 F.3d 1137, 1141 (7th Cir.1998) (quoting *Kariotis v. Navistar International Transportation Corp.,* 131 F.3d 672, 676 n. 1 (7th Cir.1997)).

***9** Summary judgment for defendant is appropriate if plaintiff fails to establish any of the foregoing elements of the prima facie case. *Atanus v. Perry,* 520 F.3d 662, 673 (7th Cir.2008). If plaintiff can make a prima facie case with respect to all elements, the burden shifts to defendant to offer a nondiscriminatory reason for its actions. *Burks,* 464 F.3d at 751. Once the defendant proffers such a reason, the burden shifts back to plaintiff to show that the reason is pretextual. *Id.*

The second and fourth elements of *McDonnell Douglas* are at issue here. With respect to the second element, defendant contends that plaintiff has not shown that she met its legitimate expectations because she violated company policy by signing a customer's name on a contract. Defendant's policy in this regard was clear, stating that "[s]igning for the retailor could lead to termination of employment." In addition, her supervisor made it clear that plaintiff's actions had been unacceptable. Plaintiff's response is that she was meeting defendant's legitimate expectations because she had performed well in the past, her supervisor was positive in his assessment of her performance on the same day she signed a customer's name to a contract and defendant did not "cancel" the contract on which she signed a customer's signature.

That plaintiff performed well in the past is not dispositive. *Naik,* 627 F.3d at 598 (plaintiff "must show that he was meeting [his employer's] expectations at the time of his termination, which includes evidence that he did not violate [company] policies."); *Luckie v. Ameritech Corp.,* 389 F.3d 708, 715 (7th Cir.2004). Plaintiff must show that she was meeting defendant's expectations at the time of her termination, which includes evidence that she did not violate defendant's policies. In addition, regardless whether Trader gave plaintiff some positive feedback on the day she signed a customer's name to a contract (a fact that defendant disputes), it is undisputed that Trader told plaintiff repeatedly that her actions were unacceptable and that he began the process of terminating her employment.

Finally, the fact that defendant failed to "cancel" the contract does not imply defendant's approval of plaintiff's behavior, particularly in light of her supervisor's reprimands. In sum, because plaintiff admits that she violated defendant's policies, she has failed to establish the second element of her prima facie case.

Turning to the fourth element, defendant contends that plaintiff cannot show that similarly situated employees not in her protected class were treated more favorably. As discussed above, plaintiff has presented no evidence that any employee who violated defendant's Contract Signatures policy remained on the job. *Naik,* 627 F.3d at 600 (plaintiff cannot satisfy similarly-situated prong with "no evidence that any employee who violated the [same policy as plaintiff] remained on the job"); *Everroad v. Scott Truck Systems, Inc.,* 604 F.3d 471, 479–480 (7th Cir.2010) (no similarly situated employees violated same "insubordination" standard that plaintiff violated).

***10** Plaintiff argues that she satisfies the fourth element of her prima facie case by showing that defendant hired a substantially younger employee to replace her, citing *Hoffman v. Primedia Special Interest Publications,* 217 F.3d 522, 524 (7th Cir.2000). In *Hoffman,* the Court of Appeals for the Seventh Circuit held that the plaintiff had to show only that he was replaced by someone substantially younger. *Id.* However, the court of appeals explained in *Naik* that this more relaxed standard for the fourth element applies only if the plaintiff has proven the second element of the prima facie case. *Naik,* 627 F.3d at 600–01. Because plaintiff has not shown that she was meeting defendant's legitimate expectations when she was terminated, her claim falls outside the more relaxed requirement mentioned in *Hoffman. Id.* Therefore, plaintiff has failed to establish the fourth element of her prima facie case.

Moreover, even if I assume that plaintiff established a prima facie case of age discrimination, she could not prevail because defendant came forth with a legitimate, nondiscriminatory reason for her termination that she fails to rebut: her violation of the Contract Signatures policy. *Naik,* 627 F.3d at 600–01. It is irrelevant whether defendant made a smart business decision or whether it treated plaintiff harshly. *Ineichen v. Ameritech,* 410 F.3d 956, 961 (7th Cir.2005) ("[I]t is not the court's concern that an employer may be wrong about its employee's performance, or be too hard on its employee. Rather, the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie.") (quotations and citation omitted). "If it is the true ground and not a pretext, the case is over." *Forrester v. Rauland–Borg Corp.,* 453 F.3d 416, 417 (7th Cir.2006). Defendant offered affidavits and deposition testimony as well as a copy of its Contract Signatures policy to support its contention that it terminated plaintiff on the basis of her violation. Because defendant articulated a credible reason, plaintiff must demonstrate that it was a pretext or lie.

Plaintiff makes two arguments in support of her position that defendant's justification for termination was pretextual. First, she contends that signing a customer's name on a contract was an "accepted practice" for trade marketing representatives. However, the evidence does not support a conclusion that this was an accepted practice. Although plaintiff says that one of her former supervisors (not Trader) told her it was acceptable to initiate a customer contract by signing for the customer, this practice is forbidden specifically by defendant's Contract Signatures policy. In addition, plaintiff testified that she had never signed a customer's name on a contract before April 23, 2008.

Plaintiff's second argument is that defendant did not comply with its own corrective action policy before terminating plaintiff because it did not apply its progressive discipline provisions. However, defendant's corrective action policy does not require that progressive discipline be applied in every situation; rather it states that some offenses merit immediate termination. Plaintiff's belief that her violation warranted progressive discipline is not evidence that defendant's justification for terminating her was pretextual. *Atanus,* 520 F.3d at 674 (plaintiff's "belief that her conduct ... did not warrant a ten-day suspension [is insufficient] to show that the [employer] did not act honestly and in good faith").

***11** Again, plaintiff has not directed the court to any evidence, direct or circumstantial, from which a jury could conclude that the but for cause of her termination was age and not her violation of company policy. Accordingly, defendant is entitled to summary judgment in its favor.

IT IS ORDERED that defendant R.J. Reynolds Tobacco Company's motion for summary judgment, dkt. # 14, is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

2011 WL 7630628

All Citations

Not Reported in F.Supp.2d, 2011 WL 7630628

End of Document

EXHIBIT 7

2011 WL 1831608
Only the Westlaw citation is currently available.
United States District Court,
W.D. Wisconsin.

CONSOLIDATED WATER POWER COMPANY, Plaintiff,
v.
0.40 ACRES OF LAND, More or Less, in Portage County, Wisconsin and Robert D. Moodie, Defendants.

No. 10–CV–397–bbc.
|
May 12, 2011.

Attorneys and Law Firms

Allen Arntsen, Foley & Lardner LLP, Madison, WI, for Plaintiff.

Robert D. Moodie, Plover, WI, pro se.

ORDER

BARBARA B. CRABB, District Judge.

***1** The parties have filed supplemental materials in response to this court's April 28, 2011 order. Because the parties' filings raise new issues of fact and law that cannot be resolved without further development, I am striking the trial date and directing the parties to start over.

This case started out as a claim brought by plaintiff Consolidated Water Power Company under the Federal Power Act, 16 U.S .C. § 814, to condemn a piece of land in Stevens Point, Wisconsin that defendant Robert D. Moodie claimed he purchased in 1998. (Plaintiff asked for condemnation of a second parcel as well, but I dismissed the complaint as to that parcel in the April 28 order.) Plaintiff's contention was that the Act authorizes condemnation of the land because plaintiff is a licensee under the Act, the land is a necessary part of the project and it has been unable to obtain the property through contract.

The case got off track because plaintiff raised two incompatible arguments in its motion for summary judgment. Although it continued to assert its claim for condemnation, it argued that it did not need to compensate defendant because it already owned the parcel at issue through adverse possession. Because one cannot condemn what one already owns, I gave plaintiff a choice: (1) seek leave to amend the complaint to include a claim for declaratory relief under state law regarding the ownership of the land and ask for condemnation in the alternative; or (2) concede for the purpose of this case that defendant owns the land and abandon its argument that defendant is entitled to no compensation because he does not own the land. Dkt. # 28. Plaintiff chose the first option. Defendant's only objection was that a state law claim should be decided by a state court, but I concluded that it was appropriate to exercise supplemental jurisdiction over the state law claim under 28 U.S.C. § 1367 because it arose out of the same facts as plaintiff's federal claim.

Because the parties already had submitted evidence and argument on the adverse possession claim, I conducted a preliminary review of the merits of that claim in the April 28 order. The evidence in the record supported a conclusion that plaintiff had obtained the parcel at issue through adverse possession no later than 1971, but I noted that neither side had discussed Wis. Stat. § 706.09, which, in some circumstances, gives bona fide purchasers of land rights that take priority over others with adverse claims. I gave both sides an opportunity to address the statute.

The parties' responses show that it would be premature to decide plaintiff's adverse possession claim now. Plaintiff submits new evidence to support its view that defendant had notice of plaintiff's adverse claim when he purchased the property in the 1998 and that plaintiff meets the statutory definition of "public service corporation," two questions that are important to the application of § 706.09. However, it would be unfair to consider this new evidence without giving defendant an opportunity to respond.

***2** For his part, defendant in his response seems to be raising two new affirmative defenses to plaintiff's claim for adverse possession: estoppel and laches. This brings up an issue I overlooked in the April 28 order, which is that defendant has not yet had an opportunity to file an answer to plaintiff's amended complaint. Although I do not know whether defendant can prevail on these defenses, it seems that both can apply in the context of a property dispute, *e.g.*, *Buza v. Wojtalewicz*, 48 Wis.2d 557, 180 N.W.2d 556

(1970)(estoppel); *Lemieux v. Agate Land Co.,* 193 Wis. 462, 214 N.W. 454, 458 (1927) (laches), so he should be allowed to develop them.

Because of the new issues raised in the parties' filings, I conclude that it is time to hit the reset button on this case. First, I will give defendant an opportunity to file an answer to plaintiff's amended complaint. An answer is simply a document that responds to each of the allegations in the complaint, agreeing or disagreeing with each allegation, as appropriate. In addition, the answer is the document in which the defendant identifies any affirmative defenses or counterclaims he wishes to assert. The top of the answer should be a caption similar to the amended complaint that includes the name of the court, the parties and the case number. Below that, defendant should include numbered paragraphs that correspond to each of the paragraphs in the amended complaint. Next to each paragraph number, he should say whether he admits each allegation in the complaint, denies it or does not have enough information to know whether the allegation is true or false. If he wishes to raise any affirmative defenses or counterclaims, he should include those in his answer as well. The requirements for preparing an answer are described further in Federal Rules of Civil Procedure 8(b) and 10.

Second, I will give the parties a new deadline for filing dispositive motions. Although both sides have had multiple opportunities to present their side of the story, I believe a do over is necessary in light of the new issues both sides have raised.

In anticipation of the new motions for summary judgment, I will give defendant a few words of advice in preparing his summary judgment submissions. First, as I explained to defendant in the April 28 order, his own statements and those of his witnesses are not admissible unless they are sworn. *Collins v. Seeman,* 462 F.3d 757, 760 n. 1 (7th Cir.2006). Defendant says that he "was under the impression that anything stated to the court with my signature attached was already sworn to be the truth." Dft.'s Br., dkt. # 54, at 1. This is wrong. In federal court, a statement may be sworn in one of two ways: (1) with the signature and seal of a notary public that is provided upon the signing of the document; or (2) with a declaration at the completion of his affidavit that includes the following statement followed by a signature: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date)." 28 U.S.C. § 1746. A court cannot consider as evidence statements that are made in a brief. Further, defendant cannot correct the problem simply by asking the court to "consider all statements to be the truth in all deliberations." Dft.'s Br., dkt. # 54, at 1. If defendant relies on a document that does not comply with the procedure identified above, the court will not consider it.

***3** Second, if defendant wants the court to use documents as evidence, they must be authenticated as Fed.R.Evid. 901(a) requires. To authenticate a document, a party must submit "evidence sufficient to support a finding that the matter in question is what its proponent claims." Ordinarily, documents are authenticated by attaching them to an affidavit of an individual who swears that the documents are true and correct copies of the originals. However, the individual who authenticates the documents must have personal knowledge of their authenticity. Fed.R.Evid. 901(b)(1).

More generally, defendant should study carefully the summary judgment procedures he received from the court after the preliminary pretrial conference in the case. In particular, defendant should read the *Memorandum to Pro Se Litigants Regarding Summary Judgment Motions.* This memorandum is designed to help pro se parties avoid common mistakes, such as those defendant made in responding to plaintiff's first summary judgment motion. (I am attaching the memorandum and the procedures to this opinion in the event thatdefendant no longer has them.) If defendant does not believe he can comply with the procedures, he should seek assistance from a lawyer.

ORDER

IT IS ORDERED that

1. The trial date in this case is STRICKEN.

2. Defendant Robert Moodie may have until May 27, 2011, to file an answer to plaintiff Consolidated Water Power Company's amended complaint.

3. The parties may have until June 17, 2011, to file renewed dispositive motions, such as a motion to dismiss or a motion for summary judgment.

4. If the case is not resolved on dispositive motions, I will set a new trial date at that time.

MEMORANDUM TO PRO SE LITIGANTS REGARDING SUMMARY JUDGMENT MOTIONS

This court expects all litigants, including persons representing themselves, to follow this court's Procedures to be Followed on Motions for Summary Judgment. If a party does not follow the procedures, there will be no second chance to do so. Therefore, PAY ATTENTION to the following list of mistakes pro se plaintiffs tend to make when they oppose a defendant's motion for summary judgment:

- *Problem:* The plaintiff does not answer the defendant's proposed facts correctly.

  Solution: To answer correctly, a plaintiff must file a document titled "Response to Defendant's Proposed Findings of Fact." In this document, the plaintiff must answer each numbered fact that the defendant proposes, using separate paragraphs that have the same numbers as defendant's paragraphs. See Procedure II.D. If plaintiff does not object to a fact that the defendant proposes, he should answer, "No dispute."

- *Problem:* The plaintiff submits his own set of proposed facts without answering the defendant's facts.

- *Solution:* Procedure II.B. allows a plaintiff to file his own set of proposed facts in response to a defendant's motion ONLY if he thinks he needs additional facts to prove his claim.

***4** • *Problem:* The plaintiff does not tell the court and the defendant where there is evidence in the record to support his version of a fact.

- *Solution:* Plaintiff must pay attention to Procedure II.D .2., which tells him how to dispute a fact proposed by the defendant. Also, he should pay attention to Procedure I.B.2., which explains how a new proposed fact should be written.

- *Problem:* The plaintiff supports a fact with an exhibit that the court cannot accept as evidence because it is not authenticated.

  Solution: Procedure I.C. explains what may be submitted as evidence. A copy of a document will not be accepted as evidence unless it is authenticated. That means that the plaintiff or someone else who has personal knowledge what the document is must declare under penalty of perjury in a separate affidavit that the document is a true and correct copy of what it appears to be. For example, if plaintiff wants to support a proposed fact with evidence that he received a conduct report, he must submit a copy of the conduct report, together with an affidavit in which he declares under penalty of perjury that the copy is a true and unaltered copy of the conduct report he received on such and such a date.

NOTE WELL: If a party fails to respond to a fact proposed by the opposing party, the court will accept the opposing party's proposed fact as undisputed. If a party's response to any proposed fact does not comply with the court's procedures or cites evidence that is not admissible, the court will take the opposing party's factual statement as true and undisputed. Additional tips for making sure that your submissions comply with the court's procedures are attached to the front of the Procedures.

HELPFUL TIPS FOR FILING A SUMMARY JUDGMENT MOTION

Please read the attached directions carefully—doing so will save your time and the court's.

REMEMBER:

1. *All* facts necessary to sustain a party's position on a motion for summary judgment must be explicitly proposed as findings of fact. This includes facts establishing jurisdiction. (Think of your proposed findings of fact as telling a story to someone who knows nothing of the controversy.)

2. The court will not search the record for factual evidence. Even if there is evidence in the record to support your position on summary judgment, if you do not propose a finding of fact with the proper citation, the court will not consider that evidence when deciding the motion.

3. A fact properly proposed by one side will be accepted by the court as undisputed unless the other side properly responds to the proposed fact and establishes that it is in dispute.

4. Your brief is the place to make your legal argument, not to restate the facts. When you finish it, check it over with a fine tooth comb to be sure you haven't relied upon or assumed any facts in making your legal argument that you failed to include

in the separate document setting out your proposed findings of fact.

***5** 5. A chart listing the documents to be filed by the deadlines set by the court for briefing motions for summary judgment or cross-motions for summary judgment is printed on the last page of the procedures.

PROCEDURE TO BE FOLLOWED ON MOTIONS FOR SUMMARY JUDGMENT

I. *MOTION FOR SUMMARY JUDGMENT*

A. Contents:

1. A motion, together with such materials permitted by Rule 56(e) as the moving party may wish to serve and file; *and*

2. In a separate document, a statement of proposed findings of fact or a stipulation of fact between or among the parties to the action, or both; *and*

3. Evidentiary materials (see I.C.); *and*

4. A supporting brief.

B. Rules Regarding Proposed Findings of Fact:

1. Each fact must be proposed in a separate, numbered paragraph, limited as nearly as possible to a single factual proposition.

2. Each factual proposition must be followed by a reference to evidence supporting the proposed fact. For example,

"1. Plaintiff Smith bought six Holstein calves on July 11, 2006. Harold Smith Affidavit, Jan. 6, 2007, p. 1, ¶ 3."

3. The statement of proposed findings of fact shall include ALL factual propositions the moving party considers necessary for judgment in the party's favor. For example, the proposed findings shall include factual statements relating to jurisdiction, the identity of the parties, the dispute, and the context of the dispute.

4. The court will not consider facts contained only in a brief.

C. Evidence

1. As noted in I.B. above, each proposed finding must be supported by admissible evidence. The court will not search the record for evidence. To support a proposed fact, you may use:

a. Depositions. Give the name of the witness, the date of the deposition, and page of the transcript of cited deposition testimony;

b. Answers to Interrogatories. State the number of the interrogatory and the party answering it;

c. Admissions made pursuant to Fed.R.Civ.P. 36. (state the number of the requested admission and the identity of the parties to whom it was directed); or

d. Other Admissions. The identity of the document, the number of the page, and paragraph of the document in which that admission is made.

e. Affidavits. The page and paragraph number, the name of the affiant, and the date of the affidavit. (Affidavits must be made by persons who have first hand knowledge and must show that the person making the affidavit is in a position to testify about those facts.)

f. Documentary evidence that is shown to be true and correct, either by an affidavit or by stipulation of the parties. (State exhibit number, page and paragraph.)

II. *RESPONSE TO MOTION FOR SUMMARY JUDGMENT*

A. Contents:

1. A response to the moving party's proposed finding of fact; *and*

2. A brief in opposition to the motion for summary judgment; *and*

3. Evidentiary materials (See I.C.)

B. In addition to responding to the moving party's proposed facts, a responding party may propose its own findings of fact following the procedure in section I.B. and C. above.

***6** 1. A responding party should file additional proposed findings of fact if it needs them to defeat the motion for summary judgment.

2. The purpose of additional proposed findings of fact is to SUPPLEMENT the moving party's proposed findings of fact, not to dispute any facts proposed by the moving party. They do not take the place of responses. Even if the responding party files additional proposed findings of fact, it MUST file a separate response to the moving party's proposed findings of fact.

C. Unless the responding party puts into dispute a fact proposed by the moving party, the court will conclude that the fact is undisputed.

D. Rules Regarding Responses to the Moving Party's Proposed Factual Statements:

1. Answer each numbered fact proposed by the moving party in separate paragraphs, *using the same number.*

2. If you dispute a proposed fact, state your version of the fact and refer to evidence that supports that version. For example,

Moving party proposes as a fact:

"1. Plaintiff Smith purchased six Holstein calves from Dell's Dairy Farm on July 11, 2006. Harold Smith Affidavit, Jan. 6, 2007, p. 1, ¶ 3."

Responding party responds:

"1. Dispute. The purchase Smith made from Dell's Dairy Farm on July 11, 2006 was for one Black Angus bull John Dell Affidavit, Feb. 1, 2007, Exh. A."

3. The court prefers but does not require that the responding party repeat verbatim the moving party's proposed fact and then respond to it. Using this format for the example above would lead to this response by the responding party:

"1. *Plaintiff Smith purchased six Holstein calves from Dell's Dairy Farm on July 11, 2006. Harold Smith Affidavit, Jan. 6, 2007, p. 1, ¶ 3.*

"**Dispute.** The purchase Smith made from Dell's Dairy Farm on July 11, 2006 was for one Black Angus bull." John Dell Affidavit, Feb. 1, 2007, Exh. A."

4. When a responding party disputes a proposed finding of fact, the response must be limited to those facts necessary to raise a dispute. The court will disregard any new facts that are not directly responsive to the proposed fact. If a responding party believes that more facts are necessary to tell its story, it should include them in its own proposed facts, as discussed in II.B.

E. Evidence

1. Each fact proposed in disputing a moving party's proposed factual statement and all additional facts proposed by the responding party must be supported by admissible evidence. The court will not search the record for evidence. To support a proposed fact, you may use evidence as described in Procedure I.C.1. a. through f.

2. The court will not consider any factual propositions made in response to the moving party's proposed facts that are not supported properly and sufficiently by admissible evidence.

III. *REPLY BY MOVING PARTY*

A. Contents:

1. An answer to each numbered factual statement made by the responding party in response to the moving party's proposed findings of fact, together with references to evidentiary materials; *and*

***7** 2. An answer to each additional numbered factual statement proposed by the responding party under Procedure II.B., if any, together with references to evidentiary materials; *and*

3. A reply brief; *and*

4. Evidentiary materials (see I.C.)

B. If the responding party has filed additional proposed findings of fact, the moving party should file its response to those proposed facts at the same time as its reply, following the procedure in section II.

C. When the moving party answers the responding party's responses to the moving party's original proposed findings of fact, and answers the responding party's additional proposed findings of

fact, the court prefers but does not require that the moving party repeat verbatim the entire sequence associated with each proposed finding of fact so that reply is a self-contained history of all proposed facts, responses and replies by all parties.

IV. *SUR–REPLY BY RESPONDING PARTY*

A responding party shall not file a sur-reply without first obtaining permission from the court. The court only permits sur-replies in rare, unusual situations.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1831608

End of Document

EXHIBIT 8

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March 31, 2020

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You are hereby notified that the Court has entered the following order:

2020AP557-OA Jefferson v. Dane County

On March 27, 2020, petitioners, Mark Jefferson and the Republican Party of Wisconsin, filed a petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a supporting legal memorandum, and a motion for temporary injunctive relief. On that same date, the court ordered the named respondents, Dane County and Scott McDonell, in his official capacity as Dane County Clerk, to file a response to the original action petition and the motion for temporary injunctive relief by 1:00 on March 30, 2020. The court has reviewed the filings of the parties and now addresses the motion for temporary injunctive relief.

When we have considered whether to grant temporary injunctive relief, we have required a movant to show (1) a reasonable probability of success on the merits; (2) a lack of an adequate remedy at law; (3) that the movant will suffer irreparable harm in the absence of an injunction; and (4) that a balancing of the equities favors issuing the injunction. See, e.g., Pure Milk Products Coop. v. National Farmers Org., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). The decision whether to grant an injunction is a discretionary one, although injunctions are not to be issued lightly. Werner, 80 Wis. 2d at 520.

The temporary injunction the petitioners seek would order respondent, Scott McDonell, the Dane County Clerk, to remove a March 25, 2020 Facebook post in which he indicated, inter alia, that all Dane County voters could declare themselves to be "indefinitely confined" under Wis. Stat. § 6.86(2) due to illness solely because of the Wisconsin Department of Health Services Emergency Order #12 (the Safer at Home Order) and difficulties in presenting or uploading a valid proof of identification, thereby avoiding the legal requirement to present or upload a copy of the voter's proof of identification when requesting an absentee ballot.[1] The petitioners further ask this court to order respondent McDonell and respondent Dane County to issue new statements setting forth the statutory interpretation proposed by the petitioners.

Although respondents do not represent that McDonell's original March 25, 2020 post has been removed, they argue that McDonell's later posting renders the petitioners' motion moot because McDonell has now posted the Wisconsin Elections Commission's (WEC) guidance on his Facebook page. They also argue that the petitioners' petition and motion for temporary relief cannot go forward in this court because they have not exhausted their administrative remedies by first filing a complaint with the WEC under Wis. Stat. § 5.06(1) and (2).

McDonell's March 25, 2020, advice was legally incorrect. In addition, McDonell's subsequent Facebook posting does not preclude McDonell's future posting of the same erroneous advice. Furthermore, his erroneous March 25, 2020 Facebook posting continues distribution on the internet.

Accordingly, we conclude that clarification of the purpose and proper use of the indefinitely confined status pursuant to Wis. Stat. § 6.86(2) as well as a temporary injunction are warranted.

In regard to clarification, the WEC has met and has issued guidance on the proper use of indefinitely confined status under Wis. Stat. § 6.86(2) in its March 29, 2020 publication, "Guidance for Indefinitely Confined Electors COVID-19." The WEC guidance states as follows:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.

2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness or infirmity, or disability.

We conclude that the WEC's guidance quoted above provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time.

We further determine that the petitioners have demonstrated a reasonable probability of success on the merits, at least with respect to certain statements in McDonell's March 25th

[1] Petitioners note that the Milwaukee County Clerk issued nearly identical advice.

Facebook post. Voters may be misled to exercise their right to vote in ways that are inconsistent with Wis. Stat. § 6.86(2). Namely, McDonell appeared to assert that all voters are automatically, indefinitely confined solely due to the emergency and the Safer at Home Order and that voters could therefore declare themselves to be indefinitely confined when requesting an absentee ballot, which would allow them to skip the step of presenting or uploading a valid proof of identification. Indeed, we do not see how the respondents could prevail with an argument that such statements in the March 25th post constitute an accurate statement of the relevant statutory provisions.

NOW THEREFORE, IT IS ORDERED that the petitioners' motion for temporary injunctive relief is granted and we order McDonell to refrain from posting advice as the County Clerk for Dane County inconsistent with the above quote from the WEC guidance.

DANIEL KELLY, J., did not participate.

Sheila T. Reiff
Clerk of Supreme Court

EXHIBIT 9

2020 WL 6686120
Only the Westlaw citation is currently available.
United States Court of Appeals, Third Circuit.

Jim BOGNET, Donald K. Miller, Debra Miller, Alan Clark, Jennifer Clark, Appellants

v.

SECRETARY COMMONWEALTH OF PENNSYLVANIA; Adams County Board of Elections; Allegheny County Board of Elections; Armstrong County Board of Elections; Beaver County Board of Elections; Bedford County Board of Elections; Berks County Board of Elections; Blair County Board of Elections; Bradford County Board of Elections; Bucks County Board of Elections; Butler County Board of Elections; Cambria County Board of Elections; Cameron County Board of Elections; Carbon County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Clarion County Board of Elections; Clearfield County Board of Elections; Clinton County Board of Elections; Columbia County Board of Elections; Crawford County Board of Elections; Cumberland County Board of Elections; Dauphin County Board of Elections; Delaware County Board of Elections; Elk County Board of Elections; Erie County Board of Elections; Fayette County Board of Elections; Forest County Board of Elections; Franklin County Board of Elections; Fulton County Board of Elections; Greene County Board of Elections; Huntingdon County Board of Elections; Indiana County Board of Elections; Jefferson County Board of Elections; Juniata County Board of Elections; Lackawanna County Board of Elections; Lancaster County Board of Elections; Lawrence County Board of Elections; Lebanon County Board of Elections; Lehigh County Board of Elections; Luzerne County Board of Elections; Lycoming County Board of Elections; Mckean County Board of Elections; Mercer County Board of Elections; Mifflin County Board of Elections; Monroe County Board of Elections; Montgomery County Board of Elections; Montour County Board of Elections; Northampton County Board of Elections; Northumberland County Board of Elections; Perry County Board of Elections; Philadelphia County Board of Elections; Pike County Board of Elections; Potter County Board of Elections; Schuylkill County Board of Elections; Snyder County Board of Elections; Somerset County Board of Elections; Sullivan County Board of Elections; Susquehanna County Board of Elections; Tioga County Board of Elections; Union County Board of Elections; Venango County Board of Elections; Warren County Board of Elections; Washington County Board of Elections; Wayne County Board of Elections; Westmoreland County Board of Elections; Wyoming County Board of Elections; York County Board of Elections

Democratic National Committee, Intervenor

No. 20-3214
|
Submitted Pursuant to Third Circuit
L.A.R. 34.1(a) November 9, 2020
|
(Filed: November 13, 2020)

Synopsis

Background: Voters and congressional candidate brought action against Secretary of Commonwealth of Pennsylvania and county boards of elections, seeking to enjoin the counting of mail-in ballots received during the three-day extension of the ballot-receipt deadline ordered by the Pennsylvania Supreme Court, and seeking a declaration that the extension period and presumption of timeliness was unconstitutional. The United States District Court for the Western District of Pennsylvania, Kim R. Gibson, Senior District Judge, 2020 WL 6323121, denied voters' and candidate's motion for a temporary restraining order (TRO) and preliminary injunction. Voters and candidate appealed.

Holdings: The Court of Appeals, Smith, Chief Judge, held that:

the District Court's order was immediately appealable;

voters and candidate lacked standing to bring action alleging violation of Constitution's Elections Clause and Electors Clause;

voters lacked concrete injury for their alleged harm of vote dilution, and thus voters did not have standing for such claim;

voters lacked particularized injury for their alleged harm of vote dilution, and thus voters did not have standing for such claim;

voters failed to allege legally cognizable "preferred class," for purposes of standing to claim equal protection violation;

alleged harm from presumption of timeliness was hypothetical or conjectural, and thus voters did not have standing to challenge presumption; and

voters and candidate were not entitled to receive injunction so close to election.

Affirmed.

On Appeal from the United States District Court for the Western District of Pennsylvania, District Court No. 3-20-cv-00215, District Judge: Honorable Kim. R. Gibson

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Before: SMITH, Chief Judge, SHWARTZ and SCIRICA, Circuit Judges

OPINION OF THE COURT

SMITH, Chief Judge.

***1** *A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.*—Alexander Hamilton[1]

The year 2020 has brought the country unprecedented challenges. The COVID-19 pandemic, which began early this year and continues today, has caused immense loss and vast disruption. As this is a presidential election year, the pandemic has also presented unique challenges regarding where and how citizens shall vote, as well as when and how their ballots shall be tabulated. The appeal on which we now rule stems from the disruption COVID-19 has wrought on the national elections. We reach our decision, detailed below, having carefully considered the full breadth of statutory law and constitutional authority applicable to this unique dispute over Pennsylvania election law. And we do so with commitment to a proposition indisputable in our democratic process: that the lawfully cast vote of every citizen must count.

I. Background & Procedural History

A. The Elections and Presidential Electors Clause

The U.S. Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. This provision is known as the "Elections Clause." The Elections Clause effectively gives state governments the "default" authority to regulate the mechanics of federal elections, *Foster v. Love*, 522 U.S. 67, 69, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997), with Congress retaining "exclusive control" to "make or alter" any state's regulations, *Colegrove v. Green*, 328 U.S. 549, 554, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). Congress has not often wielded this power but, "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384, 399, 25 L.Ed. 717 (1879) ("[T]he Constitution and constitutional laws of the [United States] are ... the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation."). By statute, Congress has set "[t]he Tuesday next after the 1st Monday in November, in every even numbered year," as the day for the election. 2 U.S.C. § 7.

Much like the Elections Clause, the "Electors Clause" of the U.S. Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." U.S. Const. art. II, § 1, cl. 2. Congress can "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, § 1, cl. 4. Congress has set the time for appointing electors as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 U.S.C. § 1.

***2** This year, both federal statutes dictate that the day for the election was to fall on Tuesday, November 3 ("Election Day").

B. Pennsylvania's Election Code

In keeping with the Constitution's otherwise broad delegation of authority to states to regulate the times, places, and manner of holding federal elections, the Pennsylvania General Assembly has enacted a comprehensive elections code. In 2019, the General Assembly passed Act 77, which (among other things) established "no-excuse" absentee voting in Pennsylvania[2]: all eligible voters in Pennsylvania may vote by mail without the need to show their absence from their voting district on the day of the election. 25 Pa. Stat. and Cons. Stat. §§ 3150.11–3150.17. Under Act 77, "[a]pplications for mail-in ballots shall be processed if received not later than five o'clock P.M. of the first Tuesday prior to the day of any primary or election." *Id.* § 3150.12a(a). After Act 77, "a completed absentee [or mail-in] ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election" for that vote to count. *Id*. §§ 3146.6(c), 3150.16(c).

C. The Pennsylvania Supreme Court Decision

Soon after Act 77's passage, Donald J. Trump for President, Inc., the Republican National Committee ("RNC"), and several Republican congressional candidates and voters brought suit against Kathy Boockvar, Secretary of the

Commonwealth of Pennsylvania, and all of Pennsylvania's county boards of elections. That suit, filed in the Western District of Pennsylvania, alleged that Act 77's "no-excuse" mail-in voting regime violated both the federal and Pennsylvania constitutions. *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, —— F.Supp.3d ——, ——, 2020 WL 4920952, at *1 (W.D. Pa. Aug. 23, 2020). Meanwhile, the Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates filed suit in Pennsylvania's Commonwealth Court, seeking declaratory and injunctive relief related to statutory-interpretation issues involving Act 77 and the Pennsylvania Election Code. *See Pa. Democratic Party v. Boockvar*, —— Pa. ——, 238 A.3d 345, 352 (2020). Secretary Boockvar asked the Pennsylvania Supreme Court to exercise extraordinary jurisdiction to allow it to immediately consider the case, and her petition was granted without objection. *Id.* at 354–55.

Pending resolution of the Pennsylvania Supreme Court case, Secretary Boockvar requested that the Western District of Pennsylvania stay the federal case. *Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——, 2020 WL 4920952, at *1. The District Court obliged and concluded that it would abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *See Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——, 2020 WL 4920952, at *21. The RNC then filed a motion for limited preliminary injunctive relief asking that all mailed ballots be segregated, but the District Court denied the motion, finding that the plaintiffs' harm had "not yet materialized in any actualized or imminent way." *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5407748, at *1 (W.D. Pa. Sept. 8, 2020).

***3** With the federal case stayed, the state court matter proceeded. The Pennsylvania Democratic Party argued that a combination of the COVID-19 pandemic and U.S. Postal Service ("USPS") mail-delivery delays made it difficult for absentee voters to timely return their ballots in the June 2020 Pennsylvania primary election. *Pa. Democratic Party*, 238 A.3d at 362. The Pennsylvania Democratic Party claimed that this voter disenfranchisement violated the Pennsylvania Constitution's Free and Equal Elections Clause, art I., § 5,[3] and sought, among other things, a weeklong extension of the deadline for receipt of ballots cast by Election Day in the upcoming general election—the same deadline for the receipt of ballots cast by servicemembers residing overseas. *Id.* at 353–54. Secretary Boockvar originally opposed the extension deadline; she changed her position after receiving a letter from USPS General Counsel which stated that Pennsylvania's ballot deadlines were "incongruous with the Postal Service's delivery standards," and that to ensure that a ballot in Pennsylvania would be received by 8:00 P.M. on Election Day, the voter would need to mail it a full week in advance, by October 27, which was also the deadline to *apply* for a mail-in ballot. *Id.* at 365–66; 25 Pa. Stat. and Cons. Stat. § 3150.12a(a). Secretary Boockvar accordingly recommended a three-day extension to the received-by deadline. *Pa. Democratic Party*, 238 A.3d at 364–65.

In a September 17, 2020 decision, the Pennsylvania Supreme Court concluded that USPS's existing delivery standards could not meet the timeline built into the Election Code and that circumstances beyond voters' control should not lead to their disenfranchisement. *Pa. Democratic Party*, 238 A.3d at 371. The Court accordingly held that the Pennsylvania Constitution's Free and Equal Elections Clause required a three-day extension of the ballot-receipt deadline for the November 3 general election. *Id.* at 371, 386–87. All ballots postmarked by 8:00 P.M. on Election Day and received by 5:00 P.M. on the Friday after Election Day, November 6, would be considered timely and counted ("Deadline Extension"). *Id.* at 386–87. Ballots postmarked or signed after Election Day, November 3, would be rejected. *Id.* If the postmark on a ballot received before the November 6 deadline was missing or illegible, the ballot would be presumed to be timely unless "a preponderance of the evidence demonstrates that it was mailed after Election Day" ("Presumption of Timeliness"). *Id.* Shortly after the ruling, Pennsylvania voters were notified of the Deadline Extension and Presumption of Timeliness.

D. Appeal to the U.S. Supreme Court, and This Litigation

The Republican Party of Pennsylvania and several intervenors, including the President pro tempore of the Pennsylvania Senate, sought to challenge in the Supreme Court of the United States the constitutionality of the Pennsylvania Supreme Court's ruling. Because the November election date was fast approaching, they filed an emergency application for a stay of the Pennsylvania Supreme Court's order pending review on the merits. The U.S. Supreme Court denied the emergency stay request in a 4-4 decision. *Republican Party of Pa. v. Boockvar*, No. 20A54, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6128193 (Oct. 19, 2020); *Scarnati v. Boockvar*, No. 20A53, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6128194 (Oct. 19, 2020). After denial of the stay, the

petitioners moved for expedited consideration of their petition for certiorari. In denying that motion, Justice Alito noted that, per the Pennsylvania Attorney General, all county boards of elections would segregate ballots received during the Deadline Extension period from those received by 8:00 P.M. on Election Day. *Republican Party of Pa. v. Boockvar*, No. 20-542, 592 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 6304626, at *2 (Oct. 28, 2020) (Alito, J., statement). Justice Alito later issued an order requiring that all county boards of elections segregate such ballots and count them separately. *Republican Party of Pa. v. Boockvar*, No. 20A84, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6536912 (Mem.) (U.S. Nov. 6, 2020) (Alito, J.).

***4** In the meantime, on October 22, 2020, three days after the U.S. Supreme Court declined to stay the Pennsylvania Supreme Court's order, Plaintiffs herein filed this suit in the Western District of Pennsylvania. Plaintiffs are four registered voters from Somerset County, Pennsylvania, who planned to vote in person on Election Day ("Voter Plaintiffs") and Pennsylvania congressional candidate Jim Bognet. Defendants are Secretary Boockvar and each Pennsylvania county's board of elections.

Bognet, the congressional candidate, claimed that the Deadline Extension and Presumption of Timeliness "allow[ ] County Boards of Elections to accept votes ... that would otherwise be unlawful" and "undermine[ ] his right to run in an election where Congress has paramount authority to set the 'times, places, and manner' " of Election Day. *Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121, at *2 (W.D. Pa. Oct. 28, 2020). The Voter Plaintiffs alleged that by voting in person, they had to comply with the single, uniform federal Election Day deadline, whereas mail-in voters could submit votes any time before 5:00 P.M. on November 6. *Id.* Thus, they alleged, the Pennsylvania Supreme Court treated them in an arbitrary and disparate way by elevating mail-in voters to a "preferred class of voters" in violation of the U.S. Constitution's Equal Protection Clause and the single, uniform, federal Election Day set by Congress. *Id.* The Voter Plaintiffs also asserted that counting ballots received after Election Day during the Deadline Extension period would unlawfully dilute their votes in violation of the Equal Protection Clause. *Id.*

All Plaintiffs sought to enjoin Defendants from counting ballots received during the Deadline Extension period. *Id.* They also sought a declaration that the Deadline Extension and Presumption of Timeliness are unconstitutional under the Elections Clause and the Electors Clause as well as the Equal Protection Clause. *Id.* Because Plaintiffs filed their suit less than two weeks before Election Day, they moved for a temporary restraining order ("TRO"), expedited hearing, and preliminary injunction. *Id.*

The District Court commendably accommodated Plaintiffs' request for an expedited hearing, then expeditiously issued a thoughtful memorandum order on October 28, denying the motion for a TRO and preliminary injunction. *Id.* at *7. The District Court held that Bognet lacked standing because his claims were too speculative and not redressable. *Id.* at *3. Similarly, the District Court concluded that the Voter Plaintiffs lacked standing to bring their Equal Protection voter dilution claim because they alleged only a generalized grievance. *Id.* at *5.

At the same time, the District Court held that the Voter Plaintiffs had standing to pursue their Equal Protection arbitrary-and-disparate-treatment claim. But it found that the Deadline Extension did not engender arbitrary and disparate treatment because that provision did not extend the period for mail-in voters to actually cast their ballots; rather, the extension only directed that the timely cast ballots of mail-in voters be counted. *Id.* As to the Presumption of Timeliness, the District Court held that the Voter Plaintiffs were likely to succeed on the merits of their arbitrary-and-disparate-treatment challenge. *Id.* at *6. Still, the District Court declined to grant a TRO because the U.S. Supreme Court "has repeatedly emphasized that ... federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* at *7 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (per curiam)). The District Court concluded that with "less than two weeks before the election. ... [g]ranting the relief Plaintiffs seek would result in significant voter confusion; precisely the kind of confusion that *Purcell* seeks to avoid." *Id.*

***5** Plaintiffs appealed the denial of their motion for a TRO and preliminary injunction to this Court on October 29, less than a week before Election Day. Plaintiffs requested an expedited briefing schedule: specifically, their opening brief would be due on October 30 and the response briefs on November 2. Notably, Plaintiffs sought to file a reply brief on November 3—Election Day. Appellants' Emergency Mot. for Expedited Briefing, Dkt. No. 17. Defendants opposed the expedited briefing schedule, arguing that Plaintiffs' own delay had caused the case to reach this Court mere days before the election. Sec'y Boockvar's Opp. to Appellants'

Emergency Mot. for Expedited Briefing, Dkt. No. 33. Defendants also contended that Plaintiffs sought to punish voters by invalidating the very rules mail-in voters had relied on when they cast their ballots. Defendants asked us to deny the motion for expedited briefing and offered to supply us with the actual numbers of mail-in ballots received during the Deadline Extension period together with an approximate count of how many of those mail-in ballots lacked legible postmarks. *Id.*

Even had we granted Plaintiffs' motion for expedited briefing, the schedule they proposed would have effectively foreclosed us from ruling on this appeal before Election Day. So we denied Plaintiffs' motion and instead ordered that their opening brief be filed by November 6. Order, No. 20-3214, Oct. 30, 2020, Dkt. No. 37. We directed Defendants to file response briefs by November 9, forgoing receipt of a reply brief.[4] *Id.* With the matter now fully briefed, we consider Plaintiffs' appeal of the District Court's denial of a TRO and preliminary injunction.

II. Standard of Review

The District Court exercised jurisdiction under 28 U.S.C. § 1331. We exercise jurisdiction under § 1292(a)(1).

Ordinarily, an order denying a TRO is not immediately appealable. *Hope v. Warden York Cnty. Prison*, 956 F.3d 156, 159 (3d Cir. 2020). Here, although Bognet and the Voter Plaintiffs styled their motion as an Emergency Motion for a TRO and Preliminary Injunction, *see Bognet v. Boockvar*, No. 3:20-cv-00215, Dkt. No. 5 (W.D. Pa. Oct. 22, 2020), the District Court's order plainly went beyond simply ruling on the TRO request.

Plaintiffs filed their motion for a TRO and a preliminary injunction on October 22, along with a supporting brief. Defendants then filed briefs opposing the motion, with Plaintiffs filing a reply in support of their motion. The District Court heard argument from the parties, remotely, during a 90-minute hearing. The next day, the District Court ruled on the merits of the request for injunctive relief. *Bognet*, 2020 WL 6323121, at *7. The District Court's Memorandum Order denied both Bognet and the Voter Plaintiffs the affirmative relief they sought to obtain prior to Election Day, confirming that the Commonwealth was to count mailed ballots received after the close of the polls on Election Day but before 5:00 P.M. on November 6.

In determining whether Bognet and the Voter Plaintiffs had standing to sue, we resolve a legal issue that does not require resolution of any factual dispute. Our review is de novo. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 266 (3d Cir. 2014). "When reviewing a district court's denial of a preliminary injunction, we review the court's findings of fact for clear error, its conclusions of law de novo, and the ultimate decision ... for an abuse of discretion." *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010)) (cleaned up).

III. Analysis

A. Standing

Derived from separation-of-powers principles, the law of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (citations omitted). Article III of the U.S. Constitution vests "[t]he judicial Power of the United States" in both the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. But this "judicial Power" extends only to "Cases" and "Controversies." *Id.* art. III, § 2; *see also Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). To ensure that judges avoid rendering impermissible advisory opinions, parties seeking to invoke federal judicial power must first establish their standing to do so. *Spokeo*, 136 S. Ct. at 1547.

***6** Article III standing doctrine speaks in jargon, but the gist of its meaning is plain enough. To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests. If you are complaining about something that does not harm you—and does not harm you in a way that is concrete—then you lack standing. And if the injury that you claim is an injury that does no specific harm to you, or if it depends on a harm that may never happen, then you lack an injury for which you may seek relief from a federal court. As we will explain below, Plaintiffs here have not suffered a concrete, particularized, and non-speculative injury necessary under the U.S. Constitution for them to bring this federal lawsuit.

The familiar elements of Article III standing require a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). To plead an injury in fact, the party invoking federal jurisdiction must establish three sub-elements: first, the "invasion of a legally protected interest"; second, that the injury is both "concrete and particularized"; and third, that the injury is "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130); *see also Mielo v. Steak 'n Shake Operations*, 897 F.3d 467, 479 n.11 (3d Cir. 2018). The second sub-element requires that the injury "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. 2130. As for the third, when a plaintiff alleges future injury, such injury must be "certainly impending." *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (quoting *Lujan*, 504 U.S. at 565 n.2, 112 S.Ct. 2130). Allegations of "possible" future injury simply aren't enough. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). All elements of standing must exist at the time the complaint is filed. *See Lujan,* 504 U.S. at 569 n.4, 112 S.Ct. 2130.

With these guideposts in mind, we turn to whether Plaintiffs have pleaded an Article III injury. They bring several claims under 42 U.S.C. § 1983, asserting deprivation of their constitutional rights. They allege that Defendants' implementation of the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness violates the Elections Clause of Article I, the Electors Clause of Article II, and the Equal Protection Clause of the Fourteenth Amendment. Because Plaintiffs lack standing to assert these claims, we will affirm the District Court's denial of injunctive relief.

1. Plaintiffs lack standing under the Elections Clause and Electors Clause.

Federal courts are not venues for plaintiffs to assert a bare right "to have the Government act in accordance with law." *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). When the alleged injury is undifferentiated and common to all members of the public, courts routinely dismiss such cases as "generalized grievances" that cannot support standing. *United States v. Richardson*, 418 U.S. 166, 173–75, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). Such is the case here insofar as Plaintiffs, and specifically candidate Bognet, theorize their harm as the right to have government administered in compliance with the Elections Clause and Electors Clause.

To begin with, private plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause. For example, in *Lance v. Coffman*, 549 U.S. 437, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam), four private citizens challenged in federal district court a Colorado Supreme Court decision invalidating a redistricting plan passed by the state legislature and requiring use of a redistricting plan created by Colorado state courts. *Id.* at 438, 127 S.Ct. 1194. The plaintiffs alleged that the Colorado Supreme Court's interpretation of the Colorado Constitution violated the Elections Clause "by depriving the state legislature of its responsibility to draw congressional districts." *Id.* at 441, 127 S.Ct. 1194. The U.S. Supreme Court held that the plaintiffs lacked Article III standing because they claimed harm only to their interest, and that of every citizen, in proper application of the Elections Clause. *Id.* at 442, 127 S.Ct. 1194 ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed."). Their relief would have no more directly benefitted them than the public at large. *Id.* The same is true here. If anything, Plaintiffs' "interest in the State's ability to 'enforce its duly enacted laws' " is even less compelling because Pennsylvania's "election officials support the challenged decree." *Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 591 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 4680151 (Mem.), at *1 (Aug. 13, 2020) (quoting *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2324 n.17, 201 L.Ed.2d 714 (2018)).

***7** Because the Elections Clause and the Electors Clause have "considerable similarity," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (Roberts, C.J., dissenting) (discussing how Electors Clause similarly vests power to determine manner of appointing electors in "the Legislature" of each State), the same logic applies to Plaintiffs' alleged injury stemming from the claimed violation of the Electors Clause. *See also Foster*, 522 U.S. at 69, 118 S.Ct. 464 (characterizing Electors Clause as Elections Clause's "counterpart for the Executive Branch"); *U.S. Term*

Limits, Inc. v. Thornton, 514 U.S. 779, 804–05, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (noting that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause).

Even a party that meets Article III standing requirements must ordinarily rest its claim for relief on violation of its own rights, not those of a third party. *Pitt News v. Fisher*, 215 F.3d 354, 361–62 (3d Cir. 2000). Plaintiffs assert that the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness usurped the General Assembly's prerogative under the Elections Clause to prescribe "[t]he Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. The Elections Clause grants that right to "the Legislature" of "each State." *Id.* Plaintiffs' Elections Clause claims thus "belong, if they belong to anyone, only to the Pennsylvania General Assembly." *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (three-judge panel) (per curiam). Plaintiffs here are four individual voters and a candidate for federal office; they in no way constitute the General Assembly, nor can they be said to comprise any part of the law-making processes of Pennsylvania. *Ariz. State Legislature*, 576 U.S. at 824, 135 S.Ct. 2652.[5] Because Plaintiffs are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses. No member of the General Assembly is a party to this lawsuit.

That said, prudential standing can suspend Article III's general prohibition on a litigant's raising another person's legal rights. Yet Plaintiffs don't fit the bill. A plaintiff may assert the rights of another if he or she "has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (citation omitted). Plaintiffs cannot invoke this exception to the rule against raising the rights of third parties because they enjoy no close relationship with the General Assembly, nor have they alleged any hindrance to the General Assembly's ability to protect its own interests. *See, e.g.*, *Corman*, 287 F. Supp. 3d at 573. Nor does Plaintiffs' other theory of prudential standing, drawn from *Bond v. United States*, 564 U.S. 211, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011), advance the ball.

***8** In *Bond*, the Supreme Court held that a litigant has prudential standing to challenge a federal law that allegedly impinges on the state's police powers, "in contravention of constitutional principles of federalism" enshrined in the Tenth Amendment. *Id.* at 223–24, 131 S.Ct. 2355. The defendant in *Bond* challenged her conviction under 18 U.S.C. § 229, which Congress enacted to comply with a chemical weapons treaty that the United States had entered. *Id.* at 214–15, 131 S.Ct. 2355. Convicted under the statute she sought to challenge, Bond satisfied Article III's standing requirements. *Id.* at 217, 131 S.Ct. 2355 (characterizing Bond's sentence and incarceration as concrete, and redressable by invalidation of her conviction); *id.* at 224–25, 131 S.Ct. 2355 (noting that Bond was subject to "[a] law," "prosecution," and "punishment" she might not have faced "if the matter were left for the Commonwealth of Pennsylvania to decide"). She argued that her conduct was "local in nature" such that § 229 usurped the Commonwealth's reserved police powers. *Id.* Rejecting the Government's contention that Bond was barred as a third party from asserting the rights of the Commonwealth, *id.* at 225, 131 S.Ct. 2355, the Court held that "[t]he structural principles secured by the separation of powers protect the individual as well" as the State. *Id.* at 222, 131 S.Ct. 2355 ("Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. ... When government acts in excess of its lawful powers, that [personal] liberty is at stake.").

But the nub of Plaintiffs' argument here is that the Pennsylvania Supreme Court intruded on the authority delegated to the Pennsylvania General Assembly under Articles I and II of the U.S. Constitution to regulate federal elections. They do not allege any violation of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Nor could they. After all, states have no inherent or reserved power over federal elections. *U.S. Term Limits*, 514 U.S. at 804–05, 115 S.Ct. 1842. When "deciding issues raised under the Elections Clause," courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns." *Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012). Either federal and state election law "operate harmoniously in a single procedural scheme," or they don't—and the federal law preempts ("alter[s]") state election law under the Elections Clause. *Id.* at 394. An assessment that the Pennsylvania Supreme Court lacked the legislative authority under the state's constitution necessary to comply with the Elections Clause (Appellants' Br. 24–27) does not implicate *Bond*, the Tenth Amendment, or even Article VI's Supremacy

Clause.[6] *See Gonzalez*, 677 F.3d at 390–92 (contrasting Elections Clause with Supremacy Clause and describing former as "unique," containing "[an] unusual delegation of power," and "unlike virtually all other provisions of the Constitution"). And, of course, third-party standing under *Bond* still presumes that the plaintiff otherwise meets the requirements of Article III; as discussed above, Plaintiffs do not.

Plaintiff Bognet, a candidate for Congress who is currently a private citizen, does not plead a cognizable injury by alleging a "right to run in an election where Congress has paramount authority," Compl. ¶ 69, or by pointing to a "threatened" reduction in the competitiveness of his election from counting absentee ballots received within three days after Election Day. Appellants' Br. 21. Bognet does not explain how that "right to run" affects him in a particularized way when, in fact, all candidates in Pennsylvania, including Bognet's opponent, are subject to the same rules. And Bognet does not explain how counting *more* timely cast votes would lead to a *less* competitive race, nor does he offer any evidence tending to show that a greater proportion of mailed ballots received after Election Day than on or before Election Day would be cast for Bognet's opponent. What's more, for Bognet to have standing to enjoin the counting of ballots arriving after Election Day, such votes would have to be sufficient in number to change the outcome of the election to Bognet's detriment. *See, e.g.*, *Sibley v. Alexander*, 916 F. Supp. 2d 58, 62 (D.D.C. 2013) ("[E]ven if the Court granted the requested relief, [plaintiff] would still fail to satisfy the redressability element [of standing] because enjoining defendants from casting the ... votes would not change the outcome of the election." (citing *Newdow v. Roberts,* 603 F.3d 1002, 1011 (D.C. Cir. 2010) (citations omitted)). Bognet does not allege as much, and such a prediction was inherently speculative when the complaint was filed. The same can be said for Bognet's alleged wrongfully incurred expenditures and future expenditures. Any harm Bognet sought to avoid in making those expenditures was not "certainly impending"—he spent the money to avoid a speculative harm. *See Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, —— F.Supp.3d ——, ——, 2020 WL 5997680, at *36 (W.D. Pa. Oct. 10, 2020). Nor are those expenditures "fairly traceable" under Article III to the actions that Bognet challenges. *See, e.g.*, *Clapper*, 568 U.S. at 402, 416, 133 S.Ct. 1138 (rejecting argument that plaintiff can "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending").[7]

***9** Plaintiffs therefore lack Article III standing to challenge Defendants' implementation of the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness under the Elections Clause and Electors Clause.

2. The Voter Plaintiffs lack standing under the Equal Protection Clause.

Stressing the "personal" nature of the right to vote, the Voter Plaintiffs assert two claims under the Equal Protection Clause.[8] First, they contend that the influence of their votes, cast in person on Election Day, is "diluted" both by (a) mailed ballots cast on or before Election Day but received between Election Day and the Deadline Extension date, ballots which Plaintiffs assert cannot be lawfully counted; and (b) mailed ballots that were unlawfully cast (*i.e.*, placed in the mail) after Election Day but are still counted because of the Presumption of Timeliness. Second, the Voter Plaintiffs allege that the Deadline Extension and the Presumption of Timeliness create a preferred class of voters based on "arbitrary and disparate treatment" that values "one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The Voter Plaintiffs lack Article III standing to assert either injury.

a. Vote Dilution

As discussed above, the foremost element of standing is injury in fact, which requires the plaintiff to show a harm that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1547–48 (citation omitted). The Voter Plaintiffs lack standing to redress their alleged vote dilution because that alleged injury is not concrete as to votes counted under the Deadline Extension, nor is it particularized for Article III purposes as to votes counted under the Deadline Extension or the Presumption of Timeliness.

i. No concrete injury from vote dilution attributable to the Deadline Extension.

The Voter Plaintiffs claim that Defendants' implementation of the Deadline Extension violates the Equal Protection Clause because "unlawfully" counting ballots received within three days of Election Day dilutes their votes. But the source of this

purported illegality is necessarily a matter of state law, which makes any alleged harm abstract for purposes of the Equal Protection Clause. And the purported vote dilution is also not concrete because it would occur in equal proportion *without* the alleged procedural illegality—that is, had the *General Assembly* enacted the Deadline Extension, which the Voter Plaintiffs do not challenge substantively.[9]

***10** The concreteness of the Voter Plaintiffs' alleged vote dilution stemming from the Deadline Extension turns on the federal and state laws applicable to voting procedures. Federal law does not provide for *when* or *how* ballot counting occurs. *See, e.g.*, *Trump for Pres., Inc. v. Way*, No. 20-cv-01753, —— F.Supp.3d ——, ——, 2020 WL 5912561, at *12 (D.N.J. Oct. 6, 2020) ("Plaintiffs direct the Court to no federal law regulating methods of determining the timeliness of mail-in ballots or requiring that mail-in ballots be postmarked."); *see also Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 76 L.Ed. 795 (1932) (noting that Elections Clause delegates to state lawmaking processes all authority to prescribe "procedure and safeguards" for "counting of votes"). Instead, the Elections Clause delegates to each state's lawmaking function the authority to prescribe such procedural regulations applicable to federal elections. *U.S. Term Limits*, 514 U.S. at 832–35, 115 S.Ct. 1842 ("The Framers intended the Elections Clause to grant States authority to create procedural regulations .... [including] 'whether the electors should vote by ballot or vivâ voce ....' " (quoting James Madison, 2 Records of the Federal Convention of 1787, at 240 (M. Farrand ed. 1911) (cleaned up)); *Smiley*, 285 U.S. at 366, 52 S.Ct. 397 (describing state authority under Elections Clause "to provide a complete code for congressional elections ... in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns"). That delegation of authority embraces all procedures "which experience shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366, 52 S.Ct. 397. Congress exercises its power to "alter" state election regulations only if the state regime cannot "operate harmoniously" with federal election laws "in a single procedural scheme." *Gonzalez*, 677 F.3d at 394.

The Deadline Extension and federal laws setting the date for federal elections can, and indeed do, operate harmoniously. At least 19 other States and the District of Columbia have post-Election Day absentee ballot receipt deadlines.[10] And many States also accept absentee ballots mailed by overseas uniformed servicemembers that are received after Election Day, in accordance with the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–20311. So the Voter Plaintiffs' only cognizable basis for alleging dilution from the "unlawful" counting of invalid ballots is state law defining lawful and unlawful ballot counting practices. *Cf. Wise v. Circosta*, 978 F.3d 93, 100–01 (4th Cir. 2020) ("Whether ballots are *illegally* counted if they are received more than three days after Election Day depends on an issue of state law from which we must abstain." (emphasis in original)), *application for injunctive relief denied sub nom. Moore v. Circosta*, No. 20A72, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6305036 (Oct. 28, 2020). The Voter Plaintiffs seem to admit as much, arguing "that counting votes that are unlawful under the General Assembly's enactments will unconstitutionally dilute the lawful votes" cast by the Voter Plaintiffs. Appellants' Br. 38; *see also id.* at 31. In other words, the Voter Plaintiffs say that the Election Day ballot receipt deadline in Pennsylvania's codified election law renders the ballots untimely and therefore unlawful to count. Defendants, for their part, contend that the Pennsylvania Supreme Court's extension of that deadline under the Free and Equal Elections Clause of the state constitution renders them timely, and therefore lawful to count.

***11** This conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment. Violation of state election laws by state officials or other unidentified third parties is not always amenable to a federal constitutional claim. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("A deliberate violation of state election laws by state election officials does not transgress against the Constitution.") (cleaned up); *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (rejecting Equal Protection Clause claim arising from state's erroneous counting of votes cast by voters unqualified to participate in closed primary). "It was not intended by the Fourteenth Amendment ... that all matters formerly within the exclusive cognizance of the states should become matters of national concern." *Snowden v. Hughes*, 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497 (1944).

Contrary to the Voter Plaintiffs' conceptualization, vote dilution under the Equal Protection Clause is concerned with votes being weighed differently. *See Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 2501, 204 L.Ed.2d 931 (2019) (" '[V]ote dilution' in the one-person, one-

vote cases refers to the idea that each vote must carry *equal weight*." (emphasis added)); *cf. Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020), *as amended* (July 27, 2020) ("[N]o vote in the South Carolina system is diluted. Every qualified person gets one vote and each vote is counted equally in determining the final tally."). As explained below, the Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the "unlawful" counting of invalidly cast ballots "were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity." *Trump for Pres. v. Boockvar,* —— F.Supp.3d at —— – ——, 2020 WL 5997680, at *45–46. That is not how the Equal Protection Clause works.[11]

Even if we were to entertain an end-run around the Voter Plaintiffs' lack of Elections Clause standing—by viewing the *federal* Elections Clause as the source of "unlawfulness" of Defendants' vote counting—the alleged vote dilution would not be a concrete injury. Consider, as we've noted, that the Voter Plaintiffs take no issue with the content of the Deadline Extension; they concede that the General Assembly, as other state legislatures have done, could have enacted exactly the same Deadline Extension as a valid "time[ ], place[ ], and manner" regulation consistent with the Elections Clause. *Cf. Snowden*, 321 U.S. at 8, 64 S.Ct. 397 (concluding that alleged "unlawful administration by state officers of a state statute *fair on its face*, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection" (emphasis added)); *Powell*, 436 F.2d at 88 ("Uneven or erroneous application of an *otherwise valid* statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.' " (emphasis added) (quoting *Snowden*, 321 U.S. at 8, 64 S.Ct. 397)). Reduced to its essence, the Voter Plaintiffs' claimed vote dilution would rest on their allegation that federal law required a different state organ to issue the Deadline Extension. The Voter Plaintiffs have not alleged, for example, that they were prevented from casting their votes, *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), nor that their votes were not counted, *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915). Any alleged harm of vote dilution that turns not on the proportional influence of votes, but solely on the federal illegality of the Deadline Extension, strikes us as quintessentially abstract in the election law context and "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)). That the alleged violation here relates to election law and the U.S. Constitution, rather than the mine-run federal consumer privacy statute, does not abrogate the requirement that a concrete harm must flow from the procedural illegality. *See, e.g.*, *Lujan*, 504 U.S. at 576, 112 S.Ct. 2130 ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.").

***12** The Voter Plaintiffs thus lack a concrete Equal Protection Clause injury for their alleged harm of vote dilution attributable to the Deadline Extension.

ii. No particularized injury from votes counted under the Deadline Extension or the Presumption of Timeliness.

The opposite of a "particularized" injury is a "generalized grievance," where "the impact on plaintiff is plainly undifferentiated and common to all members of the public." *Id.* at 575, 112 S.Ct. 2130 (cleaned up); *see also Lance*, 549 U.S. at 439, 127 S.Ct. 1194. The District Court correctly held that the Voter Plaintiffs' "dilution" claim is a "paradigmatic generalized grievance that cannot support standing." *Bognet*, 2020 WL 6323121, at *4 (quoting *Carson v. Simon*, No. 20-cv-02030, —— F.Supp.3d ——, ——, 2020 WL 6018957, at *7 (D. Minn. Oct. 12, 2020), *rev'd on other grounds*, No. 20-3139, —— F.3d ——, 2020 WL 6335967 (8th Cir. Oct. 29, 2020)). The Deadline Extension and Presumption of Timeliness, assuming they operate to allow the illegal counting of unlawful votes, "dilute" the influence of all voters in Pennsylvania equally and in an "undifferentiated" manner and do not dilute a certain group of voters particularly.[12]

Put another way, "[a] vote cast by fraud or mailed in by the wrong person through mistake," or otherwise counted illegally, "has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged." *Martel v. Condos*, No. 5:20-cv-00131, —— F.Supp.3d ——, ——, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020). Such an alleged "dilution" is suffered equally by all voters and is not "particularized" for standing purposes. The courts to consider

this issue are in accord. *See id.*; *Carson*, —— F.Supp.3d at ——– – ——, 2020 WL 6018957, at *7–8; *Moore v. Circosta*, Nos. 1:20-cv-00911, 1:20-cv-00912, —— F.Supp.3d ——, ——, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020), *emergency injunction pending appeal denied sub nom. Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020), *application for injunctive relief denied sub nom. Moore v. Circosta*, No. 20A72, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6305036 (U.S. Oct. 28, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. Apr. 30, 2020).

But the Voter Plaintiffs argue that their purported "vote dilution" is an injury in fact sufficient to confer standing, and *not* a generalized grievance belonging to all voters, because the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.' " *Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). "Thus, 'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

***13** The Voter Plaintiffs' reliance on this language from *Baker* and *Reynolds* is misplaced. In *Baker*, the plaintiffs challenged Tennessee's apportionment of seats in its legislature as violative of the Equal Protection Clause of the Fourteenth Amendment. 369 U.S. at 193, 82 S.Ct. 691. The Supreme Court held that the plaintiffs *did* have standing under Article III because "[t]he injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties." *Id.* at 207–08, 82 S.Ct. 691.

Although the *Baker* Court did not decide the merits of the Equal Protection claim, the Court in a series of cases—including *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), and *Reynolds*—made clear that the Equal Protection Clause prohibits a state from "diluti[ng] ... the *weight* of the votes of certain ... voters merely because of where they reside[ ]," just as it prevents a state from discriminating on the basis of the voter's race or sex. *Reynolds*, 377 U.S. at 557, 84 S.Ct. 1362 (emphasis added). The Voter Plaintiffs consider it significant that the Court in *Reynolds* noted—though not in the context of standing—that "the right to vote" is "individual and personal in nature." *Id.* at 561, 84 S.Ct. 1362 (quoting *United States v. Bathgate*, 246 U.S. 220, 227, 38 S.Ct. 269, 62 L.Ed. 676 (1918)). The Court then explained that a voter's right to vote encompasses both the right to cast that vote and the right to have that vote counted without "debasement or dilution":

> The right to vote can neither be denied outright, *Guinn v. United States*, 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340 (1915)], *Lane v. Wilson*, 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281 (1939)], nor destroyed by alteration of ballots, see *United States v. Classic*, 313 U.S. 299, 315 [61 S.Ct. 1031, 85 L.Ed. 1368 (1941)], nor diluted by ballot-box stuffing, *Ex parte Siebold*, 100 U.S. 371 [25 L.Ed. 717 (1880)], *United States v. Saylor*, 322 U.S. 385 [64 S.Ct. 1101, 88 L.Ed. 1341 (1944)]. As the Court stated in *Classic*, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted ...." 313 U.S. at 315 [61 S.Ct. 1031].
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> ...
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> "The right to vote includes the right to have the ballot counted. ... It also includes the right to have the vote counted at full value without dilution or discount. ... That federally protected right suffers substantial dilution ... [where a] favored group has full voting strength ... [and] [t]he groups not in favor have their votes discounted."

Reynolds, 377 U.S. at 555 & n.29, 84 S.Ct. 1362 (alterations in last paragraph in original) (quoting *South v. Peters*, 339 U.S. 276, 279, 70 S.Ct. 641, 94 L.Ed. 834 (1950) (Douglas, J., dissenting)).

Still, it does not follow from the labeling of the right to vote as "personal" in *Baker* and *Reynolds* that *any* alleged illegality affecting voting rights rises to the level of an injury in fact. After all, the Court has observed that the harms underlying a racial gerrymandering claim under the Equal Protection Clause "are personal" in part because they include the harm of a voter "being personally subjected to a racial classification." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (cleaned up). Yet a voter "who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.' " *Gill*, 138 S. Ct. at 1930 (quoting *United States v. Hays*, 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995)) (alteration in original). The key inquiry for standing is whether the alleged violation of the right to vote arises from an invidious classification—including those based on "race, sex, economic status, or place of residence

within a State," *Reynolds*, 377 U.S. at 561, 84 S.Ct. 1362—to which the plaintiff is subject and in which "the favored group has full voting strength and the groups not in favor have their votes discounted," *id.* at 555 n.29, 84 S.Ct. 1362 (cleaned up). In other words, "voters who allege facts *showing disadvantage to themselves*" have standing to bring suit to remedy that disadvantage, *Baker*, 369 U.S. at 206, 82 S.Ct. 691 (emphasis added), but a disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group. Here, no Pennsylvania voter's vote will count for less than that of any other voter as a result of the Deadline Extension and Presumption of Timeliness.[13]

***14** This conclusion cannot be avoided by describing one group of voters as "those ... who lawfully vote in person and submit their ballots *on time*" and the other group of voters as those whose (mail-in) ballots arrive after Election Day and are counted because of the Deadline Extension and/or the Presumption of Timeliness. Appellants' Br. 33 (emphasis in original). Although the former group, under Plaintiffs' theory, should make up 100% of the total votes counted and the latter group 0%, there is simply no differential *weighing* of the votes. *See Wise*, 978 F.3d at 104 (Motz, J., concurring) ("But if the extension went into effect, plaintiffs' votes would not count for less *relative to other North Carolina voters*. This is the core of an Equal Protection Clause challenge." (emphasis in original)). Unlike the malapportionment or racial gerrymandering cases, a vote cast by a voter in the so-called "favored" group counts not one bit more than the same vote cast by the "disfavored" group—no matter what set of scales one might choose to employ. *Cf. Reynolds*, 377 U.S. at 555 n.29, 84 S.Ct. 1362. And, however one tries to draw a contrast, this division is not based on a voter's personal characteristics at all, let alone a person's race, sex, economic status, or place of residence. Two voters could each have cast a mail-in ballot before Election Day at the same time, yet perhaps only one of their ballots arrived by 8:00 P.M. on Election Day, given USPS's mail delivery process. It is passing strange to assume that one of these voters would be denied "equal protection of the laws" were *both* votes counted. U.S. Const. amend. XIV, § 1.

The Voter Plaintiffs also emphasize language from *Reynolds* that "[t]he right to vote can neither be denied outright ... nor diluted by ballot-box stuffing." 377 U.S. at 555, 84 S.Ct. 1362 (citing *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1879); *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944)). In the first place, casting a vote in accordance with a procedure approved by a state's highest court—even assuming that approval violates the Elections Clause—is not equivalent to "ballot-box stuffing." The Supreme Court has only addressed this "false"-tally type of dilution where the tally was false as a result of a scheme to cast falsified or fraudulent votes. *See Saylor*, 322 U.S. at 386, 64 S.Ct. 1101. We are in uncharted territory when we are asked to declare that a tally that includes false or fraudulent votes is equivalent to a tally that includes votes that are or may be unlawful for non-fraudulent reasons, and so is more aptly described as "incorrect." *Cf. Gray*, 372 U.S. at 386, 83 S.Ct. 801 (Harlan, J., dissenting) ("[I]t is hard to take seriously the argument that 'dilution' of a vote in consequence of a legislatively sanctioned electoral system can, without more, be analogized to an impairment of the political franchise by ballot box stuffing or other criminal activity.").

Yet even were this analogy less imperfect, it still would not follow that every such "false" or incorrect tally is an injury in fact for purposes of an Equal Protection Clause claim. The Court's cases that describe ballot-box stuffing as an injury to the right to vote have arisen from criminal prosecutions under statutes making it unlawful for anyone to injure the exercise of another's constitutional right. *See, e.g.*, *Ex parte Siebold*, 100 U.S. at 373–74 (application for writ of habeas corpus); *Saylor*, 322 U.S. at 385–86, 64 S.Ct. 1101 (criminal appeal regarding whether statute prohibiting "conspir[ing] to injure ... any citizen in the free exercise ... of any right or privilege secured to him by the Constitution" applied to conspiracy to stuff ballot boxes); *Anderson v. United States*, 417 U.S. 211, 226, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974) (criminal prosecution for conspiracy to stuff ballot boxes under successor to statute in *Saylor*). Standing was, of course, never an issue in those cases because the Government was enforcing its criminal laws. Here, the Voter Plaintiffs, who bear the burden to show standing, have presented no instance in which an individual voter had Article III standing to claim an equal protection harm to his or her vote from the existence of an allegedly illegal vote cast by someone else in the same election.

Indeed, the logical conclusion of the Voter Plaintiffs' theory is that whenever an elections board counts any ballot that deviates in some way from the requirements of a state's legislatively enacted election code, there is a *particularized* injury in fact sufficient to confer Article III standing on every other voter—provided the remainder of the standing analysis is satisfied. Allowing standing for such an injury strikes us as indistinguishable from the proposition that a plaintiff has

Article III standing to assert a general interest in seeing the "proper application of the Constitution and laws"—a proposition that the Supreme Court has firmly rejected. *Lujan*, 504 U.S. at 573–74, 112 S.Ct. 2130. The Voter Plaintiffs thus lack standing to bring their Equal Protection vote dilution claim.

b. Arbitrary and Disparate Treatment

***15** The Voter Plaintiffs also lack standing to allege an injury in the form of "arbitrary and disparate treatment" of a preferred class of voters because the Voter Plaintiffs have not alleged a legally cognizable "preferred class" for equal protection purposes, and because the alleged harm from votes counted solely due to the Presumption of Timeliness is hypothetical or conjectural.

i. No legally protected "preferred class."

The District Court held that the Presumption of Timeliness creates a "preferred class of voters" who are "able to cast their ballots after the congressionally established Election Day" because it "extends the date of the election by multiple days for a select group of mail-in voters whose ballots will be presumed to be timely in the absence of a verifiable postmark."[14] *Bognet*, 2020 WL 6323121, at *6. The District Court reasoned, then, that the differential treatment between groups of voters is by itself an injury for standing purposes. To the District Court, this supposed "unequal treatment of voters ... harms the [Voter] Plaintiffs because, as in-person voters, they must vote by the end of the congressionally established Election Day in order to have their votes counted." *Id.* The District Court cited no case law in support of its conclusion that the injury it identified gives rise to Article III standing.

The District Court's analysis suffers from several flaws. First, the Deadline Extension and Presumption of Timeliness apply to all voters, not just a subset of "preferred" voters. It is an individual voter's *choice* whether to vote by mail or in person, and thus whether to become a part of the so-called "preferred class" that the District Court identified. Whether to join the "preferred class" of mail-in voters was entirely up to the Voter Plaintiffs.

Second, it is not clear that the mere creation of so-called "classes" of voters constitutes an injury in fact. An injury in fact requires the "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. We doubt that the mere existence of groupings of voters qualifies as an injury per se. "An equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)); *see also*, *e.g.*, *Batra v. Bd. of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996) ("[T]he relevant prerequisite is unlawful discrimination, not whether plaintiff is part of a victimized class."). More importantly, the Voter Plaintiffs have shown no disadvantage to themselves that arises simply by being separated into groupings. For instance, there is no argument that it is inappropriate that some voters will vote in person and others will vote by mail. The existence of these two groups of voters, without more, simply does not constitute an injury in fact to in-person voters.

Plaintiffs may believe that injury arises because of a preference shown for one class over another. But what, precisely, is the preference of which Plaintiffs complain? In *Bush v. Gore*, the Supreme Court held that a State may not engage in arbitrary and disparate treatment that results in the valuation of one person's vote over that of another. 531 U.S. at 104–05, 121 S.Ct. 525. Thus, "the right of suffrage can be denied by a *debasement or dilution of the weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 105, 121 S.Ct. 525 (quoting *Reynolds*, 377 U.S. at 555, 84 S.Ct. 1362) (emphasis added). As we have already discussed, vote dilution is not an injury in fact here.

***16** What about the risk that some ballots placed in the mail after Election Day may still be counted? Recall that no voter—whether in person or by mail—is *permitted* to vote after Election Day. Under Plaintiffs' argument, it might theoretically be easier for one group of voters—mail-in voters—to illegally cast late votes than it is for another group of voters—in-person voters. But even if that is the case, no group of voters has the *right* to vote after the deadline.[15] We remember that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) (citations omitted). And "a plaintiff lacks standing to complain about his inability to commit crimes because no one has a right to commit a crime." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014). Without a showing of discrimination or other intentionally unlawful

conduct, or at least some burden on Plaintiffs' own voting rights, we discern no basis on which they have standing to challenge the slim opportunity the Presumption of Timeliness conceivably affords wrongdoers to violate election law. *Cf. Minn. Voters Alliance v. Ritchie*, 720 F.3d 1029, 1033 (8th Cir. 2013) (affirming dismissal of claims "premised on potential harm in the form of vote dilution caused by insufficient pre-election verification of [election day registrants'] voting eligibility and the absence of post-election ballot rescission procedures").

ii. Speculative injury from ballots counted under the Presumption of Timeliness.

Plaintiffs' theory as to the Presumption of Timeliness focuses on the potential for some voters to vote after Election Day and still have their votes counted. This argument reveals that their alleged injury in fact attributable to the Presumption is "conjectural or hypothetical" instead of "actual or imminent." *Spokeo*, 136 S. Ct. at 1547–48 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). The Supreme Court has emphasized that a threatened injury must be "*certainly impending*" and not merely "*possible*" for it to constitute an injury in fact. *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (emphasis in original) (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). When determining Article III standing, our Court accepts allegations based on well-pleaded facts; but we do not credit bald assertions that rest on mere supposition. *Finkelman v. NFL*, 810 F.3d 187, 201–02 (3d Cir. 2016). The Supreme Court has also emphasized its "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414, 133 S.Ct. 1138. A standing theory becomes even more speculative when it requires that independent actors make decisions to act *unlawfully*. *See City of L.A. v. Lyons*, 461 U.S. 95, 105–06 & 106 n.7, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (rejecting Article III standing to seek injunction where party invoking federal jurisdiction would have to establish that he would unlawfully resist arrest or police officers would violate department orders in future).

Here, the Presumption of Timeliness could inflict injury on the Voter Plaintiffs only if: (1) another voter violates the law by casting an absentee ballot after Election Day; (2) the illegally cast ballot does not bear a legible postmark, which is against USPS policy;[16] (3) that same ballot still arrives within three days of Election Day, which is faster than USPS anticipates mail delivery will occur;[17] (4) the ballot lacks sufficient indicia of its untimeliness to overcome the Presumption of Timeliness; and (5) that same ballot is ultimately counted. *See Donald J. Trump for Pres., Inc. v. Way*, No. 20-cv-10753, 2020 WL 6204477, at *7 (D.N.J. Oct. 22, 2020) (laying out similar "unlikely chain of events" required for vote dilution harm from postmark rule under New Jersey election law); *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) (holding purported injury in fact was too conjectural where "we cannot now describe how Appellants will be injured in this case without beginning our explanation with the word 'if' "). This parade of horribles "may never come to pass," *Trump for Pres. v. Boockvar*, 2020 WL 5997680, at *33, and we are especially reluctant to endorse such a speculative theory of injury given Pennsylvania's "own mechanisms for deterring and prosecuting voter fraud," *Donald J. Trump for Pres., Inc. v. Cegavske*, No. 20-1445, —— F.Supp.3d ——, ——, 2020 WL 5626974, at *6 (D. Nev. Sept. 18, 2020).[18]

***17** To date, the Secretary has reported that at least 655 ballots without a legible postmark have been collected within the Deadline Extension period.[19] But it is mere speculation to say that any one of those ballots was cast after Election Day. We are reluctant to conclude that an independent actor —here, one of 655 voters—decided to mail his or her ballot after Election Day contrary to law. The Voter Plaintiffs have not provided any empirical evidence on the frequency of voter fraud or the speed of mail delivery that would establish a statistical likelihood or even the plausibility that any of the 655 ballots was cast after Election Day. Any injury to the Voter Plaintiffs attributable to the Presumption of Timeliness is merely "possible," not "actual or imminent," and thus cannot constitute an injury in fact.

B. Purcell

Even were we to conclude that Plaintiffs have standing, we could not say that the District Court abused its discretion in concluding on this record that the Supreme Court's election-law jurisprudence counseled against injunctive relief. Unique and important equitable considerations, including voters' reliance on the rules in place when they made their plans to vote and chose how to cast their ballots, support that disposition. Plaintiffs' requested relief would have upended this status quo, which is generally disfavored under the "voter confusion" and election confidence rationales of *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006). One can assume for the sake of argument that aspects of the now-prevailing regime in Pennsylvania are unlawful as

alleged and still recognize that, given the timing of Plaintiffs' request for injunctive relief, the electoral calendar was such that following it "one last time" was the better of the choices available. *Perez,* 138 S. Ct. at 2324 ("And if a [redistricting] plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.").

Here, less than two weeks before Election Day, Plaintiffs asked the District Court to enjoin a deadline established by the Pennsylvania Supreme Court on September 17, a deadline that may have informed voters' decisions about whether and when to request mail-in ballots as well as when and how they cast or intended to cast them. In such circumstances, the District Court was well within its discretion to give heed to Supreme Court decisions instructing that "federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, —— U.S. ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (per curiam) (citing *Purcell*, 549 U.S. at 1, 127 S.Ct. 5).

In *Purcell*, an appeal from a federal court order enjoining the State of Arizona from enforcing its voter identification law, the Supreme Court acknowledged that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." 549 U.S. at 4, 127 S.Ct. 5. In other words, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5, 127 S.Ct. 5. Mindful of "the necessity for clear guidance to the State of Arizona" and "the imminence of the election," the Court vacated the injunction. *Id.* at 5, 127 S.Ct. 5.

The principle announced in *Purcell* has very recently been reiterated. First, in *Republican National Committee*, the Supreme Court stayed on the eve of the April 7 Wisconsin primary a district court order that altered the State's voting rules by extending certain deadlines applicable to absentee ballots. 140 S. Ct. at 1206. The Court noted that it was adhering to *Purcell* and had "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* at 1207 (citing *Purcell*, 549 U.S. at 1, 127 S.Ct. 5). And just over two weeks ago, the Court denied an application to vacate a stay of a district court order that made similar changes to Wisconsin's election rules six weeks before Election Day. *Democratic Nat'l Comm. v. Wis. State Legislature*, No. 20A66, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6275871 (Oct. 26, 2020) (denying application to vacate stay). Justice Kavanaugh explained that the injunction was improper for the "independent reason[ ]" that "the District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's precedents." *Id.* at ——, 2020 WL 6275871 at *3 (Kavanaugh, J., concurring). *Purcell* and a string[20] of Supreme Court election-law decisions in 2020 "recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled." *Id.*

***18** The prevailing state election rule in Pennsylvania permitted voters to mail ballots up through 8:00 P.M. on Election Day so long as their ballots arrived by 5:00 P.M. on November 6. Whether that rule was wisely or properly put in place is not before us now. What matters for our purposes today is that Plaintiffs' challenge to it was not filed until sufficiently close to the election to raise a reasonable concern in the District Court that more harm than good would come from an injunction changing the rule. In sum, the District Court's justifiable reliance on *Purcell* constitutes an "alternative and independent reason[ ]" for concluding that an "injunction was unwarranted" here. *Wis. State Legislature*, —— S.Ct. at ——, 2020 WL 6275871, at *3 (Kavanaugh, J., concurring).

IV. Conclusion

We do not decide today whether the Deadline Extension or the Presumption of Timeliness are proper exercises of the Commonwealth of Pennsylvania's lawmaking authority, delegated by the U.S. Constitution, to regulate federal elections. Nor do we evaluate the policy wisdom of those two features of the Pennsylvania Supreme Court's ruling. We hold only that when voters cast their ballots under a state's facially lawful election rule and in accordance with instructions from the state's election officials, private citizens lack Article III standing to enjoin the counting of those ballots on the grounds that the source of the rule was the wrong state organ or that doing so dilutes their votes or constitutes differential treatment of voters in violation of the Equal Protection Clause. Further, and independent of our holding on standing, we hold that the District Court did not err in denying Plaintiffs' motion for injunctive relief out of concern for the settled expectations of voters and election officials. We will affirm the District Court's denial of Plaintiffs' emergency motion for a TRO or preliminary injunction.

All Citations

--- F.3d ----, 2020 WL 6686120

Footnotes

1 Second Letter from Phocion (April 1784), *reprinted in* 3 The Papers of Alexander Hamilton, 1782–1786, 530–58 (Harold C. Syrett ed., 1962).

2 Throughout this opinion, we refer to absentee voting and mail-in voting interchangeably.

3 The Free and Equal Elections Clause of the Pennsylvania Constitution provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. 1, § 5.

4 Because we have received comprehensive briefing, and given the weighty public interest in a prompt ruling on the matter before us, we have elected to forgo oral argument.

5 Bognet seeks to represent Pennsylvania in Congress, but even if he somehow had a relationship to *state* lawmaking processes, he would lack personal standing to sue for redress of the alleged "institutional injury (the diminution of legislative power), which necessarily damage[d] all Members of [the legislature] ... equally." *Raines v. Byrd*, 521 U.S. 811, 821, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (plaintiffs were six out of 535 members of Congress); *see also Corman*, 287 F. Supp. 3d at 568–69 (concluding that "two of 253 members of the Pennsylvania General Assembly" lacked standing to sue under Elections Clause for alleged "deprivation of 'their legislative authority to apportion congressional districts' "); *accord Va. House of Delegates v. Bethune-Hill*, —— U.S. ——, 139 S. Ct. 1945, 1953, 204 L.Ed.2d 305 (2019).

6 Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots. *See Carson v. Simon*, No. 20-3139, —— F.3d ——, ——, 2020 WL 6335967, at *5 (8th Cir. Oct. 29, 2020). The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none.

7 The alleged injury specific to Bognet does not implicate the Qualifications Clause or exclusion from Congress, *Powell v. McCormack*, 395 U.S. 486, 550, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), nor the standing of members of Congress to bring actions alleging separation-of-powers violations. *Moore v. U.S. House of Reps.*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring).

8 Only the Voter Plaintiffs bring the Equal Protection count in the Complaint; Bognet did not join that count.

9 We exclude the Presumption of Timeliness from our concreteness analysis. Plaintiffs allege that the federal statutes providing for a uniform election day, 3 U.S.C. § 1 and 2 U.S.C. § 7, conflict with, and thus displace, any state law that would authorize voting after Election Day. They claim that the Presumption permits, theoretically at least, some voters whose ballots lack a legible postmark to vote *after* Election Day, in violation of these federal statutes. So unlike the Deadline Extension, Plaintiffs contend that the General Assembly could not enact the Presumption consistent with the Constitution. This conceptualization of injury is thus more properly characterized as "concrete" than is the purported Deadline Extension injury attributable to voters having their timely voted ballots received and counted after Election Day. That said, we express no opinion about whether the Voter Plaintiffs have, in fact, alleged such a concrete injury for standing purposes.

10 *See* AS § 15.20.081(e) & (h) (Alaska – 10 days after Election Day if postmarked on or before Election Day); West's Ann. Cal. Elec. Code § 3020(b) (California – three days after Election Day if postmarked on or before Election Day); DC ST § 1-1001.05(a)(10A) (District of Columbia – seven days after the election if postmarked on or before Election Day); 10 ILCS 5/19-8, 5/18A-15 (Illinois – 14 days after the election if postmarked on or before Election Day); K.S.A. 25-1132 (Kansas – three days after the election if postmarked before the close of polls on Election Day); MD Code, Elec. Law, § 9-505 (Maryland – the second Friday after Election Day if postmarked on or before Election Day); Miss. Code Ann. § 23-15-637 (Mississippi – five business days after Election Day if postmarked on or before Election Day); NV Rev Stat § 293.317 (Nevada – by 5:00 P.M. on the seventh day after Election Day if postmarked by Election Day, and ballots with unclear postmarks must be received by 5:00 P.M. on the third day after Election Day); N.J.S.A. 19:63-22 (New Jersey – 48 hours after polls close if postmarked on or before Election Day); McKinney's Elec. Law § 8-412 (New York – seven days after the election for mailed ballots postmarked on Election Day); N.C. Gen. Stat. § 163-231(b)(2) and *Wise v. Circosta*,

978 F.3d 93, 96 (4th Cir. 2020) (North Carolina – recognizing extension from three to nine days after the election the deadline for mail ballots postmarked on or before Election Day); Texas Elec. Code § 86.007 (the day after the election by 5:00 P.M. if postmarked on or before Election Day); Va. Code 24.2-709 (Virginia – by noon on the third day after the election if postmarked on or before Election Day); West's RCWA 29A.40.091 (Washington – no receipt deadline for ballots postmarked on or before Election Day); W. Va. Code, §§ 3-3-5, 3-5-17 (West Virginia – five days after the election if postmarked on or before Election Day); *see also* Iowa Code § 53.17(2) (by noon the Monday following the election if postmarked by the day before Election Day); NDCC 16.1-07-09 (North Dakota – before the canvass if postmarked the day before Election Day); R.C. § 3509.05 (Ohio – 10 days after the election if postmarked by the day before Election Day); Utah Code Ann. § 20A-3a-204 (seven to 14 days after the election if postmarked the day before the election).

11 *Bush v. Gore* does not require us to perform an Equal Protection Clause analysis of Pennsylvania election law as interpreted by the Pennsylvania Supreme Court. *See* 531 U.S. at 109, 121 S.Ct. 525 ("Our consideration is limited to the present circumstances ...."); *id.* at 139–40, 121 S.Ct. 525 (Ginsburg, J., dissenting) (discussing "[r]are[ ]" occasions when Supreme Court rejected state supreme court's interpretation of state law, one of which was in 1813 and others occurred during Civil Rights Movement—and none decided federal equal protection issues).

12 In their complaint, the Voter Plaintiffs alleged that they are all "residents of Somerset County, a county where voters are requesting absentee ballots at a rate *far less* than the state average" and thus, somehow, the Voter Plaintiffs' votes "will be diluted to a greater degree than other voters." Compl. ¶ 71 (emphasis in original). Plaintiffs continue to advance this argument on appeal in support of standing, and it additionally suffers from being a conjectural or hypothetical injury under the framework discussed *infra* Section III.A.2.b.ii. It is purely hypothetical that counties where a greater percentage of voters request absentee ballots will more frequently have those ballots received after Election Day.

13 Plaintiffs also rely on *FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), for the proposition that a widespread injury—such as a mass tort injury or an injury "where large numbers of voters suffer interference with voting rights conferred by law"—does not become a "generalized grievance" just because many share it. *Id.* at 24–25, 118 S.Ct. 1777. That's true as far as it goes. But the Voter Plaintiffs have not alleged an injury like that at issue in *Akins*. There, the plaintiffs' claimed injury was their inability to obtain information they alleged was required to be disclosed under the Federal Election Campaign Act. *Id.* at 21, 118 S.Ct. 1777. The plaintiffs alleged a statutory right to obtain information and that the same information was being withheld. Here, the Voter Plaintiffs' alleged injury is to their right under the Equal Protection Clause not to have their votes "diluted," but the Voter Plaintiffs have not alleged that their votes are less influential than any other vote.

14 The District Court did not find that the Deadline Extension created such a preferred class.

15 Moreover, we cannot overlook that the mail-in voters potentially suffer a *disadvantage* relative to the in-person voters. Whereas in-person ballots that are timely cast will count, timely cast mail-in ballots may not count because, given mail delivery rates, they may not be received by 5:00 P.M. on November 6.

16 *See* Defendant-Appellee's Br. 30 (citing 39 C.F.R. § 211.2(a)(2); Postal Operations Manual at 443.3).

17 *See Pa. Democratic Party*, 238 A.3d at 364 (noting "current two to five day delivery expectation of the USPS").

18 Indeed, the conduct required of a voter to effectuate such a scheme may be punishable as a crime under Pennsylvania statutes that criminalize forging or "falsely mak[ing] the official endorsement on any ballot," 25 Pa. Stat. & Cons. Stat. § 3517 (punishable by up to two years' imprisonment); "willfully disobey[ing] any lawful instruction or order of any county board of elections," *id.* § 3501 (punishable by up to one year's imprisonment); or voting twice in one election, *id.* § 3535 (punishable by up to seven years' imprisonment).

19 As of the morning of November 12, Secretary Boockvar estimates that 655 of the 9383 ballots received between 8:00 P.M. on Election Day and 5:00 P.M. on November 6 lack a legible postmark. *See* Dkt. No. 59. That estimate of 655 ballots does not include totals from five of Pennsylvania's 67 counties: Lehigh, Northumberland, Tioga, Warren, and Wayne. *Id.* The 9383 ballots received, however, account for all of Pennsylvania's counties. *Id.*

20 *See, e.g.*, *Andino v. Middleton*, No. 20A55, 592 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J., concurring) ("By enjoining South Carolina's witness requirement shortly before the election, the District Court defied [the *Purcell*] principle and this Court's precedents." (citations omitted)); *Merrill v. People First of Ala.*, No. 19A1063, 591 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 3604049 (Mem.), at *1 (July 2, 2020); *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see also Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (per curiam) (holding that injunction issued six weeks before election violated *Purcell*); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. Oct. 2, 2020) ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s

well-known caution against federal courts mandating new election rules—especially at the last minute." (citing *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5)).

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You are hereby notified that the Court has entered the following order:

No. 2020AP1761-OA O'Bright v. Lynch

The court has considered the following filings: (1) an "Emergency Petition For Original Jurisdiction And Declaratory Judgment" filed by Outagamie County and Calumet County; (2) responses to the petition filed by the City of Appleton; the Village of Black Creek; the Town of Buchanan, et al.; the Town of Cicero; the Town of Center, et al.; the Village of Hortonville, et al.; the City of Kaukauna; the Town of Vandenbroek; and the Wisconsin Elections Commission; and (3) a statement in support of the petition filed by amicus curiae, Wisconsin Counties Association;

IT IS ORDERED that the petition is denied.

¶1 PATIENCE DRAKE ROGGENSACK, C.J. *(concurring).* Wisconsinites have a fundamental right to vote. Therefore, a vote legally cast and received by the time the polls close on Election Day must be counted if the ballot expresses the will of the voter.

¶2 In the present case, clerks for Outagamie County and Calumet County are concerned that they cannot count and report such votes by a statutorily-imposed deadline. They ask us to assume original jurisdiction and issue what amounts to an advisory opinion explaining what election laws they are free to disregard. We will not do that. However, I write separately to clarify that our denial of the petition for an original action should not be construed as an endorsement to disregard Wisconsinites' fundamental right to vote. Accordingly, I respectfully concur.

I. BACKGROUND

¶3 For context, the petitioners for declaratory judgment are the clerks of Outagamie County and Calumet County. For the upcoming November 3rd election, the Outagamie County clerk ordered ballots on behalf of all municipalities in Outagamie County and the portions of the City of Appleton and the Town of Harrison that fall in Calumet and Winnebago Counties. On September 3, the Outagamie County clerk approved proofs of ballots provided by JP Graphics, Inc. From September 8 to September 16, JP delivered more than 133,000 printed ballots for absentee voting to the municipalities. Subsequently, the municipalities mailed some of those absentee ballots to registered voters who had requested them.

¶4 Unfortunately, a portion of the absentee ballots had a printing error, which has been described to us as a blemish in the timing mark that prevents the affected ballots from being counted by electronic voting systems. Approximately 13,500 absentee ballots with this error were available to be mailed to voters.

¶5 Outagamie County and Calumet County became concerned that those absentee ballots were "defective" such that municipalities had to follow the procedures outlined in Wis. Stat. § 5.85(3) (2017-18),[1] which require that defective ballots that cannot be counted by an electronic voting system be duplicated in the presence of witnesses. If such a procedure were required, Outagamie County and Calumet County worried that their municipalities could not comply with statutorily-imposed deadlines set forth in Wis. Stat. § 7.51(5)(b) by 4 p.m. on the day following the election.

¶6 Outagamie County asked the Wisconsin Elections Commission (WEC) for advice about how to proceed. The WEC responded that it lacked the authority to extend deadlines imposed by Wis. Stat. § 7.51(5)(b). Furthermore, it could not authorize the municipalities to utilize a procedure other than Wis. Stat. § 5.85(3). The WEC also explained that, while it could authorize a hand count pursuant to Wis. Stat. § 5.40(5m), it did not believe that it could authorize hand counting of only affected ballots. As it stated, "[p]ermission to hand count is not a 'mix or match' situation where some ballots in a municipality may be counted by electronic voting equipment, and other ballots counted by hand. Either all ballots in a municipality must be counted by electronic voting equipment, or, if permission is granted, all ballots [in] that municipality must be counted by hand." According to Outagamie County and Calumet County, they cannot comply

[1] All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

with Wis. Stat. § 5.85(3) by 4 p.m. November 4. Outagamie County and Calumet County did not discuss hand-counting some or all of the ballots in their petition or memorandum relating to an original action.

II. DISCUSSION

A. The Right to Vote

¶7 The right to vote is protected by Wis. Const. art. III, § 1. Therefore, a vote legally cast and received by the time the polls close on Election Day must be counted if the ballot expresses the will of the voter.[2] In Ollmann v. Kowalewski, 238 Wis. 574, 578, 300 N.W. 183 (1941), we explained the extent of the protection afforded by § 1. There, we noted that "the voters' constitutional right to vote 'cannot be baffled by latent official failure or defect.'" Id. at 579 (quoting State ex rel. Wood v. Baker, 38 Wis. 71 (1875)).

¶8 Ollmann is not a standalone case. As the court of appeals explained in Board of Canvassers of the City of Bayfield v. Erickson: "Wisconsin has a long tradition of protecting the individual citizen's right to have his vote counted, consistent with necessary restrictions to insure the integrity of the election process." 147 Wis. 2d 467, 471, 433 N.W.2d 266 (Ct. App. 1988).

B. Application

¶9 Here, election officials desire to ignore deadlines imposed by Wis. Stat. § 7.51(5)(b), or, alternatively, to use a procedure other than the one prescribed by Wis. Stat. § 5.85(3). Effectively, they ask us to render legal advice about how to proceed. We will not do that. However, a vote legally cast and received by the time the polls close on Election Day must be counted if the ballot expresses the will of the voter.

¶10 Election officials may have to make difficult decisions regarding how to proceed as they comply with what the law requires. Obtaining more election workers appears to be necessary.

III. CONCLUSION

¶11 In conclusion, I write separately to clarify that our denial of the petition for an original action should not be construed as an endorsement to disregard Wisconsinites' fundamental right to vote. We have repeatedly recognized that Wisconsinites have a fundamental right to vote, and a vote legally cast and received by the time the polls close on Election Day must be counted if the ballot expresses the will of the voter. Accordingly, I respectfully concur to the order.

[2] Similar protection is afforded by the United States Constitution. Reynolds v. Sims, 377 U.S. 533, 554 (1964) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote and to have their votes counted." (Internal citations omitted)).

¶12 ANN WALSH BRADLEY, J. (*dissenting*). In recent months, this court has been inundated with petitions for original actions. And the court has accepted the lion's share.[3] Yet in this case, arguably one of the most consequential of the lot and a case where time is of the essence, the court denies the petition without explanation.

¶13 The petitioners, the Clerks of Outagamie and Calumet Counties, together with all of the respondents[4] as well as the Wisconsin Counties Association, ask this court to grant the petition for original action. The parties may differ in approach, but they are unanimous in their desire that some relief be granted.

¶14 The issues presented are significant and meet the criteria established for the court to exercise its original jurisdiction as set forth in Wis. Stat. § (Rule) 809.70. If the court exercises original jurisdiction and declares the parties' rights and obligations as requested in the petition, it would provide the necessary clarity and certainty as to the election process and avoid disputes that may arise after Election Day.

¶15 I conclude that our input is needed to provide critical guidance to local election officials in advance of processing ballots for a national, state, and local election that is already underway. Accordingly, I would grant the petition for original action.

¶16 The majority, however, concludes otherwise. In explaining its rationale for the denial, the concurrence seemingly rests its analysis on the premise that if the court grants the petition it would be rendering a prohibited advisory opinion. See Chief Justice Roggensack's concurrence, ¶9 ("Effectively, they ask us to render legal advice about how to proceed. We will not do that."). That premise appears to be merely an excuse.

¶17 The petition here requests a declaratory judgment from this court. The very essence of a declaratory judgment is to declare the rights and obligations of the parties so that they know

[3] See, e.g., Fabick v. Evers, No. 2020AP1718-OA; James v. Heinrich, No. 2020AP1419-OA; Wis. Council of Independent and Religious Schools v. Heinrich, No. 2020AP1420-OA; St. Ambrose Academy, Inc. v. Heinrich, No. 2020AP1446-OA; Hawkins v. Wis. Elections Comm'n, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877; Jefferson v. Dane Cty., No. 2020AP557-OA; Wis. Legislature v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900; Wis. Legislature v. Evers, No. 2020AP608-OA, unpublished order (Apr. 6, 2020).

[4] The respondents in this action are the Wisconsin Elections Commission and the clerks for the City of Appleton, City of Kaukauna, Town of Bovina, Town of Buchanan, Town of Center, Town of Cicero, Town of Ellington, Town of Freedom, Town of Grand Chute, Town of Hortonia, Town of Kaukauna, Town of Maine, Town of Maple Creek, Town of Oneida, Town of Osborn, Town of Seymour, Town of Vandenbroek, Village of Black Creek, Village of Combined Locks, Village of Hortonville, Village of Kimberly, Village of Nichols, Village of Shiocton, and Village of Harrison.

how to proceed consistent with the law. Wis. Stat. § 806.04. It is a well-recognized and often used procedure in courts throughout this state.

¶18 Having eschewed the very idea of being called upon to render an advisory opinion, the concurrence seemingly engages in what it says it will not do. It observes that the clerks "did not discuss hand-counting some or all of the ballots in their petition or memorandum relating to an original action." Chief Justice Roggensack's concurrence, ¶6. It appears that the concurrence makes this observation to suggest a possible avenue of recourse. Such a suggestion, however, may be inconsistent with both reality and the law.

¶19 Given the resources available to municipalities, it appears inconsistent with the on-the-ground reality of some of the clerks' abilities to report their results within the statutory deadline of 4:00 p.m. the following day. See Wis. Stat. § 7.51(5)(b). Additionally, it may be inconsistent with the law in that it suggests hand-counting all ballots without advance permission from the Elections Commission or some ballots in violation of Elections Commission guidance. Wis. Stat. § 5.40(5m).

¶20 In sum, the majority leaves local election officials in the lurch. Without the requested and critical guidance from this court, they are left to do their best under difficult circumstances. For the foregoing reasons, I respectfully dissent.

¶21 I am authorized to state that Justice REBECCA FRANK DALLET and Justice JILL J. KAROFSKY join this dissent.

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You are hereby notified that the Court has entered the following order:

No. 2020AP1971-OA Trump v. Evers

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a supporting legal memorandum, and an appendix have been filed on behalf of petitioners, Donald J. Trump, et al. Responses to the petition have been filed by (1) Governor Tony Evers; (2) the Wisconsin Elections Commission and its Chair, Ann S. Jacobs; (3) Scott McDonell, Dane County Clerk, and Alan A. Arnsten and Joyce Waldrop, members of the Dane County Board of Canvassers; and (4) George L. Christensen, Milwaukee County Clerk, and Timothy H. Posnanski, Richard Baas, and Dawn Martin, members of the Milwaukee County Board of Canvassers. A non-party brief in support of the petition has been filed by the Liberty Justice Center. A motion to intervene, a proposed response of proposed respondents-intervenors, and an appendix have been filed by the Democratic National Committee (DNC) and Margaret J. Andrietsch, Sheila Stubbs,

Ronald Martin, Mandela Barnes, Khary Penebaker, Mary Arnold, Patty Schachtner, Shannon Holsey, and Benjamin Wikler (collectively, "the Biden electors"). The court having considered all of the filings,

IT IS ORDERED that the petition for leave to commence an original action is denied. One or more appeals from the determination(s) of one or more boards of canvassers or from the determination of the chairperson of the Wisconsin Elections Commission may be filed by an aggrieved candidate in circuit court. Wis. Stat. § 9.01(6); and

IT IS FURTHER ORDERED that the motion to intervene is denied as moot.

BRIAN HAGEDORN, J. (*concurring).* I understand the impulse to immediately address the legal questions presented by this petition to ensure the recently completed election was conducted in accordance with the law. But challenges to election results are also governed by law. All parties seem to agree that Wis. Stat. § 9.01 (2017–18)[1] constitutes the "exclusive judicial remedy" applicable to this claim. § 9.01(11). After all, that is what the statute says. This section provides that these actions should be filed in the circuit court, and spells out detailed procedures for ensuring their orderly and swift disposition. See § 9.01(6)–(8). Following this law is not disregarding our duty, as some of my colleagues suggest. It is following the law.

Even if this court has constitutional authority to hear the case straightaway, notwithstanding the statutory text, the briefing reveals important factual disputes that are best managed by a circuit court.[2] The parties clearly disagree on some basic factual issues, supported at times by competing affidavits. I do not know how we could address all the legal issues raised in the petition without sorting through these matters, a task we are neither well-positioned nor institutionally designed to do. The statutory process assigns this responsibility to the circuit court. Wis. Stat. § 9.01(8)(b) ("The [circuit] court shall separately treat disputed issues of procedure, interpretations of law, and findings of fact.").

We do well as a judicial body to abide by time-tested judicial norms, even—and maybe especially—in high-profile cases. Following the law governing challenges to election results is no threat to the rule of law. I join the court's denial of the petition for original action so that the petitioners may promptly exercise their right to pursue these claims in the manner prescribed by the legislature.

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[1] All subsequent references to the Wisconsin Statutes are to the 2017–18 version.

[2] The legislature generally can and does set deadlines and define procedures that circumscribe a court's competence to act in a given case. Village of Trempealeau v. Mikrut, 2004 WI 79, ¶9–10, 273 Wis. 2d 76, 681 N.W.2d 190. The constitution would obviously override these legislative choices where the two conflict.

PATIENCE DRAKE ROGGENSACK, C.J. *(dissenting)*. Before us is an emergency petition for leave to commence an original action brought by President Trump, Vice President Pence and Donald Trump for President, Inc., against Governor Evers, the Wisconsin Elections Commission (WEC), its members and members of both the Milwaukee County Board of Canvassers and the Dane County Board of Canvassers. The Petitioners allege that the WEC and election officials caused voters to violate various statutes in conducting Wisconsin's recent presidential election. The Petitioners raised their concerns during recount proceedings in Dane County and Milwaukee County. Their objections were overruled in both counties.

The Respondents argue, in part, that we lack subject matter jurisdiction because of the "exclusive judicial remedy" provision found in Wis. Stat. § 9.01(11) (2017-18).[3] Alternatively, the Respondents assert that we should deny this petition because fact-finding is required, and we are not a fact-finding tribunal.

I conclude that we have subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); City of Eau Claire v. Booth, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738. Furthermore, time is of the essence.

However, fact-finding may be central to our evaluation of some of the questions presented. I agree that the circuit court should examine the record presented during the canvasses to make factual findings where legal challenges to the vote turn on questions of fact. However, I dissent because I would grant the petition for original action, refer for necessary factual findings to the circuit court, who would then report its factual findings to us, and we would decide the important legal questions presented.

I also write separately to emphasize that by denying this petition, and requiring both the factual questions and legal questions be resolved first by a circuit court, four justices of this court are ignoring that there are significant time constraints that may preclude our deciding significant legal issues that cry out for resolution by the Wisconsin Supreme Court.

I. DISCUSSION

The Petitioners set out four categories of absentee votes that they allege should not have been counted because they were not lawfully cast: (1) votes cast during the 14-day period for in-person absentee voting at a clerk's office with what are alleged to be insufficient written requests for absentee ballots, pursuant to Wis. Stat. § 6.86(1)(b); (2) votes cast when a clerk has completed information missing from the ballot envelope, contrary to Wis. Stat. § 6.87(6d); (3) votes cast by those who obtained an absentee ballot after March 25, 2020 by alleging that they were indefinitely

[3] All subsequent references to the Wisconsin Statutes are to the 2017–18 version.

confined; and (4) votes cast in Madison at "Democracy in the Park" events on September 26 and October 3, in advance of the 14-day period before the election, contrary to Wis. Stat. § 6.87.

Some of the Respondents have asserted that WEC has been advising clerks to add missing information to ballot envelopes for years, so the voters should not be punished for following WEC's advice. They make similar claims for the collection of votes more than 14 days before the November 3 election.

If WEC has been giving advice contrary to statute, those acts do not make the advice lawful. WEC must follow the law. We, as the law declaring court, owe it to the public to declare whether WEC's advice is incorrect. However, doing so does not necessarily lead to striking absentee ballots that were cast by following incorrect WEC advice. The remedy Petitioners seek may be out of reach for a number of reasons.

Procedures by which Wisconsin elections are conducted must be fair to all voters. This is an important election, but it is not the last election in which WEC will be giving advice. If we do not shoulder our responsibilities, we leave future elections to flounder and potentially result in the public's perception that Wisconsin elections are unfair. The Wisconsin Supreme Court can uphold elections by examining the procedures for which complaint was made here and explaining to all where the WEC was correct and where it was not.

I also am concerned that the public will misunderstand what our denial of the petition means. Occasionally, members of the public seem to believe that a denial of our acceptance of a case signals that the petition's allegations are either false or not serious. Nothing could be further from the truth. Indeed, sometimes, we deny petitions even when it appears that a law has been violated. Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶¶14–16, 393 Wis. 2d 629, 948 N.W.2d 877 (Roggensack, C.J., dissenting).

II. CONCLUSION

I conclude that we have subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); City of Eau Claire, 370 Wis. 2d 595, ¶7. Furthermore, time is of the essence.

However, fact-finding may be central to our evaluation of some of the questions presented. I agree that the circuit court should examine the record presented during the canvasses to make factual findings where legal challenges to the vote turn on questions of fact. However, I dissent because I would grant the petition for original action, refer for necessary factual findings to the circuit court, who would then report its factual findings to us, and we would decide the important legal questions presented.

I am authorized to state that Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

REBECCA GRASSL BRADLEY, J. (*dissenting*). "It is emphatically the province and duty of the Judicial Department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). The Wisconsin Supreme Court forsakes its duty to the people of Wisconsin in declining to decide whether election officials complied with Wisconsin's election laws in administering the November 3, 2020 election. Instead, a majority of this court passively permits the Wisconsin Elections Commission (WEC) to decree its own election rules, thereby overriding the will of the people as expressed in the election laws enacted by the people's elected representatives. Allowing six unelected commissioners to make the law governing elections, without the consent of the governed, deals a death blow to democracy. I dissent.

The President of the United States challenges the legality of the manner in which certain Wisconsin election officials directed the casting of absentee ballots, asserting they adopted and implemented particular procedures in violation of Wisconsin law. The respondents implore this court to reject the challenge because, they argue, declaring the law at this point would "retroactively change the rules" after the election. It is THE LAW that constitutes "the rules" of the election and election officials are bound to follow the law, if we are to be governed by the rule of law, and not of men.

Under the Wisconsin Constitution, "all governmental power derives 'from the consent of the governed' and government officials may act only within the confines of the authority the people give them. Wis. Const. art. I, § 1." Wisconsin Legislature v. Palm, 2020 WI 42, ¶66, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca Grassl Bradley, J., concurring). The Founders designed our "republic to be a government of laws, and not of men . . . bound by fixed laws, which the people have a voice in making, and a right to defend." John Adams, Novanglus: A History of the Dispute with America, from Its Origin, in 1754, to the Present Time, in Revolutionary Writings of John Adams (C. Bradley Thompson ed. 2000) (emphasis in original). Allowing any person, or unelected commission of six, to be "bound by no law or limitation but his own will" defies the will of the people. Id.

The importance of having the State's highest court resolve the significant legal issues presented by the petitioners warrants the exercise of this court's constitutional authority to hear this case as an original action. See Wis. Const. Art. VII, § 3. "The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards." State v. Conness, 106 Wis. 425, 82 N.W. 288, 289 (1900). While the court reserves this exercise of its jurisdiction for those original actions of statewide significance, it is beyond dispute that "[e]lections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our concern but our prompt action." State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)).

The majority notes that an action "may be filed by an aggrieved candidate in circuit court. Wis. Stat. § 9.01(6)." Justice Hagedorn goes so far as to suggest that § 9.01 "constitutes the 'exclusive judicial remedy' applicable to this claim." No statute, however, can circumscribe the

constitutional jurisdiction of the Wisconsin Supreme Court to hear this (or any) case as an original action. "The Wisconsin Constitution IS the law—and it reigns supreme over any statute." Wisconsin Legislature v. Palm, 391 Wis. 2d 497, ¶67 n.3 (Rebecca Grassl Bradley, J., concurring). "The Constitution's supremacy over legislation bears repeating: 'the Constitution is to be considered in court as a paramount law' and 'a law repugnant to the Constitution is void, and . . . courts, as well as other departments, are bound by that instrument.' See Marbury [v. Madison], 5 U.S. (1 Cranch) [137] at 178, 180 [1803])." Mayo v. Wis. Injured Patients and Families Comp. Fund, 2018 WI 78, ¶91, 383 Wis. 2d 1, 914 N.W.2d 678 (Rebecca Grassl Bradley, J., concurring). Wisconsin Statute § 9.01 is compatible with the constitution. While it provides an avenue for aggrieved candidates to pursue an appeal to a circuit court after completion of the recount determination, it does not foreclose the candidate's option to ask this court to grant his petition for an original action. Any contrary reading would render the law in conflict with the constitution and therefore void. Under the constitutional-doubt canon of statutory interpretation, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 247. See also Wisconsin Legislature v. Palm, 391 Wis. 2d 497, ¶31 ("[W]e disfavor statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration.").

While some will either celebrate or decry the court's inaction based upon the impact on their preferred candidate, the importance of this case transcends the results of this particular election. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." Purcell v. Gonzalez, 549 U.S. 1, 4 (2006). The majority takes a pass on resolving the important questions presented by the petitioners in this case, thereby undermining the public's confidence in the integrity of Wisconsin's electoral processes not only during this election, but in every future election. Alarmingly, the court's inaction also signals to the WEC that it may continue to administer elections in whatever manner it chooses, knowing that the court has repeatedly declined to scrutinize its conduct. Regardless of whether the WEC's actions affect election outcomes, the integrity of every election will be tarnished by the public's mistrust until the Wisconsin Supreme Court accepts its responsibility to declare what the election laws say. "Only . . . the supreme court can provide the necessary clarity to guide all election officials in this state on how to conform their procedures to the law" going forward. State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)).

The majority's recent pattern of deferring or altogether dodging decisions on election law controversies[4] cannot be reconciled with its lengthy history of promptly hearing cases involving

[4] Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶¶84, 86, 393 Wis. 2d 629, 948 N.W.2d 877 (Rebecca Grassl Bradley, J., dissenting) ("The majority upholds the Wisconsin Elections Commission's violation of Wisconsin law, which irrefutably entitles Howie Hawkins and Angela Walker to appear on Wisconsin's November 2020 general election ballot as candidates for President and Vice President of the United States . . . . In dodging its responsibility to uphold the rule of law, the majority ratifies a grave threat to our republic, suppresses the votes of

voting rights and election processes under the court's original jurisdiction or by bypassing the court of appeals.[5] While the United States Supreme Court has recognized that "a state indisputably has a compelling interest in preserving the integrity of its election process[,]" Burson v. Freeman, 504 U.S. 191, 199 (1992), the majority of this court repeatedly demonstrates a lack of any interest in doing so, offering purely discretionary excuses or no reasoning at all. This year, the majority in Hawkins v. Wis. Elec. Comm'n declined to hear a claim that the WEC unlawfully kept the Green Party's candidates for President and Vice President off of the ballot, ostensibly because the majority felt the candidates' claims were brought "too late."[6] But when litigants have filed cases involving voting rights well in advance of Wisconsin elections, the court has "take[n] a pass,"

Wisconsin citizens, irreparably impairs the integrity of Wisconsin's elections, and undermines the confidence of American citizens in the outcome of a presidential election"); State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("In declining to hear a case presenting issues of first impression immediately impacting the voting rights of Wisconsin citizens and the integrity of impending elections, the court shirks its institutional responsibilities to the people who elected us to make important decisions, thereby signaling the issues are not worthy of our prompt attention."); State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("A majority of this court disregards its duty to the people we serve by inexplicably delaying the final resolution of a critically important and time-sensitive case involving voting rights and the integrity of Wisconsin's elections.").

[5] See, e.g., NAACP v. Walker, 2014 WI 98, ¶¶1, 18, 357 Wis. 2d 469, 851 N.W.2d 262 (2014) (this court took jurisdiction of appeal on its own motion in order to decide constitutionality of the voter identification act enjoined by lower court); Elections Bd. of Wisconsin v. Wisconsin Mfrs. & Commerce, 227 Wis. 2d 650, 653, 670, 597 N.W.2d 721 (1999) (this court granted bypass petition to decide whether express advocacy advertisements advocating the defeat or reelection of incumbent legislators violated campaign finance laws, in absence of cases interpreting applicable statutes); State ex rel. La Follette v. Democratic Party of United States, 93 Wis. 2d 473, 480-81, 287 N.W.2d 519 (1980) (original action deciding whether Wisconsin open primary system was binding on national political parties or infringed their freedom of association), rev'd, Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981); State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 548, 126 N.W.2d 551 (1964) (original action seeking to enjoin state from holding elections pursuant to legislative apportionment alleged to violate constitutional rights); State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 400, 52 N.W.2d 903 (1952) (original action to restrain the state from holding elections based on districts as defined prior to enactment of reapportionment law), overruled in part by Reynolds, 22 Wis. 2d 544; State ex rel. Conlin v. Zimmerman, 245 Wis. 475, 476, 15 N.W.2d 32 (1944) (original action to interpret statutes in determining whether candidate for Governor timely filed papers to appear on primary election ballot).

[6] Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying the petition for leave to commence an original action).

thereby "irreparably den[ying] the citizens of Wisconsin a timely resolution of issues that impact voter rights and the integrity of our elections." State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)). Having neglected to identify any principles guiding its decisions, the majority leaves Wisconsin's voters and candidates guessing as to when, exactly, they should file their cases in order for the majority to deem them worthy of the court's attention.

The consequence of the majority operating by whim rather than rule is to leave the interpretation of multiple election laws in flux—or worse yet, in the hands of the unelected members of the WEC. "To be free is to live under a government by law . . . . Miserable is the condition of individuals, danger is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of the law . . . ." Judgment in Rex vs. Shipley, 21 St Tr 847 (K.B. 1784) (Lord Mansfield presiding). The Wisconsin Supreme Court has an institutional responsibility to decide important questions of law—not for the benefit of particular litigants, but for citizens we were elected to serve. Justice for the people of Wisconsin means ensuring the integrity of Wisconsin's elections. A majority of this court disregards its duty to the people of Wisconsin, denying them justice.

"No aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law." Gabler v. Crime Victims Rights Bd., 2017 WI 67, ¶37, 376 Wis. 2d 147, 897 N.W.2d 384. Once again, a majority of this court instead "chooses to sit idly by,"[7] in a nationally important and time-sensitive case involving voting rights and the integrity of Wisconsin's elections, depriving the people of Wisconsin of answers to questions of statutory law that only the state's highest court may resolve. The majority's "refusal to hear this case shows insufficient respect to the State of [Wisconsin], its voters,"[8] and its elections.

"This great source of free government, popular election, should be perfectly pure." Alexander Hamilton, Speech at New York Ratifying Convention (June 21, 1788), in Debates on the Federal Constitution 257 (J. Elliot ed. 1876). The majority's failure to act leaves an indelible stain on our most recent election. It will also profoundly and perhaps irreparably impact all local, statewide, and national elections going forward, with grave consequence to the State of Wisconsin and significant harm to the rule of law. Petitioners assert troubling allegations of noncompliance with Wisconsin's election laws by public officials on whom the voters rely to ensure free and fair elections. It is not "impulse"[9] but our solemn judicial duty to say what the law is that compels the exercise of our original jurisdiction in this case. The majority's failure to embrace its duty (or even

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[7] United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1609 (2016) (Thomas, J., dissenting from the denial of certiorari).

[8] County of Maricopa, Arizona v. Lopez-Valenzuela, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from the denial of certiorari).

[9] See Justice Hagedorn's concurrence.

an impulse) to decide this case risks perpetuating violations of the law by those entrusted to follow it. I dissent.

I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice ANNETTE KINGSLAND ZIEGLER join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

William Feehan,

Plaintiff,

vs.

Case No. 2:20-cv-1771

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Defendants.

NOTICE OF MOTION AND MOTION BY PROPOSED AMICUS CURIAE WISCONSIN STATE CONFERENCE NAACP, DOROTHY HARRELL, WENDELL J. HARRIS, SR., AND EARNESTINE MOSS FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Wisconsin State Conference NAACP and three of its members, Dorothy Harrell, Wendell J. Harris, Sr., and Earnestine Moss (collectively the "Wisconsin NAACP"), move the Court, for permission to file the accompanying amicus curiae brief.

The grounds for this motion are as follows:

1. On December 1, 2020, Plaintiff filed a Complaint for Declaratory, Emergency, and Permanent Injunctive Relief. Relying on their 143-paragraph pleading, Plaintiff seeks, among other things: (a) orders directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results, enjoining Governor Evers from transmitting the currently certified election results to the Electoral College, and requiring Governor Evers to instead transmit certified election results that state that President Donald Trump is the winner of the election; (b) a declaration that

the currently certified election results violated the Due Process Clause, U.S. CONST. Amend. XIV; and (c) a "permanent injunction" prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on alleged "overwhelming evidence of election tampering." (Compl. at 48-50.)

2. Approximately 3,240,268 citizens of Wisconsin voted for president on November 3, 2020. The Complaint seeks to nullify those votes and to force the Governor to transmit certified election results that state that President Donald Trump is the winner of the election. This is contrary to Wis. Stat. § 7.70(5)(b), which provides: "For presidential electors, the commission shall prepare a certificate showing the determination of **the results of the canvass and the names of the persons elected**, and the governor shall sign, affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of General services." (Emphasis added.)

3. The statewide canvass of all 72 Wisconsin counties established that President-Elect Joseph R. Biden, Jr. and Vice President-Elect Kamala Harris won the election by more than 20,000 votes. With the confirmation of election results from other states, the Biden- Harris ticket won states with far more than 270 electoral votes, resulting in their victory.

4. Instead of acknowledging the results of the election and conceding to the victors as unsuccessful Presidential candidates have done for decade after decade, President Trump and Vice President Pence, their prospective electors, and various interlopers have commenced a tidal wave of bogus lawsuits, seeking to obstruct and delay the orderly and peaceful transition of power from outgoing to incoming Administration that has been a hallmark of the democratic process in the United States until this year.

5. As of the filing of this motion, the lawsuits challenging the will of the American people filed by the President and his devotees have overwhelmingly been rejected by the federal

and state courts. Unfortunately, this record of losing cases has left the President and his supporters undeterred. This case is one of the more recently filed in the national exercise in futility and harassment. It is part of a concerted assault on the foundations of the American electoral system.

6. For the reasons set forth in this motion, Wisconsin NAACP hereby seeks leave to file the accompanying *amicus curiae* brief and declarations of Ms. Harrell, Mr. Harris, and Ms. Moss opposing any action on the Complaint, attached hereto as **Exhibits 1-4**, respectively.

7. Founded in 1909 in response to the ongoing violence against Black people around the United States, the National Association for the Advancement of Colored People (the "NAACP"), a non-partisan and non-profit organization, is the largest and pre-eminent civil rights organization in the nation. The NAACP's mission is to secure the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons.

8. The NAACP's primary objectives include: (a) ensuring the political, educational, social, and economic equality of all citizens; (b) achieving equality of rights and eliminating race prejudice among the citizens of the United States; (c) removing all barriers of racial discrimination through democratic processes; (d) seeking enactment and enforcement of federal, state, and local laws securing civil rights; (e) informing the public of the adverse effects of racial discrimination and to seek its elimination; and (f) educating persons as to their constitutional rights and to take all lawful action to secure the exercise thereof, and to take any other lawful action in furtherance of these objectives, consistent with the NAACP's founding documents. The NAACP and its 2,200 branches and units in the United States advocate on behalf of the interests of its members and regularly participate as *amicus curiae* in cases involving issues of concern to the NAACP's members. (*See* https://www.naacp.org/about-us/, last accessed on November 25, 2020.)

9. One such branch is the Wisconsin NAACP, which has 7 local units and approximately 4,000 members. Many of the Wisconsin NAACP's members are eligible to vote in Wisconsin, and a significant portion of them are registered to vote in Wisconsin. The vast majority of Wisconsin NAACP's members reside in Milwaukee County. The organization presently works in the areas of voter registration, voter education, get-out-the- vote efforts, and grassroots mobilization around voting rights. Wisconsin NAACP has an interest in preventing the disenfranchisement of more than 3.2 million eligible Wisconsin voters who properly cast ballots in the November 3, 2020 election, be it in person or absentee. If the relief sought in the Complaint is granted, Wisconsin NAACP's members who voted would be disenfranchised in violation of their constitutional rights.

10. The issues raised by the Complaint are of utmost importance to Wisconsin NAACP because the results of a presidential election in this state lie in the balance. The Wisconsin NAACP brings to the Court a unique perspective on racial equality and is well-suited to speak to the allegations in the Complaint, particularly those directed at the Black voting experience in Milwaukee and other Wisconsin counties with large concentration of Black voters.

11. Wendell J. Harris, Sr. ("Harris") lives in the City of Milwaukee, located in Milwaukee County, Wisconsin and is registered to vote at his current address in Milwaukee. (Harris Decl. ¶ 4.) Harris is also a member of the NAACP and has served as President of the Wisconsin NAACP since November 2019. (*Id*. ¶ 11.) For the November 3, 2020 General Election, Harris voted by absentee ballot because he was ill with COVID-19 at the time and was concerned about infecting others. (*Id*. ¶ 6.) Harris mailed his ballot from his Milwaukee residence on October 26, 2020. (*Id*. ¶ 5.)

12. Earnestine Moss ("Moss") lives in the City of Madison, located in Dane County, Wisconsin and has been a registered voter at her current address in Madison since approximately 2006. (Moss Decl. ¶ 4.) She is also a member of the NAACP Dane County Branch 36 AB. (*Id*. ¶ 6.) For the November 3, 2020

General Election, Moss voted in person at her polling place in Madison. (*Id*. ¶ 7.)

13. Dorothy Harrell ("Harrell") lives in the City of Beloit, located in Rock County, Wisconsin, and has been a registered voter at her current address in Beloit for nearly ten years. (Harrell Decl. ¶ 4.) Harrell is also the President of the Wisconsin NAACP Beloit Branch. (*Id*. ¶ 6.) For the November 3, 2020 General Election, Harrell voted early, in person at Beloit City Hall during the last week of October 2020. (*Id*. ¶ 7.)

14. Wisconsin NAACP sought consent from all parties to submit an amicus curiae brief directed at the dismissal of the Complaint on December 7, 2020. Defendants consent to the relief sought in this motion; Plaintiffs oppose it.

15. For all of the foregoing reasons, in an action that seeks to throw out the results of an entire election, Wisconsin NAACP is particularly suited to submit a non-party brief that would be of significant value to the Court.

WHEREFORE, Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., and Earnestine Moss respectfully request that this Court grant their motion for leave to file the accompanying *amicus curiae* brief in support of the position advanced by the Defendants.

Dated this 7th day of December 2020.

/s/ *Joseph S. Goode*

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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

William Feehan,

Plaintiff,

vs.

Case No. 2:20-cv-1771

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Defendants.

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR EMERGENCY INJUNCTIVE RELIEF OF PROPOSED AMICUS CURIAE WISCONSIN STATE CONFERENCE NAACP, DOROTHY HARRELL, WENDELL J. HARRIS, SR., AND EARNESTINE MOSS

INTRODUCTION

This lawsuit should be dismissed with prejudice on the pleadings. It is but one of 40-plus cases that have been filed around the country by President Trump or his political allies seeking to invalidate the results of the November 3, 2020 presidential election. It is the fifth such suit in Wisconsin alone, and a sixth has since been filed. The substance and timing of the instant case and the extreme and unprecedented relief it seeks constitute a continuation of an equally unprecedented abuse of the court system, to which credence need not and should not be given.

Plaintiff has already placed a significant enough burden on the Court, so the Wisconsin State Conference NAACP and its three participating members, Dorothy Harrell, Wendell J. Harris, Sr., and Earnestine Moss (collectively the "Wisconsin NAACP") will endeavor to not repeat the

substantive arguments that we expect the parties will make. Rather, we seek to highlight some of the stronger reasons why this Court should summarily dismiss this action. Three issues stand out: (1) federal courts in particular are not the proper forum for suits like this; (2) Plaintiff's inexcusable delay in filing this action deprives him of the right to the relief he seeks; and (3) the relief he seeks—the invalidation of approximately 3.2 million votes lawfully cast by eligible Wisconsin voters—is so inapt, so wrong, indeed so absurd as to mandate rejection of Plaintiff's plea without further proceedings.

In offering this perspective, the proposed amici rely on the lessons taught by federal district court and appellate judges in Pennsylvania, Georgia, and Michigan, who ruled that gussying up run-of-the-mill state law claims and unsupported voter fraud claims as federal constitutional claims is insufficient to invoke the jurisdiction of federal courts, and that suits brought even earlier than this one were still brought too late. We rely also on the opinions of members of the Wisconsin Supreme Court who, even while disagreeing on whether that court was the proper forum for an original action challenging Wisconsin's election results, raised serious threshold questions about the availability of the extraordinary relief requested by the President and his allies in those cases.

Before proceeding, we offer one final thought. Wisconsin NAACP is not simply an organization whose mission includes ensuring that voters' votes are counted, important as that mission is. It is dedicated specifically to advancing the interests of Black voters in our democracy. To that end, the national NAACP has partnered with one of the country's leading civil rights organizations, the Lawyers' Committee for Civil Rights Under Law, to work with experienced local counsel in several states, including Wisconsin, to ensure that the votes of Black voters are not invalidated in this election. It is no accident that Plaintiff's focus in this case is on the voters of Milwaukee County, home to Wisconsin's largest city and Black population. This follows a

pattern wherein the Trump Campaign and its allies have singled out alleged "corruption" in other cities with large Black populations.[1]

Wisconsin NAACP respectfully asks this Court to scrutinize Plaintiff's claims in that light, and recognize them not only as an existential threat to our democracy—which they are—but also as a particular threat to the votes of members of minority populations whose access to the ballot box has been historically obstructed.

Plaintiff's Complaint does not deserve a day in court.

ARGUMENT

I. THESE CASES DO NOT BELONG IN FEDERAL COURT.

On November 9, 2020, the Trump Campaign filed suit in the Middle District of Pennsylvania alleging a series of election improprieties, similar (and equally frivolous) to those alleged by Plaintiff here. *Donald J. Trump for President, Inc. v. Kathy Boockvar*, No. 4:20-cv-02078, 2020 WL 6821992 (Nov.21, 2020).[2] Initially, United States District Court Judge Matthew Brann scheduled an evidentiary hearing on the plaintiffs' motion for preliminary relief, but after hearing oral argument on the defendants' motion to dismiss, he not only adjourned the hearing without resetting it, but denied the plaintiffs' motion for leave to file a second amended complaint. *Trump v. Boockvar*, 2020 WL 6821992 at *3-4, 14. On appeal, a unanimous panel of the Third Circuit affirmed the denial of the request to amend the complaint, with Judge Stephanos Bibas writing for the Court and ruling that the sort of claims asserted by the plaintiffs, even though

[1] *See e.g.*, Transcript of Oral Argument Proceedings in Re: Motion to Dismiss, *Donald J. Trump for President v. Boockvar*, No. 20-3371 (M.D. Pa., Nov. 17, 2020), at 18-19 (President Trump's lawyer Rudy Giuliani alleging massive voter fraud in Philadelphia, Pittsburgh, Detroit, Milwaukee, and Atlanta).

[2] As here, the claims included allegations that election officials improperly cured absentee ballots and restricted observers.

repackaged as federal due process and equal protection claims, "boil down to issues of state law." *Donald J. Trump for President, Inc v. Pa.*, No. 20-3371, 2020 WL 7012522 at *1 (3d Cir. Nov 27, 2020).

Similar claims led to the identical result in a suit filed on November 13, 2020 in the Northern District of Georgia by L. Lin Wood, Jr.—who also serves as counsel for Plaintiff in this action—in which he alleged a series of election irregularities as frivolous as are Plaintiff's. claims here. *L. Lin Wood, Jr. v. Brad Raffensperger*, No. 1:20-cv-04651-SDG, 2020 WL 6817513 (N.D. Ga., Nov. 20, 2020).[3] The district court held a hearing, then denied Wood's request for a temporary restraining order. This past Saturday, December 5, the Eleventh Circuit, in an opinion by Chief Judge Pryor, unanimously affirmed on grounds that the case was not justiciable in the first instance, because federal courts are "courts of limited jurisdiction" and "may not entertain post-election contests about garden-variety issues of vote counting and misconduct that may properly be filed in state courts." *Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866 at *1 (11th Cir., Dec. 5, 2020).

Most recently, Judge Linda Parker of the Eastern District of Michigan also denied the Plaintiffs' Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief challenging the election results in Michigan, particularly in Detroit, in a case brought by Sidney Powell—lead counsel for plaintiff in this case—and others on November 25. *King v. Whitmer*, No. 20-13134, slip op. (E.D. Mich., Dec. 7, 2020). The district court ruled without hearing oral argument. *Id.* at 6. The court found that Plaintiffs' claims were not justiciable in federal court because they were effectively state law claims brought against state officials. *Id.* at 10-13.

[3] Wood alleged, among other things, that defendant had improperly accepted absentee ballots without signature verification and restricted observers to the counting.

This case presents no reason for the Court to veer from the path taken by these sister courts. The claims are substantially the same: alleged deviations from state court laws that govern the handling and counting of absentee ballots and wild conspiracy theories about voting machines. As in the Michigan, Georgia, and Pennsylvania cases, there are no allegations that any specific voter was not qualified to vote or that any specific vote was fraudulently cast, and certainly no evidence beyond mere speculation by Plaintiff and non-credible analyses by unqualified "experts" that there were a sufficient number of fraudulent votes to affect the outcome of the Presidential election. There is no reason for this Court to continue this case, and, as explained below, every reason for this Court not to. This is even more true because there is an active suit in state circuit court brought by President Trump alleging noncompliance with Wisconsin election law that will be decided at a hearing on December 10, 2020.

II. PLAINTIFF'S DELAY DEPRIVES HIM OF THE RIGHT TO SEEK RELIEF.[4]

Plaintiff knew of the bases for the claims he has brought in this suit earlier than December 1, 2020 when he filed this suit. For example, the guidance by the Wisconsin Elections Commission (the "Commission") to local clerks regarding application of the "indefinitely confined" category of eligibility for obtaining an absentee ballot during the COVID-19 pandemic was issued on **March 29, 2020**, with an additional directive issued **May 13, 2020**, as Plaintiff himself alleges. (Compl., ¶ 40.)[5] Likewise, the practice of local clerks filling in missing witness address information on absentee ballot envelopes without requiring the presence of the voter has been

[4] Wisconsin NAACP does not agree that Plaintiff has standing to bring this case in the first instance under the Electors or Elections Clause, *see Lance v. Coffman*, 549 U.S. 437, 442 (2007); *Corman v. Torres*, 287 F.Supp.3d 558, 573 (M.D. Pa. 2018); *Bognet v. Sec'y Commw. of Pa.*, No. 20-3214, 2020 WL 6686120, at *6-9 (3d Cir. Nov. 13, 2020); *Wood v. Raffensperger, et. al.*, No. 1:20-CV-04651-SDG, 2020 WL 6817513, at *5 (N.D. Ga. Nov. 20, 2020); *King*, slip op. at 26-29, or under the due process and equal protection clauses. *See King*, slip op. at 24-25. We assume that the parties will make the same argument and therefore will not repeat it here.

[5] The related instructions from the Dane County Clerk were issued on March 25, 2020.

mandated by the Commission since at least **October 18, 2016**, as Plaintiff himself alleges.[6] (Compl., ¶ 44.) Plaintiff's utterly baseless claims about widespread coordinated manipulation of voting machines amount to nothing more than wild conspiracy theories, based principally on a single redacted declaration from an anonymous witness. (*See* Compl., Exh. 1.) But even that declaration was purportedly signed on **November 15, 2020**, and the declarant purported to have knowledge of the bases for Plaintiff's allegations as early as a decade prior. (Compl., Exh. 1, ¶¶ 11-26.)

Nevertheless, Plaintiff did not file suit until a month after Election Day, waiting until well after he learned on November 4 that President Trump had lost the election in Wisconsin and indeed until after that result had been certified. Laches bars this suit because of Plaintiff's lack of diligence and the prejudice resulting from the delay. Indeed, in the Northern District of Georgia post-election lawsuit, involving a state election that was called against the President much later than Wisconsin's and still filed **seventeen days before this lawsuit**, the district court found that laches applied. *Wood*, 2020 WL 6817513 at * 6-9. Additionally, in the Eastern District of Michigan lawsuit, filed five days before this case, the district court also found that laches applied. *King*, slip op. at 19 ("Plaintiffs could have lodged their constitutional challenges much sooner than they did, and certainly not three weeks after Election Day and one week after certification of almost three million votes. The Court concludes that Plaintiffs' delay results in their claims being barred by laches.").

The Georgia court's decision squares with how courts have handled similar cases in the past. Plaintiff may not "'lay by and gamble upon [his favored candidate] receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action."

[6] It was merely reiterated on October 19, 2020, (Compl., ¶ 45), still weeks before the election, and a month and a half before Plaintiff filed this suit.

Hendon v. N.C. State Bd. of Elections, 710 F.2d 177, 182 (4th Cir. 1983) (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)).

Laches applies with particular rigor to election challenges, requiring "any claim against a state electoral procedure [to] be expressed expeditiously." *Fulani*, 916 F.2d at 1031. Before an election, laches requires such claims to be promptly raised lest last-minute court orders confuse voters, disincentivizing voting and undermining public confidence in the fairness of elections. *See, e.g., Purcell v. Gonzales*, 549 U.S. 1, 4-5 (2006); *Bognet v. Sec'y Commw. of Pa.*, No. 20-3214, 2020 WL 668120, at *17-18 (3d Cir. Nov. 13, 2020). And, after an election, laches generally bars parties from challenging the election on grounds they could have raised beforehand. *Soules v. Kauaians for Nukoli Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988). Moreover, applying laches avoids the "judicial fire drill[s]" and "mad scramble[s]" required to adjudicate belated challenges to election procedures before post-election deadlines mandated by state law for certification of results. *Stein v. Cortés*, 223 F.Supp.3d 423, 436 (E.D. Pa. 2016) (internal quotation marks omitted).

Plaintiff offers no justification for delaying in asserting these claims until now—nor could he, because there is none. Further, the delay is prima facie prejudicial, as the relief he requests would void an entire election of more than 3.2 million eligible Wisconsin voters. *See Hawkins v. Wis. Elections Comm'n*, 393 Wis.2d 629, 635 (2020) (denying petitioners' ballot access claim because, "given their delay in asserting their rights, [the court] would be unable to provide meaningful relief without completely upsetting the election."). And, by overturning the democratic will of the people as expressed through their votes, Plaintiff's requested relief would seriously and irreparably undermine the Commission's efforts to ensure public trust and confidence in Wisconsin's electoral system, including the trust and confidence of voters like those represented

by the Wisconsin NAACP, who have always had to fight for recognition as equals and access to the vote. *See Hawkins*, 393 Wis.2d at 635-636 (denying relief in ballot access case against the Commission where it would cause "confusion and disarray and would undermine confidence in the general election results."). Most important, it would severely prejudice more than 3.2 million Wisconsin voters who cast ballots for the presidential candidate of their choice during the 2020 General Election. Equity cannot possibly sanction such a result.

III. THE REMEDY REQUESTED IS PROHIBITED AS A MATTER OF LAW.

Overturning the results of an election—as Plaintiff asks this Court to do—would be an extraordinary intervention by the judiciary into democratic processes. Again, the recent Georgia, Michigan, and Pennsylvania cases provide useful guidance. The District Court in Georgia captured the compelling reasons why relief should not be granted in cases like this:

> The Court finds that the threatened injury to Defendants as state officials and the public at large far outweigh any minimal burden on Wood. To reiterate, Wood seeks an extraordinary remedy: to prevent Georgia's certification of the votes cast in the General Election, after millions of people had lawfully cast their ballots. To interfere with the result of an election that has already concluded would be unprecedented and harm the public in countless ways. [citations]. Granting injunctive relief here would breed confusion, undermine the public's trust in the election, and potentially disenfranchise of over one million Georgia voters. Viewed in comparison to the lack of any demonstrable harm to Wood, this Court finds no basis in fact or in law to grant him the relief he seeks.

Wood, 2020 WL 6817513 at * 13.

Similarly, as the Third Circuit stated, granting the kind of relief requested by Plaintiff here—"**throwing out millions of votes—is unprecedented.**" *Trump v. Pa.*, 2020 WL 7012522 at *7 (emphasis in original). In Pennsylvania, the Third Circuit rightly concluded that, "[v]oters, not lawyers, choose the President. Ballots, not briefs, decide elections." *Id.* at *9. Judge Parker of the Eastern District of Michigan reached a similar conclusion: "[T]he Court finds that

Plaintiffs are far from likely to succeed in this matter. In fact, this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do. ¶ The People have spoken." *King*, slip op., 35-36. Indeed, granting Plaintiff's requested relief would violate the longstanding principle that "all qualified voters have a constitutionally protected right to vote and to have their votes counted." *Reynolds v. Sims,* 377 U.S. 533, 554 (1963) (citing *Ex parte Yarbrough,* 110 U.S. 651 (1884) and *United States v. Mosley*, 238 U.S. 383 (1915)).

It is hard to imagine such a remedy could ever be appropriate, but certainly it is not here, where Plaintiff has failed to put forth any credible evidence demonstrating that a single unlawful vote was counted or valid ballot discarded. Nor has he pled a single cognizable claim. Plaintiff instead alleges what amounts to a laundry list of speculative and circumstantial claims about the **potential** for fraud and about the conduct of the election as a whole, which he asserts led to a "fail[ure] to conduct the general election in a uniform manner," (Compl., ¶ 117) and "disparate treatment of Wisconsin voters," (Compl., ¶ 144) related to the widespread use of mail-in ballots by Wisconsin voters necessitated by the COVID-19 pandemic. But even if Plaintiff's claims were legitimate, invalidating the ballots of Wisconsin voters—who justifiably relied on the voting procedures made available to them by the Wisconsin Legislature and the Commission—cannot possibly be the appropriate remedy. Tossing out votes cast by eligible voters in reliance on official instructions how to vote would violate the due process rights of every voter. *See, e.g.*, *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 595, 597–98 (6th Cir. 2012) (holding that rejecting ballots invalidly cast due to poll worker error likely violates due process).

Further, contrary to Plaintiff's allegations, this is not *Bush v. Gore*. There, the Supreme Court specifically distinguished the issue before it—whether there existed arbitrary and disparate variations in the standards applied to whether a ballot should be counted—from "[t]he question … whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. The prevailing rule is that, absent such arbitrary differences in the standards used to determine whether individual ballots should be counted or not—an issue not even hinted at in Plaintiff's blunderbuss challenge here—differences in election administration between local entities are not only permissible, but expected. *See, e.g., Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018); *Ne. Ohio Coal. for Homeless v. Husted*, 837 F.3d at 636; *Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d at 181; *Paher v. Cegavske*, No. 20-243, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *44-45.

Plaintiff's request for injunctive relief—directing Defendants to "de-certify the election results," "enjoining transmitting the currently certified results the Electoral College [sic]," and "requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election," *inter alia*, Compl., ¶ 142, is beyond bizarre. Federal courts lack the authority to determine which results a state must certify, let alone to "de-certify" results that have already been certified—and slate of Electors already submitted—under lawful constitutionally-determined and state-law-provided mechanisms, so Plaintiff's request cuts against the institutional role of each branch of the republic and each level of government. Here, the Wisconsin Legislature has already acted within its authority: it vested the right to vote for President in the people of Wisconsin, and the right to vote includes the right to have that vote counted. *See*

Reynolds, 377 U.S. at 554 (1964); *U. S. v. Classic*, 313 U.S. 299, 315 (1941); *U.S. v. Mosley*, 238 U.S. 383, 386 (1915).

In that vein, the Wisconsin Supreme Court has recognized that a remedy that would nullify the votes of millions of voters is simply a bridge too far. In the past two weeks, three original actions were brought directly to the Wisconsin Supreme Court to change the result of the election. In each, a majority of that court held that such actions need to be brought in the circuit court first, if they can be brought at all. *Trump v. Evers*, No. 2020AP1971-OA (Wis. S. Ct., Dec. 3, 2020); *Mueller v. Wis. Elections Comm'n*, No. 2020AP1958-OA (Wis. S. Ct. Dec. 4, 2020): *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930-OA (Wis. S. Ct., Dec, 4, 2020).

Beyond simply disposing of the cases, Justice Hagedorn, in his concurrence joined by three justices who comprised the majority in *Wisconsin Voters Alliance,* made clear that the remedies sought by President Trump and his supporters would cause irreparable damage to our democracy if granted or even given serious thought:

> Something far more fundamental than the winner of Wisconsin's electoral votes is implicated in this case. At stake, in some measure, is faith in our system of free and fair elections, a feature central to the enduring strength of our constitutional republic. It can be easy to blithely move on to the next case with a petition so obviously lacking, but this is sobering. The relief being sought by the petitioners is the most dramatic invocation of judicial power I have ever seen. Judicial acquiescence to such entreaties built on so flimsy a foundation would do indelible damage to every future election. Once the door is opened to judicial invalidation of presidential election results, it will be awfully hard to close that door again. This is a dangerous path we are being asked to tread. The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable.

Wis. Voters Alliance, (slip. op. at 3) (Wis. Sup. Ct., Dec, 4, 2020) (Hagedorn, J., concurring).[7]

[7] Even Chief Justice Roggensack, while dissenting in all three cases on the grounds that the Wisconsin Supreme Court should exercise original jurisdiction, acknowledged in one of her dissents that "[t]he remedy Petitioners seek may be out of reach for a number of reasons." *Trump v. Evers*, No. 2020AP1971-OA (slip. op. at 6) (Wis. S. Ct., Dec, 3, 2020) (Roggensack, C.J., dissenting).

CONCLUSION

For the reasons set forth above, Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., and Earnestine Moss respectfully requests that this Court summarily dismiss this case.

Dated this 7th day of December 2020.

/s/ *Joseph S. Goode*
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EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

William Feehan,

Plaintiffs,

Case No. 2:20-cv-1771

vs.

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Defendants.

DECLARATION OF DOROTHY HARRELL

I, Dorothy Harrell, hereby declare as follows:

1. I have personal knowledge of the matters stated herein and would testify to the same if called as a witness in Court.

2. I am over eighteen years of age and am otherwise competent to testify in Court.

3. I currently live in the City of Beloit, which is in Rock County.

4. I am a registered voter at my current address in Beloit and have been registered here for almost ten years.

5. I am 71 years old; my racial background is African-American.

6. I am the President of the Wisconsin NAACP Beloit Branch.

7. For the November 3, 2020 general election, I voted in-person early voting at Beloit City Hall at 100 State Street, Beloit, Wisconsin 53511. I voted early during the last week of October, 2020.

8. I understand this lawsuit seeks to invalidate my vote and those of thousands of Wisconsin absentee and in-person voters despite the fact those votes were legally cast.

9. This lawsuit and any others like it need to be thrown out so that people of color can regain their trust that they have legal rights in this society, which includes the right to vote. I also think these suppression efforts are a waste of valuable resources in cities and states across this country.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 7th day of December, 2020.

/s/ Dorothy Harrell
Dorothy Harrell

EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

William Feehan,

Plaintiffs,

Case No. 2:20-cv-1771

vs.

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Defendants.

DECLARATION OF WENDELL J. HARRIS, SR.

I, Wendell J. Harris, Sr., hereby declare as follows:

1. I have personal knowledge of the matters stated in this Declaration and would testify to them if called as a witness in Court.

2. I am over eighteen years of age and am otherwise competent to testify.

3. I currently live in the City of Milwaukee, which is located in Milwaukee County.

4. I am registered to vote at my current address in Milwaukee.

5. For the November 3, 2020 general election, I voted by absentee ballot because I was ill with COVID-19 and was concerned about infecting others. I mailed my ballot from my residence on October 26, 2020.

6. Normally I vote in-person at the Enderis Park Polling Place at 2900 N 72nd St, Milwaukee, WI 53210. I was unable to do this for the November 3, 2020 general election because of my COVID-19 diagnosis.

7. I prefer to vote in-person because it is a way neighbors get to see each other. We are on a first-name basis with the poll workers. It is a community effort and we all talk to each other about the importance of voting and elections.

8. I understand this lawsuit seeks to invalidate my vote and those of thousands of Wisconsin absentee and in-person voters despite the fact that those votes were legally cast.

9. If my vote were not counted, I would be robbed of this essential democratic voice, through no fault of my own. If my vote does not count, my voice is not heard, and I am not represented. As a result, I would lose faith in our democracy, of which I am very proud.

10. Additionally, I am a member of the National Association for the Advancement of Colored People ("NAACP"), a nonpartisan and non-profit organization.

11. I currently serve as the President of the Wisconsin State Conference NAACP ("Wisconsin NAACP"). I have held this position since November 2019.

12. The Wisconsin NAACP is an affiliated unit of the NAACP which is comprised of 7 local units in Wisconsin.

13. The Wisconsin NAACP has approximately 4,000 members in 7 units across Wisconsin. Many of those members are eligible to vote in Wisconsin, and a significant portion of them are registered to vote in Wisconsin. The vast majority of our members are in Milwaukee County.

14. The Wisconsin NAACP works in the areas of voter registration, voter education, get-out-the-vote efforts, and grassroots mobilization around voting rights.

15. For the 2020 general election, we continued these efforts including voter education, voter registration, election protection, and grassroots mobilization to get out the vote. In addition,

Wisconsin NAACP members served as poll monitors statewide, but most of the work was done in Milwaukee County.

16. The Wisconsin NAACP has an interest in preventing the disenfranchisement of eligible voters who properly cast absentee voter ballots, including voters it may have assisted in navigating the absent voter voting process.

17. Discarding lawfully cast absent voter ballots by qualified electors in Milwaukee would effectively disenfranchise a disproportionate number of Black voters who cast such ballots and is substantially likely to harm individual Wisconsin NAACP members who cast absent voter ballots.

18. Discarding lawfully cast absent voter ballots would also undermine the Wisconsin NAACP's voter advocacy efforts by leading some voters to believe that voting is pointless because their ballots will not be counted. This sense of futility will likely depress turnout in the future and make it more difficult for the Wisconsin NAACP to carry out its mission of encouraging Black individuals to register to vote, to vote, and to help protect others' right to vote.

19. Moreover, discarding lawfully cast absent voter ballots will force the Wisconsin NAACP to dedicate additional resources to voter education efforts, at the expense of other organizational priorities. These questions will result in the Wisconsin NAACP spending additional volunteer time and resources responding that could have been dedicated to other efforts.

20. Furthermore, the rejection of Wisconsin voters' absent voter ballots will force the Wisconsin NAACP, in an effort to promote the effective enfranchisement of Black individuals, to dedicate a larger share of its limited sources to voter education efforts, to ensure that voters cast mail-in ballots that cannot be challenged or rejected on the basis of minor errors. Because the

Wisconsin NAACP's resources are limited, those efforts will necessarily come at the expense of other efforts, including voter registration and get out the vote drives.

I declare under penalty of perjury under the laws of the United States and pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 7th day of December, 2020.

/s/ Wendell J. Harris, Sr.
Wendell J. Harris, Sr.

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

William Feehan,

Plaintiffs,

Case No. 2:20-cv-1771

vs.

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Defendants.

DECLARATION OF EARNESTINE MOSS

I, Earnestine Moss, hereby declare as follows:

1. I have personal knowledge of the matters stated in this Declaration and would testify to them if called as a witness in Court.

2. I am over eighteen years of age and am otherwise competent to testify in Court.

3. I currently live in the City of Madison, which is in Dane County.

4. I am a registered voter at my current address in Madison and have been since around 2006.

5. I am 68 years old; my racial background is African-American.

6. I am a member of the NAACP Dane County Branch 36AB, located in Madison.

7. For the November 3, 2020 general election, I voted in person at Lakeview Lutheran Church at 4001 Mandrake Road, Madison, Wisconsin 53704.

8. I love to vote in-person on Election Day as it is a great way to engage with my community about the importance of voting and elections. Normally I offer rides to the polls and see if my neighbors and friends voted already but I could not do that this year because of the COVID-19 pandemic.

9. I understand this lawsuit seeks to invalidate my vote and those of thousands of Wisconsin absentee and in-person voters despite the fact that those votes were legally cast, and I object to the notion that my voice would not be heard and I would not be represented.

10. It is unfortunate that we live in a democracy that encourages voter engagement and now that people are stepping up to the plate to make their voices heard, someone wants to question their actions, without proof, and invalidate their votes, which are their voice.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 7th day of December, 2020.

/s/ Earnestine Moss
Earnestine Moss

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN, Plaintiff, v. WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARC L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity, Defendants.	No. 2:20-cv-1771

DEMOCRATIC NATIONAL COMMITTEE'S *AMICUS CURIAE* BRIEF IN OPPOSITION TO PLAINTIFF'S AMENDED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION (ECF NO. 10)

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Democratic National Committee ("DNC") appreciates the Court's invitation to file an *amicus curiae* brief in opposition to Plaintiff's Amended Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 10). As the Court requested, the DNC will attempt to provide "unique information and a unique perspective that the defendants do not have," in order to "help to fully develop the record." ECF No. 41 at 17.

The DNC certainly has a "unique perspective" and a substantial stake in this litigation. Its nominees for President and Vice-President, President-elect Joseph R. Biden, Jr. and Vice President-elect Kamala D. Harris, won the 2020 national popular vote nearly five weeks ago by over seven million votes. Biden and Harris are expected to win the Electoral College vote by a tally of 306-232 when the College meets next Monday, December 14, 2020. In Wisconsin, the Biden-Harris ticket initially won by a margin of 20,585 votes. The partial recount demanded by President Trump and Vice President Pence, which at their behest was targeted at only two of Wisconsin's 72 counties, increased the Biden-Harris winning margin in Wisconsin to 20,682 votes.

Biden and Harris are therefore entitled—as a matter of state and federal law—to Wisconsin's ten electoral votes. *See* WIS. STAT. §§ 5.10, 5.64(1)(em), 7.70(5)(b), 8.18, 8.25(1). The results of the Wisconsin Presidential election have been certified by the Chairperson of the Wisconsin Elections Commission ("WEC"), and Governor Evers in turn has signed the Certificate of Ascertainment and transmitted it to the Archivist of the United States. *See* 3 U.S.C. § 6; *see also* Wis. Stat. §§ 7.70(3)(a), 7.70(5)(b). Wisconsin's Presidential election is over.

Except in the courts. President Trump and his allies have now filed *seven* challenges in Wisconsin's state and federal courts since November 12, three of which remain pending: this action brought solely by William Feehan, a Wisconsin voter who also is a nominated Trump elector; *Trump v. Wisconsin Elections Comm'n,* E.D. Wis. No. 2:20-cv-01785-BHL, pending

before Judge Ludwig; and President Trump's state court challenge to the recount results, pending in *Trump v. Biden,* Milwaukee Cnty. Case No. 2020-CV-7092 and Dane County Case No. 2020-CV-2514.[1]

Like this case, these other challenges have all, in the words of Wisconsin Supreme Court Justice Brian Hagedorn, sought to "invalidate the entire Presidential election in Wisconsin by declaring it 'null'—yes, the whole thing," a result that "would appear to be **unprecedented in American history**." *Wisconsin Voters All. v. Wisconsin Elections Comm'n,* No. 2020AP1930-OA, at 2 (Wis. Sup. Ct. Dec. 4, 2020) (Hagedorn, J., concurring) (emphasis added) (Ex. 1).[2] And just like the *Wisconsin Voters All.* case that Justice Hagedorn described—which raised many of the same allegations and relied on much of the same "expert" testimony and other "evidence" that is being recycled in this litigation—Plaintiff's submissions "fall[] far short of the kind of compelling evidence and legal support we would undoubtedly need to countenance the **court-ordered disenfranchisement of every Wisconsin voter**." *Id.* (emphasis added).

Not only is this case part of serial post-election litigation in Wisconsin, it is also the fourth "cookie-cutter" complaint filed nationwide in recent weeks by attorneys Sidney Powell, L. Lin

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[1] Three of the other Wisconsin post-election cases were petitions for original actions filed in Wisconsin Supreme Court; all were denied. *See Trump v. Evers,* No. 2020AP1971-OA (petition denied Dec. 3, 2020) (Ex. 2); *Mueller v. Jacobs,* No. 2020AP1958-OA (petition denied Dec. 3, 2020) (Ex. 3); *Wisconsin Voters All. v. Wisconsin Elections Comm'n*, No. 2020AP1930-OA, at 2 (petition denied Dec. 4, 2020) (Ex. 1). The remaining case challenging the Wisconsin election results was *Langenhorst v. Pecore,* No. 1:20-cv-1701-WCG (E.D. Wis.), filed on November 12 but voluntarily dismissed on November 16.

[2] The Trump recount effort does not seek to invalidate the entire Wisconsin vote, but rather seeks to nullify large numbers of ballots in only Dane and Milwaukee Counties—the two most urban, nonwhite, and Democratic counties in the State. Most of the targeted votes were cast in reliance on WEC guidance, practices, and forms dating back as long as a decade. Voters and local election officials throughout Wisconsin relied on the challenged WEC guidance, practices, and forms, but President Trump seeks to invalidate only the ballots of Dane and Milwaukee County voters who did so. That would blatantly violate equal protection guarantees.

Wood, and others in which they seek to baselessly undermine the legitimacy of the presidential election by fanning the flames of repeatedly debunked wingnut conspiracy theories, relying on the same discredited and/or unnamed "experts."[3] As discussed below, two of those lawsuits already have been dismissed. As those dismissals show, the willingness of Plaintiff's counsel to propagate their fantastical allegations across multiple jurisdictions does not make his claims any more plausible, actionable, or meritorious. The Seventh Circuit has emphasized that seemingly "paranoid" allegations of "a vast, encompassing conspiracy" must meet a "high standard of plausibility" before a plaintiff may proceed, with the court "making the determination of plausibility" by "rely[ing] upon judicial experience and common sense." *Walton v. Walker,* 364 Fed. App'x 256, 258 (7th Cir. 2010) (citation omitted). It is an understatement to say Mr. Feehan's allegations are "implausible."

There are multiple other grounds for denying Mr. Feehan's requests for emergency relief. These include:

- Mr. Feehan lacks Article III standing either as a voter or a nominated Trump elector. His claims of vote dilution and other alleged injuries (even if they had a plausible basis, which they do not) are generalized grievances, not individual harms *to him.*
- Many of Mr. Feehan's claims are barred by laches because he could have sought judicial relief *prior* to the election, *before* 3.2 million Wisconsin voters had cast their

[3] In addition to the *Feehan* action, *see* Compl., *King v. Whitmer*, No. 2:20-cv-13134-LVP-RSW, ECF No. 1 (E.D. Mich. Nov. 25, 2020); Compl., *Pearson v. Kemp*, No. 1:20-cv-4809, ECF No. 1 (N.D. Ga. Nov. 25, 2020); Compl., *Boyer v. Ducey,* No. 2:20-cv-02321-DJH, ECF No. 1 (D. Ariz. Dec. 4, 2020). The cookie-cutter character of the pleadings in these actions is revealed in part by Plaintiff's attacks on the alleged failures to enforce Wisconsin's "signature verification requirement." ECF No. 9 ("Amend. Compl.") at 49. Wisconsin has no signature verification requirement.

ballots. And *all* of his claims are barred by laches because he has waited for so long *after* the election to bring suit—nearly a full month.

- Mr. Feehan's claims also are barred under blackletter Eleventh Amendment law. He cannot ask a federal court to adjudicate state law claims against state actors, and he cannot turn those claims into federal questions by relabeling them as due process, equal protection, or other federal constitutional violations.
- Basic principles of federalism and comity also counsel both *Pullman* and *Colorado River* abstention.
- Mr. Feehan states no claim upon which relief can be granted, instead positing a sweeping and implausible conspiracy by foreign and domestic malefactors to steal the election, together with an assortment of baseless allegations that Defendants violated state election law.
- Mr. Feehan satisfies none of the requirements for the injunctive relief he seeks. He is not likely to succeed on the merits, he has failed to establish he will suffer irreparable harm, and both the public interest and the equities weigh decisively against him.

This Court should therefore deny Plaintiff's amended motion for a TRO or preliminary injunction and dismiss this suit in its entirety. President Trump and his allies have now brought dozens of lawsuits in state and federal courts throughout the Nation seeking to challenge the election results, and in many instances to nullify those results outright.[4] None of those cases has succeeded. Nor should this one.

[4] Alanna Durkin Richer, *Trump loves to win but keeps losing election lawsuits*, AP NEWS (Dec. 4, 2020), https://apnews.com/article/donald-trump-losing-election-lawsuits-36d113484ac0946fa5f0614deb7de15e.

State and federal judges from across the ideological spectrum have united in rejecting these sorts of flimsy and audacious attacks on the Presidential election results and the rule of law, as many of the citations in this brief will attest. Lawsuits like these not only are an abuse of process, they continue to, and perhaps are intended to, erode public confidence in our electoral system. The corrosive effects are like battery acid on the body politic. There must be an end to spurious litigation, and courts must communicate that to current and would-be litigants and their lawyers. As Justice Hagedorn emphasized last week in his *Wisconsin Voters All.* concurrence:

> I feel compelled to share a further observation. Something far more fundamental than the winner of Wisconsin's electoral votes is implicated in this case. At stake, in some measure, is faith in our system of free and fair elections, a feature central to the enduring strength of our constitutional republic. It can be easy to blithely move on to the next case with a petition so obviously lacking, but this is sobering. The relief being sought by the petitioners is **the most dramatic invocation of judicial power I have ever seen.** Judicial acquiescence to such entreaties built on so flimsy a foundation would do indelible damage to every future election. Once the door is opened to judicial invalidation of presidential election results, it will be awfully hard to close that door again. This is a dangerous path we are being asked to tread. The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable.

Ex. 1 at 2 (emphasis added). Other courts have joined not only in dismissing, but in strongly condemning, insidious lawsuits like these seeking the "drastic," "breathtaking," "unprecedented," and "disenfranchising" relief of nullifying the voters' decision and awarding the election to President Trump. *Donald J. Trump for President, Inc. v. Pennsylvania,* No. 20-3371, 2020 WL 7012522, at **1-7 (3d Cir. Nov. 27, 2020).

Earlier today, a federal court in Michigan dismissed another "cookie-cutter" lawsuit brought by these same counsel advancing the same allegations as here with the following observation:

> [T]he Court finds that Plaintiffs are far from likely to succeed in this matter. In fact, this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic process and their trust in our

> government. Plaintiffs ask this Court to ignore the orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do.

Slip Op. at 35-36, *King v. Whitmer*, No. 2:20-cv-13134 (E.D. Mich. Dec. 7, 2020) (Ex. 4). And still another of the four "cookie-cutter" lawsuits brought by Mr. Feehan's counsel was dismissed from the bench this morning by a federal court in Georgia. *See Pearson v. Kemp*, No. 1:20-cv-04809 (N.D. Ga. Nov. 25, 2020).[5]

Respectfully, this Court should likewise not only deny Plaintiff's requested relief, but should dismiss and condemn this litigation in the strongest terms possible.

BACKGROUND

Mr. Feehan's Amended Complaint is a cut-and-paste job from other lawsuits that bolts together into one pleading various generalized grievances and conspiracy theories that fall into three broad categories.

A. WEC-Approved Practices

The Amended Complaint argues that the WEC violated Wisconsin election statutes by providing unauthorized guidance that was widely relied upon by voters and local election officials—in one instance, for over four years. Plaintiff now seeks to exclude these votes cast in reliance on WEC guidance on the theory that these "illegal" votes "diluted" his single vote. *See generally* Amend. Compl. ¶¶ 1, 14, 37-45, 104-07, 116.

[5] Nicole Carr, *Federal judge dismisses Sidney Powell lawsuit seeking to decertify Georgia's elections,* WSB-TV2.com (Dec. 7, 2020), (available at: https://urldefense.proofpoint.com/v2/url?u=https-3A__protect-2Dus.mimecast.com_s_EVT4Cv29yYU778N0uQNLbw_&d=DwMF-g&c=XRWvQHnpdBDRh-yzrHjqLpXuHNC_9nanQc6pPG_SpT0&r=ujHaccxZeCkVMgPPje6IryfbR0QhDRwqm2pPPtsvhaw&m=Eq0xjcOJkBwSYhlm3PuGAZhfC4GhCttJ4_A4ZTuutbw&s=bRBVgiwxyHTp-Rvu36TxkTFObbXDtRBq3fwpDppFaSY&e=)

"Indefinitely confined" exemption. Voters who self-certify that they are "indefinitely confined because of age, physical illness or infirmity or . . . disabled for an indefinite period" are not required to submit photocopies of their photo IDs with their absentee ballot applications. Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)(2). After the pandemic hit Wisconsin in March and the Evers Administration issued a "Safer-at-Home Order" on March 24, some county clerks advised voters they could claim to be "indefinitely confined" pursuant to the order for purposes of voting absentee in the April 7 spring election. Both the WEC and the Wisconsin Supreme Court disagreed with that broad and unqualified reading. Instead, the WEC issued, and the State's high court endorsed, much narrower guidance that left the decision to individual voters subject to certain guidelines.

The WEC's March 29, 2020 guidance, which remains in effect, provides in pertinent part:

> 1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.
>
> 2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

Ex. 5. The WEC's guidance emphasized that, "[d]uring the current public health crisis, *many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates*." Ex. 5 (emphasis added).[6]

[6] Wisconsin has a decades-long legislative policy of taking voters at their word concerning "indefinite confinement." The relevant portion of what is now numbered Section 6.86(2)(a) has been unchanged since 1985, when the Legislature eliminated a formal affidavit requirement for those claiming to be "indefinitely confined" and allowed voters to self-certify instead. *See* WIS. STAT. § 6.86(2) (1985). Consistent with this statutory self-certification approach, the Commission's guidance emphasizes the importance of avoiding any "proof" requirements. "Statutes do not establish the option to require proof or documentation from indefinitely confined voters. Clerks may tactfully verify with voters that the voter understood the indefinitely confined

In a March 31, 2020 order, the Wisconsin Supreme Court granted the Republican Party of Wisconsin's motion for a temporary restraining order, directing the Dane County Clerk to "refrain from posting advice as the County Clerk for Dane County inconsistent with" the above quote from the WEC guidance. *Jefferson v. Dane Cnty.*, No 2020AP557-OA (Mar. 31, 2020) (Ex. 6) . Neither the WEC nor the Wisconsin Supreme Court provided further guidance before the November 3 election; WEC's March 29 guidance (as endorsed by the State's highest court) thus remained in effect through the election, and voters throughout the State relied upon it.

But like other Wisconsin litigants seeking to upend the November 3rd election in recent weeks, Mr. Feehan now argues that the WEC's definition of "indefinitely confined" is far too lenient, that WEC should have allowed local officials to demand further proof, and that WEC should have taken further efforts to limit reliance on the "indefinitely confined" exemption in the midst of the worst global pandemic in over a century. Amend. Compl. ¶¶ 1, 14, 37-45, 104-07, 116. Mr. Feehan offers no explanation for why he waited until *after* the election to challenge WEC's guidance, as he easily could have done under Wis. Stat. § 227.40(1). Nor does Mr. Feehan offer any actual facts showing that the WEC's supposedly problematic interpretation led to any abuse of the "indefinitely confined" provision. Instead, he relies upon the claim of a purported "expert" that precisely 96,437 voters "were improperly relying on the 'indefinitely confined' exemption to voter ID" in last month's election, as if Mr. Feehan or his expert has any clue about the health and veracity of nearly 100,000 Wisconsin citizens. *Id.* ¶ 59.

Witness address requirement. An absentee voter must complete her ballot and sign a "Certification of Voter" on the absentee ballot envelope in the presence of a witness. Wis. Stat.

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status designation when they submitted their request, but they may not request or require proof." Ex. 5.

§ 6.87(4)(b). The witness must then sign a "Certification of Witness" on the envelope, which must include the witness's address. Wis. Stat. § 6.87. Since October 2016, the WEC has instructed municipal clerks that, while they may *never* add missing *signatures*, they "*must* take corrective action" to add missing *witness addresses* if they are "'reasonably able to discern'" that information by contacting the witnesses or looking up the addresses through reliable sources. Ex. 7. The WEC has repeated these instructions in multiple guidance documents over the past four years. *See* Ex. 8 (guidance in current WEC Election Administration Manual that clerks "may add a missing witness address using whatever means are available," and "should initial next to the added witness address"). This construction was adopted unanimously by the WEC over four years ago; has governed in *eleven* statewide races since then, including the 2016 presidential election and recount; has been relied upon by local election officials and voters throughout the State; and has never been challenged through Chapter 227 judicial review or otherwise. Ex. 9 at 4–5.

Until now. Like the plaintiffs in many of the other Wisconsin court challenges in the past month, Mr. Feehan argues that WEC has exceeded its statutory authority over the past four years in requiring clerks to attempt to fill in missing witness addresses, and seeks to exclude all such ballots cast last month. Amend. Compl. ¶¶ 14, 43-45, 104-05. Here again, he offers no explanation for why he waited until *after* the election to raise this challenge.

B. "Massive election fraud"

Most of Mr. Feehan's Amended Complaint is devoted to recounting the supposed details of a "massive election fraud" perpetrated by Dominion Voting Systems and a motley collection of unnamed "domestic third parties or hostile foreign actors," including "rogue actors" in Iran, China, and Venezuela. Amend. Compl. ¶¶ 1, 6, 16, 70, 81; *see generally id.* ¶¶ 3, 46-50, 52, 60-99. Mr. Feehan says at one point that he is "seeking to hold election riggers like Dominion to account and to prevent the United States' descent into Venezuelan levels of voting fraud and corruption out of

which Dominion was born." *Id.* ¶ 94. Many of the supposed evidentiary sources are "redacted," so we have no idea who (or what) is feeding these tales to Mr. Feehan's credulous lawyers. The Amended Complaint throws out the word "fraud" (or variations like "fraudulent") no fewer than **47 times**, but none of those allegations of fraud meets Fed. R. Civ. P. 9(b) standards. Not one.

It is difficult to figure out why, precisely, Mr. Feehan's lawyers are pulling Governor Evers and the individual members of the WEC into the web of what Ms. Powell has now infamously called this "Kraken."[7] The Amended Complaint repeatedly makes false and frivolous claims such as this: "The multifacted schemes and artifices implemented by Defendants"—that is, the WEC Commissioners and Governor Evers—"and their collaborators to defraud resulted in the unlawful counting, or fabrication, or hundreds of thousands of illegal, ineligible, duplicate or purely fictitious ballots in the State of Wisconsin." Amend. Compl. ¶ 4. These "Kraken" allegations against the defendants are not only implausible, but outrageous.

C. "Statistical anomalies and mathematical impossibilities"

Mr. Feehan's lawyers also submit various declarations from so-called "experts," purporting to point out perceived "statistical anomalies and mathematical impossibilities" in the data they have examined that have led them to deduce that "it is statistically impossible for Joe Biden to have won Wisconsin." *Id.* ¶ 1. Never mind the statewide canvass process and the rigorous recount process in Dane and Milwaukee Counties. Never mind the pending state recount litigation. And never mind all the other media and public scrutiny of the Wisconsin election returns over the past month. Because a few "experts" believe there is a "statistical impossibility" that Joe Biden carried

[7] Davey Alba, *'Release the Kraken,' a catchphrase for unfounded conspiracy theory, trends on Twitter*, N.Y. TIMES (Nov. 17, 2020), https://www.nytimes.com/2020/11/17/technology/release-the-kraken-a-catchphrase-for-unfounded-conspiracy-theory-trends-on-twitter.html.

Wisconsin, Mr. Feehan and his counsel insist "this Court must set aside the results of the 2020 General Election" and issue "[a]n order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election." *Id.* ¶¶ 5, 142(3). Requests like these would be laughable if they were not so antidemocratic and unconstitutional.

LEGAL STANDARD

Motion to Dismiss. Although the DNC as a nonparty may not move to dismiss Mr. Feehan's claims, it may properly oppose Feehan's requested injunctive relief by showing that Feehan's Amended Complaint fails to state a cognizable claim for relief. In deciding a motion to dismiss, the Court presumes the veracity of all well-pleaded material allegations in the Complaint, *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 826 (7th Cir. 2015), but "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (alteration in original) (quoting Fed. R. Civ. P. 8(a)). "[C]onclusory statements of law . . . and their unwarranted inferences . . . are not sufficient to defeat a motion to dismiss for failure to state a claim." *N. Tr. Co. v. Peters*, 69 F.3d 123, 129 (7th Cir. 1995).

Mr. Feehan's drumbeat of claims about alleged "fraud" are subject to the pleading requirements of Fed. R. Civ. P. 9(b), which require a party pleading fraud to "state with particularity the circumstances constituting fraud." This standard "ordinarily requires describing the 'who, what, when, where, and how'" of the fraud. *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011).

Motion for Preliminary Injunction. To obtain a preliminary injunctive relief "a movant 'must make a threshold showing that (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law;

and (3) he has a reasonable likelihood of success on the merits." *Tully v. Okeson*, 977 F.3d 608, 612–13 (7th Cir. 2020). Then, "if the movant makes this threshold showing, the court proceeds to consider the balance of harms between the parties and the effect of granting or denying a preliminary injunction on the 'public interest.'" *Id.* (quoting *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015)); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 968 (W.D. Wis. 2020) (applying same standard to request for temporary restraining order).

This is a demanding standard in any case but, where, as here, plaintiffs seek a mandatory injunction, it is heightened. *See, e.g.*, *Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020) ("Mandatory preliminary injunctions—those 'requiring an affirmative act by the defendant'—are 'ordinarily cautiously viewed and sparingly issued.'") (quoting *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997)).

ARGUMENT

I. The Court should dismiss this case because Plaintiff lacks standing.

To avoid dismissal on Article III grounds, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). (citation omitted). Mr. Feehan fails all three prongs.

No cognizable injury-in-fact. Mr. Feehan has failed to establish that he has suffered an injury in fact sufficient to maintain any of his claims. As to his equal protection and due process claims in Counts II and III (as well as his freestanding fraud claim in Count IV, for which he cites neither a constitutional nor statutory basis), Feehan does not allege that he suffered any specific harm as a presidential elector, or that, as a voter, he was deprived of the right to vote; instead, he alleges that "Defendants failed to comply with the requirements of the Wisconsin Election Code

and thereby diluted the lawful ballots of the Plaintiff and of other Wisconsin voters and electors." Amend. Compl. ¶ 116; *see also id.* ¶¶ 114, 125-26, 136. But Plaintiff's theory of vote-dilution-through-unlawful-voting has been thoroughly and repeatedly rejected by federal courts as a viable basis for standing (including in several decisions in the last few weeks alone). *See, e.g.*, Slip Op. at 25, *King v. Whitmer*, No. 2:20-cv-13134, (E.D. Mich. Dec. 7, 2020) (no standing in cookie-cutter litigation) (Ex. 4); *Bognet v. Sec'y of Commonwealth*, No. 20-3214, 2020 WL 6686120, at *11-14 (3d Cir. Nov. 13, 2020) ("This conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment"); *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (similar).

Thus, in *Donald J. Trump for President v. Boockvar*, the court rejected a challenge to restrictions on poll watchers and ballot challenges on a theory, like the one Plaintiff advances, that state practices constituted fraud and thus diluted lawfully submitted votes. The court found that the fears of voter fraud that animated the claims were "based on a series of speculative events—which falls short of the requirement to establish a concrete injury." 2020 WL 5997680, at *33. Other cases have reached similar results. *See, e.g.*, *Martel v Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *3-5 (D. Vt. Sept. 16, 2020) (holding voters challenging a directive expanding vote-by-mail lacked concrete and particularized injury necessary for standing); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 925-26 (D. Nev. 2020) (same); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution" as a result of allegedly inaccurate voter rolls "[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."). Mr. Feehan's claims are similarly deficient.

Feehan also claims he has suffered harm as a result of alleged violations of the Elections

and Electors Clauses, but that injury, too, has been repeatedly rejected as "precisely the kind of undifferentiated, generalized grievance about the conduct of government" insufficient to constitute an injury for Article III standing. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam); *accord Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866, *4 (11th Cir. Dec. 5, 2020) ("Wood cannot explain how his interest in compliance with state election laws is different from that of any other person."). Plaintiff's reliance on *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), is misplaced. *See* Amend. Compl. ¶ 25. There, the Eighth Circuit held that "[a]n inaccurate vote tally is a concrete and particularized injury" to electors, under the theory that Minnesota electors are candidates for office under Minnesota law. 978 F.3d at 1058. *Carson* is neither binding on this Court nor in the legal mainstream; federal courts have repeatedly held that even candidates for office lack Article III standing to challenge alleged violations of state law under the Elections Clause. *See Bognet*, 2020 WL 6686120, at *6-7 (voters and candidate lacked standing to bring claims under Elections and Electors Clauses); *id.* at *8 n.6 (rejecting *Carson* as being based on an incorrect reading of *Bond v. United States*, 564 U.S. 211 (2011)); *Hotze v. Hollins*, No. 4:20-cv-03709, 2020 WL 6437668, at *2 (S.D. Tex. Nov. 2, 2020) (holding candidate lacked standing under Elections Clause and concluding that Supreme Court's cases "stand for the proposition that only the state legislature (or a majority of the members thereof) have standing to assert a violation of the Elections Clause," but not individuals).[8] Neither of the additional cases Plaintiff cites so much as mentions Article III standing and Plaintiff provides no explanation regarding either case's supposed significance. *See* Dkt. No. 42 at 4 (citing *McPherson v. Blacker*, 146 U.S. 1, 27 (1892);

[8] Although separate constitutional provisions, the Electors and Elections Clauses share "considerable similarity" and should be interpreted in the same manner. *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting); *see also Bognet*, 2020 WL 6686120, at *7 (applying same test for standing under both Elections and Electors Clauses).

Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 76 (2000) (per curiam)).

No traceability. Mr. Feehan has also failed to allege facts sufficient to establish that any supposed injury is traceable to Defendants. *First*, he alleges a "fraudulent scheme to rig the 2020 General Election." Amend. Compl. ¶ 50. But there are no allegations in the Amended Complaint that connect this alleged "fraudulent scheme" to Defendants. Instead, Plaintiff explicitly blames other parties, including a technology company, *see id.* ¶ 98 (describing "clear motive on the part of Dominion to rig the election"), and various unnamed foreign actors, *see id.* ¶ 70 (describing "foreign interference by Iran and China"). *Second*, Plaintiff alleges that certain actions by the WEC did not follow state law. *Id.* ¶¶ 40-41, 44-45. But other than Plaintiff's generic complaint that such supposed legal errors created an "avenue for fraudulent voting," *id.* ¶ 38, there are no allegations in the Amended Complaint showing that anything WEC allegedly did caused (or even relates to) any alleged injury to Plaintiff himself. This lack of traceability dooms Mr. Feehan's standing to pursue any claims against the WEC. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The same is true *a fortiori* of the individual Defendants, none of whom is alleged in the Amended Complaint to have done anything in particular.

No redressability. Finally, as relief sought, Mr. Feehan attempts to bypass the popular vote in Wisconsin by asking the Court to issue an injunction to prevent Governor Evers and the WEC "from transmitting the currently certified electoral results [to] the Electoral College." Amend. Compl. ¶ 142(2). Doing so would not redress Mr. Feehan's alleged injuries. As explained earlier today in *King v. Whitmer*, which concerns nearly identical claims, "Plaintiffs' alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others their right to vote." Slip Op. at 25, *King*, No. 2:20-cv-13134 (E.D. Mich. Dec. 7, 2020) (Ex. 4). Not only that, granting the

requested relief is *impossible*, because the Certificate of Ascertainment has already been transmitted. *See* Nat'l Archives, *2020 Electoral College Results*, https://www.archives.gov/electoral-college/2020. No remedy Plaintiff seeks can make it otherwise. *See Wood v. Raffensperger*, 2020 WL 7094866, *6 ("Because Georgia has already certified its results, Wood's requests to delay certification and commence a new recount are moot. 'We cannot turn back the clock and create a world in which' the 2020 election results are not certified.") (citation omitted).

In sum, Mr. Feehan meets none of the three requirements for Article III standing and this Court should dismiss the Amended Complaint on that basis alone.

II. The doctrine of laches bars Plaintiff's claims.

Even if Mr. Feehan were able to establish that he has standing to pursue his claims (and, for the reasons discussed above, he does not), the doctrine of laches independently bars any relief. "Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant." *Fulani v. Hogsett,* 917 F.2d 1028, 1031 (7th Cir. 1990). The doctrine applies with special force and urgency in the election-law context. A long line of Seventh Circuit decisions emphasizes that election-law claims "must be brought 'expeditiously' … to afford the district court 'sufficient time *in advance of an election* to rule without disruption of the electoral cycle.'" *Jones v. Markiewicz-Qualkinbush,* 842 F.3d 1053, 1061 (7th Cir. 2016) (citations omitted) (emphasis added); *see also Bowes v. Indiana Secretary of State*, 837 F.3d 813, 818 (7th Cir. 2016) ("plaintiffs in general must act quickly once they become aware of a constitutional violation, so as not to disrupt an upcoming election process"); *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) ("It would be inequitable to order preliminary relief in a suit filed so gratuitously late in the campaign season."); *Fulani*, 917 F.2d at 1031 (denying relief where plaintiffs' delay risked "interfer[ing] with the rights of other Indiana citizens, in particular the

absentee voters"); *Navarro v. Neal*, 904 F. Supp. 2d 812, 816 (N.D. Ill. 2012) ("By waiting so long to bring this action, plaintiffs 'created a situation in which any remedial order would throw the state's preparations for the election into turmoil.'"), *aff'd*, 716 F.3d 425 (7th Cir. 2013).

Through not using the term "laches," the U.S. Supreme Court has long "insisted that federal courts not change electoral rules close to an election date." *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641-42 (7th Cir. 2020) (citing, *inter alia*, *Purcell v. Gonzalez*, 549 U.S. 1 (2006)), *stay denied*, No. 20A66, 2020 WL 6275871 (Oct. 26, 2020). Wisconsin law is in accord. *See Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶¶ 9-10, 393 Wis. 2d 629, 948 N.W.2d 877 (2020) (rejecting petition for original action filed nearly three months *before* the 2020 general election where the Court concluded there was insufficient time to grant "any form of relief that would be feasible," and that granting relief would "completely upset[] the election," cause "confusion and disarray," and "undermine confidence in the general election results"). Overturning the results of an election *after* it has been held, as Mr. Feehan and his counsel seek to accomplish, would create far more confusion, disarray, and loss of public confidence in the results.

All of the elements of laches are satisfied here. Mr. Feehan and his counsel are guilty of egregious delays. Many of the practices he challenges were in place long before November 3rd and could have been readily challenged before the election. The WEC's guidance, for example, could have been challenged at any time before the election in a declaratory judgment action under Wis. Stat. § 227.40(1). These "exclusive" review procedures could have been used to present claims that the WEC's guidance "exceeds the statutory authority of the agency," *id.* § 227.40(4)(a), which is precisely what Mr. Feehan is claiming here. But Mr. Feehan and his

counsel inexcusably waited nearly a full month *after* the election before bringing suit—and until *after* Wisconsin had certified its presidential election results—to seek relief.

Nor is there any question that the DNC and its nominees, the public, and the administration of justice in general would be deeply prejudiced if the Court excused Plaintiff's delay in bringing this suit. Plaintiff's requested relief would retroactively disenfranchise some, or all, of Wisconsin's voters *after* voting has concluded and would destroy confidence in the electoral process. As explained earlier today in *King v. Whitmer*, the "rationale for interposing the doctrine of laches is at its peak." Slip Op. at 19, No. 2:20-cv-13134 (E.D. Mich. Dec. 7, 2020). "Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (citing *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). And as Justice Hagedorn emphasized last week, interference with an election *after* it has concluded "would appear to be unprecedented in American history." *Wisconsin Voters All.,* No. 2020AP1930-OA, at 2 (Hagedorn, J., concurring) (Ex. 1). Plaintiff's claims are barred by laches.

III. The Eleventh Amendment bars Plaintiff's claims.

In addition to the hurdles described above, the Eleventh Amendment also separately and independently bars Mr. Feehan's claims. The Eleventh Amendment prohibits federal courts from granting "relief against state officials on the basis of state law, whether prospective or retroactive." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *see also Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999) ("[F]ederal courts cannot enjoin a state officer from violating state law.") This is true even when state law claims are styled as federal causes of action. *See Colon v. Schneider*, 899 F.2d 660, 672 (7th Cir. 1990) (rejecting plaintiff's attempt to "transmute a violation of state law into a constitutional violation" and noting that such state law claims would be barred by the Eleventh Amendment); *see also, e.g.*, *Massey v. Coon*, No. 87-3768,

1989 WL 884, at *2 (9th Cir. Jan. 3, 1989) (affirming dismissal where "on its face the complaint states a claim under the due process and equal protection clauses of the Constitution, [but] these constitutional claims are entirely based on the failure of defendants to conform to state law"); *Balsam v. Sec'y of State*, 607 F. App'x 177, 183–84 (3d Cir. 2015) (Eleventh Amendment bars state law claims even when "premised on violations of the federal Constitution").

None of Mr. Feehan's claims escapes this bar. In substance, he asks the Court to determine that state officials violated state law and compel state officials to do what he believes Wisconsin law requires. Count I, his purported Elections and Electors Clause claim, asserts that Defendants violated the U.S. Constitution by exercising powers that are the province of the Wisconsin Legislature. Amend. Compl. ¶ 103. While less than clear, Plaintiff's allegation appears to be that Defendants did so by violating the Wisconsin State Election Code. *Id.* ¶¶ 104–06. Count II, Plaintiff's purported Equal Protection Clause claim, alleges vote dilution because "Defendants failed to comply with the requirements of the Wisconsin Election Code." *Id.* ¶ 116. It also relies on the assertion that Defendants violated "Plaintiff's right to be present and have actual observation and access to the electoral process …." *Id.* ¶ 117. But there is no constitutional right to poll watching or observation; any "right" to do so exists under state law. *See, e.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-cv-966, 2020 WL 5997680, at *67 (W.D. Pa. Oct. 10, 2020) ("[T]here is no individual constitutional right to serve as a poll watcher." (quoting *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *30 (Pa. Sept. 17, 2020))). Count III, Plaintiff's purported due process claim, also relies primarily on alleged violations of Wisconsin law. *See* Amend. Compl. ¶ 129 (discussing "violations of the Wisconsin Election Code"). Finally, Plaintiff's free-standing "fraud" claim in Count IV is expressly based on Defendants' failure to comply with state election laws. Amend. Compl. ¶ 137 (alleging

"defendants intentionally violated multiple provisions of the Wisconsin Election Code").

Mr. Feehan's motion only serves to underscore that his issues are truly state law claims masquerading as the basis for a federal action. Once again, it asserts purported violations of Wisconsin law. *See* Dkt. 19 at 3 ("Plaintiff is more likely to succeed on the merits of his claims than not due to substantial and multiple violations of Wisconsin election laws . . . ."). Granting Mr. Feehan's request would be problematic for a host of reasons; one is that it would violate the Eleventh Amendment. *See Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) ("[T]o treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law. State rather than federal courts are the appropriate institutions to enforce state rules."); *see also, e.g.*, *Ohio Republican Party v. Brunner*, 543 F.3d 357, 360-61 (6th Cir. 2008) (holding *Pennhurst* bars claim that Secretary of State violated state election law).

IV. Principles of federalism and comity strongly favor abstention.

Even if the Court were to conclude that none of the above hurdles barred it from exercising jurisdiction, principles of federalism and comity would still weigh strongly against doing so. Plaintiff seeks an extraordinary intrusion on state sovereignty from which a federal court should abstain under longstanding precedent.

Under the *Pullman* abstention doctrine, Mr. Feehan's claims should be addressed, if at all, in state court. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941). The doctrine "is based on considerations of comity and federalism and applies when 'the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law.'" *Wisconsin Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 150 (7th Cir. 2011) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17 (1996)). If a state law "is 'fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question,' abstention may be required 'in order to avoid

unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.'" *City Investing Co. v. Simcox*, 633 F.2d 56, 60 (7th Cir. 1980) (quoting *Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965)). The Seventh Circuit looks to two factors to determine whether *Pullman* abstention is appropriate: whether there is (1) "a substantial uncertainty as to the meaning of the state law" and (2) "a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Wisconsin Right to Life*, 664 F.3d at 150 (quoting *Imt'l Coll. of Surgeons v. City of Chi.*, 153 F.3d 356, 365 (7th Cir. 1998)). Each factor weighs in favor of abstention here.

First, a central contention of the Amended Complaint is that official WEC guidance misinterpreted the Wisconsin Election Code. Plaintiff alleges, among other things, legal errors by WEC in relation to "indefinitely confined" voters, Amend. Compl. ¶¶ 37-42, 104, and missing witness addresses on absentee-ballot envelopes, *id.* ¶¶ 43-45, 105-06; *see also id.* ¶ 137 ("Defendants intentionally violated multiple provisions of the Wisconsin Election Code …."). Plaintiff's TRO motion echoes these state-law concerns. *See* Dkt. No. 10, ¶ 7. Accordingly, adjudicating Plaintiff's claims would require this Court to resolve alleged uncertainty about the meaning of Wisconsin law. In fact, some of the same state law issues Plaintiff raises are currently under consideration by the Wisconsin Supreme Court. *See generally Jefferson v. Dane Cnty.*, No 2020AP557-OA (challenge to official interpretation of "indefinite confinement" provisions of Wisconsin law). The "indefinite confinement" and "witness address" issues are both also being litigated in the Wisconsin recount appeals. *See generally Trump v. Biden,* Milwaukee County Case No. 2020-CV-7092; Dane County Case No. 2020-CV-2514. And recently, in dissenting from the denial of an original action petition in which the Trump campaign raised similar challenges,

Wisconsin's Chief Justice described the petition as raising "significant legal issues that cry out for resolution by the Wisconsin Supreme Court." *Trump v. Evers*, No. 2020AP1971-OA (Wis. Dec. 3, 2020) (Roggensack, C.J., dissenting) (Ex. 2).

Second, it is at least "reasonably probable" that the Wisconsin courts' adjudication of the state law issues Mr. Feehan raises could "obviate the need for a federal constitutional ruling." *Wisconsin Right to Life*, 664 F.3d at 150. If, as the DNC submits would be proper, a Wisconsin court rejected Mr. Feehan's claim that WEC guidance violates state law, there would be no need for this Court to opine about whether constitutional injury arose from such alleged violations.

Abstention is also warranted under the *Colorado River* doctrine, which provides that "a federal suit," in certain circumstances, "should yield to a parallel state suit." *DePuy Synthes Sales, Inc. v. OrthoLA, Inc.*, 953 F.3d 469, 477 (7th Cir. 2020). Both conditions for abstention are met here. First, there is a concurrent and parallel state-court action: President Trump's appeal from the WEC's post-recount determinations in state court, which "involve[s] the same parties, the same facts, and the same issues." *Id.* at 478. Second, "the necessary exceptional circumstances exist to support" abstention. *Id.* at 477. It is highly desirable to avoid "piecemeal" litigation of the issues raised here, and the "source of governing law" is overwhelmingly Wisconsin election law. *Id.* Moreover, the pending state-court action is not only "adequa[te] … to protect [Plaintiff's] rights," but also the "exclusive judicial remedy" under Wisconsin law "for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process." Wis. Stat. § 9.01(11). Just today, a federal court in Michigan, considering identical claims, found *Colorado River* abstention appropriate. *See* Slip Op. at 20-23, *King v. Whitmer*, No. 2:20-cv-13134, (E.D. Mich. Dec. 7, 2020).

Finally, even if the Court were to conclude that this case falls outside the scope of *Pullman*, *Colorado River*, and other abstention doctrines, the DNC respectfully submits that the Court should nonetheless abstain because the case "implicates the principles of equity, comity, and federalism" that lie at the foundation of those doctrines. *SKS & Assocs., Inc. v. Dart*, 619 F.3d 674, 677 (7th Cir. 2010). The conduct of elections is uniquely constitutionally entrusted to the states. *See* U.S. Const. art. I, § 4; *id.* art. II, § 1, cl. 2. There are few areas where a federal court should tread more lightly. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019).

Moreover, as Plaintiff himself notes, "Wisconsin law allows elections to be contested through litigation," Amend. Compl. ¶ 121—litigation that President Trump is already pursuing in state court, as noted above. That litigation raises many of the same concerns Mr. Feehan raises, so he can hardly claim there is no alternative to federal-court adjudication. To the contrary, "principles of equity, comity, and federalism," *SKS & Assocs.*, 619 F.3d at 677, support abstaining from federal adjudication and instead allowing the post-recount litigation already initiated in state court by President Trump to proceed.

V. Plaintiff fails to state a claim on which relief can be granted.

The Amended Complaint is also subject to dismissal under Rule 12(b)(6), which requires a plaintiff to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. While Rule 8 "does not require 'detailed factual allegations,' … it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). The shortcomings in the Amended Complaint are particularly stark because Plaintiff's claims sound in fraud and thus are subject to the requirement of Rule 9(b) to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The Supreme Court has also instructed that "[d]etermining whether

a complaint states a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Mr. Feehan fails to meet the standards of Rule 8, much less Rule 9(b). He speculates that Wisconsin election officials and "the State of Wisconsin" engaged in "widespread fraud" to manipulate the election results, supposedly in cahoots with domestic and international actors. Amend. Compl. ¶ 48. He asserts that local election officials helped advance a "multi-state fraudulent scheme to rig the 2020 General Election," *id*. ¶ 50, by using voting machines made by Dominion, *id.* ¶ 3, a company allegedly created exclusively to ensure election-rigging so that "Venezuelan dictator Hugo Chavez never lost another election," *id*. ¶ 7, while also permitting Iran and China to manipulate the 2020 general election to ensure President-elect Biden's victory, *id*. ¶ 16, and intentionally enabling mass voter fraud among mail-in voters, *id.* ¶¶ 46, 48.

Plainly, judicial experience and common sense alone dictate that the Amended Complaint should be dismissed. "[T]he sheer size of the alleged conspiracy—involving numerous agencies of state and local government—points in the direction of paranoid fantasy" rather than plausible allegations grounded in fact. *Walton v. Walker*, 364 F. App'x 256, 257 (7th Cir. 2010) (internal quotation marks omitted). But Mr. Feehan also has failed to state cognizable legal claims. His Elections and Electors Clause claims as alleged in Count I of the Amended Complaint do not state a claim for relief. The Elections and Electors Clauses vest authority in "the Legislature" of each state to regulate "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, and to direct the selection of presidential electors, U.S. Const. art. II, § 1, cl. 2, respectively. Plaintiff's putative claims under the Elections and Electors Clauses appear to be grounded on his allegation that Defendants failed to follow state law. Amend. Compl. ¶¶ 104–06. Plaintiff, however, fails to tie these allegations to the Electors and

Elections Clauses. He has not explained how alleged deviations from state election procedures constitutes a violation of either constitutional provision. *See, e.g.*, Slip Op. at 30, *King v. Whitmer*, No. 2:20-cv-13134 (E.D. Mich. Dec. 7, 2020) ("Even assuming Defendants did not follow the Michigan Election Code, Plaintiffs do not explain how or why such violations of state election procedures automatically amount to violations of the clauses."). Nowhere does he allege that Defendants or state laws violate the authority of the Legislature to direct selection of the presidential electors, U.S. Const. art. II, § 1, cl. 2, or regulate elections, *id.* art. I, § 4, cl. 1.

Count II, Plaintiff's putative Equal Protection claim, similarly fails as a matter of law. Mr. Feehan alleges that "Defendants failed to comply with the requirements of Wisconsin Election Code and thereby diluted the lawful ballots of the Plaintiff and of other Wisconsin voters …." Amend. Compl. ¶ 116. That is not a cognizable equal protection injury. Vote dilution may give rise to a federal claim only in certain contexts, such as when laws structurally devalue one community's votes over another's. *See, e.g.*, *Bognet*, 2020 WL 6686120, at *11 ("[V]ote dilution under the Equal Protection Clause is concerned with votes being weighed differently."). Courts have repeatedly found the "conceptualization of vote dilution" that Mr. Feehan urges here—that is, "state actors counting ballots in violation of state election law"—is not a cognizable violation of equal protection. *Id.* For good reason: "if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots 'were a true equal-protection problem, then it would transform every violation of state election law … into a potential federal equal-protection claim.'" *Id.* (quoting *Boockvar*, 2020 WL 5997680, at *45-46); *see also* Slip Op. at 34 n.11, *King v. Whitmer*, No. 2:20-cv-13134 (E.D. Mich. Dec. 7, 2020) (same) (Ex. 4).[9]

[9] Mr. Feehan's allegation that Defendants "enacted regulations, or issued guidance, that had the intent and effect of favoring one class of voters—Democratic absentee voters—over

Count III also fails. Mr. Feehan appears to allege that violations of law diluted his vote in violation of the Due Process Clause. *See* Amend. Compl. ¶¶ 128-29. As noted, Mr. Feehan has failed to plead a cognizable vote-dilution claim, but regardless, vote dilution is a context-specific theory of constitutional harm premised on the Equal Protection Clause, not the Due Process Clause. And even if this Court construed Mr. Feehan's allegations as attempting to state a substantive due process claim, they would still fall short, because "section 1983 does not cover garden variety election irregularities." *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986) (characterizing *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978)); *see also Kasper v. Hayes*, 651 F. Supp. 1311, 1314 (N.D. Ill. 1987) ("The Constitution is not an election fraud statute, … [and] '[i]t is not every election irregularity … which will give rise to a constitutional claim and an action under section 1983'." (quoting *Bodine*, 788 F.2d at 1271)), *aff'd sub nom. Kasper v. Bd. of Election Comm'rs*, 810 F.2d 1167 (7th Cir. 1987). Instead, to "strike down an election on substantive due process grounds," two elements must be met: "(1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures." *Bennett v. Yoshina*, 140 F.3d 1218, 1226-27 (9th Cir. 1998); *see also Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986) (to implicate due process, problems must "go well beyond the ordinary dispute over the counting and marking of ballots") (internal quotation marks omitted). Plaintiff's allegations here fall far short. Indeed, he does not

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Republican voters" (Amend. Compl. ¶ 116) also does not state a viable equal protection claim, because the guidance at issue applied equally to all absentee voters. *See Boockvar*, 2020 WL 5997680, at *60 (absentee ballot guidance did not violate Equal Protection Clause because "[i]t was issued to all counties and applies equally to all counties, and by extension, voters."); *Bognet*, 2020 WL 6686120, at *14 (rejecting plaintiffs' proposed absentee voter groupings under Equal Protection Clause because "there is simply no differential *weighing* of the votes.").

plausibly allege that any disenfranchisement has occurred, but rather asks the Court to negate the votes cast by millions of eligible Wisconsin voters.

VI. Plaintiff is not entitled to a TRO or preliminary injunction.

For the reasons discussed above, Mr. Feehan cannot establish a "likelihood of success on the merits." *Tully*, 977 F.3d at 612-13. He has failed to carry his burden on any of the remaining factors necessary to entitle him to preliminary relief, much less the extraordinary and unprecedented relief he seeks. No court has ever done what Feehan asks this Court to do—throw out the election results and ordain the losing candidate the victor by judicial proclamation. As the Third Circuit put it recently when the Trump Campaign sought an order prohibiting Pennsylvania's officials from certifying election results, such relief—"throwing out millions of votes—is unprecedented" and a "drastic remedy." *Donald J. Trump for President, Inc.* 2020 WL 7012522, at *7. "Voters, not lawyers, choose the President. Ballots, not briefs, decide elections." *Id* *9.

A. Plaintiff cannot establish irreparable harm and has an adequate remedy at law.

Mr. Feehan has not shown injury or a likelihood of success of the merits of his constitutional claims. So, his assertion that he will suffer irreparable harm based on those violations is unfounded. Further, his delay before seeking relief weighs against the probability of irreparable injury. *See Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001); *see also* Wright & Miller, 11A *Federal Practice and Procedure*, § 2948.1 (3d ed., Apr. 2017 update) ("A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction."). Mr. Feehan's alleged injuries occurred (if they occurred at all), on or before election day. Yet he waited until nearly four weeks after election day, after the election had been certified, to file this motion. This Court should consider his inexcusable delay in determining whether he is entitled to "emergency" relief.

Mr. Feehan also has an adequate remedy at law, weighing against a finding of irreparable harm. *See United States v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429, 432 (7th Cir. 1991) ("It is well settled that the availability of an adequate remedy at law renders injunctive relief inappropriate."). In this case, Wisconsin law allows for mechanisms to dispute election results. Because Feehan could engage these mechanisms, he has an adequate remedy at law. *See, e.g.*, *Donald J. Trump for President, Inc. v. Pennsylvania*, 2020 WL 7012522, at *8 ("Because the Campaign can raise these issues and seek relief through state courts and then the U.S. Supreme Court, any harm may not be irreparable."); *see also Rural Elec. Convenience Co-op. Co.*, 922 F.2d at 432 (observing that "a party's ability to assert its claims as a defense in another proceeding constitutes an adequate remedy at law").

B. The balance of equities and public interest weigh heavily against the issuance of a restraining order or injunction.

The balance of equities and public interest cut sharply against granting injunctive relief. Plaintiff's request that this Court order Defendants "to de-certify the results of the General Election for the Office of President" and "certify the results … in favor of President Donald Trump," would wreak havoc on Wisconsin's elections processes and violate the constitutional rights of millions of Wisconsinites, all while undermining public confidence and trust in the election's results. *See United States v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted …."); *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1061 (7th Cir. 2020) ("It is undeniable that the right to vote is a fundamental right guaranteed by the Constitution. The right to vote is not just the right to put a ballot in a box but also the right to have one's vote counted." (citations omitted)).

For these reasons, in the past several weeks, courts have rightly refused to issue similar

injunctions. *See Donald J. Trump for President, Inc.*, 2020 WL 7012522, at *8–9 (construing Trump Campaign's request to enjoin Pennsylvania's certification of results as a request to disenfranchise voters, and refusing to do so); *Wood v. Raffensperger*, No. 1:20-cv-04561-SDG, 2020 WL 6817513 at *13 (N.D. Ga. Nov. 20, 2020) (denying request to enjoin Georgia from certifying its election results, concluding that "interfer[ing] with the result of an election that has already concluded would be unprecedented and harm the public in countless ways"), *aff'd,* No. 20-14418, 2020 WL 7094866 (11th Cir. Dec. 5, 2020). This Court should do the same.

CONCLUSION

For the foregoing reasons, *amicus curiae* DNC respectfully requests that the Court deny Plaintiff's Amended Motion for Temporary Restraining Order and Preliminary Injunction in its entirety.

DATED: December 7, 2020

Respectfully Submitted,

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** Admission pending*

CERTIFICATE OF SERVICE

I hereby certify that on Monday, December 7, 2020, I filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Michelle M. Umberger*
Counsel for Proposed Intervenor

Exhibit 1

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Supreme Court of Wisconsin

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December 4, 2020

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You are hereby notified that the Court has entered the following order:

No. 2020AP1930-OA Wisconsin Voters Alliance v. Wisconsin Elections Commission

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70 and a supplement thereto, a supporting legal memorandum, and supporting expert reports have been filed on behalf of petitioners, Wisconsin Voters Alliance, et al. A response to the petition has been filed by respondents, Wisconsin Elections Commission, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudsen, and Robert F. Spindell, and a separate response has been filed by respondent Governor Tony Evers. Amicus briefs regarding the issue of whether to grant leave to commence an original action have been filed by (1) Christine Todd Whitman, et al; (2) the City of Milwaukee; (3) Wisconsin State Conference NAACP, et al.; and (4) the Center for Tech and Civic Life. In addition, a motion to intervene has been filed by proposed intervenor-respondent, Democratic National Committee.

After considering all of the filings, we conclude that this petition does not satisfy our standards for granting leave to commence an original action. Although the petition raises time-

sensitive questions of statewide significance, "issues of material fact [would] prevent the court from addressing the legal issues presented." State ex rel. Ozanne v. Fitzgerald, 2011 WI 43, ¶19, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser, J., concurring). It is therefore not an appropriate case in which to exercise our original jurisdiction. Accordingly,

IT IS ORDERED that the petition for leave to commence an original action is denied; and

IT IS FURTHER ORDERED that the motion to intervene is denied as moot.

BRIAN HAGEDORN, J., (*concurring*). The Wisconsin Voters Alliance and a group of Wisconsin voters bring a petition for an original action raising a variety of questions about the operation of the November 3, 2020 presidential election. Some of these legal issues may, under other circumstances, be subject to further judicial consideration. But the real stunner here is the sought-after remedy. We are invited to invalidate the entire presidential election in Wisconsin by declaring it "null"—yes, the whole thing. And there's more. We should, we are told, enjoin the Wisconsin Elections Commission from certifying the election so that Wisconsin's presidential electors can be chosen by the legislature instead, and then compel the Governor to certify those electors. At least no one can accuse the petitioners of timidity.

Such a move would appear to be unprecedented in American history. One might expect that this solemn request would be paired with evidence of serious errors tied to a substantial and demonstrated set of illegal votes. Instead, the evidentiary support rests almost entirely on the unsworn expert report[1] of a former campaign employee that offers statistical estimates based on call center samples and social media research.

This petition falls far short of the kind of compelling evidence and legal support we would undoubtedly need to countenance the court-ordered disenfranchisement of every Wisconsin voter. The petition does not even justify the exercise of our original jurisdiction.

As an initial matter, the Wisconsin Supreme Court is not a fact-finding tribunal. Yet the petition depends upon disputed factual claims. In other words, we couldn't just accept one side's description of the facts or one side's expert report even if we were inclined to believe them.[2] That alone means this case is not well-suited for an original action. The petition's legal support is no less wanting. For example, it does not explain why its challenge to various election processes

[1] After filing their petition for original action, the Petitioners submitted a second expert report. But the second report only provides additional computations based on the assumptions and calculations in the initial expert report.

[2] The Attorney General and Governor offer legitimate arguments that this report would not even be admissible evidence under Wis. Stat. § 907.02 (2017-18).

All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

comes after the election, and not before. Nor does it grapple with how voiding the presidential election results would impact every other race on the ballot, or consider the import of election statutes that may provide the "exclusive remedy."[3] These are just a few of the glaring flaws that render the petition woefully deficient. I therefore join the court's order denying the original action.

Nonetheless, I feel compelled to share a further observation. Something far more fundamental than the winner of Wisconsin's electoral votes is implicated in this case. At stake, in some measure, is faith in our system of free and fair elections, a feature central to the enduring strength of our constitutional republic. It can be easy to blithely move on to the next case with a petition so obviously lacking, but this is sobering. The relief being sought by the petitioners is the most dramatic invocation of judicial power I have ever seen. Judicial acquiescence to such entreaties built on so flimsy a foundation would do indelible damage to every future election. Once the door is opened to judicial invalidation of presidential election results, it will be awfully hard to close that door again. This is a dangerous path we are being asked to tread. The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable.

I do not mean to suggest this court should look the other way no matter what. But if there is a sufficient basis to invalidate an election, it must be established with evidence and arguments commensurate with the scale of the claims and the relief sought. These petitioners have come nowhere close. While the rough and tumble world of electoral politics may be the prism through which many view this litigation, it cannot be so for us. In these hallowed halls, the law must rule.

Our disposal of this case should not be understood as a determination or comment on the merits of the underlying legal issues; judicial review of certain Wisconsin election practices may be appropriate. But this petition does not merit further consideration by this court, much less grant us a license to invalidate every single vote cast in Wisconsin's 2020 presidential election.

I am authorized to state that Justices ANN WALSH BRADLEY, REBECCA FRANK DALLET, and JILL J. KAROFSKY join this concurrence.

ROGGENSACK, C.J. (*dissenting*). It is critical that voting in Wisconsin elections not only be fair, but that the public also perceives voting as having been fairly conducted.

This is the third time that a case filed in this court raised allegations about purely legal questions that concern Wisconsin Elections Commission (WEC) conduct during the November 3,

[3] See Wis. Stat. § 9.01(11) (providing that § 9.01 "constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process"); Wis. Stat. § 5.05(2m)(k) (describing "[t]he commission's power to initiate civil actions" under § 5.05(2m) as the "exclusive remedy for alleged civil violations of chs. 5 to 10 or 12").

2020, presidential election.[4] This is the third time that a majority of this court has turned its back on pleas from the public to address a matter of statewide concern that requires a declaration of what the statutes require for absentee voting. I dissent and write separately because I have concluded that the court has not meet its institutional responsibilities by repeatedly refusing to address legal issues presented in all three cases.

I agree with Justice Hagedorn that we are not a circuit court, and therefore, generally, we do not take cases for which fact-finding is required. Green for Wisconsin v. State Elections Bd., 2006 WI 120, 297 Wis. 2d 300, 301, 723 N.W.2d 418. However, when the legal issue that we wish to address requires it, we have taken cases that do require factual development, referring any necessary factual determinations to a referee or to a circuit court. State ex rel. LeFebre v. Israel, 109 Wis. 2d 337, 339, 325 N.W.2d 899 (1982); State ex rel White v. Gray, 58 Wis. 2d 285, 286, 206 N.W.163 (1973).

We also have taken cases where the issues we wish to address are purely legal questions for which no factual development is required in order to state what the law requires. Wisconsin Legislature v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. The statutory authority of WEC is a purely legal question. There is no factual development required for us to declare what the law requires in absentee voting.

Justice Hagedorn is concerned about some of the relief that Petitioners request. He begins his concurrence saying, "the real stunner here is the sought after remedy." He next relates, "The relief being sought by the petitioners is the most dramatic invocation of judicial power I have ever seen." Then, he concludes with, "this petition does not merit further consideration by this court, much less grant us a license to invalidate every single vote cast in Wisconsin's 2020 presidential election."[5]

Those are scary thoughts, but Justice Hagedorn has the cart before the horse in regard to our consideration of this petition for an original action. We grant petitions to exercise our jurisdiction based on whether the legal issues presented are of state wide concern, not based on the remedies requested. Petition of Heil, 230 Wis. 428, 284 N.W.42 (1938).

Granting a petition does not carry with it the court's view that the remedy sought is appropriate for the legal issues raised. Historically, we often do not provide all the relief requested. Bartlett v. Evers, 2020 WI 68, ¶9, 393 Wis. 2d 172, 945 N.W.2d 685 (upholding some but not all partial vetoes). There have been occasions when we have provided none of the relief requested by the petitioner, but nevertheless declared the law. See Sands v. Menard, Inc., 2010 WI 96, ¶46, 328 Wis. 2d 647, 787 N.W.2d 384 (concluding that while reinstatement is the preferred remedy under

[4] Trump v. Evers, No. 2020AP1971-OA, unpublished order (Wis. S. Ct. Dec. 3, 2020); Mueller v. WEC, No. 2020AP1958-OA, unpublished order (Wis. S. Ct. Dec. 3, 2020) and Wisconsin Voters Alliance v. WEC, No. 2020AP193-OA.

[5] Justice Hagedorn forgets to mention that one form of relief sought by Petitioners is, "Any other relief the Court deems appropriate."

Title VII, it is an equitable remedy that may or may not be appropriate); Coleman v. Percy, 96 Wis. 2d 578, 588-89, 292 N.W.2d 615 (1980) (concluding that the remedy Coleman sought was precluded).

We have broad subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction is grounded in the Wisconsin Constitution. Wis. Const., art. VII, Section 3(2); City of Eau Claire v. Booth, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738.

I dissent because I would grant the petition and address the people of Wisconsin's concerns about whether WEC's conduct during the 2020 presidential election violated Wisconsin statutes. As I said as I began, it is critical that voting in Wisconsin elections not only be fair, but that the public also perceives voting as having been fairly conducted. The Wisconsin Supreme Court should not walk away from its constitutional obligation to the people of Wisconsin for a third time.

I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER and REBECCA GRASSL BRADLEY join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

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You are hereby notified that the Court has entered the following order:

No. 2020AP1971-OA Trump v. Evers

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a supporting legal memorandum, and an appendix have been filed on behalf of petitioners, Donald J. Trump, et al. Responses to the petition have been filed by (1) Governor Tony Evers; (2) the Wisconsin Elections Commission and its Chair, Ann S. Jacobs; (3) Scott McDonell, Dane County Clerk, and Alan A. Arnsten and Joyce Waldrop, members of the Dane County Board of Canvassers; and (4) George L. Christensen, Milwaukee County Clerk, and Timothy H. Posnanski, Richard Baas, and Dawn Martin, members of the Milwaukee County Board of Canvassers. A non-party brief in support of the petition has been filed by the Liberty Justice Center. A motion to intervene, a proposed response of proposed respondents-intervenors, and an appendix have been filed by the Democratic National Committee (DNC) and Margaret J. Andrietsch, Sheila Stubbs,

Ronald Martin, Mandela Barnes, Khary Penebaker, Mary Arnold, Patty Schachtner, Shannon Holsey, and Benjamin Wikler (collectively, "the Biden electors"). The court having considered all of the filings,

IT IS ORDERED that the petition for leave to commence an original action is denied. One or more appeals from the determination(s) of one or more boards of canvassers or from the determination of the chairperson of the Wisconsin Elections Commission may be filed by an aggrieved candidate in circuit court. Wis. Stat. § 9.01(6); and

IT IS FURTHER ORDERED that the motion to intervene is denied as moot.

BRIAN HAGEDORN, J. (*concurring).* I understand the impulse to immediately address the legal questions presented by this petition to ensure the recently completed election was conducted in accordance with the law. But challenges to election results are also governed by law. All parties seem to agree that Wis. Stat. § 9.01 (2017–18)[1] constitutes the "exclusive judicial remedy" applicable to this claim. § 9.01(11). After all, that is what the statute says. This section provides that these actions should be filed in the circuit court, and spells out detailed procedures for ensuring their orderly and swift disposition. See § 9.01(6)–(8). Following this law is not disregarding our duty, as some of my colleagues suggest. It is following the law.

Even if this court has constitutional authority to hear the case straightaway, notwithstanding the statutory text, the briefing reveals important factual disputes that are best managed by a circuit court.[2] The parties clearly disagree on some basic factual issues, supported at times by competing affidavits. I do not know how we could address all the legal issues raised in the petition without sorting through these matters, a task we are neither well-positioned nor institutionally designed to do. The statutory process assigns this responsibility to the circuit court. Wis. Stat. § 9.01(8)(b) ("The [circuit] court shall separately treat disputed issues of procedure, interpretations of law, and findings of fact.").

We do well as a judicial body to abide by time-tested judicial norms, even—and maybe especially—in high-profile cases. Following the law governing challenges to election results is no threat to the rule of law. I join the court's denial of the petition for original action so that the petitioners may promptly exercise their right to pursue these claims in the manner prescribed by the legislature.

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[1] All subsequent references to the Wisconsin Statutes are to the 2017–18 version.

[2] The legislature generally can and does set deadlines and define procedures that circumscribe a court's competence to act in a given case. Village of Trempealeau v. Mikrut, 2004 WI 79, ¶9–10, 273 Wis. 2d 76, 681 N.W.2d 190. The constitution would obviously override these legislative choices where the two conflict.

PATIENCE DRAKE ROGGENSACK, C.J. *(dissenting)*. Before us is an emergency petition for leave to commence an original action brought by President Trump, Vice President Pence and Donald Trump for President, Inc., against Governor Evers, the Wisconsin Elections Commission (WEC), its members and members of both the Milwaukee County Board of Canvassers and the Dane County Board of Canvassers. The Petitioners allege that the WEC and election officials caused voters to violate various statutes in conducting Wisconsin's recent presidential election. The Petitioners raised their concerns during recount proceedings in Dane County and Milwaukee County. Their objections were overruled in both counties.

The Respondents argue, in part, that we lack subject matter jurisdiction because of the "exclusive judicial remedy" provision found in Wis. Stat. § 9.01(11) (2017-18).[3] Alternatively, the Respondents assert that we should deny this petition because fact-finding is required, and we are not a fact-finding tribunal.

I conclude that we have subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); City of Eau Claire v. Booth, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738. Furthermore, time is of the essence.

However, fact-finding may be central to our evaluation of some of the questions presented. I agree that the circuit court should examine the record presented during the canvasses to make factual findings where legal challenges to the vote turn on questions of fact. However, I dissent because I would grant the petition for original action, refer for necessary factual findings to the circuit court, who would then report its factual findings to us, and we would decide the important legal questions presented.

I also write separately to emphasize that by denying this petition, and requiring both the factual questions and legal questions be resolved first by a circuit court, four justices of this court are ignoring that there are significant time constraints that may preclude our deciding significant legal issues that cry out for resolution by the Wisconsin Supreme Court.

I. DISCUSSION

The Petitioners set out four categories of absentee votes that they allege should not have been counted because they were not lawfully cast: (1) votes cast during the 14-day period for in-person absentee voting at a clerk's office with what are alleged to be insufficient written requests for absentee ballots, pursuant to Wis. Stat. § 6.86(1)(b); (2) votes cast when a clerk has completed information missing from the ballot envelope, contrary to Wis. Stat. § 6.87(6d); (3) votes cast by those who obtained an absentee ballot after March 25, 2020 by alleging that they were indefinitely

[3] All subsequent references to the Wisconsin Statutes are to the 2017–18 version.

confined; and (4) votes cast in Madison at "Democracy in the Park" events on September 26 and October 3, in advance of the 14-day period before the election, contrary to Wis. Stat. § 6.87.

Some of the Respondents have asserted that WEC has been advising clerks to add missing information to ballot envelopes for years, so the voters should not be punished for following WEC's advice. They make similar claims for the collection of votes more than 14 days before the November 3 election.

If WEC has been giving advice contrary to statute, those acts do not make the advice lawful. WEC must follow the law. We, as the law declaring court, owe it to the public to declare whether WEC's advice is incorrect. However, doing so does not necessarily lead to striking absentee ballots that were cast by following incorrect WEC advice. The remedy Petitioners seek may be out of reach for a number of reasons.

Procedures by which Wisconsin elections are conducted must be fair to all voters. This is an important election, but it is not the last election in which WEC will be giving advice. If we do not shoulder our responsibilities, we leave future elections to flounder and potentially result in the public's perception that Wisconsin elections are unfair. The Wisconsin Supreme Court can uphold elections by examining the procedures for which complaint was made here and explaining to all where the WEC was correct and where it was not.

I also am concerned that the public will misunderstand what our denial of the petition means. Occasionally, members of the public seem to believe that a denial of our acceptance of a case signals that the petition's allegations are either false or not serious. Nothing could be further from the truth. Indeed, sometimes, we deny petitions even when it appears that a law has been violated. Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶¶14–16, 393 Wis. 2d 629, 948 N.W.2d 877 (Roggensack, C.J., dissenting).

II. CONCLUSION

I conclude that we have subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); City of Eau Claire, 370 Wis. 2d 595, ¶7. Furthermore, time is of the essence.

However, fact-finding may be central to our evaluation of some of the questions presented. I agree that the circuit court should examine the record presented during the canvasses to make factual findings where legal challenges to the vote turn on questions of fact. However, I dissent because I would grant the petition for original action, refer for necessary factual findings to the circuit court, who would then report its factual findings to us, and we would decide the important legal questions presented.

I am authorized to state that Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

REBECCA GRASSL BRADLEY, J. (*dissenting*). "It is emphatically the province and duty of the Judicial Department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). The Wisconsin Supreme Court forsakes its duty to the people of Wisconsin in declining to decide whether election officials complied with Wisconsin's election laws in administering the November 3, 2020 election. Instead, a majority of this court passively permits the Wisconsin Elections Commission (WEC) to decree its own election rules, thereby overriding the will of the people as expressed in the election laws enacted by the people's elected representatives. Allowing six unelected commissioners to make the law governing elections, without the consent of the governed, deals a death blow to democracy. I dissent.

The President of the United States challenges the legality of the manner in which certain Wisconsin election officials directed the casting of absentee ballots, asserting they adopted and implemented particular procedures in violation of Wisconsin law. The respondents implore this court to reject the challenge because, they argue, declaring the law at this point would "retroactively change the rules" after the election. It is THE LAW that constitutes "the rules" of the election and election officials are bound to follow the law, if we are to be governed by the rule of law, and not of men.

Under the Wisconsin Constitution, "all governmental power derives 'from the consent of the governed' and government officials may act only within the confines of the authority the people give them. Wis. Const. art. I, § 1." Wisconsin Legislature v. Palm, 2020 WI 42, ¶66, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca Grassl Bradley, J., concurring). The Founders designed our "republic to be a government of laws, and not of men . . . bound by fixed laws, which the people have a voice in making, and a right to defend." John Adams, Novanglus: A History of the Dispute with America, from Its Origin, in 1754, to the Present Time, in Revolutionary Writings of John Adams (C. Bradley Thompson ed. 2000) (emphasis in original). Allowing any person, or unelected commission of six, to be "bound by no law or limitation but his own will" defies the will of the people. Id.

The importance of having the State's highest court resolve the significant legal issues presented by the petitioners warrants the exercise of this court's constitutional authority to hear this case as an original action. See Wis. Const. Art. VII, § 3. "The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards." State v. Conness, 106 Wis. 425, 82 N.W. 288, 289 (1900). While the court reserves this exercise of its jurisdiction for those original actions of statewide significance, it is beyond dispute that "[e]lections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our concern but our prompt action." State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)).

The majority notes that an action "may be filed by an aggrieved candidate in circuit court. Wis. Stat. § 9.01(6)." Justice Hagedorn goes so far as to suggest that § 9.01 "constitutes the 'exclusive judicial remedy' applicable to this claim." No statute, however, can circumscribe the

constitutional jurisdiction of the Wisconsin Supreme Court to hear this (or any) case as an original action. "The Wisconsin Constitution IS the law—and it reigns supreme over any statute." Wisconsin Legislature v. Palm, 391 Wis. 2d 497, ¶67 n.3 (Rebecca Grassl Bradley, J., concurring). "The Constitution's supremacy over legislation bears repeating: 'the Constitution is to be considered in court as a paramount law' and 'a law repugnant to the Constitution is void, and . . . courts, as well as other departments, are bound by that instrument.' See Marbury [v. Madison], 5 U.S. (1 Cranch) [137] at 178, 180 [1803])." Mayo v. Wis. Injured Patients and Families Comp. Fund, 2018 WI 78, ¶91, 383 Wis. 2d 1, 914 N.W.2d 678 (Rebecca Grassl Bradley, J., concurring). Wisconsin Statute § 9.01 is compatible with the constitution. While it provides an avenue for aggrieved candidates to pursue an appeal to a circuit court after completion of the recount determination, it does not foreclose the candidate's option to ask this court to grant his petition for an original action. Any contrary reading would render the law in conflict with the constitution and therefore void. Under the constitutional-doubt canon of statutory interpretation, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 247. See also Wisconsin Legislature v. Palm, 391 Wis. 2d 497, ¶31 ("[W]e disfavor statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration.").

While some will either celebrate or decry the court's inaction based upon the impact on their preferred candidate, the importance of this case transcends the results of this particular election. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." Purcell v. Gonzalez, 549 U.S. 1, 4 (2006). The majority takes a pass on resolving the important questions presented by the petitioners in this case, thereby undermining the public's confidence in the integrity of Wisconsin's electoral processes not only during this election, but in every future election. Alarmingly, the court's inaction also signals to the WEC that it may continue to administer elections in whatever manner it chooses, knowing that the court has repeatedly declined to scrutinize its conduct. Regardless of whether the WEC's actions affect election outcomes, the integrity of every election will be tarnished by the public's mistrust until the Wisconsin Supreme Court accepts its responsibility to declare what the election laws say. "Only . . . the supreme court can provide the necessary clarity to guide all election officials in this state on how to conform their procedures to the law" going forward. State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)).

The majority's recent pattern of deferring or altogether dodging decisions on election law controversies[4] cannot be reconciled with its lengthy history of promptly hearing cases involving

[4] Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶¶84, 86, 393 Wis. 2d 629, 948 N.W.2d 877 (Rebecca Grassl Bradley, J., dissenting) ("The majority upholds the Wisconsin Elections Commission's violation of Wisconsin law, which irrefutably entitles Howie Hawkins and Angela Walker to appear on Wisconsin's November 2020 general election ballot as candidates for President and Vice President of the United States . . . . In dodging its responsibility to uphold the rule of law, the majority ratifies a grave threat to our republic, suppresses the votes of

voting rights and election processes under the court's original jurisdiction or by bypassing the court of appeals.[5] While the United States Supreme Court has recognized that "a state indisputably has a compelling interest in preserving the integrity of its election process[,]" Burson v. Freeman, 504 U.S. 191, 199 (1992), the majority of this court repeatedly demonstrates a lack of any interest in doing so, offering purely discretionary excuses or no reasoning at all. This year, the majority in Hawkins v. Wis. Elec. Comm'n declined to hear a claim that the WEC unlawfully kept the Green Party's candidates for President and Vice President off of the ballot, ostensibly because the majority felt the candidates' claims were brought "too late."[6] But when litigants have filed cases involving voting rights well in advance of Wisconsin elections, the court has "take[n] a pass,"

Wisconsin citizens, irreparably impairs the integrity of Wisconsin's elections, and undermines the confidence of American citizens in the outcome of a presidential election"); State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("In declining to hear a case presenting issues of first impression immediately impacting the voting rights of Wisconsin citizens and the integrity of impending elections, the court shirks its institutional responsibilities to the people who elected us to make important decisions, thereby signaling the issues are not worthy of our prompt attention."); State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("A majority of this court disregards its duty to the people we serve by inexplicably delaying the final resolution of a critically important and time-sensitive case involving voting rights and the integrity of Wisconsin's elections.").

[5] See, e.g., NAACP v. Walker, 2014 WI 98, ¶¶1, 18, 357 Wis. 2d 469, 851 N.W.2d 262 (2014) (this court took jurisdiction of appeal on its own motion in order to decide constitutionality of the voter identification act enjoined by lower court); Elections Bd. of Wisconsin v. Wisconsin Mfrs. & Commerce, 227 Wis. 2d 650, 653, 670, 597 N.W.2d 721 (1999) (this court granted bypass petition to decide whether express advocacy advertisements advocating the defeat or reelection of incumbent legislators violated campaign finance laws, in absence of cases interpreting applicable statutes); State ex rel. La Follette v. Democratic Party of United States, 93 Wis. 2d 473, 480-81, 287 N.W.2d 519 (1980) (original action deciding whether Wisconsin open primary system was binding on national political parties or infringed their freedom of association), rev'd, Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981); State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 548, 126 N.W.2d 551 (1964) (original action seeking to enjoin state from holding elections pursuant to legislative apportionment alleged to violate constitutional rights); State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 400, 52 N.W.2d 903 (1952) (original action to restrain the state from holding elections based on districts as defined prior to enactment of reapportionment law), overruled in part by Reynolds, 22 Wis. 2d 544; State ex rel. Conlin v. Zimmerman, 245 Wis. 475, 476, 15 N.W.2d 32 (1944) (original action to interpret statutes in determining whether candidate for Governor timely filed papers to appear on primary election ballot).

[6] Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying the petition for leave to commence an original action).

thereby "irreparably den[ying] the citizens of Wisconsin a timely resolution of issues that impact voter rights and the integrity of our elections." State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)). Having neglected to identify any principles guiding its decisions, the majority leaves Wisconsin's voters and candidates guessing as to when, exactly, they should file their cases in order for the majority to deem them worthy of the court's attention.

The consequence of the majority operating by whim rather than rule is to leave the interpretation of multiple election laws in flux—or worse yet, in the hands of the unelected members of the WEC. "To be free is to live under a government by law . . . . Miserable is the condition of individuals, danger is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of the law . . . ." Judgment in Rex vs. Shipley, 21 St Tr 847 (K.B. 1784) (Lord Mansfield presiding). The Wisconsin Supreme Court has an institutional responsibility to decide important questions of law—not for the benefit of particular litigants, but for citizens we were elected to serve. Justice for the people of Wisconsin means ensuring the integrity of Wisconsin's elections. A majority of this court disregards its duty to the people of Wisconsin, denying them justice.

"No aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law." Gabler v. Crime Victims Rights Bd., 2017 WI 67, ¶37, 376 Wis. 2d 147, 897 N.W.2d 384. Once again, a majority of this court instead "chooses to sit idly by,"[7] in a nationally important and time-sensitive case involving voting rights and the integrity of Wisconsin's elections, depriving the people of Wisconsin of answers to questions of statutory law that only the state's highest court may resolve. The majority's "refusal to hear this case shows insufficient respect to the State of [Wisconsin], its voters,"[8] and its elections.

"This great source of free government, popular election, should be perfectly pure." Alexander Hamilton, Speech at New York Ratifying Convention (June 21, 1788), in Debates on the Federal Constitution 257 (J. Elliot ed. 1876). The majority's failure to act leaves an indelible stain on our most recent election. It will also profoundly and perhaps irreparably impact all local, statewide, and national elections going forward, with grave consequence to the State of Wisconsin and significant harm to the rule of law. Petitioners assert troubling allegations of noncompliance with Wisconsin's election laws by public officials on whom the voters rely to ensure free and fair elections. It is not "impulse"[9] but our solemn judicial duty to say what the law is that compels the exercise of our original jurisdiction in this case. The majority's failure to embrace its duty (or even

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[7] United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1609 (2016) (Thomas, J., dissenting from the denial of certiorari).

[8] County of Maricopa, Arizona v. Lopez-Valenzuela, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from the denial of certiorari).

[9] See Justice Hagedorn's concurrence.

an impulse) to decide this case risks perpetuating violations of the law by those entrusted to follow it. I dissent.

I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice ANNETTE KINGSLAND ZIEGLER join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

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Exhibit 3

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You are hereby notified that the Court has entered the following order:

No. 2020AP1958-OA Mueller v. Jacobs

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70 has been filed on behalf of petitioner, Dean W. Mueller. A response has been filed by respondents, Ann S. Jacobs, in her official capacity as chair of the Wisconsin Elections Commission, et al. A motion to intervene has been filed by proposed intervenor-respondent, Democratic National Committee. The court having considered all of the filings,

IT IS ORDERED that the petition for leave to commence an original action is denied; and

IT IS FURTHER ORDERED that the motion to intervene is denied as moot.

PATIENCE DRAKE ROGGENSACK, C.J., ANNETTE KINGSLAND ZIEGLER, J., and REBECCA GRASSL BRADLEY, J. (*dissenting*). This court cannot continue to shirk its institutional responsibilities to the people of Wisconsin.

Sheila T. Reiff
Clerk of Supreme Court

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Exhibit 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KING, MARIAN ELLEN SHERIDAN, JOHN EARL HAGGARD, CHARLES JAMES RITCHARD, JAMES DAVID HOOPER, and DAREN WADE RUBINGH,

Plaintiffs,

v.

Civil Case No. 20-13134
Honorable Linda V. Parker

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, JOCELYN BENSON, in her official capacity as Michigan Secretary of State, and MICHIGAN BOARD OF STATE CANVASSERS,

Defendants,

and

CITY OF DETROIT, DEMOCRATIC NATIONAL COMMITTEE and MICHIGAN DEMOCRATIC PARTY, and ROBERT DAVIS,

Intervenor-Defendants.
_____/

OPINION AND ORDER DENYING PLAINTIFFS' "EMERGENCY MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF" (ECF NO. 7)

The right to vote is among the most sacred rights of our democracy and, in turn, uniquely defines us as Americans. The struggle to achieve the right to vote is

one that has been both hard fought and cherished throughout our country's history. Local, state, and federal elections give voice to this right through the ballot. And elections that count each vote celebrate and secure this cherished right.

These principles are the bedrock of American democracy and are widely revered as being woven into the fabric of this country. In Michigan, more than 5.5 million citizens exercised the franchise either in person or by absentee ballot during the 2020 General Election. Those votes were counted and, as of November 23, 2020, certified by the Michigan Board of State Canvassers (also "State Board"). The Governor has sent the slate of Presidential Electors to the Archivist of the United States to confirm the votes for the successful candidate.

Against this backdrop, Plaintiffs filed this lawsuit, bringing forth claims of widespread voter irregularities and fraud in the processing and tabulation of votes and absentee ballots. They seek relief that is stunning in its scope and breathtaking in its reach. If granted, the relief would disenfranchise the votes of the more than 5.5 million Michigan citizens who, with dignity, hope, and a promise of a voice, participated in the 2020 General Election. The Court declines to grant Plaintiffs this relief.

I. Background

In the weeks leading up to, and on, November 3, 2020, a record 5.5 million Michiganders voted in the presidential election ("2020 General Election"). (ECF

No. 36-4 at Pg ID 2622.) Many of those votes were cast by absentee ballot. This was due in part to the coronavirus pandemic and a ballot measure the Michigan voters passed in 2018 allowing for no-reason absentee voting. When the polls closed and the votes were counted, Former Vice President Joseph R. Biden, Jr. had secured over 150,000 more votes than President Donald J. Trump in Michigan. (*Id.*)

Michigan law required the Michigan State Board of Canvassers to canvass results of the 2020 General Election by November 23, 2020. Mich. Comp. Laws § 168.842. The State Board did so by a 3-0 vote, certifying the results "for the Electors of President and Vice President," among other offices. (ECF No. 36-5 at Pg ID 2624.) That same day, Governor Gretchen Whitmer signed the Certificates of Ascertainment for the slate of electors for Vice President Biden and Senator Kamala D. Harris. (ECF No. 36-6 at Pg ID 2627-29.) Those certificates were transmitted to and received by the Archivist of the United States. (*Id.*)

Federal law provides that if election results are contested in any state, and if the state, prior to election day, has enacted procedures to decide controversies or contests over electors and electoral votes, and if these procedures have been applied, and the decisions are made at least six days before the electors' meetings, then the decisions are considered conclusive and will apply in counting the electoral votes. 3 U.S.C. § 5. This date (the "Safe Harbor" deadline) falls on

December 8, 2020. Under the federal statutory timetable for presidential elections, the Electoral College must meet on "the first Monday after the second Wednesday in December," 3 U.S.C. § 7, which is December 14 this year.

Alleging widespread fraud in the distribution, collection, and counting of ballots in Michigan, as well as violations of state law as to certain election challengers and the manipulation of ballots through corrupt election machines and software, Plaintiffs filed the current lawsuit against Defendants at 11:48 p.m. on November 25, 2020—the eve of the Thanksgiving holiday. (ECF No. 1.) Plaintiffs are registered Michigan voters and nominees of the Republican Party to be Presidential Electors on behalf of the State of Michigan. (ECF No. 6 at Pg ID 882.) They are suing Governor Whitmer and Secretary of State Jocelyn Benson in their official capacities, as well as the Michigan Board of State Canvassers.

On November 29, a Sunday, Plaintiffs filed a First Amended Complaint (ECF No. 6), "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief and Memorandum in Support Thereof" (ECF No. 7), and Emergency Motion to Seal (ECF No. 8). In their First Amended Complaint, Plaintiffs allege three claims pursuant to 42 U.S.C. § 1983: (Count I) violation of the Elections and Electors Clauses; (Count II) violation of the Fourteenth Amendment Equal Protection Clause; and, (Count III) denial of the Fourteenth

Amendment Due Process Clause. (ECF No. 6.) Plaintiffs also assert one count alleging violations of the Michigan Election Code. (*Id*.)

By December 1, motions to intervene had been filed by the City of Detroit (ECF No. 15), Robert Davis (ECF No. 12), and the Democratic National Committee and Michigan Democratic Party ("DNC/MDP") (ECF No. 14). On that date, the Court entered a briefing schedule with respect to the motions. Plaintiffs had not yet served Defendants with their pleading or emergency motions as of December 1. Thus, on December 1, the Court also entered a text-only order to hasten Plaintiffs' actions to bring Defendants into the case and enable the Court to address Plaintiffs' pending motions. Later the same day, after Plaintiffs filed certificates of service reflecting service of the summons and Amended Complaint on Defendants (ECF Nos. 21), the Court entered a briefing schedule with respect to Plaintiffs' emergency motions, requiring response briefs by 8:00 p.m. on December 2, and reply briefs by 8:00 p.m. on December 3 (ECF No. 24).

On December 2, the Court granted the motions to intervene. (ECF No. 28.) Response and reply briefs with respect to Plaintiffs' emergency motions were thereafter filed. (ECF Nos. 29, 31, 32, 34, 35, 36, 37, 39, 49, 50.) Amicus curiae Michigan State Conference NAACP subsequently moved and was granted leave to file a brief in support of Defendants' position. (ECF Nos. 48, 55.) Supplemental briefs also were filed by the parties. (ECF Nos. 57, 58.)

In light of the limited time allotted for the Court to resolve Plaintiffs' emergency motion for injunctive relief—which Plaintiffs assert "must be granted in advance of December 8, 2020" (ECF No. 7 at Pg ID 1846)—the Court has disposed of oral argument with respect to their motion pursuant to Eastern District of Michigan Local Rule 7.1(f).[1]

II. Standard of Review

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted). The plaintiff bears the burden of demonstrating entitlement to preliminary injunctive relief. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Such relief will only be granted where "the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). "Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to

[1] "'[W]here material facts are not in dispute, or where facts in dispute are not material to the preliminary injunction sought, district courts generally need not hold an evidentiary hearing.'" *Nexus Gas Transmission, LLC v. City of Green, Ohio*, 757 Fed. Appx. 489, 496-97 (6th Cir. 2018) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007)) (citation omitted).

support or oppose a motion for a preliminary injunction." 11A Mary Kay Kane, Fed. Prac. & Proc. § 2949 (3d ed.).

Four factors are relevant in deciding whether to grant preliminary injunctive relief: "'(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.'" *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020) (quoting *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012)). "At the preliminary injunction stage, 'a plaintiff must show more than a mere possibility of success,' but need not 'prove his case in full.'" *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007)). Yet, "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion …." *Leary*, 228 F.3d at 739.

III. Discussion

The Court begins by discussing those questions that go to matters of subject matter jurisdiction or which counsel against reaching the merits of Plaintiffs' claims. While the Court finds that any of these issues, alone, indicate that Plaintiffs' motion should be denied, it addresses each to be thorough.

A. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This immunity extends to suits brought by citizens against their own states. *See, e.g., Ladd v. Marchbanks*, 971 F.3d 574, 578 (6th Cir. 2020) (citing *Hans v. Louisiana*, 134 U.S. 1, 18-19 (1890)). It also extends to suits against state agencies or departments, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (citations omitted), and "suit[s] against state officials when 'the state is the real, substantial party in interest[,]'" *id.* at 101 (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)).

A suit against a State, a state agency or its department, or a state official is in fact a suit against the State and is barred "regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 100-02 (citations omitted). "'The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.'" *Id*. at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)) (internal quotation marks omitted).

Eleventh Amendment immunity is subject to three exceptions: (1) congressional abrogation; (2) waiver by the State; and (3) "a suit against a state official seeking prospective injunctive relief to end a continuing violation of federal law." *See Carten v. Kent State Univ.*, 282 F.3d 391, 398 (6th Cir. 2002) (citations omitted). Congress did not abrogate the States' sovereign immunity when it enacted 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989). "The State of Michigan has not consented to being sued in civil rights actions in the federal courts." *Johnson v. Unknown Dellatifa*, 357 F.3d 539, 545 (6th Cir. 2004) (citing *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986)). The Eleventh Amendment therefore bars Plaintiffs' claims against the Michigan Board of State Canvassers. *See McLeod v. Kelly*, 7 N.W.2d 240, 242 (Mich. 1942) ("The board of State canvassers is a State agency …"); *see also Deleeuw v. State Bd. of Canvassers*, 688 N.W.2d 847, 850 (Mich. Ct. App. 2004). Plaintiffs' claims are barred against Governor Whitmer and Secretary Benson unless the third exception applies.

The third exception arises from the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908). But as the Supreme Court has advised:

> To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle … that Eleventh Amendment immunity represents a real

> limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997). Further, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 102. "'In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (quoting *Coeur d'Alene Tribe of Idaho*, 521 U.S. 296 (O'Connor, J., concurring)).

Ex parte Young does not apply, however, to *state law* claims against state officials, regardless of the relief sought. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 106 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."); *see also In re Ohio Execution Protocol Litig.*, 709 F. App'x 779, 787 (6th Cir. 2017) ("If the plaintiff sues a state official under state law

in federal court for actions taken within the scope of his authority, sovereign immunity bars the lawsuit regardless of whether the action seeks monetary or injunctive relief."). Unquestionably, Plaintiffs' state law claims against Defendants are barred by Eleventh Amendment immunity.

The Court then turns its attention to Plaintiffs' § 1983 claims against Defendants. Defendants and Intervenor DNC/MDP contend that these claims are not in fact federal claims as they are premised entirely on alleged violations of *state* law. (ECF No. 31 at Pg ID 2185 ("Here, each count of Plaintiffs' complaint—even Counts I, II, and III, which claim to raise violations of federal law—is predicated on the election being conducted contrary to Michigan law."); ECF No. 36 at Pg ID 2494 ("While some of [Plaintiffs'] allegations concern fantastical conspiracy theories that belong more appropriately in the fact-free outer reaches of the Internet[,] … what Plaintiffs assert at bottom are violations of the Michigan Election Code.") Defendants also argue that even if properly stated as federal causes of action, "it is far from clear whether Plaintiffs' requested injunction is actually prospective in nature, as opposed to retroactive." (ECF No. 31 at Pg ID 2186.)

The latter argument convinces this Court that *Ex parte Young* does not apply. As set forth earlier, "'[i]n order to fall with the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law.'"

Russell v. Lundergan-Grimes, 784 F.3d 1037, 1047 (6th Cir. 2015) (quoting *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013)). Unlike *Russell*, which Plaintiffs cite in their reply brief, this is not a case where a plaintiff is seeking to enjoin the continuing enforcement of a statute that is allegedly unconstitutional. *See id*. at 1044, 1047 (plaintiff claimed that Kentucky law creating a 300-foot no-political-speech buffer zone around polling location violated his free-speech rights). Instead, Plaintiffs are seeking to undo what has already occurred, as their requested relief reflects.[2] (*See* ECF No. 7 at Pg ID 1847; *see also* ECF No. 6 at Pg 955-56.)

Before this lawsuit was filed, the Michigan Board of State Canvassers had already certified the election results and Governor Whitmer had transmitted the State's slate of electors to the United States Archivist. (ECF Nos. 31-4, 31-5.) There is no continuing violation to enjoin. *See Rios v. Blackwell*, 433 F. Supp. 2d 848 (N.D. Ohio Feb. 7, 2006); *see also King Lincoln Bronzeville Neighborhood Ass'n v. Husted*, No. 2:06-cv-00745, 2012 WL 395030, at *4-5 (S.D. Ohio Feb. 7, 2012); *cf. League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 (6th Cir. 2008) (finding that the plaintiff's claims fell within the *Ex parte Young* doctrine

[2] To the extent Plaintiffs ask the Court to certify the results in favor of President Donald J. Trump, such relief is beyond its powers.

where it alleged that the problems that plagued the election "are chronic and will continue absent injunctive relief").

For these reasons, the Court concludes that the Eleventh Amendment bars Plaintiffs' claims against Defendants.

B. Mootness

This case represents well the phrase: "this ship has sailed." The time has passed to provide most of the relief Plaintiffs request in their Amended Complaint; the remaining relief is beyond the power of any court. For those reasons, this matter is moot.

"'Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.'" *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). A case may become moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 410 (1980) (internal quotation marks and citation omitted). Stated differently, a case is moot where the court lacks "the ability to give meaningful relief[.]" *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019). This lawsuit was moot well before it was filed on November 25.

In their prayer for relief, Plaintiffs ask the Court to: (a) order Defendants to decertify the results of the election; (b) enjoin Secretary Benson and Governor

Whitmer from transmitting the certified election results to the Electoral College; (c) order Defendants "to transmit certified election results that state that President Donald Trump is the winner of the election"; (d) impound all voting machines and software in Michigan for expert inspection; (e) order that no votes received or tabulated by machines not certified as required by federal and state law be counted; and, (f) enter a declaratory judgment that mail-in and absentee ballot fraud must be remedied with a manual recount or statistically valid sampling.[3] (ECF No. 6 at Pg ID 955-56, ¶ 233.) What relief the Court could grant Plaintiffs is no longer available.

Before this lawsuit was filed, all 83 counties in Michigan had finished canvassing their results for all elections and reported their results for state office races to the Secretary of State and the Michigan Board of State Canvassers in accordance with Michigan law. *See* Mich. Comp. Laws § 168.843. The State Board had certified the results of the 2020 General Election and Governor Whitmer had submitted the slate of Presidential Electors to the Archivists. (ECF

[3] Plaintiffs also seek an order requiring the impoundment of all voting machines and software in Michigan for expert inspection and the production of security camera footage from the TCF Center for November 3 and 4. (ECF No. 6 at Pg ID 956, ¶ 233.) This requested relief is not meaningful, however, where the remaining requests are no longer available. In other words, the evidence Plaintiffs seek to gather by inspecting voting machines and software and security camera footage only would be useful if an avenue remained open for them to challenge the election results.

No. 31-4 at Pg ID 2257-58; ECF No. 31-5 at Pg ID 2260-63.) The time for requesting a special election based on mechanical errors or malfunctions in voting machines had expired. *See* Mich. Comp. Laws §§ 168.831, 168.832 (petitions for special election based on a defect or mechanical malfunction must be filed "no later than 10 days after the date of the election"). And so had the time for requesting a recount for the office of President. *See* Mich. Comp. Laws § 168.879.

The Michigan Election Code sets forth detailed procedures for challenging an election, including deadlines for doing so. Plaintiffs did not avail themselves of the remedies established by the Michigan legislature. The deadline for them to do so has passed. Any avenue for this Court to provide meaningful relief has been foreclosed. As the Eleventh Circuit Court of Appeals recently observed in one of the many other post-election lawsuits brought to specifically overturn the results of the 2020 presidential election:

> "We cannot turn back the clock and create a world in which" the 2020 election results are not certified. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). And it is not possible for us to delay certification nor meaningful to order a new recount when the results are already final and certified.

Wood v. Raffensperger, -- F.3d -- , 2020 WL 7094866 (11th Cir. Dec. 5, 2020). And as one Justice of the Supreme Court of Pennsylvania advised in another 2020 post-election lawsuit: "there is no basis in law by which the courts may grant Petitioners' request to ignore the results of an election and recommit the choice to

the General Assembly to substitute its preferred slate of electors for the one chosen by a majority of Pennsylvania's voters." *Kelly v. Commonwealth*, No. 68 MAP 2020, 2020 WL 7018314, at *3 (Pa. Nov. 28, 2020) (Wecht, J., concurring); *see also Wood v. Raffensperger*, No. 1:20-cv-04651, 2020 WL 6817513, at *13 (N.D. Ga. Nov. 20, 2020) (concluding that "interfer[ing] with the result of an election that has already concluded would be unprecedented and harm the public in countless ways").

In short, Plaintiffs' requested relief concerning the 2020 General Election is moot.

C. Laches

Defendants argue that Plaintiffs are unlikely to succeed on the merits because they waited too long to knock on the Court's door. (ECF No. 31 at Pg ID 2175-79; ECF No. 39 at Pg ID 2844.) The Court agrees.

The doctrine of laches is rooted in the principle that "equity aids the vigilant, not those who slumber on their rights." *Lucking v. Schram*, 117 F.2d 160, 162 (6th Cir. 1941); *see also United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 9 (2008) ("A constitutional claim can become time-barred just as any other claim can."). An action may be barred by the doctrine of laches if: (1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant is prejudiced by this delay. *Brown-Graves Co. v. Central States, Se. and Sw. Areas Pension Fund*,

206 F.3d 680, 684 (6th Cir. 2000); *Ottawa Tribe of Oklahoma v. Logan*, 577 F.3d 634, 639 n.6 (6th Cir. 2009) ("Laches arises from an extended failure to exercise a right to the detriment of another party."). Courts apply laches in election cases. *Detroit Unity Fund v. Whitmer*, 819 F. App'x 421, 422 (6th Cir. 2020) (holding that the district court did not err in finding plaintiff's claims regarding deadline for local ballot initiatives "barred by laches, considering the unreasonable delay on the part of [p]laintiffs and the consequent prejudice to [d]efendants"). *Cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence. That is as true in election law cases as elsewhere.").

First, Plaintiffs showed no diligence in asserting the claims at bar. They filed the instant action on November 25—more than 21 days after the 2020 General Election—and served it on Defendants some five days later on December 1. (ECF Nos. 1, 21.) If Plaintiffs had legitimate claims regarding whether the treatment of election challengers complied with state law, they could have brought their claims well in advance of or on Election Day—but they did not. Michigan's 83 Boards of County Canvassers finished canvassing by no later than November 17 and, on November 23, both the Michigan Board of State Canvassers and Governor Whitmer certified the election results. Mich. Comp. Laws §§ 168.822, 168.842.0. If Plaintiffs had legitimate claims regarding the manner by which

ballots were processed and tabulated on or after Election Day, they could have brought the instant action on Election Day or during the weeks of canvassing that followed—yet they did not. Plaintiffs base the claims related to election machines and software on "expert and fact witness" reports discussing "glitches" and other alleged vulnerabilities that occurred as far back as 2010. (*See e.g.,* ECF No. 6 at Pg ID 927-933, ¶¶ 157(C)-(E), (G), 158, 160, 167.) If Plaintiffs had legitimate concerns about the election machines and software, they could have filed this lawsuit well before the 2020 General Election—yet they sat back and did nothing.

Plaintiffs proffer no persuasive explanation as to why they waited so long to file this suit. Plaintiffs concede that they "would have preferred to file sooner, but [] needed some time to gather statements from dozens of fact witnesses, retain and engage expert witnesses, and gather other data supporting their Complaint." (ECF No. 49 at Pg ID 3081.) But according to Plaintiffs themselves, "[m]anipulation of votes was apparent *shortly after the polls closed on November 3, 2020*." (ECF No. 7 at Pg ID 1837 (emphasis added).) Indeed, where there is no reasonable explanation, there can be no true justification. *See Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (identifying the "first and most essential" reason to issue a stay of an election-related injunction is plaintiff offering "no reasonable explanation for waiting so long to file this action"). Defendants satisfy the first element of their laches defense.

Second, Plaintiffs' delay prejudices Defendants. *See Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights.") This is especially so considering that Plaintiffs' claims for relief are not merely last-minute—they are after the fact. While Plaintiffs delayed, the ballots were cast; the votes were counted; and the results were certified. The rationale for interposing the doctrine of laches is now at its peak. *See McDonald v. Cnty. of San Diego*, 124 F. App'x 588 (9th Cir. 2005) (citing *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988)); *Soules*, 849 F.2d at 1180 (quoting *Hendon v. N.C. State Bd. Of Elections*, 710 F.2d 177, 182 (4th Cir. 1983)) (applying doctrine of laches in post-election lawsuit because doing otherwise would, "permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action").

Plaintiffs could have lodged their constitutional challenges much sooner than they did, and certainly not three weeks after Election Day and one week after certification of almost three million votes. The Court concludes that Plaintiffs' delay results in their claims being barred by laches.

D. Abstention

As outlined in several filings, when the present lawsuit was filed on November 25, 2020, there already were multiple lawsuits pending in Michigan state courts raising the same or similar claims alleged in Plaintiffs' Amended Complaint. (*See, e.g.*, ECF No. 31 at Pg ID 2193-98 (summarizing five state court lawsuits challenging President Trump's defeat in Michigan's November 3, 2020 General Election).) Defendants and the City of Detroit urge the Court to abstain from deciding Plaintiffs' claims in deference to those proceedings under various abstention doctrines. (*Id.* at Pg ID 2191-2203; ECF No. 39 at Pg ID 2840-44.) Defendants rely on the abstention doctrine outlined by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The City of Detroit relies on the abstention doctrines outlined in *Colorado River*, as well as those set forth in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500-01 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The City of Detroit maintains that abstention is particularly appropriate when resolving election disputes in light of the autonomy provided to state courts to initially settle such disputes.

The abstention doctrine identified in *Colorado River* permits a federal court to abstain from exercising jurisdiction over a matter in deference to parallel state-court proceedings. *Colorado River*, 424 U.S. at 813, 817. The exception is found

warranted "by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (quoting *Colorado River*, 424 U.S. at 817). The Sixth Circuit has identified two prerequisites for abstention under this doctrine. *Romine v. Compuserve Corp.*, 160 F.3d 337, 339-40 (6th Cir. 1998).

First, the court must determine that the concurrent state and federal actions are parallel. *Id*. at 339. Second, the court must consider the factors outlined by the Supreme Court in *Colorado River* and subsequent cases:

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; … (4) the order in which jurisdiction was obtained; … (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

Romine, 160 F.3d at 340-41 (internal citations omitted). "These factors, however, do not comprise a mechanical checklist. Rather, they require 'a careful balancing of the important factors as they apply in a give[n] case' depending on the particular facts at hand." *Id*. (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983)).

As summarized in Defendants' response brief and reflected in their exhibits (*see* ECF No. 31 at Pg ID 2193-97; *see also* ECF Nos. 31-7, 31-9, 31-11, 31-12,

31-14), the allegations and claims in the state court proceedings and the pending matter are, at the very least, substantially similar, *Romine*, 160 F.3d at 340 ("Exact parallelism is not required; it is enough if the two proceedings are substantially similar." (internal quotation marks and citation omitted)). A careful balancing of the factors set forth by the Supreme Court counsel in favor of deferring to the concurrent jurisdiction of the state courts.

The first and second factor weigh against abstention. *Id.* (indicating that the weight is against abstention where no property is at issue and neither forum is more or less convenient). While the Supreme Court has stated that "'the presence of federal law issues must always be a major consideration weighing against surrender of federal jurisdiction in deference to state proceedings[,]'" *id*. at 342 (quoting *Moses H. Cone*, 460 U.S. at 26), this "'factor has less significance where the federal courts' jurisdiction to enforce the statutory rights in question is concurrent with that of the state courts.'"[4] *Id*. (quoting *Moses H. Cone*, 460 U.S. at 25). Moreover, the Michigan Election Code seems to dominate even Plaintiffs' federal claims. Further, the remaining factors favor abstention.

"Piecemeal litigation occurs when different courts adjudicate the identical issue, thereby duplicating judicial effort and potentially rendering conflicting

[4] State courts have concurrent jurisdiction over § 1983 actions. *Felder v. Casey*, 487 U.S. 131, 139 (1988).

results." *Id.* at 341. The parallel proceedings are premised on similar factual allegations and many of the same federal and state claims. The state court proceedings were filed well before the present matter and at least three of those matters are far more advanced than this case. Lastly, as Congress conferred concurrent jurisdiction on state courts to adjudicate § 1983 claims, *Felder v. Casey*, 487 U.S. 131, 139 (1988), "[t]here can be no legitimate contention that the [Michigan] state courts are incapable of safeguarding [the rights protected under this statute]," *Romine*, 160 F.3d at 342.

For these reasons, abstention is appropriate under the *Colorado River* doctrine. The Court finds it unnecessary to decide whether abstention is appropriate under other doctrines.

E. Standing

Under Article III of the United States Constitution, federal courts can resolve only "cases" and "controversies." U.S. Const. art. III § 2. The case-or-controversy requirement is satisfied only where a plaintiff has standing to bring suit. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). Each plaintiff must demonstrate standing for each claim he seeks to press.[5]

[5] Plaintiffs assert a due process claim in their Amended Complaint and twice state in their motion for injunctive relief that Defendants violated their due process rights. (*See* ECF No. 7 at Pg ID 1840, 1844.) Plaintiffs do not pair either statement with anything the Court could construe as a developed argument. (*Id.*) The Court finds it unnecessary, therefore, to further discuss the due process claim.

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (citation omitted) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). To establish standing, a plaintiff must show that: (1) he has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992) (internal quotation marks and citations omitted).

1. Equal Protection Claim

Plaintiffs allege that Defendants engaged in "several schemes" to, among other things, "destroy," "discard," and "switch" votes for President Trump, thereby "devalu[ing] Republican votes" and "diluting" the influence of their individual votes. (ECF No. 49 at Pg ID 3079.) Plaintiffs contend that "the vote dilution resulting from this systemic and illegal conduct did not affect all Michigan voters equally; it had the intent and effect of inflating the number of votes for Democratic candidates and reducing the number of votes for President Trump and Republican candidates." (ECF No. 49 at Pg ID 3079.) Even assuming that Plaintiffs establish

McPherson v. Kelsey, 125 F.3d 989, 995 (6th Cir. 1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

injury-in-fact and causation under this theory,[6] their constitutional claim cannot stand because Plaintiffs fall flat when attempting to clear the hurdle of redressability.

Plaintiffs fail to establish that the alleged injury of vote-dilution can be redressed by a favorable decision from this Court. Plaintiffs ask this Court to de-certify the results of the 2020 General Election in Michigan. But an order de-certifying the votes of approximately 2.8 million people would not reverse the dilution of Plaintiffs' vote. To be sure, standing is not "dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill*, 138 S. Ct. at 1934 (citing *Cuno*, 547 U.S. at 353); *Cuno*, 547 U.S. at 353 ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Plaintiffs' alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others *their* right to vote. Accordingly, Plaintiffs have failed to show that their injury can be redressed by the relief they seek and thus possess no standing to pursue their equal protection claim.

[6] To be clear, the Court does not find that Plaintiffs satisfy the first two elements of the standing inquiry.

2. Elections Clause & Electors Clause Claims

The provision of the United States Constitution known as the Elections Clause states in part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]" U.S. Const. art. I, § 4, cl. 1. "The Elections Clause effectively gives state governments the 'default' authority to regulate the mechanics of federal elections, *Foster v. Love*, 522 U.S. 67, 69, 118 S. Ct. 464, 139 L.Ed.2d 369 (1997), with Congress retaining 'exclusive control' to 'make or alter' any state's regulations, *Colegrove v. Green*, 328 U.S. 549, 554, 66 S. Ct. 1198, 90 L.Ed. 1432 (1946)." *Bognet*, 2020 WL 6686120, *1. The "Electors Clause" of the Constitution states: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors …." U.S. Const. art. II, § 1, cl. 2.

Plaintiffs argue that, as "nominees of the Republican Party to be Presidential Electors on behalf of the State of Michigan, they have standing to allege violations of the Elections Clause and Electors Clause because "a vote for President Trump and Vice-President Pence in Michigan … is a vote for each Republican elector[], and … illegal conduct aimed at harming candidates for President similarly injures Presidential Electors." (ECF No. 7 at Pg ID 1837-38; ECF No. 49 at Pg ID 3076-78.)

But where, as here, the only injury Plaintiffs have alleged is that the Elections Clause has not been followed, the United States Supreme Court has made clear that "[the] injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance."[7] *Lance v. Coffman*, 549 U.S. 437, 442 (2007). Because Plaintiffs "assert no particularized stake in the litigation," Plaintiffs fail to establish injury-in-fact and thus standing to bring their Elections Clause and Electors Clause claims. *Id.*; *see also Johnson v. Bredesen*, 356 F. App'x 781, 784 (6th Cir. 2009) (citing *Lance*, 549 U.S. at 441-42) (affirming district court's conclusion that citizens did not allege injury-in-fact to support standing for claim that the state of Tennessee violated constitutional law).

[7] Although separate constitutional provisions, the Electors Clause and Elections Clause share "considerable similarity," *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839, (2015) (Roberts, C.J., dissenting), and Plaintiffs do not at all distinguish the two clauses in their motion for injunctive relief or reply brief (ECF No. 7; ECF No. 49 at Pg ID 3076-78). *See also Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *7 (3d Cir. Nov. 13, 2020) (applying same test for standing under both Elections Clause and Electors Clause); *Wood*, 2020 WL 6817513, at *1 (same); *Foster*, 522 U.S. at 69 (characterizing Electors Clause as Elections Clauses' "counterpart for the Executive Branch"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995) (noting that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause).

This is so because the Elections Clause grants rights to "the Legislature" of "each State." U.S. Const. art. I, § 4, cl. 1. The Supreme Court interprets the words "the Legislature," as used in that clause, to mean the lawmaking bodies of a state. *Ariz. State Legislature*, 135 S.Ct. at 2673. The Elections Clause, therefore, grants rights to state legislatures and to other entities to which a State may delegate lawmaking authority. *See id.* at 2668. Plaintiffs' Elections Clause claims thus belong, if to anyone, Michigan's state legislature. *Bognet v. Secy. Commonwealth of Pa.*, -- F.3d. --, 2020 WL 6686120, *7 (3d Cir. Nov. 13, 2020). Plaintiffs here are six presidential elector nominees; they are not a part of Michigan's lawmaking bodies nor do they have a relationship to them.

To support their contention that they have standing, Plaintiffs point to *Carson v. Simon*, 78 F.3d 1051 (8th Cir. 2020), a decision finding that electors had standing to bring challenges under the Electors Clause. (ECF No. 7 at Pg ID 1839 (citing *Carson*, 978 F.3d at 1057).) In that case, which was based on the specific content and contours of Minnesota state law, the Eighth Circuit Court of Appeals concluded that because "the plain text of Minnesota law treats prospective electors as candidates," it too would treat presidential elector nominees as candidates. *Carson*, 78 F.3d at 1057. This Court, however, is as unconvinced about the majority's holding in *Carson* as the dissent:

> I am not convinced the Electors have Article III standing to assert claims under the Electors Clause. Although

> Minnesota law at times refers to them as "candidates," *see, e.g.*, Minn. Stat. § 204B.03 (2020), the Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president. *Id*. § 208.04 subdiv. 1 ("[A] vote cast for the party candidates for president and vice president shall be deemed a vote for that party's electors."). They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals.

78 F.3d at 1063 (Kelly, J., dissenting).[8]

Plaintiffs contend that the Michigan Election Code and relevant Minnesota law are similar. (See ECF No. 49 at Pg ID 3076-78.) Even if the Court were to

[8] In addition, at least one Circuit Court, the Third Circuit Court of Appeals, has distinguished *Carson*'s holding, noting:

> Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots. . . . The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none.

Bognet, 2020 WL 6686120, at *8 n.6.

agree, it finds that Plaintiffs lack standing to sue under the Elections and Electors Clauses.

F. The Merits of the Request for Injunctive Relief

1. Likelihood of Success on the Merits

The Court may deny Plaintiffs' motion for injunctive relief for the reasons discussed above. Nevertheless, the Court will proceed to analyze the merits of their claims.

a. Violation of the Elections & Electors Clauses

Plaintiffs allege that Defendants violated the Elections Clause and Electors Clause by deviating from the requirements of the Michigan Election Code. (*See, e.g.,* ECF No. 6 at Pg ID 884-85, ¶¶ 36-40, 177-81, 937-38.) Even assuming Defendants did not follow the Michigan Election Code, Plaintiffs do not explain how or why such violations of state election procedures automatically amount to violations of the clauses. In other words, it appears that Plaintiffs' claims are in fact state law claims disguised as federal claims.

A review of Supreme Court cases interpreting these clauses supports this conclusion. In *Cook v. Gralike*, the Supreme Court struck down a Missouri law that required election officials to print warnings on the ballot next to the name of any congressional candidate who refused to support term limits after concluding that such a statute constituted a "'regulation' of congressional elections," as used in

the Elections Clause. 531 U.S. 510, 525-26 (2001) (quoting U.S. Const. art. I, § 4, cl. 1). In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court upheld an Arizona law that transferred redistricting power from the state legislature to an independent commission after concluding that "the Legislature," as used in the Elections Clause, includes any official body with authority to make laws for the state. 576 U.S. 787, 824 (2015). In each of these cases, federal courts measured enacted state election laws against the federal mandates established in the clauses—they did not measure *violations* of enacted state elections law against those federal mandates.

By asking the Court to find that they have made out claims under the clauses due to alleged violations of the Michigan Election Code, Plaintiffs ask the Court to find that any alleged deviation from state election law amounts to a modification of state election law and opens the door to federal review. Plaintiffs cite to no case—and this Court found none—supporting such an expansive approach.

b. Violation of the Equal Protection Clause

Most election laws will "impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). But "[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [to vote]." *Reynolds v. Sims*, 377 U.S. 533, 559 (1964) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964)). Voting rights can be impermissibly burdened "by a

debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id*. (quoting *Reynolds*, 377 U.S. at 555).

Plaintiffs attempt to establish an Equal Protection claim based on the theory that Defendants engaged in "several schemes" to, among other things, "destroy," "discard," and "switch" votes for President Trump, thereby "devalu[ing] Republican votes" and "diluting" the influence of their individual votes. (ECF No. 49 at Pg ID 3079.)

But, to be perfectly clear, Plaintiffs' equal protection claim is not supported by any allegation that Defendants' alleged schemes caused votes for President Trump to be changed to votes for Vice President Biden. For example, the closest Plaintiffs get to alleging that physical ballots were altered in such a way is the following statement in an election challenger's sworn affidavit: "I believe some of these workers were changing votes that had been cast for Donald Trump and other Republican candidates."[9] (ECF No. 6 at Pg ID 902 ¶ 91 (citing Aff. Articia

[9] Plaintiffs allege in several portions of the Amended Complaint that election officials improperly tallied, counted, or marked ballots. But some of these allegations equivocate with words such as "believe" and "may" and none of these allegations identify which presidential candidate the ballots were allegedly altered to favor. (*See, e.g.,* ECF No. 6 at Pg ID 902, ¶ 91 (citing Aff. Articia Bomer, ECF No. 6-3 at Pg ID 1008-10 ("I *believe* some of these ballots *may* not have been properly counted." (emphasis added))); Pg ID 902-03, ¶ 92 (citing Tyson Aff. ¶ 17) ("At least one challenger observed poll workers adding marks to a ballot where there was no mark for any candidate.").

Bomer, ECF No. 6-3 at Pg ID 1008-1010).) But of course, "[a] belief is not evidence" and falls far short of what is required to obtain any relief, much less the extraordinary relief Plaintiffs request. *United States v. O'Connor*, No. 96-2992, 1997 WL 413594, at *1 (7th Cir. 1997); *see Brown v. City of Franklin*, 430 F. App'x 382, 387 (6th Cir. 2011) ("Brown just submits his belief that Fox's 'protection' statement actually meant "protection from retaliation. . . . An unsubstantiated belief is not evidence of pretext."); *Booker v. City of St. Louis*, 309 F.3d 464, 467 (8th Cir. 2002) ("Booker's "belief" that he was singled out for testing is not evidence that he was.").[10] The closest Plaintiffs get to alleging that election machines and software changed votes for President Trump to Vice

[10] As stated by the Circuit Court for the District of Columbia Circuit:

> The statement is that the complainant believes and expects to prove some things. Now his belief and expectation may be in good faith; but it has been repeatedly held that suspicion is not proof; and it is equally true that belief and expectation to prove cannot be accepted as a substitute for fact. The complainant carefully refrains from stating that he has any information upon which to found his belief or to justify his expectation; and evidently he has no such information. But belief, without an allegation of fact either upon personal knowledge or upon information reasonably sufficient upon which to base the belief, cannot justify the extraordinary remedy of injunction.

Magruder v. Schley, 18 App. D.C. 288, 292, 1901 WL 19131, at *2 (D.C. Cir. 1901).

President Biden in Wayne County is an amalgamation of theories, conjecture, and speculation that such alterations were *possible*. (*See e.g.,* ECF No. 6 at ¶¶ 7-11, 17, 125, 129, 138-43, 147-48, 155-58, 160-63, 167, 171.) And Plaintiffs do not at all explain how the question of whether the treatment of election challengers complied with state law bears on the validity of votes, or otherwise establishes an equal protection claim.

With nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs' equal protection claim fails.[11] *See Wood*, 2020 WL 7094866 (quoting *Bognet*, 2020 WL 6686120, at *12) ("'[N]o single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'").

[11] "[T]he Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity. That is not how the Equal Protection Clause works." *Bognet*, 2020 WL 6686120, at *11.

2. Irreparable Harm & Harm to Others

Because "a finding that there is simply no likelihood of success on the merits is usually fatal[,]" *Gonzales v. Nat'l Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir. 2000) (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997), the Court will not discuss the remaining preliminary injunction factors extensively.

As discussed, Plaintiffs fail to show that a favorable decision from the Court would redress their alleged injury. Moreover, granting Plaintiffs' injunctive relief would greatly harm the public interest. As Defendants aptly describe, Plaintiffs' requested injunction would "upend the statutory process for election certification and the selection of Presidential Electors. Moreover, it w[ould] disenfranchise millions of Michigan voters in favor [of] the preferences of a handful of people who [are] disappointed with the official results." (ECF No. 31 at Pg ID 2227.)

In short, none of the remaining factors weigh in favor of granting Plaintiffs' request for an injunction.

IV. Conclusion

For these reasons, the Court finds that Plaintiffs are far from likely to succeed in this matter. In fact, this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic

process and their trust in our government. Plaintiffs ask this Court to ignore the orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do.

The People have spoken.

The Court, therefore, **DENIES** Plaintiffs' "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief" (ECF No. 7.)

IT IS SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: December 7, 2020

Exhibit 5

Wisconsin Elections Commission

212 East Washington Avenue | Third Floor | P.O. Box 7984 | Madison, WI 53707-7984
(608) 266-8005 | elections@wi.gov | elections.wi.gov

MEMORANDUM

TO: Wisconsin Municipal Clerks
City of Milwaukee Election Commission
Wisconsin County Clerks
Milwaukee County Election Commission

FROM: Meagan Wolfe
Administrator

DATE: March 29, 2020

SUBJECT: Guidance for Indefinitely Confined Electors

Due to the continuing spread of COVID-19, staff of the Wisconsin Elections Commission (WEC) has received numerous inquiries regarding the application of the indefinitely confined designation for absentee voters under Wisconsin Statutes. At its meeting of March 27, 2020, the Commission discussed this issue and adopted the following guidance related to the use of indefinitely confined status to assist local election officials working with absentee voters:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.

2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

This guidance is consistent with and supplements previous statements of the WEC related to absentee voters who may qualify as indefinitely confined or "permanent" absentee voters. For ease of reference, on March 24, 2020, the WEC posted the following guidance in one of its FAQ documents addressing issues related to conducting the Spring Election in the midst of the COVID-19 pandemic:

Indefinitely Confined Absentee Applications

WEC staff has received numerous questions from clerks about the increase in voters requesting absentee ballots as indefinitely confined. Wisconsin Statutes provide the option for a voter to self-certify whether they meet the definition of indefinitely confined. The statutory definition of "age, illness, infirmity or disability" does not require any voter to meet a threshold for qualification and indefinitely confined status need not be permanent. A voter with a broken leg or one recovering from surgery may be temporarily indefinitely confined and may use that status when voting during that period of time.

We understand the concern over the use of indefinitely confined status and do not condone abuse of that option as it is an invaluable accommodation for many voters in Wisconsin. During the current public health crisis, many voters of a certain age or in at-risk populations may meet that standard of indefinitely confined until the crisis abates. We have told clerks if they do not believe a voter understood the declaration they made when requesting an absentee ballot, they can contact the voter for confirmation of their status. They should do so using appropriate discretion as voters are still entitled to privacy concerning their medical and disability status. Any request for confirmation of indefinitely confined status should not be accusatory in nature.

There may be a need to do some review of the absentee voting rolls after this election to confirm voters who met the definition of indefinitely confined during the public health crisis would like to continue that status. WEC staff has already discussed this possibility and may be able to provide resources to assist clerks with these efforts.

This guidance is based upon applicable statutes. An elector who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period may by signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election. *Wis. Stat. § 6.86(2)(a)*. The absentee ballot request form asks voters to certify to their indefinitely confined status. Statutes do not establish the option to require proof or documentation from indefinitely confined voters. Clerks may tactfully verify with voters that the voter understood the indefinitely confined status designation when they submitted their request but they may not request or require proof.

An elector who qualifies as indefinitely confined "may, in lieu of providing proof of identification, submit with his or her absentee ballot a statement signed by the same individual who witnesses voting of the ballot 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.* Thus, indefinitely confined electors may satisfy the photo ID requirement by obtaining the signature of a witness on the absentee ballot certificate envelope.

Electors who are indefinitely confined due to age, physical illness, infirmity or disability, may be unable to obtain a current photo ID or make a copy to submit with their written absentee ballot request or upload an image of their photo ID with their electronic request through MyVote Wisconsin. If a clerk is contacted by an elector in such circumstances,

WEC recommends discussing the options and making the voter aware of the criteria for qualifying as an indefinitely confined elector.

If any elector is no longer indefinitely confined, they shall so notify the municipal clerk. *Wis. Stat. 6.86(2)(a).* An elector also loses indefinitely confined status if they do not vote in a Spring or General Election and do not respond to a mailing from the municipal clerk asking whether they wish to continue automatically receiving absentee ballots. *Wis. Stat. 6.86(2)(b).* Finally, the municipal clerk shall remove the name of any elector from the list of indefinitely confined electors upon receipt of reliable information that an elector no longer qualifies for that designation and service. The clerk shall notify the elector of such action not taken at the elector's request within 5 days, if possible. *Wis. Stat. § 6.86(2)(b).*

If you have questions regarding this communication, please contact the Help Desk at 608-261-2028 or elections@wi.gov.

Exhibit 6

OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

March 31, 2020

To:

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Misha Tseytlin
Kevin M. LeRoy
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1 N. Wacker Dr., Ste. 2905
Chicago, IL 60606

You are hereby notified that the Court has entered the following order:

2020AP557-OA Jefferson v. Dane County

On March 27, 2020, petitioners, Mark Jefferson and the Republican Party of Wisconsin, filed a petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a supporting legal memorandum, and a motion for temporary injunctive relief. On that same date, the court ordered the named respondents, Dane County and Scott McDonell, in his official capacity as Dane County Clerk, to file a response to the original action petition and the motion for temporary injunctive relief by 1:00 on March 30, 2020. The court has reviewed the filings of the parties and now addresses the motion for temporary injunctive relief.

When we have considered whether to grant temporary injunctive relief, we have required a movant to show (1) a reasonable probability of success on the merits; (2) a lack of an adequate remedy at law; (3) that the movant will suffer irreparable harm in the absence of an injunction; and (4) that a balancing of the equities favors issuing the injunction. See, e.g., Pure Milk Products Coop. v. National Farmers Org., 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). The decision whether to grant an injunction is a discretionary one, although injunctions are not to be issued lightly. Werner, 80 Wis. 2d at 520.

The temporary injunction the petitioners seek would order respondent, Scott McDonell, the Dane County Clerk, to remove a March 25, 2020 Facebook post in which he indicated, inter alia, that all Dane County voters could declare themselves to be "indefinitely confined" under Wis. Stat. § 6.86(2) due to illness solely because of the Wisconsin Department of Health Services Emergency Order #12 (the Safer at Home Order) and difficulties in presenting or uploading a valid proof of identification, thereby avoiding the legal requirement to present or upload a copy of the voter's proof of identification when requesting an absentee ballot.[1] The petitioners further ask this court to order respondent McDonell and respondent Dane County to issue new statements setting forth the statutory interpretation proposed by the petitioners.

Although respondents do not represent that McDonell's original March 25, 2020 post has been removed, they argue that McDonell's later posting renders the petitioners' motion moot because McDonell has now posted the Wisconsin Elections Commission's (WEC) guidance on his Facebook page. They also argue that the petitioners' petition and motion for temporary relief cannot go forward in this court because they have not exhausted their administrative remedies by first filing a complaint with the WEC under Wis. Stat. § 5.06(1) and (2).

McDonell's March 25, 2020, advice was legally incorrect. In addition, McDonell's subsequent Facebook posting does not preclude McDonell's future posting of the same erroneous advice. Furthermore, his erroneous March 25, 2020 Facebook posting continues distribution on the internet.

Accordingly, we conclude that clarification of the purpose and proper use of the indefinitely confined status pursuant to Wis. Stat. § 6.86(2) as well as a temporary injunction are warranted.

In regard to clarification, the WEC has met and has issued guidance on the proper use of indefinitely confined status under Wis. Stat. § 6.86(2) in its March 29, 2020 publication, "Guidance for Indefinitely Confined Electors COVID-19." The WEC guidance states as follows:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.

2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness or infirmity, or disability.

We conclude that the WEC's guidance quoted above provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time.

We further determine that the petitioners have demonstrated a reasonable probability of success on the merits, at least with respect to certain statements in McDonell's March 25th

[1] Petitioners note that the Milwaukee County Clerk issued nearly identical advice.

Facebook post. Voters may be misled to exercise their right to vote in ways that are inconsistent with Wis. Stat. § 6.86(2). Namely, McDonell appeared to assert that all voters are automatically, indefinitely confined solely due to the emergency and the Safer at Home Order and that voters could therefore declare themselves to be indefinitely confined when requesting an absentee ballot, which would allow them to skip the step of presenting or uploading a valid proof of identification. Indeed, we do not see how the respondents could prevail with an argument that such statements in the March 25th post constitute an accurate statement of the relevant statutory provisions.

NOW THEREFORE, IT IS ORDERED that the petitioners' motion for temporary injunctive relief is granted and we order McDonell to refrain from posting advice as the County Clerk for Dane County inconsistent with the above quote from the WEC guidance.

DANIEL KELLY, J., did not participate.

Sheila T. Reiff
Clerk of Supreme Court

Exhibit 7

WISCONSIN ELECTIONS COMMISSION

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MADISON, WI 53707-7984
(608) 261-2028
ELECTIONS@WI.GOV
ELECTIONS.WI.GOV

ADMINISTRATOR MICHAEL HAAS

MEMORANDUM

DATE: October 18, 2016

TO: Wisconsin Municipal Clerks and the Milwaukee City Elections Commission
Wisconsin County Clerks and the Milwaukee County Elections Commission

FROM: Michael Haas, Interim Elections Administrator
Diane Lowe, Lead Elections Specialist

SUBJECT: **AMENDED:** Missing or Insufficient Witness Address on Absentee Certificate Envelopes

PLEASE NOTE: The previous guidance on this topic, which was issued on October 4, 2016, has been modified by the WEC and is replaced with the guidance below.

One of the components of 2015 Wisconsin Act 261 is the requirement for an absentee ballot witness to provide their address when signing the absentee certificate envelope.

> **SECTION 78.** 6.87 (6d) of the statutes is created to read:
> 6.87 **(6d)** If a certificate is missing the address of a witness, the ballot may not be counted.

In implementing this requirement, the first question that comes to mind is "What constitutes an address?" The Wisconsin Elections Commission (WEC) has set a policy that a complete address contains a *street number, street name and name of municipality*. But in many cases, at least one component of the address could be missing; usually the municipality.

The purpose of this memorandum is to offer guidance to assist you in addressing this issue. The WEC has determined that clerks **must** take corrective actions in an attempt to remedy a witness address error. If clerks are reasonably able to discern any missing information from outside sources, clerks are not required to contact the voter before making that correction directly to the absentee certificate envelope.

Clerks may contact voters and notify them of the address omission and the effect if the deficiency is not remedied but contacting the voter is only required if clerks cannot remedy the address insufficiency from extrinsic sources. When contacting a voter, you should advise that their ballot will not be counted with an incomplete address so that they can take action and also prevent a similar issue in the future. Clerks shall offer suggestions for correcting the certificate envelope to ensure the voter's absentee ballot will not be rejected.

Clerks shall assist in rehabilitating an absentee certificate that does not contain the street number and street name (or P.O. Box) and the municipality of the witness address. If a clerk adds information to an absentee certificate, either based on contact with the voter or based on other sources, clerks shall indicate such assistance was provided by initialing next to the information that was added on the absentee certificate. The Commission recognized the concern some clerks have expressed about altering information on the certificate envelope, especially in the case of a recount. On balance, in order to promote uniformity in the treatment of absentee ballots statewide, the Commission determined that clerks must attempt to obtain any information that is missing from the witness address and document any addition by including their initials.

In short, the Commission's guidance is that municipal clerks shall do all that they can reasonably do to obtain any missing part of the witness address. Those steps may include one or more of the following options:

1. The clerk is able to reasonably discern the missing address or address component by information appearing on the envelope or from some other source, such as:
   - The voter has provided his or her complete address and the clerk has personal knowledge that the witness resides at the same address as the voter.
   - The clerk has personal knowledge of the witness and knows his/or her address.
   - The voter's complete address appears on the address label, and the witness indicates the same street address as the voter.
   - The clerk is able to utilize lists or databases at his or her disposal to determine the witness's address.

2. The voter or witness may wish to appear in person to add the missing information, or provide the address information by phone, fax, email or mail. The voter may provide the address separately as an alternative to returning the certificate envelope and having the voter mail it back again as outlined below.

3. The voter may request that the clerk return the certificate envelope so the voter can personally add the witness address.
   - Be sure to include a self-addressed stamped envelope in which the voter may return the certificate envelope containing the ballot. The post office does not approve of placing another stamp over a cancelled stamp. Contact your postmaster or a Mail Piece Design Analyst before attempting to re-stamp or re-meter the certificate envelope. Also, note that the U.S. Postal Service is advising that voters mail absentee ballots at least one week before Election Day to accommodate new delivery standards. We suggest advising the voter of the importance of timely mailing if the voter wishes to have the certificate envelope mailed back to them.

4. The voter may wish to spoil the original ballot and vote a new one.

   If the request to spoil the ballot is within the proper time frame, the clerk mails a second ballot and new certificate envelope to the voter. (See procedure for *Spoiling and Replacement Ballots*, beginning on page 109 of Election Administration Manual.)

I hope this guidance is helpful as you continue to issue and receive absentee ballots. Thank you for your efforts to assist voters in completing the absentee certificate sufficiently so their votes may be counted.

If you have questions, please contact the Elections Help Desk at 608-261-2028 or elections@wi.gov.

Exhibit 8

Election Administration Manual

for

Wisconsin Municipal Clerks

Wisconsin Elections Commission

September 2020

i. The clerk is not required to provide postage on certificate envelopes that will be returned from outside of the United States.

g. For military and overseas voters, use the postage paid envelopes; EL-120m mailer envelope and the EL-122m certificate envelope.

6. Mail the Absentee Carrier Envelope to the mailing address provided by the absentee elector within one business day of receiving the request. Wis. Stat. § 7.15(1)(cm).

7. The clerk maintains the Absentee Ballot Log (EL-124).

   a. The Absentee Ballot Log (EL-124) is used to track the events that occur during the absentee ballot process (e.g. application received, ballot issued, ballot canceled, 2nd ballot issued, ballot received, ballot counted, etc.)

   b. The Absentee Ballot Log (EL-124) enables the clerk to track any problems with the absentee certificate envelope (missing certificate, voter signature, witness signature and address, or two SVD signatures) and communicate this information to the election inspectors so they can reject the ballot if the error is not corrected by 8:00 p.m. on Election Day.

   c. Municipal clerks who maintain their own WisVote data may also track absentee ballots and print ballot labels in WisVote.

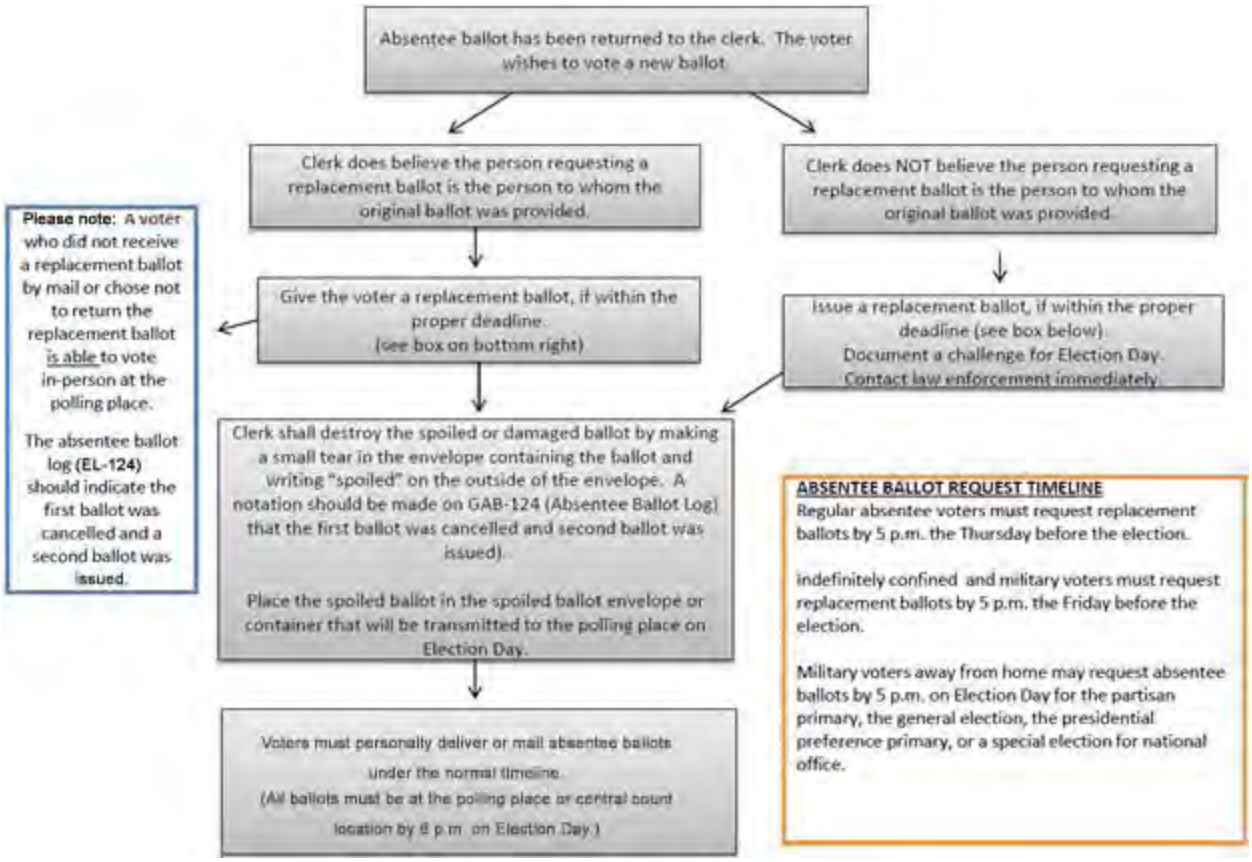
   d. The Absentee Ballot Log (EL-124) is sent to the polling place with the absentee ballots on Election Day.

8. An absentee ballot is marked by an absent voter, and sealed in an Absentee Ballot Certificate Envelope (EL-122). The Absentee Ballot Certificate Envelope (EL-122) is then completed and signed by the absentee voter, witnessed by an adult U.S. Citizen, and mailed or delivered in person to the municipal clerk. Wis. Stat. § 6.87(4)(b). Note: The witness for absentee ballots completed by Military, Permanent and Temporary Overseas voters, must be an adult, but does not have to be a U.S. Citizen.

   a. The witness must include their address.

b. Clerks may add a missing witness address using whatever means are available. Clerks should initial next to the added witness address.

Correcting Defective Absentee Certificate Envelopes



1. The municipal clerk reviews each absentee certificate envelope when it is returned to the clerk's office for any errors (e.g. missing certificate, voter signature, witness signature and address, or two SVD signatures).

2. If there is an error, the clerk should contact the voter, if possible. Wis. Stat. § 6.87(9).

    a. The voter has the option to correct the absentee certificate envelope in the clerk's office, by mail, or at the polling place/central count location on Election Day.

        i. If the voter wants the original ballot mailed back to them, the clerk shall enclose the original ballot in its unopened certificate

Exhibit 9

Wisconsin Elections Commission

State of Wisconsin

212 E. Washington Ave., Third Floor ▪ Madison, WI 53703 ▪ elections@wi.gov ▪ (608) 266-8005 ▪ http://elections.wi.gov

FOR IMMEDIATE RELEASE:
November 10, 2020

FOR MORE INFORMATION, CONTACT:
Reid.Magney@wi.gov or 608-267-7887

Correcting Misinformation about Wisconsin's Election

MADISON, WI – In the week after the presidential election, misinformation has circulated on social media and political websites raising unfounded rumors about the integrity of Wisconsin's election results.

"Wisconsin's election was conducted according to law and in the open," said Meagan Wolfe, Wisconsin's chief election official. "While the results are still unofficial and are currently being triple checked as part of the canvass and certification process, we have not seen any credible information to cast any doubt on those unofficial results."

Wolfe further stated, "When issues are reported to our office, we take them very seriously. We look into each allegation and request evidence from parties involved. At this time, no evidence has been provided that supports allegations of systemic or widespread election issues."

"Unfortunately, we are seeing many concerns that result from this unsubstantiated misinformation. We want Wisconsin's voters to know we hear their concerns and to provide facts on these processes to combat the rumors and misinformation," Wolfe said.

Every step of the election process is publicly observable and transparent, Wolfe said. This includes voting at the polls on Election Day and the counting of absentee ballots. It also includes the canvass and certification of the tally that is happening right now in counties across the state. Every ballot cast in Wisconsin has a paper audit trail. Voting equipment is randomly selected for audit after the presidential election and the paper trail is audited against the electronic vote totals; this process is conducted as part of a public meeting. If there is a recount, these materials will again be analyzed, as they were in 2016.

"Election results in Wisconsin are triple-checked for accuracy before they are certified," Wolfe said. "Your municipal and county clerks, and the staff of the Wisconsin Elections Commission are looking at everything to ensure the will of the voters is carried out and to affirm that only valid ballots were cast and counted."

In response to the misinformation, the WEC today released a list of the top facts about Wisconsin elections. This list is in addition to last week's news release which addressed rumors like Wisconsin having more votes than registrations and ballots being added to the unofficial totals on the morning of November 4, that release can be found here: https://elections.wi.gov/node/7235.

1. Wisconsin voters can trust their vote was counted.

"Many voters are visiting our MyVote Wisconsin website to check their records," said Wolfe. "As allowed by state law, it can take 45 days after a presidential election for local clerks to record everyone's paper registrations and voter participation into the electronic statewide voter database. If you do not see your participation or registration recorded right away, don't worry it takes time to get all of the data entered into the system.

A message on the MyVote.wi.gov website informs voters how long it can take to enter participation. Wolfe said the MyVote website absentee ballot tracking feature will continue to show voters whether their absentee ballot arrived.

Wolfe noted that in the last three presidential elections, Wisconsin had among the lowest rates of mail ballot rejections and other problems in the nation, according to the Elections Performance Index, a state-by-state data monitoring project maintained by the Massachusetts Institute of Technology.

However, voters should note that their record will never contain information on how you voted. State and federal law protect voter anonymity. Once you cast your ballot, who you voted for can not be tracked back to you. Your paper ballot is always anonymous, and it cannot be tied to your voter participation record.

2. Minor news media errors in reporting Wisconsin's unofficial results do not affect the outcome of the election.

"Several people have contacted us about discrepancies they may have seen in unofficial results on media websites or TV broadcasts on Election Night," Wolfe said. "They believe that these reporting errors are evidence that vote totals were somehow changed or flipped. Nothing could be farther from the truth."

Wolfe explained that Wisconsin does not have a statewide system for reporting unofficial results on Election Night, and there is no central official website or feed where results are reported. State law requires that counties post the unofficial election night numbers for each polling place. The unofficial statewide and county results numbers that the public sees on Election Night and the days thereafter come from the news media, including the Associated Press, which collects them from the 72 county clerks' websites.

One false rumor circulating now is that results were flipped in Rock County on Election Night, based on screenshots from FOXNews.com. According to the Associated Press, there was an error that occurred in the way they gathered results from Rock County's website which caused AP to transpose results for Joe Biden and Donald Trump. An AP correspondent noticed the error within a few minutes and corrected it, according to a statement from the newswire:

Patrick Maks, media relations manager for The Associated Press said, "There was a brief technical error in AP's collection of the vote count in Rock County, Wisconsin, that was quickly

corrected. AP has myriad checks and redundancies in place to ensure the integrity of the vote count reporting. We are confident in what we have delivered to customers."

https://www.politifact.com/factchecks/2020/nov/10/eric-trump/no-rock-county-did-not-have-glitch-stole-votes-tru/

The AP's error in no way reflects any problem with how Rock County counted or posted unofficial results. The WEC has confirmed with Rock County that their unofficial results reporting was always accurate.

There have been similar false claims about numbers on a CNN broadcast around 4 a.m. Wednesday when the city of Milwaukee's absentee ballot results were added to ballots cast at the polls on Election Day.

"Voters should be extremely cautious about drawing any conclusions based on changes in numbers during Election Night reporting," Wolfe said. "The news media is doing its best to report accurate results, but sometimes they make minor mistakes. These errors have nothing to do with Wisconsin's official results, which are triple checked at the municipal, county and state levels before they are certified."

3. Absentee ballots were counted properly, regardless of when the results were reported.

There are 39 municipalities which count their voters' absentee ballots at a central location. Because several municipalities could not finish processing their absentee ballots by the time the polls closed at 8 p.m. on Election Day, there was a delay in reporting those results to county clerks. This was especially true in major cities including Milwaukee, Green Bay and Kenosha, where final unofficial results were reported after 3 a.m. Wednesday.

"Due to the pandemic and the high number of absentee ballots, it took until early Wednesday for all the unofficial results to come in," said Wolfe. "It does not mean something went wrong – it means election officials did their jobs and made sure every valid ballot was counted."

In Wisconsin, voters must be registered before they can request an absentee ballot. Voters then need to submit a valid request for an absentee to their municipal clerk who sends the ballot and tracks it in the statewide database and using USPS intelligent mail barcodes. When a voted ballot is received by your clerk, it has to be recorded that it was received. On Election Day and night, only ballots issued to registered voters, with a valid request on file, and with completed certificates signed by the voter and their witness, are counted. If any of these elements are missing, the ballot is rejected and is not counted.

Some central count municipalities, including Milwaukee and Green Bay, took extra steps to provide the public and the media with live webcams of the absentee tabulation, and the physical locations were all open to the public and the media. Representatives of both major political parties were present, as well as independent poll watchers.

"Despite this transparency, we have seen unfounded allegations that clerks and poll workers stopped counting, that they mysteriously found absentee ballots in the middle of the night, or that all the votes on absentee ballots were only for one candidate," Wolfe said. "It's just not true."

The Wisconsin Elections Commission anticipated there would be misinformation about late absentee ballot reports in central count municipalities. To proactively provide insight into the process of counting and reporting absentee ballot totals, the WEC put out news releases in advance of the election and even produced a video about how results get reported. https://elections.wi.gov/2020

4. The pens or markers used by some voters did not prevent their ballots from being counted.

Wolfe said that voters have contacted the WEC because of posts they saw on social media about the use of felt tip pens or "sharpies" on ballots. "Voters do not need to worry, their ballots were counted," Wolfe said. "Voting equipment in Wisconsin is tested at both the local, state, and federal level for all kinds of pens and other marking devices. While we recommend that voters use the pen or marking device provided at their polling place or as instructed in their absentee ballot, the use of a felt-tip pen doesn't invalidate a ballot."

5. Wisconsin ballots do not have any special encoding with invisible watermarks or blockchain codes.

One of the stranger claims after the election was that legitimate ballots had been specially encoded by one of the political parties so any illegitimate ballots could be rejected.

Wisconsin county clerks are responsible for printing ballots which are distributed to municipal clerks, Wolfe said. "The secrecy of your ballot is safe," Wolfe said. "Clerks do not print any watermarks or codes on them that would identify any voter or political party." Ballot anonymity is a requirement of the law, and what candidate a voter chose is not a part of their record. The state of Wisconsin also does not track party affiliation. Local election officials do not know voter's party preference when issuing ballots.

6. Clerks and poll workers followed state law in curing absentee ballot certificates that were missing address information.

Another unfounded claim is that just before the election the WEC illegally told clerks they could add witness addresses to absentee ballot certificate envelopes. Here are the facts:

- The Wisconsin Elections Commission's guidance permitting municipal clerks to fix missing witness address components based on reliable information has been in effect since October 2016. There was no new guidance or change to this requirement.
- Voter and witness signatures can only be added by the voter and the original witness. Signatures can never be added by poll workers (unless they were the original witness during in-person absentee).

- The motion to approve the guidance was made by Republican members of the Commission in 2016 and it passed unanimously.
- The guidance has been in effect for 11 statewide elections, including the 2016 presidential and presidential recount, and no one has objected to it until now.
- Guidance to clerks that was posted on October 19, 2020, simply restates this earlier guidance.
- The law says that a witness address needs to be present for the certificate to be accepted and the ballot to be counted, it does not specify who affixes the address (for example, voter address is added by the clerk on the certificate envelope). If an absentee certificate does not contain a witness address (i.e. the witness forgot or the clerk cannot add it based on reliable information) then the ballot cannot be counted.
- There were no corrections made to "ballots" as some articles and posts claim. These were witness addresses added to the certificate, in accordance with the 2016 directive. They are also distinguishable (initials, red pen, etc.) and done as part of the publicly observable process.

7. The WEC followed the law and court orders about the ERIC Movers list.

There have been unfounded allegations that the WEC violated the law by not removing approximately 232,000 voters from the registration list because they may have moved.

The Wisconsin Court of Appeals ruled in February 2020 that WEC could not remove voters from the registration list. The court case, *Zignego v. Wisconsin Elections Commission,* was argued before the Wisconsin Supreme Court in September and no decision has been issued yet. The WEC will follow the Supreme Court's decision once it is issued.

The current process requires anyone who may have moved to affirm their address when receiving a ballot. These voters have a watermark next to their name in the poll book and are asked to sign to affirm that they still live there. If any voter has moved, they are directed to register to vote before they can be issued a ballot.

###

The Wisconsin Elections Commission is responsible for administration and enforcement of election laws in Wisconsin. The Commission is made up of six Commissioners – four appointed directly by the State Senate Majority Leader, Speaker of the Assembly and the Minority Leaders in the State Senate and Assembly. The remaining two Commissioners are by the Governor with confirmation by the State Senate from lists of former municipal and county clerks submitted by the legislative leadership in each party.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

DEFENDANTS WISCONSIN ELECTIONS COMMISSION AND ITS MEMBERS' SUBMISSION OF UNREPORTED AUTHORITY PURSUANT TO CIVIL L.R. 7(J)

Defendants Wisconsin Elections Commission, Ann S. Jacob, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, and Robert F. Spindell, Jr., by their attorneys, and pursuant to Civil L. R. 7(j), hereby submit the following attached unreported authority cited in both *Defendant Commission and Commissioner's Response Opposing Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction* and *Defendants Wisconsin Elections Commission and Its Members' Brief in Support of Motion*

to Dismiss, both of which are filed herewith. The unreported authority cited in both briefs is the same and consists of the following cases:

1. *Martel v. Condos*, -- F. Supp. 3d. --, 2020 WL 5755289 (D. Vt. 2020);

2. *Moore v. Circosta*, -- F. Supp. 3d --, 2020 WL 6063332 (M.D.N.C. 2020);

3. *Donald J. Trump for Pres., Inc. v. Cegavske*, -- F. Supp. 3d --, 2020 WL 5626974 (D. Nev. 2020);

4. *Bognet v. Sec'y Commonwealth of Pennsylvania*, -- F.3d --, 2020 WL 6686120 (3d. Cir. Nov. 13, 2020);

5. *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-CV-966, 2020 WL 5997680 (W.D. Pa. Oct. 10, 2020);

6. *Donald J. Trump for President, Inc. v. Pennsylvania*, No. 20-3371, 2020 WL 7012522 (3d Cir. Nov. 27, 2020).

7. *Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866 (11th Cir. Dec. 5, 2020)

8. *King v. Whitmer,* No. 20-13134 (E.D. Mi. Dec. 7, 2020)

Dated this 7th day of December, 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ S. Michael Murphy
S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

JODY J. SCHMELZER
Assistant Attorney General
State Bar #1027796

COLIN T. ROTH
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2020 WL 5755289
Only the Westlaw citation is currently available.
United States District Court, D. Vermont.

Tracey MARTEL, Robert Frenier, Brian Smith, Raoul Beaulieu, and Mary Beausoleil, Plaintiffs,

v.

James C. CONDOS, in his official capacity as the Secretary of State of Vermont, Defendant.

Case No. 5:20-cv-131
|
Signed 09/16/2020

Synopsis

Background: Five registered voters brought action to challenge Secretary of State directive that an election ballot be mailed to every active voter on the statewide voter checklist, alleging that the directive was unconstitutional, ultra vires, and contrary to law and seeking an injunction rescinding the directive and preventing Secretary of State from issuing mail-in ballots. Voter filed motion for preliminary injunction, and Secretary of State filed motion to dismiss.

The District Court, Geoffrey W. Crawford, Chief Judge, held that voters lacked concrete and particularized injury in fact necessary for standing.

Motion for injunction denied, case dismissed.

Attorneys and Law Firms

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David R. Groff, Esq., Philip A. Back, Esq., Office of the Vermont Attorney General, Montpelier, VT, for Defendant.

ORDER ON MOTION FOR PRELIMINARY INJUNCTION AND ON MOTION TO DISMISS

Geoffrey W. Crawford, Chief Judge

***1** In the spring of 2020, faced with the crisis resulting from the spread of COVID-19 infection, the Vermont legislature passed two bills that changed Vermont election law for the 2020 primary and general elections. *See* 2020 Vt. Acts & Resolves Nos. 92 and 135 (Act 92 and Act 135, respectively). These became law in July 2020 after the governor declined to sign or veto the measures. *See* Letter from Philip B. Scott, Governor, to the Vt. Gen. Assembly (July 2, 2020), https://governor.vermont.gov/sites/scott/files/documents/Vermont% 20General% 20Assembly% 20Letter % 20re% 20S.348.pdf. Vermont Secretary of State James C. Condos issued a Directive on July 20, 2020 exercising the authority conferred upon him by the two Acts. (Doc. 1-1.) The Directive includes, among other things, a provision stating that, for the November general election, "[a] ballot will be mailed to every active voter on the statewide voter checklist." (Doc. 1-1 at 4.)

The above-captioned plaintiffs have filed a complaint against Secretary Condos seeking a declaration that the Directive is unconstitutional, *ultra vires*, and contrary to law. (Doc. 1 at 25.) They also seek an injunction rescinding the Directive and preventing Secretary Condos from distributing mail-in ballots as contemplated by the Directive. (*Id.*) Currently pending is Plaintiffs' Motion for a Preliminary Injunction (Doc. 2) and Defendant's Motion to Dismiss (Doc. 10). The court held a hearing on the motions on September 15, 2020.

Background

The provisions in Acts 92 and 135 principally at issue in this case concern the legislature's decision to authorize the Secretary of State to require local election officials to send ballots by mail to all registered voters. Act 92 states, in pertinent part:

> In the year 2020, the Secretary of State is authorized, in consultation and agreement with the Governor, to order or permit, as applicable appropriate elections procedures for the purpose of protecting the health, safety and welfare of voters, elections workers, and candidates in carrying out elections including:

> (1) requiring mail balloting by requiring town clerks to send ballots by mail to all registered voters ....

Act 92, § 3(a). Act 135 amended Act No. 92. It removed the requirement of "agreement" with the Governor. Act 135, § 1. It also added a new subsection (c):

> If the Secretary of State orders or permits the mailing of 2020 General Election ballots to all registered voters pursuant to subsection (a) of this section, the Secretary shall:
>
> (1) inform the Governor as soon as reasonably practicable following the Secretary's decision to do so; and
>
> (2) require the return of those ballots to be in the manner prescribed by 17 V.S.A. § 2543 (return of ballots) as set forth in Sec. la of this act, the provisions of which shall apply to that return.

Id.[1] Other changes in election practices authorized by the Acts include provisions for collecting and counting mail-in ballots early, permitting drive-up, car window collection of ballots, and extending both voting hours and the time to process and count ballots. Act 92, § 3(a)(1–6); Act 135 § 1 (a)(1–6).

[1] Paragraph (2) of subsection (c) contains a mistake. Section 2543 of Title 17 sets out procedures for returning early ballots to local election officials. Sec. 1a appeared in prior versions of Act No. 135. It contained procedures restricting so-called "ballot harvesting" by third party organizations. Section la was dropped from the final version of Act 135 and never enacted. The reference to it is a legislative drafting mistake which was noted in the Governor's July 2, 2020 letter as a technical error. It refers to a proposed change in the law which was not ultimately passed. Such mistakes are unhelpful in understanding statutory language, but this one does not have any effect on the other provisions of Acts 92 and 135. The court will apply the other provisions of the Acts despite the mistaken reference to the (non-existent) Section 1a.

***2** In response to the legislative initiative, the Secretary of State issued a Directive on July 20, 2020 exercising the authority conferred upon him by the two Acts. (Doc. 1-1.) The Directive states that it is issued "[n]otwithstanding any provisions of law contained in Title 17 of the Vermont Statutes Annotated to the contrary" and "pursuant to the authority granted to the Secretary of State by Act 92 (2020) and Act 135 (2020)." (*Id.* at 1.) The Directive describes a variety of measures for both the August primary and November general elections, including new procedures for ballot returns, processing, outdoor and drive-through polling places, outdoor ballot handling, overseas voters, changes of polling places, qualifications of election officials, home delivery of ballots, mask requirements, and voting in person after receiving a ballot by mail. (*See id.* at 1–4.) Regarding ballot returns, the Directive states that, with four enumerated exceptions, "[b]allots may not be returned to the Clerk by any candidate whose name appears on the ballot for that election, or any campaign staff member of any such candidate." (*Id.* at 1.) Regarding changes to polling places, the Directive states that "[t]he location of a polling place may be changed no less than 15 days prior to the election." (*Id.* at 3.)

The Directive contains the following provision for "mailed ballots" in the November general election:

> A ballot will be mailed to every active voter on the statewide voter checklist. "Active" voters are any voters that have not been sent a challenge letter by the BCA asking the voter to affirm their residence, or who have responded to any such letter and have affirmed their residence.
>
> • Ballots will be mailed to all active registered voters starting Friday, September 18.
>
> • Ballots will be mailed or otherwise delivered to all military and overseas voters no later than the September 19 deadline mandated by federal law.
>
> • All ballots will be mailed from a central location by the Secretary of State's Office.
>
> • For mailing purposes, the Secretary of State will use the mailing address contained in any pending request for a General Election ballot first, and if none will use the mailing address in the voter's record second, and if none the legal address in the voter's record.
>
> • The issue date for all ballots will be recorded in the statewide election management system by the Secretary of State on a batch basis as they are sent. Clerks will only by required to record the date that ballots are returned. Clerks will be required to enter the request, issue, and return date for any ballots requested by voters after the statewide mailing is sent, including for those voters who may register after that date.
>
> • Postage for the mailing of ballots and the return of ballots to the Clerks by voters will be paid by the Secretary of State's office. All envelopes will be pre-paid.

(*Id.* at 4–5.)

After issuing the Directive and in preparation for the August primary election, the Secretary caused absentee primary ballot request forms printed on postcards to be sent to every person listed on the statewide voter checklist. (Doc. 1 ¶ 42.) According to the Complaint, the issuance of the postcards "was intended to be a test of the process by which Condos intended to mail ballots to all voters on the statewide voter checklist pursuant to the Directive." (*Id.* ¶ 43.) Plaintiffs allege that the postcard mailing revealed "numerous problems," such as postcards being sent to voters at addresses they no longer used, postcards sent to people who are no longer eligible to vote in Vermont, and some longtime registered voters who received no postcard. (*Id.* ¶¶ 45–48.)

The Secretary of State is prepared to follow the Directive and Acts 92 and 135 by mailing out ballots to all active registered voters on Friday, September 18, 2020.

Analysis

I. Plaintiffs' Challenges

Plaintiffs are five registered Vermont voters. In addition to their status as registered voters, several have played a role in local and state government. Plaintiff Tracey Martel is the town clerk of Victory, Vermont, where she is responsible for the administration of Victory's elections. Robert Frenier is a former member of the Vermont House of Representatives. Brian Smith is a current member of the Vermont House. Mary Beausoleil is a resident of Lyndon and previously a Justice of the Peace.

A. Challenge to Statewide Mail-In Ballots

***3** Plaintiffs complain that their individual votes will be diluted if the distribution of mail-in ballots leads—as they fear—to mistaken votes or widespread voter fraud. The Complaint alleges that:

> if General Election mail-in ballots are automatically distributed to every eligible voter (any voter on a voter check-list), without any request for such a ballot from that voter, many castable ballots will inevitably fall in the hands of persons other than the voter to whom the mail-in ballot was directed, including some mail-in ballots that will be sent to persons to have moved, died or otherwise become ineligible."

(Doc. 1 ¶ 25.) Plaintiffs fear that ballots will be mailed to voters who have moved away, died, or otherwise become ineligible and that these ballots will be used to vote illegally by the ineligible voter or others who acquire the ballots and return them to polling places. (*See id.* ¶ 62.)

B. Other Challenges

In addition to their challenge based on alleged dilution of their votes, Plaintiffs assert in Count II that the Directive is unconstitutional and an *ultra vires* use of legislative power. They assert that the Directive contains provisions that are inconsistent with Vermont law. (*See id.* ¶ 71.) Finally, in Count III, Plaintiffs assert that the Directive is *ultra vires* because, in Plaintiffs' view, it does nothing beyond existing Vermont law to "protect[ ] the health, safety, and welfare of voters, elections workers, and candidates in carrying out elections"—the stated purpose of Acts 92 and 135. *See* Act 92, § 3(a); Act 135 § 1(a).

II. Standing

Plaintiffs' case begins and ends with the issue of standing. This is a constitutional requirement which operates as a check on the ability of litigants to file claims for injuries which are insufficiently specific and direct in their effect on the plaintiff. *See Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014).[2] Cases in which plaintiffs assert "generalized grievances" of unlawful governmental action are commonly dismissed on standing grounds. *See United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (impact of government action plainly undifferentiated and common to all members of the public). The constitutional minimum of standing consists of three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 184 (2d Cir. 2020) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

2 Standing has both a constitutional and a prudential aspect. In this case, the court is only concerned with

> constitutional standing. Because it is absent, there is no need to consider the further issue of whether standing is not present for prudential reasons.

The requirement of "injury in fact" serves multiple purposes. It limits justiciable cases to those controversies which are sufficiently well-defined by injury to the plaintiff that the parties will develop the facts and seek remedies which are responsive to the harm. *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) ("The requirement of 'actual injury redressable by the court' ... tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." (internal citations omitted)). In a manner directly relevant to this case, the requirement supports principles of separation of power and caution in second-guessing decisions made by the other branches. *See Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972) ("Carried to its logical end, [litigation without direct injury] would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse,' it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action."). The "injury in fact" must have been "concrete and particularized" and also "actual or imminent, not conjectural or hypothetical." *Liberian Cmty. Ass'n of Conn.*, 970 F.3d at 184 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130).

***4** Standing doctrine has an extensive history in the context of challenges to election practices. In *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), the Supreme Court recognized the constitutional right to vote and have one's vote counted. "Obviously included within the right to choose [representatives], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections." *Id.* at 315, 61 S.Ct. 1031. *See The Ku Klux Cases,* 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884). In reapportionment cases, the Court has long recognized the standing of the disadvantaged voter. *See Baker v. Carr*, 369 U.S. 186, 208, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("[Plaintiffs] are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law.") (citations and internal quotations omitted). Standing in such cases, however, does not extend to parties who have not themselves suffered discrimination or other individualized injury. *See United States v. Hays,* 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (without evidence that "plaintiff has personally been subjected to a racial classification ... [he] would be asserting only a generalized grievance against governmental conduct of which he or she does not approve."); *Sinkfield v. Kelley*, 531 U.S. 28, 121 S.Ct. 446, 148 L.Ed.2d 329 (2000) (majority white voters lacked standing to complain of unlawful racial practices to which they had not been subjected). The Second Circuit recognized the same principles in *League of Women Voters of Nassau County v. Nassau County Bd. of Supervisors,* 737 F.2d 155, 162 (2d Cir. 1984) ("[parties] who are not persons domiciled in underrepresented voting districts lack standing to prosecute this appeal.") *See Roxbury Taxpayers Alliance v. Delaware Cty Bd. of Supervisors*, 80 F.3d 42 (2d Cir. 1996) (only underrepresented voters have standing to bring claims of disproportional representation).

It would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because it affects all voters. State legislation which unfairly restricts a voter's right to vote is subject to review by the courts. "We have long recognized that a person's right to vote is 'individual and personal in nature.' " *Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) (citing *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). But as the *Gill* decision illustrates, the Supreme Court continues to decline to extend standing to plaintiffs asserting generalized objections to state election laws. In this case, the alleged injury is similar to the impact alleged by the majority voters who lacked standing in the reapportionment cases. The gerrymandered districts altered the proportional impact of every vote, but only those specifically disadvantaged by the unconstitutional scheme have standing. A vote cast by fraud or mailed in by the wrong person through mistake has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged.

These cases lead the court to be cautious in this case about extending standing to any registered voter – such as the five who have sued here – who alleges an injury common to all other registered voters. If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury. As the affidavit submitted by plaintiffs' expert makes clear, plaintiffs believe that the new processes

in place for the 2020 general election in Vermont have an excessive error rate. They propose a different system with heightened security, principally through a system to compare the signature accompanying the mail-in ballot with the signature on file. It is unnecessary to decide whether their proposed change is a good idea or not since the standing doctrine does not permit everyone and anyone to bring a lawsuit to challenge the merits of legislation.

The Vermont Superior Court in *Paige v. State of Vermont* recently rejected a similar challenge to the Directive on standing grounds. In that case, a Vermont voter and candidate for elected office in the upcoming election, H. Brooke Paige, challenged the Directive's statewide mail-in ballot procedure in the context of what he described as an interlocutory appeal of an administrative election complaint that he had filed. The Superior Court declined to hear the case because Mr. Paige had not exhausted his administrative remedies. *Paige v. State of Vermont*, No. 20-CV-00307 (Vt. Super. Ct. Sept. 8, 2020) (Zonay, J.). But the court also held that Mr. Paige lacked standing to challenge the statewide mail-in ballot procedure based on concerns of fraud because his claim consisted of "theoretical harms to the election process rather than threats of actual injury being caused to a protected legal interest." *Id.*

***5** Plaintiffs seek to distinguish *Paige.* They note that Mr. Paige filed his suit prematurely. That is one of the bases for the Superior Court's decision, but the court also separately found that Mr. Paige lacked standing. On the issue of standing, Plaintiffs argue that Mr. Paige had standing because a Vermont statute allowed him to file an election complaint with the Secretary of State. Plaintiffs here do not rely on that Vermont statute, but instead assert that they have alleged an individualized and particular harm flowing from the Directive. For the reasons stated above, the court disagrees; Plaintiffs have failed to show the "injury in fact" necessary to have standing. The *Paige* court's conclusion on the standing issue applies with equal force in this case. *Accord, Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, —— F.Supp.3d ——, ——, 2020 WL 2089813, at *5 (D. Nev. Apr. 30, 2020) (Nevada voters lacked standing to challenge all-mail election plan based on concerns of an increase in illegal votes; their "purported injury of having their votes diluted due to ostensible election fraud may be conceivable raised by any Nevada voter. Such claimed injury therefore does not satisfy the requirement that Plaintiffs must state a concrete and particularized injury").

At oral argument, counsel for the plaintiff drew attention to a problem different from dilution by fraudulent votes which formed the focus of the complaint. Instead, plaintiffs seek to argue that the universal mail-in system may deprive them of an individualized right to vote if they (1) do not receive their ballot in the mail and (2) fail to take other measures to obtain a ballot such as contacting the town clerk directly or appearing at the polling place on election day in person. As this is not a class action, the court considers the experience of the individual plaintiffs themselves. These are sophisticated voters who have gone to considerable lengths to obtain counsel skilled in election law and to file a lawsuit in federal court. Of all people likely to be confused about how to vote, these five plaintiffs must be last on the list. The court will not enjoin a state-wide mailing because one or more of these plaintiffs may be confused by the non-receipt of a separate mailing last month in connection with the primary election.

Conclusion

Plaintiffs' Motion for Preliminary Inunction (Doc. 2) is DENIED.

Defendant's Motion to Dismiss (Doc. 10) is GRANTED.

This case is DISMISSED WITHOUT PREJUDICE.

All Citations

--- F.Supp.3d ----, 2020 WL 5755289

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Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Only the Westlaw citation is currently available.

United States District Court, M.D. North Carolina.

Timothy K. MOORE, et al., Plaintiffs,
v.
Damon CIRCOSTA, et al., Defendants,
and
North Carolina Alliance for Retired Americans, et al., Defendant-Intervenors.
Patsy J. Wise, et al., Plaintiffs,
v.
The North Carolina State Board of Elections, et al., Defendants,
and
North Carolina Alliance for Retired Americans, et al., Defendant-Intervenors.

1:20CV911
|
1:20CV912
|
Signed 10/14/2020

Synopsis

Background: State legislative leaders and individual registered voters sued the executive director and members of the North Carolina State Board of Elections (SBE), seeking an injunction against enforcement and distribution of memoranda issued by SBE pertaining to absentee voting. In a second case, individual voters, a campaign committee, national political parties, and two Members of the U.S. House of Representatives also sought an injunction against the same memoranda. Advocacy group for retirees and individual registered voters who were plaintiffs in a related state court action that resulted in a consent judgment intervened in both cases. Plaintiffs moved for preliminary injunction.

Holdings: The District Court, William L. Osteen, J., held that:

plaintiffs lacked Article III standing to bring vote-dilution claim;

individual plaintiffs who had already cast their absentee ballots by mail had standing to raise equal protection claims;

plaintiffs demonstrated a likelihood of success on the merits of their equal protection claims against the mail-in ballot witness-requirement cure procedure and extension of mail-in ballot receipt deadline;

plaintiffs demonstrated a likelihood of irreparable injury on their equal protection claims against witness-requirement cure procedure and extension of mail-in ballot receipt deadline;

balance of equities weighed heavily against preliminary injunction, and thus district court would deny injunctive relief; and

SBE exceeded its statutory authority and emergency powers when it entered into consent agreement and eliminated witness requirements for mail-in ballots.

Motion denied.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge

***1** Presently before this court are two motions for a preliminary injunction in two related cases.

In the first case, Moore v. Circosta, No. 1:20CV911 ("Moore"), Plaintiffs Timothy K. Moore and Philip E. Berger (together, "State Legislative Plaintiffs"), Bobby Heath, Maxine Whitley, and Alan Swain (together, "Moore Individual Plaintiffs") seek an injunction against the enforcement and distribution of several Numbered Memoranda issued by the North Carolina State Board of Elections pertaining to absentee voting. (Moore v. Circosta, No. 1:20CV911, Mot. for Prelim. Inj. and Mem. in Supp. ("Moore Pls.' Mot.") (Doc. 60).)

In the second case, Wise v. North Carolina State Board of Elections, No. 1:20CV912 ("Wise"), Plaintiffs Patsy J. Wise, Regis Clifford, Samuel Grayson Baum, and Camille Annette Bambini (together, "Wise Individual Plaintiffs"), Donald J. Trump for President, Inc. ("Trump Campaign"), U.S. Congressman Gregory F. Murphy and U.S. Congressman Daniel Bishop (together, "Candidate Plaintiffs"), Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), National Republican Congressional Committee ("NRCC"), and North Carolina Republican Party ("NCRP") seek an injunction against the enforcement and distribution of the same Numbered Memoranda issued by the North Carolina State Board of Elections at issue in Moore. (Wise Pls.' Mem. in Supp. of Mot. to Convert the Temp. Restraining Order into a Prelim. Inj. ("Wise Pls.' Mot.") (Doc. 43).)

By this order, this court finds Plaintiffs have established a likelihood of success on their Equal Protection challenges with respect to the State Board of Elections' procedures for curing ballots without a witness signature and for the deadline extension for receipt of ballots. This court believes the unequal treatment of voters and the resulting Equal Protection violations as found herein should be enjoined. Nevertheless, under Purcell and recent Supreme Court orders relating to Purcell, this court is of the opinion that it is required to find that injunctive relief should be denied at this late date, even in the face of what appear to be clear violations.

I. BACKGROUND

A. Parties

1. Moore v. Circosta (1:20CV911)

State Legislative Plaintiffs Timothy K. Moore and Philip E. Berger are the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the North Carolina Senate, respectively. (Moore v. Circosta, No. 1:20CV911, Compl. for Declaratory and Injunctive Relief ("Moore Compl.") (Doc. 1) ¶¶ 7-8.) Individual Plaintiffs Bobby Heath and Maxine Whitley are registered North Carolina voters who voted absentee by mail and whose ballots have been accepted by the State Board of Elections on September 21, 2020, and September 17, 2020, respectively. (Id. ¶¶ 9-10.) Plaintiff Alan Swain is a resident of Wake County, North Carolina, who is running as a Republican candidate to represent the State's Second Congressional District. (Id. ¶ 11.)

Executive Defendants include Damon Circosta, Stella Anderson, Jeff Carmon, III, and Karen Brinson Bell are members of the State Board of Elections ("SBE"). (Id. ¶¶ 12-15.) Executive Defendant Karen Brinson Bell is the Executive Director of SBE. (Id. ¶ 15.)

***2** Intervenor-Defendants North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz ("Alliance Intervenors") are plaintiffs in the related state court action in Wake County Superior Court. (Moore v. Circosta, No. 1:20CV911 (Doc. 28) at 15.)[1] Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz are individual voters who are concerned they will be disenfranchised by Defendant SBE's election rules, (id.), and North Carolina Alliance for Retired Americans ("NC Alliance") is an organization "dedicated to promoting the franchise and ensuring the full constitutional rights of its members ...." (Id.)

1 All citations in this Memorandum Opinion and Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

2. Wise v. N.C. State Bd. of Elections (1:20CV912)

Individual Plaintiffs Patsy J. Wise, Regis Clifford, Camille Annette Bambini, and Samuel Grayson Baum are registered

voters in North Carolina. (Wise v. N.C. State Bd. of Elections, No. 1:20CV912, Compl. for Declaratory and Injunctive Relief ("Wise Compl.") (Doc. 1) ¶¶ 25-28.) Wise has already cast her absentee ballot for the November 3, 2020 election by mail, "in accordance with statutes, including the Witness Requirement, enacted by the General Assembly." (Id. ¶ 25.) Plaintiffs Clifford, Bambini, and Baum intend to vote in the November 3, 2020 election and are "concern[ed] that [their] vote[s] will be negated by improperly cast or fraudulent ballots." (Id. ¶¶ 26-28.)

Plaintiff Trump Campaign represents the interests of President Donald J. Trump, who is running for re-election. (Id. ¶¶ 29-30.) Together, Candidate Plaintiffs Trump Campaign, U.S. Congressman Daniel Bishop, and U.S. Congressman Gregory F. Murphy are candidates who will appear on the ballot for re-election in the November 3, 2020 general election. (Id. ¶¶ 29-32.)

Plaintiff RNC is a national political party, (id. ¶¶ 33-36), that seeks to protect "the ability of Republican voters to cast, and Republican candidates to receive, effective votes in North Carolina elections and elsewhere," (id. ¶ 37), and avoid diverting resources and spending significant amounts of resources educating voters regarding confusing changes in election rules, (id. ¶ 38).

Plaintiff NRSC is a national political party committee that is exclusively devoted to electing Republican candidates to the U.S. Senate. (Id. ¶ 40.) Plaintiff NRCC is the national organization of the Republican Party dedicated to electing Republicans to the U.S. House of Representatives. (Id. ¶ 41.) Plaintiff NRCP is a North Carolina state political party organization that supports Republican candidates running in North Carolina elections. (Id. ¶¶ 44-45.)

Executive Defendant North Carolina SBE is the agency responsible for the administration of the elections laws of the State of North Carolina. (Id. ¶ 46.) As in Moore, included as Executive Defendants are Damon Circosta, Stella Anderson, Jeff Carmon, III, and Karen Brinson Bell of the North Carolina SBE. (Id. ¶¶ 47-50.)

Alliance Intervenors from Moore are also Intervenor-Defendants in Wise. (1:20CV912 (Doc. 22).)

B. Factual Background

1. This Court's Decision in *Democracy*

On August 4, 2020, this court issued an order in a third related case, Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457, —— F.Supp.3d ——, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) ("the August Democracy Order"), that "left the One-Witness Requirement in place, enjoined several rules related to nursing homes that would disenfranchise Plaintiff Hutchins, and enjoined the rejection of absentee ballots unless the voter is provided due process." (Id. at ——, 2020 WL 4484063, at *1.) As none of the parties appealed that order, the injunctive relief is still in effect.

2. Release of the Original Memo 2020-19

***3** In response to the August Democracy Order, on August 21, 2020, SBE officials released guidance for "the procedure county boards must use to address deficiencies in absentee ballots." (Numbered Memo 2020-19 ("Memo 2020-19" or "the original Memo") (Moore v. Circosta, No. 1:20CV911, Moore Compl. (Doc. 1) Ex. 3 – NC State Bd. of Elections Mem. ("Original Memo 2020-19") (Doc. 1-4) at 2.) This guidance instructed county boards regarding multiple topics. First, it instructed county election boards to "accept [a] voter's signature on the container-return envelope if it appears to be made by the voter ... [a]bsent clear evidence to the contrary," even if the signature is illegible. (Id.) The guidance clarified that "[t]he law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record," as "[v]erification of the voter's identity is completed through the witness requirement." (Id.)

Second, the guidance sorted ballot deficiencies into two categories: curable and uncurable deficiencies. (Id. at 3.) Under this version of Memo 2020-19, a ballot could be cured via voter affidavit alone if the voter failed to sign the certification or signed in the wrong place. (Id.) A ballot error could not be cured, and instead, was required to be spoiled, in the case of all other listed deficiencies, including a missing signature, printed name, or address of the witness; an incorrectly placed witness or assistant signature; or an unsealed or re-sealed envelope. (Id.) Counties were required to notify voters in writing regarding any ballot deficiency – curable or incurable - within one day of the county identifying the defect and to enclose either a cure affidavit or a new ballot, based on the type of deficiency at issue. (Id. at 4.)

In the case of an incurable deficiency, a new ballot could be issued only "if there [was] time to mail the voter a new ballot ... [to be] receive[d] by Election Day." (Id. at. 3) If a voter who submitted an uncurable ballot was unable to receive a new absentee ballot in time, he or she would have the option to vote in person on Election Day. (Id. at 4.)

If the deficiency was curable by a cure affidavit, the guidance stated that the voter must return the cure affidavit by no later than 5 p.m. on Thursday, November 12, 2020. (Id.)

3. Rescission of Numbered Memo 2020-19

The State began issuing ballots on September 4, 2020, marking the beginning of the election process. (Wise, No. 1:20CV912, Wise Pls.' Mot. (Doc. 43).) On September 11, 2020, SBE directed counties to stop notifying voters of deficiencies in their ballot, as advised in Memo 2020-19, pending further guidance from SBE. (Moore, No. 1:20CV911, Moore Pls.' Mot. (Doc. 60) Ex. 3, Democracy Email Chain (Doc. 60-4) at 6.)

4. Revision of Numbered Memo 2020-19

On September 22, over two weeks after the State began issuing ballots, SBE issued a revised Numbered Memo 2020-19, which set forth a variety of new policies not implemented in the original Memo 2020-19. (Numbered Memo 2020-19 ("the Revised Memo" or "Revised Memo 2020-19") (Moore v. Circosta, No. 1:20CV911 (Doc. 36) Ex. 3, Revised Numbered Memo 2020-19 ("Revised Memo 2020-19") (Doc. 36-3).) In subsequent litigation in Wake County Superior Court, SBE advised the court that both the original Memo 2020-19 and the Revised Memo were issued "to ensure full compliance with the injunction entered by Judge Osteen." (Moore v. Circosta, No. 1:20CV911, Exec. Defs.' Br. in Supp. of Joint Mot. for Entry of Consent Judgment ("SBE State Court Br.") (Doc. 68-1) at 15.) Moreover, on September 28, 2020, during a status conference with a district court in the Eastern District of North Carolina prior to transfer to this court, counsel for Defendant SBE stated that Defendant SBE issued the revised Memo 2020-19 "in order to comply with Judge Osteen's preliminary injunction in the Democracy N.C. action in the Middle District." (Moore v. Circosta, No. 1:20CV911, Order Granting Mot. for Temp. Restraining Order ("TRO") (Doc. 47) at 9.) At that time, counsel for SBE indicated that they had not yet submitted the Revised Memo 2020-19 to this court, "but that it was on counsel's list to get [it] done today." (Id.) (internal quotations omitted.) On September 28, 2020, Defendant SBE filed the Revised Memo 2020-19 with this court in the Democracy action. (Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20CV457 (Doc. 143-1).)

***4** The revised guidance modified which ballot deficiencies fell into the curable and uncurable categories. Unlike the original Memo 2020-19, the Revised Memo advised that ballots missing a witness or assistant name or address, as well as ballots with a missing or misplaced witness or assistant signature, could be cured via voter certification. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 3.) According to the revised guidance, the only deficiencies that could not be cured by certification, and thus required spoliation, were where the envelope was unsealed or where the envelope indicated the voter was requesting a replacement ballot. (Id. at 4.)

The cure certification in Revised 2020-19 required voters to sign and affirm the following:

> I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

(Moore v. Circosta, No. 1:20CV911 (Doc. 45-1) at 34.)

The revised guidance also extended the deadline for civilian absentee ballots to be received to align with that for military and overseas voters. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 5.) Under the original Memo 2020-19, in order to be counted, civilian absentee ballots must have been received by the county board office by 5 p.m. on Election Day, November 3, 2020, or if postmarked, by Election Day, by 5:00 p.m. on November 6, 2020. (Moore v. Circosta, No. 1:20CV911, Original Memo 2020-19 (Doc. 1-4) at 5 (citing N.C. Gen. Stat. § 163-231(b)).) Under the Revised Memo 2020-19, however, a late civilian ballot would be counted if postmarked on or before Election Day and received by 5:00 p.m. on November 12, 2020. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc.

36-3) at 5.) This is the same as the deadline for military and overseas voters, as indicated in the Original Memo 2020-19. (Id.)[2]

2 In Democracy N. Carolina v. N.C. State Board of Elections, No. 1:20CV457, an order is entered contemporaneously with this Memorandum Opinion and Order enjoining certain aspects of the Revised Memo 2020-19.

5. Numbered Memoranda 2020-22 and 2020-23

SBE issued two other Numbered Memoranda on September 22, 2020, in addition to Revised Numbered Memo 2020-19.

First, SBE issued Numbered Memo 2020-22, the purpose of which was to further define the term postmark used in Numbered Memo 2020-19. (Wise, No. 1:20CV912, Wise Compl. (Doc. 1), Ex. 3, N.C. State Bd. of Elections Mem. ("Memo 2020-22") (Doc. 1-3) at 2.) Numbered Memo 2020-22 advised that although "[t]he postmark requirement for ballots received after Election Day is in place to prohibit a voter from learning the outcome of an election and then casting their ballot.... [T]he USPS does not always affix a postmark to a ballot return envelope." (Id.) Recognizing that SBE now offers "BallotTrax," a system in which voters and county boards can track the status of a voter's absentee ballot, SBE said "it is possible for county boards to determine when a ballot was mailed even if does not have a postmark." (Id.) Moreover, SBE recognized that commercial carriers offer tracking services that document when a ballot was deposited with the commercial carrier. (Id.) For these reasons, the new guidance stated that a ballot would be considered postmarked by Election Day if it had a postmark, there is information in BallotTrax, or "another tracking service offered by the USPS or a commercial carrier, indicat[es] that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." (Id. at 3.)

***5** Second, SBE issued Numbered Memo 2020-23, which provides "guidance and recommendations for the safe, secure, and controlled in-person return of absentee ballots." (Wise, No. 1:20CV912, Wise Compl. (Doc. 1), Ex. 4, N.C. State Bd. of Elections Mem. ("Memo 2020-23") (Doc. 1-4) at 2.) Referring to N.C. Gen. Stat. § 163-226.3(a)(5),[3] which prohibits any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections, (id.), Numbered Memo 2020-23 confirms that "an absentee ballot may not be left in an unmanned drop box." (Id.) The guidance reminds county boards that they must keep a written log when any person returns an absentee ballot in person, which includes the name of the individual returning the ballot, their relationship to the voter, the ballot number, and the date it was received. (Id. at 3.) If the individual who drops off the ballot is not the voter, their near relative, or legal guardian, the log must also record their address and phone number. (Id.)

3 The Memoranda incorrectly cites this statute as N.C. Gen. Stat. § 163-223.6(a)(5).

At the same time, the guidance advises county boards that "[f]ailure to comply with the logging requirement, or delivery or an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot." (Id. at 3.) Instead, the guidance advises the county board that they "may ... consider the delivery of a ballot ... in conjunction with other evidence in determining whether the ballot is valid and should be counted." (Id. at 4.)

6. Consent Judgment in North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections

On August 10, 2020, NC Alliance, the Defendant-Intervenors in the two cases presently before this court, filed an action against SBE in North Carolina's Wake County Superior Court challenging, among other voting rules, the witness requirement for mail-in absentee ballots and rejection of mail-in absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election. (Moore v Circosta, No. 1:20CV911, SBE State Court Br. (Doc. 68-1) at 15.)

On August 12, 2020, Philip Berger and Timothy Moore, Plaintiffs in Moore, filed a notice of intervention as of right in the state court action and became parties to that action as intervenor-defendants on behalf of the North Carolina General Assembly. (Id. at 16.)

On September 22, 2020, SBE and NC Alliance filed a Joint Motion for Entry of a Consent Judgment with the superior court. (Id.) Philip Berger and Timothy Moore were not aware of this "secretly-negotiated" Consent Judgment, (Wise Pls.'

Mot. (Doc. 43) at 6), until the parties did not attend a previously scheduled deposition, (Democracy v. N.C. Bd. of Elections, No. 1:20CV457 (Doc. 168) at 73.)

Among the terms of the Consent Judgment, SBE agreed to extend the deadline for receipt of mail-in absentee ballots mailed on or before Election Day to nine days after Election Day, to implement the cure process established in Revised Memo 2020-19, and to establish separate mail in absentee ballot "drop off stations" at each early voting site and county board of elections office which were to be staffed by county board officials. (Moore v. Circosta, No. 1:20CV911, SBE State Court Br. (Doc. 68-1) at 16.)

In its filings with the state court, SBE frequently cited this court's decision in Democracy as a reason for why the Wake County Superior Court Judge should accept the Consent Judgment. SBE argued that a cure procedure for deficiencies related to the witness requirement were necessary because "[w]itness requirements for absentee ballots have been shown to be, broadly speaking, disfavored by the courts," (id. at 26), and that "[e]ven in North Carolina, a federal court held that the witness requirement could not be implemented as statutorily authorized without a mechanism for voters to have adequate notice of and [an opportunity to] cure materials [sic] defects that might keep their votes from being counted," (id. at 27). SBE argued that, "to comply with the State Defendants' understanding of the injunction entered by Judge Osteen, the State Board directed county boards of elections not to disapprove any ballots until a new cure procedure that would comply with the injunction could be implemented," (id. at 30), and that ultimately, the cure procedure introduced in Revised Memo 2020-19 as part of the consent judgment would comply with this injunction. (Id.) SBE indicated that it had notified the federal court of the cure mechanism process on September 22, 2020, (id.), although this court was not made aware of the cure procedure until September 28, 2020, (Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20CV457 (Doc. 143-1)), the day before the processing of absentee ballots was scheduled to begin on September 29, 2020, (Moore v. Circosta, No. 20CV911 Transcript of Oral Argument ("Oral Argument Tr.")(Doc. 70) at 109.)

***6** On October 2, 2020, the Wake County Superior Court entered the Stipulation and Consent Judgment. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1).) Among its recitals, which Defendant SBE drafted and submitted to the judge as is customary in state court, (Oral Argument Tr. (Doc. 70) at 91), the Wake County Superior Court noted this court's preliminary injunction in Democracy, finding,

> WHEREAS, on August 4, 2020, the United States District Court for the Middle District of North Carolina enjoined the State Board from "the "disallowance or rejection ... of absentee ballots without due process as to those ballots with a material error that is subject to remediation." Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20-cv-00457-WO-JLW [—— F.Supp.3d ——, 2020 WL 4484063] (M.D.N.C. Aug. 4, 2020) (Osteen, J.). ECF 124 at 187. The injunction is to remain in force until the State Board implements a cure process that provides a voter with "notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." Id.

(State Court Consent Judgment (Doc. 45-1) at 6.)[4]

[4] An additional discussion of the facts related to SBE's use of this court's order in obtaining a Consent Judgment is set out in this court's order in Democracy v. North Carolina State Board of Elections, No. 1:20CV457, 2020 WL 6058048 (M.D.N.C. Oct. 14, 2020) (enjoining witness cure procedure).

7. Numbered Memoranda 2020-27, 2020-28, and 2020-29

In addition to the Numbered Memoranda issued on September 22, 2020, as part of the consent judgment in the state court case, SBE has issued three additional numbered memoranda.

First, on October 1, 2020, SBE issued Numbered Memo 2020-27, which was issued in response to this court's order in Democracy regarding the need for parties to attend a status conference to discuss Numbered Memo 2020-19. (Moore v. Circosta, No. 1:20CV911 (Doc. 40-2) at 2.) The guidance advises county boards that this court did not find Numbered Memo 2020-19:

> "consistent with the Order entered by this Court on August 4, 2020," and indicates that its preliminary injunction order should "not be construed as finding that the failure of a witness to sign the application and certificate as a witness is a deficiency which may be cured with a certification after the ballot has been returned."

(Id.) "In order to avoid confusion while related matters are pending in a number of courts," the guidance advises that "[c]ounty boards that receive an executed absentee container-return envelope with a missing witness signature shall take

no action as to that envelope." (Id.) In all other respects, SBE stated that Revised Numbered Memo 2020-19 remains in effect. (Id.)

Second, on October 4, 2020, SBE issued Numbered Memo 2020-28, which states that both versions of Numbered Memo 2020-19, as well as Numbered Memoranda 2020-22, 2020-23, and 2020-27 "are on hold until further notice" following the temporary restraining order entered in the instant cases on October 3, 2020. (Moore v. Circosta, No. 1:20CV911 (Doc. 60-5) at 2.) Moreover, the guidance reiterated that "[c]ounty boards that receive an executed absentee container-return envelope with a deficiency shall take no action as to that envelope," including sending a cure notification or reissuing the ballot. (Id. at 2-3.) Instead, the guidance directs county boards to store envelopes with deficiencies in a secure location until further notice. (Id. at 3.) If, however, a county board had previously issued a ballot and the second envelope is returned without any deficiencies, the guidance permits the county board to approve the second ballot. (Id.)

***7** Finally, on October 4, 2020, SBE issued Numbered Memo 2020-29, which states that it provides "uniform guidance and further clarification on how to determine if the correct address can be identified if the witness's or assistant's address on an absentee container-return envelope is incomplete. (Wise, No. 1:20CV912 (Doc. 43-5).) First, the guidance clarifies that if a witness or assistant does not print their address, the envelope is deficient. (Id. at 2.) Second, the guidance states that failure to list a witness's ZIP code does not require a cure; a witness or assistant's address may be a post office box or other mailing address; and if the address is missing a city or state, but the county board can determine the correct address, the failure to include this information does not invalidate the container-return envelope. (Id.) Third, if both the city and ZIP code are missing, the guidance directs staff to determine whether the correct address can be identified. (Id.) If they cannot be identified, then the envelope is deficient. (Id.)

C. Procedural History

On September 26, 2020, Plaintiffs in Moore filed their action in the United States District Court for the Eastern District of North Carolina. (Moore Compl. (Doc. 1).) Plaintiffs in Wise also filed their action in the United States District Court for the Eastern District of North Carolina on September 26, 2020. (Wise Compl. (Doc. 1).)

Alliance Intervenors filed a Motion to Intervene as Defendants in Moore on September 30, 2020, (Moore v. Circosta, No. 1:20CV911 (Doc. 27)), and in Wise on October 2, 2020, (Wise, No. 1:20CV912 (Doc. 21)). This court granted Alliance Intervenors' Motion to Intervene on October 8, 2020. (Moore v. Circosta, No. 1:20CV911 (Doc. 67); Wise, No. 1:20CV912 (Doc. 49).)

The district court in the Eastern District of North Carolina issued a temporary restraining order in both cases on October 3, 2020, and transferred the actions to this court for this court's "consideration of additional or alternative injunctive relief along with any such relief in Democracy North Carolina v. North Carolina State Board of Elections ...." (Moore v. Circosta, 1:20CV911, TRO (Doc. 47) at 2; Wise, No. 1:20CV912 (Doc. 25) at 2.)

On October 5, 2020, this court held a Telephone Conference, (Moore v. Circosta, No. 1:20CV911, Minute Entry 10/05/2020; Wise, No. 1:20CV912, Minute Entry 10/05/2020), and issued an order directing the parties to prepare for a hearing on the temporary restraining order and/or a preliminary injunction and to submit additional briefing, (Moore v. Circosta, No. 1:20CV911 (Doc. 51); Wise, No. 1:20CV912 (Doc. 30)). On October 6, 2020, Plaintiffs in Wise filed a Memorandum in Support of Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction, (Wise Pls.' Mot. (Doc. 43)), and Plaintiffs in Moore filed a Motion for a Preliminary Injunction and Memorandum in Support of Same, (Moore Pls.' Mot. (Doc. 60)). Defendant SBE filed a response to Plaintiffs' motions in both cases on October 7, 2020. (Moore v. Circosta, No. 1:20CV911, State Defs.' Resp. to Pls.' Mot. for Prelim. Inj. ("SBE Resp.") (Doc. 65); Wise, No. 1:20CV912 (Doc. 45).) Alliance Intervenors also filed a response to Plaintiffs' motions in both cases on October 7, 2020. (Moore v. Circosta, No. 1:20CV911, Proposed Intervenors' Mem. in Opp'n to Pls.' Mot. for a Prelim. Inj. ("Alliance Resp.") (Doc. 64); Wise, No. 1:20CV912 (Doc. 47).)[5]

5 Defendant SBE and Alliance Intervenors' memoranda filed in opposition to Plaintiffs' motions for a preliminary injunction in Moore are identical to those that each party filed in Wise. (Compare SBE Resp. (Doc. 65) and Alliance Resp. (Doc. 64) with Wise, No. 1:20CV912 (Doc. 45) and Wise, No. 1:20CV912 (Doc. 47).) For clarity and ease, this court will cite only to the briefs Defendant SBE and Alliance Intervenors filed in Moore in subsequent citations.

This court held oral arguments on October 8, 2020, in which all of the parties in these two cases presented arguments with respect to Plaintiffs' motions for a preliminary injunction. (Moore v. Circosta, No. 1:20CV911, Minute Entry 10/08/2020; Wise, No. 1:20CV912, Minute Entry 10/08/2020.)

***8** This court has federal question jurisdiction over these cases under 28 U.S.C. § 1331. This matter is ripe for adjudication.

D. Preliminary Injunction Standard of Review

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Such an injunction "is an extraordinary remedy intended to protect the status quo and prevent irreparable harm during the pendency of a lawsuit." Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017).

II. ANALYSIS

Executive Defendants and Alliance Intervenors challenge Plaintiffs' standing to seek a preliminary injunction regarding their Equal Protection, Elections Clause, and Electors Clause claims. (Alliance Resp. (Doc. 64) at 14-18; SBE Resp. (Doc. 65) at 11-13.) Executive Defendants and Alliance Intervenors also challenge this court's ability to hear this action under abstention, (Alliance Resp. (Doc. 64) at 10-14; SBE Resp. (Doc. 65) at 10-11), Rooker-Feldman (Alliance Resp. (Doc. 64) at 13), and preclusion doctrines, (SBE Resp. (Doc. 65) at 7-10). Finally, Executive Defendants and Alliance Intervenors attack Plaintiffs' motions for preliminary injunction on the merits. (Alliance Resp. (Doc. 64) at 19-26; SBE Resp. (Doc. 65) at 13-18.)

Because Rooker-Feldman, abstention, and preclusion are dispositive issues, this court addresses them first, then addresses Plaintiffs' motions on standing and the likelihood of success on the merits.

As to each of these abstention doctrines, as will be explained further, this court's preliminary injunction order, (Doc. 124), in Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457, played a substantial role as relevant authority supporting SBE's request for approval, in North Carolina state court, of Revised Memo 2020-19 and the related Consent Judgment. (See discussion infra Part II.D.3.b.i.) As Berger, Moore, and SBE are all parties in Democracy, this court initially finds that abstention doctrines do not preclude this court's exercise of jurisdiction. This court's August Democracy Order was issued prior to the filing of these state court actions, and that Order was the basis of the subsequent grant of affirmative relief by the state court. This court declines to find that any abstention doctrine would preclude it from issuing orders in aid of its jurisdiction, or as to parties appearing in a pending case in this court.

A. Rooker-Feldman Doctrine

Rooker-Feldman doctrine is a jurisdictional doctrine that prohibits federal district courts from " 'exercising appellate jurisdiction over final state-court judgments.' " See Thana v. Bd. of License Comm'rs for Charles Cnty., 827 F.3d 314, 319 (4th Cir. 2016) (quoting Lance v. Dennis, 546 U.S. 459, 463, 126 S.Ct. 1198, 163 L.Ed.2d 1059 (2006) (per curiam)). The presence or absence of subject matter jurisdiction under Rooker-Feldman is a threshold issue that this court must determine before considering the merits of the case. Friedman's, Inc. v. Dunlap, 290 F.3d 191, 196 (4th Cir. 2002).

***9** Although Rooker-Feldman originally limited only federal-question jurisdiction, the Supreme Court has recognized the applicability of the doctrine to cases brought under diversity jurisdiction:

> Rooker and Feldman exhibit the limited circumstances in which this Court's appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority, e.g., § 1330 (suits against foreign states), § 1331 (federal question), and § 1332 (diversity).

See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291-92, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). Under the Rooker-Feldman doctrine, courts lack subject matter jurisdiction to hear "cases brought by [1] state-court losers complaining of [2] injuries caused by state-court judgments [3] rendered before the district court proceedings commenced and [4] inviting district court review and rejection of those judgments." Id. at 284, 125 S.Ct. 1517. The doctrine is "narrow and focused." Thana, 827 F.3d at 319. "[I]f a plaintiff in federal court does not seek review of the state court judgment itself but instead 'presents an independent claim, it

is not an impediment to the exercise of federal jurisdiction that the same or a related question was earlier aired between the parties in state court.' " Id. at 320 (quoting Skinner v. Switzer, 562 U.S. 521, 532, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011)). Rather, "any tensions between the two proceedings should be managed through the doctrines of preclusion, comity, and abstention." Id. (citing Exxon, 544 U.S. at 292–93, 125 S.Ct. 1517).

Moreover, "the Rooker–Feldman doctrine applies only when the loser in state court files suit in federal district court seeking redress for an injury allegedly caused by the state court's decision itself." Davani v. Va. Dep't of Transp., 434 F.3d 712, 713 (4th Cir. 2006); see also Hulsey v. Cisa, 947 F.3d 246, 250 (4th Cir. 2020) ("A plaintiff's injury at the hands of a third party may be 'ratified, acquiesced in, or left unpunished by' a state-court decision without being 'produced by' the state-court judgment.") (internal citations omitted).

Here, Plaintiffs are challenging SBE's election procedures and seeking injunction of those electoral rules, not attempting to directly appeal results of a state court order. More importantly, however, the Fourth Circuit has previously found that a party is not a state court loser for purposes of Rooker-Feldman if "[t]he [state court] rulings thus were not 'final state-court judgments' " against the party bringing up the same issues before a federal court. Hulsey, 947 F.3d at 251 (quoting Lance, 546 U.S. at 463, 126 S.Ct. 1198). In the Alliance state court case, Alliance brought suit against SBE. The Plaintiffs from this case were intervenors. They were not parties to the Settlement Agreement and were in no way properly adjudicated "state court losers." Given the Supreme Court's intended narrowness of the Rooker-Feldman doctrine, see Lance, 546 U.S. at 464, 126 S.Ct. 1198, and Plaintiffs' failure to fit within the Fourth Circuit's definition of "state-court losers," this court will decline to abstain under the Rooker-Feldman doctrine.

B. Abstention

1. Colorado River Abstention

***10** Abstention "is the exception, not the rule." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); see also id. at 817, 96 S.Ct. 1236 (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). Thus, this court's task "is not to find some substantial reason for the exercise of federal jurisdiction," but rather "to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' ... to justify the surrender of that jurisdiction." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25-26, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

First, and crucially for this case, the court must determine whether there are ongoing state and federal proceedings that are parallel. Al-Abood ex rel. Al-Abood v. El-Shamari, 217 F.3d 225, 232 (4th Cir. 2000) ("The threshold question in deciding whether Colorado River abstention is appropriate is whether there are parallel suits."); Ackerman v. ExxonMobil Corp., 734 F.3d 237, 248 (4th Cir. 2013) (finding that abstention is exercised only "in favor of ongoing, parallel state proceedings" (emphasis added)). In this instance, the parties have failed to allege any ongoing state proceeding that this federal suit might interfere with. In fact, Plaintiffs in this case were excluded as parties in the Consent Judgment and are bringing independent claims in this federal court alleging violations, inter alia, of the Equal Protection Clause. This court does not find that Colorado River abstention prevents it from adjudicating Equal Protection claims raised by parties who were not parties to the Consent Judgment.

2. Pennzoil Abstention

As alleged by Defendants, Pennzoil does dictate that federal courts should not "interfere with the execution of state judgments." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). However, in the very next sentence, the Pennzoil court caveats that this doctrine applies "[s]o long as those challenges relate to pending state proceedings." Id. In fact, in Pennzoil itself, the Court clarified that abstention was proper because "[t]here is at least one pending judicial proceeding in the state courts; the lawsuit out of which Texaco's constitutional claims arose is now pending before a Texas Court of Appeals in Houston, Texas." Id. at 14, 107 S.Ct. 1519 n.13.

Abstention was also justified in Pennzoil because the Texas state court was not presented with the contested federal constitutional questions, and thus, "when [the subsequent] case was filed in federal court, it was entirely possible that the Texas courts would have resolved this case ... without reaching the federal constitutional questions." Id. at 12, 107 S.Ct. 1519. In the present case, Plaintiffs raised their constitutional claims in the state court prior to the entry of

the Consent Judgment. The state court, through the Consent Judgment and without taking evidence, adjudicated those claims as to the settling parties. The Consent Judgment is effective through the 2020 Election and specifies no further basis upon which Plaintiffs here may seek relief. As a result, there does not appear to be any relief available to Plaintiffs for the federal questions raised here. For these reasons, this court will also decline to abstain under Pennzoil.

3. Pullman Abstention

Pullman abstention can be exercised where: (1) there is "an unclear issue of state law presented for decision"; and (2) resolution of that unclear state law issue "may moot or present in a different posture the federal constitutional issue such that the state law issue is potentially dispositive." Educ. Servs., Inc. v. Md. State Bd. for Higher Educ., 710 F.2d 170, 174 (4th Cir. 1983); see also N.C. State Conference of NAACP v. Cooper, 397 F. Supp. 3d 786, 794 (M.D.N.C. 2019). Pullman does not apply here because any issues of state law are not, in this court's opinion, unclear or ambiguous. Alliance's brief in Moore posits that "whether NCSBE has the authority to enter the Consent Judgment and promulgate the Numbered Memos" are at the center of this case, thereby urging Pullman abstention. (Alliance Resp. (Doc. 64 at 12).) SBE has undisputed authority to issue guidance consistent with state law and may issue guidance contrary to state law only in response to natural disasters – the court finds this, though ultimately unnecessary to the relief issued in this case, fairly clear. (See discussion supra at Part II.E.2.b.ii.) Moreover, this court has already expressly assessed and upheld the North Carolina state witness requirement, which is the primary state law at issue in this case. Democracy N. Carolina, —— F.Supp.3d at ——, 2020 WL 4484063, at *48.

***11** Furthermore, Defendants and Intervenors would additionally need to show how "resolution of ... state law issues pending in state court" would "eliminate or substantially modify the federal constitutional issues raised in Plaintiffs' Complaint." N.C. State Conference of NAACP, 397 F. Supp. 3d at 796. As Alliance notes, the Plaintiffs did not appeal the state court's conclusions, but sought relief in federal court – there is no state law issue pending in state court here. For all of these reasons, this court declines to abstain under Pullman.

C. Issue Preclusion

Collateral estoppel, or issue preclusion "refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim." New Hampshire v. Maine, 532 U.S. 742, 748-49, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). The purpose of this doctrine is to "protect the integrity of the judicial process ...." Id. at 749, 121 S.Ct. 1808 (internal quotations omitted).

Plaintiffs argue that issue preclusion does not bar their Equal Protection claims. Citing Arizona v. California, 530 U.S. 392, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000), Plaintiffs in Wise argue that a negotiated settlement between parties, like the consent judgment between the Alliance Intervenors and Defendant SBE in Wake County Superior Court, does not constitute a final judgment for issue preclusion. (Wise Pls.' Mot. (Doc. 43) at 23.) Plaintiffs in Moore, citing In re Microsoft Corp. Antitrust Litig., 355 F.3d 322 (4th Cir. 2004), argue that issue preclusion cannot be asserted because the Individual Plaintiffs in Moore were not parties to the state court litigation that resulted in the consent judgment. (Moore Pls.' Mot. (Doc. 60) at 4.)

In response, Defendant SBE argues that, under North Carolina law, issue preclusion applies where (1) the issue is identical to the issue actually litigated and necessary to a prior judgment, (2) the prior action resulted in a final judgment on the merits, and (3) the plaintiffs in the latter action are the same as, or in privity with, the parties in the earlier action, (SBE Resp. (Doc. 65) at 7), and the parties in these federal actions and those in the state actions are in privity under the third element of the test, (id. at 8).

This court finds that issue preclusion does not bar Plaintiffs' claims. In Arizona v. California, the Supreme Court held that "[i]n most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented." 530 U.S. at 414, 120 S.Ct. 2304 (internal quotations omitted). Moreover, "settlements ordinarily occasion no issue preclusion ... unless it is clear ... that the parties intend their agreement to have such an effect." Id.

The Consent Judgment SBE and Alliance entered into does not clearly demonstrate that they intended their agreement to have an issue preclusive effect with regard to claims brought now by Plaintiffs in Moore and Wise. The language

of the Consent Judgment demonstrates that it "constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit" and that "by signing this Stipulation and Consent Judgment, they are releasing any claims ... that they might have against Executive Defendants." (State Court Consent Judgment (Doc. 45-1) at 14 (emphasis added).) Although Timothy Moore and Philip Berger, State Legislative Plaintiffs in Moore, were Defendant-Intervenors in the NC Alliance action, they were not parties to the consent judgment. (Id.) Thus, because the plain language of the agreement did not expressly indicate an intention to preclude Plaintiffs Moore and Berger from litigating the issue in subsequent litigation, neither these State Legislative Plaintiffs, nor any other parties with whom they may or may not be in privity, are estopped from raising these claims now before this court.

D. Plaintiffs' Equal Protection Claims

***12** Plaintiffs raise "two separate theories of an equal protection violation," – a "vote dilution claim, and an arbitrariness claim." (Oral Argument Tr. (Doc. 70) at 52; see also Wise Pls.' Mot. (Doc. 43) at 12-15.)

1. Voting Harms Prohibited by the Equal Protection Clause

Under the Fourteenth Amendment of the U.S. Constitution, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Fourteenth Amendment is one of several constitutional provisions that "protects the right of all qualified citizens to vote, in state as well as federal elections." Reynolds v. Sims, 377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Because the Fourteenth Amendment protects not only the "initial allocation of the franchise," as well as "to the manner of its exercise," Bush v. Gore, 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), "lines may not be drawn which are inconsistent with the Equal Protection Clause ...." Id. at 105, 121 S.Ct. 525 (citing Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)).

The Supreme Court has identified two theories of voting harms prohibited by the Fourteenth Amendment. First, the Court has identified a harm caused by "debasement or dilution of the weight of a citizen's vote," also referred to "vote dilution." Reynolds, 377 U.S. at 555, 84 S.Ct. 1362. Courts find this harm arises where gerrymandering under a redistricting plan has diluted the "requirement that all citizens' votes be weighted equally, known as the one person, one vote principle," and resulted in one group or community's vote counting more than another's. Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 340 (4th Cir. 2016); see also Gill v. Whitford, 585 U.S. ——, ——, 138 S. Ct. 1916, 1930-31, 201 L.Ed.2d 313 (2018) (finding that the "harm" of vote dilution "arises from the particular composition of the voter's own district, which causes his vote – having been packed or cracked – to carry less weight than it would carry in another, hypothetical district"); Wesberry v. Sanders, 376 U.S. 1, 18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) (finding that vote dilution occurred where congressional districts did not guarantee "equal representation for equal numbers of people"); Wright v. North Carolina, 787 F.3d 256, 268 (4th Cir. 2015) (invalidating a voter redistricting plan).

Second, the Court has found that the Equal Protection Clause is violated where the state, "[h]aving once granted the right to vote on equal terms," through "later arbitrary and disparate treatment, value[s] one person's vote over that of another." Bush, 531 U.S. at 104-05, 121 S.Ct. 525 (2000); see also Baker v. Carr, 369 U.S. 186, 208, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box.") (internal citations omitted). This second theory of voting harms requires courts to balance competing concerns around access to the ballot. On the one hand, a state should not engage in practices which prevent qualified voters from exercising their right to vote. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." Gray v. Sanders, 372 U.S. 368, 379-80, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963). On the other hand, the state must protect against "the diluting effect of illegal ballots." Id. at 380, 83 S.Ct. 801. Because "the right to have one's vote counted has the same dignity as the right to put a ballot in a box," id., the vote dilution occurs only where there is both "arbitrary and disparate treatment." Bush, 531 U.S. at 105, 121 S.Ct. 525. To this end, states must have "specific rules designed to ensure uniform treatment" of a voter's ballot. Id. at 106, 121 S.Ct. 525.

2. Standing to Bring Equal Protection Claims

***13** In light of the harms prohibited by the Equal Protection Clause, this court must first consider whether Plaintiffs have standing to bring these claims.

For a case or controversy to be justiciable in federal court, a plaintiff must allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." White Tail Park, Inc. v. Stroube, 413 F.3d 451, 458 (4th Cir. 2005) (quoting Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 789 (4th Cir. 2004)).

The party seeking to invoke the federal courts' jurisdiction has the burden of satisfying Article III's standing requirement. Miller v. Brown, 462 F.3d 312, 316 (4th Cir. 2006). To meet that burden, a plaintiff must demonstrate three elements: (1) that the plaintiff has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) that the injury is fairly traceable to the challenged conduct of the defendant; and (3) that a favorable decision is likely to redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

In multi-plaintiff cases, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." Town of Chester v. Laroe Estates, Inc., 581 U.S. ——, ——, 137 S. Ct. 1645, 1651, 198 L.Ed.2d 64 (2017). Further, if there is one plaintiff "who has demonstrated standing to assert these rights as his own," the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 & n.9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

In the voting context, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue," Baker, 369 U.S. at 206, 82 S.Ct. 691, so long as their claimed injuries are "distinct from a 'generally available grievance about the government,' " Gill, 138 S. Ct. at 1923 (quoting Lance v. Coffman, 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam)).

Defendant SBE and Alliance Intervenors argue that Individual Plaintiffs in Wise and Moore have not alleged a concrete and particularized injury under either of the two Equal Protection theories. (Alliance Resp. (Doc. 64) at 14-15; SBE Resp. (Doc. 65) at 12-13.)

First, under a vote dilution theory, they argue that courts have "repeatedly rejected this theory as a basis for standing, both because it is unduly speculative and impermissibly generalized." (Alliance Resp. (Doc. 64) at 17.) Second, under an arbitrary and disparate treatment theory, they argue that the injury is too generalized because the Numbered Memoranda apply equally to all voters across the state and that Plaintiffs "cannot claim an injury for not having to go through a remedial process put in place for other voters." (SBE Resp. (Doc. 65) at 12.)

Plaintiffs in Moore and Wise do not address standing for their Equal Protection claims in their memoranda in support of their motions for a preliminary injunction. (See Wise Pls.' Mot. (Doc. 43); Moore Pls.' Mot. (Doc. 60).) At oral argument held on October 8, 2020, however, counsel for the Moore Plaintiffs responded to Defendant SBE and Alliance Intervenor's standing arguments. (Oral Argument Tr. (Doc. 70) at 52-59.)

***14** First, under a vote dilution theory, counsel argued that "the Defendants confuse a widespread injury with not having a personal injury," (id. at 53), and that the Supreme Court's decision in Reynolds demonstrates that "impermissible vote dilution occurs when there's ballot box stuffing," (id.), suggesting that each voter would have standing to sue under the Supreme Court's precedent in Reynolds because their vote has less value. (Id.) Second, under an arbitrary and disparate treatment theory, counsel argued that Plaintiffs were subjected to the witness requirement and that "[t]here are burdens associated with that" which support a finding of an injury in fact. (Id. at 56.) Counsel argued the harm that is occurring is not speculative because, for example, voters have and will continue to fail to comply with the witness requirement, (id. at 55-56), and ballots will arrive between the third and ninth day following the election pursuant to the Postmark Requirement, (id. at 58). Moreover, counsel argued that the "regime" imposed by the state is arbitrary, citing limitations on assistance allowed to complete a ballot, compared to the lessened restrictions associated with the witness requirement under Numbered Memo 2020-19. (Id. at 59.)

This court finds that Individual Plaintiffs in Moore and Wise have not articulated a cognizable injury in fact for their vote dilution claims. However, all of the Individual Plaintiffs in Moore, and one Individual Plaintiff in Wise have articulated an injury in fact for an arbitrary and disparate treatment claim.

a. Vote Dilution

Although the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.' " Gill, 138 S. Ct. at 1930 (citing Reynolds, 377 U.S. at 561, 84 S.Ct. 1362), the Court has expressly held that "vote dilution" refers specifically to "invidiously minimizing or canceling out the voting potential of racial or ethnic minorities," Abbott v. Perez, 585 U.S. ——, ——, 138 S. Ct. 2305, 2314, 201 L.Ed.2d 714 (2018) (internal quotations and modifications omitted) (emphasis added), a harm which occurs where "the particular composition of the voter's own district ... causes his vote – having been packed or cracked – to carry less weight than it would carry in another, hypothetical district." Gill, 138 S. Ct. at 1931.

Indeed, lower courts which have addressed standing in vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted, as Plaintiffs have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters. See, e.g., Donald J. Trump for President, Inc. v. Cegavske, Case No. 2:20-CV-1445 JCM (VCF), —— F.Supp.3d ——, ——, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more directly and tangibly benefits them than it does the public at large.") (internal quotations and modifications omitted); Martel v. Condos, Case No. 5:20-cv-131, —— F.Supp.3d ——, ——, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); Paher v. Cegavske, 457 F.Supp.3d 919, 926–27 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); Am. Civil Rights Union v. Martinez-Rivera, 166 F. Supp. 3d. 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution [is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.").

Although "[i]t would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because it affects all voters," Martel, —— F.Supp.3d at ——, 2020 WL 5755289, at *4, the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing. Compared to a claim of gerrymandering, in which the injury is specific to a group of voters based on their racial identity or the district where they live, all voters in North Carolina, not just Individual Plaintiffs, would suffer the injury Individual Plaintiffs allege. This court finds this injury too generalized to give rise to a claim of vote dilution, and thus, neither Plaintiffs in Moore nor in Wise have standing to bring their vote dilution claims under the Equal Protection Clause.

b. Arbitrary and Disparate Treatment

***15** In Bush, the Supreme Court held that, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05, 121 S.Ct. 525. Plaintiffs argue that they have been subjected to arbitrary and disparate treatment because they voted under one set of rules, and other voters, through the guidance in the Numbered Memoranda, will be permitted to vote invalidly under a different and unequal set of rules, and that this is a concrete and particularized injury. (Oral Argument Tr. (Doc. 70) at 70-71.)

For the purposes of determining whether Plaintiffs have standing, is it not "necessary to decide whether [Plaintiffs'] allegations of impairment of their votes" by Defendant SBE's actions "will, ultimately, entitle them to any relief," Baker, 369 U.S. at 208, 82 S.Ct. 691; whether a harm has occurred is best left to this court's analysis of the merits of Plaintiffs' claims, (see discussion infra Section II.D.3). Instead, the appropriate inquiry is, "[i]f such impairment does produce a legally cognizable injury," whether Plaintiffs "are among those who have sustained it." Baker, 369 U.S. at 208, 82 S.Ct. 691.

This court finds that Individual Plaintiffs in Moore and one Individual Plaintiff in Wise have standing to raise an arbitrary and disparate treatment claim because their injury is concrete, particularized, and not speculative. Bobby Heath and Maxine Whitley, the Individual Plaintiffs in Moore, are registered North Carolina voters who voted absentee by mail and whose ballots have been accepted by SBE. (Moore Compl. (Doc. 1) ¶¶ 9-10.) In Wise, Individual Plaintiff Patsy Wise is a registered voter who cast her absentee ballot by mail. (Wise Compl. (Doc. 1) ¶ 25.)

If Plaintiffs Heath, Whitley, and Wise were voters who intended to vote by mail but who had not yet submitted their ballots, as is the case with the other Individual Plaintiffs in Wise, (Wise Compl. (Doc. 1) ¶¶ 26-28), or voters who had intended to vote in-person either during the Early Voting period or on Election Day, then they would not in fact have been impacted by the laws and procedures for submission of absentee ballots by mail and the complained-of injury would be merely "an injury common to all other registered voters," Martel, —— F.Supp.3d at ——, 2020 WL 5755289, at *4. See also Donald J. Trump for President, Inc., —— F.Supp.3d at ——, 2020 WL 5626974, at *4 ("Plaintiffs never describe how their member voters will be harmed by vote dilution where other voters will not."). Indeed, this court finds that Individual Plaintiffs Clifford, Bambini, and Baum in Wise do not have standing to challenge the Numbered Memoranda, because any "shock[ ]" and "serious concern[s]" they have that their vote "will be negated by improperly cast or fraudulent ballots," (Wise Compl. (Doc. 1) ¶¶ 26-28), is merely speculative until such point that they have actually voted by mail and had their ballots accepted, which Plaintiffs' Complaint in Wise does not allege has occurred. (Id.)

Yet, because Plaintiffs Heath, Whitley, and Wise have, in fact, already voted by mail, (Moore Compl. (Doc. 1) ¶¶ 9-10; Wise Compl. (Doc. 1) ¶ 25), their injury is not speculative. Under the Numbered Memoranda 2020-19, 2020-22, and 2020-23, other voters who vote by mail will be subjected to a different standard than that to which Plaintiffs Heath, Whitley, and Wise were subjected when they cast their ballots by mail. Assuming this is an injury that violates the Equal Protection Clause, Baker, 369 U.S. at 208, 82 S.Ct. 691, the harm alleged by Plaintiffs is particular to voters in Heath, Whitley, and Wise's position, rather than a generalized injury that any North Carolina voter could claim. For this reason, this court finds that Individual Plaintiffs Heath, Whitley, and Wise have standing to raise Equal Protection claims under an arbitrary and disparate treatment theory. Because at least one plaintiff in each of these multi-plaintiff cases has standing to seek the relief requested, the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." Vill. of Arlington Heights, 429 U.S. at 264 & n.9, 97 S.Ct. 555.

3. Likelihood of Success on the Merits

***16** Having determined that Individual Plaintiffs have standing to bring their arbitrary and disparate treatment claims, this court now considers whether Plaintiffs' claims are likely to succeed on the merits. To demonstrate a likelihood of success on the merits, "[a] plaintiff need not establish a certainty of success, but must make a clear showing that he is likely to succeed at trial." Di Biase, 872 F.3d at 230.

a. Parties' Arguments

Plaintiffs argue that four policies indicated in the Numbered Memoranda are invalid under the Equal Protection Clause: (1) the procedure which allows ballots without a witness signature to be retroactively validated through the cure procedure indicated in Revised Numbered Memo 2020-19 ("Witness Requirement Cure Procedure"); (2) the procedure which allows absentee ballots to be received up to nine days after Election Day if they are postmarked on Election Day, as indicated in Numbered Memo 2020-19 ("Receipt Deadline Extension"); and (3) the procedure which allows for anonymous delivery of ballots to unmanned drop boxes, as indicated in Numbered Memo 2020-23 ("Drop Box Cure Procedure"); (4) the procedure which allows ballots to be counted without a United States Postal Service postmark, as indicated in Numbered Memo 2020-22 ("Postmark Requirement Changes"). (Moore Compl. (Doc. 1) ¶ 93; Wise Compl. (Doc. 1) ¶ 124; Wise Pls.' Mot. (Doc. 43) at 13-14.)

Plaintiffs in Wise argue that the changes in these Memoranda "guarantee that voters will be treated arbitrarily under the ever-changing voting regimes." (Wise Pls.' Mot. (Doc. 43) at 11.) Similarly, Plaintiffs in Moore argue that the three Memoranda were issued "after tens of thousands of North Carolinians cast their votes following the requirements set by the General Assembly," which deprives Plaintiffs "of the Equal Protection Clause's guarantee because it allows for 'varying standards to determine what [i]s a legal vote.' " (Moore Compl. (Doc. 1) ¶ 90 (citing Bush, 531 U.S. at 107, 121 S.Ct. 525).)

In response, Defendants argue that the Numbered Memoranda will not lead to the arbitrary and disparate treatment of ballots prohibited by the Supreme Court's decision in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). Defendant SBE argues that the consent judgment and Numbered Memos do "precisely what Bush contemplated: It establishes uniform and adequate standards for determining what is a legal vote, all of which apply statewide, well in advance of Election Day. Indeed, the only thing stopping uniform statewide standards from going into effect is the

TRO entered in these cases." (SBE Resp. (Doc. 65) at 17.) Moreover, Defendant SBE argues that the consent judgment "simply establishes uniform standards that help county boards ascertain which votes are lawful," and "in no way lets votes be cast unlawfully." (Id. at 18.)

Alliance Intervenors argue that the Numbered Memos "apply equally to all voters," (Alliance Resp. (Doc. 64) at 18), and "Plaintiffs have not articulated, let alone demonstrated, how their right to vote – or anyone else's – is burdened or valued unequally," (id. at 19). Moreover, Alliance Intervenors argue that the release of the Numbered Memoranda after the election began does not raise equal protection issues because, "[e]lection procedures often change after voting has started to ensure that the fundamental right to vote is protected." (Id. at 20.)

Both Defendant SBE and Alliance Intervenors argue that the release of the Numbered Memoranda after the election began does not raise equal protection issues, as election procedures often change after voting has started. (SBE Resp. (Doc. 65) at 18; Alliance Resp. (Doc. 64) at 20.) For example, Defendant SBE argues that "[i]f it is unconstitutional to extend the receipt deadline for absentee ballots to address mail disruptions, then it would also be unconstitutional to extend hours at polling places on Election Day to address power outages or voting-machine malfunctions." (SBE Resp. (Doc. 65) at 18 (citing N.C. Gen. Stat. § 163-166.01).) "Likewise, the steps that the Board has repeatedly taken to ensure that people can vote in the wake of natural disasters like hurricanes would be invalid if those steps are implemented after voting begins." (Id.)

b. Analysis

***17** This court agrees with the parties that an Equal Protection violation occurs where there is both arbitrary and disparate treatment. Bush, 531 U.S. at 105, 121 S.Ct. 525. This court also agrees with Defendants that not all disparate treatment rises to the level of an Equal Protection violation. As Defendant SBE argues, the General Assembly has empowered SBE to make changes to voting policies and procedures throughout the election, including extending hours at polling places or adjusting voting in response to natural disasters. (SBE Resp. (Doc. 65) at 18.) Other federal courts have upheld changes to election procedures even after voting has commenced. For example, in 2018, a federal court enjoined Florida's signature matching procedures and ordered a cure process after the election. Democratic Exec. Comm. of Fla. v. Detzner, 347 F. Supp. 3d 1017, 1031 (N.D. Fla. 2018), appeal dismissed as moot sub nom. Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm., 950 F.3d 790 (11th Cir. 2020). Similarly, a Georgia federal court in 2018 ordered a cure process in the middle of the absentee and early voting periods. Martin v. Kemp, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), appeal dismiss sub nom. Martin v. Sec'y of State of Ga., No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018).

A change in election rules that results in disparate treatment shifts from constitutional to unconstitutional when these rules are also arbitrary. The ordinary definition of the word "arbitrary" refers to matters "[d]epending on individual discretion" or "involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures." Arbitrary, Black's Law Dictionary (11th ed. 2019). This definition aligns with the Supreme Court's holding in Reynolds and Bush, that the State must ensure equal treatment of voters both at the time it grants citizens the right to vote and throughout the election. Bush, 531 U.S. at 104-05, 121 S.Ct. 525 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); Reynolds, 377 U.S. at 555, 84 S.Ct. 1362 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

The requirement that a state "grant[ ] the right to vote on equal terms," Bush, 531 U.S. at 104, 121 S.Ct. 525, includes protecting the public "from the diluting effect of illegal ballots," Gray, 372 U.S. at 380, 83 S.Ct. 801. To fulfill this requirement, a state legislature must define the manner in which voting should occur and the minimum requirements for a valid, qualifying ballot. In North Carolina, the General Assembly has passed laws defining the requirements for permissible absentee voting, N.C. Gen. Stat. § 163-226 et seq., including as recently as this summer, when it modified the one-witness requirement, 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a). As this court found in its order issuing a preliminary injunction in Democracy, these requirements reflect a desire by the General Assembly to prevent voter fraud resulting from illegal voting practices. Democracy N. Carolina, —— F.Supp.3d at ——, 2020 WL 4484063, at *35.

A state cannot uphold its obligation to ensure equal treatment of all voters at every stage of the election if another body,

including SBE, is permitted to contravene the duly enacted laws of the General Assembly and to permit ballots to be counted that do not satisfy the fixed rules or procedures the state legislature has deemed necessary to prevent illegal voting. Any guidance SBE adopts must be consistent with the guarantees of equal treatment contemplated by the General Assembly and Equal Protection.

Thus, following this precedent, and the ordinary definition of the word "arbitrary," this court finds that SBE engages in arbitrary behavior when it acts in ways that contravene the fixed rules or procedures the state legislature has established for voting and that fundamentally alter the definition of a validly voted ballot, creating "preferred class[es] of voters." Gray, 372 U.S. at 380, 83 S.Ct. 801.

***18** This definition of arbitrariness does not require this court to consider whether the laws enacted by the General Assembly violate other provisions in the North Carolina or U.S. Constitution or whether there are better public policy alternatives to the laws the General Assembly has enacted. These are separate inquiries. This court's review is limited to whether the challenged Numbered Memos are consistent with state law and do not create a preferred class or classes of voters.

i. Witness Requirement Cure Procedure

This court finds Plaintiffs have demonstrated a likelihood of success on the merits with respect to their Equal Protection challenge to the Witness Requirement Cure Procedure in Revised Memo 2020-19.

Under the 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1. (a), a witnessed absentee ballot must be "marked ... in the presence of at least one [qualified] person ...." This clear language dictates that the witness must be (1) physically present with the voter, and (2) present at the time the ballot is marked by the voter.

Revised Memo 2020-19 counsels that ballots missing a witness signature may be cured where voters sign and affirm the following statement:

> I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

(Moore v. Circosta, No. 1:20CV911 (Doc. 45-1) at 34.)

This "cure" affidavit language makes no mention of whether a witness was in the presence of the voter at the time that the voter cast their ballot, which is the essence of the Legislature's Witness Requirement. 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a). In fact, a voter could truthfully sign and affirm this statement and have their ballot counted by their county board of elections without any witness becoming involved in the process.[6] Because the effect of this affidavit is to eliminate the statutorily required witness requirement, this court finds that Plaintiffs have demonstrated a likelihood of success on the merits in proving that the Witness Requirement Cure Procedure indicated in Revised Memo 2020-19 is arbitrary.

6 Plaintiffs do not challenge the use of the cure affidavit for ballot deficiencies generally, aside from arguing that the cure affidavit circumvents the statutory Witness Requirement. (See Moore Compl. (Doc. 1) ¶ 93; Wise Compl. (Doc. 1) ¶ 124.) Although not raised by Plaintiffs, this courts finds the indefiniteness of the cure affidavit language troubling as a means of correcting even curable ballot deficiencies.
During oral arguments, Defendants did not and could not clearly define what it means to "vote," (see, e.g., Oral Argument Tr. (Doc. 70) at 130-32), which is all that the affidavit requires voters to attest that they have done. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1) at 34.) Under the vague "I voted" language used in the affidavit, a voter who completed their ballot with assistance from an unauthorized individual; a voter who does not qualify for voting assistance; or a voter who simply delegated the responsibility for completing their ballot to another person could truthfully sign this affidavit, although all three acts are prohibited under state law. See N.C. Gen. Stat. § 163-226.3(a)(1). Because the cure affidavit does not define what it means to vote, voters are permitted to decide what that means for themselves.
This presents additional Equal Protection concerns. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." Gray, 372 U.S. at 380, 83 S.Ct. 801. Because the affidavit does not serve as an adequate means to ensure that voters did not engage in

> unauthorized ballot casting procedures, inevitably, not all voters will be held to the same standards for casting their ballot. This is, by definition, arbitrary and disparate treatment inconsistent with existing state law.
>
> This court's concerns notwithstanding, however, Plaintiffs do not challenge the use of a cure affidavit in other contexts, so this court will decline to enjoin the use of a cure affidavit beyond its application as an alternative for compliance with the Witness Requirement.

***19** Based on counsel's statements at oral arguments, Defendant SBE may contend that the guidance in Revised Memo 2020-19 is not arbitrary because it was necessary to resolve the Alliance state court action. (Oral Argument Tr. (Doc. 70) at 105 ("Our reading then of state law is that the Board has the authority to make adjustments in emergencies or as a means of settling protracted litigation until the General Assembly reconvenes.").) However, Defendant SBE's arguments to the state court judge and the court in the Eastern District of North Carolina belie that assertion, as they advised the state court that both the original Memo 2020-19 and the Revised Memo were issued "to ensure full compliance with the injunction entered by Judge Osteen," (SBE State Court Br. (Doc. 68-1) at 15), and they advised the court in the Eastern District of North Carolina that they had issued the revised Memo 2020-19 "in order to comply with Judge Osteen's preliminary injunction in the Democracy N.C. action in the Middle District." (TRO (Doc. 47) at 9.) As this court more fully explains in its order issued in Democracy, this court finds that Defendant SBE improperly used this court's August Democracy Order to modify the witness requirement. Democracy v. N. Carolina, No. 1:20CV457, 2020 WL 6058048 (M.D.N.C. Oct. 14, 2020) (enjoining witness cure procedure). Because Defendant SBE acted improperly in that fashion, this court declines to accept an argument now that elimination of the witness requirement was a rational and justifiable basis upon which to settle the state lawsuit. Furthermore, it is difficult to conceive that SBE was authorized to resolve a pending lawsuit that could create a preferred class of voters: those who may submit an absentee ballot without a witness under an affidavit with no definition of the meaning of "vote."

This court also finds Plaintiffs have demonstrated a likelihood of success on the merits in proving disparate treatment may result as a result of the elimination of the Witness Requirement. Individual Plaintiffs Wise, Heath, and Whitley assert that they voted absentee by mail, including complying with the Witness Requirement. (Wise Compl. (Doc. 1) ¶ 25; Moore Compl. (Doc. 1) ¶¶ 9-10.) Whether because a voter inadvertently cast a ballot without a witness or because a voter was aware of the "cure" procedure and thus, willfully did not cast a ballot with a witness, there will be voters whose ballots are cast without a witness. Accordingly, this court finds that Plaintiffs have demonstrated a likelihood of success on the merits in proving that the Witness Requirement Cure Procedure indicated in Memo 2020-19 creates disparate treatment.

Thus, because Plaintiffs have demonstrated a likelihood of success on the merits with respect to arbitrary and disparate treatment that may result from under Witness Requirement Cure Procedure in Revised Memo 2020-19, this court finds Plaintiffs have established a likelihood of success on their Equal Protection claim.

ii. Receipt Deadline Extension

This court finds that Plaintiffs are likely to succeed on their Equal Protection challenge to the Receipt Deadline Extension in Revised Memo 2020-19.

Under N.C. Gen. Stat. § 163-231(b), in order to be counted, civilian absentee ballots must have been received by the county board office by 5 p.m. on Election Day, November 3, 2020, or if postmarked by Election Day, by 5:00 p.m. on November 6, 2020. The guidance in Revised Memo 2020-19 extends the time in which absentee ballots must be returned, allowing a late civilian ballot to be counted if postmarked on or before Election Day and received by 5:00 p.m. on November 12, 2020 (Revised Memo 2020-19 (Doc. 36-3) at 5.)

Alliance Intervenors argue that, "[t]o the extent Numbered Memo 2020-22 introduces a new deadline, it affects only the counting of ballots for election officials after Election Day has passed – not when voters themselves must submit their ballots. All North Carolina absentee voters still must mail their ballots by Election Day." (Alliance Resp. (Doc. 64) at 21.)

This court disagrees, finding Plaintiffs have demonstrated a likelihood of success on the merits in proving that this change contravenes the express deadline established by the General Assembly, by extending the deadline from three days after Election Day, to nine days after Election Day. Moreover, it results in disparate treatment, as voters like Individual Plaintiffs returned their ballots within the time-frame permitted under state law, (Wise Compl. (Doc. 1) ¶

25; Moore Compl. (Doc. 1) ¶¶ 9-10), but other voters whose ballots would otherwise not be counted if received three days after Election Day, will now have an additional six days to return their ballot.

Because Plaintiffs have demonstrated a likelihood of success on the merits in proving arbitrary and disparate treatment may result under the Receipt Deadline Extension, this court finds Plaintiffs have established a likelihood of success on the merits of their Equal Protection claim.

iii. Drop Box Cure Procedure

***20** Plaintiffs have failed to establish a likelihood of success, however, on their Equal Protection challenge to the Drop Box Cure Procedure indicated in Numbered Memo 2020-23. (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4).)

N.C. Gen. Stat. § 163-226.3(a)(5) makes it a felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections.

"Because of this provision in the law," and the need to ensure compliance with it, SBE recognized in Memo 2020-23 that, "an absentee ballot may not be left in an unmanned drop box," (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4) at 2), and directed county boards which have a "drop box, slot, or similar container at their office" for other business purposes to place a "sign indicating that absentee ballots may not be deposited in it." (Id.)

Moreover, the guidance reminds county boards that they must keep a written log when any person returns an absentee ballot in person, which includes the name of the individual returning the ballot, their relationship to the voter, the ballot number, and the date it was received. (Id. at 3.) If the individual who drops off the ballot is not the voter, their near relative, or legal guardian, the log must also record their address and phone number. (Id.) The guidance also advises county boards that "[f]ailure to comply with the logging requirement, or delivery or an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot." (Id. at 3.) Instead, the guidance advises the county board that they "may ... consider the delivery of a ballot ... in conjunction with other evidence in determining whether the ballot is valid and should be counted." (Id. at 4.)

Plaintiffs argue that this guidance "undermines the General Assembly's criminal prohibition of the unlawful delivery of ballots," (Moore Compl. (Doc. 1) ¶ 68), and "effectively allow[s] voters to use drop boxes for absentee ballots," (Wise Pls.' Mot. (Doc. 43) at 13), and thus, violates the Equal Protection Clause, (Moore Compl. (Doc. 1) ¶ 93). This court disagrees.

Although Numbered Memo 2020-23 was released on September 22, 2020, (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4) at 2), the guidance it contains is not new. Consistent with the guidance in Numbered Memo 2020-23, SBE administrative rules adopted on December 1, 2018, require that any person delivering a ballot to a county board of elections office provide:

> (1) Name of voter;
>
> (2) Name of person delivering ballot;
>
> (3) Relationship to voter;
>
> (4) Phone Number (if available) and current address of person delivering ballot;
>
> (5) Date and time of delivery of ballot; and
>
> (6) Signature or mark of person delivering ballot certifying that the information provided is true and correct and that the person is the voter or the voter's near relative as defined in [N.C. Gen. Stat § 163-226(f)] or verifiable legal guardian as defined in [N.C. Gen. Stat. § 163-226(e)].

8 N.C. Admin. Code 18.0102 (2018). Moreover, the administrative rule states that "the county board of elections may consider the delivery of a ballot in accordance with this Rule in conjunction with other evidence in determining whether the container-return envelope has been properly executed according to the requirements of [N.C. Gen. Stat. § 163-231]," (id.), and that "[f]ailure to comply with this Rule shall not constitute evidence sufficient in and of itself to establish that the voter did not lawfully vote his or her ballot." (Id.)

***21** Because the guidance contained in Numbered Memo 2020-23 was already in effect at the start of this election as a result of SBE's administrative rules, Individual Plaintiffs were already subject to it at the time that they cast their votes. Accordingly, because all voters were subject to the

same guidance, Plaintiffs have not demonstrated a likelihood of success on the merits in proving disparate treatment.

It is a closer issue with respect to whether Plaintiffs have demonstrated a likelihood of success on the merits in proving that the rules promulgated by Defendant SBE are inconsistent with N.C. Gen. Stat. § 163-226.3(a)(5).

This statute makes it a felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections. Id. It would seem logically inconsistent that the General Assembly would criminalize this behavior, while at the same time, permit ballots returned by unauthorized third parties to be considered valid. Yet, upon review of the legislative history, this court finds the felony statute has been in force since 1979, 1979 N.C. Sess. Laws Ch. 799 (S.B. 519) § 4, https://www.ncleg.gov/enactedlegislation/sessionlaws/pdf/1979-1980/sl1979-799.pdf (last visited Oct. 13, 2020), and in its current form since 2013. 2013 N.C. Sess. Laws 381 (H.B. 589) § 4.6.(a).

That the General Assembly, by not taking legislative action, and instead, permitted SBE's administrative rule and the General Assembly's statute to coexist for nearly two years and through several other elections undermines Plaintiffs' argument that Defendant SBE has acted arbitrarily. For this reason, this court finds that Plaintiffs have not demonstrated a likelihood of success on the merits in proving the arbitrariness of the guidance in Numbered Memo 2020-23 and accordingly, Plaintiffs have failed to establish a likelihood of success on their Equal Protection challenge to Numbered Memo 2020-23.

If the General Assembly believes that SBE's administrative rules are inconsistent with its public policy goals, they are empowered to pass legislation which overturns the practice permitted under the administrative rule.

iv. Postmark Requirement Changes

Similarly, this court finds that Plaintiffs have failed to establish likelihood of success on the merits with respect to their Equal Protection challenge to the Postmark Requirement Changes in Numbered Memo 2020-22. (Wise, 1:20CV912, Memo 2020-22 (Doc. 1-3).)

Under Numbered Memo 2020-22, a ballot will be considered postmarked by Election Day if it has a USPS postmark, there is information in BallotTrax, or "another tracking service offered by the USPS or a commercial carrier, indicat[es] that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." (Id. at 3.) This court finds that these changes are consistent with N.C. Gen. Stat. § 163-231(b)(2)b, which does not define what constitutes a "postmark," and instead, merely states that ballots received after 5:00 p.m. on Election Day may not be accepted unless the ballot is "postmarked and that postmark is dated on or before the day of the ... general election ... and are received by the county board of elections not later than three days after the election by 5:00 p.m."

In the absence of a statutory definition for postmark, this court finds Plaintiffs have not demonstrated a likelihood of success on the merits in proving that Numbered Memo 2020-22 is inconsistent with N.C. Gen. Stat. § 163-231(b)(2)b, and thus, arbitrary. If the General Assembly believes that the Postmark Requirement Changes indicated in Memo 2020-22 are inconsistent with its public policy goals, they are empowered to pass legislation which further specifies the definition of a "postmark." In the absence of such legislation, however, this court finds that Plaintiffs have failed to establish a likelihood of success on the merits of their Equal Protection challenge.

4. Irreparable Harm

***22** In addition to a likelihood of success on the merits, a plaintiff must also make a "clear showing that it is likely to be irreparably harmed absent preliminary relief" in order to obtain a preliminary injunction. UBS Fin. Servs. Inc. v. Carilion Clinic, 880 F. Supp. 2d 724, 733 (E.D. Va. 2012) (quoting Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 347 (4th Cir. 2009)). Further, an injury is typically deemed irreparable if monetary damages are inadequate or difficult to ascertain. See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994), abrogated on other grounds by Winter, 555 U.S. at 22, 129 S.Ct. 365. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014). "[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin th[ese] law[s]." Id.

The court therefore finds Plaintiffs have demonstrated a likelihood of irreparable injury regarding the Equal Protection challenges to the Witness Requirement and the Receipt Deadline Extension.

5. Balance of Equities

The third factor in determining whether preliminary relief is appropriate is whether the plaintiff demonstrates "that the balance of equities tips in his favors." Winter, 555 U.S. at 20, 129 S.Ct. 365.

The Supreme Court's decision in Purcell v. Gonzalez, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006), urges that this court should issue injunctive relief as narrowly as possible. The Supreme Court has made clear that "lower federal courts should ordinarily not alter the election rules on the eve of an election," Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. ——, ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (per curiam), as a court order affecting election rules will progressively increase the risk of "voter confusion" as "an election draws closer." Purcell, 549 U.S. at 4-5, 127 S.Ct. 5; see also Texas All. for Retired Americans v. Hughs, —— F.3d ——, ——, 2020 WL 5816887, at *2 (5th Cir. Sept. 30, 2020) ("The principle ... is clear: court changes of election laws close in time to the election are strongly disfavored."). This year alone, the Purcell doctrine of noninterference has been invoked by federal courts in cases involving witness requirements and cure provisions during COVID-19, Clark v. Edwards, Civil Action No. 20-283-SDD-RLB, —— F.Supp.3d ——, —— – ——, 2020 WL 3415376, at *1-2 (M.D. La. June 22, 2020); the implementation of an all-mail election plan developed by county election officials, Paher v. Cegavske, 2020 WL 2748301, at *1, *6 (D. Nev. 2020); and the use of college IDs for voting, Common Cause v. Thomsen, No. 19-cv-323-JDP, 2020 WL 5665475, at *1 (W.D. Wis. Sept. 23, 2020) – just to name a few.

Purcell is not a per se rejection of any injunctive relief close to an election. However, as the Supreme Court's restoration of the South Carolina witness requirement last week illustrates, a heavy thumb on the scale weighs against changes to voting regulations. Andino v. Middleton, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J., concurring) ("By enjoining South Carolina's witness requirement shortly before the election, the District Court defied [the Purcell] principle and this Court's precedents.").

In this case, there are two SBE revisions where this court has found that Plaintiffs are likely to succeed on the merits. First, the Witness Requirement Cure Procedure, which determines whether SBE will send the voter a cure certification or spoil the ballot and issue a new one. This court has, on separate grounds, already enjoined the Witness Requirement Cure Procedure in Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457, 2020 WL 6058048 (M.D.N.C. Oct. 14, 2020) (enjoining witness cure procedure). Thus, the issue of injunctive relief on the Witness Requirement Cure Procedure is moot at this time. Nevertheless, in the absence of relief in Democracy, it seems likely that SBE's creation of "preferred class[es] of voters", Gray, 372 U.S. at 380, 83 S.Ct. 801, with elimination of the witness requirement and the cure procedure could merit relief in this case.

***23** Ripe for this court's consideration is the Receipt Deadline Extension, which contradicts state statutes regarding when a ballot may be counted. Ultimately, this court will decline to enjoin the Receipt Deadline Extension, in spite of its likely unconstitutionality and the potential for irreparable injury. The Purcell doctrine dictates that this court must "ordinarily" refrain from interfering with election rules. Republican Nat'l Comm., 140 S. Ct. at 1207. These issues may be taken up by federal courts after the election, or at any time in state courts and the legislature. However, in the middle of an election, less than a month before Election Day itself, this court cannot cause "judicially created confusion" by changing election rules. Id. Accordingly, this court declines to impose a preliminary injunction because the balance of equities weighs heavily against such an injunction.

E. Plaintiffs' Electors Clause and Elections Clause Claims

As an initial matter, this court will address the substantive issues of the Electors Clause and the Elections Clause together. The Electors Clause of the U.S. Constitution requires "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President. U.S. Const. art. II, § 1, cl. 2. Plaintiffs in Wise argue that, in order to "effectuate" this Electors requirement, "the State must complete its canvas of all votes cast by three weeks after the general election" under N.C. Gen. Stat. § 163-182.5(c). (Wise Pls.' Mot. (Doc. 43) at 15.) Plaintiffs argue that (1) the extension of the ballot receipt deadline

and (2) the changing of the postmark requirement "threaten to extend the process and threaten disenfranchisement," as North Carolina "must certify its electors by December 14 or else lose its voice in the Electoral College. (Id.)

The meaning of "Legislature" within the Electors Clause can be analyzed in the same way as "Legislature" within the Elections Clause. For example,

> As an initial matter, the Court finds no need to distinguish between the term 'Legislature' as it is used in the Elections Clause as opposed to the Electors Clause. Not only were both these clauses adopted during the 1787 Constitutional Convention, but the clauses share a "considerable similarity.
>
> ....
>
> ... [T]he Court finds that the term "Legislature" is used in a sufficiently similar context in both clauses to properly afford the term an identical meaning in both instances.

Donald J. Trump for President, Inc. v. Bullock, No. CV 20-66-H-DLC, —— F.Supp.3d ——, ——, 2020 WL 5810556, at *11 (D. Mont. Sept. 30, 2020). Nor do Plaintiffs assert any difference in the meaning they assign to "Legislature" and its authority between the two Clauses.

This court finds that all Plaintiffs lack standing under either Clause. The discussion infra of the Elections Clause applies equally to the Electors Clause.

1. Elections Clause

a. Standing

The Elections Clause standing analysis differs in Moore and Wise, though this court ultimately arrives at the same conclusion in both cases.

i. Standing in Wise

In Wise, Plaintiffs are private parties clearly established by Supreme Court precedent to have no standing to contest the Elections Clause in this manner. Plaintiffs are individual voters, a campaign committee, national political parties, and two Members of the U.S. House of Representatives. Even though Plaintiffs are part of the General Assembly, they bring their Elections Clause claim alleging an institutional harm to the General Assembly. Though the Plaintiffs claim to have suffered "immediate and irreparable harm", (Wise Compl. (Doc. 1) ¶¶ 100, 109), this does not establish standing for their Elections Clause claim or Electors Clause claim. See Corman v. Torres, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) ("[T]he Elections Clause claims asserted in the verified complaint belong, if they belong to anyone, only to the ... General Assembly."). The Supreme Court has already held that a private citizen does not have standing to bring an Elections Clause challenge without further, more particularized harms. See Lance, 549 U.S. at 441-42, 127 S.Ct. 1194 ("The only injury [private citizen] plaintiffs allege is that ... the Elections Clause ... has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."). Plaintiffs allege no such extra harms, and in fact, do not speak to standing in their brief at all.

ii. Standing in Moore

***24** In Moore, both Plaintiff Moore and Plaintiff Berger are leaders of chambers in the General Assembly. The Plaintiffs allege harm stemming from SBE flouting the General Assembly's institutional authority. (Wise Pls.' Mot. (Doc. 43) at 16.) However, as Proposed Intervenors NC Alliance argue, "a subset of legislators has no standing to bring a case based on purported harm to the Legislature as a whole." (Alliance Resp. (Doc. 64) at 15.) The Supreme Court has held that legislative plaintiffs can bring Elections Clause claims on behalf of the legislature itself only if they allege some extra, particularized harm to themselves – or some direct authority from the whole legislative body to bring the legal claim. Specifically, the Supreme Court found a lack of standing where "[legislative plaintiffs] have alleged no injury to themselves as individuals"; where "the institutional injury they allege is wholly abstract and widely disperse"; and where the plaintiffs "have not been authorized to represent their respective Houses of Congress in this action." Raines v. Byrd, 521 U.S. 811, 829, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

An opinion in a very similar case in the Middle District of Pennsylvania is instructive:

> [T]he claims in the complaint rest solely on the purported usurpation of the Pennsylvania General Assembly's exclusive rights under the Elections Clause of the United

> States Constitution. We do not gainsay that these [two] Senate leaders are in some sense aggrieved by the Pennsylvania Supreme Court's actions. But that grievance alone does not carry them over the standing bar. United States Supreme Court precedent is clear — a legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature.

Corman, 287 F. Supp. 3d at 567. In the instant case, the two members of the legislature do not allege individual injury. The institutional injury they allege is dispersed across the entire General Assembly. The crucial element, then, is whether Moore and Berger are authorized by the General Assembly to represent its interests. The General Assembly has not directly authorized Plaintiffs to represent its interests in this specific case. See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 802, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (finding plaintiff "[t]he Arizona Legislature" had standing in an Elections Clause case only because it was "an institutional plaintiff asserting an institutional injury" which "commenced this action after authorizing votes in both of its chambers"). Moore and Berger argued the general authorization in N.C. Gen. Stat. Section 120-32.6(b), which explicitly authorizes them to represent the General Assembly "[w]henever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court." N.C. Gen. Stat. § 120-32.6(b). The text of § 120-32.6 references N.C. Gen. Stat. § 1-72.2, which further specifies that Plaintiffs will "jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." (emphasis added).

Neither statute, however, authorizes them to represent the General Assembly as a whole when acting as plaintiffs in a case such as this one. See N.C. State Conference of NAACP v. Berger, 970 F.3d 489, 501 (4th Cir. 2020) (granting standing to Moore and Berger in case where North Carolina law was directly challenged, distinguishing "execution of the law" from "defense of a challenged act"). The facts of this case do not match up with this court's prior application of N.C. Gen. Stat. § 1-72.2, which has been invoked where legislators defend the constitutionality of legislation passed by the legislature when the executive declines to do so. See Fisher-Borne v. Smith, 14 F. Supp. 3d 699, 703 (M.D.N.C. 2014). Furthermore, to the extent Plaintiffs Moore and Berger disagree with the challenged provisions of the Consent Judgment, they have not alleged they lack the authority to bring the legislature back into session to negate SBE's exercise of settlement authority. See N.C. Gen. Stat. § 163-22.2.

***25** Thus, even Plaintiff Moore and Plaintiff Berger lack standing to proceed with the Elections Clause claim. Nonetheless, this court will briefly address the merits as well.

2. Merits of Elections Clause Claim

a. The 'Legislature' May Delegate to SBE

The Elections Clause of the U.S. Constitution states that the "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. Plaintiffs assert that the General Assembly instituted one such time/place/manner rule regarding the election by passing H.B. 1169. Therefore, Plaintiffs argue, SBE "usurped the General Assembly's authority" when it "plainly modif[ied]" what the General Assembly had implemented. (Wise Pls.' Mot. (Doc. 43) at 14.)

The Elections Clause certainly prevents entities other than the legislature from unilaterally tinkering with election logistics and procedures. However, Plaintiffs fail to establish that the Elections Clause forbids the legislature itself from voluntarily delegating this authority. The "Legislature" of a state may constitutionally delegate the power to implement election rules – even rules that may contradict previously enacted statutes.

State legislatures historically have the power and ability to delegate their legislative authority over elections and remain in compliance with the Elections Clause. Ariz. State Legislature, 576 U.S. at 816, 135 S.Ct. 2652 (noting that, despite the Elections Clause, "States retain autonomy to establish their own governmental processes"). Here, the North Carolina General Assembly has delegated some authority to SBE to contravene previously enacted statutes, particularly in the event of certain "unexpected circumstances." (SBE Resp. (Doc. 65) at 15.)

The General Assembly anticipated that SBE may need to implement rules that would contradict previously enacted statutes. See N.C. Gen. Stat. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this Chapter." (emphasis added)). Plaintiffs claim that "[t]he

General Assembly could not, consistent with the Constitution of the United States, delegate to the Board of Elections the power to suspend or re-write the state's election laws." (Wise Compl. (Doc. 1) ¶ 97.) This would mean that the General Assembly could not delegate any emergency powers to SBE. For example, if a hurricane wiped out all the polling places in North Carolina, Plaintiffs' reading of the Constitution would prohibit the legislature from delegating to SBE any power to contradict earlier state law regarding election procedures. (See SBE Resp. (Doc. 65) at 15).

As courts have adopted a broad understanding of "Legislature" as written in the Elections Clause, see Corman, 287 F. Supp. 3d at 573, it follows that a valid delegation from the General Assembly allowing SBE to override the General Assembly in certain circumstances would not be unconstitutional. See Donald J. Trump for President, —— F.Supp.3d at ——, 2020 WL 5810556, at *12 (finding that the legislature's "decision to afford" the Governor certain statutory powers to alter the time/place/manner of elections was legitimate under the Elections Clause).

b. Whether SBE Exceeded Legitimate Delegated Powers

***26** The true question becomes, then, whether SBE was truly acting within the power legitimately delegated to it by the General Assembly. Even Proposed Intervenors NC Alliance note that SBE's actions "could ... constitute plausible violations of the Elections Clause if they exceeded the authority granted to [SBE] by the General Assembly." (Alliance Resp. (Doc. 64) at 19.)

SBE used two sources of authority to enter into the Consent Agreement changing the laws and rules of the election process after it had begun: N.C. Gen. Stat. § 163-22.2 and § 163-27.1.

i. SBE's Authority to Avoid Protracted Litigation

First, this court finds that, while N.C. Gen. Stat. § 163-22.2 authorizes agreements in lieu of protracted litigation, it does not authorize the extensive measures taken in the Consent Agreement:

> In the event any portion of Chapter 163 of the General Statutes or any State election law or form of election of any county board of commissioners, local board of education, or city officer is held unconstitutional or invalid by a State or federal court or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act of 1965 and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of this Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly. The State Board of Elections shall also be authorized, upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes.

N.C. Gen. Stat. § 163-22.2. While the authority delegated under this statute is broad, it limits SBE's powers to implementing rules that "do not conflict with any provisions of this Chapter." Moreover, this power appears to exist only "until such time as the General Assembly convenes." Id. By eliminating the witness requirement, SBE implemented a rule that conflicted directly with the statutes enacted by the North Carolina legislature.

Moreover, SBE's power to "enter into agreement with the courts in lieu of protracted litigation" is limited by the language "until such time as the General Assembly convenes." Id. Plaintiffs appear to have a remedy to what they contend is an overreach of SBE authority by convening.

ii. SBE's Power to Override the Legislature in an Emergency

Second, Defendants rely upon N.C. Gen. Stat. § 163-27.1. That statute provides:

> (a) The Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by any of the following:
>
> (1) A natural disaster.
>
> (2) Extremely inclement weather.
>
> (3) An armed conflict involving Armed Forces of the United States, or mobilization of those forces, including

North Carolina National Guard and reserve components of the Armed Forces of the United States.

N.C. Gen. Stat. § 163-27.1(a)(1-3). As neither (a)(2) or (3) apply, the parties agree that only (a)(1), a natural disaster, is at issue in this case. On March 10, 2020, the Governor of North Carolina declared a state of emergency as a result of the spread of COVID-19. N.C. Exec. Order No. 116 (March 10, 2020). Notably, the Governor did not declare a disaster pursuant to N.C. Gen. Stat. § 166A-19.21. Instead, on March 25, 2020, it was the President of the United States who declared a state of disaster existed in North Carolina:

> ***27** I have determined that the emergency conditions in the State of North Carolina resulting from the Coronavirus Disease 2019 (COVID-19) pandemic beginning on January 20, 2020, and continuing, are of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of North Carolina.

Notice, North Carolina; Major Disaster and Related Determinations, 85 Fed. Reg. 20701 (Mar. 25, 2020) (emphasis added). The President cited the Stafford Act as justification for declaring a major disaster. See 42 U.S.C. § 5122(2). Notably, neither the Governor's Emergency Proclamation nor the Presidential Proclamation identified COVID-19 as a natural disaster.

On March 12, 2020, the Executive Director of SBE, Karen Brinson Bell ("Bell"), crafted an amendment to SBE's Emergency Powers rule. Bell's proposed rule change provided as follows:

> (a) In exercising his or her emergency powers and determining whether the "normal schedule" for the election has been disrupted in accordance with G.S. ~~163A-750~~ , 163-27.1, the Executive Director shall consider whether one or more components of election administration has been impaired. The Executive Director shall consult with State Board members when exercising his or her emergency powers if feasible given the circumstances set forth in this Rule.
>
> (b) For the purposes of G.S. ~~163A-750~~ , 163-27.1, the following shall apply:
>
> (1) A natural disaster or extremely inclement weather include ~~a:~~ any of the following:
>
> (A) Hurricane;
>
> (B) Tornado;
>
> (C) Storm or snowstorm;
>
> (D) Flood;
>
> (E) Tidal wave or tsunami;
>
> (F) Earthquake or volcanic eruption;
>
> (G) Landslide or mudslide; or
>
> (H) Catastrophe arising from natural causes ~~resulted~~ and resulting in a disaster declaration by the President of the United States or the ~~Governor.~~ Governor, a national emergency declaration by the President of the United States, or a state of emergency declaration issued under G.S. 166A-19.3(19). "Catastrophe arising from natural causes" includes a disease epidemic or other public health incident. The disease epidemic or other public health incident must make [~~that makes~~] it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting [~~place or that creates~~] place, create a significant risk of physical harm to persons in the voting place, or [~~that~~] would otherwise convince a reasonable person to avoid traveling to or being in a voting place.

https://files.nc.gov/ncoah/documents/Rules/RRC/06182020-Follow-up-Tab-B-Board-of-Elections.pdf at 5 (proposed changes in strikethroughs, or underline.) Shortly after submitting the rule change, effective March 20, 2020, SBE declared COVID-19 a natural disaster, attempting to invoke its authority under the Emergency Powers Statute, § 163-27.1. However, the Rules Review Commission subsequently unanimously rejected Bell's proposed rule change, finding in part that there was a "lack of statutory authority as set forth in G.S. 150B-21.9(a)(1)," and more specifically, that "the [SBE] does not have the authority to expand the definition of 'natural disaster' as proposed." North Carolina Office of Administrative Hearings, Rules Review Commission Meeting Minutes (May 21, 2020), at 4 https://files.nc.gov/ncoah/Minutes-May-2020.pdf.

In a June 12, 2020 letter, the Rules Review Commission Counsel indicated that Bell had responded to the committee's findings by stating "that the agency will not be submitting a new statement or additional findings," and, as a result, "the Rule [was] returned" to the agency. Letter re: Return of Rule 08 NCAC 01.0106 (June

12, 2020) at 1 https://files.nc.gov/ncoah/documents/Rules/RRC/06182020-Follow-up-Tab-B-Board-of-Elections.pdf. Despite the Rules Review Commission's rejection of Bell's proposed changes, on July 17, 2020, Bell issued an Emergency Order with the following findings:

> ***28** 18. N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01. 0106 authorize me to exercise emergency powers to conduct an election where the normal schedule is disrupted by a catastrophe arising from natural causes that has resulted in a disaster declaration by the President of the United States or the Governor, while avoiding unnecessary conflict with the laws of North Carolina. The emergency remedial measures set forth here are calculated to offset the nature and scope of the disruption from the COVID-19 disaster.
>
> 19. Pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01. 0106(a) and (b), and after consultation with the State Board, I have determined that the COVID-19 health emergency is a catastrophe arising from natural causes — i.e., a naturally occurring virus — resulting in a disaster declaration by the President of the United States and a declaration of a state of emergency by the Governor, and that the disaster has already disrupted and continues to disrupt the schedule and has already impacted and continues to impact multiple components of election administration.

(Democracy N. Carolina, No. 1:20CV457 (Doc. 101-1) ¶¶ 18-19.) This directly contradicted the Rules Commission's finding that such a change was outside SBE's authority. In keeping with Bell's actions, the State failed to note in argument before this court that Bell's proposal had been rejected explicitly because SBE lacked statutory authority to exercise its emergency powers. In fact, at the close of a hearing before this court, the State made the following arguments:

> but the Rules Review Commission declined to let it go forward as a temporary rule, I think I'm remembering this right, without stating why. But it did not go through.
>
> In the meantime, the president had declared a state of national -- natural disaster declaration. The president had declared a disaster declaration, so under the existing rule, the powers kicked into place.
>
> ....
>
> And the statute that does allow her to make those emergency decisions says in it, in exercising those emergency decisions says in it, in exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this chapter, this chapter being Chapter 163 of the election laws.

(Democracy N. Carolina, No. 1:20CV457, Evidentiary Hr'g Tr. vol. 3 (Doc. 114) at 109.) This court agrees with the Rules Review Commission: re-writing the definition of "natural disaster" is outside SBE's rulemaking authority. N.C. Gen. Stat. § 163-27.1(a)(1) limits the Executive Director's emergency powers to those circumstances where "the normal schedule for the election is disrupted by any of the following: (1) A natural disaster."[7]

[7] Notably, Bell makes no finding as to whether this is a Type I, II, or III Declaration of Disaster, which would in turn limit the term of the Disaster Declaration. See, e.g., N.C. Gen. Stat. § 166A-19.21.

Nor does the President's major disaster proclamation define COVID-19 as a "natural disaster" – at least not as contemplated by the state legislature when § 163-27.1 (or its predecessor, § 163A-750) was passed. To the contrary, the Emergency Powers are limited to an election "in a district where the normal schedule for the election is disrupted." N.C. Gen. Stat. § 163-27.1(a). Nothing about COVID-19 disrupts the normal schedule for the election as might be associated with hurricanes, tornadoes, or other natural disasters.

(a) Elimination of the Witness Requirement

Finally, even if, as SBE argues, it had the authority to enter into a Consent Agreement under its emergency powers, it did not have the power to contradict statutory authority by eliminating the witness requirement. See N.C. Gen. Stat. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this Chapter.") (emphasis added). The legislature implemented a witness requirement and SBE removed that requirement. This is certainly an unnecessary conflict with the legislature's choices.

***29** By the State's own admission, any ballots not subject to witnessing would be unverified. The State of North Carolina argued as much in urging this court to uphold the one-witness requirement:

> As Director Bell testified, it is a basic bedrock principle of elections that you have some form of verifying that the voter is who they say they are; voter verification. As she

said, when a voter comes into the poll, whether that is on election day proper or whether it is by –

....

Obviously, you can't do that when it is an absentee ballot. Because you don't see the voter, you can't ask the questions. So the witness requirement, the purpose of it is to have some means that the person who sent me this is the person -- the person who has sent this absentee ballot is who they say they are. That's the purpose of the witness requirement. The witness is witnessing that they saw this person, and they know who they are, that they saw this person fill out the ballot and prepare the ballot to mail in. And that is the point of it.

And, as Director Bell testified, I mean, we've heard a lot from the Plaintiffs about how many states do not have witness requirements. And that is true, that the majority of states, I think at this point, do not have a witness requirement.

But as Director Bell testified, they're going to have one of two things. They're going to either have the witness requirement, or they're going to have a means of verifying the signature ....

One thing -- and I think that is unquestionably an important State interest. Some means of knowing that this ballot that says it came from Alec Peters actually is from Alec Peters, because somebody else put their name down and said, yes, I saw Alec Peters do this. I saw him fill out this ballot.

Otherwise, we have no way of knowing who the ballot -- whether the ballot really came from the person who voted. It is there to protect the integrity of the elections process, but it is also there to protect the voter, to make sure that the voter knows -- everybody knows that the voter is who they say they are, and so that somebody else is not voting in their place.

Additionally, it is a tool for dealing with voter fraud.

(Democracy N. Carolina, No. 1:20CV457, Evidentiary Hr'g Tr. vol. 3 (Doc. 114) at 111-12.) In this hearing, the State continued on to note that "there needs to be some form of verification of who the voter is," which can "either be through a witness requirement or ... through signature verification," but "it needs to be one or the other." (Id. at 115-16.) Losing the witness requirement, according to the State, would mean having "no verification." (Id. at 116.) Contravening a legislatively implemented witness requirement and switching to a system of "no verification," (id.), was certainly not a necessary conflict under § 163-27.1(a).

SBE argues that this court does not have authority to address how this switch contradicted state law and went outside its validly delegated emergency powers. This is a state law issue, as the dispute is over the extent of the Executive Director's authority as granted to her by the North Carolina Legislature. The State claims that, since a North Carolina Superior Court Judge has approved this exercise of authority, this court is obligated to follow that state court judgment. (SBE Resp. (Doc. 65) at 16.)

***30** However, when the Supreme Court of a state has not spoken, federal courts must predict how that highest court would rule, rather than automatically following any state court that might have considered the question first. See Doe v. Marymount Univ., 297 F. Supp. 3d 573, 590 (E.D. Va. 2018) ("[F]ederal courts are not bound to follow state trial court decisions in exercising their supplemental jurisdiction."). The Fourth Circuit has addressed this issue directly in diversity jurisdiction contexts as well:

> a federal court sitting in diversity is not bound by a state trial court's decision on matters of state law. In King v. Order of United Commercial Travelers of America, 333 U.S. 153, 68 S. Ct. 488, 92 L. Ed. 608 (1948), the Supreme Court upheld the Fourth Circuit's refusal to follow an opinion issued by a state trial court in a South Carolina insurance case. The Court concluded, "a Court of Common Pleas does not appear to have such importance and competence within South Carolina's own judicial system that its decisions should be taken as authoritative expositions of that State's 'law.' " Id. at 161, 68 S. Ct. 488.

Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 370 (4th Cir. 2005). In other words, this court's job is to predict how the Supreme Court of North Carolina would rule on the disputed state law question. Id. at 369 ("If the Supreme Court of [North Carolina] has spoken neither directly nor indirectly on the particular issue before us, [this court is] called upon to predict how that court would rule if presented with the issue.")(quotation omitted); Carter v. Fid. Life Ass'n, 339 F. Supp. 3d 551, 554 (E.D.N.C.), aff'd, 740 F. App'x 41 (4th Cir. 2018) ("Accordingly, the court applies North Carolina law, and the court must determine how the Supreme Court of North Carolina would rule."). In predicting how the North Carolina Supreme Court might decide, this court "consider[s] lower court opinions in [North Carolina], the teachings of treatises, and the practices of other states." Twin City Fire Ins. Co., 433 F.3d at 369. This court

"follow[s] the decision of an intermediate state appellate court unless there is persuasive data that the highest court would decide differently." Town of Nags Head v. Toloczko, 728 F.3d 391, 397-98 (4th Cir. 2013).

In all candor, this court cannot conceive of a more problematic conflict with the provisions of Chapter 163 of the North Carolina General Statutes than the procedures implemented by the Revised 2020-19 memo and the Consent Order. Through this abandonment of the witness requirement, some class of voters will be permitted to submit ballots with no verification. Though SBE suggests that its "cure" is sufficient to protect against voter fraud, the cure provided has few safeguards: it asks only if the voter "voted" with no explanation of the manner in which that vote was exercised. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1) at 34.) This court believes this is in clear violation of SBE's powers, even its emergency powers under N.C. Gen. Stat. § 163-27.1(a). However, none of this changes the fact that Plaintiffs in both Wise and Moore lack standing to challenge the legitimacy of SBE's election rule-setting power under either the Elections Clause or the Electors Clause.

III. CONCLUSION

This court believes the unequal treatment of voters and the resulting Equal Protection violations as found herein should be enjoined. Nevertheless, under Purcell and recent Supreme Court orders relating to Purcell, this court is of the opinion that it is required to find that injunctive relief should be denied at this late date, even in the face of what appear to be clear violations. For the foregoing reasons, this court finds that in Moore v. Circosta, No. 1:20CV911, Plaintiffs' Motion for Preliminary Injunction should be denied. This court also finds that in Wise v. N. Carolina State Bd. of Elections, No. 1:20CV912, the Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction should be denied.

***31 IT IS THEREFORE ORDERED** that Plaintiffs' Motion for Preliminary Injunction in Moore v. Circosta, No. 1:20CV911, (Doc. 60), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction in Wise v. N. Carolina State Bd. of Elections, No. 1:20CV912, (Doc. 43), is **DENIED**.

All Citations

--- F.Supp.3d ----, 2020 WL 6063332

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United States District Court, D. Nevada.

DONALD J. TRUMP FOR PRESIDENT, INC., et al., Plaintiff(s),
v.
Barbara CEGAVSKE, Defendant(s).

Case No. 2:20-CV-1445 JCM (VCF)
|
Signed 09/18/2020

Synopsis

Background: Presidential election campaign and political party brought action challenging constitutionality of Nevada statute which expanded mail-in voting for Nevada voters during COVID-19 pandemic. Nevada Secretary of State moved to dismiss.

Holdings: The District Court, James C. Mahan, Senior District Judge, held that:

presidential election campaign and political party lacked associational standing to bring suit on behalf of its member voters, and

plaintiffs lacked direct organizational standing.

Motion granted.

Attorneys and Law Firms

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ORDER

James C. Mahan, UNITED STATES DISTRICT JUDGE

***1** Presently before the court is defendant Barbara Cegavske, Nevada Secretary of State's, motion to dismiss the first amended complaint. (ECF No. 37). Plaintiffs Donald J. Trump for President, Inc. ("Trump campaign"), the Republican National Committee, and the Nevada Republican Party responded. (ECF No. 42). Defendant replied. (ECF No. 45).

I. Background

On August 3, 2020, Nevada joined the growing ranks of states that have expanded mail-in voting due to the COVID-19 pandemic.[1] *See* Assembly Bill No. 4 of the 32nd Special Session (2020) of the Nevada Legislature, Act of August 3, 2020, ch. 3, 2020 Nev. Stat. 18, §§ 1–88 ("AB 4"). The Nevada State Legislature passed Assembly Bill 4 ("AB 4"), which codified procedures for elections impacted by emergencies or disasters.[2] Specifically, the law directs city and county election officials to mail paper ballots to all active registered voters in Nevada. AB 4 at § 15.

1 Prior to the COVID-19 pandemic, Nevada voters could request an absentee ballot without providing an excuse or justification, and certain voters in rural areas could be grouped together in "mailing precincts" and "automatically mailed their paper ballots." (*See* ECF No. 37 at 7 (citing NRS §§ 293.3038-.340; 293.343-.355)).

2 "[I]f a state of emergency or declaration of disaster is proclaimed by the Governor or by resolution of the Legislature pursuant to NRS 414.070 for the entire State of Nevada, the following elections are deemed to be affected elections." AB 4 at § 8. Governor Steve Sisolak declared a state of emergency due to the COVID-19 pandemic on March 12, 2020. (ECF No. 29 at ¶ 103).

The next day, plaintiffs filed this instant suit.[3] (ECF No. 1). They challenge several key provisions of AB 4:

3 This suit is one of several that the Trump campaign has filed challenging expansions of mail-in voting during the COVID-19 pandemic. *See Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-6-H-DLC (D. Mont. filed Sept. 2, 2020); *Donald J. Trump for President, Inc. v. Murphy*, No. 3:20-cv-10753, 2020 WL

4805762 (D.N.J. filed Aug. 18, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-00966 (W.D. Pa. filed Jun. 29, 2020). This court only takes notice of the existence of these lawsuits, and not the disputed facts therein. Fed. R. Evid. 201.

Section 20(2) of AB 4 establishes a presumption that a ballot was cast in time, as long as it is received by election officials before 5 p.m. on the third day after the election, even if it lacks a postmark.[4] AB 4 at § 20(2). Plaintiffs allege that section 20(2) is preempted by federal laws that set the date of the general election,[5] because the provision allegedly permits election officials to count ballots cast after election day. (ECF No. 29 at ¶¶ 104–123). Plaintiffs theorize that, due to the speed of the United States Postal Service, a ballot mailed in Clark or Washoe county "in a state-provided, postage prepaid first-class envelope on the Wednesday or Thursday after Election Day will likely be received [by election officials] before 5:00pm on the Friday after the election" and "almost certainly will arrive without bearing a postmark." (*Id.* at ¶ 96).

4 Section 20(2) of AB 4 duplicates NRS § 293.317, a statute that has been in effect since January 1, 2020, but makes it applicable to affected elections. (ECF No. 37 at 8, 15).

5 U.S. Const. art. I, § 4, cl. 1 (Elections Clause); U.S. Const. art. II, § 1, cl. 4 (Electors Clause); U.S. Const. art. VI, § 2 (Supremacy Clause); 3 U.S.C. § 1 ("Time of appointing electors"); 2 U.S.C. § 7 ("Time of election"); 2 U.S.C. § 1 ("Time for election of senators").

***2** Sections 11 and 12 of AB 4 require election officials to establish a minimum number of in-person voting locations for early voting and election-day voting, respectively. AB 4 at §§ 11, 12. A county with a population of "700,000 or more" must establish at least 100 voting centers for election day. *Id.* at § 12. A county with a population of "100,000 or more but less than 700,000" must establish at least 25 voting centers. *Id.* And a county with a population of "less than 100,000" may establish one or more voting center. *Id.* Plaintiffs allege that sections 11 and 12 authorize the disparate treatment of rural voters in violation of the Equal Protection Clause, because there will be "more in-person voting places per capita for voters in urban counties than in rural counties." (ECF No. 29 at ¶ 100). Plaintiffs speculate that rural Nevada counties will have substantially higher numbers of registered voters per in-person voting location than urban counties such as Washoe. (*Id.* at ¶¶ 130–138).

Section 22 of AB 4 requires election officials to establish "procedures for the processing and counting of mail ballots" for any affected election.[6] AB 4 at § 22. Section 25 provides that "if two or more mail ballots are found folded together to present the appearance of a single ballot" and "a majority of the inspectors are of the opinion that the mail ballots folded together were voted by one person, the mail ballots must be rejected."[7] AB 4 at § 25(2). Plaintiffs allege that sections 22 and 25 violate the Equal Protection Clause, because they authorize " 'standardless' procedures" across counties and cities for processing, inspecting, and counting mail ballots with no "specific rules designed to ensure uniform treatment" and no " 'minimal procedural safeguards.' " (ECF No. 29 at ¶¶ 145, 159) (quoting *Bush v. Gore*, 531 U.S. 98, 105–106, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (per curiam)).

6 Section 22 is read together with other provisions in AB 4 that establish procedures for processing and counting mail ballots. For example, section 17 requires election officials to secure proof of identification from certain first-time voters before counting their mail ballots. AB 4 at § 17. Section 23 requires election officials to verify the signature on mail ballots. *Id.* at § 23. Section 26 requires election officials to verify that the voter did not vote in person before counting the mail ballot. *Id.* at § 26. And Section 22(b) forbids election officials from establishing any procedures that conflict with sections 2 to 27 of AB 4. *Id.* at § 22.

7 Section 25 of AB 4 duplicates NRS § 293.363, a statute that has been in effect since 1960, but makes it applicable to affected elections. (ECF No. 37 at 9, 21).

And finally, plaintiffs allege that all of the aforementioned provisions of AB 4, along with section 21,[8] "facilitate fraud and other illegitimate voting practices" and "dilute the value of honest, lawful votes" in violation of the Fourteenth Amendment. (ECF No. 29 at ¶ 169).

8 Section 21 allows for "a person authorized by the voter may return the mail ballot on behalf of the voter by mail or personal delivery to the county or city clerk, as applicable, or any ballot drop box established in the county or city, as applicable." AB 4 at § 21.

On August 20, 2020, plaintiffs amended their complaint without altering the parties or their claims. (ECF No. 29). Defendant now moves to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). (ECF No. 37).

II. Legal Standard

Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

A. Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows defendants to seek dismissal of a claim or action for a lack of subject matter jurisdiction. Dismissal under Rule 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts on its face sufficient to establish subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984–85 (9th Cir. 2008).

***3** Plaintiffs bear the burden of proving that the case is properly in federal court to survive a Rule 12(b)(1) motion. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936)). They must plead "the existence of whatever is essential to federal jurisdiction, and, if [plaintiffs] do[ ] not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment." *Smith v. McCullough*, 270 U.S. 456, 459, 46 S.Ct. 338, 70 L.Ed. 682 (1926).

B. Article III Standing

Standing to sue is a "doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). The doctrine "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Id.* In this way, standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–77, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

To establish standing, plaintiff must plead three elements: (1) an injury in fact; (2) a causal connection between the injury and the alleged misconduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130. The party invoking federal jurisdiction bears the burden of demonstrating that it has standing to sue. *Id.* at 561, 112 S.Ct. 2130. "[A]t the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element" of standing. *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent[.]' " *Spokeo*, 136 S. Ct. at 1548. Moreover, a concrete injury must actually exist and affect the plaintiff in a personal and individual way. *Id.* As the Supreme Court noted in *Spokeo*:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, [plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

Id. at 1549 (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing.")).

III. Discussion

Defendant argues that plaintiffs do not have standing to bring their claims for relief. (ECF Nos. 37, 45). This court agrees.

Plaintiffs attempt to establish standing in three ways: (1) associational standing to vindicate harms to their member voters, (2) direct organizational standing due to their need to divert resources, and (3) direct and associational standing to vindicate competitive injuries to their candidates. (ECF No. 42).

This court will address each of plaintiffs' theories in turn.

A. Associational Standing for Voters

***4** Plaintiffs argue that they have associational standing to vindicate the injuries caused to their member voters by

AB 4. (ECF No. 42 at 10–13). These injuries are two-fold: an individual "right under the Constitution to have [your] vote fairly counted, without being distorted by fraudulently cast votes"—vote dilution—and an "arbitrary and disparate treatment of the members of its electorate"—violations of the Equal Protection Clause. (ECF No. 29 at ¶¶ 33, 35).

An entity may establish associational standing to bring suit on behalf of its members when: (1) "its members would otherwise have standing to sue in their own right;" (2) "the interests it seeks to protect are germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

This court finds that the Trump campaign fails to satisfy the second prong of associational standing: the interests of the voters are not "germane to the organization's purpose." *Id.* The Trump campaign does not represent Nevada voters. The Trump campaign represents only Donald J. Trump and his "electoral and political goals" of reelection. (ECF No. 29 at ¶ 11). By statutory definition, a federal election candidate's "principal campaign committee" is simply a reserve of funds set aside for that campaign. *See* 52 U.S.C. § 30102 ("Organization of political committees"). Although the Trump campaign may achieve its "organization's purpose" through Nevada voters, the individual constitutional interests of those voters are wholly distinct. (ECF No. 29 at ¶ 11).

In contrast to the Trump campaign, the Republican National Committee and Nevada Republican Party satisfy the second prong; the interests of their member voters are germane to their "organization's purpose." *See Hunt*, 432 U.S. at 343, 97 S.Ct. 2434. Still, however, plaintiffs' member voters would not "otherwise have standing to sue in their own right." *Id.* Plaintiffs' alleged injury of vote dilution is impermissibly "generalized" and "speculative" at this juncture. *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011). To establish these future injuries, plaintiffs must plead facts that establish a " 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013)). Plaintiffs' allegations of equal protection violations are also generalized and speculative. However, plaintiffs' claim against sections 11 and 12 fail to satisfy redressability as well—"a likelihood that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130.

To demonstrate the substantial risk of voter fraud, plaintiffs cite studies and news articles on the subject. (ECF No. 29 at ¶¶ 63–81). The news articles describe a parade of administrative problems in Wisconsin, New Jersey, Connecticut, and New York, states that "hurriedly" implemented mail-in voting for elections during the COVID-19 pandemic. (*Id.* at ¶¶ 63–75). Plaintiffs also point to reported irregularities in Nevada's June 2020 mail-in primary elections. (*Id.* at ¶¶ 57–62).

Even if accepted as true, plaintiffs' pleadings allude to vote dilution that is impermissibly generalized. The alleged injuries are speculative as well, *see Lujan*, 504 U.S. at 560, 112 S.Ct. 2130, but their key defect is generality. As a court in this district has already recognized, plaintiffs' claims of a substantial risk of vote dilution "amount to general grievances that cannot support a finding of particularized injury as to [p]laintiffs." *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, at *4 (D. Nev. May 27, 2020). Indeed, the key provisions of AB 4 apply to all Nevada voters. Plaintiffs never describe how their member voters will be harmed by vote dilution where other voters will not. As with other "[g]enerally available grievance[s] about the government," plaintiffs seek relief on behalf of their member voters that "no more directly and tangibly benefits [them] than it does the public at large." *Lujan*, 504 U.S. at 573–74, 112 S.Ct. 2130; *see Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) ("The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries."). Plaintiffs' allegations are "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that fail to confer Article III standing. *Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007).

***5** As to plaintiffs' equal protection claims, plaintiffs first argue that "[s]ections 11 and 12 of AB4 authorize disparate treatment of voters in rural counties" due to the law's differences in *minimum* number of in-person voting locations across counties and lack of further guidance on how election officials should make their determinations. (ECF No. 29 at ¶ 126). However, plaintiffs fail to demonstrate how these harms are redressed by their requested relief. "The proposition that plaintiffs must seek relief that actually improves their position is a well-established principle." *Townley v. Miller*, 722 F.3d 1128, 1134 (9th Cir. 2013). AB 4 simply establishes a minimum number of in-person voting locations. AB 4 at

§§ 11, 12. Removing this one safeguard does not alleviate plaintiffs' concerns. In fact, it "worsen[s] plaintiffs' injury rather than redressing it." *Townley*, 722 F.3d at 1135 ("[I]f plaintiffs were to prevail in this lawsuit, ... voters would no longer have the opportunity to affirmatively express their opposition at the ballot box at all. The relief plaintiffs seek will therefore *decrease* their (and other voters') expression of political speech rather than increase it, worsening plaintiffs' injury rather than redressing it."). An injunction against the enforcement of AB 4 would not address plaintiffs' issues with the discretion that Nevada election officials have to establish in-person voting locations. It would instead eliminate the safeguard of a minimum number of in-person voting locations from all counties.[9]

9 During the pendency of this motion, Nevada election officials established polling places and voting centers for the 2020 general election. *2020 General Election & Polling Locations*, Nevada Secretary of State (2020), https://www.nvsos.gov/sos/elections/election-day-information (presenting this information by county). This does not impact this court's finding on redressability.

Plaintiffs also claim that "AB 4's three-day, post-election receipt deadline for non-postmarked ballots—coupled with its deeming rule, the faster average mailing time in urban districts such as Clark County, and the postal service's practice of not postmarking prepaid mail—will likely result in significantly more untimely ballots being counted from urban areas." (ECF No. 42 at 12). These injuries are too speculative to establish standing. Plaintiffs offer a patchwork theory of harm that does not rely on AB 4, but on the speed of the United States Postal Service, an entity out of defendant's control. (ECF No. 29 at ¶¶ 73–81, 90–97). A "future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List*, 573 U.S. at 158, 134 S.Ct. 2334. Even among the segment of voters who vote by mail, plaintiffs offer no indication that the alleged future injury is "certainly impending" or "substantial[ly]" likely. *Id.*

This court finds that plaintiffs do not have associational standing to represent their member voters.

B. Direct Organizational Standing

Plaintiffs next allege that they have direct organizational standing to bring their claims. (ECF No. 42 at 3–8). Organizational standing is recognized where the alleged misconduct of the defendant causes "a drain on [plaintiffs'] resources from both a diversion of its resources and frustration of its mission." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (quotation omitted); *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) ("Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."). Plaintiffs allege that AB 4 forces them "to divert resources and spend significant amounts of money educating Nevada voters ... and encouraging them to still vote." (ECF No. 29 at ¶ 17). Plaintiffs also briefly allege a need to divert resources to counteract voter fraud. (ECF No. 42 at 5) (citing *Am. Civil Rights Union v. Martinez Rivera*, 166 F. Supp. 3d 779, 800 (W.D. Tex. 2015)).

This court is unpersuaded by plaintiffs' theory of organizational standing. Plaintiffs argue that AB 4 would "confuse" their voters and "create incentive to remain away from the polls." (ECF No. 29 at ¶ 17). Outside of stating "confus[ion]" and "discourage[ment]" in a conclusory manner, plaintiffs make no indication of how AB 4 will discourage their member voters from voting. (ECF No. 29); *see Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (holding that a "new law injures" a political party when it compels it "to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote."). If plaintiffs did not expend any resources on educating their voters on AB 4, their voters would proceed to vote in-person as they overwhelmingly have in prior elections. (ECF No. 29 at ¶¶ 43–47). AB 4 does not abolish in-person voting. An organization cannot "simply choos[e] to spend money fixing a problem that otherwise would not affect the organization at all. It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (quoting *La Asociacion de Trabajadores de Lake Forest v. Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)). Plaintiffs make no showing of their voters' confusion. Indeed, voters exercised their ability to vote by mail in Nevada's 2020 primary election. NRS §§ 293.343-.355; *see Paher v. Cegavske*, No. 320CV00243MMDWGC, —— F.Supp.3d ——, ——, 2020 WL 2089813, at *2 (D. Nev. Apr. 30, 2020) ("[A]ll active

registered voters will be mailed an absentee ballot (mail-in ballot) for the primary election.").

***6** In making this fact-intensive finding, this court also notes the substantive differences between AB 4 and the laws challenged in plaintiffs' cited authority. *Compare* AB 4, *with Pavek v. Simon*, No. 19-CV3000 (SRN/DTS), —— F.Supp.3d ——, ——, 2020 WL 3183249, at *14 (D. Minn. June 15, 2020) (finding organizational standing to challenge a state law which "requires that in Minnesota general elections, major political party candidates must be listed, on the ballot, in reverse order based on the average number of votes that their party received in the last state general election"); *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018), *rev'd on other grounds sub nom. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc) (finding organizational standing to challenge a state law that prohibits third-party ballot collection); *Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1258 (N.D. Ga. 2018) (finding organizational standing to challenge a state voter identification and registration law); *Feldman v. Arizona Sec'y of State's Office*, 208 F. Supp. 3d 1074, 1080–81 (D. Ariz. 2016) (finding organizational standing to challenge a state law that "limits who may possess another's early ballot"); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (finding organizational standing to challenge a state voter identification law). In these cases with organizational standing, the challenged law has a direct and specific impact on a voter's ability to vote. Indeed, a diversion of resources for education would be required in such situations. But here, the challenged law expands access to voting through mail without restricting prior access to in-person voting. Thus, as detailed above, plaintiffs need not *divert* resources to enable or encourage their voters to vote.

Plaintiffs also briefly argue that they will need to divert resources to fight voter fraud. (ECF No. 42 at 4–5). This court repeats its prior finding on vote dilution: it is a speculative and "generalized grievance" in this case. *See Paher*, 2020 WL 2748301, at *4 (finding no standing where plaintiffs failed to "state a particularized injury" and did no more than "speculatively connect the specific conduct they challenge ... and the claimed injury [of] vote dilution"); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."). Plaintiffs note in their response to defendant's motion to dismiss that they will need to divert resources to combat voter fraud. (ECF No. 42 at 4–5). Plaintiffs cannot divert resources to combat an impermissibly speculative injury. *See Susan B. Anthony List*, 573 U.S. at 158, 134 S.Ct. 2334. Not only have plaintiffs failed to allege a substantial risk of voter fraud, the State of Nevada has its own mechanisms for deterring and prosecuting voter fraud. *See* NRS §§ 293.700-.840 ("unlawful acts and penalties" in the context of an election). Here, plaintiffs do not allege that those mechanisms would fail and that they would need to divert resources accordingly. This court finds that plaintiffs have again failed to show that they would "suffer[ ] some other injury if [they] had not diverted resources to counteracting the problem." *Valle del Sol*, 732 F.3d at 1018.

C. Direct and Associational Standing for Candidates

Finally, plaintiffs argue that they have both direct and associational standing to challenge "competitive harms" to their electoral candidates. (ECF No. 42 at 8). "Competitive standing" can exist when a state action will lead to the "potential loss of an election." *Drake*, 664 F.3d at 783 (quoting *Owen v. Mulligan*, 640 F.2d 1130, 1132–33 (9th Cir. 1981)).

Plaintiffs seek to vindicate the rights of their candidates, because AB 4 will undermine the ability of "Republican candidates to receive[ ] effective votes in Nevada" by "confus[ing] voters, undermin[ing] confidence in the electoral process, and creat[ing] incentives to remain away from the polls." (ECF No. 29 at ¶¶ 16–17). The pleadings make no showing of "an unfair advantage in the election process." *Drake*, 664 F.3d at 783. Plaintiffs rely on conclusory statements on confusion and disincentives that this court has already found unpersuasive. *See supra* III.B. Plaintiffs seek to muster "*competitive* standing," yet their candidates face no harms that are unique from their electoral opponents. *Owen*, 640 F.2d at 1132–33 (finding competitive standing where the postal service gave plaintiff's opponent a preferential mailing rate).

***7** As to AB 4's disparate treatment of rural voters, this court repeats its prior findings: plaintiffs' requested relief fails to satisfy redressability and the alleged harm is too speculative. *See supra* III.A. Enjoining Nevada election officials from enforcing AB 4 would not apparently improve the odds for plaintiffs' candidates. *See Drake*, 664 F.3d at 783 (quoting *Owen*, 640 F.2d at 1132–33 (9th Cir. 1981)). Plaintiffs make no such allegations. Election officials would operate without the guidance of AB 4's minimum number of in-person voting locations. On plaintiffs' theory as to Sections 20 and 22 of AB

4, plaintiffs have not established a "substantial risk" that their alleged harm will occur. *Susan B. Anthony List*, 573 U.S. at 158, 134 S.Ct. 2334. Thus, neither plaintiffs nor their member candidates "have standing to sue in their own right." *Hunt*, 432 U.S. at 343, 97 S.Ct. 2434.

Ultimately, as plaintiffs concede, they hold "policy disagreements" with proponents of AB 4. (ECF No. 42 at 2). Although they purport to allege constitutional harms that go beyond these policy disagreements, at this juncture, plaintiffs' allegations remain just that. (*Id.*). Since initiating this matter on August 4, 2020, (ECF No. 1), plaintiffs have not requested an injunction or expedited review. Plaintiffs ask for a remedy to cure the "confusion" caused by AB 4, yet they have positioned this case for last minute adjudication before the general election.[10]

10 The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19A1016, —— U.S. ——, 140 S.Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (citing *Purcell*; *Frank v. Walker*, 574 U.S. 929, 135 S.Ct. 7, 190 L.Ed.2d 245 (2014); and *Veasey v. Perry*, 574 U.S. ——, 135 S. Ct. 9, 190 L.Ed.2d 283 (2014)).

This court grants defendant's motion to dismiss due to plaintiffs' lack of standing. (ECF No. 37). Plaintiffs' amended complaint is hereby dismissed. (ECF No. 29). The remaining motions before the court are denied as moot. (ECF Nos. 10, 40, 41, 43).

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion to dismiss the amended complaint (ECF No. 37) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that defendant's motion to dismiss the original complaint (ECF No. 10) be, and the same hereby is, DENIED as moot.

IT IS FURTHER ORDERED that intervenor-defendants DNC Services Corporation/Democratic National Committee, Democratic Congressional Campaign Committee, and the Nevada State Democratic Party's motion to dismiss the amended complaint (ECF No. 40) be, and the same hereby is, DENIED as moot.

IT IS FURTHER ORDERED that plaintiff's motion for partial summary judgment (ECF No. 41) be, and the same hereby is, DENIED as moot.

IT IS FURTHER ORDERED that non-parties Walker River Paiute Tribe and Pyramid Lake Paiute Tribe's motion to intervene (ECF No. 43) be, and the same hereby is, DENIED as moot.

The clerk is instructed to close the case.

All Citations

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United States Court of Appeals, Third Circuit.

Jim BOGNET, Donald K. Miller, Debra Miller, Alan Clark, Jennifer Clark, Appellants

v.

SECRETARY COMMONWEALTH OF PENNSYLVANIA; Adams County Board of Elections; Allegheny County Board of Elections; Armstrong County Board of Elections; Beaver County Board of Elections; Bedford County Board of Elections; Berks County Board of Elections; Blair County Board of Elections; Bradford County Board of Elections; Bucks County Board of Elections; Butler County Board of Elections; Cambria County Board of Elections; Cameron County Board of Elections; Carbon County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Clarion County Board of Elections; Clearfield County Board of Elections; Clinton County Board of Elections; Columbia County Board of Elections; Crawford County Board of Elections; Cumberland County Board of Elections; Dauphin County Board of Elections; Delaware County Board of Elections; Elk County Board of Elections; Erie County Board of Elections; Fayette County Board of Elections; Forest County Board of Elections; Franklin County Board of Elections; Fulton County Board of Elections; Greene County Board of Elections; Huntingdon County Board of Elections; Indiana County Board of Elections; Jefferson County Board of Elections; Juniata County Board of Elections; Lackawanna County Board of Elections; Lancaster County Board of Elections; Lawrence County Board of Elections; Lebanon County Board of Elections; Lehigh County Board of Elections; Luzerne County Board of Elections; Lycoming County Board of Elections; Mckean County Board of Elections; Mercer County Board of Elections; Mifflin County Board of Elections; Monroe County Board of Elections; Montgomery County Board of Elections; Montour County Board of Elections; Northampton County Board of Elections; Northumberland County Board of Elections; Perry County Board of Elections; Philadelphia County Board of Elections; Pike County Board of Elections; Potter County Board of Elections; Schuylkill County Board of Elections; Snyder County Board of Elections; Somerset County Board of Elections; Sullivan County Board of Elections; Susquehanna County Board of Elections; Tioga County Board of Elections; Union County Board of Elections; Venango County Board of Elections; Warren County Board of Elections; Washington County Board of Elections; Wayne County Board of Elections; Westmoreland County Board

of Elections; Wyoming County Board of Elections; York County Board of Elections Democratic National Committee, Intervenor

No. 20-3214
|
Submitted Pursuant to Third Circuit L.A.R. 34.1(a) November 9, 2020
|
(Filed: November 13, 2020)

Synopsis

Background: Voters and congressional candidate brought action against Secretary of Commonwealth of Pennsylvania and county boards of elections, seeking to enjoin the counting of mail-in ballots received during the three-day extension of the ballot-receipt deadline ordered by the Pennsylvania Supreme Court, and seeking a declaration that the extension period and presumption of timeliness was unconstitutional. The United States District Court for the Western District of Pennsylvania, Kim R. Gibson, Senior District Judge, 2020 WL 6323121, denied voters' and candidate's motion for a temporary restraining order (TRO) and preliminary injunction. Voters and candidate appealed.

Holdings: The Court of Appeals, Smith, Chief Judge, held that:

the District Court's order was immediately appealable;

voters and candidate lacked standing to bring action alleging violation of Constitution's Elections Clause and Electors Clause;

voters lacked concrete injury for their alleged harm of vote dilution, and thus voters did not have standing for such claim;

voters lacked particularized injury for their alleged harm of vote dilution, and thus voters did not have standing for such claim;

voters failed to allege legally cognizable "preferred class," for purposes of standing to claim equal protection violation;

alleged harm from presumption of timeliness was hypothetical or conjectural, and thus voters did not have standing to challenge presumption; and

voters and candidate were not entitled to receive injunction so close to election.

Affirmed.

On Appeal from the United States District Court for the Western District of Pennsylvania, District Court No. 3-20-cv-00215, District Judge: Honorable Kim. R. Gibson

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Before: SMITH, Chief Judge, SHWARTZ and SCIRICA, Circuit Judges

OPINION OF THE COURT

SMITH, Chief Judge.

***1** *A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.*—Alexander Hamilton[1]

1 Second Letter from Phocion (April 1784), *reprinted in* 3 The Papers of Alexander Hamilton, 1782–1786, 530–58 (Harold C. Syrett ed., 1962).

The year 2020 has brought the country unprecedented challenges. The COVID-19 pandemic, which began early this year and continues today, has caused immense loss and vast disruption. As this is a presidential election year, the pandemic has also presented unique challenges regarding where and how citizens shall vote, as well as when and how their ballots shall be tabulated. The appeal on which we now rule stems from the disruption COVID-19 has wrought on the national elections. We reach our decision, detailed below, having carefully considered the full breadth of statutory law and constitutional authority applicable to this unique dispute over Pennsylvania election law. And we do so with commitment to a proposition indisputable in our democratic process: that the lawfully cast vote of every citizen must count.

I. Background & Procedural History

A. The Elections and Presidential Electors Clause

The U.S. Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. This provision is known as the "Elections Clause." The Elections Clause effectively gives state governments the "default" authority to regulate the mechanics of federal elections, *Foster v. Love*, 522 U.S. 67, 69, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997), with Congress retaining "exclusive control" to "make or alter" any state's regulations, *Colegrove v. Green*, 328 U.S. 549, 554, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). Congress has not often wielded this power but, "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384, 399, 25 L.Ed. 717 (1879) ("[T]he Constitution and constitutional laws of the [United States] are ... the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation."). By statute, Congress has set "[t]he Tuesday next after the 1st Monday in November, in every even numbered year," as the day for the election. 2 U.S.C. § 7.

Much like the Elections Clause, the "Electors Clause" of the U.S. Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." U.S. Const. art. II, § 1, cl. 2. Congress can "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, § 1, cl. 4. Congress has set the time for appointing electors as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 U.S.C. § 1.

***2** This year, both federal statutes dictate that the day for the election was to fall on Tuesday, November 3 ("Election Day").

B. Pennsylvania's Election Code

In keeping with the Constitution's otherwise broad delegation of authority to states to regulate the times, places, and manner of holding federal elections, the Pennsylvania General Assembly has enacted a comprehensive elections code. In 2019, the General Assembly passed Act 77, which (among other things) established "no-excuse" absentee voting in Pennsylvania[2]: all eligible voters in Pennsylvania may vote by mail without the need to show their absence from their voting district on the day of the election. 25 Pa. Stat. and Cons. Stat. §§ 3150.11–3150.17. Under Act 77, "[a]pplications for mail-in ballots shall be processed if received not later than five o'clock P.M. of the first Tuesday prior to the day of

any primary or election." *Id.* § 3150.12a(a). After Act 77, "a completed absentee [or mail-in] ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election" for that vote to count. *Id*. §§ 3146.6(c), 3150.16(c).

2 Throughout this opinion, we refer to absentee voting and mail-in voting interchangeably.

C. The Pennsylvania Supreme Court Decision

Soon after Act 77's passage, Donald J. Trump for President, Inc., the Republican National Committee ("RNC"), and several Republican congressional candidates and voters brought suit against Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania, and all of Pennsylvania's county boards of elections. That suit, filed in the Western District of Pennsylvania, alleged that Act 77's "no-excuse" mail-in voting regime violated both the federal and Pennsylvania constitutions. *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, —— F.Supp.3d ——, ——, 2020 WL 4920952, at *1 (W.D. Pa. Aug. 23, 2020). Meanwhile, the Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates filed suit in Pennsylvania's Commonwealth Court, seeking declaratory and injunctive relief related to statutory-interpretation issues involving Act 77 and the Pennsylvania Election Code. *See Pa. Democratic Party v. Boockvar*, —— Pa. ——, 238 A.3d 345, 352 (2020). Secretary Boockvar asked the Pennsylvania Supreme Court to exercise extraordinary jurisdiction to allow it to immediately consider the case, and her petition was granted without objection. *Id.* at 354–55.

Pending resolution of the Pennsylvania Supreme Court case, Secretary Boockvar requested that the Western District of Pennsylvania stay the federal case. *Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——, 2020 WL 4920952, at *1. The District Court obliged and concluded that it would abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *See Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——, 2020 WL 4920952, at *21. The RNC then filed a motion for limited preliminary injunctive relief asking that all mailed ballots be segregated, but the District Court denied the motion, finding that the plaintiffs' harm had "not yet materialized in any actualized or imminent way." *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5407748, at *1 (W.D. Pa. Sept. 8, 2020).

***3** With the federal case stayed, the state court matter proceeded. The Pennsylvania Democratic Party argued that a combination of the COVID-19 pandemic and U.S. Postal Service ("USPS") mail-delivery delays made it difficult for absentee voters to timely return their ballots in the June 2020 Pennsylvania primary election. *Pa. Democratic Party*, 238 A.3d at 362. The Pennsylvania Democratic Party claimed that this voter disenfranchisement violated the Pennsylvania Constitution's Free and Equal Elections Clause, art I., § 5,[3] and sought, among other things, a weeklong extension of the deadline for receipt of ballots cast by Election Day in the upcoming general election—the same deadline for the receipt of ballots cast by servicemembers residing overseas. *Id.* at 353–54. Secretary Boockvar originally opposed the extension deadline; she changed her position after receiving a letter from USPS General Counsel which stated that Pennsylvania's ballot deadlines were "incongruous with the Postal Service's delivery standards," and that to ensure that a ballot in Pennsylvania would be received by 8:00 P.M. on Election Day, the voter would need to mail it a full week in advance, by October 27, which was also the deadline to *apply* for a mail-in ballot. *Id.* at 365–66; 25 Pa. Stat. and Cons. Stat. § 3150.12a(a). Secretary Boockvar accordingly recommended a three-day extension to the received-by deadline. *Pa. Democratic Party*, 238 A.3d at 364–65.

3 The Free and Equal Elections Clause of the Pennsylvania Constitution provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. 1, § 5.

In a September 17, 2020 decision, the Pennsylvania Supreme Court concluded that USPS's existing delivery standards could not meet the timeline built into the Election Code and that circumstances beyond voters' control should not lead to their disenfranchisement. *Pa. Democratic Party*, 238 A.3d at 371. The Court accordingly held that the Pennsylvania Constitution's Free and Equal Elections Clause required a three-day extension of the ballot-receipt deadline for the November 3 general election. *Id.* at 371, 386–87. All ballots postmarked by 8:00 P.M. on Election Day and received by 5:00 P.M. on the Friday after Election Day, November 6, would be considered timely and counted ("Deadline Extension"). *Id.* at 386–87. Ballots postmarked or signed after Election Day, November 3, would be rejected. *Id.* If the postmark on a ballot received before the November 6 deadline was missing or illegible, the ballot would be presumed to be timely unless "a preponderance of the evidence demonstrates that it was mailed after Election Day" ("Presumption of

Timeliness"). *Id.* Shortly after the ruling, Pennsylvania voters were notified of the Deadline Extension and Presumption of Timeliness.

D. Appeal to the U.S. Supreme Court, and This Litigation

The Republican Party of Pennsylvania and several intervenors, including the President pro tempore of the Pennsylvania Senate, sought to challenge in the Supreme Court of the United States the constitutionality of the Pennsylvania Supreme Court's ruling. Because the November election date was fast approaching, they filed an emergency application for a stay of the Pennsylvania Supreme Court's order pending review on the merits. The U.S. Supreme Court denied the emergency stay request in a 4-4 decision. *Republican Party of Pa. v. Boockvar*, No. 20A54, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6128193 (Oct. 19, 2020); *Scarnati v. Boockvar*, No. 20A53, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6128194 (Oct. 19, 2020). After denial of the stay, the petitioners moved for expedited consideration of their petition for certiorari. In denying that motion, Justice Alito noted that, per the Pennsylvania Attorney General, all county boards of elections would segregate ballots received during the Deadline Extension period from those received by 8:00 P.M. on Election Day. *Republican Party of Pa. v. Boockvar*, No. 20-542, 592 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 6304626, at *2 (Oct. 28, 2020) (Alito, J., statement). Justice Alito later issued an order requiring that all county boards of elections segregate such ballots and count them separately. *Republican Party of Pa. v. Boockvar*, No. 20A84, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6536912 (Mem.) (U.S. Nov. 6, 2020) (Alito, J.).

***4** In the meantime, on October 22, 2020, three days after the U.S. Supreme Court declined to stay the Pennsylvania Supreme Court's order, Plaintiffs herein filed this suit in the Western District of Pennsylvania. Plaintiffs are four registered voters from Somerset County, Pennsylvania, who planned to vote in person on Election Day ("Voter Plaintiffs") and Pennsylvania congressional candidate Jim Bognet. Defendants are Secretary Boockvar and each Pennsylvania county's board of elections.

Bognet, the congressional candidate, claimed that the Deadline Extension and Presumption of Timeliness "allow[ ] County Boards of Elections to accept votes ... that would otherwise be unlawful" and "undermine[ ] his right to run in an election where Congress has paramount authority to set the 'times, places, and manner' " of Election Day. *Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121, at *2 (W.D. Pa. Oct. 28, 2020). The Voter Plaintiffs alleged that by voting in person, they had to comply with the single, uniform federal Election Day deadline, whereas mail-in voters could submit votes any time before 5:00 P.M. on November 6. *Id.* Thus, they alleged, the Pennsylvania Supreme Court treated them in an arbitrary and disparate way by elevating mail-in voters to a "preferred class of voters" in violation of the U.S. Constitution's Equal Protection Clause and the single, uniform, federal Election Day set by Congress. *Id.* The Voter Plaintiffs also asserted that counting ballots received after Election Day during the Deadline Extension period would unlawfully dilute their votes in violation of the Equal Protection Clause. *Id.*

All Plaintiffs sought to enjoin Defendants from counting ballots received during the Deadline Extension period. *Id.* They also sought a declaration that the Deadline Extension and Presumption of Timeliness are unconstitutional under the Elections Clause and the Electors Clause as well as the Equal Protection Clause. *Id.* Because Plaintiffs filed their suit less than two weeks before Election Day, they moved for a temporary restraining order ("TRO"), expedited hearing, and preliminary injunction. *Id.*

The District Court commendably accommodated Plaintiffs' request for an expedited hearing, then expeditiously issued a thoughtful memorandum order on October 28, denying the motion for a TRO and preliminary injunction. *Id.* at *7. The District Court held that Bognet lacked standing because his claims were too speculative and not redressable. *Id.* at *3. Similarly, the District Court concluded that the Voter Plaintiffs lacked standing to bring their Equal Protection voter dilution claim because they alleged only a generalized grievance. *Id.* at *5.

At the same time, the District Court held that the Voter Plaintiffs had standing to pursue their Equal Protection arbitrary-and-disparate-treatment claim. But it found that the Deadline Extension did not engender arbitrary and disparate treatment because that provision did not extend the period for mail-in voters to actually cast their ballots; rather, the extension only directed that the timely cast ballots of mail-in voters be counted. *Id.* As to the Presumption of Timeliness, the District Court held that the Voter Plaintiffs were likely to succeed on the merits of their arbitrary-and-disparate-treatment challenge. *Id.* at *6. Still, the District Court declined to grant a TRO because the U.S. Supreme Court "has

repeatedly emphasized that ... federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* at *7 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (per curiam)). The District Court concluded that with "less than two weeks before the election. ... [g]ranting the relief Plaintiffs seek would result in significant voter confusion; precisely the kind of confusion that *Purcell* seeks to avoid." *Id.*

***5** Plaintiffs appealed the denial of their motion for a TRO and preliminary injunction to this Court on October 29, less than a week before Election Day. Plaintiffs requested an expedited briefing schedule: specifically, their opening brief would be due on October 30 and the response briefs on November 2. Notably, Plaintiffs sought to file a reply brief on November 3—Election Day. Appellants' Emergency Mot. for Expedited Briefing, Dkt. No. 17. Defendants opposed the expedited briefing schedule, arguing that Plaintiffs' own delay had caused the case to reach this Court mere days before the election. Sec'y Boockvar's Opp. to Appellants' Emergency Mot. for Expedited Briefing, Dkt. No. 33. Defendants also contended that Plaintiffs sought to punish voters by invalidating the very rules mail-in voters had relied on when they cast their ballots. Defendants asked us to deny the motion for expedited briefing and offered to supply us with the actual numbers of mail-in ballots received during the Deadline Extension period together with an approximate count of how many of those mail-in ballots lacked legible postmarks. *Id.*

Even had we granted Plaintiffs' motion for expedited briefing, the schedule they proposed would have effectively foreclosed us from ruling on this appeal before Election Day. So we denied Plaintiffs' motion and instead ordered that their opening brief be filed by November 6. Order, No. 20-3214, Oct. 30, 2020, Dkt. No. 37. We directed Defendants to file response briefs by November 9, forgoing receipt of a reply brief.[4] *Id.* With the matter now fully briefed, we consider Plaintiffs' appeal of the District Court's denial of a TRO and preliminary injunction.

4 Because we have received comprehensive briefing, and given the weighty public interest in a prompt ruling on the matter before us, we have elected to forgo oral argument.

II. Standard of Review

The District Court exercised jurisdiction under 28 U.S.C. § 1331. We exercise jurisdiction under § 1292(a)(1).

Ordinarily, an order denying a TRO is not immediately appealable. *Hope v. Warden York Cnty. Prison*, 956 F.3d 156, 159 (3d Cir. 2020). Here, although Bognet and the Voter Plaintiffs styled their motion as an Emergency Motion for a TRO and Preliminary Injunction, *see Bognet v. Boockvar*, No. 3:20-cv-00215, Dkt. No. 5 (W.D. Pa. Oct. 22, 2020), the District Court's order plainly went beyond simply ruling on the TRO request.

Plaintiffs filed their motion for a TRO and a preliminary injunction on October 22, along with a supporting brief. Defendants then filed briefs opposing the motion, with Plaintiffs filing a reply in support of their motion. The District Court heard argument from the parties, remotely, during a 90-minute hearing. The next day, the District Court ruled on the merits of the request for injunctive relief. *Bognet*, 2020 WL 6323121, at *7. The District Court's Memorandum Order denied both Bognet and the Voter Plaintiffs the affirmative relief they sought to obtain prior to Election Day, confirming that the Commonwealth was to count mailed ballots received after the close of the polls on Election Day but before 5:00 P.M. on November 6.

In determining whether Bognet and the Voter Plaintiffs had standing to sue, we resolve a legal issue that does not require resolution of any factual dispute. Our review is de novo. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 266 (3d Cir. 2014). "When reviewing a district court's denial of a preliminary injunction, we review the court's findings of fact for clear error, its conclusions of law de novo, and the ultimate decision ... for an abuse of discretion." *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010)) (cleaned up).

III. Analysis

A. Standing

Derived from separation-of-powers principles, the law of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (citations omitted). Article III of the U.S. Constitution vests "[t]he judicial Power of the United States" in both the Supreme Court and "such inferior Courts as the

Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. But this "judicial Power" extends only to "Cases" and "Controversies." *Id.* art. III, § 2; *see also Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). To ensure that judges avoid rendering impermissible advisory opinions, parties seeking to invoke federal judicial power must first establish their standing to do so. *Spokeo*, 136 S. Ct. at 1547.

***6** Article III standing doctrine speaks in jargon, but the gist of its meaning is plain enough. To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests. If you are complaining about something that does not harm you—and does not harm you in a way that is concrete—then you lack standing. And if the injury that you claim is an injury that does no specific harm to you, or if it depends on a harm that may never happen, then you lack an injury for which you may seek relief from a federal court. As we will explain below, Plaintiffs here have not suffered a concrete, particularized, and non-speculative injury necessary under the U.S. Constitution for them to bring this federal lawsuit.

The familiar elements of Article III standing require a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). To plead an injury in fact, the party invoking federal jurisdiction must establish three sub-elements: first, the "invasion of a legally protected interest"; second, that the injury is both "concrete and particularized"; and third, that the injury is "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130); *see also Mielo v. Steak 'n Shake Operations*, 897 F.3d 467, 479 n.11 (3d Cir. 2018). The second sub-element requires that the injury "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. 2130. As for the third, when a plaintiff alleges future injury, such injury must be "certainly impending." *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (quoting *Lujan*, 504 U.S. at 565 n.2, 112 S.Ct. 2130). Allegations of "possible" future injury simply aren't enough. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). All elements of standing must exist at the time the complaint is filed. *See Lujan,* 504 U.S. at 569 n.4, 112 S.Ct. 2130.

With these guideposts in mind, we turn to whether Plaintiffs have pleaded an Article III injury. They bring several claims under 42 U.S.C. § 1983, asserting deprivation of their constitutional rights. They allege that Defendants' implementation of the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness violates the Elections Clause of Article I, the Electors Clause of Article II, and the Equal Protection Clause of the Fourteenth Amendment. Because Plaintiffs lack standing to assert these claims, we will affirm the District Court's denial of injunctive relief.

1. Plaintiffs lack standing under the Elections Clause and Electors Clause.

Federal courts are not venues for plaintiffs to assert a bare right "to have the Government act in accordance with law." *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). When the alleged injury is undifferentiated and common to all members of the public, courts routinely dismiss such cases as "generalized grievances" that cannot support standing. *United States v. Richardson*, 418 U.S. 166, 173–75, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). Such is the case here insofar as Plaintiffs, and specifically candidate Bognet, theorize their harm as the right to have government administered in compliance with the Elections Clause and Electors Clause.

To begin with, private plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause. For example, in *Lance v. Coffman*, 549 U.S. 437, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam), four private citizens challenged in federal district court a Colorado Supreme Court decision invalidating a redistricting plan passed by the state legislature and requiring use of a redistricting plan created by Colorado state courts. *Id.* at 438, 127 S.Ct. 1194. The plaintiffs alleged that the Colorado Supreme Court's interpretation of the Colorado Constitution violated the Elections Clause "by depriving the state legislature of its responsibility to draw congressional districts." *Id.* at 441, 127 S.Ct. 1194. The U.S. Supreme Court held that the plaintiffs lacked Article III standing because they claimed harm only to their interest, and that of every

citizen, in proper application of the Elections Clause. *Id.* at 442, 127 S.Ct. 1194 ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed."). Their relief would have no more directly benefitted them than the public at large. *Id.* The same is true here. If anything, Plaintiffs' "interest in the State's ability to 'enforce its duly enacted laws' " is even less compelling because Pennsylvania's "election officials support the challenged decree." *Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 591 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 4680151 (Mem.), at *1 (Aug. 13, 2020) (quoting *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2324 n.17, 201 L.Ed.2d 714 (2018)).

***7** Because the Elections Clause and the Electors Clause have "considerable similarity," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (Roberts, C.J., dissenting) (discussing how Electors Clause similarly vests power to determine manner of appointing electors in "the Legislature" of each State), the same logic applies to Plaintiffs' alleged injury stemming from the claimed violation of the Electors Clause. *See also Foster*, 522 U.S. at 69, 118 S.Ct. 464 (characterizing Electors Clause as Elections Clause's "counterpart for the Executive Branch"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (noting that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause).

Even a party that meets Article III standing requirements must ordinarily rest its claim for relief on violation of its own rights, not those of a third party. *Pitt News v. Fisher*, 215 F.3d 354, 361–62 (3d Cir. 2000). Plaintiffs assert that the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness usurped the General Assembly's prerogative under the Elections Clause to prescribe "[t]he Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. The Elections Clause grants that right to "the Legislature" of "each State." *Id.* Plaintiffs' Elections Clause claims thus "belong, if they belong to anyone, only to the Pennsylvania General Assembly." *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (three-judge panel) (per curiam). Plaintiffs here are four individual voters and a candidate for federal office; they in no way constitute the General Assembly, nor can they be said to comprise any part of the law-making processes of Pennsylvania. *Ariz. State Legislature*, 576 U.S. at 824, 135 S.Ct. 2652.[5] Because Plaintiffs are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses. No member of the General Assembly is a party to this lawsuit.

5 Bognet seeks to represent Pennsylvania in Congress, but even if he somehow had a relationship to *state* lawmaking processes, he would lack personal standing to sue for redress of the alleged "institutional injury (the diminution of legislative power), which necessarily damage[d] all Members of [the legislature] ... equally." *Raines v. Byrd*, 521 U.S. 811, 821, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (plaintiffs were six out of 535 members of Congress); *see also Corman*, 287 F. Supp. 3d at 568–69 (concluding that "two of 253 members of the Pennsylvania General Assembly" lacked standing to sue under Elections Clause for alleged "deprivation of 'their legislative authority to apportion congressional districts' "); *accord Va. House of Delegates v. Bethune-Hill*, —— U.S. ——, 139 S. Ct. 1945, 1953, 204 L.Ed.2d 305 (2019).

That said, prudential standing can suspend Article III's general prohibition on a litigant's raising another person's legal rights. Yet Plaintiffs don't fit the bill. A plaintiff may assert the rights of another if he or she "has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (citation omitted). Plaintiffs cannot invoke this exception to the rule against raising the rights of third parties because they enjoy no close relationship with the General Assembly, nor have they alleged any hindrance to the General Assembly's ability to protect its own interests. *See, e.g.*, *Corman*, 287 F. Supp. 3d at 573. Nor does Plaintiffs' other theory of prudential standing, drawn from *Bond v. United States*, 564 U.S. 211, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011), advance the ball.

***8** In *Bond*, the Supreme Court held that a litigant has prudential standing to challenge a federal law that allegedly impinges on the state's police powers, "in contravention of constitutional principles of federalism" enshrined in the Tenth Amendment. *Id.* at 223–24, 131 S.Ct. 2355. The defendant in *Bond* challenged her conviction under 18 U.S.C. § 229, which Congress enacted to comply with a chemical weapons treaty that the United States had entered. *Id.* at 214–15, 131 S.Ct. 2355. Convicted under the statute she sought to challenge, Bond satisfied Article III's standing requirements. *Id.* at 217, 131 S.Ct. 2355 (characterizing Bond's sentence and incarceration as concrete, and redressable by invalidation

of her conviction); *id.* at 224–25, 131 S.Ct. 2355 (noting that Bond was subject to "[a] law," "prosecution," and "punishment" she might not have faced "if the matter were left for the Commonwealth of Pennsylvania to decide"). She argued that her conduct was "local in nature" such that § 229 usurped the Commonwealth's reserved police powers. *Id.* Rejecting the Government's contention that Bond was barred as a third party from asserting the rights of the Commonwealth, *id.* at 225, 131 S.Ct. 2355, the Court held that "[t]he structural principles secured by the separation of powers protect the individual as well" as the State. *Id.* at 222, 131 S.Ct. 2355 ("Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. ... When government acts in excess of its lawful powers, that [personal] liberty is at stake.").

But the nub of Plaintiffs' argument here is that the Pennsylvania Supreme Court intruded on the authority delegated to the Pennsylvania General Assembly under Articles I and II of the U.S. Constitution to regulate federal elections. They do not allege any violation of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Nor could they. After all, states have no inherent or reserved power over federal elections. *U.S. Term Limits*, 514 U.S. at 804–05, 115 S.Ct. 1842. When "deciding issues raised under the Elections Clause," courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns." *Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012). Either federal and state election law "operate harmoniously in a single procedural scheme," or they don't—and the federal law preempts ("alter[s]") state election law under the Elections Clause. *Id.* at 394. An assessment that the Pennsylvania Supreme Court lacked the legislative authority under the state's constitution necessary to comply with the Elections Clause (Appellants' Br. 24–27) does not implicate *Bond*, the Tenth Amendment, or even Article VI's Supremacy Clause.[6] *See Gonzalez*, 677 F.3d at 390–92 (contrasting Elections Clause with Supremacy Clause and describing former as "unique," containing "[an] unusual delegation of power," and "unlike virtually all other provisions of the Constitution"). And, of course, third-party standing under *Bond* still presumes that the plaintiff otherwise meets the requirements of Article III; as discussed above, Plaintiffs do not.

6 Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots. *See Carson v. Simon*, No. 20-3139, —— F.3d ——, ——, 2020 WL 6335967, at *5 (8th Cir. Oct. 29, 2020). The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none.

Plaintiff Bognet, a candidate for Congress who is currently a private citizen, does not plead a cognizable injury by alleging a "right to run in an election where Congress has paramount authority," Compl. ¶ 69, or by pointing to a "threatened" reduction in the competitiveness of his election from counting absentee ballots received within three days after Election Day. Appellants' Br. 21. Bognet does not explain how that "right to run" affects him in a particularized way when, in fact, all candidates in Pennsylvania, including Bognet's opponent, are subject to the same rules. And Bognet does not explain how counting *more* timely cast votes would lead to a *less* competitive race, nor does he offer any evidence tending to show that a greater proportion of mailed ballots received after Election Day than on or before Election Day would be cast for Bognet's opponent. What's more, for Bognet to have standing to enjoin the counting of ballots arriving after Election Day, such votes would have to be sufficient in number to change the outcome of the election to Bognet's detriment. *See, e.g.*, *Sibley v. Alexander*, 916 F. Supp. 2d 58, 62 (D.D.C. 2013) ("[E]ven if the Court granted the requested relief, [plaintiff] would still fail to satisfy the redressability element [of standing] because enjoining defendants from casting the ... votes would not change the outcome of the election." (citing *Newdow v. Roberts,* 603 F.3d 1002, 1011 (D.C. Cir. 2010) (citations omitted)). Bognet does not allege as much, and such a prediction was inherently speculative when the complaint was filed. The same can be said for Bognet's alleged wrongfully incurred expenditures and future expenditures. Any harm Bognet sought to avoid in making those expenditures was not "certainly impending"—he spent the money to avoid a speculative harm. *See Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, —— F.Supp.3d ——, ——, 2020 WL 5997680, at *36 (W.D. Pa. Oct. 10, 2020). Nor are those expenditures "fairly traceable" under Article III to the actions that Bognet challenges. *See, e.g.*, *Clapper*, 568 U.S. at 402, 416, 133 S.Ct. 1138 (rejecting argument that

plaintiff can "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending").[7]

[7] The alleged injury specific to Bognet does not implicate the Qualifications Clause or exclusion from Congress, *Powell v. McCormack*, 395 U.S. 486, 550, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), nor the standing of members of Congress to bring actions alleging separation-of-powers violations. *Moore v. U.S. House of Reps.*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring).

***9** Plaintiffs therefore lack Article III standing to challenge Defendants' implementation of the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness under the Elections Clause and Electors Clause.

2. The Voter Plaintiffs lack standing under the Equal Protection Clause.

Stressing the "personal" nature of the right to vote, the Voter Plaintiffs assert two claims under the Equal Protection Clause.[8] First, they contend that the influence of their votes, cast in person on Election Day, is "diluted" both by (a) mailed ballots cast on or before Election Day but received between Election Day and the Deadline Extension date, ballots which Plaintiffs assert cannot be lawfully counted; and (b) mailed ballots that were unlawfully cast (*i.e.*, placed in the mail) after Election Day but are still counted because of the Presumption of Timeliness. Second, the Voter Plaintiffs allege that the Deadline Extension and the Presumption of Timeliness create a preferred class of voters based on "arbitrary and disparate treatment" that values "one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The Voter Plaintiffs lack Article III standing to assert either injury.

[8] Only the Voter Plaintiffs bring the Equal Protection count in the Complaint; Bognet did not join that count.

a. Vote Dilution

As discussed above, the foremost element of standing is injury in fact, which requires the plaintiff to show a harm that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1547–48 (citation omitted). The Voter Plaintiffs lack standing to redress their alleged vote dilution because that alleged injury is not concrete as to votes counted under the Deadline Extension, nor is it particularized for Article III purposes as to votes counted under the Deadline Extension or the Presumption of Timeliness.

i. No concrete injury from vote dilution attributable to the Deadline Extension.

The Voter Plaintiffs claim that Defendants' implementation of the Deadline Extension violates the Equal Protection Clause because "unlawfully" counting ballots received within three days of Election Day dilutes their votes. But the source of this purported illegality is necessarily a matter of state law, which makes any alleged harm abstract for purposes of the Equal Protection Clause. And the purported vote dilution is also not concrete because it would occur in equal proportion *without* the alleged procedural illegality—that is, had the *General Assembly* enacted the Deadline Extension, which the Voter Plaintiffs do not challenge substantively.[9]

[9] We exclude the Presumption of Timeliness from our concreteness analysis. Plaintiffs allege that the federal statutes providing for a uniform election day, 3 U.S.C. § 1 and 2 U.S.C. § 7, conflict with, and thus displace, any state law that would authorize voting after Election Day. They claim that the Presumption permits, theoretically at least, some voters whose ballots lack a legible postmark to vote *after* Election Day, in violation of these federal statutes. So unlike the Deadline Extension, Plaintiffs contend that the General Assembly could not enact the Presumption consistent with the Constitution. This conceptualization of injury is thus more properly characterized as "concrete" than is the purported Deadline Extension injury attributable to voters having their timely voted ballots received and counted after Election Day. That said, we express no opinion about whether the Voter Plaintiffs have, in fact, alleged such a concrete injury for standing purposes.

***10** The concreteness of the Voter Plaintiffs' alleged vote dilution stemming from the Deadline Extension turns on the federal and state laws applicable to voting procedures. Federal law does not provide for *when* or *how* ballot counting occurs. *See, e.g.*, *Trump for Pres., Inc. v. Way*, No. 20-cv-01753, —— F.Supp.3d ——, ——, 2020 WL 5912561, at *12 (D.N.J. Oct. 6, 2020) ("Plaintiffs direct the Court to no federal law regulating methods of determining the timeliness of mail-in ballots or requiring that mail-in ballots be postmarked."); *see also Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 76 L.Ed.

795 (1932) (noting that Elections Clause delegates to state lawmaking processes all authority to prescribe "procedure and safeguards" for "counting of votes"). Instead, the Elections Clause delegates to each state's lawmaking function the authority to prescribe such procedural regulations applicable to federal elections. *U.S. Term Limits*, 514 U.S. at 832–35, 115 S.Ct. 1842 ("The Framers intended the Elections Clause to grant States authority to create procedural regulations .... [including] 'whether the electors should vote by ballot or vivâ voce ....' " (quoting James Madison, 2 Records of the Federal Convention of 1787, at 240 (M. Farrand ed. 1911) (cleaned up)); *Smiley*, 285 U.S. at 366, 52 S.Ct. 397 (describing state authority under Elections Clause "to provide a complete code for congressional elections ... in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns"). That delegation of authority embraces all procedures "which experience shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366, 52 S.Ct. 397. Congress exercises its power to "alter" state election regulations only if the state regime cannot "operate harmoniously" with federal election laws "in a single procedural scheme." *Gonzalez*, 677 F.3d at 394.

The Deadline Extension and federal laws setting the date for federal elections can, and indeed do, operate harmoniously. At least 19 other States and the District of Columbia have post-Election Day absentee ballot receipt deadlines.[10] And many States also accept absentee ballots mailed by overseas uniformed servicemembers that are received after Election Day, in accordance with the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–20311. So the Voter Plaintiffs' only cognizable basis for alleging dilution from the "unlawful" counting of invalid ballots is state law defining lawful and unlawful ballot counting practices. *Cf. Wise v. Circosta*, 978 F.3d 93, 100–01 (4th Cir. 2020) ("Whether ballots are *illegally* counted if they are received more than three days after Election Day depends on an issue of state law from which we must abstain." (emphasis in original)), *application for injunctive relief denied sub nom. Moore v. Circosta*, No. 20A72, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6305036 (Oct. 28, 2020). The Voter Plaintiffs seem to admit as much, arguing "that counting votes that are unlawful under the General Assembly's enactments will unconstitutionally dilute the lawful votes" cast by the Voter Plaintiffs. Appellants' Br. 38; *see also id.* at 31. In other words, the Voter Plaintiffs say that the Election Day ballot receipt deadline in Pennsylvania's codified election law renders the ballots untimely and therefore unlawful to count. Defendants, for their part, contend that the Pennsylvania Supreme Court's extension of that deadline under the Free and Equal Elections Clause of the state constitution renders them timely, and therefore lawful to count.

10 *See* AS § 15.20.081(e) & (h) (Alaska – 10 days after Election Day if postmarked on or before Election Day); West's Ann. Cal. Elec. Code § 3020(b) (California – three days after Election Day if postmarked on or before Election Day); DC ST § 1-1001.05(a)(10A) (District of Columbia – seven days after the election if postmarked on or before Election Day); 10 ILCS 5/19-8, 5/18A-15 (Illinois – 14 days after the election if postmarked on or before Election Day); K.S.A. 25-1132 (Kansas – three days after the election if postmarked before the close of polls on Election Day); MD Code, Elec. Law, § 9-505 (Maryland – the second Friday after Election Day if postmarked on or before Election Day); Miss. Code Ann. § 23-15-637 (Mississippi – five business days after Election Day if postmarked on or before Election Day); NV Rev Stat § 293.317 (Nevada – by 5:00 P.M. on the seventh day after Election Day if postmarked by Election Day, and ballots with unclear postmarks must be received by 5:00 P.M. on the third day after Election Day); N.J.S.A. 19:63-22 (New Jersey – 48 hours after polls close if postmarked on or before Election Day); McKinney's Elec. Law § 8-412 (New York – seven days after the election for mailed ballots postmarked on Election Day); N.C. Gen. Stat. § 163-231(b)(2) and *Wise v. Circosta*, 978 F.3d 93, 96 (4th Cir. 2020) (North Carolina – recognizing extension from three to nine days after the election the deadline for mail ballots postmarked on or before Election Day); Texas Elec. Code § 86.007 (the day after the election by 5:00 P.M. if postmarked on or before Election Day); Va. Code 24.2-709 (Virginia – by noon on the third day after the election if postmarked on or before Election Day); West's RCWA 29A.40.091 (Washington – no receipt deadline for ballots postmarked on or before Election Day); W. Va. Code, §§ 3-3-5, 3-5-17 (West Virginia – five days after the election if postmarked on or before Election Day); *see also* Iowa Code § 53.17(2) (by noon the Monday following the election if postmarked by the day before Election Day); NDCC 16.1-07-09 (North Dakota – before the canvass if postmarked the day before Election Day); R.C. § 3509.05 (Ohio – 10 days after the election if postmarked by the day before Election Day); Utah Code Ann. § 20A-3a-204 (seven to 14 days after the election if postmarked the day before the election).

***11** This conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment. Violation of state election laws by state officials or other unidentified third parties is not always amenable to a federal constitutional claim. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("A deliberate violation of state election laws by state election officials does not transgress against the Constitution.") (cleaned up); *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (rejecting Equal Protection Clause claim arising from state's erroneous counting of votes cast by voters unqualified to participate in closed primary). "It was not intended by the Fourteenth Amendment ... that all matters formerly within the exclusive cognizance of the states should become matters of national concern." *Snowden v. Hughes*, 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497 (1944).

Contrary to the Voter Plaintiffs' conceptualization, vote dilution under the Equal Protection Clause is concerned with votes being weighed differently. *See Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 2501, 204 L.Ed.2d 931 (2019) (" '[V]ote dilution' in the one-person, one-vote cases refers to the idea that each vote must carry *equal weight*." (emphasis added)); *cf. Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020), *as amended* (July 27, 2020) ("[N]o vote in the South Carolina system is diluted. Every qualified person gets one vote and each vote is counted equally in determining the final tally."). As explained below, the Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the "unlawful" counting of invalidly cast ballots "were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity." *Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——– – ——, 2020 WL 5997680, at *45–46. That is not how the Equal Protection Clause works.[11]

11 *Bush v. Gore* does not require us to perform an Equal Protection Clause analysis of Pennsylvania election law as interpreted by the Pennsylvania Supreme Court. *See* 531 U.S. at 109, 121 S.Ct. 525 ("Our consideration is limited to the present circumstances ...."); *id.* at 139–40, 121 S.Ct. 525 (Ginsburg, J., dissenting) (discussing "[r]are[ ]" occasions when Supreme Court rejected state supreme court's interpretation of state law, one of which was in 1813 and others occurred during Civil Rights Movement—and none decided federal equal protection issues).

Even if we were to entertain an end-run around the Voter Plaintiffs' lack of Elections Clause standing—by viewing the *federal* Elections Clause as the source of "unlawfulness" of Defendants' vote counting—the alleged vote dilution would not be a concrete injury. Consider, as we've noted, that the Voter Plaintiffs take no issue with the content of the Deadline Extension; they concede that the General Assembly, as other state legislatures have done, could have enacted exactly the same Deadline Extension as a valid "time[ ], place[ ], and manner" regulation consistent with the Elections Clause. *Cf. Snowden*, 321 U.S. at 8, 64 S.Ct. 397 (concluding that alleged "unlawful administration by state officers of a state statute *fair on its face*, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection" (emphasis added)); *Powell*, 436 F.2d at 88 ("Uneven or erroneous application of an *otherwise valid* statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.' " (emphasis added) (quoting *Snowden*, 321 U.S. at 8, 64 S.Ct. 397)). Reduced to its essence, the Voter Plaintiffs' claimed vote dilution would rest on their allegation that federal law required a different state organ to issue the Deadline Extension. The Voter Plaintiffs have not alleged, for example, that they were prevented from casting their votes, *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), nor that their votes were not counted, *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915). Any alleged harm of vote dilution that turns not on the proportional influence of votes, but solely on the federal illegality of the Deadline Extension, strikes us as quintessentially abstract in the election law context and "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)). That the alleged violation here relates to election law and the U.S. Constitution, rather than the mine-run federal consumer privacy statute, does not abrogate the requirement that a concrete harm must flow from the procedural illegality. *See, e.g.*, *Lujan*, 504 U.S. at 576, 112 S.Ct. 2130 ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.").

***12** The Voter Plaintiffs thus lack a concrete Equal Protection Clause injury for their alleged harm of vote dilution attributable to the Deadline Extension.

ii. No particularized injury from votes counted under the Deadline Extension or the Presumption of Timeliness.

The opposite of a "particularized" injury is a "generalized grievance," where "the impact on plaintiff is plainly undifferentiated and common to all members of the public." *Id.* at 575, 112 S.Ct. 2130 (cleaned up); *see also Lance*, 549 U.S. at 439, 127 S.Ct. 1194. The District Court correctly held that the Voter Plaintiffs' "dilution" claim is a "paradigmatic generalized grievance that cannot support standing." *Bognet*, 2020 WL 6323121, at *4 (quoting *Carson v. Simon*, No. 20-cv-02030, —— F.Supp.3d ——, ——, 2020 WL 6018957, at *7 (D. Minn. Oct. 12, 2020), *rev'd on other grounds*, No. 20-3139, —— F.3d ——, 2020 WL 6335967 (8th Cir. Oct. 29, 2020)). The Deadline Extension and Presumption of Timeliness, assuming they operate to allow the illegal counting of unlawful votes, "dilute" the influence of all voters in Pennsylvania equally and in an "undifferentiated" manner and do not dilute a certain group of voters particularly.[12]

12 In their complaint, the Voter Plaintiffs alleged that they are all "residents of Somerset County, a county where voters are requesting absentee ballots at a rate *far less* than the state average" and thus, somehow, the Voter Plaintiffs' votes "will be diluted to a greater degree than other voters." Compl. ¶ 71 (emphasis in original). Plaintiffs continue to advance this argument on appeal in support of standing, and it additionally suffers from being a conjectural or hypothetical injury under the framework discussed *infra* Section III.A.2.b.ii. It is purely hypothetical that counties where a greater percentage of voters request absentee ballots will more frequently have those ballots received after Election Day.

Put another way, "[a] vote cast by fraud or mailed in by the wrong person through mistake," or otherwise counted illegally, "has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged." *Martel v. Condos*, No. 5:20-cv-00131, —— F.Supp.3d ——, ——, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020). Such an alleged "dilution" is suffered equally by all voters and is not "particularized" for standing purposes. The courts to consider this issue are in accord. *See id.*; *Carson*, —— F.Supp.3d at ——– – ——, 2020 WL 6018957, at *7–8; *Moore v. Circosta*, Nos. 1:20-cv-00911, 1:20-cv-00912, —— F.Supp.3d ——, ——, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020), *emergency injunction pending appeal denied sub nom. Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020), *application for injunctive relief denied sub nom. Moore v. Circosta*, No. 20A72, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6305036 (U.S. Oct. 28, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. Apr. 30, 2020).

But the Voter Plaintiffs argue that their purported "vote dilution" is an injury in fact sufficient to confer standing, and *not* a generalized grievance belonging to all voters, because the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.' " *Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). "Thus, 'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

***13** The Voter Plaintiffs' reliance on this language from *Baker* and *Reynolds* is misplaced. In *Baker*, the plaintiffs challenged Tennessee's apportionment of seats in its legislature as violative of the Equal Protection Clause of the Fourteenth Amendment. 369 U.S. at 193, 82 S.Ct. 691. The Supreme Court held that the plaintiffs *did* have standing under Article III because "[t]he injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties." *Id.* at 207–08, 82 S.Ct. 691.

Although the *Baker* Court did not decide the merits of the Equal Protection claim, the Court in a series of cases—including *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), and *Reynolds*—made clear that the Equal Protection Clause prohibits a state from "diluti[ng] ... the *weight* of the votes of certain ... voters merely because of where they reside[ ]," just as it prevents a state from discriminating on the basis of the voter's race or sex. *Reynolds*, 377 U.S. at 557, 84 S.Ct. 1362 (emphasis added). The Voter Plaintiffs consider it significant that the Court in *Reynolds* noted—though not in the context of standing—that "the right to vote" is "individual and personal in nature." *Id.* at 561, 84 S.Ct. 1362 (quoting *United States v. Bathgate*, 246 U.S. 220, 227, 38 S.Ct. 269, 62 L.Ed. 676 (1918)). The Court then explained that a voter's right to vote encompasses

both the right to cast that vote and the right to have that vote counted without "debasement or dilution":

> The right to vote can neither be denied outright, *Guinn v. United States*, 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340 (1915)], *Lane v. Wilson*, 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281 (1939)], nor destroyed by alteration of ballots, see *United States v. Classic*, 313 U.S. 299, 315 [61 S.Ct. 1031, 85 L.Ed. 1368 (1941)], nor diluted by ballot-box stuffing, *Ex parte Siebold*, 100 U.S. 371 [25 L.Ed. 717 (1880)], *United States v. Saylor*, 322 U.S. 385 [64 S.Ct. 1101, 88 L.Ed. 1341 (1944)]. As the Court stated in *Classic*, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted ...." 313 U.S. at 315 [61 S.Ct. 1031].
>
> ...
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> "The right to vote includes the right to have the ballot counted. ... It also includes the right to have the vote counted at full value without dilution or discount. ... That federally protected right suffers substantial dilution ... [where a] favored group has full voting strength ... [and] [t]he groups not in favor have their votes discounted."

Reynolds, 377 U.S. at 555 & n.29, 84 S.Ct. 1362 (alterations in last paragraph in original) (quoting *South v. Peters*, 339 U.S. 276, 279, 70 S.Ct. 641, 94 L.Ed. 834 (1950) (Douglas, J., dissenting)).

Still, it does not follow from the labeling of the right to vote as "personal" in *Baker* and *Reynolds* that *any* alleged illegality affecting voting rights rises to the level of an injury in fact. After all, the Court has observed that the harms underlying a racial gerrymandering claim under the Equal Protection Clause "are personal" in part because they include the harm of a voter "being personally subjected to a racial classification." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (cleaned up). Yet a voter "who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.' " *Gill*, 138 S. Ct. at 1930 (quoting *United States v. Hays*, 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995)) (alteration in original). The key inquiry for standing is whether the alleged violation of the right to vote arises from an invidious classification—including those based on "race, sex, economic status, or place of residence within a State," *Reynolds*, 377 U.S. at 561, 84 S.Ct. 1362—to which the plaintiff is subject and in which "the favored group has full voting strength and the groups not in favor have their votes discounted," *id.* at 555 n.29, 84 S.Ct. 1362 (cleaned up). In other words, "voters who allege facts *showing disadvantage to themselves*" have standing to bring suit to remedy that disadvantage, *Baker*, 369 U.S. at 206, 82 S.Ct. 691 (emphasis added), but a disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group. Here, no Pennsylvania voter's vote will count for less than that of any other voter as a result of the Deadline Extension and Presumption of Timeliness.[13]

13 Plaintiffs also rely on *FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), for the proposition that a widespread injury—such as a mass tort injury or an injury "where large numbers of voters suffer interference with voting rights conferred by law"—does not become a "generalized grievance" just because many share it. *Id.* at 24–25, 118 S.Ct. 1777. That's true as far as it goes. But the Voter Plaintiffs have not alleged an injury like that at issue in *Akins*. There, the plaintiffs' claimed injury was their inability to obtain information they alleged was required to be disclosed under the Federal Election Campaign Act. *Id.* at 21, 118 S.Ct. 1777. The plaintiffs alleged a statutory right to obtain information and that the same information was being withheld. Here, the Voter Plaintiffs' alleged injury is to their right under the Equal Protection Clause not to have their votes "diluted," but the Voter Plaintiffs have not alleged that their votes are less influential than any other vote.

***14** This conclusion cannot be avoided by describing one group of voters as "those ... who lawfully vote in person and submit their ballots *on time*" and the other group of voters as those whose (mail-in) ballots arrive after Election Day and are counted because of the Deadline Extension and/or the Presumption of Timeliness. Appellants' Br. 33 (emphasis in original). Although the former group, under Plaintiffs' theory, should make up 100% of the total votes counted and the latter group 0%, there is simply no differential *weighing* of the votes. *See Wise*, 978 F.3d at 104 (Motz, J., concurring) ("But if the extension went into effect, plaintiffs' votes would not count for less *relative to other North Carolina voters*. This is the core of an Equal Protection Clause challenge." (emphasis in original)). Unlike the malapportionment or racial gerrymandering cases, a vote cast by a voter in the so-called "favored" group counts not one bit more than the same vote cast by the "disfavored" group—no matter what set of scales one might choose to employ. *Cf. Reynolds*, 377 U.S. at 555 n.29, 84 S.Ct. 1362. And, however one tries to draw a contrast, this division is not based on

a voter's personal characteristics at all, let alone a person's race, sex, economic status, or place of residence. Two voters could each have cast a mail-in ballot before Election Day at the same time, yet perhaps only one of their ballots arrived by 8:00 P.M. on Election Day, given USPS's mail delivery process. It is passing strange to assume that one of these voters would be denied "equal protection of the laws" were *both* votes counted. U.S. Const. amend. XIV, § 1.

The Voter Plaintiffs also emphasize language from *Reynolds* that "[t]he right to vote can neither be denied outright ... nor diluted by ballot-box stuffing." 377 U.S. at 555, 84 S.Ct. 1362 (citing *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1879); *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944)). In the first place, casting a vote in accordance with a procedure approved by a state's highest court—even assuming that approval violates the Elections Clause—is not equivalent to "ballot-box stuffing." The Supreme Court has only addressed this "false"-tally type of dilution where the tally was false as a result of a scheme to cast falsified or fraudulent votes. *See Saylor*, 322 U.S. at 386, 64 S.Ct. 1101. We are in uncharted territory when we are asked to declare that a tally that includes false or fraudulent votes is equivalent to a tally that includes votes that are or may be unlawful for non-fraudulent reasons, and so is more aptly described as "incorrect." *Cf. Gray*, 372 U.S. at 386, 83 S.Ct. 801 (Harlan, J., dissenting) ("[I]t is hard to take seriously the argument that 'dilution' of a vote in consequence of a legislatively sanctioned electoral system can, without more, be analogized to an impairment of the political franchise by ballot box stuffing or other criminal activity.").

Yet even were this analogy less imperfect, it still would not follow that every such "false" or incorrect tally is an injury in fact for purposes of an Equal Protection Clause claim. The Court's cases that describe ballot-box stuffing as an injury to the right to vote have arisen from criminal prosecutions under statutes making it unlawful for anyone to injure the exercise of another's constitutional right. *See, e.g.*, *Ex parte Siebold*, 100 U.S. at 373–74 (application for writ of habeas corpus); *Saylor*, 322 U.S. at 385–86, 64 S.Ct. 1101 (criminal appeal regarding whether statute prohibiting "conspir[ing] to injure ... any citizen in the free exercise ... of any right or privilege secured to him by the Constitution" applied to conspiracy to stuff ballot boxes); *Anderson v. United States*, 417 U.S. 211, 226, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974) (criminal prosecution for conspiracy to stuff ballot boxes under successor to statute in *Saylor*). Standing was, of course, never an issue in those cases because the Government was enforcing its criminal laws. Here, the Voter Plaintiffs, who bear the burden to show standing, have presented no instance in which an individual voter had Article III standing to claim an equal protection harm to his or her vote from the existence of an allegedly illegal vote cast by someone else in the same election.

Indeed, the logical conclusion of the Voter Plaintiffs' theory is that whenever an elections board counts any ballot that deviates in some way from the requirements of a state's legislatively enacted election code, there is a *particularized* injury in fact sufficient to confer Article III standing on every other voter—provided the remainder of the standing analysis is satisfied. Allowing standing for such an injury strikes us as indistinguishable from the proposition that a plaintiff has Article III standing to assert a general interest in seeing the "proper application of the Constitution and laws"—a proposition that the Supreme Court has firmly rejected. *Lujan*, 504 U.S. at 573–74, 112 S.Ct. 2130. The Voter Plaintiffs thus lack standing to bring their Equal Protection vote dilution claim.

b. Arbitrary and Disparate Treatment

***15** The Voter Plaintiffs also lack standing to allege an injury in the form of "arbitrary and disparate treatment" of a preferred class of voters because the Voter Plaintiffs have not alleged a legally cognizable "preferred class" for equal protection purposes, and because the alleged harm from votes counted solely due to the Presumption of Timeliness is hypothetical or conjectural.

i. No legally protected "preferred class."

The District Court held that the Presumption of Timeliness creates a "preferred class of voters" who are "able to cast their ballots after the congressionally established Election Day" because it "extends the date of the election by multiple days for a select group of mail-in voters whose ballots will be presumed to be timely in the absence of a verifiable postmark."[14] *Bognet*, 2020 WL 6323121, at *6. The District Court reasoned, then, that the differential treatment between groups of voters is by itself an injury for standing purposes. To the District Court, this supposed "unequal treatment of voters ... harms the [Voter] Plaintiffs because, as in-person voters, they must vote by the end of the congressionally established Election Day in order to have their votes counted."

Id. The District Court cited no case law in support of its conclusion that the injury it identified gives rise to Article III standing.

14 The District Court did not find that the Deadline Extension created such a preferred class.

The District Court's analysis suffers from several flaws. First, the Deadline Extension and Presumption of Timeliness apply to all voters, not just a subset of "preferred" voters. It is an individual voter's *choice* whether to vote by mail or in person, and thus whether to become a part of the so-called "preferred class" that the District Court identified. Whether to join the "preferred class" of mail-in voters was entirely up to the Voter Plaintiffs.

Second, it is not clear that the mere creation of so-called "classes" of voters constitutes an injury in fact. An injury in fact requires the "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. We doubt that the mere existence of groupings of voters qualifies as an injury per se. "An equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)); *see also*, *e.g.*, *Batra v. Bd. of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996) ("[T]he relevant prerequisite is unlawful discrimination, not whether plaintiff is part of a victimized class."). More importantly, the Voter Plaintiffs have shown no disadvantage to themselves that arises simply by being separated into groupings. For instance, there is no argument that it is inappropriate that some voters will vote in person and others will vote by mail. The existence of these two groups of voters, without more, simply does not constitute an injury in fact to in-person voters.

Plaintiffs may believe that injury arises because of a preference shown for one class over another. But what, precisely, is the preference of which Plaintiffs complain? In *Bush v. Gore*, the Supreme Court held that a State may not engage in arbitrary and disparate treatment that results in the valuation of one person's vote over that of another. 531 U.S. at 104–05, 121 S.Ct. 525. Thus, "the right of suffrage can be denied by a *debasement or dilution of the weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 105, 121 S.Ct. 525 (quoting *Reynolds*, 377 U.S. at 555, 84 S.Ct. 1362) (emphasis added). As we have already discussed, vote dilution is not an injury in fact here.

***16** What about the risk that some ballots placed in the mail after Election Day may still be counted? Recall that no voter—whether in person or by mail—is *permitted* to vote after Election Day. Under Plaintiffs' argument, it might theoretically be easier for one group of voters—mail-in voters—to illegally cast late votes than it is for another group of voters—in-person voters. But even if that is the case, no group of voters has the *right* to vote after the deadline.[15] We remember that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) (citations omitted). And "a plaintiff lacks standing to complain about his inability to commit crimes because no one has a right to commit a crime." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014). Without a showing of discrimination or other intentionally unlawful conduct, or at least some burden on Plaintiffs' own voting rights, we discern no basis on which they have standing to challenge the slim opportunity the Presumption of Timeliness conceivably affords wrongdoers to violate election law. *Cf. Minn. Voters Alliance v. Ritchie*, 720 F.3d 1029, 1033 (8th Cir. 2013) (affirming dismissal of claims "premised on potential harm in the form of vote dilution caused by insufficient pre-election verification of [election day registrants'] voting eligibility and the absence of post-election ballot rescission procedures").

15 Moreover, we cannot overlook that the mail-in voters potentially suffer a *disadvantage* relative to the in-person voters. Whereas in-person ballots that are timely cast will count, timely cast mail-in ballots may not count because, given mail delivery rates, they may not be received by 5:00 P.M. on November 6.

ii. Speculative injury from ballots counted under the Presumption of Timeliness.

Plaintiffs' theory as to the Presumption of Timeliness focuses on the potential for some voters to vote after Election Day and still have their votes counted. This argument reveals that their alleged injury in fact attributable to the Presumption is "conjectural or hypothetical" instead of "actual or imminent." *Spokeo*, 136 S. Ct. at 1547–48 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). The Supreme Court has emphasized that a threatened injury must be "*certainly impending*" and not merely "*possible*" for it to constitute an injury in fact. *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (emphasis in original) (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158, 110

S.Ct. 1717, 109 L.Ed.2d 135 (1990)). When determining Article III standing, our Court accepts allegations based on well-pleaded facts; but we do not credit bald assertions that rest on mere supposition. *Finkelman v. NFL*, 810 F.3d 187, 201–02 (3d Cir. 2016). The Supreme Court has also emphasized its "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414, 133 S.Ct. 1138. A standing theory becomes even more speculative when it requires that independent actors make decisions to act *unlawfully*. *See City of L.A. v. Lyons*, 461 U.S. 95, 105–06 & 106 n.7, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (rejecting Article III standing to seek injunction where party invoking federal jurisdiction would have to establish that he would unlawfully resist arrest or police officers would violate department orders in future).

Here, the Presumption of Timeliness could inflict injury on the Voter Plaintiffs only if: (1) another voter violates the law by casting an absentee ballot after Election Day; (2) the illegally cast ballot does not bear a legible postmark, which is against USPS policy;[16] (3) that same ballot still arrives within three days of Election Day, which is faster than USPS anticipates mail delivery will occur;[17] (4) the ballot lacks sufficient indicia of its untimeliness to overcome the Presumption of Timeliness; and (5) that same ballot is ultimately counted. *See Donald J. Trump for Pres., Inc. v. Way*, No. 20-cv-10753, 2020 WL 6204477, at *7 (D.N.J. Oct. 22, 2020) (laying out similar "unlikely chain of events" required for vote dilution harm from postmark rule under New Jersey election law); *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) (holding purported injury in fact was too conjectural where "we cannot now describe how Appellants will be injured in this case without beginning our explanation with the word 'if' "). This parade of horribles "may never come to pass," *Trump for Pres. v. Boockvar*, 2020 WL 5997680, at *33, and we are especially reluctant to endorse such a speculative theory of injury given Pennsylvania's "own mechanisms for deterring and prosecuting voter fraud," *Donald J. Trump for Pres., Inc. v. Cegavske*, No. 20-1445, —— F.Supp.3d ——, ——, 2020 WL 5626974, at *6 (D. Nev. Sept. 18, 2020).[18]

16 *See* Defendant-Appellee's Br. 30 (citing 39 C.F.R. § 211.2(a)(2); Postal Operations Manual at 443.3).

17 *See Pa. Democratic Party*, 238 A.3d at 364 (noting "current two to five day delivery expectation of the USPS").

18 Indeed, the conduct required of a voter to effectuate such a scheme may be punishable as a crime under Pennsylvania statutes that criminalize forging or "falsely mak[ing] the official endorsement on any ballot," 25 Pa. Stat. & Cons. Stat. § 3517 (punishable by up to two years' imprisonment); "willfully disobey[ing] any lawful instruction or order of any county board of elections," *id.* § 3501 (punishable by up to one year's imprisonment); or voting twice in one election, *id.* § 3535 (punishable by up to seven years' imprisonment).

***17** To date, the Secretary has reported that at least 655 ballots without a legible postmark have been collected within the Deadline Extension period.[19] But it is mere speculation to say that any one of those ballots was cast after Election Day. We are reluctant to conclude that an independent actor —here, one of 655 voters—decided to mail his or her ballot after Election Day contrary to law. The Voter Plaintiffs have not provided any empirical evidence on the frequency of voter fraud or the speed of mail delivery that would establish a statistical likelihood or even the plausibility that any of the 655 ballots was cast after Election Day. Any injury to the Voter Plaintiffs attributable to the Presumption of Timeliness is merely "possible," not "actual or imminent," and thus cannot constitute an injury in fact.

19 As of the morning of November 12, Secretary Boockvar estimates that 655 of the 9383 ballots received between 8:00 P.M. on Election Day and 5:00 P.M. on November 6 lack a legible postmark. *See* Dkt. No. 59. That estimate of 655 ballots does not include totals from five of Pennsylvania's 67 counties: Lehigh, Northumberland, Tioga, Warren, and Wayne. *Id.* The 9383 ballots received, however, account for all of Pennsylvania's counties. *Id.*

B. Purcell

Even were we to conclude that Plaintiffs have standing, we could not say that the District Court abused its discretion in concluding on this record that the Supreme Court's election-law jurisprudence counseled against injunctive relief. Unique and important equitable considerations, including voters' reliance on the rules in place when they made their plans to vote and chose how to cast their ballots, support that disposition. Plaintiffs' requested relief would have upended this status quo, which is generally disfavored under the "voter confusion" and election confidence rationales of *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006). One can assume for the sake of argument that aspects of the now-prevailing regime in Pennsylvania are unlawful as alleged and still recognize that, given the timing of Plaintiffs'

request for injunctive relief, the electoral calendar was such that following it "one last time" was the better of the choices available. *Perez,* 138 S. Ct. at 2324 ("And if a [redistricting] plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.").

Here, less than two weeks before Election Day, Plaintiffs asked the District Court to enjoin a deadline established by the Pennsylvania Supreme Court on September 17, a deadline that may have informed voters' decisions about whether and when to request mail-in ballots as well as when and how they cast or intended to cast them. In such circumstances, the District Court was well within its discretion to give heed to Supreme Court decisions instructing that "federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, —— U.S. ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (per curiam) (citing *Purcell*, 549 U.S. at 1, 127 S.Ct. 5).

In *Purcell*, an appeal from a federal court order enjoining the State of Arizona from enforcing its voter identification law, the Supreme Court acknowledged that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." 549 U.S. at 4, 127 S.Ct. 5. In other words, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5, 127 S.Ct. 5. Mindful of "the necessity for clear guidance to the State of Arizona" and "the imminence of the election," the Court vacated the injunction. *Id.* at 5, 127 S.Ct. 5.

The principle announced in *Purcell* has very recently been reiterated. First, in *Republican National Committee*, the Supreme Court stayed on the eve of the April 7 Wisconsin primary a district court order that altered the State's voting rules by extending certain deadlines applicable to absentee ballots. 140 S. Ct. at 1206. The Court noted that it was adhering to *Purcell* and had "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* at 1207 (citing *Purcell*, 549 U.S. at 1, 127 S.Ct. 5). And just over two weeks ago, the Court denied an application to vacate a stay of a district court order that made similar changes to Wisconsin's election rules six weeks before Election Day. *Democratic Nat'l Comm. v. Wis. State Legislature*, No. 20A66, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6275871 (Oct. 26, 2020) (denying application to vacate stay). Justice Kavanaugh explained that the injunction was improper for the "independent reason[ ]" that "the District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's precedents." *Id.* at ——, 2020 WL 6275871 at *3 (Kavanaugh, J., concurring). *Purcell* and a string[20] of Supreme Court election-law decisions in 2020 "recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled." *Id.*

20 *See, e.g.*, *Andino v. Middleton*, No. 20A55, 592 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J., concurring) ("By enjoining South Carolina's witness requirement shortly before the election, the District Court defied [the *Purcell*] principle and this Court's precedents." (citations omitted)); *Merrill v. People First of Ala.*, No. 19A1063, 591 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 3604049 (Mem.), at *1 (July 2, 2020); *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see also Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (per curiam) (holding that injunction issued six weeks before election violated *Purcell*); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. Oct. 2, 2020) ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s well-known caution against federal courts mandating new election rules—especially at the last minute." (citing *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5)).

***18** The prevailing state election rule in Pennsylvania permitted voters to mail ballots up through 8:00 P.M. on Election Day so long as their ballots arrived by 5:00 P.M. on November 6. Whether that rule was wisely or properly put in place is not before us now. What matters for our purposes today is that Plaintiffs' challenge to it was not filed until sufficiently close to the election to raise a reasonable concern in the District Court that more harm than good would come from an injunction changing the rule. In sum, the District Court's justifiable reliance on *Purcell* constitutes an "alternative and independent reason[ ]" for concluding that an "injunction was unwarranted" here. *Wis. State Legislature*, —— S.Ct. at ——, 2020 WL 6275871, at *3 (Kavanaugh, J., concurring).

IV. Conclusion

We do not decide today whether the Deadline Extension or the Presumption of Timeliness are proper exercises of the Commonwealth of Pennsylvania's lawmaking authority, delegated by the U.S. Constitution, to regulate federal elections. Nor do we evaluate the policy wisdom of those two features of the Pennsylvania Supreme Court's ruling. We hold only that when voters cast their ballots under a state's facially lawful election rule and in accordance with instructions from the state's election officials, private citizens lack Article III standing to enjoin the counting of those ballots on the grounds that the source of the rule was the wrong state organ or that doing so dilutes their votes or constitutes differential treatment of voters in violation of the Equal Protection Clause. Further, and independent of our holding on standing, we hold that the District Court did not err in denying Plaintiffs' motion for injunctive relief out of concern for the settled expectations of voters and election officials. We will affirm the District Court's denial of Plaintiffs' emergency motion for a TRO or preliminary injunction.

All Citations

--- F.3d ----, 2020 WL 6686120

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United States District Court, W.D. Pennsylvania.

DONALD J. TRUMP FOR PRESIDENT, INC., et al., Plaintiffs
v.
Kathy BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania, et al., Defendants.

No. 2:20-cv-966
|
Signed 10/10/2020

Synopsis

Background: President's reelection campaign, Republican National Committee, and Republican congressional candidates and electors filed suit against state and county election officials alleging federal and state constitutional violations stemming from Pennsylvania's implementation of mail-in voting plan for upcoming general election and its poll watcher residency requirement. State Democratic Party, advocacy organizations, and their members intervened. Parties filed cross-motions for summary judgment.

Holdings: The District Court, J. Nicholas Ranjan, J., held that:

plaintiffs' claims were ripe for adjudication;

any injury that plaintiffs would suffer was too speculative to establish Article III standing;

use of unmanned drop boxes for mail-in ballots by some counties, but not others, did not violate Equal Protection Clause;

use of unmanned drop boxes for mail-in ballots did not violate substantive due process principles;

state law did not impose signature comparison requirement for mail-in and absentee ballots;

state law did not impose signature comparison requirement for applications for mail-in and absentee ballots;

fact that some county boards of elections intended to verify signatures on mail-in and absentee ballots and applications, while others did not, did not violate Equal Protection Clause;

fact that state did not require signature comparison for mail-in and absentee ballots, but did for in-person ballots, did not violate Equal Protection Clause; and

county residency requirement on being poll watcher did not violate plaintiffs' constitutional rights.

Defendants' motion granted.

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OPINION

J. Nicholas Ranjan, United States District Judge

***1** Plaintiffs in this case are President Trump's reelection campaign, the Republican National Committee, and several other Republican congressional candidates and electors. They originally filed this suit, alleging federal and state constitutional violations stemming from Pennsylvania's implementation of a mail-in voting plan for the upcoming general election.

Since then, the Pennsylvania Supreme Court issued a decision involving similar claims, which substantially narrowed the focus of this case. And Secretary of the Commonwealth, Kathy Boockvar, issued additional election "guidance," which further narrowed certain of the claims.

Therefore, as this case presently stands, only three claims remain. First, whether the use of so-called "drop boxes"[1] for mail-in ballots is unconstitutional, given the lack of guidance or mandates that those drop boxes have security guards to man them. Second, whether the Secretary's guidance as to mail-in ballots—specifically, her guidance that county election boards should not reject mail-in ballots where the voter's signature does not match the one on file—is unconstitutional. Third, whether Pennsylvania's restriction that poll watchers be residents in the county for which they are assigned, as applied to the facts of this case, is unconstitutional.

1 "Drop boxes" are receptacles similar to U.S. Postal Service mailboxes. They are made of metal, and have a locking mechanism, storage compartment, and an insert or slot into which a voter can insert a ballot. *See generally* [ECF 549-9].

In order to present these claims to the Court on a complete record, the parties engaged in extensive fact and expert discovery, and have filed cross-motions for summary judgment. No party has raised a genuine dispute of material fact that would require a trial, and the Court has found none. As such, the parties' cross-motions for summary judgment are ready for disposition.

After a careful review of the parties' submissions and the extensive evidentiary record, the Court will enter judgment in favor of Defendants on all of Plaintiffs' federal-constitutional claims, decline to exercise supplemental jurisdiction over the state-constitutional claims, and dismiss this case. This is so for two main reasons.

First, the Court concludes that Plaintiffs lack Article III standing to pursue their claims. Standing, of course, is a necessary requirement to cross the threshold into federal court. Federal courts adjudicate cases and controversies, where a plaintiff's injury is concrete and particularized. Here, however, Plaintiffs have not presented a concrete injury to warrant federal-court review. All of Plaintiffs' remaining claims have the same theory of injury—one of "vote dilution."

Plaintiffs fear that absent implementation of the security measures that they seek (guards by drop boxes, signature comparison of mail-in ballots, and poll watchers), there is a risk of voter fraud by other voters. If another person engages in voter fraud, Plaintiffs assert that their own lawfully cast vote will, by comparison, count for less, or be diluted.

***2** The problem with this theory of harm is that it is speculative, and thus Plaintiffs' injury is not "concrete"—a critical element to have standing in federal court. While Plaintiffs may not need to prove actual voter fraud, they must at least prove that such fraud is "certainly impending." They haven't met that burden. At most, they have pieced together a sequence of uncertain assumptions: (1) they assume potential fraudsters may attempt to commit election fraud through the use of drop boxes or forged ballots, or due to a potential shortage of poll watchers; (2) they assume the numerous election-security measures used by county election officials may not work; and (3) they assume their own security measures may have prevented that fraud.

All of these assumptions could end up being true, and these events could theoretically happen. But so could many things. The relevant question here is: are they "certainly impending"? At least based on the evidence presented, the answer to that is "no." And that is the legal standard that Plaintiffs must meet. As the Supreme Court has held, this Court cannot "endorse standing theories that rest on speculation about the decisions of independent actors." *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013).

Second, even if Plaintiffs had standing, their claims fail on the merits. Plaintiffs essentially ask this Court to second-guess the judgment of the Pennsylvania General Assembly and election officials, who are experts in creating and implementing an election plan. Perhaps Plaintiffs are right that guards should be placed near drop boxes, signature-analysis experts should examine every mail-in ballot, poll watchers should be able to man any poll regardless of location, and other security improvements should be made. But the job of an unelected federal judge isn't to suggest election improvements, especially when those improvements contradict the reasoned judgment of democratically elected officials. *See Andino v. Middleton*, —— U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J. concurring) (state legislatures should not be subject to "second-guessing by an unelected federal judiciary," which is "not accountable to the people") (cleaned up).

Put differently, "[f]ederal judges can have a lot of power—especially when issuing injunctions. And sometimes we may even have a good idea or two. But the Constitution sets out our sphere of decision-making, and that sphere does not extend to second-guessing and interfering with a State's reasonable, nondiscriminatory election rules." *New Georgia Project v. Raffensperger*, —— F.3d ——, ——, 2020 WL 5877588, at *4 (11th Cir. Oct. 2, 2020).

As discussed below, the Court finds that the election regulations put in place by the General Assembly and implemented by Defendants do not significantly burden any right to vote. They are rational. They further important state interests. They align with the Commonwealth's elaborate election-security measures. They do not run afoul of the United States Constitution. They will not otherwise be second-guessed by this Court.

BACKGROUND

I. Procedural Background

A. Plaintiffs' original claims.

On June 29, 2020, Plaintiffs filed their original complaint in this case against Defendants, who are the Secretary of the Commonwealth and the 67 county boards of elections. [ECF 4]. With their lawsuit, Plaintiffs challenged a number of Pennsylvania's procedures with respect to mail-in voting—in particular, the use of drop boxes and the counting of mail-in ballots that contained certain procedural defects. *See* [*id.*]. Shortly after filing their original complaint, Plaintiffs moved for expedited discovery and an expedited declaratory-judgment hearing. [ECF 6]. Defendants opposed the motion. The Court partially granted the motion, scheduled a speedy hearing, and ordered expedited discovery before that hearing. [ECF 123; ECF 124].

***3** After Plaintiffs filed the original complaint, many non-parties sought to intervene in the action, including several organizations.[2] The Court granted all intervention motions. [ECF 309].

2 Intervenors include the Pennsylvania State Democratic Party, the League of Women Voters, the NAACP Pennsylvania State Conference, Common Cause Pennsylvania, Citizens for Pennsylvania's Future, the Sierra Club, the Pennsylvania Alliance for Retired

> Americans, and several affiliated individuals of these organizations.

Defendants and Intervenors moved to dismiss the original complaint. In response, Plaintiffs filed an amended complaint. [ECF 234]. The amended complaint maintained the gist of the original, but added two new counts and made a variety of other drafting changes. *See* [ECF 242]. Defendants and Intervenors moved to dismiss the first amended complaint, too, primarily asking the Court to abstain and stay the case.

Plaintiffs' first amended complaint asserted nine separate counts, but they could be sorted into three overarching categories.

1. Claims alleging vote dilution due to unlawful ballot collection and counting procedures.

The first category covered claims related to allegedly unlawful procedures implemented by some Defendants for the collection and counting of mail-in and absentee ballots. Those included claims related to (1) Defendants' uneven use of drop boxes and other satellite ballot-collection sites, (2) procedures for verifying the qualifications of voters applying in person for mail-in or absentee ballots, and (3) rules for counting non-compliant ballots (such as ballots submitted without a secrecy envelope, without an elector declaration, or that contained stray marks on the envelope).

In Count I, Plaintiffs alleged violations of the Elections Clause and the related Presidential Electors Clause of the U.S. Constitution. [ECF 234, ¶¶ 193-205]. Plaintiffs asserted that, under these provisions, only the state legislature may set the time, place, and manner of congressional elections and determine how the state chooses electors for the presidency. [*Id.* at ¶ 196].

In support of this claim, Plaintiffs alleged that Secretary Boockvar's guidance concerning the use of mail-in ballot drop boxes, whether county boards of elections must independently verify mail-in ballot applications, and the counting of non-compliant mail-in ballots, was an executive overreach—in that the Secretary's guidance allegedly violated certain provisions of the Election Code enacted by the Pennsylvania General Assembly. [*Id.* at ¶ 201]. Plaintiffs also claimed that the Secretary's "unlawful guidance" increased the risk of fraudulent or unlawful voting and infringed on the right to vote, which, they said, amounted to additional violations of the 1st and 14th Amendments to the U.S. Constitution. [*Id.* at ¶¶ 202-03].

In Count II, Plaintiffs alleged a violation of the Equal-Protection Clause under the 14th Amendment. [*Id.* at ¶¶ 206-15]. Plaintiffs asserted that the implementation of the foregoing (*i.e.*, mail-in ballot drop boxes, the verification of mail-in ballot applications, and the counting of non-compliant ballots) was different in different counties, thereby treating voters across the state in an unequal fashion. [*Id.* at ¶¶ 211-13].

***4** In Count III, Plaintiffs asserted a violation of the Pennsylvania State Constitution. [*Id.* at ¶¶ 216-22]. Plaintiffs alleged that the same actions and conduct that comprised Counts I and II also violated similar provisions of the Pennsylvania Constitution. [*Id.* at ¶ 220].

Finally, in Counts VI and VII, Plaintiffs alleged that Defendants violated provisions of the federal and state constitutions by disregarding the Election Code's notice and selection requirements applicable to "polling places." [*Id.* at ¶¶ 237-52]. Plaintiffs alleged that drop boxes are "polling places," and thus subject to certain criteria for site selection and the requirement that county election boards provide 20 days' public notice. [*Id.* at ¶¶ 239-42]. Plaintiffs asserted that Defendants' failure to provide this notice or select appropriate "polling places" in the primary election, if repeated in the general election, would create the risk of voter fraud and vote dilution. [*Id.* at ¶¶ 243-246].

2. Poll-watcher claims.

The second category of claims in the first amended complaint consisted of challenges to the constitutionality of Election-Code provisions related to poll watchers.

In Count IV, Plaintiffs alleged violations of the 1st and 14th Amendments. These claims had both a facial and an as-applied component. [ECF 234, ¶ 230 ("On its face and as applied to the 2020 General Election ...")].

First, Plaintiffs alleged that 25 P.S. § 2687 was facially unconstitutional because it "arbitrarily and unreasonably" limits poll watchers to serving only in their county of residence and to monitoring only in-person voting at the polling place on election day. [*Id.* at ¶ 226]. Second, Plaintiffs alleged that the same provision was unconstitutional as

applied in the context of Pennsylvania's new vote-by-mail system, because these poll-watcher restrictions, combined with insecure voting procedures, create unacceptable risks of fraud and vote dilution. [*Id.* at ¶ 228]. Plaintiffs contended that these limitations make it "functionally impracticable" for candidates to ensure that they have poll watchers present where ballots are deposited and collected, given the widespread use of remote drop boxes and other satellite collection sites. [*Id.*].

Count V was the same as Count IV, but alleged that the same poll-watching restrictions violated the Pennsylvania Constitution, too. [*Id.* at ¶ 234].

3. In-person voting claims.

The third category of claims consisted of challenges to the procedures for allowing electors to vote in person after requesting a mail-in ballot.

That is, in Counts VIII and IX, Plaintiffs asserted that the Election Code permits an elector that has requested a mail-in ballot to still vote in person so long as he remits his spoiled ballot. [ECF 234, ¶¶ 253-267]. Plaintiffs asserted that during the primary, some counties allowed such electors to vote in person, while others did not, and they fear the same will happen in the general election. [*Id.* at ¶¶ 255, 259]. Plaintiffs also asserted that some counties allowed electors who had voted by mail to vote in person, in violation of the Election Code. [*Id.* at ¶¶ 257-58]. Plaintiffs alleged that this conduct also violates the federal and state constitutional provisions concerning the right to vote and equal protection. [*Id.* at ¶¶ 261, 265].

B. The Court's decision to abstain.

***5** Upon consideration of Defendants' and Intervenors' motions to dismiss the first amended complaint, on August 23, 2020, the Court issued an opinion abstaining under *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and temporarily staying the case. [ECF 409, 410].

In doing so, the Court determined that the three requisite prongs for *Pullman* abstention were met, and that the discretionary considerations weighed in favor of abstention. [ECF 409, p. 3 ("[Under *Pullman*, federal courts abstain] if (1) doing so requires interpretation of 'unsettled questions of state law'; (2) permitting resolution of the unsettled state-law questions by state courts would 'obviate the need for, or substantially narrow the scope of adjudication of the constitutional claims'; and (3) an 'erroneous construction of state law would be disruptive of important state policies[.]' " (citing *Chez Sez III Corp. v. Township of Union*, 945 F.2d 628, 631 (3d Cir. 1991))); *id.* at p. 30 (explaining that after the three prongs of *Pullman* abstention are met, the court must "make a discretionary determination of whether abstention is appropriate given the particular facts of this case," which requires weighing "such factors as the availability of an adequate state remedy, the length of time the litigation has been pending, and the impact of delay on the litigants." (cleaned up))].

The Court found that abstaining under *Pullman* was appropriate because of several unresolved ambiguities in Pennsylvania's Election Code. Specifically, the Court found that there were significant ambiguities as to whether the Election Code (1) permitted delivery of ballots to locations other than the county election board's headquarters, such as drop boxes, (2) permitted counties to count ballots that were not placed within the "secrecy envelope" (*i.e.*, "naked ballots"), (3) considered drop boxes and other ballot-collection sites as "polling places," as defined in the Election Code, and (4) required counties to automatically verify ballot applications for mail-in ballots (where the person applied for the ballot in person), even if there was no "bona fide objection" to the application. [ECF 409, pp. 17-23].

The Court explained that each of these ambiguities, if settled, would significantly narrow—or even resolve—some of Plaintiffs' claims. As the Court explained, for example, if a state court interpreted the Election Code to disallow drop boxes, Plaintiffs would obtain their requested relief (*i.e.*, no drop boxes); alternatively, if drop boxes were authorized by the Election Code, then Plaintiffs' allegations that drop boxes were illegal would be eliminated, which would, in turn, significantly affect the constitutional analysis of Plaintiffs' claims. [*Id.* at pp. 25-28]. The same held true for "naked ballots," the breadth of coverage of "polling places," and the requisite verification for personal ballot applications.

The Court then explained that it was appropriate for it to abstain until a state court could interpret the ambiguous state law. [*Id.* at pp. 28-30]. The Court concluded that if it interpreted the ambiguous state law, there was a sufficient chance that a state court could disagree with the interpretation, which would render this Court's interpretation not only

advisory, but disruptive to state policies. The Court noted that especially in the election context, states have considerable discretion to implement their own policies without federal intervention. Accordingly, because these were questions of uninterpreted state law that were sufficiently ambiguous, federalism and comity demanded that a state court, not this Court, be the first interpreter.

***6** Finally, the Court explained that, despite the imminence of the election, abstention was still proper. [*Id.* at pp. 30-33]. The Court noted that state-court litigation was already pending that would resolve some of the statutory ambiguities at issue. [*Id.* at p. 31]. Further, the Court highlighted three courses Plaintiffs could immediately take to resolve the statutory ambiguities: intervene in the pending state-court litigation; file their own state-court case; or appeal this Court's abstention decision to the Third Circuit, and then seek certification of the unsettled state-law issues in the Pennsylvania Supreme Court. [*Id.* at pp. 31-33].

Additionally, the Court explained that it would stay the entire case, despite several of Plaintiffs' claims not being subject to *Pullman* abstention as they were not based on ambiguous state law. [*Id.* at pp. 34-37]. That's because, in its discretion, the Court determined it would be more efficient for this case to progress as a single proceeding, rather than in piecemeal fashion. [*Id.*]. However, the Court allowed any party to move to lift the stay as to the few claims not subject to *Pullman* abstention, if no state-court decision had been issued by October 5, 2020. [*Id.*].

On August 28, 2020, five days after the Court abstained, Plaintiffs moved to modify the Court's stay, and moved for a preliminary injunction. [ECF 414]. Plaintiffs requested, among other things, that the Court order Defendants to segregate, and not pre-canvass or canvass, all ballots that were returned in drop boxes, lacked a secrecy envelope, or were delivered by a third party. [*Id.*]. Plaintiffs also requested that the Court lift the stay by September 14, 2020, instead of October 5, 2020. [*Id.*].

The Court denied Plaintiffs' motion for preliminary injunctive relief, finding that Plaintiffs failed to show they would be irreparably harmed. [ECF 444; ECF 445]. The Court also declined to move up the date when the stay would be lifted. [*Id.*]. The Court noted that, at the request of Secretary Boockvar, the Pennsylvania Supreme Court had already exercised its extraordinary jurisdiction to consider five discrete issues and clarify Pennsylvania law in time for the general election. [*Id.* at p. 1]. Since that case appeared to be on track, the Court denied Plaintiffs' motion without prejudice, and the Court's abstention opinion and order remained in effect.

C. The Pennsylvania Supreme Court's decision.

On September 17, 2020, the Pennsylvania Supreme Court issued its decision in *Pennsylvania Democratic Party v. Boockvar*, —— Pa. ——, —— A.3d ——, 2020 WL 5554644 (Sept. 17, 2020). The court clarified three issues of state election law that are directly relevant to this case.

1. Counties are permitted under the Election Code to establish alternate ballot-collection sites beyond just their main county office locations.

The Pennsylvania Supreme Court first considered whether the Election Code allowed a Pennsylvania voter to deliver his or her mail-in ballot in person to a location other than the established office address of the county's board of election. *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *8. The court further considered the means by which county boards of election could accept hand-delivered mail-in ballots. *Id.*

Consistent with this Court's abstention opinion, the court found that "the parties' competing interpretations of the Election Code on [these questions] are reasonable, rendering the Code ambiguous" on these questions. *Id.* After applying traditional principles of statutory interpretation, the court held that "the Election Code should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes." *Id.* at.——, 2020 WL 5554644, at *9. The court reached this conclusion due to "the clear legislative intent underlying Act 77 ... to provide electors with options to vote outside of traditional polling places." *Id.*

***7** The respondents in that case further argued that this interpretation would cause county boards of election to "employ myriad systems to accept hand-delivered mail-in ballots," which would "be unconstitutionally disparate from one another in so much as some systems will offer more legal protections to voters than others will provide" and violate the Equal-Protection Clause *Id.* The court rejected this argument. It found that "the exact manner in which each county board of election will accept these votes is entirely unknown at this point; thus, we have no metric by which to measure whether

any one system offers more legal protection than another, making an equal protection analysis impossible at this time." *Id.*

2. Ballots lacking inner secrecy envelopes should not be counted.

The court next considered whether the boards of elections "must 'clothe and count naked ballots,' *i.e.*, place ballots that were returned without the secrecy envelope into a proper envelope and count them, rather than invalidate them." *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *21. The court concluded that they should not.

The court held that "the Legislature intended for the secrecy envelope provision [in the Election Code] to be mandatory." *Id.* at ——, 2020 WL 5554644, at *24. In other words, the relevant provisions "make clear the General Assembly's intention that, during the collection and canvassing processes, when the outer envelope in which the ballot arrived is unsealed and the sealed ballot removed, it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted." *Id.* The secrecy envelope "properly unmarked and sealed ensures that result," and "[w]hatever the wisdom of the requirement, the command that the mail-in elector utilize the secrecy envelope and leave it unblemished by identifying information is neither ambiguous nor unreasonable." *Id.*

As a result, the court ultimately concluded, "a mail-ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified." *Id.* at ——, 2020 WL 5554644, at *26

3. Pennsylvania's county-residency requirement for poll watchers is constitutional.

The final relevant issue the court considered was whether the poll-watcher residency requirement found in 25 P.S. § 2687(b) violates state or federal constitutional rights. *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *26. Relying on *Republican Party of Pennsylvania v. Cortés*, 218 F. Supp. 3d 396 (E.D. Pa. 2016), the court concluded that the poll-watcher residency provision "impose[d] no burden on one's constitutional right to vote and, accordingly, requires only a showing that a rational basis exists to be upheld." *Id.* at ——, 2020 WL 5554644, at *30. The court found rational-basis review was appropriate for three reasons.

First, "there is no individual constitutional right to serve as a poll watcher; rather, the right to do so is conferred by statute." *Id.* (citation omitted). Second, "poll watching is not incidental to the right of free association and, thus, has no distinct First Amendment protection." *Id.* (cleaned up). Third, "poll watching does not implicate core political speech." *Id.* (citation omitted).

The court went on to find that there was a "clear rational basis for the county poll watcher residency requirement[.]" *Id.* That is, given "Pennsylvania has envisioned a county-based scheme for managing elections within the Commonwealth," it is "reasonable that the Legislature would require poll watchers, who serve within the various counties of the state, to be residents of the counties in which they serve." *Id.*

In upholding the constitutionality of the "county poll watcher residency requirement," the court rejected the claim that "poll watchers are vital to protect against voter fraud and that because of the distribution of voters throughout Pennsylvania, the residency requirement makes it difficult to identify poll watchers in all precincts." *Id.* The court concluded that the claims of "heightened election fraud involving mail-in voting" were "unsubstantiated" and "specifically belied by the Act 35 report issued by [Secretary Boockvar] on August 1, 2020." *Id.* Moreover, the court held that the "speculative claim that it is 'difficult' for both parties to fill poll watcher positions in every precinct, even if true, is insufficient to transform the Commonwealth's uniform and reasonable regulation requiring that poll watchers be residents of the counties they serve into a non-rational policy choice." *Id.*

***8** Based on the foregoing, the court declared "that the poll-watcher residency requirement does not violate the state or federal constitutions." *Id.* at ——, 2020 WL 5554644, at *31.

D. Plaintiffs' notice of remaining claims.

Following the Pennsylvania Supreme Court's decision, this Court lifted the stay it had imposed pursuant to the *Pullman* abstention doctrine and ordered the parties to identify the remaining viable claims and defenses in the case. [ECF 447].

In their notice, Plaintiffs took the position that nearly all their claims remained viable, with a few discrete exceptions. Plaintiffs conceded that their "federal and state constitutional claims of voter dilution solely on the basis that drop boxes and other collection sites are not statutorily authorized by the

Pennsylvania Election Code [were] no longer viable." [ECF 448, p. 4]. They also stated that their "facial challenge to the county residency requirement under 25 P.S. § 2687 is no longer a viable claim." [*Id.* at p. 10]. Plaintiffs also moved for leave to amend their complaint a second time to add new allegations and a new claim relating to Secretary Boockvar's recent signature-comparison guidance. [ECF 451].

Defendants and Intervenors, for their part, suggested that Plaintiffs' claims had been substantially narrowed, if not outright mooted, by the Pennsylvania Supreme Court's decision, and reminded the Court that their arguments for dismissal remained outstanding.

E. The Court's September 23, 2020, memorandum orders.

In response to the notices filed by the parties and Plaintiffs' motion for leave to amend the first amended complaint, the Court issued an order granting Plaintiffs' motion, narrowing the scope of the lawsuit, and establishing the procedure for resolving the remaining claims. [ECF 459].

As to Plaintiffs' proposed amendment to their complaint, the Court found that the new claim and allegations were relatively narrow, and thus amendment wouldn't prejudice Defendants and Intervenors. [*Id.* at pp. 3-4]. As a result, the Court granted the motion. [*Id.* at p. 4].

The Court, however, did inform the parties that it would "continue to abstain under *Pullman* as to Plaintiffs' claim pertaining to the notice of drop box locations and, more generally, whether the "polling place" requirements under the Election Code apply to drop-box locations." [*Id.* at p. 5]. This was so because those claims involve still-unsettled issues of state law. The Court explained that the "fact that the Pennsylvania Supreme Court did not address this issue in its recent decision is immaterial" because the "propriety of *Pullman* abstention does not depend on the existence of parallel state-court proceedings." [*Id.* (citing *Stoe v. Flaherty*, 436 F.3d 209, 213 (3d Cir. 2006))]. Moreover, Plaintiffs had several other avenues to pursue prompt interpretation of state law after this Court abstained. [*Id.* at p. 6].

The Court also informed the parties, for similar reasons, that it would continue to abstain with respect to Plaintiffs' claims regarding Secretary Boockvar's guidance that personal applications for mail-in ballots shall be accepted absent a "bona fide objection." [ECF 460].

The Court found that "no Article III 'case or controversy' remain[ed] with respect to the claims on which the Pennsylvania Supreme Court effectively ruled in Plaintiffs' favor on state-law grounds (*e.g.*, illegality of third-party ballot delivery; excluding 'naked ballots' submitted without inner-secrecy envelopes)." [ECF 459, p. 6]. Because there was "no reason to believe Defendants plan to violate what they themselves now agree the law requires," the Court held that Plaintiffs' claims were premature and speculative. [*Id.* at p. 7]. The Court therefore dismissed those claims as falling outside of its Article III power to adjudicate. [*Id.* (citations omitted)].

***9** To resolve the remaining claims, the Court directed the parties to file cross-motions for summary judgment presenting all arguments for dismissal or judgment under Federal Rule of Civil Procedure 56. [*Id.* at pp. 8-10]. Before briefing on those motions, the Court authorized additional expedited discovery. [*Id.* at pp. 4-5]. The parties completed discovery and timely filed their motions; they identified no material disputes of fact; and therefore, the motions are now fully briefed and ready for disposition.

F. The claims now at issue.

Based on the Pennsylvania Supreme Court's prior ruling, this Court's prior decisions, Plaintiffs' nine-count Second Amended Complaint, and recent guidance issued by Secretary Boockvar, the claims remaining in this case are narrow and substantially different than those asserted at the outset of the case.

Drop Boxes (Counts I-III). Plaintiffs still advance a claim that drop boxes are unconstitutional, but in a different way. Now that the Pennsylvania Supreme Court has expressly held that drop boxes are authorized under the Election Code, Plaintiffs now assert that the use of "unmanned" drop boxes is unconstitutional under the federal and state constitutions, for reasons discussed in more detail below.

Signature Comparison (Counts I-III). Plaintiffs' newly added claim relates to signature comparison. Secretary Boockvar's September 2020 guidance informs the county boards that they are not to engage in a signature analysis of mail-in ballots and applications, and they must count those ballots, even if the signature on the ballot does not match the voter's signature on file. Plaintiffs assert that this guidance is unconstitutional under the federal and state constitutions.

Poll Watching (Counts IV, V). The Pennsylvania Supreme Court already declared that Pennsylvania's county-residency

requirement for poll watchers is ***facially*** constitutional. Plaintiffs now only assert that the requirement, ***as applied***, is unconstitutional under the federal and state constitutions.

The counts that remain in the Second Amended Complaint, but which are ***not*** at issue, are the counts related to where poll watchers can be located. That is implicated mostly by Counts VI and VII, and by certain allegations in Counts IV and V. The Court continues to abstain from reaching that issue. Plaintiffs have filed a separate state lawsuit that would appear to address many of those issues, in any event. [ECF 549-22; ECF 573-1]. Counts VIII and IX concern challenges related to voters that have requested mail-in ballots, but that instead seek to vote in person. The Secretary issued recent guidance, effectively mooting those claims, and, based on Plaintiffs' positions taken in the course of this litigation, the Court deems Plaintiffs to have withdrawn Counts VIII and IX. [ECF 509, p. 15 n.4 ("[I]n the September 28 guidance memo, the Secretary corrected [her] earlier guidance to conform to the Election Code and states that any mail-in voter who spoils his/her ballot and the accompanying envelopes and signs a declaration that they did not vote by mail-in ballot will be allowed to vote a regular ballot. Therefore, Plaintiffs agree to withdraw this claim from those that still are being pursued.")].

II. Factual Background

A. Pennsylvania's Election Code, and the adoption of Act 77.

1. The county-based election system.

Pennsylvania's Election Code, first enacted in 1937, established a county-based system for administering elections. *See* 25 P.S. § 2641(a) ("There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of [the Election Code]."). The Election Code vests county boards of elections with discretion to conduct elections and implement procedures intended to ensure the honesty, efficiency, and uniformity of Pennsylvania's elections. *Id.* §§ 2641(a), 2642(g).

2. The adoption of Act 77.

***10** On October 31, 2019, the Pennsylvania General Assembly passed "Act 77," a bipartisan reform of Pennsylvania's Election Code. *See* [ECF 461, ¶¶ 91]; 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421).

Among other things, by passing Act 77, Pennsylvania joined 34 other states in authorizing "no excuse" mail-in voting by all qualified electors. *See* [ECF 461, ¶¶ 92]; 25 P.S. §§ 3150.11-3150.17; [ECF 549-11, p. 5 ("The largest number of states (34), practice no-excuse mail-in voting, allowing any persons to vote by mail regardless of whether they have a reason or whether they will be out of their jurisdiction on Election Day.")]. Previously, a voter could only cast an "absentee" ballot if certain criteria were met, such as that the voter would be away from the election district on election day. *See* 1998 Pa. Legis. Serv. Act. 1998-18 (H.B. 1760), § 14.

Like the previous absentee voting system, Pennsylvania's mail-in voting system requires voters to "opt-in" by requesting a ballot from either the Secretary or the voter's county board of elections. *See* 25 P.S. §§ 3146.2(a), 3150.12(a). When requesting a ballot, the voter must provide, among other things, his or her name, date of birth, voting district, length of time residing in the voting district, and party choice for primary elections. *See* 25 P.S. §§ 3146.2(b), 3150.12(b). A voter must also provide proof of identification; namely, either a driver's license number or, in the case of a voter who does not have a driver's license, the last four digits of the voter's Social Security number, or, in the case of a voter who has neither a driver's license nor a Social Security number, another form of approved identification. 25 P.S. § 2602(z.5)(3). In this respect, Pennsylvania differs from states that automatically mail each registered voter a ballot—a practice known as "universal mail-in voting." [ECF 549-11, p. 6] ("[N]ine states conduct universal vote-by-mail elections in which the state (or a local entity, such [as] a county or municipality) mails all registered voters a ballot before each election without voters' [sic] having to request them.").

3. The COVID-19 pandemic.

Since early 2020, the United States, and Pennsylvania, have been engulfed in a viral pandemic of unprecedented scope and scale. [ECF 549-8, ¶ 31]. In that time, COVID-19 has spread to every corner of the globe, including Pennsylvania, and jeopardized the safety and health of many people. [*Id.* at ¶¶ 31, 38-39, 54-55, 66]. As of this date, more than 200,000 Americans have died,

including more than 8,000 Pennsylvanians. *See* Covid in the U.S.: Latest Map and Case Count, The New York Times, available at https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last visited Oct. 10, 2020); COVID-19 Data for Pennsylvania, Pennsylvania Department of Health, available at https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last visited Oct. 10, 2020).

There have been many safety precautions that Pennsylvanians have been either required or urged to take, such as limiting participation in large gatherings, maintaining social distance, and wearing face coverings. [ECF 549-8, ¶¶ 58, 63-65]. The threat of COVID-19 is likely to persist through the November general election. [*Id.* at ¶¶ 53-56, 66-68].

B. Facts relevant to drop boxes.

***11** Pennsylvania's county-based election system vests county boards of elections with "jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions" of the Election Code. 25 P.S. § 2641(a). The Election Code further empowers the county boards to "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." *Id.* at § 2642(f). The counties are also charged with the responsibility to "purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines." *Id.* at § 2642(c).

As noted above, in *Pennsylvania Democratic Party v. Boockvar*, the Pennsylvania Supreme Court interpreted the Election Code, which allows for mail-in and absentee ballots to be returned to the "county board of election," to "permit[ ] county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes." —— A.3d at ——, 2020 WL 5554644, at *10.

Thus, it is now settled that the Election Code permits (but does not require) counties to authorize drop boxes and other satellite-collection locations for mailed ballots. 25 P.S. § 3150.16(a). Pennsylvania is not alone in this regard—as many as 34 other states and the District of Columbia authorize the use of drop boxes or satellite ballot collection sites to one degree or another. [ECF 549-11, p. 8, fig. 4]. Indeed, Secretary Boockvar stated that as many as 16% of voters nationwide had cast their ballots using drop boxes in the 2016 general election, including the majority of voters in Colorado (75%) and Washington (56.9%). [ECF 547, p. 18 (citing ECF 549-16)].

1. Secretary Boockvar's guidance with respect to drop boxes.

Since the passage of Act 77, Secretary Boockvar has issued several guidance documents to the counties regarding the counties' implementation of mail-in voting, including guidance with respect to the use of drop boxes. [ECF 504-21; 504-22; 504-23; 504-24; 504-25; 571-1, Ex. E]. In general terms, the Secretary's guidance as to drop boxes informed the counties that the use of drop boxes was authorized by the Election Code and recommended "best practices" for their use. Her latest guidance offered standards for (1) where drop boxes should be located, [ECF 504-23, § 1.2], (2) how drop boxes should be designed and what signage should accompany them, [*id.* at §§ 2.2-2.3], (3) what security measures should be employed, [*id.* at § 2.5], and (4) what procedures should be implemented for collecting and returning ballots to the county election office, [*id.* at §§ 3.1-3.3, 4].

As to the location of drop boxes, the Secretary recommended that counties consider the following criteria, [*id.* at § 1.2]:

- Locations that serve heavily populated urban/suburban areas, as well as rural areas;
- Locations near heavy traffic areas such as commercial corridors, large residential areas, major employers and public transportation routes;
- Locations that are easily recognizable and accessible within the community;
- Locations in areas in which there have historically been delays at existing polling locations, and areas with historically low turnout;
- Proximity to communities with historically low vote by mail usage;
- Proximity to language minority communities;
- Proximity to voters with disabilities;
- Proximity to communities with low rates of household vehicle ownership;
- Proximity to low-income communities;

- Access to accessible and free parking; and
- The distance and time a voter must travel by car or public transportation.

With respect to drop-box design criteria, the Secretary recommended to counties, [*id.* at § 2.2]:

***12** • Hardware should be operable without any tight grasping, pinching, or twisting of the wrist;

- Hardware should require no more than 5 lbs. of pressure for the voter to operate;
- Receptacle should be operable within reach-range of 15 to 48 inches from the floor or ground for a person utilizing a wheelchair;
- The drop-box should provide specific points identifying the slot where ballots are inserted;
- The drop-box may have more than one ballot slot (e.g. one for drive-by ballot return and one for walk-up returns);
- To ensure that only ballot material can be deposited and not be removed by anyone but designated county board of election officials, the opening slot of a drop-box should be too small to allow tampering or removal of ballots; and
- The opening slot should also minimize the ability for liquid to be poured into the drop-box or rainwater to seep in.

The Secretary's guidance as to signage recommended, [*id.* at § 2.3]:

- Signage should be in all languages required under the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10503);
- Signage should display language stating that counterfeiting, forging, tampering with, or destroying ballots is a second-degree misdemeanor pursuant to sections 1816 and 1817 of the Pennsylvania Election Code (25 P.S. §§ 3516 and 3517);
- Signage should also provide a statement that third-party return of ballots is prohibited unless the person returning the ballot is rendering assistance to a disabled voter or an emergency absentee voter. Such assistance requires a declaration signed by the voter and the person rendering assistance; and
- Signage should provide a statement requesting that the designated county elections official should be notified immediately in the event the receptacle is full, not functioning, or is damaged in any fashion, and should provide a phone number and email address for such purpose.

With respect to ballot security, the Secretary stated that county boards should implement the following security measures, [*id.* at § 2.5]:

- Only personnel authorized by the county board of elections should have access to the ballots inside of a drop-box;
- Drop-boxes should be secured in a manner to prevent their unauthorized removal;
- All drop-boxes should be secured by a lock and sealed with a tamper-evident seal. Only authorized election officials designated by the county board of elections may access the keys and/or combination of the lock;
- Drop-boxes should be securely fastened in a manner as to prevent moving or tampering, such as fastening the drop-box to concrete or an immovable object;
- During the hours when the staffed return site is closed or staff is unavailable, the drop-box should be placed in a secure area that is inaccessible to the public and/or otherwise safeguarded;
- The county boards of election should ensure adequate lighting is provided at all ballot return sites when the site is in use;
- When feasible, ballot return sites should be monitored by a video security surveillance system, or an internal camera that can capture digital images and/or video. A video security surveillance system can include existing systems on county, city, municipal, or private buildings. Video surveillance should be retained by the county election office through 60 days following the deadline to certify the election; and

***13** • To prevent physical damage and unauthorized entry, the drop-box at a ballot return site located outdoors should be constructed of durable material able to withstand vandalism, removal, and inclement weather.

With respect to ballot collection and "chain of custody" procedures, the Secretary stated that counties should adhere to the following standards, [*id.* at §§ 3.1-3.2]:

- Ballots should be collected from ballot return sites only by personnel authorized by the county board of elections and at times determined by the board of elections, at least every 24 hours, excluding Saturdays and Sundays;
- The county board of elections should designate at least two election officials to collect voted ballots from a ballot return site. Each designated election official should carry identification or an official designation that identifies them as an election official authorized to collect voted ballots;
- Election officials designated to collect voted ballots by the board of elections should sign a declaration declaring that he or she will timely and securely collect and return voted ballots, will not permit any person to tamper with a ballot return site or its contents, and that he or she will faithfully and securely perform his or her duties;
- The designated election officials should retrieve the voted ballots from the ballot return site and place the voted ballots in a secure ballot transfer container;
- The designated election officials should note on *Ballot Return Site Collection Forms* the site and unique identification number of the ballot return site and the date and time of retrieval;
- Ballots collected from any ballot return site should be immediately transported to the county board of elections;
- Upon arrival at the office of the county board of elections, the county board of elections, or their designee(s), should note the time of arrival on the same form, as described above;
- The seal number should be verified by a county election official or a designated representative;
- The county board of elections, or their designee(s), should inspect the drop-box or secure ballot transfer container for evidence of tampering and should receive the retrieved ballots by signing the retrieval form and including the date and time of receipt. In the event tampering is evident, that fact must be noted on the retrieval form;
- The completed collection form should be maintained in a manner proscribed by the board of elections to ensure that the form is traceable to its respective secure ballot container; and
- The county elections official at the county election office or central count location should note the number of ballots delivered on the retrieval form.

And finally, as to election day and post-election day procedures with respect to drop boxes, the Secretary provided as follows, [*id.* at §§ 3.3, 4]:

- The county board of elections should arrange for authorized personnel to retrieve ballots on election night and transport them to the county board of elections for canvassing of the ballots;
- Authorized personnel should be present at ballot return sites immediately prior to 8:00 p.m. or at the time the polls should otherwise be closed;
- At 8:00 p.m. on election night, or later if the polling place hours have been extended, all ballot return sites and drop-boxes must be closed and locked;

***14** • Staff must ensure that no ballots are returned to the ballot return site after the close of polls;

- After the final retrieval after the closing of the polls, the drop-box must be removed or locked and/or covered to prevent any further ballots from being deposited, and a sign shall be posted indicating that polling is closed for the election; and
- Any ballots collected from a return site should be processed in the same manner as mail-in ballots personally delivered to the central office of the county board of elections official by the voter and ballots received via the United States Postal Service or any other delivery service.

The Secretary and her staff developed this guidance in consultation with subject-matter experts within her Department and after review of the policies, practices, and laws in other states where drop boxes have been used. [ECF 549-6, pp. 23:14-22]. The evidence reflects at least one instance in which the Secretary's deputies reiterated that these "best practices" should be followed in response to inquiries from county officials considering whether to use drop boxes.

[ECF 549-32 ("Per our conversation, the list of items are things the county must keep in mind if you are going to provide a box for voters to return their ballots in person.")].

Approximately 24 counties plan to use drop boxes during the November general election, to varying degrees. [ECF 549-28; ECF 504-1]. Of these, about nine counties intend to staff the drop boxes with county officials, while about 17 counties intend to use video surveillance in lieu of having staff present. [ECF 549-28].

2. Defendants' and Intervenors' evidence of the benefits and low risks associated with drop boxes.

Secretary Boockvar advocates for the use of drop boxes as a "direct and convenient way" for voters to deliver cast ballots to their county boards of elections, "thereby increasing turnout." [ECF 547, p. 22 ¶ 54 (citing 549-11 at pp. 10-11)]. The Secretary also touts the special benefits of expanding drop-box use in the ongoing COVID-19 pandemic. Specifically, she asserts that drop boxes reduce health risks and inspire voter confidence because "many voters understandably do not wish to cast their votes in person at their polling place on Election Day" due to COVID-19. [*Id.* at ¶¶ 55, 57 (citing ECF 549-2 ¶ 39; ECF 549-11 at p. 10; 549-8, ¶ 95)]. Drop boxes, she says, allow voters to vote in person without coming into "close proximity to other members of the public, compared to in-person voting or personally delivering a mail-in ballot to a public office building." [*Id.* at ¶ 57].

Secretary Boockvar also states that drop boxes are highly convenient, and cost-saving, for both counties and voters. For counties, she notes that "24-hour secure ballot drop boxes" are "cost-effective measures ... as they do not have to be staffed by election judges." [*Id.* at p. 24 ¶ 62 (citing ECF 549-11 at p. 11); ECF 549-9 at ¶ 34]. As for voters, the Secretary explains that, in a state where "ten counties ... cover more than 1,000 square miles" and "two-thirds" of counties "cover more than 500 square miles," many Pennsylvania voters "could be required to drive dozens of miles (and perhaps in excess of 100 miles) if he or she wished to deposit his or her mail-in ballot in person at the main county board of elections office." [*Id.* at ¶ 58 (citing ECF 549-29)].

***15** In addition to any tangible benefit drop boxes may have for voter access and turnout, Secretary Boockvar also states that drop boxes have a positive impact on voter confidence. In particular, she cites a recent news article, and a letter sent by the General Counsel of the U.S. Postal Service regarding Pennsylvania's absentee and mail-in ballot deadline, which have raised concerns over the timeliness and reliability of the U.S. Postal Service. [*Id.* at ¶¶ 60-61 (citing ECF 549-13; ECF 549-14); ECF 549-17; ECF 549-2 ¶¶ 42-43]. Voters' fears that votes returned by mail will not be timely counted could, the Secretary worries, "justifiably dissuade voters from wanting to rely upon the Postal Service for return of their mail-in or absentee ballot." [ECF 547, ¶ 61]. Drop boxes, she says, can address this concern by allowing voters to safely return mail-in ballots to an in-person location.

In exchange for these benefits, the Secretary insists that any potential security risk associated with drop boxes is low. She notes that the federal Department of Homeland Security has released guidance affirming that a "ballot drop box provides a secure and convenient means for voters to return their mail ballot," and recommending that states deploy one drop box for every 15,000 to 20,000 registered voters. [*Id.* at ¶¶ 63-65 (citing ECF 549-24, p. 1)]. She also points to a purported lack of evidence of systemic ballot harvesting or any attempts to tamper with, destroy, or otherwise commit voter fraud using drop boxes, either in Pennsylvania's recent primary election, or in other states that have used drop boxes for many years. [*Id.* at ¶¶ 68-74 (citations omitted)]. And she asserts that "[i]n the last 20 years in the entire state of Pennsylvania, there have been fewer than a dozen confirmed cases of fraud involving a handful of absentee ballots" among the many millions of votes cast during that time period. [*Id.* at ¶ 70 (citing ECF 549-10, pp. 3-4)].

Finally, the Secretary, and other Defendants and Intervenors, argue that Pennsylvania already has robust measures in place to prevent fraud, including its criminal laws, voter registration system, mail-in ballot application requirement, and canvassing procedures. [*Id.* at ¶¶ 66-67 (citing 25 P.S. §§ 3516 - 3518)]; [ECF 549-9, p. 15, ¶¶ 46-47 ("These allegations are not consistent with my experience with drop box security, particularly given the strong voter verification procedures that are followed by elections officials throughout the country and in Pennsylvania. Specifically, the eligibility and identity of the voter to cast a ballot is examined by an election judge who reviews and confirms all the personal identity information provided on the outside envelope. Once voter eligibility is confirmed, the ballot is extracted and separated from the outside envelope to ensure the ballot remains secret. During this step, election judges confirm that there is only one ballot in the envelope and checks for

potential defects, such as tears in the ballot.... Regardless of the receptacle used for acceptance of the ballot (drop box versus USPS mailbox), ballot validation occurs when the ballot is received by the county board of elections. The validation is the same regardless of how the ballots are collected or who delivers the ballot, even where that delivery contravenes state law.")].

Defendants and Intervenors also point to several expert reports expressing the view that drop boxes are both low risk and beneficial. These experts include:

Professor Matthew A. Barreto, a Professor of Political Science and Chicana/o Studies at UCLA. [ECF 549-7]. Professor Barreto offers the opinion that ballot drop boxes are an important tool in facilitating voting in Black and Latino communities. Specifically, he discusses research showing that Black and Latino voters are "particularly concerned about the USPS delivering their ballots." [*Id.* at ¶ 22]. And he opines that ballot drop boxes help to reassure these voters that their vote will count, because "there is no intermediary step between the voters and the county officials who collect the ballot." [*Id.* at ¶ 24].

***16 Professor Donald S. Burke**, a medical doctor and Distinguished University Professor of Health Science and Policy, Jonas Salk Chair in Population Health, and Professor of Epidemiology at the University of Pittsburgh. [ECF 549-8]. Professor Burke details the "significant risk of exposure" to COVID-19 in "enclosed areas like polling places." [*Id.* at ¶ 69]. He opines that "depositing a ballot in a mailbox and depositing a ballot in a drop-box are potential methods of voting that impart the least health risk to individual voters, and the least public health risk to the community." [*Id.* at ¶ 95].

Amber McReynolds, the CEO of the National Vote at Home Institute, with 13 years of experience administering elections as an Elections Director, Deputy Director, and Operations Manager for the City and County of Denver, Colorado. [ECF 549-9]. Ms. McReynolds opines that "[b]allot drop-boxes can be an important component of implementing expanded mail-in voting" that are "generally more secure than putting a ballot in post office boxes." [*Id.* at ¶ 16 (a)]. She notes that "[d]rop boxes are managed by election officials ... delivered to election officials more quickly than delivery through the U.S. postal system, and are secure." [*Id.*].

Ms. McReynolds also opines that Secretary Boockvar's guidance with respect to drop boxes is "consistent with best practices and advice that NVAHI has provided across jurisdictions." [*Id.* at ¶ 35]. But she also notes that "[b]est practices will vary by county based on the county's available resources, population, needs, and assessment of risk." [*Id.* at ¶ 52].

More generally, Ms. McReynolds argues that "[d]rop-boxes do not create an increased opportunity for fraud" as compared to postal boxes. [*Id.* at ¶ 44]. She also suggests that Pennsylvania guards against such fraud through other "strong voter verification procedures," including "ballot validation [that] occurs when the ballot is received by the county board of elections" and "[r]econciliation procedures adopted by election officials ... [to] protect against the potential risk of double voting." [*Id.* at ¶¶ 46-48]. She notes that "Pennsylvania's balloting system requires that those who request a mail-in vote and do not return the ballot (or spoil the mail-in ballot at their polling place), can only vote a provisional ballot" and "[i]f a mail-in or absentee ballot was submitted by an individual, their provisional ballot is not counted." [*Id.* at ¶ 48].

Professor Lorraine C. Minnite, an Associate Professor and Chair of the Department of Public Policy and Administration at Rutgers University-Camden. [ECF 549-10]. Professor Minnite opines that "the incidence of voter fraud in contemporary U.S. elections is exceedingly rare, including the incidence of voter impersonation fraud committed through the use of mail-in absentee ballots." [*Id.* at p. 3]. In Pennsylvania specifically, she notes that "[i]n the last 20 years ... there have been fewer than a dozen confirmed cases of fraud involving a handful of absentee ballots, and most of them were perpetrated by insiders rather than ordinary voters." [*Id.* at pp. 3-4]. As a "point of reference," she notes that 1,459,555 mail-in and absentee ballots were cast in Pennsylvania's 2020 primary election alone. [*Id.* at 4].

Professor Robert M. Stein, a Professor of Political Science at Rice University and a fellow in urban politics at the Baker Institute. [ECF 549-11]. Professor Stein opines that "the Commonwealth's use of drop boxes provides a number of benefits without increasing the risk of mail-in or absentee voter fraud that existed before drop boxes were implemented because (manned or unmanned) they are at least as secure as U.S. Postal Service ('USPS') mailboxes, which have been successfully used to return mail-in ballots for decades in the Commonwealth and elsewhere around the U.S." [*Id.* at p. 3]. According to Professor Stein, the use of drop boxes "has been shown to increase turnout," which he suggests is

particularly important "during a global pandemic and where research has shown that natural and manmade disasters have historically had a depressive effect on voter turnout." [*Id.* at p. 4]. Professor Stein notes that "[d]rop boxes are widely used across a majority of states as a means to return mail-in ballots" and he is "not aware of any studies or research that suggest that drop boxes (manned or unmanned) are a source for voter fraud." [*Id.*]. Nor is he aware "of any evidence that drop boxes have been tampered with or led to the destruction of ballots." [*Id.*].

***17 Professor Paul Gronke**, a Professor of Political Science at Reed College and Director of the Early Voting Information Center. [ECF 545-7]. Professor Gronke recommends that "drop boxes should be provided in every jurisdiction that has significant (20% or more) percentage[ ] of voters casting a ballot by mail, which includes Pennsylvania" for the general election. [*Id.* at ¶ 6]. He avers that "[s]cientific research shows that drop boxes raise voter turnout and enhance voter confidence in the elections process." [*Id.* at ¶ 7]. Voters, he explains, "utilize drop boxes heavily—forty to seventy percent of voters in vote by mail states and twenty-five percent or more in no-excuse absentee states." [*Id.*]. Professor Gronke further states that he is "not aware of any reports that drop boxes are a source for voter fraud" despite having "been in use for years all over the country." [*Id.* at ¶ 8]. And he suggests that the use of drop boxes is "especially important" in an election "that will be conducted under the cloud of the COVID-19 pandemic, and for a state like Pennsylvania that is going to experience an enormous increase in the number of by-mail ballots cast by the citizenry of the state." [*Id.* at ¶ 9].

Based on this evidence, and the purported lack of any contrary evidence showing great risks of fraud associated with the use of drop boxes, Defendants and Intervenors argue that Pennsylvania's authorization of drop boxes, and the counties' specific implementation of them, furthers important state interests at little cost to the integrity of the election system.

3. Plaintiffs' evidence of the risks of fraud and vote dilution associated with drop boxes.

Plaintiffs, on the other hand, argue that the drop boxes allow for an unacceptable risk of voter fraud and "illegal delivery or ballot harvesting" that, when it occurs, will "dilute" the votes of all lawful voters who comply with the Election Code. *See, e.g.,* [ECF 461, ¶¶ 127-128]. As evidence of the dilutive impact of drop boxes, Plaintiffs offer a combination of anecdotal and expert evidence.

Foremost among this evidence is the expert report of Greg Riddlemoser, the former Director of Elections and General Registrar for Stafford County, Virginia from 2011 until 2019. [ECF 504-19]. According to Mr. Riddlemoser, "voter fraud exists." [*Id.* at p. 2]. He defines the term "voter fraud" to mean any "casting and/or counting of ballots in violation of a state's election code." [*Id.*]. Examples he gives include: "Voting twice yourself—even if in multiple jurisdictions," "voting someone else's ballot," and "[e]lection officials giving ballots to or counting ballots from people who were not entitled to vote for various reasons." [*Id.* at pp. 2-3]. All of these things, he asserts, are "against the law and therefore fraudulent." [*Id.*].[3]

3 As noted above, Plaintiffs and Mr. Riddlemoser use the term "voter fraud" to mean "illegal voting"—*i.e.*, voter fraud is any practice that violates the Election Code. For purposes of the Court's decision and analysis of Plaintiffs' vote-dilution claims, the Court accepts this definition.

Mr. Riddlemoser argues that "ballot harvesting" (which is the term Plaintiffs use to refer to situations in which an individual returns the ballots of other people) "persists in Pennsylvania." [*Id.* at p. 3]. He points to the following evidence to support this opinion:

- Admissions by Pennsylvania's Deputy Secretary for Elections and Commissions, Jonathan Marks, that "several Pennsylvania counties permitted ballot harvesting by counting ballots that were delivered in violation of Pennsylvania law" during the recent primary election, [*Id.*];
- "[S]everal instances captured by the media where voters in the June 2020 Primary deposited multiple ballots into unstaffed ballot drop boxes," [*Id.* at p. 4];
- "Other photographs and video footage of at least one county's drop box (Elk County) on Primary Election day" which "revealed additional instances of third-party delivery," [*Id.*]; and
- "Documents produced by Montgomery County" which "reveal that despite signs warning that ballot harvesting is not permitted, people during the 2020 Primary attempted to deposit into the five drop boxes used by that county ballots that were not theirs," [*Id.*].

***18** With respect to the use of "unstaffed" or "unmanned" ballot drop boxes, Mr. Riddlemoser expresses the opinion that "the use of unmanned drop boxes presents the easiest opportunity for voter fraud" and "certain steps must be taken to make drop boxes 'secure' and 'monitored.' " [*Id.* at p. 16].

He states that, to be "secure," drop boxes must be "attended" by "sworn election officials" at all times (*i.e.*, "never left unattended at any time they are open for ballot drop-off."). [*Id.*]. He further suggests that officials stationed at drop boxes must be empowered, and required, to "verify the person seeking to drop off a ballot is the one who voted it and is not dropping off someone else's ballot." [*Id.*]. Doing so, he says, would, in addition to providing better security, also "allow the election official to ask the voter if they followed the instructions they were provided ... and assist them in doing so to remediate any errors, where possible, before ballot submission." [*Id.*].

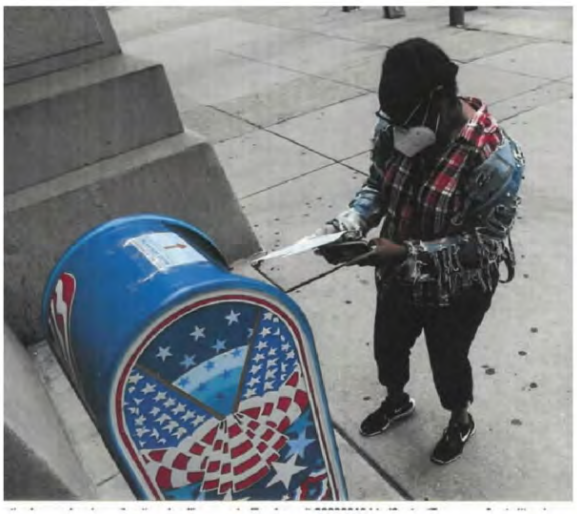
In addition to being "manned," Mr. Riddlemoser suggests that certain procedures with respect to ballot collection are necessary to ensure the integrity of votes cast in drop boxes. For example, he suggests that, at the end of each day, drop boxes, which should themselves be "tamperproof," should "be verifiably completely emptied into fireproof/tamperproof receptacles, which are then sealed and labeled by affidavit as to whom, where, when, etc." [*Id.*] Once sealed, the containers "must then be transported by sworn officials in a county owned vehicle (preferably marked law enforcement) back to the county board where they are properly receipted and safeguarded." [*Id.*]. Emptied drop boxes should also be sealed at the end of each day "such that they are not able to accept any additional ballots until they are 'open' again[.]" [*Id.*]. And boxes should be "examined to ensure no ballots are in the box, that nothing else is inside the box, and that the structural integrity and any security associated with the box remains intact." [*Id.*]. All of this, he suggests, should also be "available for monitoring by poll watchers." [*Id.*].

According to Mr. Riddlemoser, anything short of these robust procedures won't do. In particular, "video cameras would not prevent anyone from engaging in activity that could or is designed to spoil the ballots inside the box; such as dumping liquids into the box, lighting the ballots on fire by using gasoline and matches, or even removing the box itself." [*Id.* at p. 17]. Even if the "identity of the person responsible may be determined ... the ballots themselves would be destroyed —effectively disenfranchising numerous voters." [*Id.*]. And given "recent footage of toppled statues and damage to government buildings" in the news, Mr. Riddlemoser finds the "forcible removal of ballot drop boxes" to be "a distinct possibility." [*Id.*]. In addition to increasing the risk of ballot destruction, Mr. Riddlemoser notes that reliance on video cameras would also "not prohibit someone from engaging in ballot harvesting by depositing more than one ballot in the drop box[.]" [*Id.*].

Beyond Mr. Riddlemoser's expert testimony, Plaintiffs proffer several other pieces of evidence to support their claims that drop boxes pose a dilutive threat to the ballots of lawful voters. Most notably, they present photographs and video stills of, by the Court's count, approximately seven individuals returning more than one ballot to drop boxes in Philadelphia and Elk County (the same photographs referenced by Mr. Riddlemoser). [ECF 504-19, PDF pp. 49-71].

***19** Those photographs depict the following:

- **An unidentified woman holding what appear to be two ballots at a Philadelphia drop box.**



- **Instagram user "thefoodiebarrister" posing for a selfie with two ballots in Philadelphia; captioned, in part, "dropping of [sic] my votes in a designated ballot drop box."**

- **A photograph posted to social media showing a hand placing two ballots in a drop box; captioned, in part, "Cory and I voted!"**

- **A photograph of an unidentified man wearing a "Philadelphia Water" sweater and hat, placing two ballots in a Philadelphia drop box.**

- **Several video stills that, according to Plaintiffs, show voters depositing more than one ballot in an Elk County drop box.**

In addition to these photographs and video stills, Plaintiffs also provide a May 24, 2020, email sent by an official in Montgomery County (which placed security guards to monitor its drop boxes) observing that security "have turned people away yesterday and today without incident who had ballots other than their own." [ECF 504-28].

Separate and apart from this evidence specific to the use of drop boxes, Plaintiffs and their expert also provide evidence of instances of election fraud, voter fraud, and illegal voting generally. These include, for example:

- A case in which a New Jersey court ordered a new municipal election after a city councilman and councilman-elect were charged with fraud involving mail-in ballots. [ECF 504-19, p. 3].

- A New York Post article written by an anonymous fraudster who claimed to be a "master at fixing mail-in ballots" and detailed his methods. [*Id.*].

- Philadelphia officials' admission that approximately 40 people were permitted to vote twice during the 2020 primary elections. [*Id.*].

- A YouTube video purporting to show Philadelphia election officials approving the counting of mail-in ballots that lacked a completed certification on the outside of the envelope. [*Id.* (citation omitted)].

- The recent guilty plea of the former Judge of Elections in South Philadelphia, Domenick J. DeMuro, to adding fraudulent votes to voting machines on election day. [ECF 461, ¶ 61]; *see United States v. DeMuro*, No. 20-cr-112 (E.D. Pa. May 21, 2020).

- The 2014 guilty plea of Harmar Township police chief Richard Allen Toney to illegally soliciting absentee ballots to benefit his wife and her running mate in the 2009 Democratic primary for town council, [ECF 461, ¶ 69];

- The 2015 guilty plea of Eugene Gallagher for unlawfully persuading residents and non-residents of Taylor, in Lackawanna County, Pennsylvania, to register for absentee ballots and cast them for him during his councilman candidacy in the November 2013 election, [*Id.*];

***20** - The 1999 indictment of Representative Austin J. Murphy in Fayette County for forging absentee ballots for residents of a nursing home and adding his wife as a write-in candidate for township election judge, [*Id.*];

- The 1994 Eastern District of Pennsylvania and Third Circuit case *Marks v. Stinson*, which involved an alleged incident of extensive absentee ballot fraud by a candidate for the Pennsylvania State Senate, *see Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994); *Marks v. Stinson*, No. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994), [ECF 461, ¶ 78]; and

- A report from the bipartisan Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which observed that absentee voting is "the largest source of potential voter fraud" and proposed that states "reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." [ECF 461, ¶¶ 66-67, 80].

C. Facts relevant to signature comparison.

Many of the facts relevant to Plaintiffs' signature-comparison claim relate to the verification procedures for mail-in and absentee ballots, on one hand, and those procedures for in-person voting, on the other. These are described below.

1. Mail-in and absentee ballot verification.

As noted above, Pennsylvania does not distribute unsolicited mail-in and absentee ballots. Rather, a voter must apply for the ballot (and any voter can). [ECF 549-2, ¶ 64]. As part of the application for a mail-in ballot,[4] an applicant must provide certain identifying information, including name, date of birth, length of time as a resident of the voting district, voting district if known, party choice in the primary, and address where the ballot should be sent. 25 P.S. § 3150.12(b). In applying for a mail-in ballot, the applicant must also provide "proof of identification," which is defined by statute as that person's driver's license number, last four digits of Social Security number, or another specifically approved form of identification. [ECF 549-2, ¶ 64; ECF 549-27]; 25 P.S. § 2602(z.5)(3). A signature is not mentioned in the definition of "proof of identification." 25 P.S. § 2602(z.5)(3). However, if physically capable, the applicant must sign the application. *Id.* at § 3150.12(c)-(d).

4 The procedure for absentee ballots and applications largely resembles the procedure for mail-in ballots and applications.

Upon receiving the mail-in ballot application, the county board of elections determines if the applicant is qualified by "verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant's permanent registration card." 25 P.S. § 3150.12b(a). The county board of elections then either approves the application[5] or "immediately" notifies the applicant if the application is not approved. *Id.* at § 3150.12b(a), (c). Upon approval, the county mails the voter the mail-in ballot.

5 If the application is approved, the approval is "final and binding," subject only to challenges "on the grounds that the applicant was not a qualified elector." 25 P.S. § 3150.12b(a)(2). An unqualified elector would be, for example, an individual who has not "been a citizen of the United States at least one month." Pa. Const. Art. 7, § 1; *see also* 25 P.S. § 2602(t) (defining "qualified elector" as "any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election").

***21** After receiving the ballot, the mail-in voter must "mark the ballot" with his or her vote, insert the ballot into the "secrecy" envelope, and place the "secrecy" envelope into a larger envelope. *Id.* at § 3150.16(a). Then, the voter must "fill out, date and sign the declaration printed on [the larger] envelope. [The larger] envelope shall then be securely sealed and the elector shall send [it] by mail ... or deliver it in person to said county board of election." *Id.* The declaration on the larger envelope must be signed, unless the voter is physically unable to do so. *Id.* at § 3150.16(a)-(a.1).

Once the voter mails or delivers the completed mail-in ballot to the appropriate county board of elections, the ballot is kept "in sealed or locked containers until they are to be canvassed by the county board of elections." *Id.* at § 3146.8(a). The county boards of elections can begin pre-canvassing and canvassing the mail-in ballots no earlier than election day. *Id.* at § 3146.8(g)(1.1).

When pre-canvassing and canvassing the mail-in ballots, the county boards of elections must "examine the declaration on the [larger] envelope of each ballot ... and shall compare the information thereon with that contained in the ...Voters File." *Id.* at § 3146.8(g)(3). The board shall then verify the "proof of identification" and shall determine if "the declaration [on the larger envelope] is sufficient." *Id.* If the information in the "Voters File ... verifies [the elector's] right to vote," the ballot shall be counted. *Id.*

2. In-person voting verification.

When a voter decides to vote in-person on election day, rather than vote by mail, the procedures are different. There is no application to vote in person. Rather, on election day, the in-person voter arrives at the polling place and "present[s] to an election officer proof of identification," which the election officer "shall examine." *Id.* at § 3050(a). The in-person voter shall then sign a voter's certificate" and give it to "the election officer in charge of the district register." *Id.* at § 3050(a.3)(1). Next, the election officer shall "announce the elector's name" and "shall compare the elector's signature on his voter's certificate with his signature in the district register." *Id.* at § 3050(a.3)(2). If the election officer believes the signature to be "genuine," the in-person voter may vote. *Id.* But if the election officer does not deem the signature "authentic," the

in-person voter may still cast a provisional ballot and is given the opportunity to remedy the deficiency. *Id.*

3. The September 11, 2020, and September 28, 2020, sets of guidance.

In September 2020, Secretary Boockvar issued two new sets of guidance related to signature comparisons of mail-in and absentee ballots and applications. The first, issued on September 11, 2020, was titled "Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes." [ECF 504-24]. The guidance stated, in relevant part, the "Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections." [*Id.* at p. 3]. The second set of guidance, issued on September 28, 2020, was titled, "Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures." [ECF 504-25]. This September 28, 2020, guidance stated, in relevant part, "The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis. ... No challenges may be made to mail-in and absentee ballots at any time based on signature analysis." [*Id.* at p. 9]. Thus, as evidenced by these two sets of guidance, Secretary Boockvar advised the county boards of elections not to engage in a signature-comparison analysis of voters' signatures on ballots and applications for ballots.

***22** Most of the counties intend to follow the Secretary's guidance and will not compare signatures on mail-in ballots and applications for the upcoming general election. *E.g.*, [ECF 504-1]. A few counties, however, stated their intent to not comply with the guidance, and instead would compare and verify the authenticity of signatures. *E.g.*, [*id.* (noting the counties of Cambria, Elk, Franklin, Juniata, Mifflin, Sullivan, Susquehanna, and Wyoming, as not intending to follow Secretary Boockvar's guidance to not compare signatures)].

According to Defendants, there are valid reasons to not require signature comparisons for mail-in and absentee ballots. For example, Secretary Boockvar notes that signature verification is a technical practice, and election officers are not "handwriting experts." [ECF 549-2, p. 19, ¶ 68]. Secretary Boockvar also notes that voters' signatures can change over time, and various medical conditions (*e.g.*, arthritis) can impact a person's signature. [*Id.*] Defendants' expert, Amber McReynolds, also finds that "signature verification" involves "inherent subjectivity." [ECF 549-9, p. 20, ¶ 64]. Ms. McReynolds further notes the "inherent variability of individuals' signatures over time." [*Id.*] And according to Secretary Boockvar, these are just some reasons Pennsylvania implements verification procedures other than signature comparisons for mail-in voters, who, unlike in-person voters, are not present when their signature would be verified. [ECF 549-2, p. 20, ¶ 69].

Plaintiffs' expert, Greg Riddlemoser, on the other hand, states that signature comparison is "a crucial security aspect of vote-by-mail" and failing to verify signatures on mail-in ballots would "undermine voter confidence and would increase the possibility of voter fraud." [ECF 504-19, pp. 10-11]. Mr. Riddlemoser asserts that Secretary Boockvar's September 11, 2020, and September 28, 2020, guidance "encourage, rather than prevent, voter fraud." [*Id.* at p. 12]. As such, Mr. Riddlemoser explains that mail-in voters should be subject to the same signature-comparison requirement as in-person voters. [*Id.* at pp. 13-14].

4. Secretary Boockvar's King's Bench petition.

In light of this case and the parties' disagreement over whether the Election Code mandates signature comparison for mail-in ballots, Secretary Boockvar filed a "King's Bench" petition with the Pennsylvania Supreme Court on October 4, 2020. In that petition, she asked the Pennsylvania Supreme Court to exercise its extraordinary jurisdiction, in light of the impending election, to clarify whether the Election Code mandates signature comparison of mail-in and absentee ballots and applications. [ECF 556, p. 11; ECF 557].

On October 7, 2020, several groups, including Donald J. Trump for President, Inc. and the Republican National Committee—who are Plaintiffs in this case—moved to intervene as Respondents in the Pennsylvania Supreme Court case. [ECF 571-1]. The Pennsylvania Supreme Court has not yet decided the motion to intervene or whether to accept the case. The petition remains pending.

D. Facts relevant to poll-watcher claims.

The position of "poll watcher" is a creation of state statute. *See* 25 P.S. § 2687. As such, the Election Code defines how a poll watcher may be appointed, what a poll watcher may do, and where a poll watcher may serve.

1. The county-residency requirement for poll watchers.

***23** The Election Code permits candidates to appoint two poll watchers for each election district. 25 P.S. § 2687(a). The Election Code permits political parties and bodies to appoint three poll watchers for each election district. *Id.*

For many years, the Pennsylvania Election Code required that poll watchers serve only within their "election district," which the Code defines as "a district, division or precinct, ... within which all qualified electors vote at one polling place." 25 P.S. § 2687(b) (eff. to May 15, 2002) (watchers "shall serve in only one district and must be qualified registered electors of the municipality or township in which the district where they are authorized to act is located"); 25 P.S. § 2602(g). Thus, originally, poll watching was confined to a more limited geographic reach than one's county, as counties are themselves made up of many election districts.

Then, in 2004, the General Assembly amended the relevant poll-watcher statute to provide that a poll watcher "shall be authorized to serve in the election district for which the watcher was appointed and, when the watcher is not serving in the election district for which the watcher was appointed, in any other election district in the county in which the watcher is a qualified registered elector." 25 P.S. § 2687(b) (eff. Oct. 8, 2004).

This county-residency requirement is in line with (or is, in some cases, more permissive than) the laws of at least eight other states, which similarly require prospective poll watchers to reside in the county in which they wish to serve as a watcher or (similar to the pre-2004 Pennsylvania statute) limit poll watchers to a sub-division of the county. *See, e.g.*, Fla. Stat. Ann. § 101.131(1) (Florida); Ind. Code Ann. § 3-6-8-2.5 (Indiana); Ky. Rev. Stat. Ann. § 117.315(1) (Kentucky); N.Y. Elec. Law § 8-500(5) (New York); N.C. Gen. Stat. Ann. § 163-45(a) (North Carolina); Tex. Elec. Code Ann. § 33.031(a) (Texas); S.C. Code Ann. § 7-13-860 (South Carolina); Wyo. Stat. Ann. § 22-15-109(b) (Wyoming). However, at least one state (West Virginia) does not provide for poll watchers at all. *See* W. Va. Code Ann. § 3-1-37; W. Va. Code Ann. § 3-1-41

The General Assembly has not amended the poll-watcher statute since 2004, even though some lawmakers have advocated for the repeal of the residency requirement. *See Cortés*, 218 F. Supp. 3d at 402 (observing that legislative efforts to repeal the poll-watcher residency requirement have been unsuccessful).

As part of its September 17, 2020, decision, the Pennsylvania Supreme Court found that the county-residency requirement does not violate the U.S. or Pennsylvania constitutions. *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *31.

2. Where and when poll watchers can be present during the election.

The Pennsylvania Election Code sets forth the rules for where and when poll watchers are permitted to be present.

The Election Code provides that poll watchers may be present "at any public session or sessions of the county board of elections, and at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines under" the Code. 25 P.S. § 2650. Additionally, one poll watcher for each candidate, political party, or political body may "be present in the polling place ... from the time that the election officers meet prior to the opening of the polls ... until the time that the counting of votes is complete and the district register and voting check list is locked and sealed." 25 P.S. § 2687(b).

***24** During this time, poll watchers may raise objections to "challenge any person making application to vote." *Id.* Poll watchers also may raise challenges regarding the voters' identity, continued residence in the election district, or registration status. 25 P.S. § 3050(d).

Although Pennsylvania has historically allowed absentee ballots to be returned by U.S. Postal Service or by in-person delivery to a county board of elections office, the Election Code does not provide (and has never provided for) any right to have poll watchers in locations where absentee voters fill out their ballots (which may include their home, office, or myriad other locations), nor where those votes are mailed (which may include their own mailbox, an official U.S. Postal Service collection box, a work mailroom, or other places U.S. Postal Service mail is collected), nor at county board of elections offices. [ECF 549-2, ¶¶ 86-90].

Before Act 77, absentee ballots were held in election districts rather than centralized at the county board of elections. *See* 25 P.S. § 3146.8 (eff. Mar. 14, 2012 to Oct. 30, 2019) ("In all election districts in which electronic voting systems are

used, absentee ballots shall be opened at the election district, checked for write-in votes in accordance with section 1113-A and then either hand-counted or counted by means of the automatic tabulation equipment, whatever the case may be.").

At such time (again, before Act 77), poll workers opened those absentee ballots at each polling place after the close of the polls. *Id.* ("Except as provided in section 1302.1(a.2), the county board of elections shall then distribute the absentee ballots, unopened, to the absentee voter's respective election district concurrently with the distribution of the other election supplies. Absentee ballots shall be canvassed immediately and continuously without interruption until completed after the close of the polls on the day of the election in each election district. The results of the canvass of the absentee ballots shall then be included in and returned to the county board with the returns of that district." (footnote omitted)).

With the enactment of Act 77, processing and counting of mail-in and absentee ballots is now centralized in each county board of elections, with all mail-in and absentee ballots in such county held and counted at the county board of elections (or such other site as the county board may choose) without regard to which election district those ballots originated from. 25 P.S. § 3146.8(a) (eff. Mar. 27, 2020); [ECF 549-2, ¶ 81].

Under Act 12, counties are permitted to "pre-canvass" mail-in or absentee ballots received before Election Day beginning at 7:00 a.m. on Election Day. 25 P.S. § 3146.8(g)(1.1). Counties are further permitted to "canvass" ballots received after that time beginning "no earlier than the close of the polls on the day of the election and no later than the third day following the election." *Id.* § 3146.8(g)(2).

The Election Code permits "[o]ne authorized representative of each candidate" and "one representative from each political party" to "remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed." 25 P.S. § 3146.8(g)(1.1). Similarly, during canvassing, the Election Code permits "[o]ne authorized representative of each candidate" and "one representative from each political party" to "remain in the room in which the absentee ballots and mail-in ballots are canvassed." 25 P.S. § 3146.8(g)(2).

***25** The Election Code provisions pertaining to the "pre-canvass" and "canvass" do not make any separate reference to poll watchers, instead referring only to the "authorized representatives" of parties and candidates. *See* 25 P.S. § 3146.8.

On October 6, 2020, Secretary Boockvar issued guidance concerning poll watchers and authorized representatives. [ECF 571-1]. The guidance states that poll watchers "have no legal right to observe or be present at ... ballot return sites," such as drop-box locations. [ECF 571-1, Ex. E, p. 5]. The guidance also states that while a candidate's authorized representative may be present when mail-in ballots are opened (including during pre-canvass and canvass), the representative cannot challenge those ballots. [*Id.* at Ex. E, p. 4].

On October 9, 2020, in a separate lawsuit brought by the Trump Campaign in the Philadelphia County Court of Common Pleas, the state court there confirmed Secretary Boockvar's guidance. Specifically, the state court held that satellite ballot-collection locations, such as drop-box locations, are not "polling places," and therefore poll watchers are not authorized to be present in those places. [ECF 573-1, p. 12 ("It is clear from a reading of the above sections [of the Election Code] that the satellite offices where these activities, and only these activities, occur are true 'offices of the Board of Elections' and are not polling places, nor public sessions of the Board of Elections, at which watchers have a right to be present under the Election Code.")]. Immediately after issuance of this decision, the Trump Campaign filed a notice of appeal, indicating its intention to appeal the decision to the Commonwealth Court of Pennsylvania. Having just been noticed, that appeal remains in its infancy as of the date of this Opinion.

3. Plaintiffs' efforts to recruit poll watchers for the upcoming general election.

In order to become a certified poll watcher, a candidate must meet certain criteria. [ECF 504-20, ¶ 9]. That is, a poll watcher needs to be "willing to accept token remuneration, which is capped at $120 under Pennsylvania state law" and must be able to take off work or otherwise make arrangements to be at the polling place during its open hours on Election Day, which can mean working more than 14 hours in a single day. [*Id.*].

The Pennsylvania Director for Election Day Operations for the Trump Campaign, James J. Fitzpatrick, stated that the Trump Campaign wants to recruit poll watchers for every county in Pennsylvania. [ECF 504-2, ¶ 30]. To that end, the RNC and the Trump Campaign have initiated poll-watcher recruitment efforts for the general election by

using a website called DefendYourBallot.com. [ECF 528-14, 265:2-15, 326:14-329-7]. That website permits qualified electors to volunteer to be a poll watcher. [*Id.*]. In addition, Plaintiffs have called qualified individuals to volunteer to be poll watchers, and worked with county chairs and conservative activists to identify potential poll watchers. [*Id.*].

Despite these efforts, the Trump Campaign claims it "is concerned that due to the residency restriction, it will not have enough poll watchers in certain counties." [ECF 504-2, ¶ 25]. Mr. Fitzpatrick, however, could not identify a specific county where the Trump Campaign has been unable to obtain full coverage of poll watchers or any county where they have tried and failed to recruit poll watchers for the General Election. [ECF 528-14, 261:21-262:3, 263:8-19, 265:2-266:3].

***26** In his declaration, Representative Reschenthaler shared Mr. Fitzpatrick's concern, stating that he does not believe that he will "be able to recruit enough volunteers from Greene County to watch the necessary polls in Greene County." [ECF 504-6, ¶ 12]. But Representative Reschenthaler did not provide any information regarding his efforts to recruit poll watchers to date, or what he plans to do in the future to attempt to address his concern. *See generally* [*id.*].

Representative Kelly stated in his declaration that he was "likely to have difficulty getting enough poll watchers from within Erie County to watch all polls within that county on election day." [ECF 504-5, ¶ 16]. Representative Kelly never detailed his efforts (*e.g.*, the outreach he tried, prospective candidates he unsuccessfully recruited, and the like), and he never explained why those efforts aren't likely to succeed in the future. *See generally* [*id.*].

In his declaration, Representative Thompson only stated that based on his experience, "parties and campaigns cannot always find enough volunteers to serve as poll watchers in each precinct." [ECF 504-4, ¶ 20].

According to statistics collected and disseminated by the Pennsylvania Department of State, there is a gap between the number of voters registered as Democrats and Republicans in some Pennsylvania counties. [ECF 504-34]. Plaintiffs' expert, Professor Lockerbie, believes this puts the party with less than a majority of voters in that county at a disadvantage in recruiting poll watchers. [ECF 504-20, ¶ 15]. However, despite this disadvantage, Professor Lockerbie states that "the Democratic and Republican parties might be able to meet the relevant criteria and recruit a sufficient population of qualified poll watchers who meet the residency requirement[ ]." [*Id.* at ¶ 16].

Additionally, Professor Lockerbie finds the gap in registered voters in various counties to be especially problematic for minor political parties. [*Id.* at ¶ 16]. As just one example, according to Professor Lockerbie, even if one were to assume that all third-party voters were members of the same minor party, then in Philadelphia County it would require "every 7th registrant" to be a poll watcher in order for the third party to have a poll watcher observing each precinct." [*Id.*].

Professor Lockerbie believes that disruptions to public life caused by the COVID-19 pandemic "magnified" the difficulties in securing sufficient poll watchers. [*Id.* at ¶ 10].

Nothing in the Election Code limits parties from recruiting only registered voters from their own party. [ECF 528-14, 267:23-268:1]. For example, the Trump Campaign utilized at least two Democrats among the poll watchers it registered in the primary. [ECF 528-15, P001648].

4. Rationale for the county-residency requirement.

Defendants have advanced several reasons to explain the rationale behind county-residency requirement for poll watchers.

Secretary Boockvar has submitted a declaration, in which she has set forth the reasons for and interests supporting the county-residency requirement. Secretary Boockvar states that the residency requirement "aligns with Pennsylvania's county-based election scheme[.]" [ECF 549-2, p. 22, ¶ 77]. "By restricting poll watchers' service to the counties in which they actually reside, the law ensures that poll watchers should have some degree of familiarity with the voters they are observing in a given election district." [*Id.* at p. 22, ¶ 78].

***27** In a similar vein, Intervenors' expert, Dr. Barreto, in his report, states that, voters are more likely to be comfortable with poll watchers that "they know" and are "familiar with ... from their community." [ECF 524-1, p. 14, ¶ 40]. That's because when poll watchers come from the community, "there is increased trust in government, faith in elections, and voter turnout[.]" [*Id.*].

At his deposition, Representative Kelly agreed with this idea: "Yeah, I think – again, depending how the districts

are established, I think people are probably even more comfortable with people that they – that they know and they recognize from their area." [ECF 524-23, 111:21-25].

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). At summary judgment, the Court must ask whether the evidence presents "a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In making that determination, the Court must "consider all evidence in the light most favorable to the party opposing the motion." *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791, 794 (3d Cir. 2007).

The summary-judgment stage "is essentially 'put up or shut up' time for the non-moving party," which "must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." *Berckeley Inv. Grp. Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006). If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial," summary judgment is warranted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

"The rule is no different where there are cross-motions for summary judgment." *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008). The parties' filing of cross-motions "does not constitute an agreement that if one is rejected the other is necessarily justified[.]" *Id.* But the Court may "resolve cross-motions for summary judgment concurrently." *Hawkins v. Switchback MX, LLC*, 339 F. Supp. 3d 543, 547 (W.D. Pa. 2018). When doing so, the Court views the evidence "in the light most favorable to the non-moving party with respect to each motion." *Id.*

DISCUSSION & ANALYSIS

Plaintiffs, Defendants, and Intervenors all cross-move for summary judgment on all three of Plaintiffs' remaining claims, which the Court refers to, in the short-hand, as (1) the drop-box claim, (2) the signature-comparison claim, and (3) the poll-watching claim. The common constitutional theory behind each of these claims is vote dilution. Absent the security measures that Plaintiffs seek, they fear that others will commit voter fraud, which will, in turn, dilute their lawfully cast votes. They assert that this violates the federal and Pennsylvania constitutions.

The Court will address only the federal-constitutional claims. For the reasons that follow, the Court finds that Plaintiffs lack standing to bring their federal-constitutional claims because Plaintiffs' injury of vote dilution is not "concrete" for Article III purposes.

But even assuming Plaintiffs had standing, the Court also concludes that Defendants' regulations, conduct, and election guidance here do not infringe on any right to vote, and if they do, the burden is slight and outweighed by the Commonwealth's interests—interests inherent in the Commonwealth's other various procedures to police fraud, as well as its overall election scheme.

***28** Finally, because the Court will be dismissing all federal-constitutional claims, it will decline to exercise supplemental jurisdiction over any of the state-constitutional claims and will thus dismiss those claims without prejudice.

I. Defendants' procedural and jurisdictional challenges.

At the outset, Defendants and Intervenors raise a number of jurisdictional, justiciability, and procedural arguments, which they assert preclude review of the merits of Plaintiffs' claims. Specifically, they assert (1) the claims are not ripe and are moot, (2) there is a lack of evidence against certain county boards, and those boards are not otherwise necessary parties, and (3) Plaintiffs lack standing. The Court addresses each argument, in turn.

A. Plaintiffs' claims are ripe and not moot.

Several Defendants have argued that Plaintiffs' claims in the Second Amended Complaint are not ripe and are moot. The Court disagrees.

1. Plaintiffs' claims are ripe.

The ripeness doctrine seeks to "prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Artway v. Attorney*

Gen. of N.J., 81 F.3d 1235, 1246-47 (3d Cir. 1996) (cleaned up). The ripeness inquiry involves various considerations including whether there is a "sufficiently adversarial posture," the facts are "sufficiently developed," and a party is "genuinely aggrieved." *Peachlum v. City of York*, 333 F.3d 429, 433-34 (3d Cir. 2003). Ripeness requires the case to "have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Wyatt, Virgin Islands, Inc. v. Gov't of the Virgin Islands*, 385 F.3d 801, 806 (3d Cir. 2004) (quoting *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 244, 73 S.Ct. 236, 97 L.Ed. 291 (1952)). "A dispute is not ripe for judicial determination if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.*

Ultimately, "[r]ipeness involves weighing two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review." *Artway*, 81 F.3d at 1247. Unlike standing, ripeness is assessed at the time of the court's decision (rather than the time the complaint was filed). *See Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 139-40, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974).

The Court finds that Plaintiffs' claims are ripe. Applying the two-factor test here, the Court first concludes that the parties would face significant hardship if the Court were to hold that the case was unripe (assuming it was otherwise justiciable). The general election is less than one month away, and Plaintiffs assert claims that could significantly affect the implementation of Pennsylvania's electoral procedures. Further, if the Court were to find that Plaintiffs' claims were not ripe, Plaintiffs would be burdened. This is because Plaintiffs would then have to either wait until after the election occurred—and thus after the alleged harms occurred—or Plaintiffs would have to bring suit on the very eve of the election, and thus there would be insufficient time for the Court to address the issues. This hardship makes judicial review at this time appropriate. The first factor is met.

***29** Some Defendants argue that because some of the Secretary's guidance was issued after the 2020 primary election, Plaintiffs' claims that rely on such guidance are not ripe because the guidance has not been implemented in an election yet. The Court disagrees. Both the allegations in the Second Amended Complaint, and the evidence presented on summary judgment, reveal that the guidance issued after the primary election will apply to the upcoming general election. This is sufficient to make this a properly ripe controversy.[6]

6 In her summary-judgment brief, Secretary Boockvar argues that Plaintiffs' as-applied challenge to Pennsylvania's county-residency requirement is unripe. [ECF 547, pp. 60-63]. The Secretary reasons that Plaintiffs have not shown sufficient evidence that they are harmed by the county-residency requirement. This argument is directed more towards a lack of standing and a lack of evidence to support the claim on the merits. As the sufficiency of the evidence of harm is a separate issue from ripeness (which is more concerned with timing), the Court does not find Plaintiffs' as-applied challenge to the county-residency requirement unripe. *See Progressive Mountain Ins. Co. v. Middlebrooks*, 805 F. App'x 731, 734 (11th Cir. 2020) ("The question of ripeness frequently boils down to the same question as questions of Article III standing, but the distinction between the two is that standing focuses [on] whether the type of injury alleged is qualitatively sufficient to fulfill the requirements of Article III and whether the plaintiff has personally suffered that harm, whereas ripeness centers on whether that injury has occurred yet." (cleaned up) (citations omitted)).

The second factor the Court must consider in determining ripeness is "the fitness of the issues for judicial review." *Artway*, 81 F.3d at 1247. "The principal consideration [for this factor] is whether the record is factually adequate to enable the court to make the necessary legal determinations. The more that the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa." *Id.* at 1249.

Under this framework, the Court concludes that the issues are fit for review. The parties have engaged in extensive discovery, creating a developed factual record for the Court to review. Further, as shown below, the Court finds it can assess Plaintiffs' claims based on the current factual record and can adequately address the remaining legal questions that predominate this lawsuit. As such, the Court finds Plaintiffs' claims fit for judicial review.

Thus, Plaintiffs' claims are presently ripe.

2. Plaintiffs' claims are not moot.

Some Defendants also assert that Plaintiffs' claims are moot because Plaintiffs reference allegations of harm that occurred

during the primary election, and since then, Secretary Boockvar has issued new guidance and the Pennsylvania Supreme Court has interpreted the Election Code to clarify several ambiguities. The Court, however, concludes that Plaintiffs' remaining claims are not moot.

Mootness stems from the same principle as ripeness, but is stated in the inverse: courts "lack jurisdiction when 'the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *Merle v. U.S.*, 351 F.3d 92, 94 (3d Cir. 2003) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). Like ripeness and unlike standing, mootness is determined at the time of the court's decision (rather than at the time the complaint is filed). *See U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). When assessing mootness, the Court may assume (for purposes of the mootness analysis) that standing exists. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citation omitted).

***30** Here, the Court finds that Plaintiffs' claims are not moot, as the claims Plaintiffs are proceeding with are "live." First, Plaintiffs' claims are based on guidance that issued after the primary election and are to be applied in the upcoming general election. As such, the *harms* alleged are not solely dependent on the already-passed primary election. Second, Defendants, by and large, have made clear that they intend to abide by guidance that Plaintiffs assert is unlawful or unconstitutional. Third, Plaintiffs sufficiently show that certain Defendants intend to engage in the conduct (*e.g.*, use unmanned drop-boxes) that Plaintiffs say infringes their constitutional rights. Thus, these issues are presently "live" and are not affected by the completion of the primary election.[7] Plaintiffs' claims are not moot.

7 In their briefing, the parties focused on the "capable of repetition yet evading review" exception to the mootness doctrine. The Court, however, does not find that it needs to rely on this exception. Nearing the eve of the election, it is clear that Defendants intend to engage in the conduct that Plaintiffs assert is illegal and unconstitutional. Thus, the claims are presently live, and are not "evading review" in this circumstance.

3. All named Defendants are necessary parties to this lawsuit.

Many of the county boards of elections that are Defendants in this case argue that the claims against them should be dismissed because Plaintiffs did not specifically allege or prove sufficient violative facts against them. Plaintiffs argue in response that all county boards have been joined because they are necessary parties, and the Court cannot afford relief without their presence in this case. The Court agrees with Plaintiffs, and declines to dismiss the county boards from the case. They are necessary parties.

Federal Rule of Civil Procedure 19(a) states that a party is a necessary party that must be joined in the lawsuit if, "in that [party's] absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A).

Here, if the county boards were not named defendants in this case, the Court would not be able to provide Plaintiffs complete relief should Plaintiffs prove their case. That's because the Court could not enjoin the county boards if they were not parties. *See* Fed. R. Civ. P. 65(d)(2).[8] This is important because each individual county board of elections manages the electoral process within its county lines. As one court previously summarized, "Election procedures and processes are managed by each of the Commonwealth's sixty-seven counties. Each county has a board of elections, which oversees the conduct of all elections within the county." *Cortés*, 218 F. Supp. 3d at 403 (citing 25 P.S. § 2641(a)). "The county board of elections selects, fixes and at times alters the polling locations of new election districts. Individual counties are also tasked with the preservation of all ballots cast in that county, and have the authority to investigate fraud and report irregularities or any other issues to the district attorney[.]" *Id.* (citing 25 P.S. §§ 2726, 2649, and 2642). The county boards of elections may also make rules and regulations "as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f).

8 While Rule 65(d)(2)(C) states that an injunction binds "[non-parties] who are in active concert or participation" with the parties or the parties' agents, the Court does not find that Rule 65(d) helps the county boards. As discussed, the county boards manage the elections and implement the electoral procedures. While the Court could enjoin Secretary Boockvar, for example, from using unmanned drop boxes, each individual county election board could still use unmanned drop boxes on their own. Doing so would not result in the counties being in "active concert or participation" with Secretary Boockvar, as each county is independently managing the electoral process within their county lines. *See*

Marshak v. Treadwell, 595 F.3d 478, 486 (3d Cir. 2009) ("[N]on-parties guilty of aiding or abetting or acting in concert with a named defendant or his privy in violating the injunction may be held in contempt." (cleaned up) (citations omitted)). In other words, each county elections board would not be "aiding or abetting" Secretary Boockvar in violating the injunction (which would implicate Rule 65(d)(2)(C)); rather, the counties would be utilizing their independent statutory authority to manage elections within their county lines.

***31** Indeed, Defendants' own arguments suggest that they must be joined in this case. As just one example, a handful of counties assert in their summary-judgment brief that the "[Election] Code permits Boards to exercise discretion in certain areas when administering elections, to administer the election in a manner that is both legally-compliant and meets the unique needs of each County's citizens." [ECF 518, p. 6]. Thus, because of each county's discretionary authority, if county boards engage in unconstitutional conduct, the Court would not be able to remedy the violation by enjoining only Secretary Boockvar.[9]

9 As evidence of the county boards' indispensability, one court recently found that the failure to join local election officials in an election case can make the harm alleged not "redressable." It would be a catch-22 to say that county boards cannot be joined to this case as necessary parties, but then dismiss the case for lack of standing due to the boards' absence. *Cf. Jacobson v. Florida Secretary of States*, 974 F.3d 1236, —— – ——, 2020 WL 5289377, at *11-12 (11th Cir. Sept. 3, 2020) ("The problem for the [plaintiffs] is that Florida law tasks the [county] Supervisors, independently of the Secretary, with printing the names of candidates on ballots in the order prescribed by the ballot statute. ... The Secretary is responsible only for certifying to the supervisor of elections of each county the names of persons nominated ... Because the Secretary didn't do (or fail to do) anything that contributed to [plaintiffs'] harm, the voters and organizations cannot meet Article III's traceability requirement." (cleaned up)).

To grant Plaintiffs relief, if warranted, the Court would need to enter an order affecting all county boards of elections—which the Court could not do if some county boards were not joined in this case. Otherwise, the Court could only enjoin violative conduct in some counties but not others. As a result, inconsistent rules and procedures would be in effect throughout the Commonwealth. While some counties can pledge to follow orders issued by this Court, the judicial system cannot rely on pledges and promises, regardless of the county boards' good intent. The only way to ensure that any illegal or unconstitutional conduct is uniformly remedied, permanently, is to include all county boards in this case.

Thus, because the county boards are necessary parties, the Court cannot dismiss them.

4. Plaintiffs lack Article III standing to raise their claims of vote dilution because they cannot establish a "concrete" injury-in-fact.

While Plaintiffs can clear the foregoing procedural hurdles, they cannot clear the final one—Article III standing.

Federal courts must determine that they have jurisdiction before proceeding to the merits of any claim. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of (1) injury in fact, (2) causation, and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Standing is particularly important in the context of election-law cases, including a case like this one, that challenge the laws, regulations, and guidance issued by elected and appointed state officials through the democratic processes. As the Supreme Court has explained, the standing "doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (cleaned up). The doctrine "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Id.* In this way, "Article III standing serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.* Nowhere is that concern more acute than in a case that challenges a state's exercise of its core constitutional authority to regulate the most deeply political arena of all—elections.

***32** Here, Defendants and Intervenors claim that Plaintiffs lack standing, largely arguing that Plaintiffs' injury is too speculative. [ECF 547, pp. 43-50]. The Court agrees and finds that Plaintiffs lack Article III standing for this reason.

Initially, to frame the standing inquiry, understanding the specific claims at issue is important. As discussed above, there are essentially three claims remaining in this case: (1) a challenge to Secretary Boockvar's guidance that does not require all drop boxes to have manned security personnel; (2) a challenge to Secretary Boockvar's guidance that counties should not perform a signature comparison for mail-in ballots; and (3) a challenge to Pennsylvania's county-residency restriction for poll-watchers. *See* [ECF 509, pp. 4-5]. The theory behind all of these claims and the asserted injury is one of vote dilution due to the heightened risk of fraud; that is, without the above measures in place, there is an imminent risk of voter fraud (primarily by mail-in voters); and if that fraud occurs, it will dilute the votes of many of Plaintiffs, who intend to vote in person in the upcoming election. [ECF 551, p. 12 ("As qualified electors who will be voting in the November election, Plaintiffs will suffer an injury through their non-equal treatment and/or the dilution or debasement of their legitimately case votes by absentee and mail-in votes that have not been properly verified by matching the voters' signatures on their applications and ballots to the permanent voter registration record and/or that have been improperly delivered by others to drop boxes or other mobile collection sites in manners that are different[ ] from those offered or being used in their counties of residence.")].

Turning to the familiar elements of Article III standing, the first and, in the Supreme Court's estimation, "foremost" element—injury-in-fact—is dispositive. *See Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018). Specifically, the Court finds that Plaintiffs' theory of vote dilution, based on the evidence presented, is insufficient to establish standing because Plaintiffs' injury-in-fact is not sufficiently "concrete."

With respect to injury-in-fact, the Supreme Court has made clear that an injury must be "concrete" and "particularized." *See Spokeo*, 136 S. Ct. at 1548. Defendants argue that the claimed injury of vote dilution caused by possible voter fraud here is too speculative to be concrete. The Court agrees.

To establish a "concrete" injury, Plaintiffs rely on a chain of theoretical events. They first argue that Defendants' lack of election safeguards (poll watchers, drop-box guards, and signature-comparison procedures) creates a risk of voter fraud or illegal voting. *See* [ECF 461, ¶¶ 230-31, 240, 256]. That risk, they say, will lead to potential fraudsters committing voter fraud or ballot destruction. [*Id.*]. And if that happens, each vote cast in contravention of the Election Code will, in Plaintiffs' view, dilute Plaintiffs' lawfully cast votes, resulting in a constitutional violation.

The problem with this theory of harm is that this fraud hasn't yet occurred, and there is insufficient evidence that the harm is "certainly impending."

To be clear, Plaintiffs need not establish actual fraud at this stage; but they must establish that fraud is "certainly impending," and not just a "possible future injury." *See Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 ("Thus, we have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient.") (cleaned up).

***33** This case is well past the pleading stage. Extensive fact and expert discovery are complete. [ECF 462]. Nearly 300 exhibits have been submitted on cross-motions for summary judgment (including 68 by Plaintiffs alone). Plaintiffs bear the burden of proof on this issue, and unlike on a motion to dismiss, on summary judgment, they must come forward with proof of injury, taken as true, that will prove standing, including a concrete injury-in-fact. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice ... In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts ... which for purposes of the summary judgment motion will be taken to be true.") (cleaned up).

Based on the evidence presented by Plaintiffs, accepted as true, Plaintiffs have only proven the "possibility of future injury" based on a series of speculative events—which falls short of the requirement to establish a concrete injury. For example, Plaintiffs' expert, Mr. Riddlemoser, opines that the use of "unstaffed or unmanned" drop boxes merely "increases the ***possibility*** for voter fraud (and vote destruction)[.]" [ECF 504-19, p. 20 (emphasis added)]. That's because, according to him (and Plaintiffs' other witnesses), theoretical bad actors ***might*** intentionally "target" a drop box as the "easiest opportunity for voter fraud" or with the malicious "intent to destroy as many votes ... as possible." [*Id.* at pp. 16-18; *see also* ECF 504-2, ¶ 12 (declaring that drop boxes "***may*** serve as a target for bad actors that may wish to tamper with lawfully case ballots before such ballots are counted") (emphasis added)]. But there's no way of knowing whether these independent actors will ever surface, and if they do,

whether they will act as Mr. Riddlemoser and Plaintiffs predict.

Similarly, Mr. Riddlemoser concludes that, at most, not conducting signature analysis for mail-in and absentee ballots "open[s] the door to the potential for massive fraud through a mechanism already susceptible to voter fraud." [ECF 504-19, p. 20].

This increased susceptibility to fraud and ballot destruction is the impetus for Plaintiffs, in their various capacities, to express their concerns that vote dilution might occur and disrupt their right to a "free and fair election." *See, e.g.,* [504-3, ¶ 6; 504-4, ¶ 7; ECF 504-6, ¶¶ 6-8; ECF 504-7, ¶¶ 5-9]. But these concerns, as outlined above, are based solely on a chain of unknown events that may never come to pass.

In addition to Plaintiffs' expert report, Plaintiffs' evidence consists of instances of voter fraud in the past, including an article in the N.Y. Post purporting to detail the strategies of an anonymous fraudster, as well as pointing to certain prior cases of voter fraud and election irregularities (*e.g.*, Philadelphia inadvertently allowing 40 people to vote twice in the 2020 primary election; some counties counting ballots that did not have a completed declaration in the 2020 primary election). [ECF 461, ¶¶ 63-82; ECF 504-19, p. 3 & Ex. D]. Initially, with one exception noted directly below, none of this evidence is tied to individuals using drop boxes, submitting forged mail-in ballots, or being unable to poll watch in another county —and thus it is unclear how this can serve as evidence of a concrete harm in the upcoming election as to the specific claims in this case.

***34** Perhaps the best evidence Plaintiffs present are the several photographs and video stills, which are depicted above, and which are of individuals who appear to be delivering more than one ballot to a drop box during the primary election. It is undisputed that during the primary election, some county boards believed it be appropriate to allow voters to deliver ballots on behalf of third parties. [ECF 504-9, 92:4-10; ECF 504-10, 60:3-61:10; ECF 504-49].

But this evidence of past injury is also speculative. Initially, the evidence is scant. But even assuming the evidence were more substantial, it would still be speculative to find that third-party ballot delivery will also occur in the general election. It may; it may not. Indeed, it may be less likely to occur now that the Secretary issued her September 28, 2020, guidance, which made clear to all county boards that for the general election, third-party ballot delivery is prohibited. [ECF 504-25 ("Third-person delivery of absentee or mail-in ballots is not permitted, and any ballots delivered by someone other than the voter are required to be set aside. The only exceptions are voters with a disability, who have designated in writing an agent to deliver their ballot for them.")]. It may also be less likely to occur in light of the Secretary's other guidance, which recommends that county boards place signs near drop boxes, warning voters that third-party delivery is prohibited.

It is difficult—and ultimately speculative—to predict future injury from evidence of past injury. This is why the Supreme Court has recognized that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130 (cleaned up).

In fact, based on Plaintiffs' theory of harm in this case, it is almost impossible for them to present anything other than speculative evidence of injury. That is, they would have to establish evidence of a certainly impending illegal practice that is likely to be prevented by the precautions they seek. All of this sounds in "possible future injury," not "certainly impending" injury. In that way, this case is very much like the Supreme Court's decision in *Clapper*.

In *Clapper*, plaintiffs-respondents were attorneys, other advocates, and media groups who communicated with clients overseas whom they feared would be subject to government surveillance under a FISA statute. 568 U.S. at 406, 133 S.Ct. 1138. The plaintiffs there alleged that the FISA statute at issue created a risk of possible government surveillance, which prevented them from communicating in confidence with their clients and compelled them to travel overseas instead and incur additional costs. *Id.* at 406-07, 133 S.Ct. 1138. Based on these asserted injures, the plaintiffs filed suit, seeking to invalidate provisions of FISA. *Id.* at 407, 133 S.Ct. 1138.

The Supreme Court held that plaintiffs there lacked standing because their risk of harm was not concrete—rather, it was attenuated and based on a series of speculative events that may or may not ever occur. *Id.* at 410, 133 S.Ct. 1138 (finding that "respondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than

utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts).

***35** In the end, the Court found that it would not "endorse standing theories that rest on speculation about the decisions of independent actors." *Id.* at 414, 133 S.Ct. 1138.

Like *Clapper*, here, Plaintiffs' theory of harm rests on speculation about the decisions of independent actors. For drop boxes, that speculation includes that unknown individuals will utilize drop boxes to commit fraud or other illegal activity; for signature comparison, that fraudsters will submit forged ballots by mail; for poll watchers, that illegal votes will not be sufficiently challenged; and for all these claims, that other security measures in place to monitor drop boxes, to verify ballot information, and to challenge ballots will not work.

All of this may occur and may result in some of Plaintiffs' votes being diluted; but the question is whether these events are "certainly impending." The evidence outlined above and presented by Plaintiffs simply fails to meet that standard.

This is not to say that claims of vote dilution or voter fraud never give rise to a concrete injury. A plaintiff can have standing to bring a vote-dilution claim—typically, in a malapportionment case—by putting forth statistical evidence and computer simulations of dilution and establishing that he or she is in a packed or cracked district. *See Gill*, 138 S. Ct. at 1936 (Kagan, J., concurring). And a plaintiff can have standing to bring a voter-fraud claim, but the proof of injury there is evidence of actual fraud in the election and thus the suit will be brought after the election has occurred. *See, e.g., Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994). But, at least based on the evidence presented here, a claim of vote dilution brought in advance of an election on the theory of the risk of potential fraud fails to establish the requisite concrete injury for purposes of Article III standing.

Plaintiffs advance three other theories of harm here, in order to establish standing—none of which establish a concrete injury-in-fact.

First, Plaintiffs assert that since some of them are Republican candidates and that Republicans are more likely to vote in person and Democrats more likely to vote by mail, that their injury here is a competitive disadvantage in the electoral process. [ECF 551, pp. 16-18 ("The challenged guidance will further harm the RNC through the institutional prioritization of voting by mail and the potential disenfranchisement of Republican voters, who prefer to vote in person in the upcoming General Election.")]. This too is a speculative, non-concrete injury. There is nothing in the record to establish that potential voter fraud and dilution will impact Republicans more than Democrats.

***36** To be sure, the information that Plaintiffs present shows that more Democrats are likely to use mail-in ballots. [ECF 551, p. 31 ("[I]n Pennsylvania, of the 1.9 million absentee or mail-in ballots that have been requested for the November 3, 2020 General Election, 'nearly 1.5 million Democrats have requested a mail-in ballot—nearly three times the requests from Republicans.' ") (quoting L. Broadwater, "Both Parties Fret as More Democrats Request Mail Ballots in Key States," New York Times (Sept. 30, 2020), *available at* https://www.nytimes.com/2020/09/30/us/mail-voting-democrats-republicans-turnout.html)]. But it doesn't necessarily follow that more Democrats will commit voter fraud, such as through the destruction of drop boxes or third-party ballot harvesting, and thus more Republicans' votes will be diluted.

In fact, as Plaintiffs' expert, Mr. Riddlemoser, explains, fraudsters from either party could target drop boxes in specific areas in order to destroy ballots, depending on who may be the predominant party in the area. [ECF 504-19, at pp. 17-18 ("In short, nothing would prevent someone from intentionally targeting a drop box in a predominantly Republican or predominantly Democratic area with an intent to destroy as many votes for that political party or that party's candidate(s) as possible.")]. Indeed, the more important fact for this theory of harm is not the party of the voter, but the party of the fraudster—and, on this, Plaintiffs present no evidence that one party over the other is likely to commit voter fraud.

Second, Plaintiffs also argue that the RNC, the Congressional Plaintiffs, and the Trump Campaign have organizational standing because they "have and will continue to devote their time and resources to ensure that their Pennsylvania supporters, who might otherwise be discouraged by the Secretary's guidance memos favoring mail-in and absentee

voting and Defendants' implementation thereof, get out to the polls and vote on Election Day." [ECF 551, p. 19]. This is a similar argument raised by the plaintiffs in *Clapper*, and rejected there by the Supreme Court. Because Plaintiffs' harm is not "certainly impending," as discussed above, spending money in response to that speculative harm cannot establish a concrete injury. *Clapper*, 568 U.S. at 416, 133 S.Ct. 1138 ("Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."); *see also Donald J. Trump for President, Inc. v. Cegavske*, —— F. Supp. 3d ——, ——, 2020 WL 5626974, at *5 (D. Nev. Sept. 18, 2020) ("Outside of stating 'confusion' and 'discouragement' in a conclusory manner, plaintiffs make no indication of how AB 4 will discourage their member voters from voting. If plaintiffs did not expend any resources on educating their voters on AB4, their voters would proceed to vote in-person as they overwhelmingly have in prior elections.").

Third, with respect to the poll-watching claim, Plaintiffs argue that at least one of the Plaintiffs, Ms. Patterson, is a prospective poll watcher who is being denied the right to poll watch based on the county-residency restriction, and thus she meets the Article III requirements. [ECF 551, p. 34 (citing ECF 551-3, ¶¶ 9-10)]. However, Ms. Patterson cannot establish standing because, by Plaintiffs' own concession, the theory of harm in this case is not the denial of the right to poll watch, but instead dilution of votes from fraud caused from the failure to have sufficient poll watchers. [ECF 509, p. 67 ("But, the core of the as-applied challenge here is not that the Plaintiffs cannot staff a particular polling place, it is that a candidate and his or her party is presented with the Hobson's choice of selecting limited polling places to observe due to the residency requirement and accept that unobserved polling places must exist due to the inability to recruit a sufficient force of poll watchers due to the necessity that candidates be county residents.")].

***37** And the remedy sought here is much broader than simply allowing Ms. Patterson to poll watch in a certain county, but is tied to the broader harm of vote dilution that Plaintiffs assert. [ECF 503-1, p. 3, ¶ 3 ("Plaintiffs shall be permitted to have watchers present at all locations where voters are registering to vote, applying for absentee or mail-in ballots, voting absentee or mail-in ballots, and/or returning or collecting absentee or mail-in ballots, including without limitation any satellite or early voting sites established by any county board of elections.")]. Standing is measured based on the theory of harm and the specific relief requested. *See Gill*, 138 S. Ct. at 1934 ("We caution, however, that 'standing is not dispensed in gross': A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."). As with all of the claims, the poll-watching claim rests on evidence of vote dilution that does not rise to the level of a concrete harm.

In sum, Plaintiffs here, based on the evidence presented, lack Article III standing to assert their claims. Because they lack standing, the Court will enter judgment in Defendants' favor and dismiss all claims.[10] However, because of the novelty of Plaintiffs' claims and theories, a potential appeal in this case, and the short time before the general election, out of an abundance of caution, the Court will, in the alternative, proceed to examine the claims on the merits.

10 The organizational Plaintiffs also raise certain associational and organizational standing arguments, asserting that they represent their members' interests. The associational standing arguments are derivative of their members' interests. That is, because the Court has found no concrete injury suffered by the individual voters, which would include the members of the organizational Plaintiffs, there are no separate grounds to establish standing for these organizations. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1997) (an organization only has standing to sue on behalf of its members when "its members would otherwise have standing to sue in their own right") (citation omitted).

II. Defendants and Intervenors are entitled to summary judgment on Plaintiffs' claim that drop boxes violate the U.S. Constitution.

Plaintiffs' drop-box claim has materially changed since the Pennsylvania Supreme Court's decision authorizing the use of drop boxes. Plaintiffs now allege that drop boxes effectively allow third parties to return the ballots of voters other than themselves because, they say, no one is there to stop them. Absent an in-person guard or poll worker to monitor the drop boxes and prevent the return of ballots cast in a manner contrary to what the Election Code permits, Plaintiffs assert that they face an unacceptable risk of vote dilution, which burdens their right to vote. Plaintiffs also argue that the "uneven" use of drop boxes in Pennsylvania, by some counties but not others, violates equal protection by

subjecting voters in different counties to different amounts of dilutive risk, and perhaps by diluting lawful votes cast by individuals who failed to comply with the Election Code.

The evidence relevant to these claims is undisputed. *See* [ECF 509, p. 45 ("After the completion of extensive discovery, including numerous depositions and responses to discovery requests, no genuine dispute of material fact exists regarding Plaintiffs' constitutional claims.")]. Viewed in the light most favorable to Plaintiffs, the Court could conclude from this evidence, and will assume for purposes of this decision, that (1) drop boxes allow for greater risk of third-party ballot delivery in violation of the Election Code than in-person polling locations or manned drop boxes, and (2) that the use of drop boxes is "uneven" across Pennsylvania due to its county-based election system—*i.e.*, some counties are using "unmanned" drop boxes with varying security measures, some are using "manned" drop boxes, some are using dozens of drop boxes in a variety of locations, some are using one drop box in a county office building, and some are not using drop boxes at all. The question before the Court is whether this state of affairs violates equal protection or due process.

***38** The Court finds that it does not. The uneven use of drop boxes across counties does not produce dilution as between voters in different counties, or between "lawful" and "unlawful" voters, and therefore does not present an equal-protection violation. But even if it did, the guidelines provided by Secretary Boockvar are rational, and weighing the relative burdens and benefits, the Commonwealth's interests here outweigh any burden on Plaintiffs' right to vote.

A. Pennsylvania's "uneven" use of drop boxes does not violate federal equal-protection rights.

Plaintiffs' primary claim concerns the uneven use of drop boxes across the Commonwealth, which they contend violates the Equal-Protection Clause of the 14th Amendment.

The 14th Amendment's Equal-Protection Clause commands that "no State shall ... deny to any person within its jurisdiction the equal protection of laws." U.S. Const. amend. XIV, § 1. This broad and simple promise is "an essential part of the concept of a government of laws and not men." *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

But while the Constitution demands equal protection, that does not mean all forms of differential treatment are forbidden. *See Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) ("Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications."). Instead, equal protection "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* (citation omitted). What's more, "unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.* (citations omitted).

Of course, the right of every citizen to vote is a fundamental right. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) ("[F]or reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure.") (citations omitted). Indeed, it is a foundational right "that helps to preserve all other rights." *Werme v. Merrill*, 84 F.3d 479, 483 (1st Cir. 1996); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). And its scope is broad enough to encompass not only the right of each voter to cast a ballot, but also the right to have those votes "counted without dilution as compared to the votes of others." *Minn. Voters Alliance v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013) (cleaned up).

As a result, Plaintiffs are quite correct when they suggest that a state election procedure that burdens the right to vote, including by diluting the value of votes compared to others, must "comport with equal protection and all other constitutional requirements." *Cortés*, 218 F. Supp. 3d at 407. That much, at least, is not in dispute.

At the same time, however, the Constitution "confers on the states broad authority to regulate the conduct of elections, including federal ones." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (citing U.S. Const. Art. I, § 4, cl. 1). This authority includes "broad powers to determine the conditions under which the right of suffrage may be exercised." *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 543, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (cleaned up). Indeed, "[c]ommon sense, as well as constitutional law, compels the conclusion" that states must be free to engage in "substantial regulation of elections" if "some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick v. Takushi*,

504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (cleaned up). And all "[e]lection laws will invariably impose some burden upon individual voters." *Id.*

***39** If the courts were "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest," it "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* The "machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501, 51 S.Ct. 228, 75 L.Ed. 482 (1931). Thus, when faced with a constitutional challenge to a state election law, or to the actions of state officials responsible for regulating elections, a federal court must weigh these competing constitutional considerations and "make the 'hard judgment' that our adversary system demands." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008).

The Supreme Court has supplied lower courts guidance as to how to make these hard judgments, by "forg[ing]" the "flexible standard" for assessing the constitutionality of election regulations into "something resembling an administrable rule." *Id.* at 205, 128 S.Ct. 1610 (Scalia, J. concurring) (citing *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059).

Under this standard, first articulated in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) and then refined in *Burdick*, the fact "[t]hat a law or state action imposes some burden on the right to vote does not make it subject to strict scrutiny." *Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir. 1993); *see also Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006) ("[V]oting regulations are not automatically subjected to heightened scrutiny."). Instead, any "law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process," is subjected to "a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote." *Crawford*, 553 U.S. at 204, 128 S.Ct. 1610 (Scalia, J. concurring).

In practice, this means that courts must weigh the "character and magnitude of the burden the State's rule imposes" on the right to vote "against the interests the State contends justify that burden, and consider the extent to which the State's concerns make that burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (cleaned up). If the state imposes a "severe" burden on the right to vote, strict scrutiny applies—the rule may survive only if it is "narrowly tailored" and only if the state advances a "compelling interest." *Id.* But if the state imposes only "reasonable, nondiscriminatory restrictions," its "important regulatory interests will usually be enough" to justify it. *Id.* Indeed, where state regulations are "minimally burdensome and nondiscriminatory" a level of scrutiny "closer to rational basis applies[.]" *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016). And where the state imposes no burden on the "right to vote" at all, true rational basis review applies. *See Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004) ("Biener also cannot establish an infringement on the fundamental right to vote ... As the [election] filing fee does not infringe upon a fundamental right, nor is Biener in a suspect class, we consider the claims under a rational basis test.") (citation omitted); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 310 (S.D.N.Y. 2020) ("Under this framework, election laws that impose no burden on the right to vote are subject to rational-basis review.").

***40** This operates as a "sliding scale"—the "more severe the burden imposed, the more exacting our scrutiny; the less severe, the more relaxed our scrutiny." *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1090 (9th Cir. 2019); *see also Fish v. Schwab*, 957 F.3d 1105, 1124 (10th Cir. 2020) ("We, and our sister circuits and commentators, have referred to this as a 'sliding scale' test."); *Libertarian Party of New Hampshire v. Gardner*, 638 F.3d 6, 14 (1st Cir. 2011) ("We review all of the First and Fourteenth Amendment claims under the sliding scale approach announced by the Supreme Court in *Anderson* ... and *Burdick*[.]"); *Burdick,* 504 U.S. at 434, 112 S.Ct. 2059 ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.").

Against that backdrop, the Court now turns to Plaintiffs' claim that the use of unmanned drop boxes by some Pennsylvania counties, but not others, violates equal protection. As will be discussed, Plaintiffs' equal-protection claim fails at the threshold, without even reaching *Anderson-Burdick*, because Plaintiffs have not alleged or shown that Pennsylvania's system will result in the dilution of votes in certain counties and not others. Furthermore, even if the Court applies *Anderson-Burdick*, the attenuated "burden" Plaintiffs have identified—an increased risk of vote dilution created by the use of unmanned drop boxes—is more than justified

by Defendants' important and precise interests in regulating elections.

1. Plaintiffs have not shown that Pennsylvania treats equivalent votes in different counties differently.

Plaintiffs' equal-protection claim asserts differential treatment on a theory of vote dilution. As far as the Court can discern, this claim has two dimensions.

First, the main thrust concerns differential treatment as between counties. Plaintiffs assert that some counties will use drop boxes in certain ways (specifically, without in-person guards or in varying number and locations), while others will not—resulting in differential treatment. *See, e.g.,* [ECF 551, p. 44 ("Plaintiffs assert (and have proven) that Defendants have adopted, and intend to implement in the General Election, an election regime that applies Pennsylvania's Election Code in a way that treats the citizens of Pennsylvania unequally depending on ... the location where they happen to live: in some counties, voters will have around-the-clock access to 'satellite election offices' at which they can deposit their vote, but in other counties, voters will have no access at all to such drop boxes; in some counties those drop boxes will be staffed and secure, but in other counties drop boxes will be unmonitored and open to tampering[.]")]; [*Id.* at p. 46 ("Defendants' ongoing actions and stated intentions ensure that votes will not be counted the same as those voting in other counties, and in some instances, in the same Congressional district. For instance, the harm flowing from those actions will fall disproportionately on the Republican candidates that bring suit here because many Democrat-heavy counties have stated intentions to implement the Secretary's unconstitutional ... ballot collection guidance, and many Republican-heavy counties have stated intentions to follow the Election Code as it is written.")].

***41** Second, although less clear, Plaintiffs' equal-protection claim may also concern broader differential treatment between law-abiders and scofflaws. In other words, Plaintiffs appear to suggest that Pennsylvania discriminates against all law-abiding voters by adopting policies which tolerate an unacceptable risk of a lawfully cast votes being diluted by each unlawfully cast vote anywhere in Pennsylvania. *See, e.g.,* [ECF 509, p. 55 ("The use of unstaffed drop boxes ... not only dilutes the weight of *all* qualified Pennsylvanian electors, it curtails a sense of security in the voting process.") (emphasis in original)]; [ECF 509 p. 68 ("There will be no protection of one-person, one-vote in Pennsylvania, because her policies ... allowing inconsistently located/used drop boxes will result in illegal ballots being cast and counted with legitimate votes[.]")].

As discussed below, both of these species of equal protection fail because there is, in fact, no differential treatment here—a necessary predicate for an equal-protection claim.

Initially, Plaintiffs "have to identify a burden before we can weigh it." *Crawford*, 553 U.S. at 205, 128 S.Ct. 1610 (Scalia, J. concurring). In the equal-protection context, this means the plaintiff "must present evidence that s/he has been treated differently from persons who are similarly situated." *Renchenski v. Williams*, 622 F.3d 315, 337 (3d Cir. 2010) (cleaned up). And not just any differential treatment will do. As discussed above, differences in treatment raise equal-protection concerns, and necessitate heightened scrutiny of governmental interests, only if they burden a fundamental right (such as the right to vote) or involve a suspect classification based on a protected class. *See Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) ("If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used.").

Plaintiffs argue that equal protection is implicated because Pennsylvania has permitted counties to use drop boxes to varying extents, and with varying degrees of security. Some, like Delaware County, intend to use dozens of drop boxes. *See generally* [ECF 549-28]. Many others will not use drop boxes at all. *See generally* [ECF 504-1]. And among the counties that *do* use drop boxes, some will staff them with county officials, while others will monitor them only with video surveillance or not at all. *See generally* [ECF 549-28].

In this respect, Plaintiffs argue that they suffer an equal-protection harm similar to that found by the Supreme Court in *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). There, the Supreme Court held that the Florida Supreme Court violated equal protection when it "ratified" election recount procedures that allowed different counties to use "varying standards to determine what was a legal vote." *Id.* at 107, 121 S.Ct. 525. This meant that entirely equivalent votes might be counted in one county but discounted in another. *See, e.g., id.* ("Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly

disproportionate to the difference in population between the counties."). Given the absence of uniform, statewide rules or standards to determine which votes counted, the Court concluded that the patchwork recount scheme failed to "satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right [to vote]." *Id.*

***42** While the Supreme Court expressly limited its holding in *Bush* "to the present circumstances" of a standardless "statewide recount under the authority of a single state judicial officer," *id.* at 109, 121 S.Ct. 525, a few courts have found its reasoning to be persuasive as a broader principle of equal protection. *See Stewart v. Blackwell*, 444 F.3d 843, 859 (6th Cir. 2006) ("Somewhat more recently decided is *Bush v. Gore*, ... which reiterated long established Equal Protection principles."); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 598 (6th Cir. 2012) ("We agree with all of the parties and the district court that the consent decree likely violates the equal protection principle recognized in *Bush v. Gore*."); *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F. Supp. 2d 684, 705 (W.D. Pa. 2003) (Conti, J.) ("As noted above, the court finds that the facts presented raise a serious equal protection claim under a theory similar to that espoused by the United States Supreme Court in *Bush v. Gore, supra.*"); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) ("The Court is certainly mindful of the limited holding of Bush. However, we believe that situation presented by this case is sufficiently related to the situation presented in Bush that the holding should be the same.").

Indeed, *Bush*'s core proposition—that a state may not take the votes of two voters, similarly situated in all respects, and, for no good reason, count the vote of one but not the other—seems uncontroversial. It also seems reasonable (or at least defensible) that this proposition should be extended to situations where a state takes two equivalent votes and, for no good reason, adopts procedures that greatly increase the risk that one of them will not be counted—or perhaps gives more weight to one over the other. *See, e.g.*, *Black*, 209 F. Supp. 2d at 899 ("Plaintiffs in this case allege that the resulting vote dilution, which was found to be unacceptable in *Bush* without any evidence of a disproportionate impact on any group delineated by traditional suspect criteria, is impacting African American and Hispanic groups disproportionately.... Any voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional."); *see also Reynolds*, 377 U.S. at 555, 84 S.Ct. 1362 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

That is the sort of equal-protection claim Plaintiffs purport to be asserting—a claim that voters in counties that use drop boxes are subjected to a much higher risk of vote dilution than those in other counties that do not. But that characterization falls apart under scrutiny. Indeed, despite their assertions, Plaintiffs have not actually alleged, let alone proven, that votes cast in some counties are diluted by a greater amount relative to votes cast in others. Rather, they have, at best, shown only that events causing dilution are more likely to occur in counties that use drop boxes. But, importantly, the effect of those events will, by Plaintiffs' own admission, be felt by every voter across all of Pennsylvania. [ECF 509, p. 55. ("The use of unstaffed drop boxes places the security of unknown hundreds (if not thousands) of ballots in jeopardy of theft, destruction, and manipulation. This not only dilutes the weight of *all* qualified Pennsylvanian electors, it curtails a sense of security in the voting process.") (citations omitted) (emphasis in original)]. Such dilution impacts the entire electorate equally; not just voters in the county where it occurs.

To illustrate this distinction, consider, for example, a presidential election. The Court agrees with Plaintiffs that the relevant electoral unit in such an election is "the entire Commonwealth of Pennsylvania." [ECF 551, p. 55 ("The electoral unit in this election is the entire Commonwealth of Pennsylvania.")]. Indeed, on election night, votes cast in each of Pennsylvania's 67 counties will be canvassed, counted, and ultimately added to a statewide vote total that decides who wins Pennsylvania's 20 electoral votes. So, ask: what is the dilutive impact of a hypothetical illegal vote cast in Philadelphia during that election? Does it cause, in any sense, an "unequal evaluation of ballots" cast in different counties, *Bush*, 531 U.S. at 106, 121 S.Ct. 525, such that lawful ballots cast in Philadelphia will be less likely to count, worth less if they do, or otherwise disfavored when compared to votes cast in other counties? The answer is evident—it does not. Rather, the hypothetical illegal vote cast in Philadelphia dilutes *all lawful votes* cast in the election *anywhere* in the Commonwealth by the exact same amount.

***43** The same reasoning holds in elections that occur within part of a state, rather than statewide. For example, consider a hypothetical legislative district covering two counties—one that uses drop boxes and one that does not. There may well be a greater risk that illegal voting will occur in the county that

uses drop boxes. But any dilutive impact of those votes will be felt equally by voters in *both* counties.

This is categorically different from the harm at issue in *Bush* and cases like it. In *Bush*, Florida's arbitrary use of different recount standards in different counties meant that the state was counting equivalent ballots differently in different counties, meaning that voters in some counties were more likely to have their votes counted than those in others.

In *Black v. McGuffage*, an Illinois district-court case on which Plaintiffs heavily rely, the plaintiffs alleged that the type of voting machines used in some Illinois counties were statistically much more likely to result in equivalent votes being discounted at a much higher frequency in some counties than others, and that the worst machines were those being used in counties with high populations of minority groups. 209 F. Supp. 2d at 899. As a result, voters (and, specifically, minority voters) were much more likely to have their votes discounted, based just on the county in which they lived. *See id.* ("As a result, voters in some counties are statistically less likely to have their votes counted than voters in other counties in the same state in the same election for the same office. Similarly situated persons are treated differently in an arbitrary manner.... In addition, the Plaintiffs in this case allege that the resulting vote dilution ... is impacting African American and Hispanic groups disproportionately.").

Finally, *Stewart v. Blackwell*, another case cited by Plaintiffs, was the same as *Black*—voters in counties that used punch-card voting were "approximately four times as likely not to have their votes counted" as a voter in a different county "using reliable electronic voting equipment." 444 F.3d at 848.

What ties these cases together is that each of them involves a state arbitrarily "valu[ing] one person's vote over that of another," *Bush*, 531 U.S. at 104-05, 121 S.Ct. 525, by permitting counties to either apply different standards to decide what votes count (*Bush*) or use different voting technologies that create a great risk of votes being discounted in one county that does not exist in others (*Black* and *Stewart*). It is this sort of "differential treatment ... burden[ing] a fundamental right" that forms the bedrock of equal protection. *Sullivan v. Benningfield*, 920 F.3d 401, 409 (6th Cir. 2019).

Plaintiffs, in contrast, have shown no constitutionally significant differential treatment at all.

Instead, as discussed, if Plaintiffs are correct that the use of drop boxes increases the risk of vote dilution, all votes in the relevant electoral unit—whether that is statewide, a subset of the state, or a single county—face the same degree of increased risk and dilution, regardless of which county is most at fault for elevating that risk.

What Plaintiffs have really identified, then, are not uneven ***risks of vote dilution***—affecting voters in some counties more than equivalent voters in others—but merely different voting procedures in different counties that may contribute different amounts of vote dilution ***distributed equally across the electorate as a whole***. The Court finds that this is not an equal-protection issue.

44** To be clear, the reason that there is no differential treatment is solely based on Plaintiffs' theory of harm in this case. In the more "routine" vote-dilution cases, the state imposes some restriction or direct impact on the plaintiff's right to vote—that results in his or her vote being weighed less (*i.e.*, diluted) compared to those in other counties or election districts. *See Gill,* 138 S. Ct. at 1930, (explaining that "the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were individual and personal in nature, because the claims were brought by voters who alleged facts showing disadvantage to themselves as individuals") (cleaned up). In this case, though, Plaintiffs complain that the state is ***not imposing a restriction on ***someone else's*** right to vote, which, they say, raises the risk of fraud, which, if it occurs, could dilute the value of Plaintiffs' vote. The consequence of this inverted theory of vote dilution is that all other votes are diluted in the same way; all feel the same effect.

Finally, the Court's ruling in this regard is consistent with the many courts that have recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state. *See, e.g., Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006) ("Plaintiffs do not contend that equal protection requires a state to employ a single kind of voting system throughout the state. Indeed, local variety in voting systems can be justified by concerns about cost, the potential value of innovation, and so on.") (cleaned up); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983) ("A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state."); *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) ("[T]he appellants' reading of the Supreme Court's

voting cases would essentially bar a state from implementing any pilot program to increase voter turnout. Under their theory, unless California foists a new system on all fifty-eight counties at once, it creates 'unconstitutional vote-dilution' in counties that do not participate in the pilot plan. Nothing in the Constitution, the Supreme Court's controlling precedent, or our case law suggests that we can micromanage a state's election process to this degree."); *Fla. State Conference of N.A.A.C.P. v. Browning*, 569 F. Supp. 2d 1237, 1258 (N.D. Fla. 2008) ("[A]s with countless public services delivered through Florida's political subdivisions—such as law enforcement and education—resource disparities are to some degree inevitable. They are not, however, unconstitutional."); *Green Party of State of New York v. Weiner*, 216 F. Supp. 2d 176, 192 (S.D.N.Y. 2002) ("Even in that situation, [*Bush v. Gore*] did not challenge, and the Court did not question, the use of entirely different technologies of voting in different parts of the state, even in the same election."); *Paher v. Cegavske*, No. 20-243, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020) ("[I]t cannot be contested that Clark County, which contains most of Nevada's population—and likewise voters (69% of all registered voters [ ])—is differently situated than other counties. Acknowledging this as a matter of generally known (or judicially noticeable) fact and commonsense makes it more than rational for Clark County to provide additional accommodations to assist eligible voters."); *Ron Barber for Cong. v. Bennett*, No. 14-2489, 2014 WL 6694451, at *5 (D. Ariz. Nov. 27, 2014) ("[T]he [*Bush v. Gore*] Court did not invalidate different county systems regarding implementation of election procedures."); *Tex. Democratic Party v. Williams*, No. 07-115, 2007 WL 9710211, at n.4 (W.D. Tex. Aug. 16, 2007) ("In *Bush v. Gore*, the Supreme Court specifically noted: 'The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.' ").

***45** Equal protection does not demand the imposition of "mechanical compartments of law all exactly alike." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S.Ct. 9, 67 L.Ed. 107 (1922). Rather, "the Constitution is sufficiently flexible to permit its requirements to be considered in relation to the ... contexts in which they are invoked." *Merchants Nat'l Bank of Mobile v. Dredge Gen. G. L. Gillespie*, 663 F.2d 1338, 1343 (5th Cir. 1981). And in this context, "few (if any) electoral systems could survive constitutional scrutiny if the use of different voting mechanisms by counties offended the Equal Protection Clause." *Trump v. Bullock*, —— F.3d ——, ——, 2020 WL 5810556, at *14 (D. Mont. Sept. 30, 2020).

The distinction—between differences in county election procedures and differences in the treatment of votes or voters between counties—is reflected in *Bush* itself. There, the Supreme Court took pains to clarify that the question before it was "not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Bush*, 531 U.S. at 109, 121 S.Ct. 525; *see also id.* at 134, 121 S.Ct. 525 (Souter, J. dissenting) ("It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on."); *Bullock*, —— F.3d at ——, 2020 WL 5810556, at *14 ("[T]he Supreme Court was clear in *Bush v. Gore* that the question was not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.") (cleaned up).

Thus, coming back to the theory of Plaintiffs' case, Plaintiffs contend that Secretary Boockvar's drop-box guidance will result in differences between counties and differing risks of fraud. But the result of that uneven implementation will not be votes in certain counties being valued less than others. And the result won't be that voters who vote in person will have their votes valued less, either. Instead, if Plaintiffs are right, any unlawful votes will dilute all other lawful votes in the same way. While certainly voter fraud and illegal voting are bad, as a matter of equal protection, there is no unequal treatment here, and thus no burden on Plaintiffs' rights under the Equal Protection Clause.

In addition to their equal-protection claim based on county differences, Plaintiffs also appear to allude to a more general type of equal-protection violation. They assert that Pennsylvania comprises a single election unit. [ECF 551, p. 55 ("The electoral unit in this election is the entire Commonwealth of Pennsylvania.")]. They assert that they intend to cast their ballots lawfully. *See, e.g.,* [ECF 504-3, ¶ 4 ("As a Pennsylvania qualified registered elector, I have always voted in-person at primary and general elections, and I intend to vote in-person at the upcoming November 3, 2020 General Election.")]. And they assert that unmanned drop boxes across the Commonwealth (regardless of the county) will, on a statewide basis, dilute their votes. *See, e.g.,* [*id.* at ¶ 6 ("As a Pennsylvania qualified registered elector who votes in-person, I do not want my in-person vote diluted or cancelled by votes that are cast in a manner contrary

to the requirements enacted by the Pennsylvania General Assembly.")]. For example, if one "qualified elector" casts a lawful ballot, but a fraudulent voter casts ten ballots, then that elector's vote will, under Plaintiffs' theory, be diluted by a magnitude of ten—resulting in differential treatment.

***46** The problem with this theory is that there does not appear to be any law to support it. Indeed, if this were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's "interest" in failing to do more to stop illegal activity. This is not the law. To the contrary, it is well-established that even violations of state election laws by state officials, let alone violations by unidentified third parties, do not give rise to federal constitutional claims except in unusual circumstances. *See Shipley v. Chicago Bd. of Election Commissioners*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("A violation of state law does not state a claim under § 1983, and, more specifically, a deliberate violation of state election laws by state election officials does not transgress against the Constitution.") (cleaned up); *Martinez v. Colon*, 54 F.3d 980, 989 (1st Cir. 1995) ("[T]he Constitution is not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations—no matter how egregious those violations may appear within the local legal framework.").

Thus, this type of equal-protection claim fails as a matter of law, as well.

2. If Pennsylvania's "uneven" use of drop boxes indirectly burdens the right to vote at all, that burden is slight, and justified by important state interests.

Even assuming that Plaintiffs could establish unequal treatment to state an equal-protection claim, their claim nonetheless fails because the governmental interests here outweigh any burden on the right to vote.

Initially, the Court finds that the appropriate level of scrutiny is rational basis. Defendants' failure to implement a mandatory requirement to "man" drop boxes doesn't directly infringe or burden Plaintiffs' rights to vote at all. Indeed, as discussed above in the context of standing, what Plaintiffs characterize as the burden or harm here is really just an ancillary 'increased risk' of a theoretical harm, the degree of which has not been established with any empirical precision. *See Obama*, 697 F.3d at 429 ("If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used."); *Brehm*, 432 F. Supp. 3d at 310 ("Under this framework, election laws that impose no burden on the right to vote are subject to rational-basis review.").

On rational-basis review, the Secretary's guidance here passes constitutional muster. Her guidance certainly provides some flexibility in how counties may use drop boxes, but the guidance overall is rationally related to a legitimate governmental interest—namely, the implementation of drop boxes in a secure manner, taking into account specific county differences. That Plaintiffs feel the decisions and actions of the Pennsylvania General Assembly, Secretary Boockvar, and the county Defendants are insufficient to prevent fraud or illegal voting is of no significance. "[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

As detailed above, Secretary Boockvar's guidance provides lawful, comprehensive, and reasonable standards with respect to (1) selecting the location of drop boxes, (2) drop-box design criteria, (3) signage, (4) drop-box security measures, and (5) drop-box ballot collection and chain of custody procedures. Of particular note, with respect to ballot security, the Secretary's guidance calls for the use of reasonably robust measures like video surveillance, durable and tamperproof design features, regular ballot collection every 24 hours, chain-of-custody procedures to maintain ballot traceability, and signage advising voters that third-party delivery is prohibited, among other things.

To be sure, the Secretary's guidance doesn't insist on the use of security personnel—though some counties have decided to post security guards outside of drop boxes on their own. But the Court can't say that either the Secretary's failure to provide that requirement, or the decision of some counties to proceed with drop boxes "unmanned," is irrational. For example, the evidence presented demonstrates that placing a security guard outside of a drop box at all times is costly, particularly for cash-strapped counties—at least $13 per hour or about $104 (8 hours) to $312 (24 hours) per day, according to Defendants' expert, Professor Robert McNair. [ECF 549-11, p. 11] In the context of a broader election system that detects and deters fraud at many other stages of the voting process, and given

that that there are also no equivalent security measures present at U.S. postal mailboxes (which constitute an arguably more tempting vehicle for the would-be ballot harvester), the Court finds that the lack of any statewide requirement that all drop boxes be manned or otherwise surveilled is reasonable, and certainly rational.

***47** But even assuming Plaintiffs are right that their right to vote here has been burdened (and thus a heightened level of scrutiny must apply), that burden is slight and cannot overcome Defendants' important state interests under the *Anderson-Burdick* framework. Indeed, courts routinely find attenuated or ancillary burdens on the right to vote to be "slight" or insignificant, even burdens considerably *less* attenuated or ancillary than any burden arguably shown here. *See, e.g.*, *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) ("Under *Burdick*, the use of touchscreen voting systems is not subject to strict scrutiny simply because this particular balloting system may make the possibility of some kinds of fraud more difficult to detect.").[11]

11 *See, also, e.g.*, *Dudum v. Arntz*, 640 F.3d 1098, 1117 (9th Cir. 2011) ("If the aspects of the City's restricted IRV scheme Dudum challenges impose any burdens on voters' constitutional rights to vote, they are minimal at best."); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354–55 (11th Cir. 2009) ("The district court determined that the burden imposed on Georgia voters who lack photo identification was not undue or significant, and we agree.... The NAACP and voters are unable to direct this Court to any admissible and reliable evidence that quantifies the extent and scope of the burden imposed by the Georgia statute."); *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1183 (9th Cir. 1988) ("Appellants claim that Hawaii's absentee voting law fails to prohibit 'the solicitation, examination and delivery of absentee ballots by persons other than the voters' and that such activities occurred during the special election ... We agree with the district court that the Hawaii absentee ballot statute and the regulations adopted under it adequately protect the secrecy and integrity of the ballot. Although Hawaii has not adopted a regulation to prevent the delivery of ballots by persons other than the voter, the Hawaii regulations go into great detail in their elaboration of procedures to prevent tampering with the ballots."); *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) ("[A]lthough ballot format has an effect on the fundamental right to vote, the effect is somewhat attenuated."); *Nemes v. Bensinger*, —— F. Supp. 3d ——, ——, 2020 WL 3402345, at *13 (W.D. Ky. June 18, 2020) ("The burden imposed by the contraction to one polling place is modest, and the identified groups are afforded various other means under the voting plans to easily and effectively avoid disenfranchisement. As already discussed, Defendants have offered evidence of the substantial government interest in implementing voting plans that provide for a free and fair election while attempting to minimize the spread of COVID-19."); *Paralyzed Veterans of Am. v. McPherson*, No. 06-4670, 2008 WL 4183981, at *22 (N.D. Cal. Sept. 9, 2008) ("Plaintiff Bohlke's listed burdens rely on speculative risk or the ancillary effects of third party assistance, but not on evidence of any concrete harm. Such speculations or effects are insufficient under Supreme Court and Ninth Circuit precedent to demonstrate a severe burden on the fundamental right to vote.").

To begin with, application of the *Anderson-Burdick* framework here presents something of a "square peg, round hole" dilemma. After all, that test assumes there is some constitutional injury to "weigh" against the state's "important" regulatory interests in the first place. And without differential treatment of votes or voters, there isn't any equal-protection injury for the Court to balance.

The *Anderson-Burdick* test is also ill-fitted to Plaintiffs' claims for another reason. Typically, *Anderson-Burdick* is invoked where the government takes some direct action to burden or restrict a plaintiff's right to vote. Here, in contrast, Plaintiffs complain that Pennsylvania has indirectly burdened the right to vote through ***inaction***—*i.e.*, by not imposing ***enough*** regulation to secure the voting process it has adopted, which, Plaintiffs say, will allow third parties to vote in an unlawful way, which, if it happens, will dilute (and thus burden) the right to vote.

***48** This unusual causal daisy-chain makes it difficult to apply *Anderson-Burdick*'s balancing approach. After all, it is one thing to assess the government's interest in taking a specific action that imposed burdens on the right to vote. It is much less natural for a court to evaluate whether the government had a good reason for not doing something differently, or for failing to do more to prevent (or reduce the risk of) misconduct by third parties that could burden the right to vote.

To the extent *Anderson-Burdick* applies in such circumstances, the appropriate course would, in this Court's view, be to weigh any burden stemming from the government's alleged failures against the government's interest in enacting the broader election scheme it has

erected, of which the challenged piece is usually only one part. Focusing solely on the allegedly inadequate procedure being challenged, such as the state's authorization of "drop boxes" here, would ignore the fact that Election Code provisions and regulations operate as part of a single, complex organism balancing many competing interests, all of which are "important" for purposes of the *Anderson-Burdick* analysis. *See, e.g.*, *Crawford*, 553 U.S. at 184, 128 S.Ct. 1610 ("deterring and detecting voter fraud"); *Tedards v. Ducey*, 951 F.3d 1041, 1067 (9th Cir. 2020) ("voter turnout"); *Lunde v. Schultz*, 221 F. Supp. 3d 1095, 1106 (S.D. Iowa 2014) ("expanding ballot access to nonparty candidates"); *Greenville Cnty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 671 (D.S.C. 2011) ("promoting voter participation in the electoral process"); *Mays v. LaRose,* 951 F.3d 775, 787 (6th Cir. 2020) ("orderly administration of elections"); *Dudum*, 640 F.3d at 1115 ("orderly administration of ... elections"); *Paher v. Cegavske* , 457 F.Supp.3d 919, ——, 2020 WL 2089813, at *7 (2020) ("protect[ing] the health and safety of ... voters" and "safeguard[ing] the voting franchise"); *Nemes*, —— F. Supp. 3d at ——, 2020 WL 3402345, at *13 ("implementing voting plans that provide for a free and fair election while attempting to minimize the spread of COVID-19").

Thus, on the "burden" side of the equation is Plaintiffs' harm of vote dilution predicated on a risk of fraud. As discussed above in the context of lack of standing, that burden is slight, factually, because it is based on largely speculative evidence of voter fraud generally, anecdotal evidence of the mis-use of certain drop boxes during the primary election, and worries that the counties will not implement a "best practice" of having poll workers or guards man the drop boxes. *See* [ECF 461, ¶¶ 63-82; ECF 504-2, ¶ 12; 504-3, ¶ 6; 504-4, ¶7;; ECF 504-6, ¶¶ 6-8; ECF 504-7, ¶¶ 5-9; ECF 504-9, 92:4-10; ECF 504-10, 60:3-61:10; 504-19, pp. 3, 16-18, 20 & Ex. D; ECF 504-25; ECF 504-49; ECF 509, p. 67; ECF 551, p. 34].

This somewhat scant evidence demonstrates, at most, an increased risk of some election irregularities—which, as many courts have held, does not impose a meaningful burden under *Anderson-Burdick*. "Elections are, regrettably, not always free from error," *Hutchinson v. Miller*, 797 F.2d 1279, 1286–87 (4th Cir. 1986), let alone the "risk" of error. In just about every election, votes are counted, or discounted, when the state election code says they should not be. But the Constitution "d[oes] not authorize federal courts to be state election monitors." *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1980). It is "not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations." *Fournier v. Reardon*, 160 F.3d 754, 757 (1st Cir. 1998). Nor is it "an election fraud statute." *Minnesota Voters*, 720 F.3d at 1031.

***49** "Garden variety" election irregularities, let alone the "risk" of such irregularities, are simply not a matter of federal constitutional concern "even if they control the outcome of the vote or election." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). And as discussed above, most often, even "a deliberate violation of state election laws by state election officials does not transgress against the Constitution." *Shipley*, 947 F.3d at 1062. *see, e.g.*, *Lecky v. Virginia State Bd. of Elections*, 285 F. Supp. 3d 908, 919 (E.D. Va. 2018) ("[E]ven assuming the Fredericksburg officials' failure to provide provisional ballots amounted to a violation of state law, it would not rise to the level of an equal protection violation.").

Compared, then, to Plaintiffs' slight burden, the Commonwealth has put forward reasonable, precise, and sufficiently weighty interests that are undisputed and that can be distilled into three general categories: (1) the benefits of drop boxes, (2) the Commonwealth's interests in furthering its overall election-security plan concerning drop boxes, and (3) the interests inherent in the Commonwealth's general mail-in ballot scheme.

The first category concerns the benefits of drop boxes generally. Secretary Boockvar has pointed out the Commonwealth's interests generally in using drop boxes—including, (1) the increase of voter turnout, (2) the protection of voters' health in the midst of the ongoing pandemic, (3) the increase of voter satisfaction, in light of ongoing U.S. Postal Service issues, and (4) the reduction of costs for counties. [ECF No. 547, at pp. 22-25; ECF No. 549-2, ¶¶ 36-39, 42-44]. Plaintiffs do not dispute any of these interests.

The second category of interests concerns the Commonwealth's interests in implementing drop boxes with appropriate and effective safety measures and protocols in place. That is, Secretary Boockvar has, in her capacity as the chief state official charged with overseeing elections, issued uniform guidance to all counties regarding the use of drop boxes, which is noted above. That guidance includes (1) advising counties that the Election Code permits the use of drop boxes, and (2) setting forth best practices that the counties should "consider" with respect to their use. Among other things, the Secretary advised that counties

should maintain a traceable chain of custody for mail-in and absentee ballots retrieved from drop boxes; utilize drop boxes with various security features (*e.g.,* anti-tampering features, locks, video surveillance, and removal when the site is closed or cannot be monitored); and designate sworn county personnel to remove ballots from drop boxes. And evidence suggests that the Secretary's deputies have emphasized these best practices when queried by county officials. [ECF 549-32 ("Per our conversation, the list of items are things the county must keep in mind if you are going to provide a box for voters to return their ballots in person.")].

This guidance is lawful, reasonable, and non-discriminatory, and so does not create any constitutional issue in its own right. With this guidance, the Secretary has diminished the risks tolerated by the legislature in adopting mail-in voting and authorizing drop-boxes, by encouraging the counties to adopt rather comprehensive security and chain-of-custody procedures if they do elect to use drop boxes. Conversely, the legislature's decision to leave the counties with ultimate discretion when it comes to how, and to what extent, to use drop boxes (as opposed to adopting a scheme in which the Secretary could enforce compliance with her guidance) is also reasonable, and justified by sufficiently weighty governmental interests, given the many variations in population, geography, local political culture, crime rates, and resources. [ECF 549-9 ("There is no logical reason why ballot receptacles such as drop boxes must be uniform across different counties; particularly because the verification of the voter is determined by election officials upon receipt of the ballot. Counties vary in size and need. Across the country, best practices dictate that counties determine what type of box and size works for them. The needs of a large county are very different from the needs of a smaller county."); ECF 549-11, p. 9 ("Such variation between counties even within a state makes sense, since the needs of different counties vary and their use of drop boxes reflects those considerations (e.g., the geographic size of a county, the population of the county, and the ease with which voters in the county can access other locations to return mail-in ballots).").

***50** The third category of interests is, more generally, the interests of the Commonwealth in administering its overall mail-in ballot regime, including the various security and accountability measures inherent in that legislative plan.

Pennsylvania did not authorize drop boxes in a vacuum. Last year, the Pennsylvania legislature "weigh[ed] the pros and cons," *Weber*, 347 F.3d at 1107, and adopted a broader system of "no excuse" mail-in voting as part of the Commonwealth's Election Code. As the Pennsylvania Supreme Court has now confirmed, that system left room for counties to authorize drop boxes and other satellite locations for returning ballots to the county boards of elections. *See Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *9 ("[W]e need not belabor our ultimate conclusion that the Election Code should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes.").

Inherent in any mail-in or absentee voting system is some degree of increased risk of votes being cast in violation of other provisions of the Election Code, regardless of whether those ballots are returned to drop boxes, mailboxes, or some other location. For example, there is simply no practical way to police third party delivery of ballots to any mailbox anywhere in the Commonwealth, where Plaintiffs do not dispute that such ballots can be lawfully returned. It is also likely that more (and perhaps many more) voters than usual will be disenfranchised by technicalities this year, for failing to comply with the procedural requirements associated with mail-in ballots, such as the requirement that such ballots be placed in "inner secrecy envelopes."

But in enacting the "no excuse" mail-in voting system that it did, the Pennsylvania legislature chose to tolerate the risks inherent in that approach. And the key point is that the legislature made that judgment in the context of erecting a broader election scheme that authorizes other forms of voting and has many other safeguards in place to catch or deter fraud and other illegal voting practices. These safeguards include voter registration; a mail-in ballot application and identity verification process, 25 P.S. §§ 3146.2, 3150.12; a system for tracking receipt of mail-in ballots, 25 P.S. §§ 3146.3(a), 3150.13(a); and, perhaps most important of all, a pre-canvassing and canvassing process during which mail-in ballots are validated before being counted. In addition, Pennsylvania law also seeks to deter and punish fraud by imposing criminal penalties for unlawful voting, 25 P.S § 3533; voting twice in one election, 25 P.S § 3535; forging or destroying ballots, 25 P.S § 3517; unlawful possession or counterfeiting of ballots 25 P.S § 3516; and much more of the conduct Plaintiffs fear, *see* 25 P.S. § 3501, *et seq.*

In this larger context, the Court cannot say that the balance Pennsylvania struck across the Election Code was unreasonable, illegitimate, or otherwise not "sufficiently weighty to justify," *Crawford*, 553 U.S. at 191, 128 S.Ct.

1610, whatever ancillary risks may be associated with the use of drop boxes, or with allowing counties to exercise discretion in that regard. Pennsylvania may balance the many important and often contradictory interests at play in the democratic process however it wishes, and it must be free to do so "without worrying that a rogue district judge might later accuse it of drawing lines unwisely." *Abbott*, 961 F.3d at 407.

***51** Thus, balancing the slight burden of Plaintiffs' claim of dilution against the categories of interests above, the Court finds that the Commonwealth and Defendants' interests in administering a comprehensive county-based mail-in ballot plan, while both promoting voting and minimizing fraud, are sufficiently "weighty," reasonable, and justified. Notably, in weighing the burdens and interests at issue, the Court is mindful of its limited role, and careful to not intrude on what is "quintessentially a legislative judgment." *Griffin*, 385 F.3d at 1131. "[I]t is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems." *Weber*, 347 F.3d at 1106. "So long as their choice is reasonable and neutral, it is free from judicial second-guessing." *Id.*; *see also Abbott,* 961 at 407, ("That the line might have been drawn differently ... is a matter for legislative, rather than judicial, consideration.") (cleaned up); *Trinsey v. Com. of Pa.,* 941 F.2d 224, 235 (3d Cir. 1991) ("We take no position on the balancing of the respective interests in this situation. That is a function for which the legislature is uniquely fitted.").

Thus, even under the *Anderson-Burdick* framework, the Court finds that Plaintiffs' constitutional challenge fails as a matter of law.

B. Pennsylvania's use of drop boxes does not violate federal due process.

In addition to their equal-protection challenge to the use of drop boxes, Plaintiffs also appear to argue that the use of unmanned drop boxes violates substantive due process protected by the 14th Amendment. This argument is just a variation on their equal-protection argument—*i.e.*, the uneven use of drop boxes will work a "patent and fundamental unfairness" in violation of substantive due process principles. *See Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (substantive due process rights are violated "[i]f the election process itself reaches the point of patent and fundamental unfairness[.]"). The analysis for this claim is the same as that for equal protection, and thus it fails for the same reasons.

But beyond that, this claim demands even stricter proof. Such a claim exists in only the most extraordinary circumstances. *See Nolles v. State Comm. for Reorganization of Sch. Districts*, 524 F.3d 892, 898 (8th Cir. 2008) ("A canvass of substantive due process cases related to voting rights reveals that voters can challenge a state election procedure in federal court only in limited circumstances, such as when the complained of conduct discriminates against a discrete group of voters, when election officials refuse to hold an election though required by state law, resulting in a complete disenfranchisement, or when the willful and illegal conduct of election officials results in fraudulently obtained or fundamentally unfair voting results.") (cleaned up); *Yoshina,* 140 F.3d at 1226 ("We have drawn a distinction between 'garden variety' election irregularities and a pervasive error that undermines the integrity of the vote. In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election.") (citation omitted); *Bennett v. Mollis*, 590 F. Supp. 2d 273, 278 (D.R.I. 2008) ("Before an election error becomes a key that unlocks the restraints on the federal court's authority to act, the Plaintiffs must demonstrate either an intentional election fraud or an unintentional error resulting in broad-gauge unfairness.").

Indeed, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense"—the "executive action must be so ill-conceived or malicious that it 'shocks the conscience.' " *Miller v. City of Phila.*, 174 F.3d 368, 375 (3d Cir. 1999) (cleaned up).

Based on the slight burden imposed here, and the Commonwealth's interests in their overall county specific voting regime, which includes a host of other fraud-prevention measures, the Court finds that the drop-box claim falls short of the standard of substantive due process.

III. Defendants and Intervenors are entitled to summary judgment on Plaintiffs' signature-comparison claims.

***52** Plaintiffs' next claim concerns whether the Secretary's recent guidance on signature comparison violates the federal Constitution. Plaintiffs frame their claims pertaining to signature comparison in two ways—one based on due process and the other based on equal protection.

Plaintiffs initially assert that the Election Code requires a signature comparison for mail-in and absentee applications and ballots. Thus, according to Plaintiffs, Secretary Boockvar's guidance, which says the opposite, is creating unconstitutional vote dilution, in violation of due-process principles—*i.e.*, certain unlawful, unverified ballots will

now be counted, thereby diluting the lawful ones cast by other voters (such as in-person voters, whose signatures are verified). Plaintiffs also appear to argue more generally that absent signature comparison, there is a heightened risk of voter fraud, and therefore a heightened risk of vote dilution of lawful votes.

In addition to due process, Plaintiffs argue that the guidance violates equal-protection principles—first, by counties engaging in a patchwork of procedures (where some counties intend to do a signature comparison for mail-in ballots, while others do not); and second, by implementing different standards between mail-in ballots and in-person ones.

In contrast, Defendants and Intervenors take the position that state law does not require signature comparison, and for good reason. According to them, requiring such comparisons is fraught with trouble, as signatures change over time and elections officials are not signature-analysis experts. This leaves open the possibility for arbitrary and discriminatory application that could result in the disenfranchisement of valid voters.

For the reasons that follow, the Court will dismiss the signature-comparison claims and enter judgment in favor of Defendants. A plain reading of the Election Code demonstrates that it does not impose a signature-comparison requirement for mail-in ballots and applications, and thus Plaintiffs' vote-dilution claim sounding in due process fails at the outset. Further, the heightened risk of fraud resulting from a lack of signature comparison, alone, does not rise to the level of a federal constitutional violation. Finally, the equal-protection claims fail because there are sound reasons for the different treatment of in-person ballots versus mail-in ballots; and any potential burdens on the right to vote are outweighed by the state's interests in their various election security measures.

A. The Election Code does not require signature comparison for mail-in and absentee ballots or ballot applications.

Plaintiffs' federal-constitutional claims in Count I of their Second Amended Complaint are partially based on the Secretary's guidance violating state law. That is, Plaintiffs' first theory is that by the Secretary violating state law, unlawful votes are counted and thus lawfully cast votes are diluted. According to Plaintiffs, this violates the 1st and 14th Amendments, as well as the Elections Clause (the latter of which requires the legislature, not an executive, to issue election laws).[12]

12 The parties do not specifically brief the elements of an Elections-Clause claim. This is typically a claim brought by a state legislature, and the Court has doubts that this is a viable theory for Plaintiffs to assert. *See Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007). Regardless, if state law does not require signature comparison, then there is no difference between the Secretary's guidance and the Election Code, and the Elections-Clause claim necessarily fails.

***53** Thus, a necessary predicate for these constitutional claims is whether the Election Code mandates signature comparison for mail-in and absentee ballots. If it doesn't, as the Secretary's guidance advises, then there can be no vote dilution as between lawful and unlawful votes, nor a usurpation of the legislature's authority in violation of the Elections Clause.

After carefully considering the parties' arguments and the relevant law, the Court finds that the plain language of the Election Code imposes no requirement for signature comparison for mail-in and absentee ballots and applications.[13] In other words, the Secretary's guidance is consistent with the Election Code, and creates no vote-dilution problems.[14]

13 Several Defendants and Intervenors have asked this Court to abstain from deciding this issue on the basis of *Pullman*. As this Court previously discussed, a court can abstain under *Pullman* if three factors are met: "(1) [the dispute] requires interpretation of "unsettled questions of state law,"; (2) permitting resolution of the unsettled state-law questions by state courts would "obviate the need for, or substantially narrow the scope of adjudication of the constitutional claims"; and (3) an "erroneous construction of state law would be disruptive of important state policies[.]" " [ECF 409, p. 3 (quoting *Chez Sez*, 945 F.2d at 631)]. But if, on the other hand, the answer to the state law dispute is "clear and unmistakable," abstention is not warranted. [*Id.* at p. 15 (citing *Chez Sez*, 945 F.2d at 632)]. Here, the Court concludes (as discussed below) that the Election Code is clear that signature comparison is not required and further, that Plaintiffs' competing interpretation is not plausible. As such, the Court cannot abstain under *Pullman*.
The *Pullman* analysis does not change simply because Secretary Boockvar has filed a "King's Bench" petition

with the Pennsylvania Supreme Court, requesting that court to clarify whether the Election Code mandates signature comparison of mail-in and absentee ballots and applications. [ECF 556, p. 11; ECF 557]. The fact that such a petition was filed does not change this Court's conclusion that the Election Code is clear. The *Pullman* factors remain the same. And they are not met here.

14 The Secretary's September 11, 2020, guidance, stated that the "Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections." [ECF 504-24, p. 3, § 3]. Similarly, the Secretary's September 28, 2020, guidance stated that "Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis. ... No challenges may be made to mail-in and absentee ballots at any time based on signature analysis." [ECF 504-25, p. 9, § 5.2].

Plaintiffs, in advancing their claim, rely on section 3146.8(g)(3)-(7) of the Election Code to assert that the Code requires counties to "verify" the signatures on mail-in and absentee ballots (*i.e.*, examine the signatures to determine whether they are authentic). Plaintiffs specifically point to section 3146.8(g)(3) as requiring this signature verification. [ECF 509, pp. 17-18].

Section 3146.8(g)(3) states:

> When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots ... the board shall examine the declaration on the envelope of each ballot ... and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

***54** 25 P.S. § 3146.8(g)(3).

According to Plaintiffs, Section 3146.8(g)(3)'s requirement to verify the proof of identification, and compare the information on the declaration, is tantamount to signature comparison. The Court disagrees, for at least three reasons.

First, nowhere does the plain language of the statute require signature comparison as part of the verification analysis of the ballots.

When interpreting a statute enacted by the Pennsylvania General Assembly, courts apply Pennsylvania's Statutory Construction Act, 1 Pa. C.S. §§ 1501-1991. And as the Act instructs, the "object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa C.S. § 1921(a). If the words of the statute are clear and unambiguous, the letter of the law applies. *Id.* at § 1921(b). Otherwise, courts may consider a variety of factors to determine the legislature's intent, including "other statutes upon the same or similar subjects" and "[t]he consequences of a particular interpretation." *Id.* at § 1921(c)(5)-(6).

Section 3146.8(g)(3) does not expressly require any signature verification or signature comparison. 25 P.S. § 3146.8(g)(3). It instead requires election officials to (1) "examine the declaration on the envelope of each ballot," (2) "compare the information thereon with that contained in the ... 'Voters file' [or] the absentee voters' list," and (3) if "the county board has [a] verified the proof of identification as required under this act and [b] is satisfied that the declaration is sufficient and the information contained in the [Voter's file] ... verifies his right to vote," the election official shall include the ballot to be counted. *Id.*

Under the express terms of the statute, then, the information to be "verified" is the "proof of identification." *Id.* The Election Code defines "proof of identification" as the mail-in/absentee voter's driver's license number, last four digits of their Social Security number, or a specifically approved form of identification. 25 P.S. § 2602(z.5)(3)(i)-(iv).[15] The only other "verification" the election official must conduct is to determine whether "the information contained in the [Voter's file] ... verifies his right to vote."

15 The Election Code's definition of "proof of identification" in full provides:

> The words "proof of identification" shall mean ... For a qualified absentee elector ... or a qualified mail-in elector ...:

> i. in the case of an elector who has been issued a current and valid driver's license, the elector's driver's license number;
> ii. in the case of an elector who has not been issued a current and valid driver's license, the last four digits of the elector's Social Security number;
> iii. in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1) [*i.e.*, "a valid-without-photo driver's license or a valid-without-photo identification card issued by the Department of Transportation"]; or
> iv. in the case of an elector who has not been issued a current and valid driver's license or Social Security number, a copy of a document that satisfies paragraph (2) [*i.e.*, "a document that shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register; shows a photograph of the individual to whom the document was issued; includes an expiration date and is not expired, except (A) ... or (B) ...; and was issued by" the federal, state, or municipal government, or an "accredited Pennsylvania public or private institution of higher learning [or] "a Pennsylvania are facility."].
>
> 25 P.S. § 2602(z.5)(3).

***55** Nowhere does this provision require the election official to compare and verify the authenticity of the elector's signature. In fact, the word "signature" is absent from the provision. It is true that the elector must fill out and sign the declaration included on the ballot. 25 P.S. §§ 3146.6(a), 3150.16(a). However, while section 3146.8(g)(3) instructs the election official to "examine the declaration ... and compare the information thereon with that contained in the [Voter's file]," the provision clarifies that this is so the election official can be "satisfied that the declaration is sufficient." 25 P.S. § 3146.8(g)(3). In other words, the election official must be "satisfied" that the declaration is "fill[ed] out, date[d] and sign[ed]," as required by sections 3150.16(a) and 3146.6(a) of the Election Code. Notably absent is any instruction to verify the signature and set aside the ballot if the election official believes the signature to be non-genuine. There is an obvious difference between checking to see if a signature was provided at all, and checking to see if the provided signature is sufficiently authentic. Only the former is referred to in section 3146.8(g)(3).

Second, beyond the plain language of the statute, other canons of construction compel the Court's interpretation. When interpreting statutes passed by the General Assembly, Pennsylvania law instructs courts to look at other aspects of the statute for context. *See* 1 Pa. C.S. § 1921(c)(5) ("When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering ... other statutes upon the same or similar subjects."); *O'Rourke v. Commonwealth*, 566 Pa. 161, 778 A.2d 1194, 1201 (2001) ("The cardinal rule of all statutory construction is to ascertain and effectuate the intent of the Legislature. To accomplish that goal, we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear." (citation omitted)).

Context here is important because the General Assembly mandated signature comparison for in-person voting elsewhere in the Election Code—thus evidencing its intention not to require such comparison for mail-in ballots. *See Fonner v. Shandon, Inc.*, 555 Pa. 370, 724 A.2d 903, 907 (1999) ("[W]here a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent.") (citation omitted).

In addressing in-person voting, the General Assembly explicitly instructs that the election official shall, after receiving the in-person elector's voter certificate, immediately "***compare the elector's signature*** on his voter's certificate with his signature in the district register. If, upon such comparison, the signature upon the voter's certificate appears to be genuine, the elector who has signed the certificate shall, if otherwise qualified, be permitted to vote: Provided, That ***if the signature on the voter's certificate, as compared with the signature as recorded in the district register, shall not be deemed authentic*** by any of the election officers, such elector shall not be denied the right to vote for that reason, but shall be considered challenged as to identity and required to [cure the deficiency]." 25 P.S. § 3050(a.3)(2) (emphasis added).

Elsewhere, the General Assembly also explicitly accounts for signature comparison of in-person voters: "[I]f it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, ***the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, shall count the ballot*** if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election. ... [But a] provisional ballot shall not be counted if ... the signature[s] required ... are either not genuine or are not executed by the same individual ..." 25 P.S. §

3050(a.4)(5)(i)-(ii) (emphasis added); *see also* 25 P.S. § 2936 ("[When reviewing nomination papers], the Secretary of the Commonwealth or the county board of elections, although not hereby required so to do, ***may question the genuineness of any signature or signatures appearing thereon***, and if he or it shall thereupon find that any such signature or signatures are not genuine, such signature or signatures shall be disregarded[.]" (emphasis added)).

***56** Clearly then, the General Assembly, in enacting the Election Code, knew that it could impose a signature-comparison requirement that requires an analysis to determine whether a signature is "genuine." And when that was its intent, the General Assembly explicitly and unequivocally imposed that requirement. It is thus telling, from a statutory construction standpoint, that no such explicit requirement is imposed for returned mail-in or absentee ballots. Indeed, the General Assembly is aware—and in fact, requires—that a voter must sign their application for an absentee or mail-in ballot, and must sign the declaration on their returned ballot. 25 P.S. §§ 3146.2(d) (absentee-ballot application), 3150.12(c) (mail-in-ballot application), 3146.6(a) (absentee-voter declaration), 3150.16(a) (mail-in voter declaration). Despite this, the General Assembly did not mention a signature-comparison requirement for returned absentee and mail-in ballots.

The Court concludes from this context that this is because the General Assembly did not intend for such a requirement. *See, e.g.*, *Mishoe v. Erie Ins. Co.*, 573 Pa. 267, 824 A.2d 1153, 1155 (2003) ("In arriving at our conclusion that the foregoing language does not provide for the right to a jury trial, we relied on three criteria. First, we put ***substantial emphasis*** on the fact that the PHRA was silent regarding the right to a jury trial. As we explained, 'the General Assembly is well aware of its ability to grant a jury trial in its legislative pronouncements,' and therefore, 'we can presume that the General Assembly's express granting of trial by jury in some enactments means that it did not intend to permit for a jury trial under the PHRA.' " (cleaned up) (emphasis added)); *Holland v. Marcy*, 584 Pa. 195, 883 A.2d 449, 456, n.15 (2005) ("We additionally note that the legislature, in fact, did specify clearly when it intended the choice of one individual to bind others. In every other category addressed by Section 1705(a) other than (a)(5) which addressed uninsured owners, the General Assembly specifically referenced the fact that the decision of the named insured ... binds other household members.... Similar reference to the ability of the uninsured owner's deemed choice to affect the rights of household members is conspicuously missing from Section 1705(a)(5).").

Accordingly, the Court finds that the General Assembly's decision not to expressly refer to signature comparisons for mail-in ballots, when it did so elsewhere, is significant.

Third, this Court is mindful that Pennsylvania's election statutes are to be construed in a manner that does not risk disenfranchising voters. *See, e.g.*, 1 Pa. C.S. § 1922(3) ("In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: ... That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth."); *id.* at § 1921(c)(6) (in interpreting a statute, the court may consider "[t]he consequences of a particular interpretation").

As the Pennsylvania Supreme Court emphasized last month, "[I]t is well-settled that, although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote. Indeed, our goal must be to enfranchise and not to disenfranchise the electorate." *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *9 (cleaned up); *see also id.* ("[A]lthough both Respondent and the Caucus offer a reasonable interpretation of Section 3150.16(a) as it operates within the Election Code, their interpretation restricts voters' rights, as opposed to the reasonable interpretation tendered by Petitioner and the Secretary. The law, therefore, militates in favor of this Court construing the Election Code in a manner consistent with the view of Petitioner and the Secretary, as this construction of the Code favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate.").

***57** Here, imposing a signature-comparison requirement as to mail-in and absentee ballots runs the risk of restricting voters' rights. This is so because election officials, unstudied and untested in signature verification, would have to subjectively analyze and compare signatures, which as discussed in greater detail below, is potentially problematic.[16] [ECF 549-2, p. 19, ¶ 68]; [ECF 549-9, p. 20, ¶ 64]. And perhaps more importantly, even assuming an adequate, universal standard is implemented, mail-in and absentee voters whose signatures were "rejected" would, unlike in-person voters, be unable to cure the purported error. *See* 25 P.S. § 3146.8(a) (stating that in-person and absentee ballots "shall [be safely kept] in sealed or locked containers until they are to be canvassed by the county board of

elections," which § 3146.8(g)(1.1)-(2) states is no earlier than election day); *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *20 ("[A]lthough the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the 'notice and opportunity to cure' procedure sought by Petitioner. To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature."). As discussed in more detail below, unlike in-person voters, whose signatures are verified in their presence, mail-in and absentee voters' signatures would be verified at a later date outside the presence of the voter. *See generally* 25 P.S. § 3146.8(a), (g) (requiring mail-in and absentee ballots to be kept secured in a sealed container until Election Day). Unbeknownst to the voter, then, and without an opportunity to remedy the purported error, these mail-in and absentee voters may not have their votes counted. Based on this risk of disenfranchisement, which the Court must consider in interpreting the statute, the Court cannot conclude that this was the General Assembly's intention.

16 While election officials must engage in signature comparison for in-person voters, that requirement is explicitly required by the Election Code, unlike for mail-in ballots. 25 P.S. § 3050(a.3)(2). And as discussed below, in-person voters, unlike mail-in voters, are immediately notified if their signatures are deficient.

The Court is not persuaded by Plaintiffs' arguments to the contrary.

Plaintiffs argue that section 3146.8(g)(5)-(7) provides a voter, whose ballot-signature was rejected, notice and an opportunity to cure the signature deficiency. [ECF 509, pp. 13, 18, 50]. That section, however, refers to when a person raises a specific challenge to a specific ballot or application on the grounds that the elector is not a "qualified elector." 25 P.S. § 3146.8(g)(4) (stating that mail-in and absentee ballots shall be counted unless they were challenged under §§ 3146.2b or 3150.12b, which allow challenges on the grounds that the elector applying for a mail-in or absentee ballot wasn't qualified). Thus, the "challenges" referenced in § 3146.8(g)(5)-(7) refer to a voter's qualifications to vote, not a signature verification.

Plaintiffs similarly argue that section 3146.8(h) provides mail-in voters notice and opportunity to cure signature deficiencies. [ECF 552, p. 60]. But that section relates to "those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified." 25 P.S. § 3146.8(h). As discussed above, "proof of identification" is a defined term, and includes the voter's driver's license number, last four digits of their Social Security number, or a specifically approved form of identification. 25 P.S. § 2602(z.5)(3)(i)-(iv). Not included is the voter's signature.[17]

17 Plaintiffs also argue that signature comparison for mail-in and absentee ballots is supported by historical case law. [ECF 552, pp. 58-59]. Plaintiffs cite to two cases from the 1960s that the Court of Common Pleas decided. [*Id.*]. The first, *Appeal of Fogleman*, concluded that under the then-applicable election law, an absentee voter had to sign a declaration to show that he was a proper resident who had not already voted in that election. 36 Pa. D. & C.2d 426, 427 (Pa. Ct. Comm. Pl. 1964). Regarding the voter's signature, the court simply stated, "[i]f the elector fails or refuses to attach his or her signature, then such elector has not completed the declaration as required by law of all voters." *Id.* Thus, no signature comparison or verification was implicated there; rather, the court simply stated that the declaration must be signed (*i.e.*, completed). The second case Plaintiffs cite, *In re Canvass of Absentee Ballots of Gen. Election* [ECF 552, pp. 58-59], arose from individual, post-election challenges to 46 individual absentee ballots. 39 Pa. D. & C.2d 429, 430 (Pa. Ct. Comm. Pl. 1965). Thus, a universal and mandatory signature-comparison requirement was not at issue there, unlike what Plaintiffs contest here. This Court finds neither case persuasive.

***58** At bottom, Plaintiffs request this Court to impose a requirement—signature comparison—that the General Assembly chose not to impose. Section 3146.8(g)(3) does not mention or require signature comparison. The Court will not write it into the statute.

For the same reasons that the Election Code does not impose a signature-comparison requirement for mail-in and absentee ballots, the Election Code does not impose a signature-comparison requirement for mail-in and absentee ballot ***applications.*** While the General Assembly imposed a requirement that the application be signed, there is no mention of a requirement that the signature be verified, much less that the application be rejected based solely on such verification. 25 P.S. §§ 3146.2(d) (absentee-ballot application), 3150.12(c) (mail-in-ballot application). Again, finding no explicit instructions for signature comparison here (unlike elsewhere in the Code), the Court concludes that

the General Assembly chose not to include a signature-comparison requirement for ballot applications.

The Court again finds Plaintiffs' arguments to the contrary unavailing. Plaintiffs argue that "there is no other proof of identification required to be submitted with the ballot applications," and thus, a signature comparison must be required. [ECF 509, p. 16].

But the Election Code expressly requires the applicant to include several pieces of identifying information, including their name, mailing address, and date of birth. 25 P.S. §§ 3146.2(b), 3150.12(b). And after receiving the applicant's application, the election official must "verify[ ] the proof of identification [a defined term as discussed above] and compar[e] the information provided on the application with the information contained on the applicant's permanent registration card."[18] *Id.* at §§ 3146.2b(c), 3150.12b(a). Thus, contrary to Plaintiffs' argument, the General Assembly provided for certain methods of identification as to ballot applications. Signature verification isn't one of them.

18 This identifying information on a ballot application includes much of the same information expressly listed for what a voter must provide in initially registering to vote. 25 Pa. C.S.A. § 1327(a) (stating that the "official voter registration application" shall request the applicant's: full name, address of residence (and mailing address if different), and date of birth).

For these reasons, the Court concludes that the Election Code does not impose a signature-comparison requirement for absentee and mail-in ballots and applications. As such, the Secretary's September 11, 2020, and September 28, 2020, guidance is consistent with the Election Code. Plaintiffs' claims of vote dilution based on this guidance will therefore be dismissed.

B. The lack of a signature comparison does not violate substantive due process.

In addition to alleging that the Secretary's guidance violates the Election Code, Plaintiffs appear to also argue that their right to vote is unconstitutionally burdened and diluted due to a risk of fraud. That is, regardless of what the Election Code requires, Plaintiffs assert that absent signature comparison, mail-in and absentee ballots will be prone to fraud, thereby diluting other lawful ballots. [ECF 509, pp. 45-50; 504-19, pp. 10-15]. Plaintiffs argue that this significantly burdens their fundamental right to vote, resulting in a due-process violation, and thus strict scrutiny applies. The Court disagrees.

***59** As discussed above in the context of Plaintiffs' drop-box claim, Plaintiffs' claim here simply does not rise to the high level for a substantive due process claim. To violate substantive due process in the voting-rights context, the infringements are much more severe. Only in extraordinary circumstances will there be "patent and fundamental unfairness" that causes a constitutional harm. *See Bonas v. Town of North Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001); *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005).

Here, Plaintiffs' signature-comparison claim does not meet this high standard. This isn't a situation of malapportionment, disenfranchisement, or intentional discrimination. And the risk of voter fraud generally without signature comparison —as a matter of fact and law—does not rise to "patent and fundamental unfairness."

Indeed, as discussed above, Plaintiffs' evidence of potential voter fraud here is insufficient to establish "patent and fundamental unfairness." In their summary-judgment brief, Plaintiffs argue that "the Secretary's September 2020 guidance memos promote voter fraud." [ECF 509, p. 48]. Plaintiffs then offer a hypothetical where a parent signs a ballot application on their child's behalf because the child is out-of-state. [ECF 509, p. 48]. Plaintiffs assert that without signature comparisons, such "fraud" could proceed unchecked. [*Id.*]. Plaintiffs continue, arguing that the "fraud" would "snowball," so that "spouses, neighbors, acquaintances, strangers, and others" were signing applications and ballots on others' behalf. [*Id.* at pp. 48-49]. To prevent such fraud, Plaintiffs' expert, Mr. Riddlemoser, asserts that signature comparison is needed. [ECF 504-19, p. 10 ("Not only does enforcing the Election Code's requirement of a completed and signed declaration ensure uniformity, which increases voter confidence, it also functions to reduce fraud possibilities by allowing signature verification.")].

Mr. Riddlemoser first highlights that in Philadelphia in the primary, ballots were counted "that lacked a completed declaration." [*Id.* at p. 11]. Mr. Riddlemoser further opines that the September 11, 2020, guidance and September 28, 2020, guidance, in instructing that signature comparison is not required for mail-in and absentee ballots and applications, "encourage[s], rather than prevent[s], voter fraud." [*Id.* at pp. 12-13]. Mr. Riddlemoser also notes that signature comparison

is "the most common method" to verify ballots and that the Secretary's guidance "leave the absentee/mail-in ballots subject to the potential for unfettered fraud." [*Id.* at p. 14]. He concludes that the guidance "invites the dilution of legitimately cast votes." [*Id.*].

Based on this evidentiary record, construed in Plaintiffs' favor, the Court cannot conclude that there exists "patent and fundamental unfairness." Rather, Plaintiffs present only the possibility and potential for voter fraud. In their briefing, Plaintiffs relied on hypotheticals, rather than actual events. [ECF 509, p. 48]. Mr. Riddlemoser admits that failing to verify signatures only creates "the potential" for fraud and "invites" vote dilution. [ECF 504-19, pp. 14, 15]. Even assuming an absence of signature comparison does indeed invite the potential for fraud, the nondiscriminatory, uniform practice and guidance does not give rise to "patent and fundamental unfairness" simply because of a "potential" for fraud. Plaintiffs have not presented evidence to establish a sufficient burden on their constitutional right to vote.

***60** Indeed, even if the Court assumed some "forged" applications or ballots were approved or counted, this is insufficient to establish substantial, widespread fraud that undermines the electoral process. Rather, limited instances of "forged" ballots—which according to Plaintiffs' definition, includes an individual signing for their spouse or child—amount to what the law refers to as "garden variety" disputes of limited harm. As has long been understood, federal courts should not intervene in such "garden variety" disputes. *Hutchinson*, 797 F.2d at 1283 ("[C]ourts have uniformly declined to endorse action under § 1983 with respect to garden variety election irregularities.") (cleaned up); *Yoshina*, 140 F.3d at 1226 ("In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election." (collecting cases)); *Curry v. Baker*, 802 F.2d 1302, 1314-15 (11th Cir. 1986) ("[I]f the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots." (cleaned up)).

To be clear, the Court does not take Plaintiffs' allegations and evidence lightly. Election fraud is serious and disruptive. And Plaintiffs could be right that the safer course would be to mandate signature comparison for all ballots. But what Plaintiffs essentially complain of here is whether the procedures employed by the Commonwealth are sufficient to prevent that fraud. That is a decision left to the General Assembly, not to the meddling of a federal judge. *Crawford*, 553 U.S. at 208, 128 S.Ct. 1610 (Scalia, J. concurring) ("It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class."). *Griffin*, 385 F.3d at 1131-32 ("[S]triking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.").

C. Plaintiffs' federal equal-protection claims based on signature comparison fail.

Plaintiffs present two federal equal-protection claims. The Court will address each in turn.

1. County differences over signature comparison do not violate federal equal-protection rights.

Plaintiffs' first federal equal-protection claim is based on some county boards of elections intending to verify the signatures on mail-in and absentee ballots and applications, while others do not intend to do so. To that end, Plaintiffs have presented evidence that some, but not all, counties do intend to verify signatures. *E.g.*, [ECF 504-1].[19] According to Plaintiffs, this arbitrary and differential treatment of mail-in and absentee ballots among counties—purportedly caused by the Secretary's September 11, 2020, and September 28, 2020, guidance—violates the Equal-Protection Clause because voters will be treated differently simply because of the county in which they reside. The Court, however, finds no equal-protection violation in this context.

19 The counties that intend to compare and verify signatures in the upcoming election include at least the following counties: Cambria, Elk, Franklin, Juniata, Mifflin, Sullivan, Susquehanna, and Wyoming. [ECF 504-1].

The Secretary's guidance about which Plaintiffs complain is uniform and nondiscriminatory. It was issued to all counties and applies equally to all counties, and by extension, voters. Because the uniform, nondiscriminatory guidance is rational, it is sound under the Equal-Protection Clause. *See Gamza*, 619 F.2d at 453 (5th Cir. 1980) ("We must, therefore, recognize a distinction between state laws and

patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause.") (citation omitted). Indeed, the guidance merely instructs counties to abide by the Election Code—an instruction to follow the law is certainly rational and related to an obviously rational government interest.

61** In fact, if there is any unequal application now, it is caused by those counties that are ***not following the guidance and are going above and beyond the Election Code to impose a signature-comparison requirement. That claim, though, is not before the Court, as Plaintiffs here do not assert that imposing a signature-comparison requirement violates the Constitution (they allege the opposite).

In any event, to the extent there was uncertainty before, this decision informs the counties of the current state of the law as it relates to signature comparison. If any county still imposes a signature-comparison requirement in order to disallow ballots, it does so without support from the Secretary's guidance or the Election Code. Further, counties that impose this signature-comparison requirement to reject ballots may be creating a different potential constitutional claim for voters whose ballots are rejected. *Boockvar*, ––– A.3d at ––––, 2020 WL 5554644, at *34, n.16 (Wecht, J. concurring) (noting that courts around the country have found due process issues with signature-comparison requirements; and collecting cases).

For these reasons, Plaintiffs' equal-protection claim falls short.

2. Different treatment between in-person ballots and mail-in ballots also does not violate federal equal-protection rights.

Plaintiffs also assert a second federal equal-protection claim on the grounds that the Election Code, by not requiring signature comparison for mail-in and absentee ballots, treats such ballots differently than in-person ballots (which require signature comparisons). Plaintiffs argue that this is an unconstitutionally arbitrary and unequal treatment. The Court disagrees.

It is well-settled that states may employ in-person voting, absentee voting, and mail-in voting and each method need not be implemented in exactly the same way. *See Hendon*, 710 F.2d at 181 ("A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state.")

"Absentee voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures." *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) (citations omitted). It is an "obvious fact that absentee voting is an inherently different procedure from in-person voting." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 830-31 (S.D. Ind. 2006). Because in-person voting is "inherently different" from mail-in and absentee voting, the procedures for each need not be the same. *See, e.g.*, *Santillanes*, 546 F.3d at 1320-21 ("[B]ecause there are clear differences between the two types of voting procedures, the law's distinction is proper."); *Rokita*, 458 F. Supp. 2d at 831 ("[I]t is axiomatic that a state which allows for both in-person and absentee voting must therefore apply different requirements to these two groups of voters."); *Billups*, 439 F. Supp. 2d at 1356-57 ("[A]bsentee voting and in-person voting are inherently different processes, and both processes use different standards, practices, and procedures.").

Plaintiffs argue that while absentee and mail-in voting "is a fundamentally different process from in-person voting," Defendants have "no justification in this instance to create such an arbitrary and disparate rule between absentee/mail-in voters and in-person voters." [ECF 509, p. 51]. Not so.

***62** Because of the "inherent" differences between in-person voting and mail-in and absentee voting, Pennsylvania's requirement for signature comparison for in-person ballots, but not mail-in and absentee ballots, is not arbitrary. By way of example, Secretary Boockvar articulated several valid reasons why Pennsylvania implements different verification procedures for mail-in and absentee voters versus in-person voters. [ECF 504-12; ECF 549-2].

In her deposition, Secretary Boockvar explained that for in-person voters, the only possible verification is signature comparison and verification. [ECF 504-12, 55:19-56:19]. This is because, unlike mail-in and absentee voters who must apply for a ballot, in-person voters may simply show up at the polls on Election Day and vote. In contrast, for mail-in and absentee voters, there are several verification steps

implemented before the voter's mail-in/absentee ballot is counted, such as checking their application and their drivers' license number or social security number. [*Id.* at 56:8-19]. Thus, counties don't need to resort to a signature comparison to identify and verify the mail-in or absentee voter.

This is important, as Defendants and Intervenors present valid concerns about the uniformity and equality of signature comparisons, in part, due to the technical nature of signature analysis, the subjective underpinnings of signature analysis, and the variety of reasons that signatures can naturally change over time. [ECF 549-2, pp. 19-20, ¶ 68; ECF 549-9, p. 20, ¶¶ 63-64]. Such factors can reasonably justify not requiring a signature comparison when the elector is not physically present.

For example, Secretary Boockvar notes the concern with non-handwriting-expert election officials comparing signatures, without uniform standards. [ECF 549-2, pp. 19-20, ¶ 68]. She also notes that people's signatures can change over time, due to natural and unavoidable occurrences, like injuries, arthritis, or the simple passage of time. [*Id.*]. Such reasons are valid and reasonable. *See Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *34 (Wecht, J. concurring) ("Signature comparison is a process fraught with the risk of error and inconsistent application, especially when conducted by lay people.").

Secretary Boockvar further asserts that signature comparison is justified for in-person voting, but not mail-in or absentee voting, because the in-person voter is notified of his or her signature deficiency, and afforded an opportunity to cure. [ECF 549-2, pp. 19-20, ¶¶ 66-68 (explaining that in-person voters can be immediately notified of the signature deficiency, but mail-in/absentee voters cannot)]. Secretary Boockvar's justifications are consistent with the Election Code's framework.

When a voter votes in person, he or she signs the voter's certificate, and the election official immediately, in the voter's presence, verifies the signature. 25 P.S. § 3050(a.3)(1)-(2). If the election official finds the signature to be problematic, the in-person voter is told as such. *Id.* at § 3050(a.3)(2). Notably, however, the in-person voter may still cast a ballot. *Id.* ("[I]f the signature on the voter's certificate ... shall not be deemed authentic by any of the election officers, such elector shall not be denied the right to vote for that reason[.]"). The in-person voter whose signature is questioned must, after casting the ballot, "produce at least one qualified elector of the election district as a witness, who shall make affidavit of his identity or continued residence in the election district." *Id.* at § 3050(d). Thus, the in-person voter whose signature is not verified is immediately notified, is still allowed to cast a ballot, and is given the opportunity to remedy the signature-deficiency.

***63** In contrast, a voter who casts a mail-in or absentee ballot cannot be afforded this opportunity. Absentee and mail-in ballots are kept in "sealed or locked containers" until they are "canvassed by the county board of elections." 25 P.S. § 3146.8(a). The pre-canvassing and canvassing cannot begin until Election Day. *Id.* at § 3146.8(g)(1.1)-(2). As such, the absentee and mail-in ballots cannot be verified until Election Day, regardless of when the voter mails the ballot. Further, even if there were sufficient time, a voter cannot cure these types of deficiencies on their mail-in or absentee ballot. *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *20 ("[A]lthough the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the "notice and opportunity to cure" procedure sought by Petitioner.").

Therefore, if mail-in and absentee ballots were subject to signature comparison, an election official—who is unstudied in the technical aspects of signature comparison—could deem a voter's signature problematic and not count the ballot, which would effectively disenfranchise that voter. Unlike the in-person voter, the mail-in or absentee voter may not know that his or her signature was deemed inauthentic, and thus may be unable to promptly cure the deficiency even if he or she were aware.

Accordingly, the Court concludes that the inherent differences and opportunities afforded to in-person voters compared to mail-in and absentee voters provides sufficient reason to treat such voters differently regarding signature comparison. The Court concludes that the lack of signature comparison for mail-in and absentee ballots is neither arbitrary, nor burdens Plaintiffs' equal-protection rights.

For these reasons, the Court will dismiss Plaintiffs' federal equal-protection claims related to signature comparison.

3. The Election Code provisions related to signature comparison satisfy *Anderson*-*Burdick*.

Finally, even assuming the Election Code's absence of a signature-comparison requirement imposes some burden

on Plaintiffs' constitutional rights, Plaintiffs' constitutional claims still fail.

As discussed above with respect to Defendants' drop-box implementation, *Anderson-Burdick* does not apply neatly to this claim either. This is because Plaintiffs aren't challenging a specific regulation affecting their right to vote, but are instead challenging the ***lack*** of a restriction on someone else's right to vote. This makes both the burden difficult to assess and also the state's interests in ***not*** doing something more abstract. As such, the Court finds that the proper application of the *Anderson-Burdick* framework here includes weighing the burden involving Plaintiffs' risk of vote dilution against the state's interests and overall plan in preventing against voter fraud, including with respect to forged mail-in ballots.

Weighing these considerations compels a conclusion that there is no constitutional violation here. With respect to any burden on Plaintiffs' right to vote, that burden is slight, at best. A failure to engage in a signature comparison may, crediting Plaintiffs' evidence, increase the risk of voter fraud. But even then, this remains a largely speculative concern. This burden too is lessened by the numerous other regulations imposed by the Election Code, including the detailed verification procedure as to the information on mail-in ballots (discussed above), and the deterrence furthered by criminal sanctions for those engaging in such voter fraud.

Against these burdens, the Commonwealth has precise and weighty interests in verifying ballot applications and ballots in an appropriate manner to ensure that they are accurate. As discussed above, the Commonwealth determined that the risk of disenfranchising mail-in and absentee voters, did not justify signature comparison for those voters. [ECF 549-2, pp. 19-20, ¶¶ 66-69]. Unlike for in-person voters, there are other means of identifying and verifying mail-in and absentee voters, such as having to specifically apply for a mail-in or absentee ballot and provide various categories of identifying information. [ECF 504-12, 55:19-56:19]; 25 P.S. §§ 3146.2(b), 3150.12(b). And ultimately, due to the slight burden imposed on Plaintiffs, Pennsylvania's regulatory interests in a uniform election pursuant to established procedures is sufficient to withstand scrutiny. *Timmons*, 520 U.S. at 358, 117 S.Ct. 1364.

***64** The General Assembly opted not to require signature comparisons for mail-in and absentee ballots and applications. And as previously discussed, absent extraordinary reasons to, the Court is not to second-guess the legislature.

IV. Defendants and Intervenors are entitled to summary judgment on Plaintiffs' as-applied, federal constitutional challenge to the county-residency requirement for poll watchers.

Plaintiffs next take exception with the provision of the Election Code that restricts a registered voter from serving as a poll watcher outside the county of his or her residence. [ECF 461, ¶ 217].

Plaintiffs argue that "[a]s applied to the 2020 General Election, during the midst of the COVID-19 pandemic, Pennsylvania's residency requirement for watchers violates equal protection." [ECF 509, p. 58]. That's because, according to Plaintiffs, the "current pandemic severely challenges the ability of parties to staff watchers[.]" [*Id.* at p. 60]. And not having enough poll watchers in place "puts into danger the constitutionally-guaranteed right to a transparent and undiluted vote," [*id.* at p. 68], by "fostering an environment that encourages ballot fraud or tampering," [ECF 461, ¶ 256]. As such, Plaintiffs believe that the county residency requirement "is not rationally connected or reasonably related to any interest presented by the Commonwealth." [ECF 509, p. 63].

Defendants and Intervenors have a markedly different view.

As an initial matter, the Democratic Intervenors argue that Plaintiffs "are precluded from relitigating their claim that the Commonwealth lacks a constitutionally recognized basis for imposing a county-residence restriction for poll watchers" based on the doctrine articulated in *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). [ECF 529, p. 16]. That doctrine requires that after a federal court has abstained under *Pullman*, the plaintiff must expressly reserve the right to litigate any federal claims in federal court while litigating state-law issues in state court. *England*, 375 U.S. at 419, 421-22, 84 S.Ct. 461. Defendants and Intervenors contend that Plaintiffs (specifically, the Trump Campaign, the RNC, and the Republican Party) failed to do so in the proceedings before the Pennsylvania Supreme Court.

And if the *England* doctrine doesn't bar this claim, Defendants and Intervenors argue that "Plaintiffs' as-applied challenge simply fails to state a constitutional claim." *See, e.g.*, [ECF 547, p. 65]. They believe that the county-residency

requirement does not infringe on a fundamental right or regulate a suspect classification (such as race, sex, or national origin). [*Id.*]. As a result, the Commonwealth need only provide a rational basis for the requirement, which Defendants and Intervenors believe the Commonwealth has done. [*Id.*].

After carefully reviewing the record and considering the parties' arguments and evidence, the Court finds that the *England* doctrine does not bar Plaintiffs' ability to bring this claim. Even so, after fully crediting Plaintiffs' evidence, the Court agrees with Defendants and Intervenors that Plaintiffs' as-applied challenge fails on the merits.

A. The *England* doctrine does not bar Plaintiffs' federal challenge to the county-residency requirement.

***65** In *England*, the Supreme Court established that after a federal court abstains under *Pullman*, "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then ... he has elected to forgo his right to return to the District Court." 375 U.S. at 419, 84 S.Ct. 461. To reserve those rights, a plaintiff forced into state court by way of abstention must inform the state court that he is exposing the federal claims there only to provide the proper context for considering the state-law questions. *Id.* at 421, 84 S.Ct. 461. And that "he intends, should the state court[ ] hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." *Id.* Essentially, in *England*, the Supreme Court created a special doctrine of *res judicata* for *Pullman* abstention cases.

The Democratic Intervenors argue that because none of the three Plaintiffs who participated in the Pennsylvania Supreme Court case as either intervenors or *amici* "reserved the right to relitigate [Plaintiffs' poll-watcher claim] in federal court," they are now "precluded" from doing so. [ECF 529, p. 17]. The Court is not convinced that this doctrine bars Plaintiffs' claim for at least two reasons.

First, in its original abstention decision, the Court noted that "[n]one of Plaintiffs' poll-watching claims directly ask the Court to construe an ambiguous state statute." [ECF 409, p. 24]. Instead, these claims resided in a *Pullman* gray area, because they were only indirectly affected by other unsettled state-law issues. In light of that, the Court finds that the *England* doctrine was not "triggered," such that Plaintiffs needed to reserve their right to return to federal court to litigate the specific as-applied claim at issue here.

Second, even if it were triggered, not all of the Plaintiffs here were parties in the Pennsylvania Supreme Court case, and only one (the Republican Party) was even given intervenor status. But even the Republican Party, acting as an intervenor, did not have an opportunity to develop the record or present evidence relevant to its as-applied challenge. Thus, this claim wasn't "fully litigated" by any of the Plaintiffs, which is a necessary condition for the claim to be barred under the *England* doctrine. *Cf. Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1073 (3d Cir. 1990) (explaining that a litigant "may not relitigate an issue s/he fully and unreservedly litigated in state court").

Thus, Plaintiffs are not precluded by the *England* doctrine from bringing their remaining as applied poll-watcher claim. The Court will now address the claim on the merits.

B. The county-residency requirement, as applied to the facts presented and the upcoming general election, does not violate the U.S. Constitution.

Originally, Plaintiffs raised a facial challenge to the county-residency requirement under 25 P.S. § 2687. That is, Plaintiffs first took the position that there was no conceivable constitutional application of the requirement that an elector be a resident of the county in which he or she seeks to serve. But, as Plaintiffs' concede, that facial challenge is no longer viable in light of the Pennsylvania Supreme Court's recent decision. [ECF 448, p. 10]. As a result, Plaintiffs now focus solely on raising an as-applied challenge to the county-residency requirement.

"[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

At a fundamental level, a "facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case. *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010). By contrast, an "as-applied attack" on a statute "does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *Id.* The distinction between facial and an as-applied attack, then, "goes to the breadth of the remedy employed by the Court, not what must be pleaded

in a complaint." *Citizens United*, 558 U.S. at 331, 130 S.Ct. 876; *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 362 (3d Cir. 2016) ("The distinction between facial and as-applied constitutional challenges, then, is of critical importance in determining the remedy to be provided).

***66** Because the distinction is focused on the available remedies, not the substantive pleading requirements, "[t]he substantive rule of law is the same for both challenges." *Edwards v. D.C.*, 755 F.3d 996, 1001 (D.C. Cir. 2014); *see also Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 509, n.5 (D.C. Cir. 2016) ("Indeed, the substantive rule of law is the same for both as-applied and facial First Amendment challenges.") (cleaned up); *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 608 F.3d 1084, 1096 (9th Cir. 2010) ("The underlying constitutional standard, however, is no different [in an as-applied challenge] th[a]n in a facial challenge.").

"In other words, *how* one must demonstrate the statute's invalidity remains the same for both type of challenges, namely, by showing that a specific rule of law, usually a constitutional rule of law, invalidates the statute, whether in a personal application or to all." *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 228 (2d Cir. 2006), *abrogated on other grounds by Bond v. United States*, 564 U.S. 211, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011).

In determining whether a state election law violates the U.S. Constitution, the Court must "first examine whether the challenged law burdens rights protected by the First and Fourteenth Amendments." *Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 95 F.3d 253, 258 (3d Cir. 1996). "Where the right to vote is not burdened by a state's regulation on the election process, ... the state need only provide a rational basis for the statute." *Cortés*, 218 F. Supp. 3d at 408. The same is true under an equal protection analysis. "If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used." *Obama*, 697 F.3d at 428 (6th Cir. 2012); *see also Biener*, 361 F.3d at 214-15 (applying rational basis where there was no showing of an "infringement on the fundamental right to vote."); *Donatelli*, 2 F.3d at 515 ("A legislative classification that does not affect a suspect category or infringe on a fundamental constitutional right must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (cleaned up)).

But where the law imposes at least some burden on protected rights, the court "must gauge the character and magnitude of the burden on the plaintiff and weigh it against the importance of the interests that the state proffers to justify the burden." *Patriot Party*, 95 F.3d at 258 (citations omitted).

Consistent with the Pennsylvania Supreme Court's recent decision, but now based on a complete record, this Court finds that the county-residency requirement for poll watching does not, as applied to the particular circumstances of this election, burden any of Plaintiffs' fundamental constitutional rights, and so a deferential standard of review should apply. *See Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30. Under a rational-basis review and considering all the relevant evidence before the Court, the county-residency requirement is rational, and thus constitutional. But even if the requirement burdened the right to vote, that burden is slight—and under the *Anderson-Burdick* test, the Commonwealth's interests in a county-specific voting system, viewed in the context of its overall polling-place security measures, outweigh any slight burden imposed by the county-residency restriction.

1. The county-residency requirement neither burdens a fundamental right, including the right to vote, nor discriminates based on a suspect classification.

***67** At the outset, "there is no individual constitutional right to serve as a poll watcher[.]" *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30 (citing *Cortés*, 218 F. Supp. 3d at 408); *see also Dailey v. Hands*, No. 14-423, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015) ("[P]oll watching is not a fundamental right protected by the First Amendment."); *Turner v. Cooper*, 583 F. Supp. 1160, 1162 (N.D. Ill. 1983) ("Plaintiffs have cited no authority ..., nor have we found any, that supports the proposition that [the plaintiff] had a first amendment right to act as a poll watcher.").

"State law, not the Federal Constitution, grants individuals the ability to serve as poll watchers and parties and candidates the authority to select those individuals." *Cortés*, 218 F. Supp. 3d at 414; *see also Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30 (the right to serve as a poll watcher "is conferred by statute"); *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979) ("The number of poll-watchers allowed, the manner of their appointment, their location within the

polling place, the activities permitted and the amount of compensation allowed are all dictated by [25 P.S. § 2687].”). Given the nature of the right, “[i]t is at least arguable that the [Commonwealth of Pennsylvania] could eliminate the position of poll watcher” without offending the constitution. *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364 (S.D.N.Y. 2007). In fact, one neighboring state—West Virginia—has eliminated poll watchers. W. Va. Code Ann. § 3-1-37; W. Va. Code Ann. § 3-1-41.

Nor does the county-residency requirement hinder the “exercise of the franchise.” *Cortés*, 218 F. Supp. 3d at 408. It doesn't in any way limit voters’ “range of choices in the voting booth”—voters can still “cast ballots for whomever they wish[.]” *Id.* And, as Plaintiffs admit, the county-residency requirement doesn't make the actual act of casting a vote any harder. *See* [ECF 524-24, 67:1-6]. Indeed, at least one of the plaintiffs here, Representative Joyce, testified that he was unaware of anyone unable to cast his ballot because of the county-residency requirement for poll watchers [*Id.*].

Finally, Plaintiffs’ claim that Pennsylvania's “poll watching system” denies them “equal access” to the ability to observe polling places in the upcoming election does not, on its own, require the Court to apply anything other than rational-basis scrutiny. [ECF 551, p. 75]. To the extent Plaintiffs are denied equal access (which discussed below, as a matter of evidence, is very much in doubt), it isn't based on their membership in any suspect classification.

For a state law to be subject to strict scrutiny, it must not only make a distinction among groups, but the distinction must be based on inherently suspect classes such as race, gender, alienage, or national origin. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Political parties are not such a suspect class. *Greenville Republican Party*, 824 F. Supp. 2d at 669 (“[T]his court is unfamiliar with, and Plaintiffs have not cited, any authority categorizing political parties as an inherently suspect class.”) Likewise, “[c]ounty of residence is not a suspect classification warranting heightened scrutiny[.]” *Short*, 893 F.3d at 679.

Plaintiffs don't dispute this. [ECF 509, p. 65 (“To be clear, the right at issue here is the right of **candidates** and **political parties** to participate in an election where the process is transparent and open to observation and the right of the **voters** to participate in such election.” (emphasis in original))]. Rather, Plaintiffs’ theory as to how the county-residency requirement burdens the right to vote is based on the same threat of vote dilution by fraud that they have advanced with their other claims. In other words, Plaintiffs’ claim that the county-residency requirement for poll watchers limits the ability to find poll watchers, which, in turn, limits the ability for poll watchers to detect fraud and ballot tampering. [ECF 461, ¶¶ 256-57]. The resulting fraudulent or destroyed ballots cause the dilution of lawfully cast ballots. [ECF 509, pp. 64-68].

***68** Thus, based on this theory, to establish the burden flowing from the county-residency restriction, Plaintiffs must show (1) the county-residency requirement prevents them from recruiting enough registered Republican poll watchers in every county, (2) the absence of these Republican poll watchers creates a material risk of increased fraud and ballot tampering, and (3) this risk of fraud and ballot tampering will dilute the value of honestly cast votes.

There are both factual and legal problems fatal to Plaintiffs’ vote-dilution theory in this context. Factually, Plaintiffs’ evidence, accepted as true, fails to establish that they cannot find enough poll watchers because of the county-residency requirement. But even if they made that factual showing, the inability to find poll watchers still does not burden any recognized constitutional right in a way that would necessitate anything more than deferential review.

2. Plaintiffs’ evidence does not establish any factual predicate for their theory.

Even accepting as true Plaintiffs’ version of events, Plaintiffs have not established that the county-residency requirement is responsible for an inability to find enough poll watchers for at least two reasons.

First, Plaintiffs’ evidence stops short of demonstrating any actual shortfall of desired poll watchers.

For example, in his declaration, James J. Fitzpatrick, the Pennsylvania Director for Election Day Operations for the Trump Campaign, stated only that the “Trump Campaign is ***concerned*** that due to the residency restriction, it will not have enough poll watchers in certain counties.” [ECF 504-2, ¶ 25 (emphasis added)]. Notably, however, Mr. Fitzpatrick, even when specifically asked during his deposition, never identified a single county where the Trump Campaign has ***actually*** tried and failed to recruit a poll watcher because

of the county-residency requirement. *See, e.g.*, [ECF 528-14, 261:21-25] ("Q: Which counties does the Trump campaign or the RNC contend that they will not be able to obtain what you refer to as full coverage of poll watchers for the November 2020 election? A: I'm not sure. I couldn't tell you a list.").

Nor do any of Plaintiffs' other witness declarations establish an actual, inability to recruit poll watchers in any specific county. Representative Reschenthaler stated only that he was "concerned" that he "will not be able to recruit enough volunteers from Greene County to watch the necessary polls in Greene County." [ECF 504-6, ¶ 12].

Representative Kelly stated that he was "likely to have difficulty getting enough poll watchers from within Erie County to watch all polls within that county on election day." [ECF 504-5, ¶ 16]. "Likely difficulty" isn't the same as an "actual inability." That aside, the declaration doesn't provide any basis for Representative Kelly's assessment of this "likely difficulty." Nowhere does he detail the efforts he took (*e.g.*, the outreach he tried, prospective candidates he unsuccessfully recruited, and the like), nor did he explain why those efforts aren't likely to succeed in the future.

The same goes for Representative Thompson's declaration. Representative Thompson stated that during some unspecified prior elections, unidentified parties and campaigns did not "always find enough volunteers to serve as poll watchers in each precinct." [ECF 504-4, ¶ 20]. But this undetailed statement doesn't help Plaintiffs' cause, because it doesn't identify the elections during which this was a problem, the parties and campaigns affected by a lack of poll watchers, or the precincts for which no poll watcher could be found.

***69** Representative Joyce's declaration doesn't even express a "concern" about "likely difficulty" in recruiting poll watchers. He simply stated his belief that "[p]oll watchers play a very important role in terms of protecting the integrity of the election process[.]" [ECF 504-7, ¶ 11]. While he may be right, it has no bearing on whether Plaintiffs can find enough people to play that "very important role."

Indeed, Plaintiffs' prediction that they will "likely" have difficulty finding poll watchers is belied by the uncontested Pennsylvania voter registration statistics for 2019 that they included as an exhibit to their summary-judgment brief. [ECF 504-34]. Those statistics suggest that there is no shortage of registered Republican voters who are qualified to serve as poll watchers. [*Id.*]. Even in the three specific counties in which Plaintiffs warn that "Democratic registered voters outnumber ... their Republican counterparts" (*i.e.*, Philadelphia, Delaware, and Centre), there are still significant numbers of registered Republicans. *See* [ECF 504-34 (Philadelphia – 118,003; Delaware – 156,867; and Centre – 42,903)]. And only a very small percentage of the registered Republicans would be needed to fill all the necessary poll watcher positions in those allegedly problematic counties. *See, e.g.*, *Cortés*, 218 F. Supp. 3d at 410 (noting that, in 2016, the Republican Party "could staff the entirety of the poll watcher allotment in Philadelphia county with just 4.1% of the registered Republicans in the county."). While Plaintiffs argue that these statistics don't show the number of registered Republicans *willing* to serve as a poll watcher, the Court is hard pressed to see, nor do Plaintiffs show, how among the tens—or hundreds—of thousands of registered Republicans in these counties, Plaintiffs are unable to find enough poll workers.[20]

20 Plus, these figures do not even tell the whole story because they do not take into account the hundreds of thousands of voters who are registered to other parties who could also conceivably serve as poll watchers for the Trump Campaign and the candidate Plaintiffs. [504-34]. While that may not be the ideal scenario for Plaintiffs, they concede there's nothing in the Election Code that limits them to recruiting only registered voters from the Republican Party. [ECF 528-14, 267:23-268:1 (Q: And you don't have to be a registered Republican to serve as a poll watcher for the Trump campaign, do you? A: No.)]. To that point, the Trump Campaign utilized at least two Democrats among the poll watchers it registered in the primary. [ECF 528-15, P001648].

Plaintiffs have not presented any evidence that would explain how, despite these numbers, they will have a hard time finding enough poll watchers. In fact, Plaintiffs' own expert, Professor Lockerbie, admits that "the Democratic and Republican parties might be able to meet the relevant criteria and recruit a sufficient population of qualified poll watchers who meet the residency requirements[.]" [ECF 504-20, ¶ 16].

Professor Lockerbie's report makes clear, and Plaintiffs appear to agree, that the county-residency requirement only potentially burdens other, "minor" political parties' ability to recruit enough poll watchers. [ECF 509, p. 61 (citing ECF 504-20, ¶¶ 16-17)]. Regardless, any burden on these third parties is not properly before the Court. They are not parties to this litigation, and so the Court doesn't know their precise identities, whether they have, in fact, experienced any

difficulty in recruiting poll watchers, or, more fundamentally, whether they even want to recruit poll watchers at all.[21]

21 To the extent that Plaintiffs are attempting to bring their claim on behalf of these third parties (which is unclear), they would lack standing to do so. Ordinarily, "a litigant must assert his or her own legal rights and interests and cannot rest a claim of relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The only time a litigant can bring an action on behalf of a third party is when "three important criteria are satisfied." *Id.* "The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interest." *Id.* at 410-11, 111 S.Ct. 1364 (cleaned up). Plaintiffs cannot satisfy the second or third criteria.
Plaintiffs claim that they "have a close relationship with these minor parties such that it will act as an effective advocate for the minor parties." [ECF 551, p. 30]. It is hard to see how Plaintiffs can be said to have a close relationship with rival political parties who are their direct adversaries in the upcoming election.
Plaintiffs also argue that these "minor parties are hindered from protecting their own interests, particularly in this action when there are no minor party intervenors." [*Id.*]. But that doesn't hold water either. Just because these other parties have not asked to intervene, it does not mean they were incapable of intervening or seeking relief elsewhere. Indeed, these parties and their candidates have demonstrated time and again that they can raise their own challenges to election laws when they so desire, including by filing suit in federal district court. *See, e.g.*, *Stein v. Cortés*, 223 F. Supp. 3d 423 (E.D. Pa. 2016) (Green Party Presidential candidate Jill Stein seeking recount); *Libertarian Party of Conn. v. Merrill*, No. 20-467, 2020 WL 3526922 (D. Conn. June 27, 2020) (seeking to enjoin Connecticut's ballot access rules that required minor party candidates to petition their way onto the ballot); *Green Party of Ark. v. Martin*, 649 F.3d 675 (8th Cir. 2011) (challenging Arkansas' ballot access laws).

***70** Additionally, Plaintiffs failed to present evidence that connects the county-residency requirement to their inability to find enough poll watchers. To succeed on their theory Plaintiffs cannot just point to difficulty recruiting poll watchers, they need to also show that "Section 2687(b) is responsible for their purported staffing woes." *Cortés*, 218 F. Supp. 3d at 410. Plaintiffs fail to show this, too.

Plaintiffs argue that the ongoing COVID-19 pandemic greatly reduces the number of people who would be willing to serve as a poll watcher, which further exacerbates the alleged problem caused by the county-residency requirement. [ECF 509, p. 60]. The primary problem with this argument, though, is that Plaintiffs have not presented any evidence to support it. Plaintiffs have not put forward a statement from a single registered voter who says they are unwilling to serve as a poll watcher due to concerns about contracting COVID-19.

Despite this shortcoming, the Court also acknowledges that COVID-19 generally has made it more difficult to do anything in person, and it is entirely plausible that the current pandemic will limit Plaintiffs from recruiting poll watchers to man polling places on election day. But that is likely true for just about every type of election rule and regulation. For example, the effects of the ongoing pandemic coupled with the requirement that the poll watcher be a registered voter (a requirement that unquestionably narrows the pool of potential candidates) would also make it harder to recruit poll watchers. There is no basis to find that the current public-health conditions, standing alone, render the county-residency requirement irrational or unconstitutional.

To bolster their concerns over COVID-19, Plaintiffs point to *Democratic Nat'l Committee v. Bostelmann*, No. 20-249, —— F.Supp.3d ——, 2020 WL 5627186 (W.D. Wis. Sept. 21, 2020), where the court there enjoined Wisconsin's statute that requires that each election official (*i.e.*, poll worker) be an elector of the county in which the municipality is located. That case is distinguishable in at least two important ways.

First, *Bostelmann* concerned poll ***workers***, not poll ***watchers***. *Id.* at ——, 2020 WL 5627186, at *7. The difference between the two is significant. Poll workers are a more fundamental and essential aspect of the voting process. Without poll workers, counties cannot even open polling sites, which creates the possibility that voters will be completely disenfranchised. In fact, in *Bostelmann*, the plaintiffs presented evidence that Milwaukee was only able to open 5 of its normal 180 polling places. *Id.* A failure to provide voters a place to vote is a much more direct and established constitutional harm than the one Plaintiffs allege here.

Second, the plaintiffs in *Bostelmann* actually presented evidence that they were unable to find the poll workers they needed due to the confluence of the COVID-19 pandemic and

the challenged restriction. *Id.* As discussed above, Plaintiffs here have presented no such evidence.

To succeed on summary judgment, Plaintiffs need to move beyond the speculative concerns they offer and into the realm of proven facts. But they haven't done so on two critical fronts —they haven't shown an actual inability to find the necessary poll watchers, or that such an inability is caused by the county-residency requirement. Because Plaintiffs have not pointed to any specific "polling place that Section 2687(b) prevents [them] from staffing with poll watchers," Plaintiffs' theory of burden is doomed at launch. *Cortés*, 218 F. Supp. 3d at 409.

3. Even if Plaintiffs could establish a factual predicate for their theory, it would fail as a matter of law.

71** As the Pennsylvania Supreme Court concluded last month, Plaintiffs' "speculative claim that it is 'difficult' for both parties to fill poll watcher positions in every precinct, ***even if true, is insufficient to transform the Commonwealth's uniform and reasonable regulation requiring that poll watchers be residents of the counties they serve into a non-rational policy choice." *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30 (emphasis added).[22] The fundamental constitutional principles undergirding this finding are sound.

22 The Sierra Club Intervenors argue this should end the analysis. [ECF 542, p. 14 ("Even 'as applied,' Plaintiffs' claim has already been rejected")]. While the Court finds the Pennsylvania Supreme Court's apparent ruling on Plaintiffs' as-applied challenge instructive, it is not outcome determinative. That is because the Pennsylvania Supreme Court did not have the benefit of the full evidentiary record that the Court has here.

Plaintiffs' only alleged burden on the right to vote is that Defendants' lawful imposition of a county-residency requirement on poll watching will result in an increased risk of voter irregularities (*i.e.*, ballot fraud or tampering) that will, in turn, potentially cause voter dilution. While vote dilution is a recognized burden on the right to vote in certain contexts, such as when laws are crafted that structurally devalue one community's or group of people's votes over another's, there is no authority to support a finding of burden based solely on a speculative, future possibility that election irregularities might occur. *See, e.g.*, *Minnesota Voters,* 720 F.3d at 1033 (affirming dismissal of claims "premised on potential harm in the form of vote dilution caused by insufficient pre-election verification of EDRs' voting eligibility and the absence of post-election ballot rescission procedures"); *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 15 (1st Cir. 2020) (rejecting the claim that a ballot witness signature requirement should not be enjoined during a pandemic because it would allegedly increase the risk of voter fraud and put Republican candidates at risk); *Cook Cnty. Rep. Party v. Pritzker*, No. 20-4676, 2020 WL 5573059, at *4 (N.D. Ill. Sept. 17, 2020) (denying a motion to enjoin a law expanding the deadline to cure votes because plaintiffs did not show how voter fraud would dilute the plaintiffs' votes).

Without a recognized burden on the right to vote, Plaintiffs' "argument that the defendants did not present an adequate justification is immaterial." *Green Party of Tennessee v. Hargett*, No. 16-6299, 2017 WL 4011854, at *4 (6th Cir. May 11, 2017). That's because the Court need not apply the *Anderson-Burdick* framework, and its intermediate standards, in this situation. *See Donatelli*, 2 F.3d at 514 & n.10. Instead, just as the Pennsylvania Supreme Court held, the Commonwealth here need only show "that a rational basis exists [for the county-residency requirement] to be upheld. *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30 (citing *Cortes*, 218 F. Supp. 3d at 408); *see also Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 899 (5th Cir. 2012) (applying rational basis review as opposed to the *Anderson-Burdick* balancing test because state election law did not implicate or burden specific constitutional rights); *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1227 (4th Cir. 1995) (concluding that a ballot access law "fails the *Anderson* balancing test only if it also does in fact burden protected rights").

***72** "Under rational-basis review, the challenged classification must be upheld 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Donatelli*, 2 F.3d at 513 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). "This standard of review is a paradigm of judicial restraint." *FCC*, 508 U.S. at 314, 113 S.Ct. 2096. It "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* at 313, 113 S.Ct. 2096. Nor is it the Court's "place to determine whether the [General Assembly's decisions] were the best decisions or even whether they were good ones." *Donatelli*, 2 F.3d at 518.

Applying this deferential standard of review, the Pennsylvania Supreme Court found that given Pennsylvania's "county-based scheme for conducting elections, it is reasonable that the Legislature would require poll watchers,

who serve within the various counties of the state, to be residents of the counties in which they serve." *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30 (citing *Cortés*, 218 F. Supp. 3d at 409). The Court agrees.

There are multiple reasons for this. As Secretary Boockvar advises, "[b]y restricting poll watchers' service to the counties in which they actually reside, the law ensures that poll watchers should have some degree of familiarity with the voters they are observing in a given election district." [ECF 549-2, p. 22, ¶ 78]. In a similar vein, Intervenors' expert, Dr. Barreto, in his report, states that, voters are more likely to be comfortable with poll watchers that "they know and they recognize from their area." [ECF 524-1, ¶40 ("Research in political science suggests that voters are much more comfortable and trusting of the process when they know or are familiar with poll workers who are from their community.")]. When poll watchers come from the community, "there is increased trust in government, faith in elections, and voter turnout[.]" [*Id.*].

At his deposition, Representative Kelly agreed with this idea: "Yeah, I think – again, depending how the districts are established, I think people are probably even more comfortable with people that they – that they know and they recognize from their area." [ECF 524-23, 111:21-25].

Whether requiring poll watchers to be residents of the county in which they will serve is the best or wisest rule is not the issue before the Court. The issue is whether that rule is *reasonable* and rationally advances Pennsylvania's legitimate interests. This Court, like multiple courts before it, finds that it does.

4. Plaintiffs' poll-watcher claim fails under the *Anderson*-*Burdick* framework.

Even if rational-basis review did not apply and Plaintiffs had established a burden on their right to vote, their claim nonetheless fails under the *Anderson*-*Burdick* framework.

Viewing Plaintiffs' evidence in the best possible light, at most, the county-residency requirement for poll watching places only an indirect, ancillary burden on the right to vote through an elevated risk of vote dilution.

Against this slight burden, the Commonwealth has sound interests in imposing a county-residency requirement, including, as noted above, local familiarity with rules, regulations, procedures, and the voters. Beyond this, in assessing the Commonwealth's interest in imposing the county-based restriction, that interest must be viewed in the overall context of the Commonwealth's security measures involving polling places that are designed to prevent against fraud and vote dilution.

As the court in *Cortés* recognized, "while poll watchers may help guard the integrity of the vote, they are not the Election Code's only, or even best, means of doing so." 218 F. Supp. 3d at 404.

***73** Each county has the authority to investigate fraud and report irregularities to the district attorney. 25 P.S. § 2642(i). Elections in each district are conducted by a multimember election board, which is comprised of an election judge, a majority inspector, and a minor inspector. 25 P.S. § 2671. Each voting district may also use two overseers of election, who are appointed from different political parties by the Pennsylvania Courts of Common Pleas, and "carry greater authority than poll watchers." *Cortés*, 218 F. Supp. 3d at 403 (citing 25 P.S. § 2685). "Election overseers have the right to be present with the officers of an election 'within the enclosed space during the entire time the ... election is held." *Id.* "Poll watchers have no such right," they must "remain 'outside the enclosed space' where ballots are counted or voting machines canvassed." *Id.* (citing 25 P.S. § 2687(b)). Election overseers can also challenge any person offering to vote, while poll watchers have no such authority. 25 P.S. § 2687. For these reasons, concerns "over potential voter fraud —whether perpetrated by putative electors or poll workers themselves—appear more effectively addressed by election overseers than poll watchers[.]" *Id.* at 406.

Plaintiffs complain that poll watchers may not be present during the pre-canvass and canvass meetings for absentee and mail-in ballots. But the Election Code provides that "authorized representatives" of each party ***and*** each candidate can attend such canvassing. 25 P.S. § 3146.8(g)(1.1), (2). That means if, for example, 15 Republican candidates appear on ballots within a particular county (between both the state and federal elections), there could be up to 16 "authorized representatives" related to the Republican Party (one for each candidate and one for the party as a whole) present during canvassing. Adding poll watchers to that mix would just be forcing unnecessary cooks into an already crowded kitchen.[23] *See* [ECF 549-2, p. 23, ¶ 83 ("If every certified poll watcher within a county was permitted to attend the pre-canvass

meeting, the elections staff could be overwhelmed by the vast numbers of poll watchers, and the pre-canvassing process could become chaotic and compromised.")].

23 After the briefing on the cross-motions for summary judgment had closed, on October 6, 2020, Secretary Boockvar issued additional guidance, which Plaintiffs then raised with the Court the following day. [ECF 571]. This new guidance confirms that poll watchers cannot be present during the pre-canvassing and canvassing of mail-in ballots. It also makes clear that while the authorized representative can be present, the representative cannot make any challenges to the ballots. The Court finds that this new guidance has minimal relevance to the current disputes at issue here. The scope of duties of a representative is not before the Court. Of sole relevance here is whether this new guidance changes how this Court weighs the burdens and benefits of the county-residency restriction for poll watchers. The Court finds that the representative's inability to challenge mail-in ballots does appear to provide less protection to Plaintiffs; but in the grand election scheme, particularly in light of the role of the election overseers, the Court does not find the new guidance to materially upset the Commonwealth's interests in its overall election-monitoring plan.

***74** Further, Secretary Boockvar testified that Pennsylvania has adopted new voting systems that will provide an additional layer of security. [ECF 524-27, 237:21-238:11]. That is, there will now be a paper trail in the form of verifiable paper ballots that will allow voters to confirm their choice, and the state recently piloted a new program that will help ensure that votes can be properly verified. [*Id.*].

On balance, then, it is clear that to the extent any burden on the right to vote exists, it is minimal. On the other hand, the Commonwealth's interest in a county-specific voting system, including with county-resident poll watchers, is rational and weighty, particularly when viewed in the context of the measures that the Commonwealth has implemented to prevent against election fraud at the polls. As such, under the flexible *Anderson-Burdick* standard, Plaintiffs have failed to establish that the county-residency requirement is unconstitutional.

5. The Court will continue to abstain from deciding where the Election Code permits poll watching to occur.

Plaintiffs also appear to challenge any attempts to limit poll watching to "monitoring only in-person voting at the polling place on Election Day." [ECF 461, ¶ 254]. That is, in their proposed order accompanying their Motion for Summary Judgement, Plaintiffs seek a declaration that they are "permitted to have watchers present at all locations where voters are registering to vote, applying for absentee or mail-in ballots, voting absentee or mail-in ballots, and/or returning or collecting absentee or mail-in ballots, including without limitation any satellite or early voting sites established by any county board of elections." [ECF 503-1, ¶ 3].

Plaintiffs also argue that Secretary Boockvar's October 6, 2020, guidance expressly, and unlawfully, prohibits poll watchers from being present at county election offices, satellite offices, and designated ballot-return sites. [ECF 571].

This challenge, however, is directly related to the unsettled state-law question of whether drop boxes and other satellite locations are "polling places" as envisioned under the Election Code. If they are, then Plaintiffs may be right in that poll watchers must be allowed to be present. However, the Court previously abstained under *Pullman* in addressing this "location" claim due to the unsettled nature of the state-law issues; and it will continue to do so. [ECF 459, p. 5 ("The Court will continue to abstain under *Pullman* as to Plaintiffs' claim pertaining to the notice of drop box locations and, more generally, whether the 'polling place' requirements under the Election Code apply to drop-box locations. As discussed in the Court's prior opinion, this claim involves unsettled issues of state law.")].

Moreover, Plaintiffs have filed a lawsuit in the Court of Common Pleas of Philadelphia to secure access to drop box locations for poll watchers. The state court held that satellite ballot-collection locations, such as drop-box locations, are not "polling places," and therefore poll watchers are not authorized to be present in those places. [ECF 573-1, at p. 12]. The Trump Campaign immediately filed a notice of appeal of that decision. Regardless of what happens on appeal, Plaintiffs appear to be on track to obtain resolution of that claim in state court. [ECF 549-22]. Although this isn't dispositive, it does give the Court comfort that Plaintiffs will be able to seek timely resolution of these issues, which appear to be largely matters of state law. *See Barr v. Galvin*, 626 F.3d 99, 108 n.3 (1st Cir. 2010) ("Though the existence of a pending state court action is sometimes considered as a factor in favor of abstention, the lack of such pending proceedings does not necessarily prevent abstention by a federal court.").

V. The Court will decline to exercise supplemental jurisdiction over Plaintiffs' state-constitutional claims.

***75** In addition to the federal-constitutional claims addressed above, Plaintiffs assert violations of the Pennsylvania Constitution in Counts III, V, VII, and IX of the Second Amended Complaint. Because the Court will be dismissing all federal-constitutional claims in this case, it will decline to exercise supplemental jurisdiction over these state-law claims.

Under 28 U.S.C. § 1367(c)(3), a court "may decline to exercise supplemental jurisdiction over state law claims if it has dismissed all claims over which it has original jurisdiction[.]" *Stone v. Martin*, 720 F. App'x 132, 136 (3d Cir. 2017) (cleaned up). "It 'must decline' to exercise supplemental jurisdiction in such circumstances 'unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for [exercising supplemental jurisdiction].' " *Id.* (quoting *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000) (emphasis in original)).

Courts have specifically applied this principle in cases raising federal and state constitutional challenges to provisions of the state's election code. *See, e.g., Silberberg v. Bd. of Elections of New York*, 272 F. Supp. 3d 454, 480–81 (S.D.N.Y. 2017) ("Having dismissed plaintiffs' First and Fourteenth Amendment claims, the Court declines to exercise supplemental jurisdiction over plaintiffs' state law claims."); *Bishop v. Bartlett*, No. 06-462, 2007 WL 9718438, at *10 (E.D.N.C. Aug. 18, 2007) (declining "to exercise supplemental jurisdiction over the state constitutional claim" following dismissal of all federal claims and recognizing "the limited role of the federal judiciary in matters of state elections" and that North Carolina's administrative, judicial, and political processes provide a better forum for plaintiffs to seek vindication of their state constitutional claim), *aff'd*, 575 F.3d 419 (4th Cir. 2009).

Beyond these usual reasons to decline to exercise supplemental jurisdiction over the state-constitutional claims, there are two additional reasons to do so here.

First, the parties do not meaningfully address the state-constitutional claims in their cross-motions for summary judgment, effectively treating them as coextensive with the federal-constitutional claims here. The Pennsylvania Supreme Court, however, has held that Pennsylvania's "Free and Equal Elections" Clause is not necessarily coextensive with the 14th Amendment. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 812-813 (2018) (referring to the Pennsylvania Free and Equal Elections Clause as employing a "separate and distinct standard" than that under the 14th Amendment to the U.S. Constitution). Given the lack of briefing on this issue and out of deference to the state courts to interpret their own state constitution, the Court declines to exercise supplemental jurisdiction.

Second, several Defendants have asserted a defense of sovereign immunity in this case. That defense does not apply to Plaintiffs' federal-constitutional claims under the *Ex parte Young* doctrine. *See Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 627 (E.D. Pa. 2018) ("Here, the doctrine of *Ex parte Young* applies to Plaintiffs' constitutional claims for prospective injunctive and declaratory relief, and therefore the First and Fourteenth Amendment claims are not barred by the Eleventh Amendment. Secretary Cortés, as an officer of the Pennsylvania Department of State, may be sued in his individual and official capacities 'for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law.' "). But sovereign immunity may apply to the state-law claims, at least those against Secretary Boockvar. The possibility of sovereign immunity potentially applying here counsels in favor of declining supplemental jurisdiction to decide the state-law claims.

***76** As such, all state-constitutional claims will be dismissed without prejudice.

CONCLUSION

For the foregoing reasons, the Court will enter judgment in favor of Defendants and against Plaintiffs on all federal-constitutional claims, decline to exercise supplemental jurisdiction over the remaining state-law claims, and dismiss all claims in this case. Because there is no just reason for delay, the Court will also direct entry of final judgment under Federal Rule of Civil Procedure 54(b). An appropriate order follows.

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on or after Jan. 1, 2007. See also U.S.Ct. of
Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals, Third Circuit.

DONALD J. TRUMP FOR PRESIDENT, INC.; Lawrence Roberts; David John Henry, Appellants

v.

Secretary Commonwealth of PENNSYLVANIA; Allegheny County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Delaware County Board of Elections; Montgomery County Board of Elections; Northampton County Board of Elections; Philadelphia County Board of Elections

No. 20-3371
|
Submitted Under Third Circuit
L.A.R. 34.1(a) on November 25, 2020
|
(Filed: November 27, 2020)

Synopsis

Background: Voters and President's reelection campaign brought action against Secretary of the Commonwealth of Pennsylvania and county boards of elections, seeking to invalidate millions of votes cast by Pennsylvanians in presidential election during COVID-19 pandemic based on allegations that Secretary's authorization of notice-and-cure procedure for procedurally defective mail-in ballots violated the Equal Protection Clause and that poll watchers were impermissibly excluded from canvass. The United States District Court for the Middle District of Pennsylvania, Matthew W. Brann, J., 2020 WL 6821992, granted motion by Secretary and county boards of elections to dismiss. Voters and campaign appealed.

Holdings: The Court of Appeals, Bibas, Circuit Judge, held that:

delay by President's reelection campaign in moving to amend complaint second time was undue;

second amendment of complaint would have been futile;

county-to-county variations in processing votes from election did not show discrimination;

failure of President's reelection campaign to request injunction pending appeal from district court or show that it could not have made that request barred campaign from pursuing that motion on appeal;

campaign likely could not succeed on merits;

campaign likely would not suffer irreparable harm; and

granting relief would not have been equitable.

Affirmed.

On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. No. 4:20-cv-02078), District Judge: Honorable Matthew W. Brann

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Before: SMITH, Chief Judge, and CHAGARES and BIBAS, Circuit Judges

OPINION[*]

[*] This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

BIBAS, Circuit Judge.

***1** Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.

The Trump Presidential Campaign asserts that Pennsylvania's 2020 election was unfair. But as lawyer Rudolph Giuliani stressed, the Campaign "doesn't plead fraud. ... [T]his is not a fraud case." Mot. to Dismiss Hr'g Tr. 118:19–20, 137:18. Instead, it objects that Pennsylvania's Secretary of State and some counties restricted poll watchers and let voters fix technical defects in their mail-in ballots. It offers nothing more.

This case is not about whether those claims are true. Rather, the Campaign appeals on a very narrow ground: whether the District Court abused its discretion in not letting the Campaign amend its complaint a second time. It did not.

Most of the claims in the Second Amended Complaint boil down to issues of state law. But Pennsylvania law is willing

to overlook many technical defects. It favors counting votes as long as there is no fraud. Indeed, the Campaign has already litigated and lost many of these issues in state courts.

The Campaign tries to repackage these state-law claims as unconstitutional discrimination. Yet its allegations are vague and conclusory. It never alleges that anyone treated the Trump campaign or Trump votes worse than it treated the Biden campaign or Biden votes. And federal law does not require poll watchers or specify how they may observe. It also says nothing about curing technical state-law errors in ballots. Each of these defects is fatal, and the proposed Second Amended Complaint does not fix them. So the District Court properly denied leave to amend again.

Nor does the Campaign deserve an injunction to undo Pennsylvania's certification of its votes. The Campaign's claims have no merit. The number of ballots it specifically challenges is far smaller than the roughly 81,000-vote margin of victory. And it never claims fraud or that any votes were cast by illegal voters. Plus, tossing out millions of mail-in ballots would be drastic and unprecedented, disenfranchising a huge swath of the electorate and upsetting all down-ballot races too. That remedy would be grossly disproportionate to the procedural challenges raised. So we deny the motion for an injunction pending appeal.

I. Background

A. Pennsylvania election law

In Pennsylvania, each county runs its own elections. 25 Pa. Stat. § 2641(a). Counties choose and staff polling places. § 2642(b), (d). They buy their own ballot boxes and voting booths and machines. § 2642(c). They even count the votes and post the results. § 2642(k), (*l*). In all this, counties must follow Pennsylvania's Election Code and regulations. But counties can, and do, adopt rules and guidance for election officers and electors. § 2642(f). And they are charged with ensuring that elections are "honestly, efficiently, and uniformly conducted." § 2642(g).

1. *Poll watchers and representatives*. Counties must admit qualified poll "watchers" to observe votes being tallied. 25 Pa. Stat. § 2650(a). Poll watchers must be registered to vote in the county where they will serve. § 2687(b). Each candidate can pick two poll watchers per election district; each political party, three. § 2687(a). The poll watchers remain at the polling place while election officials count in-person ballots. § 2687(b). They can ask to check voting lists. *Id.* And they get to be present when officials open and count all the mail-in ballots. § 3146.8(b). Likewise, candidates' and political parties' "representatives" may be present when absentee and mail-in ballots are inspected, opened, or counted, or when provisional ballots are examined. §§ 2602(a.1), (q.1), 3050(a.4)(4), 3146.8(g)(1.1) & (2); *see also* § 3050(a.4)(12) (defining provisional ballots as those cast by voters whose voter registration cannot be verified right away).

***2** Still, counties have some control over these poll watchers and representatives. The Election Code does not tell counties how they must accommodate them. Counties need only allow them "in the polling place" or "in the room" where ballots are being inspected, opened, or counted. §§ 2687(b), 3050(a.4)(4), 3146.8(g)(1.1) & (2). Counties are expected to set up "an enclosed space" for vote counters at the polling place, and poll watchers "shall remain outside the enclosed space." § 2687(b). So the counties decide where the watchers stand and how close they get to the vote counters.

2. *Mail-in ballots*. For decades, Pennsylvania let only certain people, like members of the military and their families, vote by mail. *See, e.g.*, 25 Pa. Stat. § 3146.1. But last year, as part of a bipartisan election reform, Pennsylvania expanded mail-in voting. Act of Oct. 31, 2019, Pub. L. No. 552, sec. 8, § 1310-D, 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421). Now, any Pennsylvania voter can vote by mail for any reason. *See* 25 Pa. Stat. §§ 2602(t), 3150.11(a).

To vote by mail, a Pennsylvania voter must take several steps. First, he (or she) must ask the State (Commonwealth) or his county for a mail-in ballot. 25 Pa. Stat. § 3150.12(a). To do that, he must submit a signed application with his name, date of birth, address, and other information. § 3150.12(b)–(c). He must also provide a driver's license number, the last four digits of his Social Security number, or the like. §§ 2602(z.5), 3150.12b(a), (c). Once the application is correct and complete, the county will approve it. *See* §§ 3150.12a(a), 3150.12b.

Close to the election, the county will mail the voter a mail-in ballot package. § 3150.15. The package has a ballot and two envelopes. The smaller envelope (also called the secrecy envelope) is stamped "Official Election Ballot." § 3150.14(a). The larger envelope is stamped with the county board of election's name and address and bears a printed voter declaration. *Id.*

Next, the voter fills out the ballot. § 3150.16(a). He then folds the ballot; puts it into the first, smaller secrecy envelope; and seals it. *Id.* After that, he puts the secrecy envelope inside the larger envelope and seals that too. *Id.* He must also "fill out, date and sign the declaration printed" on the outside of the larger envelope. §§ 3150.16(a), 3150.14(b). The declaration for the November 2020 election read thus:

> I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.
>
> [BAR CODE]
>
> Voter, sign or mark here/Votante firme o mar[q]ue aqui
>
> **X**_____
>
> _____
>
> Date of signing (MM/DD/YYYY)/Fechade firme (MM/DD/YYYY)
>
> _____
>
> Voter, print name/Votante, nombre en letra de impreta

In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, Nos. 31–35 EAP & 29 WAP 2020,—— A.3d ——, ——, 2020 WL 6875017, at *4 (Pa. Nov. 23, 2020). Once the voter assembles the ballot packet, he can mail it back or deliver it in person. 25 Pa. Stat. § 3150.16(a).

Not every voter can be expected to follow this process perfectly. Some forget one of the envelopes. Others forget to sign on the dotted line. Some major errors will invalidate a ballot. For instance, counties may not count mail-in ballots that lack secrecy envelopes. *Pa. Dem. Party v. Boockvar*, 238 A.3d 345, 378–80 (Pa. 2020). But the Election Code says nothing about what should happen if a county notices these errors before election day. Some counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors.

B. Facts and procedural history

***3** On appeal from the dismissal of a complaint, we take the factual allegations as true:

1. *Mail-in voting*. For months, Pennsylvanians went to the polls, so to speak. The first batch of mail-in ballots went out to voters in late September. As they trickled back in, election officials noticed that some voters had not followed the rules. Some ballots were not in secrecy envelopes, so those packages were lighter and thinner than complete ballot packages. Others had declarations that voters had not completed. Some counties did not notify voters about these defective ballots. Others, including the counties named in this suit, decided to reach out to these voters to let them cure their mistakes by voting provisionally on Election Day or asking for a replacement ballot.

2. *Election Day*. Though more than two million Pennsylvanians voted by mail, even more voted in person. On Election Day, November 3, the Campaign set up poll watchers at polling places around the Commonwealth. Appellees' election officials kept poll watchers and representatives away from where ballots were opened, counted, and tallied. In Philadelphia, for instance, poll watchers were kept six to twenty-five feet back from officials. In comparison, other, "Republican[-]controlled" counties did give the Campaign's poll watchers and representatives full access. Second Am. Compl. ¶¶ 151, 154.

In all, nearly seven million Pennsylvanians voted, more than a third of them by mail. *Unofficial Returns for the 2020 Presidential Election*, Pa. Dep't of State, https://www.electionreturns.pa.gov/ (last visited Nov. 27, 2020). As of today, former Vice President Biden leads President Trump in Pennsylvania by 81,660 votes. *Id.*

Pennsylvania's counties certified their election results by the November 23 certification deadline. 25 Pa. Stat. § 2642(k). The next morning, the Secretary of State (technically, Secretary of the Commonwealth) certified the vote totals, and the Governor signed the Certificate of Ascertainment and sent it to the U.S. Archivist. *Department of State Certifies Presidential Election Results*, PA Media, https://www.media.pa.gov/Pages/State-details.aspx?newsid=435 (last visited Nov. 27, 2020). The certified margin of victory was 80,555 votes. *Id.*

3. *This lawsuit*. Almost a week after the election, the Campaign (as well as two voters) sued seven Pennsylvania

counties and Secretary of State Kathy Boockvar. It alleged that they had violated the Due Process, Equal Protection, and Electors and Elections Clauses of the U.S. Constitution by taking two basic actions: First, the counties (encouraged by Secretary Boockvar) identified defective mail-in ballots early and told voters how to fix them. Second, they kept poll watchers and representatives from watching officials count all ballots.

So far, the Campaign has filed or tried to file three complaints. The original Complaint, filed November 9, set out six counts (plus a duplicate). After Boockvar and the counties moved to dismiss, on November 15 the Campaign filed a First Amended Complaint as of right, dropping four of the six counts (plus the duplicate), including all the counts relating to poll watchers and representatives. The Campaign sought a preliminary injunction to block certifying the election results. Boockvar and the counties again moved to dismiss. On November 18, the Campaign sought to file a Second Amended Complaint, resurrecting four dropped claims from the original Complaint and adding three more about how Philadelphia had blocked poll watching.

***4** The District Court ended these volleys, denying leave to file the Second Amended Complaint. Instead, it dismissed the First Amended Complaint with prejudice and denied the Campaign's motion for a preliminary injunction as moot. *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, —— F. Supp. 3d ——, 2020 WL 6821992 (M.D. Pa. Nov. 21, 2020). In doing so, it held that the individual voters lacked standing. *Id.* at ——, at *5–6. We commend the District Court for its fast, fair, patient handling of this demanding litigation.

4. *This appeal*. The Campaign filed this appeal on Sunday, November 22, and we granted its motion to expedite. The Campaign filed its brief and another motion November 23; opposing briefs and filings arrived the next day. We are issuing this opinion nonprecedentially so we can rule by November 27.

The Campaign does not challenge the District Court's finding that the voters lacked standing, so we do not consider their claims. On appeal, it seeks only narrow relief: to overturn the District Court's decision not to let it amend its complaint again. We address that claim in Part II. Separately, the Campaign asks us for an injunction to prevent the certified vote totals from taking effect. We address that claim in Part III.

II. The District Court Properly Denied Leave To Amend the Complaint Again

After one amendment, the District Court denied the Campaign's motion to amend the complaint a second time. We review that denial for abuse of discretion. *Premier Comp. Sol., LLC v. UPMC*, 970 F.3d 316, 318–19 (3d Cir. 2020). But on any standard of review, the court got it right.

Courts should grant leave to amend "freely ... when justice so requires." Fed. R. Civ. P. 15(a)(2). In civil-rights cases, that means granting leave unless "amendment would be futile or inequitable." *Vorchheimer v. Phila. Owners Ass'n*, 903 F.3d 100, 113 (3d Cir. 2018); *Cureton v. NCAA*, 252 F.3d 267, 272–73 (3d Cir. 2001) (giving undue delay as an example of inequity). Here, the Campaign's request fails as both inequitable and futile.

A. The Campaign's delay was undue, given its stress on needing to resolve the case by November 23

When the Campaign was before the District Court, it focused its arguments on the need to resolve the case by Pennsylvania's deadline for counties to certify their votes: Monday, November 23. Indeed, all three iterations of the complaint focused their prayers for relief on blocking the certification of the vote tally. The Campaign said it could get no "meaningful remedy" after that date. Br. in Supp. of Mot. for TRO & PI, Dkt. 89-1, at 4.

The Campaign filed its First Amended Complaint on November 15, eight days before the certification deadline. In response to several pending motions to dismiss, it dropped many of the challenged counts from the original Complaint. It did not then move to file a Second Amended Complaint until November 18, when its opposition to the new motions to dismiss was due. And it did not file a brief in support of that motion until Friday, November 20. Certification was three days away.

As the District Court rightly noted, amending that close to the deadline would have delayed resolving the issues. True, delay alone is not enough to bar amendment. *Cureton*, 252 F.3d at 273. But "at some point, the delay will become 'undue,' placing an unwarranted burden on the court." *Id.* (quoting *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984)). The Campaign's motion would have done just that. It would

have mooted the existing motions to dismiss and required new briefing, possibly new oral argument, and a reasoned judicial opinion within seventy-two hours over a weekend. That is too much to ask—especially since the proposed Second Amended Complaint largely repleaded many claims abandoned by the first one. *Cf. Rolo v. City Investing Co. Liquidating Tr.*, 155 F.3d 644, 654–55 (3d Cir. 1998) (affirming denial of leave to amend because the movant sought largely to "replead facts and arguments that could have been pled much earlier").

***5** Having repeatedly stressed the certification deadline, the Campaign cannot now pivot and object that the District Court abused its discretion by holding the Campaign to that very deadline. It did not.

B. Amending the Complaint again would have been futile

The Campaign focuses on critiquing the District Court's discussion of undue delay. Though the court properly rested on that ground, we can affirm on any ground supported by the record. Another ground also supports its denial of leave to amend: it would have been futile.

1. *The Campaign had to plead plausible facts, not just conclusory allegations*. Plaintiffs must do more than allege conclusions. Rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The Second Amended Complaint does not meet *Twombly* and *Iqbal*'s baseline standard of specifics.

To start, note what it does not allege: fraud. Indeed, in oral argument before the District Court, Campaign lawyer Rudolph Giuliani conceded that the Campaign "doesn't plead fraud." Mot. to Dismiss Hr'g Tr. 118:19–20 (Nov. 17, 2020). He reiterated: "If we had alleged fraud, yes, but this is not a fraud case." *Id.* at 137:18.

Though it alleges many conclusions, the Second Amended Complaint is light on facts. Take the nearly identical paragraphs introducing Counts One, Two, Four, and Six: "Democrats who controlled the Defendant County Election Boards engaged in a deliberate scheme of intentional and purposeful discrimination ... by excluding Republican and Trump Campaign observers from the canvassing of the mail ballots in order to conceal their decision not to enforce [certain ballot] requirements." Second Am. Compl. ¶¶167, 193, 222, 252. That is conclusory. So is the claim that, "[u]pon information and belief, a substantial portion of the approximately 1.5 million absentee and mail votes in Defendant Counties should not have been counted." *Id.* ¶¶168, 194, 223, 253. "Upon information and belief" is a lawyerly way of saying that the Campaign does not know that something is a fact but just suspects it or has heard it. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937. Yet the Campaign offers no specific facts to back up these claims.

2. *The Campaign has already litigated and lost most of these issues*. Many of the Second Amended Complaint's claims have already had their day in court. The Campaign cannot use this lawsuit to collaterally attack those prior rulings. On Counts One, Two, Four, and Six, the Campaign has already litigated whether ballots that lack a handwritten name, address, or date on the outer envelope must be disqualified. *See In re: Canvass of Absentee and Mail-in Ballots*, —— A.3d at ——, 2020 WL 6875017, at *1. The Pennsylvania Supreme Court ruled against the Campaign, holding: "[T]he Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged." *Id.* at ——, at *1. That holding undermines the Campaign's suggestions that defective ballots should not have been counted.

***6** Counts One and Two also challenge the requirement that poll watchers be registered electors of the county they wish to observe and that observers be Pennsylvania lawyers. But a federal district court has already held "that the county-residency requirement for poll watching does not, as applied to the particular circumstances of this election, burden any of [the Campaign's] fundamental constitutional rights." *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, —— F. Supp. 3d ——, ——, 2020 WL 5997680, at *66 (W.D. Pa. Oct. 10, 2020). The Campaign never appealed that decision, so it is bound by it.

Count Seven alleges that Philadelphia's Board of Elections violated due process by obstructing poll watchers and representatives. But nothing in the Due Process Clause requires having poll watchers or representatives, let alone watchers from outside a county or less than eighteen feet away

from the nearest table. The Campaign cites no authority for those propositions, and we know of none. (Ditto for notice-and-cure procedures.) And the Campaign litigated and lost that claim under state law too. The Pennsylvania Supreme Court held that the Election Code requires only that poll watchers be in the room, not that they be within any specific distance of the ballots. *In re Canvassing Observation Appeal of: City of Phila. Bd. of Electors*, No. 30 EAP 2020, —— A.3d ——, ——, 2020 WL 6737895, at *8–9 (Pa. Nov. 17, 2020).

The Campaign does not even challenge the dismissal of Counts Three, Five, and Nine, the Electors and Elections Clause counts. It concedes that under our recent decision, it lacks standing to pursue alleged violations of those clauses. *Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, —— F.3d ——, ——, 2020 WL 6686120, at *6–9 (3d Cir. Nov. 13, 2020). Given its concession, we need not consider the issue any more.

The Second Amended Complaint thus boils down to the equal-protection claims in Counts Two, Four, Six, and Eight. They require not violations of state law, but discrimination in applying it. Those claims fail too.

3. *The Campaign never pleads that any defendant treated the Trump and Biden campaigns or votes differently.* A violation of the Equal Protection Clause requires more than variation from county to county. It requires unequal treatment of similarly situated parties. But the Campaign never pleads or alleges that anyone treated it differently from the Biden campaign. Count One alleges that the counties refused to credential the Campaign's poll watchers or kept them behind metal barricades, away from the ballots. It never alleges that other campaigns' poll watchers or representatives were treated differently. Count Two alleges that an unnamed lawyer was able to watch all aspects of voting in York County, while poll watchers in Philadelphia were not. It also makes a claim about one Jared M. Mellott, who was able to poll watch in York County. Counts Four and Six allege that poll watcher George Gallenthin had no issues in Bucks County but was barred from watching in Philadelphia. And Count Eight alleges that Philadelphia officials kept Jeremy Mercer too far away to verify that ballots were properly filled out. None of these counts alleges facts showing improper vote counting. And none alleges facts showing that the Trump campaign was singled out for adverse treatment. The Campaign cites no authority suggesting that an actor discriminates by treating people equally while harboring a partisan motive, and we know of none.

These county-to-county variations do not show discrimination. "[C]ounties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state." *Donald J. Trump for President, Inc.*, —— F. Supp. 3d at ——, 2020 WL 5997680, at *44 (collecting cases). Even when boards of elections "vary ... considerably" in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635–36 (6th Cir. 2016); *see also Wexler v. Anderson*, 452 F.3d 1226, 1231–33 (11th Cir. 2006) (recognizing that equal protection lets different counties use different voting systems).

***7** Nor does *Bush v. Gore* help the Campaign. 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (per curiam). There, the Florida Supreme Court had ratified treating ballots unequally. *Id.* at 107, 121 S.Ct. 525. That was because the principle it set forth, the "intent of the voter," lacked *any* "specific standards to ensure its equal application." *Id.* at 105–06, 121 S.Ct. 525. The lack of any standards at all empowered officials to treat ballots arbitrarily, violating equal protection. *Id.* Here, by contrast, Pennsylvania's Election Code gives counties specific guidelines. To be sure, counties vary in implementing that guidance, but that is normal. Reasonable county-to-county variation is not discrimination. *Bush v. Gore* does not federalize every jot and tittle of state election law.

4. *The relief sought—throwing out millions of votes—is unprecedented*. Finally, the Second Amended Complaint seeks breathtaking relief: barring the Commonwealth from certifying its results or else declaring the election results defective and ordering the Pennsylvania General Assembly, not the voters, to choose Pennsylvania's presidential electors. It cites no authority for this drastic remedy.

The closest the Campaign comes to justifying the relief it seeks is citing *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994). But those facts were a far cry from the ones here. In *Marks*, the district court found that the Stinson campaign had orchestrated "massive absentee ballot fraud, deception, intimidation, harassment and forgery." *Id.* at 887 (quoting district court's tentative findings). It had lied to voters, deceived election officials, and forged ballots. *Id.* at 877. We remanded that case, instructing that "the district court should not direct the certification of a candidate unless it finds, on the basis of record evidence, that the designated candidate would have won the election but for wrongdoing." *Id.* at 889. And

that seemed likely: the Stinson campaign had gotten about 600 net absentee-ballot applications (roughly 1000 minus 400 that were later rejected), more than the 461-vote margin of victory. *Id.* at 876–77.

Here, however, there is no clear evidence of massive absentee-ballot fraud or forgery. On the contrary, at oral argument in the District Court, the Campaign specifically disavowed any claim of fraud. And the margin of victory here is not nearly as close: not 461 votes, but roughly 81,000.

Though district courts should freely give leave to amend, they need not do so when amendment would be futile. Because the Second Amended Complaint would not survive a motion to dismiss, the District Court properly denied leave to file it.

III. No Stay or Injunction Is Warranted

We could stop here. Once we affirm the denial of leave to amend, this case is over. Still, for completeness, we address the Campaign's emergency motion to stay the effect of certification. No stay or injunction is called for.

Though the Campaign styles its motion as seeking a stay or preliminary injunction, what it really wants is an injunction pending appeal. But it neither requested that from the District Court during the appeal nor showed that it could not make that request, as required by Federal Rule of Appellate Procedure 8(a)(2)(A). That failure bars the motion.

Even if we could grant relief, we would not. Injunctions pending appeal, like preliminary injunctions, are "extraordinary remed[ies] never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). For a stay or injunction pending appeal, the movant must show both (1) a "strong" likelihood of success on the merits and (2) irreparable injury absent a stay or injunction. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). The first two factors are "the most critical." *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). After that, we also balance (3) whether a stay or injunction will injure other interested parties (also called the balance of equities) and (4) the public interest. *Hilton*, 481 U.S. at 776, 107 S.Ct. 2113; *In re Revel AC, Inc.*, 802 F.3d 558, 568–71 (3d Cir. 2015). None of the four factors favors taking this extraordinary step.

A. The Campaign has no strong likelihood of success on the merits

***8** As discussed, the Campaign cannot win this lawsuit. It conceded that it is not alleging election fraud. It has already raised and lost most of these state-law issues, and it cannot relitigate them here. It cites no federal authority regulating poll watchers or notice and cure. It alleges no specific discrimination. And it does not contest that it lacks standing under the Elections and Electors Clauses. These claims cannot succeed.

B. The Campaign faces no irreparable harm

The Campaign has not shown that denying relief will injure it. "Upon information and belief," it suspects that many of the 1.5 million mail-in ballots in the challenged counties were improperly counted. Second Am. Compl. ¶¶168, 194, 223, 253. But it challenges no specific ballots. The Campaign alleges only that at most three specific voters cast ballots that were not counted. *Id.* ¶237 (one voter); First Am. Compl. ¶¶15–16, 112 (three). And it never alleges that anyone except a lawful voter cast a vote. Of the seven counties whose notice-and-cure procedures are challenged, four (including the three most populous) represented that they gave notice to only about 6,500 voters who sent in defective ballot packages. Allegheny Cty. Opp. Mot. TRO & PI 7–8, D. Ct. Dkt. No. 193 (Nov. 20, 2020). The Campaign never disputed these numbers or alleged its own. Even if 10,000 voters got notice and cured their defective ballots, and every single one then voted for Biden, that is less than an eighth of the margin of victory.

Without more facts, we will not extrapolate from these modest numbers to postulate that the number of affected ballots comes close to the certified margin of victory of 80,555 votes. Denying relief will not move the needle.

Plus, states are primarily responsible for running federal elections. U.S. Const. art. I, § 4, cl. 1; 3 U.S.C. § 5. Pennsylvania law has detailed mechanisms for disputing election results. 25 Pa. Stat. §§ 3261–3474. Because the Campaign can raise these issues and seek relief through state courts and then the U.S. Supreme Court, any harm may not be irreparable. *Touchston v. McDermott*, 234 F.3d 1130, 1132–33 (11th Cir. 2000) (per curiam) (en banc).

C. The balance of equities opposes disenfranchising voters

Nor would granting relief be equitable. The Campaign has already litigated and lost most of these issues as garden-variety state-law claims. It now tries to turn them into federal constitutional claims but cannot. *See Bognet*, —— F.3d at ——, 2020 WL 6686120, at *11.

Even if it could, it has delayed bringing this suit. For instance, in proposed Count Four, it challenges giving voters notice and letting them cure ballot defects as violating equal protection. The Campaign could have disputed these practices while they were happening or during the canvassing period. Instead, it waited almost a week after Election Day to file its original complaint, almost another week to amend it, and then another three days to amend it again. Its delay is inequitable, and further delay would wreak further inequity.

And the Campaign's charges are selective. Though Pennsylvanians cast 2.6 million mail-in ballots, the Campaign challenges 1.5 million of them. It cherry-picks votes cast in "Democratic-heavy counties" but not "those in Republican-heavy counties." Second Am. Compl. ¶8. Without compelling evidence of massive fraud, not even alleged here, we can hardly grant such lopsided relief.

Granting relief would harm millions of Pennsylvania voters too. The Campaign would have us set aside 1.5 million ballots without even alleging fraud. As the deadline to certify votes has already passed, granting relief would disenfranchise those voters or sidestep the expressed will of the people. Tossing out those ballots could disrupt every down-ballot race as well. There is no allegation of fraud (let alone proof) to justify harming those millions of voters as well as other candidates.

D. The public interest favors counting all lawful voters' votes

***9** Lastly, relief would not serve the public interest. Democracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes.

What is more, throwing out those votes would conflict with Pennsylvania election law. The Pennsylvania Supreme Court has long "liberally construed" its Election Code "to protect voters' right to vote," even when a ballot violates a technical requirement. *Shambach v. Bickhart*, 577 Pa. 384, 845 A.2d 793, 802 (2004). "Technicalities should not be used to make the right of the voter insecure." *Appeal of James*, 377 Pa. 405, 105 A.2d 64, 66 (1954) (internal quotation marks omitted). That court recently reiterated: "[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice." *Pa. Dem. Party*, 238 A.3d at 356. Thus, unless there is evidence of fraud, Pennsylvania law overlooks small ballot glitches and respects the expressed intent of every lawful voter. *In re: Canvass of Absentee and Mail-in Ballots*, 2020 WL 6875017, at *1 (plurality opinion). In our federalist system, we must respect Pennsylvania's approach to running elections. We will not make more of ballot technicalities than Pennsylvania itself does.

* * * * *

Voters, not lawyers, choose the President. Ballots, not briefs, decide elections. The ballots here are governed by Pennsylvania election law. No federal law requires poll watchers or specifies where they must live or how close they may stand when votes are counted. Nor does federal law govern whether to count ballots with minor state-law defects or let voters cure those defects. Those are all issues of state law, not ones that we can hear. And earlier lawsuits have rejected those claims.

Seeking to turn those state-law claims into federal ones, the Campaign claims discrimination. But its alchemy cannot transmute lead into gold. The Campaign never alleges that any ballot was fraudulent or cast by an illegal voter. It never alleges that any defendant treated the Trump campaign or its votes worse than it treated the Biden campaign or its votes. Calling something discrimination does not make it so. The Second Amended Complaint still suffers from these core defects, so granting leave to amend would have been futile.

And there is no basis to grant the unprecedented injunction sought here. First, for the reasons already given, the Campaign is unlikely to succeed on the merits. Second, it shows no irreparable harm, offering specific challenges to many fewer ballots than the roughly 81,000-vote margin of victory. Third, the Campaign is responsible for its delay and repetitive litigation. Finally, the public interest strongly favors finality, counting every lawful voter's vote, and not disenfranchising millions of Pennsylvania voters who voted by mail. Plus, discarding those votes could disrupt every other election on the ballot.

We will thus affirm the District Court's denial of leave to amend, and we deny an injunction pending appeal. The Campaign asked for a very fast briefing schedule, and we have

granted its request. Because the Campaign wants us to move as fast as possible, we also deny oral argument. We grant all motions to file overlength responses, to file amicus briefs, and to supplement appendices. We deny all other outstanding motions as moot. This Court's mandate shall issue at once.

All Citations

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United States Court of Appeals, Eleventh Circuit.

L. Lin WOOD, Jr., Plaintiff-Appellant,
v.
Brad RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, Rebecca N. Sullivan, in her official capacity as Vice Chair of the Georgia State Election Board, et al., Defendants-Appellees.

No. 20-14418
|
(December 5, 2020)

Synopsis

Background: Voter brought post-election action against Georgia election officials alleging violations of equal protection, due process, and election and electors clauses and seeking to enjoin certification of general election results, to secure a new recount under different rules, and to establish new rules for upcoming runoff election. The United States District Court for the Northern District of Georgia, No. 1:20-cv-04651-SDG, Steven D. Grimberg, J., 2020 WL 6817513, denied voter's motion for temporary restraining order (TRO). Voter appealed.

Holdings: The Court of Appeals, William H. Pryor, Chief Judge, held that:

voter did not satisfy the injury-in-fact requirement for Article III standing;

voter's requests to delay certification of election results and commence a new recount were moot; and

exception to mootness doctrine for issues that are capable of repetition yet evading review did not apply.

Affirmed.

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Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:20-cv-04651-SDG

Before WILLIAM PRYOR, Chief Judge, JILL PRYOR and LAGOA, Circuit Judges.

Opinion

WILLIAM PRYOR, Chief Judge:

***1** This appeal requires us to decide whether we have jurisdiction over an appeal from the denial of a request for emergency relief in a post-election lawsuit. Ten days after the presidential election, L. Lin Wood Jr., a Georgia voter, sued state election officials to enjoin certification of the general election results, to secure a new recount under different rules, and to establish new rules for an upcoming runoff election. Wood alleged that the extant absentee-ballot and recount procedures violated Georgia law and, as a result, his federal constitutional rights. After Wood moved for emergency relief, the district court denied his motion. We agree with the district court that Wood lacks standing to sue because he fails to allege a particularized injury. And because Georgia

has already certified its election results and its slate of presidential electors, Wood's requests for emergency relief are moot to the extent they concern the 2020 election. The Constitution makes clear that federal courts are courts of limited jurisdiction, U.S. Const. art. III; we may not entertain post-election contests about garden-variety issues of vote counting and misconduct that may properly be filed in state courts. We affirm.

I. BACKGROUND

Secretary of State Brad Raffensperger is the "chief election official" of Georgia. Ga. Code Ann. § 21-2-50(b). He manages the state system of elections and chairs the State Election Board. *Id.* § 21-2-30(a), (d). The Board has the authority to promulgate rules and regulations to ensure uniformity in the practices of county election officials and, "consistent with law," to aid "the fair, legal, and orderly conduct of primaries and elections." *Id.* § 21-2-31(1)–(2). The Board may also publish and distribute to county election officials a compilation of Georgia's election laws and regulations. *Id.* § 21-2-31(3). Many of these laws and regulations govern absentee voting.

Any voter in Georgia may vote by absentee ballot. *Id.* § 21-2-380(b). State law prescribes the procedures by which a voter may request and submit an absentee ballot. *Id.* §§ 21-2-381; 21-2-384; 21-2-385. The ballot comes with an oath, which the voter must sign and return with his ballot. *Id.* § 21-2-385(a). State law also prescribes the procedures for how county election officials must certify and count absentee ballots. *Id.* § 21-2-386(a). It directs the official to "compare the identifying information on the oath with the information on file" and "compare the signature or mark on the oath with the signature or mark" on file. *Id.* § 21-2-386(a)(1)(B). If everything appears correct, the official certifies the ballot. *Id.* But if there is a problem, such as a signature that does not match, the official is to "write across the face of the envelope 'Rejected.' " *Id.* § 21-2-386(a)(1)(C). The government must then notify the voter of this rejection, and the voter may cure the problem. *Id.*

In November 2019, the Democratic Party of Georgia, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee challenged Georgia's absentee ballot procedures as unconstitutional under the First and Fourteenth Amendments. They sued Secretary Raffensperger and members of the Board for declaratory and injunctive relief. Secretary Raffensperger and the Board maintained that the procedures were constitutional, but they agreed to promulgate regulations to ensure uniform practices across counties. In March 2020, the parties entered into a settlement agreement and dismissed the suit.

***2** In the settlement agreement, Secretary Raffensperger and the Board agreed to issue an Official Election Bulletin regarding the review of signatures on absentee ballots. The Bulletin instructed officials to review the voter's signature with the following process:

> If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file ..., the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail-in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file ....

Secretary Raffensperger and the Board also agreed to train county election officials to follow this process.

This procedure has been in place for at least three elections since March, including the general election on November 3, 2020. Over one million Georgians voted by absentee ballot in the general election. No one challenged the settlement agreement until the filing of this action. By then, the general election returns had been tallied and a statewide hand recount of the presidential election results was underway.

On November 13, L. Lin Wood Jr. sued Secretary Raffensperger and the members of the Board in the district court. Wood alleged that he sued "in his capacity as a private citizen." He is a registered voter in Fulton County, Georgia, and a donor to various 2020 Republican candidates. His amended complaint alleged that the settlement agreement violates state law. As a result, he contends, it violates the Election Clause of Article I; the Electors Clause of Article II; and the Equal Protection Clause of the Fourteenth Amendment. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2; *id.* amend. XIV, § 1. Wood also alleged that irregularities in the hand recount violated his rights under the Due Process Clause of the Fourteenth Amendment. *Id.* amend. XIV, § 1.

State law requires that such recounts be done in public view, and it permits the Board to promulgate policies that facilitate recounting. Ga. Code Ann. § 21-2-498(c)(4), (d). Secretary

Raffensperger directed county election officials to designate viewing areas for members of the public and the news media to observe the recount. He also permitted the Democratic and Republican Parties to designate special recount monitors.

Wood alleged that officials ignored their own rules and denied Wood and President Donald Trump's campaign "meaningful access to observe and monitor the electoral process." Although Wood did not personally attempt to observe or monitor the recount, he alleged that Secretary Raffensperger and the Board violated his "vested interest in being present and having meaningful access to observe and monitor the electoral process to ensure that it is properly administered ... and ... otherwise free, fair, and transparent."

Wood submitted two affidavits from volunteer monitors. One monitor stated that she was not allowed to enter the counting area because there were too many monitors already present, and she could not be sure from a distance whether the recount was accurate. The other explained that the counting was hard for her to follow and described what she thought were possible tabulation errors.

***3** Wood moved for extraordinary relief. He asked that the district court take one of three steps: prohibit Georgia from certifying the results of the November election; prevent it from certifying results that include "defective absentee ballots, regardless of whether said ballots were cured"; or declare the entire election defective and order the state to fix the problems caused by the settlement agreement. He also sought greater access for Republican election monitors, both at a new hand recount of the November election and in a runoff election scheduled for January 5, 2021.

Wood's lawsuit faced a quickly approaching obstacle: Georgia law requires the Secretary of State to certify its general election results by 5:00 p.m. on the seventeenth day after Election Day. Ga. Code Ann. § 21-2-499(b). And it requires the Governor to certify Georgia's slate of presidential electors by 5:00 p.m. on the eighteenth day after Election Day. *Id.* Secretary Raffensperger's deadline was November 20, and Governor Brian Kemp had a deadline of November 21.

To avoid these deadlines, Wood moved to bar officials from certifying the election results until a court could consider his lawsuit. His emergency motion reiterated many of the requests from his amended complaint, including requests for changes to the procedures for the January runoff. He also submitted additional affidavits and declarations in support of his motion.

The district court held a hearing on November 19 to consider whether it should issue a temporary restraining order. It heard from Wood, state officials, and two groups of intervenors. Wood also introduced testimony from Susan Voyles, a poll manager who participated in the hand recount. Voyles described her experience during the recount. She recalled that one batch of absentee ballots felt different from the rest, and that that batch favored Joe Biden to an unusual extent. At the end of the hearing, the district court orally denied Wood's motion.

On November 20, the district court issued a written opinion and order that explained its denial. It first ruled that Wood lacked standing because he had alleged only generalized grievances, instead of injuries that affected him in a personal and individual way. It next explained that, even if Wood had standing, the doctrine of laches prevented him from challenging the settlement agreement now: he could have sued eight months earlier, yet he waited until two weeks after the election. Finally, it explained why Wood would not be entitled to a temporary restraining order even if the district court could reach the merits of his claims. On the same day, Secretary Raffensperger certified the results of the general election and Governor Kemp certified a slate of presidential electors.

II. STANDARD OF REVIEW

"We are required to examine our jurisdiction *sua sponte*, and we review jurisdictional issues *de novo*." *United States v. Lopez*, 562 F.3d 1309, 1311 (11th Cir. 2009) (citation omitted).

III. DISCUSSION

This appeal turns on one of the most fundamental principles of the federal courts: our limited jurisdiction. Federal courts are not "constituted as free-wheeling enforcers of the Constitution and laws." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc). As the Supreme Court "ha[s] often explained," we are instead "courts of limited jurisdiction." *Home Depot U.S.A., Inc. v. Jackson*, —— U.S. ——, 139 S. Ct. 1743, 1746, 204 L.Ed.2d 34 (2019) (internal quotation marks omitted).

Article III of the Constitution establishes that our jurisdiction —that is, our judicial power—reaches only "Cases" and "Controversies." U.S. Const. art. III, § 2. Absent a justiciable case or controversy between interested parties, we lack the "power to declare the law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

***4** When someone sues in federal court, he bears the burden of proving that his suit falls within our jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Wood had the choice to sue in state or federal court. Georgia law makes clear that post-election litigation may proceed in a state court. Ga. Code Ann. §§ 21-2-499(b), 21-2-524(a). But Wood chose to sue in federal court. In doing so, he had to prove that his suit presents a justiciable controversy under Article III of the Constitution. *See Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (listing examples of problems that preclude our jurisdiction). He failed to satisfy this burden.

We divide our discussion in two parts. We first explain why Wood lacks standing to sue. We then explain that, even if he had standing, his requests to recount and delay certification of the November election results are moot. Because this case is not justiciable, we lack jurisdiction. *Id.* And because we lack the power to entertain this appeal, we will not address the other issues the parties raise.

A. Wood Lacks Standing Because He Has Not Been Injured in a Particularized Way.

Standing is a threshold jurisdictional inquiry: the elements of standing are "an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To prove standing, Wood "must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020). If he cannot satisfy these requirements, then we may not decide the merits of his appeal. *Steel Co.*, 523 U.S. at 94, 118 S.Ct. 1003.

Wood lacks standing because he fails to allege the "first and foremost of standing's three elements": an injury in fact. *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (alteration adopted) (internal quotation marks omitted). An injury in fact is "an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020) (internal quotation marks omitted). Wood's injury is not particularized.

Wood asserts only a generalized grievance. A particularized injury is one that "affect[s] the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks omitted). For example, if Wood were a political candidate harmed by the recount, he would satisfy this requirement because he could assert a personal, distinct injury. *Cf. Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 579 (11th Cir. 1995). But Wood bases his standing on his interest in "ensur[ing that] ... only lawful ballots are counted." An injury to the right "to require that the government be administered according to the law" is a generalized grievance. *Chiles v. Thornburgh*, 865 F.2d 1197, 1205–06 (11th Cir. 1989) (alteration adopted) (internal quotation marks omitted). And the Supreme Court has made clear that a generalized grievance, "no matter how sincere," cannot support standing. *Hollingsworth v. Perry*, 570 U.S. 693, 706, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013).

A generalized grievance is "undifferentiated and common to all members of the public." *Lujan*, 504 U.S. at 575, 112 S.Ct. 2130 (internal quotation marks omitted). Wood cannot explain how his interest in compliance with state election laws is different from that of any other person. Indeed, he admits that any Georgia voter could bring an identical suit. But the logic of his argument sweeps past even that boundary. All Americans, whether they voted in this election or whether they reside in Georgia, could be said to share Wood's interest in "ensur[ing] that [a presidential election] is properly administered."

***5** Wood argues that he has two bases for standing, but neither satisfies the requirement of a distinct, personal injury. He first asserts that the inclusion of unlawfully processed absentee ballots diluted the weight of his vote. To be sure, vote dilution can be a basis for standing. *Cf. Jacobson*, 974 F.3d at 1247–48. But it requires a point of comparison. For example, in the racial gerrymandering and malapportionment contexts, vote dilution occurs when voters are harmed compared to "irrationally favored" voters from other districts. *See Baker v. Carr*, 369 U.S. 186, 207–08, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). By contrast, "no single voter is specifically disadvantaged" if a vote is counted improperly, even if the error might have a "mathematical impact on the final tally

and thus on the proportional effect of every vote." *Bognet v. Sec'y Commonwealth of Pa.*, —— F.3d ——, ——, 2020 WL 6686120, at *12 (3d Cir. Nov. 13, 2020) (internal quotation marks omitted). Vote dilution in this context is a "paradigmatic generalized grievance that cannot support standing." *Id.* (internal quotation marks omitted).

Wood's second theory—that Georgia "value[d] one person's vote over that of another" through "arbitrary and disparate treatment"—fares no better. He argues that Georgia treats absentee voters as a "preferred class" compared to those who vote in person, both by the terms of the settlement agreement and in practice. In his view, all voters were bound by law before the settlement agreement, but the rules for absentee voting now run afoul of the law, while in-person voters remain bound by the law. And he asserts that in practice Georgia has favored absentee voters because there were "numerous irregularities" in the processing and recounting of absentee ballots. Setting aside the fact that "[i]t is an individual voter's *choice* whether to vote by mail or in person," *Bognet*, —— F.3d at ——, 2020 WL 6686120, at *15, these complaints are generalized grievances. Even if we assume that absentee voters are favored over in-person voters, that harm does not affect Wood as an individual—it is instead shared identically by the four million or so Georgians who voted in person this November. "[W]hen the asserted harm is ... shared in substantially equal measure by ... a large class of citizens," it is not a particularized injury. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). And irregularities in the tabulation of election results do not affect Wood differently from any other person. His allegation, at bottom, remains "that the law ... has not been followed." *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1332 (11th Cir. 2007) (quoting *Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007)).

Wood's attempts to liken his injury to those we have found sufficient in other appeals fall short. In *Common Cause/Georgia v. Billups*, we ruled that "[r]equiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing." 554 F.3d 1340, 1351–52 (11th Cir. 2009). But the injury there was the burden of producing photo identification, not the existence of separate rules for in-person and absentee voters. *Id.* And the burden to produce photo identification affected each voter in a personal way. For example, some plaintiffs in *Common Cause* alleged that they "would be required to make a special trip" to obtain valid identification "that is not required of voters who have driver's licenses or passports." *Id.* at 1351 (internal quotation marks omitted). By contrast, even Wood agrees that he is affected by Georgia's alleged violations of the law in the same way as every other Georgia voter. "This injury is precisely the kind of undifferentiated, generalized grievance that the Supreme Court has warned must not be countenanced." *Dillard*, 495 F.3d at 1335 (internal quotation marks omitted).

Roe v. Alabama ex rel. Evans, 43 F.3d 574, also does not support Wood's argument for standing. In *Roe*, we ruled that the post-election inclusion of previously excluded absentee ballots would violate the substantive-due-process rights of Alabama voters and two political candidates. *Id.* at 579–81. But no party raised and we did not address standing in *Roe*, so that precedent provides no basis for Wood to establish standing. *Cf. Lewis v. Casey*, 518 U.S. 343, 352 n.2, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (noting that in cases where "standing was neither challenged nor discussed ... the existence of unaddressed jurisdictional defects has no precedential effect"). And Wood's purported injury is far more general than the voters' injury in *Roe*. The voters in *Roe* bore individual burdens—to obtain notarization or witness signatures if they wanted to vote absentee—that state courts post-election retroactively permitted other voters to ignore. *Roe*, 43 F.3d at 580–81. In contrast, Georgia applied uniform rules, established before the election, to all voters, who could choose between voting in person or by absentee ballot, and Wood asserts that the effect of those rules harmed the electorate collectively. That alleged harm is not a particularized injury.

***6** Wood suggested in his amended complaint that his status as a donor contributed to standing and aligned his interests with those of the Georgia Republican Party. But he forfeited this argument when he failed to raise it in his opening brief. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004); *see also Nat'l All. for the Mentally Ill v. Bd. of Cnty. Comm'rs*, 376 F.3d 1292, 1296 (11th Cir. 2004) (ruling standing claims forfeited for failure to comply with the Federal Rules of Appellate Procedure). And the donor argument fails on its own terms. True, a donor can establish standing based on injuries that flow from his status as a donor. *See, e.g.*, *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019). But donors, like voters, "have no judicially enforceable interest in the *outcome* of an election." *Jacobson*, 974 F.3d at 1246. Nor does a donation give the donor a legally cognizable interest in the proper administration of elections. Any injury to Wood based on election irregularities must flow

from his status as a voter, unrelated to his donations. And that fact returns him to the stumbling block of particularization.

"[T]he 'injury in fact' test requires ... that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563, 112 S.Ct. 2130 (internal quotation marks omitted). Wood's allegations suggest that various nonparties might have a particularized injury. For example, perhaps a candidate or political party would have standing to challenge the settlement agreement or other alleged irregularities. Or perhaps election monitors would have standing to sue if they were denied access to the recount. But Wood cannot place himself in the stead of these groups, even if he supports them. *Cf. Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006) (explaining that "associational standing ... does not operate in reverse," so a member cannot represent an association). He is at most a "concerned bystander." *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004) (internal quotation marks omitted). So he is not "entitled to have the court[s] decide the merits of [his] dispute." *Warth*, 422 U.S. at 498, 95 S.Ct. 2197.

B. Wood's Requested Relief Concerning the 2020 General Election Is Moot.

Even if Wood had standing, several of his requests for relief are barred by another jurisdictional defect: mootness. We are "not empowered to decide moot questions." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (internal quotation marks omitted). "An issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011) (alteration rejected) (internal quotation marks omitted). And an issue can become moot at any stage of litigation, even if there was a live case or controversy when the lawsuit began. *Id.* at 1189–90.

Wood asked for several kinds of relief in his emergency motion, but most of his requests pertained to the 2020 election results. He moved the district court to prohibit either the certification of the election results or certification that included the disputed absentee ballots. He also asked the district court to order a new hand recount and to grant Republican election monitors greater access during both the recount and the January runoff election. But after the district court denied Wood's motion, Secretary Raffensperger certified the election results on November 20. And Governor Kemp certified the slate of presidential electors later that day.

Because Georgia has already certified its results, Wood's requests to delay certification and commence a new recount are moot. "We cannot turn back the clock and create a world in which" the 2020 election results are not certified. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). And it is not possible for us to delay certification nor meaningful to order a new recount when the results are already final and certified. *Cf. Tropicana Prods. Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1582 (11th Cir. 1989) ("[A]n appeal from the denial of a motion for preliminary injunction is mooted when the requested effective end-date for the preliminary injunction has passed."). Nor can we reconstrue Wood's previous request that we temporarily prohibit certification into a new request that we undo the certification. A district court "must first have the opportunity to pass upon [every] issue," so we may not consider requests for relief made for the first time on appeal. *S.F. Residence Club, Inc. v. 7027 Old Madison Pike, LLC*, 583 F.3d 750, 755 (11th Cir. 2009).

***7** Wood's arguments reflect a basic misunderstanding of what mootness is. He argues that the certification does not moot anything "because this litigation is ongoing" and he remains injured. But mootness concerns the availability of relief, not the existence of a lawsuit or an injury. *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1304 (11th Cir. 2011). So even if post-election litigation is not always mooted by certification, *see, e.g.*, *Siegel v. LePore*, 234 F.3d 1163, 1172–73 (11th Cir. 2000) (en banc), Wood's particular requests are moot. Wood is right that certification does not moot his requests for relief concerning the 2021 runoff—although Wood's lack of standing still forecloses our consideration of those requests—but the pendency of other claims for relief cannot rescue the otherwise moot claims. *See, e.g.*, *Adler v. Duval Cnty. Sch. Bd.*, 112 F.3d 1475, 1478–79, 1481 (11th Cir. 1997) (instructing the district court to dismiss moot claims but resolving other claims on the merits). Wood finally tells us that President Trump has also requested a recount, but that fact is irrelevant to whether Wood's requests remain live.

Nor does any exception to mootness apply. True, we often review otherwise-moot election appeals because they are "capable of repetition yet evading review." *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1496 (11th Cir. 1993) (internal quotation marks omitted). We may apply this exception when "(1) the challenged action was in its duration too short to be fully

litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Nat'l Broad. Co. v. Commc'ns Workers of Am.*, 860 F.2d 1022, 1023 (11th Cir. 1988) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975)). But we will not apply this exception if there is "some alternative vehicle through which a particular policy may effectively be subject to" complete review. *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004).

The "capable of repetition yet evading review" exception does not save Wood's appeal because there is no "reasonable expectation" that Wood will again face the issues in this appeal. Based on the posture of this appeal, the challenged action is the denial of an emergency injunction against the certification of election results. *See Fleming*, 785 F.3d at 446 (explaining that whether the issues in an interlocutory appeal are "capable of repetition, yet evading review" is a separate question from whether the issues in the overall lawsuit are capable of doing so). That denial is the decision we would review but for the jurisdictional problems. But Wood cannot satisfy the requirement that there be a "reasonable expectation" that he will again seek to delay certification. Wood does not suggest that this situation might recur. *Cf. FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 463–64, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007). And we have no reason to think it would: he is a private citizen, so the possibility of a recurrence is purely theoretical. *Cf. Hall v. Sec'y, Ala.*, 902 F.3d 1294, 1305 (11th Cir. 2018).

IV. CONCLUSION

We **AFFIRM** the denial of Wood's motion for emergency relief.

All Citations

--- F.3d ----, 2020 WL 7094866

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KING, MARIAN ELLEN SHERIDAN, JOHN EARL HAGGARD, CHARLES JAMES RITCHARD, JAMES DAVID HOOPER, and DAREN WADE RUBINGH,

Plaintiffs,

v.

Civil Case No. 20-13134
Honorable Linda V. Parker

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, JOCELYN BENSON, in her official capacity as Michigan Secretary of State, and MICHIGAN BOARD OF STATE CANVASSERS,

Defendants,

and

CITY OF DETROIT, DEMOCRATIC NATIONAL COMMITTEE and MICHIGAN DEMOCRATIC PARTY, and ROBERT DAVIS,

Intervenor-Defendants.
_____/

OPINION AND ORDER DENYING PLAINTIFFS' "EMERGENCY MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF" (ECF NO. 7)

The right to vote is among the most sacred rights of our democracy and, in turn, uniquely defines us as Americans. The struggle to achieve the right to vote is

one that has been both hard fought and cherished throughout our country's history. Local, state, and federal elections give voice to this right through the ballot. And elections that count each vote celebrate and secure this cherished right.

These principles are the bedrock of American democracy and are widely revered as being woven into the fabric of this country. In Michigan, more than 5.5 million citizens exercised the franchise either in person or by absentee ballot during the 2020 General Election. Those votes were counted and, as of November 23, 2020, certified by the Michigan Board of State Canvassers (also "State Board"). The Governor has sent the slate of Presidential Electors to the Archivist of the United States to confirm the votes for the successful candidate.

Against this backdrop, Plaintiffs filed this lawsuit, bringing forth claims of widespread voter irregularities and fraud in the processing and tabulation of votes and absentee ballots. They seek relief that is stunning in its scope and breathtaking in its reach. If granted, the relief would disenfranchise the votes of the more than 5.5 million Michigan citizens who, with dignity, hope, and a promise of a voice, participated in the 2020 General Election. The Court declines to grant Plaintiffs this relief.

I. Background

In the weeks leading up to, and on, November 3, 2020, a record 5.5 million Michiganders voted in the presidential election ("2020 General Election"). (ECF

No. 36-4 at Pg ID 2622.) Many of those votes were cast by absentee ballot. This was due in part to the coronavirus pandemic and a ballot measure the Michigan voters passed in 2018 allowing for no-reason absentee voting. When the polls closed and the votes were counted, Former Vice President Joseph R. Biden, Jr. had secured over 150,000 more votes than President Donald J. Trump in Michigan. (*Id.*)

Michigan law required the Michigan State Board of Canvassers to canvass results of the 2020 General Election by November 23, 2020. Mich. Comp. Laws § 168.842. The State Board did so by a 3-0 vote, certifying the results "for the Electors of President and Vice President," among other offices. (ECF No. 36-5 at Pg ID 2624.) That same day, Governor Gretchen Whitmer signed the Certificates of Ascertainment for the slate of electors for Vice President Biden and Senator Kamala D. Harris. (ECF No. 36-6 at Pg ID 2627-29.) Those certificates were transmitted to and received by the Archivist of the United States. (*Id.*)

Federal law provides that if election results are contested in any state, and if the state, prior to election day, has enacted procedures to decide controversies or contests over electors and electoral votes, and if these procedures have been applied, and the decisions are made at least six days before the electors' meetings, then the decisions are considered conclusive and will apply in counting the electoral votes. 3 U.S.C. § 5. This date (the "Safe Harbor" deadline) falls on

December 8, 2020. Under the federal statutory timetable for presidential elections, the Electoral College must meet on "the first Monday after the second Wednesday in December," 3 U.S.C. § 7, which is December 14 this year.

Alleging widespread fraud in the distribution, collection, and counting of ballots in Michigan, as well as violations of state law as to certain election challengers and the manipulation of ballots through corrupt election machines and software, Plaintiffs filed the current lawsuit against Defendants at 11:48 p.m. on November 25, 2020—the eve of the Thanksgiving holiday. (ECF No. 1.) Plaintiffs are registered Michigan voters and nominees of the Republican Party to be Presidential Electors on behalf of the State of Michigan. (ECF No. 6 at Pg ID 882.) They are suing Governor Whitmer and Secretary of State Jocelyn Benson in their official capacities, as well as the Michigan Board of State Canvassers.

On November 29, a Sunday, Plaintiffs filed a First Amended Complaint (ECF No. 6), "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief and Memorandum in Support Thereof" (ECF No. 7), and Emergency Motion to Seal (ECF No. 8). In their First Amended Complaint, Plaintiffs allege three claims pursuant to 42 U.S.C. § 1983: (Count I) violation of the Elections and Electors Clauses; (Count II) violation of the Fourteenth Amendment Equal Protection Clause; and, (Count III) denial of the Fourteenth

Amendment Due Process Clause. (ECF No. 6.) Plaintiffs also assert one count alleging violations of the Michigan Election Code. (*Id.*)

By December 1, motions to intervene had been filed by the City of Detroit (ECF No. 15), Robert Davis (ECF No. 12), and the Democratic National Committee and Michigan Democratic Party ("DNC/MDP") (ECF No. 14). On that date, the Court entered a briefing schedule with respect to the motions. Plaintiffs had not yet served Defendants with their pleading or emergency motions as of December 1. Thus, on December 1, the Court also entered a text-only order to hasten Plaintiffs' actions to bring Defendants into the case and enable the Court to address Plaintiffs' pending motions. Later the same day, after Plaintiffs filed certificates of service reflecting service of the summons and Amended Complaint on Defendants (ECF Nos. 21), the Court entered a briefing schedule with respect to Plaintiffs' emergency motions, requiring response briefs by 8:00 p.m. on December 2, and reply briefs by 8:00 p.m. on December 3 (ECF No. 24).

On December 2, the Court granted the motions to intervene. (ECF No. 28.) Response and reply briefs with respect to Plaintiffs' emergency motions were thereafter filed. (ECF Nos. 29, 31, 32, 34, 35, 36, 37, 39, 49, 50.) Amicus curiae Michigan State Conference NAACP subsequently moved and was granted leave to file a brief in support of Defendants' position. (ECF Nos. 48, 55.) Supplemental briefs also were filed by the parties. (ECF Nos. 57, 58.)

In light of the limited time allotted for the Court to resolve Plaintiffs' emergency motion for injunctive relief—which Plaintiffs assert "must be granted in advance of December 8, 2020" (ECF No. 7 at Pg ID 1846)—the Court has disposed of oral argument with respect to their motion pursuant to Eastern District of Michigan Local Rule 7.1(f).[1]

II. Standard of Review

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted). The plaintiff bears the burden of demonstrating entitlement to preliminary injunctive relief. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Such relief will only be granted where "the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). "Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to

[1] "'[W]here material facts are not in dispute, or where facts in dispute are not material to the preliminary injunction sought, district courts generally need not hold an evidentiary hearing.'" *Nexus Gas Transmission, LLC v. City of Green, Ohio*, 757 Fed. Appx. 489, 496-97 (6th Cir. 2018) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007)) (citation omitted).

support or oppose a motion for a preliminary injunction." 11A Mary Kay Kane, Fed. Prac. & Proc. § 2949 (3d ed.).

Four factors are relevant in deciding whether to grant preliminary injunctive relief: "'(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.'" *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020) (quoting *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012)). "At the preliminary injunction stage, 'a plaintiff must show more than a mere possibility of success,' but need not 'prove his case in full.'" *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007)). Yet, "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion …." *Leary*, 228 F.3d at 739.

III. Discussion

The Court begins by discussing those questions that go to matters of subject matter jurisdiction or which counsel against reaching the merits of Plaintiffs' claims. While the Court finds that any of these issues, alone, indicate that Plaintiffs' motion should be denied, it addresses each to be thorough.

A. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This immunity extends to suits brought by citizens against their own states. *See, e.g., Ladd v. Marchbanks*, 971 F.3d 574, 578 (6th Cir. 2020) (citing *Hans v. Louisiana*, 134 U.S. 1, 18-19 (1890)). It also extends to suits against state agencies or departments, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (citations omitted), and "suit[s] against state officials when 'the state is the real, substantial party in interest[,]'" *id.* at 101 (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)).

A suit against a State, a state agency or its department, or a state official is in fact a suit against the State and is barred "regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 100-02 (citations omitted). "'The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.'" *Id*. at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)) (internal quotation marks omitted).

Eleventh Amendment immunity is subject to three exceptions: (1) congressional abrogation; (2) waiver by the State; and (3) "a suit against a state official seeking prospective injunctive relief to end a continuing violation of federal law." *See Carten v. Kent State Univ.*, 282 F.3d 391, 398 (6th Cir. 2002) (citations omitted). Congress did not abrogate the States' sovereign immunity when it enacted 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989). "The State of Michigan has not consented to being sued in civil rights actions in the federal courts." *Johnson v. Unknown Dellatifa*, 357 F.3d 539, 545 (6th Cir. 2004) (citing *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986)). The Eleventh Amendment therefore bars Plaintiffs' claims against the Michigan Board of State Canvassers. *See McLeod v. Kelly*, 7 N.W.2d 240, 242 (Mich. 1942) ("The board of State canvassers is a State agency …"); *see also Deleeuw v. State Bd. of Canvassers*, 688 N.W.2d 847, 850 (Mich. Ct. App. 2004). Plaintiffs' claims are barred against Governor Whitmer and Secretary Benson unless the third exception applies.

The third exception arises from the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908). But as the Supreme Court has advised:

> To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle … that Eleventh Amendment immunity represents a real

> limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997). Further, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 102. "'In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (quoting *Coeur d'Alene Tribe of Idaho*, 521 U.S. 296 (O'Connor, J., concurring)).

Ex parte Young does not apply, however, to *state law* claims against state officials, regardless of the relief sought. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 106 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."); *see also In re Ohio Execution Protocol Litig.*, 709 F. App'x 779, 787 (6th Cir. 2017) ("If the plaintiff sues a state official under state law

in federal court for actions taken within the scope of his authority, sovereign immunity bars the lawsuit regardless of whether the action seeks monetary or injunctive relief."). Unquestionably, Plaintiffs' state law claims against Defendants are barred by Eleventh Amendment immunity.

The Court then turns its attention to Plaintiffs' § 1983 claims against Defendants. Defendants and Intervenor DNC/MDP contend that these claims are not in fact federal claims as they are premised entirely on alleged violations of *state* law. (ECF No. 31 at Pg ID 2185 ("Here, each count of Plaintiffs' complaint—even Counts I, II, and III, which claim to raise violations of federal law—is predicated on the election being conducted contrary to Michigan law."); ECF No. 36 at Pg ID 2494 ("While some of [Plaintiffs'] allegations concern fantastical conspiracy theories that belong more appropriately in the fact-free outer reaches of the Internet[,] … what Plaintiffs assert at bottom are violations of the Michigan Election Code.") Defendants also argue that even if properly stated as federal causes of action, "it is far from clear whether Plaintiffs' requested injunction is actually prospective in nature, as opposed to retroactive." (ECF No. 31 at Pg ID 2186.)

The latter argument convinces this Court that *Ex parte Young* does not apply. As set forth earlier, "'[i]n order to fall with the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law.'"

Russell v. Lundergan-Grimes, 784 F.3d 1037, 1047 (6th Cir. 2015) (quoting *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013)). Unlike *Russell*, which Plaintiffs cite in their reply brief, this is not a case where a plaintiff is seeking to enjoin the continuing enforcement of a statute that is allegedly unconstitutional. *See id*. at 1044, 1047 (plaintiff claimed that Kentucky law creating a 300-foot no-political-speech buffer zone around polling location violated his free-speech rights). Instead, Plaintiffs are seeking to undo what has already occurred, as their requested relief reflects.[2] (*See* ECF No. 7 at Pg ID 1847; *see also* ECF No. 6 at Pg 955-56.)

Before this lawsuit was filed, the Michigan Board of State Canvassers had already certified the election results and Governor Whitmer had transmitted the State's slate of electors to the United States Archivist. (ECF Nos. 31-4, 31-5.) There is no continuing violation to enjoin. *See Rios v. Blackwell*, 433 F. Supp. 2d 848 (N.D. Ohio Feb. 7, 2006); *see also King Lincoln Bronzeville Neighborhood Ass'n v. Husted*, No. 2:06-cv-00745, 2012 WL 395030, at *4-5 (S.D. Ohio Feb. 7, 2012); *cf. League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 (6th Cir. 2008) (finding that the plaintiff's claims fell within the *Ex parte Young* doctrine

[2] To the extent Plaintiffs ask the Court to certify the results in favor of President Donald J. Trump, such relief is beyond its powers.

where it alleged that the problems that plagued the election "are chronic and will continue absent injunctive relief").

For these reasons, the Court concludes that the Eleventh Amendment bars Plaintiffs' claims against Defendants.

B. Mootness

This case represents well the phrase: "this ship has sailed." The time has passed to provide most of the relief Plaintiffs request in their Amended Complaint; the remaining relief is beyond the power of any court. For those reasons, this matter is moot.

"'Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.'" *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). A case may become moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 410 (1980) (internal quotation marks and citation omitted). Stated differently, a case is moot where the court lacks "the ability to give meaningful relief[.]" *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019). This lawsuit was moot well before it was filed on November 25.

In their prayer for relief, Plaintiffs ask the Court to: (a) order Defendants to decertify the results of the election; (b) enjoin Secretary Benson and Governor

Whitmer from transmitting the certified election results to the Electoral College; (c) order Defendants "to transmit certified election results that state that President Donald Trump is the winner of the election"; (d) impound all voting machines and software in Michigan for expert inspection; (e) order that no votes received or tabulated by machines not certified as required by federal and state law be counted; and, (f) enter a declaratory judgment that mail-in and absentee ballot fraud must be remedied with a manual recount or statistically valid sampling.[3] (ECF No. 6 at Pg ID 955-56, ¶ 233.) What relief the Court could grant Plaintiffs is no longer available.

Before this lawsuit was filed, all 83 counties in Michigan had finished canvassing their results for all elections and reported their results for state office races to the Secretary of State and the Michigan Board of State Canvassers in accordance with Michigan law. *See* Mich. Comp. Laws § 168.843. The State Board had certified the results of the 2020 General Election and Governor Whitmer had submitted the slate of Presidential Electors to the Archivists. (ECF

[3] Plaintiffs also seek an order requiring the impoundment of all voting machines and software in Michigan for expert inspection and the production of security camera footage from the TCF Center for November 3 and 4. (ECF No. 6 at Pg ID 956, ¶ 233.) This requested relief is not meaningful, however, where the remaining requests are no longer available. In other words, the evidence Plaintiffs seek to gather by inspecting voting machines and software and security camera footage only would be useful if an avenue remained open for them to challenge the election results.

No. 31-4 at Pg ID 2257-58; ECF No. 31-5 at Pg ID 2260-63.) The time for requesting a special election based on mechanical errors or malfunctions in voting machines had expired. *See* Mich. Comp. Laws §§ 168.831, 168.832 (petitions for special election based on a defect or mechanical malfunction must be filed "no later than 10 days after the date of the election"). And so had the time for requesting a recount for the office of President. *See* Mich. Comp. Laws § 168.879.

The Michigan Election Code sets forth detailed procedures for challenging an election, including deadlines for doing so. Plaintiffs did not avail themselves of the remedies established by the Michigan legislature. The deadline for them to do so has passed. Any avenue for this Court to provide meaningful relief has been foreclosed. As the Eleventh Circuit Court of Appeals recently observed in one of the many other post-election lawsuits brought to specifically overturn the results of the 2020 presidential election:

> "We cannot turn back the clock and create a world in which" the 2020 election results are not certified. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). And it is not possible for us to delay certification nor meaningful to order a new recount when the results are already final and certified.

Wood v. Raffensperger, -- F.3d -- , 2020 WL 7094866 (11th Cir. Dec. 5, 2020). And as one Justice of the Supreme Court of Pennsylvania advised in another 2020 post-election lawsuit: "there is no basis in law by which the courts may grant Petitioners' request to ignore the results of an election and recommit the choice to

the General Assembly to substitute its preferred slate of electors for the one chosen by a majority of Pennsylvania's voters." *Kelly v. Commonwealth*, No. 68 MAP 2020, 2020 WL 7018314, at *3 (Pa. Nov. 28, 2020) (Wecht, J., concurring); *see also Wood v. Raffensperger*, No. 1:20-cv-04651, 2020 WL 6817513, at *13 (N.D. Ga. Nov. 20, 2020) (concluding that "interfer[ing] with the result of an election that has already concluded would be unprecedented and harm the public in countless ways").

In short, Plaintiffs' requested relief concerning the 2020 General Election is moot.

C. Laches

Defendants argue that Plaintiffs are unlikely to succeed on the merits because they waited too long to knock on the Court's door. (ECF No. 31 at Pg ID 2175-79; ECF No. 39 at Pg ID 2844.) The Court agrees.

The doctrine of laches is rooted in the principle that "equity aids the vigilant, not those who slumber on their rights." *Lucking v. Schram*, 117 F.2d 160, 162 (6th Cir. 1941); *see also United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 9 (2008) ("A constitutional claim can become time-barred just as any other claim can."). An action may be barred by the doctrine of laches if: (1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant is prejudiced by this delay. *Brown-Graves Co. v. Central States, Se. and Sw. Areas Pension Fund*,

206 F.3d 680, 684 (6th Cir. 2000); *Ottawa Tribe of Oklahoma v. Logan*, 577 F.3d 634, 639 n.6 (6th Cir. 2009) ("Laches arises from an extended failure to exercise a right to the detriment of another party."). Courts apply laches in election cases. *Detroit Unity Fund v. Whitmer*, 819 F. App'x 421, 422 (6th Cir. 2020) (holding that the district court did not err in finding plaintiff's claims regarding deadline for local ballot initiatives "barred by laches, considering the unreasonable delay on the part of [p]laintiffs and the consequent prejudice to [d]efendants"). *Cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence. That is as true in election law cases as elsewhere.").

First, Plaintiffs showed no diligence in asserting the claims at bar. They filed the instant action on November 25—more than 21 days after the 2020 General Election—and served it on Defendants some five days later on December 1. (ECF Nos. 1, 21.) If Plaintiffs had legitimate claims regarding whether the treatment of election challengers complied with state law, they could have brought their claims well in advance of or on Election Day—but they did not. Michigan's 83 Boards of County Canvassers finished canvassing by no later than November 17 and, on November 23, both the Michigan Board of State Canvassers and Governor Whitmer certified the election results. Mich. Comp. Laws §§ 168.822, 168.842.0. If Plaintiffs had legitimate claims regarding the manner by which

ballots were processed and tabulated on or after Election Day, they could have brought the instant action on Election Day or during the weeks of canvassing that followed—yet they did not. Plaintiffs base the claims related to election machines and software on "expert and fact witness" reports discussing "glitches" and other alleged vulnerabilities that occurred as far back as 2010. (*See e.g.,* ECF No. 6 at Pg ID 927-933, ¶¶ 157(C)-(E), (G), 158, 160, 167.) If Plaintiffs had legitimate concerns about the election machines and software, they could have filed this lawsuit well before the 2020 General Election—yet they sat back and did nothing.

Plaintiffs proffer no persuasive explanation as to why they waited so long to file this suit. Plaintiffs concede that they "would have preferred to file sooner, but [] needed some time to gather statements from dozens of fact witnesses, retain and engage expert witnesses, and gather other data supporting their Complaint." (ECF No. 49 at Pg ID 3081.) But according to Plaintiffs themselves, "[m]anipulation of votes was apparent *shortly after the polls closed on November 3, 2020*." (ECF No. 7 at Pg ID 1837 (emphasis added).) Indeed, where there is no reasonable explanation, there can be no true justification. *See Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (identifying the "first and most essential" reason to issue a stay of an election-related injunction is plaintiff offering "no reasonable explanation for waiting so long to file this action"). Defendants satisfy the first element of their laches defense.

Second, Plaintiffs' delay prejudices Defendants. *See Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights.") This is especially so considering that Plaintiffs' claims for relief are not merely last-minute—they are after the fact. While Plaintiffs delayed, the ballots were cast; the votes were counted; and the results were certified. The rationale for interposing the doctrine of laches is now at its peak. *See McDonald v. Cnty. of San Diego*, 124 F. App'x 588 (9th Cir. 2005) (citing *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988)); *Soules*, 849 F.2d at 1180 (quoting *Hendon v. N.C. State Bd. Of Elections*, 710 F.2d 177, 182 (4th Cir. 1983)) (applying doctrine of laches in post-election lawsuit because doing otherwise would, "permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action").

Plaintiffs could have lodged their constitutional challenges much sooner than they did, and certainly not three weeks after Election Day and one week after certification of almost three million votes. The Court concludes that Plaintiffs' delay results in their claims being barred by laches.

D. Abstention

As outlined in several filings, when the present lawsuit was filed on November 25, 2020, there already were multiple lawsuits pending in Michigan state courts raising the same or similar claims alleged in Plaintiffs' Amended Complaint. (*See, e.g.*, ECF No. 31 at Pg ID 2193-98 (summarizing five state court lawsuits challenging President Trump's defeat in Michigan's November 3, 2020 General Election).) Defendants and the City of Detroit urge the Court to abstain from deciding Plaintiffs' claims in deference to those proceedings under various abstention doctrines. (*Id.* at Pg ID 2191-2203; ECF No. 39 at Pg ID 2840-44.) Defendants rely on the abstention doctrine outlined by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The City of Detroit relies on the abstention doctrines outlined in *Colorado River*, as well as those set forth in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500-01 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The City of Detroit maintains that abstention is particularly appropriate when resolving election disputes in light of the autonomy provided to state courts to initially settle such disputes.

The abstention doctrine identified in *Colorado River* permits a federal court to abstain from exercising jurisdiction over a matter in deference to parallel state-court proceedings. *Colorado River*, 424 U.S. at 813, 817. The exception is found

warranted "by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration.'" *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (quoting *Colorado River*, 424 U.S. at 817). The Sixth Circuit has identified two prerequisites for abstention under this doctrine. *Romine v. Compuserve Corp.*, 160 F.3d 337, 339-40 (6th Cir. 1998).

First, the court must determine that the concurrent state and federal actions are parallel. *Id*. at 339. Second, the court must consider the factors outlined by the Supreme Court in *Colorado River* and subsequent cases:

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; … (4) the order in which jurisdiction was obtained; … (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

Romine, 160 F.3d at 340-41 (internal citations omitted). "These factors, however, do not comprise a mechanical checklist. Rather, they require 'a careful balancing of the important factors as they apply in a give[n] case' depending on the particular facts at hand." *Id*. (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983)).

As summarized in Defendants' response brief and reflected in their exhibits (*see* ECF No. 31 at Pg ID 2193-97; *see also* ECF Nos. 31-7, 31-9, 31-11, 31-12,

31-14), the allegations and claims in the state court proceedings and the pending matter are, at the very least, substantially similar, *Romine*, 160 F.3d at 340 ("Exact parallelism is not required; it is enough if the two proceedings are substantially similar." (internal quotation marks and citation omitted)). A careful balancing of the factors set forth by the Supreme Court counsel in favor of deferring to the concurrent jurisdiction of the state courts.

The first and second factor weigh against abstention. *Id.* (indicating that the weight is against abstention where no property is at issue and neither forum is more or less convenient). While the Supreme Court has stated that "'the presence of federal law issues must always be a major consideration weighing against surrender of federal jurisdiction in deference to state proceedings[,]'" *id*. at 342 (quoting *Moses H. Cone*, 460 U.S. at 26), this "'factor has less significance where the federal courts' jurisdiction to enforce the statutory rights in question is concurrent with that of the state courts.'"[4] *Id*. (quoting *Moses H. Cone*, 460 U.S. at 25). Moreover, the Michigan Election Code seems to dominate even Plaintiffs' federal claims. Further, the remaining factors favor abstention.

"Piecemeal litigation occurs when different courts adjudicate the identical issue, thereby duplicating judicial effort and potentially rendering conflicting

[4] State courts have concurrent jurisdiction over § 1983 actions. *Felder v. Casey*, 487 U.S. 131, 139 (1988).

results." *Id.* at 341. The parallel proceedings are premised on similar factual allegations and many of the same federal and state claims. The state court proceedings were filed well before the present matter and at least three of those matters are far more advanced than this case. Lastly, as Congress conferred concurrent jurisdiction on state courts to adjudicate § 1983 claims, *Felder v. Casey*, 487 U.S. 131, 139 (1988), "[t]here can be no legitimate contention that the [Michigan] state courts are incapable of safeguarding [the rights protected under this statute]," *Romine*, 160 F.3d at 342.

For these reasons, abstention is appropriate under the *Colorado River* doctrine. The Court finds it unnecessary to decide whether abstention is appropriate under other doctrines.

E. Standing

Under Article III of the United States Constitution, federal courts can resolve only "cases" and "controversies." U.S. Const. art. III § 2. The case-or-controversy requirement is satisfied only where a plaintiff has standing to bring suit. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). Each plaintiff must demonstrate standing for each claim he seeks to press.[5]

[5] Plaintiffs assert a due process claim in their Amended Complaint and twice state in their motion for injunctive relief that Defendants violated their due process rights. (*See* ECF No. 7 at Pg ID 1840, 1844.) Plaintiffs do not pair either statement with anything the Court could construe as a developed argument. (*Id.*) The Court finds it unnecessary, therefore, to further discuss the due process claim.

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (citation omitted) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). To establish standing, a plaintiff must show that: (1) he has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992) (internal quotation marks and citations omitted).

1. Equal Protection Claim

Plaintiffs allege that Defendants engaged in "several schemes" to, among other things, "destroy," "discard," and "switch" votes for President Trump, thereby "devalu[ing] Republican votes" and "diluting" the influence of their individual votes. (ECF No. 49 at Pg ID 3079.) Plaintiffs contend that "the vote dilution resulting from this systemic and illegal conduct did not affect all Michigan voters equally; it had the intent and effect of inflating the number of votes for Democratic candidates and reducing the number of votes for President Trump and Republican candidates." (ECF No. 49 at Pg ID 3079.) Even assuming that Plaintiffs establish

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McPherson v. Kelsey, 125 F.3d 989, 995 (6th Cir. 1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

injury-in-fact and causation under this theory,[6] their constitutional claim cannot stand because Plaintiffs fall flat when attempting to clear the hurdle of redressability.

Plaintiffs fail to establish that the alleged injury of vote-dilution can be redressed by a favorable decision from this Court. Plaintiffs ask this Court to de-certify the results of the 2020 General Election in Michigan. But an order de-certifying the votes of approximately 2.8 million people would not reverse the dilution of Plaintiffs' vote. To be sure, standing is not "dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill*, 138 S. Ct. at 1934 (citing *Cuno*, 547 U.S. at 353); *Cuno*, 547 U.S. at 353 ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Plaintiffs' alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others *their* right to vote. Accordingly, Plaintiffs have failed to show that their injury can be redressed by the relief they seek and thus possess no standing to pursue their equal protection claim.

[6] To be clear, the Court does not find that Plaintiffs satisfy the first two elements of the standing inquiry.

2. Elections Clause & Electors Clause Claims

The provision of the United States Constitution known as the Elections Clause states in part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]" U.S. Const. art. I, § 4, cl. 1. "The Elections Clause effectively gives state governments the 'default' authority to regulate the mechanics of federal elections, *Foster v. Love*, 522 U.S. 67, 69, 118 S. Ct. 464, 139 L.Ed.2d 369 (1997), with Congress retaining 'exclusive control' to 'make or alter' any state's regulations, *Colegrove v. Green*, 328 U.S. 549, 554, 66 S. Ct. 1198, 90 L.Ed. 1432 (1946)." *Bognet*, 2020 WL 6686120, *1. The "Electors Clause" of the Constitution states: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors …." U.S. Const. art. II, § 1, cl. 2.

Plaintiffs argue that, as "nominees of the Republican Party to be Presidential Electors on behalf of the State of Michigan, they have standing to allege violations of the Elections Clause and Electors Clause because "a vote for President Trump and Vice-President Pence in Michigan … is a vote for each Republican elector[], and … illegal conduct aimed at harming candidates for President similarly injures Presidential Electors." (ECF No. 7 at Pg ID 1837-38; ECF No. 49 at Pg ID 3076-78.)

But where, as here, the only injury Plaintiffs have alleged is that the Elections Clause has not been followed, the United States Supreme Court has made clear that "[the] injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance."[7] *Lance v. Coffman*, 549 U.S. 437, 442 (2007). Because Plaintiffs "assert no particularized stake in the litigation," Plaintiffs fail to establish injury-in-fact and thus standing to bring their Elections Clause and Electors Clause claims. *Id.*; *see also Johnson v. Bredesen*, 356 F. App'x 781, 784 (6th Cir. 2009) (citing *Lance*, 549 U.S. at 441-42) (affirming district court's conclusion that citizens did not allege injury-in-fact to support standing for claim that the state of Tennessee violated constitutional law).

[7] Although separate constitutional provisions, the Electors Clause and Elections Clause share "considerable similarity," *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839, (2015) (Roberts, C.J., dissenting), and Plaintiffs do not at all distinguish the two clauses in their motion for injunctive relief or reply brief (ECF No. 7; ECF No. 49 at Pg ID 3076-78). *See also Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *7 (3d Cir. Nov. 13, 2020) (applying same test for standing under both Elections Clause and Electors Clause); *Wood*, 2020 WL 6817513, at *1 (same); *Foster*, 522 U.S. at 69 (characterizing Electors Clause as Elections Clauses' "counterpart for the Executive Branch"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995) (noting that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause).

This is so because the Elections Clause grants rights to "the Legislature" of "each State." U.S. Const. art. I, § 4, cl. 1. The Supreme Court interprets the words "the Legislature," as used in that clause, to mean the lawmaking bodies of a state. *Ariz. State Legislature*, 135 S.Ct. at 2673. The Elections Clause, therefore, grants rights to state legislatures and to other entities to which a State may delegate lawmaking authority. *See id.* at 2668. Plaintiffs' Elections Clause claims thus belong, if to anyone, Michigan's state legislature. *Bognet v. Secy. Commonwealth of Pa.*, -- F.3d. --, 2020 WL 6686120, *7 (3d Cir. Nov. 13, 2020). Plaintiffs here are six presidential elector nominees; they are not a part of Michigan's lawmaking bodies nor do they have a relationship to them.

To support their contention that they have standing, Plaintiffs point to *Carson v. Simon*, 78 F.3d 1051 (8th Cir. 2020), a decision finding that electors had standing to bring challenges under the Electors Clause. (ECF No. 7 at Pg ID 1839 (citing *Carson*, 978 F.3d at 1057).) In that case, which was based on the specific content and contours of Minnesota state law, the Eighth Circuit Court of Appeals concluded that because "the plain text of Minnesota law treats prospective electors as candidates," it too would treat presidential elector nominees as candidates. *Carson*, 78 F.3d at 1057. This Court, however, is as unconvinced about the majority's holding in *Carson* as the dissent:

> I am not convinced the Electors have Article III standing to assert claims under the Electors Clause. Although

> Minnesota law at times refers to them as "candidates," *see, e.g.*, Minn. Stat. § 204B.03 (2020), the Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president. *Id*. § 208.04 subdiv. 1 ("[A] vote cast for the party candidates for president and vice president shall be deemed a vote for that party's electors."). They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals.

78 F.3d at 1063 (Kelly, J., dissenting).[8]

Plaintiffs contend that the Michigan Election Code and relevant Minnesota law are similar. (See ECF No. 49 at Pg ID 3076-78.) Even if the Court were to

[8] In addition, at least one Circuit Court, the Third Circuit Court of Appeals, has distinguished *Carson*'s holding, noting:

> Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots. . . . The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none.

Bognet, 2020 WL 6686120, at *8 n.6.

agree, it finds that Plaintiffs lack standing to sue under the Elections and Electors Clauses.

F. The Merits of the Request for Injunctive Relief

1. Likelihood of Success on the Merits

The Court may deny Plaintiffs' motion for injunctive relief for the reasons discussed above. Nevertheless, the Court will proceed to analyze the merits of their claims.

a. Violation of the Elections & Electors Clauses

Plaintiffs allege that Defendants violated the Elections Clause and Electors Clause by deviating from the requirements of the Michigan Election Code. (*See, e.g.,* ECF No. 6 at Pg ID 884-85, ¶¶ 36-40, 177-81, 937-38.) Even assuming Defendants did not follow the Michigan Election Code, Plaintiffs do not explain how or why such violations of state election procedures automatically amount to violations of the clauses. In other words, it appears that Plaintiffs' claims are in fact state law claims disguised as federal claims.

A review of Supreme Court cases interpreting these clauses supports this conclusion. In *Cook v. Gralike*, the Supreme Court struck down a Missouri law that required election officials to print warnings on the ballot next to the name of any congressional candidate who refused to support term limits after concluding that such a statute constituted a "'regulation' of congressional elections," as used in

the Elections Clause. 531 U.S. 510, 525-26 (2001) (quoting U.S. Const. art. I, § 4, cl. 1). In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court upheld an Arizona law that transferred redistricting power from the state legislature to an independent commission after concluding that "the Legislature," as used in the Elections Clause, includes any official body with authority to make laws for the state. 576 U.S. 787, 824 (2015). In each of these cases, federal courts measured enacted state election laws against the federal mandates established in the clauses—they did not measure *violations* of enacted state elections law against those federal mandates.

By asking the Court to find that they have made out claims under the clauses due to alleged violations of the Michigan Election Code, Plaintiffs ask the Court to find that any alleged deviation from state election law amounts to a modification of state election law and opens the door to federal review. Plaintiffs cite to no case—and this Court found none—supporting such an expansive approach.

b. Violation of the Equal Protection Clause

Most election laws will "impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). But "[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [to vote]." *Reynolds v. Sims*, 377 U.S. 533, 559 (1964) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964)). Voting rights can be impermissibly burdened "by a

debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id*. (quoting *Reynolds*, 377 U.S. at 555).

Plaintiffs attempt to establish an Equal Protection claim based on the theory that Defendants engaged in "several schemes" to, among other things, "destroy," "discard," and "switch" votes for President Trump, thereby "devalu[ing] Republican votes" and "diluting" the influence of their individual votes. (ECF No. 49 at Pg ID 3079.)

But, to be perfectly clear, Plaintiffs' equal protection claim is not supported by any allegation that Defendants' alleged schemes caused votes for President Trump to be changed to votes for Vice President Biden. For example, the closest Plaintiffs get to alleging that physical ballots were altered in such a way is the following statement in an election challenger's sworn affidavit: "I believe some of these workers were changing votes that had been cast for Donald Trump and other Republican candidates."[9] (ECF No. 6 at Pg ID 902 ¶ 91 (citing Aff. Articia

[9] Plaintiffs allege in several portions of the Amended Complaint that election officials improperly tallied, counted, or marked ballots. But some of these allegations equivocate with words such as "believe" and "may" and none of these allegations identify which presidential candidate the ballots were allegedly altered to favor. (*See, e.g.,* ECF No. 6 at Pg ID 902, ¶ 91 (citing Aff. Articia Bomer, ECF No. 6-3 at Pg ID 1008-10 ("I *believe* some of these ballots *may* not have been properly counted." (emphasis added))); Pg ID 902-03, ¶ 92 (citing Tyson Aff. ¶ 17) ("At least one challenger observed poll workers adding marks to a ballot where there was no mark for any candidate.").

Bomer, ECF No. 6-3 at Pg ID 1008-1010).) But of course, "[a] belief is not evidence" and falls far short of what is required to obtain any relief, much less the extraordinary relief Plaintiffs request. *United States v. O'Connor*, No. 96-2992, 1997 WL 413594, at *1 (7th Cir. 1997); *see Brown v. City of Franklin*, 430 F. App'x 382, 387 (6th Cir. 2011) ("Brown just submits his belief that Fox's 'protection' statement actually meant "protection from retaliation. . . . An unsubstantiated belief is not evidence of pretext."); *Booker v. City of St. Louis*, 309 F.3d 464, 467 (8th Cir. 2002) ("Booker's "belief" that he was singled out for testing is not evidence that he was.").[10] The closest Plaintiffs get to alleging that election machines and software changed votes for President Trump to Vice

[10] As stated by the Circuit Court for the District of Columbia Circuit:

> The statement is that the complainant believes and expects to prove some things. Now his belief and expectation may be in good faith; but it has been repeatedly held that suspicion is not proof; and it is equally true that belief and expectation to prove cannot be accepted as a substitute for fact. The complainant carefully refrains from stating that he has any information upon which to found his belief or to justify his expectation; and evidently he has no such information. But belief, without an allegation of fact either upon personal knowledge or upon information reasonably sufficient upon which to base the belief, cannot justify the extraordinary remedy of injunction.

Magruder v. Schley, 18 App. D.C. 288, 292, 1901 WL 19131, at *2 (D.C. Cir. 1901).

President Biden in Wayne County is an amalgamation of theories, conjecture, and speculation that such alterations were *possible*. (*See e.g.,* ECF No. 6 at ¶¶ 7-11, 17, 125, 129, 138-43, 147-48, 155-58, 160-63, 167, 171.) And Plaintiffs do not at all explain how the question of whether the treatment of election challengers complied with state law bears on the validity of votes, or otherwise establishes an equal protection claim.

With nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs' equal protection claim fails.[11] *See Wood*, 2020 WL 7094866 (quoting *Bognet*, 2020 WL 6686120, at *12) ("'[N]o single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.'").

[11] "[T]he Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity. That is not how the Equal Protection Clause works." *Bognet*, 2020 WL 6686120, at *11.

2. Irreparable Harm & Harm to Others

Because "a finding that there is simply no likelihood of success on the merits is usually fatal[,]" *Gonzales v. Nat'l Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir. 2000) (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997), the Court will not discuss the remaining preliminary injunction factors extensively.

As discussed, Plaintiffs fail to show that a favorable decision from the Court would redress their alleged injury. Moreover, granting Plaintiffs' injunctive relief would greatly harm the public interest. As Defendants aptly describe, Plaintiffs' requested injunction would "upend the statutory process for election certification and the selection of Presidential Electors. Moreover, it w[ould] disenfranchise millions of Michigan voters in favor [of] the preferences of a handful of people who [are] disappointed with the official results." (ECF No. 31 at Pg ID 2227.)

In short, none of the remaining factors weigh in favor of granting Plaintiffs' request for an injunction.

IV. Conclusion

For these reasons, the Court finds that Plaintiffs are far from likely to succeed in this matter. In fact, this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic

process and their trust in our government. Plaintiffs ask this Court to ignore the orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do.

The People have spoken.

The Court, therefore, **DENIES** Plaintiffs' "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief" (ECF No. 7.)

IT IS SO ORDERED.

s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: December 7, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

BRIEF OF GOVERNOR TONY EVERS IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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December 7, 2020

INTRODUCTION

This Court is the latest theater in a six-state campaign of meritless, scorched earth litigation relentlessly—albeit uniformly unsuccessfully—waged by the Trump campaign and its allies after the November 3 election. In each state, as here, plaintiffs "seek relief that is stunning in its scope and breathtaking in its reach." *King v. Whitmer*, No. 20-13134, Op. & Order, at *2 (E.D. Mich. Dec. 7, 2020).[1] Wisconsin's Supreme Court called a similar request "the most dramatic invocation of judicial power [they] have ever seen." *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930-OA (Wis. Dec. 4, 2020) (Hagedorn, J., concurring on behalf of majority). This multi-state campaign is failing on every front. It should meet the same fate here.

Plaintiff's unprecedented requests for relief are based on nothing but a mishmash of speculation, conjecture, and conspiracy theories, all without a shred of evidence that could plausibly support their requested relief—and, despite waiting until a month after the election was completed, he asks the Court to grant this drastic relief immediately and thereby imperil Wisconsin's participation in the Electoral College next week. Plaintiff's case falls flat on step one (standing), and it trips again on each of the additional steps he would need to climb to establish a justiciable controversy that is not moot and that could properly be adjudicated in this Court, avoid a laches bar based on his failure to bring his claims earlier, and set forth a claim that could plausibly support his requested relief under *Twombly* and *Iqbal*.

Earlier today, a court in Michigan held, without a hearing or evidentiary presentation, that an analogous case raising nearly identical arguments with many of the same supporting exhibits

[1] Pursuant to Civil L.R. 7(j)(2), all unpublished cases, orders, and dispositions cited are filed in conjunction with this brief.

must be dismissed and the plea for injunctive relief denied. It did so for the same reasons identified in Governor Evers's Motion to Dismiss and his companion opposition to injunctive relief:

The plaintiffs lacked standing. Specifically relevant here, the court rejected the theory of vote dilution as a violation of the Equal Protection Clause and the allegation that presidential electors have standing under the Election and Electors Clauses. *King*, Op. & Order, at *23-*30.

The court deemed the case non-justiciable, for several reasons. The court held abstention was appropriate under the *Colorado River* doctrine. That conclusion made it "unnecessary to decide whether abstention is appropriate under other doctrines." *Id.* at *23. *Burford* abstention is argued below. The court also found the matter moot because "[t]he time has passed to provide most of the relief" and "the remaining relief is beyond the power of any court." *Id.* This accords with the Eleventh Circuit's decision affirming dismissal of the Georgia litigation, which noted that courts "cannot turn back the clock and create a world in which' the 2020 election results are not certified." *Wood v. Raffensberger*, No. 20-14418, 2020 WL 7094866, at *6 (11th Cir. Dec. 5, 2020). The Governor's Motion additionally argues that Plaintiff's case fails both because there is an exclusive state judicial procedure and he failed to exhaust his administrative remedies.

The Michigan court deemed the Eleventh Amendment preclusive. To escape that constitutional bar, the court explained, a plaintiff must "allege[] an ongoing violation of federal law and seek[] relief properly characterizes as prospective." *King*, Op. & Order, at *11 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 525 U.S. 635, 645 (2002)). But in Michigan, as here, the election results have been certified, leaving "no continuing violation to enjoin." *Id.* at *13.

The Michigan court applied laches because plaintiffs "waited too long to knock on the Court's door." *Id.* at *16. The Georgia similarly held that, "rather than challenging election rules on the eve of an election, [Wood] wants the rules for the already concluded election declared

unconstitutional and over one million absentee ballots called into question, [which] would disenfranchise a substantial portion of the electorate and erode public confidence in the electoral process." *Wood v. Raffensberger*, No. 1:2020-cv-04651-SDG, 2020 WL 6817513, at *8 (N.D. Ga. Nov. 20, 2020), *aff'd*, 2020 WL 7094866, at *6 (11th Cir. Dec. 5, 2020).

All of this before the court even reached the merits, which it found decidedly lacking. Here, the merits are so lacking that they fail to meet federal pleading standards, as argued below.

Given that Plaintiff Feehan seeks not preliminary relief to preserve the status quo but a radical remedy to reverse the results of Wisconsin's presidential election and disenfranchise millions of voters, the Court should resolve this motion to dismiss before considering any request for relief. *See* Fed. R. Civ. P. 12(i); *accord, e.g.*, *Packaging Corp. of Am., Inc. v. Croner*, 419 F. Supp. 3d 1059, 1062 (N.D. Ill. 2020) (court addressed motion to dismiss first, and then addressed preliminary injunction on remaining count not dismissed); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 8846573, at *1 (E.D. Wis. Oct. 3, 2016) (court addressed motion to dismiss before previously filed motion for preliminary injunction).

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(1) tests the sufficiency of the complaint, not the merits of the case. *Center for Dermatology and Skin Cancer, Ltd. v. Burwell*, 770 F.3d 586, 588 (7th Cir. 2014). A plaintiff facing a 12(b)(1) motion to dismiss must establish that the jurisdictional requirements have been met. *Id*. at 588-89. A complaint must be dismissed under Rule 12(b)(1) if the plaintiff lacks standing or the case is nonjusticiable.

To establish standing, Plaintiff must show that: (1) he has "suffered an actual or imminent, concrete and particularized injury-in-fact;" (2) there is a "causal connection between [his] injury and the conduct complained of;" and (3) there is a "likelihood that this injury will be redressed by a favorable decision." *Democratic Party of Wis. v. Vos*, 966 F.3d 581, 585 (7th Cir. 2020) (quoting

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992)). "A plaintiff may not rely on only a 'generalized grievance about the conduct of government.'" *Id*. (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (U.S. 2018)). If a plaintiff lacks standing to assert a claim, the court lacks subject-matter jurisdiction over the claim, and the claim must be dismissed. Fed. R. Civ. P. 12(h)(3); *see also Taylor v. McCament*, 875 F.3d 849, 853 (7th Cir. 2017). In addition to constitutional standing, the Court must also conclude that Plaintiff has prudential standing, which generally prohibits a litigant from "raising another person's legal rights," bars "adjudication of general grievances more appropriately addressed in the representative branches," and requires that claims "fall within the zone of interests protected by the law invoked." *Winkler v. Gates*, 481 F.3d 977, 979 (7th Cir. 2007) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004)).

A court may also deem a complaint nonjusticiable for several reasons, including that it is: (1) subject to exclusive remedies in a different forum, and, therefore, an appropriate subject for abstention; (2) not yet ripe because the plaintiff has failed to exhaust administrative remedies; or (3) moot because the requested relief is no longer available in light of events that have already transpired. A federal court may appropriately decline to exercise jurisdiction over a matter (abstain) "when (1) there is a substantial uncertainty as to the meaning of the state law and (2) there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 150 (7th Cir. 2011) (citation omitted). Moreover, under Wisconsin law, "where administrative action has taken place, and a statute sets forth a specific procedure for review of that action and court review of the administrative decision, the statutory remedy is exclusive and the parties cannot seek judicial review of the agency decision through other means." *Thomas v. McCaughtry*, 201 F.3d 995, 1001 (7th Cir. 2000) (citation omitted). Also, a "case is

moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Stotts v. Cmty. Unit Sch. Dist. No. 1*, 230 F.3d 989, 990 (7th Cir. 2000) (internal quotation marks and citations omitted). And as the Eleventh Circuit and Eastern District of Michigan recognized in rejecting substantially identical claims over the past couple days, the failure to overcome these hurdles to establishing a justiciable controversy is fatal to Plaintiff's claims. King, Op. & Order, at *16; Wood v. Raffensberger, 2020 WL 7094866, at *6.

The equitable doctrine of laches may also bar a complaint if a plaintiff's "unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant. In the context of elections, this means that any claim against a state electoral procedure must be expressed expeditiously." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (citations omitted).

Upon satisfying those basic requirements for pursuing any claim in federal court, a Plaintiff then can nonetheless overcome a motion to dismiss only if the allegations underlying his claims are plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And where, as here, a plaintiff alleges fraud, the Federal Rules apply a heightened pleading standard. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). Under this heightened standard, a plaintiff "must describe the 'who, what, when, where, and how' of the fraud." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 441 (7th Cir. 2011) (quoting *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009)).

A court must hear and resolve a properly filed motion to dismiss for the reasons stated above before proceeding to address any other matters. Pursuant to Fed. R. Civ. P. 12(i), a motion under brought under 12(b)(1) and 12(b)(6) "must be heard and decided before trial, unless the court orders a deferral until trial."

ARGUMENT

Plaintiff's claims are utterly meritless and should be dismissed for several reasons. *First*, Plaintiff lacks standing to bring his claims. *Second*, Plaintiff's claims are non-justiciable in this Court because they are the subject to the exclusive remedy provided in state law, and are properly subject to abstention, are either moot (with respect to some of the requested relief) or not yet ripe (as to others) for Plaintiff's failure to exhaust state administrative remedies, and are moot. *Third*, the Eleventh Amendment of the U.S. Constitution bars Plaintiff's claims. *Fourth*, even if Plaintiff had standing and his claims were properly before this Court, they are barred by the doctrine of laches. *Fifth*, and finally, Plaintiff's claims, rooted in a toxic combination of deeply fatally flawed "expert" "analysis" and wholly unsupported leaps of logic lacking any factual foundation in the Wisconisn election come nowhere near meeting the *Twombly/Iqbal* plausibility standard. are For all of these reasons, this Court should dismiss Plaintiff's Amended Complaint in the first instance, without ever adjudicating Plaintiff's motion for injunctive relief.

I. Plaintiff Lacks Standing to Assert His Claims in Federal Court.

Plaintiff lacks standing to bring his claims, both under Article III of the U.S. Constitution and as a prudential matter. "The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Kowalski v. Tesmer*, 534 U.S. 125, 128-29 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). To establish standing, Plaintiff must show: (1) injury in fact; (2) a causal connection between the claim and the alleged injury; and (3) redressability of the claimed harm. *Democratic Party of Wis.*, 966 F.3d at 585. The law is clear: general grievances applicable to everyone do not establish standing. *Winkler*, 481 F.3d at 979 (quoting *Newdow*, 542 U.S. at 11-12). Plaintiff has alleged a general grievance, based

on speculation and conjecture, that does not differentiate his claimed injury from that of other Wisconsin voters. It follows that Plaintiff lacks standing.

A. Plaintiff lacks standing to pursue his Electors and Elections Clauses Claim.

Plaintiff claims that Defendants violated Wisconsin election law, usurping the power of the Legislature. Specifically, Plaintiff claims that Defendants facilitated the illegal use and counting of absentee ballots by individuals who, allegedly, did not qualify as "indefinitely confined" under state law, contradicted state law which provides that absentee ballots may not be counted if the certification lacks a witness address, and illegally cured absentee ballots by filling in missing witness or voter information. (Amend. Cmplt. ¶¶37-45, 104-106) But Plaintiff alleges general "harms" of statewide non-compliance with election laws that would apply to any of the 3.3 million Wisconsin voters. This is "precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance in the past." *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

Nor does Plaintiff does gain standing by virtue of his role as a potential presidential elector. Presidential electors have a purely ministerial role under Wisconsin law. The presidential electors pledged to the candidate who won the popular vote, as determined by the state canvass, meet at the state capitol on the first Monday after the second Wednesday in December. Wis. Stat. § 7.75(1). Those presidential electors "*shall* vote by ballot for that person for president and that person for vice president who are, respectively, the candidates" for or by whom they were nominated. Wis. Stat. § 7.75(2) (emphasis added). It is mandatory, not discretionary, that a presidential elector vote for the winner of the statewide popular vote, and there can be no claim that Plaintiff is deprived of any individual or personal right under the Electors and the Elections Clauses by Defendants' alleged failure to administer the election in the manner that Plaintiff desires. Indeed, the Third Circuit recently held that plaintiffs, whether voters or elector candidates, have no private right of

action at all under the Electors and Elections Clauses. *Bognet v. Sec'y of Commonwealth*, No. 20-3214, 2020 WL 6686120, at *19 (3d Cir. Nov. 13, 2020); *accord Hotze v. Hollins*, No. 4:20-cv-03709, 2020 WL 6437668, at *2 (S.D. Tex. Nov. 2, 2020); *King*, Op. & Order, at *28-*30.[2] Treating electors the same as every other voter for these standing purposes makes sense, given that electors, confined by state law to executing a mandatory duty to vote for the winner of the statewide popular vote, have no personal interest under the Electors and Elections Clauses distinguishable from the rest of the voting population. While electors no doubt have a preference as to who wins the election, that is no different from any of the other millions of Wisconsin voters who voted in the election.

Prudential standing compels the same result. Under the prudential standing doctrine, even plaintiffs who can show some injury in fact, unlike Plaintiff here, may nonetheless, "assert only a violation of [their] own rights." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988). Here, Plaintiff's claims rest entirely on the rights of third parties: the right of the Legislature (which has chosen not to litigate) to determine how elections are conducted; the right of President Trump (who is litigating in state court under Wis. Stat. § 9.01) to be awarded Wisconsin's electoral votes if, as alleged, he received the highest number of votes; and the rights of unidentified non-party Wisconsin voters whose votes allegedly were not properly counted or were diluted by the counting of illegally cast ballots. Plaintiff, himself, has not alleged and cannot claim to have suffered any individualized harm or violation of his own rights. He thus lacks standing to proceed in this Court.

[2] Plaintiff erroneously cites *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) (per curiam), to assert presidential electors have Article II standing. *Carson* is an outlier and wrong as a matter of law. The weight of federal authority holds that only state legislatures have standing to bring Electors/Elections Clause cases in cases like this.

B. Plaintiff also lacks standing to pursue Equal Protection, Due Process, and "widespread fraud" claims.

The standing principles that doom Plaintiff's lead claim in Count I for violations of the Elections and Electors Clauses also foreclose his claims in Counts II-IV for violations of the Equal Protection Clause, the Due Process Clause, and "Widespread Ballot Fraud." The common thread running through each of these claims is that Plaintiff's vote was diluted because Wisconsin counties counted some votes that Plaintiff contends were "illegal" and failed to count some votes that Plaintiff contends were "legal." But here again, Plaintiff fails to provide any detail whatsoever of a concrete constitutional harm. Courts have consistently, including with respect to the November 2020 election, rejected the notion that the generalized grievance of alleged vote dilution provides private plaintiffs, like Plaintiff here, with a right of action. *Bognet*, 2020 WL 6686120, at *11 ("This conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm."); *Wood,* 2020 WL 6817513, at *5 ("This is a textbook generalized grievance."), *aff'd*, No. 20-14418, 2020 WL 7094866, at *7 (11th Cir. Dec. 5, 2020) ("Vote dilution in this context is a paradigmatic generalized grievance that cannot support standing."); *Moore v. Cicosta*, No. 1:20-cv-911, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020) ("[T]he notion that a single person's vote will be less valuable as a result of unlawful or illegal ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing."). There is a good reason for this standing principle that precludes private plaintiffs from challenging governmental action or inaction that impacts the public generally: otherwise, any enterprising conspiracy theorist with a Twitter following could run a GoFundMe campaign to fuel a series of meritless (and seemingly unending) challenges to the results of an election.

II. Plaintiff's Claims Are Not Justiciable in this Court.

A. The exclusive remedy for Plaintiff's claims is in state court.

The gravamen of Plaintiff's claims, "alleged irregularity, defect, or mistake committed during the voting or canvassing process," is addressed by the sole remedy of a recount process outlined in state law. Wis. Stat. § 9.01(11). The recount statute "constitutes the exclusive judicial remedy" for such claims under state law. *Id*. The plain language of the statute is unambiguous on this point, as recently confirmed by the Wisconsin Supreme Court. *Trump v. Evers*, No. 2020AP1971-OA, Order at *2 (Wis. Dec. 3, 2020); *see also id.* (Hagedorn, J. concurring) ("[C]hallenges to election results are also governed by law. … [Section 9.01] provides that these actions should be filed in the circuit court, and spells out detailed procedures for ensuring their orderly and swift disposition."); *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930-OA, Order at *3 (Wis. Dec. 4, 2020) (Hagedorn, J. concurring in denial of petition for original action, joined by a majority of the Justices) (noting that one reason petition for original action was "woefully deficient" was because it failed to "consider the import of election statutes that may provide the 'exclusive remedy,'" namely, Wis. Stat. §§ 5.05(2m) and 9.01).

President Trump requested a recount, the results of which are currently being appealed in state circuit court pursuant to Wisconsin law. Many of Plaintiff's claims of election law "violations" are in fact currently being litigated where they must be brought: via the recount process in state court. Federal jurisdiction is not available to circumvent the Wisconsin Legislature's designated forum for challenging an election simply by bootstrapping concerns about the constitutional right to vote to any election-related cause of action. Wisconsin has instituted a strict set of procedures for challenging election results, permitting such challenges only when election results are close (no more than a 1% difference between the leading candidates), and requiring such challenges to be brought and proceed promptly. Wis. Stat. § 9.01(1)(a)5.b. To

permit Plaintiff to circumvent these procedures and time limits, through the artifice of filing a federal lawsuit bootstrapping federal claims onto what at bottom are grievances about state officials purportedly failing to properly follow state election law, would eviscerate Wisconsin's careful process for properly and quickly deciding election challenges. If plaintiffs are not required to avail themselves of Wisconsin's strict procedural and timing requirements for challenging election results, what's to stop other disappointed Republican voters or candidates from filing lawsuit after lawsuit until January 20 (if not beyond)? Such a result would not just offend state law but would permit crafty litigants to blow past federal guideposts for finalizing the presidential election results; it would further destabilize our democracy and undermine the will of Congress, the Wisconsin legislature and, above all, the will of Wisconsin's voters. *See also infra* Part IV (laches).

B. The Court should abstain from deciding this case.

This Court should abstain from exercising jurisdiction over this case. Abstention under the *Pullman* doctrine is warranted when "there is a substantial uncertainty as to the meaning of state law" and "there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Wis. Right to Life State Political Action Comm.*, 664 F.3d at 150 (quotation omitted). In other words, this Court should abstain if it concludes that "the resolution of a federal constitutional question might be obviated if state courts were given the opportunity to interpret ambiguous state law." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716-17 (1996). These criteria are easily met here: in accordance with Wisconsin state law, Wisconsin courts are currently considering a recount appeal raising issues that overlap with those Plaintiff asserts here. *See Trump v. Biden*, No. 2020CV7092, Order for Consolidation and for Appointment of Judicial Officer (Milwaukee Cty. Cir. Ct. Dec. 3, 2020).

First, the Wisconsin state law issues underlying Plaintiff's claims are sufficiently uncertain to warrant abstention. When similar issues were raised in a petition for leave to commence an original action in the Wisconsin Supreme Court, three Justices of that court characterized the claims as presenting a "matter of statewide concern that requires a declaration" of the relevant Wisconsin law. *See Wisc. Voters All. v. Wisc. Elections Comm'n*, Order, No. 2020AP1930-OA, at *4 (Wis. Dec. 4, 2020) (Roggensack, Ziegler, and Bradley, JJ., dissenting). Particularly in light of the sensitive issues of state law implicated by Plaintiff's claims, the Court should abstain from addressing those issues pending state courts' consideration of them.

Second, there exists a reasonable probability that the recount appeal will clarify enough issues of state law to significantly narrow or eliminate altogether the federal constitutional issues Plaintiffs allege are presented in this case. In particular, the recount appeal is likely to provide a resolution on several state law issues raised in this case: the proper interpretation of Wisconsin Stat. § 6.87's absentee ballot signature verification requirements (*see* Recount Pet. ¶4; Amend. Cmplt. ¶¶43-45), and Wisconsin Stat. § 6.86(2)'s voter identification requirements (*see* Recount Pet. ¶6; Amend. Cmplt. ¶¶38-42). There is therefore a strong probability that resolution of the state-law recount appeal process will obviate this Court's need to address most or all of the federal constitutional issues raised here. Accordingly, to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication," *Pullman*, 312 U.S. at 500, this Court should refrain from injecting itself into the middle of this dispute.

C. Plaintiff's failure to exhaust administrative remedies bars litigation.

Plaintiff, as a Wisconsin voter, is required to bring elections claims through a complaint to the Wisconsin Elections Commission pursuant to Wis. Stat. § 5.06. This provision provides an exclusive administrative remedy to all voters. The administrative procedure allows WEC to

investigate the complaint to determine whether it has any merit, and potentially provide the complainant with a hearing. Wis. Stat. §§ 5.06(1) and (5). Critically, Wis. Stat. § 5.06(2) prohibits commencing any "action or proceeding to test the validity of any decision, action or failure to act on the part of any election official … without first filing a complaint…" Plaintiff has not complied with this mandatory administrative procedure. There are no allegations in the Amended Complaint, nor any copies of any WEC complaint forms attached as exhibits. Since Plaintiff has failed to exhaust his administrative remedies, this Court cannot provide the extraordinary relief requested. *See Glisson v. U.S. Forest Serv.*, 55 F.3d 1325, 1326 (7th Cir. 1995).

D. Plaintiff's requests for relief are moot.

Plaintiff's claims are also barred because his requested relief is moot. Federal courts may adjudicate only "live cases and controversies." *See Murphy v. Hunt*, 455 U.S. 478, 481 (1982). "A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Stotts,* 230 F.3d at 990 (internal quotation marks and citations omitted). "When a case is moot, it must be dismissed as non-justiciable." *Id*. at 991.

All of Plaintiff's requests for relief relate to the general election held on November 3, 2020, and its results. (Amend. Cmplt. ¶¶138-42) In part, Plaintiff asks the Court to (1) order Defendants to decertify the election results; (2) enjoin Defendant Governor Evers from transmitting the already certified election results to the Electoral College; and (3) order Defendant Governor Evers to transmit certified election results stating that President Donald Trump is the election winner. (*Id*. ¶142) But, as was recently confirmed in both Georgia and Michigan where similar requests for relief were reviewed, this relief is no longer available to Plaintiff and his claims are moot. *See King*, Op. & Order, at *13-*16; *Wood,* 2020 WL 7094866, at *6-7.

By the time Plaintiff filed his claim, not only had all 72 counties in Wisconsin finished canvassing their results and reported those results to the WEC: (1) both Dane and Milwaukee Counties had completed a full recount and reported their results to the WEC; (2) the WEC Chairperson had completed the statewide canvass and certified the results: (3) Governor Evers had signed the certificate of ascertainment and submitted the slate of presidential electors to the U.S. Archivist; and (4) the U.S. Archivist had confirmed receipt. To paraphrase Judge Parker in Michigan, by the time Plaintiff filed his complaint, the ship had sailed. *See King*, Op. & Order, at *13. Similarly, Judge Pryor of the Eleventh Circuit stated:

> "We cannot turn back the clock and create a world in which" the 2020 election results are not certified. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). And it is not possible for us to delay certification nor meaningful to order a new recount when results are already final and certified.

Wood, 2020 WL 7094866, at *6.

Because Wisconsin has already certified the election results, Plaintiff's requests to delay or prevent certification are moot and his complaint should be dismissed, as judges in several other states have concluded. "[T]here is no basis in law by which the courts may grant Petitioner's request to ignore the results of an election and recommit the choice to substitute its preferred slate of electors for the one chosen by a majority of Pennsylvania's voters." *Kelly v. Commonwealth*, No. 68 MAP 2020, 2020 WL 7018314, at *3 (Pa. Nov. 28, 2020)) (Wecht, J., concurring); *see also Wood*, 2020 WL 6817513, at *13 (concluding that "interfer[ing] with the result of an election that has already been concluded would be unprecedented and harm the public in countless ways").

III. Plaintiff's Claims are Barred by the Eleventh Amendment.

Plaintiff's claims face yet another insurmountable hurdle: the Eleventh Amendment. The Eleventh Amendment bars federal courts from granting "relief against state officials on the basis of state law, whether prospective or retroactive." *Pennhurst State Sch. & Hosp. v. Halderman*, 465

U.S. 89, 106 (1984). This bar applies when the relief sought would require a federal court to "instruct[] state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. at 106. It therefore precludes relief when, as here, plaintiffs have tried to disguise their state law claims as federal causes of action.

As federal courts have repeatedly emphasized, if the "gravamen" of a claim is that the state has "improperly interpreted and failed to adhere" to state law, a plaintiff cannot plead around an Eleventh Amendment problem by asserting that that failure to follow state law violates the federal constitution. *S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1204-05 (11th Cir. 2019); *see also Massey v. Coon*, No. 87-3768, 1989 WL 884, at *2 (9th Cir. Jan. 3, 1989) (holding state official immune where claim was brought under the Due Process and Equal Protection Clauses of the Constitution "on its face," but such "constitutional claims [were] entirely based on the failure of defendants to conform to state law"); *Balsam v. Sec'y of State*, 607 F. App'x 177, 183-84 (3d Cir. 2015) (applying the bar to claims "premised on violations of the federal Constitution"); *Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 626 (E.D. Pa. 2018) (explaining that, "[e]ven when voters attempt to tie their state law claims into their federal claims, the Eleventh Amendment bars the state law claims" (quotation omitted)); *Six v. Newsom*, 462 F. Supp. 3d 1060, 1073 (C.D. Cal. 2020) (denying temporary restraining order in part because Fifth and Fourteenth Amendment claims were predicated on violations of state law); *Thompson v. Alabama*, No. 2:16-CV-783-WKW, 2017 WL 3223915, at *8 (M.D. Ala. July 28, 2017) (denying injunction putatively based on federal constitutional claims because those claims rested on premise that state officials were violating state law).

That is just what Plaintiff has done here. Count I, for instance, alleges that Defendants violated the Elections and Electors Clauses by somehow exercising their powers in a way that

"conflict[s] with existing legislation" enacted by the Wisconsin legislature. (Amend. Cmplt. ¶105) But to assess whether that is so, the court would have to adjudicate a host of state law questions, including interpreting the State's photo identification law (*id.* ¶¶40-45), its address certification requirements (*id.* ¶¶46-47), and its purported ballot-processing restrictions (*id.* ¶48), as well as the scope of any delegation to state and county election boards. The same questions underlie Count II, Plaintiff's Equal Protection Clause claim, which relies on allegations that Defendants failed to comply with the requirements of the Wisconsin Election Code. (*Id.* ¶116) Similarly, the Due Process Clause claim asserted in Count III would require concluding that Wisconsin ballots were not tallied in accordance with Wisconsin law—and asks this Court to order decertification or a recount based on claims about what Wisconsin law requires for certification. (*See id.* ¶131) And while Count IV is captioned as "Wide-Spread Ballot Fraud" and cites federal vote-dilution law (*see id*. ¶¶132-38), the factual allegations on which it is premised raise state-law issues with respect to election administration and voting by allegedly ineligible voters. (*Id.* ¶54)

The relief Plaintiff seeks thus "conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst*, 465 U.S. at 106.

IV. The Doctrine of Laches Bars Plaintiff's Claims.

Even if Plaintiff has standing, which he does not, and his claims are both justiciable in this Court and not barred by the Eleventh Amendment, the doctrine of laches bars his claims because he has unreasonably delayed bringing his claims to the detriment not only of Defendants, but also of the nearly 3.3 million voters in Wisconsin who voted in this last election under the good-faith belief they were following the correct procedures to have their votes counted. "Laches arises when an unwarranted delay in bringing a suit or otherwise pressing a claim produces prejudice to the defendant. In the context of elections, this means that any claim against a state electoral procedure must be expressed expeditiously." *Fulani*, 917 F.2d at 1031.In the elections context, federal courts

regularly dismiss claims brought both before and after elections based on laches, "lest the granting of post-election relief encourage sandbagging on the part of wily plaintiffs." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988). This is because of "the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Id.*; *see also, e.g.*, *Knox v. Milw. Cty. Bd. of Election Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984) (laches warranted denial of preliminary injunction to restrain Wisconsin county elections where complaint was filed seven weeks before election).

Indeed, relating to the election at issue here, a federal court in Georgia rejected similar challenges to the presidential election results in that state on laches grounds. *See Wood*, 2020 WL 6817513. In doing so, the court stressed that laches principles are particularly salient in post-election cases because of the potential impact on the rights of voters and on public confidence in the electoral process. Unlike a pre-election challenge to the rules, the court explained, Wood "wants the rules for the already concluded election declared unconstitutional and over one million absentee ballots called into question. Beyond merely causing confusion, Wood's requested relief would disenfranchise a substantial portion of the electorate and erode public confidence in the electoral process." *Id.* at *8. The same is true here. Plaintiff unreasonably delayed bringing his claims not only until after the election, but nearly a month after Election Day. This delay is manifestly unwarranted and unreasonable, providing ample grounds for dismissal.

Plaintiff's equal protection and due process claims in Counts II and III are based on alleged violations of Wisconsin election laws. (Amend. Cmplt. ¶¶116, 129) Specifically, Plaintiff complains about directives the WEC issued in October 2016, May 2020, and October 2020, relating to absentee ballot procedures. (*Id.* ¶¶37-45) In Count IV, Plaintiff alleges widespread ballot fraud, or more accurately, suggests that ballot fraud could have potentially occurred, from

the use of Dominion Voting Machines.[3] (*Id.* ¶¶132-35) Plaintiff does not claim actual knowledge that any of these policies or procedures led to counting a single illegal vote or discounting a single legal vote in Wisconsin. Neither does Plaintiff provide any explanation for why he waited until nearly a month *after* the election to bring his claims. More egregiously, he does not explain why he waited more than six months since the May 2020 guidance was issued and more than four years since the October 2016 guidance was issued to challenge these procedures.[4] Yet, he now asks this Court to disenfranchise tens of thousands of citizens, if not all of the nearly 3.3 million Wisconsin voters, who cast their ballots in reliance upon the election proceeding under established rules.

Plaintiff, by his own admission, has long been on notice about alleged "irregularities" with Dominion voting machines. Throughout his Amended Complaint, Plaintiff alleges that Dominion machines perpetuated errors and fraud based on publicly available evidence, including that: (1) in 2018, an expert witness testified about Dominion's vulnerabilities (*see* Amend. Cmplt. ¶¶67-68); (2) on January 24, 2020, Texas opted not to use Dominion due to the possibility of fraud (*see* Amend. Cmplt. ¶64 and Exh. 11); and (3) on October 22, 2020, the Northern District of Georgia issued an order as to Dominion voting machines (*see* Amend. Cmplt. ¶¶65-66). Plaintiff makes no effort to offer a justifiable explanation for why he waited until weeks after the election to challenge the use of Dominion voting machines in Wisconsin.

[3] To the extent that Plaintiff claims that he was illegally, or at least inappropriately, prevented from observing the election process (Amend. Cmplt. ¶¶117, 130, 140), this allegation is too underdeveloped to constitute a sufficient claim for relief. Plaintiff's sparse allegation is completely devoid of specificity and without any evidentiary support. On its face, this allegation appears to be a recycled argument from a similar lawsuit filed in a different state. Moreover, Plaintiff's claim is obviated by the fact that a public recount, with observers from both campaigns, was conducted in Dane and Milwaukee Counties after Election Day.

[4] Lest the Court infer that Plaintiff acted with greater alacrity in response to the October 2020 guidance, that is incorrect. The October 2020 guidance merely restated the policy adopted by the WEC in October 2016. There was nothing new about it. (Amend. Cmplt. ¶¶44-45)

There can be no doubt that Plaintiff's delay, if it somehow resulted in his desired relief of decertifying the Wisconsin election results and awarding Wisconsin's electors to the losing candidate instead of the winning candidate, would prejudice both Defendants and the nearly 3.3 million Wisconsinites who cast their votes in the election. Local municipal officials, often part-time workers, administered this election, and Wisconsin voters participated in this election, in reliance on the propriety of the pre-election policies that Plaintiff only now belatedly seeks to challenge. Had Plaintiff raised and diligently pursued his challenges to these policies and before the election, as he should have, then any required changes to election procedures could have been implemented in response to any court rulings before the election—before, that is, the voters of Wisconsin participated in the election in reliance on these very policies. Courts routinely decline to change the rules of elections in the days and weeks leading up to an election, because of the significant prejudice caused by last-minute changes, which can result in voter confusion and depressed turnout. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). A court decision to *retroactively* change the rules *after* the election, and to invalidate tens of thousands, if not millions, of votes in the process, is even more unacceptable.

Federal appellate courts have repeatedly held that voters should not have their votes nullified for having followed guidance, policies, and court decisions in effect when they cast their ballot. *See, e.g.*, *Griffin v. Burns*, 570 F.2d 1065, 1074-75 (1st Cir. 1978); *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012). These courts have relied both on fundamental notions of fairness and on federal constitutional due-process protections. And this very election cycle, the U.S. Supreme Court followed suit in *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020). In that case, the Supreme Court stayed a district court's order, in effect reinstating a briefly enjoined state-law witness requirement for absentee ballots.

See id. But, in doing so, the Supreme Court expressly stated that any votes cast while the district court's order had been in effect "may not be rejected for failing to comply with the witness requirement." *Id.* The Court recognized the need to validate voters' reliance on the rules in place at the time they voted.

Nullifying tens of thousands, if not millions, of votes cast in the November general election based on Plaintiff's inexcusably belated challenges to policies and court decisions in place well before the election would violate due process just as surely as the decisions struck down in *Griffin* and *Husted*, and would run afoul of the U.S. Supreme Court's decision in *Andino*. Violating both the voting and due process rights of Wisconsinites would be hugely, unfairly, and indisputably prejudicial.

V. Plaintiff's Amended Complaint Fails to Meet Federal Pleading Standards.

Because Plaintiff's claims fail on jurisdictional and justiciability grounds, the Court need not reach the merits to dismiss the case with prejudice. Nonetheless, should the Court conclude that Plaintiff has standing, that this claims are justiciable, and that the doctrine of laches does not apply, Plaintiff's claims should be dismissed for their insurmountable pleading deficiencies – there is simply no plausible basis for the far-reaching conspiracy Plaintiff alleges, and no plausible support for his claim the Wisconsin election results were the product of anything other than counting the valid votes that were cast in reliance on the election procedures in effect. And Plaintiff has only magnified the gross deficiencies and utter ridiculousness and implausibility of his claims with the affidavits and so-called experts incorporated by reference in his complaint. Plaintiff's Amended Complaint fails to meet the fundamental threshold requirement under Rule 12(b)(6) of stating a claim upon which relief can be granted, and certainly falls short of Rule 9(b)'s mandate to plead all claims of fraud with particularity.

A. Assuming all of Plaintiff's allegations are true, they do not make a plausible allegation that Dominion Voting Systems machines were hacked in Wisconsin.

For purposes of the Rule 12(b)(6) analysis, this Court must assume Plaintiff's allegations, no matter how fantastical, are true. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). The Court must draw reasonable inferences from those allegations. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). But it need not go further and follow Plaintiff down a path of conjecture and conspiracy that is not supported by the facts. *Taha v. Int'l Bhd. of Teamsters, Local 781*, 947 F.3d 464, 472 (7th Cir. 2020). And, without blindly following Plaintiff through flights of fancy, leaps of faith, and logical fallacies, there is no claim here.

The allegations based on Plaintiff's first exhibit set the tone. That exhibit is a declaration from an anonymous witness who claims to have had ties to long-dead Venezuelan dictator Hugo Chavez[5] and involvement in rigging elections in that country. (Amend. Cmplt. ¶¶8-9, 81, 87 & Exh. 1) Plaintiff's anonymous declarant acknowledges having little knowledge of the electoral process in the United States: "I have not participated in any political process in the United States, have not supported any candidate for office in the United States, am not legally permitted to vote in the United States, and have never attempted to vote in the United States." (Amend. Cmplt. Exh. 1) The witness claims to have witnessed the creation and operation of a voting systems company called "Smartmatic," and claims this system was used to manipulate elections in favor of Chavez and his successor, Nicolas Maduro. (Amend. Cmplt. Exh. 1) The witness also claims this system was used to rig elections throughout Latin America. (*Id.* ¶20) This witness further claims that descendants of this "Smartmatic" system are now "in the DNA" of voting software systems used

[5] *See* William Neuman, "Chavez Dies, Leaving Sharp Divisions in Venezuela," *N.Y. Times* (Mar. 6, 2013), *available at* https://www.nytimes.com/2013/03/06/world/americas/hugo-chavez-of-venezuela-dies.html (last visited Dec. 5, 2020).

in the United States, including Dominion Voting Systems, such that they could be exploited by unscrupulous persons seeking to manipulate election results. (*Id.* ¶5) There is no allegation here that any of this has anything to do with Wisconsin. The declarant asserts that, in the U.S. election on November 3, 2020, "vote counting was abruptly stopped in five states using Dominion software" when "Donald Trump was significantly ahead in the votes." (*Id.* ¶26) He then jumps to "the wee hours of the morning," when he vaguely asserts that "something significantly changed" and "[w]hen the vote reporting resumed the very next morning there was a very pronounced change in favor of the opposing candidate, Joe Biden." (*Id.*) Notably, there is no explanation—in the Amended Complaint, this anonymous declaration, or elsewhere in Plaintiff's filings—of which states stopped vote counting, what changed in the wee hours, or that any fraudulent activity occurred in Wisconsin.

Plaintiff alleges that Dominion Voting Systems machines *could be* hacked, but he makes no plausible allegation that Dominion machines in Wisconsin *were* hacked and manipulated. "When a complaint's facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not shown—that the pleader is entitled to relief." *Taha*, 947 F.3d at 469 (quoting *Iqbal*, 556 U.S. at 679) (internal quotation marks omitted). Moreover, beyond presenting allegations of *potential* vulnerabilities of Dominion machines and software, Plaintiff offers no plausible connection whatsoever between these allegations and any impact on the results of the election in Wisconsin. Risk of fraud does not constitute fraud.

B. Plaintiff's allegations regarding "unreturned absentee ballots" and out-of-state voters provide no basis for overturning the election results.

Plaintiff's claim that there were a sufficient number of illegal votes counted and legal votes uncounted to overturn the results of the election is based on the statistical analysis of two proffered experts. Wiliam Briggs, self-proclaimed "Statistician to the Stars!" (Amend. Cmplt. Exh. 2 at 9),

provides statistical analysis, though without any methodological explanation or support. Briggs bases his opinions entirely on survey data provided by Matthew Braynard. (*Id.* at 2) But Braynard is not a qualified expert. In support of Braynard's qualifications, Plaintiff submits an "expert report" submitted by Braynard to the Wisconsin Supreme Court along with the Wisconsin Voters Alliance's petition for original action. (Amend. Cmplt. Exh. 3) However, although the report states that Braynard's resume is attached (*id.* at 3) it is not. Thus, Plaintiff apparently expects the Court to assume (without basis for doing so) Braynard's qualifications but the Court need not do so, as Braynard's resume was filed in a proposed petition to the Wisconsin Supreme Court, and reveals that he is a former Trump campaign staffer with an undergraduate business degree and a masters of fine art and "writing" who and has worked on various Republican campaigns. *See* Report of Matt Braynard, *Wis. Voters Alliance,* No. P2020AP1930-OA, attached as Exh. 15.

Braynard has an undergraduate business degree and an MFA in "writing", and he has worked on various Republican campaigns, including the Trump campaign. (*Id.* at 3-4) Braynard does not have any apparent training or expertise in survey-based research; he does not purport to have any expertise in linking and analyzing complex databases; he does not have any peer-reviewed publications relating to election data or data analysis; and he apparently has never been qualified to serve as an expert witness in any matter in any court. (*Id.* at 4) His survey methodologies have not been disclosed, and the complaint provides no basis for inferring that he is competent to conduct a reliable survey that would comport with professional standards in the field, or that he even endeavored to do so. According to a recent article in the *Washington Post* (and his own postings on Twitter), Braynard and a team of contractors he has retained using crowd-sourced funds, engaged in an effort to "hunt for fraud" in the 2020 election.[6]

[6] *See* Jon Swaine & Lisa Raine, "The federal government's chief information security officer is helping an outside effort to hunt for alleged voter fraud," *Washington Post* (Nov. 15, 2020), available

Despite the purported "expert" status of his report, Braynard fails to provide even a cursory explanation of his survey methodologies and whether those methodologies comported with the standards required for considering a survey reliable, the steps taken to ensure his samples were random and representative of the underlying population, or the steps taken to account for possible inaccuracies or falsehoods provided in survey responses. Obviously Braynard is not a qualified expert and his "expert opinions" regarding absentee ballots in Wisconsin are likely not admissible, let alone credible. The same Braynard report was submitted in the Wisconsin Supreme Court recently, leading a majority of the Court to cite "legitimate arguments that [Braynard's] report would not even be admissible evidence." *Wis. Voters Alliance*, No. 2020AP1930-OA, Order at *3 (Hagedorn, J. concurring in denial of original action petition, joined by majority of the Justices).

Briggs's analysis relies upon Braynard's data without question, assuming the validity of Braynard's conclusion that there were approximately 96,771 "unreturned absentee ballots" in Wisconsin.[7] (Amend. Cmplt. Ex 3 at 4) By relying upon Braynard's statistically unreliable data, Briggs's expertise is also questionable, at best. The printout of Wisconsin-specific data included with Briggs's report further undermines the plausibility of Briggs's assertions. (Amend. Cmplt. Exh. 2 at 4-7) This printout indicates that survey respondents were asked whether they requested an absentee ballot "in Wisconsin," and that the 13.92% of respondents who answered "no" were deemed to have received a ballot without requesting one – even though a Wisconsin voter who

at https://www.washingtonpost.com/politics/trump-voter-integrity-fund/2020/11/15/89986f1c-25fe-11eb-952e-0c475972cfc0_story.html (last visited Dec. 6, 2020); http://twitter.com/MattBraynard.

[7] Braynard claims this 96,771 ballot figure was derived from a report he obtained from a firm called "L2 Political." (Amend. Cmplt. Exh. 3 at 5-6) Braynard does not provide the report itself, the date of the report, the underlying data from the State that supposedly served as the basis for the report, or any other information that would allow for validation of his double-hearsay account of what this data purportedly shows. Accordingly, there is no basis for relying on the 96,771 ballot figure that serves as the basis for his calculations.

requested an absentee ballot while attending school out-of-state or living on a military base abroad would have properly answered "no" to the question as posed. (*Id.* at 6) Briggs labels this alleged problem Error #1. (*Id.* at 1) From the results of this fatally poorly drafted survey, Briggs even more inexplicably leaps to the conclusion that 16,316-19,273, or 31% of the alleged "unreturned absentee ballots" were "troublesome," (*id.*) which Plaintiff argues supports overturning the results of the election. (Amend. Cmplt. ¶¶107, 119)

Briggs's so-called Error #2, upon which he asserts that somewhere between 13,991 and 16,757 votes of Wisconsinites should be invalidated, bears no closer relationship to plausibility. (Amend. Cmplt. Exh 2 at 1-2) These figures are based on respondents to Braynard's surveys who were listed as having an "unreturned absentee ballot," but who responded "yes" when asked whether they had mailed their ballot. In other words, these are absentee ballots that were allegedly returned but not counted. Neither Briggs nor Braynard does anything to account for various reasons a person may have answered "yes"—perhaps they answered "yes" because they mailed back their ballot, but did not do so in a timely fashion such that it was not properly counted; perhaps they mailed back their ballot, but it was not properly completed or cured, such that it was not counted; or conceivably, some of the respondents to the survey conducted on November 15-17, 2020, *two weeks after the election*, lied or misremembered. Nor does Briggs even suggest there is any reason to believe these ballots predominantly favored Trump rather than Biden. Yet, Plaintiff implausibly asserts this "analysis" serves as a basis for overturning the election.

Plaintiff's assertion that the Court could plausibly conclude that 6,966[8] absentee votes were "illegal" based on voters having moved out-of-state prior to Election Day or having registered to

[8] Further highlighting the liberties Plaintiff has taken with the alleged expert opinions is the fact that Braynard concluded, after having removed duplicates, that 6,848 individuals lost Wisconsin

vote in another state after having registered in Wisconsin is equally ridiculous. (Amend. Cmplt. ¶51) This assertion is based entirely on Braynard's questionable analysis. To come to his conclusions, Braynard compared the National Change of Address database for the day after Election Day with Wisconsin's database for all absentee or early voters, and alleges that anyone who appears to have moved as of the day after Election Day was ineligible to vote. (Amend. Cmplt. Exh. 3 at 9) However, Braynard fails to account for the fact that a person may file a change of address for a number of reasons, yet retain residence for voting purposes in his or her home state. For example, college students may file a change of address in order to receive mail while living out of state on a university campus without establishing residency for voting purposes in that state. Moreover, neither Plaintiff nor Braynard provides a single, specific example of a person illegally voting in Wisconsin after having moved out-of-state. Although Plaintiff is entitled to a presumption in favor of his allegations, that presumption does not extend so far that the Court must assume an expert's opinions are correct, or even admissible, and there are not facts here that, even if assumed true, support a reasonable inference that Plaintiff's constitutional rights were violated in the Wisconsin general election.

C. Plaintiff's allegations regarding "statistical impossibilities" provide no basis for overturning the election results.

Plaintiff further asks this Court to cast aside 181,440 votes, and thereby reverse the results of the election as determined by the will of nearly 3.3 million Wisconsin voters, based on "statistically significant" results favoring President-Elect Biden in unspecified counties using Dominion Voting Machines. (Amend. Cmplt. ¶¶52-58) Notably, Plaintiff bases this assertion on the purported statistical analysis of an anonymous "Affiant." (*Id.* ¶52) But, despite this analysis

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residency and cast illegal ballots (Exh. 3 at 9), yet Plaintiff asserts that 6,966 such votes were cast and should be invalidated. Amend. Cmplt. ¶51.

styled as expert opinion, Plaintiff does not allege any facts to support what is, at best, an implied allegation that vote totals in Wisconsin counties using Dominion Voting Machines were modified in favor of President-Elect Biden. Rather, Plaintiff provides that "[t]he results of the analysis and the pattern seen in the included graph strongly *suggest* a systemic, system-wide algorithm was enacted by an outside agent, causing the results of Wisconsin's vote tallies to be inflated by somewhere between three and five point six percentage points." (*Id.* ¶58 (emphasis added))

That a questionable statistical analysis *suggests* that vote tallies may have been tampered with is a far cry from evidence, or even an allegation, that vote tallies *were in fact* modified, and such a suggestion certainly does not warrant overturning the results of an election in which 3.3 million Wisconsinites participated. Again, the Court is required to presume Plaintiff's allegations are true and to draw reasonable inferences in his favor, but the Court is under no obligation to draw unreasonable inferences. "[W]hen considering the viability of a claim in the face of a Rule 12(b)(6) challenge, [the Court] may reject sheer speculation, bald assertions, and unsupported conclusory statements." *Taha*, 947 F.3d at 469 (citing *Yeftich v. Navistar, Inc.*, 722 F.3d 911, 915 (7th Cir. 2013); *Iqbal*, 556 U.S. at 678, 681; *Twombly*, 550 U.S. at 555).

D. Plaintiff's allegations regarding alleged violations of Wisconsin Elections laws provide no basis for overturning the election results.

Plaintiff also alleges that Defendants violated Wisconsin elections law by providing guidance to municipal clerks that conflicts with state law. (Amend. Cmplt. ¶¶37-45) Even if the Court accepts as true that election laws were violated, which they were not, Plaintiff fails to allege with any specificity that even one vote was illegally cast and counted. Rather, Plaintiff simply concludes that illegal ballots must have been cast and counted because the allegedly illegal guidance was issued. Plaintiff does allege that 96,437 absentee ballots were illegally cast by

individuals who did not qualify for indefinitely confined statutes under state law, but Plaintiff fails to cite a source for this conclusory allegation.[9]

Plaintiff alleges that the entire Wisconsin general election was "so riddled with fraud, illegality, and statistical impossibility," for the purpose of "manipulating the vote count to manufacture an election of Joe Biden as President of the United States," that the results of the election must be set aside entirely. (Amend. Cmplt. ¶¶2, 5) But, to plead fraud, Plaintiff is required to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). A complaint alleging fraud "must describe the 'who, what, when, where, and how' of the fraud." *Pirelli*, 631 F.3d at 441 (quoting *Lusby*, 570 F.3d at 854). Ostensibly, this alleged fraudulent course of conduct was perpetrated through the combination of the use of allegedly vulnerable Dominion Voting Machines and the issuance of guidance regarding absentee ballots to municipal clerks. However, the use of Dominion Voting Machines and the guidance that Plaintiff cites as illegal and fraudulent have been in use for multiple elections, and in some cases, for years. Plaintiff fails to articulate with any modicum of particularity how these longstanding practices only now demonstrate fraud. And to the extent that such speculation constitutes the "how," which it does not, Plaintiff fails to answer with particularity the requisite who, what, when, and where. As discussed above, because Plaintiff clearly fails to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6), he most certainly fails to state a claim for fraud with the particularity required under Fed. R. Civ. P. 9(b).

[9] Presumably, Plaintiff pulls this number from Braynard's report, but his conclusion is based on speculative social media research and faulty statistical extrapolation. (Amend. Cmplt. Exh. 3 at 9-10) Like Plaintiff, Braynard presents no evidence that anyone who was self-identified as indefinitely confined illegally claimed that status to obtain and cast an absentee ballot.

CONCLUSION

For the reasons above, Defendant Governor Tony Evers's Motion to Dismiss (Dkt. 51) should be adjudicated before the Court considers Plaintiff's request for injunctive relief, and the Governor's Motion should be granted.

Dated: December 7, 2020

Respectfully submitted,

/s/ Jeffrey A. Mandell

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EXHIBIT 1

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United States District Court, E.D. Wisconsin.

Ashton WHITAKER, By his mother and next friend, Melissa Whitaker, Plaintiff,

v.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION and Sue Savaglio–Jarvis, Defendants.

Case No. 16–cv–943–pp

|

Signed 10/03/2016

Attorneys and Law Firms

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Aaron J. Graf, Jonathan E. Sacks, Ronald S. Stadler, Mallery & Zimmerman SC, Milwaukee, WI, for Defendants.

ORDER DENYING DEFENDANTS' CIVIL L.R. 7(h) EXPEDITED, NON–DISPOSITIVE MOTION TO STAY PRELIMINARY INJUNCTION (DKT. NO. 33) PENDING APPEAL (DKT. NO. 44)

PAMELA PEPPER, United States District Judge

***1** The plaintiff filed his complaint on July 19, 2016, Dkt. No. 1, and less than a month later, filed a motion for preliminary injunction, Dkt. No. 10. A day after the plaintiff filed the motion for preliminary injunction, the defendants filed a motion to dismiss the complaint. Dkt. No. 15. A few days later, they filed a brief in opposition to the motion for preliminary injunction. Dkt. No. 17.

On September 6, 2016, the court heard oral argument on the motion to dismiss. Dkt. No. 26. On September 19, 2016, the court issued an oral ruling denying the defendants' motion to dismiss. Dkt. No. 28. The court scheduled a hearing on the motion for preliminary injunction for the following day, September 20, 2016. Id. at 9.

On September 20, 2016, the parties presented their oral arguments on the motion for preliminary injunction. Dkt. No. 31. In considering the question of whether the plaintiffs had a likelihood of success on the merits, the court relied in good part on its decision from the previous day denying the motion to dismiss.[1] At the conclusion of the hearing, the court granted in part[2] the plaintiff's motion for a preliminary injunction, and enjoined the defendants from prohibiting the plaintiff from using the boys' restrooms at his high school; from taking punitive action against the plaintiff for using the boys' restrooms; and from taking any action to monitor his restroom usage. Dkt. No. 31 at 1. Counsel for the defendants asked the court to stay the injunction until October 1, 2016, to allow the defendants time to appeal. Id. The court declined. Id. at 2. The defendants also asked the court to require the plaintiff to post a bond; the court took that request under advisement. Id.

***2** On September 22, 2016, the court issued its written order granting in part the motion for preliminary injunction. Dkt. No. 33. In particular, the court weighed the balance of harms, and concluded that the harms suffered by the plaintiff if the court did not grant the injunctive relief outweighed any potential harms suffered by the defendant if the court were to impose the injunction. Id. at 13–15. The court also found that the issuance of the injunction would not negatively impact the public interest. Id. at 15. Finally, the court declined to require the plaintiff to post a bond. Id. at 15–17.

The defendants again have asked the court to stay the preliminary injunction. Dkt. No. 44. The defendants point out that they have appealed the court's decision to the Seventh Circuit (both appealed as of right regarding the order granting the motion for preliminary injunction, and sought interlocutory appeal regarding the court's denial of the motion to dismiss the complaint). Id. at 2. They argue, as they did in their motion to dismiss, that the Seventh Circuit's decision on Ulane v. Eastern Airlines, Inc., 742 F.2d 1081) (7th Circuit) mandates a ruling in their favor on the Title IX issue (despite conceding that the court has not decided the precise issue in question in this case). Id. at 1–2. They argue that they will suffer irreparable harm from the injunction, because the injunction "threatens the constitutionally protected privacy interest of the approximately 22,000 students in the school district." Id. at 2–3. They argue that the plaintiff will not be harmed by staying the injunction, because a stay would

maintain the *status quo* and would not worsen the plaintiff's health. Id. at 3. Finally, they argue that the public interest would be served by a stay of the injunction, because it will prevent the school district's students and parents from being "subjected to an injunction that perpetuates a policy that the federal government is unable to enforce," citing State of Texas v. United States, Case No. 16–cv–54, 2016 WL 4426495 (N.D. Tex., August 21, 2016).[3]

As the defendants state in their motion, the factors a movant must satisfy to obtain a stay pending appeal are similar to the factors a movant must satisfy to obtain injunction relief. Hinrichs v. Bosma, 440 F.3d 393, 396 (7th Cir. 2006) (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). The moving party must demonstrate that "1) it has a reasonable likelihood of success on the merits; 2) no adequate remedy at law exists; 3) it will suffer irreparable harm if it is denied; 4) the irreparable harm the party will suffer without relief is greater than the harm the opposing party will suffer if the stay is granted; and 5) the stay will be in the public interest." Id. (citing Kiel v. City of Kenosha, 236 F.3d 814, 815–16 (7th Cir. 2000)).

Every argument which the defendants raise in their motion for stay pending appeal was raised in their objection to the motion for preliminary injunction, and the parties argued every one of those issues at the September 20, 2016 hearing. The court found in favor of the plaintiff, and against the defendants, on each factor. The defendants give no explanation for why the court should find in their favor now, when eight days prior to their filing this motion to stay, the court found against them on exactly the same issues they raise here.

***3** The court **DENIES** the defendants' motion Civil L.R. 7(h) Expedited, Non–Dispositive Motion to Stay Preliminary Injunction. Dkt. No. 44.

All Citations

Not Reported in Fed. Supp., 2016 WL 8846573

Footnotes

1 There is a bit of a procedural morass surrounding that decision. Counsel for the defendants informed the court at the end of the hearing that he would be submitting a proposed order, denying his motion to dismiss but containing the necessary findings for certification of an interlocutory appeal. He did not make any argument in support of that proposal; the court did not elicit any, nor did it ask for the plaintiff's position. The court entered the order, with the interlocutory appeal certification language, on September 21. Dkt. No. 29. The next day, the plaintiff filed a motion asking the court to reconsider including the interlocutory appeal certification language. Dkt. No. 30. On September 23, 2016, before the court ruled on that motion, the defendants filed a notice of appeal with the Seventh Circuit, appealing both the order denying the motion to dismiss and the order granting the preliminary injunction (an order the court had issued on September 22, 2016, Dkt. No. 33). Dkt. No. 34. On September 25, 2016, the court issued an order granting the plaintiff's motion to reconsider, Dkt. No. 36, and entered an amended order denying the motion to dismiss but removing the interlocutory appeal certification language, Dkt. No. 35. The next day, the Seventh Circuit ordered the plaintiff to respond to the defendants' request for interlocutory appeal by October 11, 2016.

2 The plaintiff's complaint requests other relief: it asks the court to prohibit the defendants from referring to the plaintiff by his birth name, and from using female pronouns to identify him; to require the school to allow him to room with other boys on school trips; to prohibit the school from requiring the plaintiff to wear identifying markers, such as a colored wristband; and other relief. The court did not grant injunctive relief on those requests—some were not ripe, and others speculated actions that had not yet occurred.

3 The defendants' statement that Texas district court's injunction prohibits the federal government from enforcing its policies at all is overbroad. The Texas court's order prohibits the federal government from enforcing certain Department of Education policies (relevant to this case) against the plaintiffs in that case "until the Court rules on the merits of this claim, or until further direction from the Fifth Circuit Court of Appeals." Texas v. United States, 2016 WL 4426495 at 17.

EXHIBIT 2

2020 WL 6686120
Only the Westlaw citation is currently available.
United States Court of Appeals, Third Circuit.

Jim BOGNET, Donald K. Miller, Debra Miller, Alan Clark, Jennifer Clark, Appellants

v.

SECRETARY COMMONWEALTH OF PENNSYLVANIA; Adams County Board of Elections; Allegheny County Board of Elections; Armstrong County Board of Elections; Beaver County Board of Elections; Bedford County Board of Elections; Berks County Board of Elections; Blair County Board of Elections; Bradford County Board of Elections; Bucks County Board of Elections; Butler County Board of Elections; Cambria County Board of Elections; Cameron County Board of Elections; Carbon County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Clarion County Board of Elections; Clearfield County Board of Elections; Clinton County Board of Elections; Columbia County Board of Elections; Crawford County Board of Elections; Cumberland County Board of Elections; Dauphin County Board of Elections; Delaware County Board of Elections; Elk County Board of Elections; Erie County Board of Elections; Fayette County Board of Elections; Forest County Board of Elections; Franklin County Board of Elections; Fulton County Board of Elections; Greene County Board of Elections; Huntingdon County Board of Elections; Indiana County Board of Elections; Jefferson County Board of Elections; Juniata County Board of Elections; Lackawanna County Board of Elections; Lancaster County Board of Elections; Lawrence County Board of Elections; Lebanon County Board of Elections; Lehigh County Board of Elections; Luzerne County Board of Elections; Lycoming County Board of Elections; Mckean County Board of Elections; Mercer County Board of Elections; Mifflin County Board of Elections; Monroe County Board of Elections; Montgomery County Board of Elections; Montour County Board of Elections; Northampton County Board of Elections; Northumberland County Board of Elections; Perry County Board of Elections; Philadelphia County Board of Elections; Pike County Board of Elections; Potter County Board of Elections; Schuylkill County Board of Elections; Snyder County Board of Elections; Somerset County Board of Elections; Sullivan County Board of Elections; Susquehanna County Board of Elections; Tioga County Board of Elections; Union County Board of Elections; Venango County Board of Elections; Warren County Board of Elections; Washington County Board of Elections; Wayne County Board of Elections; Westmoreland County Board of Elections; Wyoming County Board of Elections; York County Board of Elections

Democratic National Committee, Intervenor

No. 20-3214
|
Submitted Pursuant to Third Circuit
L.A.R. 34.1(a) November 9, 2020
|
(Filed: November 13, 2020)

Synopsis

Background: Voters and congressional candidate brought action against Secretary of Commonwealth of Pennsylvania and county boards of elections, seeking to enjoin the counting of mail-in ballots received during the three-day extension of the ballot-receipt deadline ordered by the Pennsylvania Supreme Court, and seeking a declaration that the extension period and presumption of timeliness was unconstitutional. The United States District Court for the Western District of Pennsylvania, Kim R. Gibson, Senior District Judge, 2020 WL 6323121, denied voters' and candidate's motion for a temporary restraining order (TRO) and preliminary injunction. Voters and candidate appealed.

Holdings: The Court of Appeals, Smith, Chief Judge, held that:

the District Court's order was immediately appealable;

voters and candidate lacked standing to bring action alleging violation of Constitution's Elections Clause and Electors Clause;

voters lacked concrete injury for their alleged harm of vote dilution, and thus voters did not have standing for such claim;

voters lacked particularized injury for their alleged harm of vote dilution, and thus voters did not have standing for such claim;

voters failed to allege legally cognizable "preferred class," for purposes of standing to claim equal protection violation;

alleged harm from presumption of timeliness was hypothetical or conjectural, and thus voters did not have standing to challenge presumption; and

voters and candidate were not entitled to receive injunction so close to election.

Affirmed.

On Appeal from the United States District Court for the Western District of Pennsylvania, District Court No. 3-20-cv-00215, District Judge: Honorable Kim. R. Gibson

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Before: SMITH, Chief Judge, SHWARTZ and SCIRICA, Circuit Judges

OPINION OF THE COURT

SMITH, Chief Judge.

***1** *A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.*—Alexander Hamilton[1]

The year 2020 has brought the country unprecedented challenges. The COVID-19 pandemic, which began early this year and continues today, has caused immense loss and vast disruption. As this is a presidential election year, the pandemic has also presented unique challenges regarding where and how citizens shall vote, as well as when and how their ballots shall be tabulated. The appeal on which we now rule stems from the disruption COVID-19 has wrought on the national elections. We reach our decision, detailed below, having carefully considered the full breadth of statutory law and constitutional authority applicable to this unique dispute over Pennsylvania election law. And we do so with commitment to a proposition indisputable in our democratic process: that the lawfully cast vote of every citizen must count.

I. Background & Procedural History

A. The Elections and Presidential Electors Clause

The U.S. Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. This provision is known as the "Elections Clause." The Elections Clause effectively gives state governments the "default" authority to regulate the mechanics of federal elections, *Foster v. Love*, 522 U.S. 67, 69, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997), with Congress retaining "exclusive control" to "make or alter" any state's regulations, *Colegrove v. Green*, 328 U.S. 549, 554, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). Congress has not often wielded this power but, "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384, 399, 25 L.Ed. 717 (1879) ("[T]he Constitution and constitutional laws of the [United States] are ... the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation."). By statute, Congress has set "[t]he Tuesday next after the 1st Monday in November, in every even numbered year," as the day for the election. 2 U.S.C. § 7.

Much like the Elections Clause, the "Electors Clause" of the U.S. Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." U.S. Const. art. II, § 1, cl. 2. Congress can "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, § 1, cl. 4. Congress has set the time for appointing electors as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 U.S.C. § 1.

***2** This year, both federal statutes dictate that the day for the election was to fall on Tuesday, November 3 ("Election Day").

B. Pennsylvania's Election Code

In keeping with the Constitution's otherwise broad delegation of authority to states to regulate the times, places, and manner of holding federal elections, the Pennsylvania General Assembly has enacted a comprehensive elections code. In 2019, the General Assembly passed Act 77, which (among other things) established "no-excuse" absentee voting in Pennsylvania[2]: all eligible voters in Pennsylvania may vote by mail without the need to show their absence from their voting district on the day of the election. 25 Pa. Stat. and Cons. Stat. §§ 3150.11–3150.17. Under Act 77, "[a]pplications for mail-in ballots shall be processed if received not later than five o'clock P.M. of the first Tuesday prior to the day of any primary or election." *Id.* § 3150.12a(a). After Act 77, "a completed absentee [or mail-in] ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election" for that vote to count. *Id.* §§ 3146.6(c), 3150.16(c).

C. The Pennsylvania Supreme Court Decision

Soon after Act 77's passage, Donald J. Trump for President, Inc., the Republican National Committee ("RNC"), and several Republican congressional candidates and voters brought suit against Kathy Boockvar, Secretary of the

Commonwealth of Pennsylvania, and all of Pennsylvania's county boards of elections. That suit, filed in the Western District of Pennsylvania, alleged that Act 77's "no-excuse" mail-in voting regime violated both the federal and Pennsylvania constitutions. *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, —— F.Supp.3d ——, ——, 2020 WL 4920952, at *1 (W.D. Pa. Aug. 23, 2020). Meanwhile, the Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates filed suit in Pennsylvania's Commonwealth Court, seeking declaratory and injunctive relief related to statutory-interpretation issues involving Act 77 and the Pennsylvania Election Code. *See Pa. Democratic Party v. Boockvar*, —— Pa. ——, 238 A.3d 345, 352 (2020). Secretary Boockvar asked the Pennsylvania Supreme Court to exercise extraordinary jurisdiction to allow it to immediately consider the case, and her petition was granted without objection. *Id.* at 354–55.

Pending resolution of the Pennsylvania Supreme Court case, Secretary Boockvar requested that the Western District of Pennsylvania stay the federal case. *Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——, 2020 WL 4920952, at *1. The District Court obliged and concluded that it would abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *See Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——, 2020 WL 4920952, at *21. The RNC then filed a motion for limited preliminary injunctive relief asking that all mailed ballots be segregated, but the District Court denied the motion, finding that the plaintiffs' harm had "not yet materialized in any actualized or imminent way." *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5407748, at *1 (W.D. Pa. Sept. 8, 2020).

***3** With the federal case stayed, the state court matter proceeded. The Pennsylvania Democratic Party argued that a combination of the COVID-19 pandemic and U.S. Postal Service ("USPS") mail-delivery delays made it difficult for absentee voters to timely return their ballots in the June 2020 Pennsylvania primary election. *Pa. Democratic Party*, 238 A.3d at 362. The Pennsylvania Democratic Party claimed that this voter disenfranchisement violated the Pennsylvania Constitution's Free and Equal Elections Clause, art I., § 5,[3] and sought, among other things, a weeklong extension of the deadline for receipt of ballots cast by Election Day in the upcoming general election—the same deadline for the receipt of ballots cast by servicemembers residing overseas. *Id.* at 353–54. Secretary Boockvar originally opposed the extension deadline; she changed her position after receiving a letter from USPS General Counsel which stated that Pennsylvania's ballot deadlines were "incongruous with the Postal Service's delivery standards," and that to ensure that a ballot in Pennsylvania would be received by 8:00 P.M. on Election Day, the voter would need to mail it a full week in advance, by October 27, which was also the deadline to *apply* for a mail-in ballot. *Id.* at 365–66; 25 Pa. Stat. and Cons. Stat. § 3150.12a(a). Secretary Boockvar accordingly recommended a three-day extension to the received-by deadline. *Pa. Democratic Party*, 238 A.3d at 364–65.

In a September 17, 2020 decision, the Pennsylvania Supreme Court concluded that USPS's existing delivery standards could not meet the timeline built into the Election Code and that circumstances beyond voters' control should not lead to their disenfranchisement. *Pa. Democratic Party*, 238 A.3d at 371. The Court accordingly held that the Pennsylvania Constitution's Free and Equal Elections Clause required a three-day extension of the ballot-receipt deadline for the November 3 general election. *Id.* at 371, 386–87. All ballots postmarked by 8:00 P.M. on Election Day and received by 5:00 P.M. on the Friday after Election Day, November 6, would be considered timely and counted ("Deadline Extension"). *Id.* at 386–87. Ballots postmarked or signed after Election Day, November 3, would be rejected. *Id.* If the postmark on a ballot received before the November 6 deadline was missing or illegible, the ballot would be presumed to be timely unless "a preponderance of the evidence demonstrates that it was mailed after Election Day" ("Presumption of Timeliness"). *Id.* Shortly after the ruling, Pennsylvania voters were notified of the Deadline Extension and Presumption of Timeliness.

D. Appeal to the U.S. Supreme Court, and This Litigation

The Republican Party of Pennsylvania and several intervenors, including the President pro tempore of the Pennsylvania Senate, sought to challenge in the Supreme Court of the United States the constitutionality of the Pennsylvania Supreme Court's ruling. Because the November election date was fast approaching, they filed an emergency application for a stay of the Pennsylvania Supreme Court's order pending review on the merits. The U.S. Supreme Court denied the emergency stay request in a 4-4 decision. *Republican Party of Pa. v. Boockvar*, No. 20A54, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6128193 (Oct. 19, 2020); *Scarnati v. Boockvar*, No. 20A53, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6128194 (Oct. 19, 2020). After denial of the stay, the

petitioners moved for expedited consideration of their petition for certiorari. In denying that motion, Justice Alito noted that, per the Pennsylvania Attorney General, all county boards of elections would segregate ballots received during the Deadline Extension period from those received by 8:00 P.M. on Election Day. *Republican Party of Pa. v. Boockvar*, No. 20-542, 592 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 6304626, at *2 (Oct. 28, 2020) (Alito, J., statement). Justice Alito later issued an order requiring that all county boards of elections segregate such ballots and count them separately. *Republican Party of Pa. v. Boockvar*, No. 20A84, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6536912 (Mem.) (U.S. Nov. 6, 2020) (Alito, J.).

***4** In the meantime, on October 22, 2020, three days after the U.S. Supreme Court declined to stay the Pennsylvania Supreme Court's order, Plaintiffs herein filed this suit in the Western District of Pennsylvania. Plaintiffs are four registered voters from Somerset County, Pennsylvania, who planned to vote in person on Election Day ("Voter Plaintiffs") and Pennsylvania congressional candidate Jim Bognet. Defendants are Secretary Boockvar and each Pennsylvania county's board of elections.

Bognet, the congressional candidate, claimed that the Deadline Extension and Presumption of Timeliness "allow[ ] County Boards of Elections to accept votes ... that would otherwise be unlawful" and "undermine[ ] his right to run in an election where Congress has paramount authority to set the 'times, places, and manner' " of Election Day. *Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121, at *2 (W.D. Pa. Oct. 28, 2020). The Voter Plaintiffs alleged that by voting in person, they had to comply with the single, uniform federal Election Day deadline, whereas mail-in voters could submit votes any time before 5:00 P.M. on November 6. *Id.* Thus, they alleged, the Pennsylvania Supreme Court treated them in an arbitrary and disparate way by elevating mail-in voters to a "preferred class of voters" in violation of the U.S. Constitution's Equal Protection Clause and the single, uniform, federal Election Day set by Congress. *Id.* The Voter Plaintiffs also asserted that counting ballots received after Election Day during the Deadline Extension period would unlawfully dilute their votes in violation of the Equal Protection Clause. *Id.*

All Plaintiffs sought to enjoin Defendants from counting ballots received during the Deadline Extension period. *Id.* They also sought a declaration that the Deadline Extension and Presumption of Timeliness are unconstitutional under the Elections Clause and the Electors Clause as well as the Equal Protection Clause. *Id.* Because Plaintiffs filed their suit less than two weeks before Election Day, they moved for a temporary restraining order ("TRO"), expedited hearing, and preliminary injunction. *Id.*

The District Court commendably accommodated Plaintiffs' request for an expedited hearing, then expeditiously issued a thoughtful memorandum order on October 28, denying the motion for a TRO and preliminary injunction. *Id.* at *7. The District Court held that Bognet lacked standing because his claims were too speculative and not redressable. *Id.* at *3. Similarly, the District Court concluded that the Voter Plaintiffs lacked standing to bring their Equal Protection voter dilution claim because they alleged only a generalized grievance. *Id.* at *5.

At the same time, the District Court held that the Voter Plaintiffs had standing to pursue their Equal Protection arbitrary-and-disparate-treatment claim. But it found that the Deadline Extension did not engender arbitrary and disparate treatment because that provision did not extend the period for mail-in voters to actually cast their ballots; rather, the extension only directed that the timely cast ballots of mail-in voters be counted. *Id.* As to the Presumption of Timeliness, the District Court held that the Voter Plaintiffs were likely to succeed on the merits of their arbitrary-and-disparate-treatment challenge. *Id.* at *6. Still, the District Court declined to grant a TRO because the U.S. Supreme Court "has repeatedly emphasized that ... federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* at *7 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (per curiam)). The District Court concluded that with "less than two weeks before the election. ... [g]ranting the relief Plaintiffs seek would result in significant voter confusion; precisely the kind of confusion that *Purcell* seeks to avoid." *Id.*

***5** Plaintiffs appealed the denial of their motion for a TRO and preliminary injunction to this Court on October 29, less than a week before Election Day. Plaintiffs requested an expedited briefing schedule: specifically, their opening brief would be due on October 30 and the response briefs on November 2. Notably, Plaintiffs sought to file a reply brief on November 3—Election Day. Appellants' Emergency Mot. for Expedited Briefing, Dkt. No. 17. Defendants opposed the expedited briefing schedule, arguing that Plaintiffs' own delay had caused the case to reach this Court mere days before the election. Sec'y Boockvar's Opp. to Appellants'

Emergency Mot. for Expedited Briefing, Dkt. No. 33. Defendants also contended that Plaintiffs sought to punish voters by invalidating the very rules mail-in voters had relied on when they cast their ballots. Defendants asked us to deny the motion for expedited briefing and offered to supply us with the actual numbers of mail-in ballots received during the Deadline Extension period together with an approximate count of how many of those mail-in ballots lacked legible postmarks. *Id.*

Even had we granted Plaintiffs' motion for expedited briefing, the schedule they proposed would have effectively foreclosed us from ruling on this appeal before Election Day. So we denied Plaintiffs' motion and instead ordered that their opening brief be filed by November 6. Order, No. 20-3214, Oct. 30, 2020, Dkt. No. 37. We directed Defendants to file response briefs by November 9, forgoing receipt of a reply brief.[4] *Id.* With the matter now fully briefed, we consider Plaintiffs' appeal of the District Court's denial of a TRO and preliminary injunction.

II. Standard of Review

The District Court exercised jurisdiction under 28 U.S.C. § 1331. We exercise jurisdiction under § 1292(a)(1).

Ordinarily, an order denying a TRO is not immediately appealable. *Hope v. Warden York Cnty. Prison*, 956 F.3d 156, 159 (3d Cir. 2020). Here, although Bognet and the Voter Plaintiffs styled their motion as an Emergency Motion for a TRO and Preliminary Injunction, *see Bognet v. Boockvar*, No. 3:20-cv-00215, Dkt. No. 5 (W.D. Pa. Oct. 22, 2020), the District Court's order plainly went beyond simply ruling on the TRO request.

Plaintiffs filed their motion for a TRO and a preliminary injunction on October 22, along with a supporting brief. Defendants then filed briefs opposing the motion, with Plaintiffs filing a reply in support of their motion. The District Court heard argument from the parties, remotely, during a 90-minute hearing. The next day, the District Court ruled on the merits of the request for injunctive relief. *Bognet*, 2020 WL 6323121, at *7. The District Court's Memorandum Order denied both Bognet and the Voter Plaintiffs the affirmative relief they sought to obtain prior to Election Day, confirming that the Commonwealth was to count mailed ballots received after the close of the polls on Election Day but before 5:00 P.M. on November 6.

In determining whether Bognet and the Voter Plaintiffs had standing to sue, we resolve a legal issue that does not require resolution of any factual dispute. Our review is de novo. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 266 (3d Cir. 2014). "When reviewing a district court's denial of a preliminary injunction, we review the court's findings of fact for clear error, its conclusions of law de novo, and the ultimate decision ... for an abuse of discretion." *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010)) (cleaned up).

III. Analysis

A. Standing

Derived from separation-of-powers principles, the law of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (citations omitted). Article III of the U.S. Constitution vests "[t]he judicial Power of the United States" in both the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. But this "judicial Power" extends only to "Cases" and "Controversies." *Id.* art. III, § 2; *see also Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). To ensure that judges avoid rendering impermissible advisory opinions, parties seeking to invoke federal judicial power must first establish their standing to do so. *Spokeo*, 136 S. Ct. at 1547.

***6** Article III standing doctrine speaks in jargon, but the gist of its meaning is plain enough. To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests. If you are complaining about something that does not harm you—and does not harm you in a way that is concrete—then you lack standing. And if the injury that you claim is an injury that does no specific harm to you, or if it depends on a harm that may never happen, then you lack an injury for which you may seek relief from a federal court. As we will explain below, Plaintiffs here have not suffered a concrete, particularized, and non-speculative injury necessary under the U.S. Constitution for them to bring this federal lawsuit.

The familiar elements of Article III standing require a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). To plead an injury in fact, the party invoking federal jurisdiction must establish three sub-elements: first, the "invasion of a legally protected interest"; second, that the injury is both "concrete and particularized"; and third, that the injury is "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130); *see also Mielo v. Steak 'n Shake Operations*, 897 F.3d 467, 479 n.11 (3d Cir. 2018). The second sub-element requires that the injury "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. 2130. As for the third, when a plaintiff alleges future injury, such injury must be "certainly impending." *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (quoting *Lujan*, 504 U.S. at 565 n.2, 112 S.Ct. 2130). Allegations of "possible" future injury simply aren't enough. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). All elements of standing must exist at the time the complaint is filed. *See Lujan,* 504 U.S. at 569 n.4, 112 S.Ct. 2130.

With these guideposts in mind, we turn to whether Plaintiffs have pleaded an Article III injury. They bring several claims under 42 U.S.C. § 1983, asserting deprivation of their constitutional rights. They allege that Defendants' implementation of the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness violates the Elections Clause of Article I, the Electors Clause of Article II, and the Equal Protection Clause of the Fourteenth Amendment. Because Plaintiffs lack standing to assert these claims, we will affirm the District Court's denial of injunctive relief.

1. Plaintiffs lack standing under the Elections Clause and Electors Clause.

Federal courts are not venues for plaintiffs to assert a bare right "to have the Government act in accordance with law." *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). When the alleged injury is undifferentiated and common to all members of the public, courts routinely dismiss such cases as "generalized grievances" that cannot support standing. *United States v. Richardson*, 418 U.S. 166, 173–75, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). Such is the case here insofar as Plaintiffs, and specifically candidate Bognet, theorize their harm as the right to have government administered in compliance with the Elections Clause and Electors Clause.

To begin with, private plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause. For example, in *Lance v. Coffman*, 549 U.S. 437, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam), four private citizens challenged in federal district court a Colorado Supreme Court decision invalidating a redistricting plan passed by the state legislature and requiring use of a redistricting plan created by Colorado state courts. *Id.* at 438, 127 S.Ct. 1194. The plaintiffs alleged that the Colorado Supreme Court's interpretation of the Colorado Constitution violated the Elections Clause "by depriving the state legislature of its responsibility to draw congressional districts." *Id.* at 441, 127 S.Ct. 1194. The U.S. Supreme Court held that the plaintiffs lacked Article III standing because they claimed harm only to their interest, and that of every citizen, in proper application of the Elections Clause. *Id.* at 442, 127 S.Ct. 1194 ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed."). Their relief would have no more directly benefitted them than the public at large. *Id.* The same is true here. If anything, Plaintiffs' "interest in the State's ability to 'enforce its duly enacted laws' " is even less compelling because Pennsylvania's "election officials support the challenged decree." *Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 591 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 4680151 (Mem.), at *1 (Aug. 13, 2020) (quoting *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2324 n.17, 201 L.Ed.2d 714 (2018)).

***7** Because the Elections Clause and the Electors Clause have "considerable similarity," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (Roberts, C.J., dissenting) (discussing how Electors Clause similarly vests power to determine manner of appointing electors in "the Legislature" of each State), the same logic applies to Plaintiffs' alleged injury stemming from the claimed violation of the Electors Clause. *See also Foster*, 522 U.S. at 69, 118 S.Ct. 464 (characterizing Electors Clause as Elections Clause's "counterpart for the Executive Branch"); *U.S. Term*

Limits, Inc. v. Thornton, 514 U.S. 779, 804–05, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (noting that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause).

Even a party that meets Article III standing requirements must ordinarily rest its claim for relief on violation of its own rights, not those of a third party. *Pitt News v. Fisher*, 215 F.3d 354, 361–62 (3d Cir. 2000). Plaintiffs assert that the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness usurped the General Assembly's prerogative under the Elections Clause to prescribe "[t]he Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. The Elections Clause grants that right to "the Legislature" of "each State." *Id.* Plaintiffs' Elections Clause claims thus "belong, if they belong to anyone, only to the Pennsylvania General Assembly." *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (three-judge panel) (per curiam). Plaintiffs here are four individual voters and a candidate for federal office; they in no way constitute the General Assembly, nor can they be said to comprise any part of the law-making processes of Pennsylvania. *Ariz. State Legislature*, 576 U.S. at 824, 135 S.Ct. 2652.[5] Because Plaintiffs are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses. No member of the General Assembly is a party to this lawsuit.

That said, prudential standing can suspend Article III's general prohibition on a litigant's raising another person's legal rights. Yet Plaintiffs don't fit the bill. A plaintiff may assert the rights of another if he or she "has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (citation omitted). Plaintiffs cannot invoke this exception to the rule against raising the rights of third parties because they enjoy no close relationship with the General Assembly, nor have they alleged any hindrance to the General Assembly's ability to protect its own interests. *See, e.g.*, *Corman*, 287 F. Supp. 3d at 573. Nor does Plaintiffs' other theory of prudential standing, drawn from *Bond v. United States*, 564 U.S. 211, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011), advance the ball.

***8** In *Bond*, the Supreme Court held that a litigant has prudential standing to challenge a federal law that allegedly impinges on the state's police powers, "in contravention of constitutional principles of federalism" enshrined in the Tenth Amendment. *Id.* at 223–24, 131 S.Ct. 2355. The defendant in *Bond* challenged her conviction under 18 U.S.C. § 229, which Congress enacted to comply with a chemical weapons treaty that the United States had entered. *Id.* at 214–15, 131 S.Ct. 2355. Convicted under the statute she sought to challenge, Bond satisfied Article III's standing requirements. *Id.* at 217, 131 S.Ct. 2355 (characterizing Bond's sentence and incarceration as concrete, and redressable by invalidation of her conviction); *id.* at 224–25, 131 S.Ct. 2355 (noting that Bond was subject to "[a] law," "prosecution," and "punishment" she might not have faced "if the matter were left for the Commonwealth of Pennsylvania to decide"). She argued that her conduct was "local in nature" such that § 229 usurped the Commonwealth's reserved police powers. *Id.* Rejecting the Government's contention that Bond was barred as a third party from asserting the rights of the Commonwealth, *id.* at 225, 131 S.Ct. 2355, the Court held that "[t]he structural principles secured by the separation of powers protect the individual as well" as the State. *Id.* at 222, 131 S.Ct. 2355 ("Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. ... When government acts in excess of its lawful powers, that [personal] liberty is at stake.").

But the nub of Plaintiffs' argument here is that the Pennsylvania Supreme Court intruded on the authority delegated to the Pennsylvania General Assembly under Articles I and II of the U.S. Constitution to regulate federal elections. They do not allege any violation of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Nor could they. After all, states have no inherent or reserved power over federal elections. *U.S. Term Limits*, 514 U.S. at 804–05, 115 S.Ct. 1842. When "deciding issues raised under the Elections Clause," courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns." *Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012). Either federal and state election law "operate harmoniously in a single procedural scheme," or they don't—and the federal law preempts ("alter[s]") state election law under the Elections Clause. *Id.* at 394. An assessment that the Pennsylvania Supreme Court lacked the legislative authority under the state's constitution necessary to comply with the Elections Clause (Appellants' Br. 24–27) does not implicate *Bond*, the Tenth Amendment, or even Article VI's Supremacy

Clause.[6] *See Gonzalez*, 677 F.3d at 390–92 (contrasting Elections Clause with Supremacy Clause and describing former as "unique," containing "[an] unusual delegation of power," and "unlike virtually all other provisions of the Constitution"). And, of course, third-party standing under *Bond* still presumes that the plaintiff otherwise meets the requirements of Article III; as discussed above, Plaintiffs do not.

Plaintiff Bognet, a candidate for Congress who is currently a private citizen, does not plead a cognizable injury by alleging a "right to run in an election where Congress has paramount authority," Compl. ¶ 69, or by pointing to a "threatened" reduction in the competitiveness of his election from counting absentee ballots received within three days after Election Day. Appellants' Br. 21. Bognet does not explain how that "right to run" affects him in a particularized way when, in fact, all candidates in Pennsylvania, including Bognet's opponent, are subject to the same rules. And Bognet does not explain how counting *more* timely cast votes would lead to a *less* competitive race, nor does he offer any evidence tending to show that a greater proportion of mailed ballots received after Election Day than on or before Election Day would be cast for Bognet's opponent. What's more, for Bognet to have standing to enjoin the counting of ballots arriving after Election Day, such votes would have to be sufficient in number to change the outcome of the election to Bognet's detriment. *See, e.g.*, *Sibley v. Alexander*, 916 F. Supp. 2d 58, 62 (D.D.C. 2013) ("[E]ven if the Court granted the requested relief, [plaintiff] would still fail to satisfy the redressability element [of standing] because enjoining defendants from casting the ... votes would not change the outcome of the election." (citing *Newdow v. Roberts,* 603 F.3d 1002, 1011 (D.C. Cir. 2010) (citations omitted)). Bognet does not allege as much, and such a prediction was inherently speculative when the complaint was filed. The same can be said for Bognet's alleged wrongfully incurred expenditures and future expenditures. Any harm Bognet sought to avoid in making those expenditures was not "certainly impending"—he spent the money to avoid a speculative harm. *See Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, —— F.Supp.3d ——, ——, 2020 WL 5997680, at *36 (W.D. Pa. Oct. 10, 2020). Nor are those expenditures "fairly traceable" under Article III to the actions that Bognet challenges. *See, e.g.*, *Clapper*, 568 U.S. at 402, 416, 133 S.Ct. 1138 (rejecting argument that plaintiff can "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending").[7]

***9** Plaintiffs therefore lack Article III standing to challenge Defendants' implementation of the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness under the Elections Clause and Electors Clause.

2. The Voter Plaintiffs lack standing under the Equal Protection Clause.

Stressing the "personal" nature of the right to vote, the Voter Plaintiffs assert two claims under the Equal Protection Clause.[8] First, they contend that the influence of their votes, cast in person on Election Day, is "diluted" both by (a) mailed ballots cast on or before Election Day but received between Election Day and the Deadline Extension date, ballots which Plaintiffs assert cannot be lawfully counted; and (b) mailed ballots that were unlawfully cast (*i.e.*, placed in the mail) after Election Day but are still counted because of the Presumption of Timeliness. Second, the Voter Plaintiffs allege that the Deadline Extension and the Presumption of Timeliness create a preferred class of voters based on "arbitrary and disparate treatment" that values "one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The Voter Plaintiffs lack Article III standing to assert either injury.

a. Vote Dilution

As discussed above, the foremost element of standing is injury in fact, which requires the plaintiff to show a harm that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1547–48 (citation omitted). The Voter Plaintiffs lack standing to redress their alleged vote dilution because that alleged injury is not concrete as to votes counted under the Deadline Extension, nor is it particularized for Article III purposes as to votes counted under the Deadline Extension or the Presumption of Timeliness.

i. No concrete injury from vote dilution attributable to the Deadline Extension.

The Voter Plaintiffs claim that Defendants' implementation of the Deadline Extension violates the Equal Protection Clause because "unlawfully" counting ballots received within three days of Election Day dilutes their votes. But the source of this

purported illegality is necessarily a matter of state law, which makes any alleged harm abstract for purposes of the Equal Protection Clause. And the purported vote dilution is also not concrete because it would occur in equal proportion *without* the alleged procedural illegality—that is, had the *General Assembly* enacted the Deadline Extension, which the Voter Plaintiffs do not challenge substantively.[9]

***10** The concreteness of the Voter Plaintiffs' alleged vote dilution stemming from the Deadline Extension turns on the federal and state laws applicable to voting procedures. Federal law does not provide for *when* or *how* ballot counting occurs. *See, e.g.*, *Trump for Pres., Inc. v. Way*, No. 20-cv-01753, —— F.Supp.3d ——, ——, 2020 WL 5912561, at *12 (D.N.J. Oct. 6, 2020) ("Plaintiffs direct the Court to no federal law regulating methods of determining the timeliness of mail-in ballots or requiring that mail-in ballots be postmarked."); *see also Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 76 L.Ed. 795 (1932) (noting that Elections Clause delegates to state lawmaking processes all authority to prescribe "procedure and safeguards" for "counting of votes"). Instead, the Elections Clause delegates to each state's lawmaking function the authority to prescribe such procedural regulations applicable to federal elections. *U.S. Term Limits*, 514 U.S. at 832–35, 115 S.Ct. 1842 ("The Framers intended the Elections Clause to grant States authority to create procedural regulations .... [including] 'whether the electors should vote by ballot or vivâ voce ....' " (quoting James Madison, 2 Records of the Federal Convention of 1787, at 240 (M. Farrand ed. 1911) (cleaned up)); *Smiley*, 285 U.S. at 366, 52 S.Ct. 397 (describing state authority under Elections Clause "to provide a complete code for congressional elections ... in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns"). That delegation of authority embraces all procedures "which experience shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366, 52 S.Ct. 397. Congress exercises its power to "alter" state election regulations only if the state regime cannot "operate harmoniously" with federal election laws "in a single procedural scheme." *Gonzalez*, 677 F.3d at 394.

The Deadline Extension and federal laws setting the date for federal elections can, and indeed do, operate harmoniously. At least 19 other States and the District of Columbia have post-Election Day absentee ballot receipt deadlines.[10] And many States also accept absentee ballots mailed by overseas uniformed servicemembers that are received after Election Day, in accordance with the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–20311. So the Voter Plaintiffs' only cognizable basis for alleging dilution from the "unlawful" counting of invalid ballots is state law defining lawful and unlawful ballot counting practices. *Cf. Wise v. Circosta*, 978 F.3d 93, 100–01 (4th Cir. 2020) ("Whether ballots are *illegally* counted if they are received more than three days after Election Day depends on an issue of state law from which we must abstain." (emphasis in original)), *application for injunctive relief denied sub nom. Moore v. Circosta*, No. 20A72, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6305036 (Oct. 28, 2020). The Voter Plaintiffs seem to admit as much, arguing "that counting votes that are unlawful under the General Assembly's enactments will unconstitutionally dilute the lawful votes" cast by the Voter Plaintiffs. Appellants' Br. 38; *see also id.* at 31. In other words, the Voter Plaintiffs say that the Election Day ballot receipt deadline in Pennsylvania's codified election law renders the ballots untimely and therefore unlawful to count. Defendants, for their part, contend that the Pennsylvania Supreme Court's extension of that deadline under the Free and Equal Elections Clause of the state constitution renders them timely, and therefore lawful to count.

***11** This conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment. Violation of state election laws by state officials or other unidentified third parties is not always amenable to a federal constitutional claim. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("A deliberate violation of state election laws by state election officials does not transgress against the Constitution.") (cleaned up); *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (rejecting Equal Protection Clause claim arising from state's erroneous counting of votes cast by voters unqualified to participate in closed primary). "It was not intended by the Fourteenth Amendment ... that all matters formerly within the exclusive cognizance of the states should become matters of national concern." *Snowden v. Hughes*, 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497 (1944).

Contrary to the Voter Plaintiffs' conceptualization, vote dilution under the Equal Protection Clause is concerned with votes being weighed differently. *See Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 2501, 204 L.Ed.2d 931 (2019) (" '[V]ote dilution' in the one-person, one-

vote cases refers to the idea that each vote must carry *equal weight*." (emphasis added)); *cf. Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020), *as amended* (July 27, 2020) ("[N]o vote in the South Carolina system is diluted. Every qualified person gets one vote and each vote is counted equally in determining the final tally."). As explained below, the Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the "unlawful" counting of invalidly cast ballots "were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity." *Trump for Pres. v. Boockvar,* —— F.Supp.3d at —— – ——, 2020 WL 5997680, at *45–46. That is not how the Equal Protection Clause works.[11]

Even if we were to entertain an end-run around the Voter Plaintiffs' lack of Elections Clause standing—by viewing the *federal* Elections Clause as the source of "unlawfulness" of Defendants' vote counting—the alleged vote dilution would not be a concrete injury. Consider, as we've noted, that the Voter Plaintiffs take no issue with the content of the Deadline Extension; they concede that the General Assembly, as other state legislatures have done, could have enacted exactly the same Deadline Extension as a valid "time[ ], place[ ], and manner" regulation consistent with the Elections Clause. *Cf. Snowden*, 321 U.S. at 8, 64 S.Ct. 397 (concluding that alleged "unlawful administration by state officers of a state statute *fair on its face*, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection" (emphasis added)); *Powell*, 436 F.2d at 88 ("Uneven or erroneous application of an *otherwise valid* statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.' " (emphasis added) (quoting *Snowden*, 321 U.S. at 8, 64 S.Ct. 397)). Reduced to its essence, the Voter Plaintiffs' claimed vote dilution would rest on their allegation that federal law required a different state organ to issue the Deadline Extension. The Voter Plaintiffs have not alleged, for example, that they were prevented from casting their votes, *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), nor that their votes were not counted, *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915). Any alleged harm of vote dilution that turns not on the proportional influence of votes, but solely on the federal illegality of the Deadline Extension, strikes us as quintessentially abstract in the election law context and "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)). That the alleged violation here relates to election law and the U.S. Constitution, rather than the mine-run federal consumer privacy statute, does not abrogate the requirement that a concrete harm must flow from the procedural illegality. *See, e.g.*, *Lujan*, 504 U.S. at 576, 112 S.Ct. 2130 ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.").

***12** The Voter Plaintiffs thus lack a concrete Equal Protection Clause injury for their alleged harm of vote dilution attributable to the Deadline Extension.

ii. No particularized injury from votes counted under the Deadline Extension or the Presumption of Timeliness.

The opposite of a "particularized" injury is a "generalized grievance," where "the impact on plaintiff is plainly undifferentiated and common to all members of the public." *Id.* at 575, 112 S.Ct. 2130 (cleaned up); *see also Lance*, 549 U.S. at 439, 127 S.Ct. 1194. The District Court correctly held that the Voter Plaintiffs' "dilution" claim is a "paradigmatic generalized grievance that cannot support standing." *Bognet*, 2020 WL 6323121, at *4 (quoting *Carson v. Simon*, No. 20-cv-02030, —— F.Supp.3d ——, ——, 2020 WL 6018957, at *7 (D. Minn. Oct. 12, 2020), *rev'd on other grounds*, No. 20-3139, —— F.3d ——, 2020 WL 6335967 (8th Cir. Oct. 29, 2020)). The Deadline Extension and Presumption of Timeliness, assuming they operate to allow the illegal counting of unlawful votes, "dilute" the influence of all voters in Pennsylvania equally and in an "undifferentiated" manner and do not dilute a certain group of voters particularly.[12]

Put another way, "[a] vote cast by fraud or mailed in by the wrong person through mistake," or otherwise counted illegally, "has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged." *Martel v. Condos*, No. 5:20-cv-00131, —— F.Supp.3d ——, ——, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020). Such an alleged "dilution" is suffered equally by all voters and is not "particularized" for standing purposes. The courts to consider

this issue are in accord. *See id.*; *Carson*, —— F.Supp.3d at ——– – ——, 2020 WL 6018957, at *7–8; *Moore v. Circosta*, Nos. 1:20-cv-00911, 1:20-cv-00912, —— F.Supp.3d ——, ——, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020), *emergency injunction pending appeal denied sub nom. Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020), *application for injunctive relief denied sub nom. Moore v. Circosta*, No. 20A72, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6305036 (U.S. Oct. 28, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. Apr. 30, 2020).

But the Voter Plaintiffs argue that their purported "vote dilution" is an injury in fact sufficient to confer standing, and *not* a generalized grievance belonging to all voters, because the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.' " *Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). "Thus, 'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

***13** The Voter Plaintiffs' reliance on this language from *Baker* and *Reynolds* is misplaced. In *Baker*, the plaintiffs challenged Tennessee's apportionment of seats in its legislature as violative of the Equal Protection Clause of the Fourteenth Amendment. 369 U.S. at 193, 82 S.Ct. 691. The Supreme Court held that the plaintiffs *did* have standing under Article III because "[t]he injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties." *Id.* at 207–08, 82 S.Ct. 691.

Although the *Baker* Court did not decide the merits of the Equal Protection claim, the Court in a series of cases—including *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), and *Reynolds*—made clear that the Equal Protection Clause prohibits a state from "diluti[ng] ... the *weight* of the votes of certain ... voters merely because of where they reside[ ]," just as it prevents a state from discriminating on the basis of the voter's race or sex. *Reynolds*, 377 U.S. at 557, 84 S.Ct. 1362 (emphasis added). The Voter Plaintiffs consider it significant that the Court in *Reynolds* noted—though not in the context of standing—that "the right to vote" is "individual and personal in nature." *Id.* at 561, 84 S.Ct. 1362 (quoting *United States v. Bathgate*, 246 U.S. 220, 227, 38 S.Ct. 269, 62 L.Ed. 676 (1918)). The Court then explained that a voter's right to vote encompasses both the right to cast that vote and the right to have that vote counted without "debasement or dilution":

> The right to vote can neither be denied outright, *Guinn v. United States*, 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340 (1915)], *Lane v. Wilson*, 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281 (1939)], nor destroyed by alteration of ballots, see *United States v. Classic*, 313 U.S. 299, 315 [61 S.Ct. 1031, 85 L.Ed. 1368 (1941)], nor diluted by ballot-box stuffing, *Ex parte Siebold*, 100 U.S. 371 [25 L.Ed. 717 (1880)], *United States v. Saylor*, 322 U.S. 385 [64 S.Ct. 1101, 88 L.Ed. 1341 (1944)]. As the Court stated in *Classic*, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted ...." 313 U.S. at 315 [61 S.Ct. 1031].
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> ...
>
> "The right to vote includes the right to have the ballot counted. ... It also includes the right to have the vote counted at full value without dilution or discount. ... That federally protected right suffers substantial dilution ... [where a] favored group has full voting strength ... [and] [t]he groups not in favor have their votes discounted."

Reynolds, 377 U.S. at 555 & n.29, 84 S.Ct. 1362 (alterations in last paragraph in original) (quoting *South v. Peters*, 339 U.S. 276, 279, 70 S.Ct. 641, 94 L.Ed. 834 (1950) (Douglas, J., dissenting)).

Still, it does not follow from the labeling of the right to vote as "personal" in *Baker* and *Reynolds* that *any* alleged illegality affecting voting rights rises to the level of an injury in fact. After all, the Court has observed that the harms underlying a racial gerrymandering claim under the Equal Protection Clause "are personal" in part because they include the harm of a voter "being personally subjected to a racial classification." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (cleaned up). Yet a voter "who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.' " *Gill*, 138 S. Ct. at 1930 (quoting *United States v. Hays*, 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995)) (alteration in original). The key inquiry for standing is whether the alleged violation of the right to vote arises from an invidious classification—including those based on "race, sex, economic status, or place of residence

within a State," *Reynolds*, 377 U.S. at 561, 84 S.Ct. 1362—to which the plaintiff is subject and in which "the favored group has full voting strength and the groups not in favor have their votes discounted," *id.* at 555 n.29, 84 S.Ct. 1362 (cleaned up). In other words, "voters who allege facts *showing disadvantage to themselves*" have standing to bring suit to remedy that disadvantage, *Baker*, 369 U.S. at 206, 82 S.Ct. 691 (emphasis added), but a disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group. Here, no Pennsylvania voter's vote will count for less than that of any other voter as a result of the Deadline Extension and Presumption of Timeliness.[13]

***14** This conclusion cannot be avoided by describing one group of voters as "those ... who lawfully vote in person and submit their ballots *on time*" and the other group of voters as those whose (mail-in) ballots arrive after Election Day and are counted because of the Deadline Extension and/or the Presumption of Timeliness. Appellants' Br. 33 (emphasis in original). Although the former group, under Plaintiffs' theory, should make up 100% of the total votes counted and the latter group 0%, there is simply no differential *weighing* of the votes. *See Wise*, 978 F.3d at 104 (Motz, J., concurring) ("But if the extension went into effect, plaintiffs' votes would not count for less *relative to other North Carolina voters*. This is the core of an Equal Protection Clause challenge." (emphasis in original)). Unlike the malapportionment or racial gerrymandering cases, a vote cast by a voter in the so-called "favored" group counts not one bit more than the same vote cast by the "disfavored" group—no matter what set of scales one might choose to employ. *Cf. Reynolds*, 377 U.S. at 555 n.29, 84 S.Ct. 1362. And, however one tries to draw a contrast, this division is not based on a voter's personal characteristics at all, let alone a person's race, sex, economic status, or place of residence. Two voters could each have cast a mail-in ballot before Election Day at the same time, yet perhaps only one of their ballots arrived by 8:00 P.M. on Election Day, given USPS's mail delivery process. It is passing strange to assume that one of these voters would be denied "equal protection of the laws" were *both* votes counted. U.S. Const. amend. XIV, § 1.

The Voter Plaintiffs also emphasize language from *Reynolds* that "[t]he right to vote can neither be denied outright ... nor diluted by ballot-box stuffing." 377 U.S. at 555, 84 S.Ct. 1362 (citing *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1879); *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944)). In the first place, casting a vote in accordance with a procedure approved by a state's highest court—even assuming that approval violates the Elections Clause—is not equivalent to "ballot-box stuffing." The Supreme Court has only addressed this "false"-tally type of dilution where the tally was false as a result of a scheme to cast falsified or fraudulent votes. *See Saylor*, 322 U.S. at 386, 64 S.Ct. 1101. We are in uncharted territory when we are asked to declare that a tally that includes false or fraudulent votes is equivalent to a tally that includes votes that are or may be unlawful for non-fraudulent reasons, and so is more aptly described as "incorrect." *Cf. Gray*, 372 U.S. at 386, 83 S.Ct. 801 (Harlan, J., dissenting) ("[I]t is hard to take seriously the argument that 'dilution' of a vote in consequence of a legislatively sanctioned electoral system can, without more, be analogized to an impairment of the political franchise by ballot box stuffing or other criminal activity.").

Yet even were this analogy less imperfect, it still would not follow that every such "false" or incorrect tally is an injury in fact for purposes of an Equal Protection Clause claim. The Court's cases that describe ballot-box stuffing as an injury to the right to vote have arisen from criminal prosecutions under statutes making it unlawful for anyone to injure the exercise of another's constitutional right. *See, e.g.*, *Ex parte Siebold*, 100 U.S. at 373–74 (application for writ of habeas corpus); *Saylor*, 322 U.S. at 385–86, 64 S.Ct. 1101 (criminal appeal regarding whether statute prohibiting "conspir[ing] to injure ... any citizen in the free exercise ... of any right or privilege secured to him by the Constitution" applied to conspiracy to stuff ballot boxes); *Anderson v. United States*, 417 U.S. 211, 226, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974) (criminal prosecution for conspiracy to stuff ballot boxes under successor to statute in *Saylor*). Standing was, of course, never an issue in those cases because the Government was enforcing its criminal laws. Here, the Voter Plaintiffs, who bear the burden to show standing, have presented no instance in which an individual voter had Article III standing to claim an equal protection harm to his or her vote from the existence of an allegedly illegal vote cast by someone else in the same election.

Indeed, the logical conclusion of the Voter Plaintiffs' theory is that whenever an elections board counts any ballot that deviates in some way from the requirements of a state's legislatively enacted election code, there is a *particularized* injury in fact sufficient to confer Article III standing on every other voter—provided the remainder of the standing analysis is satisfied. Allowing standing for such an injury strikes us as indistinguishable from the proposition that a plaintiff has

Article III standing to assert a general interest in seeing the "proper application of the Constitution and laws"—a proposition that the Supreme Court has firmly rejected. *Lujan*, 504 U.S. at 573–74, 112 S.Ct. 2130. The Voter Plaintiffs thus lack standing to bring their Equal Protection vote dilution claim.

b. Arbitrary and Disparate Treatment

***15** The Voter Plaintiffs also lack standing to allege an injury in the form of "arbitrary and disparate treatment" of a preferred class of voters because the Voter Plaintiffs have not alleged a legally cognizable "preferred class" for equal protection purposes, and because the alleged harm from votes counted solely due to the Presumption of Timeliness is hypothetical or conjectural.

i. No legally protected "preferred class."

The District Court held that the Presumption of Timeliness creates a "preferred class of voters" who are "able to cast their ballots after the congressionally established Election Day" because it "extends the date of the election by multiple days for a select group of mail-in voters whose ballots will be presumed to be timely in the absence of a verifiable postmark."[14] *Bognet*, 2020 WL 6323121, at *6. The District Court reasoned, then, that the differential treatment between groups of voters is by itself an injury for standing purposes. To the District Court, this supposed "unequal treatment of voters ... harms the [Voter] Plaintiffs because, as in-person voters, they must vote by the end of the congressionally established Election Day in order to have their votes counted." *Id.* The District Court cited no case law in support of its conclusion that the injury it identified gives rise to Article III standing.

The District Court's analysis suffers from several flaws. First, the Deadline Extension and Presumption of Timeliness apply to all voters, not just a subset of "preferred" voters. It is an individual voter's *choice* whether to vote by mail or in person, and thus whether to become a part of the so-called "preferred class" that the District Court identified. Whether to join the "preferred class" of mail-in voters was entirely up to the Voter Plaintiffs.

Second, it is not clear that the mere creation of so-called "classes" of voters constitutes an injury in fact. An injury in fact requires the "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. We doubt that the mere existence of groupings of voters qualifies as an injury per se. "An equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)); *see also*, *e.g.*, *Batra v. Bd. of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996) ("[T]he relevant prerequisite is unlawful discrimination, not whether plaintiff is part of a victimized class."). More importantly, the Voter Plaintiffs have shown no disadvantage to themselves that arises simply by being separated into groupings. For instance, there is no argument that it is inappropriate that some voters will vote in person and others will vote by mail. The existence of these two groups of voters, without more, simply does not constitute an injury in fact to in-person voters.

Plaintiffs may believe that injury arises because of a preference shown for one class over another. But what, precisely, is the preference of which Plaintiffs complain? In *Bush v. Gore*, the Supreme Court held that a State may not engage in arbitrary and disparate treatment that results in the valuation of one person's vote over that of another. 531 U.S. at 104–05, 121 S.Ct. 525. Thus, "the right of suffrage can be denied by a *debasement or dilution of the weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 105, 121 S.Ct. 525 (quoting *Reynolds*, 377 U.S. at 555, 84 S.Ct. 1362) (emphasis added). As we have already discussed, vote dilution is not an injury in fact here.

***16** What about the risk that some ballots placed in the mail after Election Day may still be counted? Recall that no voter—whether in person or by mail—is *permitted* to vote after Election Day. Under Plaintiffs' argument, it might theoretically be easier for one group of voters—mail-in voters—to illegally cast late votes than it is for another group of voters—in-person voters. But even if that is the case, no group of voters has the *right* to vote after the deadline.[15] We remember that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) (citations omitted). And "a plaintiff lacks standing to complain about his inability to commit crimes because no one has a right to commit a crime." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014). Without a showing of discrimination or other intentionally unlawful

conduct, or at least some burden on Plaintiffs' own voting rights, we discern no basis on which they have standing to challenge the slim opportunity the Presumption of Timeliness conceivably affords wrongdoers to violate election law. *Cf. Minn. Voters Alliance v. Ritchie*, 720 F.3d 1029, 1033 (8th Cir. 2013) (affirming dismissal of claims "premised on potential harm in the form of vote dilution caused by insufficient pre-election verification of [election day registrants'] voting eligibility and the absence of post-election ballot rescission procedures").

ii. Speculative injury from ballots counted under the Presumption of Timeliness.

Plaintiffs' theory as to the Presumption of Timeliness focuses on the potential for some voters to vote after Election Day and still have their votes counted. This argument reveals that their alleged injury in fact attributable to the Presumption is "conjectural or hypothetical" instead of "actual or imminent." *Spokeo*, 136 S. Ct. at 1547–48 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). The Supreme Court has emphasized that a threatened injury must be "*certainly impending*" and not merely "*possible*" for it to constitute an injury in fact. *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (emphasis in original) (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). When determining Article III standing, our Court accepts allegations based on well-pleaded facts; but we do not credit bald assertions that rest on mere supposition. *Finkelman v. NFL*, 810 F.3d 187, 201–02 (3d Cir. 2016). The Supreme Court has also emphasized its "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414, 133 S.Ct. 1138. A standing theory becomes even more speculative when it requires that independent actors make decisions to act *unlawfully*. *See City of L.A. v. Lyons*, 461 U.S. 95, 105–06 & 106 n.7, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (rejecting Article III standing to seek injunction where party invoking federal jurisdiction would have to establish that he would unlawfully resist arrest or police officers would violate department orders in future).

Here, the Presumption of Timeliness could inflict injury on the Voter Plaintiffs only if: (1) another voter violates the law by casting an absentee ballot after Election Day; (2) the illegally cast ballot does not bear a legible postmark, which is against USPS policy;[16] (3) that same ballot still arrives within three days of Election Day, which is faster than USPS anticipates mail delivery will occur;[17] (4) the ballot lacks sufficient indicia of its untimeliness to overcome the Presumption of Timeliness; and (5) that same ballot is ultimately counted. *See Donald J. Trump for Pres., Inc. v. Way*, No. 20-cv-10753, 2020 WL 6204477, at *7 (D.N.J. Oct. 22, 2020) (laying out similar "unlikely chain of events" required for vote dilution harm from postmark rule under New Jersey election law); *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) (holding purported injury in fact was too conjectural where "we cannot now describe how Appellants will be injured in this case without beginning our explanation with the word 'if' "). This parade of horribles "may never come to pass," *Trump for Pres. v. Boockvar*, 2020 WL 5997680, at *33, and we are especially reluctant to endorse such a speculative theory of injury given Pennsylvania's "own mechanisms for deterring and prosecuting voter fraud," *Donald J. Trump for Pres., Inc. v. Cegavske*, No. 20-1445, —— F.Supp.3d ——, ——, 2020 WL 5626974, at *6 (D. Nev. Sept. 18, 2020).[18]

***17** To date, the Secretary has reported that at least 655 ballots without a legible postmark have been collected within the Deadline Extension period.[19] But it is mere speculation to say that any one of those ballots was cast after Election Day. We are reluctant to conclude that an independent actor —here, one of 655 voters—decided to mail his or her ballot after Election Day contrary to law. The Voter Plaintiffs have not provided any empirical evidence on the frequency of voter fraud or the speed of mail delivery that would establish a statistical likelihood or even the plausibility that any of the 655 ballots was cast after Election Day. Any injury to the Voter Plaintiffs attributable to the Presumption of Timeliness is merely "possible," not "actual or imminent," and thus cannot constitute an injury in fact.

B. Purcell

Even were we to conclude that Plaintiffs have standing, we could not say that the District Court abused its discretion in concluding on this record that the Supreme Court's election-law jurisprudence counseled against injunctive relief. Unique and important equitable considerations, including voters' reliance on the rules in place when they made their plans to vote and chose how to cast their ballots, support that disposition. Plaintiffs' requested relief would have upended this status quo, which is generally disfavored under the "voter confusion" and election confidence rationales of *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006). One can assume for the sake of argument that aspects of the now-prevailing regime in Pennsylvania are unlawful as

alleged and still recognize that, given the timing of Plaintiffs' request for injunctive relief, the electoral calendar was such that following it "one last time" was the better of the choices available. *Perez,* 138 S. Ct. at 2324 ("And if a [redistricting] plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.").

Here, less than two weeks before Election Day, Plaintiffs asked the District Court to enjoin a deadline established by the Pennsylvania Supreme Court on September 17, a deadline that may have informed voters' decisions about whether and when to request mail-in ballots as well as when and how they cast or intended to cast them. In such circumstances, the District Court was well within its discretion to give heed to Supreme Court decisions instructing that "federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, —— U.S. ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (per curiam) (citing *Purcell*, 549 U.S. at 1, 127 S.Ct. 5).

In *Purcell*, an appeal from a federal court order enjoining the State of Arizona from enforcing its voter identification law, the Supreme Court acknowledged that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." 549 U.S. at 4, 127 S.Ct. 5. In other words, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5, 127 S.Ct. 5. Mindful of "the necessity for clear guidance to the State of Arizona" and "the imminence of the election," the Court vacated the injunction. *Id.* at 5, 127 S.Ct. 5.

The principle announced in *Purcell* has very recently been reiterated. First, in *Republican National Committee*, the Supreme Court stayed on the eve of the April 7 Wisconsin primary a district court order that altered the State's voting rules by extending certain deadlines applicable to absentee ballots. 140 S. Ct. at 1206. The Court noted that it was adhering to *Purcell* and had "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* at 1207 (citing *Purcell*, 549 U.S. at 1, 127 S.Ct. 5). And just over two weeks ago, the Court denied an application to vacate a stay of a district court order that made similar changes to Wisconsin's election rules six weeks before Election Day. *Democratic Nat'l Comm. v. Wis. State Legislature*, No. 20A66, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6275871 (Oct. 26, 2020) (denying application to vacate stay). Justice Kavanaugh explained that the injunction was improper for the "independent reason[ ]" that "the District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's precedents." *Id.* at ——, 2020 WL 6275871 at *3 (Kavanaugh, J., concurring). *Purcell* and a string[20] of Supreme Court election-law decisions in 2020 "recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled." *Id.*

***18** The prevailing state election rule in Pennsylvania permitted voters to mail ballots up through 8:00 P.M. on Election Day so long as their ballots arrived by 5:00 P.M. on November 6. Whether that rule was wisely or properly put in place is not before us now. What matters for our purposes today is that Plaintiffs' challenge to it was not filed until sufficiently close to the election to raise a reasonable concern in the District Court that more harm than good would come from an injunction changing the rule. In sum, the District Court's justifiable reliance on *Purcell* constitutes an "alternative and independent reason[ ]" for concluding that an "injunction was unwarranted" here. *Wis. State Legislature*, —— S.Ct. at ——, 2020 WL 6275871, at *3 (Kavanaugh, J., concurring).

IV. Conclusion

We do not decide today whether the Deadline Extension or the Presumption of Timeliness are proper exercises of the Commonwealth of Pennsylvania's lawmaking authority, delegated by the U.S. Constitution, to regulate federal elections. Nor do we evaluate the policy wisdom of those two features of the Pennsylvania Supreme Court's ruling. We hold only that when voters cast their ballots under a state's facially lawful election rule and in accordance with instructions from the state's election officials, private citizens lack Article III standing to enjoin the counting of those ballots on the grounds that the source of the rule was the wrong state organ or that doing so dilutes their votes or constitutes differential treatment of voters in violation of the Equal Protection Clause. Further, and independent of our holding on standing, we hold that the District Court did not err in denying Plaintiffs' motion for injunctive relief out of concern for the settled expectations of voters and election officials. We will affirm the District Court's denial of Plaintiffs' emergency motion for a TRO or preliminary injunction.

All Citations

--- F.3d ----, 2020 WL 6686120

Footnotes

1 Second Letter from Phocion (April 1784), *reprinted in* 3 The Papers of Alexander Hamilton, 1782–1786, 530–58 (Harold C. Syrett ed., 1962).

2 Throughout this opinion, we refer to absentee voting and mail-in voting interchangeably.

3 The Free and Equal Elections Clause of the Pennsylvania Constitution provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. 1, § 5.

4 Because we have received comprehensive briefing, and given the weighty public interest in a prompt ruling on the matter before us, we have elected to forgo oral argument.

5 Bognet seeks to represent Pennsylvania in Congress, but even if he somehow had a relationship to *state* lawmaking processes, he would lack personal standing to sue for redress of the alleged "institutional injury (the diminution of legislative power), which necessarily damage[d] all Members of [the legislature] ... equally." *Raines v. Byrd*, 521 U.S. 811, 821, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (plaintiffs were six out of 535 members of Congress); *see also Corman*, 287 F. Supp. 3d at 568–69 (concluding that "two of 253 members of the Pennsylvania General Assembly" lacked standing to sue under Elections Clause for alleged "deprivation of 'their legislative authority to apportion congressional districts' "); *accord Va. House of Delegates v. Bethune-Hill*, —— U.S. ——, 139 S. Ct. 1945, 1953, 204 L.Ed.2d 305 (2019).

6 Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots. *See Carson v. Simon*, No. 20-3139, —— F.3d ——, ——, 2020 WL 6335967, at *5 (8th Cir. Oct. 29, 2020). The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none.

7 The alleged injury specific to Bognet does not implicate the Qualifications Clause or exclusion from Congress, *Powell v. McCormack*, 395 U.S. 486, 550, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), nor the standing of members of Congress to bring actions alleging separation-of-powers violations. *Moore v. U.S. House of Reps.*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring).

8 Only the Voter Plaintiffs bring the Equal Protection count in the Complaint; Bognet did not join that count.

9 We exclude the Presumption of Timeliness from our concreteness analysis. Plaintiffs allege that the federal statutes providing for a uniform election day, 3 U.S.C. § 1 and 2 U.S.C. § 7, conflict with, and thus displace, any state law that would authorize voting after Election Day. They claim that the Presumption permits, theoretically at least, some voters whose ballots lack a legible postmark to vote *after* Election Day, in violation of these federal statutes. So unlike the Deadline Extension, Plaintiffs contend that the General Assembly could not enact the Presumption consistent with the Constitution. This conceptualization of injury is thus more properly characterized as "concrete" than is the purported Deadline Extension injury attributable to voters having their timely voted ballots received and counted after Election Day. That said, we express no opinion about whether the Voter Plaintiffs have, in fact, alleged such a concrete injury for standing purposes.

10 *See* AS § 15.20.081(e) & (h) (Alaska – 10 days after Election Day if postmarked on or before Election Day); West's Ann. Cal. Elec. Code § 3020(b) (California – three days after Election Day if postmarked on or before Election Day); DC ST § 1-1001.05(a)(10A) (District of Columbia – seven days after the election if postmarked on or before Election Day); 10 ILCS 5/19-8, 5/18A-15 (Illinois – 14 days after the election if postmarked on or before Election Day); K.S.A. 25-1132 (Kansas – three days after the election if postmarked before the close of polls on Election Day); MD Code, Elec. Law, § 9-505 (Maryland – the second Friday after Election Day if postmarked on or before Election Day); Miss. Code Ann. § 23-15-637 (Mississippi – five business days after Election Day if postmarked on or before Election Day); NV Rev Stat § 293.317 (Nevada – by 5:00 P.M. on the seventh day after Election Day if postmarked by Election Day, and ballots with unclear postmarks must be received by 5:00 P.M. on the third day after Election Day); N.J.S.A. 19:63-22 (New Jersey – 48 hours after polls close if postmarked on or before Election Day); McKinney's Elec. Law § 8-412 (New York – seven days after the election for mailed ballots postmarked on Election Day); N.C. Gen. Stat. § 163-231(b)(2) and *Wise v. Circosta*,

978 F.3d 93, 96 (4th Cir. 2020) (North Carolina – recognizing extension from three to nine days after the election the deadline for mail ballots postmarked on or before Election Day); Texas Elec. Code § 86.007 (the day after the election by 5:00 P.M. if postmarked on or before Election Day); Va. Code 24.2-709 (Virginia – by noon on the third day after the election if postmarked on or before Election Day); West's RCWA 29A.40.091 (Washington – no receipt deadline for ballots postmarked on or before Election Day); W. Va. Code, §§ 3-3-5, 3-5-17 (West Virginia – five days after the election if postmarked on or before Election Day); *see also* Iowa Code § 53.17(2) (by noon the Monday following the election if postmarked by the day before Election Day); NDCC 16.1-07-09 (North Dakota – before the canvass if postmarked the day before Election Day); R.C. § 3509.05 (Ohio – 10 days after the election if postmarked by the day before Election Day); Utah Code Ann. § 20A-3a-204 (seven to 14 days after the election if postmarked the day before the election).

11 *Bush v. Gore* does not require us to perform an Equal Protection Clause analysis of Pennsylvania election law as interpreted by the Pennsylvania Supreme Court. *See* 531 U.S. at 109, 121 S.Ct. 525 ("Our consideration is limited to the present circumstances ...."); *id.* at 139–40, 121 S.Ct. 525 (Ginsburg, J., dissenting) (discussing "[r]are[ ]" occasions when Supreme Court rejected state supreme court's interpretation of state law, one of which was in 1813 and others occurred during Civil Rights Movement—and none decided federal equal protection issues).

12 In their complaint, the Voter Plaintiffs alleged that they are all "residents of Somerset County, a county where voters are requesting absentee ballots at a rate *far less* than the state average" and thus, somehow, the Voter Plaintiffs' votes "will be diluted to a greater degree than other voters." Compl. ¶ 71 (emphasis in original). Plaintiffs continue to advance this argument on appeal in support of standing, and it additionally suffers from being a conjectural or hypothetical injury under the framework discussed *infra* Section III.A.2.b.ii. It is purely hypothetical that counties where a greater percentage of voters request absentee ballots will more frequently have those ballots received after Election Day.

13 Plaintiffs also rely on *FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), for the proposition that a widespread injury—such as a mass tort injury or an injury "where large numbers of voters suffer interference with voting rights conferred by law"—does not become a "generalized grievance" just because many share it. *Id.* at 24–25, 118 S.Ct. 1777. That's true as far as it goes. But the Voter Plaintiffs have not alleged an injury like that at issue in *Akins*. There, the plaintiffs' claimed injury was their inability to obtain information they alleged was required to be disclosed under the Federal Election Campaign Act. *Id.* at 21, 118 S.Ct. 1777. The plaintiffs alleged a statutory right to obtain information and that the same information was being withheld. Here, the Voter Plaintiffs' alleged injury is to their right under the Equal Protection Clause not to have their votes "diluted," but the Voter Plaintiffs have not alleged that their votes are less influential than any other vote.

14 The District Court did not find that the Deadline Extension created such a preferred class.

15 Moreover, we cannot overlook that the mail-in voters potentially suffer a *disadvantage* relative to the in-person voters. Whereas in-person ballots that are timely cast will count, timely cast mail-in ballots may not count because, given mail delivery rates, they may not be received by 5:00 P.M. on November 6.

16 *See* Defendant-Appellee's Br. 30 (citing 39 C.F.R. § 211.2(a)(2); Postal Operations Manual at 443.3).

17 *See Pa. Democratic Party*, 238 A.3d at 364 (noting "current two to five day delivery expectation of the USPS").

18 Indeed, the conduct required of a voter to effectuate such a scheme may be punishable as a crime under Pennsylvania statutes that criminalize forging or "falsely mak[ing] the official endorsement on any ballot," 25 Pa. Stat. & Cons. Stat. § 3517 (punishable by up to two years' imprisonment); "willfully disobey[ing] any lawful instruction or order of any county board of elections," *id.* § 3501 (punishable by up to one year's imprisonment); or voting twice in one election, *id.* § 3535 (punishable by up to seven years' imprisonment).

19 As of the morning of November 12, Secretary Boockvar estimates that 655 of the 9383 ballots received between 8:00 P.M. on Election Day and 5:00 P.M. on November 6 lack a legible postmark. *See* Dkt. No. 59. That estimate of 655 ballots does not include totals from five of Pennsylvania's 67 counties: Lehigh, Northumberland, Tioga, Warren, and Wayne. *Id.* The 9383 ballots received, however, account for all of Pennsylvania's counties. *Id.*

20 *See, e.g.*, *Andino v. Middleton*, No. 20A55, 592 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J., concurring) ("By enjoining South Carolina's witness requirement shortly before the election, the District Court defied [the *Purcell*] principle and this Court's precedents." (citations omitted)); *Merrill v. People First of Ala.*, No. 19A1063, 591 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 3604049 (Mem.), at *1 (July 2, 2020); *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see also Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (per curiam) (holding that injunction issued six weeks before election violated *Purcell*); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. Oct. 2, 2020) ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s

well-known caution against federal courts mandating new election rules—especially at the last minute." (citing *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5)).

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EXHIBIT 3

2020 WL 6437668
Only the Westlaw citation is currently available.
United States District Court,
S.D. Texas, Houston Division.

Steven HOTZE, M.D., Wendell Champion, Hon. Steve Toth, and Sharon Hemphill, Plaintiffs,

v.

Chris HOLLINS, in his official capacity as Harris County Clerk, Defendant.

Civil Action No. 4:20-cv-03709
|
Signed 11/02/2020

Attorneys and Law Firms

Jared Ryker Woodfill, Woodfill Law Firm P.C., Houston, TX, for Plaintiffs.

Richard Warren Mithoff, Jr., Mithoff Law Firm, Kenneth Royce Barrett, KBR Law, Houston, TX, Charles Stein Siegel, Waters & Kraus, LLP, Dallas, TX, S. Nasim Ahmad, The Ahmad Law Firm, The Woodlands, TX, for Defendant.

ORDER

Andrew S. Hanen, United States District Judge

***1** The Court has before it the Motion for Preliminary Injunction (Doc. No. 3) filed by Plaintiffs Steven Hotze, M.D., Wendell Champion, Hon. Steve Toth, and Sharon Hemphill (collectively, "Plaintiffs"), the Response in Opposition (Doc. No. 22) filed by Defendant Chris Hollins in his official capacity as Harris County Clerk (hereinafter, "Defendant"), and various Motions to Intervene filed on behalf of forty-eight individuals and/or entities. The Court also has before it *amicus curiae* briefs filed by the Texas Coalition of Black Democrats, The Lincoln Project, the Libertarian Party of Texas, Joseph R. Straus, III, and election law professor, Benjamin L. Ginsberg.

I.

Due to the time constraints given the issue involved, this Court cannot issue the formal opinion that this matter deserves. Consequently, given those confines, this Order must suffice. The Court first notes that it appreciates the participation of all counsel involved and the attention each gave to this important topic on such short notice.

This Court's overall ruling is that the Plaintiffs do not have standing (as explained below). While this ruling is supported by general Equal Protection and Election Clause cases, it is somewhat without precedent with regard to the Plaintiffs (or Intervenors) who are actual candidates for elected office. Therefore, the Court, in anticipation of an appeal or petition for writ of mandamus and knowing that the appellate court could draw a distinction in that regard and hold that standing exists, has gone further to indicate what its ruling would have been in that case.

II.

The Court finds that Plaintiffs lack standing to sue. Federal courts must determine whether they have jurisdiction before proceeding to the merits. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94–95 (1998). Article III of the Constitution limits federal jurisdiction to "Cases" and "Controversies." One component of the case or controversy requirement is standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The Supreme Court has repeatedly held that an individual plaintiff raising only a generalized grievance about government does not meet the Article III requirement of a case or controversy. *Id.* at 573–74. This Court finds that the Plaintiffs here allege only a "generalized grievance about the conduct of government." *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

The Plaintiffs' lack of a particularized grievance is fatal to their claim under the Equal Protection Clause. "The rule against generalized grievances applies with as much force in the equal protection context as in any other." *U.S. v. Hays*, 515 U.S. 737, 743 (1995). Plaintiffs' general claim that Harris County's election is being administered differently than Texas's other counties does not rise to the level of the sort of particularized injury that the Supreme Court has required for constitutional standing in elections cases. *See id.; Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (no standing in equal protection case when alleged injury involved "group political interests" and not "individual legal rights").

***2** Further, it is unclear that individual plaintiffs have standing to assert claims under the Elections Clause at all. The Supreme Court has held that individual plaintiffs, like those here, whose only asserted injury was that the Elections Clause had not been followed, did not have standing to assert such a claim. *See Lance*, 549 U.S. at 442. Conversely, the Court has held that the Arizona Legislature did have standing to allege a violation of the Elections Clause as it was "an institutional plaintiff asserting an institutional injury." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015). In addition, the Supreme Court has also held plaintiffs had such standing when they were state senators whose "votes had been completely nullified" by executive action. *Id.* at 803 (citing *Raines v. Byrd*, 521 U.S. 811, 822–23 (1997)). These cases appear to stand for the proposition that only the state legislature (or a majority of the members thereof) have standing to assert a violation of the Elections Clause.

The Court finds that the Plaintiffs here are akin to those in *Lance v. Coffman*, in which the Supreme Court held that private citizens, whose primary alleged injury was that the Elections Clause was not followed, lacked standing to bring a claim under the Elections Clause. 549 U.S. at 442. To summarize the Plaintiffs' primary argument, the alleged irreparable harm caused to Plaintiffs is that the Texas Election Code has been violated and that violation compromises the integrity of the voting process. This type of harm is a quintessential generalized grievance: the harm is to every citizen's interest in proper application of the law. *Lujan*, 504 U.S. at 573–74; *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (holding that the right, possessed by every citizen, to require that the Government be administered according to the law does not entitle a private citizen to institute a lawsuit in federal court). Every citizen, including the Plaintiff who is a candidate for federal office, has an interest in proper execution of voting procedure. Plaintiffs have not argued that they have any specialized grievance beyond an interest in the integrity of the election process, which is "common to all members of the public." *United States v. Richardson*, 418 U.S. 166, 176–77.[1]

III.

If the Court had plaintiffs with standing, it would have denied in part and granted in part the motion for preliminary injunction.[2] A preliminary injunction is an "extraordinary remedy" that should only be granted if the movant has "clearly carried the burden of persuasion" on all four factors. *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 196 (5th Cir. 2003). The movant, however, "need not prove his case." *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 (5th Cir. 1991) (citing *H & W Indus. v. Formosa Plastics Corp.*, 860 F.2d 172, 179 (5th Cir. 1988)). Before a court will grant a preliminary injunction, the movants must clearly show "(1) a substantial likelihood that they will prevail on the merits, (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted, (3) that their substantial injury outweighs the threatened harm to the party whom they seek to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *City of El Cenizo v. Texas*, 890 F.3d 164, 176 (5th Cir. 2018) (quoting *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012)); *see also Winter v. NRDC*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). "The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).

***3** This Court finds that there is a difference between the voting periods presented to it. The merits need to be analyzed separately by early voting and election day voting. With respect to the likelihood of success, the Court would find that the Plaintiffs do not prevail on the element of likelihood of success with respect to early voting. First, § 85.062 of the Texas Election Code provides for "temporary branch polling places" during early voting. Tex. Elec. Code. § 85.062. The statute authorizes county election officials to use "movable structure[s]" as polling places. *Id.* § 85.062(b). The Code does not define "structure," but Black's Law Dictionary defines the term as: "Any construction, production, or piece of work artificially built up or composed of parts purposefully joined together." Black's Law Dictionary (11th ed. 2019). The Court finds, after reviewing the record, the briefing, and considering the arguments of counsel, that the tents used for drive-thru voting qualify as "movable structures" for purposes of the Election Code. The Court is unpersuaded by Plaintiffs' argument that the voters' vehicles, and not the tents, are the polling places under the drive-thru voting scheme. Consequently, the Court finds that drive-thru voting was permissible during early voting. Moreover, the Plaintiffs failed to demonstrate under the Texas Election Code that an

otherwise legal vote, cast pursuant to the instructions of local voting officials, becomes uncountable if cast in a voting place that is subsequently found to be non-compliant.

Additionally, the promptness with which one brings an injunction action colors both the elements of likelihood of success on the merits and irreparable harm. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685 (2014) ("In extraordinary circumstances, however, the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very outset of the litigation, curtailment of the relief equitably awardable."); *Environmental Defense Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (1980) ("equitable remedies are not available if granting the remedy would be inequitable to the defendant because of the plaintiff's long delay."). Here, the Court finds that the Plaintiffs did not act with alacrity. There has been an increasing amount of conversation and action around the subject of implementing drive-thru voting since earlier this summer. The Defendant has argued, and no one has refuted, that discussions were held with leaders of both major political parties, and, using that input, a drive-thru voting plan was developed. The Harris County Commissioners Court approved a budget for drive-thru voting in late September. Finally, actual drive-thru voting began October 13, 2020. At virtually any point, but certainly by October 12, 2020, Plaintiffs could have filed this action. Instead, they waited until October 28, 2020 at 9:08 p.m. to file their complaint and did not file their actual motion for temporary relief until mid-day on October 30, 2020—the last day of early voting. The Court finds this delay is critical. It is especially important in this compact early voting timeframe, in a particularly tense election, where each day's voting tally functionally equated to many days or even weeks of early voting in different situations.

Therefore, this Court finds the Plaintiffs do not prevail on the first element.

With regard to the second element, "irreparable injury," this point is covered more thoroughly in the standing discussion, but suffice it to say, in response to the Court's question during oral argument, Plaintiff's counsel described their injuries as the concern for the voting law to be accurately enforced and voting to be legal. In response to the Court's questions, Plaintiffs' Counsel said their irreparable injury was that the election process was being compromised, and that it prevents there being uniformity in the manner of voting throughout Texas. While certainly valid concerns, those are not the kind of injuries that separate Plaintiffs from other concerned citizens. Plaintiffs have no evidence of individualized irreparable injuries.

The one element that the Court finds the Plaintiffs have prevailed on is the harm to the party defendant. The Court finds that there would be no harm to Harris County. The only suggested harm is that the County has spent millions of dollars to implement drive-thru voting. While these funds may have been better spent, their loss does not prevail over tens of thousands of potentially illegal votes. Further, if granted, the injunction would only require the Defendant to conduct elections as Harris County has conducted them in the past without drive-thru voting.

***4** The last element must, like the first, take on extraordinary significance in this context. That element concerns the public interest. Plaintiffs argue, correctly, that the public has an interest in seeing that elections are carried out pursuant to the Election Code. This is no doubt true; however, this generalized interest is offset by two somewhat stronger factors. First, the drive-thru early voting as designed and implemented is, to this Court's reading, legal as described above. Second, there have been over 120,000 citizens who have legally voted utilizing this process. While Plaintiffs have complained about anecdotal reports of irregularities, the record reflects that the vast majority were legal voters, voting as instructed by their local voting officials and voting in an otherwise legal manner. The only claimed widespread illegality is the place of voting—a tent outside the polling place instead of inside the actual building. To disenfranchise over 120,000 voters who voted as instructed the day before the scheduled election does not serve the public interest.

Therefore, if the Court had found standing existed, it would have denied an injunction as to the drive-thru early voting.

The Court finds the issue as to Election Day to cut the opposite direction. On Election Day, as opposed to early voting, there is no legislative authorization for movable structures as polling places. The Election Code makes clear that, on Election Day, "[e]ach polling place shall be located inside a building." Tex. Elec. Code § 43.031(b). The term "building" is not defined in the Code. Nevertheless, Black's Law Dictionary defines "building" as: "A structure with walls and a roof, esp. a permanent structure." Black's Law Dictionary (11th ed. 2019). The Court finds, after reviewing the record and arguments of counsel, that the tents used for drive-thru voting are not "buildings" within the meaning of the Election Code. Further, they are not inside, they are clearly outside.

Accordingly, if the Plaintiffs had standing, the Court would have found that the continuation of drive-thru voting on Election Day violates the Texas Election Code.

It also finds that, unlike in early voting, the Plaintiffs prevail when one weighs the various elements that underlie the issuance of an injunction. First, as stated above, the Court does not find a tent to be a building. Therefore, under the Election Code it is not a legal voting location. Second, the Plaintiffs' request for injunctive relief is timely. While it could and should have been made earlier, it was made days before the election. The Court would have found that the Plaintiffs had a likelihood of success. The analysis of the second element remains the same. With regard to the loss that the Defendant might suffer, the Court finds this to be minimal. While it apparently spent millions in implementing the drive-thru voting system, it had over 120,000 voters use it—so it is money well-spent. The fact it would not be used on Election Day does not diminish its benefit. The analysis of the last element, public interest, swings in favor of the Plaintiffs. No one should want votes to be cast illegally or at an illegal polling place. No one has voted yet—so no one is being disenfranchised. Moreover, for those who are injured or worried that their health would be compromised should they be compelled to enter the building to vote, curbside voting is available under § 64.009 of the Texas Election Code.[3] Lastly, there are very few citizens who would want their vote to be in jeopardy, so it is incumbent on election officials to conduct voting in a proper location—not one which the Attorney General has already said was inappropriate. Consequently, this Court, had it found that standing existed, would have granted the injunction prospectively and enjoined drive-thru voting on Election Day and denied all other relief.

***5** Nevertheless, since it found standing does not exist, this action is hereby dismissed.

All Citations

Slip Copy, 2020 WL 6437668

Footnotes

1 This Court finds the answer to this question to be particularly thorny, given that some of the Plaintiffs are actual candidates who have put in time, effort, and money into campaigning, to say nothing of the blood, sweat, and tears that a modern campaign for public office entails. This Court would readily understand if some appellate court finds that these Plaintiffs have standing despite the fact they cannot individualize their damage beyond their rightful feeling that an election should be conducted lawfully. Neither this Court's research nor the briefing of the parties have brought forth any precedent to support this concept under either of the two pleaded causes of action based upon claimed violations of Equal Protection or the "Elections Clause." Given the timing of this case and the impact that such a ruling might have, this Court finds it prudent to follow the existing precedent.

2 The Defendant and Intervenors suggested both in oral argument and in their written presentations that the Court should abstain under either *Pullman, Colorado River*, or *Rooker-Feldman* doctrine. Since standing is jurisdictional and since this Court is dismissing this action, it need not analyze these arguments. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643 (1941); *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

3 This Court is quite cognizant of the Texas Supreme Court ruling (in a slightly different context) that fear of contracting COVID-19 does not establish an exception. *In re State*, 602 S.W.3d 549 (Tex. 2020).

EXHIBIT 4

2020 WL 6817513
Only the Westlaw citation is currently available.
United States District Court,
N.D. Georgia, Atlanta Division.

L. LIN WOOD, JR., Plaintiff,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of Georgia; REBECCA N. SULLIVAN, in her official capacity as Vice Chair of the Georgia State Election Board; DAVID J. WORLEY, in his official capacity as a Member of the Georgia State Election Board; MATTHEW MASHBURN, in his official capacity as a Member of the Georgia State Election Board; and ANH LE, in her official capacity as a Member of the Georgia State Election Board, Defendants.

Civil Action No. 1:20-cv-04651-SDG
|
11/20/2020

Steven D. Grimberg, United States District Court Judge

OPINION AND ORDER

***1** This matter is before the Court on a motion for temporary restraining order filed by Plaintiff L. Lin Wood, Jr. [ECF 6]. For the following reasons, and with the benefit of oral argument, Wood's motion is **DENIED**.

I. BACKGROUND

On November 3, 2020, the United States conducted a general election for various federal, state, and local political offices (the General Election).[1] However, the voting process in Georgia began in earnest before that date. On September 15, 2020, local election officials began mailing absentee ballots for the General Election to eligible voters.[2] On October 12, 2020, Georgia's in-person, early voting period started.[3] This entire process played out amidst the throes of a global health pandemic caused by the novel coronavirus SARS-CoV-2—colloquially known as COVID-19. Due in large part to the threat posed by COVID-19, an overwhelming number of Georgia voters—over 1 million of the 5 million votes cast by November 3—participated in the General Election through the use of absentee ballots.[4]

Wood, a registered voter in Fulton County, Georgia, believes Defendants— the elected officials tasked with conducting elections in the state—performed their roles in an unconstitutional manner. As such, Wood initiated this action on November 13, 2020, ten days after the conclusion of the General Election.[5] On November 16, Wood filed an Amended Complaint, asserting three claims against Defendants—all in their official capacities—for violation of: the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (Count I); the Electors and Elections Clause of the Constitution (Count II); and the Due Process Clause of the Fourteenth Amendment (Count III).[6]

Counts I and II seek extraordinary relief:

> As a result of Defendants' unauthorized actions and disparate treatment of defective absentee ballots, this Court should enter an order, declaration, and/or injunction that prohibits Defendants from certifying the results of the 2020 general election in Georgia on a statewide basis.
>
> Alternatively, this Court should enter an order, declaration, and/or injunction prohibiting Defendants from certifying the results of the General Election which include the tabulation of defective absentee ballots, regardless of whether said ballots were cured.
>
> Alternatively, this Court should enter an order, declaration, and/or injunction that the results of the 2020 general election in Georgia are defective as a result of the above-described constitutional violations, and that Defendants are required to cure said deficiencies in a manner consistent with federal and Georgia law, and without the taint of the procedures described in the Litigation Settlement.[7]

For Count III, Wood requests an order, declaration, and/or injunction requiring Defendants to perform a myriad of activities, including ordering a second recount prior to the certification of the election results and permitting monitors designated by the Republican Party to have special access to observe all election activity.[8]

***2** On November 17, 2020, Wood filed an emergency motion for a temporary restraining order.[9] Two sets of parties subsequently sought permission to intervene as defendants (collectively, the Intervenors): (1) the Democratic Party of Georgia, Inc. (DPG), DSCC, and DCCC; and (2) the Georgia State Conference of the NAACP (Georgia NAACP) and Georgia Coalition for the People's Agenda (GCPA).[10] On November 19, Defendants and Intervenors filed separate responses in opposition to Wood's motion for a temporary restraining order.[11] The Court held oral argument on Wood's motion the same day. At the conclusion of the oral argument, the Court denied Wood's request for a temporary restraining order. This Order follows and supplements this Court's oral ruling.

a. Georgia Statutory Law Regarding Absentee Ballots. Georgia law authorizes any eligible voter to cast his or her absentee ballot by mail without providing a reason. O.C.G.A. § 21-2-380(b). To initiate the absentee-voting process, a prospective voter must submit an application to the applicable registrar's or absentee ballot clerk's office. O.C.G.A. § 21-2-381(a)(1)(A). Upon receipt of a timely absentee ballot request, a registrar or absentee ballot clerk must enter the date the office received the application and compare the prospective voter's information and signature on the application with the information and signature on file in the registrar's or clerk's office. O.C.G.A. § 21-2-381(b)(1). If the prospective voter's eligibility is confirmed, the registrar or clerk must mail the voter an absentee ballot. O.C.G.A. § 21-2-381(b)(2)(A).

An absentee voter receives two envelopes along with the absentee ballot; the completed ballot is placed in the smaller envelope, which is then placed in the larger envelope, which contains the oath of the elector and a signature line. O.C.G.A. § 21-2-384(b). Upon receipt of a timely absentee ballot, a registrar or clerk is required to compare the identifying information and signature provided in the oath with the information and signature on file in the respective office. O.C.G.A. § 21-2-386(a)(1)(B). If the information and signature appear to match, the registrar or clerk signs his or her name below the voter's oath. *Id*. If the information or signature is missing or does not appear to match, the registrar or clerk is required to write "Rejected" across the envelope and provide the reason for the rejection. O.C.G.A. § 21-2-386(a)(1)(C). The board of registrars or absentee ballot clerk is required to "promptly notify" the elector of the rejection, who then has until the end of the period for verifying provisional ballots to cure the issue that resulted in the rejection. *Id*.

Secretary of State Raffensperger is "the state's chief election official." O.C.G.A. § 21-2-50(b). *See also* Ga. Op. Att'y Gen. No. 2005-3 (Apr. 15, 2005) ("Just as a matter of sheer volume and scope, it is clear that under both the Constitution and the laws of the State the Secretary is the state official with the power, duty, and authority to manage the state's electoral system. No other state official or entity is assigned the range of responsibilities given to the Secretary of State in the area of elections."). In this role, Raffensperger is required to, among other things, "promulgate rules and regulations so as to obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, and other officials" and "formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections." O.C.G.A. § 21-3-31(1)-(2).

b. The Settlement Agreement

Wood does not challenge the underlying constitutionality of the absentee ballot framework enacted by the Georgia General Assembly. The genesis of his claims instead derive from a lawsuit filed over one year ago by the DPG against Raffensperger, the then-Members of the Georgia State Election Board, and the then-Members of the Gwinnett County Board of Registration and Elections.[12] In that action, the DPG, DSCC, and DCCC challenged several aspects of the process for rejecting absentee ballots based on a missing or mismatched signature.[13]

***3** On March 6, 2020, the DPG, DSCC, DCCC, Raffensperger, and the Members of the Georgia State Election Board executed—and filed on the public docket—a "Compromise Settlement Agreement and Release" (Settlement Agreement).[14] As part of the Settlement Agreement, Raffensperger agreed to issue an Official Election Bulletin containing certain procedures for the review of signatures on absentee ballot envelopes by county election officials for the March 24, 2020 Presidential Primary Election and subsequent General Election. In relevant part, the procedures stated:

> When reviewing an elector's signature on the mail-in absentee ballot envelope, the registrar or clerk must compare the signature on the mail-in absentee ballot

envelope to each signature contained in such elector's voter registration record in eNet and the elector's signature on the application for the mail-in absentee ballot. **If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file in eNet or on the absentee ballot application.** If a determination is made that the elector's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file in eNet or on the absentee ballot application, the registrar or absentee ballot clerk shall write the names of the three elections officials who conducted the signature review across the face of the absentee ballot envelope, which shall be in addition to writing "Rejected" and the reason for the rejection as required under OCGA 21-2-386(a)(1)(C).[15]

No entity or individual sought permission to intervene and challenge the Settlement Agreement. United States District Judge William M. Ray closed the case on March 9.[16]

c. The Risk-Limiting Audit

Georgia law provides procedures for conducting a "risk-limiting audit" prior to the final certification of an election. O.C.G.A. § 21-2-498. Such an audit must be "[c]omplete[d]...in public view." O.C.G.A. § 21-2-498(c)(4). And the State Election Board is "authorized to promulgate rules, regulations, and procedures to implement and administer" an audit, including "security procedures to ensure that [the] collection of validly cast ballots is complete, accurate, and trustworthy throughout the audit." O.C.G.A. § 21-2-498(d). *See also* Ga. Comp. R. & Regs. 183-1-15-.04 (2020).

On November 11, 2020, Raffensperger announced a statewide risk-limiting audit (the Audit)—also referred to as a "full hand recount"—of all votes cast in the contest for President of the United States.[17] Every county in Georgia was required to begin the Audit at 9:00 am on November 13 and finish by 11:59 pm on November 18.[18] The statewide election results are set to be certified on November 20.[19] Raffensperger required the Audit to "be open to the public and the press" and required local election officials to "designate a viewing area from which members of the public and press may observe the audit for the purpose of good order and maintaining the integrity of the audit."[20] The two major political parties—Democratic and Republican—were permitted "the right to have one properly designated person as a monitor of the audit for each ten audit teams that are conducting the audit, with a minimum of two designated monitors in each county per party per room where the audit is being conducted."[21] The designated monitors were not required to remain in the public viewing areas, but were required to comply with the rules promulgated by Raffensperger and the local election officials.[22] The Audit process differs from that required by Georgia law for a recount requested by a unsuccessful candidate following the official certification of votes. *See* O.C.G.A. § 21-2-524.

II. LEGAL STANDARD

***4** The standard for the issuance of a temporary restraining order and a preliminary injunction are identical. *Windsor v. United States*, 379 F. App'x 912, 916–17 (11th Cir. 2010). A preliminary injunction is "an extraordinary remedy." *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). To obtain the relief he seeks, Wood must affirmatively demonstrate: "(1) substantial likelihood of success on the merits; (2) [that] irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to [him] outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). *See also Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) ("In this Circuit, a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion as to each of the four prerequisites.").

III. DISCUSSION

Wood's motion essentially boils down to two overarching claims:

that Defendants violated the Constitution by (1) executing and enforcing the Settlement Agreement to the extent it requires different procedures than the Georgia Election Code, and (2) not permitting designated monitors to have certain live viewing privileges of the Audit at the county locations.

Defendants and Intervenors posit a number of challenges to Wood's claims.

a. Standing

As a threshold matter, the Court finds Wood lacks standing to assert these claims. Article III limits federal courts to the consideration of "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. The doctrine of standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). It is "built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). *See also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.") (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). The standing inquiry is threefold: "The litigant must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (citing *Lujan*, 504 U.S. at 561). Wood must "demonstrate standing for each claim he seeks to press and for each form of relief that is sought"—*Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017)—and shoulders "the burden of establishing [each] element[ ]." *Lujan*, 504 U.S. at 561.

Injury in fact is "the first and foremost of standing's three elements" and requires Wood to show that he suffered "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1547–48. To be "particularized," the alleged injury "must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 561 n.1. Wood must demonstrate "a personal stake in the outcome of the controversy," as a federal court "is not a forum for generalized grievances." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). This requires more than a mere "keen interest in the issue." *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). The alleged injury must be "distinct from a generally available grievance about government." *Gill*, 138 S. Ct. at 1923. *See also id.* at 1929 (explaining that a person's "right to vote is individual and personal in nature...[t]hus [only] voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage") (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964); *Baker v. Carr*, 369 U.S. 186, 206 (1962)). Claims premised on allegations that "the law...has not been followed...[are] precisely the kind of undifferentiated, generalized grievance about the conduct of government...[and] quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1332–33 (11th Cir. 2007) (citing *Baker*, 369 U.S. at 207–08). *See also Lance v. Coffman*, 549 U.S. 437, 440–41 (2007) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree. . . . [A] generalized grievance that is plainly undifferentiated and common to all members of the public" is not sufficient for standing).

***5** Wood alleges he has standing because he is "a qualified registered elector residing in Fulton County, Georgia" who has "made donations to various Republican candidates on the ballot for the November 3, 2020 elections, and his interests are aligned with those of the Georgia Republican Party for the purposes of the instant lawsuit."[23] These allegations fall far short of demonstrating that Wood has standing to assert these claims.

i. The Elections and Electors Clause

Starting with his claim asserted under the Elections and Electors Clause, Wood lacks standing as a matter of law. The law is clear: A generalized grievance regarding a state government's failure to properly follow the Elections Clause of the Constitution does not confer standing on a private citizen.[24] *Lance*, 549 U.S. at 442; *Bognet*, 2020 WL 6686120, at *6 ("[P]rivate plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause....Their relief would have no more directly benefitted them than the public at large."); *Dillard*, 495 F.3d at 1332–33.

ii. Equal Protection

For his equal protection claim, Wood relies on a theory of vote dilution, *i.e.*, because Defendants allegedly did not follow the correct processes, invalid absentee votes may have been cast and tabulated, thereby diluting Wood's in-person vote. But the same prohibition against generalized grievances applies to equal protection claims. *United States v. Hays*, 515 U.S. 737, 743 (1995) ("The rule against generalized grievances applies with as much force in the equal protection context as in any other.") Wood does not differentiate his alleged injury from any harm felt in precisely the same

manner by every Georgia voter. As Wood conceded during oral argument, under his theory any one of Georgia's more than seven million registered voters would have standing to assert these claims. This is a textbook generalized grievance. *Bognet*, 2020 WL 6686120, at *12 ("Voter Plaintiffs' dilution claim is a paradigmatic generalized grievance that cannot support standing....Put another way, a vote cast by fraud or mailed in by the wrong person through mistake, or otherwise counted illegally, has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged. Such an alleged dilution is suffered equally by all voters and is not particularized for standing purposes.") (internal punctuation omitted) (collecting cases); *Moore v. Circosta*, No. 1:20-cv-911, 2020 WL 6063332, a *14 (M.D.N.C. Oct. 14, 2020) ("[T]he notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing."). *See also Citizens for Fair Representation v. Padilla*, 815 F. App'x 120, 123 (9th Cir. 2020) (dismissing equal protection claim for lack of standing and stating "the Supreme Court has consistently held that a plaintiff raising only a generally available grievance...does not state an Article III case or controversy.").

iii. Due Process

6** For the same reasons, Wood also does not have standing to pursue his due process claim. Wood asserts that various election monitors appointed by the Republican Party "have been denied the opportunity to be present throughout the entire Hand Recount, and when allowed to be present, they were denied the opportunity to observe the Hand Recount in any meaningful way."[25] Yet, Wood does not allege that ***he attempted to participate as a designated monitor. Nor does he allege that, on behalf of the Republican Party, he himself designated monitors who were ultimately denied access. Wood's broad objection is that Defendants failed to conduct the Audit fairly and consistently under Georgia law. This is a generalized grievance.[26] *Lance*, 549 U.S. at 440–41. *See also Nolles v. State Comm. for Reorganization of Sch. Dists.*, 524 F.3d 892, 900 (8th Cir. 2008) (voters lacked standing because substantive due process claim that delay of implementation of new statute until after referendum election violated their right to fair election did not allege particularized injury).

iv. Alignment with Non-Parties

Wood further points to his status as a donor to the Republican Party whose interests are aligned with that party and its political candidates to support his standing argument. But this does not sufficiently differentiate his alleged injury from that which *any* voter might have suffered—no matter the party affiliation. Ostensibly, Wood believes he suffered a particularized injury because his preferred candidates—to whom he has contributed money—did not prevail in the General Election. This argument has been squarely rejected by the Eleventh Circuit. *Jacobson*, 974 F.3d at 1247 ("A candidate's electoral loss does not, by itself, injure those who voted for the candidate. Voters have no judicially enforceable interest in the outcome of an election. Instead, they have an interest in their ability to vote and in their vote being given the same weight as any other.") (internal citation omitted).

v. Lack of Relevant Authorities

Finally, the Court notes the futility of Wood's standing argument is particularly evident in that his sole relied-on authority—*Meek v. Metropolitan Dade County, Florida*, 985 F.2d 1471 (11th Cir. 1993)—is no longer good law. The Eleventh Circuit ***expressly abrogated*** its holding in that case over thirteen years ago. *Dillard*, 495 F.3d at 1331–32 ("We subsequently upheld *Meek's* reasoning against repeated challenges that it was wrongly decided in light of the Supreme Court's later decisions...[b]ut it is clear that we can no longer do so in light of the Supreme Court's most recent pronouncement on voter standing in *Lance*.").

During oral argument, Wood additionally pointed to *Roe v. State of Alabama by & through Evans*, 43 F.3d 574 (11th Cir. 1995), but that case does not support Wood's standing argument. For example, two plaintiffs in *Roe* were candidates for a political office decided in the challenged election. *Id.* at 579. Wood is a private citizen, not a candidate for any elected office. Moreover, the Eleventh Circuit found particularized harm in the post-election inclusion of absentee ballots that had been deemed invalid. *Id.* at 580. Wood here seeks to do the opposite—remove validly cast absentee ballots after completion of the election.

In sum, Wood lacks standing to pursue these claims in the first instance.

b. The Doctrine of Laches

***7** Even if the Court found Wood possessed standing to pursue his claims regarding the Settlement Agreement (Counts I and II), such claims would nonetheless be barred by

the doctrine of laches. To establish laches, Defendants must show "(1) there was a delay in asserting a right or a claim, (2) the delay was not excusable, and (3) the delay caused [them] undue prejudice." *United States v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005). *See also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1326 (11th Cir. 2019) ("To succeed on a laches claim, [defendant] must demonstrate that [p]laintiffs inexcusably delayed bringing their claim and that the delay caused it undue prejudice."). Courts apply laches in election cases. *E.g.*, *Sanders v. Dooly Cnty., Ga.*, 245 F.3d 1289, 1291 (11th Cir. 2001) ("[W]e conclude that the district court did not abuse its discretion in deeming the claims seeking injunctive relief to be laches-barred."). *See also, e.g., Detroit Unity Fund v. Whitmer*, 819 F. App'x 421, 422 (6th Cir. 2020) (holding district court did not err in finding that plaintiff's claims regarding deadline for local ballot initiatives "barred by laches, considering the unreasonable delay on the part of [p]laintiffs and the consequent prejudice to [d]efendants"). *Cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence. That is as true in election law cases as elsewhere.") (internal citation omitted). Defendants have established each element of laches.

i. Delay

First, Wood delayed considerably in asserting these claims. On March 6, 2020, the GDP, DSCC, DCCC, and Defendants executed the Settlement Agreement, which was entered on the public docket. It has since been in effect for at least three elections. Nearly eight months later—and ***after*** over one million voters cast their absentee ballots in the General Election—Wood challenges the terms of the Settlement Agreement as unconstitutional. Wood could have, and should have, filed his constitutional challenge much sooner than he did, and certainly not two weeks *after* the General Election.

ii. Excuse

Nor has Wood articulated any reasonable excuse for his prolonged delay. Wood failed to submit any evidence explaining why he waited to bring these claims until the eleventh hour. He instead relies solely on a representation from his legal counsel during oral argument, without evidence, that Wood did not vote in any election between the execution of the Settlement Agreement and the General Election. Even assuming this proffer to be true, it does not provide a reasonable justification for the delay. Wood's claims are constitutional challenges to Defendants' promulgation authority under state law. If valid, these claims should not depend on the outcome of any particular election, to wit, whether Wood's preferred candidates won or lost. Indeed, Wood's claims, even assuming his standing for bringing them could be established, were ripe the moment the parties executed the Settlement Agreement.

iii. Prejudice

Finally, Defendants, Intervenors, and the public at large would be significantly injured if the Court were to excuse Wood's delay. A bedrock principle of election law is that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006)). This is because a last-minute intervention by a federal court could "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5. *See also Democratic Nat'l Comm. v. Wisc. State Legislature*, No. 20A66, 2020 WL 6275871, at *4 (U.S. Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay) ("The principle [of judicial restraint] also discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process. For those reasons, among others, this Court has regularly cautioned that a federal court's last-minute interference with state election laws is ordinarily inappropriate.").

***8** Underscoring the exceptional nature of his requested relief, Wood's claims go much further; rather than changing the rules on the eve of an election, he wants the rules for the already concluded election declared unconstitutional and over one million absentee ballots called into question. Beyond merely causing confusion, Wood's requested relief could disenfranchise a substantial portion of the electorate and erode the public's confidence in the electoral process. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented.") (citation omitted); *Arkansas United v. Thurston*, No. 5:20-cv-5193, 2020 WL 6472651, at *5 (W.D. Ark. Nov. 3, 2020) ("[T]he equities do not favor intervention where the election is already in progress and the requested relief would change the rules of the game mid-play.").

Thus, Wood is not entitled to injunctive relief on Counts I and II for the additional reason that these claims are barred by the doctrine of laches.

c. The Merits of the Request for Injunctive Relief

Even assuming Wood possessed standing, and assuming Counts I and II are not barred by laches, the Court nonetheless finds Wood would not be entitled to the relief he seeks. The Court addresses each required element for a temporary restraining order in turn.

i. Substantial Likelihood of Success on the Merits

1. Equal Protection (Count I)

Wood argues the execution and enforcement of the Settlement Agreement burdens his right to vote in contravention of the Equal Protection Clause because the agreement sets forth additional voting safeguards not found in the Georgia Election Code. States retain the power to regulate their own elections. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing U.S. Const. Art. I, § 4, cl. 1). The Supreme Court has held that:

> Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.

Burdick, 504 U.S. at 433 (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Inevitably, most election laws will "impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. But the Equal Protection Clause only becomes applicable if "a state either classifies voters in disparate ways...or places restrictions on the right to vote." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012). As recently summarized by one federal district court:

> The Supreme Court has identified two theories of voting harms prohibited by the Fourteenth Amendment. First, the Court has identified a harm caused by debasement or dilution of the weight of a citizen's vote, also referred to [as] vote dilution....Second, the Court has found that the Equal Protection Clause is violated where the state, having once granted the right to vote on equal terms, through later arbitrary and disparate treatment, values one person's vote over that of another.

Moore, 2020 WL 6063332, at *12 (citing *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *Reynolds*, 377 U.S. at 554). A rationale basis standard of review applies if the plaintiff alleges "that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote." *Obama for Am.*, 697 F.3d at 429 (citing *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807–09 (1969)). If a fundamental right is implicated, the claim is governed by the flexible *Anderson/Burdick* balancing test. *Burdick*, 504 U.S. at 433–35; *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

***9** Wood's equal protection claim does not fit within this framework.[27] Wood does not articulate a cognizable harm that invokes the Equal Protection Clause. For example, to the extent Wood relies on a theory of disparate treatment, *Bush v. Gore* is inapplicable. Defendants applied the Settlement Agreement in a wholly uniform manner across the entire state.[28] In other words, no voter—including Wood—was treated any differently than any other voter. *E.g., Wise v. Circosta*, 978 F.3d 93, 100 (4th Cir. 2020); *Deutsch v. New York State Bd. of Elections*, No. 20 CIV. 8929 (LGS), 2020 WL 6384064, at *6 (S.D.N.Y. Oct. 30, 2020).

Wood fares no better with a vote dilution argument. According to Wood, his fundamental right to vote was burdened because the "rules and regulations set forth in the [Settlement Agreement] created an arbitrary, disparate, and ad hoc process for processing defective absentee ballots, and for determining which of such ballots should be 'rejected,' contrary to Georgia law."[29] At the starting gate, the additional safeguards on signature and identification match enacted by Defendants did not burden Wood's ability to cast his ballot at all. Wood, according to his legal counsel during oral argument, did not vote absentee during the General Election. And the "burden that [a state's] signature-match scheme imposes on the right to vote...falls on vote-by-mail and provisional voters' fundamental right to vote." *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019).

This leaves Wood to speculate that, because the Settlement Agreement required three ballot clerks—as opposed to just one—to review an absentee ballot before it could be rejected, fewer ballots were ultimately rejected, invalid ballots were tabulated, and his in-person vote was diluted. In support of this argument, Wood relies on *Baker v. Carr*, where the Supreme Court found vote dilution in the context of apportionment of elected representatives. 369 U.S. at 204–208. But Wood cannot transmute allegations that state officials violated state law into a claim that his vote was somehow weighted differently than others. This theory has been squarely rejected. *Bognet*, 2020 WL 6686120, at

*11 ("[T]he Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity. That is not how the Equal Protection Clause works.").

***10** Even if Wood's claim were cognizable in the equal protection framework, it is not supported by the evidence at this stage. Wood's argument is that the procedures in the Settlement Agreement regarding information and signature match so overwhelmed ballot clerks that the rate of rejection plummeted and, ergo, invalid ballots were passed over and counted. This argument is belied by the record; the percentage of absentee ballots rejected for missing or mismatched information and signature is the exact same for the 2018 election and the General Election (.15%).[30] This is despite a substantial increase in the total number of absentee ballots submitted by voters during the General Election as compared to the 2018 election.[31]

In sum, there is insubstantial evidence supporting Wood's equal protection theory and he has not established a substantial likelihood of success on the merits as to Count I.

2. Electors and Elections Clauses (Count II)

In relevant part, the Constitution states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. This provision— colloquially known as the Elections Clause—vests authority in the states to regulate the mechanics of federal elections. *Foster v. Love*, 522 U.S. 67, 69 (1997). The "Electors Clause" of the Constitution similarly states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." U.S. Const. art. II, § 1, cl. 2.

Wood argues Defendants violated the Elections and Electors Clauses because the "procedures set forth in the [Settlement Agreement] for the handling of defective absentee ballots is not consistent with the laws of the State of Georgia, and thus, Defendants' actions...exceed their authority."[32] Put another way, Wood argues Defendants usurped the role of the Georgia General Assembly—and thereby violated the United States Constitution—by enacting additional safeguards regarding absentee ballots not found in the Georgia Election Code. In support, Wood points to Chief Justice Rehnquist's concurrence in *Bush v. Gore*, which states that "in a Presidential election the clearly expressed intent of the legislature must prevail." 531 U.S. at 120 (Rehnquist, C.J., concurring).

State legislatures—such as the Georgia General Assembly—possess the authority to delegate their authority over elections to state officials in conformity with the Elections and Electors Clauses. *Ariz. State Legislature*, 576 U.S. at 816 ("The Elections Clause [ ] is not reasonably read to disarm States from adopting modes of legislation that place the lead rein in the people's hands...it is characteristic of our federal system that States retain autonomy to establish their own governmental processes."). *See also Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) ("The Elections Clause, therefore, affirmatively grants rights to state legislatures, and under Supreme Court precedent, to other entities to which a state may, consistent with the Constitution, delegate lawmaking authority."). *Cf. Bullock*, 2020 WL 5810556, at *11 ("A survey of the relevant case law makes clear that the term 'Legislature' as used in the Elections Clause is not confined to a state's legislative body.").

Recognizing that Secretary Raffensperger is "the state's chief election official,"[33] the General Assembly enacted legislation permitting him (in his official capacity) to "formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of primaries and elections." O.C.G.A. § 21-2-31(2). The Settlement Agreement is a manifestation of Secretary Raffensperger's statutorily granted authority. It does not override or rewrite state law. It simply adds an additional safeguard to ensure election security by having more than one individual review an absentee ballot's information and signature for accuracy before the ballot is rejected. Wood does not articulate how the Settlement Agreement is not "consistent with law" other than it not being a verbatim recitation of the statutory code. Taking Wood's argument at face value renders O.C.G.A. § 21-2-31(2) superfluous. A state official—such as Secretary Raffensperger—could never wield his or her authority to make rules for conducting elections that had not otherwise already been adopted

by the Georgia General Assembly. The record in this case demonstrates that, if anything, Defendants' actions in entering into the Settlement Agreement sought to achieve consistency among the county election officials in Georgia, which ***furthers*** Wood's stated goals of conducting "[f]ree, fair, and transparent public elections."[34]

***11** Wood has not demonstrated a substantial likelihood of success as to Count II.

3. Due Process (Count III)

Under the Fourteenth Amendment, "[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Due Process Clause has two components: procedural and substantive. *DeKalb Stone, Inc. v. Cnty. of DeKalb, Ga.*, 106 F.3d 956, 959 (11th Cir. 1997). Wood alleges that Defendants have "fail[ed]...to ensure that the Hand Recount is conducted fairly and in compliance with the Georgia Election Code" by denying monitors "the opportunity to be present throughout the entire Hand Recount, and when allowed to be present, they were denied the opportunity to observe the Hand Recount in any meaningful way."[35] Although not articulated in his Amended Complaint or motion for temporary restraining order, Wood clarified during oral argument that he is pursing both a procedural and substantive due process claim. Each will be addressed in turn.

a) Procedural Due Process

A procedural due process claim raises two inquires: "(1) whether there exists a liberty or property interest which has been interfered with by the State and (2) whether the procedures attendant upon that deprivation were constitutionally sufficient." *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 229 (5th Cir. 2020) (citing *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). The party invoking the Due Process Clause's procedural protections bears the "burden...of establishing a cognizable liberty or property interest." *Richardson*, 978 F.3d at 229 (citing *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)). Wood bases his procedural due process claim on "a vested interest in being present and having meaningful access to observe and monitor the electoral process."[36] But Wood does not articulate how this "vested interest" fits within a recognized, cognizable interest protected by procedural due process. The Court is not persuaded that the right to monitor an audit or vote recount is a liberty or property right secured by the Constitution. For example, the Eleventh Circuit does "assume that the right to vote is a liberty interest protected by the Due Process Clause." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020). But the circuit court has expressly declined to extend the strictures of procedural due process to "a State's election procedures." *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020) ("The generalized due process argument that the plaintiffs argued for and the district court applied would stretch concepts of due process to their breaking point.").

More specifically, federal courts have rejected the very interest Wood claims has been violated, *i.e.*, the right to observe the electoral process. *See, e.g.*, *Republican Party of Penn. v. Cortes*, 218 F. Supp. 3d 396, 408 (E.D. Pa. 2016) ("[T]here is no individual constitutional right to serve as a poll watcher...but rather the right is conferred by statute."); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *67 (W.D. Pa. Oct. 10, 2020) (same); *Dailey v. Hands*, No. 14-423, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015) ("[P]oll watching is not a fundamental right."); *Turner v. Cooper*, 583 F. Supp. 1160, 1162 (N.D. Ill. 1983) (finding no authority "that supports the proposition that [plaintiff] had a first amendment right to act as a pollwatcher. Indeed, we would suggest that the state is not constitutionally required to permit pollwatchers for political parties and candidates to observe the conduct of elections."). Without such an interest, Wood cannot establish a substantial likelihood of success on the merits as to his procedural due process claim.

b) Substantive Due Process

***12** Wood's substantive due process claim fares no better. The types of voting rights covered by the substantive due process clause are considered narrow. *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986). Pursuant to the "functional structure embodied in the Constitution," a federal court must not "intervene to examine the validity of individual ballots or supervise the administrative details of a local election." *Id*. In only "extraordinary circumstances will a challenge to a state election rise to the level of a constitutional deprivation." *Id*. *See also Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) ("We have drawn a distinction between garden variety election irregularities and a pervasive error that undermines the integrity of the vote. In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election.") (citation and punctuation omitted) (collecting cases); *Duncan v. Poythress*, 657 F.2d 691, 700 (5th Cir. 1981) ("[T]he due

process clause of the fourteenth amendment prohibits action by state officials which seriously undermine the fundamental fairness of the electoral process."). It is well understood that "garden variety" election disputes, including "the ordinary dispute over the counting and marking of ballots" do not rise to the level of a constitutional deprivation.[37] *Curry*, 802 F.2d at 1314–15. *See also Serpentfoot v. Rome City Comm'n*, 426 F. App'x 884, 887 (11th Cir. 2011) ("[Plaintiff's] allegations show, at most, a single instance of vote dilution and not an election process that has reached the point of patent and fundamental unfairness indicative of a due process violation.").

Although Wood generally claims fundamental unfairness, and the declarations and testimony submitted in support of his motion speculate as to wide-spread impropriety, the actual harm alleged by Wood concerns merely a "garden variety" election dispute. Wood does not allege unfairness in counting the ballots; instead, he alleges that select non-party, partisan monitors were not permitted to observe the Audit in an ideal manner. Wood presents no authority, and the Court finds none, providing for a right to unrestrained observation or monitoring of vote counting, recounting, or auditing. Precedent militates against a finding of a due process violation regarding such an "ordinary dispute over the counting and marking of ballots." *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980) ("If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute."). Wood has not satisfied his burden of establishing a substantial likelihood of success on the merits as to his substantive due process claim.

ii. Irreparable Harm

Because Wood cannot show a likelihood of success on the merits, an extensive discussion of the remaining factors for the issuance of a temporary restraining order is unnecessary. *Obama for Am.*, 697 F.3d at 436 ("When a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor."). *See also Bloedorn*, 631 F.3d at 1229 ("If [plaintiff] is unable to show a substantial likelihood of success on the merits, we need not consider the other requirements."). Nonetheless, for the second factor, Plaintiffs must show that "irreparable injury would result if no injunction were issued." *Siegel*, 234 F.3d at 1175–76 ("A showing of irreparable injury is the *sine qua non* of injunctive relief."). This factor also weighs in Defendants' favor. As discussed above, Wood's allegations are the quintessential generalized grievance. He has not presented any evidence demonstrating how he will suffer any particularized harm as a voter or donor by the denial of this motion. The fact that Wood's preferred candidates did not prevail in the General Election—for whom he may have voted or to whom he may have contributed financially—does not create a legally cognizable harm, much less an irreparable one. *Jacobson*, 974 F.3d at 1247.

iii. Balance of the Equities and Public Interest

***13** The Court finds that the threatened injury to Defendants as state officials and the public at large far outweigh any minimal burden on Wood. To reiterate, Wood seeks an extraordinary remedy: to prevent Georgia's certification of the votes cast in the General Election, after millions of people had lawfully cast their ballots. To interfere with the result of an election that has already concluded would be unprecedented and harm the public in countless ways. *See Sw. Voter Registration Educ. Project*, 344 F.3d at 919; *Arkansas United*, 2020 WL 6472651, at *5. Granting injunctive relief here would breed confusion, undermine the public's trust in the election, and potentially disenfranchise of over one million Georgia voters. Viewed in comparison to the lack of any demonstrable harm to Wood, this Court finds no basis in fact or in law to grant him the relief he seeks.

IV. CONCLUSION

Wood's motion for temporary restraining order [ECF 6] is **DENIED**. **SO ORDERED** this the 20th day of November 2020.

Steven D. Grimberg

United States District Court Judge

All Citations

Slip Copy, 2020 WL 6817513

Footnotes

1 *Elections and Voter Registration Calendars*, https://sos.ga.gov/index.php/electi

ons/elections_and_voter_registration_calendars (last accessed Nov. 19, 2020).

2 *Id*.

3 *Id*.

4 ECF 33-2; ECF 33-6; ECF 33-8.

5 ECF 1.

6 ECF 5.

7 *E.g.*, ECF 5, ¶¶ 81–83, 93–95. The Litigation Settlement—also referred to as the Settlement Agreement—is discussed *infra* in Section I.b.

8 ECF 5, ¶ 106.

9 ECF 6.

10 ECF 8; ECF 22.

11 ECF 31; ECF 34; ECF 39.

12 *Democratic Party of Ga., Inc. v. Raffensperger*, 1:19-cv-05028-WMR (ECF 1) (Compl.).

13 *Id*.

14 *Id.* at ECF 56 (Settlement Agreement).

15 *Id*. (emphasis added).

16 *Id.* at ECF 57.

17 ECF 33-1; ECF 33-2; ECF 33-3.

18 *Id*.

19 *Id*.

20 ECF 33-4.

21 *Id*.

22 *Id*.

23 ECF 5, ¶ 8.

24 Although separate constitutional provisions, the Electors Clause and Elections Clause share "considerably similarity" and may be interpreted in the same manner. *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting). *See also Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, 2020 WL 6686120, at *7 (3d Cir. Nov. 13, 2020) (applying same test for standing under both Elections Clause and Electors Clause); *Donald J. Trump for President, Inc. v. Bullock*, No. CV 20-66-H-DLC, 2020 WL 5810556, at *11 (D. Mont. Sept. 30, 2020) ("As an initial matter, the Court finds no need to distinguish between the term 'Legislature' as it is used in the Elections Clause as opposed to the Electors Clause.").

25 ECF 6, at 21.

26 To the extent Wood attempts to rely on a theory of third party standing, the Court disagrees; the doctrine is disfavored and Wood has not alleged or proven any of the required elements—that (1) he "suffered an injury-in-fact that gives [him] a sufficiently concrete interest in the dispute"; (2) he has "a close relationship to the third party"; and (3) there is "a hindrance to the third party's ability to protect its own interests." *Aaron Private Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1339 (11th Cir. 2019) (internal quotation marks omitted).

27 The Court notes that, in the Amended Complaint, Wood alludes to issues caused by Raffensperger's adoption of Ballot Trax—an electronic interface that permits an elector to track his or her ballot as it is being processed [ECF 5, ¶¶ 44–46]. Wood also alleges harm in that the Settlement Agreement permitted the DPG to submit "additional guidance and training materials" for identifying a signature mismatch, which Defendants "agree[d] to consider in good faith" [*id*. ¶ 47; *see also* ECF 5-1, ¶ 4]. Wood did not address how these items violated his constitutional rights—equal protection or otherwise—in either his motion or during oral argument. Therefore, the Court need not address them at this stage.

28 Wood concedes as much in the Amended Complaint. *See* ECF 5, ¶ 25 (alleging the Settlement Agreement "set[ ] forth different standards to be followed by the clerks and registrars in processing absentee ballots ***in the State of Georgia***.") (emphasis added).

29 ECF 6, at 18.

30 ECF 33-6.

31 *Id*.

32 ECF 5, ¶ 90.
33 O.C.G.A. § 21-2-50(b).
34 ECF 5, ¶ 11.
35 ECF 6, at 20–21.
36 ECF 5, ¶ 101.
37 In contrast, as Defendants note, it would be a violation of the constitutional rights of the millions of absentee voters who relied on the absentee ballot procedures in exercising their right to vote. *See e.g. Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978) (finding disenfranchisement of electorate who voted by absentee ballot a violation of substantive due process).

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EXHIBIT 5

2020 WL 7094866
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

L. Lin WOOD, Jr., Plaintiff-Appellant,

v.

Brad RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, Rebecca N. Sullivan, in her official capacity as Vice Chair of the Georgia State Election Board, et al., Defendants-Appellees.

No. 20-14418
|
(December 5, 2020)

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Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:20-cv-04651-SDG

Before WILLIAM PRYOR, Chief Judge, JILL PRYOR and LAGOA, Circuit Judges.

Opinion

WILLIAM PRYOR, Chief Judge:

***1** This appeal requires us to decide whether we have jurisdiction over an appeal from the denial of a request for emergency relief in a post-election lawsuit. Ten days after the presidential election, L. Lin Wood Jr., a Georgia voter, sued state election officials to enjoin certification of the general election results, to secure a new recount under different rules, and to establish new rules for an upcoming runoff election. Wood alleged that the extant absentee-ballot and recount procedures violated Georgia law and, as a result, his federal constitutional rights. After Wood moved for emergency relief, the district court denied his motion. We agree with the district court that Wood lacks standing to sue because he fails to allege a particularized injury. And because Georgia has already certified its election results and its slate of presidential electors, Wood's requests for emergency relief are moot to the extent they concern the 2020 election. The Constitution makes clear that federal courts are courts of limited jurisdiction, U.S. Const. art. III; we may not entertain post-election contests about garden-variety issues of vote counting and misconduct that may properly be filed in state courts. We affirm.

I. BACKGROUND

Secretary of State Brad Raffensperger is the "chief election official" of Georgia. Ga. Code Ann. § 21-2-50(b). He manages the state system of elections and chairs the State Election Board. *Id.* § 21-2-30(a), (d). The Board has the authority to promulgate rules and regulations to ensure uniformity in the practices of county election officials and, "consistent with law," to aid "the fair, legal, and orderly conduct of primaries and elections." *Id.* § 21-2-31(1)–(2). The Board may also publish and distribute to county election officials a compilation of Georgia's election laws and regulations. *Id.* § 21-2-31(3). Many of these laws and regulations govern absentee voting.

Any voter in Georgia may vote by absentee ballot. *Id.* § 21-2-380(b). State law prescribes the procedures by which a voter may request and submit an absentee ballot. *Id.* §§ 21-2-381; 21-2-384; 21-2-385. The ballot comes with an oath,

which the voter must sign and return with his ballot. *Id.* § 21-2-385(a). State law also prescribes the procedures for how county election officials must certify and count absentee ballots. *Id.* § 21-2-386(a). It directs the official to "compare the identifying information on the oath with the information on file" and "compare the signature or mark on the oath with the signature or mark" on file. *Id.* § 21-2-386(a)(1)(B). If everything appears correct, the official certifies the ballot. *Id.* But if there is a problem, such as a signature that does not match, the official is to "write across the face of the envelope 'Rejected.' " *Id.* § 21-2-386(a)(1)(C). The government must then notify the voter of this rejection, and the voter may cure the problem. *Id.*

In November 2019, the Democratic Party of Georgia, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee challenged Georgia's absentee ballot procedures as unconstitutional under the First and Fourteenth Amendments. They sued Secretary Raffensperger and members of the Board for declaratory and injunctive relief. Secretary Raffensperger and the Board maintained that the procedures were constitutional, but they agreed to promulgate regulations to ensure uniform practices across counties. In March 2020, the parties entered into a settlement agreement and dismissed the suit.

***2** In the settlement agreement, Secretary Raffensperger and the Board agreed to issue an Official Election Bulletin regarding the review of signatures on absentee ballots. The Bulletin instructed officials to review the voter's signature with the following process:

> If the registrar or absentee ballot clerk determines that the voter's signature on the mail-in absentee ballot envelope does not match any of the voter's signatures on file ..., the registrar or absentee ballot clerk must seek review from two other registrars, deputy registrars, or absentee ballot clerks. A mail-in absentee ballot shall not be rejected unless a majority of the registrars, deputy registrars, or absentee ballot clerks reviewing the signature agree that the signature does not match any of the voter's signatures on file ....

Secretary Raffensperger and the Board also agreed to train county election officials to follow this process.

This procedure has been in place for at least three elections since March, including the general election on November 3, 2020. Over one million Georgians voted by absentee ballot in the general election. No one challenged the settlement agreement until the filing of this action. By then, the general election returns had been tallied and a statewide hand recount of the presidential election results was underway.

On November 13, L. Lin Wood Jr. sued Secretary Raffensperger and the members of the Board in the district court. Wood alleged that he sued "in his capacity as a private citizen." He is a registered voter in Fulton County, Georgia, and a donor to various 2020 Republican candidates. His amended complaint alleged that the settlement agreement violates state law. As a result, he contends, it violates the Election Clause of Article I; the Electors Clause of Article II; and the Equal Protection Clause of the Fourteenth Amendment. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2; *id.* amend. XIV, § 1. Wood also alleged that irregularities in the hand recount violated his rights under the Due Process Clause of the Fourteenth Amendment. *Id.* amend. XIV, § 1.

State law requires that such recounts be done in public view, and it permits the Board to promulgate policies that facilitate recounting. Ga. Code Ann. § 21-2-498(c)(4), (d). Secretary Raffensperger directed county election officials to designate viewing areas for members of the public and the news media to observe the recount. He also permitted the Democratic and Republican Parties to designate special recount monitors.

Wood alleged that officials ignored their own rules and denied Wood and President Donald Trump's campaign "meaningful access to observe and monitor the electoral process." Although Wood did not personally attempt to observe or monitor the recount, he alleged that Secretary Raffensperger and the Board violated his "vested interest in being present and having meaningful access to observe and monitor the electoral process to ensure that it is properly administered ... and ... otherwise free, fair, and transparent."

Wood submitted two affidavits from volunteer monitors. One monitor stated that she was not allowed to enter the counting area because there were too many monitors already present, and she could not be sure from a distance whether the recount was accurate. The other explained that the counting was hard for her to follow and described what she thought were possible tabulation errors.

***3** Wood moved for extraordinary relief. He asked that the district court take one of three steps: prohibit Georgia from certifying the results of the November election; prevent it from certifying results that include "defective absentee ballots, regardless of whether said ballots were cured"; or declare the entire election defective and order the state to fix

the problems caused by the settlement agreement. He also sought greater access for Republican election monitors, both at a new hand recount of the November election and in a runoff election scheduled for January 5, 2021.

Wood's lawsuit faced a quickly approaching obstacle: Georgia law requires the Secretary of State to certify its general election results by 5:00 p.m. on the seventeenth day after Election Day. Ga. Code Ann. § 21-2-499(b). And it requires the Governor to certify Georgia's slate of presidential electors by 5:00 p.m. on the eighteenth day after Election Day. *Id.* Secretary Raffensperger's deadline was November 20, and Governor Brian Kemp had a deadline of November 21.

To avoid these deadlines, Wood moved to bar officials from certifying the election results until a court could consider his lawsuit. His emergency motion reiterated many of the requests from his amended complaint, including requests for changes to the procedures for the January runoff. He also submitted additional affidavits and declarations in support of his motion.

The district court held a hearing on November 19 to consider whether it should issue a temporary restraining order. It heard from Wood, state officials, and two groups of intervenors. Wood also introduced testimony from Susan Voyles, a poll manager who participated in the hand recount. Voyles described her experience during the recount. She recalled that one batch of absentee ballots felt different from the rest, and that that batch favored Joe Biden to an unusual extent. At the end of the hearing, the district court orally denied Wood's motion.

On November 20, the district court issued a written opinion and order that explained its denial. It first ruled that Wood lacked standing because he had alleged only generalized grievances, instead of injuries that affected him in a personal and individual way. It next explained that, even if Wood had standing, the doctrine of laches prevented him from challenging the settlement agreement now: he could have sued eight months earlier, yet he waited until two weeks after the election. Finally, it explained why Wood would not be entitled to a temporary restraining order even if the district court could reach the merits of his claims. On the same day, Secretary Raffensperger certified the results of the general election and Governor Kemp certified a slate of presidential electors.

II. STANDARD OF REVIEW

"We are required to examine our jurisdiction *sua sponte*, and we review jurisdictional issues *de novo*." *United States v. Lopez*, 562 F.3d 1309, 1311 (11th Cir. 2009) (citation omitted).

III. DISCUSSION

This appeal turns on one of the most fundamental principles of the federal courts: our limited jurisdiction. Federal courts are not "constituted as free-wheeling enforcers of the Constitution and laws." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc). As the Supreme Court "ha[s] often explained," we are instead "courts of limited jurisdiction." *Home Depot U.S.A., Inc. v. Jackson*, —— U.S. ——, 139 S. Ct. 1743, 1746, 204 L.Ed.2d 34 (2019) (internal quotation marks omitted). Article III of the Constitution establishes that our jurisdiction —that is, our judicial power—reaches only "Cases" and "Controversies." U.S. Const. art. III, § 2. Absent a justiciable case or controversy between interested parties, we lack the "power to declare the law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

***4** When someone sues in federal court, he bears the burden of proving that his suit falls within our jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Wood had the choice to sue in state or federal court. Georgia law makes clear that post-election litigation may proceed in a state court. Ga. Code Ann. §§ 21-2-499(b), 21-2-524(a). But Wood chose to sue in federal court. In doing so, he had to prove that his suit presents a justiciable controversy under Article III of the Constitution. *See Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (listing examples of problems that preclude our jurisdiction). He failed to satisfy this burden.

We divide our discussion in two parts. We first explain why Wood lacks standing to sue. We then explain that, even if he had standing, his requests to recount and delay certification of the November election results are moot. Because this case is not justiciable, we lack jurisdiction. *Id.* And because we lack the power to entertain this appeal, we will not address the other issues the parties raise.

A. Wood Lacks Standing Because He Has Not Been Injured in a Particularized Way.

Standing is a threshold jurisdictional inquiry: the elements of standing are "an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To prove standing, Wood "must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020). If he cannot satisfy these requirements, then we may not decide the merits of his appeal. *Steel Co.*, 523 U.S. at 94, 118 S.Ct. 1003.

Wood lacks standing because he fails to allege the "first and foremost of standing's three elements": an injury in fact. *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (alteration adopted) (internal quotation marks omitted). An injury in fact is "an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020) (internal quotation marks omitted). Wood's injury is not particularized.

Wood asserts only a generalized grievance. A particularized injury is one that "affect[s] the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (internal quotation marks omitted). For example, if Wood were a political candidate harmed by the recount, he would satisfy this requirement because he could assert a personal, distinct injury. *Cf. Roe v. Alabama ex rel. Evans*, 43 F.3d 574, 579 (11th Cir. 1995). But Wood bases his standing on his interest in "ensur[ing that] ... only lawful ballots are counted." An injury to the right "to require that the government be administered according to the law" is a generalized grievance. *Chiles v. Thornburgh*, 865 F.2d 1197, 1205–06 (11th Cir. 1989) (alteration adopted) (internal quotation marks omitted). And the Supreme Court has made clear that a generalized grievance, "no matter how sincere," cannot support standing. *Hollingsworth v. Perry*, 570 U.S. 693, 706, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013).

A generalized grievance is "undifferentiated and common to all members of the public." *Lujan*, 504 U.S. at 575, 112 S.Ct. 2130 (internal quotation marks omitted). Wood cannot explain how his interest in compliance with state election laws is different from that of any other person. Indeed, he admits that any Georgia voter could bring an identical suit. But the logic of his argument sweeps past even that boundary. All Americans, whether they voted in this election or whether they reside in Georgia, could be said to share Wood's interest in "ensur[ing] that [a presidential election] is properly administered."

***5** Wood argues that he has two bases for standing, but neither satisfies the requirement of a distinct, personal injury. He first asserts that the inclusion of unlawfully processed absentee ballots diluted the weight of his vote. To be sure, vote dilution can be a basis for standing. *Cf. Jacobson*, 974 F.3d at 1247–48. But it requires a point of comparison. For example, in the racial gerrymandering and malapportionment contexts, vote dilution occurs when voters are harmed compared to "irrationally favored" voters from other districts. *See Baker v. Carr*, 369 U.S. 186, 207–08, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). By contrast, "no single voter is specifically disadvantaged" if a vote is counted improperly, even if the error might have a "mathematical impact on the final tally and thus on the proportional effect of every vote." *Bognet v. Sec'y Commonwealth of Pa.*, —— F.3d ——, ——, 2020 WL 6686120, at *12 (3d Cir. Nov. 13, 2020) (internal quotation marks omitted). Vote dilution in this context is a "paradigmatic generalized grievance that cannot support standing." *Id.* (internal quotation marks omitted).

Wood's second theory—that Georgia "value[d] one person's vote over that of another" through "arbitrary and disparate treatment"—fares no better. He argues that Georgia treats absentee voters as a "preferred class" compared to those who vote in person, both by the terms of the settlement agreement and in practice. In his view, all voters were bound by law before the settlement agreement, but the rules for absentee voting now run afoul of the law, while in-person voters remain bound by the law. And he asserts that in practice Georgia has favored absentee voters because there were "numerous irregularities" in the processing and recounting of absentee ballots. Setting aside the fact that "[i]t is an individual voter's *choice* whether to vote by mail or in person," *Bognet*, —— F.3d at ——, 2020 WL 6686120, at *15, these complaints are generalized grievances. Even if we assume that absentee voters are favored over in-person voters, that harm does not affect Wood as an individual—it is instead shared identically by the four million or so Georgians who voted in person this November. "[W]hen the asserted harm is ... shared in substantially equal measure by ... a large class of citizens," it is not a particularized injury. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). And irregularities

in the tabulation of election results do not affect Wood differently from any other person. His allegation, at bottom, remains "that the law ... has not been followed." *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1332 (11th Cir. 2007) (quoting *Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007)).

Wood's attempts to liken his injury to those we have found sufficient in other appeals fall short. In *Common Cause/Georgia v. Billups*, we ruled that "[r]equiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing." 554 F.3d 1340, 1351–52 (11th Cir. 2009). But the injury there was the burden of producing photo identification, not the existence of separate rules for in-person and absentee voters. *Id.* And the burden to produce photo identification affected each voter in a personal way. For example, some plaintiffs in *Common Cause* alleged that they "would be required to make a special trip" to obtain valid identification "that is not required of voters who have driver's licenses or passports." *Id.* at 1351 (internal quotation marks omitted). By contrast, even Wood agrees that he is affected by Georgia's alleged violations of the law in the same way as every other Georgia voter. "This injury is precisely the kind of undifferentiated, generalized grievance that the Supreme Court has warned must not be countenanced." *Dillard*, 495 F.3d at 1335 (internal quotation marks omitted).

Roe v. Alabama ex rel. Evans, 43 F.3d 574, also does not support Wood's argument for standing. In *Roe*, we ruled that the post-election inclusion of previously excluded absentee ballots would violate the substantive-due-process rights of Alabama voters and two political candidates. *Id.* at 579–81. But no party raised and we did not address standing in *Roe*, so that precedent provides no basis for Wood to establish standing. *Cf. Lewis v. Casey*, 518 U.S. 343, 352 n.2, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (noting that in cases where "standing was neither challenged nor discussed ... the existence of unaddressed jurisdictional defects has no precedential effect"). And Wood's purported injury is far more general than the voters' injury in *Roe*. The voters in *Roe* bore individual burdens—to obtain notarization or witness signatures if they wanted to vote absentee—that state courts post-election retroactively permitted other voters to ignore. *Roe*, 43 F.3d at 580–81. In contrast, Georgia applied uniform rules, established before the election, to all voters, who could choose between voting in person or by absentee ballot, and Wood asserts that the effect of those rules harmed the electorate collectively. That alleged harm is not a particularized injury.

***6** Wood suggested in his amended complaint that his status as a donor contributed to standing and aligned his interests with those of the Georgia Republican Party. But he forfeited this argument when he failed to raise it in his opening brief. *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1335 (11th Cir. 2004); *see also Nat'l All. for the Mentally Ill v. Bd. of Cnty. Comm'rs*, 376 F.3d 1292, 1296 (11th Cir. 2004) (ruling standing claims forfeited for failure to comply with the Federal Rules of Appellate Procedure). And the donor argument fails on its own terms. True, a donor can establish standing based on injuries that flow from his status as a donor. *See, e.g.*, *Wilding v. DNC Servs. Corp.*, 941 F.3d 1116, 1125 (11th Cir. 2019). But donors, like voters, "have no judicially enforceable interest in the *outcome* of an election." *Jacobson*, 974 F.3d at 1246. Nor does a donation give the donor a legally cognizable interest in the proper administration of elections. Any injury to Wood based on election irregularities must flow from his status as a voter, unrelated to his donations. And that fact returns him to the stumbling block of particularization.

"[T]he 'injury in fact' test requires ... that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563, 112 S.Ct. 2130 (internal quotation marks omitted). Wood's allegations suggest that various nonparties might have a particularized injury. For example, perhaps a candidate or political party would have standing to challenge the settlement agreement or other alleged irregularities. Or perhaps election monitors would have standing to sue if they were denied access to the recount. But Wood cannot place himself in the stead of these groups, even if he supports them. *Cf. Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006) (explaining that "associational standing ... does not operate in reverse," so a member cannot represent an association). He is at most a "concerned bystander." *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004) (internal quotation marks omitted). So he is not "entitled to have the court[s] decide the merits of [his] dispute." *Warth*, 422 U.S. at 498, 95 S.Ct. 2197.

B. Wood's Requested Relief Concerning the 2020 General Election Is Moot.

Even if Wood had standing, several of his requests for relief are barred by another jurisdictional defect: mootness. We are

"not empowered to decide moot questions." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (internal quotation marks omitted). "An issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011) (alteration rejected) (internal quotation marks omitted). And an issue can become moot at any stage of litigation, even if there was a live case or controversy when the lawsuit began. *Id.* at 1189–90.

Wood asked for several kinds of relief in his emergency motion, but most of his requests pertained to the 2020 election results. He moved the district court to prohibit either the certification of the election results or certification that included the disputed absentee ballots. He also asked the district court to order a new hand recount and to grant Republican election monitors greater access during both the recount and the January runoff election. But after the district court denied Wood's motion, Secretary Raffensperger certified the election results on November 20. And Governor Kemp certified the slate of presidential electors later that day.

Because Georgia has already certified its results, Wood's requests to delay certification and commence a new recount are moot. "We cannot turn back the clock and create a world in which" the 2020 election results are not certified. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). And it is not possible for us to delay certification nor meaningful to order a new recount when the results are already final and certified. *Cf. Tropicana Prods. Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1582 (11th Cir. 1989) ("[A]n appeal from the denial of a motion for preliminary injunction is mooted when the requested effective end-date for the preliminary injunction has passed."). Nor can we reconstrue Wood's previous request that we temporarily prohibit certification into a new request that we undo the certification. A district court "must first have the opportunity to pass upon [every] issue," so we may not consider requests for relief made for the first time on appeal. *S.F. Residence Club, Inc. v. 7027 Old Madison Pike, LLC*, 583 F.3d 750, 755 (11th Cir. 2009).

***7** Wood's arguments reflect a basic misunderstanding of what mootness is. He argues that the certification does not moot anything "because this litigation is ongoing" and he remains injured. But mootness concerns the availability of relief, not the existence of a lawsuit or an injury. *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1304 (11th Cir. 2011). So even if post-election litigation is not always mooted by certification, *see, e.g.*, *Siegel v. LePore*, 234 F.3d 1163, 1172–73 (11th Cir. 2000) (en banc), Wood's particular requests are moot. Wood is right that certification does not moot his requests for relief concerning the 2021 runoff—although Wood's lack of standing still forecloses our consideration of those requests—but the pendency of other claims for relief cannot rescue the otherwise moot claims. *See, e.g.*, *Adler v. Duval Cnty. Sch. Bd.*, 112 F.3d 1475, 1478–79, 1481 (11th Cir. 1997) (instructing the district court to dismiss moot claims but resolving other claims on the merits). Wood finally tells us that President Trump has also requested a recount, but that fact is irrelevant to whether Wood's requests remain live.

Nor does any exception to mootness apply. True, we often review otherwise-moot election appeals because they are "capable of repetition yet evading review." *ACLU v. The Fla. Bar*, 999 F.2d 1486, 1496 (11th Cir. 1993) (internal quotation marks omitted). We may apply this exception when "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Nat'l Broad. Co. v. Commc'ns Workers of Am.*, 860 F.2d 1022, 1023 (11th Cir. 1988) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975)). But we will not apply this exception if there is "some alternative vehicle through which a particular policy may effectively be subject to" complete review. *Bourgeois v. Peters*, 387 F.3d 1303, 1308 (11th Cir. 2004).

The "capable of repetition yet evading review" exception does not save Wood's appeal because there is no "reasonable expectation" that Wood will again face the issues in this appeal. Based on the posture of this appeal, the challenged action is the denial of an emergency injunction against the certification of election results. *See Fleming*, 785 F.3d at 446 (explaining that whether the issues in an interlocutory appeal are "capable of repetition, yet evading review" is a separate question from whether the issues in the overall lawsuit are capable of doing so). That denial is the decision we would review but for the jurisdictional problems. But Wood cannot satisfy the requirement that there be a "reasonable expectation" that he will again seek to delay certification. Wood does not suggest that this situation might recur. *Cf. FEC v. Wis. Right To Life, Inc.*, 551 U.S. 449, 463–64, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007). And we have no reason to think it would: he is a private citizen, so the possibility of a

recurrence is purely theoretical. *Cf. Hall v. Sec'y, Ala.*, 902 F.3d 1294, 1305 (11th Cir. 2018).

IV. CONCLUSION

We **AFFIRM** the denial of Wood's motion for emergency relief.

All Citations

--- F.3d ----, 2020 WL 7094866

End of Document

EXHIBIT 6

2020 WL 6063332

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Only the Westlaw citation is currently available.

United States District Court, M.D. North Carolina.

Timothy K. MOORE, et al., Plaintiffs,
v.
Damon CIRCOSTA, et al., Defendants,
and
North Carolina Alliance for Retired Americans, et al., Defendant-Intervenors.
Patsy J. Wise, et al., Plaintiffs,
v.
The North Carolina State Board of Elections, et al., Defendants,
and
North Carolina Alliance for Retired Americans, et al., Defendant-Intervenors.

1:20CV911
|
1:20CV912
|
Signed 10/14/2020

Synopsis

Background: State legislative leaders and individual registered voters sued the executive director and members of the North Carolina State Board of Elections (SBE), seeking an injunction against enforcement and distribution of memoranda issued by SBE pertaining to absentee voting. In a second case, individual voters, a campaign committee, national political parties, and two Members of the U.S. House of Representatives also sought an injunction against the same memoranda. Advocacy group for retirees and individual registered voters who were plaintiffs in a related state court action that resulted in a consent judgment intervened in both cases. Plaintiffs moved for preliminary injunction.

Holdings: The District Court, William L. Osteen, J., held that:

plaintiffs lacked Article III standing to bring vote-dilution claim;

individual plaintiffs who had already cast their absentee ballots by mail had standing to raise equal protection claims;

plaintiffs demonstrated a likelihood of success on the merits of their equal protection claims against the mail-in ballot witness-requirement cure procedure and extension of mail-in ballot receipt deadline;

plaintiffs demonstrated a likelihood of irreparable injury on their equal protection claims against witness-requirement cure procedure and extension of mail-in ballot receipt deadline;

balance of equities weighed heavily against preliminary injunction, and thus district court would deny injunctive relief; and

SBE exceeded its statutory authority and emergency powers when it entered into consent agreement and eliminated witness requirements for mail-in ballots.

Motion denied.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge

***1** Presently before this court are two motions for a preliminary injunction in two related cases.

In the first case, Moore v. Circosta, No. 1:20CV911 ("Moore"), Plaintiffs Timothy K. Moore and Philip E. Berger (together, "State Legislative Plaintiffs"), Bobby Heath, Maxine Whitley, and Alan Swain (together, "Moore Individual Plaintiffs") seek an injunction against the enforcement and distribution of several Numbered Memoranda issued by the North Carolina State Board of Elections pertaining to absentee voting. (Moore v. Circosta, No. 1:20CV911, Mot. for Prelim. Inj. and Mem. in Supp. ("Moore Pls.' Mot.") (Doc. 60).)

In the second case, Wise v. North Carolina State Board of Elections, No. 1:20CV912 ("Wise"), Plaintiffs Patsy J. Wise, Regis Clifford, Samuel Grayson Baum, and Camille Annette Bambini (together, "Wise Individual Plaintiffs"), Donald J. Trump for President, Inc. ("Trump Campaign"), U.S. Congressman Gregory F. Murphy and U.S. Congressman Daniel Bishop (together, "Candidate Plaintiffs"), Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), National Republican Congressional Committee ("NRCC"), and North Carolina Republican Party ("NCRP") seek an injunction against the enforcement and distribution of the same Numbered Memoranda issued by the North Carolina State Board of Elections at issue in Moore. (Wise Pls.' Mem. in Supp. of Mot. to Convert the Temp. Restraining Order into a Prelim. Inj. ("Wise Pls.' Mot.") (Doc. 43).)

By this order, this court finds Plaintiffs have established a likelihood of success on their Equal Protection challenges with respect to the State Board of Elections' procedures for curing ballots without a witness signature and for the deadline extension for receipt of ballots. This court believes the unequal treatment of voters and the resulting Equal Protection violations as found herein should be enjoined. Nevertheless, under Purcell and recent Supreme Court orders relating to Purcell, this court is of the opinion that it is required to find that injunctive relief should be denied at this late date, even in the face of what appear to be clear violations.

I. BACKGROUND

A. Parties

1. Moore v. Circosta (1:20CV911)

State Legislative Plaintiffs Timothy K. Moore and Philip E. Berger are the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the North Carolina Senate, respectively. (Moore v. Circosta, No. 1:20CV911, Compl. for Declaratory and Injunctive Relief ("Moore Compl.") (Doc. 1) ¶¶ 7-8.) Individual Plaintiffs Bobby Heath and Maxine Whitley are registered North Carolina voters who voted absentee by mail and whose ballots have been accepted by the State Board of Elections on September 21, 2020, and September 17, 2020, respectively. (Id. ¶¶ 9-10.) Plaintiff Alan Swain is a resident of Wake County, North Carolina, who is running as a Republican candidate to represent the State's Second Congressional District. (Id. ¶ 11.)

Executive Defendants include Damon Circosta, Stella Anderson, Jeff Carmon, III, and Karen Brinson Bell are members of the State Board of Elections ("SBE"). (Id. ¶¶ 12-15.) Executive Defendant Karen Brinson Bell is the Executive Director of SBE. (Id. ¶ 15.)

***2** Intervenor-Defendants North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz ("Alliance Intervenors") are plaintiffs in the related state court action in Wake County Superior Court. (Moore v. Circosta, No. 1:20CV911 (Doc. 28) at 15.)[1] Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz are individual voters who are concerned they will be disenfranchised by Defendant SBE's election rules, (id.), and North Carolina Alliance for Retired Americans ("NC Alliance") is an organization "dedicated to promoting the franchise and ensuring the full constitutional rights of its members ...." (Id.)

2. Wise v. N.C. State Bd. of Elections (1:20CV912)

Individual Plaintiffs Patsy J. Wise, Regis Clifford, Camille Annette Bambini, and Samuel Grayson Baum are registered voters in North Carolina. (Wise v. N.C. State Bd. of Elections, No. 1:20CV912, Compl. for Declaratory and Injunctive Relief ("Wise Compl.") (Doc. 1) ¶¶ 25-28.) Wise has already cast her absentee ballot for the November 3, 2020 election by mail, "in accordance with statutes, including the Witness Requirement, enacted by the General Assembly." (Id. ¶ 25.) Plaintiffs Clifford, Bambini, and Baum intend to vote in the November 3, 2020 election and are "concern[ed] that [their] vote[s] will be negated by improperly cast or fraudulent ballots." (Id. ¶¶ 26-28.)

Plaintiff Trump Campaign represents the interests of President Donald J. Trump, who is running for re-election. (Id. ¶¶ 29-30.) Together, Candidate Plaintiffs Trump Campaign, U.S. Congressman Daniel Bishop, and U.S. Congressman Gregory F. Murphy are candidates who will appear on the ballot for re-election in the November 3, 2020 general election. (Id. ¶¶ 29-32.)

Plaintiff RNC is a national political party, (id. ¶¶ 33-36), that seeks to protect "the ability of Republican voters to cast, and Republican candidates to receive, effective votes in North Carolina elections and elsewhere," (id. ¶ 37), and avoid diverting resources and spending significant amounts of resources educating voters regarding confusing changes in election rules, (id. ¶ 38).

Plaintiff NRSC is a national political party committee that is exclusively devoted to electing Republican candidates to the U.S. Senate. (Id. ¶ 40.) Plaintiff NRCC is the national organization of the Republican Party dedicated to electing Republicans to the U.S. House of Representatives. (Id. ¶ 41.) Plaintiff NRCP is a North Carolina state political party organization that supports Republican candidates running in North Carolina elections. (Id. ¶¶ 44-45.)

Executive Defendant North Carolina SBE is the agency responsible for the administration of the elections laws of the State of North Carolina. (Id. ¶ 46.) As in Moore, included as Executive Defendants are Damon Circosta, Stella Anderson, Jeff Carmon, III, and Karen Brinson Bell of the North Carolina SBE. (Id. ¶¶ 47-50.)

Alliance Intervenors from Moore are also Intervenor-Defendants in Wise. (1:20CV912 (Doc. 22).)

B. Factual Background

1. This Court's Decision in *Democracy*

On August 4, 2020, this court issued an order in a third related case, Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457, —— F.Supp.3d ——, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) ("the August Democracy Order"), that "left the One-Witness Requirement in place, enjoined several rules related to nursing homes that would disenfranchise Plaintiff Hutchins, and enjoined the rejection of absentee ballots unless the voter is provided due process." (Id. at ——, 2020 WL 4484063, at *1.) As none of the parties appealed that order, the injunctive relief is still in effect.

2. Release of the Original Memo 2020-19

***3** In response to the August Democracy Order, on August 21, 2020, SBE officials released guidance for "the procedure county boards must use to address deficiencies in absentee ballots." (Numbered Memo 2020-19 ("Memo 2020-19" or "the original Memo") (Moore v. Circosta, No. 1:20CV911, Moore Compl. (Doc. 1) Ex. 3 – NC State Bd. of Elections Mem. ("Original Memo 2020-19") (Doc. 1-4) at 2.) This guidance instructed county boards regarding multiple topics. First, it instructed county election boards to "accept [a] voter's signature on the container-return envelope if it appears to be made by the voter ... [a]bsent clear evidence to the contrary," even if the signature is illegible. (Id.) The guidance clarified that "[t]he law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record," as "[v]erification of the voter's identity is completed through the witness requirement." (Id.)

Second, the guidance sorted ballot deficiencies into two categories: curable and uncurable deficiencies. (Id. at 3.) Under this version of Memo 2020-19, a ballot could be cured via voter affidavit alone if the voter failed to sign the certification or signed in the wrong place. (Id.) A ballot error could not be cured, and instead, was required to be spoiled, in the case of all other listed deficiencies, including a missing signature, printed name, or address of the witness; an incorrectly placed witness or assistant signature; or an unsealed or re-sealed envelope. (Id.) Counties were required to notify voters in writing regarding any ballot deficiency – curable or incurable - within one day of the county identifying the defect and to enclose either a cure affidavit or a new ballot, based on the type of deficiency at issue. (Id. at 4.)

In the case of an incurable deficiency, a new ballot could be issued only "if there [was] time to mail the voter a new ballot ... [to be] receive[d] by Election Day." (Id. at. 3) If a voter who submitted an uncurable ballot was unable to receive a new absentee ballot in time, he or she would have the option to vote in person on Election Day. (Id. at 4.)

If the deficiency was curable by a cure affidavit, the guidance stated that the voter must return the cure affidavit by no later than 5 p.m. on Thursday, November 12, 2020. (Id.)

3. Rescission of Numbered Memo 2020-19

The State began issuing ballots on September 4, 2020, marking the beginning of the election process. (Wise, No. 1:20CV912, Wise Pls.' Mot. (Doc. 43).) On September 11, 2020, SBE directed counties to stop notifying voters of deficiencies in their ballot, as advised in Memo 2020-19, pending further guidance from SBE. (Moore, No. 1:20CV911, Moore Pls.' Mot. (Doc. 60) Ex. 3, Democracy Email Chain (Doc. 60-4) at 6.)

4. Revision of Numbered Memo 2020-19

On September 22, over two weeks after the State began issuing ballots, SBE issued a revised Numbered Memo 2020-19, which set forth a variety of new policies not implemented in the original Memo 2020-19. (Numbered Memo 2020-19 ("the Revised Memo" or "Revised Memo 2020-19") (Moore v. Circosta, No. 1:20CV911 (Doc. 36) Ex. 3, Revised Numbered Memo 2020-19 ("Revised Memo 2020-19") (Doc. 36-3).) In subsequent litigation in Wake County Superior Court, SBE advised the court that both the original Memo 2020-19 and the Revised Memo were issued "to ensure full compliance with the injunction entered by Judge Osteen." (Moore v. Circosta, No. 1:20CV911, Exec. Defs.' Br. in Supp. of Joint Mot. for Entry of Consent Judgment ("SBE State Court Br.") (Doc. 68-1) at 15.) Moreover, on September 28, 2020, during a status conference with a district court in the Eastern District of North Carolina prior to transfer to this court, counsel for Defendant SBE stated that Defendant SBE issued the revised Memo 2020-19 "in order to comply with Judge Osteen's preliminary injunction in the Democracy N.C. action in the Middle District." (Moore v. Circosta, No. 1:20CV911, Order Granting Mot. for Temp. Restraining Order ("TRO") (Doc. 47) at 9.) At that time, counsel for SBE indicated that they had not yet submitted the Revised Memo 2020-19 to this court, "but that it was on counsel's list to get [it] done today." (Id.) (internal quotations omitted.) On September 28, 2020, Defendant SBE filed the Revised Memo 2020-19 with this court in the Democracy action. (Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20CV457 (Doc. 143-1).)

***4** The revised guidance modified which ballot deficiencies fell into the curable and uncurable categories. Unlike the original Memo 2020-19, the Revised Memo advised that ballots missing a witness or assistant name or address, as well as ballots with a missing or misplaced witness or assistant signature, could be cured via voter certification. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 3.) According to the revised guidance, the only deficiencies that could not be cured by certification, and thus required spoliation, were where the envelope was unsealed or where the envelope indicated the voter was requesting a replacement ballot. (Id. at 4.)

The cure certification in Revised 2020-19 required voters to sign and affirm the following:

> I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

(Moore v. Circosta, No. 1:20CV911 (Doc. 45-1) at 34.)

The revised guidance also extended the deadline for civilian absentee ballots to be received to align with that for military and overseas voters. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 5.) Under the original Memo 2020-19, in order to be counted, civilian absentee ballots must have been received by the county board office by 5 p.m. on Election Day, November 3, 2020, or if postmarked, by Election Day, by 5:00 p.m. on November 6, 2020. (Moore v. Circosta, No. 1:20CV911, Original Memo 2020-19 (Doc. 1-4) at 5 (citing N.C. Gen. Stat. § 163-231(b)).) Under the Revised Memo 2020-19, however, a late civilian ballot would be counted if postmarked on or before Election Day and received by 5:00 p.m. on November 12, 2020. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 5.) This is the same as the deadline for military and overseas voters, as indicated in the Original Memo 2020-19. (Id.)[2]

5. Numbered Memoranda 2020-22 and 2020-23

SBE issued two other Numbered Memoranda on September 22, 2020, in addition to Revised Numbered Memo 2020-19.

First, SBE issued Numbered Memo 2020-22, the purpose of which was to further define the term postmark used in Numbered Memo 2020-19. (Wise, No. 1:20CV912, Wise Compl. (Doc. 1), Ex. 3, N.C. State Bd. of Elections Mem. ("Memo 2020-22") (Doc. 1-3) at 2.) Numbered Memo 2020-22 advised that although "[t]he postmark requirement for ballots received after Election Day is in place to prohibit a voter from learning the outcome of an election and then casting their ballot.... [T]he USPS does not always affix a postmark to a ballot return envelope." (Id.) Recognizing that SBE now offers "BallotTrax," a system in which voters and county boards can track the status of a voter's absentee ballot, SBE said "it is possible for county boards to determine when a ballot was mailed even if does not have a postmark." (Id.) Moreover, SBE recognized that commercial carriers offer tracking services that document when a ballot was deposited with the commercial carrier. (Id.) For these reasons, the new guidance stated that a ballot would be considered postmarked by Election Day if it had a postmark, there is information in BallotTrax, or "another tracking service offered by the USPS or a commercial carrier, indicat[es] that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." (Id. at 3.)

***5** Second, SBE issued Numbered Memo 2020-23, which provides "guidance and recommendations for the safe, secure, and controlled in-person return of absentee ballots." (Wise, No. 1:20CV912, Wise Compl. (Doc. 1), Ex. 4, N.C. State Bd. of Elections Mem. ("Memo 2020-23") (Doc. 1-4) at 2.) Referring to N.C. Gen. Stat. § 163-226.3(a)(5),[3] which prohibits any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections, (id.), Numbered Memo 2020-23 confirms that "an absentee ballot may not be left in an unmanned drop box." (Id.) The guidance reminds county boards that they must keep a written log when any person returns an absentee ballot in person, which includes the name of the individual returning the ballot, their relationship to the voter, the ballot number, and the date it was received. (Id. at 3.) If the individual who drops off the ballot is not the voter, their near relative, or legal guardian, the log must also record their address and phone number. (Id.)

At the same time, the guidance advises county boards that "[f]ailure to comply with the logging requirement, or delivery or an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot." (Id. at 3.) Instead, the guidance advises the county board that they "may ... consider the delivery of a ballot ... in conjunction with other evidence in determining whether the ballot is valid and should be counted." (Id. at 4.)

6. Consent Judgment in North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections

On August 10, 2020, NC Alliance, the Defendant-Intervenors in the two cases presently before this court, filed an action against SBE in North Carolina's Wake County Superior Court challenging, among other voting rules, the witness requirement for mail-in absentee ballots and rejection of mail-in absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election. (Moore v Circosta, No. 1:20CV911, SBE State Court Br. (Doc. 68-1) at 15.)

On August 12, 2020, Philip Berger and Timothy Moore, Plaintiffs in Moore, filed a notice of intervention as of right in the state court action and became parties to that action as intervenor-defendants on behalf of the North Carolina General Assembly. (Id. at 16.)

On September 22, 2020, SBE and NC Alliance filed a Joint Motion for Entry of a Consent Judgment with the superior court. (Id.) Philip Berger and Timothy Moore were not aware of this "secretly-negotiated" Consent Judgment, (Wise Pls.' Mot. (Doc. 43) at 6), until the parties did not attend a previously scheduled deposition, (Democracy v. N.C. Bd. of Elections, No. 1:20CV457 (Doc. 168) at 73.)

Among the terms of the Consent Judgment, SBE agreed to extend the deadline for receipt of mail-in absentee ballots mailed on or before Election Day to nine days after Election Day, to implement the cure process established in Revised Memo 2020-19, and to establish separate mail in absentee ballot "drop off stations" at each early voting site and county board of elections office which were to be staffed by county board officials. (Moore v. Circosta, No. 1:20CV911, SBE State Court Br. (Doc. 68-1) at 16.)

In its filings with the state court, SBE frequently cited this court's decision in Democracy as a reason for why the Wake County Superior Court Judge should accept the Consent Judgment. SBE argued that a cure procedure for deficiencies

related to the witness requirement were necessary because "[w]itness requirements for absentee ballots have been shown to be, broadly speaking, disfavored by the courts," (id. at 26), and that "[e]ven in North Carolina, a federal court held that the witness requirement could not be implemented as statutorily authorized without a mechanism for voters to have adequate notice of and [an opportunity to] cure materials [sic] defects that might keep their votes from being counted," (id. at 27). SBE argued that, "to comply with the State Defendants' understanding of the injunction entered by Judge Osteen, the State Board directed county boards of elections not to disapprove any ballots until a new cure procedure that would comply with the injunction could be implemented," (id. at 30), and that ultimately, the cure procedure introduced in Revised Memo 2020-19 as part of the consent judgment would comply with this injunction. (Id.) SBE indicated that it had notified the federal court of the cure mechanism process on September 22, 2020, (id.), although this court was not made aware of the cure procedure until September 28, 2020, (Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20CV457 (Doc. 143-1)), the day before the processing of absentee ballots was scheduled to begin on September 29, 2020, (Moore v. Circosta, No. 20CV911 Transcript of Oral Argument ("Oral Argument Tr.")(Doc. 70) at 109.)

***6** On October 2, 2020, the Wake County Superior Court entered the Stipulation and Consent Judgment. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1).) Among its recitals, which Defendant SBE drafted and submitted to the judge as is customary in state court, (Oral Argument Tr. (Doc. 70) at 91), the Wake County Superior Court noted this court's preliminary injunction in Democracy, finding,

> WHEREAS, on August 4, 2020, the United States District Court for the Middle District of North Carolina enjoined the State Board from "the "disallowance or rejection ... of absentee ballots without due process as to those ballots with a material error that is subject to remediation." Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20-cv-00457-WO-JLW [—— F.Supp.3d ——, 2020 WL 4484063] (M.D.N.C. Aug. 4, 2020) (Osteen, J.). ECF 124 at 187. The injunction is to remain in force until the State Board implements a cure process that provides a voter with "notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." Id.

(State Court Consent Judgment (Doc. 45-1) at 6.)[4]

7. Numbered Memoranda 2020-27, 2020-28, and 2020-29

In addition to the Numbered Memoranda issued on September 22, 2020, as part of the consent judgment in the state court case, SBE has issued three additional numbered memoranda.

First, on October 1, 2020, SBE issued Numbered Memo 2020-27, which was issued in response to this court's order in Democracy regarding the need for parties to attend a status conference to discuss Numbered Memo 2020-19. (Moore v. Circosta, No. 1:20CV911 (Doc. 40-2) at 2.) The guidance advises county boards that this court did not find Numbered Memo 2020-19:

> "consistent with the Order entered by this Court on August 4, 2020," and indicates that its preliminary injunction order should "not be construed as finding that the failure of a witness to sign the application and certificate as a witness is a deficiency which may be cured with a certification after the ballot has been returned."

(Id.) "In order to avoid confusion while related matters are pending in a number of courts," the guidance advises that "[c]ounty boards that receive an executed absentee container-return envelope with a missing witness signature shall take no action as to that envelope." (Id.) In all other respects, SBE stated that Revised Numbered Memo 2020-19 remains in effect. (Id.)

Second, on October 4, 2020, SBE issued Numbered Memo 2020-28, which states that both versions of Numbered Memo 2020-19, as well as Numbered Memoranda 2020-22, 2020-23, and 2020-27 "are on hold until further notice" following the temporary restraining order entered in the instant cases on October 3, 2020. (Moore v. Circosta, No. 1:20CV911 (Doc. 60-5) at 2.) Moreover, the guidance reiterated that "[c]ounty boards that receive an executed absentee container-return envelope with a deficiency shall take no action as to that envelope," including sending a cure notification or reissuing the ballot. (Id. at 2-3.) Instead, the guidance directs county boards to store envelopes with deficiencies in a secure location until further notice. (Id. at 3.) If, however, a county board had previously issued a ballot and the second envelope is returned without any deficiencies, the guidance permits the county board to approve the second ballot. (Id.)

***7** Finally, on October 4, 2020, SBE issued Numbered Memo 2020-29, which states that it provides "uniform

guidance and further clarification on how to determine if the correct address can be identified if the witness's or assistant's address on an absentee container-return envelope is incomplete. (Wise, No. 1:20CV912 (Doc. 43-5).) First, the guidance clarifies that if a witness or assistant does not print their address, the envelope is deficient. (Id. at 2.) Second, the guidance states that failure to list a witness's ZIP code does not require a cure; a witness or assistant's address may be a post office box or other mailing address; and if the address is missing a city or state, but the county board can determine the correct address, the failure to include this information does not invalidate the container-return envelope. (Id.) Third, if both the city and ZIP code are missing, the guidance directs staff to determine whether the correct address can be identified. (Id.) If they cannot be identified, then the envelope is deficient. (Id.)

C. Procedural History

On September 26, 2020, Plaintiffs in Moore filed their action in the United States District Court for the Eastern District of North Carolina. (Moore Compl. (Doc. 1).) Plaintiffs in Wise also filed their action in the United States District Court for the Eastern District of North Carolina on September 26, 2020. (Wise Compl. (Doc. 1).)

Alliance Intervenors filed a Motion to Intervene as Defendants in Moore on September 30, 2020, (Moore v. Circosta, No. 1:20CV911 (Doc. 27)), and in Wise on October 2, 2020, (Wise, No. 1:20CV912 (Doc. 21)). This court granted Alliance Intervenors' Motion to Intervene on October 8, 2020. (Moore v. Circosta, No. 1:20CV911 (Doc. 67); Wise, No. 1:20CV912 (Doc. 49).)

The district court in the Eastern District of North Carolina issued a temporary restraining order in both cases on October 3, 2020, and transferred the actions to this court for this court's "consideration of additional or alternative injunctive relief along with any such relief in Democracy North Carolina v. North Carolina State Board of Elections ...." (Moore v. Circosta, 1:20CV911, TRO (Doc. 47) at 2; Wise, No. 1:20CV912 (Doc. 25) at 2.)

On October 5, 2020, this court held a Telephone Conference, (Moore v. Circosta, No. 1:20CV911, Minute Entry 10/05/2020; Wise, No. 1:20CV912, Minute Entry 10/05/2020), and issued an order directing the parties to prepare for a hearing on the temporary restraining order and/or a preliminary injunction and to submit additional briefing, (Moore v. Circosta, No. 1:20CV911 (Doc. 51); Wise, No. 1:20CV912 (Doc. 30)). On October 6, 2020, Plaintiffs in Wise filed a Memorandum in Support of Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction, (Wise Pls.' Mot. (Doc. 43)), and Plaintiffs in Moore filed a Motion for a Preliminary Injunction and Memorandum in Support of Same, (Moore Pls.' Mot. (Doc. 60)). Defendant SBE filed a response to Plaintiffs' motions in both cases on October 7, 2020. (Moore v. Circosta, No. 1:20CV911, State Defs.' Resp. to Pls.' Mot. for Prelim. Inj. ("SBE Resp.") (Doc. 65); Wise, No. 1:20CV912 (Doc. 45).) Alliance Intervenors also filed a response to Plaintiffs' motions in both cases on October 7, 2020. (Moore v. Circosta, No. 1:20CV911, Proposed Intervenors' Mem. in Opp'n to Pls.' Mot. for a Prelim. Inj. ("Alliance Resp.") (Doc. 64); Wise, No. 1:20CV912 (Doc. 47).)[5]

This court held oral arguments on October 8, 2020, in which all of the parties in these two cases presented arguments with respect to Plaintiffs' motions for a preliminary injunction. (Moore v. Circosta, No. 1:20CV911, Minute Entry 10/08/2020; Wise, No. 1:20CV912, Minute Entry 10/08/2020.)

***8** This court has federal question jurisdiction over these cases under 28 U.S.C. § 1331. This matter is ripe for adjudication.

D. Preliminary Injunction Standard of Review

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Such an injunction "is an extraordinary remedy intended to protect the status quo and prevent irreparable harm during the pendency of a lawsuit." Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017).

II. ANALYSIS

Executive Defendants and Alliance Intervenors challenge Plaintiffs' standing to seek a preliminary injunction regarding their Equal Protection, Elections Clause, and Electors Clause claims. (Alliance Resp. (Doc. 64) at 14-18; SBE Resp. (Doc. 65) at 11-13.) Executive Defendants and Alliance Intervenors also challenge this court's ability to hear this action under abstention, (Alliance Resp. (Doc. 64) at 10-14; SBE Resp. (Doc. 65) at 10-11), Rooker-Feldman (Alliance

Resp. (Doc. 64) at 13), and preclusion doctrines, (SBE Resp. (Doc. 65) at 7-10). Finally, Executive Defendants and Alliance Intervenors attack Plaintiffs' motions for preliminary injunction on the merits. (Alliance Resp. (Doc. 64) at 19-26; SBE Resp. (Doc. 65) at 13-18.)

Because Rooker-Feldman, abstention, and preclusion are dispositive issues, this court addresses them first, then addresses Plaintiffs' motions on standing and the likelihood of success on the merits.

As to each of these abstention doctrines, as will be explained further, this court's preliminary injunction order, (Doc. 124), in Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457, played a substantial role as relevant authority supporting SBE's request for approval, in North Carolina state court, of Revised Memo 2020-19 and the related Consent Judgment. (See discussion infra Part II.D.3.b.i.) As Berger, Moore, and SBE are all parties in Democracy, this court initially finds that abstention doctrines do not preclude this court's exercise of jurisdiction. This court's August Democracy Order was issued prior to the filing of these state court actions, and that Order was the basis of the subsequent grant of affirmative relief by the state court. This court declines to find that any abstention doctrine would preclude it from issuing orders in aid of its jurisdiction, or as to parties appearing in a pending case in this court.

A. Rooker-Feldman Doctrine

Rooker-Feldman doctrine is a jurisdictional doctrine that prohibits federal district courts from " 'exercising appellate jurisdiction over final state-court judgments.' " See Thana v. Bd. of License Comm'rs for Charles Cnty., 827 F.3d 314, 319 (4th Cir. 2016) (quoting Lance v. Dennis, 546 U.S. 459, 463, 126 S.Ct. 1198, 163 L.Ed.2d 1059 (2006) (per curiam)). The presence or absence of subject matter jurisdiction under Rooker-Feldman is a threshold issue that this court must determine before considering the merits of the case. Friedman's, Inc. v. Dunlap, 290 F.3d 191, 196 (4th Cir. 2002).

***9** Although Rooker-Feldman originally limited only federal-question jurisdiction, the Supreme Court has recognized the applicability of the doctrine to cases brought under diversity jurisdiction:

> Rooker and Feldman exhibit the limited circumstances in which this Court's appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority, e.g., § 1330 (suits against foreign states), § 1331 (federal question), and § 1332 (diversity).

See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291-92, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). Under the Rooker-Feldman doctrine, courts lack subject matter jurisdiction to hear "cases brought by [1] state-court losers complaining of [2] injuries caused by state-court judgments [3] rendered before the district court proceedings commenced and [4] inviting district court review and rejection of those judgments." Id. at 284, 125 S.Ct. 1517. The doctrine is "narrow and focused." Thana, 827 F.3d at 319. "[I]f a plaintiff in federal court does not seek review of the state court judgment itself but instead 'presents an independent claim, it is not an impediment to the exercise of federal jurisdiction that the same or a related question was earlier aired between the parties in state court.' " Id. at 320 (quoting Skinner v. Switzer, 562 U.S. 521, 532, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011)). Rather, "any tensions between the two proceedings should be managed through the doctrines of preclusion, comity, and abstention." Id. (citing Exxon, 544 U.S. at 292–93, 125 S.Ct. 1517).

Moreover, "the Rooker–Feldman doctrine applies only when the loser in state court files suit in federal district court seeking redress for an injury allegedly caused by the state court's decision itself." Davani v. Va. Dep't of Transp., 434 F.3d 712, 713 (4th Cir. 2006); see also Hulsey v. Cisa, 947 F.3d 246, 250 (4th Cir. 2020) ("A plaintiff's injury at the hands of a third party may be 'ratified, acquiesced in, or left unpunished by' a state-court decision without being 'produced by' the state-court judgment.") (internal citations omitted).

Here, Plaintiffs are challenging SBE's election procedures and seeking injunction of those electoral rules, not attempting to directly appeal results of a state court order. More importantly, however, the Fourth Circuit has previously found that a party is not a state court loser for purposes of Rooker-Feldman if "[t]he [state court] rulings thus were not 'final state-court judgments' " against the party bringing up the same issues before a federal court. Hulsey, 947 F.3d at 251 (quoting Lance, 546 U.S. at 463, 126 S.Ct. 1198). In the Alliance state court case, Alliance brought suit against SBE. The Plaintiffs from this case were intervenors. They were not parties to the Settlement Agreement and were in no way properly adjudicated "state court losers." Given the Supreme Court's intended narrowness of the Rooker-Feldman doctrine, see

Lance, 546 U.S. at 464, 126 S.Ct. 1198, and Plaintiffs' failure to fit within the Fourth Circuit's definition of "state-court losers," this court will decline to abstain under the Rooker-Feldman doctrine.

B. Abstention

1. Colorado River Abstention

***10** Abstention "is the exception, not the rule." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); see also id. at 817, 96 S.Ct. 1236 (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). Thus, this court's task "is not to find some substantial reason for the exercise of federal jurisdiction," but rather "to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' ... to justify the surrender of that jurisdiction." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25-26, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

First, and crucially for this case, the court must determine whether there are ongoing state and federal proceedings that are parallel. Al-Abood ex rel. Al-Abood v. El-Shamari, 217 F.3d 225, 232 (4th Cir. 2000) ("The threshold question in deciding whether Colorado River abstention is appropriate is whether there are parallel suits."); Ackerman v. ExxonMobil Corp., 734 F.3d 237, 248 (4th Cir. 2013) (finding that abstention is exercised only "in favor of ongoing, parallel state proceedings" (emphasis added)). In this instance, the parties have failed to allege any ongoing state proceeding that this federal suit might interfere with. In fact, Plaintiffs in this case were excluded as parties in the Consent Judgment and are bringing independent claims in this federal court alleging violations, inter alia, of the Equal Protection Clause. This court does not find that Colorado River abstention prevents it from adjudicating Equal Protection claims raised by parties who were not parties to the Consent Judgment.

2. Pennzoil Abstention

As alleged by Defendants, Pennzoil does dictate that federal courts should not "interfere with the execution of state judgments." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987). However, in the very next sentence, the Pennzoil court caveats that this doctrine applies "[s]o long as those challenges relate to pending state proceedings." Id. In fact, in Pennzoil itself, the Court clarified that abstention was proper because "[t]here is at least one pending judicial proceeding in the state courts; the lawsuit out of which Texaco's constitutional claims arose is now pending before a Texas Court of Appeals in Houston, Texas." Id. at 14, 107 S.Ct. 1519 n.13.

Abstention was also justified in Pennzoil because the Texas state court was not presented with the contested federal constitutional questions, and thus, "when [the subsequent] case was filed in federal court, it was entirely possible that the Texas courts would have resolved this case ... without reaching the federal constitutional questions." Id. at 12, 107 S.Ct. 1519. In the present case, Plaintiffs raised their constitutional claims in the state court prior to the entry of the Consent Judgment. The state court, through the Consent Judgment and without taking evidence, adjudicated those claims as to the settling parties. The Consent Judgment is effective through the 2020 Election and specifies no further basis upon which Plaintiffs here may seek relief. As a result, there does not appear to be any relief available to Plaintiffs for the federal questions raised here. For these reasons, this court will also decline to abstain under Pennzoil.

3. Pullman Abstention

Pullman abstention can be exercised where: (1) there is "an unclear issue of state law presented for decision"; and (2) resolution of that unclear state law issue "may moot or present in a different posture the federal constitutional issue such that the state law issue is potentially dispositive." Educ. Servs., Inc. v. Md. State Bd. for Higher Educ., 710 F.2d 170, 174 (4th Cir. 1983); see also N.C. State Conference of NAACP v. Cooper, 397 F. Supp. 3d 786, 794 (M.D.N.C. 2019). Pullman does not apply here because any issues of state law are not, in this court's opinion, unclear or ambiguous. Alliance's brief in Moore posits that "whether NCSBE has the authority to enter the Consent Judgment and promulgate the Numbered Memos" are at the center of this case, thereby urging Pullman abstention. (Alliance Resp. (Doc. 64 at 12).) SBE has undisputed authority to issue guidance consistent with state law and may issue guidance contrary to state law only in response to natural disasters – the court finds this, though ultimately unnecessary to the relief issued in this case, fairly clear. (See discussion supra at Part II.E.2.b.ii.) Moreover, this court has already expressly assessed and upheld the North Carolina state witness requirement, which

is the primary state law at issue in this case. Democracy N. Carolina, —— F.Supp.3d at ——, 2020 WL 4484063, at *48.

***11** Furthermore, Defendants and Intervenors would additionally need to show how "resolution of ... state law issues pending in state court" would "eliminate or substantially modify the federal constitutional issues raised in Plaintiffs' Complaint." N.C. State Conference of NAACP, 397 F. Supp. 3d at 796. As Alliance notes, the Plaintiffs did not appeal the state court's conclusions, but sought relief in federal court – there is no state law issue pending in state court here. For all of these reasons, this court declines to abstain under Pullman.

C. Issue Preclusion

Collateral estoppel, or issue preclusion "refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim." New Hampshire v. Maine, 532 U.S. 742, 748-49, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). The purpose of this doctrine is to "protect the integrity of the judicial process ...." Id. at 749, 121 S.Ct. 1808 (internal quotations omitted).

Plaintiffs argue that issue preclusion does not bar their Equal Protection claims. Citing Arizona v. California, 530 U.S. 392, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000), Plaintiffs in Wise argue that a negotiated settlement between parties, like the consent judgment between the Alliance Intervenors and Defendant SBE in Wake County Superior Court, does not constitute a final judgment for issue preclusion. (Wise Pls.' Mot. (Doc. 43) at 23.) Plaintiffs in Moore, citing In re Microsoft Corp. Antitrust Litig., 355 F.3d 322 (4th Cir. 2004), argue that issue preclusion cannot be asserted because the Individual Plaintiffs in Moore were not parties to the state court litigation that resulted in the consent judgment. (Moore Pls.' Mot. (Doc. 60) at 4.)

In response, Defendant SBE argues that, under North Carolina law, issue preclusion applies where (1) the issue is identical to the issue actually litigated and necessary to a prior judgment, (2) the prior action resulted in a final judgment on the merits, and (3) the plaintiffs in the latter action are the same as, or in privity with, the parties in the earlier action, (SBE Resp. (Doc. 65) at 7), and the parties in these federal actions and those in the state actions are in privity under the third element of the test, (id. at 8).

This court finds that issue preclusion does not bar Plaintiffs' claims. In Arizona v. California, the Supreme Court held that "[i]n most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented." 530 U.S. at 414, 120 S.Ct. 2304 (internal quotations omitted). Moreover, "settlements ordinarily occasion no issue preclusion ... unless it is clear ... that the parties intend their agreement to have such an effect." Id.

The Consent Judgment SBE and Alliance entered into does not clearly demonstrate that they intended their agreement to have an issue preclusive effect with regard to claims brought now by Plaintiffs in Moore and Wise. The language of the Consent Judgment demonstrates that it "constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit" and that "by signing this Stipulation and Consent Judgment, they are releasing any claims ... that they might have against Executive Defendants." (State Court Consent Judgment (Doc. 45-1) at 14 (emphasis added).) Although Timothy Moore and Philip Berger, State Legislative Plaintiffs in Moore, were Defendant-Intervenors in the NC Alliance action, they were not parties to the consent judgment. (Id.) Thus, because the plain language of the agreement did not expressly indicate an intention to preclude Plaintiffs Moore and Berger from litigating the issue in subsequent litigation, neither these State Legislative Plaintiffs, nor any other parties with whom they may or may not be in privity, are estopped from raising these claims now before this court.

D. Plaintiffs' Equal Protection Claims

***12** Plaintiffs raise "two separate theories of an equal protection violation," – a "vote dilution claim, and an arbitrariness claim." (Oral Argument Tr. (Doc. 70) at 52; see also Wise Pls.' Mot. (Doc. 43) at 12-15.)

1. Voting Harms Prohibited by the Equal Protection Clause

Under the Fourteenth Amendment of the U.S. Constitution, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Fourteenth Amendment is one of several constitutional provisions that "protects the right of all qualified citizens to vote, in state as well as federal elections." Reynolds v. Sims,

377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Because the Fourteenth Amendment protects not only the "initial allocation of the franchise," as well as "to the manner of its exercise," Bush v. Gore, 531 U.S. 98, 104, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), "lines may not be drawn which are inconsistent with the Equal Protection Clause ...." Id. at 105, 121 S.Ct. 525 (citing Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966)).

The Supreme Court has identified two theories of voting harms prohibited by the Fourteenth Amendment. First, the Court has identified a harm caused by "debasement or dilution of the weight of a citizen's vote," also referred to "vote dilution." Reynolds, 377 U.S. at 555, 84 S.Ct. 1362. Courts find this harm arises where gerrymandering under a redistricting plan has diluted the "requirement that all citizens' votes be weighted equally, known as the one person, one vote principle," and resulted in one group or community's vote counting more than another's. Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 340 (4th Cir. 2016); see also Gill v. Whitford, 585 U.S. ——, ——, 138 S. Ct. 1916, 1930-31, 201 L.Ed.2d 313 (2018) (finding that the "harm" of vote dilution "arises from the particular composition of the voter's own district, which causes his vote – having been packed or cracked – to carry less weight than it would carry in another, hypothetical district"); Wesberry v. Sanders, 376 U.S. 1, 18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) (finding that vote dilution occurred where congressional districts did not guarantee "equal representation for equal numbers of people"); Wright v. North Carolina, 787 F.3d 256, 268 (4th Cir. 2015) (invalidating a voter redistricting plan).

Second, the Court has found that the Equal Protection Clause is violated where the state, "[h]aving once granted the right to vote on equal terms," through "later arbitrary and disparate treatment, value[s] one person's vote over that of another." Bush, 531 U.S. at 104-05, 121 S.Ct. 525 (2000); see also Baker v. Carr, 369 U.S. 186, 208, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box.") (internal citations omitted). This second theory of voting harms requires courts to balance competing concerns around access to the ballot. On the one hand, a state should not engage in practices which prevent qualified voters from exercising their right to vote. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." Gray v. Sanders, 372 U.S. 368, 379-80, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963). On the other hand, the state must protect against "the diluting effect of illegal ballots." Id. at 380, 83 S.Ct. 801. Because "the right to have one's vote counted has the same dignity as the right to put a ballot in a box," id., the vote dilution occurs only where there is both "arbitrary and disparate treatment." Bush, 531 U.S. at 105, 121 S.Ct. 525. To this end, states must have "specific rules designed to ensure uniform treatment" of a voter's ballot. Id. at 106, 121 S.Ct. 525.

2. Standing to Bring Equal Protection Claims

***13** In light of the harms prohibited by the Equal Protection Clause, this court must first consider whether Plaintiffs have standing to bring these claims.

For a case or controversy to be justiciable in federal court, a plaintiff must allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." White Tail Park, Inc. v. Stroube, 413 F.3d 451, 458 (4th Cir. 2005) (quoting Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 789 (4th Cir. 2004)).

The party seeking to invoke the federal courts' jurisdiction has the burden of satisfying Article III's standing requirement. Miller v. Brown, 462 F.3d 312, 316 (4th Cir. 2006). To meet that burden, a plaintiff must demonstrate three elements: (1) that the plaintiff has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) that the injury is fairly traceable to the challenged conduct of the defendant; and (3) that a favorable decision is likely to redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

In multi-plaintiff cases, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." Town of Chester v. Laroe Estates, Inc., 581 U.S. ——, ——, 137 S. Ct. 1645, 1651, 198 L.Ed.2d 64 (2017). Further, if there is one plaintiff "who has demonstrated standing to assert these rights as his own," the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 & n.9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

In the voting context, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue," Baker, 369 U.S. at 206, 82 S.Ct. 691, so long as their claimed injuries are "distinct from a 'generally available grievance about the government,' " Gill, 138 S. Ct. at 1923 (quoting Lance v. Coffman, 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam)).

Defendant SBE and Alliance Intervenors argue that Individual Plaintiffs in Wise and Moore have not alleged a concrete and particularized injury under either of the two Equal Protection theories. (Alliance Resp. (Doc. 64) at 14-15; SBE Resp. (Doc. 65) at 12-13.)

First, under a vote dilution theory, they argue that courts have "repeatedly rejected this theory as a basis for standing, both because it is unduly speculative and impermissibly generalized." (Alliance Resp. (Doc. 64) at 17.) Second, under an arbitrary and disparate treatment theory, they argue that the injury is too generalized because the Numbered Memoranda apply equally to all voters across the state and that Plaintiffs "cannot claim an injury for not having to go through a remedial process put in place for other voters." (SBE Resp. (Doc. 65) at 12.)

Plaintiffs in Moore and Wise do not address standing for their Equal Protection claims in their memoranda in support of their motions for a preliminary injunction. (See Wise Pls.' Mot. (Doc. 43); Moore Pls.' Mot. (Doc. 60).) At oral argument held on October 8, 2020, however, counsel for the Moore Plaintiffs responded to Defendant SBE and Alliance Intervenor's standing arguments. (Oral Argument Tr. (Doc. 70) at 52-59.)

***14** First, under a vote dilution theory, counsel argued that "the Defendants confuse a widespread injury with not having a personal injury," (id. at 53), and that the Supreme Court's decision in Reynolds demonstrates that "impermissible vote dilution occurs when there's ballot box stuffing," (id.), suggesting that each voter would have standing to sue under the Supreme Court's precedent in Reynolds because their vote has less value. (Id.) Second, under an arbitrary and disparate treatment theory, counsel argued that Plaintiffs were subjected to the witness requirement and that "[t]here are burdens associated with that" which support a finding of an injury in fact. (Id. at 56.) Counsel argued the harm that is occurring is not speculative because, for example, voters have and will continue to fail to comply with the witness requirement, (id. at 55-56), and ballots will arrive between the third and ninth day following the election pursuant to the Postmark Requirement, (id. at 58). Moreover, counsel argued that the "regime" imposed by the state is arbitrary, citing limitations on assistance allowed to complete a ballot, compared to the lessened restrictions associated with the witness requirement under Numbered Memo 2020-19. (Id. at 59.)

This court finds that Individual Plaintiffs in Moore and Wise have not articulated a cognizable injury in fact for their vote dilution claims. However, all of the Individual Plaintiffs in Moore, and one Individual Plaintiff in Wise have articulated an injury in fact for an arbitrary and disparate treatment claim.

a. Vote Dilution

Although the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.' " Gill, 138 S. Ct. at 1930 (citing Reynolds, 377 U.S. at 561, 84 S.Ct. 1362), the Court has expressly held that "vote dilution" refers specifically to "invidiously minimizing or canceling out the voting potential of racial or ethnic minorities," Abbott v. Perez, 585 U.S. ——, ——, 138 S. Ct. 2305, 2314, 201 L.Ed.2d 714 (2018) (internal quotations and modifications omitted) (emphasis added), a harm which occurs where "the particular composition of the voter's own district ... causes his vote – having been packed or cracked – to carry less weight than it would carry in another, hypothetical district." Gill, 138 S. Ct. at 1931.

Indeed, lower courts which have addressed standing in vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted, as Plaintiffs have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters. See, e.g., Donald J. Trump for President, Inc. v. Cegavske, Case No. 2:20-CV-1445 JCM (VCF), —— F.Supp.3d ——, ——, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more directly and tangibly benefits them than it does the public at large.") (internal quotations and modifications omitted); Martel v. Condos, Case No. 5:20-cv-131, —— F.Supp.3d ——, ——, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); Paher v. Cegavske, 457 F.Supp.3d

919, 926–27 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); Am. Civil Rights Union v. Martinez-Rivera, 166 F. Supp. 3d. 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution [is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.").

Although "[i]t would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because it affects all voters," Martel, —— F.Supp.3d at ——, 2020 WL 5755289, at *4, the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing. Compared to a claim of gerrymandering, in which the injury is specific to a group of voters based on their racial identity or the district where they live, all voters in North Carolina, not just Individual Plaintiffs, would suffer the injury Individual Plaintiffs allege. This court finds this injury too generalized to give rise to a claim of vote dilution, and thus, neither Plaintiffs in Moore nor in Wise have standing to bring their vote dilution claims under the Equal Protection Clause.

b. Arbitrary and Disparate Treatment

***15** In Bush, the Supreme Court held that, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05, 121 S.Ct. 525. Plaintiffs argue that they have been subjected to arbitrary and disparate treatment because they voted under one set of rules, and other voters, through the guidance in the Numbered Memoranda, will be permitted to vote invalidly under a different and unequal set of rules, and that this is a concrete and particularized injury. (Oral Argument Tr. (Doc. 70) at 70-71.)

For the purposes of determining whether Plaintiffs have standing, is it not "necessary to decide whether [Plaintiffs'] allegations of impairment of their votes" by Defendant SBE's actions "will, ultimately, entitle them to any relief," Baker, 369 U.S. at 208, 82 S.Ct. 691; whether a harm has occurred is best left to this court's analysis of the merits of Plaintiffs' claims, (see discussion infra Section II.D.3). Instead, the appropriate inquiry is, "[i]f such impairment does produce a legally cognizable injury," whether Plaintiffs "are among those who have sustained it." Baker, 369 U.S. at 208, 82 S.Ct. 691.

This court finds that Individual Plaintiffs in Moore and one Individual Plaintiff in Wise have standing to raise an arbitrary and disparate treatment claim because their injury is concrete, particularized, and not speculative. Bobby Heath and Maxine Whitley, the Individual Plaintiffs in Moore, are registered North Carolina voters who voted absentee by mail and whose ballots have been accepted by SBE. (Moore Compl. (Doc. 1) ¶¶ 9-10.) In Wise, Individual Plaintiff Patsy Wise is a registered voter who cast her absentee ballot by mail. (Wise Compl. (Doc. 1) ¶ 25.)

If Plaintiffs Heath, Whitley, and Wise were voters who intended to vote by mail but who had not yet submitted their ballots, as is the case with the other Individual Plaintiffs in Wise, (Wise Compl. (Doc. 1) ¶¶ 26-28), or voters who had intended to vote in-person either during the Early Voting period or on Election Day, then they would not in fact have been impacted by the laws and procedures for submission of absentee ballots by mail and the complained-of injury would be merely "an injury common to all other registered voters," Martel, —— F.Supp.3d at ——, 2020 WL 5755289, at *4. See also Donald J. Trump for President, Inc., —— F.Supp.3d at ——, 2020 WL 5626974, at *4 ("Plaintiffs never describe how their member voters will be harmed by vote dilution where other voters will not."). Indeed, this court finds that Individual Plaintiffs Clifford, Bambini, and Baum in Wise do not have standing to challenge the Numbered Memoranda, because any "shock[ ]" and "serious concern[s]" they have that their vote "will be negated by improperly cast or fraudulent ballots," (Wise Compl. (Doc. 1) ¶¶ 26-28), is merely speculative until such point that they have actually voted by mail and had their ballots accepted, which Plaintiffs' Complaint in Wise does not allege has occurred. (Id.)

Yet, because Plaintiffs Heath, Whitley, and Wise have, in fact, already voted by mail, (Moore Compl. (Doc. 1) ¶¶ 9-10; Wise Compl. (Doc. 1) ¶ 25), their injury is not speculative. Under the Numbered Memoranda 2020-19, 2020-22, and 2020-23, other voters who vote by mail will be subjected to a different standard than that to which Plaintiffs Heath, Whitley, and Wise were subjected when they cast their ballots by mail. Assuming this is an injury that violates the Equal Protection Clause, Baker, 369 U.S. at 208, 82 S.Ct. 691, the harm alleged by Plaintiffs is particular to voters in Heath, Whitley, and Wise's position, rather than a generalized injury that any North Carolina voter could claim. For this reason, this court

finds that Individual Plaintiffs Heath, Whitley, and Wise have standing to raise Equal Protection claims under an arbitrary and disparate treatment theory. Because at least one plaintiff in each of these multi-plaintiff cases has standing to seek the relief requested, the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." Vill. of Arlington Heights, 429 U.S. at 264 & n.9, 97 S.Ct. 555.

3. Likelihood of Success on the Merits

***16** Having determined that Individual Plaintiffs have standing to bring their arbitrary and disparate treatment claims, this court now considers whether Plaintiffs' claims are likely to succeed on the merits. To demonstrate a likelihood of success on the merits, "[a] plaintiff need not establish a certainty of success, but must make a clear showing that he is likely to succeed at trial." Di Biase, 872 F.3d at 230.

a. Parties' Arguments

Plaintiffs argue that four policies indicated in the Numbered Memoranda are invalid under the Equal Protection Clause: (1) the procedure which allows ballots without a witness signature to be retroactively validated through the cure procedure indicated in Revised Numbered Memo 2020-19 ("Witness Requirement Cure Procedure"); (2) the procedure which allows absentee ballots to be received up to nine days after Election Day if they are postmarked on Election Day, as indicated in Numbered Memo 2020-19 ("Receipt Deadline Extension"); and (3) the procedure which allows for anonymous delivery of ballots to unmanned drop boxes, as indicated in Numbered Memo 2020-23 ("Drop Box Cure Procedure"); (4) the procedure which allows ballots to be counted without a United States Postal Service postmark, as indicated in Numbered Memo 2020-22 ("Postmark Requirement Changes"). (Moore Compl. (Doc. 1) ¶ 93; Wise Compl. (Doc. 1) ¶ 124; Wise Pls.' Mot. (Doc. 43) at 13-14.)

Plaintiffs in Wise argue that the changes in these Memoranda "guarantee that voters will be treated arbitrarily under the ever-changing voting regimes." (Wise Pls.' Mot. (Doc. 43) at 11.) Similarly, Plaintiffs in Moore argue that the three Memoranda were issued "after tens of thousands of North Carolinians cast their votes following the requirements set by the General Assembly," which deprives Plaintiffs "of the Equal Protection Clause's guarantee because it allows for 'varying standards to determine what [i]s a legal vote.' " (Moore Compl. (Doc. 1) ¶ 90 (citing Bush, 531 U.S. at 107, 121 S.Ct. 525).)

In response, Defendants argue that the Numbered Memoranda will not lead to the arbitrary and disparate treatment of ballots prohibited by the Supreme Court's decision in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). Defendant SBE argues that the consent judgment and Numbered Memos do "precisely what Bush contemplated: It establishes uniform and adequate standards for determining what is a legal vote, all of which apply statewide, well in advance of Election Day. Indeed, the only thing stopping uniform statewide standards from going into effect is the TRO entered in these cases." (SBE Resp. (Doc. 65) at 17.) Moreover, Defendant SBE argues that the consent judgment "simply establishes uniform standards that help county boards ascertain which votes are lawful," and "in no way lets votes be cast unlawfully." (Id. at 18.)

Alliance Intervenors argue that the Numbered Memos "apply equally to all voters," (Alliance Resp. (Doc. 64) at 18), and "Plaintiffs have not articulated, let alone demonstrated, how their right to vote – or anyone else's – is burdened or valued unequally," (id. at 19). Moreover, Alliance Intervenors argue that the release of the Numbered Memoranda after the election began does not raise equal protection issues because, "[e]lection procedures often change after voting has started to ensure that the fundamental right to vote is protected." (Id. at 20.)

Both Defendant SBE and Alliance Intervenors argue that the release of the Numbered Memoranda after the election began does not raise equal protection issues, as election procedures often change after voting has started. (SBE Resp. (Doc. 65) at 18; Alliance Resp. (Doc. 64) at 20.) For example, Defendant SBE argues that "[i]f it is unconstitutional to extend the receipt deadline for absentee ballots to address mail disruptions, then it would also be unconstitutional to extend hours at polling places on Election Day to address power outages or voting-machine malfunctions." (SBE Resp. (Doc. 65) at 18 (citing N.C. Gen. Stat. § 163-166.01).) "Likewise, the steps that the Board has repeatedly taken to ensure that people can vote in the wake of natural disasters like hurricanes would be invalid if those steps are implemented after voting begins." (Id.)

b. Analysis

***17** This court agrees with the parties that an Equal Protection violation occurs where there is both arbitrary and disparate treatment. Bush, 531 U.S. at 105, 121 S.Ct. 525. This court also agrees with Defendants that not all disparate treatment rises to the level of an Equal Protection violation. As Defendant SBE argues, the General Assembly has empowered SBE to make changes to voting policies and procedures throughout the election, including extending hours at polling places or adjusting voting in response to natural disasters. (SBE Resp. (Doc. 65) at 18.) Other federal courts have upheld changes to election procedures even after voting has commenced. For example, in 2018, a federal court enjoined Florida's signature matching procedures and ordered a cure process after the election. Democratic Exec. Comm. of Fla. v. Detzner, 347 F. Supp. 3d 1017, 1031 (N.D. Fla. 2018), appeal dismissed as moot sub nom. Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm., 950 F.3d 790 (11th Cir. 2020). Similarly, a Georgia federal court in 2018 ordered a cure process in the middle of the absentee and early voting periods. Martin v. Kemp, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), appeal dismiss sub nom. Martin v. Sec'y of State of Ga., No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018).

A change in election rules that results in disparate treatment shifts from constitutional to unconstitutional when these rules are also arbitrary. The ordinary definition of the word "arbitrary" refers to matters "[d]epending on individual discretion" or "involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures." Arbitrary, Black's Law Dictionary (11th ed. 2019). This definition aligns with the Supreme Court's holding in Reynolds and Bush, that the State must ensure equal treatment of voters both at the time it grants citizens the right to vote and throughout the election. Bush, 531 U.S. at 104-05, 121 S.Ct. 525 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); Reynolds, 377 U.S. at 555, 84 S.Ct. 1362 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

The requirement that a state "grant[ ] the right to vote on equal terms," Bush, 531 U.S. at 104, 121 S.Ct. 525, includes protecting the public "from the diluting effect of illegal ballots," Gray, 372 U.S. at 380, 83 S.Ct. 801. To fulfill this requirement, a state legislature must define the manner in which voting should occur and the minimum requirements for a valid, qualifying ballot. In North Carolina, the General Assembly has passed laws defining the requirements for permissible absentee voting, N.C. Gen. Stat. § 163-226 et seq., including as recently as this summer, when it modified the one-witness requirement, 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a). As this court found in its order issuing a preliminary injunction in Democracy, these requirements reflect a desire by the General Assembly to prevent voter fraud resulting from illegal voting practices. Democracy N. Carolina, —— F.Supp.3d at ——, 2020 WL 4484063, at *35.

A state cannot uphold its obligation to ensure equal treatment of all voters at every stage of the election if another body, including SBE, is permitted to contravene the duly enacted laws of the General Assembly and to permit ballots to be counted that do not satisfy the fixed rules or procedures the state legislature has deemed necessary to prevent illegal voting. Any guidance SBE adopts must be consistent with the guarantees of equal treatment contemplated by the General Assembly and Equal Protection.

Thus, following this precedent, and the ordinary definition of the word "arbitrary," this court finds that SBE engages in arbitrary behavior when it acts in ways that contravene the fixed rules or procedures the state legislature has established for voting and that fundamentally alter the definition of a validly voted ballot, creating "preferred class[es] of voters." Gray, 372 U.S. at 380, 83 S.Ct. 801.

***18** This definition of arbitrariness does not require this court to consider whether the laws enacted by the General Assembly violate other provisions in the North Carolina or U.S. Constitution or whether there are better public policy alternatives to the laws the General Assembly has enacted. These are separate inquiries. This court's review is limited to whether the challenged Numbered Memos are consistent with state law and do not create a preferred class or classes of voters.

i. Witness Requirement Cure Procedure

This court finds Plaintiffs have demonstrated a likelihood of success on the merits with respect to their Equal Protection challenge to the Witness Requirement Cure Procedure in Revised Memo 2020-19.

Under the 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1. (a), a witnessed absentee ballot must be "marked ... in the presence of at least one [qualified] person ...." This clear language dictates that the witness must be (1) physically present with the voter, and (2) present at the time the ballot is marked by the voter.

Revised Memo 2020-19 counsels that ballots missing a witness signature may be cured where voters sign and affirm the following statement:

> I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

(Moore v. Circosta, No. 1:20CV911 (Doc. 45-1) at 34.)

This "cure" affidavit language makes no mention of whether a witness was in the presence of the voter at the time that the voter cast their ballot, which is the essence of the Legislature's Witness Requirement. 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a). In fact, a voter could truthfully sign and affirm this statement and have their ballot counted by their county board of elections without any witness becoming involved in the process.[6] Because the effect of this affidavit is to eliminate the statutorily required witness requirement, this court finds that Plaintiffs have demonstrated a likelihood of success on the merits in proving that the Witness Requirement Cure Procedure indicated in Revised Memo 2020-19 is arbitrary.

***19** Based on counsel's statements at oral arguments, Defendant SBE may contend that the guidance in Revised Memo 2020-19 is not arbitrary because it was necessary to resolve the Alliance state court action. (Oral Argument Tr. (Doc. 70) at 105 ("Our reading then of state law is that the Board has the authority to make adjustments in emergencies or as a means of settling protracted litigation until the General Assembly reconvenes.").) However, Defendant SBE's arguments to the state court judge and the court in the Eastern District of North Carolina belie that assertion, as they advised the state court that both the original Memo 2020-19 and the Revised Memo were issued "to ensure full compliance with the injunction entered by Judge Osteen," (SBE State Court Br. (Doc. 68-1) at 15), and they advised the court in the Eastern District of North Carolina that they had issued the revised Memo 2020-19 "in order to comply with Judge Osteen's preliminary injunction in the Democracy N.C. action in the Middle District." (TRO (Doc. 47) at 9.) As this court more fully explains in its order issued in Democracy, this court finds that Defendant SBE improperly used this court's August Democracy Order to modify the witness requirement. Democracy v. N. Carolina, No. 1:20CV457, 2020 WL 6058048 (M.D.N.C. Oct. 14, 2020) (enjoining witness cure procedure). Because Defendant SBE acted improperly in that fashion, this court declines to accept an argument now that elimination of the witness requirement was a rational and justifiable basis upon which to settle the state lawsuit. Furthermore, it is difficult to conceive that SBE was authorized to resolve a pending lawsuit that could create a preferred class of voters: those who may submit an absentee ballot without a witness under an affidavit with no definition of the meaning of "vote."

This court also finds Plaintiffs have demonstrated a likelihood of success on the merits in proving disparate treatment may result as a result of the elimination of the Witness Requirement. Individual Plaintiffs Wise, Heath, and Whitley assert that they voted absentee by mail, including complying with the Witness Requirement. (Wise Compl. (Doc. 1) ¶ 25; Moore Compl. (Doc. 1) ¶¶ 9-10.) Whether because a voter inadvertently cast a ballot without a witness or because a voter was aware of the "cure" procedure and thus, willfully did not cast a ballot with a witness, there will be voters whose ballots are cast without a witness. Accordingly, this court finds that Plaintiffs have demonstrated a likelihood of success on the merits in proving that the Witness Requirement Cure Procedure indicated in Memo 2020-19 creates disparate treatment.

Thus, because Plaintiffs have demonstrated a likelihood of success on the merits with respect to arbitrary and disparate treatment that may result from under Witness Requirement Cure Procedure in Revised Memo 2020-19, this court finds Plaintiffs have established a likelihood of success on their Equal Protection claim.

ii. Receipt Deadline Extension

This court finds that Plaintiffs are likely to succeed on their Equal Protection challenge to the Receipt Deadline Extension in Revised Memo 2020-19.

Under N.C. Gen. Stat. § 163-231(b), in order to be counted, civilian absentee ballots must have been received by the county board office by 5 p.m. on Election Day, November 3, 2020, or if postmarked by Election Day, by 5:00 p.m. on November 6, 2020. The guidance in Revised Memo 2020-19 extends the time in which absentee ballots must be returned, allowing a late civilian ballot to be counted if postmarked on or before Election Day and received by 5:00 p.m. on November 12, 2020 (Revised Memo 2020-19 (Doc. 36-3) at 5.)

Alliance Intervenors argue that, "[t]o the extent Numbered Memo 2020-22 introduces a new deadline, it affects only the counting of ballots for election officials after Election Day has passed – not when voters themselves must submit their ballots. All North Carolina absentee voters still must mail their ballots by Election Day." (Alliance Resp. (Doc. 64) at 21.)

This court disagrees, finding Plaintiffs have demonstrated a likelihood of success on the merits in proving that this change contravenes the express deadline established by the General Assembly, by extending the deadline from three days after Election Day, to nine days after Election Day. Moreover, it results in disparate treatment, as voters like Individual Plaintiffs returned their ballots within the time-frame permitted under state law, (Wise Compl. (Doc. 1) ¶ 25; Moore Compl. (Doc. 1) ¶¶ 9-10), but other voters whose ballots would otherwise not be counted if received three days after Election Day, will now have an additional six days to return their ballot.

Because Plaintiffs have demonstrated a likelihood of success on the merits in proving arbitrary and disparate treatment may result under the Receipt Deadline Extension, this court finds Plaintiffs have established a likelihood of success on the merits of their Equal Protection claim.

iii. Drop Box Cure Procedure

***20** Plaintiffs have failed to establish a likelihood of success, however, on their Equal Protection challenge to the Drop Box Cure Procedure indicated in Numbered Memo 2020-23. (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4).)

N.C. Gen. Stat. § 163-226.3(a)(5) makes it a felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections.

"Because of this provision in the law," and the need to ensure compliance with it, SBE recognized in Memo 2020-23 that, "an absentee ballot may not be left in an unmanned drop box," (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4) at 2), and directed county boards which have a "drop box, slot, or similar container at their office" for other business purposes to place a "sign indicating that absentee ballots may not be deposited in it." (Id.)

Moreover, the guidance reminds county boards that they must keep a written log when any person returns an absentee ballot in person, which includes the name of the individual returning the ballot, their relationship to the voter, the ballot number, and the date it was received. (Id. at 3.) If the individual who drops off the ballot is not the voter, their near relative, or legal guardian, the log must also record their address and phone number. (Id.) The guidance also advises county boards that "[f]ailure to comply with the logging requirement, or delivery or an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot." (Id. at 3.) Instead, the guidance advises the county board that they "may ... consider the delivery of a ballot ... in conjunction with other evidence in determining whether the ballot is valid and should be counted." (Id. at 4.)

Plaintiffs argue that this guidance "undermines the General Assembly's criminal prohibition of the unlawful delivery of ballots," (Moore Compl. (Doc. 1) ¶ 68), and "effectively allow[s] voters to use drop boxes for absentee ballots," (Wise Pls.' Mot. (Doc. 43) at 13), and thus, violates the Equal Protection Clause, (Moore Compl. (Doc. 1) ¶ 93). This court disagrees.

Although Numbered Memo 2020-23 was released on September 22, 2020, (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4) at 2), the guidance it contains is not new. Consistent with the guidance in Numbered Memo 2020-23, SBE administrative rules adopted on December 1, 2018, require that any person delivering a ballot to a county board of elections office provide:

(1) Name of voter;

(2) Name of person delivering ballot;

(3) Relationship to voter;

(4) Phone Number (if available) and current address of person delivering ballot;

(5) Date and time of delivery of ballot; and

(6) Signature or mark of person delivering ballot certifying that the information provided is true and correct and that the person is the voter or the voter's near relative as defined in [N.C. Gen. Stat § 163-226(f)] or verifiable legal guardian as defined in [N.C. Gen. Stat. § 163-226(e)].

8 N.C. Admin. Code 18.0102 (2018). Moreover, the administrative rule states that "the county board of elections may consider the delivery of a ballot in accordance with this Rule in conjunction with other evidence in determining whether the container-return envelope has been properly executed according to the requirements of [N.C. Gen. Stat. § 163-231]," (id.), and that "[f]ailure to comply with this Rule shall not constitute evidence sufficient in and of itself to establish that the voter did not lawfully vote his or her ballot." (Id.)

***21** Because the guidance contained in Numbered Memo 2020-23 was already in effect at the start of this election as a result of SBE's administrative rules, Individual Plaintiffs were already subject to it at the time that they cast their votes. Accordingly, because all voters were subject to the same guidance, Plaintiffs have not demonstrated a likelihood of success on the merits in proving disparate treatment.

It is a closer issue with respect to whether Plaintiffs have demonstrated a likelihood of success on the merits in proving that the rules promulgated by Defendant SBE are inconsistent with N.C. Gen. Stat. § 163-226.3(a)(5).

This statute makes it a felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections. Id. It would seem logically inconsistent that the General Assembly would criminalize this behavior, while at the same time, permit ballots returned by unauthorized third parties to be considered valid. Yet, upon review of the legislative history, this court finds the felony statute has been in force since 1979, 1979 N.C. Sess. Laws Ch. 799 (S.B. 519) § 4, https://www.ncleg.gov/enactedlegislation/sessionlaws/pdf/1979-1980/sl1979-799.pdf (last visited Oct. 13, 2020), and in its current form since 2013. 2013 N.C. Sess. Laws 381 (H.B. 589) § 4.6.(a).

That the General Assembly, by not taking legislative action, and instead, permitted SBE's administrative rule and the General Assembly's statute to coexist for nearly two years and through several other elections undermines Plaintiffs' argument that Defendant SBE has acted arbitrarily. For this reason, this court finds that Plaintiffs have not demonstrated a likelihood of success on the merits in proving the arbitrariness of the guidance in Numbered Memo 2020-23 and accordingly, Plaintiffs have failed to establish a likelihood of success on their Equal Protection challenge to Numbered Memo 2020-23.

If the General Assembly believes that SBE's administrative rules are inconsistent with its public policy goals, they are empowered to pass legislation which overturns the practice permitted under the administrative rule.

iv. Postmark Requirement Changes

Similarly, this court finds that Plaintiffs have failed to establish likelihood of success on the merits with respect to their Equal Protection challenge to the Postmark Requirement Changes in Numbered Memo 2020-22. (Wise, 1:20CV912, Memo 2020-22 (Doc. 1-3).)

Under Numbered Memo 2020-22, a ballot will be considered postmarked by Election Day if it has a USPS postmark, there is information in BallotTrax, or "another tracking service offered by the USPS or a commercial carrier, indicat[es] that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." (Id. at 3.) This court finds that these changes are consistent with N.C. Gen. Stat. § 163-231(b)(2)b, which does not define what constitutes a "postmark," and instead, merely states that ballots received after 5:00 p.m. on Election Day may not be accepted unless the ballot is "postmarked and that postmark is dated on or before the day of the ... general election ... and are received by the county board of elections not later than three days after the election by 5:00 p.m."

In the absence of a statutory definition for postmark, this court finds Plaintiffs have not demonstrated a likelihood of success on the merits in proving that Numbered Memo 2020-22 is inconsistent with N.C. Gen. Stat. § 163-231(b)(2)b, and thus, arbitrary. If the General Assembly believes

that the Postmark Requirement Changes indicated in Memo 2020-22 are inconsistent with its public policy goals, they are empowered to pass legislation which further specifies the definition of a "postmark." In the absence of such legislation, however, this court finds that Plaintiffs have failed to establish a likelihood of success on the merits of their Equal Protection challenge.

4. Irreparable Harm

***22** In addition to a likelihood of success on the merits, a plaintiff must also make a "clear showing that it is likely to be irreparably harmed absent preliminary relief" in order to obtain a preliminary injunction. UBS Fin. Servs. Inc. v. Carilion Clinic, 880 F. Supp. 2d 724, 733 (E.D. Va. 2012) (quoting Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 347 (4th Cir. 2009)). Further, an injury is typically deemed irreparable if monetary damages are inadequate or difficult to ascertain. See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994), abrogated on other grounds by Winter, 555 U.S. at 22, 129 S.Ct. 365. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014). "[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin th[ese] law[s]." Id.

The court therefore finds Plaintiffs have demonstrated a likelihood of irreparable injury regarding the Equal Protection challenges to the Witness Requirement and the Receipt Deadline Extension.

5. Balance of Equities

The third factor in determining whether preliminary relief is appropriate is whether the plaintiff demonstrates "that the balance of equities tips in his favors." Winter, 555 U.S. at 20, 129 S.Ct. 365.

The Supreme Court's decision in Purcell v. Gonzalez, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006), urges that this court should issue injunctive relief as narrowly as possible. The Supreme Court has made clear that "lower federal courts should ordinarily not alter the election rules on the eve of an election," Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. ——, ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (per curiam), as a court order affecting election rules will progressively increase the risk of "voter confusion" as "an election draws closer." Purcell, 549 U.S. at 4-5, 127 S.Ct. 5; see also Texas All. for Retired Americans v. Hughs, —— F.3d ——, ——, 2020 WL 5816887, at *2 (5th Cir. Sept. 30, 2020) ("The principle ... is clear: court changes of election laws close in time to the election are strongly disfavored."). This year alone, the Purcell doctrine of noninterference has been invoked by federal courts in cases involving witness requirements and cure provisions during COVID-19, Clark v. Edwards, Civil Action No. 20-283-SDD-RLB, —— F.Supp.3d ——, —— – ——, 2020 WL 3415376, at *1-2 (M.D. La. June 22, 2020); the implementation of an all-mail election plan developed by county election officials, Paher v. Cegavske, 2020 WL 2748301, at *1, *6 (D. Nev. 2020); and the use of college IDs for voting, Common Cause v. Thomsen, No. 19-cv-323-JDP, 2020 WL 5665475, at *1 (W.D. Wis. Sept. 23, 2020) – just to name a few.

Purcell is not a per se rejection of any injunctive relief close to an election. However, as the Supreme Court's restoration of the South Carolina witness requirement last week illustrates, a heavy thumb on the scale weighs against changes to voting regulations. Andino v. Middleton, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J., concurring) ("By enjoining South Carolina's witness requirement shortly before the election, the District Court defied [the Purcell] principle and this Court's precedents.").

In this case, there are two SBE revisions where this court has found that Plaintiffs are likely to succeed on the merits. First, the Witness Requirement Cure Procedure, which determines whether SBE will send the voter a cure certification or spoil the ballot and issue a new one. This court has, on separate grounds, already enjoined the Witness Requirement Cure Procedure in Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457, 2020 WL 6058048 (M.D.N.C. Oct. 14, 2020) (enjoining witness cure procedure). Thus, the issue of injunctive relief on the Witness Requirement Cure Procedure is moot at this time. Nevertheless, in the absence of relief in Democracy, it seems likely that SBE's creation of "preferred class[es] of voters", Gray, 372 U.S. at 380, 83 S.Ct. 801, with elimination of the witness requirement and the cure procedure could merit relief in this case.

***23** Ripe for this court's consideration is the Receipt Deadline Extension, which contradicts state statutes regarding when a ballot may be counted. Ultimately, this court will decline to enjoin the Receipt Deadline Extension, in spite of its likely unconstitutionality and the potential for irreparable injury. The Purcell doctrine dictates that this court must "ordinarily" refrain from interfering with election rules. Republican Nat'l Comm., 140 S. Ct. at 1207. These issues may be taken up by federal courts after the election, or at any time in state courts and the legislature. However, in the middle of an election, less than a month before Election Day itself, this court cannot cause "judicially created confusion" by changing election rules. Id. Accordingly, this court declines to impose a preliminary injunction because the balance of equities weighs heavily against such an injunction.

E. Plaintiffs' Electors Clause and Elections Clause Claims

As an initial matter, this court will address the substantive issues of the Electors Clause and the Elections Clause together. The Electors Clause of the U.S. Constitution requires "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President. U.S. Const. art. II, § 1, cl. 2. Plaintiffs in Wise argue that, in order to "effectuate" this Electors requirement, "the State must complete its canvas of all votes cast by three weeks after the general election" under N.C. Gen. Stat. § 163-182.5(c). (Wise Pls.' Mot. (Doc. 43) at 15.) Plaintiffs argue that (1) the extension of the ballot receipt deadline and (2) the changing of the postmark requirement "threaten to extend the process and threaten disenfranchisement," as North Carolina "must certify its electors by December 14 or else lose its voice in the Electoral College. (Id.)

The meaning of "Legislature" within the Electors Clause can be analyzed in the same way as "Legislature" within the Elections Clause. For example,

> As an initial matter, the Court finds no need to distinguish between the term 'Legislature' as it is used in the Elections Clause as opposed to the Electors Clause. Not only were both these clauses adopted during the 1787 Constitutional Convention, but the clauses share a "considerable similarity.
>
> ....
>
> ... [T]he Court finds that the term "Legislature" is used in a sufficiently similar context in both clauses to properly afford the term an identical meaning in both instances.

Donald J. Trump for President, Inc. v. Bullock, No. CV 20-66-H-DLC, —— F.Supp.3d ——, ——, 2020 WL 5810556, at *11 (D. Mont. Sept. 30, 2020). Nor do Plaintiffs assert any difference in the meaning they assign to "Legislature" and its authority between the two Clauses.

This court finds that all Plaintiffs lack standing under either Clause. The discussion infra of the Elections Clause applies equally to the Electors Clause.

1. Elections Clause

a. Standing

The Elections Clause standing analysis differs in Moore and Wise, though this court ultimately arrives at the same conclusion in both cases.

i. Standing in Wise

In Wise, Plaintiffs are private parties clearly established by Supreme Court precedent to have no standing to contest the Elections Clause in this manner. Plaintiffs are individual voters, a campaign committee, national political parties, and two Members of the U.S. House of Representatives. Even though Plaintiffs are part of the General Assembly, they bring their Elections Clause claim alleging an institutional harm to the General Assembly. Though the Plaintiffs claim to have suffered "immediate and irreparable harm", (Wise Compl. (Doc. 1) ¶¶ 100, 109), this does not establish standing for their Elections Clause claim or Electors Clause claim. See Corman v. Torres, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) ("[T]he Elections Clause claims asserted in the verified complaint belong, if they belong to anyone, only to the ... General Assembly."). The Supreme Court has already held that a private citizen does not have standing to bring an Elections Clause challenge without further, more particularized harms. See Lance, 549 U.S. at 441-42, 127 S.Ct. 1194 ("The only injury [private citizen] plaintiffs allege is that ... the Elections Clause ... has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance

in the past."). Plaintiffs allege no such extra harms, and in fact, do not speak to standing in their brief at all.

ii. Standing in Moore

***24** In Moore, both Plaintiff Moore and Plaintiff Berger are leaders of chambers in the General Assembly. The Plaintiffs allege harm stemming from SBE flouting the General Assembly's institutional authority. (Wise Pls.' Mot. (Doc. 43) at 16.) However, as Proposed Intervenors NC Alliance argue, "a subset of legislators has no standing to bring a case based on purported harm to the Legislature as a whole." (Alliance Resp. (Doc. 64) at 15.) The Supreme Court has held that legislative plaintiffs can bring Elections Clause claims on behalf of the legislature itself only if they allege some extra, particularized harm to themselves – or some direct authority from the whole legislative body to bring the legal claim. Specifically, the Supreme Court found a lack of standing where "[legislative plaintiffs] have alleged no injury to themselves as individuals"; where "the institutional injury they allege is wholly abstract and widely disperse"; and where the plaintiffs "have not been authorized to represent their respective Houses of Congress in this action." Raines v. Byrd, 521 U.S. 811, 829, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

An opinion in a very similar case in the Middle District of Pennsylvania is instructive:

> [T]he claims in the complaint rest solely on the purported usurpation of the Pennsylvania General Assembly's exclusive rights under the Elections Clause of the United States Constitution. We do not gainsay that these [two] Senate leaders are in some sense aggrieved by the Pennsylvania Supreme Court's actions. But that grievance alone does not carry them over the standing bar. United States Supreme Court precedent is clear — a legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature.

Corman, 287 F. Supp. 3d at 567. In the instant case, the two members of the legislature do not allege individual injury. The institutional injury they allege is dispersed across the entire General Assembly. The crucial element, then, is whether Moore and Berger are authorized by the General Assembly to represent its interests. The General Assembly has not directly authorized Plaintiffs to represent its interests in this specific case. See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 802, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (finding plaintiff "[t]he Arizona Legislature" had standing in an Elections Clause case only because it was "an institutional plaintiff asserting an institutional injury" which "commenced this action after authorizing votes in both of its chambers"). Moore and Berger argued the general authorization in N.C. Gen. Stat. Section 120-32.6(b), which explicitly authorizes them to represent the General Assembly "[w]henever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court." N.C. Gen. Stat. § 120-32.6(b). The text of § 120-32.6 references N.C. Gen. Stat. § 1-72.2, which further specifies that Plaintiffs will "jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." (emphasis added).

Neither statute, however, authorizes them to represent the General Assembly as a whole when acting as plaintiffs in a case such as this one. See N.C. State Conference of NAACP v. Berger, 970 F.3d 489, 501 (4th Cir. 2020) (granting standing to Moore and Berger in case where North Carolina law was directly challenged, distinguishing "execution of the law" from "defense of a challenged act"). The facts of this case do not match up with this court's prior application of N.C. Gen. Stat. § 1-72.2, which has been invoked where legislators defend the constitutionality of legislation passed by the legislature when the executive declines to do so. See Fisher-Borne v. Smith, 14 F. Supp. 3d 699, 703 (M.D.N.C. 2014). Furthermore, to the extent Plaintiffs Moore and Berger disagree with the challenged provisions of the Consent Judgment, they have not alleged they lack the authority to bring the legislature back into session to negate SBE's exercise of settlement authority. See N.C. Gen. Stat. § 163-22.2.

***25** Thus, even Plaintiff Moore and Plaintiff Berger lack standing to proceed with the Elections Clause claim. Nonetheless, this court will briefly address the merits as well.

2. Merits of Elections Clause Claim

a. The 'Legislature' May Delegate to SBE

The Elections Clause of the U.S. Constitution states that the "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. Plaintiffs

assert that the General Assembly instituted one such time/place/manner rule regarding the election by passing H.B. 1169. Therefore, Plaintiffs argue, SBE "usurped the General Assembly's authority" when it "plainly modif[ied]" what the General Assembly had implemented. (Wise Pls.' Mot. (Doc. 43) at 14.)

The Elections Clause certainly prevents entities other than the legislature from unilaterally tinkering with election logistics and procedures. However, Plaintiffs fail to establish that the Elections Clause forbids the legislature itself from voluntarily delegating this authority. The "Legislature" of a state may constitutionally delegate the power to implement election rules – even rules that may contradict previously enacted statutes.

State legislatures historically have the power and ability to delegate their legislative authority over elections and remain in compliance with the Elections Clause. Ariz. State Legislature, 576 U.S. at 816, 135 S.Ct. 2652 (noting that, despite the Elections Clause, "States retain autonomy to establish their own governmental processes"). Here, the North Carolina General Assembly has delegated some authority to SBE to contravene previously enacted statutes, particularly in the event of certain "unexpected circumstances." (SBE Resp. (Doc. 65) at 15.)

The General Assembly anticipated that SBE may need to implement rules that would contradict previously enacted statutes. See N.C. Gen. Stat. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this Chapter." (emphasis added)). Plaintiffs claim that "[t]he General Assembly could not, consistent with the Constitution of the United States, delegate to the Board of Elections the power to suspend or re-write the state's election laws." (Wise Compl. (Doc. 1) ¶ 97.) This would mean that the General Assembly could not delegate any emergency powers to SBE. For example, if a hurricane wiped out all the polling places in North Carolina, Plaintiffs' reading of the Constitution would prohibit the legislature from delegating to SBE any power to contradict earlier state law regarding election procedures. (See SBE Resp. (Doc. 65) at 15).

As courts have adopted a broad understanding of "Legislature" as written in the Elections Clause, see Corman, 287 F. Supp. 3d at 573, it follows that a valid delegation from the General Assembly allowing SBE to override the General Assembly in certain circumstances would not be unconstitutional. See Donald J. Trump for President, ––– F.Supp.3d at ––––, 2020 WL 5810556, at *12 (finding that the legislature's "decision to afford" the Governor certain statutory powers to alter the time/place/manner of elections was legitimate under the Elections Clause).

b. Whether SBE Exceeded Legitimate Delegated Powers

***26** The true question becomes, then, whether SBE was truly acting within the power legitimately delegated to it by the General Assembly. Even Proposed Intervenors NC Alliance note that SBE's actions "could ... constitute plausible violations of the Elections Clause if they exceeded the authority granted to [SBE] by the General Assembly." (Alliance Resp. (Doc. 64) at 19.)

SBE used two sources of authority to enter into the Consent Agreement changing the laws and rules of the election process after it had begun: N.C. Gen. Stat. § 163-22.2 and § 163-27.1.

i. SBE's Authority to Avoid Protracted Litigation

First, this court finds that, while N.C. Gen. Stat. § 163-22.2 authorizes agreements in lieu of protracted litigation, it does not authorize the extensive measures taken in the Consent Agreement:

> In the event any portion of Chapter 163 of the General Statutes or any State election law or form of election of any county board of commissioners, local board of education, or city officer is held unconstitutional or invalid by a State or federal court or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act of 1965 and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of this Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly. The State Board of Elections shall also be authorized, upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes.

N.C. Gen. Stat. § 163-22.2. While the authority delegated under this statute is broad, it limits SBE's powers to implementing rules that "do not conflict with any provisions of this Chapter." Moreover, this power appears to exist only "until such time as the General Assembly convenes." Id. By eliminating the witness requirement, SBE implemented a rule that conflicted directly with the statutes enacted by the North Carolina legislature.

Moreover, SBE's power to "enter into agreement with the courts in lieu of protracted litigation" is limited by the language "until such time as the General Assembly convenes." Id. Plaintiffs appear to have a remedy to what they contend is an overreach of SBE authority by convening.

ii. SBE's Power to Override the Legislature in an Emergency

Second, Defendants rely upon N.C. Gen. Stat. § 163-27.1. That statute provides:

> (a) The Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by any of the following:
>
> (1) A natural disaster.
>
> (2) Extremely inclement weather.
>
> (3) An armed conflict involving Armed Forces of the United States, or mobilization of those forces, including North Carolina National Guard and reserve components of the Armed Forces of the United States.

N.C. Gen. Stat. § 163-27.1(a)(1-3). As neither (a)(2) or (3) apply, the parties agree that only (a)(1), a natural disaster, is at issue in this case. On March 10, 2020, the Governor of North Carolina declared a state of emergency as a result of the spread of COVID-19. N.C. Exec. Order No. 116 (March 10, 2020). Notably, the Governor did not declare a disaster pursuant to N.C. Gen. Stat. § 166A-19.21. Instead, on March 25, 2020, it was the President of the United States who declared a state of disaster existed in North Carolina:

> ***27** I have determined that the emergency conditions in the State of North Carolina resulting from the Coronavirus Disease 2019 (COVID-19) pandemic beginning on January 20, 2020, and continuing, are of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of North Carolina.

Notice, North Carolina; Major Disaster and Related Determinations, 85 Fed. Reg. 20701 (Mar. 25, 2020) (emphasis added). The President cited the Stafford Act as justification for declaring a major disaster. See 42 U.S.C. § 5122(2). Notably, neither the Governor's Emergency Proclamation nor the Presidential Proclamation identified COVID-19 as a natural disaster.

On March 12, 2020, the Executive Director of SBE, Karen Brinson Bell ("Bell"), crafted an amendment to SBE's Emergency Powers rule. Bell's proposed rule change provided as follows:

> (a) In exercising his or her emergency powers and determining whether the "normal schedule" for the election has been disrupted in accordance with G.S. ~~163A-750~~ , 163-27.1, the Executive Director shall consider whether one or more components of election administration has been impaired. The Executive Director shall consult with State Board members when exercising his or her emergency powers if feasible given the circumstances set forth in this Rule.
>
> (b) For the purposes of G.S. ~~163A-750~~ , 163-27.1, the following shall apply:
>
> (1) A natural disaster or extremely inclement weather include ~~a:~~ any of the following:
>
> (A) Hurricane;
>
> (B) Tornado;
>
> (C) Storm or snowstorm;
>
> (D) Flood;
>
> (E) Tidal wave or tsunami;
>
> (F) Earthquake or volcanic eruption;
>
> (G) Landslide or mudslide; or
>
> (H) Catastrophe arising from natural causes ~~resulted~~ and resulting in a disaster declaration by the President of the United States or the ~~Governor.~~ Governor, a national emergency declaration by the President of the United States, or a state of emergency declaration

> issued under G.S. 166A-19.3(19). "Catastrophe arising from natural causes" includes a disease epidemic or other public health incident. The disease epidemic or other public health incident must make [~~that makes~~] it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting [~~place or that creates~~] place, create a significant risk of physical harm to persons in the voting place, or [~~that~~] would otherwise convince a reasonable person to avoid traveling to or being in a voting place.

https://files.nc.gov/ncoah/documents/Rules/RRC/06182020-Follow-up-Tab-B-Board-of-Elections.pdf at 5 (proposed changes in strikethroughs, or underline.) Shortly after submitting the rule change, effective March 20, 2020, SBE declared COVID-19 a natural disaster, attempting to invoke its authority under the Emergency Powers Statute, § 163-27.1. However, the Rules Review Commission subsequently unanimously rejected Bell's proposed rule change, finding in part that there was a "lack of statutory authority as set forth in G.S. 150B-21.9(a)(1)," and more specifically, that "the [SBE] does not have the authority to expand the definition of 'natural disaster' as proposed." North Carolina Office of Administrative Hearings, Rules Review Commission Meeting Minutes (May 21, 2020), at 4 https://files.nc.gov/ncoah/Minutes-May-2020.pdf.

In a June 12, 2020 letter, the Rules Review Commission Counsel indicated that Bell had responded to the committee's findings by stating "that the agency will not be submitting a new statement or additional findings," and, as a result, "the Rule [was] returned" to the agency. Letter re: Return of Rule 08 NCAC 01.0106 (June 12, 2020) at 1 https://files.nc.gov/ncoah/documents/Rules/RRC/06182020-Follow-up-Tab-B-Board-of-Elections.pdf. Despite the Rules Review Commission's rejection of Bell's proposed changes, on July 17, 2020, Bell issued an Emergency Order with the following findings:

> ***28** 18. N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01. 0106 authorize me to exercise emergency powers to conduct an election where the normal schedule is disrupted by a catastrophe arising from natural causes that has resulted in a disaster declaration by the President of the United States or the Governor, while avoiding unnecessary conflict with the laws of North Carolina. The emergency remedial measures set forth here are calculated to offset the nature and scope of the disruption from the COVID-19 disaster.
>
> 19. Pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01. 0106(a) and (b), and after consultation with the State Board, I have determined that the COVID-19 health emergency is a catastrophe arising from natural causes — i.e., a naturally occurring virus — resulting in a disaster declaration by the President of the United States and a declaration of a state of emergency by the Governor, and that the disaster has already disrupted and continues to disrupt the schedule and has already impacted and continues to impact multiple components of election administration.

(Democracy N. Carolina, No. 1:20CV457 (Doc. 101-1) ¶¶ 18-19.) This directly contradicted the Rules Commission's finding that such a change was outside SBE's authority. In keeping with Bell's actions, the State failed to note in argument before this court that Bell's proposal had been rejected explicitly because SBE lacked statutory authority to exercise its emergency powers. In fact, at the close of a hearing before this court, the State made the following arguments:

> but the Rules Review Commission declined to let it go forward as a temporary rule, I think I'm remembering this right, without stating why. But it did not go through.
>
> In the meantime, the president had declared a state of national -- natural disaster declaration. The president had declared a disaster declaration, so under the existing rule, the powers kicked into place.
>
> ....
>
> And the statute that does allow her to make those emergency decisions says in it, in exercising those emergency decisions says in it, in exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this chapter, this chapter being Chapter 163 of the election laws.

(Democracy N. Carolina, No. 1:20CV457, Evidentiary Hr'g Tr. vol. 3 (Doc. 114) at 109.) This court agrees with the Rules Review Commission: re-writing the definition of "natural disaster" is outside SBE's rulemaking authority. N.C. Gen. Stat. § 163-27.1(a)(1) limits the Executive Director's emergency powers to those circumstances where "the normal schedule for the election is disrupted by any of the following: (1) A natural disaster."[7]

Nor does the President's major disaster proclamation define COVID-19 as a "natural disaster" – at least not as

contemplated by the state legislature when § 163-27.1 (or its predecessor, § 163A-750) was passed. To the contrary, the Emergency Powers are limited to an election "in a district where the normal schedule for the election is disrupted." N.C. Gen. Stat. § 163-27.1(a). Nothing about COVID-19 disrupts the normal schedule for the election as might be associated with hurricanes, tornadoes, or other natural disasters.

(a) Elimination of the Witness Requirement

Finally, even if, as SBE argues, it had the authority to enter into a Consent Agreement under its emergency powers, it did not have the power to contradict statutory authority by eliminating the witness requirement. See N.C. Gen. Stat. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this Chapter.") (emphasis added). The legislature implemented a witness requirement and SBE removed that requirement. This is certainly an unnecessary conflict with the legislature's choices.

***29** By the State's own admission, any ballots not subject to witnessing would be unverified. The State of North Carolina argued as much in urging this court to uphold the one-witness requirement:

> As Director Bell testified, it is a basic bedrock principle of elections that you have some form of verifying that the voter is who they say they are; voter verification. As she said, when a voter comes into the poll, whether that is on election day proper or whether it is by –
>
> ....
>
> Obviously, you can't do that when it is an absentee ballot. Because you don't see the voter, you can't ask the questions. So the witness requirement, the purpose of it is to have some means that the person who sent me this is the person -- the person who has sent this absentee ballot is who they say they are. That's the purpose of the witness requirement. The witness is witnessing that they saw this person, and they know who they are, that they saw this person fill out the ballot and prepare the ballot to mail in. And that is the point of it.
>
> And, as Director Bell testified, I mean, we've heard a lot from the Plaintiffs about how many states do not have witness requirements. And that is true, that the majority of states, I think at this point, do not have a witness requirement.
>
> But as Director Bell testified, they're going to have one of two things. They're going to either have the witness requirement, or they're going to have a means of verifying the signature ....
>
> One thing -- and I think that is unquestionably an important State interest. Some means of knowing that this ballot that says it came from Alec Peters actually is from Alec Peters, because somebody else put their name down and said, yes, I saw Alec Peters do this. I saw him fill out this ballot.
>
> Otherwise, we have no way of knowing who the ballot -- whether the ballot really came from the person who voted. It is there to protect the integrity of the elections process, but it is also there to protect the voter, to make sure that the voter knows -- everybody knows that the voter is who they say they are, and so that somebody else is not voting in their place.

Additionally, it is a tool for dealing with voter fraud. (Democracy N. Carolina, No. 1:20CV457, Evidentiary Hr'g Tr. vol. 3 (Doc. 114) at 111-12.) In this hearing, the State continued on to note that "there needs to be some form of verification of who the voter is," which can "either be through a witness requirement or ... through signature verification," but "it needs to be one or the other." (Id. at 115-16.) Losing the witness requirement, according to the State, would mean having "no verification." (Id. at 116.) Contravening a legislatively implemented witness requirement and switching to a system of "no verification," (id.), was certainly not a necessary conflict under § 163-27.1(a).

SBE argues that this court does not have authority to address how this switch contradicted state law and went outside its validly delegated emergency powers. This is a state law issue, as the dispute is over the extent of the Executive Director's authority as granted to her by the North Carolina Legislature. The State claims that, since a North Carolina Superior Court Judge has approved this exercise of authority, this court is obligated to follow that state court judgment. (SBE Resp. (Doc. 65) at 16.)

***30** However, when the Supreme Court of a state has not spoken, federal courts must predict how that highest court would rule, rather than automatically following any state court that might have considered the question first. See Doe v. Marymount Univ., 297 F. Supp. 3d 573, 590 (E.D. Va. 2018)

("[F]ederal courts are not bound to follow state trial court decisions in exercising their supplemental jurisdiction."). The Fourth Circuit has addressed this issue directly in diversity jurisdiction contexts as well:

> a federal court sitting in diversity is not bound by a state trial court's decision on matters of state law. In King v. Order of United Commercial Travelers of America, 333 U.S. 153, 68 S. Ct. 488, 92 L. Ed. 608 (1948), the Supreme Court upheld the Fourth Circuit's refusal to follow an opinion issued by a state trial court in a South Carolina insurance case. The Court concluded, "a Court of Common Pleas does not appear to have such importance and competence within South Carolina's own judicial system that its decisions should be taken as authoritative expositions of that State's 'law.' " Id. at 161, 68 S. Ct. 488.

Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 370 (4th Cir. 2005). In other words, this court's job is to predict how the Supreme Court of North Carolina would rule on the disputed state law question. Id. at 369 ("If the Supreme Court of [North Carolina] has spoken neither directly nor indirectly on the particular issue before us, [this court is] called upon to predict how that court would rule if presented with the issue.")(quotation omitted); Carter v. Fid. Life Ass'n, 339 F. Supp. 3d 551, 554 (E.D.N.C.), aff'd, 740 F. App'x 41 (4th Cir. 2018) ("Accordingly, the court applies North Carolina law, and the court must determine how the Supreme Court of North Carolina would rule."). In predicting how the North Carolina Supreme Court might decide, this court "consider[s] lower court opinions in [North Carolina], the teachings of treatises, and the practices of other states." Twin City Fire Ins. Co., 433 F.3d at 369. This court "follow[s] the decision of an intermediate state appellate court unless there is persuasive data that the highest court would decide differently." Town of Nags Head v. Toloczko, 728 F.3d 391, 397-98 (4th Cir. 2013).

In all candor, this court cannot conceive of a more problematic conflict with the provisions of Chapter 163 of the North Carolina General Statutes than the procedures implemented by the Revised 2020-19 memo and the Consent Order. Through this abandonment of the witness requirement, some class of voters will be permitted to submit ballots with no verification. Though SBE suggests that its "cure" is sufficient to protect against voter fraud, the cure provided has few safeguards: it asks only if the voter "voted" with no explanation of the manner in which that vote was exercised. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1) at 34.) This court believes this is in clear violation of SBE's powers, even its emergency powers under N.C. Gen. Stat. § 163-27.1(a). However, none of this changes the fact that Plaintiffs in both Wise and Moore lack standing to challenge the legitimacy of SBE's election rule-setting power under either the Elections Clause or the Electors Clause.

III. CONCLUSION

This court believes the unequal treatment of voters and the resulting Equal Protection violations as found herein should be enjoined. Nevertheless, under Purcell and recent Supreme Court orders relating to Purcell, this court is of the opinion that it is required to find that injunctive relief should be denied at this late date, even in the face of what appear to be clear violations. For the foregoing reasons, this court finds that in Moore v. Circosta, No. 1:20CV911, Plaintiffs' Motion for Preliminary Injunction should be denied. This court also finds that in Wise v. N. Carolina State Bd. of Elections, No. 1:20CV912, the Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction should be denied.

***31 IT IS THEREFORE ORDERED** that Plaintiffs' Motion for Preliminary Injunction in Moore v. Circosta, No. 1:20CV911, (Doc. 60), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction in Wise v. N. Carolina State Bd. of Elections, No. 1:20CV912, (Doc. 43), is **DENIED**.

All Citations

--- F.Supp.3d ----, 2020 WL 6063332

Footnotes

1 All citations in this Memorandum Opinion and Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

2 In Democracy N. Carolina v. N.C. State Board of Elections, No. 1:20CV457, an order is entered contemporaneously with this Memorandum Opinion and Order enjoining certain aspects of the Revised Memo 2020-19.

3 The Memoranda incorrectly cites this statute as N.C. Gen. Stat. § 163-223.6(a)(5).

4 An additional discussion of the facts related to SBE's use of this court's order in obtaining a Consent Judgment is set out in this court's order in Democracy v. North Carolina State Board of Elections, No. 1:20CV457, 2020 WL 6058048 (M.D.N.C. Oct. 14, 2020) (enjoining witness cure procedure).

5 Defendant SBE and Alliance Intervenors' memoranda filed in opposition to Plaintiffs' motions for a preliminary injunction in Moore are identical to those that each party filed in Wise. (Compare SBE Resp. (Doc. 65) and Alliance Resp. (Doc. 64) with Wise, No. 1:20CV912 (Doc. 45) and Wise, No. 1:20CV912 (Doc. 47).) For clarity and ease, this court will cite only to the briefs Defendant SBE and Alliance Intervenors filed in Moore in subsequent citations.

6 Plaintiffs do not challenge the use of the cure affidavit for ballot deficiencies generally, aside from arguing that the cure affidavit circumvents the statutory Witness Requirement. (See Moore Compl. (Doc. 1) ¶ 93; Wise Compl. (Doc. 1) ¶ 124.) Although not raised by Plaintiffs, this courts finds the indefiniteness of the cure affidavit language troubling as a means of correcting even curable ballot deficiencies.

During oral arguments, Defendants did not and could not clearly define what it means to "vote," (see, e.g., Oral Argument Tr. (Doc. 70) at 130-32), which is all that the affidavit requires voters to attest that they have done. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1) at 34.) Under the vague "I voted" language used in the affidavit, a voter who completed their ballot with assistance from an unauthorized individual; a voter who does not qualify for voting assistance; or a voter who simply delegated the responsibility for completing their ballot to another person could truthfully sign this affidavit, although all three acts are prohibited under state law. See N.C. Gen. Stat. § 163-226.3(a)(1). Because the cure affidavit does not define what it means to vote, voters are permitted to decide what that means for themselves. This presents additional Equal Protection concerns. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." Gray, 372 U.S. at 380, 83 S.Ct. 801. Because the affidavit does not serve as an adequate means to ensure that voters did not engage in unauthorized ballot casting procedures, inevitably, not all voters will be held to the same standards for casting their ballot. This is, by definition, arbitrary and disparate treatment inconsistent with existing state law.

This court's concerns notwithstanding, however, Plaintiffs do not challenge the use of a cure affidavit in other contexts, so this court will decline to enjoin the use of a cure affidavit beyond its application as an alternative for compliance with the Witness Requirement.

7 Notably, Bell makes no finding as to whether this is a Type I, II, or III Declaration of Disaster, which would in turn limit the term of the Disaster Declaration. See, e.g., N.C. Gen. Stat. § 166A-19.21.

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EXHIBIT 7

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You are hereby notified that the Court has entered the following order:

No. 2020AP1971-OA Trump v. Evers

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a supporting legal memorandum, and an appendix have been filed on behalf of petitioners, Donald J. Trump, et al. Responses to the petition have been filed by (1) Governor Tony Evers; (2) the Wisconsin Elections Commission and its Chair, Ann S. Jacobs; (3) Scott McDonell, Dane County Clerk, and Alan A. Arnsten and Joyce Waldrop, members of the Dane County Board of Canvassers; and (4) George L. Christensen, Milwaukee County Clerk, and Timothy H. Posnanski, Richard Baas, and Dawn Martin, members of the Milwaukee County Board of Canvassers. A non-party brief in support of the petition has been filed by the Liberty Justice Center. A motion to intervene, a proposed response of proposed respondents-intervenors, and an appendix have been filed by the Democratic National Committee (DNC) and Margaret J. Andrietsch, Sheila Stubbs,

Ronald Martin, Mandela Barnes, Khary Penebaker, Mary Arnold, Patty Schachtner, Shannon Holsey, and Benjamin Wikler (collectively, "the Biden electors"). The court having considered all of the filings,

IT IS ORDERED that the petition for leave to commence an original action is denied. One or more appeals from the determination(s) of one or more boards of canvassers or from the determination of the chairperson of the Wisconsin Elections Commission may be filed by an aggrieved candidate in circuit court. Wis. Stat. § 9.01(6); and

IT IS FURTHER ORDERED that the motion to intervene is denied as moot.

BRIAN HAGEDORN, J. (*concurring).* I understand the impulse to immediately address the legal questions presented by this petition to ensure the recently completed election was conducted in accordance with the law. But challenges to election results are also governed by law. All parties seem to agree that Wis. Stat. § 9.01 (2017–18)[1] constitutes the "exclusive judicial remedy" applicable to this claim. § 9.01(11). After all, that is what the statute says. This section provides that these actions should be filed in the circuit court, and spells out detailed procedures for ensuring their orderly and swift disposition. See § 9.01(6)–(8). Following this law is not disregarding our duty, as some of my colleagues suggest. It is following the law.

Even if this court has constitutional authority to hear the case straightaway, notwithstanding the statutory text, the briefing reveals important factual disputes that are best managed by a circuit court.[2] The parties clearly disagree on some basic factual issues, supported at times by competing affidavits. I do not know how we could address all the legal issues raised in the petition without sorting through these matters, a task we are neither well-positioned nor institutionally designed to do. The statutory process assigns this responsibility to the circuit court. Wis. Stat. § 9.01(8)(b) ("The [circuit] court shall separately treat disputed issues of procedure, interpretations of law, and findings of fact.").

We do well as a judicial body to abide by time-tested judicial norms, even—and maybe especially—in high-profile cases. Following the law governing challenges to election results is no threat to the rule of law. I join the court's denial of the petition for original action so that the petitioners may promptly exercise their right to pursue these claims in the manner prescribed by the legislature.

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[1] All subsequent references to the Wisconsin Statutes are to the 2017–18 version.

[2] The legislature generally can and does set deadlines and define procedures that circumscribe a court's competence to act in a given case. Village of Trempealeau v. Mikrut, 2004 WI 79, ¶9–10, 273 Wis. 2d 76, 681 N.W.2d 190. The constitution would obviously override these legislative choices where the two conflict.

PATIENCE DRAKE ROGGENSACK, C.J. *(dissenting)*. Before us is an emergency petition for leave to commence an original action brought by President Trump, Vice President Pence and Donald Trump for President, Inc., against Governor Evers, the Wisconsin Elections Commission (WEC), its members and members of both the Milwaukee County Board of Canvassers and the Dane County Board of Canvassers. The Petitioners allege that the WEC and election officials caused voters to violate various statutes in conducting Wisconsin's recent presidential election. The Petitioners raised their concerns during recount proceedings in Dane County and Milwaukee County. Their objections were overruled in both counties.

The Respondents argue, in part, that we lack subject matter jurisdiction because of the "exclusive judicial remedy" provision found in Wis. Stat. § 9.01(11) (2017-18).[3] Alternatively, the Respondents assert that we should deny this petition because fact-finding is required, and we are not a fact-finding tribunal.

I conclude that we have subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); City of Eau Claire v. Booth, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738. Furthermore, time is of the essence.

However, fact-finding may be central to our evaluation of some of the questions presented. I agree that the circuit court should examine the record presented during the canvasses to make factual findings where legal challenges to the vote turn on questions of fact. However, I dissent because I would grant the petition for original action, refer for necessary factual findings to the circuit court, who would then report its factual findings to us, and we would decide the important legal questions presented.

I also write separately to emphasize that by denying this petition, and requiring both the factual questions and legal questions be resolved first by a circuit court, four justices of this court are ignoring that there are significant time constraints that may preclude our deciding significant legal issues that cry out for resolution by the Wisconsin Supreme Court.

I. DISCUSSION

The Petitioners set out four categories of absentee votes that they allege should not have been counted because they were not lawfully cast: (1) votes cast during the 14-day period for in-person absentee voting at a clerk's office with what are alleged to be insufficient written requests for absentee ballots, pursuant to Wis. Stat. § 6.86(1)(b); (2) votes cast when a clerk has completed information missing from the ballot envelope, contrary to Wis. Stat. § 6.87(6d); (3) votes cast by those who obtained an absentee ballot after March 25, 2020 by alleging that they were indefinitely

[3] All subsequent references to the Wisconsin Statutes are to the 2017–18 version.

confined; and (4) votes cast in Madison at "Democracy in the Park" events on September 26 and October 3, in advance of the 14-day period before the election, contrary to Wis. Stat. § 6.87.

Some of the Respondents have asserted that WEC has been advising clerks to add missing information to ballot envelopes for years, so the voters should not be punished for following WEC's advice. They make similar claims for the collection of votes more than 14 days before the November 3 election.

If WEC has been giving advice contrary to statute, those acts do not make the advice lawful. WEC must follow the law. We, as the law declaring court, owe it to the public to declare whether WEC's advice is incorrect. However, doing so does not necessarily lead to striking absentee ballots that were cast by following incorrect WEC advice. The remedy Petitioners seek may be out of reach for a number of reasons.

Procedures by which Wisconsin elections are conducted must be fair to all voters. This is an important election, but it is not the last election in which WEC will be giving advice. If we do not shoulder our responsibilities, we leave future elections to flounder and potentially result in the public's perception that Wisconsin elections are unfair. The Wisconsin Supreme Court can uphold elections by examining the procedures for which complaint was made here and explaining to all where the WEC was correct and where it was not.

I also am concerned that the public will misunderstand what our denial of the petition means. Occasionally, members of the public seem to believe that a denial of our acceptance of a case signals that the petition's allegations are either false or not serious. Nothing could be further from the truth. Indeed, sometimes, we deny petitions even when it appears that a law has been violated. Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶¶14–16, 393 Wis. 2d 629, 948 N.W.2d 877 (Roggensack, C.J., dissenting).

II. CONCLUSION

I conclude that we have subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction arises from the Wisconsin Constitution and cannot be impeded by statute. Wis. Const., art. VII, Section 3(2); City of Eau Claire, 370 Wis. 2d 595, ¶7. Furthermore, time is of the essence.

However, fact-finding may be central to our evaluation of some of the questions presented. I agree that the circuit court should examine the record presented during the canvasses to make factual findings where legal challenges to the vote turn on questions of fact. However, I dissent because I would grant the petition for original action, refer for necessary factual findings to the circuit court, who would then report its factual findings to us, and we would decide the important legal questions presented.

I am authorized to state that Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

REBECCA GRASSL BRADLEY, J. (*dissenting*). "It is emphatically the province and duty of the Judicial Department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). The Wisconsin Supreme Court forsakes its duty to the people of Wisconsin in declining to decide whether election officials complied with Wisconsin's election laws in administering the November 3, 2020 election. Instead, a majority of this court passively permits the Wisconsin Elections Commission (WEC) to decree its own election rules, thereby overriding the will of the people as expressed in the election laws enacted by the people's elected representatives. Allowing six unelected commissioners to make the law governing elections, without the consent of the governed, deals a death blow to democracy. I dissent.

The President of the United States challenges the legality of the manner in which certain Wisconsin election officials directed the casting of absentee ballots, asserting they adopted and implemented particular procedures in violation of Wisconsin law. The respondents implore this court to reject the challenge because, they argue, declaring the law at this point would "retroactively change the rules" after the election. It is THE LAW that constitutes "the rules" of the election and election officials are bound to follow the law, if we are to be governed by the rule of law, and not of men.

Under the Wisconsin Constitution, "all governmental power derives 'from the consent of the governed' and government officials may act only within the confines of the authority the people give them. Wis. Const. art. I, § 1." Wisconsin Legislature v. Palm, 2020 WI 42, ¶66, 391 Wis. 2d 497, 942 N.W.2d 900 (Rebecca Grassl Bradley, J., concurring). The Founders designed our "republic to be a government of laws, and not of men . . . bound by fixed laws, which the people have a voice in making, and a right to defend." John Adams, Novanglus: A History of the Dispute with America, from Its Origin, in 1754, to the Present Time, in Revolutionary Writings of John Adams (C. Bradley Thompson ed. 2000) (emphasis in original). Allowing any person, or unelected commission of six, to be "bound by no law or limitation but his own will" defies the will of the people. Id.

The importance of having the State's highest court resolve the significant legal issues presented by the petitioners warrants the exercise of this court's constitutional authority to hear this case as an original action. See Wis. Const. Art. VII, § 3. "The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards." State v. Conness, 106 Wis. 425, 82 N.W. 288, 289 (1900). While the court reserves this exercise of its jurisdiction for those original actions of statewide significance, it is beyond dispute that "[e]lections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our concern but our prompt action." State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)).

The majority notes that an action "may be filed by an aggrieved candidate in circuit court. Wis. Stat. § 9.01(6)." Justice Hagedorn goes so far as to suggest that § 9.01 "constitutes the 'exclusive judicial remedy' applicable to this claim." No statute, however, can circumscribe the

constitutional jurisdiction of the Wisconsin Supreme Court to hear this (or any) case as an original action. "The Wisconsin Constitution IS the law—and it reigns supreme over any statute." Wisconsin Legislature v. Palm, 391 Wis. 2d 497, ¶67 n.3 (Rebecca Grassl Bradley, J., concurring). "The Constitution's supremacy over legislation bears repeating: 'the Constitution is to be considered in court as a paramount law' and 'a law repugnant to the Constitution is void, and . . . courts, as well as other departments, are bound by that instrument.' See Marbury [v. Madison], 5 U.S. (1 Cranch) [137] at 178, 180 [1803])." Mayo v. Wis. Injured Patients and Families Comp. Fund, 2018 WI 78, ¶91, 383 Wis. 2d 1, 914 N.W.2d 678 (Rebecca Grassl Bradley, J., concurring). Wisconsin Statute § 9.01 is compatible with the constitution. While it provides an avenue for aggrieved candidates to pursue an appeal to a circuit court after completion of the recount determination, it does not foreclose the candidate's option to ask this court to grant his petition for an original action. Any contrary reading would render the law in conflict with the constitution and therefore void. Under the constitutional-doubt canon of statutory interpretation, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 247. See also Wisconsin Legislature v. Palm, 391 Wis. 2d 497, ¶31 ("[W]e disfavor statutory interpretations that unnecessarily raise serious constitutional questions about the statute under consideration.").

While some will either celebrate or decry the court's inaction based upon the impact on their preferred candidate, the importance of this case transcends the results of this particular election. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." Purcell v. Gonzalez, 549 U.S. 1, 4 (2006). The majority takes a pass on resolving the important questions presented by the petitioners in this case, thereby undermining the public's confidence in the integrity of Wisconsin's electoral processes not only during this election, but in every future election. Alarmingly, the court's inaction also signals to the WEC that it may continue to administer elections in whatever manner it chooses, knowing that the court has repeatedly declined to scrutinize its conduct. Regardless of whether the WEC's actions affect election outcomes, the integrity of every election will be tarnished by the public's mistrust until the Wisconsin Supreme Court accepts its responsibility to declare what the election laws say. "Only . . . the supreme court can provide the necessary clarity to guide all election officials in this state on how to conform their procedures to the law" going forward. State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)).

The majority's recent pattern of deferring or altogether dodging decisions on election law controversies[4] cannot be reconciled with its lengthy history of promptly hearing cases involving

[4] Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶¶84, 86, 393 Wis. 2d 629, 948 N.W.2d 877 (Rebecca Grassl Bradley, J., dissenting) ("The majority upholds the Wisconsin Elections Commission's violation of Wisconsin law, which irrefutably entitles Howie Hawkins and Angela Walker to appear on Wisconsin's November 2020 general election ballot as candidates for President and Vice President of the United States . . . . In dodging its responsibility to uphold the rule of law, the majority ratifies a grave threat to our republic, suppresses the votes of

voting rights and election processes under the court's original jurisdiction or by bypassing the court of appeals.[5] While the United States Supreme Court has recognized that "a state indisputably has a compelling interest in preserving the integrity of its election process[,]" Burson v. Freeman, 504 U.S. 191, 199 (1992), the majority of this court repeatedly demonstrates a lack of any interest in doing so, offering purely discretionary excuses or no reasoning at all. This year, the majority in Hawkins v. Wis. Elec. Comm'n declined to hear a claim that the WEC unlawfully kept the Green Party's candidates for President and Vice President off of the ballot, ostensibly because the majority felt the candidates' claims were brought "too late."[6] But when litigants have filed cases involving voting rights well in advance of Wisconsin elections, the court has "take[n] a pass,"

Wisconsin citizens, irreparably impairs the integrity of Wisconsin's elections, and undermines the confidence of American citizens in the outcome of a presidential election"); State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("In declining to hear a case presenting issues of first impression immediately impacting the voting rights of Wisconsin citizens and the integrity of impending elections, the court shirks its institutional responsibilities to the people who elected us to make important decisions, thereby signaling the issues are not worthy of our prompt attention."); State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("A majority of this court disregards its duty to the people we serve by inexplicably delaying the final resolution of a critically important and time-sensitive case involving voting rights and the integrity of Wisconsin's elections.").

[5] See, e.g., NAACP v. Walker, 2014 WI 98, ¶¶1, 18, 357 Wis. 2d 469, 851 N.W.2d 262 (2014) (this court took jurisdiction of appeal on its own motion in order to decide constitutionality of the voter identification act enjoined by lower court); Elections Bd. of Wisconsin v. Wisconsin Mfrs. & Commerce, 227 Wis. 2d 650, 653, 670, 597 N.W.2d 721 (1999) (this court granted bypass petition to decide whether express advocacy advertisements advocating the defeat or reelection of incumbent legislators violated campaign finance laws, in absence of cases interpreting applicable statutes); State ex rel. La Follette v. Democratic Party of United States, 93 Wis. 2d 473, 480-81, 287 N.W.2d 519 (1980) (original action deciding whether Wisconsin open primary system was binding on national political parties or infringed their freedom of association), rev'd, Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981); State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 548, 126 N.W.2d 551 (1964) (original action seeking to enjoin state from holding elections pursuant to legislative apportionment alleged to violate constitutional rights); State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 400, 52 N.W.2d 903 (1952) (original action to restrain the state from holding elections based on districts as defined prior to enactment of reapportionment law), overruled in part by Reynolds, 22 Wis. 2d 544; State ex rel. Conlin v. Zimmerman, 245 Wis. 475, 476, 15 N.W.2d 32 (1944) (original action to interpret statutes in determining whether candidate for Governor timely filed papers to appear on primary election ballot).

[6] Hawkins v. Wis. Elec. Comm'n, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (denying the petition for leave to commence an original action).

thereby "irreparably den[ying] the citizens of Wisconsin a timely resolution of issues that impact voter rights and the integrity of our elections." State ex rel. Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)). Having neglected to identify any principles guiding its decisions, the majority leaves Wisconsin's voters and candidates guessing as to when, exactly, they should file their cases in order for the majority to deem them worthy of the court's attention.

The consequence of the majority operating by whim rather than rule is to leave the interpretation of multiple election laws in flux—or worse yet, in the hands of the unelected members of the WEC. "To be free is to live under a government by law . . . . Miserable is the condition of individuals, danger is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of the law . . . ." Judgment in Rex vs. Shipley, 21 St Tr 847 (K.B. 1784) (Lord Mansfield presiding). The Wisconsin Supreme Court has an institutional responsibility to decide important questions of law—not for the benefit of particular litigants, but for citizens we were elected to serve. Justice for the people of Wisconsin means ensuring the integrity of Wisconsin's elections. A majority of this court disregards its duty to the people of Wisconsin, denying them justice.

"No aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under the law." Gabler v. Crime Victims Rights Bd., 2017 WI 67, ¶37, 376 Wis. 2d 147, 897 N.W.2d 384. Once again, a majority of this court instead "chooses to sit idly by,"[7] in a nationally important and time-sensitive case involving voting rights and the integrity of Wisconsin's elections, depriving the people of Wisconsin of answers to questions of statutory law that only the state's highest court may resolve. The majority's "refusal to hear this case shows insufficient respect to the State of [Wisconsin], its voters,"[8] and its elections.

"This great source of free government, popular election, should be perfectly pure." Alexander Hamilton, Speech at New York Ratifying Convention (June 21, 1788), in Debates on the Federal Constitution 257 (J. Elliot ed. 1876). The majority's failure to act leaves an indelible stain on our most recent election. It will also profoundly and perhaps irreparably impact all local, statewide, and national elections going forward, with grave consequence to the State of Wisconsin and significant harm to the rule of law. Petitioners assert troubling allegations of noncompliance with Wisconsin's election laws by public officials on whom the voters rely to ensure free and fair elections. It is not "impulse"[9] but our solemn judicial duty to say what the law is that compels the exercise of our original jurisdiction in this case. The majority's failure to embrace its duty (or even

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[7] United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1609 (2016) (Thomas, J., dissenting from the denial of certiorari).

[8] County of Maricopa, Arizona v. Lopez-Valenzuela, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from the denial of certiorari).

[9] See Justice Hagedorn's concurrence.

an impulse) to decide this case risks perpetuating violations of the law by those entrusted to follow it. I dissent.

I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice ANNETTE KINGSLAND ZIEGLER join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

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EXHIBIT 8

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You are hereby notified that the Court has entered the following order:

No. 2020AP1930-OA Wisconsin Voters Alliance v. Wisconsin Elections Commission

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70 and a supplement thereto, a supporting legal memorandum, and supporting expert reports have been filed on behalf of petitioners, Wisconsin Voters Alliance, et al. A response to the petition has been filed by respondents, Wisconsin Elections Commission, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudsen, and Robert F. Spindell, and a separate response has been filed by respondent Governor Tony Evers. Amicus briefs regarding the issue of whether to grant leave to commence an original action have been filed by (1) Christine Todd Whitman, et al; (2) the City of Milwaukee; (3) Wisconsin State Conference NAACP, et al.; and (4) the Center for Tech and Civic Life. In addition, a motion to intervene has been filed by proposed intervenor-respondent, Democratic National Committee.

After considering all of the filings, we conclude that this petition does not satisfy our standards for granting leave to commence an original action. Although the petition raises time-

sensitive questions of statewide significance, "issues of material fact [would] prevent the court from addressing the legal issues presented." State ex rel. Ozanne v. Fitzgerald, 2011 WI 43, ¶19, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser, J., concurring). It is therefore not an appropriate case in which to exercise our original jurisdiction. Accordingly,

IT IS ORDERED that the petition for leave to commence an original action is denied; and

IT IS FURTHER ORDERED that the motion to intervene is denied as moot.

BRIAN HAGEDORN, J., (*concurring*). The Wisconsin Voters Alliance and a group of Wisconsin voters bring a petition for an original action raising a variety of questions about the operation of the November 3, 2020 presidential election. Some of these legal issues may, under other circumstances, be subject to further judicial consideration. But the real stunner here is the sought-after remedy. We are invited to invalidate the entire presidential election in Wisconsin by declaring it "null"—yes, the whole thing. And there's more. We should, we are told, enjoin the Wisconsin Elections Commission from certifying the election so that Wisconsin's presidential electors can be chosen by the legislature instead, and then compel the Governor to certify those electors. At least no one can accuse the petitioners of timidity.

Such a move would appear to be unprecedented in American history. One might expect that this solemn request would be paired with evidence of serious errors tied to a substantial and demonstrated set of illegal votes. Instead, the evidentiary support rests almost entirely on the unsworn expert report[1] of a former campaign employee that offers statistical estimates based on call center samples and social media research.

This petition falls far short of the kind of compelling evidence and legal support we would undoubtedly need to countenance the court-ordered disenfranchisement of every Wisconsin voter. The petition does not even justify the exercise of our original jurisdiction.

As an initial matter, the Wisconsin Supreme Court is not a fact-finding tribunal. Yet the petition depends upon disputed factual claims. In other words, we couldn't just accept one side's description of the facts or one side's expert report even if we were inclined to believe them.[2] That alone means this case is not well-suited for an original action. The petition's legal support is no less wanting. For example, it does not explain why its challenge to various election processes

[1] After filing their petition for original action, the Petitioners submitted a second expert report. But the second report only provides additional computations based on the assumptions and calculations in the initial expert report.

[2] The Attorney General and Governor offer legitimate arguments that this report would not even be admissible evidence under Wis. Stat. § 907.02 (2017-18).

All subsequent references to the Wisconsin Statutes are to the 2017-18 version.

comes after the election, and not before. Nor does it grapple with how voiding the presidential election results would impact every other race on the ballot, or consider the import of election statutes that may provide the "exclusive remedy."[3] These are just a few of the glaring flaws that render the petition woefully deficient. I therefore join the court's order denying the original action.

Nonetheless, I feel compelled to share a further observation. Something far more fundamental than the winner of Wisconsin's electoral votes is implicated in this case. At stake, in some measure, is faith in our system of free and fair elections, a feature central to the enduring strength of our constitutional republic. It can be easy to blithely move on to the next case with a petition so obviously lacking, but this is sobering. The relief being sought by the petitioners is the most dramatic invocation of judicial power I have ever seen. Judicial acquiescence to such entreaties built on so flimsy a foundation would do indelible damage to every future election. Once the door is opened to judicial invalidation of presidential election results, it will be awfully hard to close that door again. This is a dangerous path we are being asked to tread. The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable.

I do not mean to suggest this court should look the other way no matter what. But if there is a sufficient basis to invalidate an election, it must be established with evidence and arguments commensurate with the scale of the claims and the relief sought. These petitioners have come nowhere close. While the rough and tumble world of electoral politics may be the prism through which many view this litigation, it cannot be so for us. In these hallowed halls, the law must rule.

Our disposal of this case should not be understood as a determination or comment on the merits of the underlying legal issues; judicial review of certain Wisconsin election practices may be appropriate. But this petition does not merit further consideration by this court, much less grant us a license to invalidate every single vote cast in Wisconsin's 2020 presidential election.

I am authorized to state that Justices ANN WALSH BRADLEY, REBECCA FRANK DALLET, and JILL J. KAROFSKY join this concurrence.

ROGGENSACK, C.J. (*dissenting*). It is critical that voting in Wisconsin elections not only be fair, but that the public also perceives voting as having been fairly conducted.

This is the third time that a case filed in this court raised allegations about purely legal questions that concern Wisconsin Elections Commission (WEC) conduct during the November 3,

[3] See Wis. Stat. § 9.01(11) (providing that § 9.01 "constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process"); Wis. Stat. § 5.05(2m)(k) (describing "[t]he commission's power to initiate civil actions" under § 5.05(2m) as the "exclusive remedy for alleged civil violations of chs. 5 to 10 or 12").

2020, presidential election.[4] This is the third time that a majority of this court has turned its back on pleas from the public to address a matter of statewide concern that requires a declaration of what the statutes require for absentee voting. I dissent and write separately because I have concluded that the court has not meet its institutional responsibilities by repeatedly refusing to address legal issues presented in all three cases.

I agree with Justice Hagedorn that we are not a circuit court, and therefore, generally, we do not take cases for which fact-finding is required. Green for Wisconsin v. State Elections Bd., 2006 WI 120, 297 Wis. 2d 300, 301, 723 N.W.2d 418. However, when the legal issue that we wish to address requires it, we have taken cases that do require factual development, referring any necessary factual determinations to a referee or to a circuit court. State ex rel. LeFebre v. Israel, 109 Wis. 2d 337, 339, 325 N.W.2d 899 (1982); State ex rel White v. Gray, 58 Wis. 2d 285, 286, 206 N.W.163 (1973).

We also have taken cases where the issues we wish to address are purely legal questions for which no factual development is required in order to state what the law requires. Wisconsin Legislature v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. The statutory authority of WEC is a purely legal question. There is no factual development required for us to declare what the law requires in absentee voting.

Justice Hagedorn is concerned about some of the relief that Petitioners request. He begins his concurrence saying, "the real stunner here is the sought after remedy." He next relates, "The relief being sought by the petitioners is the most dramatic invocation of judicial power I have ever seen." Then, he concludes with, "this petition does not merit further consideration by this court, much less grant us a license to invalidate every single vote cast in Wisconsin's 2020 presidential election."[5]

Those are scary thoughts, but Justice Hagedorn has the cart before the horse in regard to our consideration of this petition for an original action. We grant petitions to exercise our jurisdiction based on whether the legal issues presented are of state wide concern, not based on the remedies requested. Petition of Heil, 230 Wis. 428, 284 N.W.42 (1938).

Granting a petition does not carry with it the court's view that the remedy sought is appropriate for the legal issues raised. Historically, we often do not provide all the relief requested. Bartlett v. Evers, 2020 WI 68, ¶9, 393 Wis. 2d 172, 945 N.W.2d 685 (upholding some but not all partial vetoes). There have been occasions when we have provided none of the relief requested by the petitioner, but nevertheless declared the law. See Sands v. Menard, Inc., 2010 WI 96, ¶46, 328 Wis. 2d 647, 787 N.W.2d 384 (concluding that while reinstatement is the preferred remedy under

[4] Trump v. Evers, No. 2020AP1971-OA, unpublished order (Wis. S. Ct. Dec. 3, 2020); Mueller v. WEC, No. 2020AP1958-OA, unpublished order (Wis. S. Ct. Dec. 3, 2020) and Wisconsin Voters Alliance v. WEC, No. 2020AP193-OA.

[5] Justice Hagedorn forgets to mention that one form of relief sought by Petitioners is, "Any other relief the Court deems appropriate."

Title VII, it is an equitable remedy that may or may not be appropriate); Coleman v. Percy, 96 Wis. 2d 578, 588-89, 292 N.W.2d 615 (1980) (concluding that the remedy Coleman sought was precluded).

We have broad subject matter jurisdiction that enables us to grant the petition for original action pending before us. Our jurisdiction is grounded in the Wisconsin Constitution. Wis. Const., art. VII, Section 3(2); City of Eau Claire v. Booth, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738.

I dissent because I would grant the petition and address the people of Wisconsin's concerns about whether WEC's conduct during the 2020 presidential election violated Wisconsin statutes. As I said as I began, it is critical that voting in Wisconsin elections not only be fair, but that the public also perceives voting as having been fairly conducted. The Wisconsin Supreme Court should not walk away from its constitutional obligation to the people of Wisconsin for a third time.

I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER and REBECCA GRASSL BRADLEY join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

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EXHIBIT 9

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December 3, 2020
Via E-mail to the Clerk of Courts

Chief Justice Patience Roggensack
Wisconsin Supreme Court
110 East Main Street
Suite 215
Madison, Wi. 53701

Dear Chief Justice Roggensack: Re: Trump et al. v. Evers, et al. #not yet assigned (Dane County)
Trump et al. v. Evers, et al. #not yet assigned (Milwaukee County)

This afternoon, pursuant to Wis. Stat. 9.01 et seq, we filed Notices of Appeal from the Recount in Dane County and Milwaukee County conducted from November 20-29, 2020 on the Verified Petition for Recount of Donald J. Trump and Michael R. Pence in accordance with an Order of the Wisconsin Election Commission. A copy of the Notices of Appeal are enclosed. Pursuant to the statute, the appellant will post "an undertaking and surety in the amount approved by the court" and is prepared to post cash as provided in Wis. Stat. 895.346 to such account and in such amount as the court may approve.

Pursuant to Wis. Stat. 9.01(6)(b) we respectfully request that you "appoint a circuit judge, who shall be a reserve judge if available, to hear the appeal."

In order to avoid any delay, we respectfully request the appointed judge hold a "scheduling conference" (Wis. Stat. 9.01(7)(b)) on Friday, December 4, 2020 or Saturday, December 5, 2020 to set the surety amount and set a schedule. Matters to be addressed in that scheduling conference include, but need not be limited to, the dates for filing a complaint, filing an answer, propounding findings of fact and conclusions of law, submitting record evidence, providing supporting legal memoranda, oral hearings, if any, and final order. Given the time limitations inherent in the election for President, Appellants will be prepared to submit their complaint, proposed findings of fact and conclusion of law, the record evidence and legal memoranda on Monday, December 7. As the evidence and other matters to be addressed are limited to those raised at the Boards of Canvassers, completion should be expeditious.

Thank you for your consideration.

Very truly yours,
TROUPIS LAW OFFICE

James R. Troupis

Cc w/ encl. All parties of record in *Trump et al. v. Evers et al* 2020 AP 1971-OA by email (The parties are identical in the two proceedings.)

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DONALD J. TRUMP,
1100 South Ocean Boulevard
Palm Beach, FL 33480,

MICHAEL R. PENCE,
4750 North Meridian Street
Indianapolis, IN 46208,

AND

DONALD J. TRUMP FOR
PRESIDENT, INC.,
725 Fifth Avenue
New York, NY 10022,

Plaintiffs,

v.

JOSEPH R. BIDEN
1209 Barley Mill Road
Wilmington, DE 19807,

KAMALA D. HARRIS
435 N. Kenter Avenue
Los Angeles, CA 90049,

MILWAUKEE COUNTY CLERK
c/o GEORGE L. CHRISTENSON
Milwaukee County Clerk
901 North 9th Street
Milwaukee, WI 53233,

MILWAUKEE COUNTY BOARD OF CANVASSERS
c/o TIMOTHY H. POSNANSKI, Chairman of
Milwaukee County Board of Canvassers
901 North 9th Street
Milwaukee, WI 53233,

WISCONSIN ELECTIONS COMMISSION
212 E. Washington Avenue, Third Floor
Madison, WI 53703,

AND

ANN S. JACOBS,
212 E. Washington Avenue, Third Floor
Madison, WI 53703,

Defendants.

NOTICE OF APPEAL AND APPEAL UNDER WIS. STAT. § 9.01(6)(a)

TO: MILWAUKEE COUNTY CLERK OF COURTS
901 North 9th Street
Milwaukee, Wisconsin 53233

WISCONSIN SUPREME COURT
Attn: CHIEF JUSTICE PATIENCE D. ROGGENSACK
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Madison, WI 53701-1688

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Wilmington, DE 19807

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AMAR PATEL
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MILWAUKEE COUNTY CLERK
901 North 9th Street
Milwaukee, WI 53233

MILWAUKEE COUNTY BOARD
OF CANVASSERS
Attn: TIMOTHY H. POSNANSKI, Chair
901 North 9th Street
Milwaukee, WI 53233

WISCONSIN ELECTIONS COMMISSION
212 E. Washington Avenue, Third Floor
Madison, WI 53703

AND

ANN S. JACOBS,
212 E. Washington Avenue, Third Floor
Madison, WI 53703

PLEASE TAKE NOTICE that the above-named Plaintiffs, by their attorneys, TROUPIS LAW OFFICE and the LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C., hereby appeal to the Circuit Court of Milwaukee County in accordance with Wis. Stat. § 9.01(6)(a), from the determination of the recount of the election for the Offices of President and Vice President of the

United States in Milwaukee County, Wisconsin. Plaintiffs are further prepared, and have sufficient funds available, to post an undertaking and surety in cash, pursuant to Wis. Stat. § 895.346, and will do so as soon as the court approves an amount as required under Wis. Stat. § 9.01(6)(a).

Because Plaintiffs are also filing a notice of appeal under Wis. Stat. § 9.01 from the determination of the recount of the election for the Offices of President and Vice President of the United States in Dane County, Wisconsin, Plaintiffs request and contemporaneously hereby move the Chief Justice of the Wisconsin Supreme Court, the Honorable Patience D. Roggensack, to "consolidate all appeals relating to [such] election and appoint a circuit judge, who shall be a reserve judge if available, to hear the appeal." Wis. Stat. § 9.01(6)(b).

Dated at Madison, Wisconsin this 3rd day of December, 2020.

TROUPIS LAW OFFICE

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CONWAY, OLEJNICZAK & JERRY S.C.

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STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DONALD J. TRUMP,
and
MICHAEL R. PENCE,

Plaintiffs,

v.

JOSEPH R. BIDEN
KAMALA D. HARRIS,
MILWAUKEE COUNTY CLERK
c/o GEORGE L. CHRISTENSON,
MILWAUKEE COUNTY BOARD
OF CANVASSERS
c/o TIMOTHY H. POSNANSKI,
WISCONSIN ELECTION COMMISSION,
and
ANN S. JACOBS,

Defendants.

SURETY AND UNDERTAKING FOR APPEAL

WHEREAS, the Republican Party of Wisconsin (the "Surety") desires to act as surety and give undertaking for the payment of all costs taxed against the appellant in the above-captioned matter pursuant to Wis. Stat. § 9.01(6)(a).

WHEREAS, the Surety has deposited the sum of One Hundred Thousand and 00/100 Dollars ($100,000.00) in an account located at BMO Harris Bank, NA.

NOW, THEREFORE, the undersigned surety does hereby obligate itself under said statutory obligations in the amount of up to One Hundred Thousand and 00/100 Dollars ($100,000.00).

IT IS FURTHER AGREED by the Surety, that contemporaneously with the filing of this document, it shall deposit the sum of Fifty Thousand and 00/100 Dollars ($50,000.00) with the Clerk of Court for Milwaukee County and Fifty Thousand and 00/100 Dollars ($50,000.00) with the Clerk of Court for Dane County or, in the alternative, if these matters are consolidated the Surety shall deposit the sum of One Hundred Thousand and 00/100 Dollars ($100,000.00) with the Clerk of Court for the County as directed by a court having due jurisdiction (the

"Undertaking"). The Undertaking shall be held by the respective county's Clerk of Court as security for the obligations for all costs taxed against the appellant pursuant to Wis. Stat. § 9.01(6)(a).

IT IS FURTHER AGREED by the Surety, that in the case of default or contumacy by the Surety or the appellant, the Court may, upon notice to it of not less than ten (10) days, deduct all costs taxed against the appellant from the Undertaking or proceed summarily and render judgment against the Surety in accordance with its obligation and award execution thereon.

IT IS FURTHER AGREED that the Surety, its successors and assigns, by the signature of the undersigned Chairman, agrees to be bound by the promises set forth herein.

Dated this 3rd day of December, 2020.

REPUBLICAN PARTY OF WISCONSIN

By: *Electronically signed by Andrew Hitt*
Andrew Hitt, its Chairman

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

DONALD J. TRUMP,
1100 South Ocean Boulevard
Palm Beach, FL 33480,

MICHAEL R. PENCE,
4750 North Meridian Street
Indianapolis, IN 46208,

AND

DONALD J. TRUMP FOR
PRESIDENT, INC.,
725 Fifth Avenue
New York, NY 10022,

Plaintiffs,

v.

JOSEPH R. BIDEN
1209 Barley Mill Road
Wilmington, DE 19807,

KAMALA D. HARRIS
435 N. Kenter Avenue
Los Angeles, CA 90049,

DANE COUNTY CLERK
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Dane County Clerk
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DANE COUNTY BOARD
OF CANVASSERS
c/o ALAN A. ARNSTEN, Member of
Dane County Board of Canvassers
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WISCONSIN ELECTIONS COMMISSION
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AND

ANN S. JACOBS, Chair
Wisconsin Elections Commission
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Madison, WI 53703,

Defendants.

NOTICE OF APPEAL AND APPEAL UNDER WIS. STAT. § 9.01(6)(a)

TO: DANE COUNTY CLERK OF COURTS
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WISCONSIN ELECTIONS COMMISSION
212 E. Washington Avenue, Third Floor
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AND

ANN S. JACOBS,
212 E. Washington Avenue, Third Floor
Madison, WI 53703

PLEASE TAKE NOTICE that the above-named Plaintiffs, by their attorneys, TROUPIS LAW OFFICE and the LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C., hereby appeal to the Circuit Court of Dane County in accordance with Wis. Stat. § 9.01(6)(a), from the determination of the recount of the election for the Offices of President and Vice President of the United States in Dane County, Wisconsin. Plaintiffs are further prepared, and have sufficient funds available,

to post an undertaking and surety in cash, pursuant to Wis. Stat. § 895.346, and will do so as soon as the court approves an amount as required under Wis. Stat. § 9.01(6)(a).

Because Plaintiffs are also filing a notice of appeal under Wis. Stat. § 9.01 from the determination of the recount of the election for the Offices of President and Vice President of the United States in Milwaukee County, Wisconsin, Plaintiffs request and contemporaneously hereby move the Chief Justice of the Wisconsin Supreme Court, the Honorable Patience D. Roggensack, to "consolidate all appeals relating to [such] election and appoint a circuit judge, who shall be a reserve judge if available, to hear the appeal." Wis. Stat. § 9.01(6)(b).

Dated at Madison, Wisconsin this 3rd day of December, 2020.

TROUPIS LAW OFFICE

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CONWAY, OLEJNICZAK & JERRY S.C.

By: *Electronically Signed by R. George Burnett*
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Attorneys for Plaintiffs

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

DONALD J. TRUMP,
and
MICHAEL R. PENCE,

Plaintiffs,

v.

JOSEPH R. BIDEN
KAMALA D. HARRIS,
DANE COUNTY CLERK
c/o SCOTT MCDONELL,
DANE COUNTY BOARD
OF CANVASSERS
c/o ALAN A. ARNSTEN,
WISCONSIN ELECTION COMMISSION,
and
ANN S. JACOBS,

Defendants.

SURETY AND UNDERTAKING FOR APPEAL

WHEREAS, the Republican Party of Wisconsin (the "Surety") desires to act as surety and give undertaking for the payment of all costs taxed against the appellant in the above-captioned matter pursuant to Wis. Stat. § 9.01(6)(a).

WHEREAS, the Surety has deposited the sum of One Hundred Thousand and 00/100 Dollars ($100,000.00) in an account located at BMO Harris Bank, NA.

NOW, THEREFORE, the undersigned surety does hereby obligate itself under said statutory obligations in the amount of up to One Hundred Thousand and 00/100 Dollars ($100,000.00).

IT IS FURTHER AGREED by the Surety, that contemporaneously with the filing of this document, it shall deposit the sum of Fifty Thousand and 00/100 Dollars ($50,000.00) with the Clerk of Court for Dane County and Fifty Thousand and 00/100 Dollars ($50,000.00) with the Clerk of Court for Milwaukee County or, in the alternative, if these matters are consolidated the Surety shall deposit the sum of One Hundred Thousand and 00/100 Dollars ($100,000.00) with the Clerk of Court for the County as directed by a court having due jurisdiction (the

"Undertaking"). The Undertaking shall be held by the respective county's Clerk of Court as security for the obligations for all costs taxed against the appellant pursuant to Wis. Stat. § 9.01(6)(a).

IT IS FURTHER AGREED by the Surety, that in the case of default or contumacy by the Surety or the appellant, the Court may, upon notice to it of not less than ten (10) days, deduct all costs taxed against the appellant from the Undertaking or proceed summarily and render judgment against the Surety in accordance with its obligation and award execution thereon.

IT IS FURTHER AGREED that the Surety, its successors and assigns, by the signature of the undersigned Chairman, agrees to be bound by the promises set forth herein.

Dated this 3rd day of December, 2020.

REPUBLICAN PARTY OF WISCONSIN

By: *Electronically signed by Andrew Hitt*
Andrew Hitt, its Chairman

EXHIBIT 10

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

Case No. 2020CV7092

Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc.

Plaintiffs,

v.

Joseph R. Biden, Kamala D. Harris, Milwaukee County Clerk c/o George L. Christenson, Milwaukee County Board of Canvassers c/o Timothy H. Posnanski, Chairman of Milwaukee County Board of Canvassers, Wisconsin Elections Commission, and Ann S. Jacobs

Defendants.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Case No. 2020CV2514

Donald J. Trump, Michael R. Pence, and Donald J. Trump for President, Inc.

Plaintiffs,

v.

Joseph R. Biden, Kamala D. Harris, Dane County Clerk c/o Scott McDonell, Dane County Board of Canvassers c/o Allan A. Arnsten, Member of the Dane County Board of Canvassers, Wisconsin Election Commission, and Ann S. Jacobs

Defendants.

Order for Consolidation and for Appointment of Judicial Officer **ORDER**

You are hereby notified that the Chief Justice of the Wisconsin Supreme Court has issued the following order:

Appeals of the determinations of boards of canvassers or of the determinations of the chairperson of the Wisconsin Elections Commission relating to the November 3, 2020 general election have been filed, pursuant to Wis. Stat. § 9.01(6)(a), in Dane County (Trump v. Biden; Case No. 2020CV2514) and in Milwaukee County (Trump v. Biden; Case No. 2020CV7092). Those appeals relate to an election that was held in more than one judicial district. In such circumstances, Wisconsin Statute § 9.01(6)(b) provides that the Chief Justice of the Supreme Court shall consolidate those appeals and appoint the judge, who shall be a reserve judge if available, to preside over the consolidated appeal. Accordingly,

IT IS ORDERED that Trump v. Biden, Milwaukee County Case No. 2020CV7092, and Trump v. Biden, Dane County Case No. 2020CV2514, shall be consolidated for all purposes in the Milwaukee County Circuit Court under Case No. 2020CV7092; and

IT IS FURTHER ORDERED that Reserve Judge Stephen A. Simanek of Racine County is appointed to preside over the consolidated appeal proceedings in the circuit court.

Dated this 3 day of December 2020.

BY:

Patience D. Roggensack
Chief Justice
Wisconsin Supreme Court

EXHIBIT 11

2020 WL 5887393
Supreme Court of the United States.

Marci ANDINO, et al.
v.
Kylon MIDDLETON, et al.

No. 20A55
|
October 5, 2020

Opinion

***1** The application for stay presented to THE CHIEF JUSTICE and by him referred to the Court is granted in part, and the district court's September 18, 2020 order granting a preliminary injunction is stayed pending disposition of the appeal in the United States Court of Appeals for the Fourth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

The order is stayed except to the extent that any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement.

Justice THOMAS, Justice ALITO, and Justice GORSUCH would grant the application in full.

Justice KAVANAUGH, concurring in grant of application for stay.

The District Court enjoined South Carolina's witness requirement for absentee ballots because the court disagreed with the State's decision to retain that requirement during the COVID–19 pandemic. For two alternative and independent reasons, I agree with this Court's order staying in part the District Court's injunction.

First, the Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States." *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ——, ——, 140 S.Ct. 1613, 1613-1614, 207 L.Ed.2d 154 (2020) (ROBERTS, C. J., concurring in denial of application for injunctive relief) (internal quotation marks and alteration omitted). "When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' " *Ibid.* (quoting *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974); alteration in original). It follows that a State legislature's decision either to keep or to make changes to election rules to address COVID–19 ordinarily "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *South Bay*, 590 U. S., at ——, 140 S.Ct., at 1613-1614 (citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)). The District Court's injunction contravened that principle.

Second, for many years, this Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election. See *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (*per curiam*). By enjoining South Carolina's witness requirement shortly before the election, the District Court defied that principle and this Court's precedents. See —— F. 3d ——, ——– – ——, 2020 WL 5752607 (CA4 2020) (Wilkinson and Agee, JJ., dissenting from denial of stay).

For those two alternative and independent reasons, I agree with this Court's order staying in part the District Court's injunction.

All Citations

--- S.Ct. ----, 2020 WL 5887393 (Mem), 2020 Daily Journal D.A.R. 10,854

End of Document

EXHIBIT 12

865 F.2d 264
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Ninth Circuit.

G. Donald MASSEY; Bruce L. Bax; Donna L. Sergi, Plaintiffs–Appellants,

v.

A. COON, District Judge; Circuit Court of Oregon for Josephine County; Supreme Court of the State of Oregon; L.A. Cushing, District Judge, Defendants–Appellees.

No. 87–3768.
|
Submitted* Nov. 28, 1988.
|
Decided Jan. 3, 1989.

Synopsis
D.Or.

AFFIRMED.

Appeal from the United States District Court for the District of Oregon; James A. Redden, District Judge, Presiding.

Before CHOY, TANG and O'SCANNLAIN, Circuit Judges.

MEMORANDUM**

***1** G. Donald Massey, Bruce L. Bax, and Donna L. Sergi appeal *pro se* the district court's judgment dismissing their action for injunctive and declaratory relief.

Massey, Bax, and Sergi filed an action in federal district court seeking declaratory and injunctive relief against the Oregon Supreme Court, the Circuit Court of Oregon for Josephine County, Oregon State District Judge A. Coon, and Oregon Circuit Judge L.A. Cushing. The complaint alleged that the defendants violated the plaintiffs' federal due process and equal protection rights by unlawfully assigning Coon to serve as circuit court judge *pro tem* in plaintiffs' quiet title action in state court. Defendants moved to dismiss the complaint for failure to state a claim. The magistrate recommended granting dismissal and the district court adopted the magistrate's findings and recommendations and dismissed the action. The appeal now comes before this court.

A. *Jurisdiction Over Bax and Sergi*
This court does not have jurisdiction to hear an appeal by *pro se* appellants who do not personally sign the notice of appeal. *Carter v. Commissioner,* 784 F.2d 1006, 1008 (9th Cir.1986). Bax and Sergi signed neither the original nor the amended notices of appeal. Therefore, Bax and Sergi's appeals must be dismissed.

B. *Massey's Appeal*
Massey contends that Article VII Section 2(a)(3) of the Oregon Constitution and several Oregon statutes (1) prohibit the appointment of a state circuit judge *pro tem* to serve in the judicial district for which the judge was elected; and (2) forbid a state circuit judge to name a judge *pro tem* as that power is reserved to the Oregon Supreme Court.

Massey also contends that such assignment, because it is contrary to state law, violates the due process and equal protection clauses of the Constitution. Assuming, arguendo, that Massey has correctly interpreted state law, we nonetheless conclude that the eleventh amendment bars his suit.

The eleventh amendment prevents federal courts from hearing suits brought against a state without its consent, regardless of the type of relief sought. *See Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984). Massey has failed to indicate any explicit waiver of Oregon's immunity to suit in federal court. He contends that the eleventh amendment is inapplicable because his suit is not in substance brought against the state. He further argues that this suit is excepted from the general jurisdictional bar by the principles of *Ex Parte Young,* 209 U.S. 123 (1908). We reject both arguments.

The eleventh amendment bars any suit nominally brought against individual state officials where the state is the real party in interest.[1] *Pennhurst,* 465 U.S. at 101. A suit for non-monetary relief is in substance against the sovereign if "the

effect of the judgment would be 'to restrain the Government from acting or compel it to act.' " *Pennhurst,* 465 U.S. at 101 n. 11 (citing *Dugan v. Rank,* 372 U.S. 609, 620 (1963)). Here, the relief sought would require the state, acting through its officials, to conform its conduct to state law by appointing a judge from another district to serve as judge *pro tem* in this case.

***2** Massey contends that this suit is not brought against the state for purposes of the eleventh amendment because defendants' actions were outside their delegated power. However, a state official is not entitled to eleventh amendment immunity only when he acts "without any authority whatever." *Pennhurst,* 465 U.S. at 101 n. 11 (citing *Florida Dept. of State v. Treasure Salvors, Inc.,* 458 U.S. 670, 697 (1982) (plurality opinion)). "A claim of error in the exercise of [an official's delegated] power is therefore not sufficient" to support a claim of ultra vires. *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 690 (1949). Oregon's Constitution and statutes clearly did provide a mechanism for appointing judges *pro tem,* even though the procedures may not have been followed correctly in this case. Therefore, this case does not fall within the narrow scope of the ultra vires doctrine as enunciated by the Supreme Court. The action against Judges Coon and Cushing was thus in substance an action against the state.

Massey argues that if the suit is deemed to be one against the state, it is not barred by the eleventh amendment because it falls under the exception enunciated in *Ex Parte Young. Young* provides that a suit for injunctive relief challenging a state official's action under the Constitution is not considered a suit against the state for purposes of the eleventh amendment. *Young,* 209 U.S. at 167. Although on its face the complaint states a claim under the due process and equal protection clauses of the Constitution, these constitutional claims are entirely based on the failure of defendants to conform to state law. "[W]hen a plaintiff alleges that a state official has violated *state* law.... the entire basis for the doctrine of *Young* ... disappears." *Pennhurst,* 465 U.S. at 106 (emphasis in original). Therefore, the *Young* exception does not apply and the district court correctly dismissed the suit against Judges Coon and Cushing.

Finally, the district court properly dismissed Massey's action without leave to amend. Where amendment of the complaint would have served no purpose because the acts complained of could not constitute a cognizable claim for relief, it is not error to dismiss a complaint without leave to amend. *See Jones v. Community Redevelopment Agency,* 733 F.2d 646, 650 (9th Cir.1984). No restatement of Massey's claim could constitute a claim for relief cognizable in federal court.[2]

AFFIRMED.

All Citations

865 F.2d 264 (Table), 1989 WL 884

Footnotes

* The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed.R.App.P. 34(a), Ninth Circuit Rule 34–4.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36–3.

1 We consider only the claims against Judges Coon and Cushing because Massey does not argue on appeal that the district court erred in its determination that the state court defendants are immune from suit in federal court.

2 We also deny Massey's motion to file an amended opening brief. The amended brief adds no new arguments and would have no effect on the outcome of this case.

EXHIBIT 13

607 Fed.Appx. 177
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued
on or after Jan. 1, 2007. See also U.S.Ct. of
Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals,
Third Circuit.

Mark BALSAM; Charles Donahue; Hans Henkes; Rebecca Feldman; Jaime Martinez; William Conger; Tia Williams; Independent Voter Project; Committee for a Unified Independent Party Inc, doing business as Independentvoting.Org, Appellants

v.

SECRETARY of the State OF NEW JERSEY.

No. 14–3882.
|
Argued March 17, 2015.
|
Filed: April 8, 2015.

Synopsis

Background: Voters commenced action against New Jersey's Secretary of State, alleging that closed primary election scheme violated § 1983, New Jersey Civil Rights Act, First and Fourteenth Amendments, and New Jersey Constitution. The United States District Court for the District of New Jersey, Stanley R. Chesler, J., 2014 WL 4054051, dismissed the complaint. Voters appealed.

Holdings: The Court of Appeals, Jordan, Circuit Judge, held that:

fundamental right to meaningfully participate at all stages of election did not guarantee participation in primary elections;

Ex Parte Young 's exception to Eleventh Amendment immunity did not apply; and

supplemental jurisdiction statute did not authorize district court to exercise jurisdiction over claims against non-consenting States.

Affirmed.

***178** On Appeal from the United States District Court for the District of New Jersey (D.C. No. 2–14–cv–01388), District Judge: Hon. Stanley R. Chesler.

Attorneys and Law Firms

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Richard T. Robol, Esq., Columbus, OH, for Amici Independent Ohio, Independent Pennsylvanians, Massachusetts Coalition of Independent Voters, North Carolina Independents, Utah League of Independent Voters, and Virginia Independent Voters Association.

Before: SMITH, JORDAN, and VAN ANTWERPEN, Circuit Judges.

OPINION[*]

JORDAN, Circuit Judge.

The Appellants challenge an order of the United States District Court for the District of New Jersey dismissing their complaint. We will affirm.

I. Background

A. New Jersey's Closed Primary Election System

New Jersey has created a comprehensive statutory scheme to govern elections in the state. *See* N.J. Stat. Ann. §§ 19:1–1 ***179** to 19:63–28. A "general" election is held on the first Tuesday after the first Monday in November, at which time voters "elect persons to fill public office." *Id.* at § 19:1–1. There are two ways in which a candidate can secure a place on the ballot for a general election. The first is to be nominated by a political party in a primary election; the second is to submit a petition with the requisite number of signatures.

Under the first option, "members of a political party ... nominate candidates" in the month of June "to be voted for at general elections." *Id.* at §§ 19:1–1 and 19:2–1. New Jersey law defines a "political party" as any party that garners at least ten percent of the votes cast in the last general election for the office of a member of the General Assembly. *Id.* at § 19:1–1. To appear on a primary election ballot, a candidate must file a nominating petition accompanied by the requisite number of signatures at least sixty-four days before the primary election. *Id.* at §§ 19:23–8 and 19:23–14. To be eligible to vote in a political party's primary election, a voter must be deemed a member of that party at least fifty-five days before the election, unless the voter is newly registered or the voter has not previously voted in a primary election. *Id.* at § 19:23–45. The state bears the cost of conducting primary elections. *Id.* at § 19:45–1.

Under the second option, candidates unaffiliated with a political party may "bypass the primary election and proceed directly to the general election" upon submission of a petition bearing the necessary number of signatures. *Council of Alt. Political Parties v. Hooks,* 179 F.3d 64, 69 (3d Cir.1999); *see also* N.J. Stat. Ann. §§ 19:13–3 to 19:13–13.

B. The Appellants' Complaint

Appellants Mark Balsam, Charles Donahue, Hans Henkes, and Rebecca Feldman are registered as unaffiliated voters, which means that they were not permitted to vote in New Jersey's 2013 primary election because they "exercis[ed] their right not to affiliate with either the Democratic or Republican parties." (Opening Br. at 10.) Appellant Jaime Martinez is a registered Democrat, and Appellants William Conger and Tia Williams are registered Republicans; each of whom was, as the Appellants put it, "required to forfeit their right of non-association in order to exercise their right to vote in the 2013 Primary Election." (Opening Br. at 11.) Appellants Independent Voter Project and Committee for a Unified Independent Party, Inc., "seek to protect the rights of all voters to cast a meaningful vote." (Opening Br. at 11.)

Appellants filed this lawsuit against Kim Guadagno in her official capacity as New Jersey's Secretary of State, alleging violations of (1) 42 U.S.C. § 1983; (2) the New Jersey Civil Rights Act, N.J. Stat. Ann. § 10:6–2(c); (3) the First and Fourteenth Amendments of the United States Constitution; and (4) Article II, Section I and Article VIII, Section III of the New Jersey Constitution. In their complaint, the Appellants sought three forms of relief: (1) an order declaring the state's primary election scheme unconstitutional on its face and as applied; (2) an injunction restraining the state from funding and administering its current primary election scheme; and (3) an order directing the state legislature or Secretary of State to implement a different primary election scheme, in keeping with the Appellants' views of the United States Constitution.

C. Procedural History

Guadagno filed a motion to dismiss, which the District Court granted. The Court held that "[a]ny attempt to use the Constitution to pry open a state-sanctioned ***180** closed primary system is precluded by current Supreme Court doctrine." (App. at 6.) In addition, the Court reasoned that the Appellants' state law claims had to be dismissed as being barred by the Eleventh Amendment. This timely appeal followed.

II. Discussion[1]

As acknowledged by the Appellants at oral argument, their main argument boils down to the following syllogism: (1) all voters in New Jersey, regardless of party affiliation, have a constitutional right to participate at each stage of the electoral process that materially impacts the outcome of non-presidential elections in the state; (2) New Jersey's closed primary elections materially impact the outcome of non-presidential elections in the state; therefore, (3) all voters in New Jersey, regardless of party affiliation, have a constitutional right to participate in New Jersey's closed primary elections—i.e., the primaries may not be closed. But it appears that the Appellants are aware that controlling precedents preclude us from ordering New Jersey to force political parties to open their primary elections to non-party members. Therefore, the Appellants argue instead that, in order to protect their fundamental right to meaningfully participate at all stages of an election, we force New Jersey to abolish the closed primary election scheme altogether.

A. Federal Claims

The Appellants rely on First Amendment and Fourteenth Amendment theories to support their federal claims. They contend that New Jersey's primary election system violates the First Amendment because it burdens their associational rights by "requir[ing] that a voter 'qualify' for the right to vote in the Primary Election by joining a political party." (Opening Br. at 36.) They further argue that it violates their Fourteenth Amendment right to equal protection of the law because it is inconsistent with the "one person, one vote" standard articulated in *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). *See id.* at 566, 84 S.Ct. 1362 ("[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."). According to the Appellants, the state's system creates two classes of voters: "(1) major party members who enjoy full participation in both the Primary Election and the general election; and[ ] (2) voters who, by reason of choosing not to associate with one of the dominant political parties, are allowed only limited participation in the general election." (Opening Br. at 35.) As a result, they say, the latter class's Fourteenth Amendment rights are violated because, "[w]ithout equality of the right to vote within all integral stages of the process, there is essential[ly] no meaningful right to vote at all." (Opening Br. at 34–35.) Their position, however, is untenable.

States possess a " 'broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," [U.S. Const.] Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices.' " *Clingman v. Beaver,* 544 U.S. 581, 586, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005) (quoting *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986)). That power is not ***181** absolute, but is "subject to the limitation that [it] may not be exercised in a way that violates ... specific provisions of the Constitution." *Williams v. Rhodes,* 393 U.S. 23, 29, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). In particular, New Jersey has a " 'responsibility to observe the limits established by the First Amendment rights of [its] citizens,' " including the freedom of political association or, in this case, non-association. *Eu v. S.F. Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 222, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (quoting *Tashjian,* 479 U.S. at 217, 107 S.Ct. 544). Election regulations that impose a severe burden on associational rights are subject to strict scrutiny and may be upheld only if they are "narrowly tailored to serve a compelling state interest." *Clingman,* 544 U.S. at 586, 125 S.Ct. 2029. If a statute imposes only modest burdens, however, then "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions" on election procedures. *Anderson v. Celebrezze,* 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). Accordingly, the Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Burdick v. Takushi,* 504 U.S. 428, 438, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992).

While "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein,* 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), no court has ever held that that right guarantees participation in primary elections. The Appellants nevertheless rely on *United States v. Classic,* 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), as authority for their argument that voters have a constitutional right to participate in primary elections. Their reliance is misplaced. In *Classic,* the federal government prosecuted certain Louisiana state elections commissioners for allegedly falsifying ballots in a Democratic primary election for the House of Representatives. The Supreme Court held that the Constitution gives Congress the power to regulate intraparty primaries through the criminal code and secures the right to have one's "vote counted in both the general election and in the primary election, where the latter is a part of the election machinery." *Id.* at 322, 61 S.Ct. 1031.

In answering the question presented to it, the Court in *Classic* presupposed that the right it recognized only applied to voters who were "qualified" to cast votes in Louisiana's Democratic primary. *Id.* at 307, 61 S.Ct. 1031 (stating that one of the "questions for decision [is] whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right 'secured ... by the Constitution' within the meaning of ... the Criminal Code" (second alteration in original)). But *Classic* did not expound on who was "qualified," and instead left that distinction up to Louisiana law. *See id.* at 311, 61 S.Ct. 1031 ("Pursuant to the authority given by [§] 2 of Article I of the Constitution ... the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress."). Fairly read, *Classic* speaks to the constitutional protections that inure to qualified primary voters, but it is completely silent as to who is qualified. It is, therefore, of no help to the Appellants' argument.

The Appellants also quote *Friedland v. State,* 149 N.J.Super. 483, 374 A.2d 60, 63 (N.J.Super. Ct. Law Div.1977), for the

proposition that "courts have held that the right to vote in the Primary Election is 'as protected as voting in a general election.' " (Opening Br. at 20.) As noted by the ***182** District Court, however, the Appellants' citation to *Friedland* is "puzzling." (App. at 10.) *Friedland* rejected an attack on New Jersey's primary election system that is similar to the one mounted by the Appellants in this case. *See Friedland,* 374 A.2d at 63–67 (dismissing complaint that contended New Jersey's primary election law violates the First and Fourteenth Amendments, "in that it deprives [plaintiffs] of their right to vote and to affiliate with political parties of their own choice and denies them equal protection"). When read in context, the language that the Appellants have lifted from *Friedland* does not advance their argument.

The Appellants identify no other precedent even arguably suggesting that voters have a constitutional right to unqualified participation in primary elections. There is, however, relevant precedent that cogently rebuts their position. In *Nader v. Schaffer,* the Supreme Court summarily affirmed a decision upholding Connecticut's closed primary election system, a system which, in broad strokes, looks like New Jersey's. 417 F.Supp. 837 (D.Conn.) (three-judge panel), *aff'd,* 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976) (mem.). The *Nader* plaintiffs were registered voters who refused to enroll in a political party. *Id.* at 840. As a result of that choice, they were prohibited from voting in Connecticut's closed primary elections. *Id.* They argued that Connecticut's closed primary election system violated their constitutional rights in the following ways: (1) it violated their Fourteenth Amendment right to equal protection by denying them the right to participate in primary elections while extending that right to enrolled party members; (2) it violated their First Amendment associational rights by compelling them to either enroll in a political party or forgo the right to vote in a primary; and (3) it violated their right to vote, as guaranteed by Article I, Section 2, cl. 1 and the Fourteenth and Seventeenth Amendments, by preventing them from participating in an " 'integral part' "—namely the primary elections—" 'of the process by which their United States Senators and Representatives are chosen.' " *Id.* The *Nader* plaintiffs argued that participation in a primary election was an exercise of their constitutionally protected rights to vote and associate (or not associate) with others in support of a candidate. *Id.* at 842. They further asserted that they wished to exercise both of those rights but that Connecticut's closed primary election scheme limited them to one or the other; that is, in order to vote in a party's primary election, they were wrongly forced to enroll in a party. *Id.*

Nader rejected those arguments and struck a balance of competing First Amendment associational rights and Fourteenth Amendment rights that undermines the Appellants' position here. The court in *Nader* concluded that, in order to safeguard the constitutional rights of party members, Connecticut could "legislat[e] to protect the party from intrusion by those with adverse political principles," during the candidate selection process. *Id.* at 845 (internal quotation marks omitted). *Nader* also reasoned that "a state has a more general, but equally legitimate, interest in protecting the overall integrity of [primary elections]," which "includes preserving parties as viable and identifiable interest groups[, and] insuring that the results of primary elections ... accurately reflect the voting of party members." *Id.* Thus, "in order to protect party members from intrusion by those with adverse political principles, and to preserve the integrity of the electoral process, a state legitimately may condition one's participation in a party's nominating process on some showing of loyalty to that party," including party ***183** membership. *Id.* at 847 (internal quotation marks omitted).

The reasoning of *Nader* is directly applicable here. The Appellants claim that *Nader* recognized political parties' associational rights without considering the countervailing rights of individuals who are not members of a political party to not have their vote unconstitutionally diluted. (Opening Br. at 39, 42.) But that is simply incorrect. The court in *Nader* did consider the countervailing rights of individuals who were not members of a political party, and it found that the associational rights of party members and the regulatory interests of the state outweighed those rights. *See* 417 F.Supp. at 844, 845 ("Because the political party is formed for the purpose of engaging in political activities, constitutionally protected associational rights of its members are vitally essential to the candidate selection process.... The rights of party members may to some extent offset the importance of claimed conflicting rights asserted by persons challenging some aspect of the candidate selection process.").

We conclude, in keeping with *Nader*, that the burden, if any, imposed on the Appellants' First Amendment and Fourteenth Amendment rights is outweighed and constitutionally justified by the interests identified by New Jersey in this case. *See* Answering Br. at 15 ("[T]he State has a legitimate interest in protecting the overall integrity of the ... electoral process as well as the associational rights of political associations, maintaining ballot integrity, avoiding voter confusion, and ensuring electoral fairness.").

B. State Law Claims

Under the Eleventh Amendment, state officials acting in their official capacity cannot be sued unless Congress specifically abrogates the state's immunity or the state waives its own immunity. *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 66, 70–71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). The Appellants assert that, because their state law claims are premised on violations of the federal Constitution and seek prospective injunctive relief, the principles of *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), are implicated and the action against Guadagno strips her of her official or representative character and subjects her to the consequences of her individual conduct. Thus, the Appellants argue, this suit is "not really a suit against the state itself" and Eleventh Amendment immunity does not apply. (Opening Br. at 44–45.)

We disagree. Although *Ex Parte Young* held that the Eleventh Amendment does not bar a party from bringing suit for prospective injunctive relief on the basis of federal law, the Supreme Court held in *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), that state officials are immune from suits in federal court based on violations of state law, including suits for prospective injunctive relief under state law, unless the state waives sovereign immunity. *Id.* at 106, 104 S.Ct. 900 ("We conclude that *Young* ... [is] inapplicable in a suit against state officials on the basis of state law."). Moreover, the supplemental jurisdiction statute, 28 U.S.C. § 1367, does not authorize district courts to exercise jurisdiction over claims against non-consenting States. *See Raygor v. Regents of the Univ. of Minnesota,* 534 U.S. 533, 541–42, 122 S.Ct. 999, 152 L.Ed.2d 27 (2002) ("[W]e hold that § 1367(a)'s grant of jurisdiction does not extend to claims against nonconsenting state defendants.").

The Appellants' attempt to tie their state law claims into their federal claims is unpersuasive. Even assuming that they are correct that violation of the federal ***184** Constitution could be used to establish a violation of the state law on which they rely, it is state law that provides the cause of action, if any, and the attendant relief they seek. Therefore, *Ex Parte Young* 's exception to Eleventh Amendment immunity does not apply. In short, because Congress has not abrogated and New Jersey has not waived its sovereign immunity, the Appellants cannot invoke federal jurisdiction over their state law challenge to New Jersey's closed primary election system.

III. Conclusion

For the foregoing reasons, we will affirm the District Court's dismissal of the Appellants' federal and state law claims.

All Citations

607 Fed.Appx. 177

Footnotes

* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

1 The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review of the District Court's order granting the motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. *United States ex rel. Schumann v. AstraZeneca Pharms. L.P.,* 769 F.3d 837, 845 (3d Cir.2014); *Rea v. Federated Investors,* 627 F.3d 937, 940 (3d Cir.2010).

EXHIBIT 14

2017 WL 3223915
Only the Westlaw citation is currently available.
United States District Court, M.D.
Alabama, Northern Division.

Treva THOMPSON, et al., Plaintiffs,

v.

State of ALABAMA, et al., Defendants.

CASE NO. 2:16-CV-783-WKW
|
Signed 07/28/2017

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MEMORANDUM OPINION AND ORDER

W. Keith Watkins, CHIEF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** Alabama citizens lose their right to vote if they are "convicted of a felony involving moral turpitude." Ala. Const., Art. VIII, § 177(b) (1996). Disenfranchisement of felons, for more than two decades, has hinged on the meaning of "moral turpitude." But what does "moral turpitude" mean? Because the Alabama Constitution did not define this nebulous standard, "[n]either individuals with felony convictions nor election officials ha[d] a comprehensive, authoritative source for determining if a felony conviction involve[d] moral turpitude and [was] therefore a disqualifying felony." Ala. Code § 17-3-30.1 (eff. Aug. 1, 2017). But that dilemma for felons and election officials appears to have resolved on May 25, 2017, at least prospectively, with the enactment of the Felony Voter Disqualification Act, Alabama Laws Act 2017-378 ("HB 282"), which for the first time established a specific and inclusive list of felonies "involving moral turpitude." HB 282, codified as § 17-3-30.1 of the Alabama Code, has an effective date of August 1, 2017.

This lawsuit originally was not about HB 282; it could not have been because its commencement preceded HB 282's enactment by eight months. Rather, Plaintiffs filed this proposed class action against the State of Alabama and its officials, seeking in part to invalidate § 177(b) of Article VIII of the Alabama Constitution of 1901 on federal constitutional grounds, including vagueness.

HB 282 changed the course of this lawsuit significantly. Acknowledging that HB 282 "seeks to put an end to" a system that required "individual county registrars to make subjective and contradictory determinations of citizens' eligibility to vote on an ad hoc basis" (Pls.' Mot. Prelim. Inj., at 7), Plaintiffs filed a motion for preliminary injunction thirty-seven days after HB 282's enactment. Plaintiffs do not challenge the provisions of HB 282 itself. Instead, they ask for a preliminary injunction mandating Defendants to take specified steps to implement HB 282.

The urgency of the motion, according to Plaintiffs, is the upcoming special election for the United States Senate seat in Alabama, and more specifically, the voter registration deadline, which is July 31, 2017. The special primary election is August 15, 2017; the special runoff election is September 26, 2017; and the special general election is December 12, 2017. Plaintiffs contend that, "[a]bsent immediate relief from this Court, thousands of eligible voters risk losing the opportunity to vote in yet another election." (Pls.' Mot. Prelim. Inj., at 8.) The preliminary injunction motion "seeks relief solely for those voters whose voting rights under Section 177 of the Constitution have been affirmed by HB 282." (*Id.*) The motion refers to these potential voters as "HB 282 voters." (*Id.*)

In their motion, Plaintiffs ask for a preliminary injunction mandating Defendants to take the following actions prior to the voter registration deadline on July 31, 2017: (1) to provide notice of HB 282's voting eligibility standards on the electronic Alabama Voter Registration Form on the Alabama Secretary of State's website; (2) to post notice of HB 282's voting eligibility standards on the Alabama Secretary of

State's website and at county registrars and DMV offices; (3) to submit a request to the federal Election Assistance Commission to provide notice of HB 282's voting eligibility standards in Alabama's state-specific instructions on the Federal Voter Registration Form; and (4) to reinstate HB 282 voters—voters whose registration applications were denied or who were struck from the voter registration rolls in the last two years, but whose eligibility was affirmed by HB 282—to the voter registration rolls and provide them with individualized notice of their eligibility to vote.[1]

***2** Defendants oppose the motion, arguing that Plaintiffs have not met "the high bar for an emergency mandatory injunction and [that] the equities clearly outweigh granting one." (Defs. Resp., at 2 (Doc. # 58).) Defendants further represent that the Alabama Secretary of State is responsible for the unanimous passage of the Act and "fully supports the new law and is implementing it in a deliberate fashion." (*Id.* at 8.) The record contains briefing and evidence in support of and in opposition to the motion, and the parties presented additional evidence and arguments at the hearing held on July 25, 2017.

For the reasons that follow, Plaintiffs have not demonstrated that they are entitled to preliminary injunctive relief, and Plaintiffs' motion (Doc. # 56) is due to be denied.

II. JURISDICTION AND VENUE

Subject matter jurisdiction is exercised pursuant to 28 U.S.C. § 1331. The parties do not contest personal jurisdiction or venue.

III. BACKGROUND

A. The Relevant Parties and Claims

Plaintiffs seek a preliminary injunction on some, but not all, counts. Only those parties and claims that are the subject of the preliminary injunction are set out here.

1. *Parties*

Plaintiffs filed this lawsuit on September 26, 2016. The ten individual Plaintiffs are Alabama citizens who, on the basis of their felony convictions, have been removed from the voter registration list, have been denied applications to vote, or have not registered to vote in this state based on the uncertainty of whether they have been convicted of a disqualifying felony involving moral turpitude. The organizational Plaintiff, Greater Birmingham Ministries, whose central goal is "the pursuit of social justice in the governance of Alabama," expends financial and other resources to help individuals with felony convictions determine whether they are eligible to vote or to have their voting rights restored. (Compl. ¶ 62 (Doc. # 1).) Defendants are the State of Alabama, the Secretary of State of Alabama, the Chair of the Board of Registrars for Montgomery County, and a Defendant class consisting of "[a]ll voter registrars in the State of Alabama." (Compl. ¶ 68.) The individual Defendants are sued in their official capacities only.

The Complaint seeks to certify a class of Plaintiffs defined as: "All unregistered persons otherwise eligible to register to vote in Alabama who are now, or who may in the future be, denied the right to vote because they have been convicted of a felony." (Compl. ¶ 50.) The Complaint also enumerates nine subclasses of Plaintiffs.

The motion for preliminary injunction also contains its own class, namely, "those voters whose voting rights under Section 177 of the [Alabama] Constitution have been affirmed by HB 282." (Pls.' Mot. Prelim. Inj., at 8 (Doc. # 56).)

2. *Claims*

Section 177(b)'s phrase "moral turpitude" is at the forefront of twelve of the Complaint's fifteen counts challenging the constitutionality of § 177(b) of the Alabama Constitution. Only Counts 6–10 are relevant to the motion for preliminary injunction. These counts seek injunctive and declaratory relief.

Counts 6 and 7 allege that § 177(b)'s failure to define which Alabama felonies involve moral turpitude "imposes an unconstitutional burden on the right to vote of eligible Alabama voters with felony convictions in violation of the Equal Protection Clause" (Count 6) and the First Amendment (Count 7), and that, therefore, § 177(b) is subject to strict scrutiny. (Compl. ¶¶ 204, 207.)

Count 8 is a Fourteenth Amendment procedural due process claim, alleging that § 177(b)'s felon-disenfranchisement provision "provides Alabama citizens with little to no pre-deprivation process before revoking their right to vote, a fundamental right protected by both the Alabama and United States Constitutions." (Compl. ¶ 210.) Count 9 alleges that the "prohibition on voting for those convicted of felonies

'involving moral turpitude' is void for vagueness under the First and Fourteenth Amendments." (Compl. ¶ 225.)

***3** Count 10 is a selective enforcement claim under the Fourteenth Amendment's Due Process Clause. It alleges that Defendants arbitrarily distinguish between groups of felons by administering § 177(b) with an unequal hand from county to county and that, therefore, § 177(b) cannot survive rational-basis scrutiny.

The Complaint's prayer for relief seeks certification of the Plaintiff class, of nine Plaintiff sub-classes, and of a Defendant class of county registrars. It also asks for a declaratory judgment that § 177(b) of the Alabama Constitution, on its face and as applied, violates the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

B. HB 282

Shortly after taking office in 2014, Alabama Secretary of State John Merrill established an exploratory committee on "voter disenfranchisement and restoration of voting rights." (*See* Ex. A, Decl. of Edward Packard ¶ 6 (Doc. # 63-1).) A subcommittee of the "voter disenfranchisement and restoration of voting rights" committee drafted proposed legislation to create an exclusive list of felonies that would qualify as felonies of "moral turpitude" for the purposes of voting. (*Id.*) After this bill was introduced in previous sessions, the Legislature ultimately enacted this proposed legislation in a modified form by a unanimous vote in the 2017 regular legislature session. (*Id.*) HB 282 sets out its purposes, which are:

> a. To give full effect to Article VIII of the Constitution of Alabama of 1901, now appearing as Section 177 of Article VIII of the Official Recompilation of the Constitution of Alabama of 1901, as amended.
>
> b. To ensure that no one is wrongly excluded from the electoral franchise.
>
> c. To provide a comprehensive list of acts that constitute moral turpitude for the limited purpose of disqualifying a person from exercising his or her right to vote.

Ala. Code § 17-3-30.1(b)(2) (eff. Aug. 1, 2017).

On May 25, 2017, Governor Kay Ivey signed HB 282 into law. Defendants estimate that some 60,000 felons could be affected by HB 282.

The effective date of HB 282 is August 1, 2017. However, because the August 15 special primary election for the U.S. Senate seat in Alabama is after HB 282's effective date, the Alabama Secretary of State has instructed registrars to use the new law to determine whether new registrants who have committed felonies are qualified to vote in the August 15 primary election. (*See* Ex. E, Decl. of George Noblin ¶ 4 (Doc. # 63-5).) The Chairman of the Montgomery County Board of Registrars, George Noblin, gave an example that, on July 17, 2017, his staff permitted an individual convicted of a felony to register to vote based upon application of HB 282. The Secretary of State's liaison with the Board of Registrars is "not aware of any registrar who has received an application to register from a felon and has not applied the new law." (*See* Ex. B, Decl. of Clay Helms ¶ 7 (Doc. # 63-2).)

The Alabama Secretary of State also is implementing statewide training to registrars. Through a contract with Auburn University, the Secretary of the State implemented a three-year training program on a variety of subjects for all of the state's registrars. The program, which commenced in June 2017, includes a course on felon disenfranchisement and the definition of "moral turpitude." (*See* Ex. B, Decl. of Clay Helms ¶ 12 & Ex. 6 (contract and course schedule).) Moreover, on June 2, 2017, which was eight days after HB 282's enactment, Secretary Merrill gave a presentation on HB 282 to the state association of registrars at their summer conference and advised them to use the list as the exclusive means of evaluating registrants. (*See id.*) And the Secretary's staff distributed a modified registrars' handbook that incorporated HB 282. (*See id.* ¶ 9 & Ex. 5.) The Secretary of State also has provided written guidance on HB 282 to all registrars via email. (Pls.' Mot. Prelim. Inj., at 9.) Based on the steps that the Alabama Secretary of State has taken to train the registrars on HB 282, Plaintiffs, at the hearing, withdrew their request for a preliminary injunction ordering that Defendants provide Alabama's 200 registrars mandatory training regarding the proper implementation of HB 282 for the upcoming special elections for the U.S. Senate seat in Alabama.

IV. STANDARD OF REVIEW

***4** A party seeking a preliminary injunction must establish four elements: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that its own injury outweighs the injury to the nonmovant; and

(4) that the injunction would not disserve the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1179 (11th Cir. 2000). "A preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four prerequisites." *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). That burden is even higher where, as here, the plaintiff seeks a mandatory preliminary injunction. *See Winmark Corp. v. Brenoby Sports, Inc.*, 32 F. Supp. 3d 1206, 1218 (S.D. Fla. 2014); *see also Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996) (A prohibitory injunction "restrains" a party from acting, while a mandatory injunction requires a party to "take action."). "[T]he burden of persuasion [on a motion for preliminary injunction] becomes even greater where the relief requested is a mandatory injunction, as opposed to a prohibitory injunction."); *see also Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979) ("Only in rare instances is the issuance of a mandatory preliminary injunction proper." (citing *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560 (5th Cir. 1971)).

V. DISCUSSION

Plaintiffs have not met their high burden for obtaining a mandatory preliminary injunction. They have failed to demonstrate that any of the preliminary injunction factors weighs in their favor.

A. Plaintiffs have not shown a likelihood of success on the merits.

Plaintiffs argue that they are likely to succeed on their claims challenging Alabama's standardless enforcement of the "moral turpitude" provision of § 177(b) as set out in Counts 6–10 of the Complaint. Defendants assert, on the other hand, that Plaintiffs cannot succeed because HB 282 moots Counts 6–10 and because their motion for preliminary injunction seeks relief that is outside the Complaint. These arguments are addressed in turn.

1. *Plaintiffs' claims are moot.*

When, during the pendency of a lawsuit, the challenged law undergoes substantial amendment "so as plainly to cure the alleged defect, ... there is no live controversy for the Court to decide." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 670 (1993) (O'Connor, J., dissenting). "Such cases functionally are indistinguishable from those involving outright repeal: Neither a declaration of the challenged statute's invalidity nor an injunction against its future enforcement would benefit the plaintiff, because the statute no longer can be said to affect the plaintiff." *Id.* The Eleventh Circuit has recognized that both it and the United States Supreme Court "have repeatedly held that the repeal or amendment of an allegedly unconstitutional statute moots legal challenges to the legitimacy of the repealed legislation." *Nat'l Advert. Co. v. City of Miami*, 402 F.3d 1329, 1332 (11th Cir. 2005) (collecting cases).

"While [the] general rule is that repeal [or amendment] of a statute renders a legal challenge moot, an important exception to that general rule is that mere voluntary termination of an allegedly illegal activity is not always sufficient to render a case moot and deprive the federal courts of jurisdiction to try the case." *Id.* at 1333. As a general principle, "[a] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Doe v. Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014) (citation omitted). However, the Eleventh Circuit "gives government actors more leeway than private parties in the presumption that they are unlikely to resume illegal activities"; this leeway translates to a "rebuttable presumption" or a "lesser burden." *Id.* (citations omitted).

***5** Before the presumption can attach, a defendant's termination of the challenged conduct must be "absolutely clear." *Id.* at 1322. Three factors guide that analysis: (1) "whether the termination of the offending conduct was unambiguous"; (2) "whether the change in government policy or conduct appears to be the result of substantial deliberation, or is simply an attempt to manipulate jurisdiction"; and (3) "whether the government has 'consistently applied' a new policy or adhered to a new course of conduct." *Id.* at 1323. The government's repeal or amendment of a challenged statute is "often a clear indicator of unambiguous termination." *Id.* at 1322.

When the presumption attaches, "the controversy will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated." *Id.* (citation omitted). Stated differently, only "when a court is presented with evidence of a 'substantial likelihood' that the challenged statute will be reenacted, the litigation is not moot and the court should retain jurisdiction." *Nat'l Advert. Co.*, 402 F.3d at 1334. "[T]he cases are legion from this [circuit] and other courts where the repeal of an allegedly

unconstitutional statute was sufficient to moot litigation challenging the statute." *Id.* at 1333–34.

Defendants argue for application of the general rule—that HB 282 is a clarifying amendment that moots Counts 6–10. Plaintiffs contend that the voluntary-cessation exception keeps this case alive.

The court begins with an analysis of the three *Doe* factors to determine whether HB 282 makes it "absolutely clear" that Defendants have ceased the challenged conduct. To begin, there is no serious debate that HB 282 resolves Plaintiffs' challenge to § 177(b)'s vagueness. (*See, e.g.*, Pls. Counsel's Letter to Andrew Brasher (Doc. # 56-1), in which counsel acknowledges that "HB 282 is most relevant to Counts 6–10," which challenge "the prior standardless system for determining who could vote," and that "HB 282 is an important step to remedying the harms we alleged in those counts of the complaint").) At the heart of Counts 6, 7, 8, 9, and 10's constitutional challenge is that § 177(b)'s phrase "moral turpitude" is so vague that it fails to provide reasonable guidelines for determining whether a felony conviction "involves moral turpitude." (*See, e.g.*, Compl. ¶ 198 ("The failure [of the State of Alabama] to define ... crimes of moral turpitude imposes an unconstitutional burden on those qualified to vote under Alabama law but who have been convicted of felonies." (Count 6)); Compl. ¶ 207 (incorporating ¶ 198 into Count 7); Compl. ¶ 211 ("[T]he risk of erroneous deprivation [of procedural due process] is high" because county registrars, with no legal training, must interpret § 177(b) in order to determine a citizen's eligibility to vote (Count 8); Compl. ¶¶ 222, 224, 225 § 177(b)'s "prohibition on voting for those convicted of felonies involving moral turpitude—with possible exception of those crimes listed in Alabama Code Section 15-22-36.1(g)"—is standardless, does not provide fair notice of the conduct prohibited, and is void for vagueness (Count 9); Compl. ¶ 227 ("Defendants' enforcement of Section 177(b) is not guided by a principled determination of which felonies 'involve moral turpitude' " and, thus, has resulted in a system of arbitrary disenfranchisement in violation of the Fourteenth Amendment (Count 10)).

Through the enactment of HB 282, the Alabama legislature has addressed Plaintiffs' quandary. HB 282's list of specific Alabama felonies, by crime and code section, is a definitive list of felonies involving moral turpitude under § 177(b)'s felony disenfranchisement provision. Plaintiffs now can be certain whether their convictions are disqualifying. They can review HB 282 and know whether their felony conviction involves moral turpitude. In fact, as a result of HB 282's listing of disqualifying felonies, Antwoine Giles and Laura Corley now know with certainty that they are eligible to vote because their felonies are not on the HB 282 list.[2] Counts 6–10's challenges that § 177(b)'s phrase "moral turpitude" is vague and lacks reasonably clear guidelines hardly can be said to still exist in view of HB 282. Plaintiffs have not argued that HB 282 fails to provide them with clarity as to whether their felony convictions involve "moral turpitude."

***6** Additionally, although Plaintiffs are not content with the progress of HB 282's implementation, the preponderance of the evidence shows that registrars are abiding by and applying HB 282 when registering felons to vote. More specifically, at the state association of registrars conference in June 2017, the Alabama Secretary of State advised registrars to use HB 282's list as the exclusive means of evaluating registrants. Registrars also have received an amended registrars' handbook that has been updated to incorporate the legislation. (Ex. B, Decl. of Clay Helms ¶¶ 8, 9.) And, in Montgomery County, a felon was permitted to register to vote under the new law, whose felony would have been disqualifying under the old law. (Ex. E, Decl. of George Noblin ¶ 4.) The Secretary of State's liaison with the Board of Registrars is "not aware of any registrar who has received an application to register from a felon and has not applied the new law." (Ex. B, Decl. of Clay Helms ¶ 7.) These facts demonstrate that HB 282, through its enactment and application, unambiguously terminated the offending conduct. The first factor is satisfied.

As to the second factor, there is no evidence, argument, or suggestion that HB 282 was an attempt to manipulate this court's jurisdiction over this lawsuit. There is no evidence suggesting that the Alabama legislature intends to repeal HB 282 after this lawsuit concludes. To the contrary, the record reveals that the passage of HB 282 is the culmination of several years of work initiated by the Alabama Secretary of State. (*See* Ex. C, Decl. of Brent Beal ¶ 2 (Doc. # 63-3).) Defendants' evidence establishes that, shortly after taking office in 2014, Secretary of State Merrill established an exploratory committee on "voter disenfranchisement and restoration of voting rights." (Ex. A, Decl. of Edward Packard ¶ 6.) A subcommittee of the "voter disenfranchisement and restoration of voting rights" committee drafted proposed legislation to create an exclusive list of felonies that would qualify as felonies of "moral turpitude" for the purposes of voting. (*Id.*) Ultimately, after this bill was introduced

in previous sessions, the Alabama Legislature enacted this proposed legislation in a modified form by a unanimous vote in 2017. (*Id.*) These facts show that substantial deliberation undergirded HB 282's enactment. The second factor is met.

Finally, with respect to the third factor, Defendants are applying HB 282 and are in the midst of implementing programs to educate registrars, voters, and other officials on the new law. There is no evidence that any eligible HB 282 voter has been denied the right to register to vote. This evidence, together with the unanimous vote for the law in both chambers of the legislature, demonstrates Defendants' commitment to abide by the new law and its "adhere[nce] to a new course of conduct." *Doe*, 747 F.3d at 1323.

In sum, the State of Alabama's enactment of HB 282 is "a clear indicator of unambiguous termination" of the allegedly unconstitutional conduct. *Id.* at 1322. Accordingly, Defendants are entitled to a rebuttable presumption that "they are unlikely to resume illegal activities." *Id.* Plaintiffs have failed to rebut that presumption; they have presented no evidence, for example, that the Alabama Legislature intends that HB 282's repeal will follow on the heels of the conclusion of this lawsuit. The absence of this sort of evidence is not surprising, given that the state legislature passed HB 282 unanimously and that the state's extensive training efforts on HB 282 already are underway.

Based on the foregoing, the enactment of HB 282, which clarifies for Plaintiffs whether their convictions are felonies "involving moral turpitude" under § 177(b), moots a legal challenge to the vagueness of § 177(b)'s moral turpitude phrase. The claims' mootness is a jurisdictional flaw that precludes the court from reaching the merits of these claims. Because Counts 6, 7, 8, 9, and 10 are moot, Plaintiffs cannot demonstrate a likelihood of success on the merits.[3]

2. *The requested preliminary injunctive relief is unlike the relief sought in the Complaint.*

***7** A preliminary injunction is not appropriate when it is based on relief that "is not of the same character [as that requested in the complaint], and deals with a matter lying wholly outside the issues in the suit." *Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997) (per curiam), *amended on reh'g on other grounds by* 131 F.3d 950 (11th Cir. 1997). *See also Westbank Yellow Pages v. BRI, Inc.*, No. 96-1128, 1996 WL 255912, at *1 (E.D. La. May 13, 1996) ("A preliminary injunction is not an appropriate vehicle for trying to obtain relief that is not even sought in the underlying action."). The relief requested here is problematic, both for what it seeks and for whom it is sought.

First, the relief requested in the motion for preliminary injunction is of a different nature than that pleaded in the Complaint. The Complaint seeks a declaratory judgment that § 177(b)'s moral-turpitude standard is unconstitutional and a permanent injunction enjoining Defendants from enforcing § 177(b), for example, by preventing Defendants "from denying any voter registration applications on the basis of felony convictions." (Compl., at 56.) The motion for preliminary injunction changes the focus of the relief to HB 282. (Pls.' Mot. Prelim. Inj., at 28.) As Plaintiffs admit, the motion for preliminary injunction asserts "new facts relevant to the passage of HB 282," (*id.* at 2), and asks the court to order the Secretary to provide notice of HB 282 in a specified manner and to automatically reinstate certain HB 282 voters. These remedies are not the remedies that the Complaint requests should Plaintiffs succeed in their underlying suit challenging the constitutionality of § 177(b).[4]

Moreover, to be clear, the subject matter of both the Complaint and the motion for preliminary injunction concerns the voting rights of felons. But the Complaint focuses on felons who, under § 177(b), could not vote, either because the state explicitly had taken away that right or because of the uncertainty § 177(b) created as to whether a conviction arose from a felony involving moral turpitude. The motion for preliminary injunction, on the other hand, turns attention to felons who now undeniably can vote by virtue of HB 282. Felons whose voting rights have been "affirmed" in that they now are eligible to register to vote (the subject of the motion for preliminary injunction) are not felons whose voting rights have been denied because of a felony conviction (the subject matter of the Complaint).

Second, Plaintiffs request preliminary injunctive relief for a new putative class of felons. In their brief in support of their motion for preliminary injunction, Plaintiffs ask for "relief solely for those voters whose rights under Section 177 of the [Alabama] Constitution have been affirmed by HB 282." (Pls.' Mot. Prelim. Inj., at 8.) It appears that Plaintiffs have formulated a class of felons—those who previously were denied voting rights or were unsure of their eligibility to vote under § 177(b) (and therefore did not attempt to register), but who now are eligible to vote and are certain of that eligibility because HB 282 has clarified that their felonies are

not disqualifying. But this class is not a part of the class or nine sub-classes alleged in the Complaint.

***8** The Complaint's class and sub-classes share a common factual denominator. Each includes unregistered voters who have been denied the right to vote because either their voting applications were denied, their names were purged from the voting registration rolls, or they cannot be legally certain whether their felony convictions are felonies involving moral turpitude. As Plaintiffs point out, the Complaint could not have alleged a purported class of HB 282 voters because HB 282 was non-existent at the initiation of this suit. But this point ignores that adding classes (and claims) in briefs circumvents the letter and spirit of the orderly procedures established by the Federal Rules of Civil Procedure for the efficient administration of a lawsuit. *See Gyenis v. Scottsdale Ins. Co.*, No. 8:12-CV-805-T-33AEP, 2013 WL 3013618, at *1 (M.D. Fla. June 14, 2013) ("The Federal Rules of Civil Procedure are necessary for the orderly and efficient running of this Court and to ensure that in the interests of justice, everyone is on a level playing field. The Rules cannot be ignored or overlooked."); *see, e.g.*, Fed. R. Civ. 15(a), (d) (governing pre-trial amendments to pleadings and supplemental pleadings); *cf. Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 863 (11th Cir. 2013) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment.").

Plaintiffs have not moved to amend the Complaint or to supplement the pleadings in order to redefine the claims for relief or the purported class. These pleading deficiencies, which expand the litigation highway outside the Complaint's roadmap, present yet another reason for denying the motion for preliminary injunction.

3. *Plaintiffs have a* Pennhurst *problem.*

The Eleventh Amendment prevents a federal court from issuing an injunction against state officials solely to require them to adhere to state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106–07 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). To avoid the *Pennhurst* problem, Plaintiffs' new claims challenging Defendants' implementation of HB 282 may only proceed in federal court if a provision of federal law creates a right to the enforcement of HB 282.

Plaintiffs argue that *Pennhurst* is inapposite because they seek an injunction against state officials to "remedy the harms caused by their *unconstitutional* behavior" under federal law. (Doc. # 59, at 4 (emphasis in original).) Plaintiffs' attempt to differentiate *Pennhurst* from this case is not convincing.

Plaintiffs express no dissatisfaction with HB 282 itself; they advance no argument that HB 282 violates the federal constitution. Rather, Plaintiffs complain that, since May 25, 2017, Defendants have refused to implement HB 282 in a manner that would maximize notice to HB 282 voters and give more opportunities to HB 282 voters to vote in the August 15 special election for the U.S. Senate seat in Alabama.[5] (*See* Pls.' Mot. Prelim. Inj., at 28, in which Plaintiffs argue that they seek "full implementation of governing Alabama law"). What Plaintiffs really appear to be asking is that this court supervise and direct these state Defendants in how they should carry out their responsibilities under HB 282, a state law. The true nature of this "remedy" sounds in state law. Plaintiffs fail to persuade the court, at this juncture, that *Pennhurst* is not prohibitive of what they are asking this court to do. At the very least, *Pennhurst* presents another reason why Plaintiffs have not demonstrated a substantial likelihood of success on the merits.

B. Plaintiffs have not shown a substantial threat of irreparable injury.

Plaintiffs contend that "[e]ligible HB 282 voters plainly face irreparable injury if the State does not take the[ ] [requested] commonsense steps to implement HB 282, correct recent unlawful voter registration purges and application denials, and educate voters about HB 282's eligibility requirements." (Pls.' Mot. Prelim. Inj., at 26–27.) The argument is illogical on many levels.

***9** "A showing of irreparable injury is the sine qua non of injunctive relief." *Siegel*, 234 F.3d at 1176 (citations omitted). "[T]he asserted irreparable injury must be neither remote nor speculative, but actual and imminent." *Id.* (citations omitted). Here, for the most part, the asserted injuries are not actual.

An actual injury is imperceptible under these facts. An "HB 282 voter," as Plaintiffs explain it, is an individual whose felony offense does not appear on the list of offenses in HB 282 and, thus, who is *not* disqualified to vote on the basis of a felony involving moral turpitude. The injuries alleged in Counts 6–10 focus on the harm to Plaintiffs —the inability to discern whether their felony convictions

render them unable to vote—caused by § 177(b)'s "failure to define or list disqualifying crimes or crimes of moral turpitude." (Compl. ¶ 198.) HB 282 has alleviated that harm. It is no longer problematic for Plaintiffs to determine whether they are eligible to vote. All a Plaintiff needs to know is the offense resulting in his or her conviction. If that felony is on the HB 282 list, he or she cannot vote; if it is not on that list, he or she can vote. Plaintiffs do not deny that HB 282's "comprehensive list of crimes that 'involve moral turpitude' " provides the clarity they sought for § 177(b).[6] (Pls.' Mot. Prelim. Inj., at 7.)

Having acknowledged that the alleged unconstitutional scheme (and thus necessarily the injury) of which Plaintiffs allege in the Complaint is "in the past" because of HB 282 (Prel. Inj. H'rg, June 25, 2017), Plaintiffs are left to argue that Defendants are not doing enough to get the word out on HB 282 to all felons, who were previously disenfranchised under Alabama's old § 177(b) scheme, but who now are eligible to vote by reason of HB 282.[7] They want this court to direct the Alabama Secretary of State to post notice about HB 282's voting eligibility standards on its website and to update state and federal voter registration forms.[8] Plaintiffs go so far as to insist that as to those felons, who in the past two years were denied voter registration or were struck from the voter registration rolls, Defendants should automatically reinstate them on the voter registration rolls and provide them with individualized notice of their automatic registration and right to vote. Having reconstructed their injuries in their motion for preliminary injunction, Plaintiffs contend that, post HB 282, they have suffered injuries as a result of Defendants' failure to take these affirmative steps to provide notice and automatic reinstatement.

***10** But, at bottom, these alleged injuries are misdirected. It is true that, once the August 15 special primary election passes, "there can be no do-over" for an unconstitutionally disenfranchised voter. *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). But the HB 282 voters do not contend that they have been disenfranchised. To quote Plaintiffs, HB 282 has "affirmed" these individuals' right to vote. It would be an entirely different matter if Defendants were refusing to allow felons to register to vote where their offense of conviction was not on the HB 282 list. There is no evidence, however, that Defendants have denied any eligible HB 282 voter's application to register to vote or have engaged in any type of prohibitive tactic. Instead, the evidence demonstrates that the county registrars, at the direction of the Alabama Secretary of State, are adhering to HB 282 and are permitting individuals to register whom HB 282 does not disqualify. Plaintiffs, who are eligible HB 282 voters, cannot claim irreparable harm when they have been granted the right to vote.[9]

Moreover, as to the different forms of notice Plaintiffs request—a posting on the Alabama Secretary of State's website; updated state and federal registration forms; and individualized notice—Plaintiffs have presented no evidence that either named Plaintiff suffered any injury based upon a lack of notice. There is no evidence that Mr. Giles or Ms. Corley do not know that they can go to their respective county registrars office and register to vote. There is no evidence that imminent injury will occur to Mr. Giles or Ms. Corley if the requested forms of notice are denied to them.

Moreover, as a matter of general observation on public notice rather than a finding, HB 282 and Alabama's felon disenfranchisement laws have received widespread news coverage at the local, county, state, and national levels through broadcast news, the internet, and print media. Exhibits, submitted by both Plaintiffs and Defendants, include compilations of the coverage on these issues and confirm that there have been no less than thirty-five sources of publicity about Alabama's laws on felon disenfranchisement, with most of those sources also reporting on HB 282. Notwithstanding Plaintiffs' contention that Defendants have failed to provide adequate notice of HB 282 to the targeted felon pool of eligible HB 282 voters, it is relevant for the equitable equation that the press has assisted in notifying the public about HB 282.[10]

As to the putative class members of eligible HB 282 voters, the following represents the nature of Plaintiffs' evidence. There is a declaration from a Greater Birmingham Ministries employee, who "think[s] many of these [eligible HB 282] voters may never discover that they have the right to vote" unless they receive "individual notification" of HB 282. (Shearer Decl. ¶ 10 (Doc. # 66-6).) She explains that many of the eligible HB 282 voters "are poor and do not have regular access to computers and the internet," and, thus, "website notification alone would be insufficient." (*Id.* ¶ 11.) There also are two declarations from individuals who are eligible HB 282 voters, but who say that they would have been "unaware of the new law and [their] ability to register to vote" if they had not been contacted by the Campaign Legal Center. (Brio Richardson Decl. ¶ 8 (Doc. # 66-9)); (Willie Goldsmith Decl. ¶ 4 (Doc. # 66-10).)

***11** Individualized notice, along with automatic reinstatement on the voter registration rolls, is what the putative class really seeks because Plaintiffs, in effect, concede that a posting on the Secretary's website on HB 282 would not effectively reach eligible HB 282 voters. These affirmative steps, if Defendants were ordered to take them, would not give HB 282 voters any more voting rights than they have today.[11] They, like their proposed class representatives, can register to vote in their respective counties; there is no question as to their eligibility to vote after HB 282.

Plaintiffs contend, though, that *Hobson v. Pow*, 434 F. Supp. 362 (N.D. Ala. 1977), requires individualized notice and reinstatement to the voter registration rolls of the eligible HB 282 voters. In that case, the district court enjoined the State of Alabama from disenfranchising men convicted of "wife-beating," which it found to be an impermissible gender-based classification, and ordered registrars to "either publish the notice [of the court's order] or send notice to each person purged by first-class mail." *Id.* It also ordered some counties to take the extra step of "reinstat[ing] all voters purged" for wife-beating. *Id.* at 368. *Hobson* is distinguishable for at least two reasons.

First, in *Hobson*, the plaintiffs secured the right to vote through litigation and a federal court order. Here, the State changed the law through legislation, which "everyone is presumed to know" and of which everyone "is bound to take notice." *See Meacham v. Halley*, 103 F.2d 967, 972 (5th Cir. 1939). Second, *Hobson* found that it was a violation of equal protection to disqualify a discrete group of male felons (and not their female counterparts). The relief the court granted was prospective declaratory and injunctive relief compelling state officials to comply with federal law. There is no federal constitutional claim by the HB 282 voters; these voters have secured their right to vote. The relief they request arises under state law and seeks enforcement of state law. Again, the HB 282 voters' claims in this lawsuit succumb to *Pennhurst.* Because their alleged injuries have no federal law grounding in this court, they cannot be said to be actual, irreparable, or imminent.

Finally, Plaintiffs' delay in seeking preliminary injunctive relief undercuts their argument of irreparable injury. Under Eleventh Circuit law, "[a] delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016).

Here, two significant events preceded Plaintiffs' preliminary injunction motion. First, Plaintiffs have known since April 18, 2017, when Governor Kay Ivey signed a proclamation, of the dates for the special election for the United States Senate seat in Alabama. Yet, Plaintiffs delayed filing a preliminary injunction motion until nearly two-and-a-half months later on June 30, 2017. Second, Plaintiffs have been on notice since May 25, 2017, when HB 282 was enacted, of the bill's effect on current felons' eligibility to vote, but they still waited more than a month to file their preliminary injunction motion. The court is mindful of the efforts Plaintiffs say they made to reach an agreement with the State without the need for court intervention. But with a July 31 voter registration deadline for the special primary election looming and given the multitude of steps that the State must take to get ready for the election, the delay nevertheless cuts against the premise that these HB 282 voters needed urgent action to protect their rights.

***12** For all of these reasons, Plaintiffs have not shown a substantial threat of irreparable injury if the requested relief is not granted.

C. Plaintiffs have not shown that the threatened injury to them outweighs the harm an injunction may cause the defendant.

Plaintiffs argue that Defendants will not be harmed by their relief because "[i]t falls squarely within the Secretary of State's responsibilities to update the voter registration forms, [the website], and all other voter education materials, both to reflect current Alabama law and to provide registrars with 'uniform guidance' on the administration of the Election Code." (Pls.' Mot. Prelim. Inj., at 27.) Plaintiffs contend that the important "principle of election law ... that, because of the risk of voter confusion, courts as a general rule should be reluctant to allow last-minute changes to the status quo" is inapplicable in this case because their motion for a preliminary injunction is intended to eliminate confusion. *Hall v. Merrill*, 212 F. Supp. 3d 1148, 1157 (M.D. Ala. 2016) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)).

Contrary to Plaintiffs' position, the requested preliminary injunction, if granted, would alter the status quo. Defendants would have to divert essential resources needed to prepare for and conduct the election in order to fulfill the many last-minute tasks that Plaintiffs want them to perform. Plaintiffs are requesting, for example, the court to order Defendants to

send individualized notice to a sub-group of the approximate 60,000 felons who were removed from voter rolls or denied registration over an indeterminate time frame. Defendants have demonstrated, at the very least, that identifying the dates of conviction, the specific felonies committed, and whether new felonies had been committed would be an arduous, case-by-case task. With an election looming and only six employees in the Secretary of State's Election Division, just the task of preparing the mass mailings to provide individualized notice to potential HB 282 voters in 67 counties and potentially 3,487 precincts would be massive, and likely impossible. Considering cumulatively Plaintiffs' requests for preliminary injunction, completion of those tasks by Defendants so close to an election would harm Defendants.

Moreover, the harm to Defendants from this court's meddling with the state's election law is not inconsequential, particularly here, where Plaintiffs ask this court to oversee Defendants' implementation of state law. The Eighth Circuit's observations on principles of federalism are fitting:

> The value of decentralized government is recognized more clearly today than it has been for decades. This recognition, born of experience, enables us (and not only us) to see that federal judicial decrees that bristle with interpretive difficulties and invite protracted federal judicial supervision of functions that the Constitution assigns to state and local government are to be reserved for extreme cases of demonstrated noncompliance with milder measures. They are last resorts, not first.

Ass'n of Cmty. Organizations for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 798 (7th Cir. 1995).

***13** Overall, Plaintiffs have not shown that the threatened injury to them outweighs the harm an injunction may cause Defendants.

D. Plaintiffs have not demonstrated that a preliminary injunction would serve the public interest.

Finally, the public interest militates against the granting of the preliminary injunction motion. The HB 282 voters can have a voice in the election for the U.S. Senate seat in Alabama; all of them are, by Plaintiffs' definition of the putative class, eligible to register to vote and to cast a vote in the special election. The grant of a preliminary injunction will not give these voters additional voting rights. HB 282 has advanced, therefore, the public interest in protecting voting rights from erroneous disenfranchisement, and, thus, there is little for the public to gain by granting Plaintiffs' preliminary injunctive relief.

At the same time, "there is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately preceding the election." *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). Plaintiffs contend that they only are seeking enforcement of the new HB 282, not a change in the law, so as to avoid voter confusion. Even so, the diversion of the state's resources to fulfilling Plaintiffs' requested tasks, when balanced against the multitude of hurdles Plaintiffs face as to the other elements for obtaining injunctive relief and the steps Defendants have taken to implement HB 282, weighs heavily against granting preliminary injunction relief.

VI. CONCLUSION

HB 282 offered long-needed and sought-after clarification to the conundrum in the Alabama Constitution's disenfranchising provision, § 177(b), when it defined a "felony involving moral turpitude." HB 282 did not exist when Plaintiffs filed this lawsuit challenging § 177(b) on federal constitutional grounds, but after its enactment, Plaintiffs filed a motion for preliminary injunction asking this court to tell Alabama's state officials how to implement the law. Plaintiffs' motion, however, is based on claims that HB 282 has mooted; raises new claims, new requests for relief, a new putative class of voters who were ineligible to vote prior to HB 282, but now are eligible; seeks to alter the status quo; and raises serious concerns about federal intrusion into state election law. The motion for preliminary injunction is due to be denied for all these reasons and more. Plaintiffs satisfy none of the elements for granting a preliminary injunction.

Accordingly, based upon careful consideration of Plaintiffs' motion for preliminary injunction, Defendants' opposition, the evidentiary hearing, and the oral arguments, and the record, it is ORDERED that the motion (Doc. # 56) is DENIED.

DONE this 28th day of July, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 3223915

Footnotes

1 At the July 25, 2017, hearing on the motion for preliminary injunction, Plaintiffs orally narrowed their written requests for preliminary injunctive relief. These are the modified requests.

2 Mr. Giles alleges that his name was purged from the Montgomery County voter registration list after his 2006 Alabama conviction for stalking in the first degree. Because that felony is not on the HB 282 list, he now is eligible to register to vote. Ms. Corley alleges that she received conflicting information from state agencies as to whether her 2015 Alabama convictions for possession of controlled substances disqualified her from voting, and, thus, she was uncertain whether she could register to vote in Jefferson County. Because the felony underlying Ms. Corley's convictions is not on the HB 282 list, she now knows with certainty that she is qualified to vote.

3 Although the court's decision on mootness obviates the necessity to delve into the merits of Counts 6–10, it is nonetheless important to clear up a misconception in Plaintiffs' briefing. Plaintiffs contend that, because "Alabama's system of disenfranchisement unquestionably ... led to the arbitrary deprivation of *fundamental rights*, Plaintiffs are likely to succeed" on Count 6–10. (Pls.' Mot. Prelim. Inj., at 19 (emphasis added).)

Felons do not have a fundamental right to vote protected by strict scrutiny (absent allegations that a disenfranchisement classification discriminates on the basis of race or other suspect criteria). A state's decision to deprive some convicted felons, but not others, of voting rights is not subject to a strict scrutiny standard. In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court upheld a California statute disenfranchising felons convicted of "infamous crimes," holding that, notwithstanding the guarantee of equal protection in Section 1 of the Fourteenth Amendment, the reduced-representation clause in Section 2 permitted the state to disenfranchise felons. *See id.* at 52–55. The Court rejected the petitioners' argument that the statute limiting their voting rights was subject to strict scrutiny. It reasoned that states can disenfranchise felons on the "demonstrably sound proposition that § 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement." *Id.* at 55.

The Third, former Fifth, Sixth, and Ninth Circuits have interpreted *Richardson*'s analysis of the interplay between Sections 1 and 2 of the Fourteenth Amendment as immunizing felon-disenfranchisement provisions from strict scrutiny under the Equal Protection Clause. In *Owens v. Barnes*, 711 F.2d 25 (3d Cir. 1983), which addressed a challenge that Pennsylvania's law disenfranchising convicted felons during their incarceration violated equal protection, the Third Circuit held that *Richardson* compelled the conclusion that "the right of convicted felons to vote is not fundamental." *Id.* at 27 (citing *Richardson*, 418 U.S. at 654). It held that "the state cannot only disenfranchise all convicted felons but it can also distinguish among them provided that such distinction is rationally related to a legitimate state interest." *Id.* Pennsylvania could have rationally concluded that one of the losses attendant to incarceration should be the loss of "participation in the democratic process" and that incarcerated and un-incarcerated felons did not stand on equal footing for purposes of voting rights. *Id.* at 28. The Sixth Circuit aligned with *Owens*, holding that "[i]t is undisputed that a state may constitutionally disenfranchise convicted felons," *id.* (citing *Richardson*, 418 U.S. at 24), and that "the right to vote is not fundamental," *id.* (citing *Owens*, 711 F.2d at 27).

The Ninth Circuit emphasized that, as for their equal protection claim, the plaintiffs could not "complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of *Richardson*, 18 U.S. at 55." *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010). It explained that it would "not apply strict scrutiny as [it] would if plaintiffs were complaining about the deprivation of a fundamental right." *Id.* Finally, in *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978), the former Fifth Circuit applied the rational-basis test, rather than strict scrutiny, to a state statutory scheme that disenfranchised all convicted felons, but that provided a mechanism for the restoration of voting rights only to those who were convicted in state court, not federal court.

All that said, the Supreme Court has not immunized all felon disenfranchisement laws from constitutional review. In *Hunter v. Underwood*, 421 U.S. 22 (1985), the Court held that the 1901 Alabama Constitution's provision that disenfranchised individuals convicted of misdemeanors involving moral turpitude was racially discriminatory. The Court explained: "We are confident that [Section] 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of [the state constitutional provision] which otherwise violates [Section] 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* suggests the contrary." *Id.* at 233. This is the claim Plaintiffs bring in Count 1, which will be addressed in a separate opinion in the context of Defendants' pending motion to dismiss.

States cannot make arbitrary classifications between felons. *See, e.g., Richardson*, 418 U.S. at 56 (remanding a claim that "there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as

to work a separate denial of equal protection"); *Owen v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) (noting in dicta that a state "could not disenfranchise similarly situated blue-eyed felons but not brown-eyed felons"); *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) ("[S]elective disenfranchisement or reenfranchisement of convicted felons ... must bear a rational relationship to the achieving of a legitimate state interest." (internal citations omitted)).

4 Because the relief Plaintiffs seek in their motion for preliminary injunction arises from the passage of HB 282, which occurred eight months after the commencement of this action, that relief could not have been encompassed in the Complaint.

5 There is irony in this argument because HB 282 is not effective until August 1, 2017. However, because HB 282 voters will be able to vote in the August 15, 2017 special primary election, should they choose to register to vote, Defendants are applying the law now so that these individuals can meet the July 31 voter registration deadline.

6 At this phase of litigation, the parties have not argued, and the court does not address, felony convictions outside Alabama law. As alleged in the Complaint, all of the named Plaintiffs have Alabama felony convictions.

7 Of the named Plaintiffs, Mr. Giles and Ms. Corley fit within this new class of HB 282 voters Plaintiffs have identified.

8 There is no dispute that the Alabama Secretary of State's website includes an electronic state voter registration form and that the Secretary has modified the instructions on the electronic form by including a hyperlink that lists the HB 282 felonies. (*See* Ex. B, Decl. of Clay Helms ¶ 13.) Plaintiffs want this court to order the Alabama Secretary of State to attach the list generated by that hyperlink and attach that list to the PDF of the registration form. This additional step, says Plaintiffs, would give voters access to the HB 282 crimes list on the downloaded voter registration form.

9 Alabama has in place statutory procedures for disenfranchised felons to request restoration of voting rights. There is no evidence that the State of Alabama is requiring an eligible HB 282 voter to apply to have his or her rights restored before he or she can register to vote.

10 The media coverage is not referenced here for the truth of the matter asserted, but rather to demonstrate that the news industry is reporting on HB 282 in and outside this state in multiple media formats. *See, e.g., United States v. Michtavi*, 155 Fed.Appx. 433, 435 (11th Cir. 2005) (observing that "the Government did not offer the newspaper articles to prove the truth of the matter asserted therein—the occurrence of the drug bust—but rather to show that newspaper articles reporting a New York drug bust existed, and thereby rehabilitate Cohen's testimony").

11 It can be assumed that a prominent posting about HB 282 on the Alabama Secretary of State's website would provide the possibility of more opportunities, for an individual who previously was denied or purged from the voting list, to learn about his or her eligibility to register to vote under HB 282. It is just a possibility on this record, though, where one declarant claims it would be inadequate alone, no Plaintiff contends that such a notice would be adequate, and where the supposition is that most HB 282 voters do not have internet access. This requested relief is too speculative to warrant preliminary injunctive relief.

EXHIBIT 15

No._____

In the Supreme Court of Wisconsin

The Wisconsin Voters Alliance, Ronald H. Heuer, William Joseph Laurent, Richard Kucksdorf, James Fitzgerald, Kelly Ruh, William Berglund, John Jaconi, Donna Utschig, Jeff Wellhouse, Kurt Johnson, Thomas Reczek, Linda Sinkula, Atilla Thorbjorsson, Jeff Kleiman, Navin Jarugumilli, Jonathan Hunt, Suzanne Vlach, Jacob Blazkovec, Donald Utschig, Carol Aldinger, Jay Plaumann, Deborah Gorman, Robert R. Liebeck, Valerie M. Bruns Liebeck, Edward Hudak, Ron Cork, Charles Risch, Karl Lehrke, Arnet Holty and Joseph McGrath, PETITIONERS,

v.

Wisconsin Elections Commission, and its members Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity, RESPONDENTS

On Petition For Original Action
Before this Court

EXPERT REPORT OF MATTHEW BRAYNARD

I. INTRODUCTION

I have been retained as an expert witness on behalf of Petitioners in the above captioned proceeding. I expect to testify on the following subject matters: (i) analysis of the database for the November 3, 2020 election for the selection of Presidential Electors in the State of Wisconsin ("State"); (ii) render opinions regarding whether individuals identified in the State's voter database actually voted; and (iii) render opinions regarding whether individuals identified in the State's voter database were actually qualified to vote on election day.

This is a statement of my relevant opinions and an outline of the factual basis for these opinions. The opinions and facts contained herein are based on the information made available to me in this case prior to preparation of this report, as well as my professional experience as an election data analyst.

I reserve the right to supplement or amend this statement on the basis of further information obtained prior to the time of trial or in order to clarify or correct the information contained herein.

II. DOCUMENTS REVIEWED

I reviewed the following documents in arriving at my opinions.

1. The voter records and election returns as maintained on the State's election database;

2. Records maintained by the National Change of Address Source which is maintained by the United States Postal Service and which is available for licensed users on the internet. I am a licensed member.

3. Records developed by the staff of my call centers and social media researchers; and

4. A national voter database maintained by L2 Political;

In addition, I discussed the facts of this matter with Petitioner's attorney Erick G. Kaardal and members of his legal team.

III. PROFESSIONAL QUALIFICATIONS

I have attached hereto as Exhibit 1 a true and correct copy of my resume. As detailed in the resume, I graduated from George Washington University in 2000 with a degree in business administration with a concentration in finance and management information systems. I have been working in the voter data and election administration field since 1996. I have worked building and deploying voter databases for the Republican National Committee, five Presidential campaigns, and no less than one-hundred different campaigns and election-related organizations in all fifty states and the U.S. Virgin Islands. I worked for eight years as a senior analyst at the nation's premier redistricting and election administration firm, Election Data Services, where I worked with states and municipalities on voter databases, delineation, and litigation support related to these matters. Also, while at Election Data Services, I worked under our contract with the US Census Bureau analyzing voting age population. Since 2004, I have worked for my own business, now known as External Affairs, Inc., providing

statistical and data analysis for local, state, and federal candidates and policy organizations in the areas of voter targeting, polling/research, fundraising, branding, and online development and strategy. My firm has worked for over two-hundred candidates from president to town council and over a dozen DC-based policy/advocacy organizations.

With respect to publications I have authored in the last 10 years, I have not authored any publications in the last ten years.

IV. COMPENSATION

I have been retained as an expert witness for Petitioners. I am being compensated for a flat fee of $40,000.

V. PRIOR TESTIMONY

I have not provided testimony as an expert either at trial or in deposition in the last four years.

VI. STATEMENT OF OPINIONS

As set forth above, I have been engaged to provide expert opinions regarding analysis in the November 3, 2020 election of Presidential electors. Based on my review of the documents set forth above, my discussions with statisticians and analysts working with me and at my direction, my discussions with the attorneys representing the Petitioners, I have the following opinions:

1. It is my opinion, to a reasonable degree of scientific certainty, that in the State, the State's database for the November 3, 2020 election show 96,711 voters whom the state marks as having requested and been sent an absentee ballot did not return it. It is my opinion, to a reasonable degree of scientific certainty, that in my sample

of this universe, 18.12% of these absentee voters in the State did not request an absentee ballot.

2. From the State's database for the November 3, 2020 election and our call center results, it is my opinion to a reasonable degree of scientific certainty that 96,771 individuals whom the State's database identifies as having not returned an absentee ballot, that in my sample of this universe, 15.37% of those absentee voters did in fact mail back an absentee ballot to the clerk's office.

3. From the State's database for the November 3, 2020 election, the NCOA database, and our call center results, it is my opinion to a reasonable degree of scientific certainty that out of the 26,673 individuals had changed their address before the election, that in my sample of this universe, 1.11% of those individuals denied casting a ballot.

4. From the State's database for the November 3, 2020 election and the NCOA database and other state's voter databases, it is my opinion to a reasonable degree of scientific certainty, that at least 6,848 absentee or early voters were not residents of the State when they voted.

5. From the State's database for the November 3, 2020 election and my staff's review of social media for voters who applied for indefinitely confined absentee voting status, it is my opinion to a reasonable degree of scientific certainty, that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

6. From the State's database for the November 3, 2020 election and comparing that data to other states voting data and identifying individuals who cast early/absentee ballots in multiple states, it is my opinion to a reasonable degree of scientific certainty, that at least 234 individuals in the State voted in multiple states.

VII. BASIS AND REASONS SUPPORTING OPINIONS.

First, State maintains a database for the November 3, 2020 election which I obtained from L2 Political and which L2 Political obtained from the State's records on, among other things, voters who applied for an absentee or early voter status. I received this database from L2 Political in a table format with columns and rows which can be searched, sorted and filtered. Each row sets forth data on an individual voter. Each

column contained information such as the name of the voter, the voter's address, whether the voter applied for an absentee ballot, whether the voter voted and whether the voter voted indefinitely confined status.

Second, we are able to obtain other data from other sources such as the National Change of Address Database maintained by the United States Postal Service and licensed by L2 Political. This database also in table format shows the name of an individual, the individual's new address, the individual's old address and the date that the change of address became effective.

Third, I conducted randomized surveys of data obtained from the State's database by having my staff or the call center's staff make phone calls to and ask questions of individuals identified on the State's database by certain categories such as absentee voters who did not return a ballot. Our staff, if they talked to any of these individuals, would then ask a series of questions beginning with a confirmation of the individual's name to ensure it matched the name of the voter identified in the State's database. The staff would then ask additional questions of the individuals and record the answers.

Fourth, I had this staff survey a random sample I obtained from the State's database on indefinitely confined voters. The staff conducted research on the internet and social media postings by these individuals. Staff would undertake to determine if the individual was the individual listed on the database meant the State's definition of indefinitely confined. Staff would then attempt to determine if the individuals had posted photos, images or other information demonstrating that the individuals were not indefinitely confined. For instance, if the individual's social media showed a photo on or

near election day of the individual doing something inconsistent with indefinitely confined status such as riding a bike. Staff would then record the results as either "not indefinitely confined," "confirmed indefinitely confined," or "inconclusive."

Fifth, attached as Exhibits 2 is my written analysis of the data obtained.

Below are the opinions I rendered and the basis of the reasons for those opinions.

1. It is my opinion, to a reasonable degree of scientific certainty, that in the State, the State's database for the November 3, 2020 election show 96,711 voters whom the state marks as having requested and been sent an absentee ballot did not return it. It is my opinion, to a reasonable degree of scientific certainty, that in my sample of this universe, 18.12% of these absentee voters in the State did not request an absentee ballot.

I obtained this data from the State via L2 Political after the November 3, 2020, Election Day. This data identified 96,771 absentee voters who were sent an absentee ballot but who failed to return the absentee ballot.

I then had my staff make phone calls to a sample of this universe. When contacted, I had my staff confirm the individual's identity by name. Once the name was confirmed, I then had staff ask if the person requested an absentee ballot or not. Staff then recorded the number of persons who answered yes. My staff then recorded that of the 2,114 individuals who answered the question, 1,731 individuals answered yes to the question whether they requested an absentee ballot. My staff recorded that 383 individuals answered no to the question whether they requested an absentee ballot. Attached as Exhibit 2 is my written analysis containing information from the data above on absentee voters. Paragraph 2 of Exhibit 2 presents this information.

Next, I then had staff ask the individuals who answered yes, they requested an absentee ballot, whether the individual mailed back the absentee ballot or did not mail back the absentee ballot. Staff then recorded that of the 1,626 individuals who answered the question, 325 individuals answered yes, they mailed back the absentee ballot. Staff recorded 1301 individuals answered no, they did not mail back the absentee ballot. Paragraph 2 of Exhibit 2 presents this information.

Based on these results, 18.12% of our sample of these absentee voters in the State did not request an absentee ballot.

2. From the State's database for the November 3, 2020 election and our call center results, it is my opinion to a reasonable degree of scientific certainty that 96,771 individuals whom the State's database identifies as having not returned an absentee ballot, that in my sample of this universe, 15.37% of those absentee voters did in fact mail back an absentee ballot to the clerk's office.

This opinion includes the analysis set forth above. Among the 1,626 who told our call center that they did request an absentee ballot and answered the second question, 325 told our staff that they mailed the absentee ballot back, which is 15.37% of those whom the State identified as having not returned the absentee ballot the State sent them. Paragraph 2 of Exhibit 2 presents this information.

3. From the State's database for the November 3, 2020 election, the NCOA database, and our call center results, it is my opinion to a reasonable degree of scientific certainty that out of the 26,673 individuals had changed their address before the election, that in my sample of this universe, 1.11% of those individuals denied casting a ballot.

On Exhibit 2, in paragraph 4, I took the State's database of all absentee or early voters and matched those voters to the NCOA database for the day after election day.

This data identified 26,673 individuals whose address on the State's database did not match the address on the NCOA database on election day. Next, I had my staff call the persons identified and ask these individuals whether they had voted. My call center staff identified 1,607 individuals who confirmed that they had casted a ballot. My call center staff identified 18 individuals who denied casting a ballot. Our analysis shows that 1.11% of our sample of these individuals who changed address did not vote despite the State's data recorded that the individuals did vote.

4. From the State's database for the November 3, 2020 election and the NCOA data and other state's voter data, it is my opinion to a reasonable degree of scientific certainty, that at least 6,848 absentee or early voters were not residents of the State when they voted.

On Exhibit 2, in paragraph 1, I took the State's database of all absentee or early voters and matched those voters to the NCOA database for the day after Election Day. This data identified 6,207 individuals who had moved of the State prior to Election Day. Further, by comparing the other 49 states voter databases to the State's database, I identified 765 who registered to vote in a state other than the State subsequent to the date they registered to vote in the State. When merging these two lists and removing the duplicates, and accounting for moves that would not cause an individual to lose their residency and eligibility to vote under State law, these voters total 6,848.

5. From the State's database for the November 3, 2020 election and my staff's review of social media for voters who applied for indefinitely confined absentee voting status, it is my opinion to a reasonable degree of scientific certainty, that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

This opinion is taken from data developed on Exhibit 3. For this determination, I had my staff investigate using the internet and social media the individuals the State's data identified as claiming indefinitely confined status in their absentee ballot applications. The staff conducted research on the internet and social media postings by these individuals. Staff would undertake to determine if the individual was the individual listed on the database as indefinitely confined. Staff would then attempt to determine if the individuals had posted photos, images or other information demonstrating that the individuals were not indefinitely confined. For instance, if the individual's social media showed a photo on or near election day doing something inconsistent with indefinitely confined status such as riding a bike. Staff would then record the results as either "not indefinitely confined," "confirmed indefinitely confined," or "inconclusive."

These results showed that of the 213,215 who claimed indefinitely confined absentee voter status in the State, that in my sample of this universe, 45.23% of those individuals were not indefinitely confined on Election Day.

6. From the State's database for the November 3, 2020 election and comparing that data to other states voting data and identifying individuals who cast early/absentee ballots in multiple states, it is my opinion to a reasonable degree of scientific certainty, that at least 234 individuals in the State voted in multiple states.

On Exhibit 2, in paragraph 2, I had my staff compare the State's early and absentee voters to other states voting data and identified individuals who cast early/absentee ballots in multiple states. My staff located 234 individuals who voted in the State and in other states for the November 3, 2020 general election.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

DEFENDANT TONY EVERS'S OPPOSITION TO PLAINTIFF'S MOTION FOR A CONSOLIDATED EVIDENTIARY HEARING AND TRIAL ON THE MERITS

Plaintiff's motion for a consolidated hearing/trial on the merits (Dkt. 44) should be denied. A host of reasons require holding off on scheduling such a hearing. The only reason Plaintiff now claims to have time for an earlier hearing date is that the District Court of Arizona this past Saturday *sua sponte* converted Plaintiff's attorneys' originally scheduled evidentiary hearing in their virtually identical Arizona lawsuit to oral argument on a motion to dismiss, postponing any potential evidentiary hearing to later in the week. Further, just today the Eastern District of Michigan denied a preliminary injunction in an almost identical lawsuit filed by Plaintiff's counsel; that court acted for reasons relevant here and raised in Governor Evers's briefs filed today (Dkt. 55, 59), including that:

- The relief requested would violate the Eleventh Amendment;
- Michigan had already certified its election results, making the lawsuit moot;
- The doctrine of laches barred relief;

- Abstention was warranted in light of ongoing state-court litigation;
- Plaintiffs lacked standing; and
- Plaintiffs had no likelihood of success on the merits.

King v. Whitmer, No. 2:20-cv-13134, ECF No. 62 (E.D. Mich. Dec. 7, 2020) (filed as Dkt. 55-5). The court based its decision on the parties' paper submissions. And in Georgia, a ruling today resulted in dismissal of another near-identical lawsuit on similar grounds. *Pearson v. Kemp*, No. 1:20-cv-04809, oral decision issued from the bench (N.D. Ga. Dec. 7, 2020).

The same result is exceedingly likely in the case before this Court, as the Michigan and Georgia lawsuits are almost identical to this case. The cases all rely on speculation and wild conjecture, and all lack any evidence in support of their fantastical conspiracy claims. Governor Evers has filed a Motion to Dismiss and a brief in support of that Motion. Like the District of Arizona court, this Court should first decide threshold issues in the Motion to Dismiss before holding any type of evidentiary hearing. Doing so is an efficient use of the Court's and parties' resources because if the Court holds, for example, the Plaintiff lacks standing (which he does) or his claims are non-justiciable (which they are), then there will be no need for an evidentiary hearing.

Additionally, there are several anonymous declarants and proffered experts who Defendants may need to depose prior to any evidentiary hearing. Without knowing the identities of some of the witnesses, it is impossible to prepare for even a deposition. That necessitates scheduling any evidentiary hearing no earlier than December 11 so that witnesses can be identified and deposed. Plaintiff has no basis to demand that this Court forgo even a rushed, rudimentary discovery process when he unnecessarily delayed by waiting until a month after the election to bring his claim.

In truth, the request that the Court hold an evidentiary hearing before deciding the Motion to Dismiss represents a last-gasp effort to hijack a federal court for the same type of circus-atmosphere proceeding, as the nation witnessed a few days ago in a Michigan legislative hearing. For all the reasons Governor Evers explains in both his Motion to Dismiss and his brief in opposition to Plaintiff's motion for injunctive relief, none of these witnesses has a shred of credibility, expertise, or personal knowledge of any facts that would actually be relevant to the recent election in Wisconsin. Just as other federal courts have done, this Court should decline to let Plaintiff coopt a federal courthouse for such a circus, when Plaintiff's complaint should be dismissed on the papers for any of numerous, independently sufficient reasons.

For the above reasons, Governor Evers opposes Plaintiff's Motion for Consolidated Evidentiary Hearing and Trial on the Merits, and requests that the Court either deny the motion or schedule any evidentiary hearing on a date after the Court decides Governor Evers's Motion to Dismiss. Counsel for Governor Evers will be prepared to discuss this issue further at the status conference the Court has set for tomorrow at 11:00 am.

Respectfully submitted this 7th day of December 2020.

/s/ Jeffrey A. Mandell
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Attorneys for Defendant,
Governor Tony Evers

UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

WILLIAM FEEHAN, DERRICK VAN ORDEN *Plaintiff* v. WISCONSIN ELECTIONS COMMISSION, *Defendant*	)	Case No.

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

_____ .

Date: _____

_____
Attorney's signature

_____
Printed name and bar number

_____
Address

_____
E-mail address

_____
Telephone number

_____
FAX number

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

William Feehan,

Plaintiffs,

Case No. 2:20-cv-1771

vs.

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Defendants.

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Allison E. Laffey hereby appears in this matter as counsel for Proposed Amicus Curiae Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., and Earnestine Moss, and further requests that all further notices and copies of pleadings, papers, and other materials relevant to this action be directed and served upon her via the PACER/ECF electronic filing system, with correspondence, written discovery, and other documents not filed with the Court to be served upon her at the address below.

Dated this 8th day of December 2020.

/s/ *Allison E. Laffey*

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

William Feehan,

Plaintiffs,

Case No. 2:20-cv-1771

vs.

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Defendants.

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that John W. Halpin hereby appears in this matter as counsel for Proposed Amicus Curiae Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., and Earnestine Moss, and further requests that all further notices and copies of pleadings, papers, and other materials relevant to this action be directed and served upon him via the PACER/ECF electronic filing system, with correspondence, written discovery, and other documents not filed with the Court to be served upon him at the address below.

Dated this 8th day of December 2020.

/s/ *John W. Halpin*

Joseph S. Goode (WI State Bar No. 1020886)
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

William Feehan,

Plaintiffs,

Case No. 2:20-cv-1771

vs.

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Defendants.

NOTICE OF APPEARANCE

PLEASE TAKE NOTICE that Mark M. Leitner hereby appears in this matter as counsel for Proposed Amicus Curiae Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., and Earnestine Moss, and further requests that all further notices and copies of pleadings, papers, and other materials relevant to this action be directed and served upon him via the PACER/ECF electronic filing system, with correspondence, written discovery, and other documents not filed with the Court to be served upon him at the address below.

Dated this 8th day of December 2020.

/s/ *Mark M. Leitner*

Joseph S. Goode (WI State Bar No. 1020886)
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

William Feehan,

Plaintiffs,

Case No. 2:20-cv-1771

vs.

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Defendants.

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PLEASE TAKE NOTICE that Joseph S. Goode hereby appears in this matter as counsel for Proposed Amicus Curiae Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., and Earnestine Moss, and further requests that all further notices and copies of pleadings, papers, and other materials relevant to this action be directed and served upon him via the PACER/ECF electronic filing system, with correspondence, written discovery, and other documents not filed with the Court to be served upon him at the address below.

Dated this 8th day of December 2020.

/s/ *Joseph S. Goode*

Joseph S. Goode (WI State Bar No. 1020886)
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UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

WILLIAM FEEHAN, DERRICK VAN ORDEN *Plaintiff* v. WISCONSIN ELECTIONS COMMISSION, *Defendant*	)	Case No.

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

_____ .

Date: _____

_____
Attorney's signature

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Printed name and bar number

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Address

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E-mail address

_____
Telephone number

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FAX number

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UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

William Feehan *Plaintiff*	)	
v.	)	Case No. 2:20-cv-1771
Wisconsin Elections Commission, et al. *Defendant*	)	

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Defendant-Intervenors Wisconsins State Conference NAACP; D. Harrell; W.J. Harris, Sr.; E. Moss .

Date: 12/08/2020

/s/ Jacob P. Conarck
Attorney's signature

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UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

WILLIAM FEEHAN and DERRICK VAN ORDEN *Plaintiff*	)	
v.	)	Case No. 2:20-cv-01771-PP
WISCONSIN ELECTIONS COMMISSION, et al. *Defendant*	)	

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Intervenor - Democratic National Committee .

Date: 12/08/2020

s/ Seth P. Waxman
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants.

ORDER GRANTING MOTION BY PROPOSED *AMICUS CURIAE* WISCONSIN STATE CONFERENCE NAACP, DOROTHY HARRELL, WENDELL J. HARRIS, SR., AND EARNESTINE MOSS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF (DKT. NO. 56)

The plaintiff filed this lawsuit on December 1, 2020. Dkt. Nos. 1. The named defendants have filed motions to dismiss the case with supporting briefs—dkt. nos. 51 (Governor Tony Evers) and 53 (Wisconsin Elections Commission and its members). Defendant Evers' brief has fifteen attachments, several of which are decisions from other federal district courts and from the Wisconsin Supreme Court.

On December 7, the Wisconsin State Conference NAACP and three of its members—Dorothy Harrell, Wendell J. Harris, Sr. and Earnestine Moss—filed a motion for permission to file an *amicus* brief on the question of whether the court ought to dismiss the lawsuit. Dkt. No. 56. In the opening paragraphs of the proposed brief, the movants state that "[p]laintiff has already placed a significant enough burden on the Court, so [they] will endeavor not to repeat the substantive arguments that [they] expect the parties will make." Id. at 8-9.

They state that instead, they "seek to highlight some of the stronger reasons why this Court should summarily dismiss this action." Id. at 9. They state that they will rely on decisions from federal courts in other districts and the Wisconsin Supreme Court. Id. Finally, the movants state:

> Wisconsin NAACP is not simply an organization whose mission includes ensuring that voters' votes are counted, important as that mission is. It is dedicated specifically to advancing the interests of Black voters in our democracy. To that end, the national NAACP has partnered with one of the country's leading civil rights organizations, the Lawyers' Committee for Civil Rights Under Law, to work with experienced local counsel in several states, including Wisconsin, to ensure that the votes of Black voters are not invalidated in this election. It is no accident that Plaintiff's focus in this case is on the voters of Milwaukee County, home to Wisconsin's largest city and Black population. This follows a pattern wherein the Trump Campaign and its allies have singled out alleged "corruption" in other cities with large Black populations.
>
> Wisconsin NAACP respectfully asks this Court to scrutinize Plaintiff's claims in that light, and to recognize them not only as an existential threat to our democracy—which they are—but also as a particular threat to the votes of members of minority populations whose access to the ballot box has been historically obstructed.
>
> Plaintiff's complaint does not deserve a day in court.

Id. at 9-10.

Recently Seventh Circuit judge Michael Scudder issued a thoughtful consideration of the purpose of an *amicus*, or "friend of the court," brief. In considering whether to accept three proposed *amicus* briefs, Judge Scudder explained:

> The guidance for prospective *amici* is sparing. The Federal Rules of Appellate Procedure say only that a prospective friend of the court must explain "why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." FED. R. APP. P. 29(a)(3)(B). [The Seventh Circuit's] *Practitioner's Handbook for*

Appeals adds that, in deciding whether to accept an *amicus* brief, the court looks at whether the submission "will assist the judges by presenting ides, arguments, theories, insights, factors, or data that are not found in the briefs of the parties." See *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit*, XXII.B "Amicus Briefs" (2020 ed.) (citing *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 544-45 (7th Cir. 2003) (Posner, J., in chambers)).

At times individual judges have rightly observed that too many *amicus* briefs do not even pretend to offer value and instead merely repeat (literally or through conspicuous paraphrasing) a party's position. See, *e.g.*, *Voices for Choices*, 339 F.3d at 545 ("[I]t is very rare for an *amicus curiae* brief to do more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting."); *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers) ("[T]he vast majority of [*amicus curiae* briefs] have not assisted the judges . . . ."). Nobody benefits from a copycat *amicus* brief and indeed our practice is to reject them. See *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). Nor should *amicus* briefs serve only as a show of hands on what interest groups are rooting for what outcome. See *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004) ("Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed.").

Rather, a true friend of the court will seek to add value to [the court's] evaluation of the issues presented on appeal. To be sure, the fiction that an *amicus* acts as a neutral information broker, and not an advocate, is long gone. See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 703-704 (1963). But even a friend of the court interested in a particular outcome can contribute in clear and distinct ways, by, for example:

- Offering a different analytical approach to the legal issues before the court;

- Highlighting factual, historical, or legal nuance glossed over by the parties;

- Explaining the broader regulatory or commercial context in which a question comes to the court;

- Providing practical perspectives on the consequences of potential outcomes;

- Relaying views on legal questions by employing the tools of social science;

- Supplying empirical data informing one or another question implicated by an appeal;

- Conveying instruction on highly technical, scientific, or specialized subjects beyond the ken of most generalist federal judges;

- Identifying how other jurisdictions—cities, states, or even foreign countries—have approached one or another aspect of a legal question or regulatory challenge.

The point, of course, is that an *amicus curiae* brief should be additive—it should strive to offer something different, new, and important. See *Scheidler*, 223 F.3d at 617.

Prairie Rivers Network v. Dynegy Midwest Generation, LLC, 976 F.3d 761, 762-64 (7th Cir. Sept. 24, 2020).

It is a close call whether the brief proposed by the movants adds anything new or different. The movants concede that they seek only to highlight what they characterize as the stronger of the arguments they anticipated the defendants would make. The court has reviewed the movants' brief—in the main, it relies on cases cited by the defendants and makes arguments made by the defendants.

What the proposed brief *does* do that is different from the other briefs the court has received is ask the court to consider the suit from the perspective of Black voters. It also provides verified declarations from three individuals—the African-American president of the Beloit Branch of the Wisconsin NAACP (and

resident of Beloit, Wisconsin) who voted by in-person early voting in the November 3, 2020 general election and who asserts that the relief the plaintiff requests would invalidate her vote, dkt. no. 56 at 22-23; the current president of the Wisconsin State Conference NAACP who voted by absentee ballot in the November 3, 2020 general election due to having been diagnosed with COVID-19 and who asserts that some of the relief the plaintiff requests would disenfranchise members of the Wisconsin NAACP who voted absentee and would depress future voter turnout, dkt. no. 56 at 25-28; and an African-American member of the Dane County branch of the NAACP who voted in person in the November 3, 2020 election and who alleges that the relief the plaintiff requests would invalidate her vote, dkt. no. 56 at 30-31.

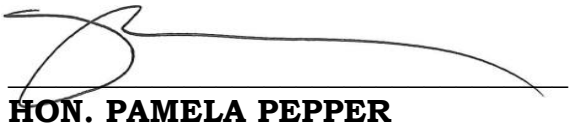
One might argue that the movant's proposed brief is a "show of hands" brief—another interest group expressing its agreement with the arguments made by the defendants in their briefs supporting their motions to dismiss. But because it does shed light on perspectives the defendants may not have—perspectives of members of the NAACP; of Black or African-American voters; of voters who were forced to vote absentee; of voters who used the in-person, early voting option—the court will grant the motion and accept the movant's proposed brief.

The court **GRANTS** the Motion by Proposed Amicus Curiae Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., and

Earnestine Moss for Leave to File Amicus Curiae Brief. Dkt. No. 56.

Dated in Milwaukee, Wisconsin this 8th day of December, 2020.

BY THE COURT:



HON. PAMELA PEPPER
Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Court Minutes and Order

DATE:	December 8, 2020
JUDGE:	Pamela Pepper
CASE NO:	2020-cv-1771
CASE NAME:	William Feehan, *et al.* v. Wisconsin Elections Commission, *et al.*
NATURE OF HEARING:	Status Conference
APPEARANCES:	Howard Kleinhendler – Attorney for plaintiff Jody Schmelzer – Attorney for the Wisconsin Elections Commission and members S. Michael Murphy – Attorney for the Wisconsin Elections Commission And members Davida Brook – Attorney for Governor Tony Evers Jeffrey Mandell – Attorney for Governor Tony Evers David Lesser – Attorney for Amicus Democratic National Committee John Devaney – Attorney for Amicus Democratic National Committee
COURTROOM DEPUTY:	Kristine Wrobel
TIME:	11:08 a.m. – 12:01 p.m.

AUDIO OF THIS HEARING AT DKT. NO. 70

For reasons it explained in detail on the record, the court denied the plaintiffs' motion for a consolidated evidentiary hearing and trial on the merits. Dkt. No. 44.

After explaining that it need to decide the justiciability questions raised by the defendants and *amici* before it could consider the merits of the plaintiff's request for injunctive relief, the court asked the plaintiff's counsel whether the plaintiff needed time to respond to the defendants' motions to dismiss (Dkt. Nos. 51 and 53). Counsel responded that the plaintiff would file both his reply in support of the motion for injunctive relief and his brief in opposition to the motions to dismiss by 5:00 p.m. CST today. When the court enquired when the plaintiff needed a decision from the court (in order to avoid extinguishment of any appellate rights), counsel responded that he would like the court to rule by tomorrow (December 9, 2020). After hearing from the defendants and amicus the DNC regarding when they could file reply briefs, the court ordered that the deadline for the defendants and *amici* to file reply briefs in support of the motions to dismiss was December 9, 2020 at 3 p.m. CST. The court indicated that it will try to get a decision out as soon as possible.

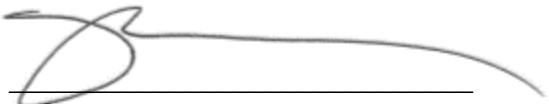
The court **DENIES** the plaintiffs' motion for consolidated evidentiary hearing and trial on the merits. Dkt. No. 44.

The court **ORDERS** the plaintiff to file his responses to the motions to dismiss (Dkt. Nos. 51 and 53) and reply brief in support of his motion for injunctive relief (Dkt. No. 10) by December 8, 2020 at 5 p.m. CST.

The court **ORDERS** that if the defendants and *amici* wish to file reply briefs in support of the motions to dismiss, they must do so by December 9, 2020 at 3 p.m. CST.

Dated in Milwaukee, Wisconsin this 8th day of December, 2020.

BY THE COURT:



HON. PAMELA PEPPER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN

Plaintiff,

v. **CASE NO. 20-cv-1771**

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARLC L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PLAINTIFF'S CONSOLIDATED RESPONSES TO DEFENDANTS' MOTIONS TO DISMISS AND REPLIES TO RESPONSES OF DEFENDANTS AND *AMICI* IN OPPOSITION TO MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF AND MEMORANDUM IN SUPPORT THEREOF

COMES NOW Plaintiff, Michael Feehan, by and through undersigned counsel, and files this Consolidated[1] Response, and Memorandum of Law In Support Thereof, to Defendants Motions to Dismiss Plaintiff's December 3, 2020 Amended Complaint ("Amended Complaint"), ECF No. 9, and Defendants Responses to Plaintiffs' December 3, 2020 Emergency Motion for Declaratory, Emergency and Permanent Injunctive Relief ("TRO Motion"). ECF No. 10.

[1] The Court granted Plaintiff's request to file separate Replies to Defendants. In light of the multiple Motions to Dismiss, Responses and submissions of Amici, most of which are duplicative and repetitive, and given the time constraints, Plaintiff believes it is more efficient to submit a single consolidated response and reply.

INTRODUCTION

Plaintiff seeks to preserve election integrity in Wisconsin by requesting that this Court order Defendants to rescind or reverse their certification of the 2020 General Election, which included hundreds of thousands of illegal, ineligible, fraudulent and fictitious votes that Defendant Governor Evers and the members of the Wisconsin Elections Commission ("WEC") knowingly facilitated and permitted to be cast, through intentionally weakening, or disregarding altogether, the Wisconsin Election Code's many safeguards against absentee ballot voter fraud, for the purpose of ensuring the election of Joe Biden as President.

Defendants, along with Wisconsin state courts, have refused to initiate an investigation into other glaring "irregularities" strongly indicative of brazen election fraud, such as the nearly simultaneous halt in vote counting in Milwaukee and Madison (as well as in five other swing states) in the early morning of November 4 when President Trump had significant lead, followed by the addition of over 140,000 votes for Biden when counting resumed a couple of hours later, giving Biden the narrow lead that he has now. Defendants now seek to run out the clock to cover-up the evidence of their complicity in the stolen election of 2020. In doing so, it is Defendants, not Plaintiff, that would disenfranchise millions of Wisconsin voters who cast lawful ballots and thereby overturned the results of the 2020 General Election.

Plaintiff has provided ample evidence of constitutional election fraud as set forth by the Seventh Circuit in *Kasper v. Bd. of Election Com'rs of the City of Chicago*, 814 F.2d 332, 343 (7th Cir. 1987) ("section 1983 is implicated only when there is willful conduct which undermines the organic process by which candidates are elected"):

- Third parties, whether foreign actors, local officials and/or Defendant WEC, corrupted election results.

- Defendants' knowing refusal to rescind certification and delivery of corrupted results to the Electoral College will deny Plaintiff equal protection.

- Plaintiff is entitled to injunctive relief to prevent defendants from delivering corrupted results the deny him due process and equal protection, and the ability to cast his vote in the Electoral College on December 14, 2020 for President Trump..

This case therefore turns on the question whether Plaintiff can carry his burden of proof that the results are corrupt. Tellingly, Defendants have not propounded *any* declarations or affidavits contesting Plaintiff's extensive sworn testimony and documentary evidence.

STATEMENT OF FACTS

In *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922 (Fed. Cir. 2012), the Court upheld the district court's entry of a preliminary injunction based on defendant's failure to offer any evidence controverting the plaintiff's sworn testimony and documentary evidence.

> Based on the record before the district court, this court sees no error in the district court's finding that Celsis would suffer irreparable harm absent a preliminary injunction. . . . .
>
> Celsis offered testimony from its expert Mark Peterson on irreparable harm. In contrast, LTC did not offer expert testimony in rebuttal. This court sees no error in the district court's reliance on Celsis' unrebutted expert testimony. To substantiate its claims, Celsis presented fact and expert testimony as well as specific financial records.

Id. 930–31.[2]

The following facts are unrebutted by any countervailing evidence.

WEC uses the same Dominion Voting Systems Corporation ("Dominion") election software and hardware designed by Smartmatic Corporation (Sequoia in the United States). Amd. Cplt. ECF

[2] In its opposition to Plaintiff's request for Evidentiary Hearing, WEC complained that Plaintiff has "sandbagged," and will likely make a variant of that same complaint in response to Plaintiff's position that the Court may determine Plaintiff's TRO/PI Motion on the unrebutted record before the Court. Plaintiff's evidence submitted in this case is substantially similar to that submitted in parallel actions in other jurisdictions referenced by Defendants because the same three voting technology companies that control voting in those jurisdictions (along with 90% of the US market) also control substantial voting operations in Wisconsin.

Plaintiff's proof was filed with his Complaint December 1. Further, Counsel for Defendants and Intervenor/Amicus Democratic National Committee have also appeared in those other actions and have been well aware of Plaintiff's proof for weeks.

9 (hereafter, "Amd. Cplt."), Pars. 6 - 8. Dominion and Smartmatic were founded and employed to conduct computerized ballot-stuffing and vote manipulation. The Smartmatic software ensured that ensured Venezuelan dictator Hugo Chavez never lost an election. Exhs. 1 and 8 (member Chavez's security detail and a 25-year member of the Supreme Electoral Council, which oversees all Venezuela elections.)[3]

Smartmatic software design adopted by Dominion for Wisconsin's elections provides the ability to hide vote manipulation votes from any audit. It allows an unauthorized user to add, modify, or remove log entries, causing the machine to log election events that do not reflect actual voting tabulation. Amd. Cplt. 9 – 10. Exh. 14.

For those reasons, the Texas Board of Elections rejected Dominion software and denied certification of the 2020 election results. Amd. Cplt. Pars. 10, n. 1, 12. (Exhs.17, 9, 11)

Texas has today filed with the United States Supreme Court its Motion for Leave to File Bill of Complaint. Exh. 2 to this Response/Reply The Motion includes allegations oof fraud and vote manipulation specific to Wisconsin. Id., pars. 106 – 124.

According to Princeton Professor of Computer Science and Election Security Expert Dr. Andrew Appel, he wrote a similar program that would enable someone to "hack a voting machine [with] 7 minutes alone with a screwdriver." Amd. Cplt. Par. 13. (Exh. 10).

The WEC itself issued patently unlawful "guidance" to county and municipal clerks not to reject "indefinitely confined" absentee voters for whom they had "reliable information" that the voters were not confined, and to fill in missing absentee ballot certification information themselves on envelope and at the polls. Amd. Cplt. Pars. 14, 37 – 45). (WEC May 13, 2020 Guidance Memorandum.)

[3] All Exhibit references are to the Amended Complaint.

The Dominion software was accessed by agents acting on behalf of China and Iran in order to monitor and manipulate elections, including the most recent US general election in 2020. Amd. Cplt. Par. 16 (Exh. 12, former military electronic intelligence analyst).

Many Wisconsin jurisdictions also used the Elections Systems & Software Election Management System, which is similarly compromised. Exh. 17, Pars. 7 – 11.

The WEC certified the Election results on November 30, 2020, showing a difference of 20,565 votes in favor of former Vice-President Joe Biden over President Trump. Amd. Cplt. Par. 35.[4]

Additional errors included voters receiving ballots who didn't request them and returned ballots that went missing. Dr. Briggs concluded that those errors affected almost 97,000 ballots in the state of Wisconsin, with tens of thousands of unrequested ballots being wrongfully, returned ballots not being counted, and others lost or destroyed. Amd.Cplt. Pars. 46 – 51.

Statistical analysis of voting pattern anomalies demonstrated statistically significant outperformance of Dominion machines on behalf of Joe Biden by 181,440. Amd. Cplt. Pars. 52 – 58 (Exh. 4)

The State of Wisconsin, in many locations, used either Sequoia, a subsidiary of Dominion Systems, and or Dominion Systems, Democracy Suite 4.14-D first, and then included Dominion Systems Democracy Suite 5.0-S on or about January 27, 2017, which added a fundamental modification: "dial-up and wireless results transmission capabilities to the Image Cast Precinct and results transmission using the Democracy Suite EMS Results Transfer Manager module." (*See* Exh. 5, attached hereto, a copy of the Equipment for WI election systems).

[4] Available at https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf

Anomalous voting results occurred in voting jurisdictions throughout Wisconsin using software by Dominion and its subsidiary Sequoia, which included "dial-up and wireless results transmission capabilities." Amd.Cplt, Par. 60 - 62. Exh 5.

WEC continued using Dominion and Sequoia software despite numerous concerns expressed by federal and state agencies and courts throughout the country regarding multiple "acute security vulnerabilities." Amd.Cp.t, Par. 63 - 68. Exh. 7.

Dominion software has been compromised by actors in both China and Iran. Dominions systems are further vulnerable because hardware is manufactured by foreign companies with interests contrary to those of the United States. Amd. Cplt. 70-76 (Exh. 12).

Further, a Dominion

> ". . . algorithm looks to have been set to give Joe Biden a 52% win even with an initial 50K+ vote block allocation was provided initially as tallying began (as in case of Arizona too). In the am of November 4, 2020 the algorithm stopped working, therefore another "block allocation" to remedy the failure of the algorithm. This was done manually as ALL the SYSTEMS shut down NATIONWIDE to avoid detection."

Exh. 13, Par. 76 (emphasis original)

Dominion data feeds revealed "raw vote data coming directly that includes decimal places establishes selection by an algorithm, and not individual voter's choice. Otherwise, votes would be solely represented as whole numbers (votes cannot possibly be added up and have decimal places reported)." Amd. Cplt. Pars. 78 – 79, Exzh. 17. Statistical anomalies and impossibilities compel the conclusion that at least 119,430 must be disregarded. *Id.*

Smartmatic's inventors and key personnel are foreign nationals, and the Venezuelan official personally witnessed manipulation of petitions to prevent removal of President Chavez from office. Amd. Cplt. Pars. 80-81. (Exhs. 17 and 8).

In their October 30, 2020 advisory "Iranian Advanced Persistent Threat Actor Identified Obtained Voter Registration Data," both the FBIC and United States Cybersecurity and

Infrastructure Security Agency warned of Iranian influence in the 2020 election. Amd. Cplt. Par. 82, Exh. 18.

Dominion systems allow operators to "accept" or "discard" batches of votes on fed through tabulation machines, including through arbitrarily designating batches of ballots as "problem" batches. Amd. Cplt. Pars. 83 - 85.Exhs. 14 and 8.

Problems with Dominion systems have been widely reported and documented by individual citizens and expert academics. Amd Cplt. Pars. 86 - 89.

In particular, Democratic Senators Warren, Klobuchar, Wyden and Congressman Mark Pocan wrote to the hedge fund owners of voting systems about their concerns that trouble plagued companies owning voting systems were compromising on security and concentrating ownership in only three large companies - Election Systems & Software, Dominion Voting Systems, & Hart InterCivic – which collectively serve over 90% of all eligible voters in the U.S." Amd. Cplt. Par. 88. Exh. 16.

Of particular concern, Dominion's Security Director Eric Coomer, who invented critical dominion software, is a vehement, virulent and frequent opponent of President Trump who, besides intemperate and obscene attacks on the President, has posted videos how Dominion systems may be compromised and boasted publicly he was "f**ing sure" the President was "not going to win." . Amd. Cplt. Par. 88-99

Additional facts relevant to this Consolidated Response and Reply are set forth in the December 3, 2020 Amended Complaint, ECF No. 9, filed in the above-captioned proceeding, and its accompanying exhibits, and the TRO Motion.

DISCUSSION

The Amended Complaint lays out in detail factual allegations and violations of the U.S. Constitution and the Wisconsin Election Code, supported by more than a dozen sworn affidavits from fact and expert witnesses. Yet Defendants dismiss the Amended Complaint as a "mishmash of speculation, conjecture, and conspiracy theories, all without a shred of evidence." ECF No. 59 at 1. Defendants and *Amicus* filings have not presented any facts or witness testimony that responds to, much less rebuts, Plaintiffs' factual allegations and witnesses. Accordingly, Plaintiff's allegation and witness testimony remains unrebutted and unchallenged and must be accepted as true for the purpose of this response.

In Section I, Plaintiff will first review the legal standard for granting injunctive relief, and the evidentiary standards applicable to the TRO Motion where, as here, defendants fail to offer any rebutting evidence. Thereafter, Plaintiff will again demonstrate that it has met the requirements for injunctive relief, which are: (1) substantial likelihood of success on the merits, and in particular that Plaintiffs have adequately pled their Constitutional and statutory claims; (2) irreparable injury, (3) the balance of equities tips in their favor, and (4) the requested relief is in the public interest.

In Section II, Plaintiff will demonstrate that he has met the applicable pleading standard for constitutional election fraud and other constitutional claims under 42 U.S.C. § 1983, in particular, under Federal Rules of Civil Procedure Rule 9(b) and Rule 12(b)(6). As an initial matter, we would note that dismissal of election-related challenges is inappropriate before the development of the evidentiary record.

Finally, Section III will respond to, and dispose of, specious legal arguments by Defendants and *Amicus* for denial of Plaintiffs' TRO Motion, and/or dismissal of the Amended Complaint, on

grounds of: (1) standing, (2) laches, (3) mootness, (4) the Eleventh Amendment, (5) administrative exhaustion and exclusive state jurisdiction, and (6) abstention

I. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF

A. Legal Standard for Injunctive Relief.

"To obtain a preliminary injunction, a plaintiff must show three things: (1) without such relief, he will suffer irreparable harm before his claim is finally resolved; (2) he has no adequate remedy at law; and (3) he has some likelihood of success on the merits. *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017) (*citing Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am*., Inc., 549 F.3d 1079, 1086 (7th Cir. 2008)." "If the plaintiff can do that much, the court must then weigh the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Harlin*, 866 F.3d at 758 (*citing Ty, Inc. v. Jones Grp., Inc*., 237 F.3d 891, 895 (7th Cir. 2001). In addition, the court must ask whether the preliminary injunction is in the public interest. *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1058 (7th Cir. 2016).

All elements are met here, under either standard, and Defendants' and *Amicus* responses have not shown otherwise. Further, this Court can grant the requested injunctive relief on the pleadings, without an evidentiary hearing, because Defendants have failed to provide any fact or expert witness testimony whatsoever to rebut Plaintiff's fact and expert witnesses. *See, e.g., Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 663 F.3d 922, 930-31 (Fed. Cir. 2012) (affirming district court grant of preliminary injunction that relied on plaintiff's unrebutted expert testimony).

Of course, as an initial matter, "[w]hen the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, plaintiff need show neither irreparable injury nor a balance of hardship in his favor." 11 Wright & Miller, Federal Practice & Proc. ¶ 2948 (3d ed. 1998)) (internal quotation marks omitted); *see also Current-Jacks Fork Canoe Rental Ass'n v. Clark*, 603 F. Supp. 421, 427 (E.D. Mo. 1985) (stating that "[i]n actions to enjoin continued

violations of federal statutes, once a movant establishes the likelihood of prevailing on the merits, irreparable harm to the public is presumed."). Certifying election results tainted by election fraud and failing to retract such a certification is clearly unlawful and against the public interest. Hence, Plaintiffs discuss irreparable hardship and the public interest only in the alternative.

B. Plaintiff Has Satisfied Requirements for Preliminary Injunction and TRO.

1. Plaintiff has a substantial likelihood of success.

The Plaintiff does not need to demonstrate a likelihood of absolute success on the merits. "Instead, [it] must only show that [its] chances to succeed on his claims are 'better than negligible.'" *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046 (7th Cir. 2017). (*quoting Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999)). "This is a low threshold," *id.*, that Plaintiff has easily passed.

Through detailed fact and expert testimony including documentary evidence contained in the Amended Complaint and its exhibits, Plaintiff has made a compelling showing that Defendants' intentional actions jeopardized the rights of Wisconsin citizens to select their leaders under the process set out by the Wisconsin Legislature through the commission of election frauds that violated Wisconsin laws, including multiple provisions of the Wisconsin election laws. These acts also violated the Equal Protection and Due Process Clauses of the United States Constitution. U.S. Const. Amend XIV. And pursuant to 42 U.S.C. § 1983, plaintiffs must demonstrate by a preponderance of the evidence that their constitutional rights to equal protection or fundamental right to vote were violated. *See, e.g., Radentz v. Marion Cty.*, 640 F.3d 754, 756-757 (7th Cir. 2011).

Defendants and *Amicus* misrepresent Plaintiff's constitutional claims. Plaintiff alleges both vote dilution and voter disenfranchisement, both of which are claims under the Equal Protection and Due Process Clause, due to the actions of Defendants in collusion with public

employees and voting systems like Dominion. The Amended Complaint describes in great detail Defendants' actions to dilute the votes of Republican voters through counting and even manufacturing hundreds of thousands of illegal, ineligible, duplicative or outright fraudulent ballots.

While the U.S. Constitution itself accords no right to vote for presidential electors, "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (emphasis added). The evidence shows not only that Defendants failed to administer the November 3, 2020 election in compliance with the manner prescribed by the Wisconsin Legislature, but they administered the voter registration, absentee ballot rules, and subsequent ballot processing and counting in a manner that facilitated fraudulent and illegal voter registration and ballot tabulation by election workers, Dominion, Democratic Party officials and activists and other third parties making certain the election of Joe Biden as President of the United States. This conduct violated Equal Protection and Due Process rights of Plaintiff and other similarly situated voters, as well rights under the Wisconsin election laws. *See Kasper v. Bd. of Election Com'rs of the City of Chicago*, 814 F.2d 332, 343 (7th Cir. 1987) (state officials "casting (or approving) of fictitious votes can violate the Constitution and other federal laws.").

But Defendants' actions also disenfranchised Republican voters in violation of the U.S. Constitution's "one person, one vote" requirement by:

- **Republican Ballot Destruction**: "1 Person, 0 Votes." Fact and witness expert testimony alleges and provides strong evidence that tens or even hundreds of thousands of Republican votes were destroyed, thus completely disenfranchising that voter.

- **Republican Vote Switching**: "1 Person, -1 Votes." Plaintiff's fact and expert witnesses further alleged and provided supporting evidence that in many cases, Trump/Republican votes were switched or counted as Biden/Democrat votes. Here, the Republican voter was not only disenfranchised by not having his vote counted for his chosen candidates, but the constitutional injury is compounded by adding his or her vote to the candidates he or she opposes.

- **Dominion Algorithmic Manipulation**: For Republicans, "1 Person, 0.5 Votes," while for Democrats "1 Person, 1.5 Votes. Plaintiff presented evidence in the Complaint regarding Dominion's algorithmic manipulation of ballot tabulation, such that Republican voters in a given geographic region, received less weight per person, than Democratic voters in the same or other geographic regions. See ECF No. 6, Ex. 104. This unequal treatment is the 21st century of the evil that the Supreme Court sought to remedy in the apportionment cases beginning with *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). Further, Dominion has done so in collusion with State actors, including Defendants, so this form of discrimination is under color of law.

This Court should consider the totality of the circumstances in evaluating Plaintiff's constitutional and voting rights claims, *see, e.g., Chisom v. Roemer*, 111 S.Ct 2354, 2368 (1991), and thus the cumulative effect of the Defendants' voter dilution, disenfranchisement, fraud and manipulation, in addition to the effects of specific practices. Taken together, these various forms of unlawful and unconstitutional conduct destroyed or shifted tens or hundreds of thousands of Trump votes, and illegally added tens or hundreds of thousand of Biden votes, changing the result of the election, and effectively disenfranchising the majority of Wisconsin voters. Defendant (and *Amicus*) were fully aware of these constitutional violations, and did nothing to stop it.

While Plaintiff alleges several categories of traditional "voting fraud", Plaintiff has also alleged new forms of voting dilution and disenfranchisement made possible by new technology. The potential for voter fraud inherent in electronic voting was increased as a direct result of Defendants' and *Amicus*'s efforts to transform traditional in-person paper voting – for which there are significant protections from fraud in place – to near universal absentee voting with electronic tabulation – while at the same time eliminating through legislation or litigation. And when that failed by refusing to enforce – traditional protections against voting fraud (voter ID, signature

matching, witness and address requirements, etc.). Defendants' design and administration of the Wisconsin Election Code facilitated illegal and fraudulent voter registration and voting, and thus evinced a state "policy" that "honest voting is unnecessary or unimportant." *Kasper*, 814 F.2d at 344. Defendants' filing in this proceeding – where they seek to cover up the illegal conduct of state officials and other third parties and prevent the evidence from ever seeing the light of day – provide further proof that Defendants are complicit in the massive election fraud scheme described in the Amended Complaint.

Thus, while Plaintiff's claims include novel elements due to changes in technology and voting practices, that does not nullify the Constitution or Plaintiff's rights thereunder. Defendants and Defendant-Intervenors have implemented likely the most wide-ranging and comprehensive scheme of voting fraud yet devised, integrating new technology with old fashioned urban machine corruption and skullduggery. The fact that this scheme is novel does not make it legal, or prevent this Court from fashioning appropriate injunctive relief to protect Plaintiff's right and prevent Defendants from enjoying the benefits of their illegal conduct.

2. The Plaintiff Will Suffer Irreparable Harm.

Plaintiff will suffer an irreparable harm due to the Defendants' myriad violations of Plaintiff's rights under the U.S. Constitution, and Wisconsin Election Code, and Defendant and Defendant Intervenors have not shown otherwise.

Where, as here, plaintiff has demonstrated a likelihood of success on the merits as to a constitutional claim, such an injury has been held to constitute irreparable harm." *Democratic Nat'l Comm. v. Bostelmann*, 447 F.Supp.3d 757, 769 (W.D. Wis. 2020) (*citing Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (where plaintiff had proven a probability of success on the merits, the threatened loss of First Amendment freedoms "unquestionably constitutes irreparable injury"); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.4 (7th Cir.

1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm."). Moreover, courts have specifically held that infringement on the fundamental right to vote constitutes irreparable injury. *See Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012) ("A restriction on the fundamental right to vote ... constitutes irreparable injury."); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (holding that plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon")."

"Additionally, traditional legal remedies would be inadequate, since infringement on a citizens' constitutional right to vote cannot be redressed by money damages." *Bostelmann*, 447 F.Supp.3d at 769 (*citing Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate."); *League of Women* Voters *of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress.")."

In this Response, Plaintiff has refuted and rebutted Defendants' arguments in detail, in particular, regarding standing, equitable defenses, and jurisdictional claims, as well as establishing their substantial likelihood of success. Having disposed of those arguments, and shown a substantial likelihood of success, this Court should presume that the requirement to show irreparable injury has been satisfied.

3. The Balance of Equities & The Public Interest

Under Seventh Circuit law, a "sliding scale" approach is used for balancing of harms: "[t]he more likely it is that [the movant] will win its case on the merits, the less the balance of harms need weigh in its favor." *Girl Scouts of Manitou Council v. Girl Scouts of United States of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). Plaintiff has shown a strong likelihood of success on the merits above.

Granting Plaintiff's primary request for injunctive relief, enjoining certification of the 2020 General Election results, or requiring Defendants to de-certify the results, would not only not impose a burden on Defendants, but would instead relieve Defendants of the obligation to take any further affirmative action. The result would be to place the decision regarding certification and the selection of Presidential Electors back into the hands of the Wisconsin Legislature, which is the ultimate decision maker under the Elections and Electors Clause of the U.S. Constitution.

Conversely, permitting Defendants' certification of an election so tainted by fraud and Defendants' own unlawful conduct that it would impose a certain and irreparable injury not only on Plaintiff, but would also irreparably harm the public interest insofar as it would undermine "[c]onfidence in the integrity of our electoral processes," which "is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 127 S.Ct. 5, 7 (2006) (per curiam).

II. PLAINTIFF SATISFIES APPLICABLE PLEADING STANDARDS

Defendants urge this Court to dismiss the Amended Complaint for failure to state a claim under Rule 12(b)(6) or to plead with particularity under Rule 9(b). *See* ECF No. 54 at 2; ECF No. 59 at 21-22; ECF No. 57 at 21-26.

The pleading requirements for stating a constitutional election fraud claim in the Seventh Circuit under Section 1983 are set forth in *Kasper*, a case addressing widespread voter fraud in Chicago on a scale similar to what occurred in the 2020 General Election. 814 F.2d at 342-344. While "intent is an essential ingredient of a constitutional election fraud case under § 1983," *id.* at 343, it is not the same intent as required in a common law fraud claim under Federal Rules of Civil Procedure 9(b). Instead, "section 1983 is implicated only when there is willful conduct which undermines the organic process by which candidates are elected." *Id.* (internal citations and quotation omitted).

In *Kasper*, Republican plaintiffs alleged a range of illegal conduct strikingly similar to what has occurred in Wisconsin and other state in the 2020 General Election, in particular, maintenance of voter lists with ineligible voters, fictitious or fraudulent votes, and failure to enforce safeguards against voting fraud. Their complaint did not allege active state participation in vote dilution or other illegal conduct, but rather that the state defendants were aware that a substantial number of registrations are bogus and [had] not alleviated the situation." *Id.* The *Kasper* held that "casting (or approval) of fictitious votes can violate the Constitution and other federal laws," and that for the purposes of Section 1983, it is sufficient to allege that this conduct was permitted pursuant to a state "'policy" of diluting votes" that "may be established by a demonstration" state officials who "despite knowing of the practice, [have] done nothing to make it difficult." *Id.* at 344. This "policy" may also lie in the "design and administration" of the voting system that is "incapable of producing an honest vote," in which case "[t]he resulting fraud may be attributable" to state officials "because the whole system is in [their] care and therefore is state action." *Id.*

Accordingly, Plaintiff is not required to allege that Defendants directly participated in illegal conduct, or to meet Rule 9(b) requirements to plead with particularity facts demonstrating their active participation. Instead, it is sufficient, both for purposes of Rule 9(b) and Rule 12(b)(6) that Defendants' administration of the Wisconsin Election Code, in particular their guidance that nullified express provisions intend to prevent absentee voter fraud, certification of and reliance on Dominion voting machines, and their certification of results tainted by widespread fraud, in a manner that facilitated voter fraud and resulted in the constitutional violations set forth in the Compliant. "In a system of notice pleading, judges should read complaints generously," *id.* at 343, and Plaintiff's Amended Complaint, detailing several distinct types of voter fraud and constitutional violations, supported by over a dozen sworn affidavits from fact and expert

witnesses providing evidence of voter fraud, easily exceeds the applicable pleading requirements under the Federal Rules of Civil Procedure.

III. DEFENDANTS' JURISDICTIONAL AND OTHER GROUNDS FOR DISMISSAL.

A. Plaintiff Has Standing.

Plaintiff is a lawfully registered Wisconsin voter, who voted for President Trump in the 2020 General Election, and a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin. See ECF No. 1, "Parties" and Exh. 1, Declaration of William Feehan.

1. Plaintiff Elector Has Standing under Electors and Elections Clause.

Defendants arguments on standing rely on the Third Circuit's decision in *Bognet v. Sec'y of Commonwealth*, No. 20-2314, 2020 WL 6686120 (3d Cir. Nov. 13, 2020), *see* ECF No. 52 at 7; ECF No. 59 at 7-8, as well as a recent district court decision in Michigan that followed *Bognet*. ECF No. 59 at 8. (*citing King v. Whitmer*, No. 2:20-vc-13134 (E.D. Mich. Dec. 7, 2020). The *Bognet* court addressed a complaint by Pennsylvania voters and a congressional candidate, but not by a Presidential Elector.

Plaintiff Feehan has standing for the same reason that the Eighth Circuit held that Minnesota Electors had standing in *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). The *Carson* court affirmed that Presidential Electors have both Article III and Prudential standing under the Electors and Elections Clauses, "was rooted heavily in the court's interpretation of Minnesota law." Defendants neglect to mention is that the Carson court relied on provisions of Minnesota law treating electors as candidates for office are just like the corresponding provision of the Wisconsin Election Code because in both States an elector is a candidate for office nominated by a political party, and a vote cast for a party's candidate for President and Vice-President is cast for

that party's Electors. The Carson court concluded that, "[b]ecause Minnesota law plainly treats presidential electors as a candidate, we do, too." *Carson*, 978 F.3d at 1057.

Like the Minnesota statute addressed by the *Carson* court, Wisconsin statutes provide, first, that electors are candidates for office nominated by their political party at their state convention held "on the first Tuesday in October of each year in which there is a Presidential election." Wis. Stat. § 8.18.

More importantly, Wisconsin voters do not vote directly for the office of President and Vice-President, but instead vote for Electors like Mr. Feehan:

> Presidential electors. By general ballot at the general election for choosing the president and vice president of the United States there shall be elected as many electors of president and vice president as this state is entitled to elect senators and representatives in congress. ***A vote for the president and vice president nominations of any party is a vote for the electors of the nominees.***
>
> Wis. Stat. §8.25.
>
> When presidential electors … are to be voted for, ***a vote cast for the party candidate for president and vice-president shall be deemed a vote cast for that party's electors*** … as filed with the secretary of state.
>
> Minn. Stat. § 208.04(1) (emphasis added).

In Wisconsin as in Minnesota, the President and Vice-President are not directly elected by voters. Instead, voters elect the Presidential Electors, who in turn elect the President and Vice-President A vote for President Trump and Vice-President Pence in Wisconsin ***was*** a vote for Plaintiff and his fellow Republican Presidential Electors. It goes without saying that Presidential Electors play a unique – and central – role in Presidential elections, a role expressly spelled out in the Electors Clause of the U.S. Constitution. As such, election fraud or other violations of state election law impacting federal Presidential elections, have a unique and distinct impact on Presidential Electors, and illegal conduct aimed at harming candidates for President similarly

injures Presidential Electors. As such, Plaintiff Elector has "a cognizable interest in ensuring that the final vote tally reflects the legally valid votes cast," as "[a]n inaccurate vote tally is a concrete and particularized injury to candidates such as the Electors." *Carson*, 978 F.3d at 1058. *See also McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (*per curiam*).

2. Plaintiff Has Standing for Equal Protection and Due Process Claims as a Registered Voter on His Own Behalf and on Behalf Similarly Situated Voters for Republican Candidates

Defendants misrepresent Plaintiff's Equal Protection and Due Process claims, both in terms of substance and for standing purposes, insofar as they claim that Plaintiffs' claims are based solely on a theory of vote dilution, and therefore is a "generalized grievance," rather than the concrete and particularized injury required for Article III standing. *See* ECF No. 52 at 6; ECF No. 4 at 6: ECF No. 59 at 9.[5] Defendants also cite the Eleventh Circuit's decision in *Wood v. Raffensperger*, No. 20-14418 (D.C. Cir. Dec. 5, 2020). *See* ECF No. 57 at 14. But they fail to recognize that The Eleventh Circuit's decision in *Wood* supports Plaintiff's standing argument, and refutes theirs. The court dismissed plaintiff Wood's claim because he was not a candidate. "[I]f Wood were a political candidate," like the Plaintiff here, "he would satisfy this requirement because he could assert a personal, distinct injury." ECF No. 55-4 at *4 (citations omitted).

Plaintiff, on behalf of himself and other similarly situated voters allege, first, and with great particularity, that Defendants have both violated Wisconsin law and applied Wisconsin law, in an arbitrary and disparate manner, to dilute the votes of (or voters for Republican candidates) with

[5] *Amicus* also cites *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, 2020 WL 6821992 (M.D. Penn Nov. 21, 2020). *See* ECF No. 57 at 13. This case addressed a number of theories for standing -- associational, organizational, and standing of a political party based on harm to that party's candidates -- that are not present here because each Plaintiff bring suit in their personal capacity as registered Arizona voters and 11 of the Plaintiffs as Presidential Electors.

illegal, ineligible, duplicate or fictitious votes. The fact and expert witness testimony describes and quantifies the myriad means by which Defendants and their collaborators illegally inflated the vote tally for Biden and other Democrats. See ECF No. 9, Section II and III. Thus, the vote dilution resulting from this systemic and illegal conduct did not affect all Wisconsin voters equally; it had the intent and effect of inflating the number of votes for Democratic candidates and reducing the number of votes for Trump and Republican candidates.

Further, Plaintiff has presented evidence that, not only did Defendants dilute the votes of Plaintiff and similarly-situated voters for Republican candidates, they sought to actively disenfranchise such voters to reduce their voting power, in clear violation of "one person, one vote." *See generally Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964). The Constitution protects "the right of all qualified citizens to vote in state and federal elections ... and [ ] the right to have votes counted without dilution as compared to the votes of others." *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986). Similarly, federal courts in Wisconsin have held that voters have standing to challenge state laws that collectively reduce the value of one party's impose an injury that is statewide. *See Whitford v. Nichol*, 151 F.Supp.3d 918, 926 (W.D. Wis. 2015).

Defendants engaged in several schemes to devalue Republican votes as detailed in the Amended Complaint, including Republican ballots being destroyed or discarded, or "1 person, 0 votes," vote switching "1 person, -1 votes," (Dominion and election workers switching votes from Trump/Republican to Biden/Democrat), and Dominion algorithmic manipulation, or for Republicans, "1 person, 1/2 votes," and for Democrats, "1 person, 1.5 votes." *See e.g.,* ECF No. 9, Section II.C (ballot destruction/discarding) Ex. 2 (Dr. Briggs Testimony regarding potential ballot destruction), Ex. 17 (Ramsland testimony regarding additive algorithm), Section IV

(multiple witnesses regarding Dominion vote manipulation). Plaintiff's injury is that the relative value of his particular votes was devalued, or eliminated altogether, and as such, it is not a "generalized grievance," as Defendants claim.

It is hard to square Defendants' argument that a candidate Plaintiff—whose interests and injury are identical to that of President Trump—lacks standing to raise Equal Protection and Due Process claims of similarly situated Republican voters, with the Supreme Court's 7-2 decision in *Bush v. Gore*, 531 U.S. 98 (200), "then-candidate George W. Bush of Texas had standing to raise the equal protection rights of Florida voters that a majority of the Supreme Court deemed decisive" in that case. *Hawkins v. Wayne Twp. Bd. of Marion Cty., IN*, 183 F. Supp. 2d 1099, 1103 (S.D. Ind. 2002).

Plaintiff can also establish that the alleged particularized injury in fact is causally connected to Defendants' actions. Specifically, "WEC's administration of Wisconsin's elections, including the enforcement of its current election laws, is the cause of plaintiff['s] alleged injuries. Moreover, the WEC has the authority to implement a federal court order relating to election law to redress these alleged injuries." *Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 5627186, at *12 (W.D. Wis. Sept. 21, 2020). Defendant Evers can also provide partial redress in terms of the requested injunctive relief, namely, by refusing to certify or transmit the election results, and providing access to voting machines, records and other "election materials." ECF No. 9 ¶142(4).

Plaintiff thus meets the requirements for standing: (1) the injuries of their rights under the Equal Protection and Due Process clauses that concrete and particularized for themselves, and similarly situated voters, whose votes have been devalued or disregarded altogether (2) that are actual or imminent and (3) are causally connected to Defendants conduct because the debasement

of their votes is a direct and intended result of the conducts of the Defendants and the public employee election workers they supervise. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

B. Laches

Defendants assert that Plaintiff's claims are barred by laches. See ECF No. 52 at 8; ECF No. 59 at 16-20. To establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself. *See ,e.g*., *Lingenfelter v. Keystone Consolidated Indus., Inc.,* 691 F.2d 339, 340 (7th Cir.1982).

First off, "ordinarily a motion to dismiss is not the appropriate vehicle to address the defense of laches," *American Commercial Barge Lines, LLC v. Reserve FTL, Inc.*, 2002 WL 31749171 (N.D. Ill. Dec. 3, 2002) (*citing Farries v. Stanadyne/Chicago Div.*, 832 F.2d 374, 376 (7th Cir. 1987)), because "the defense of laches … involves more than the mere lapse of time and depends largely on questions of fact." *Id.* (*quoting* 5 Wright & Miller, Federal Practice and Procedure § 1277 (2d ed. 1987). Accordingly, most courts have found the defense "unsuitable for resolution at the pleading stage." *Id.* (citation omitted).

Defendant Evers relies on *Soules v. Kauians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988), ECF No. 59 at 17, a case with entirely different facts. There, the Ninth Circuit held that plaintiff Equal Protection claim was barred by laches because they "knew the basis of their equal claim well in advance" of the election, months in advance in fact, *Soules*, 849 F.2d at 1181, and failed to provide any explanation for their failure to press their claim before the election. *Id*. at 1182.

Here, by contrast to Defendants' assertions, all of the unlawful conduct occurred during the course of the election and in the post-election vote counting, manipulation, and even fabrication. Plaintiff could not have known the basis of these claims, or presented evidence

substantiating their claim, until after the election. Further, because Wisconsin election officials and other third parties involved did not announce or publicize their misconduct, and in fact prevented Republican poll watchers from observing the ballot counting and handling, it took Plaintiff additional time post-election to gather the fact and expert witness testimony presented in the Amended Complaint. Had they filed before the election, as the Defendant Secretary asserts, it would have been dismissed as speculative--because the injuries asserted had not occurred--and on ripeness grounds.

Any "delay" in filing after Election Day is almost entirely due to Defendants failure to promptly complete counting until weeks after November 3, 2020. Wisconsin did not complete counting at the same time it certified results, which was not until November 30, 2020, and Plaintiff filed the initial complaint (which is materially the same as the Amended Complaint filed December 3, 2020), and TRO motion the ***very next day*** on December 1, 2020. Defendants cannot now assert the equitable affirmative defense of laches, when there is no unreasonable delay nor is there any genuine prejudice to the Defendants.

C. Mootness

Defendant Evers' mootness argument is similarly without merit. *See* ECF No. 59 at 13-14. This argument is based on the false premise that this Court cannot order any of the relief requested in the Amended Complaint or the TRO Motion because the "requests for relief relate to the general election held on November 3, 2020, and its results," *id.* at 13, and "[b]ecause Wisconsin has already certified its results." *Id.* at 14.

It is well settled that "the passage of an election does not necessarily render an election-related challenge moot and that such challenges may fall within the 'capable of repetition yet evading review' exception to the mootness doctrine." *Tobin for Governor v. Illinois State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir. 2001) (citations omitted). This exception applies where:

"(1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Id*. at 529 (citations omitted). Plaintiff's claims regarding Defendants' arbitrary and disparate implementation of Wisconsin law, in a manner that directly contravenes Wisconsin Election Code provisions governing absentee voting—in particular their guidance relating to "indefinitely confined" (*see* Wis. Stat. § 6.86 & Amended Complaint, Section I.A) voters and witness address verification requirements (*see* Wis. Stat. § 6.87 & Amended Complaint Section I.B—where officials have violated statute in this election, and further assert that it was proper to do so, their conduct will certainly continue in the next election.

In any case, the certification of election results render Plaintiff's election-related claims moot. In *Siegel v. Lepore*, 234 F.3d 1163 (11th Cir. 2000), a case arising from the 2000 General Election, the Eleventh Circuit addressed post-certification election challenges:

> This Court has held that "[a] claim for injunctive relief may become moot if: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.
>
> We conclude that neither of these elements is satisfied in this case. The Democratic candidate, Vice President Gore, and others are currently contesting the election results in various lawsuits in numerous Florida state courts. There are still manual recount votes from at least Volusia and Broward Counties in the November 26th official election results of the Florida Secretary of State. **In view of the complex and ever-shifting circumstances of the case, we cannot say with any confidence that no live controversy is before us.**

Id. at 1172-73 (emphasis added). *See also Common Cause*, 347 F.Supp.3d at 1291 (holding that certification of election results did not moot post-election claim for emergency injunctive relief). The cutoff for election-related challenges, at least in the Seventh Circuit, appears to be the date that the electors meet, rather than the date of certification: "even though the ***election*** has passed,

the meeting of electors obviously has not, so plaintiff's claim here is hardly moot." *Swaffer v. Deininger*, No. 08-CV-208, 2008 WL 5246167, at *4 (E.D. Wis. Dec. 17, 2008).

A recent decision by this very Court appears to have applied the *Swaffer* court's interpretation—that the relevant date for federal election-related claims is the December 14, 2020 meeting of the electors, rather than the date of certification—from which it follows that Plaintiff's request for relief are not moot. *See* ECF No. 29, *William Feehan v. Wisconsin Elections Commission*, et al., Case No. 20-cv-1771-pp (E.D. Wis. Dec. 4, 2020) ("*Feehan*"). In response to Plaintiff's request for an expedited briefing schedule, this Court explained that, under 3 U.S.C §5, while the "Safe Harbor" date is December 8, 2020, the Electoral College does not vote for president and vice president until December 14, 2020. *Id.* at 7. While "December 8 is a critical date for resolution of any *state court litigation* involving an aggrieved candidate," like Plaintiff, it is not necessary for this federal Court to grant or deny the injunctive relief requested "before the safe harbor deadline for *state* courts to resolve alleged violations of" Wisconsin election laws. *Id.* at 8 (emphasis in original). Implicit in this Court's determination that—because the "electors do not meet until December 14, 2020," a less "truncated briefing schedule" is appropriate—this Court can still grant some or perhaps all of the relief requested and this Plaintiff's claims are not moot.

Finally, Defendant Evers cites the Eleventh Circuit case in *Wood* as authority in his mootness argument, ECF No. 57 at 14, but fails to acknowledge the significant differences between Mr. Feehan's requests for relief in the Amended Complaint and Mr. Wood's in that proceeding. Unlike Plaintiff, Mr. Wood did not ask the district court to de-certify the election (instead asking for a delay in certification), nor did he assert claims under the Elections and Electors Clause. The *Wood* court held that Georgia's certification of results mooted Mr. Wood's request to delay certification, so the court could not consider a request for de-certification "made for the first time

on appeal." *Id.* at 18. Plaintiff made his request for de-certification and other injunctive relief in the Amended Complaint, Compl. at ¶¶ 142-145, and this request is not mooted by Defendants' certification of the results. While the *Wood* court finds that the mootness exception for "capable of repetition yet evading review," discussed above, was not applicable, their denial was based on the specific "posture of [his] appeal" and the specific relief requested (delay of certification), *id.* at *7, which are not applicable to Plaintiff's claims and requested relief.

This Court can grant the primary relief requested by Plaintiff – de-certification of Wisconsin's election results and an injunction prohibiting State Defendants from transmitting the results – as discussed in Section I.F. on abstention below. There is also no question that this Court can order other types of declaratory and injunctive relief requested by Plaintiff, in particular, impounding Dominion voting machines and software for inspection, nor have State Defendants claimed otherwise.

D. Eleventh Amendment

Defendants assert that Plaintiff's claims are barred by the Eleventh Amendment. *See* ECF No. 52 at 10-11; ECF No. 59 at 14-16. Defendants fail, however, to acknowledge that the Eleventh Amendment permits claims for prospective and injunctive relief enjoining state officials from ongoing violations of federal law or the U.S. Constitution. At this stage of the proceeding, this Court "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Council 31 of the Am. Fed'n of State, Cty. & Mun. Employees, AFL-CIO v. Quinn*, 680 F.3d 875, 882 (7th Cir. 2012) (citations omitted).

Plaintiff's requests for relief in the Amended Complaint meet both requirements. First, Plaintiff has identified ongoing violations of federal law, among other things by certifying results of the 2020 General Election that are tainted not only by widespread fraud, but by ongoing

violations of the Electors and Elections Clauses, the Equal Protection and Due Process Clauses, as well as likely violations of federal law including the Voting Rights Act and the Help America Vote Act. Second, the declaratory and injunctive relief requested is prospective including: an order directing Defendants to de-certify the election results, enjoining Defendants from transmitting the currently certified election results to the Electoral College, TRO to seize and impound servers, voting machines and other "election materials" for forensic audit and inspection by Plaintiff. ECF No. 9 ¶142. Moreover, the Amended Complaint requests that this Court prospectively enjoin Defendants to take actions that are specifically in the scope of their statutory authority. *See Bostelmann*, 2020 WL 5627186, at *12 (finding that WEC is responsible for "administration of Wisconsin's elections," and "WEC has the authority to implement a federal court order relating to election law to redress [Plaintiff's] alleged injuries.").

E. Administrative Exhaustion and Exclusive State Jurisdiction

Defendant Evers asserts that Plaintiff's claims are barred alternately because he failed to exhaust administrative remedies (namely, a complaint to Defendant WEC under Wis. Stat. § 5.06) and because Wisconsin's recount statute, Wis. Stat. § 9.01(11), "'constitutes the exclusive judicial remedy' for such claims under ***state*** law." ECF No. 59 at 10 (emphasis added) (*citing Trump v. Evers*, No. 2020AP1971-OA, Order at *2 (Wis. Dec. 3, 2020)). Irrespective of whether the cited Wisconsin statutes set forth exclusive ***state*** administrative or judicial remedies, these provisions do not bar the Plaintiff's claims under the U.S. Constitution.

The Elections and Electors Clauses of the U.S. Constitution delegate to the Wisconsin Legislature the power to determine the manner of holding federal elections and selecting Presidential Electors:

> But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue

> of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.

Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000). As such, the state laws – and the implementation thereof by the State's executive and judicial branches – are inherently a federal question, and a "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (finding that state court's recount standards violated the Equal Protection and Due Process Clauses). Accordingly, the Wisconsin statutes cited above cannot bar Plaintiff's federal constitutional claims, or impose an administrative exhaustion requirement where Plaintiff is not seeking review of state administrative action.

This Court has subject matter jurisdiction for Plaintiff's federal constitutional claims under 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This Court also has subject matter jurisdiction under 28 U.S.C. § 1343 because this action involves a federal election for President of the United States. The jurisdiction of the Court to grant declaratory relief is conferred by 28 U.S.C. §§ 2201 and 2202 and by Rule 57, Fed. R. Civ. P. "The right to vote is protected in more than the initial allocation of the franchise.

To the extent the Amended Complaint implicates Wisconsin statutory or constitutional law, jurisdiction remains appropriate under 28 U.S.C. § 1367. As a threshold matter, the supplemental jurisdiction statute, section 1367, says that district courts "shall have" jurisdiction over the non-federal claims forming part of the same case or controversy, ... if state law claims are asserted as part of the same case or controversy with a federal claim, the district court has discretion to exercise supplemental jurisdiction over the remaining state law claims and the mandatory remand provision of the procedure after removal statute does not apply.

F. Abstention

Defendant Evers urges this Court to dismiss the Amended Complaint and abstain from taking jurisdiction over the claims raised in the Amended Complaint. ECF No. 59 at 11-12. The standard for federal abstention in the voting rights and state election law context, *Harman v. Forssenius*, 380 U.S. 528, 534, (1965), where the Supreme Court explained that abstention may be appropriate where "the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law," and "deference to state court adjudication only be made where the issue of state law is uncertain." *Harman*, 380 U.S. at 534 (citations omitted). But if state law in question "is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question," then "it is the duty of the federal court to exercise its properly invoked jurisdiction." *Id.* (citation omitted).

Governor Evers claims that the "state law issues underlying Plaintiff's claims are sufficiently uncertain to warrant abstention," and points to the order of the Supreme Court of Wisconsin addressing a petition alleging misconduct by WEC during the 2020 General Election that "raises time-sensitive questions of state-wide concern." ECF No. 59 at 12 (*citing Wisconsin Voters Alliance v. Wisconsin Elections Commission*, No. 2020AP1930-OA, at *1 (Wis. Dec. 4, 2020) ("*Wisconsin Voters Alliance*"). What he neglects to mention is that the Wisconsin Supreme Court ***denied*** the petition, "the third time that a majority of [the Wisconsin Supreme Court] has turned its back on pleas from the public to address a matter of state-wide concern," involving alleged wrongdoing by Defendant WEC during the 2020 General Election, "that requires a declaration of what the statutes require for absentee voting." *Wisconsin Voters Alliance* at *5 (Roggensack, C.J., dissenting). Abstention requires more than uncertainty about state law – and notably, the majority asserted only that the petition required resolution of "disputed factual claims," *id.* at 3, not any uncertainty regarding the interpretation of the statutes – it requires the

likelihood that a state court will resolve that uncertainty. Here, the relevant state court has repeatedly refused to address these issues; by accepting jurisdiction this Court is not "injecting itself into the middle of [a] dispute," ECF No. 59 at 12, as there is no current state court proceeding addressing these issues (or at least not any identified by Defendant).

Respectfully submitted, this 8th day of December, 2020.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff, **CASE NO. 2:20-cv-1771**

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

DECLARATION OF WILLIAM FEEHAN

Pursuant to 28 U.S.C.§ 1746, I, William Feehan, hereby declare as follows:

1) I am Plaintiff in the above action, and am a resident of the City of La Crosse and La Crosse County, Wisconsin.

2) I am a lawfully registered Wisconsin voter and lawfully voted for President Donald J. Trump in the November 3, 2020 election.

3) I am a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin and am pledged as an Elector to vote for him when the Electoral College meets December 14, 2020.

I declare under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

Dated December 8, 2020

/s William Feehan .
William Feehan

No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF GEORGIA, STATE OF MICHIGAN, AND STATE OF WISCONSIN,

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Pursuant to 28 U.S.C. § 1251(a) and this Court's Rule 17, the State of Texas respectfully seeks leave to file the accompanying Bill of Complaint against the States of Georgia, Michigan, and Wisconsin and the Commonwealth of Pennsylvania (collectively, the "Defendant States") challenging their administration of the 2020 presidential election.

As set forth in the accompanying brief and complaint, the 2020 election suffered from significant and unconstitutional irregularities in the Defendant States:

- Non-legislative actors' purported amendments to States' duly enacted election laws, in violation of the Electors Clause's vesting State legislatures with plenary authority regarding the appointment of presidential electors.

- Intrastate differences in the treatment of voters, with more favorable allotted to voters – whether lawful or unlawful – in areas administered by local government under Democrat control and with populations with higher ratios of Democrat voters than other areas of Defendant States.
- The appearance of voting irregularities in the Defendant States that would be consistent with the unconstitutional relaxation of ballot-integrity protections in those States' election laws.

All these flaws – even the violations of *state* election law – violate one or more of the federal requirements for elections (*i.e.*, equal protection, due process, and the Electors Clause) and thus arise under federal law. *See Bush v Gore*, 531 U.S. 98, 113 (2000) ("significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question") (Rehnquist, C.J., concurring). Plaintiff State respectfully submits that the foregoing types of electoral irregularities exceed the hanging-chad saga of the 2000 election in their degree of departure from both state and federal law. Moreover, these flaws cumulatively preclude knowing who legitimately won the 2020 election and threaten to cloud all future elections.

Taken together, these flaws affect an outcome-determinative numbers of popular votes in a group of States that cast outcome-determinative numbers of electoral votes. This Court should grant leave to file the complaint and, ultimately, enjoin the use of unlawful election results without review and ratification by the Defendant States' legislatures and remand to the Defendant States' respective

legislatures to appoint Presidential Electors in a manner consistent with the Electors Clause and pursuant to 3 U.S.C. § 2.

December 7, 2020 Respectfully submitted,

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In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

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COMMONWEALTH OF PENNSYLVANIA, STATE OF STATE OF GEORGIA, STATE OF MICHIGAN, AND STATE OF WISCONSIN,

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"[T]hat form of government which is best contrived to secure an impartial and exact execution of the law, is the best of republics."

—John Adams

BILL OF COMPLAINT

Our Country stands at an important crossroads. Either the Constitution matters and must be followed, even when some officials consider it inconvenient or out of date, or it is simply a piece of parchment on display at the National Archives. We ask the Court to choose the former.

Lawful elections are at the heart of our constitutional democracy. The public, and indeed the candidates themselves, have a compelling interest in ensuring that the selection of a President—any President—is legitimate. If that trust is lost, the American Experiment will founder. A dark cloud hangs over the 2020 Presidential election.

Here is what we know. Using the COVID-19 pandemic as a justification, government officials in the defendant states of Georgia, Michigan, and Wisconsin, and the Commonwealth of Pennsylvania (collectively, "Defendant States"), usurped their legislatures' authority and unconstitutionally revised their state's election statutes. They accomplished these statutory revisions through executive fiat or friendly lawsuits, thereby weakening ballot integrity. Finally, these same government officials flooded the Defendant States with millions of ballots to be sent through the mails, or placed in drop boxes, with little

or no chain of custody[1] and, at the same time, weakened the strongest security measures protecting the integrity of the vote—signature verification and witness requirements.

Presently, evidence of material illegality in the 2020 general elections held in Defendant States grows daily. And, to be sure, the two presidential candidates who have garnered the most votes have an interest in assuming the duties of the Office of President without a taint of impropriety threatening the perceived legitimacy of their election. However, 3 U.S.C. § 7 requires that presidential electors be appointed on December 14, 2020. That deadline, however, should not cement a potentially illegitimate election result in the middle of this storm—a storm that is of the Defendant States' own making by virtue of their own unconstitutional actions.

This Court is the only forum that can delay the deadline for the appointment of presidential electors under 3 U.S.C. §§ 5, 7. To safeguard public legitimacy at this unprecedented moment and restore public trust in the presidential election, this Court should extend the December 14, 2020 deadline for Defendant States' certification of presidential electors to allow these investigations to be completed. Should one of the two leading candidates receive an absolute majority of the presidential electors' votes to be cast on December 14, this would finalize the selection of our President. The only date that is mandated under

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[1] *See* https://georgiastarnews.com/2020/12/05/dekalb-county-cannot-find-chain-of-custody-records-for-absentee-ballots-deposited-in-drop-boxes-it-has-not-been-determined-if-responsive-records-to-your-request-exist/

the Constitution, however, is January 20, 2021. U.S. CONST. amend. XX.

Against that background, the State of Texas ("Plaintiff State") brings this action against Defendant States based on the following allegations:

NATURE OF THE ACTION

1. Plaintiff State challenges Defendant States' administration of the 2020 election under the Electors Clause of Article II, Section 1, Clause 2, and the Fourteenth Amendment of the U.S. Constitution.

2. This case presents a question of law: Did Defendant States violate the Electors Clause (or, in the alternative, the Fourteenth Amendment) by taking—or allowing—non-legislative actions to change the election rules that would govern the appointment of presidential electors?

3. Those unconstitutional changes opened the door to election irregularities in various forms. Plaintiff State alleges that each of the Defendant States flagrantly violated constitutional rules governing the appointment of presidential electors. In doing so, seeds of deep distrust have been sown across the country. In the spirit of *Marbury v. Madison*, this Court's attention is profoundly needed to declare what the law is and to restore public trust in this election.

4. As Justice Gorsuch observed recently, "Government is not free to disregard the [Constitution] in times of crisis. … Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles." *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. ____ (2020) (Gorsuch, J., concurring). This case is no different.

5. Each of Defendant States acted in a common pattern. State officials, sometimes through pending litigation (*e.g.*, settling "friendly" suits) and sometimes unilaterally by executive fiat, announced new rules for the conduct of the 2020 election that were inconsistent with existing state statutes defining what constitutes a lawful vote.

6. Defendant States also failed to segregate ballots in a manner that would permit accurate analysis to determine which ballots were cast in conformity with the legislatively set rules and which were not. This is especially true of the mail-in ballots in these States. By waiving, lowering, and otherwise failing to follow the state statutory requirements for signature validation and other processes for ballot security, the entire body of such ballots is now constitutionally suspect and may not be legitimately used to determine allocation of the Defendant States' presidential electors.

7. The rampant lawlessness arising out of Defendant States' unconstitutional acts is described in a number of currently pending lawsuits in Defendant States or in public view including:

- *Dozens of witnesses testifying under oath about*: the physical blocking and kicking out of Republican poll challengers; thousands of the same ballots run multiple times through tabulators; mysterious late night dumps of thousands of ballots at tabulation centers; illegally backdating thousands of ballots; signature verification procedures ignored; more

than 173,000 ballots in the Wayne County, MI center that cannot be tied to a registered voter;[2]

- *Videos of*: poll workers erupting in cheers as poll challengers are removed from vote counting centers; poll watchers being blocked from entering vote counting centers—despite even having a court order to enter; suitcases full of ballots being pulled out from underneath tables after poll watchers were told to leave.
- *Facts for which no independently verified reasonable explanation yet exists*: On October 1, 2020, in Pennsylvania a laptop and several USB drives, used to program Pennsylvania's Dominion voting machines, were mysteriously stolen from a warehouse in Philadelphia. The laptop and the USB drives were the *only* items taken, and potentially could be used to alter vote tallies; In Michigan, which also employed the same Dominion voting system, on November 4, 2020, Michigan election officials have admitted that a purported "glitch" caused 6,000 votes for President Trump to be wrongly switched to Democrat Candidate Biden. A flash drive containing tens of thousands of votes was left unattended in the Milwaukee tabulations center in the early morning hours of Nov. 4, 2020, without anyone aware it was not in a proper chain of custody.

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[2] All exhibits cited in this Complaint are in the Appendix to the Plaintiff State's forthcoming motion to expedite ("App. 1a-151a"). *See* Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Benson*, 1:20-cv-1083 (W.D. Mich. Nov. 11, 2020) at ¶¶ 26-55 & Doc. Nos. 1-2, 1-4.

8. Nor was this Court immune from the blatant disregard for the rule of law. Pennsylvania itself played fast and loose with its promise to this Court. In a classic bait and switch, Pennsylvania used guidance from its Secretary of State to argue that this Court should not expedite review because the State would segregate potentially unlawful ballots. A court of law would reasonably rely on such a representation. Remarkably, before the ink was dry on the Court's 4-4 decision, Pennsylvania changed that guidance, breaking the State's promise to this Court. *Compare Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 U.S. LEXIS 5188, at *5-6 (Oct. 28, 2020) ("we have been informed by the Pennsylvania Attorney General that the Secretary of the Commonwealth issued guidance today directing county boards of elections to segregate [late-arriving] ballots") (Alito, J., concurring) *with Republican Party v. Boockvar*, No. 20A84, 2020 U.S. LEXIS 5345, at *1 (Nov. 6, 2020) ("this Court was not informed that the guidance issued on October 28, which had an important bearing on the question whether to order special treatment of the ballots in question, had been modified") (Alito, J., Circuit Justice).

9. Expert analysis using a commonly accepted statistical test further raises serious questions as to the integrity of this election.

10. The probability of former Vice President Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently given President Trump's early lead in those States as of 3 a.m. on November 4, 2020, is less than one in a quadrillion, or 1 in 1,000,000,000,000,000. For former Vice President Biden to win these four States collectively, the odds of

that event happening decrease to less than one in a quadrillion to the fourth power (*i.e.*, 1 in 1,000,000,000,000,000[4]). *See* Decl. of Charles J. Cicchetti, Ph.D. ("Cicchetti Decl.") at ¶¶ 14-21, 30-31. *See* App. 4a-7a, 9a.

11. The same less than one in a quadrillion statistical improbability of Mr. Biden winning the popular vote in the four Defendant States—Georgia, Michigan, Pennsylvania, and Wisconsin—independently exists when Mr. Biden's performance in each of those Defendant States is compared to former Secretary of State Hilary Clinton's performance in the 2016 general election and President Trump's performance in the 2016 and 2020 general elections. Again, the statistical improbability of Mr. Biden winning the popular vote in these **four** States collectively is 1 in 1,000,000,000,000,000[5]. *Id.* 10-13, 17-21, 30-31.

12. Put simply, there is substantial reason to doubt the voting results in the Defendant States.

13. By purporting to waive or otherwise modify the existing state law in a manner that was wholly *ultra vires* and not adopted by each state's legislature, Defendant States violated not only the Electors Clause, U.S. CONST. art. II, § 1, cl. 2, but also the Elections Clause, *id.* art. I, § 4 (to the extent that the Article I Elections Clause textually applies to the Article II process of selecting presidential electors).

14. Plaintiff States and their voters are entitled to a presidential election in which the votes from each of the states are counted only if the ballots are cast and counted in a manner that complies with the pre-existing laws of each state. *See Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983) ("for the

President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."). Voters who cast lawful ballots cannot have their votes diminished by states that administered their 2020 presidential elections in a manner where it is impossible to distinguish a lawful ballot from an unlawful ballot.

15. The number of absentee and mail-in ballots that have been handled unconstitutionally in Defendant States greatly exceeds the difference between the vote totals of the two candidates for President of the United States in each Defendant State.

16. In addition to injunctive relief for this election, Plaintiff State seeks declaratory relief for all presidential elections in the future. This problem is clearly capable of repetition yet evading review. The integrity of our constitutional democracy requires that states conduct presidential elections in accordance with the rule of law and federal constitutional guarantees.

JURISDICTION AND VENUE

17. This Court has original and exclusive jurisdiction over this action because it is a "controvers[y] between two or more States" under Article III, § 2, cl. 2 of the U.S. Constitution and 28 U.S.C. § 1251(a) (2018).

18. In a presidential election, "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson*, 460 U.S. at 795. The constitutional failures of Defendant States injure Plaintiff States because "'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as

effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) (*Bush II*). In other words, Plaintiff State is acting to protect the interests of its respective citizens in the fair and constitutional conduct of elections used to appoint presidential electors.

19. This Court's Article III decisions indicate that only a state can bring certain claims. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (distinguishing citizen plaintiffs from citizen relators who sued in the name of a state); *cf. Massachusetts v. EPA,* 549 U.S. 497, 520 (2007) (courts owe states "special solicitude in standing analysis"). Moreover, redressability likely would undermine a suit against a single state officer or State because no one State's electoral votes will make a difference in the election outcome. This action against multiple State defendants is the only adequate remedy for Plaintiff States, and this Court is the only court that can accommodate such a suit.

20. Individual state courts do not—and under the circumstance of contested elections in multiple states, *cannot*—offer an adequate remedy to resolve election disputes within the timeframe set by the Constitution to resolve such disputes and to appoint a President via the electoral college. No court—other than this Court—can redress constitutional injuries spanning multiple States with the sufficient number of states joined as defendants or respondents to make a difference in the Electoral College.

21. This Court is the sole forum in which to exercise the jurisdictional basis for this action.

PARTIES

22. Plaintiff is the State of Texas, which is a sovereign State of the United States.

23. Defendants are the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin, which are sovereign States of the United States.

LEGAL BACKGROUND

24. Under the Supremacy Clause, the "Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme law of the land." U.S. CONST. Art. VI, cl. 2.

25. "The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college." *Bush II*, 531 U.S. at 104 (citing U.S. CONST. art. II, § 1).

26. State legislatures have plenary power to set the process for appointing presidential electors: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." U.S. CONST. art. II, §1, cl. 2; *see also Bush II*, 531 U.S. at 104 ("[T]he state legislature's power to select the manner for appointing electors is *plenary*." (emphasis added)).

27. At the time of the Founding, most States did not appoint electors through popular statewide elections. In the first presidential election, six of the ten States that appointed electors did so by direct legislative appointment. *McPherson v. Blacker*, 146 U.S. 1, 29-30 (1892).

28. In the second presidential election, nine of the fifteen States that appointed electors did so by direct legislative appointment. *Id.* at 30.

29. In the third presidential election, nine of sixteen States that appointed electors did so by direct legislative appointment. *Id.* at 31. This practice persisted in lesser degrees through the Election of 1860. *Id.* at 32.

30. Though "[h]istory has now favored the voter," *Bush II*, 531 U.S. at 104, "there is no doubt of the right of the legislature to resume the power [of appointing presidential electors] at any time, for *it can neither be taken away nor abdicated*." *McPherson*, 146 U.S. at 35 (emphasis added); *cf.* 3 U.S.C. § 2 ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.").

31. Given the State legislatures' constitutional primacy in selecting presidential electors, the ability to set rules governing the casting of ballots and counting of votes cannot be usurped by other branches of state government.

32. The Framers of the Constitution decided to select the President through the Electoral College "to afford as little opportunity as possible to tumult and disorder" and to place "every practicable obstacle [to] cabal, intrigue, and corruption," including "foreign powers" that might try to insinuate themselves into our elections. THE FEDERALIST NO. 68, at 410-11 (C. Rossiter, ed. 1961) (Madison, J.).

33. Defendant States' applicable laws are set out under the facts for each Defendant State.

FACTS

34. The use of absentee and mail-in ballots skyrocketed in 2020, not only as a public-health response to the COVID-19 pandemic but also at the urging of mail-in voting's proponents, and most especially executive branch officials in Defendant States. According to the Pew Research Center, in the 2020 general election, a record number of votes—about 65 million—were cast via mail compared to 33.5 million mail-in ballots cast in the 2016 general election—an increase of more than 94 percent.

35. In the wake of the contested 2000 election, the bipartisan Jimmy Carter-James Baker commission identified absentee ballots as "the largest source of potential voter fraud." BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005).

36. Concern over the use of mail-in ballots is not novel to the modern era, Dustin Waters, *Mail-in Ballots Were Part of a Plot to Deny Lincoln Reelection in 1864*, WASH. POST (Aug. 22, 2020),[3] but it remains a *current* concern. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-96 & n.11 (2008); *see also* Texas Office of the Attorney General, *AG Paxton Announces Joint Prosecution of Gregg County Organized Election Fraud in Mail-In Balloting Scheme* (Sept. 24, 2020); Harriet Alexander & Ariel Zilber, *Minneapolis police opens investigation into reports that Ilhan Omar's supporters illegally harvested Democrat ballots in Minnesota*, DAILY MAIL, Sept. 28, 2020.

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[3] https://www.washingtonpost.com/history/2020/08/22/mail-in-voting-civil-war-election-conspiracy-lincoln/

37. Absentee and mail-in voting are the primary opportunities for unlawful ballots to be cast. As a result of expanded absentee and mail-in voting in Defendant States, combined with Defendant States' unconstitutional modification of statutory protections designed to ensure ballot integrity, Defendant States created a massive opportunity for fraud. In addition, the Defendant States have made it difficult or impossible to separate the constitutionally tainted mail-in ballots from all mail-in ballots.

38. Rather than augment safeguards against illegal voting in anticipation of the millions of additional mail-in ballots flooding their States, Defendant States *all* materially weakened, or did away with, security measures, such as witness or signature verification procedures, required by their respective legislatures. Their legislatures established those commonsense safeguards to prevent—or at least reduce—fraudulent mail-in ballots.

39. Significantly, in Defendant States, Democrat voters voted by mail at two to three times the rate of Republicans. Former Vice President Biden thus greatly benefited from this unconstitutional usurpation of legislative authority, and the weakening of legislative mandated ballot security measures.

40. The outcome of the Electoral College vote is directly affected by the constitutional violations committed by Defendant States. Plaintiff State complied with the Constitution in the process of appointing presidential electors for President Trump. Defendant States violated the Constitution in the process of appointing presidential electors by unlawfully abrogating state election laws designed to

protect the integrity of the ballots and the electoral process, and those violations proximately caused the appointment of presidential electors for former Vice President Biden. Plaintiff State will therefore be injured if Defendant States' unlawfully certify these presidential electors.

Commonwealth of Pennsylvania

41. Pennsylvania has 20 electoral votes, with a statewide vote tally currently estimated at 3,363,951 for President Trump and 3,445,548 for former Vice President Biden, a margin of 81,597 votes.

42. The number of votes affected by the various constitutional violations exceeds the margin of votes separating the candidates.

43. Pennsylvania's Secretary of State, Kathy Boockvar, without legislative approval, unilaterally abrogated several Pennsylvania statutes requiring signature verification for absentee or mail-in ballots. Pennsylvania's legislature has not ratified these changes, and the legislation did not include a severability clause.

44. On August 7, 2020, the League of Women Voters of Pennsylvania and others filed a complaint against Secretary Boockvar and other local election officials, seeking "a declaratory judgment that Pennsylvania existing signature verification procedures for mail-in voting" were unlawful for a number of reasons. *League of Women Voters of Pennsylvania v. Boockvar*, No. 2:20-cv-03850-PBT, (E.D. Pa. Aug. 7, 2020).

45. The Pennsylvania Department of State quickly settled with the plaintiffs, issuing revised guidance on September 11, 2020, stating in relevant part: "The Pennsylvania Election Code does not

authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections."

46. This guidance is contrary to Pennsylvania law. First, Pennsylvania Election Code mandates that, for non-disabled and non-military voters, all applications for an absentee or mail-in ballot "shall be signed by the applicant." 25 PA. STAT. §§ 3146.2(d) & 3150.12(c). Second, Pennsylvania's voter signature verification requirements are expressly set forth at 25 PA. STAT. 350(a.3)(1)-(2) and § 3146.8(g)(3)-(7).

47. The Pennsylvania Department of State's guidance unconstitutionally did away with Pennsylvania's statutory signature verification requirements. Approximately 70 percent of the requests for absentee ballots were from Democrats and 25 percent from Republicans. Thus, this unconstitutional abrogation of state election law greatly inured to former Vice President Biden's benefit.

48. In addition, in 2019, Pennsylvania's legislature enacted bipartisan election reforms, 2019 Pa. Legis. Serv. Act 2019-77, that set *inter alia* a deadline of 8:00 p.m. on election day for a county board of elections to receive a mail-in ballot. 25 PA. STAT. §§ 3146.6(c), 3150.16(c). Acting under a generally worded clause that "Elections shall be free and equal," PA. CONST. art. I, § 5, cl. 1, a 4-3 majority of Pennsylvania's Supreme Court in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), extended that deadline to three days after Election Day and adopted a presumption that even *non-postmarked ballots* were presumptively timely.

49. Pennsylvania's election law also requires that poll-watchers be granted access to the opening, counting, and recording of absentee ballots: "Watchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded." 25 PA. STAT. § 3146.8(b). Local election officials in Philadelphia and Allegheny Counties decided not to follow 25 PA. STAT. § 3146.8(b) for the opening, counting, and recording of absentee and mail-in ballots.

50. Prior to the election, Secretary Boockvar sent an email to local election officials urging them to provide opportunities for various persons—including political parties—to contact voters to "cure" defective mail-in ballots. This process clearly violated several provisions of the state election code.

- Section 3146.8(a) requires: "The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D,1 shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections."
- Section 3146.8(g)(1)(ii) provides that mail-in ballots shall be canvassed (if they are received by eight o'clock p.m. on election day) in the manner prescribed by this subsection.
- Section 3146.8(g)(1.1) provides that the first look at the ballots shall be "no earlier than seven o'clock a.m. on election day." And the hour for this "pre-canvas" must be publicly announced at least

48 hours in advance. Then the votes are counted on election day.

51. By removing the ballots for examination prior to seven o'clock a.m. on election day, Secretary Boockvar created a system whereby local officials could review ballots without the proper announcements, observation, and security. This entire scheme, which was only followed in Democrat majority counties, was blatantly illegal in that it permitted the illegal removal of ballots from their locked containers prematurely.

52. Statewide election officials and local election officials in Philadelphia and Allegheny Counties, aware of the historical Democrat advantage in those counties, violated Pennsylvania's election code and adopted the differential standards favoring voters in Philadelphia and Allegheny Counties with the intent to favor former Vice President Biden. *See* Verified Complaint (Doc. No. 1), *Donald J. Trump for President, Inc. v. Boockvar*, 4:20-cv-02078-MWB (M.D. Pa. Nov. 18, 2020) at ¶¶ 3-6, 9, 11, 100-143.

53. Absentee and mail-in ballots in Pennsylvania were thus evaluated under an illegal standard regarding signature verification. It is now impossible to determine which ballots were properly cast and which ballots were not.

54. The changed process allowing the curing of absentee and mail-in ballots in Allegheny and Philadelphia counties is a separate basis resulting in an unknown number of ballots being treated in an unconstitutional manner inconsistent with Pennsylvania statute. *Id.*

55. In addition, a great number of ballots were received after the statutory deadline and yet

were counted by virtue of the fact that Pennsylvania did not segregate all ballots received after 8:00 pm on November 3, 2020. Boockvar's claim that only about 10,000 ballots were received after this deadline has no way of being proven since Pennsylvania broke its promise to the Court to segregate ballots and co-mingled perhaps tens, or even hundreds of thousands, of illegal late ballots.

56. On December 4, 2020, fifteen members of the Pennsylvania House of Representatives led by Rep. Francis X. Ryan issued a report to Congressman Scott Perry (the "Ryan Report," App. 139a-144a) stating that "[t]he general election of 2020 in Pennsylvania was fraught with inconsistencies, documented irregularities and improprieties associated with mail-in balloting, pre-canvassing, and canvassing that the reliability of the mail-in votes in the Commonwealth of Pennsylvania is impossible to rely upon."

57. The Ryan Report's findings are startling, including:

- Ballots with NO MAILED date. That total is 9,005.
- Ballots Returned on or BEFORE the Mailed Date. That total is 58,221.
- Ballots Returned one day after Mailed Date. That total is 51,200.

Id. 143a.

58. These nonsensical numbers alone total 118,426 ballots and exceed Mr. Biden's margin of 81,660 votes over President Trump. But these discrepancies pale in comparison to the discrepancies in Pennsylvania's reported data concerning the

number of mail-in ballots distributed to the populace—now with no longer subject to legislated mandated signature verification requirements.

59. The Ryan Report also states as follows:

> [I]n a data file received on November 4, 2020, the Commonwealth's PA Open Data sites reported over 3.1 million mail in ballots sent out. The CSV file from the state on November 4 depicts 3.1 million mail in ballots sent out but on November 2, the information was provided that only 2.7 million ballots had been sent out. ***This discrepancy of approximately 400,000 ballots from November 2 to November 4 has not been explained***.

Id. at 143a-44a. (Emphasis added).

60. These stunning figures illustrate the out-of-control nature of Pennsylvania's mail-in balloting scheme. Democrats submitted mail-in ballots at more than two times the rate of Republicans. This number of constitutionally tainted ballots far exceeds the approximately 81,660 votes separating the candidates.

61. This blatant disregard of statutory law renders all mail-in ballots constitutionally tainted and cannot form the basis for appointing or certifying Pennsylvania's presidential electors to the Electoral College.

62. According to the U.S. Election Assistance Commission's report to Congress *Election Administration and Voting Survey: 2016 Comprehensive Report*, in 2016 Pennsylvania received 266,208 mail-in ballots; 2,534 of them were rejected (.95%). *Id.* at p. 24. However, in 2020, Pennsylvania received more than 10 times the number of mail-in ballots compared to 2016. As explained *supra*, this

much larger volume of mail-in ballots was treated in an unconstitutionally modified manner that included: (1) doing away with the Pennsylvania's signature verification requirements; (2) extending that deadline to three days after Election Day and adopting a presumption that even *non-postmarked ballots* were presumptively timely; and (3) blocking poll watchers in Philadelphia and Allegheny Counties in violation of State law.

63. These non-legislative modifications to Pennsylvania's election rules appear to have generated an outcome-determinative number of unlawful ballots that were cast in Pennsylvania. Regardless of the number of such ballots, the non-legislative changes to the election rules violated the Electors Clause.

State of Georgia

64. Georgia has 16 electoral votes, with a statewide vote tally currently estimated at 2,458,121 for President Trump and 2,472,098 for former Vice President Biden, a margin of approximately 12,670 votes.

65. The number of votes affected by the various constitutional violations exceeds the margin of votes dividing the candidates.

66. Georgia's Secretary of State, Brad Raffensperger, without legislative approval, unilaterally abrogated Georgia's statute governing the signature verification process for absentee ballots.

67. O.C.G.A. § 21-2-386(a)(2) prohibits the opening of absentee ballots until after the polls open on Election Day: In April 2020, however, the State Election Board adopted Secretary of State Rule 183-1-14-0.9-.15, Processing Ballots Prior to Election Day.

That rule purports to authorize county election officials to begin processing absentee ballots up to three weeks before Election Day.

68. Georgia law authorizes and requires a single registrar or clerk—after reviewing the outer envelope—to reject an absentee ballot if the voter failed to sign the required oath or to provide the required information, the signature appears invalid, or the required information does not conform with the information on file, or if the voter is otherwise found ineligible to vote. O.C.G.A. § 21-2-386(a)(1)(B)-(C).

69. Georgia law provides absentee voters the chance to "cure a failure to sign the oath, an invalid signature, or missing information" on a ballot's outer envelope by the deadline for verifying provisional ballots (*i.e.*, three days after the election). O.C.G.A. §§ 21-2-386(a)(1)(C), 21-2-419(c)(2). To facilitate cures, Georgia law requires the relevant election official to notify the voter in writing: "The board of registrars or absentee ballot clerk shall promptly notify the elector of such rejection, a copy of which notification shall be retained in the files of the board of registrars or absentee ballot clerk for at least two years." O.C.G.A. § 21-2-386(a)(1)(B).

70. On March 6, 2020, in *Democratic Party of Georgia v. Raffensperger*, No. 1:19-cv-5028-WMR (N.D. Ga.), Georgia's Secretary of State entered a Compromise Settlement Agreement and Release with the Democratic Party of Georgia (the "Settlement") to materially change the statutory requirements for reviewing signatures on absentee ballot envelopes to confirm the voter's identity by making it far more difficult to challenge defective signatures beyond the

express mandatory procedures set forth at GA. CODE § 21-2-386(a)(1)(B).

71. Among other things, before a ballot could be rejected, the Settlement required a registrar who found a defective signature to now seek a review by two other registrars, and only if a majority of the registrars agreed that the signature was defective could the ballot be rejected but not before all three registrars' names were written on the ballot envelope along with the reason for the rejection. These cumbersome procedures are in direct conflict with Georgia's statutory requirements, as is the Settlement's requirement that notice be provided by telephone (*i.e.*, not in writing) if a telephone number is available. Finally, the Settlement purports to require State election officials to consider issuing guidance and training materials drafted by an expert retained by the Democratic Party of Georgia.

72. Georgia's legislature has not ratified these material changes to statutory law mandated by the Compromise Settlement Agreement and Release, including altered signature verification requirements and early opening of ballots. The relevant legislation that was violated by Compromise Settlement Agreement and Release did not include a severability clause.

73. This unconstitutional change in Georgia law materially benefitted former Vice President Biden. According to the Georgia Secretary of State's office, former Vice President Biden had almost double the number of absentee votes (65.32%) as President Trump (34.68%). *See* Cicchetti Decl. at ¶ 25, App. 7a-8a.

74. The effect of this unconstitutional change in Georgia election law, which made it more likely that ballots without matching signatures would be counted, had a material impact on the outcome of the election.

75. Specifically, there were 1,305,659 absentee mail-in ballots submitted in Georgia in 2020. There were 4,786 absentee ballots rejected in 2020. This is a rejection rate of .37%. In contrast, in 2016, the 2016 rejection rate was 6.42% with 13,677 absentee mail-in ballots being rejected out of 213,033 submitted, which more than *seventeen times greater* than in 2020. *See* Cicchetti Decl. at ¶ 24, App. 7a.

76. If the rejection rate of mailed-in absentee ballots remained the same in 2020 as it was in 2016, there would be 83,517 less tabulated ballots in 2020. The statewide split of absentee ballots was 34.68% for Trump and 65.2% for Biden. Rejecting at the higher 2016 rate with the 2020 split between Trump and Biden would decrease Trump votes by 28,965 and Biden votes by 54,552, which would be a net gain for Trump of 25,587 votes. This would be more than needed to overcome the Biden advantage of 12,670 votes, and Trump would win by 12,917 votes. *Id*. Regardless of the number of ballots affected, however, the non-legislative changes to the election rules violated the Electors Clause.

State of Michigan

77. Michigan has 16 electoral votes, with a statewide vote tally currently estimated at 2,650,695 for President Trump and 2,796,702 for former Vice President Biden, a margin of 146,007 votes. In Wayne County, Mr. Biden's margin (322,925 votes) significantly exceeds his statewide lead.

78. The number of votes affected by the various constitutional violations exceeds the margin of votes dividing the candidates.

79. Michigan's Secretary of State, Jocelyn Benson, without legislative approval, unilaterally abrogated Michigan election statutes related to absentee ballot applications and signature verification. Michigan's legislature has not ratified these changes, and its election laws do not include a severability clause.

80. As amended in 2018, the Michigan Constitution provides all registered voters the right to request and vote by an absentee ballot without giving a reason. MICH. CONST. art. 2, § 4.

81. On May 19, 2020, however, Secretary Benson announced that her office would send unsolicited absentee-voter ballot applications by mail to all 7.7 million registered Michigan voters prior to the primary and general elections. Although her office repeatedly encouraged voters to vote absentee because of the COVID-19 pandemic, it did not ensure that Michigan's election systems and procedures were adequate to ensure the accuracy and legality of the historic flood of mail-in votes. In fact, it did the opposite and did away with protections designed to deter voter fraud.

82. Secretary Benson's flooding of Michigan with millions of absentee ballot applications prior to the 2020 general election violated M.C.L. § 168.759(3). That statute limits the procedures for requesting an absentee ballot to three specified ways:

> An application for an absent voter ballot under this section may be made in *any of the following ways*:
>
> (a) By a written request signed by the voter.

> (b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.
>
> (c) On a federal postcard application.

M.C.L. § 168.759(3) (emphasis added).

83. The Michigan Legislature thus declined to include the Secretary of State as a means for distributing absentee ballot applications. *Id.* § 168.759(3)(b). Under the statute's plain language, the Legislature explicitly gave *only local clerks* the power to distribute absentee voter ballot applications. *Id.*

84. Because the Legislature declined to explicitly include the Secretary of State as a vehicle for distributing absentee ballots applications, Secretary Benson lacked authority to distribute even a single absentee voter ballot application—much less the *millions* of absentee ballot applications Secretary Benson chose to flood across Michigan.

85. Secretary Benson also violated Michigan law when she launched a program in June 2020 allowing absentee ballots to be requested online, *without* signature verification as expressly required under Michigan law. The Michigan Legislature did not approve or authorize Secretary Benson's unilateral actions.

86. MCL § 168.759(4) states in relevant part: "An applicant for an absent voter ballot shall sign the application. Subject to section 761(2), a clerk or assistant clerk shall not deliver an absent voter ballot to an applicant who does not sign the application."

87. Further, MCL § 168.761(2) states in relevant part: "The qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot", and if "the

signatures do not agree sufficiently or [if] the signature is missing" the ballot must be rejected.

88. In 2016 only 587,618 Michigan voters requested absentee ballots. In stark contrast, in 2020, 3.2 million votes were cast by absentee ballot, about 57% of total votes cast – and more than *five times* the number of ballots *even requested* in 2016.

89. Secretary Benson's unconstitutional modifications of Michigan's election rules resulted in the distribution of millions of absentee ballot applications without verifying voter signatures as required by MCL §§ 168.759(4) and 168.761(2). This means that *millions* of absentee ballots were disseminated in violation of Michigan's statutory signature-verification requirements. Democrats in Michigan voted by mail at a ratio of approximately two to one compared to Republican voters. Thus, former Vice President Biden materially benefited from these unconstitutional changes to Michigan's election law.

90. Michigan also requires that poll watchers and inspectors have access to vote counting and canvassing. M.C.L. §§ 168.674-.675.

91. Local election officials in Wayne County made a conscious and express policy decision not to follow M.C.L. §§ 168.674-.675 for the opening, counting, and recording of absentee ballots.

92. Michigan also has strict signature verification requirements for absentee ballots, including that the Elections Department place a written statement or stamp on each ballot envelope where the voter signature is placed, indicating that the voter signature was in fact checked and verified

with the signature on file with the State. *See* MCL § 168.765a(6).

93. However, Wayne County made the policy decision to ignore Michigan's statutory signature-verification requirements for absentee ballots. Former Vice President Biden received approximately 587,074, or 68%, of the votes cast there compared to President Trump's receiving approximate 264,149, or 30.59%, of the total vote. Thus, Mr. Biden materially benefited from these unconstitutional changes to Michigan's election law.

94. Numerous poll challengers and an Election Department employee whistleblower have testified that the signature verification requirement was ignored in Wayne County in a case currently pending in the Michigan Supreme Court.[4] For example, Jesse Jacob, a decades-long City of Detroit employee assigned to work in the Elections Department for the 2020 election testified that:

> Absentee ballots that were received in the mail would have the voter's signature on the envelope. While I was at the TCF Center, I was instructed not to look at any of the signatures on the absentee ballots, and I was instructed not to compare the signature on the absentee ballot with the signature on file.[5]

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[4] *Johnson v. Benson*, Petition for Extraordinary Writs & Declaratory Relief filed Nov. 26, 2020 (Mich. Sup. Ct.) at ¶¶ 71, 138-39, App. 25a-51a.

[5] *Id.*, Affidavit of Jessy Jacob, Appendix 14 at ¶15, attached at App. 34a-36a.

95. The TCF was the only facility within Wayne County authorized to count ballots for the City of Detroit.

96. These non-legislative modifications to Michigan's election statutes resulted in a number of constitutionally tainted votes that far exceeds the margin of voters separating the candidates in Michigan.

97. Additional public information confirms the material adverse impact on the integrity of the vote in Wayne County caused by these unconstitutional changes to Michigan's election law. For example, the Wayne County Statement of Votes Report lists 174,384 absentee ballots out of 566,694 absentee ballots tabulated (about 30.8%) as counted without a registration number for precincts in the City of Detroit. *See* Cicchetti Decl. at ¶ 27, App. 8a. The number of votes not tied to a registered voter by itself exceeds Vice President Biden's margin of margin of 146,007 votes by more than 28,377 votes.

98. The extra ballots cast most likely resulted from the phenomenon of Wayne County election workers running the same ballots through a tabulator multiple times, with Republican poll watchers obstructed or denied access, and election officials ignoring poll watchers' challenges, as documented by numerous declarations. App. 25a-51a.

99. In addition, a member of the Wayne County Board of Canvassers ("Canvassers Board"), William Hartman, determined that 71% of Detroit's Absent Voter Counting Boards ("AVCBs") were unbalanced—*i.e.*, the number of people who checked in did not match the number of ballots cast—without explanation. *Id*. at ¶ 29.

100. On November 17, 2020, the Canvassers Board deadlocked 2-2 over whether to certify the results of the presidential election based on numerous reports of fraud and unanswered material discrepancies in the county-wide election results. A few hours later, the Republican Board members reversed their decision and voted to certify the results after severe harassment, including threats of violence.

101. The following day, the two Republican members of the Board *rescinded their votes* to certify the vote and signed affidavits alleging they were bullied and misled into approving election results and do not believe the votes should be certified until serious irregularities in Detroit votes are resolved. *See* Cicchetti Decl. at ¶ 29, App. 8a.

102. Regardless of the number of votes that were affected by the unconstitutional modification of Michigan's election rules, the non-legislative changes to the election rules violated the Electors Clause.

State of Wisconsin

103. Wisconsin has 10 electoral votes, with a statewide vote tally currently estimated at 1,610,151 for President Trump and 1,630,716 for former Vice President Biden (*i.e.*, a margin of 20,565 votes). In two counties, Milwaukee and Dane, Mr. Biden's margin (364,298 votes) significantly exceeds his statewide lead.

104. In the 2016 general election some 146,932 mail-in ballots were returned in Wisconsin out of more than 3 million votes cast.[6] In stark contrast, 1,275,019 mail-in ballots, nearly a 900

[6] Source: U.S. Elections Project, *available at*: http://www.electproject.org/early_2016.

percent increase over 2016, were returned in the November 3, 2020 election.[7]

105. Wisconsin statutes guard against fraud in absentee ballots: "[V]oting by absentee ballot is a privilege exercised wholly outside the traditional safeguards of the polling place. The legislature finds that the privilege of voting by absentee ballot must be carefully regulated to prevent the potential for fraud or abuse[.]" WISC. STAT. § 6.84(1).

106. In direct contravention of Wisconsin law, leading up to the 2020 general election, the Wisconsin Elections Commission ("WEC") and other local officials unconstitutionally modified Wisconsin election laws—each time taking steps that weakened, or did away with, established security procedures put in place by the Wisconsin legislature to ensure absentee ballot integrity.

107. For example, the WEC undertook a campaign to position hundreds of drop boxes to collect absentee ballots—including the use of unmanned drop boxes.[8]

108. The mayors of Wisconsin's five largest cities—Green Bay, Kenosha, Madison, Milwaukee, and Racine, which all have Democrat majorities—joined in this effort, and together, developed a plan use purportedly "secure drop-boxes to facilitate return

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[7] Source: U.S. Elections Project, *available at*: https://electproject.github.io/Early-Vote-2020G/WI.html.

[8] Wisconsin Elections Commission Memoranda, To: All Wisconsin Election Officials, Aug. 19, 2020, *available at*: https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/Drop%20Box%20Final.pdf. at p. 3 of 4.

of absentee ballots." Wisconsin Safe Voting Plan 2020, at 4 (June 15, 2020).[9]

109. It is alleged in an action recently filed in the United States District Court for the Eastern District of Wisconsin that over five hundred unmanned, illegal, absentee ballot drop boxes were used in the Presidential election in Wisconsin.[10]

110. However, the use of *any* drop box, manned or unmanned, is directly prohibited by Wisconsin statute. The Wisconsin legislature specifically described in the Election Code "Alternate absentee ballot site[s]" and detailed the procedure by which the governing body of a municipality may designate a site or sites for the delivery of absentee ballots "other than the office of the municipal clerk or board of election commissioners as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election." Wis. Stat. 6.855(1).

111. Any alternate absentee ballot site "shall be staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners." Wis. Stat. 6.855(3). Likewise, Wis.

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[9] Wisconsin Safe Voting Plan 2020 Submitted to the Center for Tech & Civic Life, June 15, 2020, by the Mayors of Madison, Milwaukee, Racine, Kenosha and Green Bay *available at*: https://www.techandciviclife.org/wp-content/uploads/2020/07/Approved-Wisconsin-Safe-Voting-Plan-2020.pdf.

[10] *See* Complaint (Doc. No. 1), *Donald J. Trump, Candidate for President of the United States of America v. The Wisconsin Election Commission*, Case 2:20-cv-01785-BHL (E.D. Wisc. Dec. 2, 2020) (Wisconsin Trump Campaign Complaint") at ¶¶ 188-89.

Stat. 7.15(2m) provides, "[i]n a municipality in which the governing body has elected to an establish an alternate absentee ballot sit under s. 6.855, the municipal clerk shall operate such site as though it were his or her office for absentee ballot purposes and shall ensure that such site is adequately staffed."

112. Thus, the unmanned absentee ballot drop-off sites are prohibited by the Wisconsin Legislature as they do not comply with Wisconsin law expressly defining "[a]lternate absentee ballot site[s]". Wis. Stat. 6.855(1), (3).

113. In addition, the use of drop boxes for the collection of absentee ballots, positioned predominantly in Wisconsin's largest cities, is directly contrary to Wisconsin law providing that absentee ballots may only be "mailed by the elector, or delivered *in person* to the municipal clerk issuing the ballot or ballots." Wis. Stat. § 6.87(4)(b)1 (emphasis added).

114. The fact that other methods of delivering absentee ballots, such as through unmanned drop boxes, are *not* permitted is underscored by Wis. Stat. § 6.87(6) which mandates that, "[a]ny ballot not mailed or delivered as provided in this subsection may not be counted." Likewise, Wis. Stat. § 6.84(2) underscores this point, providing that Wis. Stat. § 6.87(6) "shall be construed as mandatory." The provision continues—"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).

115. These were not the only Wisconsin election laws that the WEC violated in the 2020

general election. The WEC and local election officials also took it upon themselves to encourage voters to unlawfully declare themselves "indefinitely confined"—which under Wisconsin law allows the voter to avoid security measures like signature verification and photo ID requirements.

116. Specifically, registering to vote by absentee ballot requires photo identification, except for those who register as "indefinitely confined" or "hospitalized." WISC. STAT. § 6.86(2)(a), (3)(a). Registering for indefinite confinement requires certifying confinement "because of age, physical illness or infirmity or [because the voter] is disabled for an indefinite period." *Id.* § 6.86(2)(a). Should indefinite confinement cease, the voter must notify the county clerk, *id.*, who must remove the voter from indefinite-confinement status. *Id.* § 6.86(2)(b).

117. Wisconsin election procedures for voting absentee based on indefinite confinement enable the voter to avoid the photo ID requirement and signature requirement. *Id.* § 6.86(1)(ag)/(3)(a)(2).

118. On March 25, 2020, in clear violation of Wisconsin law, Dane County Clerk Scott McDonnell and Milwaukee County Clerk George Christensen both issued guidance indicating that all voters should mark themselves as "indefinitely confined" because of the COVID-19 pandemic.

119. Believing this to be an attempt to circumvent Wisconsin's strict voter ID laws, the Republican Party of Wisconsin petitioned the Wisconsin Supreme Court to intervene. On March 31, 2020, the Wisconsin Supreme Court unanimously confirmed that the clerks' "advice was legally incorrect" and potentially dangerous because "voters

may be misled to exercise their right to vote in ways that are inconsistent with WISC. STAT. § 6.86(2)."

120. On May 13, 2020, the Administrator of WEC issued a directive to the Wisconsin clerks prohibiting removal of voters from the registry for indefinite-confinement status if the voter is no longer "indefinitely confined."

121. The WEC's directive violated Wisconsin law. Specifically, WISC. STAT. § 6.86(2)(a) specifically provides that "any [indefinitely confined] elector [who] is no longer indefinitely confined … shall so notify the municipal clerk." WISC. STAT. § 6.86(2)(b) further provides that the municipal clerk "shall remove the name of any other elector from the list upon request of the elector or upon receipt of reliable information that an elector no longer qualifies for the service."

122. According to statistics kept by the WEC, nearly 216,000 voters said they were indefinitely confined in the 2020 election, nearly a fourfold increase from nearly 57,000 voters in 2016. In Dane and Milwaukee counties, more than 68,000 voters said they were indefinitely confined in 2020, a fourfold increase from the roughly 17,000 indefinitely confined voters in those counties in 2016.

123. Under Wisconsin law, voting by absentee ballot also requires voters to complete a certification, including their address, and have the envelope witnessed by an adult who also must sign and indicate their address on the envelope. *See* WISC. STAT. § 6.87. The sole remedy to cure an "improperly completed certificate or [ballot] with no certificate" is for "the clerk [to] return the ballot to the elector[.]" *Id.* § 6.87(9). "If a certificate is missing the address of a

witness, the ballot *may not be counted*." *Id.* § 6.87(6d) (emphasis added).

124. However, in a training video issued April 1, 2020, the Administrator of the City of Milwaukee Elections Commission unilaterally declared that a "witness address may be written in red and that is because we were able to locate the witnesses' address for the voter" to add an address missing from the certifications on absentee ballots. The Administrator's instruction violated WISC. STAT. § 6.87(6d). The WEC issued similar guidance on October 19, 2020, in violation of this statute as well.

125. In the Wisconsin Trump Campaign Complaint, it is alleged, supported by the sworn affidavits of poll watchers, that canvas workers carried out this unlawful policy, and acting pursuant to this guidance, in Milwaukee used red-ink pens to alter the certificates on the absentee envelope and then cast and count the absentee ballot. These acts violated WISC. STAT. § 6.87(6d) ("If a certificate is missing the address of a witness, the ballot may not be counted"). *See also* WISC. 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 . . . whenever time permits the elector to correct the defect and return the ballot within the period authorized.").

126. Wisconsin's legislature has not ratified these changes, and its election laws do not include a severability clause.

127. In addition, Ethan J. Pease, a box truck delivery driver subcontracted to the U.S. Postal Service ("USPS") to deliver truckloads of mail-in ballots to the sorting center in Madison, WI, testified

that USPS employees were backdating ballots received after November 3, 2020. Decl. of Ethan J. Pease at ¶¶ 3-13. Further, Pease testified how a senior USPS employee told him on November 4, 2020 that "[a]n order came down from the Wisconsin/Illinois Chapter of the Postal Service that 100,000 ballots were missing" and how the USPS dispatched employees to "find[] . . . the ballots." *Id.* ¶¶ 8-10. One hundred thousand ballots supposedly "found" after election day would far exceed former Vice President Biden margin of 20,565 votes over President Trump.

COUNT I: ELECTORS CLAUSE

128. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

129. The Electors Clause of Article II, Section 1, Clause 2, of the Constitution makes clear that only the legislatures of the States are permitted to determine the rules for appointing presidential electors. The pertinent rules here are the state election statutes, specifically those relevant to the presidential election.

130. Non-legislative actors lack authority to amend or nullify election statutes. *Bush II*, 531 U.S. at 104 (quoted *supra*).

131. Under *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985), conscious and express executive policies—even if unwritten—to nullify statutes or to abdicate statutory responsibilities are reviewable to the same extent as if the policies had been written or adopted. Thus, conscious and express actions by State or local election officials to nullify or ignore requirements of election statutes violate the Electors

Clause to the same extent as formal modifications by judicial officers or State executive officers.

132. The actions set out in Paragraphs 41-128 constitute non-legislative changes to State election law by executive-branch State election officials, or by judicial officials, in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Electors Clause.

133. Electors appointed to Electoral College in violation of the Electors Clause cannot cast constitutionally valid votes for the office of President.

COUNT II: EQUAL PROTECTION

134. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

135. The Equal Protection Clause prohibits the use of differential standards in the treatment and tabulation of ballots within a State. *Bush II*, 531 U.S. at 107.

136. The one-person, one-vote principle requires counting valid votes and not counting invalid votes. *Reynolds*, 377 U.S. at 554-55; *Bush II*, 531 U.S. at 103 ("the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements").

137. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) created differential voting standards in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin in violation of the Equal Protection Clause.

138. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) violated the one-person, one-

vote principle in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin.

139. By the shared enterprise of the entire nation electing the President and Vice President, equal protection violations in one State can and do adversely affect and diminish the weight of votes cast in States that lawfully abide by the election structure set forth in the Constitution. Plaintiff State is therefore harmed by this unconstitutional conduct in violation of the Equal Protection or Due Process Clauses.

COUNT III: DUE PROCESS

140. Plaintiff State repeats and re-alleges the allegations above, as if fully set forth herein.

141. When election practices reach "the point of patent and fundamental unfairness," the integrity of the election itself violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978); *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994).

142. Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451 U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984).

The difference between intentional acts and random and unauthorized acts is the degree of pre-deprivation review.

143. Defendant States acted unconstitutionally to lower their election standards—including to allow invalid ballots to be counted and valid ballots to not be counted—with the express intent to favor their candidate for President and to alter the outcome of the 2020 election. In many instances these actions occurred in areas having a history of election fraud.

144. The actions set out in Paragraphs 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), and 106-24 (Wisconsin) constitute intentional violations of State election law by State election officials and their designees in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin, in violation of the Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff States respectfully request that this Court issue the following relief:

A. Declare that Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin administered the 2020 presidential election in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution.

B. Declare that any electoral college votes cast by such presidential electors appointed in Defendant States Pennsylvania, Georgia, Michigan, and Wisconsin are in violation of the Electors Clause and the Fourteenth Amendment of the U.S. Constitution and cannot be counted.

C. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College.

D. Enjoin Defendant States' use of the 2020 election results for the Office of President to appoint presidential electors to the Electoral College and authorize, pursuant to the Court's remedial authority, the Defendant States to conduct a special election to appoint presidential electors.

E. If any of Defendant States have already appointed presidential electors to the Electoral College using the 2020 election results, direct such States' legislatures, pursuant to 3 U.S.C. § 2 and U.S. CONST. art. II, § 1, cl. 2, to appoint a new set of presidential electors in a manner that does not violate the Electors Clause and the Fourteenth Amendment, or to appoint no presidential electors at all.

F. Enjoin the Defendant States from certifying presidential electors or otherwise meeting for purposes of the electoral college pursuant to 3 U.S.C. § 5, 3 U.S.C. § 7, or applicable law pending further order of this Court.

G. Award costs to Plaintiff State.

H. Grant such other relief as the Court deems just and proper.

December 7, 2020

Respectfully submitted,

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No. _____, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF STATE OF GEORGIA, STATE OF MICHIGAN, AND STATE OF WISCONSIN,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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STATE OF TEXAS,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, STATE OF STATE OF GEORGIA, STATE OF MICHIGAN, AND STATE OF WISCONSIN,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE

Pursuant to S.Ct. Rule 17.3 and U.S. CONST. art. III, § 2, the State of Texas ("Plaintiff State") respectfully submits this brief in support of its Motion for Leave to File a Bill of Complaint against the Commonwealth of Pennsylvania and the States of Georgia, Michigan, and Wisconsin (collectively, "Defendant States").

STATEMENT OF THE CASE

Lawful elections are at the heart of our freedoms. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964). Trust in the integrity of that process

is the glue that binds our citizenry and the States in this Union.

Elections face the competing goals of maximizing and counting *lawful* votes but minimizing and excluding *unlawful* ones. *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964); *Bush v. Gore*, 531 U.S. 98, 103 (2000) ("the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements") ("*Bush II*"); *compare* 52 U.S.C. § 20501(b)(1)-(2) (2018) *with id.* § 20501(b)(3)-(4). Moreover, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. Reviewing election results requires not only counting lawful votes but also eliminating unlawful ones.

It is an understatement to say that 2020 was not a good year. In addition to a divided and partisan national mood, the country faced the COVID-19 pandemic. Certain officials in Defendant States presented the pandemic as the justification for ignoring state laws regarding absentee and mail-in voting. Defendant States flooded their citizenry with tens of millions of ballot applications and ballots ignoring statutory controls as to how they were received, evaluated, and counted. Whether well intentioned or not, these unconstitutional and unlawful changes had the same *uniform effect*—they made the 2020 election less secure in Defendant States. Those changes were made in violation of relevant state laws and were made by non-legislative entities, without any consent by the state legislatures.

These unlawful acts thus directly violated the Constitution. U.S. CONST. art. I, § 4; *id.* art. II, § 1, cl. 2.

This case presents a question of law: Did Defendant States violate the Electors Clause by taking non-legislative actions to change the election rules that would govern the appointment of presidential electors? Each of these States flagrantly violated the statutes enacted by relevant State legislatures, thereby violating the Electors Clause of Article II, Section 1, Clause 2 of the Constitution. By these unlawful acts, Defendant States have not only tainted the integrity of their own citizens' votes, but their actions have also debased the votes of citizens in the States that remained loyal to the Constitution.

Elections for federal office must comport with federal constitutional standards, s*ee Bush II*, 531 U.S. at 103-105, and executive branch government officials cannot subvert these constitutional requirements, no matter their stated intent. For presidential elections, each State must appoint its electors to the electoral college in a manner that complies with the Constitution, specifically the Electors Clause requirement that only state *legislatures* may set the rules governing the appointment of electors and the elections upon which such appointment is based.[1]

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[1] Subject to override by Congress, state legislatures have the exclusive power to regulate the time, place, and manner for electing Members of Congress, *see* U.S. CONST. art. I, § 4, which is distinct from legislatures' exclusive and plenary authority on the appointment of presidential electors. When non-legislative actors purport to set state election law for presidential elections, they violate both the Elections Clause and the Electors Clause.

Constitutional Background

The right to vote is protected by the by the Equal Protection Clause and the Due Process Clause. U.S. CONST. amend. XIV, § 1, cl. 3-4. Because "the right to vote is personal," *Reynolds*, 377 U.S. at 561-62 (alterations omitted), "[e]very voter in a federal … election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted." *Anderson v. United States*, 417 U.S. 211, 227 (1974); *Baker v. Carr*, 369 U.S. 186, 208 (1962). Invalid or fraudulent votes debase or dilute the weight of each validly cast vote. *Bush II*, 531 U.S. at 105. The unequal treatment of votes within a state, and unequal standards for processing votes raise equal protection concerns. *Id.* Though *Bush II* did not involve an action between States, the concern that illegal votes can cancel out lawful votes does not stop at a State's boundary in the context of a Presidential election.

The Electors Clause requires that each State "shall appoint" its presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 2 (emphasis added); *cf. id.* art. I, § 4, cl. 1 (similar for time, place, and manner of federal legislative elections). "[T]he state legislature's power to select the manner for appointing electors is *plenary*," *Bush II*, 531 U.S. at 104 (emphasis added), and sufficiently *federal* for this Court's review. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("*Bush I*"). This textual feature of our Constitution was adopted to ensure the integrity of the presidential selection process: "Nothing was more

to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." FEDERALIST NO. 68 (Alexander Hamilton). When a State conducts a popular election to appoint electors, the State must comply with all constitutional requirements. *Bush II*, 531 U.S. at 104. When a State fails to conduct a valid election—for any reason—"the electors may be appointed on a subsequent day in such a manner *as the legislature of such State may direct*." 3 U.S.C. § 2 (emphasis added).

Non-Legislative Changes Made in Violation of the Electors Clause

As set forth in the Complaint, executive and judicial officials made significant changes to the legislatively defined election rules in Defendant States. *See* Compl. at ¶¶ 66-73 (Georgia), 80-93 (Michigan), 44-55 (Pennsylvania), 106-24 (Wisconsin). Taken together, these non-legislative changes did away with statutory ballot-security measures for absentee and mail-in ballots such as signature verification, witness requirements, and statutorily authorized secure ballot drop-off locations.

Citing the COVID-19 pandemic, Defendant States gutted the safeguards for absentee ballots through non-legislative actions, despite knowledge that absentee ballots are "the largest source of potential voter fraud," BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005) (hereinafter, "CARTER-BAKER"), which is magnified when absentee balloting is shorn of ballot-integrity measures such as signature verification, witness requirements, or outer-envelope protections, or when absentee ballots

are processed and tabulated without bipartisan observation by poll watchers.

Without Defendant States' combined 62 electoral votes, President Trump presumably has 232 electoral votes, and former Vice President Biden presumably has 244. Thus, Defendant States' presidential electors will determine the outcome of the election. Alternatively, if Defendant States are unable to certify 37 or more presidential electors, neither candidate will have a majority in the electoral college, in which case the election would devolve to the House of Representatives under the Twelfth Amendment.

Defendant States experienced serious voting irregularities. *See* Compl. at ¶¶ 75-76 (Georgia), 97-101 (Michigan), 55-60 (Pennsylvania), 122-28 (Wisconsin). At the time of this filing, Plaintiff State continues to investigate allegations of not only unlawful votes being counted but also fraud. Plaintiff State reserves the right to seek leave to amend the complaint as those investigations resolve. *See* S.Ct. Rule 17.2; FED. R. CIV. P. 15(a)(1)(A)-(B), (a)(2). But even the *appearance* of fraud in a close election is poisonous to democratic principles: "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006); *Crawford v. Marion County Election Bd.,* 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence)**.**

STANDARD OF REVIEW

This Court considers two primary factors when it decides whether to grant a State leave to file a bill of complaint against another State: (1) "the nature of the

interest of the complaining State," and (2) "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal quotations omitted) Because original proceedings in this Court follow the Federal Rules of Civil Procedure, S.Ct. Rule 17.2, the facts for purposes of a motion for leave to file are the well-pleaded facts alleged in the complaint. *Hernandez v. Mesa*, 137 S.Ct. 2003, 2005 (2017).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER PLAINTIFF STATE'S CLAIMS.

In order to grant leave to file, this Court first must assure itself of its jurisdiction, *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998); *cf. Foman v. Davis*, 371 U.S. 178, 182 (1962) (courts deny leave to file amended pleadings that would be futile). That standard is met here. Plaintiff State's fundamental rights and interests are at stake. This Court is the *only* venue that can protect Plaintiff State's electoral college votes from being cancelled by the unlawful and constitutionally tainted votes cast by electors appointed and certified by Defendant States.

A. The claims fall within this Court's constitutional and statutory subject-matter jurisdiction.

The federal judicial power extends to "Controversies between two or more States." U.S. CONST. art. III, § 2, and Congress has placed the jurisdiction for such suits exclusively with the Supreme Court: "The Supreme Court shall have original *and exclusive* jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a)

(emphasis added). This Court not only is a permissible court for hearing this action; it is the only court that can hear this action quickly enough to render relief sufficient to avoid constitutionally tainted votes in the electoral college and to place the appointment of Defendant States' electors before their legislatures pursuant to 3 U.S.C. § 2 in time for a vote in the House of Representatives on January 6, 2021. *See* 3 U.S.C. § 15. With that relief in place, the House can resolve the election on January 6, 2021, in time for the president to be selected by the constitutionally set date of January 20. U.S. CONST. amend. XX, § 1.

B. The claims arise under the Constitution.

When States violate their own election laws, they may argue that these violations are insufficiently federal to allow review in this Court. *Cf. Foster v. Chatman*, 136 S.Ct. 1737, 1745-46 (2016) (this Court lacks jurisdiction to review state-court decisions that "rest[] on an adequate and independent state law ground"). That attempted evasion would fail for two reasons.

First, in the election context, a state-court remedy or a state executive's administrative action purporting to alter state election statutes implicates the Electors Clause. *See Bush II*, 531 U.S. at 105. Even a plausible federal-law defense to state action arises under federal law within the meaning of Article III. *Mesa v. California*, 489 U.S. 121, 136 (1989) (holding that "it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes"). Constitutional arising-under jurisdiction exceeds statutory federal-question

jurisdiction of federal district courts,[2] and—indeed—we did not even have federal-question jurisdiction until 1875. *Merrell Dow Pharm.,* 478 U.S. at 807. Plaintiff States' Electoral Clause claims arise under the Constitution and so are *federal*, even if the only claim is that Defendant States violated their own state election statutes. Moreover, as is explained below, Defendant States' actions injure the interests of Plaintiff State in the appointment of electors to the electoral college in a manner that is inconsistent with the Constitution.

Given this federal-law basis against these state actions, the state actions are not "independent" of the federal constitutional requirements that provide this Court jurisdiction. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210-11 (1935); *cf. City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164 (1997) (noting that "even though state law creates a party's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law" and collecting cases) (internal quotations and alterations omitted). Plaintiff State's claims therefore fall within this Court's jurisdiction.

Second, state election law is not purely a matter of state law because it applies "not only to elections to state offices, but also to the election of Presidential

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[2] The statute for federal officer removal at issue in *Mesa* omits the well-pleaded complaint rule, *id.*, which is a *statutory* restriction on federal question jurisdiction under 28 U.S.C. § 1331. *See Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

electors," meaning that state law operates, in part, "by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush I*, 531 U.S. at 76. Logically, "any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution," meaning that any "such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (internal quotations omitted). "It is no original prerogative of State power to appoint a representative, a senator, or President for the Union." J. Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858). For these reasons, any "significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question." *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

Under these circumstances, this Court has the power both to review and to remedy a violation of the Constitution. Significantly, parties do not need winning hands to establish jurisdiction. Instead, jurisdiction exists when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction," even if the right "will be defeated if they are given another." *Bell v. Hood*, 327 U.S. 678, 685 (1946). At least as to *jurisdiction*, a plaintiff need survive only the low threshold that "the alleged claim under the Constitution or federal statutes [not] … be immaterial and made solely for the purpose of obtaining jurisdiction or … wholly insubstantial and frivolous." *Id.* at 682. The bill of complaint meets that test.

C. The claims raise a "case or controversy" between the States.

Like any other action, an original action must meet the Article III criteria for a case or controversy: "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981) (internal quotations omitted). Plaintiff State has standing under those rules.[3]

With voting, "'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush II*, 531 U.S. at 105 (quoting *Reynolds*, 377 U.S. at 555). In presidential elections, "the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States." *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). Thus, votes in Defendant States affect the votes in Plaintiff State, as set forth in more detail below.

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[3] At its constitutional minimum, standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The rules for standing in state-versus-state actions is the same as the rules in other actions under Article III. *See Maryland v. Louisiana*, 451 U.S. 725, 736 (1981).

1. Plaintiff State suffers an injury in fact.

The citizens of Plaintiff State have the right to demand that all other States abide by the constitutionally set rules in appointing presidential electors to the electoral college. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 10; *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("the political franchise of voting" is "a fundamental political right, because preservative of all rights"). "Every voter in a federal … election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted." *Anderson v. United States*, 417 U.S. at 227; *Baker*, 369 U.S. at 208. Put differently, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), and—unlike the residency durations required in *Dunn*—the "jurisdiction" here is the entire United States. In short, the rights at issue are congeable under Article III.

Significantly, Plaintiff State presses its own form of voting-rights injury *as States*. As with the one-person, one-vote principle for congressional redistricting in *Wesberry*, the equality of the States arises from the structure of the Constitution, not from the Equal Protection or Due Process Clauses. *See Wesberry*, 376 U.S. at 7-8; *id.* n.10 (expressly not

reaching claims under Fourteenth Amendment). Whereas the House represents the People proportionally, the Senate represents the States. *See* U.S. CONST. art. V, cl. 3 ("no state, without its consent, shall be deprived of its equal suffrage in the Senate"). While Americans likely care more about who is elected President, the States have a distinct interest in who is elected *Vice President* and thus who can cast the tie-breaking vote in the Senate. Through that interest, States suffer an Article III injury when another State violates federal law to affect the outcome of a presidential election. This injury is particularly acute in 2020, where a Senate majority often will hang on the Vice President's tie-breaking vote because of the nearly equal—and, depending on the outcome of Georgia run-off elections in January, possibly *equal*—balance between political parties. Quite simply, it is vitally important to the States who becomes Vice President.

Because individual citizens may arguably suffer only a generalized grievance from Electors Clause violations, States have standing where their citizen voters would not, *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (distinguishing citizen plaintiffs from citizen relators who sued in the name of a state). In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), this Court held that states seeking to protect their sovereign interests are "entitled to special solicitude in our standing analysis." *Id.* at 520. While *Massachusetts* arose in a different context—the same principles of federalism apply equally here to require special deference to the sovereign states on standing questions.

In addition to standing for their own injuries, States can assert *parens patriae* standing for their citizens who are presidential electors.[4] Like legislators, presidential electors assert "legislative injury" whenever allegedly improper actions deny them a working majority. *Coleman v. Miller*, 307 U.S. 433, 435 (1939). The electoral college is a zero-sum game. If Defendant States' unconstitutionally appointed electors vote for a presidential candidate opposed by the Plaintiff State's electors, that operates to defeat Plaintiff State's interests.[5] Indeed, even without an electoral college majority, presidential electors suffer the same voting-debasement injury as voters generally: "It must be remembered that 'the

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[4] "The '*parens patriae*' doctrine … is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953) (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)).

[5] Because Plaintiff State appointed its electors consistent with the Constitution, they suffer injury if its electors are defeated by Defendant States' unconstitutionally appointed electors. This injury is all the more acute because Plaintiff State has taken steps to prevent fraud. For example, Texas does not allow no excuse vote by mail (Texas Election Code Sections 82.001-82.004); has strict signature verification procedures (Tex. Election Code §87.027(j); Early voting ballot boxes have two locks and different keys and other strict security measures (Tex. Election Code §§85.032(d) & 87.063); requires voter ID (House Comm. on Elections, Bill Analysis, Tex. H.B. 148, 83d R.S. (2013)); has witness requirements for assisting those in need (Tex. Election Code §§ 86.0052 & 86.0105), and does not allow ballot harvesting Tex. Election Code 86.006(f)(1-6). Unlike Defendant States, Plaintiff State neither weakened nor allowed the weakening of its ballot-integrity statutes by non-legislative means.

right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Bush II*, 531 U.S. at 105 (quoting *Reynolds v. Sims*, 377 U. S. 533, 555 (1964)) ("*Bush II*"). Finally, once Plaintiff State has standing to challenge Defendant States' unlawful actions, Plaintiff State may do so on any legal theory that undermines those actions. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 78-81 (1978); *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006). Injuries to Plaintiff State's electors serve as an Article III basis for a *parens patriae* action.

2. Defendant States caused the injuries.

Non-legislative officials in Defendant States either directly caused the challenged violations of the Electors Clause or, in the case of Georgia, acquiesced to them in settling a federal lawsuit. The Defendants thus caused the Plaintiff's injuries.

3. The requested relief would redress the injuries.

This Court has authority to redress Plaintiff State's injuries, and the requested relief will do so.

First, while Defendant States are responsible for their elections, this Court has authority to enjoin reliance on *unconstitutional* elections:

> When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight

> accorded to each vote and the equal dignity owed to each voter.

Bush II, 531 U.S. at 104; *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997) ("power to interpret the Constitution in a case or controversy remains in the Judiciary"). Plaintiff State does not ask this Court to decide who won the election; they only ask that the Court enjoin the clear violations of the Electors Clause of the Constitution.

Second, the relief that Plaintiff State requests—namely, remand to the State legislatures to allocate electors in a manner consistent with the Constitution—does not violate Defendant States' rights or exceed this Court's power. The power to select electors is a plenary power of the State legislatures, and this remains so, without regard to state law:

> This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions…. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.

McPherson v. Blacker, 146 U.S. 1, 35 (1892) (internal quotations omitted); *accord Bush I*, 531 U.S. at 76-77; *Bush II*, 531 U.S at 104.

Third, uncertainty of how Defendant States' legislatures will allocate their electors is irrelevant to the question of redressability:

> If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case – even though the agency … might later, in the exercise of its lawful discretion, reach the same result for a different reason.

FEC v. Akins, 524 U.S. 11, 25 (1998). Defendant States' legislatures would remain free to exercise their plenary authority under the Electors Clause in any *constitutional* manner they wish. Under *Akins*, the simple act of reconsideration under lawful means is redress enough.

Fourth, the requested relief is consistent with federal election law: "Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct." 3 U.S.C. § 2. Regardless of the statutory deadlines for the electoral college to vote, this Court could enjoin reliance on the results from the constitutionally tainted November 3 election, remand the appointment of electors to Defendant States, and order Defendant States' legislatures to certify their electors in a manner consistent with the Constitution, which could be accomplished well in advance of the statutory deadline of January 6 for House to count the presidential electors' votes. 3 U.S.C. § 15.

D. This action is not moot and will not become moot.

None of the looming election deadlines are constitutional, and they all are within this Court's power to enjoin. Indeed, if this Court vacated a State's

appointment of presidential electors, those electors could not vote on December 14, 2020; if the Court vacated their vote after the fact, the House of Representatives could not count those votes on January 6, 2021. Moreover, any remedial action can be complete well before January 6, 2020. Indeed, even the swearing in of the next President on January 20, 2021, will not moot this case because review could outlast even the selection of the next President under "the 'capable of repetition, yet evading review' doctrine," which applies "in the context of election cases … when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (internal quotations omitted); *accord Norman v. Reed*, 502 U.S. 279, 287-88 (1992). Mootness is not, and will not become, an issue here.

E. This matter is ripe for review.

Plaintiff State's claims are clearly ripe now, but they were not ripe before the election: "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted). Prior to the election, there was no reason to know who would win the vote in any given State.

Ripeness also raises the question of laches, which Justice Blackmun called "precisely the opposite argument" from ripeness. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 915 n.16 (1990) (Blackmun, J., dissenting). Laches is an equitable defense against unreasonable delay in commencing suit. *Petrella v. MGM*, 572 U.S. 663, 667 (2014). This action was

neither unreasonably delayed nor is prejudicial to Defendant States.

Before the election, Plaintiff States had no ripe claim against a Defendant State:

> "One cannot be guilty of laches until his right ripens into one entitled to protection. For only then can his torpor be deemed inexcusable."

What-A-Burger of Va., Inc. v. Whataburger, Inc., 357 F.3d 441, 449-50 (4th Cir. 2004) (quoting 5 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31: 19 (4th ed. 2003); *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 777 (Fed. Cir. 1995) (same); *Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 70 (2d Cir. 2002) (same). Plaintiff State could not have brought this action before the election results. The extent of the county-level deviations from election statutes in Defendant States became evident well after the election. Neither ripeness nor laches presents a timing problem here.

F. This action does not raise a non-justiciable political question.

The "political questions doctrine" does not apply here. Under that doctrine, federal courts will decline to review issues that the Constitution delegates to one of the other branches—the "political branches"—of government. While picking electors involves political rights, the Supreme Court has ruled in a line of cases beginning with *Baker* that constitutional claims related to voting (other than claims brought under the Guaranty Clause) are justiciable in the federal courts. As the Court held in *Baker*, litigation over political rights is not the same as a political question:

> We hold that this challenge to an apportionment presents no nonjusticiable "political question." The mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words."

Baker, 369 U.S. at 209. This is no political question; it is a constitutional one that this Court should answer.

G. No adequate alternate remedy or forum exists.

In determining whether to hear a case under this Court's original jurisdiction, the Court has considered whether a plaintiff State "has another adequate forum in which to settle [its] claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973). This equitable limit does not apply here because Plaintiff State cannot sue Defendant States in any other forum.

To the extent that Defendant States wish to avail themselves of 3 U.S.C. § 5's safe harbor, *Bush I*, 531 U.S. at 77-78, this action will not meaningfully stand in their way:

> The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. … There is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated[.]

Bush II, 531 U.S. at 104 (citations and internal quotations omitted).[6] Defendant States' legislature

[6] Indeed, the Constitution also includes another backstop: "if no person have such majority [of electoral votes], then from the

will remain free under the Constitution to appoint electors or vote in any *constitutional* manner they wish. The only thing that they cannot do—and should not wish to do—is to rely on an allocation conducted in violation of the Constitution to determine the appointment of presidential electors.

Moreover, if this Court agrees with Plaintiff State that Defendant States' appointment of presidential electors under the recently conducted elections would be unconstitutional, then the statutorily created safe harbor cannot be used as a justification for a violation of the Constitution. The safe-harbor framework created by statute would have to yield in order to ensure that the Constitution was not violated.

It is of no moment that Defendants' *state laws* may purport to tether state legislatures to popular votes. Those state limits on a state legislature's exercising federal constitutional functions cannot block action because the federal Constitution "transcends any limitations sought to be imposed by the people of a State" under this Court's precedents. *Leser v. Garnett*, 258 U.S. 130, 137 (1922); *see also Bush I*, 531 U.S. at 77; *United States Term Limits v. Thornton*, 514 U.S. 779, 805 (1995) ("the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution").

As this Court recognized in *McPherson v. Blacker*, the authority to choose presidential electors:

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persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot." U.S. CONST. amend. XII.

> is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified by their state constitutions. ... *Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away or abdicated*.

146 U.S. 1, 35 (1892) (emphasis added) (internal quotations omitted). Defendant States would suffer no cognizable injury from this Court's enjoining their reliance on an unconstitutional vote.

II. THIS CASE PRESENTS CONSTITUTIONAL QUESTIONS OF IMMENSE NATIONAL CONSEQUENCE THAT WARRANT THIS COURT'S DISCRETIONARY REVIEW.

Electoral integrity ensures the legitimacy of not just our governmental institutions, but the Republic itself. *See Wesberry*, 376 U.S. at 10. "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell,* 549 U.S. at 4. Against that backdrop, few cases could warrant this Court's review more than this one. In addition, the constitutionality of the process for selecting the President is of extreme national importance. If Defendant States are permitted to violate the requirements of the Constitution in the appointment of their electors, the resulting vote of the electoral college not only lacks constitutional legitimacy, but the Constitution itself will be forever sullied.

Though the Court claims "discretion when accepting original cases, even as to actions between States where [its] jurisdiction is exclusive," *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992) (internal quotations omitted), this is not a case where the Court should apply that discretion "sparingly." *Id.* While Plaintiff State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of Defendant States' election laws designed to ensure election integrity by a few officials, and examples of material irregularities in the 2020 election cumulatively warrant this Court's exercising jurisdiction as this Court's "unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush II*, 531 U.S. at 111; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). While isolated irregularities could be "garden-variety" election irregularities that do not raise a federal question,[7] the closeness of the presidential election results, combined with the unconstitutional setting-aside of state election laws by non-legislative actors call both the result and the process into question.

[7] "To be sure, 'garden variety election irregularities' may not present facts sufficient to offend the Constitution's guarantee of due process[.]" *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 232 (6th Cir. 2011) (quoting *Griffin*, 570 F.2d at 1077-79)).

A. The 2020 election suffered from serious irregularities that constitutionally prohibit using the reported results.

Defendant States' administration of the 2020 election violated several constitutional requirements and, thus, violated the rights that Plaintiff State seeks to protect. "When the state legislature vests the right to vote for President in its people, the *right to vote as the legislature has prescribed is fundamental*; and one source of *its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter*." *Bush II*, 531 U.S. at 104.[8] Even a State legislature vested with authority to regulate election procedures lacks authority to "abridg[e …] fundamental rights, such as the right to vote." *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986). As demonstrated in this section, Defendant States' administration of the 2020 election violated the Electors Clause, which renders invalid any appointment of electors based upon those election results, unless the relevant State legislatures review and modify or expressly ratify those results as sufficient to determine the appointment of electors. For example, even without fraud or nefarious intent, a mail-in vote not subjected to the State legislature's ballot-integrity measures cannot be counted.

It does not matter that a judicial or executive officer sought to bypass that screening in response to the COVID pandemic: the choice was not theirs to

[8] The right to vote is "a fundamental political right, because preservative of all rights." *Reynolds*, 377 U.S. at 561-62 (internal quotations omitted).

make. "Government is not free to disregard the [the Constitution] in times of crisis." *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U.S. ___ (Nov. 25, 2020) (Gorsuch, J., concurring). With all unlawful votes discounted, the election result is an open question that this Court must address. Under 3 U.S.C. § 2, the State legislatures may answer the question, but the question must be asked here.

1. Defendant States violated the Electors Clause by modifying their legislatures' election laws through non-legislative action.

The Electors Clause grants authority to *state legislatures* under both horizontal and vertical separation of powers. It provides authority to each State—not to federal actors—the authority to dictate the manner of selecting presidential electors. And within each State, it explicitly allocates that authority to a single branch of State government: to the "Legislature thereof." U.S. CONST. art. II, § 1, cl. 2. State legislatures' primacy *vis-à-vis* non-legislative actors—whether State or federal—is even more significant than congressional primacy *vis-à-vis* State legislatures.

The State legislatures' authority is plenary. *Bush II*, 531 U.S. at 104. It "cannot be taken from them or modified" even through "their state constitutions." *McPherson*, 146 U.S. at 35; *Bush I*, 531 U.S at 76-77; *Bush II*, 531 U.S at 104. The Framers allocated election authority to State legislatures as the branch closest—and most accountable—to the People. *See, e.g.*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA.

J. CONST. L. 1, 31 (2010) (collecting Founding-era documents); *cf.* THE FEDERALIST NO. 57, at 350 (C. Rossiter, ed. 2003) (J. Madison) ("House of Representatives is so constituted as to support in its members a habitual recollection of their dependence on the people"). Thus, only the State legislatures are permitted to create or modify the respective State's rules for the appointment of presidential electors. U.S. CONST. art. II, § 1, cl. 2.

"[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (interior quotations omitted). Thus, for example, deadlines are necessary, even if some votes sent via absentee ballot do not arrive timely. *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973). Even more importantly in this pandemic year with expanded mail-in voting, ballot-integrity measures—*e.g.*, witness requirements, signature verification, and the like—are an essential component of any legislative expansion of mail-in voting. *See* CARTER-BAKER, at 46 (absentee ballots are "the largest source of potential voter fraud"). Though it may be tempting to permit a breakdown of the constitutional order in the face of a global pandemic, the rule of law demands otherwise.

Specifically, because the Electors Clause makes clear that state legislative authority is exclusive, non-legislative actors lack authority to *amend* statutes. *Republican Party of Pa. v. Boockvar*, No. 20-542, 2020 U.S. LEXIS 5188, at *4 (Oct. 28, 2020) ("there is a strong likelihood that the State Supreme Court

decision violates the Federal Constitution") (Alito, J., concurring); *Wisconsin State Legis.*, No. 20A66, 2020 U.S. LEXIS 5187, at *11-14 (Oct. 26, 2020) (Kavanaugh, J., concurring in denial of application to vacate stay); *cf. Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972) ("it is not within our power to construe and narrow state laws"); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509-10 (2010) ("editorial freedom … [to "blue-pencil" statutes] belongs to the Legislature, not the Judiciary"). That said, courts can enjoin elections or even enforcement of *unconstitutional* election laws, but they cannot rewrite the law in federal presidential elections.

For example, if a state court enjoins or modifies ballot-integrity measures adopted to allow absentee or mail-in voting, that invalidates ballots cast under the relaxed standard unless the legislature has—prior to the election—ratified the new procedure. Without pre-election legislative ratification, results based on the treatment and tabulation of votes done in violation of state law cannot be used to appoint presidential electors.

Elections must be lawful contests, but they should not be mere *litigation contests* where the side with the most lawyers wins. As with the explosion of nation-wide injunctions, the explosion of challenges to State election law for partisan advantage in the lead-up to the 2020 election "is not normal." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay). Nor is it healthy. Under the "*Purcell* principle," federal courts generally avoid enjoining state election laws in the period close to an election. *Purcell*, 549 U.S. at 4-5 (citing "voter

confusion and consequent incentive to remain away from the polls"). *Purcell* raises valid concerns about confusion in the run-up to elections, but judicial election-related injunctions also raise *post-election* concerns. For example, if a state court enjoins ballot-integrity measures adopted to secure absentee or mail-in voting, that invalidates ballots cast under the relaxed standard unless the State legislature has had time to ratify the new procedure. Without either pre-election legislative ratification or a severability clause in the legislation that created the rules for absentee voting by mail, the state court's actions operate to violate the Electors Clause.

2. State and local administrator's systemic failure to follow State election qualifies as an unlawful amendment of State law.

When non-legislative state and local executive actors engage in systemic or intentional failure to comply with their State's duly enacted election laws, they adopt by executive fiat a *de facto* equivalent of an impermissible amendment of State election law by an executive or judicial officer. *See* Section II.A.1, *supra*. This Court recognizes an executive's "consciously and expressly adopt[ing] a general policy that is so extreme as to amount to an abdication of its statutory responsibilities" as another form of reviewable final action, even if the policy is not a written policy. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (interior quotations omitted); *accord id.* at 839 (Brennan, J., concurring). Without a *bona fide* amendment to State election law *by the legislature*, executive officers must follow state law. *Cf. Morton v.*

Ruiz, 415 U.S. 199, 235 (1974); *Service v. Dulles*, 354 U.S. 363, 388-89 (1957). The wrinkle here is that the non-legislative actors lack the authority under the federal Constitution to enact a *bona fide* amendment, regardless of whatever COVID-related emergency power they may have.

This form of executive nullification of state law by statewide, county, or city officers is a variant of impermissible amendment by a non-legislative actor. *See* Section II.A.1, *supra*. Such nullification is always unconstitutional, but it is especially egregious when it eliminates legislative safeguards for election integrity (*e.g.*, signature and witness requirements for absentee ballots, poll watchers[9]). Systemic failure by statewide, county, or city election officials to follow State election law is no more permissible than formal amendments by an executive or judicial actor.

3. Defendant States' administration of the 2020 election violated the Fourteenth Amendment.

In each of Defendant States, important rules governing the sending, receipt, validity, and counting of ballots were modified in a manner that varied from county to county. These variations from county to county violated the Equal Protection Clause, as this

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[9] Poll watchers are "prophylactic measures designed to prevent election fraud," *Harris v. Conradi,* 675 F.2d 1212, 1216 n.10 (11th Cir. 1982), and "to insure against tampering with the voting process." *Baer v. Meyer,* 728 F.2d 471, 476 (10th Cir. 1984). For example, poll monitors reported that 199 Chicago voters cast 300 party-line Democratic votes, as well as three party-line Republican votes in one election. *Barr v. Chatman,* 397 F.2d 515, 515-16 & n.3 (7th Cir. 1968).

Court explained at length in *Bush II*. Each vote must be treated equally. "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush II*, 531 U.S. at 104. The Equal Protection Clause demands uniform "statewide standards for determining what is a legal vote." *Id*. at 110.

Differential intrastate voting standards are "hostile to the one man, one vote basis of our representative government." *Bush II*, 531 U.S. at 107 (internal quotations omitted). These variations from county to county also appear to have operated to affect the election result. For example, the obstruction of poll-watcher requirements that occurred in Michigan's Wayne County may have contributed to the unusually high number of more than 173,000 votes which are not tied to a registered voter and that 71 percent of the precincts are out of balance with no explanation. Compl. ¶ 97.

Regardless of whether the modification of legal standards in some counties in Defendant States tilted the election outcome in those States, it is clear that the standards for determining what is a legal vote varied greatly from county to county. That constitutes a clear violation of the Equal Protection Clause; and it calls into question the constitutionality of any Electors appointed by Defendant States based on such an unconstitutional election.

The Fourteenth Amendment's due process clause protects the fundamental right to vote against "[t]he

disenfranchisement of a state electorate." *Duncan v. Poythress*, 657 F.2d 691, 702 (5th Cir. 1981). Weakening or eliminating signature-validating requirements, then restricting poll watchers also undermines the 2020 election's integrity—especially as practiced in urban centers with histories of electoral fraud—also violates substantive due process. *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) ("violation of the due process clause may be indicated" if "election process itself reaches the point of patent and fundamental unfairness"); *see also Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1183-84 (11th Cir. 2008); *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 580-82 (11th Cir. 1995); *Roe v. State of Ala.*, 68 F.3d 404, 407 (11th Cir. 1995); *Marks v. Stinson*, 19 F. 3d 873, 878 (3rd Cir. 1994). Defendant States made concerted efforts to weaken or nullify their legislatures' ballot-integrity measures for the unprecedented deluge of mail-in ballots, citing the COVID-19 pandemic as a rationale. But "Government is not free to disregard the [the Constitution] in times of crisis." *Roman Catholic Diocese of Brooklyn*, 592 U.S. at ___ (Gorsuch, J., concurring).

Similarly, failing to follow procedural requirements for amending election standards violates procedural due process. *Brown v. O'Brien*, 469 F.2d 563, 567 (D.C. Cir.), *vacated as moot*, 409 U.S. 816 (1972). Under this Court's precedents on procedural due process, not only intentional failure to follow election law as enacted by a State's legislature but also random and unauthorized acts by state election officials and their designees in local government can violate the Due Process Clause. *Parratt v. Taylor*, 451

U.S. 527, 537-41 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 532 (1984). Here, the violations all were intentional, even if done for the reason of addressing the COVID-19 pandemic.

While Plaintiff State disputes that exercising this Court's original jurisdiction is discretionary, *see* Section III, *infra*, the clear unlawful abrogation of Defendant States' election laws designed to ensure election integrity by a few officials, and examples of material irregularities in the 2020 election cumulatively warrant exercising jurisdiction. Although isolated irregularities could be "garden-variety" election disputes that do not raise a federal question,[10] the closeness of election results in swing states combines with unprecedented expansion in the use of fraud-prone mail-in ballots—millions of which were also mailed out—and received and counted—without verification—often in violation of express state laws by non-legislative actors, *see* Sections II.A.1-II.A.2, *supra*, call both the result and the process into question. For an office as important as the presidency, these clear violations of the Constitution, coupled with a reasonable inference of unconstitutional ballots being cast in numbers that far exceed the margin of former Vice President Biden's vote tally over President Trump demands the attention of this Court.

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[10] "To be sure, 'garden variety election irregularities' may not present facts sufficient to offend the Constitution's guarantee of due process[.]" *Hunter*, 635 F.3d at 232 (quoting *Griffin*, 570 F.2d at 1077-79)).

While investigations into allegations of unlawful votes being counted and fraud continue, even the appearance of fraud in a close election would justify exercising the Court's discretion to grant the motion for leave to file. Regardless, Defendant States' violations of the Constitution would warrant this Court's review, even if no election fraud had resulted.

B. A ruling on the 2020 election would preserve the Constitution and help prevent irregularities in future elections.

In addition to ensuring that the 2020 presidential election is resolved in a manner consistent with the Constitution, this Court must review the violations that occurred in Defendant States to enable Congress and State legislatures to avoid future chaos and constitutional violations. Unless this Court acts to review this presidential election, these unconstitutional and unilateral violations of state election laws will continue in the future.

Regardless of how the 2020 election resolves and whatever this Court does with respect to the 2020 election, it is imperative for our system of government that elections follow the clear constitutional mandates for all future elections. Just as this Court in *Bush II* provided constitutional guidance to all states regarding the equal treatment of ballots from county to county in 2000, this Court should now provide a clear statement that non-legislative modification of rules governing presidential elections violate the Electors Clause. Such a ruling will discourage in the future the kind of non-legislative election modifications that proliferated in 2020.

III. REVIEW IS NOT DISCRETIONARY.

Although this Court's original jurisdiction precedents would justify the Court's hearing this matter under the Court's discretion, *see* Section II, *supra*, Plaintiff State respectfully submits that the Court's review is not discretionary. To the contrary, the plain text of § 1251(a) provides *exclusive* jurisdiction, not discretionary jurisdiction. *See* 28 U.S.C. § 1251(a). In addition, no other remedy exists for these interstate challenges, *see* Section I.G, *supra*, and *some* court must have jurisdiction for these weighty issues. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021, 1028 (K.B. 1774) ("if there is no other mode of trial, that alone will give the King's courts a jurisdiction"). As individual Justices have concluded, the issue "bears reconsideration." *Nebraska v. Colorado*, 136 S.Ct. 1034, 1035 (2016) (Thomas, J., dissenting, joined by Alito, J.); *accord New Mexico v. Colorado*, 137 S.Ct. 2319 (2017) (Thomas, J., dissenting) (same). Plaintiff State respectfully submits that that reconsideration would be warranted to the extent that the Court does not elect to hear this matter in its discretion.

IV. THIS CASE WARRANTS SUMMARY DISPOSITION OR EXPEDITED BRIEFING.

The issues presented here are neither fact-bound nor complex, and their vital importance urgently needs a resolution. Plaintiff State will move this Court for expedited consideration but also suggest that this case is a prime candidate for summary disposition because the material facts—namely, that the COVID-19 pandemic prompted non-legislative actors to unlawfully modify Defendant States' election laws, and carry out an election in violation of basic voter

integrity statutes—are not in serious dispute. *California v. United States*, 457 U.S. 273, 278 (1982); *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966). This case presents a pure and straightforward question of law that requires neither finding additional facts nor briefing beyond the threshold issues presented here.

CONCLUSION

Leave to file the Bill of Complaint should be granted.

December 7, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN HUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

Case No.: 20CV1771

DEFENDANT GOVERNOR TONY EVERS'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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December 9, 2020

INTRODUCTION

Plaintiff's response brief, like the Amended Complaint, is rampant with wild speculation and conspiratorial conclusions, and simply without any basis in law or fact. To make up for these deficiencies, Plaintiff makes egregious misstatements of the law, and simply ignores standards he does not like.

Starting with the "merits," Defendant Evers explained in great detail why Plaintiff's claims are not remotely plausible, including that the factual allegations have nothing specific to do with Wisconsin, are made by persons with no actual firsthand knowledge (of anything they allege, let alone anything that allegedly happened in Wisconsin), and are overwhelmingly conclusory assertions without any alleged plausible factual basis, while the "expert" allegations are made by persons without required expertise, using either no disclosed methodology at all or methodologies riddled with fatal flaws. (*See* Dkt. 59 at 20-28) Plaintiff responds to this detailed refutation of his allegations with…nothing. He offers not a word in substantive defense of the supposed "plausibility" of his fantastical allegations. He instead offers a short exploration of the pleading standard for intent under Rule 9(b) (Dkt. 72 at 15-17), but that discussion has nothing to do with Defendant Evers' eight pages explaining the many reasons why Plaintiff's allegations come nowhere close to meeting the *Twombly* and *Iqbal* "plausibility" standard. Plaintiff fails even to cite, let alone discuss, *Twombly* and *Iqbal*. This failure to even try to defend the "plausibility" of his allegations constitutes waiver on the Rule 12(b)(6) issue, and is itself sufficient grounds to dismiss.

Moving beyond the "merits issues" while Plaintiff does actually engage (to varying degrees) with Defendant Evers's other arguments for dismissal, Plaintiff's efforts fail. Plaintiff makes conflicting statements regarding standing, arguing that his standing stems from his status as a presidential elector and then switches to a voter when he perceives that status as more

convenient for standing purposes. He fails to realize that, either as a voter or a presidential elector, he has no standing. He even cites to a case to support standing, but fails to acknowledge that the Supreme Court overruled the decision. While he seeks to shrug aside laches, he cannot avoid the fact that he seeks to disenfranchise millions of Wisconsin voters who cast their votes in reliance on the voting procedures in place on Election Day. He does so despite having had ample opportunity—years, in some cases—to challenge those procedures, *including Wisconsin's use of Dominion voting machines* (though not nearly as widespread as he alleges (*see* Amend. Cmplt. Exh. 5) that he claims have long been susceptible to fraud, well before those votes were cast. Instead, Plaintiff lay in the weeds, allowing the election to take place and a full month thereafter to pass by, refraining from participating in any of the established state-law procedures for challenging the results, and even staying on the sidelines as Governor Evers transmitted the certified results to the National Archives confirming Wisconsin's Electors, before finally asserting these claims with the Electoral College set to meet on December 14, 2020. While he likewise gives short shrift to the mootness, Eleventh Amendment, abstention, and exclusive-jurisdiction principles raised in Governor Evers' motion, each provides an independent basis for dismissing his claims with prejudice. Ultimately, Plaintiff cannot and does not even try to differentiate his Wisconsin case from *King v. Whitmer* or *Pearson v. Kemp*, where judges shot down identical lawsuits by these same lawyers on all the grounds that Defendants have here too presented to the Court. The Wisconsin lawsuit must meet the same fate.

I. Plaintiff Misstated Applicable Pleading Standards.

Plaintiff misleadingly cites to a pre-*Twombly* and *Iqbal* case to argue he has sufficiently alleged constitutional violations. (Dkt. 72, at 15-16) He discusses that case, *Kasper v. Bd. of Election Com'rs of the City of Chicago*, 814 F.2d 332 (7th Cir. 1987), to make an argument about pleading standards for a defendant's intent that has nothing to do with Defendant Evers'

eight-page refutation of the "plausibility" of Plaintiff's allegations and claims. The entire discussion is thus irrelevant to Defendant Evers's *Twombly* and *Iqbal* arguments. By citing a pre-*Twombly* and *Iqbal* case, he completely ignores "the factual heft required to survive a motion to dismiss after *Twombly* and *Iqbal*." *McCauley v. City of Chicago*, 671 F.3d 611, 617 (7th Cir. 2011); *see also Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 589 (7th Cir. 2016) (stating that *Twombly* and *Iqbal* established "heightened pleading requirements"); *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) (quoting *In re marchFIRST Inc.*, 589 F.3d 901, 905 (7th Cir. 2009)) ("After *Twombly* and *Iqbal* a plaintiff to survive dismissal 'must plead some facts that suggest a right to relief that is beyond the speculative level.'"); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (after *Twombly* and *Iqbal*, the plaintiff must "present a story that holds together").

Twombly and *Iqbal* require more than traditional notice pleading. Instead, Plaintiff must provide particular facts that nudge his "claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plaintiff offers only wild conspiracy theories, rank speculation, and conjecture, and his Amended Complaint completely lacks any plausible first-hand factual or expert allegations, tied to the election *in Wisconsin*. Plaintiff thus fails to establish his claims as remotely conceivable. The leaps of logic and facially bogus theories underlying Plaintiff's claims of a globe-spanning conspiracy—allegations of rigged elections in Venezuela in 2009 to 2013 involving some company called "Smartmatic" that has no apparent connection to anything in Wisconsin in 2020; software algorithms in Dominion Voting machines that somehow (albeit without allegations providing any explanation at all, let alone a plausible explanation) affected votes in Wisconsin counties that were won by President Trump or used other companies' voting machines; assertions that the fact of election results that were

relatively favorable to Vice President Biden in Madison and Milwaukee as compared to Oshkosh or Stevens Point were the product of "statistical impossibilities" rather than the far more plausible explanation that those are predominantly Democratic parts of the states; and assertions that a so-called "survey" conducted by a former campaign staffer with no qualifications or experience and no showing that his methodologies comported with professional standards (to the contrary, a "survey" that on its face was methodologically fatally flawed) somehow provides a basis for throwing out hundreds of thousands of votes cast by Wisconsinites—rightly would be called out as ridiculous if suggested at a social event or in most Internet forums. They surely have no place in a complaint filed in federal court. Plaintiff completely failed to respond to Defendant Evers's detailed Rule 12(b)(6) and 9(b) arguments explaining the utter lack of plausibility of these allegations, and that failure alone constitutes waiver requiring dismissal. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 465-66 (7th Cir. 2010) (complete failure to address Rule 12(b)(6) arguments constitutes waiver).

II. Plaintiff does not have standing.

A. *Carson* is irrelevant.

Plaintiff claims that an Eighth Circuit decision grants him standing to sue under the Electors and Elections Clauses. (*See* Dkt. 72 at 17) He relies upon *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), a non-binding case that was specific to Minnesota law and involved a *pre-election* challenge to Minnesota election procedures that were modified by a state court. Nothing in *Carson* suggests that the Electors and Elections Clauses create *post-election* rights to challenge the results of an election.

Plaintiff's counsel made a similar argument in *King v. Whitmer*, 2020 WL 7134198 (E.D. Mich.) (Dec. 7, 2020) (provided at Dkt. 51-5). The judge in *King* rejected that argument, specifically finding that the *Carson* majority was not as persuasive as the dissenting judge. *King*

at *11. The dissent in *Carson* argued against standing because "the Electors are not candidates for public office as that term is commonly understood." 978 F.3d at 1063 Kelly, J., dissenting). It went on to argue that presidential electors

> are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals. But even if we nonetheless assume the Electors should be treated like traditional political candidates for standing purposes, I question whether these particular candidates have demonstrated the "concrete and particularized" injury necessary for Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To the contrary, their claimed injury—a potentially "inaccurate vote tally"—appears to be "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that the Supreme Court has long considered inadequate for standing.

Id. In *King*, the court found this more convincing and stated that even if Michigan and Minnesota law were similar, "Plaintiffs lack standing to sue under the Elections and Electors Clauses." *King* at *11. And Plaintiff only glosses over the fact that in *Bognet* the court found no standing despite a plaintiff being a congressional candidate. *Bognet v. Sec'y of Commonwealth*, 2020 WL 6686120 at *4, *6-8 (provided at Dkt. 51-9).

Regardless of how Minnesota law treats electors, Wisconsin law makes clear that the presidential electors have a purely ministerial role. The presidential electors do not appear on the ballot. Contrary to Plaintiff's misleading assertion, voters submit ballots for their presidential candidate, not the presidential elector.

Yet even if Plaintiff were correct, and he has standing as a surrogate for President Trump or a "candidate" himself, that does not help him because then he undoubtedly would have had to utilize state law remedies and intervened in the recount petition that President Trump filed. Thus, his failure to utilize state law remedies would foreclose him from bringing his claims.

B. Plaintiff's equal protection and due process standing arguments are in error.

Plaintiff's argument for standing for Due Process and Equal Protection would normally not merit any response. However, two points must be refuted. For the first time, Plaintiff says in

his response brief that he voted for Donald Trump. (Dkt. 72 at 17) His Amended Complaint contains no reference to whom he voted for in the presidential election. Thus, he cannot bring a claim as a voter, because his Amended Complaint does not allege that he voted for Trump. Nonetheless, if he brings his state claims (which he tries to disguise as constitutional claims) as a voter, then he must exhaust his exclusive, state-administrative remedy under Wis. Stat. § 5.06.

Second, Plaintiff cites *Whitford v. Nichol*, 151 F.Supp.3d 918 (W.D. Wis. 2015), to argue voters have standing for "state laws that collectively reduce the value of one party[]." (Dkt. 72 at 20) He neglects to mention that the case was appealed and the *Supreme Court* rejected the same theory of Article III standing as plaintiff advances. *See Gill v. Whitford,* 138 S. Ct. 1916, 1921 (U.S. 2018). Arguing that the case somehow creates standing for Plaintiff in this case is an egregious misstatement of the law. Consequently, he can point to no decision where similar plaintiffs had standing. Again, *Bognet* is instructive because it found a similar concept of vote dilution as argued by Plaintiff here "is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment." *Bognet* at *11.

III. Plaintiff's Complaint is Barred by Laches

As a foundational matter, Plaintiff asserts that "*ordinarily*, a motion to dismiss is not the appropriate vehicle to address the defense of laches." (Dkt. 72 at 22 (quoting *Am. Commercial Barge Lines, LLC v. Reserve FTL, Inc.*, 2002 WL 31749171, at *1 (N.D. Ill. Dec. 3, 2002))[1] (emphasis added)) But what Plaintiff ignores is that the same case qualifies this statement, noting that most courts have found the defense of laches unsuitable at the pleading stage "unless laches is apparent on the face of the complaint." *Am. Commercial Barge Lines, LLC*, 2002 WL

[1] Pursuant to Civil L. R. 7(j)(2), all unpublished cases, orders, and dispositions cited are filed in conjunction with this brief.

31749171, at *1 (citation omitted). In this case, laches is most certainly apparent on the face of the complaint, and the circumstances giving rise to this case are far from ordinary.

Despite Plaintiff's assertion that he could not have known the basis of his claims earlier than he did (Dkt. 72 at 22-23), Plaintiff's own pleadings prove that assertion is false. Plaintiff's Amended Complaint is based on alleged violations of Wisconsin election laws stemming from the use of Dominion Voting Machines and guidance issued by the Wisconsin Elections Commission. It is apparent on the face of the Amended Complaint that Plaintiff knew about these longstanding practices, including the use of Dominion Voting Machines, for months and, in some cases, years before the general election on November 3, 2020. (*See* Amend. Cmplt. ¶¶37-45, 64-68; *see also* Dkt. 59 at 17-18) Plaintiff's claims are based on assumptions Plaintiff makes about how alleged problems with these machines and this guidance must have resulted in improper counting of votes. Yet having known about these alleged problems with the machines and the guidance well before the election, Plaintiff was obligated to raise his complaints about the machines and the guidance then, before millions of voters had cast their ballots in reliance on the guidance and using these machines.

Moreover, the nature of the allegations in the Amended Complaint and the audacity of the requested relief compel the conclusion that this case is certainly not ordinary. In several other recent cases like this one, the lateness of the filings and the prejudice to the defendants and to the voting public have been so obvious that courts around the country are dismissing on the bases of laches. *King*, Op. & Order, at *6; *Wood v. Raffensberger*, No. 1:2020-cv-04651-SDG, 2020 WL 6817513, at *8 (N.D. Ga. Nov. 20, 2020), *aff'd*, 2020 WL 7094866, at *6 (11th Cir. Dec. 5, 2020) (provided at Dkt. 51-3, 51-4).

Finally, Plaintiff's attempt to attribute delay to Defendants' failure to promptly complete ballot counting after Election Day is preposterous. First, Wisconsin did not certify the election results until November 30, 2020, because a recount was requested by the Trump campaign and promptly conducted by Dane and Milwaukee Counties. To the extent that Plaintiff asserts his standing is the same as the candidate for whom he is a presidential elector (which it is not), any delay caused by the recount must be attributed to the candidate, and by extension to Plaintiff. Second, Plaintiff points to no law that required him to wait until after completion of the recount and certification to file *this federal court lawsuit*. To be sure, this lawsuit is entirely improper, as Plaintiff should have used the available, exclusive state-law procedures. But having wrongly eschewed those procedures, Plaintiff cannot point to their unique requirements to justify his own hugely prejudicial delay in filing this lawsuit (especially given that one of the two procedures—the administrative complaint procedure available to regular voters—does *not* require that the voter wait until after certification to file a complaint, Wis. Stat. § 5.06(1)). Having decided to file in federal court rather than in either of the proper exclusive state forums, and having known about the basis for his claims for weeks, months, and sometimes years, Plaintiff's lengthy delay in filing is wholly unjustified and ample grounds for invoking laches to dismiss this case.

IV. Plaintiff's Requests for Relief are Moot.

Despite Plaintiff's assertions to the contrary, "a case is moot where the court lacks 'the ability to give meaningful relief[.]'" *King*, Op. & Order, at *13 (citing *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019)). Presumably, all of Plaintiff's requests for relief are targeted to invalidate the results of the general election in order to declare President Trump the winner of Wisconsin's electoral votes. From that perspective, it is apparent that Plaintiff's requests for relief are moot. In part, Plaintiff asks this Court to "de-certify the election results," to enjoin "Governor Evers from transmitting the currently certified election results [to] the Electoral

College," and to order "Governor Evers to transmit certified election results that state President Donald Trump is the winner of the election." (Amend. Cmplt. ¶42) But, the Court has no authority to simply declare an alternative winner of an election; an injunction cannot stop the Governor from transmitting the election results to the federal government because that was already done before Plaintiff filed his Amended Complaint; and there is no legal mechanism for the de-certification of the election results. While the exclusive state procedure for contesting election results holds open the possibility for relief, *see* Wis. Stat. §§ 9.01(6) & (9), any efforts to obtain relief *in federal court* are not only barred by the exclusive state procedure, but were rendered moot by the certification of election results.

V. The Eleventh Amendment Bars Plaintiff's Complaint.

Governor Evers does not dispute that the Eleventh Amendment permits prospective injunctive relief against state officials on the basis of federal law. But Plaintiff ignores the requisite latter part of that sentence. Where claims are based on *state law*, the Eleventh Amendment bars all relief, "whether prospective or retroactive." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). That restriction applies even where, as here, Plaintiff cloaks his state-law claims in federal garb. (Dkt. 59 at 15 (citing cases)) Plaintiff's Elections and Electors Clause claim is based on Defendants purportedly exercising electoral authority in ways that "conflict with existing legislation" enacted by the Wisconsin Legislature. (Amend. Cmplt. ¶103) Likewise, his Equal Protection Clause claim hinges on Defendants' alleged failure to "enforce[] fairly and uniformly" Wisconsin's election laws, claiming that because "Defendants failed to comply with the requirements of the *Wisconsin Election Code*," his vote was diluted in violation of the Equal Protection Clause. (*Id.* ¶¶115-16 (emphasis added)) Count III alleges a Due Process Clause violation based on so-called "vote dilution." This, too, has no actual basis in federal law; rather, it is grounded in Plaintiff's state-law-based allegations regarding ballot

counting. (*Id.* ¶¶123-29) In short, Plaintiffs cannot escape the Eleventh Amendment's bar by simply slapping a "federal claim" label on what are ultimately questions of state law.

VI. Plaintiff's Remedies are Controlled by State Law.

The Wisconsin Legislature has prescribed the process for the filing, review, and adjudication of claims of election-related misconduct, which begins with administrative review by the WEC. Wis. Stat. §§ 5.05(2m), 5.06. The Wisconsin Legislature has also determined that claims challenging the results of an election based on alleged irregularities and defects in the voting process are exclusively determined through the recount statute. Wis. Stat. § 9.01(11). Plaintiff attempts to circumvent these procedures and inappropriately invoke federal jurisdiction. In Count IV of his Amended Complaint, Plaintiff states that "Defendants intentionally violated multiple provisions of the *Wisconsin Election Code* to elect Biden and other Democratic candidates and defeat President Trump and other Republican candidates." (Amend. Cmplt. ¶137 (emphasis added)) Moreover, Section I of the Amended Complaint, which is incorporated into Counts I through III of the Amended Complaint (*see id.* ¶¶104-06, 116, 129) details only state law violations (*see id.* ¶¶37-45).

Plaintiff could have filed a complaint with the WEC under Wis. Stat. §§ 5.05(2m) or 5.06. Or, to the extent that Plaintiff alleges that he has standing on par with candidate President Trump (which he does not), he should have intervened in the recount requested by President Trump, the results of which are currently being appealed. Plaintiff's allegations here are precisely the sorts of claims captured by the Wisconsin statutory processes review. He alleges election official misconduct, which is subject to review under Wis. Stat. § 5.06, and he alleges irregularities or defects in the voting process, which are subject to challenge only via the recount process under Wis. Stat. § 9.01.

Federal jurisdiction is not available to circumvent the Wisconsin Legislature's designated forums for challenging the conduct of an election or its results simply by bootstrapping concerns about the constitutional right to vote onto any election-related cause of action. Moreover, if Plaintiff is not required to avail himself of state requirements for challenging election conduct and instead may proceed in federal court, what is there to stop other disappointed voters or candidates from filing lawsuit after lawsuit until January 20 (if not beyond)? Such a result would further destabilize our democracy and undermine the will of Congress, the Wisconsin Legislature, and, above all, the will of Wisconsin's voters.

VII. Abstention Doctrines Apply to Plaintiff's Complaint.

Plaintiff asserts that abstention is not appropriate here because the Wisconsin Supreme Court declined to grant original jurisdiction over a separately filed case that alleges many of the same state law violations alleged by Plaintiff. (Dkt. 72 at 29) He concludes that because the Wisconsin Supreme Court issued its denial, the Court refuses to resolve the state law issues. (*Id.* at 29-30) Thus, he argues, it is entirely appropriate for this federal Court to exercise jurisdiction over this matter because "there is no current state court proceeding addressing these issues." (*Id.* at 30) This conclusion is wrong for two reasons. First, Plaintiff ignores the fact that the Wisconsin Supreme Court refused to exercise original jurisdiction over the claims not because it refused to interpret state law, but because the petition was "woefully deficient" and therefore not appropriate for the Court to take up. *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930-OA, Order at *3 (Wis. Dec. 4, 2020) (Hagedorn, J. concurring in denial of petition for original action, joined by a majority of the Justices) (noting that one reason petition for original action was "woefully deficient" was because it failed to "consider the import of election statutes that may provide the 'exclusive remedy,'" namely, Wis. Stat. §§ 5.05(2m) and 9.01)

(provided at Dkt. 55-1). Failure on the part of petitioners in a state case to sufficiently plead does not render the doctrine of abstention inapplicable.

Second, as noted above, while the Wisconsin Supreme Court refused original jurisdiction, it is simply not true that *no* Wisconsin court is willing to review these state-law issues. To the contrary, a recount which alleges many of the same state law claims is currently being appealed in a Wisconsin trial court. Thus, state courts are currently addressing the issues cited by Plaintiff, and this Court should abstain from exercising jurisdiction over Plaintiff's complaint.

CONCLUSION

As the Third Circuit recently held, "[v]oters, not lawyers, choose the President. Ballots, not briefs, decide election." *Donald J. Trump for President, Inc. v. Sec'y of the Commonwealth of Pa.*, No. 20-3371, 2020 WL 7012522, at *9 (3d Cir. Nov. 27, 2020). Like other cases that have been brought in the wake of the 2020 election, Plaintiff's case is nothing more than an effort to win through litigation or legislative fiat a result that could not be won at the polls. This unconscionable attack on American democracy cannot be permitted to proceed any further. Plaintiff's claims should be dismissed with prejudice.

Respectfully submitted this 9th day of December 2020.

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EXHIBIT 1

2002 WL 31749171
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

AMERICAN COMMERCIAL BARGE LINES, LLC., a Delaware Limited Liability Company, Plaintiff,
v.
RESERVE FTL, INC., an Ohio corporation, d/b/a Reserve Marine Terminal, Defendant.

No. 01 C 5858.
|
Dec. 3, 2002.

MEMORANDUM OPINION AND ORDER

HIBBLER, J.

***1** This admiralty and maritime action arises out of the sinking of a barge owned by Plaintiff American Commercial Barge Lines, L.L.C. ("ACBL"), while docked in a wharf operated by Defendant Reserve FTL, Inc. ("Reserve"). Although the sinking incident occurred in 1994, ACBL did not file this lawsuit against Reserve, alleging negligence, breach of Stevedore's duty and bailment, until July 2001. Reserve now moves to dismiss ACBL's complaint pursuant to Fed.R.Civ.P. 12(b)(6) based on the equitable defense of laches. For the following reasons, the Court concludes Reserve's motion to dismiss must be converted to a motion for summary judgment under Fed.R.Civ.P. 56(c), and holds that, at this stage in the litigation, the request for summary judgment is premature.

STANDARD OF REVIEW

Before turning to the particulars of the case, it is necessary to first consider whether Reserve's motion seeks relief under Rule 12(b)(6) or Rule 56(c). Ordinarily a motion to dismiss is not the appropriate vehicle to raise the defense of laches. *See Farries v. Stanadyne/Chicago Div.,* 832 F.2d 374, 376 (7th Cir.1987) (upholding district court's conversion of Rule 12(b)(6) motion to a Rule 56(c) motion); *Svec v. Board of Trustees of Teamsters Local Union No. 727 Pension Fund,* No., 02C1640, 2002 WL 1559640, at *2 (N.D.Ill. July 16, 2002); *Abbott Labs. v. CVS Pharmacy, Inc.,* Nos. 01C2772 & 01C2784, 2001 WL 777060, at *3 (N.D.Ill. July 11, 2001). Indeed, "the defense of laches ... involves more than the mere lapse of time and depends largely upon questions of fact." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1277 (2d ed.1987). As such, unless laches is apparent on the face of the complaint, most courts have found the defense "unsuitable for resolution at the pleading stage." *Abbott Labs.,* 2001 WL 777060, at *3–4.

While Reserve styled its motion as a request for dismissal for failure to state a claim, in support of the argument that the elements of laches (i.e., inexcusable delay and undue prejudice) are present in this case, Reserve also submitted for consideration documents that fall outside the four corners of the complaint. According to Rule 12(b), whenever "matters outside the pleadings are presented to and not excluded by the court, [a 12(b)(6)] motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56." ACBL then responded to Reserve's motion by presenting two volumes of exhibits in its defense, as well as a First Amended Complaint setting forth further details about the events that transpired between the parties prior to the filing of this lawsuit. Reserve, in its reply, noted that ACBL appeared to be treating the motion as one for summary judgment, and thus explained that it intended to attack the sufficiency of ACBL's pleadings. Nevertheless, Reserve attached several exhibits—deposition transcripts and affidavits—to the reply in support of its motion.

***2** It is clear, then, that regardless of the title on the motion, the parties have proceeded as if the Court were considering the propriety of summary judgment. Indeed, each side has relied heavily upon discovery materials to substantiate its argument on the laches question. Consequently, the Court believes it appropriate to convert Reserve's motion to dismiss to a motion for summary judgment, and decide if the record shows there is no genuine issue as to any material fact and Reserve is entitled to judgment as a matter of law on its claim that ACBL's suit is barred by laches. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); Fed.R.Civ.P. 56(c). In making this determination, the Court views all facts and inferences in the light most favorable to the non-moving party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 246 (1986). Further, a genuine issue of material fact will be found to exist where the dispute over facts might affect the outcome of the lawsuit and there is sufficient evidence to support a jury verdict for the nonmoving party. *Id.* at 248.

BACKGROUND[1]

This controversy arose on October 26, 1994, when a barge owned by ACBL that was docked at or near Reserve's wharf and under Reserve's exclusive care, custody and control for the purpose of loading cargo of metal slag, sank. Shortly thereafter, ACBL prepared a notice of claim and sent it to Mr. Hal Tolin ("Tolin") at Reserve. In addition, ACBL engaged the law firm of Keck, Mahin and Cate ("Keck") to represent its interests in the claims process.

In April 1995, Paul Tobin ("Tobin"), a claims adjuster at MG Bush & Associates, Inc. ("MG Bush"), informed ACBL's assigned claims representative for the file, Larry Grieb ("Grieb"), that all matters concerning the Barge sinking should be directed to his attention, as MG Bush was adjusting the claim on behalf of Reserve's insurer. Tobin also stated that he expected the parties should be able to resolve the claim "amicably." Tobin likewise indicated to Michael Ash, Grieb's supervisor, that he believed Reserve's underwriters intended to resolve the claim without litigation. In June and September 1995, Tobin wrote to ACBL inquiring if its claim for damages had been formulated, and stating that Reserve "would like every opportunity to amicably resolve this claim short of litigation, if at all possible."

It appears that ACBL and MG Bush did not correspond further concerning the claim until December 1997, when ACBL finally sent a claims package to Tobin. Receiving no response from Tobin at MG Bush, ACBL forwarded the claims package directly to Tolin at Reserve in January 1998. In early March 1998, John Stickling, a senior adjuster at MG Bush, wrote ACBL requesting further information with respect to the damages claim.

In July 1999, ACBL sent MG Bush the additional materials sought and responded to the questions posed. MG Bush replied that the claim was being forwarded to defense counsel for review, and reiterated a desire to settle the matter without resorting to litigation. After further unsuccessful attempts to follow up with MG Bush regarding the status of the claim, ACBL filed this action in July 2001.

ANALYSIS

***3** "The doctrine of laches is derived from the maxim that those who sleep on their rights, lose them." *Chattanoga Mfg., Inc. v. Nike, Inc.,* 301 F.3d 789, 792 (7th Cir.2002). Indeed, the equitable defense of laches is "concerned principally with the fairness of permitting a claim to be enforced." *Zelazny v. Lyng,* 853 F.2d 540, 541 (7th Cir.1988). Illinois law imposes a five year statute of limitations for suits to recover for property damages. *See* 735 ILCS 5/13–205. Further, the cause of action accrues and the statute of limitations begins to run when there is actual knowledge that both a physical problem exists and that someone may be at fault for its existence. *See Carey v. Kerr–McGee Chem. Corp.,* 999 F.Supp. 1109, 1115 (N.D.Ill.1998).

It is undisputed that ACBL submitted notice to Reserve of a possible claim shortly after the sinking of the barge in October 1994, but that ACBL did not file this lawsuit until July 2001, six years and nine months later. Because the analogous state statute of limitations governing ACBL's damages claim has run, there is a presumption that this action is barred under the doctrine of laches. *See Hot Wax, Inc. v. Turtle Wax, Inc.,* 191 F.3d 813, 821 (7th Cir.1999); *Conopco, Inc. v. Campbell Soup Co.,* 95 F.3d 187, 191 (2d Cir.1996). Nevertheless, to prevail on its laches defense here, Reserve must demonstrate: 1) an unreasonable lack of diligence by ACBL in bringing suit; and 2) prejudice arising from that delay. *See e.g., Hot Wax, Inc.,* 191 F.3d at 822.

A. Unreasonable Lack of Diligence

Reserve argues that ACBL's delay in filing this lawsuit—almost two years after the expiration of the analogous state limitations period—is inexcusable. ACBL counters that its delay should be excused because it was lulled into inaction by the representations of MG Bush, on behalf of Reserve, of an intent to resolve the dispute without resorting to litigation. ACBL focuses primarily on the July 1999 letter, which states not only that the additional information requested had been received and the claim was under review, but also expresses a desire to settle rather than litigate the matter. ACBL maintains Reserve should be equitably estopped from raising the laches defense because this representation, made only three months prior to the expiration of the five year statute of limitations, induced ACBL to forgo filing a lawsuit.

ACBL correctly states that the Seventh Circuit has indicated "attempts to resolve a dispute without resorting to a court do not constitute unreasonable delay." *Leonard v. United Air Lines, Inc.,* 972 F.2d 155, 158 (7th Cir.1992). However, that rule was invoked in a case where the court specifically noted that the time plaintiff spent pursuing internal administrative remedies to recover lost pension benefits should be excluded from the delay analysis. *See id.* The situation here is clearly distinguishable. Consequently, ACBL must produce sufficient evidence to demonstrate it was induced to forbear litigation until after the statute of limitations had expired.

***4** Even construing all the facts in ACBL's favor as it must, the Court finds ACBL's claim of excusable delay weak. The representations ACBL claims to have relied upon express nothing more than a desire for amicable settlement. Unlike *United States v. Continental Cas. Co.,* 357 F.Supp. 795, 800 (E.D.La.1983), a case relied upon by ACBL, the record does not reflect any promises by Reserve to pay out the claim at the conclusion of its investigation. Nor is there any evidence of actual settlement efforts or negotiations between the parties concerning the amount of damages, as in *Windjammer Cruises, Inc. v. Paradise Cruises, Ltd.,* No. 93–00190ACK, 1993 WL 732431, at *3 (D. Hawaii June 8, 1993), another case ACBL points to as supporting authority for its position. Furthermore, those representations were first made within a year after Reserve received notice of the claim, and then again almost four years later after MG Bush had finally obtained all of the information it needed to fully consider the damages claim. Thus, there is no evidence of ongoing discussions throughout the limitations period about forthcoming payment or settlement that would permit the Court to infer ACBL was induced not to act until almost two years after the statute of limitations had expired. *See e.g., United States v. Reliance Ins. Co.,* 436 F.2d 1366, 1370 (10th Cir.1971). However, notwithstanding the Court's concerns about ACBL's diligence in asserting its legal rights here, it is not necessary to decide if the delay was excusable since laches will not apply, even in the face of inexcusable delay, unless there is also a showing of prejudice as a result of the delay. *See Hot–Wax,* 191 F.3d at 824.

B. Resultant Prejudice

Prejudice "ensues when a defendant has changed his position in a way that would have occurred if the plaintiff had not delayed." *Conopco, Inc. v. Campbell Soup Co.,* 95 F.3d 187, 192 (2nd Cir.1996). Reserve maintains that due to ACBL's delay in filing its lawsuit, an evidentiary prejudice arises because it will be unable to put on a fair defense in light of the passage of time. Specifically, Reserves argues that it has changed its records storage systems, facilities and most of its employees since these claims accrued, and that necessary records have been lost or destroyed in the regular course of business. As a result, Reserve claims, it has been unable to identify and locate both documents and witnesses.

In response, ACBL counters that MG Bush thoroughly investigated the claim when the barge sank and the results of that investigation have been preserved in a written report which was produced in discovery. Indeed, the report identifies all employees who were involved in any fashion in the incident, and sets forth detailed interviews of the witnesses, thereby preserving their recollection of the events, as well as their dates of birth and social security numbers. Moreover, Carrier Marine, Inc., which acted as a marine surveyor on behalf of Reserve after the sinking and was present throughout the salvage efforts of the barge, also took detailed notes concerning the damage to the barge, the position of the barge after sinking, and the disposition of the cargo in the barge as a result of the incident, all of which have been produced in discovery.

***5** Given the availability of the written report and surveyor's notes, the Court cannot say, as a matter of law, that Reserve has established an inability to defend this action. *See e.g., Turner v.. American Dredging Co.,* 407 F.Supp. 1047, 1053 (E.D.Penn.1976). Certainly there are some witnesses whose memories of this incident will have dimmed, but that possibility, standing alone, is not enough to find resultant prejudice, particularly since detailed statements from many key witnesses have been preserved.

The Court recognizes discovery has only begun in this case and that other facts may come to light that bear on the issue of prejudice to Reserve. Consequently, the Court will not preclude Reserve from asserting a laches defense at a more appropriate time when the record has been developed further. However, upon consideration of the limited record that currently exists, the Court finds it insufficient to demonstrate that ACBL's delay in filing this lawsuit to recover damages for the sunken barge warrants application of the laches defense. Reserve's motion for summary judgment is therefore denied.

IT IS SO ORDERED.

2002 WL 31749171

All Citations

Not Reported in F.Supp.2d, 2002 WL 31749171

Footnotes

1 The parties usually set out the material undisputed facts in their Local Rule 56.1 statements. *See* N.D. Illinois L.R. 56.1. However, in light of the procedural posture of this case, the Court will look to the complaint and the motions papers to ascertain the relevant factual contentions.

EXHIBIT 2

2020 WL 7012522
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued
on or after Jan. 1, 2007. See also U.S.Ct. of
Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals, Third Circuit.

DONALD J. TRUMP FOR PRESIDENT, INC.; Lawrence Roberts; David John Henry, Appellants

v.

SECRETARY Commonwealth OF PENNSYLVANIA; Allegheny County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Delaware County Board of Elections; Montgomery County Board of Elections; Northampton County Board of Elections; Philadelphia County Board of Elections

No. 20-3371
|
Submitted Under Third Circuit
L.A.R. 34.1(a) on November 25, 2020
|
(Filed: November 27, 2020)

Synopsis

Background: Voters and President's reelection campaign brought action against Secretary of the Commonwealth of Pennsylvania and county boards of elections, seeking to invalidate millions of votes cast by Pennsylvanians in presidential election during COVID-19 pandemic based on allegations that Secretary's authorization of notice-and-cure procedure for procedurally defective mail-in ballots violated the Equal Protection Clause and that poll watchers were impermissibly excluded from canvass. The United States District Court for the Middle District of Pennsylvania, Matthew W. Brann, J., 2020 WL 6821992, granted motion by Secretary and county boards of elections to dismiss. Voters and campaign appealed.

Holdings: The Court of Appeals, Bibas, Circuit Judge, held that:

delay by President's reelection campaign in moving to amend complaint second time was undue;

second amendment of complaint would have been futile;

county-to-county variations in processing votes from election did not show discrimination;

failure of President's reelection campaign to request injunction pending appeal from district court or show that it could not have made that request barred campaign from pursuing that motion on appeal;

campaign likely could not succeed on merits;

campaign likely would not suffer irreparable harm; and

granting relief would not have been equitable.

Affirmed.

On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. No. 4:20-cv-02078), District Judge: Honorable Matthew W. Brann

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Before: SMITH, Chief Judge, and CHAGARES and BIBAS, Circuit Judges

OPINION[*]

BIBAS, Circuit Judge.

***1** Free, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.

The Trump Presidential Campaign asserts that Pennsylvania's 2020 election was unfair. But as lawyer Rudolph Giuliani stressed, the Campaign "doesn't plead fraud. ... [T]his is not a fraud case." Mot. to Dismiss Hr'g Tr. 118:19–20, 137:18. Instead, it objects that Pennsylvania's Secretary of State and some counties restricted poll watchers and let voters fix technical defects in their mail-in ballots. It offers nothing more.

This case is not about whether those claims are true. Rather, the Campaign appeals on a very narrow ground: whether the District Court abused its discretion in not letting the Campaign amend its complaint a second time. It did not.

Most of the claims in the Second Amended Complaint boil down to issues of state law. But Pennsylvania law is willing to overlook many technical defects. It favors counting votes as long as there is no fraud. Indeed, the Campaign has already litigated and lost many of these issues in state courts.

The Campaign tries to repackage these state-law claims as unconstitutional discrimination. Yet its allegations are vague and conclusory. It never alleges that anyone treated the Trump campaign or Trump votes worse than it treated the Biden campaign or Biden votes. And federal law does not require poll watchers or specify how they may observe. It also says nothing about curing technical state-law errors in ballots. Each of these defects is fatal, and the proposed Second Amended Complaint does not fix them. So the District Court properly denied leave to amend again.

Nor does the Campaign deserve an injunction to undo Pennsylvania's certification of its votes. The Campaign's claims have no merit. The number of ballots it specifically challenges is far smaller than the roughly 81,000-vote margin of victory. And it never claims fraud or that any votes were cast by illegal voters. Plus, tossing out millions of mail-in ballots would be drastic and unprecedented, disenfranchising a huge swath of the electorate and upsetting all down-ballot races too. That remedy would be grossly disproportionate to the procedural challenges raised. So we deny the motion for an injunction pending appeal.

I. Background

A. Pennsylvania election law

In Pennsylvania, each county runs its own elections. 25 Pa. Stat. § 2641(a). Counties choose and staff polling places. § 2642(b), (d). They buy their own ballot boxes and voting booths and machines. § 2642(c). They even count the votes and post the results. § 2642(k), (*l*). In all this, counties must follow Pennsylvania's Election Code and regulations. But counties can, and do, adopt rules and guidance for election officers and electors. § 2642(f). And they are charged with ensuring that elections are "honestly, efficiently, and uniformly conducted." § 2642(g).

1. *Poll watchers and representatives*. Counties must admit qualified poll "watchers" to observe votes being tallied. 25 Pa. Stat. § 2650(a). Poll watchers must be registered to vote in the county where they will serve. § 2687(b). Each candidate can pick two poll watchers per election district; each political party, three. § 2687(a). The poll watchers remain at the polling place while election officials count in-person ballots. § 2687(b). They can ask to check voting lists. *Id.* And they get to be present when officials open and count all the mail-in ballots. § 3146.8(b). Likewise, candidates' and political parties' "representatives" may be present when absentee and mail-in ballots are inspected, opened, or counted, or when provisional ballots are examined. §§ 2602(a.1), (q.1), 3050(a.4)(4), 3146.8(g)(1.1) & (2); *see also* § 3050(a.4)(12) (defining provisional ballots as those cast by voters whose voter registration cannot be verified right away).

***2** Still, counties have some control over these poll watchers and representatives. The Election Code does not tell counties how they must accommodate them. Counties need only allow them "in the polling place" or "in the room" where ballots are being inspected, opened, or counted. §§ 2687(b), 3050(a.4)(4), 3146.8(g)(1.1) & (2). Counties are expected to set up "an enclosed space" for vote counters at the polling place, and poll watchers "shall remain outside the enclosed space." § 2687(b). So the counties decide where the watchers stand and how close they get to the vote counters.

2. *Mail-in ballots*. For decades, Pennsylvania let only certain people, like members of the military and their families, vote by mail. *See, e.g.*, 25 Pa. Stat. § 3146.1. But last year, as part of a bipartisan election reform, Pennsylvania expanded mail-in voting. Act of Oct. 31, 2019, Pub. L. No. 552, sec. 8, § 1310-D, 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421). Now, any Pennsylvania voter can vote by mail for any reason. *See* 25 Pa. Stat. §§ 2602(t), 3150.11(a).

To vote by mail, a Pennsylvania voter must take several steps. First, he (or she) must ask the State (Commonwealth) or his county for a mail-in ballot. 25 Pa. Stat. § 3150.12(a). To do that, he must submit a signed application with his name, date of birth, address, and other information. § 3150.12(b)–(c). He must also provide a driver's license number, the last four digits of his Social Security number, or the like. §§ 2602(z.5), 3150.12b(a), (c). Once the application is correct and complete, the county will approve it. *See* §§ 3150.12a(a), 3150.12b.

Close to the election, the county will mail the voter a mail-in ballot package. § 3150.15. The package has a ballot and two envelopes. The smaller envelope (also called the secrecy envelope) is stamped "Official Election Ballot." § 3150.14(a). The larger envelope is stamped with the county board of election's name and address and bears a printed voter declaration. *Id.*

Next, the voter fills out the ballot. § 3150.16(a). He then folds the ballot; puts it into the first, smaller secrecy envelope; and seals it. *Id.* After that, he puts the secrecy envelope inside the larger envelope and seals that too. *Id.* He must also "fill out,

date and sign the declaration printed" on the outside of the larger envelope. §§ 3150.16(a), 3150.14(b). The declaration for the November 2020 election read thus:

> I hereby declare that I am qualified to vote from the below stated address at this election; that I have not already voted in this election; and I further declare that I marked my ballot in secret. I am qualified to vote the enclosed ballot. I understand I am no longer eligible to vote at my polling place after I return my voted ballot. However, if my ballot is not received by the county, I understand I may only vote by provisional ballot at my polling place, unless I surrender my balloting materials, to be voided, to the judge of elections at my polling place.
>
> [BAR CODE]
>
> Voter, sign or mark here/Votante firme o mar[q]ue aqui
>
> **X**_____
>
> _____
>
> Date of signing (MM/DD/YYYY)/Fechade firme (MM/DD/YYYY)
>
> _____
>
> Voter, print name/Votante, nombre en letra de impreta

In re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, Nos. 31–35 EAP & 29 WAP 2020,—— A.3d ——, ——, 2020 WL 6875017, at *4 (Pa. Nov. 23, 2020). Once the voter assembles the ballot packet, he can mail it back or deliver it in person. 25 Pa. Stat. § 3150.16(a).

Not every voter can be expected to follow this process perfectly. Some forget one of the envelopes. Others forget to sign on the dotted line. Some major errors will invalidate a ballot. For instance, counties may not count mail-in ballots that lack secrecy envelopes. *Pa. Dem. Party v. Boockvar*, 238 A.3d 345, 378–80 (Pa. 2020). But the Election Code says nothing about what should happen if a county notices these errors before election day. Some counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors.

B. Facts and procedural history

***3** On appeal from the dismissal of a complaint, we take the factual allegations as true:

1. *Mail-in voting*. For months, Pennsylvanians went to the polls, so to speak. The first batch of mail-in ballots went out to voters in late September. As they trickled back in, election officials noticed that some voters had not followed the rules. Some ballots were not in secrecy envelopes, so those packages were lighter and thinner than complete ballot packages. Others had declarations that voters had not completed. Some counties did not notify voters about these defective ballots. Others, including the counties named in this suit, decided to reach out to these voters to let them cure their mistakes by voting provisionally on Election Day or asking for a replacement ballot.

2. *Election Day*. Though more than two million Pennsylvanians voted by mail, even more voted in person. On Election Day, November 3, the Campaign set up poll watchers at polling places around the Commonwealth. Appellees' election officials kept poll watchers and representatives away from where ballots were opened, counted, and tallied. In Philadelphia, for instance, poll watchers were kept six to twenty-five feet back from officials. In comparison, other, "Republican[-]controlled" counties did give the Campaign's poll watchers and representatives full access. Second Am. Compl. ¶¶ 151, 154.

In all, nearly seven million Pennsylvanians voted, more than a third of them by mail. *Unofficial Returns for the 2020 Presidential Election*, Pa. Dep't of State, https://www.electionreturns.pa.gov/ (last visited Nov. 27, 2020). As of today, former Vice President Biden leads President Trump in Pennsylvania by 81,660 votes. *Id.*

Pennsylvania's counties certified their election results by the November 23 certification deadline. 25 Pa. Stat. § 2642(k). The next morning, the Secretary of State (technically, Secretary of the Commonwealth) certified the vote totals, and the Governor signed the Certificate of Ascertainment and sent it to the U.S. Archivist. *Department of State Certifies Presidential Election Results*, PA Media, https://www.media.pa.gov/Pages/State-details.aspx?newsid=435 (last visited Nov. 27, 2020). The certified margin of victory was 80,555 votes. *Id.*

3. *This lawsuit*. Almost a week after the election, the Campaign (as well as two voters) sued seven Pennsylvania counties and Secretary of State Kathy Boockvar. It alleged that they had violated the Due Process, Equal Protection, and Electors and Elections Clauses of the U.S. Constitution by taking two basic actions: First, the counties (encouraged

by Secretary Boockvar) identified defective mail-in ballots early and told voters how to fix them. Second, they kept poll watchers and representatives from watching officials count all ballots.

So far, the Campaign has filed or tried to file three complaints. The original Complaint, filed November 9, set out six counts (plus a duplicate). After Boockvar and the counties moved to dismiss, on November 15 the Campaign filed a First Amended Complaint as of right, dropping four of the six counts (plus the duplicate), including all the counts relating to poll watchers and representatives. The Campaign sought a preliminary injunction to block certifying the election results. Boockvar and the counties again moved to dismiss. On November 18, the Campaign sought to file a Second Amended Complaint, resurrecting four dropped claims from the original Complaint and adding three more about how Philadelphia had blocked poll watching.

***4** The District Court ended these volleys, denying leave to file the Second Amended Complaint. Instead, it dismissed the First Amended Complaint with prejudice and denied the Campaign's motion for a preliminary injunction as moot. *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078, —— F. Supp. 3d ——, 2020 WL 6821992 (M.D. Pa. Nov. 21, 2020). In doing so, it held that the individual voters lacked standing. *Id.* at ——, at *5–6. We commend the District Court for its fast, fair, patient handling of this demanding litigation.

4. *This appeal*. The Campaign filed this appeal on Sunday, November 22, and we granted its motion to expedite. The Campaign filed its brief and another motion November 23; opposing briefs and filings arrived the next day. We are issuing this opinion nonprecedentially so we can rule by November 27.

The Campaign does not challenge the District Court's finding that the voters lacked standing, so we do not consider their claims. On appeal, it seeks only narrow relief: to overturn the District Court's decision not to let it amend its complaint again. We address that claim in Part II. Separately, the Campaign asks us for an injunction to prevent the certified vote totals from taking effect. We address that claim in Part III.

II. The District Court Properly Denied Leave To Amend the Complaint Again

After one amendment, the District Court denied the Campaign's motion to amend the complaint a second time. We review that denial for abuse of discretion. *Premier Comp. Sol., LLC v. UPMC*, 970 F.3d 316, 318–19 (3d Cir. 2020). But on any standard of review, the court got it right.

Courts should grant leave to amend "freely ... when justice so requires." Fed. R. Civ. P. 15(a)(2). In civil-rights cases, that means granting leave unless "amendment would be futile or inequitable." *Vorchheimer v. Phila. Owners Ass'n*, 903 F.3d 100, 113 (3d Cir. 2018); *Cureton v. NCAA*, 252 F.3d 267, 272–73 (3d Cir. 2001) (giving undue delay as an example of inequity). Here, the Campaign's request fails as both inequitable and futile.

A. The Campaign's delay was undue, given its stress on needing to resolve the case by November 23

When the Campaign was before the District Court, it focused its arguments on the need to resolve the case by Pennsylvania's deadline for counties to certify their votes: Monday, November 23. Indeed, all three iterations of the complaint focused their prayers for relief on blocking the certification of the vote tally. The Campaign said it could get no "meaningful remedy" after that date. Br. in Supp. of Mot. for TRO & PI, Dkt. 89-1, at 4.

The Campaign filed its First Amended Complaint on November 15, eight days before the certification deadline. In response to several pending motions to dismiss, it dropped many of the challenged counts from the original Complaint. It did not then move to file a Second Amended Complaint until November 18, when its opposition to the new motions to dismiss was due. And it did not file a brief in support of that motion until Friday, November 20. Certification was three days away.

As the District Court rightly noted, amending that close to the deadline would have delayed resolving the issues. True, delay alone is not enough to bar amendment. *Cureton*, 252 F.3d at 273. But "at some point, the delay will become 'undue,' placing an unwarranted burden on the court." *Id.* (quoting *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984)). The Campaign's motion would have done just that. It would have mooted the existing motions to dismiss and required new

briefing, possibly new oral argument, and a reasoned judicial opinion within seventy-two hours over a weekend. That is too much to ask—especially since the proposed Second Amended Complaint largely repleaded many claims abandoned by the first one. *Cf. Rolo v. City Investing Co. Liquidating Tr.*, 155 F.3d 644, 654–55 (3d Cir. 1998) (affirming denial of leave to amend because the movant sought largely to "replead facts and arguments that could have been pled much earlier").

***5** Having repeatedly stressed the certification deadline, the Campaign cannot now pivot and object that the District Court abused its discretion by holding the Campaign to that very deadline. It did not.

B. Amending the Complaint again would have been futile

The Campaign focuses on critiquing the District Court's discussion of undue delay. Though the court properly rested on that ground, we can affirm on any ground supported by the record. Another ground also supports its denial of leave to amend: it would have been futile.

1. *The Campaign had to plead plausible facts, not just conclusory allegations*. Plaintiffs must do more than allege conclusions. Rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The Second Amended Complaint does not meet *Twombly* and *Iqbal*'s baseline standard of specifics.

To start, note what it does not allege: fraud. Indeed, in oral argument before the District Court, Campaign lawyer Rudolph Giuliani conceded that the Campaign "doesn't plead fraud." Mot. to Dismiss Hr'g Tr. 118:19–20 (Nov. 17, 2020). He reiterated: "If we had alleged fraud, yes, but this is not a fraud case." *Id.* at 137:18.

Though it alleges many conclusions, the Second Amended Complaint is light on facts. Take the nearly identical paragraphs introducing Counts One, Two, Four, and Six: "Democrats who controlled the Defendant County Election Boards engaged in a deliberate scheme of intentional and purposeful discrimination ... by excluding Republican and Trump Campaign observers from the canvassing of the mail ballots in order to conceal their decision not to enforce [certain ballot] requirements." Second Am. Compl. ¶¶167, 193, 222, 252. That is conclusory. So is the claim that, "[u]pon information and belief, a substantial portion of the approximately 1.5 million absentee and mail votes in Defendant Counties should not have been counted." *Id.* ¶¶168, 194, 223, 253. "Upon information and belief" is a lawyerly way of saying that the Campaign does not know that something is a fact but just suspects it or has heard it. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937. Yet the Campaign offers no specific facts to back up these claims.

2. *The Campaign has already litigated and lost most of these issues*. Many of the Second Amended Complaint's claims have already had their day in court. The Campaign cannot use this lawsuit to collaterally attack those prior rulings. On Counts One, Two, Four, and Six, the Campaign has already litigated whether ballots that lack a handwritten name, address, or date on the outer envelope must be disqualified. *See In re: Canvass of Absentee and Mail-in Ballots*, —— A.3d at ——, 2020 WL 6875017, at *1. The Pennsylvania Supreme Court ruled against the Campaign, holding: "[T]he Election Code does not require boards of elections to disqualify mail-in or absentee ballots submitted by qualified electors who signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged." *Id.* at ——, at *1. That holding undermines the Campaign's suggestions that defective ballots should not have been counted.

***6** Counts One and Two also challenge the requirement that poll watchers be registered electors of the county they wish to observe and that observers be Pennsylvania lawyers. But a federal district court has already held "that the county-residency requirement for poll watching does not, as applied to the particular circumstances of this election, burden any of [the Campaign's] fundamental constitutional rights." *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, —— F. Supp. 3d ——, ——, 2020 WL 5997680, at *66 (W.D. Pa. Oct. 10, 2020). The Campaign never appealed that decision, so it is bound by it.

Count Seven alleges that Philadelphia's Board of Elections violated due process by obstructing poll watchers and representatives. But nothing in the Due Process Clause requires having poll watchers or representatives, let alone watchers from outside a county or less than eighteen feet away from the nearest table. The Campaign cites no authority for

those propositions, and we know of none. (Ditto for notice-and-cure procedures.) And the Campaign litigated and lost that claim under state law too. The Pennsylvania Supreme Court held that the Election Code requires only that poll watchers be in the room, not that they be within any specific distance of the ballots. *In re Canvassing Observation Appeal of: City of Phila. Bd. of Electors*, No. 30 EAP 2020, —— A.3d ——, ——, 2020 WL 6737895, at *8–9 (Pa. Nov. 17, 2020).

The Campaign does not even challenge the dismissal of Counts Three, Five, and Nine, the Electors and Elections Clause counts. It concedes that under our recent decision, it lacks standing to pursue alleged violations of those clauses. *Bognet v. Sec'y Commonwealth of Pa.*, No. 20-3214, —— F.3d ——, ——, 2020 WL 6686120, at *6–9 (3d Cir. Nov. 13, 2020). Given its concession, we need not consider the issue any more.

The Second Amended Complaint thus boils down to the equal-protection claims in Counts Two, Four, Six, and Eight. They require not violations of state law, but discrimination in applying it. Those claims fail too.

3. *The Campaign never pleads that any defendant treated the Trump and Biden campaigns or votes differently.* A violation of the Equal Protection Clause requires more than variation from county to county. It requires unequal treatment of similarly situated parties. But the Campaign never pleads or alleges that anyone treated it differently from the Biden campaign. Count One alleges that the counties refused to credential the Campaign's poll watchers or kept them behind metal barricades, away from the ballots. It never alleges that other campaigns' poll watchers or representatives were treated differently. Count Two alleges that an unnamed lawyer was able to watch all aspects of voting in York County, while poll watchers in Philadelphia were not. It also makes a claim about one Jared M. Mellott, who was able to poll watch in York County. Counts Four and Six allege that poll watcher George Gallenthin had no issues in Bucks County but was barred from watching in Philadelphia. And Count Eight alleges that Philadelphia officials kept Jeremy Mercer too far away to verify that ballots were properly filled out. None of these counts alleges facts showing improper vote counting. And none alleges facts showing that the Trump campaign was singled out for adverse treatment. The Campaign cites no authority suggesting that an actor discriminates by treating people equally while harboring a partisan motive, and we know of none.

These county-to-county variations do not show discrimination. "[C]ounties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state." *Donald J. Trump for President, Inc.*, —— F. Supp. 3d at ——, 2020 WL 5997680, at *44 (collecting cases). Even when boards of elections "vary ... considerably" in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635–36 (6th Cir. 2016); *see also Wexler v. Anderson*, 452 F.3d 1226, 1231–33 (11th Cir. 2006) (recognizing that equal protection lets different counties use different voting systems).

***7** Nor does *Bush v. Gore* help the Campaign. 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (per curiam). There, the Florida Supreme Court had ratified treating ballots unequally. *Id.* at 107, 121 S.Ct. 525. That was because the principle it set forth, the "intent of the voter," lacked *any* "specific standards to ensure its equal application." *Id.* at 105–06, 121 S.Ct. 525. The lack of any standards at all empowered officials to treat ballots arbitrarily, violating equal protection. *Id.* Here, by contrast, Pennsylvania's Election Code gives counties specific guidelines. To be sure, counties vary in implementing that guidance, but that is normal. Reasonable county-to-county variation is not discrimination. *Bush v. Gore* does not federalize every jot and tittle of state election law.

4. *The relief sought—throwing out millions of votes—is unprecedented.* Finally, the Second Amended Complaint seeks breathtaking relief: barring the Commonwealth from certifying its results or else declaring the election results defective and ordering the Pennsylvania General Assembly, not the voters, to choose Pennsylvania's presidential electors. It cites no authority for this drastic remedy.

The closest the Campaign comes to justifying the relief it seeks is citing *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994). But those facts were a far cry from the ones here. In *Marks*, the district court found that the Stinson campaign had orchestrated "massive absentee ballot fraud, deception, intimidation, harassment and forgery." *Id.* at 887 (quoting district court's tentative findings). It had lied to voters, deceived election officials, and forged ballots. *Id.* at 877. We remanded that case, instructing that "the district court should not direct the certification of a candidate unless it finds, on the basis of record evidence, that the designated candidate would have won the election but for wrongdoing." *Id.* at 889. And that seemed likely: the Stinson campaign had gotten about

600 net absentee-ballot applications (roughly 1000 minus 400 that were later rejected), more than the 461-vote margin of victory. *Id.* at 876–77.

Here, however, there is no clear evidence of massive absentee-ballot fraud or forgery. On the contrary, at oral argument in the District Court, the Campaign specifically disavowed any claim of fraud. And the margin of victory here is not nearly as close: not 461 votes, but roughly 81,000.

Though district courts should freely give leave to amend, they need not do so when amendment would be futile. Because the Second Amended Complaint would not survive a motion to dismiss, the District Court properly denied leave to file it.

III. No Stay or Injunction Is Warranted

We could stop here. Once we affirm the denial of leave to amend, this case is over. Still, for completeness, we address the Campaign's emergency motion to stay the effect of certification. No stay or injunction is called for.

Though the Campaign styles its motion as seeking a stay or preliminary injunction, what it really wants is an injunction pending appeal. But it neither requested that from the District Court during the appeal nor showed that it could not make that request, as required by Federal Rule of Appellate Procedure 8(a)(2)(A). That failure bars the motion.

Even if we could grant relief, we would not. Injunctions pending appeal, like preliminary injunctions, are "extraordinary remed[ies] never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). For a stay or injunction pending appeal, the movant must show both (1) a "strong" likelihood of success on the merits and (2) irreparable injury absent a stay or injunction. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). The first two factors are "the most critical." *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). After that, we also balance (3) whether a stay or injunction will injure other interested parties (also called the balance of equities) and (4) the public interest. *Hilton*, 481 U.S. at 776, 107 S.Ct. 2113; *In re Revel AC, Inc.*, 802 F.3d 558, 568–71 (3d Cir. 2015). None of the four factors favors taking this extraordinary step.

A. The Campaign has no strong likelihood of success on the merits

***8** As discussed, the Campaign cannot win this lawsuit. It conceded that it is not alleging election fraud. It has already raised and lost most of these state-law issues, and it cannot relitigate them here. It cites no federal authority regulating poll watchers or notice and cure. It alleges no specific discrimination. And it does not contest that it lacks standing under the Elections and Electors Clauses. These claims cannot succeed.

B. The Campaign faces no irreparable harm

The Campaign has not shown that denying relief will injure it. "Upon information and belief," it suspects that many of the 1.5 million mail-in ballots in the challenged counties were improperly counted. Second Am. Compl. ¶¶168, 194, 223, 253. But it challenges no specific ballots. The Campaign alleges only that at most three specific voters cast ballots that were not counted. *Id.* ¶237 (one voter); First Am. Compl. ¶¶15–16, 112 (three). And it never alleges that anyone except a lawful voter cast a vote. Of the seven counties whose notice-and-cure procedures are challenged, four (including the three most populous) represented that they gave notice to only about 6,500 voters who sent in defective ballot packages. Allegheny Cty. Opp. Mot. TRO & PI 7–8, D. Ct. Dkt. No. 193 (Nov. 20, 2020). The Campaign never disputed these numbers or alleged its own. Even if 10,000 voters got notice and cured their defective ballots, and every single one then voted for Biden, that is less than an eighth of the margin of victory.

Without more facts, we will not extrapolate from these modest numbers to postulate that the number of affected ballots comes close to the certified margin of victory of 80,555 votes. Denying relief will not move the needle.

Plus, states are primarily responsible for running federal elections. U.S. Const. art. I, § 4, cl. 1; 3 U.S.C. § 5. Pennsylvania law has detailed mechanisms for disputing election results. 25 Pa. Stat. §§ 3261–3474. Because the Campaign can raise these issues and seek relief through state courts and then the U.S. Supreme Court, any harm may not be irreparable. *Touchston v. McDermott*, 234 F.3d 1130, 1132–33 (11th Cir. 2000) (per curiam) (en banc).

C. The balance of equities opposes disenfranchising voters

Nor would granting relief be equitable. The Campaign has already litigated and lost most of these issues as garden-variety state-law claims. It now tries to turn them into federal constitutional claims but cannot. *See Bognet*, —— F.3d at ——, 2020 WL 6686120, at *11.

Even if it could, it has delayed bringing this suit. For instance, in proposed Count Four, it challenges giving voters notice and letting them cure ballot defects as violating equal protection. The Campaign could have disputed these practices while they were happening or during the canvassing period. Instead, it waited almost a week after Election Day to file its original complaint, almost another week to amend it, and then another three days to amend it again. Its delay is inequitable, and further delay would wreak further inequity.

And the Campaign's charges are selective. Though Pennsylvanians cast 2.6 million mail-in ballots, the Campaign challenges 1.5 million of them. It cherry-picks votes cast in "Democratic-heavy counties" but not "those in Republican-heavy counties." Second Am. Compl. ¶8. Without compelling evidence of massive fraud, not even alleged here, we can hardly grant such lopsided relief.

Granting relief would harm millions of Pennsylvania voters too. The Campaign would have us set aside 1.5 million ballots without even alleging fraud. As the deadline to certify votes has already passed, granting relief would disenfranchise those voters or sidestep the expressed will of the people. Tossing out those ballots could disrupt every down-ballot race as well. There is no allegation of fraud (let alone proof) to justify harming those millions of voters as well as other candidates.

D. The public interest favors counting all lawful voters' votes

***9** Lastly, relief would not serve the public interest. Democracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes.

What is more, throwing out those votes would conflict with Pennsylvania election law. The Pennsylvania Supreme Court has long "liberally construed" its Election Code "to protect voters' right to vote," even when a ballot violates a technical requirement. *Shambach v. Bickhart*, 577 Pa. 384, 845 A.2d 793, 802 (2004). "Technicalities should not be used to make the right of the voter insecure." *Appeal of James*, 377 Pa. 405, 105 A.2d 64, 66 (1954) (internal quotation marks omitted). That court recently reiterated: "[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice." *Pa. Dem. Party*, 238 A.3d at 356. Thus, unless there is evidence of fraud, Pennsylvania law overlooks small ballot glitches and respects the expressed intent of every lawful voter. *In re: Canvass of Absentee and Mail-in Ballots*, 2020 WL 6875017, at *1 (plurality opinion). In our federalist system, we must respect Pennsylvania's approach to running elections. We will not make more of ballot technicalities than Pennsylvania itself does.

* * * * *

Voters, not lawyers, choose the President. Ballots, not briefs, decide elections. The ballots here are governed by Pennsylvania election law. No federal law requires poll watchers or specifies where they must live or how close they may stand when votes are counted. Nor does federal law govern whether to count ballots with minor state-law defects or let voters cure those defects. Those are all issues of state law, not ones that we can hear. And earlier lawsuits have rejected those claims.

Seeking to turn those state-law claims into federal ones, the Campaign claims discrimination. But its alchemy cannot transmute lead into gold. The Campaign never alleges that any ballot was fraudulent or cast by an illegal voter. It never alleges that any defendant treated the Trump campaign or its votes worse than it treated the Biden campaign or its votes. Calling something discrimination does not make it so. The Second Amended Complaint still suffers from these core defects, so granting leave to amend would have been futile.

And there is no basis to grant the unprecedented injunction sought here. First, for the reasons already given, the Campaign is unlikely to succeed on the merits. Second, it shows no irreparable harm, offering specific challenges to many fewer ballots than the roughly 81,000-vote margin of victory. Third, the Campaign is responsible for its delay and repetitive litigation. Finally, the public interest strongly favors finality, counting every lawful voter's vote, and not disenfranchising millions of Pennsylvania voters who voted by mail. Plus, discarding those votes could disrupt every other election on the ballot.

We will thus affirm the District Court's denial of leave to amend, and we deny an injunction pending appeal. The Campaign asked for a very fast briefing schedule, and we have

granted its request. Because the Campaign wants us to move as fast as possible, we also deny oral argument. We grant all motions to file overlength responses, to file amicus briefs, and to supplement appendices. We deny all other outstanding motions as moot. This Court's mandate shall issue at once.

All Citations

--- Fed.Appx. ----, 2020 WL 7012522

Footnotes

* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants.

ORDER DENYING JAMES GESBECK'S MOTION TO INTERVENE (DKT. NO. 14) AND GRANTING IN PART AND DENYING IN PART INTERVENOR-DEFENDANT CIVIL L.R. 7(H) EXPEDITED NONDISPOSITIVE MOTION TO INTERVENE (DKT. NO. 33)

The plaintiff's amended complaint alleges that the 2020 election process "is so riddled with fraud, illegality, and statistical impossibility that this Court, and Wisconsin's voters, courts, and legislators, cannot rely on, or certify, any numbers resulting from this election." Dkt. No. 9 at ¶5. It states that the court "must set aside the results of the 2020 General Election and grant the declaratory and injunctive relief requested herein." Id.

The amended complaint first asserts that the election software and hardware used by defendant the Wisconsin Elections Commission were subject to hacking and manipulation and that "Wisconsin officials" disregarded widely reported concerns to this effect in utilizing the hardware and software. Id. at ¶¶6-13, 52-99. Next, it asserts that the Wisconsin Elections Commission issued improper guidance to clerks and election officials in violation of Wisconsin law. Id. at ¶¶14, 37-45. Third, it alleges that mail-in ballots either

were lost or were fraudulently recorded for voters who did not request them. Id. at ¶¶46-50. Fourth, it asserts that voters who were ineligible to vote because they were registered in other states nonetheless voted in Wisconsin. Id. at ¶51.

The plaintiff requests the following relief:

> 1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results;
>
> 2. An order enjoining Governor Evers from transmitting the currently certified election results [to] the Electoral College;
>
> 3. An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election;
>
> 4. An immediate temporary restraining order to seize and impound all servers, software, voting machines, tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11. related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiff;
>
> 5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;
>
> 6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;
>
> 7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. CONST. Amend. XIV;
>
> 8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that invalidates the certified results if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;

> 9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;
>
> 10. A permanent injunction prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;
>
> 11. Immediate production of 48 hours of security camera recordings of all voting central count facilities and processes in Milwaukee and Dane Counties for November 3, 2020 and November 4, 2020.

Id. at ¶142.

The same day the plaintiff filed the amended complaint, movant James Gesbeck filed a motion to intervene. Dkt. No. 14. The movant describes himself as a Wisconsin citizen and a licensed attorney (although he is not admitted to practice before this court). Id. at 1. He indicates that he voted in the 2020 general election, and that he voted in Wisconsin. Dkt. No. 15 at 1. He asserts that if the court grants the relief the plaintiff requests, it will disenfranchise his vote. Id.

The movant first argues that he is entitled to intervene as of right under Fed. R. Civ. P. 24(a). Id. at 2. He argues that his motion is timely filed and that he has a personal and individual interest in the outcome of the litigation. Id. He asserts that his interest would be impaired if the court were to grant the plaintiff's proposed relief. Id. at 3. He asserts that his interests are not adequately protected by the named defendants. Id. at 3-4. The movant asserts that he also meets the requirements for permissive intervention under Fed. R. Civ. P. 24(b). Id. at 4.

The movant later filed a Rule 7(h) expedited, non-dispositive motion; that motion did not add to the substance of his arguments, focusing on the movant's request that the court rule by 5:00 p.m. on Friday, December 4. Dkt. No. 33.

The court grants the movant's request for an expedited ruling (although not as expedited as he requested) and denies the motion to intervene.

A. Intervention As of Right

Fed. R. Civ. P. 24(a) provides that "[o]n timely motion, the court *must* permit anyone to intervene" if the party seeking to intervene "claims an interest relating to the . . . transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." (Emphasis added.) The Seventh Circuit has described the rule as "straightforward:"

> [T]he court *must* permit intervention if (1) the motion is timely; (2) the moving party has an interest relating to the property or transaction at issue in the litigation; and (3) that interest may, as a practical matter, be impaired or impeded by disposition of the case. A proposed intervenor who satisfies these three elements is *entitled* to intervene *unless* existing parties adequately represent his interests.

Driftless Area Land Conservancy v. Huebsch, 969 F.3d 742, 746 (7th Cir. 2019) (emphasis in the original).

1. *Timeliness of the Motion*

"The test for timeliness is essentially one of reasonableness: 'potential intervenors need to be reasonably diligent in learning of a suit that might affect

their rights, and upon so learning they need to act promptly.'" Reich v. ABC/York-Estes Corp., 64 F.3d 316, 321 (7th Cir. 1995 (quoting Nissei Sangyo Am., Ltd. v. United States, 31 F.3d 435, 438 (7th Cir. 1994)). In determining whether the potential intervenor was reasonably diligent, courts "also consider the prejudice to the original party if intervention is permitted and the prejudice to the intervenor if his motion is denied." Id. The Seventh Circuit has expressed these concepts in the form of a four-factor test:

> (1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances.

State v. City of Chi., 912 F.3d 979, 984 (7th Cir. 2019) (quoting Grochinski v. Mayer Brown Rowe & Maw, LLP, 719 F.3d 785, 797-90 (7th Cir. 2013)).

The movant filed his motion to intervene two days after the original complaint was filed and the same day as the amended complaint. There would be no prejudice to the original parties in allowing the movant to intervene, particularly because he represented that he was prepared to oppose the plaintiff's motion for injunctive relief by whatever deadline the court set. The movant did not address the third and fourth factors—the prejudice to the movant if the court did not allow him to intervene and any other unusual circumstances. Because the movant filed his motion the same day the plaintiff filed the original complaint, however, the court concludes that the motion is timely.

2. *The Moving Party's Interest*

The movant next must demonstrate that he has an interest relating to the property or transaction at issue in the litigation. The "transactions" at issue in this litigation are the decisions of defendants the Wisconsin Elections Commission and its members to sign the canvass statement for the 2020 general election and the recount in Dane and Milwaukee Counties and the action of defendant Governor Tony Evers in signing the Certificate of Ascertainment certifying the results of the 2020 general election.

The question of whether the movant, a Wisconsin resident who voted in the 2020 general election in Wisconsin, has an "interest" in those transactions is not as straightforward as one might imagine.

> Rule 24(a)(2) requires that the applicant claim "an interest relating to the property or transaction that is the subject of the action." "Interest" is not defined, but the case law makes clear that more than the minimum Article III interest is required. Cases say for example that a mere "economic interest" is not enough. E.g., *In re Lease Oil Antitrust Litigation*, 570 F.3d 244, 250-52 (5th Cir. 2009); *Mountaintop Condominium Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995); cf. *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 322-23 (7th Cir. 1995). While that is a confusing formulation—most civil litigation is based on nothing more than an "economic interest"—all that the cases mean is that the fact that you might anticipate a benefit from a judgment in favor of one of the parties to the lawsuit—maybe you're a creditor of one of them—does not entitle you to intervene in their suit.

Flying J, Inc. v. Van Hollen, 578 F.3d 569, 571 (7th Cir. 2009).

The movant contends that the litigation "directly concerns [his] vote that was [cast] in the 2020 General Election in Wisconsin," and argues that both the right to vote and the right to have the vote count is fundamental. Dkt. No.

15 at 2. The movant could anticipate benefits from a judgment in favor of the defendants; because he says that granting the relief the plaintiff requests would invalidate his vote or disenfranchise him, he could anticipate a benefit if the court denied that relief.

Related to—possibly entangled with—the concept of "interest" is the question of standing. The Seventh Circuit has held that "[n]o one can maintain an action in a federal court . . . unless he has standing to sue, in the sense required by Article III of the Constitution—that is, unless he can show injury . . . and that he would benefit from a decision in his favor." Flying J, Inc., 578 F.3d at 571. "Standing to sue" implies that it is only the plaintiff who must have standing. In most cases, the question of whether a defendant has standing does not arise because the plaintiff has sought relief against the plaintiff. But a party who seeks to intervene as a *defendant* seeks to intervene in a lawsuit brought by a plaintiff who has not sought relief against it. See Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 Fordham L. Rev. 1539, 1552 (2012). Whether such a defendant—particularly when the defendant represents a broad public interest (as, arguably, the movant does)—must have Article III standing is unclear. See, *e.g.*, Diamond v. Charles, 476 U.S. 54, 68 (1986) (concluding that it need not decide whether a party seeking to intervene due to public concerns must have Article III standing); Gregory R. Manring, *It's Time for an Intervention: Resolving the Conflict Between Rule 24(a)(2) and Article III Standing*, 85 Fordham L. Rev. 2525 (2017).

The movant's motion does not address his standing to intervene as a defendant. Courts recently have found that a registered voter did not have standing to sue an election board for allegedly denying his preferred candidate's campaign access to observe and monitor the voting process, *see* Wood v. Raffensperger, No. 20-14418, 2020 WL 7094866, at *4-6 (11th Cir. Dec. 5, 2020); did not have standing to raise claims of vote dilution, *see* Moore v. Circosta, Nos. 1:20CV911, 1:20CV912, 2020 WL 6063332, at *14 (M.D. N.C. Oct. 14, 2020); and did not have standing to challenge a Secretary of State's directive that election ballots be mailed to every active voter on a statewide voter checklist, *see* Martel v. Condos, No. 5:20-cv-131, 2020 WL 5755289, at *3-5 (D. Vermont Sept. 16, 2020). Each of these courts concluded that the voter plaintiffs had not identified the kind of concrete, particularized injury required to establish standing.

While the court could engage in an extensive analysis of whether the movant's argument that his vote will not count if the court rules in the plaintiff's favor constitutes such a concrete and particularized injury, it suffices to say that the question of whether a defendant-intervenor must have Article III standing, and what that standing might look like when the potential defendant-intervenor is a voter who asserts that the court's action invalidates his vote, is fraught. Without deciding today whether a defendant-intervenor must have Article III standing or what would constitute such standing under the movant's circumstances, the court assumes that the movant has an interest in the

transactions that give rise to the litigation and will move to the next two factors.

3. *Impairment of the Movant's Interest*

"The existence of 'impairment' depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding." Meridian Homes Corp. v. Nicholas W. Prassas & Co., 683 F.2d 201, 204 (7th Cir. 1982). (Citation omitted). The "foreclosure" of the proposed intervenor's rights "is measured by the general standards of stare decisis." Id. (Citations omitted.) In other words, whether or not the defendants succeed in this suit, is the movant free to initiate its own suit? See Shea v. Angulo, 19 F.3d 343, 347 (7th Cir. 1994).

Because the movant's interest is in having his vote count, as opposed to having a court direct the result of the 2020 general election, a decision granting the relief the plaintiff requests—decertifying the results of Wisconsin's 2020 general election and ordering the defendants to certify a different result—likely would foreclose the movant's rights in a subsequent suit. The movant cannot bring suit as a plaintiff because he has no complaint with the *status quo*. Because the electoral college will meet and vote in five days, the movant likely would not have time to mount his own suit in the event this court rules in favor of the plaintiff.

The movant has demonstrated that as a practical matter, his interests may be impaired or impeded by disposition of case, depending on that disposition.

4. *Adequacy of Representation*

The movant asserts that his interests are not adequately represented by the existing parties. Dkt. No. 15 at 3. He asserts that his interest is to defend his constitutional right to vote and that the Wisconsin Elections Commission, its members and Governor Tony Evers are not tasked with protecting that right. Id. He also asserts that the defendants are responsible for representing the state of Wisconsin as a whole and not individual voters. Id. He asserts that the right to vote is an individual right and argues that the court should not assume that it is the role of the governor or the elections commission to protect that individual right. Id. at 4. He says that there may be times when the defendants are averse to the individual right to vote, "as occurs during lawsuits over felon disenfranchisement." Id.

The Seventh Circuit has spoken extensively on this factor of the Rule 24(a) test in the past year. Most recently, in Driftless, the court explained that

> "[t]he most important factor in determining adequacy of representation is how the interest of the absentee compares with the interests of the present parties." 7C CHARLES ALAN WRIGHT & ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1909 (3d ed. 2007). Our recent decision in *Planned Parenthood of Wisconsin, Inc. v. Kaul* describes our circuit's three-tiered methodology for evaluating adequacy of representation under Rule 24(a)(2). 942 F.3d 793, 799 (7th Cir. 2019). "The default rule," we explained, "is a liberal one." *Id.* It derives from the Supreme Court's decision in *Trbovich v. United Mine Workers of America*, which explained that "the requirement of the Rule is satisfied if the

> applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." 404 U.S. 528, 538 n.10 . . . (1972).
>
> However, if the interest of the absentee is identical to that of an existing party, or if a governmental party is charged by law with representing the absentee's interest, then the standard for measuring adequacy of representation changes. In both situations—where the absentee and an existing party have identical interests, or the existing party is a governmental agency or official with a legal duty to represent the absentee's interest—a rebuttable presumption of adequate representation arises, and the prospective intervenor must carry a heightened burden to establish inadequacy of representation. The degree of this heightened burden varies.

Driftless Area Land Conservancy, 969 F.3d at 747.

So—if the movant's interest is not identical to that of an existing party or if there is no governmental party charged by law with representing the movant's interest, the movant has only the minimal burden of showing that the party's representation "may be" inadequate. But if the movant's interest is identical to that of an existing party, "there is a rebuttable presumption of adequate representation that requires a showing of 'some conflict' to warrant intervention." Planned Parenthood, 942 F.3d at 799 (quoting Wis. Ed. Ass'n Council v. Walker ("WEAC"), 705 F.3d 640, 659 (7th Cir. 2013)). And if one of the existing parties is a governmental body charged by law with protecting the interests of the movant, the presumption is even stronger and the standard for rebutting the presumption higher. Id.

Defendant the Wisconsin Elections Commission is a governmental body; its members and defendant Governor Tony Evers are representatives of government bodies. The movant asserts, however, that the court should not assume that any of these defendants are responsible for protecting his

interests. Dkt. No. 15 at 3. The Wisconsin Elections Commission "administers and enforces Wisconsin elections law." https://elections.wi.gov/about. It appears that neither the WEC nor its members are charged with protecting the interests of individual voters beyond the voter's interest in seeing Wisconsin's election laws enforced. But its mission would appear to include ensuring that the valid ballot of every voter—Democratic, Republican or other—is counted. In the narrower context of the lawsuit, the court presumes the WEC's interest and that of its members is in defending its actions in administering and enforcing Wisconsin's election laws, particularly in signing the canvass statement for the 2020 Presidential general election results after the recount in Milwaukee and Dane Counties. And the interest of defendant Governor Evers presumably will be to defend his signing of the Certificate of Ascertainment certifying the results of that election.

The court agrees that none of the defendants are "charged by law with protecting the interests of the proposed intervenor[]," Planned Parenthood, 942 F.3d at 799, to the extent that the movant's interests go beyond his interest in the proper administration and enforcement of state and federal election laws and procedures. This means the movant need not rebut the most heightened presumption of adequacy.

But the movant and the defendants have "the same goal." WEAC, 705 F.3d at 659 (citing Shea, 19 F.3d at 347). The movant and the defendants both seek to defend the certified results of the Wisconsin 2020 Presidential general election. Both oppose the relief the plaintiff seeks—the decertification of the

election and the certification of a different result. Both seek to defend the certification on the ground that the election was lawful and the results valid.

The fact that the movant and the defendants share the same goal may not necessarily give rise to the presumption of adequate representation. In her concurrence in Planned Parenthood, now-Chief Judge Sykes explained that in WEAC, the court had stated that an intervenor's interest must be "unique;" Judge Sykes sought to clarify:

> *WEAC* cited *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985), as support for the uniqueness requirement. The relevant passage in *Keith*, however, doesn't use the term "unique." It says this: "The [intervenor's] interest must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit." *Id.* In other words, the intervenor's interest must be based on a right that is *direct* and *independent*. That much is clear from the immediately preceding sentence: "A proposed intervenor must demonstrate a direct, significant[,] and legally protectable interest in the property [or transaction] at issue in the lawsuit."
>
> "Unique" is a suitable word to describe the nature of the required interest, but as used in this context, "unique" means an interest that is *independent of* an existing party's, not *different from* an existing party's. If the intervenor has a significant independent interest but shares the same goal as an existing party (that is, if their interests align), then the standard for measuring the adequacy of existing representation changes, as *WEAC* later explains. 705 F.3d at 659 (explaining that a presumption of adequate representation arises when goals align). But sharing the same goal as an existing party doesn't defeat "uniqueness," properly understood.

Planned Parenthood, 942 F.3d at 806.

Given this clarification, Judge Sykes concluded that the Legislature had an independent right from the Attorney General because it had an independent, statutory right to intervene under Wis. Stat. §803.09(2m). Id.

The movant does not have a right, independent of the defendants, to defend the certification of the 2020 election results. He has different *reasons* for defending the certification. As a registered voter, he wants to make sure the winner of the election is decided by a count of the valid votes cast, not by a decision of an appointed federal judge. But the movant seeks to defend the certification because he believes it was lawful and because he believes it utilized his vote—it resulted in his vote "counting." The movant is more concerned about *his* vote being disregarded. But his concern about *any* votes being disregarded aligns with the defendants' interests in defending the legality of the certification.

Because the movant has the same goal as the defendants and has identified no right independent of the defendants, the movant must rebut the presumption of adequate representation by "show[ing] that some conflict exists." WEAC, 705 F.3d at 659. The movant has not identified such a conflict.

5. *Conclusion*

The court concludes that because the movant has not rebutted the presumption that the defendants will adequately represent his interests, he is not entitled to intervene as of right.

B. Permissive Intervention

The movant also says that he is qualified to intervene under Rule 24(b). Dkt. No. 15 at 4. He says that if his vote is not counted, he would "have a cause of action to seek a court order requiring these defendants to honor [his]

vote," and argues that this would not further judicial economy because his suit would rely on the same facts and issues of law as this case. Id.

Rule 24(b)(1)(B) gives a court the discretion to allow a party to intervene if that party "has a claim or defense that shares with the main action a common question of law or fact." The Planned Parenthood decision sheds light on the distinction between Rules 24(a) and 24(b):

> Rule 24(b) is vague about the factors relevant to permissive intervention, but it is not just a repeat of Rule 24(a)(2). We have thus cautioned courts not to deny permissive intervention solely because a proposed intervenor failed to prove an element of intervention as of right. *See City of Chi. v. FEMA*, 660 F.3d 980, 987 (7th Cir. 2011); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996). Still, we have never gone so far as confining the district court's discretion to only the two mandatory factors in Rule 24(b)(3) or to prohibit consideration of the elements of intervention as of right as discretionary factors. Even when a district court "did not explicitly break out its reasoning" on the two requests, we have affirmed so long as the "decision shows a thorough consideration of the interests of all the parties." *Ligas [ex rel. Foster v. Maram]*, 478 F.3d [771] at 776 [7th Cir. 2007)].

Planned Parenthood, 942 F.3d at 804.

The court will not exercise its discretion to grant permissive intervention. First, as the court has noted, the issue of standing for defendant-intervenors is murky. While the Seventh Circuit has speculated that permissive intervention may not require standing "if the existing parties present a case or controversy," it has not decided the question. Id. at 803 n.5. Second, the court has noted that the movant has not identified any conflict that would prevent the current defendants from adequately representing his interests. Third, the court already has granted the movant leave to file an *amicus* brief, dkt. no. 37, and he has

done so, dkt. no. 47. The court has the benefit of the movant's perspective; he does not need to become a party to ensure that the court takes into account the perspective of an individual voter.

C. Conclusion

The court **GRANTS** the Intervenor-Defendant Civil L.R. 7(h) Expedited Nondispositive Motion to Intervene, to the extent that it asks the court to expedite its ruling on his December 3, 2020 motion to intervene. Dkt. No. 33.

The court **DENIES** James Gesbeck's Motion to Intervene. Dkt. No. 14.

The court **DENIES** the Intervenor-Defendant Civil L.R. 7(h) Expedited Nondispositive Motion to Intervene, to the extent that it asks the court to grant the movant's December 3, 2020 motion to intervene. Dkt. No. 33.

Dated in Milwaukee, Wisconsin this 9th day of December, 2020.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff, **CASE NO. 2:20-cv-1771**

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PLAINTIFF'S MOTION TO FILE UNREDACTED COPIES OF (1) EXHIBITS 1 AND 12 TO PLAINTIFF'S AMENDED COMPLANT UNDER SEAL AND (2) EXHIBITS 4, 13 AND 19 UNDER PROTECTIVE ORDER

COMES NOW Plaintiff, William Feehan by and through his undersigned counsel, and respectfully moves that the Court grant him permission to File Copies of (1) Exhibits 1 and 12 to Plaintiff's Amended Complaint Under Seal and (2) Exhibits 4, 13 and 19 Under Protective Order. This motion is made pursuant to General L. R. 79 and Eastern District of Wisconsin ECF Policies and Procedures.[1]

Pursuant to the Policies and Procedures, Plaintiff designates Exhibits 1 and 12 as "Sealed," to be "only by the judge."[2] Plaintiff has designated Exhibits 4, 13, and 19 as "Restricted to Case Participant," allowing "all attorneys of record to view the document" using an "e-filing log-in and password" provided by the Court."[3] Plaintiff's Memorandum in support is filed herewith.

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[1] https://www.wied.uscourts.gov/e-filing-restricted-and-sealed-documents

[2] *Id.* , § 1.

[3] *Id.*

As General L. R. 79(d)(2) the Policies and Procedures direct, this Motion and Memorandum are being filed "publicly" by "**separate motion"** "PRIOR" to filing the unredacted Exhibits themselves.[4]

Respectfully submitted, this 9th day of December, 2020.

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[4] Section 2 provides:

> 2. FILE A MOTION TO SEAL/RESTRICT
>
> General Local Rule 79(d) states that the Court will consider all documents to be filed publicly unless they are accompanied by a **separate motion** to seal/restrict the document or portion thereof. The motion to seal/restrict should be filed PRIOR to the filing of any sealed/restricted documents. Documents electronically filed as sealed or restricted which do not have an accompanying motion to seal/restrict will be made publicly available.

Id. Bold face and capitalization original).

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CERTIFICATION

Pursuant to General L. R. 79(d)(4), I certify that I have conferred with lead counsel for Defendants in a good faith attempt to avoid this Motion to limit the scope of the documents or materials subject to sealing under the Motion to only the Sealed or Restricted identities of the Affiants whose complete affidavits and declarations are already filed with the Court as Exhibits to Plaintiffs' Amended Complaint, with only their identities being redacted.

As indicated in the Motion, Counsel for Defendant Governor Evers has objected. Response to Gov. Evers' objection are included in the Memorandum submitted in support.

December 9, 2020

LOCAL COUNSEL FOR PLAINTIFF

/s Michael D. Dean .

Michael Dean

From: Jeffrey Mandell <JMandell@staffordlaw.com>
Sent: Wednesday, December 9, 2020 11:24 AM
To: Michael Dean; Murphy, S. Michael
Cc: sidney@federalappeals.com; Howard Kleinhendler (howard@kleinhendler.com); Dan Eastman (daneastman@me.com)
Subject: RE: Motion to Seal/Restrict Identities Feehan v. Wisconsin Elections Commission et al 2:20-cv-1771

Mike –

The Governor opposes your motion.

First, Judge Pepper could not have been clearer yesterday that she is not entertaining evidentiary issues until and unless she has resolved the justiciability and dismissal arguments. Continuing to press forward with evidentiary issues at this point is prejudicial to Governor Evers, whose counsel are working around the clock to satisfy Plaintiffs' request for expedited resolution of this case.

Second, we object to the notion that Plaintiff can rely upon anonymous declarants or witnesses. Can you provide any authority showing that a federal court has allowed such an approach anywhere at any time in a civil matter?

Third, even if you proceed and the Court allows these revised filings, it remains our position, as I outlined on yesterday's call, that the Court cannot and should not consider any declarations, affidavits, or reports that Defendants have not had a full and fair opportunity to test through live cross-examination. We also reserve the right to object to any testimony being introduced via declaration or affidavit, depending on how a hearing, if ever scheduled, is structured.

Jeff

STAFFORD ROSENBAUM

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Wisconsin member firm of ALFA International, the premiere global network of independent law firms.

From: Michael Dean <miked@michaelddeanllc.com>
Sent: Wednesday, December 9, 2020 10:21 AM
To: Murphy, S. Michael <murphysm@doj.state.wi.us>; Jeffrey Mandell <JMandell@staffordlaw.com>
Cc: sidney@federalappeals.com; Howard Kleinhendler (howard@kleinhendler.com) <howard@kleinhendler.com>; Dan Eastman (daneastman@me.com) <daneastman@me.com>
Subject: Motion to Seal/Restrict Identities Feehan v. Wisconsin Elections Commission et al 2:20-cv-1771

Mike and Jeff

For housekeeping on the exhibits, we would like to submit unredacted copies of

(1) Exhs. 1 and 12 to Plaintiff's Amended Complaint as "Sealed" so that the identities of the affiants will be available to the court only and

(2) Exhibits 4, 13 and 19 as "Restricted" so that identifies of the affiants will be available only to counsel through a court-generated password.

https://www.wied.uscourts.gov/e-filing-restricted-and-sealed-documents

General L. R. 79(d)(4) requires that a motion to seal be accompanied by a "certification that the parties have conferred in a good faith attempt to avoid the motion or to limit the scope of the documents or materials subject to sealing under the motion," so I am communicating with you only as lead counsel for the current "parties" to the case.

The motion and supporting memo are attached, also a short declaration as an exhibit. There's some precedent in the 7th Cir. that the court can't leave it to parties to stipulate to seal, so I think I have to file the motion regardless.

Please let me whether you concur with the Motion so I can note that in the Motion and Certification.

Thanks much.

Mike Dean
Michael D. Dean, LLC
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P.O. Box 2545
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(262) 798-8044
(262) 798-8045 fax

****

I am writing this statement in regard to my identity being known. I have worked in areas that have made me a known target, have had death threats and even a price put on my head by foreign terrorist organizations. For the safety of myself and my family, I have requested to remain redacted. I have found listening devices in my home and have had attempts on myself.

Because of work I have done as a Confidential Human source/ Confidential informant as well as work investigating spy's across the globe, my identity is redacted. Not just work I have done here in America but also working with foreign nations, where even currently I am working to get Smartmatic out of other nations elections systems and doing election fraud mitigation.

I request that these extreme cases be taken into consideration for my personal safety, my families safety, the safety of sources I have worked with, I respectfully request that my persona remain redacted.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge. Executed this December 3, 2020.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff, **CASE NO. 2:20-cv-1771**

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO FILE UNREDACTED COPIES OF (1) EXHIBITS 1 AND 12 TO PLAINTIFF'S AMENDED COMPLANT UNDER SEAL AND (2) EXHIBITS 4, 13 AND 19 UNDER PROTECTIVE ORDER

This Memorandum is in support of Plaintiff's Motion to File Copies of (1) Exhibits 1 and 12 to Plaintiff's Amended Complaint Under Seal and (2) Exhibits 4, 13 and 19 Under Protective Order. Gen. L. R. 79.(d)(3).[1]

Eastern District of Wisconsin ECF Policies and Procedures[2] allow a "filer to choose between restricting the document to case participants or completely sealing the document so that it is available only to the judge." [3]

[1] References to "Exhibits" are to the Amended Complaint Exhibits.

[2] https://www.wied.uscourts.gov/e-filing-restricted-and-sealed-documents

[3] *Id.* , INTRODUCTION.

Plaintiff has designated unredacted Exhibits 1 and 12 as "Sealed," to be "only by the judge."[4] Plaintiff's Motion designates unredacted Exhibits 4, 13, and 19 as "Restricted to Case Participant," allowing "all attorneys of record to view the document" using an "e-filing log-in and password" provided by the Court."[5]

Plaintiff brings this Motion so that the identities of the Exhs. 1 and 12 affiants will be available to the court only and the identities of the Exhs. 4, 13 and 19 affiants will be available only to counsel through a court-generated password. For ease of reference, this Memorandum refers to the Various Affiants by their Exhibit numbers – "Affiant Ex. 1," etc.

In support of his Amended Complaint, ECF Doc. # 9, Plaintiff has previously filed redacted copies of Exhibits 1, 4, 12, 13, and 19 as ECF Doc. ## 9-1, 9-4, 9-12, 9-13, and 9-19. Gen. L. R. 79.(d)(1). Those Exhibits conceal only the Affiants' personally identifying information – all of their other testimony is public and unredacted.

"Good cause" exists to so restrict disclosure of the affiants' identities. *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999).

Defendant's Objection. As indicated in Counsel's Certification accompanying the Motion, Defendant Gov. Evers objects to the Motion on grounds that the Court should not consider declarations or testimony from "anonymous" affiants or declarants and that the Court indicated at

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[4] *Id.* , § 1. "Sealed."

- Sealed. Documents which are designated as sealed are viewable only by the judge. No attorney of record, not even the filing attorney, will be able to view this document unless given permission by the court. Although a notice of electronic filing will be generated, no attorney will be able to access the document and the filing attorney must serve opposing counsel in paper format. A motion to restrict/seal must be filed prior to filing any document designated as sealed.

[5] *Id.* , § 1. "Restricted to case participants."

- Restricted to case participants. This option allows all attorneys of record to view the document, but not the general public. A notice of electronic filing will be generated from which each attorney can view the document using their **e-filing** log-in and password. Although not sealed, this type of restriction still requires that a motion to restrict/seal be filed prior to the filing of any restricted documents.

the December 8 status conference that it will not consider "evidentiary" issues until an evidentiary hearing is held, if one is ever held at all. Motion Exhibit 1.

First, sealing submission to protect identities is routine. *E.g.*, *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348–49 (7th Cir. 2006) ("identities of undercover agents"), *abrogated on other grounds by RTP LLC v. ORIX Real Estate Capital*, 827 F.3d 689, 691–92 (7th Cir. 2016). *See also, e.g., Roe v. City of Milwaukee*, 37 F. Supp. 2d 1127 (E.D. Wis. 1999) (plaintiff allowed to proceed anonymously under pseudonym).

More to the point, Gov. Evers' counsel conflates the narrow issue raised by the Motion with subsequent issues regarding reliance on the Affiants' Exhibits in relation to Defendants' Motions to Dismiss and a subsequent evidentiary hearing, if one is scheduled at all.

The narrow issue raised by the Motion is only whether the Court will accept filing of Exhibits 1 and 12 under "Seal" and Exhibits 4, 13 and 19 Under Protective Order. Gen. L. R. 79.(d)(3). Whether and to what extent the Court considers the redacted or unredacted Exhibits in relation to Defendants' motions to dismiss or at a possible future evidentiary hearing are different questions.

Accordingly, "anonymity" is not the issue at all. The very purpose of the Motion is to provide the Court with identities of *all* Affiants and defense counsel with restricted identities of three Affiants – in which case none of the witnesses would be anonymous to the Court, and only two would be anonymous to defense counsel.

As to reliance on either the redacted or unredacted Exhibits in relation to the motions to dismiss, Gov. Evers bases his motion to dismiss in part on grounds the Affiants are anonymous. Now he opposes Plaintiff's motion to disclose their identities to the Court, yet continues to maintain the Amended Complaint should be dismissed because the Affiants are anonymous. Gov. Evers can't have it both ways.

Again, the Court's ruling on Plaintiff's Motion to Seal/Restrict is a different question than whether and to what extent the Court will consider Affiants' declarations, either in relation to the motions to dismiss or later at an evidentiary hearing, if one is scheduled.[6] The Court need reach those questions to resolve the present Motion to Seal/Restrict.

Background. This case brings a challenge to the November 3, 2020 Presidential election. Plaintiffs' evidence shows ballot fraud and illegality, *i.e.* including counting fraud and illegality in the Dominion Voting Systems machines and software.

Witnesses Would Be Prejudiced by Disclosure. As explained hereafter, Affiants are in reasonable fear of harassment and threats to their physical safety and their livelihoods in retaliation for their coming forward with their testimony. As election controversies have unfolded around the country, there have been multiple incidents of harassment and threats to destroy the careers of or physically harm witnesses who come forward with evidence of election fraud and illegality. There was an organized campaign by The Lincoln Project to destroy the business relationships of major law firms with their clients for having the temerity to represent the President of the United States in these controversies. One Pennsylvania law firm withdrew from representing the President only days after filing a lawsuit on his behalf because of such harassment, abuse, threats, pressure and economic coercion. Other lawyers for the President have been physically threatened and verbally abused and forced to obtain personal security to protect them. Therefore, the apprehensions of Plaintiffs' witnesses are serious and well-founded. Moreover, the testimony of these witnesses is

[6] Objections raised by Gov. Evers' counsel regarding evidentiary hearings are premature at this stage of the case, where the Court is considering threshold motions to dismiss. However, as stated in Plaintiff's Motion for Evidentiary Hearing, the Affiants themselves would appear in person at such a hearing, if one were ever scheduled. And though they would file a request for the hearing to be conducted *in camera* under pseudonyms, they would obviously not be "anonymous" to the Court or parties

, only to the public.

consequential to the matter before this court, namely a legal challenge to the outcome of the Presidential election in Wisconsin.

Sealed Affiant Exh. 1: Venezuela Whistleblower. Affiant Exh. 1 is a Venezuelan whistleblower, who is not an American citizen, and swears under oath that "I was selected for the national security guard detail of the President of Venezuela." At great risk to himself, he further reveals that

> Importantly, I was a direct witness to the creation and operation of an electronic voting system in a conspiracy between a company known as Smartmatic and the leaders of conspiracy with the Venezuelan government. This conspiracy specifically involved President Hugo Chavez Frias, the person in charge of the National Electoral Council named Jorge Rodriguez, and principals, representatives, and personnel from Smartmatic which included … The purpose of this conspiracy was to create and operate a voting system that could change the votes in elections from votes against persons running the Venezuelan government to votes in their favor in order to maintain control of the government.

Exh. 1, ¶ 10.

Sealed Affiant Exh. 12: "Spider". Affiant Exh. 12, called "Spider," sets forth evidence in his sworn affidavit regarding his findings of foreign interference in this election, and his background:

> I was an electronic intelligence analyst under 305th Military Intelligence with experience gathering SAM missile system electronic intelligence. I have extensive experience as a white hat hacker used by some of the top election specialists in the world. The methodologies I have employed represent industry standard cyber operation toolkits for digital forensics and OSINT, which are commonly used to certify connections between servers, network nodes and other digital properties and probe to network system vulnerabilities.
>
> …
>
> In my professional opinion, this affidavit presents unambiguous evidence that Dominion Voter Systems and Edison Research have been accessible and were certainly compromised by rogue actors, such as Iran and China. By using servers and employees connected with rogue actors and hostile foreign influences combined with numerous easily discoverable leaked credentials, these organizations neglectfully allowed foreign adversaries to access data and intentionally provided access to their infrastructure in order to monitor and manipulate elections, including the most recent one in 2020. This represents a complete failure of their duty to provide basic cyber security. This is not a technological issue, but rather a governance and basic security issue: if it is not corrected, future elections in the United States and beyond will not be secure and citizens will not have confidence in the results.

Exh. 12, ¶¶ 1, 21.

Spider's sworn testimony is further supported by the evidence of a recent October 30, 2020 FBI and CISSA Joint advisory, which identified the hostile nation and foreign interference activity seen in late October prior to the Presidential election, which stated:

> This joint cybersecurity advisory was coauthored by the Cybersecurity and Infrastructure Security Agency (CISA) and the Federal Bureau of Investigation (FBI). CISA and the FBI are aware of an Iranian advanced persistent threat (APT) actor targeting U.S. state websites to include election websites. CISA and the FBI assess this actor is responsible for the mass dissemination of voter intimidation emails to U.S. citizens and the dissemination of U.S. election-related disinformation in mid-October 2020.1 (Reference FBI FLASH message ME-000138-TT, disseminated October 29, 2020). Further evaluation by CISA and the FBI has identified the targeting of U.S. state election websites was an intentional effort to influence and interfere with the 2020 U.S. presidential election.

Exhibit 18.

The Advisory further states, "[f]ollowing the review of web server access logs, CISA analysts, in coordination with the FBI, found instances of the URL and FDM User Agents sending GET requests to a web resource associated with voter registration data. The activity occurred between September 29 and October 17, 2020. Suspected scripted activity submitted several hundred thousand queries iterating through voter identification values and retrieving results with varying levels of success [Gather Victim Identity Information (T1589)]. A sample of the records identified by the FBI reveals they match information in the aforementioned propaganda video. *Id.*

Affiants Exhs. 1 and 12 have shown great courage in coming forward at a critical moment to deliver the truth to the Court about matters of great importance to our country. They need the Court's protection from the readily foreseeable harms of harassment online, and similarly many federal agents such as CBP officers have recently been "doxed,' which includes harassed at home, and in relation to their work, which would accrue to them if their identities were made public. Thus, good cause exists for the relief requested.

Restricted Affiant Exh. 4: Statistical Analyst. Affiant Exh. 4 is a statistical analyst with a Bachelor of Science degree in mathematics and a Master of Science degree in statistics. He opines at great risk to himself:

> The p-value of statistical analysis regarding the centerline for the red dots (Wisconsin counties with Dominion machines) is 0.000000049, pointing to a statistical impossibility that this is a "random" statistical anomaly. Some external force caused this anomaly. (par. 10)… *and*
>
> The results of the analysis and the pattern seen in the included graph strongly suggest a systemic, system-wide algorithm was enacted by an outside agent, causing the results of Wisconsin's vote tallies to be inflated by somewhere between three and five point six percentage points.

Exh. 4, Par. 13.

For thirty years, Affiant Exh. 4 has performed statistical analysis for major companies and organizations. For the reasons stated regarding prejudice from disclosure, Affiant he rightly fears attacks against his reputation, professional career and personal safety.

Restricted Affiant Exh. 13: Voting Systems Analyst. Affiant Exh. 13 explains in technical detail the lack of proper verification of Wisconsin's voting machines and systems:

> The importance of VSTLs in underrated to protect up from foreign interference by way of open access via COTS software. Pro V& V who's EAC certification EXPIRED on 24 FEB 2017 was contracted with the state of WISCONSIN.

Exh. 13.

Affiant Exh. 13 can explain the foreign relationships in the hardware used by Dominion Voting Systems and its subsidiary Sequoia and explains specifically the port that Dominion uses, which is called Edge Gateway and that is a part of Akamai Technologies based in Germany and China. She explains that Dominion Voting Systems works with SCYTL, and that votes on route, before reporting, go to SCYTL in foreign countries. On the way, they get mixed and an algorithm is applied, which is done through a secretive process. Among other things, when staying in Washington, D.C. shortly before the Complaint was filed in this case, an intruder broke into her hotel room and ransacked it.

For the reasons stated regarding prejudice from disclosure, Affiant Exh. 13 also fears attacks against his reputation, professional career and personal safety.

Restricted Affiant Exh. 19: Mathematics and Electrical Engineering Analyst. Affiant Exh. 19 is also fearful for his career and personal safety. He has a Masters Degree in Mathematics and PhD. In Electrical Engineering. He opines:

> Given the same data sources, I also assert that Milwaukee precincts exhibit statistical anomalies that are not normally present in fair elections.. The fraud model hypothesis in Milwaukee has a posterior probability of 100% to machine precision. This model predicts 105,639 fraudulent Biden ballots in Milwaukee.

Exh. 19, Par. 1. Affiant Exh. 19 makes further sensitive statements regarding conduct of the election in Milwaukee at Par. 5. For the reasons stated regarding prejudice from disclosure, Affiant Exh. 19 also fears attacks against his reputation, professional career and personal safety.

Generally. Testimony of Affiants Exh. 1, 4, 12, 13, and 19 have been given at great risk of these Affiants who hold positions and/or training and experience to obtain such information related to foreign interference in the 2020 election.

The privacy, reputation, and personal and financial security interests of each Affiant is at grave risk of if his identity is disclosed. Their interests, as well as those of the parties and the Court, vastly outweigh the interests of the public in having access to the Affiant's personally identifying information, and no less drastic alternatives other than sealing or restricting their unredacted affidavits to conceal or restrict their identities will provide adequate protection to the them and the proper functioning of this Court. The common law right of public access to Court filings must yield to countervailing interests of the Affiants in keeping their identities undisclosed beyond the parties and the Court to protect them from readily foreseeable threats.

CONCLUSION

Wherefore, the Plaintiffs respectfully request leave of Court to submit Exhibits 1 and 12 under Seal and Exhibits 4, 13 and 19 Restricted to access by Parties' counsel only.

Respectfully submitted, this 9th day of December, 2020.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

DEFENDANTS WISCONSIN ELECTIONS COMMISSION AND ITS MEMBERS' REPLY IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This lawsuit is the Wisconsin version of cookie-cutter litigation that has been brought in multiple district courts in different states in an effort to overturn the outcome of the November 2020 presidential election and disregard the will of the electorate. It makes wild and anonymous claims about a Venezuelan election conspiracy in an attempt to spread generalized and speculative doubt about the Wisconsin election. Plaintiff's unfortunate attempt in Wisconsin fails as a matter of law, just as other plaintiff's attempts are uniformly failing across the country, and this case should be dismissed.

Earlier this week two other district courts rejected essentially identical cases for reasons that are applicable here. First, the Eastern District of Michigan denied preliminary injunctive relief in *King v. Whitmer,* No. 20-13134, 2020 WL 7134198, *3–13. (E.D. MI. December 7, 2020). That case was filed by the same lead attorneys as here and included the same federal legal theories and allegations of problems with voting machines. In its ruling, the court rejected the same arguments that the Plaintiff makes here. *King*, 2020 WL 7134198 at *1. The court found that the case failed on the Eleventh Amendment, mootness, laches, abstention, and standing. *Id.* at *3–13.

Of particular note, the court found that the alleged federal claims rested on state-law issues, implicating the Eleventh Amendment. *Id.* at *3–5. The court observed that what the plaintiffs were really requesting was an order to ignore the outcome of the election. *Id.* at *5–6. Laches barred the claim because the plaintiffs waited until after the election and the vote certification to file a claim. *Id.* at *6–7.

The court rejected the plaintiffs' standing arguments based on equal protection because "Plaintiffs' alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others *their* right to vote." *Id.* at *9 (emphasis in original). And it held that the plaintiffs had no standing under the Elections and Electors Clauses because such claims belong to state legislatures, if anyone. *Id.* at *10–11.

Finally, the court found that the plaintiffs had no likelihood of success on the merits. Alleged deviations from state law do not state a claim for violations of the

Elections or Electors Clauses. *Id.* at *11–12. On the widespread fraud theory, it held that "[w]ith nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs' equal protection claim fails." *Id.* at *13.

The district court in Michigan closed its decision with a poignant comment that applies here as well:

> this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic process and their trust in our government. Plaintiffs ask this Court to ignore the orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do.
>
> The People have spoken.

Id.

Second, the Northern District of Georgia dismissed the case of *Pearson et al v. Kemp et al.*, No. 20-cv-04809-TCB (N.D. GA. December 7, 2020.) That was another case by the same lead attorneys making similar claims. (*Pearson* Dkt. 1.) Only a minute entry is docketed for the dismissal, but media has reported on the oral ruling from the court.[1] During the ruling, the court explained that "these types of cases are not properly before federal courts. These are state elections."[2] On laches, and particularly regarding the allegations about voting machines, the court explained

[1] Nicole Carr, *Federal judge dismisses Sidney Powell lawsuit seeking to decertify Georgia's elections,* WSB-TV2, (Dec. 7, 2020 6:57pm) https://www.wsbtv.com/news/local/federal-judge-dismisses-sidney-powell-lawsuit-seeking-decertify-georgias-elections/N7Z5MDKYRJAIZKCPQAXXEEP35Q/

[2] *Id.*

that "[t]his suit could have been filed months ago at the time these machines were adopted." Instead, the court noted, "the plaintiffs waited until over three weeks after the election to file the suit."[3]

Just as in Michigan and Georgia, this lawsuit fails and should be dismissed. Defendants Wisconsin Elections Commission and its member ("the Commission") explained in its opening brief that Plaintiff's claims are not justiciable under the doctrines of standing, laches, and Eleventh Amendment immunity, and his Amended Complaint fails to plead any plausible federal claim for which relief can be granted. (Dkt. 54.) In response, Plaintiff repeats his same string of allegations about a wide-ranging global conspiracy. He argues the untenable position that every supposed misapplication of state election law violates the Elections and Electors Clauses, the Equal Protection Clause, and the Due Process Clause—a view that conflicts with both decades of precedent and the Constitution's commitment of the times, places, and manner of holding elections to the States.

Plaintiff's response to the Commission's justiciability arguments are equally unavailing. Even as an elector to Donald Trump, Plaintiff lacks standing and suffers nothing different than a generalized harm. His attempts to cloak state law violations as federal claims cannot shield him from the Eleventh Amendment's bar. And waiting until your candidate loses to bring claims that materialized months, if not decades, before the November 3 election does not survive laches. Lastly, his proposed remedy disenfranchising the votes of hundreds of thousands of Wisconsinites is unlawful and

[3] *Id.*

violates due process. Nothing in Plaintiff's response sufficiently challenges the Commission's arguments, and the Amended Complaint should be dismissed.

ARGUMENT

I. This case is nonjusticiable because Plaintiff lacks standing.

Plaintiff's status as a voter and nominated presidential elector does not create rights reserved to state legislatures or support federal standing for claims of generalized election irregularities.

A. Plaintiff has no standing for a claim under the Elections or Electors Clauses.

The Elections and Electors Clauses of the U.S. Constitution give rights to "the Legislature" of each state for conducing elections and directing the selection of presidential electors. U.S. Const. art. I, § 4, cl. 1; U.S. Const. art. II, § 1, cl. 2. Rights under those clauses belong, therefore, to state legislatures, as courts have routinely held. *See, e.g., Lance v. Coffman*, 549 U.S. 437, 442 (2007) (holding individuals lacked Article III standing to bring claim under the Elections Clause); *Bognet v. Sec'y of the Comm. of Pennsylvania*, No. 20-3214, 2020 WL 6686120, *6–7 (3d Cir., Nov. 13, 2020) (same); *Hotze v. Hollins*, No. 4:20-cv-03709, 2020 WL 6437668, at *2 (S.D. Tex. Nov. 2, 2020) (holding candidate lacked standing under Elections Clause and concluding that Supreme Court's cases "stand for the proposition that only the state legislature (or a majority of the members thereof) have standing to assert a violation of the Elections Clause"). Plaintiff has no standing for a claim under those clauses.

Plaintiff relies exclusively on one case, *Carson,* for his contrary argument. (Dkt. 72:14 (citing *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) .) That case does

not even mention the Elections Clause. To the extent it found standing under the Electors Clause, it is a lone outlier, has no precedential value in this circuit, and is wrongly decided. The only two decisions that cite *Carson*, from the Third Circuit and the Eastern District of Michigan, do not follow it. *Bognet*, 2020 WL 6686120, *8 n.6 (noting departure from *Carson*); *King v. Whitmer*, No. CV 20-13134, 2020 WL 7134198, at *11 (E.D. Mich. Dec. 7, 2020) ("This Court, however, is as unconvinced about the majority's holding in *Carson* as the dissent."). *Carson* has never been adopted in the Seventh Circuit and should be unpersuaded by this Court.

Plaintiff's reliance on his status as a nominated elector is unpersuasive. As the dissent in *Carson* noted, nominated presidential electors are entirely derivative of the actual candidate and "[w]hether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president." *Carson*, 978 F.3d at 1063. Indeed, under Wisconsin law, an elector has no discretion in what candidate to vote for or anything other than a ministerial job of delivering the outcome of the election. *See* Wis. Stat. § 7.75 (presidential elector "shall" vote by ballot for the persona or party who nominated them). Plaintiff Feehan's argument that his interests "are identical to that of President Trump" is meritless; Plaintiff was not running for President. (Dkt. 72:21.) And the person who was running for that office is conspicuously absent from this case. Simply put, "[e]lectors are not candidates for public office as that term is commonly understood." *Carson*, 978 F.3d at 1063.

Plaintiff here has no injury related to the Elections or Electors Clauses.

B. Plaintiff has no standing for a claim under due process or equal protection.

For reasons explained in the opening briefs, Plaintiff has no standing for a vote-dilution-theory constitutional claim. Generally, vote dilution occurs in apportionment or districting situations that improperly apportion population or representation. Plaintiff's alleged vote-counting violations are not federal vote dilution claims—they are garden-variety election disputes that do not implicate the constitution. (*See* Dkt. 54:11–15); *Shipley v. Chi. Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("A violation of state law does not state a claim under § 1983, and, more specifically, 'a deliberate violation of state election laws by state election officials does not transgress against the Constitution.'" (citation omitted)); *see also Donald J. Trump for President, Inc. v. Boockvar*, No. 20-CV-966, 2020 WL 5997680, *46 (W.D. Pa. Oct. 10, 2020) ("[I]t is well-established that even violations of state election laws by state officials, let alone violations by unidentified third parties, do not give rise to federal constitutional claims except in unusual circumstances.").

In briefing, Plaintiff retreats from the vote-dilution theory in his Amended Complaint. (Dkt. 72:19.) Instead, he claims that Defendants "sought to actively disenfranchise" certain voters in violation of the one person, one vote, doctrine. (Dkt. 72:20.) This is remarkable considering that "disenfranchise" does not appear a single time in his Amended Complaint, and his requested relief is to literally disenfranchise hundreds of thousands of people and reverse the outcome of the election. In any event, he has no "one person one vote" standing.

Plaintiff cites four cases for this novel disenfranchisement theory. (Dkt. 72:20.) Two are apportionment cases and one is a redistricting case, none of which have any applicability here. *Baker v. Carr*, 369 U.S. 186 (1962); (considering a 1901 apportioning the members of the General Assembly); *Reynolds v. Sims*, 377 U.S. 533 (1964) (considering Alabama legislative apportionment); *Whitford v. Nichol*, 151 F. Supp. 3d 918, 926 (W.D. Wis. 2015) (challenging the 2012 districting plan for the Wisconsin Assembly). Remarkably, the fourth is a case where claims alleging electronic vote-counting irregularities was dismissed as not rising to the level of a constitutional claim. *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986). *Bodine* cautioned that "If every state election irregularity were considered a federal constitutional deprivation, federal courts would adjudicate every state election dispute, and the elaborate state election contest procedures, designed to assure speedy and orderly disposition of the multitudinous questions that may arise in the electoral process, would be superseded by a section 1983 gloss." *Id.* (quoting *Gamza v. Aguirre*, 619 F.2d 449, 453 (5th Cir. 1980)) . This binding decision, and its warning, forecloses Plaintiff's claims here.

II. The Eleventh Amendment bars Plaintiff's claims.

Plaintiff argues that the Eleventh Amendment is not a bar because he is raising only federal claims and seeking prospective relief. (Dkt. 72:26.) This is a straw-man argument because Plaintiff's claims are based entirely on violations of state law.

Plaintiff' cannot escape the Eleventh Amendment by cloaking his state law claims in federal garb. *See*, *Balsam v. Sec'y of State*, 607 F. App'x 177, 183–84 (3d Cir. 2015) (finding Eleventh Amendment bars state law claims even when "premised on violations of the federal Constitution"); *Massey v. Coon*, No. 87-3768, 1989 WL 884, at *2 (9th Cir. Jan. 3, 1989) (affirming dismissal where "on its face the complaint states a claim under the due process and equal protection clauses of the Constitution, [but] these constitutional claims are entirely based on the failure of defendants to conform to state law").

Indeed, the introductory paragraph of Plaintiff's complaint expressly alleges "multiple violations of Wisconsin Statutes Chapters 5 – 12." (Dkt. 9:1.) He goes on to allege widespread fraud based on the "Defendants directing Wisconsin clerks and other election officials to ignore or violate the express requirements of the Wisconsin Election Code." (Dkt. 9 ¶ 14.) Plaintiff's Elections and Electors Clause claim is based entirely on "three separate instances where Defendants violated the Wisconsin Election Code" (Dkt. 9 ¶¶ 104–06); his Equal Protection Clause claim rests on how "Defendants failed to comply with the requirements of the Wisconsin Election Code" (Dkt. 9 ¶ 116); and his due process claim relies on "Defendants['] violation of the Wisconsin Election Code" (Dkt. 9 ¶ 129). His reliance on state law violations is echoed in his requested relief, where he seeks a declaration that "absentee ballot fraud occurred in violation of . . . Election laws and under state law." (Dkt. 9:49.) Plaintiff cannot camouflage these state law claims as federal violations simply to evade the Eleventh Amendment bar.

Further, it is not enough to escape the Eleventh Amendment that Plaintiff asks for prospective relief. (*See* Dkt. 72:26–27.) The Eleventh Amendment prohibits federal courts from granting "relief against state officials on the basis of state law, *whether prospective or retroactive*." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (emphasis added); *see also, Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("[t]he doctrine of *Ex parte Young* . . . has no application in suits against the States and their agencies, which are barred regardless of the relief sought"); *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dept.*, 510 F.3d 681, 696 (7th Cir. 2007) (Eleventh Amendment bars plaintiff's claim, "even [ ] her claims for prospective injunctive relief").

The Commission—comprised of its members, as pled here—is a state entity that has not consented to suit under § 1983; nor has Congress abrogated the State of Wisconsin's Eleventh Amendment immunity. *See, Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989); *Joseph v. Bd. of Regents of Univ. of Wis. Sys.*, 432 F.3d 746, 748 (7th Cir. 2005). Plaintiff cannot masquerade his state law claims as a federal § 1983 action. Plaintiff's claims are, thus, barred by the Eleventh Amendment.

III. Laches bars this case.

Plaintiff's primary arguments against laches are (1) the application of laches is frequently fact-specific, and (2) he did not unreasonably delay in bringing this action. (Dkt. 72:22–23.) Neither argument is convincing.

First, courts can and do dismiss claims due to laches based on the pleadings or before trial, particularly when it is clear from the face of the complaint that laches

applies. *See, e.g.*, *King*, 2020 WL 7134198 at *7 ("The Court concludes that Plaintiffs' delay results in their claims being barred by laches."); *Aguila Mgmt. LLC v. Int'l Fruit Genetics, LLC*, No. CV-19-00173-PHX-DJH, 2020 WL 736303, at *3 (D. Ariz. Feb. 13, 2020) (Humetewa, J.) (noting that "[c]ourts in this district have previously applied laches in a motion to dismiss" because "where the elements of laches are apparent on the face of a complaint, it may be asserted on a motion to dismiss" (citation omitted)); *Solow Bldg. Co., LLC v. Nine West Group, Inc.*, No. 00 Civ. 7685(DC), 2001 WL 736794, at *3 (S.D.N.Y. June 29, 2001) (granting motion to dismiss based on laches, noting "When the defense of laches is clear on the face of the complaint, and where it is clear that the plaintiff can prove no set of facts to avoid the insuperable bar, a court may consider the defense on a motion to dismiss.") (citation omitted).

Second, Plaintiff's unreasonable delay in bringing this action is evident from the pleadings. He bases the claims related to election machines and software on "expert and fact witness" reports discussing "glitches" and other alleged vulnerabilities that occurred as far back as 2006. (*See* Dkt. 9 ¶ 88(A)–(H)). And Plaintiff's alleged injuries from the Commission's guidance on absentee ballot certification and indefinite confinement arose—and were ripe for challenge—long before the November 3, 2020 election. The basis of Plaintiff's claims regarding these issues is the Commission's guidance that was issued on October 18, 2016 (absentee ballot certification), May 13, 2020 (indefinite confinement), and October 19, 2020 (curing absentee ballot certification envelopes). (*See* Dkt. 9 ¶¶ 40, 44–45, 104–105.) If Plaintiff had legitimate concerns about the election machines and software, or the

Commission's guidance regarding absentee ballot and indefinite confinement status, he could have filed this lawsuit well before the November 3 election—yet he sat back and did nothing.

In his brief, Plaintiff argues that his delay was justified because "all of the unlawful conduct occurred during the course of the election and in the post-election vote counting, manipulation, and even fabrication." (Dkt. 72:22.) If this were the case, then Plaintiff fails to state a claim against *any* defendant in this case, since neither the Commission nor the Governor took part in any "post-election vote counting." Regardless, statements in Plaintiff's brief cannot change the allegations in his complaint, *see Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) ("it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss"), which clearly outline claims stemming back months, if not decades. Given this, Plaintiff cannot overcome the doctrine of laches, which plainly bars the relief he seeks.

IV. Plaintiff has failed to state a claim for widespread fraud.

Plaintiff has not pled a plausible claim for fraud and falls short of the Rule 9(b) "particularity" requirement. Fed. R. Civ. P. 9(b). His allegations, even as supplemented by his briefing, do not connect his conspiracy theory involving foreign oligarchs and dictators, and a voting system called "Smartmatic," with any alleged mis-counted votes in Wisconsin. (Dkt. 9 ¶¶ 7–8; 9-1 ¶¶ 13–20.) Generally alleging a Venezuelan plot to reelect Hugo Chavez and speculating about conversations overheard in Colorado does not state a plausible claim for fraud. (*See* Dkt. 9 ¶¶ 8, 97.)

The Commission's opening brief detailed the absurdities underlying his factual allegations, including secret witnesses, Google research, and statistical analysis that would not even pass basics evidentiary reliability standards. (Dkt. 54:17–22.) Plaintiff says nothing in response. He makes no attempt to defend his facially implausible factual underpinnings and implausible theory. Instead, he claims that his factual bases are "unrebutted." (Dkt. 72:3.) This claim is wrong, but also misses the mark. This is briefing on a motion to dismiss, not summary judgment. Whether evidence has been factually rebutted is not at issue. The question is whether his claims are plausible and pled with particularity, which they are not.

He also ignores that his completely speculative theory about voting matching mis-counting is disproven by the publicly-available results of a hand-counted audit of election machines in Wisconsin. (*See* Dkt. 52:2–4.)[4] Over 140,000 ballots were hand counted and checked against voting machine results, including 28 Dominion machines, and no voting equipment issues were found. Likewise, a recount of Dane and Milwaukee counties did not materially change the vote tallies, which belies any speculation that election-day results were remotely manipulated. Lastly, Dominion has publicly responded these specific allegations, further demonstrating the

[4] Memorandum from Meagan Wolfe, Administrator of Wis. Elections Comm'n., to Wis. Elections Comm'n. (Dec. 1, 2020), https://elections.wi.gov/sites/elections.wi.gov/files/2020-12/2020%20Audit%20Program%20Update%20for%2012_1_2020%20Meeting%20FINAL.pdf

baselessness of Plaintiff's voter fraud claim.[5] Plaintiff offers no response, and his contrasting conspiracy theories fail plausibility and common sense.

V. The remedy the Plaintiff seeks is unlawful.

The Commission's brief in support of dismissal pointed out that this lawsuit fails in its premise because the relief that Plaintiff requests is unlawful. (Dkt. 54:22.) Plaintiff asks to disenfranchise hundreds of thousands of Wisconsinites who properly voted under election procedures that were in place for the November 2020 election. That retroactive disenfranchisement would violate voters' due process rights. Plaintiff offers no response. This lawsuit plainly cannot proceed.

Once a state legislature has directed that the state's electors are to be appointed by popular election, the people's "right to vote as the legislature has prescribed is fundamental." *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). Conducting an election under procedures, and then changing those procedures in a way that disenfranchises voters violates due process. *Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998) ("a court will strike down an election on substantive due process grounds if two elements are present: (1) likely reliance by voters on an established election procedure and/or official pronouncements about what the procedure will be in the coming election; and (2) significant disenfranchisement that results from a change in the election procedures.")

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[5] *See* Dominion Voting, *Statement from Dominion on Sidney Powell's Charges, https://www.dominionvoting.com/dominion-statement-on-sidney-powell-charges/*. (Nov. 26, 2020).

And yet, that is exactly what Plaintiff asks here. The November election was held after months of careful preparation and public announcement of election procedures. Nearly 3.3 million Wisconsin voters casted their ballots.[6] Plaintiff did not challenge any of those procedures, or any of the voting equipment before the election. But, after the votes have been counted and certified, and the outcome is known, he wants to throw out those votes and reverse the outcome. Due process does not permit retroactively changing the election rules to reverse the will of the electorate.

CONCLUSION

Defendants Wisconsin Elections Commission and its members request that this case be dismissed.

Dated this 9th day of December, 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

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[6] Wisconsin Elections Commission, *WEC Canvass Reporting System County by County Report, 2020 General Election*, Nov. 3, 2020, https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf (Nov. 18, 2020).

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v. Case No. 20-CV-1771

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

DEFENDANTS WISCONSIN ELECTIONS COMMISSION AND ITS MEMBERS' SUBMISSION OF UNREPORTED AUTHORITY PURSUANT TO CIVIL L.R. 7(J)

Defendants Wisconsin Elections Commission, Ann S. Jacob, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, and Robert F. Spindell, Jr., by their attorneys, and pursuant to Civil L. R. 7(j), hereby submit the following unreported authority cited in *Defendant Commission and Commissioner's Reply in Support of Motion to Dismiss*.

1. *King v. Whitmer*, No. 20-13134, 2020 WL 7134198 (E.D. Mi. December 7, 2020);

2. *Bognet v. Sec'y Commonwealth of Pennsylvania*, No. 20-3214, 2020 WL 6686120 (3d. Cir. Nov. 13, 2020)– (previously filed at Dkt. 58-4);

3. *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-CV-966, 2020 WL 5997680 (W.D. Pa. Oct. 10, 2020)– (previously filed at Dkt. 58-5)

4. *Hotze v. Hollins,* No. 4:20-cv-03709, 2020 WL 6437668 (S.D. Tex. Nov. 2, 2020);

5. *Massey v. Coon*, No. 87-3768, 1989 WL 884 (9th Cir. Jan. 3, 1989)

6. *Aguila Mgmt. LLC v. Int'l Fruit Genetics LLC*, No. CV-19-00173-PHX-DJH, 2020 WL 736303 (D. Ariz. Feb. 13, 2020);

7. *Solow Bldg. Co., LLC v. Nine West Group, Inc.*, No. 00 Civ. 7685(DC), 2001 WL 736794 (S.D.N.Y. June 29, 2001)

Dated this 9th day of December, 2020.

Respectfully submitted,

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2020 WL 7134198
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

Timothy KING, Marian Ellen Sheridan, John Earl Haggard, Charles James Ritchard, James David Hooper, and Daren Wade Rubingh, Plaintiffs,

v.

Gretchen WHITMER, in her official capacity as Governor of the State of Michigan, Jocelyn Benson, in her official capacity as Michigan Secretary of State, and Michigan Board of State Canvassers, Defendants,

and

City of Detroit, Democratic National Committee and Michigan Democratic Party, and Robert Davis, Intervenor-Defendants.

Civil Case No. 20-13134
|
Signed 12/07/2020

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Mary Ellen Gurewitz, Cummings & Cummings Law PLLC, Royal Oak, MI, Scott R. Eldridge, Miller, Canfield, Lansing, MI, for Intervenor-Defendants Democratic National Committee, Michigan Democratic Party.

OPINION AND ORDER DENYING PLAINTIFFS' "EMERGENCY MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF" (ECF NO. 7)

LINDA V. PARKER, U.S. DISTRICT JUDGE

***1** The right to vote is among the most sacred rights of our democracy and, in turn, uniquely defines us as Americans. The struggle to achieve the right to vote is one that has been both hard fought and cherished throughout our country's history. Local, state, and federal elections give voice to this right through the ballot. And elections that count each vote celebrate and secure this cherished right.

These principles are the bedrock of American democracy and are widely revered as being woven into the fabric of this country. In Michigan, more than 5.5 million citizens exercised the franchise either in person or by absentee ballot during the 2020 General Election. Those votes were counted and, as of November 23, 2020, certified by the Michigan Board of State Canvassers (also "State Board"). The Governor has sent the slate of Presidential Electors to the Archivist of the United States to confirm the votes for the successful candidate.

Against this backdrop, Plaintiffs filed this lawsuit, bringing forth claims of widespread voter irregularities and fraud in the processing and tabulation of votes and absentee ballots. They seek relief that is stunning in its scope and breathtaking in its reach. If granted, the relief would disenfranchise the votes of the more than 5.5 million Michigan citizens who, with dignity, hope, and a promise of a voice, participated in the 2020 General Election. The Court declines to grant Plaintiffs this relief.

I. Background

In the weeks leading up to, and on, November 3, 2020, a record 5.5 million Michiganders voted in the presidential election ("2020 General Election"). (ECF No. 36-4 at Pg ID 2622.) Many of those votes were cast by absentee ballot. This was due in part to the coronavirus pandemic and a ballot measure the Michigan voters passed in 2018 allowing for no-reason absentee voting. When the polls closed and the votes were counted, Former Vice President Joseph R. Biden, Jr. had secured over 150,000 more votes than President Donald J. Trump in Michigan. (*Id.*)

Michigan law required the Michigan State Board of Canvassers to canvass results of the 2020 General Election by November 23, 2020. Mich. Comp. Laws § 168.842. The State Board did so by a 3-0 vote, certifying the results "for the Electors of President and Vice President," among other offices. (ECF No. 36-5 at Pg ID 2624.) That same day, Governor Gretchen Whitmer signed the Certificates of Ascertainment for the slate of electors for Vice President Biden and Senator Kamala D. Harris. (ECF No. 36-6 at Pg ID 2627-29.) Those certificates were transmitted to and received by the Archivist of the United States. (*Id.*)

Federal law provides that if election results are contested in any state, and if the state, prior to election day, has enacted procedures to decide controversies or contests over electors and electoral votes, and if these procedures have been applied, and the decisions are made at least six days before the electors' meetings, then the decisions are considered conclusive and will apply in counting the electoral votes. 3 U.S.C. § 5. This date (the "Safe Harbor" deadline) falls on December 8, 2020. Under the federal statutory timetable for presidential elections, the Electoral College must meet on "the first Monday after the second Wednesday in December," 3 U.S.C. § 7, which is December 14 this year.

***2** Alleging widespread fraud in the distribution, collection, and counting of ballots in Michigan, as well as violations of state law as to certain election challengers and the manipulation of ballots through corrupt election machines and software, Plaintiffs filed the current lawsuit against Defendants at 11:48 p.m. on November 25, 2020—the eve of the Thanksgiving holiday. (ECF No. 1.) Plaintiffs are registered Michigan voters and nominees of the Republican Party to be Presidential Electors on behalf of the State of Michigan. (ECF No. 6 at Pg ID 882.) They are suing Governor Whitmer and Secretary of State Jocelyn Benson in their official capacities, as well as the Michigan Board of State Canvassers.

On November 29, a Sunday, Plaintiffs filed a First Amended Complaint (ECF No. 6), "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief and Memorandum in Support Thereof" (ECF No. 7), and Emergency Motion to Seal (ECF No. 8). In their First Amended Complaint, Plaintiffs allege three claims pursuant to 42 U.S.C. § 1983: (Count I) violation of the Elections and Electors Clauses; (Count II) violation of the Fourteenth Amendment Equal Protection Clause; and, (Count III) denial of the Fourteenth Amendment Due Process Clause. (ECF No. 6.) Plaintiffs also assert one count alleging violations of the Michigan Election Code. (*Id.*)

By December 1, motions to intervene had been filed by the City of Detroit (ECF No. 15), Robert Davis (ECF No. 12), and the Democratic National Committee and Michigan Democratic Party ("DNC/MDP") (ECF No. 14). On that date, the Court entered a briefing schedule with respect to the motions. Plaintiffs had not yet served Defendants with their pleading or emergency motions as of December 1. Thus, on December 1, the Court also entered a text-only order to hasten Plaintiffs' actions to bring Defendants into the case and enable the Court to address Plaintiffs' pending motions. Later the same day, after Plaintiffs filed certificates of service reflecting service of the summons and Amended Complaint on Defendants (ECF Nos. 21), the Court entered a briefing schedule with respect to Plaintiffs' emergency motions, requiring response briefs by 8:00 p.m. on December 2, and reply briefs by 8:00 p.m. on December 3 (ECF No. 24).

On December 2, the Court granted the motions to intervene. (ECF No. 28.) Response and reply briefs with respect to Plaintiffs' emergency motions were thereafter filed. (ECF Nos. 29, 31, 32, 34, 35, 36, 37, 39, 49, 50.) Amicus curiae Michigan State Conference NAACP subsequently moved and was granted leave to file a brief in support of Defendants' position. (ECF Nos. 48, 55.) Supplemental briefs also were filed by the parties. (ECF Nos. 57, 58.)

In light of the limited time allotted for the Court to resolve Plaintiffs' emergency motion for injunctive relief—which Plaintiffs assert "must be granted in advance of December 8, 2020" (ECF No. 7 at Pg ID 1846)—the Court has disposed of oral argument with respect to their motion pursuant to Eastern District of Michigan Local Rule 7.1(f).[1]

1 " '[W]here material facts are not in dispute, or where facts in dispute are not material to the preliminary injunction sought, district courts generally need not hold an evidentiary hearing.' " *Nexus Gas Transmission, LLC v. City of Green, Ohio*, 757 Fed. Appx. 489, 496-97 (6th Cir. 2018) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007)) (citation omitted).

II. Standard of Review

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council,*

Inc., 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (citation omitted). The plaintiff bears the burden of demonstrating entitlement to preliminary injunctive relief. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Such relief will only be granted where "the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). "Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support or oppose a motion for a preliminary injunction." 11A Mary Kay Kane, Fed. Prac. & Proc. § 2949 (3d ed.).

***3** Four factors are relevant in deciding whether to grant preliminary injunctive relief: " '(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.' " *Daunt v. Benson*, 956 F.3d 396, 406 (6th Cir. 2020) (quoting *Bays v. City of Fairborn*, 668 F.3d 814, 818-19 (6th Cir. 2012)). "At the preliminary injunction stage, 'a plaintiff must show more than a mere possibility of success,' but need not 'prove his case in full.' " *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007)). Yet, "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion ...." *Leary*, 228 F.3d at 739.

III. Discussion

The Court begins by discussing those questions that go to matters of subject matter jurisdiction or which counsel against reaching the merits of Plaintiffs' claims. While the Court finds that any of these issues, alone, indicate that Plaintiffs' motion should be denied, it addresses each to be thorough.

A. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. This immunity extends to suits brought by citizens against their own states. *See, e.g., Ladd v. Marchbanks*, 971 F.3d 574, 578 (6th Cir. 2020) (citing *Hans v. Louisiana*, 134 U.S. 1, 18-19, 10 S.Ct. 504, 33 L.Ed. 842 (1890)). It also extends to suits against state agencies or departments, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (citations omitted), and "suit[s] against state officials when 'the state is the real, substantial party in interest[,]' " *id.* at 101, 104 S.Ct. 900 (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945)).

A suit against a State, a state agency or its department, or a state official is in fact a suit against the State and is barred "regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 100-02, 104 S.Ct. 900 (citations omitted). " 'The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.' " *Id.* at 101 n.11, 104 S.Ct. 900 (quoting *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963)) (internal quotation marks omitted).

Eleventh Amendment immunity is subject to three exceptions: (1) congressional abrogation; (2) waiver by the State; and (3) "a suit against a state official seeking prospective injunctive relief to end a continuing violation of federal law." *See Carten v. Kent State Univ.*, 282 F.3d 391, 398 (6th Cir. 2002) (citations omitted). Congress did not abrogate the States' sovereign immunity when it enacted 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). "The State of Michigan has not consented to being sued in civil rights actions in the federal courts." *Johnson v. Unknown Dellatifa*, 357 F.3d 539, 545 (6th Cir. 2004) (citing *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986)). The Eleventh Amendment therefore bars Plaintiffs' claims against the Michigan Board of State Canvassers. *See McLeod v. Kelly*, 304 Mich. 120, 7 N.W.2d 240, 242 (1942) ("The board of State canvassers is a State agency ..."); *see also Deleeuw v. State Bd. of Canvassers*, 263 Mich.App. 497, 688 N.W.2d 847, 850 (2004). Plaintiffs' claims are barred against Governor Whitmer and Secretary Benson unless the third exception applies.

***4** The third exception arises from the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). But as the Supreme Court has advised:

> To interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle ... that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). Further, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 102, 104 S.Ct. 900. " 'In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.' " *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (quoting *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 296, 117 S.Ct. 2028 (O'Connor, J., concurring)).

Ex parte Young does not apply, however, to *state law* claims against state officials, regardless of the relief sought. *Pennhurst State Sch. & Hosp.*, 465 U.S. at 106, 104 S.Ct. 900 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."); *see also In re Ohio Execution Protocol Litig.*, 709 F. App'x 779, 787 (6th Cir. 2017) ("If the plaintiff sues a state official under state law in federal court for actions taken within the scope of his authority, sovereign immunity bars the lawsuit regardless of whether the action seeks monetary or injunctive relief."). Unquestionably, Plaintiffs' state law claims against Defendants are barred by Eleventh Amendment immunity.

The Court then turns its attention to Plaintiffs' § 1983 claims against Defendants. Defendants and Intervenor DNC/MDP contend that these claims are not in fact federal claims as they are premised entirely on alleged violations of *state* law. (ECF No. 31 at Pg ID 2185 ("Here, each count of Plaintiffs' complaint—even Counts I, II, and III, which claim to raise violations of federal law—is predicated on the election being conducted contrary to Michigan law."); ECF No. 36 at Pg ID 2494 ("While some of [Plaintiffs'] allegations concern fantastical conspiracy theories that belong more appropriately in the fact-free outer reaches of the Internet[,] ... what Plaintiffs assert at bottom are violations of the Michigan Election Code.") Defendants also argue that even if properly stated as federal causes of action, "it is far from clear whether Plaintiffs' requested injunction is actually prospective in nature, as opposed to retroactive." (ECF No. 31 at Pg ID 2186.)

***5** The latter argument convinces this Court that *Ex parte Young* does not apply. As set forth earlier, " '[i]n order to fall with the *Ex parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law.' " *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) (quoting *Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 964 (6th Cir. 2013)). Unlike *Russell*, which Plaintiffs cite in their reply brief, this is not a case where a plaintiff is seeking to enjoin the continuing enforcement of a statute that is allegedly unconstitutional. *See id.* at 1044, 1047 (plaintiff claimed that Kentucky law creating a 300-foot no-political-speech buffer zone around polling location violated his free-speech rights). Instead, Plaintiffs are seeking to undo what has already occurred, as their requested relief reflects.[2] (*See* ECF No. 7 at Pg ID 1847; *see also* ECF No. 6 at Pg 955-56.)

2 To the extent Plaintiffs ask the Court to certify the results in favor of President Donald J. Trump, such relief is beyond its powers.

Before this lawsuit was filed, the Michigan Board of State Canvassers had already certified the election results and Governor Whitmer had transmitted the State's slate of electors to the United States Archivist. (ECF Nos. 31-4, 31-5.) There is no continuing violation to enjoin. *See Rios v. Blackwell*, 433 F. Supp. 2d 848 (N.D. Ohio, 2006); *see also King Lincoln Bronzeville Neighborhood Ass'n v. Husted*, No. 2:06-cv-00745, 2012 WL 395030, at *4-5 (S.D. Ohio Feb. 7, 2012); *cf. League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 (6th Cir. 2008) (finding that the plaintiff's claims fell within the *Ex parte Young* doctrine where it alleged that the problems that plagued the election "are chronic and will continue absent injunctive relief").

For these reasons, the Court concludes that the Eleventh Amendment bars Plaintiffs' claims against Defendants.

B. Mootness

This case represents well the phrase: "this ship has sailed." The time has passed to provide most of the relief Plaintiffs request in their Amended Complaint; the remaining relief is beyond the power of any court. For those reasons, this matter is moot.

" 'Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.' " *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990)). A case may become moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 410, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (internal quotation marks and citation omitted). Stated differently, a case is moot where the court lacks "the ability to give meaningful relief[.]" *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019). This lawsuit was moot well before it was filed on November 25.

In their prayer for relief, Plaintiffs ask the Court to: (a) order Defendants to decertify the results of the election; (b) enjoin Secretary Benson and Governor Whitmer from transmitting the certified election results to the Electoral College; (c) order Defendants "to transmit certified election results that state that President Donald Trump is the winner of the election"; (d) impound all voting machines and software in Michigan for expert inspection; (e) order that no votes received or tabulated by machines not certified as required by federal and state law be counted; and, (f) enter a declaratory judgment that mail-in and absentee ballot fraud must be remedied with a manual recount or statistically valid sampling.[3] (ECF No. 6 at Pg ID 955-56, ¶ 233.) What relief the Court could grant Plaintiffs is no longer available.

3 Plaintiffs also seek an order requiring the impoundment of all voting machines and software in Michigan for expert inspection and the production of security camera footage from the TCF Center for November 3 and 4. (ECF No. 6 at Pg ID 956, ¶ 233.) This requested relief is not meaningful, however, where the remaining requests are no longer available. In other words, the evidence Plaintiffs seek to gather by inspecting voting machines and software and security camera footage only would be useful if an avenue remained open for them to challenge the election results.

***6** Before this lawsuit was filed, all 83 counties in Michigan had finished canvassing their results for all elections and reported their results for state office races to the Secretary of State and the Michigan Board of State Canvassers in accordance with Michigan law. *See* Mich. Comp. Laws § 168.843. The State Board had certified the results of the 2020 General Election and Governor Whitmer had submitted the slate of Presidential Electors to the Archivists. (ECF No. 31-4 at Pg ID 2257-58; ECF No. 31-5 at Pg ID 2260-63.) The time for requesting a special election based on mechanical errors or malfunctions in voting machines had expired. *See* Mich. Comp. Laws §§ 168.831, 168.832 (petitions for special election based on a defect or mechanical malfunction must be filed "no later than 10 days after the date of the election"). And so had the time for requesting a recount for the office of President. *See* Mich. Comp. Laws § 168.879.

The Michigan Election Code sets forth detailed procedures for challenging an election, including deadlines for doing so. Plaintiffs did not avail themselves of the remedies established by the Michigan legislature. The deadline for them to do so has passed. Any avenue for this Court to provide meaningful relief has been foreclosed. As the Eleventh Circuit Court of Appeals recently observed in one of the many other post-election lawsuits brought to specifically overturn the results of the 2020 presidential election:

> "We cannot turn back the clock and create a world in which" the 2020 election results are not certified. *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015). And it is not possible for us to delay certification nor meaningful to order a new recount when the results are already final and certified.

Wood v. Raffensperger, — F.3d —, 2020 WL 7094866 (11th Cir. Dec. 5, 2020). And as one Justice of the Supreme Court of Pennsylvania advised in another 2020 post-election lawsuit: "there is no basis in law by which the courts may grant Petitioners' request to ignore the results of an election and recommit the choice to the General Assembly to substitute its preferred slate of electors for the one chosen by a majority of Pennsylvania's voters." *Kelly v. Commonwealth*, No. 68 MAP 2020, 2020 WL 7018314, at *3 (Pa. Nov. 28, 2020) (Wecht, J., concurring); *see also Wood v. Raffensperger*, No. 1:20-cv-04651, 2020 WL 6817513, at *13 (N.D. Ga. Nov. 20, 2020) (concluding that "interfer[ing] with the result of an election that has already concluded would be unprecedented and harm the public in countless ways").

In short, Plaintiffs' requested relief concerning the 2020 General Election is moot.

C. Laches

Defendants argue that Plaintiffs are unlikely to succeed on the merits because they waited too long to knock on the Court's door. (ECF No. 31 at Pg ID 2175-79; ECF No. 39 at Pg ID 2844.) The Court agrees.

The doctrine of laches is rooted in the principle that "equity aids the vigilant, not those who slumber on their rights." *Lucking v. Schram*, 117 F.2d 160, 162 (6th Cir. 1941); *see also United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 9, 128 S.Ct. 1511, 170 L.Ed.2d 392 (2008) ("A constitutional claim can become time-barred just as any other claim can."). An action may be barred by the doctrine of laches if: (1) the plaintiff delayed unreasonably in asserting his rights and (2) the defendant is prejudiced by this delay. *Brown-Graves Co. v. Central States, Se. and Sw. Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000); *Ottawa Tribe of Oklahoma v. Logan*, 577 F.3d 634, 639 n.6 (6th Cir. 2009) ("Laches arises from an extended failure to exercise a right to the detriment of another party."). Courts apply laches in election cases. *Detroit Unity Fund v. Whitmer*, 819 F. App'x 421, 422 (6th Cir. 2020) (holding that the district court did not err in finding plaintiff's claims regarding deadline for local ballot initiatives "barred by laches, considering the unreasonable delay on the part of [p]laintiffs and the consequent prejudice to [d]efendants"). *Cf. Benisek v. Lamone*, —— U.S. ——, 138 S. Ct. 1942, 1944, 201 L.Ed.2d 398 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence. That is as true in election law cases as elsewhere.").

***7** First, Plaintiffs showed no diligence in asserting the claims at bar. They filed the instant action on November 25—more than 21 days after the 2020 General Election—and served it on Defendants some five days later on December 1. (ECF Nos. 1, 21.) If Plaintiffs had legitimate claims regarding whether the treatment of election challengers complied with state law, they could have brought their claims well in advance of or on Election Day—but they did not. Michigan's 83 Boards of County Canvassers finished canvassing by no later than November 17 and, on November 23, both the Michigan Board of State Canvassers and Governor Whitmer certified the election results. Mich. Comp. Laws §§ 168.822, 168.842.0. If Plaintiffs had legitimate claims regarding the manner by which ballots were processed and tabulated on or after Election Day, they could have brought the instant action on Election Day or during the weeks of canvassing that followed—yet they did not. Plaintiffs base the claims related to election machines and software on "expert and fact witness" reports discussing "glitches" and other alleged vulnerabilities that occurred as far back as 2010. (*See e.g.*, ECF No. 6 at Pg ID 927-933, ¶¶ 157(C)-(E), (G), 158, 160, 167.) If Plaintiffs had legitimate concerns about the election machines and software, they could have filed this lawsuit well before the 2020 General Election—yet they sat back and did nothing.

Plaintiffs proffer no persuasive explanation as to why they waited so long to file this suit. Plaintiffs concede that they "would have preferred to file sooner, but [ ] needed some time to gather statements from dozens of fact witnesses, retain and engage expert witnesses, and gather other data supporting their Complaint." (ECF No. 49 at Pg ID 3081.) But according to Plaintiffs themselves, "[m]anipulation of votes was apparent *shortly after the polls closed on November 3, 2020.*" (ECF No. 7 at Pg ID 1837 (emphasis added).) Indeed, where there is no reasonable explanation, there can be no true justification. *See Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (identifying the "first and most essential" reason to issue a stay of an election-related injunction is plaintiff offering "no reasonable explanation for waiting so long to file this action"). Defendants satisfy the first element of their laches defense.

Second, Plaintiffs' delay prejudices Defendants. *See Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) ("As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights.") This is especially so considering that Plaintiffs' claims for relief are not merely last-minute—they are after the fact. While Plaintiffs delayed, the ballots were cast; the votes were counted; and the results were certified. The rationale for interposing the doctrine of laches is now at its peak. *See McDonald v. Cnty. of San Diego*, 124 F. App'x 588 (9th Cir. 2005) (citing *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988)); *Soules*, 849 F.2d at 1180 (quoting *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983)) (applying doctrine of laches in post-election lawsuit because doing otherwise would, "permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action").

Plaintiffs could have lodged their constitutional challenges much sooner than they did, and certainly not three weeks

after Election Day and one week after certification of almost three million votes. The Court concludes that Plaintiffs' delay results in their claims being barred by laches.

D. Abstention

As outlined in several filings, when the present lawsuit was filed on November 25, 2020, there already were multiple lawsuits pending in Michigan state courts raising the same or similar claims alleged in Plaintiffs' Amended Complaint. (*See, e.g.*, ECF No. 31 at Pg ID 2193-98 (summarizing five state court lawsuits challenging President Trump's defeat in Michigan's November 3, 2020 General Election).) Defendants and the City of Detroit urge the Court to abstain from deciding Plaintiffs' claims in deference to those proceedings under various abstention doctrines. (*Id.* at Pg ID 2191-2203; ECF No. 39 at Pg ID 2840-44.) Defendants rely on the abstention doctrine outlined by the Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). The City of Detroit relies on the abstention doctrines outlined in *Colorado River*, as well as those set forth in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500-01, 61 S.Ct. 643, 85 L.Ed. 971 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The City of Detroit maintains that abstention is particularly appropriate when resolving election disputes in light of the autonomy provided to state courts to initially settle such disputes.

***8** The abstention doctrine identified in *Colorado River* permits a federal court to abstain from exercising jurisdiction over a matter in deference to parallel state-court proceedings. *Colorado River*, 424 U.S. at 813, 817, 96 S.Ct. 1236. The exception is found warranted "by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration.' " *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (quoting *Colorado River*, 424 U.S. at 817, 96 S.Ct. 1236). The Sixth Circuit has identified two prerequisites for abstention under this doctrine. *Romine v. Compuserve Corp.*, 160 F.3d 337, 339-40 (6th Cir. 1998).

First, the court must determine that the concurrent state and federal actions are parallel. *Id.* at 339. Second, the court must consider the factors outlined by the Supreme Court in *Colorado River* and subsequent cases:

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; ... (4) the order in which jurisdiction was obtained; ... (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

Romine, 160 F.3d at 340-41 (internal citations omitted). "These factors, however, do not comprise a mechanical checklist. Rather, they require 'a careful balancing of the important factors as they apply in a give[n] case' depending on the particular facts at hand." *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

As summarized in Defendants' response brief and reflected in their exhibits (*see* ECF No. 31 at Pg ID 2193-97; *see also* ECF Nos. 31-7, 31-9, 31-11, 31-12, 31-14), the allegations and claims in the state court proceedings and the pending matter are, at the very least, substantially similar, *Romine*, 160 F.3d at 340 ("Exact parallelism is not required; it is enough if the two proceedings are substantially similar." (internal quotation marks and citation omitted)). A careful balancing of the factors set forth by the Supreme Court counsel in favor of deferring to the concurrent jurisdiction of the state courts.

The first and second factor weigh against abstention. *Id.* (indicating that the weight is against abstention where no property is at issue and neither forum is more or less convenient). While the Supreme Court has stated that " 'the presence of federal law issues must always be a major consideration weighing against surrender of federal jurisdiction in deference to state proceedings[,]' " *id.* at 342 (quoting *Moses H. Cone*, 460 U.S. at 26, 103 S.Ct. 927), this " 'factor has less significance where the federal courts' jurisdiction to enforce the statutory rights in question is concurrent with that of the state courts.' "[4] *Id.* (quoting *Moses H. Cone*, 460 U.S. at 25, 103 S.Ct. 927). Moreover, the Michigan Election Code seems to dominate even Plaintiffs' federal claims. Further, the remaining factors favor abstention.

4 State courts have concurrent jurisdiction over § 1983 actions. *Felder v. Casey*, 487 U.S. 131, 139, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988).

"Piecemeal litigation occurs when different courts adjudicate the identical issue, thereby duplicating judicial effort and potentially rendering conflicting results." *Id.* at 341. The parallel proceedings are premised on similar factual allegations and many of the same federal and state claims.

The state court proceedings were filed well before the present matter and at least three of those matters are far more advanced than this case. Lastly, as Congress conferred concurrent jurisdiction on state courts to adjudicate § 1983 claims, *Felder v. Casey*, 487 U.S. 131, 139, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988), "[t]here can be no legitimate contention that the [Michigan] state courts are incapable of safeguarding [the rights protected under this statute]," *Romine*, 160 F.3d at 342.

***9** For these reasons, abstention is appropriate under the *Colorado River* doctrine. The Court finds it unnecessary to decide whether abstention is appropriate under other doctrines.

E. Standing

Under Article III of the United States Constitution, federal courts can resolve only "cases" and "controversies." U.S. Const. art. III § 2. The case-or-controversy requirement is satisfied only where a plaintiff has standing to bring suit. *See Spokeo, Inc. v. Robins*, ––– U.S. ––––, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016), *as revised* (May 24, 2016). Each plaintiff must demonstrate standing for each claim he seeks to press.[5] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (citation omitted) ("[A] plaintiff must demonstrate standing separately for each form of relief sought."). To establish standing, a plaintiff must show that: (1) he has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) the injury is "fairly ... trace[able] to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks and citations omitted).

5 Plaintiffs assert a due process claim in their Amended Complaint and twice state in their motion for injunctive relief that Defendants violated their due process rights. (*See* ECF No. 7 at Pg ID 1840, 1844.) Plaintiffs do not pair either statement with anything the Court could construe as a developed argument. (*Id.*) The Court finds it unnecessary, therefore, to further discuss the due process claim. *McPherson v. Kelsey*, 125 F.3d 989, 995 (6th Cir. 1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

1. Equal Protection Claim

Plaintiffs allege that Defendants engaged in "several schemes" to, among other things, "destroy," "discard," and "switch" votes for President Trump, thereby "devalu[ing] Republican votes" and "diluting" the influence of their individual votes. (ECF No. 49 at Pg ID 3079.) Plaintiffs contend that "the vote dilution resulting from this systemic and illegal conduct did not affect all Michigan voters equally; it had the intent and effect of inflating the number of votes for Democratic candidates and reducing the number of votes for President Trump and Republican candidates." (ECF No. 49 at Pg ID 3079.) Even assuming that Plaintiffs establish injury-in-fact and causation under this theory,[6] their constitutional claim cannot stand because Plaintiffs fall flat when attempting to clear the hurdle of redressability.

6 To be clear, the Court does not find that Plaintiffs satisfy the first two elements of the standing inquiry.

Plaintiffs fail to establish that the alleged injury of vote-dilution can be redressed by a favorable decision from this Court. Plaintiffs ask this Court to de-certify the results of the 2020 General Election in Michigan. But an order de-certifying the votes of approximately 2.8 million people would not reverse the dilution of Plaintiffs' vote. To be sure, standing is not "dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, ––– U.S. ––––, 138 S. Ct. 1916, 1934, 201 L.Ed.2d 313 (2018) (citing *Cuno*, 547 U.S. at 353, 126 S.Ct. 1854); *Cuno*, 547 U.S. at 353, 126 S.Ct. 1854 ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.") (quoting *Lewis v. Casey*, 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)). Plaintiffs' alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others *their* right to vote. Accordingly, Plaintiffs have failed to show that their injury can be redressed by the relief they seek and thus possess no standing to pursue their equal protection claim.

2. Elections Clause & Electors Clause Claims

***10** The provision of the United States Constitution known as the Elections Clause states in part: "The Times, Places and Manner of holding Elections for Senators and

Representatives, shall be prescribed in each State by the Legislature thereof[.]" U.S. Const. art. I, § 4, cl. 1. "The Elections Clause effectively gives state governments the 'default' authority to regulate the mechanics of federal elections, *Foster v. Love*, 522 U.S. 67, 69, 118 S. Ct. 464, 139 L.Ed.2d 369 (1997), with Congress retaining 'exclusive control' to 'make or alter' any state's regulations, *Colegrove v. Green*, 328 U.S. 549, 554, 66 S. Ct. 1198, 90 L.Ed. 1432 (1946)." *Bognet*, 980 F.3d at ——, 2020 WL 6686120, *1. The "Electors Clause" of the Constitution states: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors ...." U.S. Const. art. II, § 1, cl. 2.

Plaintiffs argue that, as "nominees of the Republican Party to be Presidential Electors on behalf of the State of Michigan, they have standing to allege violations of the Elections Clause and Electors Clause because "a vote for President Trump and Vice-President Pence in Michigan ... is a vote for each Republican elector[ ], and ... illegal conduct aimed at harming candidates for President similarly injures Presidential Electors." (ECF No. 7 at Pg ID 1837-38; ECF No. 49 at Pg ID 3076-78.)

But where, as here, the only injury Plaintiffs have alleged is that the Elections Clause has not been followed, the United States Supreme Court has made clear that "[the] injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance."[7] *Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007). Because Plaintiffs "assert no particularized stake in the litigation," Plaintiffs fail to establish injury-in-fact and thus standing to bring their Elections Clause and Electors Clause claims. *Id.*; *see also Johnson v. Bredesen*, 356 F. App'x 781, 784 (6th Cir. 2009) (citing *Lance*, 549 U.S. at 441-42, 127 S.Ct. 1194) (affirming district court's conclusion that citizens did not allege injury-in-fact to support standing for claim that the state of Tennessee violated constitutional law).

7 Although separate constitutional provisions, the Electors Clause and Elections Clause share "considerable similarity," *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839, 135 S.Ct. 2652, 192 L.Ed.2d 704, (2015) (Roberts, C.J., dissenting), and Plaintiffs do not at all distinguish the two clauses in their motion for injunctive relief or reply brief (ECF No. 7; ECF No. 49 at Pg ID 3076-78). *See also Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d at ——, 2020 WL 6686120, at *7 (3d Cir. 2020) (applying same test for standing under both Elections Clause and Electors Clause); *Wood*, 2020 WL 6817513, at *1 (same); *Foster*, 522 U.S. at 69, 118 S.Ct. 464 (characterizing Electors Clause as Elections Clauses' "counterpart for the Executive Branch"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (noting that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause).

This is so because the Elections Clause grants rights to "the Legislature" of "each State." U.S. Const. art. I, § 4, cl. 1. The Supreme Court interprets the words "the Legislature," as used in that clause, to mean the lawmaking bodies of a state. *Ariz. State Legislature*, 135 S.Ct. at 2673. The Elections Clause, therefore, grants rights to state legislatures and to other entities to which a State may delegate lawmaking authority. *See id.* at 2668. Plaintiffs' Elections Clause claims thus belong, if to anyone, Michigan's state legislature. *Bognet v. Secy. Commonwealth of Pa.*, 980 F.3d 336, ——, 2020 WL 6686120, *7 (3d Cir. 2020). Plaintiffs here are six presidential elector nominees; they are not a part of Michigan's lawmaking bodies nor do they have a relationship to them.

***11** To support their contention that they have standing, Plaintiffs point to *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), a decision finding that electors had standing to bring challenges under the Electors Clause. (ECF No. 7 at Pg ID 1839 (citing *Carson*, 978 F.3d at 1057).) In that case, which was based on the specific content and contours of Minnesota state law, the Eighth Circuit Court of Appeals concluded that because "the plain text of Minnesota law treats prospective electors as candidates," it too would treat presidential elector nominees as candidates. *Carson*, 978 F.3d at 1057. This Court, however, is as unconvinced about the majority's holding in *Carson* as the dissent:

> I am not convinced the Electors have Article III standing to assert claims under the Electors Clause. Although Minnesota law at times refers to them as "candidates," *see, e.g.*, Minn. Stat. § 204B.03 (2020), the Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president. *Id.* § 208.04 subdiv. 1 ("[A] vote cast for the party candidates for president and vice president shall be deemed a vote for that party's electors."). They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals.

978 F.3d at 1063 (Kelly, J., dissenting).[8]

8 In addition, at least one Circuit Court, the Third Circuit Court of Appeals, has distinguished *Carson*'s holding, noting:

> Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* [*v. U.S.*, 564 U.S. 211, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011)] to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots.... The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none.

Bognet, 980 F.3d at —— n.6, 2020 WL 6686120, at *8 n.6.

Plaintiffs contend that the Michigan Election Code and relevant Minnesota law are similar. (See ECF No. 49 at Pg ID 3076-78.) Even if the Court were to agree, it finds that Plaintiffs lack standing to sue under the Elections and Electors Clauses.

F. The Merits of the Request for Injunctive Relief

1. Likelihood of Success on the Merits

The Court may deny Plaintiffs' motion for injunctive relief for the reasons discussed above. Nevertheless, the Court will proceed to analyze the merits of their claims.

a. Violation of the Elections & Electors Clauses

Plaintiffs allege that Defendants violated the Elections Clause and Electors Clause by deviating from the requirements of the Michigan Election Code. (*See, e.g.*, ECF No. 6 at Pg ID 884-85, ¶¶ 36-40, 177-81, 937-38.) Even assuming Defendants did not follow the Michigan Election Code, Plaintiffs do not explain how or why such violations of state election procedures automatically amount to violations of the clauses. In other words, it appears that Plaintiffs' claims are in fact state law claims disguised as federal claims.

A review of Supreme Court cases interpreting these clauses supports this conclusion. In *Cook v. Gralike*, the Supreme Court struck down a Missouri law that required election officials to print warnings on the ballot next to the name of any congressional candidate who refused to support term limits after concluding that such a statute constituted a " 'regulation' of congressional elections," as used in the Elections Clause. 531 U.S. 510, 525-26, 121 S.Ct. 1029, 149 L.Ed.2d 44 (2001) (quoting U.S. Const. art. I, § 4, cl. 1). In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court upheld an Arizona law that transferred redistricting power from the state legislature to an independent commission after concluding that "the Legislature," as used in the Elections Clause, includes any official body with authority to make laws for the state. 576 U.S. 787, 824, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015). In each of these cases, federal courts measured enacted state election laws against the federal mandates established in the clauses—they did not measure *violations* of enacted state elections law against those federal mandates.

***12** By asking the Court to find that they have made out claims under the clauses due to alleged violations of the Michigan Election Code, Plaintiffs ask the Court to find that any alleged deviation from state election law amounts to a modification of state election law and opens the door to federal review. Plaintiffs cite to no case—and this Court found none—supporting such an expansive approach.

b. Violation of the Equal Protection Clause

Most election laws will "impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). But "[o]ur Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [to vote]." *Reynolds v. Sims*, 377 U.S. 533, 559, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17-18, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964)). Voting rights can be impermissibly burdened "by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* (quoting *Reynolds*, 377 U.S. at 555, 84 S.Ct. 1362).

Plaintiffs attempt to establish an Equal Protection claim based on the theory that Defendants engaged in "several schemes" to, among other things, "destroy," "discard," and "switch" votes for President Trump, thereby "devalu[ing] Republican votes" and "diluting" the influence of their individual votes. (ECF No. 49 at Pg ID 3079.)

But, to be perfectly clear, Plaintiffs' equal protection claim is not supported by any allegation that Defendants' alleged schemes caused votes for President Trump to be changed to votes for Vice President Biden. For example, the closest Plaintiffs get to alleging that physical ballots were altered in such a way is the following statement in an election challenger's sworn affidavit: "I believe some of these workers were changing votes that had been cast for Donald Trump and other Republican candidates."[9] (ECF No. 6 at Pg ID 902 ¶ 91 (citing Aff. Articia Bomer, ECF No. 6-3 at Pg ID 1008-1010).) But of course, "[a] belief is not evidence" and falls far short of what is required to obtain any relief, much less the extraordinary relief Plaintiffs request. *United States v. O'Connor*, 1997 WL 413594, at *1 (7th Cir. 1997); *see Brown v. City of Franklin*, 430 F. App'x 382, 387 (6th Cir. 2011) ("Brown just submits his belief that Fox's 'protection' statement actually meant "protection from retaliation.... An unsubstantiated belief is not evidence of pretext."); *Booker v. City of St. Louis*, 309 F.3d 464, 467 (8th Cir. 2002) ("Booker's "belief" that he was singled out for testing is not evidence that he was.").[10] The closest Plaintiffs get to alleging that election machines and software changed votes for President Trump to Vice President Biden in Wayne County is an amalgamation of theories, conjecture, and speculation that such alterations were *possible.* (*See e.g.*, ECF No. 6 at ¶¶ 7-11, 17, 125, 129, 138-43, 147-48, 155-58, 160-63, 167, 171.) And Plaintiffs do not at all explain how the question of whether the treatment of election challengers complied with state law bears on the validity of votes, or otherwise establishes an equal protection claim.

9 Plaintiffs allege in several portions of the Amended Complaint that election officials improperly tallied, counted, or marked ballots. But some of these allegations equivocate with words such as "believe" and "may" and none of these allegations identify which presidential candidate the ballots were allegedly altered to favor. (*See, e.g.*, ECF No. 6 at Pg ID 902, ¶ 91 (citing Aff. Articia Bomer, ECF No. 6-3 at Pg ID 1008-10 ("I *believe* some of these ballots *may* not have been properly counted.") (emphasis added))); Pg ID 902-03, ¶ 92 (citing Tyson Aff. ¶ 17) ("At least one challenger observed poll workers adding marks to a ballot where there was no mark for any candidate.").

10 As stated by the Circuit Court for the District of Columbia Circuit:

> The statement is that the complainant believes and expects to prove some things. Now his belief and expectation may be in good faith; but it has been repeatedly held that suspicion is not proof; and it is equally true that belief and expectation to prove cannot be accepted as a substitute for fact. The complainant carefully refrains from stating that he has any information upon which to found his belief or to justify his expectation; and evidently he has no such information. But belief, without an allegation of fact either upon personal knowledge or upon information reasonably sufficient upon which to base the belief, cannot justify the extraordinary remedy of injunction.

Magruder v. Schley, 18 App. D.C. 288, 292, 1901 WL 19131, at *2 (D.C. Cir. 1901).

***13** With nothing but speculation and conjecture that votes for President Trump were destroyed, discarded or switched to votes for Vice President Biden, Plaintiffs' equal protection claim fails.[11] *See Wood*, —— F.3d ——, 2020 WL 7094866 (quoting *Bognet*, 980 F.3d at ——, 2020 WL 6686120, at *12) (" '[N]o single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a 'mathematical impact on the final tally and thus on the proportional effect of every vote.' ").

11 "[T]he Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity. That is not how the Equal Protection Clause works." *Bognet*, 980 F.3d at ——, 2020 WL 6686120, at *11.

2. Irreparable Harm & Harm to Others

Because "a finding that there is simply no likelihood of success on the merits is usually fatal[,]" *Gonzales v. Nat'l Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir. 2000) (citing *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997)), the Court will not discuss the remaining preliminary injunction factors extensively.

As discussed, Plaintiffs fail to show that a favorable decision from the Court would redress their alleged injury. Moreover, granting Plaintiffs' injunctive relief would greatly harm the

public interest. As Defendants aptly describe, Plaintiffs' requested injunction would "upend the statutory process for election certification and the selection of Presidential Electors. Moreover, it w[ould] disenfranchise millions of Michigan voters in favor [of] the preferences of a handful of people who [are] disappointed with the official results." (ECF No. 31 at Pg ID 2227.)

In short, none of the remaining factors weigh in favor of granting Plaintiffs' request for an injunction.

IV. Conclusion

For these reasons, the Court finds that Plaintiffs are far from likely to succeed in this matter. In fact, this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic process and their trust in our government. Plaintiffs ask this Court to ignore the orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do.

The People have spoken.

The Court, therefore, **DENIES** Plaintiffs' "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief" (ECF No. 7.)

IT IS SO ORDERED.

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980 F.3d 336
United States Court of Appeals, Third Circuit.

Jim BOGNET, Donald K. Miller, Debra Miller, Alan Clark, Jennifer Clark, Appellants

v.

SECRETARY COMMONWEALTH OF PENNSYLVANIA; Adams County Board of Elections; Allegheny County Board of Elections; Armstrong County Board of Elections; Beaver County Board of Elections; Bedford County Board of Elections; Berks County Board of Elections; Blair County Board of Elections; Bradford County Board of Elections; Bucks County Board of Elections; Butler County Board of Elections; Cambria County Board of Elections; Cameron County Board of Elections; Carbon County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Clarion County Board of Elections; Clearfield County Board of Elections; Clinton County Board of Elections; Columbia County Board of Elections; Crawford County Board of Elections; Cumberland County Board of Elections; Dauphin County Board of Elections; Delaware County Board of Elections; Elk County Board of Elections; Erie County Board of Elections; Fayette County Board of Elections; Forest County Board of Elections; Franklin County Board of Elections; Fulton County Board of Elections; Greene County Board of Elections; Huntingdon County Board of Elections; Indiana County Board of Elections; Jefferson County Board of Elections; Juniata County Board of Elections; Lackawanna County Board of Elections; Lancaster County Board of Elections; Lawrence County Board of Elections; Lebanon County Board of Elections; Lehigh County Board of Elections; Luzerne County Board of Elections; Lycoming County Board of Elections; Mckean County Board of Elections; Mercer County Board of Elections; Mifflin County Board of Elections; Monroe County Board of Elections; Montgomery County Board of Elections; Montour County Board of Elections; Northampton County Board of Elections; Northumberland County Board of Elections; Perry County Board of Elections; Philadelphia County Board of Elections; Pike County Board of Elections; Potter County Board of Elections; Schuylkill County Board of Elections; Snyder County Board of Elections; Somerset County Board of Elections; Sullivan County Board of Elections; Susquehanna County Board of Elections; Tioga County Board of Elections; Union County Board of Elections; Venango County Board of Elections; Warren County Board of Elections; Washington County Board of Elections; Wayne County Board of Elections; Westmoreland County Board of Elections; Wyoming County Board of Elections; York County Board of Elections

Democratic National Committee, Intervenor

No. 20-3214
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Submitted Pursuant to Third Circuit L.A.R. 34.1(a) November 9, 2020
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(Filed: November 13, 2020)

Synopsis

Background: Voters and congressional candidate brought action against Secretary of Commonwealth of Pennsylvania and county boards of elections, seeking to enjoin the counting of mail-in ballots received during the three-day extension of the ballot-receipt deadline ordered by the Pennsylvania Supreme Court, and seeking a declaration that the extension period and presumption of timeliness was unconstitutional. The United States District Court for the Western District of Pennsylvania, Kim R. Gibson, Senior District Judge, 2020 WL 6323121, denied voters' and candidate's motion for a temporary restraining order (TRO) and preliminary injunction. Voters and candidate appealed.

Holdings: The Court of Appeals, Smith, Chief Judge, held that:

the District Court's order was immediately appealable;

voters and candidate lacked standing to bring action alleging violation of Constitution's Elections Clause and Electors Clause;

voters lacked concrete injury for their alleged harm of vote dilution, and thus voters did not have standing for such claim;

voters lacked particularized injury for their alleged harm of vote dilution, and thus voters did not have standing for such claim;

voters failed to allege legally cognizable "preferred class," for purposes of standing to claim equal protection violation;

alleged harm from presumption of timeliness was hypothetical or conjectural, and thus voters did not have standing to challenge presumption; and

voters and candidate were not entitled to receive injunction so close to election.

Affirmed.

***341** On Appeal from the United States District Court for the Western District of Pennsylvania, District Court No. 3-20-cv-00215, District Judge: Honorable Kim. R. Gibson

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Before: SMITH, Chief Judge, SHWARTZ and SCIRICA, Circuit Judges

OPINION OF THE COURT

SMITH, Chief Judge.

***342** *A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.*—Alexander Hamilton[1]

The year 2020 has brought the country unprecedented challenges. The COVID-19 pandemic, which began early this year and continues today, has caused immense loss and vast disruption. As this is a presidential election year, the pandemic has also presented unique challenges regarding where and how citizens shall vote, as well as when and how their ballots shall be tabulated. The appeal on which we now rule stems from the disruption COVID-19 has wrought on the national elections. We reach our decision, detailed below, having carefully considered the full breadth of statutory law and constitutional authority applicable to this unique dispute over Pennsylvania election law. And we do so with commitment to a proposition indisputable in our democratic process: that the lawfully cast vote of every citizen must count.

***343** I. Background & Procedural History

A. The Elections and Presidential Electors Clause

The U.S. Constitution delegates to state "Legislature[s]" the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's ability to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. This provision is known as the "Elections Clause." The Elections Clause effectively gives state governments the "default" authority to regulate the mechanics of federal elections, *Foster v. Love*, 522 U.S. 67, 69, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997), with Congress retaining "exclusive control" to "make or alter" any state's regulations, *Colegrove v. Green*, 328 U.S. 549, 554, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). Congress has not often wielded this power but, "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384, 399, 25 L.Ed. 717 (1879) ("[T]he Constitution and constitutional laws of the [United States] are ... the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation."). By statute, Congress has set "[t]he Tuesday next after the 1st Monday in November, in every even numbered year," as the day for the election. 2 U.S.C. § 7.

Much like the Elections Clause, the "Electors Clause" of the U.S. Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors." U.S. Const. art. II, § 1, cl. 2. Congress can "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, § 1, cl. 4. Congress has set the time for appointing electors as "the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 U.S.C. § 1.

This year, both federal statutes dictate that the day for the election was to fall on Tuesday, November 3 ("Election Day").

B. Pennsylvania's Election Code

In keeping with the Constitution's otherwise broad delegation of authority to states to regulate the times, places, and manner of holding federal elections, the Pennsylvania General Assembly has enacted a comprehensive elections code. In 2019, the General Assembly passed Act 77, which (among other things) established "no-excuse" absentee voting in Pennsylvania[2]: all eligible voters in Pennsylvania may vote by mail without the need to show their absence from their voting district on the day of the election. 25 Pa. Stat. and Cons. Stat. §§ 3150.11–3150.17. Under Act 77, "[a]pplications for mail-in ballots shall be processed if received not later than five o'clock P.M. of the first Tuesday prior to the day of any primary or election." *Id.* § 3150.12a(a). After Act 77, "a completed absentee [or mail-in] ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election" for that vote to count. *Id.* §§ 3146.6(c), 3150.16(c).

C. The Pennsylvania Supreme Court Decision

Soon after Act 77's passage, Donald J. Trump for President, Inc., the Republican National Committee ("RNC"), and several Republican congressional candidates and ***344** voters brought suit against Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania, and all of Pennsylvania's county boards of elections. That suit, filed in the Western District of Pennsylvania, alleged that Act 77's "no-excuse" mail-in voting regime violated both the federal and Pennsylvania constitutions. *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, —— F.Supp.3d ——, ——, 2020 WL 4920952, at *1 (W.D. Pa. Aug. 23, 2020). Meanwhile, the Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates filed suit in Pennsylvania's Commonwealth Court, seeking declaratory and injunctive relief related to statutory-interpretation issues involving Act 77 and the Pennsylvania Election Code. *See Pa. Democratic Party v. Boockvar*, —— Pa. ——, 238 A.3d 345, 352 (2020). Secretary Boockvar asked the Pennsylvania Supreme Court to exercise extraordinary jurisdiction to allow it to immediately consider the case, and her petition was granted without objection. *Id.* at 354–55.

Pending resolution of the Pennsylvania Supreme Court case, Secretary Boockvar requested that the Western District of Pennsylvania stay the federal case. *Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——, 2020 WL 4920952, at *1. The District Court obliged and concluded that it would abstain under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). *See Trump for Pres. v. Boockvar*, —— F.Supp.3d at ——, 2020 WL 4920952, at *21. The RNC then filed a motion for limited preliminary injunctive relief asking that all mailed ballots be segregated, but the District Court denied the motion, finding that the plaintiffs' harm had "not yet materialized in any actualized or imminent way." *Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5407748, at *1 (W.D. Pa. Sept. 8, 2020).

With the federal case stayed, the state court matter proceeded. The Pennsylvania Democratic Party argued that a combination of the COVID-19 pandemic and U.S. Postal Service ("USPS") mail-delivery delays made it difficult for absentee voters to timely return their ballots in the June 2020 Pennsylvania primary election. *Pa. Democratic Party*, 238 A.3d at 362. The Pennsylvania Democratic Party claimed that this voter disenfranchisement violated the Pennsylvania Constitution's Free and Equal Elections Clause, art I., § 5,[3] and sought, among other things, a weeklong extension of the deadline for receipt of ballots cast by Election Day in the upcoming general election—the same deadline for the receipt of ballots cast by servicemembers residing overseas. *Id.* at 353–54. Secretary Boockvar originally opposed the extension deadline; she changed her position after receiving a letter from USPS General Counsel which stated that Pennsylvania's ballot deadlines were "incongruous with the Postal Service's delivery standards," and that to ensure that a ballot in Pennsylvania would be received by 8:00 P.M. on Election Day, the voter would need to mail it a full week in advance, by October 27, which was also the deadline to *apply* for a mail-in ballot. *Id.* at 365–66; 25 Pa. Stat. and Cons. Stat. § 3150.12a(a). Secretary Boockvar accordingly recommended a three-day extension to the received-by deadline. *Pa. Democratic Party*, 238 A.3d at 364–65.

In a September 17, 2020 decision, the Pennsylvania Supreme Court concluded that USPS's existing delivery standards ***345** could not meet the timeline built into the Election Code and that circumstances beyond voters' control should not lead to their disenfranchisement. *Pa. Democratic Party*, 238 A.3d at 371. The Court accordingly held that the Pennsylvania Constitution's Free and Equal Elections Clause required a three-day extension of the ballot-receipt deadline for the November 3 general election. *Id.* at 371, 386–87. All ballots postmarked by 8:00 P.M. on Election Day and received by 5:00 P.M. on the Friday after Election Day, November 6, would be considered timely and counted ("Deadline Extension"). *Id.* at 386–87. Ballots postmarked or signed after Election Day, November 3, would be rejected. *Id.* If the postmark on a ballot received before the November 6 deadline was missing or illegible, the ballot would be presumed to be timely unless "a preponderance of the evidence demonstrates that it was mailed after Election Day" ("Presumption of Timeliness"). *Id.* Shortly after the ruling, Pennsylvania voters were notified of the Deadline Extension and Presumption of Timeliness.

D. Appeal to the U.S. Supreme Court, and This Litigation

The Republican Party of Pennsylvania and several intervenors, including the President pro tempore of the Pennsylvania Senate, sought to challenge in the Supreme Court of the United States the constitutionality of the Pennsylvania Supreme Court's ruling. Because the November election date was fast approaching, they filed an emergency application for a stay of the Pennsylvania Supreme Court's order pending review on the merits. The U.S. Supreme Court denied the emergency stay request in a 4-4 decision. *Republican Party of Pa. v. Boockvar*, No. 20A54, 592

U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6128193 (Oct. 19, 2020); *Scarnati v. Boockvar*, No. 20A53, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6128194 (Oct. 19, 2020). After denial of the stay, the petitioners moved for expedited consideration of their petition for certiorari. In denying that motion, Justice Alito noted that, per the Pennsylvania Attorney General, all county boards of elections would segregate ballots received during the Deadline Extension period from those received by 8:00 P.M. on Election Day. *Republican Party of Pa. v. Boockvar*, No. 20-542, 592 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 6304626, at *2 (Oct. 28, 2020) (Alito, J., statement). Justice Alito later issued an order requiring that all county boards of elections segregate such ballots and count them separately. *Republican Party of Pa. v. Boockvar*, No. 20A84, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6536912 (Mem.) (U.S. Nov. 6, 2020) (Alito, J.).

In the meantime, on October 22, 2020, three days after the U.S. Supreme Court declined to stay the Pennsylvania Supreme Court's order, Plaintiffs herein filed this suit in the Western District of Pennsylvania. Plaintiffs are four registered voters from Somerset County, Pennsylvania, who planned to vote in person on Election Day ("Voter Plaintiffs") and Pennsylvania congressional candidate Jim Bognet. Defendants are Secretary Boockvar and each Pennsylvania county's board of elections.

Bognet, the congressional candidate, claimed that the Deadline Extension and Presumption of Timeliness "allow[ ] County Boards of Elections to accept votes ... that would otherwise be unlawful" and "undermine[ ] his right to run in an election where Congress has paramount authority to set the 'times, places, and manner' " of Election Day. *Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121, at *2 (W.D. Pa. Oct. 28, 2020). The Voter Plaintiffs alleged that by voting in person, they had to comply with the single, uniform ***346** federal Election Day deadline, whereas mail-in voters could submit votes any time before 5:00 P.M. on November 6. *Id.* Thus, they alleged, the Pennsylvania Supreme Court treated them in an arbitrary and disparate way by elevating mail-in voters to a "preferred class of voters" in violation of the U.S. Constitution's Equal Protection Clause and the single, uniform, federal Election Day set by Congress. *Id.* The Voter Plaintiffs also asserted that counting ballots received after Election Day during the Deadline Extension period would unlawfully dilute their votes in violation of the Equal Protection Clause. *Id.*

All Plaintiffs sought to enjoin Defendants from counting ballots received during the Deadline Extension period. *Id.* They also sought a declaration that the Deadline Extension and Presumption of Timeliness are unconstitutional under the Elections Clause and the Electors Clause as well as the Equal Protection Clause. *Id.* Because Plaintiffs filed their suit less than two weeks before Election Day, they moved for a temporary restraining order ("TRO"), expedited hearing, and preliminary injunction. *Id.*

The District Court commendably accommodated Plaintiffs' request for an expedited hearing, then expeditiously issued a thoughtful memorandum order on October 28, denying the motion for a TRO and preliminary injunction. *Id.* at *7. The District Court held that Bognet lacked standing because his claims were too speculative and not redressable. *Id.* at *3. Similarly, the District Court concluded that the Voter Plaintiffs lacked standing to bring their Equal Protection voter dilution claim because they alleged only a generalized grievance. *Id.* at *5.

At the same time, the District Court held that the Voter Plaintiffs had standing to pursue their Equal Protection arbitrary-and-disparate-treatment claim. But it found that the Deadline Extension did not engender arbitrary and disparate treatment because that provision did not extend the period for mail-in voters to actually cast their ballots; rather, the extension only directed that the timely cast ballots of mail-in voters be counted. *Id.* As to the Presumption of Timeliness, the District Court held that the Voter Plaintiffs were likely to succeed on the merits of their arbitrary-and-disparate-treatment challenge. *Id.* at *6. Still, the District Court declined to grant a TRO because the U.S. Supreme Court "has repeatedly emphasized that ... federal courts should ordinarily not alter the election rules on the eve of an election." *Id.* at *7 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (per curiam)). The District Court concluded that with "less than two weeks before the election. ... [g]ranting the relief Plaintiffs seek would result in significant voter confusion; precisely the kind of confusion that *Purcell* seeks to avoid." *Id.*

Plaintiffs appealed the denial of their motion for a TRO and preliminary injunction to this Court on October 29, less than a week before Election Day. Plaintiffs requested an expedited briefing schedule: specifically, their opening brief would be due on October 30 and the response briefs on November 2. Notably, Plaintiffs sought to file a reply brief on November 3 —Election Day. Appellants' Emergency Mot. for Expedited

Briefing, Dkt. No. 17. Defendants opposed the expedited briefing schedule, arguing that Plaintiffs' own delay had caused the case to reach this Court mere days before the election. Sec'y Boockvar's Opp. to Appellants' Emergency Mot. for Expedited Briefing, Dkt. No. 33. Defendants also contended that Plaintiffs sought to punish voters by invalidating the very rules mail-in voters had relied on when they cast their ballots. Defendants ***347** asked us to deny the motion for expedited briefing and offered to supply us with the actual numbers of mail-in ballots received during the Deadline Extension period together with an approximate count of how many of those mail-in ballots lacked legible postmarks. *Id.*

Even had we granted Plaintiffs' motion for expedited briefing, the schedule they proposed would have effectively foreclosed us from ruling on this appeal before Election Day. So we denied Plaintiffs' motion and instead ordered that their opening brief be filed by November 6. Order, No. 20-3214, Oct. 30, 2020, Dkt. No. 37. We directed Defendants to file response briefs by November 9, forgoing receipt of a reply brief.[4] *Id.* With the matter now fully briefed, we consider Plaintiffs' appeal of the District Court's denial of a TRO and preliminary injunction.

II. Standard of Review

The District Court exercised jurisdiction under 28 U.S.C. § 1331. We exercise jurisdiction under § 1292(a)(1).

Ordinarily, an order denying a TRO is not immediately appealable. *Hope v. Warden York Cnty. Prison*, 956 F.3d 156, 159 (3d Cir. 2020). Here, although Bognet and the Voter Plaintiffs styled their motion as an Emergency Motion for a TRO and Preliminary Injunction, *see Bognet v. Boockvar*, No. 3:20-cv-00215, Dkt. No. 5 (W.D. Pa. Oct. 22, 2020), the District Court's order plainly went beyond simply ruling on the TRO request.

Plaintiffs filed their motion for a TRO and a preliminary injunction on October 22, along with a supporting brief. Defendants then filed briefs opposing the motion, with Plaintiffs filing a reply in support of their motion. The District Court heard argument from the parties, remotely, during a 90-minute hearing. The next day, the District Court ruled on the merits of the request for injunctive relief. *Bognet*, 2020 WL 6323121, at *7. The District Court's Memorandum Order denied both Bognet and the Voter Plaintiffs the affirmative relief they sought to obtain prior to Election Day, confirming that the Commonwealth was to count mailed ballots received after the close of the polls on Election Day but before 5:00 P.M. on November 6.

In determining whether Bognet and the Voter Plaintiffs had standing to sue, we resolve a legal issue that does not require resolution of any factual dispute. Our review is de novo. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 266 (3d Cir. 2014). "When reviewing a district court's denial of a preliminary injunction, we review the court's findings of fact for clear error, its conclusions of law de novo, and the ultimate decision ... for an abuse of discretion." *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010)) (cleaned up).

III. Analysis

A. Standing

Derived from separation-of-powers principles, the law of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (citations omitted). Article III of the U.S. Constitution vests "[t]he judicial Power of the United States" in both the Supreme Court and "such inferior Courts as the Congress may from ***348** time to time ordain and establish." U.S. Const. art. III, § 1. But this "judicial Power" extends only to "Cases" and "Controversies." *Id.* art. III, § 2; *see also Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). To ensure that judges avoid rendering impermissible advisory opinions, parties seeking to invoke federal judicial power must first establish their standing to do so. *Spokeo*, 136 S. Ct. at 1547.

Article III standing doctrine speaks in jargon, but the gist of its meaning is plain enough. To bring suit, you—and you personally—must be injured, and you must be injured in a way that concretely impacts your own protected legal interests. If you are complaining about something that does not harm you—and does not harm you in a way that is concrete—then you lack standing. And if the injury that you claim is an injury that does no specific harm to you, or if it depends on a harm that may never happen, then you lack an injury for which you may seek relief from a federal court. As we will explain below, Plaintiffs here have not suffered a concrete, particularized, and non-speculative injury necessary

under the U.S. Constitution for them to bring this federal lawsuit.

The familiar elements of Article III standing require a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). To plead an injury in fact, the party invoking federal jurisdiction must establish three sub-elements: first, the "invasion of a legally protected interest"; second, that the injury is both "concrete and particularized"; and third, that the injury is "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130); *see also Mielo v. Steak 'n Shake Operations*, 897 F.3d 467, 479 n.11 (3d Cir. 2018). The second sub-element requires that the injury "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1, 112 S.Ct. 2130. As for the third, when a plaintiff alleges future injury, such injury must be "certainly impending." *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (quoting *Lujan*, 504 U.S. at 565 n.2, 112 S.Ct. 2130). Allegations of "possible" future injury simply aren't enough. *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). All elements of standing must exist at the time the complaint is filed. *See Lujan,* 504 U.S. at 569 n.4, 112 S.Ct. 2130.

With these guideposts in mind, we turn to whether Plaintiffs have pleaded an Article III injury. They bring several claims under 42 U.S.C. § 1983, asserting deprivation of their constitutional rights. They allege that Defendants' implementation of the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness violates the Elections Clause of Article I, the Electors Clause of Article II, and the Equal Protection Clause of the Fourteenth Amendment. Because Plaintiffs lack standing to assert these claims, we will affirm the District Court's denial of injunctive relief.

1. Plaintiffs lack standing under the Elections Clause and Electors Clause.

Federal courts are not venues for plaintiffs to assert a bare right "to have the Government act in accordance with law." ***349** *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). When the alleged injury is undifferentiated and common to all members of the public, courts routinely dismiss such cases as "generalized grievances" that cannot support standing. *United States v. Richardson*, 418 U.S. 166, 173–75, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974). Such is the case here insofar as Plaintiffs, and specifically candidate Bognet, theorize their harm as the right to have government administered in compliance with the Elections Clause and Electors Clause.

To begin with, private plaintiffs lack standing to sue for alleged injuries attributable to a state government's violations of the Elections Clause. For example, in *Lance v. Coffman*, 549 U.S. 437, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) (per curiam), four private citizens challenged in federal district court a Colorado Supreme Court decision invalidating a redistricting plan passed by the state legislature and requiring use of a redistricting plan created by Colorado state courts. *Id.* at 438, 127 S.Ct. 1194. The plaintiffs alleged that the Colorado Supreme Court's interpretation of the Colorado Constitution violated the Elections Clause "by depriving the state legislature of its responsibility to draw congressional districts." *Id.* at 441, 127 S.Ct. 1194. The U.S. Supreme Court held that the plaintiffs lacked Article III standing because they claimed harm only to their interest, and that of every citizen, in proper application of the Elections Clause. *Id.* at 442, 127 S.Ct. 1194 ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed."). Their relief would have no more directly benefitted them than the public at large. *Id.* The same is true here. If anything, Plaintiffs' "interest in the State's ability to 'enforce its duly enacted laws' " is even less compelling because Pennsylvania's "election officials support the challenged decree." *Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 591 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 4680151 (Mem.), at *1 (Aug. 13, 2020) (quoting *Abbott v. Perez*, —— U.S. ——, 138 S. Ct. 2305, 2324 n.17, 201 L.Ed.2d 714 (2018)).

Because the Elections Clause and the Electors Clause have "considerable similarity," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (Roberts, C.J., dissenting) (discussing how Electors Clause similarly vests power to determine manner of appointing electors in "the Legislature" of each State), the same logic applies to Plaintiffs' alleged injury stemming from the claimed violation

of the Electors Clause. *See also Foster*, 522 U.S. at 69, 118 S.Ct. 464 (characterizing Electors Clause as Elections Clause's "counterpart for the Executive Branch"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (noting that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause).

Even a party that meets Article III standing requirements must ordinarily rest its claim for relief on violation of its own rights, not those of a third party. *Pitt News v. Fisher*, 215 F.3d 354, 361–62 (3d Cir. 2000). Plaintiffs assert that the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness usurped the General Assembly's prerogative under the Elections Clause to prescribe "[t]he Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. The Elections Clause grants that right to "the Legislature" of "each State." *Id.* Plaintiffs' Elections Clause claims thus ***350** "belong, if they belong to anyone, only to the Pennsylvania General Assembly." *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (three-judge panel) (per curiam). Plaintiffs here are four individual voters and a candidate for federal office; they in no way constitute the General Assembly, nor can they be said to comprise any part of the law-making processes of Pennsylvania. *Ariz. State Legislature*, 576 U.S. at 824, 135 S.Ct. 2652.[5] Because Plaintiffs are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses. No member of the General Assembly is a party to this lawsuit.

That said, prudential standing can suspend Article III's general prohibition on a litigant's raising another person's legal rights. Yet Plaintiffs don't fit the bill. A plaintiff may assert the rights of another if he or she "has a 'close' relationship with the person who possesses the right" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (citation omitted). Plaintiffs cannot invoke this exception to the rule against raising the rights of third parties because they enjoy no close relationship with the General Assembly, nor have they alleged any hindrance to the General Assembly's ability to protect its own interests. *See, e.g.*, *Corman*, 287 F. Supp. 3d at 573. Nor does Plaintiffs' other theory of prudential standing, drawn from *Bond v. United States*, 564 U.S. 211, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011), advance the ball.

In *Bond*, the Supreme Court held that a litigant has prudential standing to challenge a federal law that allegedly impinges on the state's police powers, "in contravention of constitutional principles of federalism" enshrined in the Tenth Amendment. *Id.* at 223–24, 131 S.Ct. 2355. The defendant in *Bond* challenged her conviction under 18 U.S.C. § 229, which Congress enacted to comply with a chemical weapons treaty that the United States had entered. *Id.* at 214–15, 131 S.Ct. 2355. Convicted under the statute she sought to challenge, Bond satisfied Article III's standing requirements. *Id.* at 217, 131 S.Ct. 2355 (characterizing Bond's sentence and incarceration as concrete, and redressable by invalidation of her conviction); *id.* at 224–25, 131 S.Ct. 2355 (noting that Bond was subject to "[a] law," "prosecution," and "punishment" she might not have faced "if the matter were left for the Commonwealth of Pennsylvania to decide"). She argued that her conduct was "local in nature" such that § 229 usurped the Commonwealth's reserved police powers. *Id.* Rejecting the Government's contention that Bond was barred as a third party from asserting the rights of the Commonwealth, *id.* at 225, 131 S.Ct. 2355, the Court held that "[t]he structural principles secured by the separation of powers protect the individual as well" as the State. ***351** *Id.* at 222, 131 S.Ct. 2355 ("Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. ... When government acts in excess of its lawful powers, that [personal] liberty is at stake.").

But the nub of Plaintiffs' argument here is that the Pennsylvania Supreme Court intruded on the authority delegated to the Pennsylvania General Assembly under Articles I and II of the U.S. Constitution to regulate federal elections. They do not allege any violation of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Nor could they. After all, states have no inherent or reserved power over federal elections. *U.S. Term Limits*, 514 U.S. at 804–05, 115 S.Ct. 1842. When "deciding issues raised under the Elections Clause," courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns." *Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012). Either federal and state election law "operate harmoniously in a single procedural scheme," or they don't—and the federal law preempts ("alter[s]") state election law under the Elections Clause. *Id.* at 394. An assessment that the Pennsylvania Supreme Court lacked the legislative authority under the

state's constitution necessary to comply with the Elections Clause (Appellants' Br. 24–27) does not implicate *Bond*, the Tenth Amendment, or even Article VI's Supremacy Clause.[6] *See Gonzalez*, 677 F.3d at 390–92 (contrasting Elections Clause with Supremacy Clause and describing former as "unique," containing "[an] unusual delegation of power," and "unlike virtually all other provisions of the Constitution"). And, of course, third-party standing under *Bond* still presumes that the plaintiff otherwise meets the requirements of Article III; as discussed above, Plaintiffs do not.

Plaintiff Bognet, a candidate for Congress who is currently a private citizen, does not plead a cognizable injury by alleging a "right to run in an election where Congress has paramount authority," Compl. ¶ 69, or by pointing to a "threatened" reduction in the competitiveness of his election from counting absentee ballots received within three days after Election Day. Appellants' Br. 21. Bognet does not explain how that "right to run" affects him in a particularized way when, in fact, all candidates in Pennsylvania, including Bognet's opponent, are subject to the same rules. And Bognet does not explain how counting *more* timely cast votes would lead to a *less* competitive race, nor does he offer any evidence tending to show that a greater proportion of mailed ballots received after Election Day than on or before Election Day would be cast for Bognet's opponent. What's more, for Bognet to have standing to enjoin the counting of ballots arriving after Election Day, such votes would have to be sufficient in number ***352** to change the outcome of the election to Bognet's detriment. *See, e.g.*, *Sibley v. Alexander*, 916 F. Supp. 2d 58, 62 (D.D.C. 2013) ("[E]ven if the Court granted the requested relief, [plaintiff] would still fail to satisfy the redressability element [of standing] because enjoining defendants from casting the ... votes would not change the outcome of the election." (citing *Newdow v. Roberts,* 603 F.3d 1002, 1011 (D.C. Cir. 2010) (citations omitted)). Bognet does not allege as much, and such a prediction was inherently speculative when the complaint was filed. The same can be said for Bognet's alleged wrongfully incurred expenditures and future expenditures. Any harm Bognet sought to avoid in making those expenditures was not "certainly impending"—he spent the money to avoid a speculative harm. *See Donald J. Trump for Pres., Inc. v. Boockvar*, No. 2:20-cv-966, —— F.Supp.3d ——, ——, 2020 WL 5997680, at *36 (W.D. Pa. Oct. 10, 2020). Nor are those expenditures "fairly traceable" under Article III to the actions that Bognet challenges. *See, e.g.*, *Clapper*, 568 U.S. at 402, 416, 133 S.Ct. 1138 (rejecting argument that plaintiff can "manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending").[7]

Plaintiffs therefore lack Article III standing to challenge Defendants' implementation of the Pennsylvania Supreme Court's Deadline Extension and Presumption of Timeliness under the Elections Clause and Electors Clause.

2. The Voter Plaintiffs lack standing under the Equal Protection Clause.

Stressing the "personal" nature of the right to vote, the Voter Plaintiffs assert two claims under the Equal Protection Clause.[8] First, they contend that the influence of their votes, cast in person on Election Day, is "diluted" both by (a) mailed ballots cast on or before Election Day but received between Election Day and the Deadline Extension date, ballots which Plaintiffs assert cannot be lawfully counted; and (b) mailed ballots that were unlawfully cast (*i.e.*, placed in the mail) after Election Day but are still counted because of the Presumption of Timeliness. Second, the Voter Plaintiffs allege that the Deadline Extension and the Presumption of Timeliness create a preferred class of voters based on "arbitrary and disparate treatment" that values "one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The Voter Plaintiffs lack Article III standing to assert either injury.

a. Vote Dilution

As discussed above, the foremost element of standing is injury in fact, which requires the plaintiff to show a harm that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1547–48 (citation omitted). The Voter Plaintiffs lack standing to redress their alleged vote dilution because that alleged injury is not concrete as to votes counted under the Deadline Extension, nor is it particularized for Article III purposes as to votes counted ***353** under the Deadline Extension or the Presumption of Timeliness.

i. No concrete injury from vote dilution attributable to the Deadline Extension.

The Voter Plaintiffs claim that Defendants' implementation of the Deadline Extension violates the Equal Protection Clause because "unlawfully" counting ballots received within three days of Election Day dilutes their votes. But the source of this purported illegality is necessarily a matter of state law, which makes any alleged harm abstract for purposes of the Equal Protection Clause. And the purported vote dilution is also not concrete because it would occur in equal proportion *without* the alleged procedural illegality—that is, had the *General Assembly* enacted the Deadline Extension, which the Voter Plaintiffs do not challenge substantively.[9]

The concreteness of the Voter Plaintiffs' alleged vote dilution stemming from the Deadline Extension turns on the federal and state laws applicable to voting procedures. Federal law does not provide for *when* or *how* ballot counting occurs. *See, e.g.*, *Trump for Pres., Inc. v. Way*, No. 20-cv-01753, —— F.Supp.3d ——, ——, 2020 WL 5912561, at *12 (D.N.J. Oct. 6, 2020) ("Plaintiffs direct the Court to no federal law regulating methods of determining the timeliness of mail-in ballots or requiring that mail-in ballots be postmarked."); *see also Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 76 L.Ed. 795 (1932) (noting that Elections Clause delegates to state lawmaking processes all authority to prescribe "procedure and safeguards" for "counting of votes"). Instead, the Elections Clause delegates to each state's lawmaking function the authority to prescribe such procedural regulations applicable to federal elections. *U.S. Term Limits*, 514 U.S. at 832–35, 115 S.Ct. 1842 ("The Framers intended the Elections Clause to grant States authority to create procedural regulations .... [including] 'whether the electors should vote by ballot or vivâ voce ....' " (quoting James Madison, 2 Records of the Federal Convention of 1787, at 240 (M. Farrand ed. 1911) (cleaned up)); *Smiley*, 285 U.S. at 366, 52 S.Ct. 397 (describing state authority under Elections Clause "to provide a complete code for congressional elections ... in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns"). That delegation of authority embraces all procedures "which experience shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366, 52 S.Ct. 397. Congress exercises its power to "alter" state election regulations only if the state regime cannot "operate harmoniously" with federal election laws "in a single procedural scheme." *Gonzalez*, 677 F.3d at 394.

***354** The Deadline Extension and federal laws setting the date for federal elections can, and indeed do, operate harmoniously. At least 19 other States and the District of Columbia have post-Election Day absentee ballot receipt deadlines.[10] And many States also accept absentee ballots mailed by overseas uniformed servicemembers that are received after Election Day, in accordance with the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301–20311. So the Voter Plaintiffs' only cognizable basis for alleging dilution from the "unlawful" counting of invalid ballots is state law defining lawful and unlawful ballot counting practices. *Cf. Wise v. Circosta*, 978 F.3d 93, 100–01 (4th Cir. 2020) ("Whether ballots are *illegally* counted if they are received more than three days after Election Day depends on an issue of state law from which we must abstain." (emphasis in original)), *application for injunctive relief denied sub nom. Moore v. Circosta*, No. 20A72, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6305036 (Oct. 28, 2020). The Voter Plaintiffs seem to admit as much, arguing "that counting votes that are unlawful under the General Assembly's enactments will unconstitutionally dilute the lawful votes" cast by the Voter Plaintiffs. Appellants' Br. 38; *see also id.* at 31. In other words, the Voter Plaintiffs say that the Election Day ballot receipt deadline in Pennsylvania's codified election law renders the ballots untimely and therefore unlawful to count. Defendants, for their part, contend that the Pennsylvania Supreme Court's extension of that deadline under the Free and Equal Elections Clause of the state constitution renders them timely, and therefore lawful to count.

This conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment. Violation of state election laws by state officials ***355** or other unidentified third parties is not always amenable to a federal constitutional claim. *See Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("A deliberate violation of state election laws by state election officials does not transgress against the Constitution.") (cleaned up); *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (rejecting Equal Protection Clause claim arising from state's erroneous counting of votes cast by voters unqualified to participate in closed primary). "It was not intended by the Fourteenth Amendment ... that all matters formerly within the exclusive cognizance of the states should become matters of national concern." *Snowden v. Hughes*, 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497 (1944).

Contrary to the Voter Plaintiffs' conceptualization, vote dilution under the Equal Protection Clause is concerned with votes being weighed differently. *See Rucho v. Common Cause*, —— U.S. ——, 139 S. Ct. 2484, 2501, 204 L.Ed.2d 931 (2019) (" '[V]ote dilution' in the one-person, one-vote cases refers to the idea that each vote must carry *equal weight*." (emphasis added)); *cf. Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020), *as amended* (July 27, 2020) ("[N]o vote in the South Carolina system is diluted. Every qualified person gets one vote and each vote is counted equally in determining the final tally."). As explained below, the Voter Plaintiffs cannot analogize their Equal Protection claim to gerrymandering cases in which votes were weighted differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials' alleged violation of state law that does not cause unequal treatment. And if dilution of lawfully cast ballots by the "unlawful" counting of invalidly cast ballots "were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity." *Trump for Pres. v. Boockvar,* —— F.Supp.3d at ——– – ——, 2020 WL 5997680, at *45–46. That is not how the Equal Protection Clause works.[11]

Even if we were to entertain an end-run around the Voter Plaintiffs' lack of Elections Clause standing—by viewing the *federal* Elections Clause as the source of "unlawfulness" of Defendants' vote counting—the alleged vote dilution would not be a concrete injury. Consider, as we've noted, that the Voter Plaintiffs take no issue with the content of the Deadline Extension; they concede that the General Assembly, as other state legislatures have done, could have enacted exactly the same Deadline Extension as a valid "time[ ], place[ ], and manner" regulation consistent with the Elections Clause. *Cf. Snowden*, 321 U.S. at 8, 64 S.Ct. 397 (concluding that alleged "unlawful administration by state officers of a state statute *fair on its face*, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection" (emphasis added)); *Powell*, 436 F.2d at 88 ("Uneven or erroneous application of an *otherwise valid* statute constitutes a denial of equal protection ***356** only if it represents 'intentional or purposeful discrimination.' " (emphasis added) (quoting *Snowden*, 321 U.S. at 8, 64 S.Ct. 397)). Reduced to its essence, the Voter Plaintiffs' claimed vote dilution would rest on their allegation that federal law required a different state organ to issue the Deadline Extension. The Voter Plaintiffs have not alleged, for example, that they were prevented from casting their votes, *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), nor that their votes were not counted, *United States v. Mosley*, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1915). Any alleged harm of vote dilution that turns not on the proportional influence of votes, but solely on the federal illegality of the Deadline Extension, strikes us as quintessentially abstract in the election law context and "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)). That the alleged violation here relates to election law and the U.S. Constitution, rather than the mine-run federal consumer privacy statute, does not abrogate the requirement that a concrete harm must flow from the procedural illegality. *See, e.g.*, *Lujan*, 504 U.S. at 576, 112 S.Ct. 2130 ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.").

The Voter Plaintiffs thus lack a concrete Equal Protection Clause injury for their alleged harm of vote dilution attributable to the Deadline Extension.

ii. No particularized injury from votes counted under the Deadline Extension or the Presumption of Timeliness.

The opposite of a "particularized" injury is a "generalized grievance," where "the impact on plaintiff is plainly undifferentiated and common to all members of the public." *Id.* at 575, 112 S.Ct. 2130 (cleaned up); *see also Lance*, 549 U.S. at 439, 127 S.Ct. 1194. The District Court correctly held that the Voter Plaintiffs' "dilution" claim is a "paradigmatic generalized grievance that cannot support standing." *Bognet*, 2020 WL 6323121, at *4 (quoting *Carson v. Simon*, No. 20-cv-02030, —— F.Supp.3d ——, ——, 2020 WL 6018957, at *7 (D. Minn. Oct. 12, 2020), *rev'd on other grounds*, No. 20-3139, —— F.3d ——, 2020 WL 6335967 (8th Cir. Oct. 29, 2020)). The Deadline Extension and Presumption of Timeliness, assuming they operate to allow the illegal counting of unlawful votes, "dilute" the influence of all voters in Pennsylvania equally and in an "undifferentiated" manner and do not dilute a certain group of voters particularly.[12]

Put another way, "[a] vote cast by fraud or mailed in by the wrong person through mistake," or otherwise counted illegally, "has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no

single voter is specifically disadvantaged." *Martel v. Condos*, No. 5:20-cv-00131, —— F.Supp.3d ——, ——, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020). Such an alleged "dilution" is suffered equally by all voters and is not "particularized" for standing purposes. ***357** The courts to consider this issue are in accord. *See id.*; *Carson*, —— F.Supp.3d at —— – ——, 2020 WL 6018957, at *7–8; *Moore v. Circosta*, Nos. 1:20-cv-00911, 1:20-cv-00912, —— F.Supp.3d ——, ——, 2020 WL 6063332, at *14 (M.D.N.C. Oct. 14, 2020), *emergency injunction pending appeal denied sub nom. Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020), *application for injunctive relief denied sub nom. Moore v. Circosta*, No. 20A72, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6305036 (U.S. Oct. 28, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. Apr. 30, 2020).

But the Voter Plaintiffs argue that their purported "vote dilution" is an injury in fact sufficient to confer standing, and *not* a generalized grievance belonging to all voters, because the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.' " *Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)). "Thus, 'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

The Voter Plaintiffs' reliance on this language from *Baker* and *Reynolds* is misplaced. In *Baker*, the plaintiffs challenged Tennessee's apportionment of seats in its legislature as violative of the Equal Protection Clause of the Fourteenth Amendment. 369 U.S. at 193, 82 S.Ct. 691. The Supreme Court held that the plaintiffs *did* have standing under Article III because "[t]he injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties." *Id.* at 207–08, 82 S.Ct. 691.

Although the *Baker* Court did not decide the merits of the Equal Protection claim, the Court in a series of cases—including *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), and *Reynolds*—made clear that the Equal Protection Clause prohibits a state from "diluti[ng] ... the *weight* of the votes of certain ... voters merely because of where they reside[ ]," just as it prevents a state from discriminating on the basis of the voter's race or sex. *Reynolds*, 377 U.S. at 557, 84 S.Ct. 1362 (emphasis added). The Voter Plaintiffs consider it significant that the Court in *Reynolds* noted—though not in the context of standing—that "the right to vote" is "individual and personal in nature." *Id.* at 561, 84 S.Ct. 1362 (quoting *United States v. Bathgate*, 246 U.S. 220, 227, 38 S.Ct. 269, 62 L.Ed. 676 (1918)). The Court then explained that a voter's right to vote encompasses both the right to cast that vote and the right to have that vote counted without "debasement or dilution":

> The right to vote can neither be denied outright, *Guinn v. United States*, 238 U.S. 347 [35 S.Ct. 926, 59 L.Ed. 1340 (1915)], *Lane v. Wilson*, 307 U.S. 268 [59 S.Ct. 872, 83 L.Ed. 1281 (1939)], nor destroyed by alteration of ballots, see *United States v. Classic*, 313 U.S. 299, 315 [61 S.Ct. 1031, 85 L.Ed. 1368 (1941)], nor diluted by ballot-box stuffing, *Ex parte Siebold*, 100 U.S. 371 [25 L.Ed. 717 (1880)], *United States v. Saylor*, 322 U.S. 385 [64 S.Ct. 1101, 88 L.Ed. 1341 (1944)]. As the Court stated in *Classic*, "Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted ...." 313 U.S. at 315 [61 S.Ct. 1031].
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> ***358** "The right to vote includes the right to have the ballot counted. ... It also includes the right to have the vote counted at full value without dilution or discount. ... That federally protected right suffers substantial dilution ... [where a] favored group has full voting strength ... [and] [t]he groups not in favor have their votes discounted."

Reynolds, 377 U.S. at 555 & n.29, 84 S.Ct. 1362 (alterations in last paragraph in original) (quoting *South v. Peters*, 339 U.S. 276, 279, 70 S.Ct. 641, 94 L.Ed. 834 (1950) (Douglas, J., dissenting)).

Still, it does not follow from the labeling of the right to vote as "personal" in *Baker* and *Reynolds* that *any* alleged illegality affecting voting rights rises to the level of an injury in fact. After all, the Court has observed that the harms underlying a racial gerrymandering claim under the Equal Protection Clause "are personal" in part because they include the harm of a voter "being personally subjected to a racial classification." *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 263, 135 S.Ct. 1257, 191 L.Ed.2d 314 (2015) (cleaned up). Yet a voter "who complains of gerrymandering, but who does not live in a gerrymandered district, 'assert[s] only a generalized grievance against governmental conduct of which he or she

does not approve.' " *Gill*, 138 S. Ct. at 1930 (quoting *United States v. Hays*, 515 U.S. 737, 745, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995)) (alteration in original). The key inquiry for standing is whether the alleged violation of the right to vote arises from an invidious classification—including those based on "race, sex, economic status, or place of residence within a State," *Reynolds*, 377 U.S. at 561, 84 S.Ct. 1362—to which the plaintiff is subject and in which "the favored group has full voting strength and the groups not in favor have their votes discounted," *id.* at 555 n.29, 84 S.Ct. 1362 (cleaned up). In other words, "voters who allege facts *showing disadvantage to themselves*" have standing to bring suit to remedy that disadvantage, *Baker*, 369 U.S. at 206, 82 S.Ct. 691 (emphasis added), but a disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group. Here, no Pennsylvania voter's vote will count for less than that of any other voter as a result of the Deadline Extension and Presumption of Timeliness.[13]

This conclusion cannot be avoided by describing one group of voters as "those ... who lawfully vote in person and submit their ballots *on time*" and the other group of voters as those whose (mail-in) ballots arrive after Election Day and are counted because of the Deadline Extension and/or the Presumption of Timeliness. Appellants' Br. 33 (emphasis in original). Although the former group, under Plaintiffs' theory, should make up 100% of the total votes counted and the latter group 0%, there is ***359** simply no differential *weighing* of the votes. *See Wise*, 978 F.3d at 104 (Motz, J., concurring) ("But if the extension went into effect, plaintiffs' votes would not count for less *relative to other North Carolina voters*. This is the core of an Equal Protection Clause challenge." (emphasis in original)). Unlike the malapportionment or racial gerrymandering cases, a vote cast by a voter in the so-called "favored" group counts not one bit more than the same vote cast by the "disfavored" group—no matter what set of scales one might choose to employ. *Cf. Reynolds*, 377 U.S. at 555 n.29, 84 S.Ct. 1362. And, however one tries to draw a contrast, this division is not based on a voter's personal characteristics at all, let alone a person's race, sex, economic status, or place of residence. Two voters could each have cast a mail-in ballot before Election Day at the same time, yet perhaps only one of their ballots arrived by 8:00 P.M. on Election Day, given USPS's mail delivery process. It is passing strange to assume that one of these voters would be denied "equal protection of the laws" were *both* votes counted. U.S. Const. amend. XIV, § 1.

The Voter Plaintiffs also emphasize language from *Reynolds* that "[t]he right to vote can neither be denied outright ... nor diluted by ballot-box stuffing." 377 U.S. at 555, 84 S.Ct. 1362 (citing *Ex parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1879); *United States v. Saylor*, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944)). In the first place, casting a vote in accordance with a procedure approved by a state's highest court—even assuming that approval violates the Elections Clause—is not equivalent to "ballot-box stuffing." The Supreme Court has only addressed this "false"-tally type of dilution where the tally was false as a result of a scheme to cast falsified or fraudulent votes. *See Saylor*, 322 U.S. at 386, 64 S.Ct. 1101. We are in uncharted territory when we are asked to declare that a tally that includes false or fraudulent votes is equivalent to a tally that includes votes that are or may be unlawful for non-fraudulent reasons, and so is more aptly described as "incorrect." *Cf. Gray*, 372 U.S. at 386, 83 S.Ct. 801 (Harlan, J., dissenting) ("[I]t is hard to take seriously the argument that 'dilution' of a vote in consequence of a legislatively sanctioned electoral system can, without more, be analogized to an impairment of the political franchise by ballot box stuffing or other criminal activity.").

Yet even were this analogy less imperfect, it still would not follow that every such "false" or incorrect tally is an injury in fact for purposes of an Equal Protection Clause claim. The Court's cases that describe ballot-box stuffing as an injury to the right to vote have arisen from criminal prosecutions under statutes making it unlawful for anyone to injure the exercise of another's constitutional right. *See, e.g.*, *Ex parte Siebold*, 100 U.S. at 373–74 (application for writ of habeas corpus); *Saylor*, 322 U.S. at 385–86, 64 S.Ct. 1101 (criminal appeal regarding whether statute prohibiting "conspir[ing] to injure ... any citizen in the free exercise ... of any right or privilege secured to him by the Constitution" applied to conspiracy to stuff ballot boxes); *Anderson v. United States*, 417 U.S. 211, 226, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974) (criminal prosecution for conspiracy to stuff ballot boxes under successor to statute in *Saylor*). Standing was, of course, never an issue in those cases because the Government was enforcing its criminal laws. Here, the Voter Plaintiffs, who bear the burden to show standing, have presented no instance in which an individual voter had Article III standing to claim an equal protection harm to his or her vote from the existence of an allegedly illegal vote cast by someone else in the same election.

***360** Indeed, the logical conclusion of the Voter Plaintiffs' theory is that whenever an elections board counts any ballot

that deviates in some way from the requirements of a state's legislatively enacted election code, there is a *particularized* injury in fact sufficient to confer Article III standing on every other voter—provided the remainder of the standing analysis is satisfied. Allowing standing for such an injury strikes us as indistinguishable from the proposition that a plaintiff has Article III standing to assert a general interest in seeing the "proper application of the Constitution and laws"—a proposition that the Supreme Court has firmly rejected. *Lujan*, 504 U.S. at 573–74, 112 S.Ct. 2130. The Voter Plaintiffs thus lack standing to bring their Equal Protection vote dilution claim.

b. Arbitrary and Disparate Treatment

The Voter Plaintiffs also lack standing to allege an injury in the form of "arbitrary and disparate treatment" of a preferred class of voters because the Voter Plaintiffs have not alleged a legally cognizable "preferred class" for equal protection purposes, and because the alleged harm from votes counted solely due to the Presumption of Timeliness is hypothetical or conjectural.

i. No legally protected "preferred class."

The District Court held that the Presumption of Timeliness creates a "preferred class of voters" who are "able to cast their ballots after the congressionally established Election Day" because it "extends the date of the election by multiple days for a select group of mail-in voters whose ballots will be presumed to be timely in the absence of a verifiable postmark."[14] *Bognet*, 2020 WL 6323121, at *6. The District Court reasoned, then, that the differential treatment between groups of voters is by itself an injury for standing purposes. To the District Court, this supposed "unequal treatment of voters ... harms the [Voter] Plaintiffs because, as in-person voters, they must vote by the end of the congressionally established Election Day in order to have their votes counted." *Id.* The District Court cited no case law in support of its conclusion that the injury it identified gives rise to Article III standing.

The District Court's analysis suffers from several flaws. First, the Deadline Extension and Presumption of Timeliness apply to all voters, not just a subset of "preferred" voters. It is an individual voter's *choice* whether to vote by mail or in person, and thus whether to become a part of the so-called "preferred class" that the District Court identified. Whether to join the "preferred class" of mail-in voters was entirely up to the Voter Plaintiffs.

Second, it is not clear that the mere creation of so-called "classes" of voters constitutes an injury in fact. An injury in fact requires the "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. We doubt that the mere existence of groupings of voters qualifies as an injury per se. "An equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)); *see also*, *e.g.*, *Batra v. Bd. of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996) ("[T]he relevant prerequisite is unlawful discrimination, not whether plaintiff is part of a victimized class."). ***361** More importantly, the Voter Plaintiffs have shown no disadvantage to themselves that arises simply by being separated into groupings. For instance, there is no argument that it is inappropriate that some voters will vote in person and others will vote by mail. The existence of these two groups of voters, without more, simply does not constitute an injury in fact to in-person voters.

Plaintiffs may believe that injury arises because of a preference shown for one class over another. But what, precisely, is the preference of which Plaintiffs complain? In *Bush v. Gore*, the Supreme Court held that a State may not engage in arbitrary and disparate treatment that results in the valuation of one person's vote over that of another. 531 U.S. at 104–05, 121 S.Ct. 525. Thus, "the right of suffrage can be denied by a *debasement or dilution of the weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 105, 121 S.Ct. 525 (quoting *Reynolds*, 377 U.S. at 555, 84 S.Ct. 1362) (emphasis added). As we have already discussed, vote dilution is not an injury in fact here.

What about the risk that some ballots placed in the mail after Election Day may still be counted? Recall that no voter—whether in person or by mail—is *permitted* to vote after Election Day. Under Plaintiffs' argument, it might theoretically be easier for one group of voters—mail-in voters—to illegally cast late votes than it is for another group of voters—in-person voters. But even if that is the case, no group of voters has the *right* to vote after the deadline.[15] We remember that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."

Linda R.S. v. Richard D., 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) (citations omitted). And "a plaintiff lacks standing to complain about his inability to commit crimes because no one has a right to commit a crime." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014). Without a showing of discrimination or other intentionally unlawful conduct, or at least some burden on Plaintiffs' own voting rights, we discern no basis on which they have standing to challenge the slim opportunity the Presumption of Timeliness conceivably affords wrongdoers to violate election law. *Cf. Minn. Voters Alliance v. Ritchie*, 720 F.3d 1029, 1033 (8th Cir. 2013) (affirming dismissal of claims "premised on potential harm in the form of vote dilution caused by insufficient pre-election verification of [election day registrants'] voting eligibility and the absence of post-election ballot rescission procedures").

ii. Speculative injury from ballots counted under the Presumption of Timeliness.

Plaintiffs' theory as to the Presumption of Timeliness focuses on the potential for some voters to vote after Election Day and still have their votes counted. This argument reveals that their alleged injury in fact attributable to the Presumption is "conjectural or hypothetical" instead of "actual or imminent." *Spokeo*, 136 S. Ct. at 1547–48 (quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130). The Supreme Court has emphasized that a threatened injury must be "*certainly impending*" and not merely "*possible*" for it to constitute an injury in fact. *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (emphasis in original) (quoting ***362** *Whitmore v. Ark.*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)). When determining Article III standing, our Court accepts allegations based on well-pleaded facts; but we do not credit bald assertions that rest on mere supposition. *Finkelman v. NFL*, 810 F.3d 187, 201–02 (3d Cir. 2016). The Supreme Court has also emphasized its "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414, 133 S.Ct. 1138. A standing theory becomes even more speculative when it requires that independent actors make decisions to act *unlawfully*. *See City of L.A. v. Lyons*, 461 U.S. 95, 105–06 & 106 n.7, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (rejecting Article III standing to seek injunction where party invoking federal jurisdiction would have to establish that he would unlawfully resist arrest or police officers would violate department orders in future).

Here, the Presumption of Timeliness could inflict injury on the Voter Plaintiffs only if: (1) another voter violates the law by casting an absentee ballot after Election Day; (2) the illegally cast ballot does not bear a legible postmark, which is against USPS policy;[16] (3) that same ballot still arrives within three days of Election Day, which is faster than USPS anticipates mail delivery will occur;[17] (4) the ballot lacks sufficient indicia of its untimeliness to overcome the Presumption of Timeliness; and (5) that same ballot is ultimately counted. *See Donald J. Trump for Pres., Inc. v. Way*, No. 20-cv-10753, 2020 WL 6204477, at *7 (D.N.J. Oct. 22, 2020) (laying out similar "unlikely chain of events" required for vote dilution harm from postmark rule under New Jersey election law); *see also Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) (holding purported injury in fact was too conjectural where "we cannot now describe how Appellants will be injured in this case without beginning our explanation with the word 'if' "). This parade of horribles "may never come to pass," *Trump for Pres. v. Boockvar*, 2020 WL 5997680, at *33, and we are especially reluctant to endorse such a speculative theory of injury given Pennsylvania's "own mechanisms for deterring and prosecuting voter fraud," *Donald J. Trump for Pres., Inc. v. Cegavske*, No. 20-1445, —— F.Supp.3d ——, ——, 2020 WL 5626974, at *6 (D. Nev. Sept. 18, 2020).[18]

To date, the Secretary has reported that at least 655 ballots without a legible postmark have been collected within the Deadline Extension period.[19] But it is mere speculation to say that any one of those ballots was cast after Election Day. We are reluctant to conclude that an independent ***363** actor—here, one of 655 voters—decided to mail his or her ballot after Election Day contrary to law. The Voter Plaintiffs have not provided any empirical evidence on the frequency of voter fraud or the speed of mail delivery that would establish a statistical likelihood or even the plausibility that any of the 655 ballots was cast after Election Day. Any injury to the Voter Plaintiffs attributable to the Presumption of Timeliness is merely "possible," not "actual or imminent," and thus cannot constitute an injury in fact.

B. Purcell

Even were we to conclude that Plaintiffs have standing, we could not say that the District Court abused its discretion in concluding on this record that the Supreme Court's election-law jurisprudence counseled against injunctive relief. Unique and important equitable considerations, including voters' reliance on the rules in place when they made their plans

to vote and chose how to cast their ballots, support that disposition. Plaintiffs' requested relief would have upended this status quo, which is generally disfavored under the "voter confusion" and election confidence rationales of *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006). One can assume for the sake of argument that aspects of the now-prevailing regime in Pennsylvania are unlawful as alleged and still recognize that, given the timing of Plaintiffs' request for injunctive relief, the electoral calendar was such that following it "one last time" was the better of the choices available. *Perez,* 138 S. Ct. at 2324 ("And if a [redistricting] plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.").

Here, less than two weeks before Election Day, Plaintiffs asked the District Court to enjoin a deadline established by the Pennsylvania Supreme Court on September 17, a deadline that may have informed voters' decisions about whether and when to request mail-in ballots as well as when and how they cast or intended to cast them. In such circumstances, the District Court was well within its discretion to give heed to Supreme Court decisions instructing that "federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, —— U.S. ——, 140 S. Ct. 1205, 1207, 206 L.Ed.2d 452 (2020) (per curiam) (citing *Purcell*, 549 U.S. at 1, 127 S.Ct. 5).

In *Purcell*, an appeal from a federal court order enjoining the State of Arizona from enforcing its voter identification law, the Supreme Court acknowledged that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." 549 U.S. at 4, 127 S.Ct. 5. In other words, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5, 127 S.Ct. 5. Mindful of "the necessity for clear guidance to the State of Arizona" and "the imminence of the election," the Court vacated the injunction. *Id.* at 5, 127 S.Ct. 5.

The principle announced in *Purcell* has very recently been reiterated. First, in *Republican National Committee*, the Supreme Court stayed on the eve of the April 7 Wisconsin primary a district court order that altered the State's voting rules by extending certain deadlines applicable to absentee ballots. 140 S. Ct. at 1206. The Court noted that it was adhering to *Purcell* and had "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an ***364** election." *Id.* at 1207 (citing *Purcell*, 549 U.S. at 1, 127 S.Ct. 5). And just over two weeks ago, the Court denied an application to vacate a stay of a district court order that made similar changes to Wisconsin's election rules six weeks before Election Day. *Democratic Nat'l Comm. v. Wis. State Legislature*, No. 20A66, 592 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 6275871 (Oct. 26, 2020) (denying application to vacate stay). Justice Kavanaugh explained that the injunction was improper for the "independent reason[ ]" that "the District Court changed Wisconsin's election rules too close to the election, in contravention of this Court's precedents." *Id.* at ——, 2020 WL 6275871 at *3 (Kavanaugh, J., concurring). *Purcell* and a string[20] of Supreme Court election-law decisions in 2020 "recognize a basic tenet of election law: When an election is close at hand, the rules of the road should be clear and settled." *Id.*

The prevailing state election rule in Pennsylvania permitted voters to mail ballots up through 8:00 P.M. on Election Day so long as their ballots arrived by 5:00 P.M. on November 6. Whether that rule was wisely or properly put in place is not before us now. What matters for our purposes today is that Plaintiffs' challenge to it was not filed until sufficiently close to the election to raise a reasonable concern in the District Court that more harm than good would come from an injunction changing the rule. In sum, the District Court's justifiable reliance on *Purcell* constitutes an "alternative and independent reason[ ]" for concluding that an "injunction was unwarranted" here. *Wis. State Legislature*, —— S.Ct. at ——, 2020 WL 6275871, at *3 (Kavanaugh, J., concurring).

IV. Conclusion

We do not decide today whether the Deadline Extension or the Presumption of Timeliness are proper exercises of the Commonwealth of Pennsylvania's lawmaking authority, delegated by the U.S. Constitution, to regulate federal elections. Nor do we evaluate the policy wisdom of those two features of the Pennsylvania Supreme Court's ruling. We hold only that when voters cast their ballots under a state's facially lawful election rule and in accordance with instructions from the state's election officials, private citizens lack Article III standing to enjoin the counting of those ballots on the grounds that the source of the rule was the wrong state organ or that doing so dilutes their votes or constitutes differential treatment of voters in violation of the Equal

Protection Clause. Further, and independent of our holding on standing, we hold that the District Court did not err in denying Plaintiffs' motion for injunctive relief out of concern for the settled expectations of voters and election officials. We will affirm the District Court's denial of Plaintiffs' ***365** emergency motion for a TRO or preliminary injunction.

All Citations

980 F.3d 336

Footnotes

1 Second Letter from Phocion (April 1784), *reprinted in* 3 The Papers of Alexander Hamilton, 1782–1786, 530–58 (Harold C. Syrett ed., 1962).

2 Throughout this opinion, we refer to absentee voting and mail-in voting interchangeably.

3 The Free and Equal Elections Clause of the Pennsylvania Constitution provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. 1, § 5.

4 Because we have received comprehensive briefing, and given the weighty public interest in a prompt ruling on the matter before us, we have elected to forgo oral argument.

5 Bognet seeks to represent Pennsylvania in Congress, but even if he somehow had a relationship to *state* lawmaking processes, he would lack personal standing to sue for redress of the alleged "institutional injury (the diminution of legislative power), which necessarily damage[d] all Members of [the legislature] ... equally." *Raines v. Byrd*, 521 U.S. 811, 821, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (plaintiffs were six out of 535 members of Congress); *see also Corman*, 287 F. Supp. 3d at 568–69 (concluding that "two of 253 members of the Pennsylvania General Assembly" lacked standing to sue under Elections Clause for alleged "deprivation of 'their legislative authority to apportion congressional districts' "); *accord Va. House of Delegates v. Bethune-Hill*, —— U.S. ——, 139 S. Ct. 1945, 1953, 204 L.Ed.2d 305 (2019).

6 Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots. *See Carson v. Simon*, No. 20-3139, —— F.3d ——, ——, 2020 WL 6335967, at *5 (8th Cir. Oct. 29, 2020). The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none.

7 The alleged injury specific to Bognet does not implicate the Qualifications Clause or exclusion from Congress, *Powell v. McCormack*, 395 U.S. 486, 550, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), nor the standing of members of Congress to bring actions alleging separation-of-powers violations. *Moore v. U.S. House of Reps.*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring).

8 Only the Voter Plaintiffs bring the Equal Protection count in the Complaint; Bognet did not join that count.

9 We exclude the Presumption of Timeliness from our concreteness analysis. Plaintiffs allege that the federal statutes providing for a uniform election day, 3 U.S.C. § 1 and 2 U.S.C. § 7, conflict with, and thus displace, any state law that would authorize voting after Election Day. They claim that the Presumption permits, theoretically at least, some voters whose ballots lack a legible postmark to vote *after* Election Day, in violation of these federal statutes. So unlike the Deadline Extension, Plaintiffs contend that the General Assembly could not enact the Presumption consistent with the Constitution. This conceptualization of injury is thus more properly characterized as "concrete" than is the purported Deadline Extension injury attributable to voters having their timely voted ballots received and counted after Election Day. That said, we express no opinion about whether the Voter Plaintiffs have, in fact, alleged such a concrete injury for standing purposes.

10 *See* AS § 15.20.081(e) & (h) (Alaska – 10 days after Election Day if postmarked on or before Election Day); West's Ann. Cal. Elec. Code § 3020(b) (California – three days after Election Day if postmarked on or before Election Day); DC ST § 1-1001.05(a)(10A) (District of Columbia – seven days after the election if postmarked on or before Election Day); 10 ILCS 5/19-8, 5/18A-15 (Illinois – 14 days after the election if postmarked on or before Election Day); K.S.A. 25-1132 (Kansas – three days after the election if postmarked before the close of polls on Election Day); MD Code, Elec. Law, § 9-505 (Maryland – the second Friday after Election Day if postmarked on or before Election Day); Miss. Code Ann. § 23-15-637 (Mississippi – five business days after Election Day if postmarked on or before Election Day); NV Rev Stat § 293.317 (Nevada – by 5:00 P.M. on the seventh day after Election Day if postmarked by Election Day, and ballots with unclear

postmarks must be received by 5:00 P.M. on the third day after Election Day); N.J.S.A. 19:63-22 (New Jersey – 48 hours after polls close if postmarked on or before Election Day); McKinney's Elec. Law § 8-412 (New York – seven days after the election for mailed ballots postmarked on Election Day); N.C. Gen. Stat. § 163-231(b)(2) and *Wise v. Circosta*, 978 F.3d 93, 96 (4th Cir. 2020) (North Carolina – recognizing extension from three to nine days after the election the deadline for mail ballots postmarked on or before Election Day); Texas Elec. Code § 86.007 (the day after the election by 5:00 P.M. if postmarked on or before Election Day); Va. Code 24.2-709 (Virginia – by noon on the third day after the election if postmarked on or before Election Day); West's RCWA 29A.40.091 (Washington – no receipt deadline for ballots postmarked on or before Election Day); W. Va. Code, §§ 3-3-5, 3-5-17 (West Virginia – five days after the election if postmarked on or before Election Day); *see also* Iowa Code § 53.17(2) (by noon the Monday following the election if postmarked by the day before Election Day); NDCC 16.1-07-09 (North Dakota – before the canvass if postmarked the day before Election Day); R.C. § 3509.05 (Ohio – 10 days after the election if postmarked by the day before Election Day); Utah Code Ann. § 20A-3a-204 (seven to 14 days after the election if postmarked the day before the election).

11 *Bush v. Gore* does not require us to perform an Equal Protection Clause analysis of Pennsylvania election law as interpreted by the Pennsylvania Supreme Court. *See* 531 U.S. at 109, 121 S.Ct. 525 ("Our consideration is limited to the present circumstances ...."); *id.* at 139–40, 121 S.Ct. 525 (Ginsburg, J., dissenting) (discussing "[r]are[ ]" occasions when Supreme Court rejected state supreme court's interpretation of state law, one of which was in 1813 and others occurred during Civil Rights Movement—and none decided federal equal protection issues).

12 In their complaint, the Voter Plaintiffs alleged that they are all "residents of Somerset County, a county where voters are requesting absentee ballots at a rate *far less* than the state average" and thus, somehow, the Voter Plaintiffs' votes "will be diluted to a greater degree than other voters." Compl. ¶ 71 (emphasis in original). Plaintiffs continue to advance this argument on appeal in support of standing, and it additionally suffers from being a conjectural or hypothetical injury under the framework discussed *infra* Section III.A.2.b.ii. It is purely hypothetical that counties where a greater percentage of voters request absentee ballots will more frequently have those ballots received after Election Day.

13 Plaintiffs also rely on *FEC v. Akins*, 524 U.S. 11, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998), for the proposition that a widespread injury—such as a mass tort injury or an injury "where large numbers of voters suffer interference with voting rights conferred by law"—does not become a "generalized grievance" just because many share it. *Id.* at 24–25, 118 S.Ct. 1777. That's true as far as it goes. But the Voter Plaintiffs have not alleged an injury like that at issue in *Akins*. There, the plaintiffs' claimed injury was their inability to obtain information they alleged was required to be disclosed under the Federal Election Campaign Act. *Id.* at 21, 118 S.Ct. 1777. The plaintiffs alleged a statutory right to obtain information and that the same information was being withheld. Here, the Voter Plaintiffs' alleged injury is to their right under the Equal Protection Clause not to have their votes "diluted," but the Voter Plaintiffs have not alleged that their votes are less influential than any other vote.

14 The District Court did not find that the Deadline Extension created such a preferred class.

15 Moreover, we cannot overlook that the mail-in voters potentially suffer a *disadvantage* relative to the in-person voters. Whereas in-person ballots that are timely cast will count, timely cast mail-in ballots may not count because, given mail delivery rates, they may not be received by 5:00 P.M. on November 6.

16 *See* Defendant-Appellee's Br. 30 (citing 39 C.F.R. § 211.2(a)(2); Postal Operations Manual at 443.3).

17 *See Pa. Democratic Party*, 238 A.3d at 364 (noting "current two to five day delivery expectation of the USPS").

18 Indeed, the conduct required of a voter to effectuate such a scheme may be punishable as a crime under Pennsylvania statutes that criminalize forging or "falsely mak[ing] the official endorsement on any ballot," 25 Pa. Stat. & Cons. Stat. § 3517 (punishable by up to two years' imprisonment); "willfully disobey[ing] any lawful instruction or order of any county board of elections," *id.* § 3501 (punishable by up to one year's imprisonment); or voting twice in one election, *id.* § 3535 (punishable by up to seven years' imprisonment).

19 As of the morning of November 12, Secretary Boockvar estimates that 655 of the 9383 ballots received between 8:00 P.M. on Election Day and 5:00 P.M. on November 6 lack a legible postmark. *See* Dkt. No. 59. That estimate of 655 ballots does not include totals from five of Pennsylvania's 67 counties: Lehigh, Northumberland, Tioga, Warren, and Wayne. *Id.* The 9383 ballots received, however, account for all of Pennsylvania's counties. *Id.*

20 *See, e.g.*, *Andino v. Middleton*, No. 20A55, 592 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J., concurring) ("By enjoining South Carolina's witness requirement shortly before the election, the District Court defied [the *Purcell*] principle and this Court's precedents." (citations omitted)); *Merrill v. People First of Ala.*, No. 19A1063, 591 U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 3604049 (Mem.), at *1 (July 2, 2020); *Republican Nat'l Comm.*, 140 S. Ct. at 1207; *see also Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639, 641 (7th Cir. 2020) (per curiam) (holding that injunction issued six weeks before election violated *Purcell*); *New Ga.*

Project v. Raffensperger, 976 F.3d 1278, 1283 (11th Cir. Oct. 2, 2020) ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus violate *Purcell*'s well-known caution against federal courts mandating new election rules—especially at the last minute." (citing *Purcell*, 549 U.S. at 4–5, 127 S.Ct. 5)).

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2020 WL 5997680
Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

DONALD J. TRUMP FOR PRESIDENT, INC., et al., Plaintiffs
v.
Kathy BOOCKVAR, in her capacity as Secretary of the Commonwealth of Pennsylvania, et al., Defendants.

No. 2:20-cv-966
|
Signed 10/10/2020

Synopsis

Background: President's reelection campaign, Republican National Committee, and Republican congressional candidates and electors filed suit against state and county election officials alleging federal and state constitutional violations stemming from Pennsylvania's implementation of mail-in voting plan for upcoming general election and its poll watcher residency requirement. State Democratic Party, advocacy organizations, and their members intervened. Parties filed cross-motions for summary judgment.

Holdings: The District Court, J. Nicholas Ranjan, J., held that:

plaintiffs' claims were ripe for adjudication;

any injury that plaintiffs would suffer was too speculative to establish Article III standing;

use of unmanned drop boxes for mail-in ballots by some counties, but not others, did not violate Equal Protection Clause;

use of unmanned drop boxes for mail-in ballots did not violate substantive due process principles;

state law did not impose signature comparison requirement for mail-in and absentee ballots;

state law did not impose signature comparison requirement for applications for mail-in and absentee ballots;

fact that some county boards of elections intended to verify signatures on mail-in and absentee ballots and applications, while others did not, did not violate Equal Protection Clause;

fact that state did not require signature comparison for mail-in and absentee ballots, but did for in-person ballots, did not violate Equal Protection Clause; and

county residency requirement on being poll watcher did not violate plaintiffs' constitutional rights.

Defendants' motion granted.

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OPINION

J. Nicholas Ranjan, United States District Judge

***1** Plaintiffs in this case are President Trump's reelection campaign, the Republican National Committee, and several other Republican congressional candidates and electors. They originally filed this suit, alleging federal and state constitutional violations stemming from Pennsylvania's implementation of a mail-in voting plan for the upcoming general election.

Since then, the Pennsylvania Supreme Court issued a decision involving similar claims, which substantially narrowed the focus of this case. And Secretary of the Commonwealth, Kathy Boockvar, issued additional election "guidance," which further narrowed certain of the claims.

Therefore, as this case presently stands, only three claims remain. First, whether the use of so-called "drop boxes"[1] for mail-in ballots is unconstitutional, given the lack of guidance or mandates that those drop boxes have security guards to man them. Second, whether the Secretary's guidance as to mail-in ballots—specifically, her guidance that county election boards should not reject mail-in ballots where the voter's signature does not match the one on file—is unconstitutional. Third, whether Pennsylvania's restriction that poll watchers be residents in the county for which they are assigned, as applied to the facts of this case, is unconstitutional.

In order to present these claims to the Court on a complete record, the parties engaged in extensive fact and expert discovery, and have filed cross-motions for summary judgment. No party has raised a genuine dispute of material fact that would require a trial, and the Court has found none. As such, the parties' cross-motions for summary judgment are ready for disposition.

After a careful review of the parties' submissions and the extensive evidentiary record, the Court will enter judgment in favor of Defendants on all of Plaintiffs' federal-constitutional claims, decline to exercise supplemental jurisdiction over the state-constitutional claims, and dismiss this case. This is so for two main reasons.

First, the Court concludes that Plaintiffs lack Article III standing to pursue their claims. Standing, of course, is a necessary requirement to cross the threshold into federal court. Federal courts adjudicate cases and controversies, where a plaintiff's injury is concrete and particularized. Here, however, Plaintiffs have not presented a concrete injury to warrant federal-court review. All of Plaintiffs' remaining claims have the same theory of injury—one of "vote dilution." Plaintiffs fear that absent implementation of the security measures that they seek (guards by drop boxes, signature comparison of mail-in ballots, and poll watchers), there is a risk of voter fraud by other voters. If another person engages

in voter fraud, Plaintiffs assert that their own lawfully cast vote will, by comparison, count for less, or be diluted.

***2** The problem with this theory of harm is that it is speculative, and thus Plaintiffs' injury is not "concrete"—a critical element to have standing in federal court. While Plaintiffs may not need to prove actual voter fraud, they must at least prove that such fraud is "certainly impending." They haven't met that burden. At most, they have pieced together a sequence of uncertain assumptions: (1) they assume potential fraudsters may attempt to commit election fraud through the use of drop boxes or forged ballots, or due to a potential shortage of poll watchers; (2) they assume the numerous election-security measures used by county election officials may not work; and (3) they assume their own security measures may have prevented that fraud.

All of these assumptions could end up being true, and these events could theoretically happen. But so could many things. The relevant question here is: are they "certainly impending"? At least based on the evidence presented, the answer to that is "no." And that is the legal standard that Plaintiffs must meet. As the Supreme Court has held, this Court cannot "endorse standing theories that rest on speculation about the decisions of independent actors." *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013).

Second, even if Plaintiffs had standing, their claims fail on the merits. Plaintiffs essentially ask this Court to second-guess the judgment of the Pennsylvania General Assembly and election officials, who are experts in creating and implementing an election plan. Perhaps Plaintiffs are right that guards should be placed near drop boxes, signature-analysis experts should examine every mail-in ballot, poll watchers should be able to man any poll regardless of location, and other security improvements should be made. But the job of an unelected federal judge isn't to suggest election improvements, especially when those improvements contradict the reasoned judgment of democratically elected officials. *See Andino v. Middleton*, —— U.S. ——, —— S.Ct. ——, ——, —— L.Ed.2d ——, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J. concurring) (state legislatures should not be subject to "second-guessing by an unelected federal judiciary," which is "not accountable to the people") (cleaned up).

Put differently, "[f]ederal judges can have a lot of power—especially when issuing injunctions. And sometimes we may even have a good idea or two. But the Constitution sets out our sphere of decision-making, and that sphere does not extend to second-guessing and interfering with a State's reasonable, nondiscriminatory election rules." *New Georgia Project v. Raffensperger*, —— F.3d ——, ——, 2020 WL 5877588, at *4 (11th Cir. Oct. 2, 2020).

As discussed below, the Court finds that the election regulations put in place by the General Assembly and implemented by Defendants do not significantly burden any right to vote. They are rational. They further important state interests. They align with the Commonwealth's elaborate election-security measures. They do not run afoul of the United States Constitution. They will not otherwise be second-guessed by this Court.

BACKGROUND

I. Procedural Background

A. Plaintiffs' original claims.

On June 29, 2020, Plaintiffs filed their original complaint in this case against Defendants, who are the Secretary of the Commonwealth and the 67 county boards of elections. [ECF 4]. With their lawsuit, Plaintiffs challenged a number of Pennsylvania's procedures with respect to mail-in voting—in particular, the use of drop boxes and the counting of mail-in ballots that contained certain procedural defects. *See* [*id.*]. Shortly after filing their original complaint, Plaintiffs moved for expedited discovery and an expedited declaratory-judgment hearing. [ECF 6]. Defendants opposed the motion. The Court partially granted the motion, scheduled a speedy hearing, and ordered expedited discovery before that hearing. [ECF 123; ECF 124].

***3** After Plaintiffs filed the original complaint, many non-parties sought to intervene in the action, including several organizations.[2] The Court granted all intervention motions. [ECF 309].

Defendants and Intervenors moved to dismiss the original complaint. In response, Plaintiffs filed an amended complaint. [ECF 234]. The amended complaint maintained the gist of the original, but added two new counts and made a variety of other drafting changes. *See* [ECF 242]. Defendants and Intervenors moved to dismiss the first amended complaint, too, primarily asking the Court to abstain and stay the case.

Plaintiffs' first amended complaint asserted nine separate counts, but they could be sorted into three overarching categories.

1. Claims alleging vote dilution due to unlawful ballot collection and counting procedures.

The first category covered claims related to allegedly unlawful procedures implemented by some Defendants for the collection and counting of mail-in and absentee ballots. Those included claims related to (1) Defendants' uneven use of drop boxes and other satellite ballot-collection sites, (2) procedures for verifying the qualifications of voters applying in person for mail-in or absentee ballots, and (3) rules for counting non-compliant ballots (such as ballots submitted without a secrecy envelope, without an elector declaration, or that contained stray marks on the envelope).

In Count I, Plaintiffs alleged violations of the Elections Clause and the related Presidential Electors Clause of the U.S. Constitution. [ECF 234, ¶¶ 193-205]. Plaintiffs asserted that, under these provisions, only the state legislature may set the time, place, and manner of congressional elections and determine how the state chooses electors for the presidency. [*Id.* at ¶ 196].

In support of this claim, Plaintiffs alleged that Secretary Boockvar's guidance concerning the use of mail-in ballot drop boxes, whether county boards of elections must independently verify mail-in ballot applications, and the counting of non-compliant mail-in ballots, was an executive overreach—in that the Secretary's guidance allegedly violated certain provisions of the Election Code enacted by the Pennsylvania General Assembly. [*Id.* at ¶ 201]. Plaintiffs also claimed that the Secretary's "unlawful guidance" increased the risk of fraudulent or unlawful voting and infringed on the right to vote, which, they said, amounted to additional violations of the 1st and 14th Amendments to the U.S. Constitution. [*Id.* at ¶¶ 202-03].

In Count II, Plaintiffs alleged a violation of the Equal-Protection Clause under the 14th Amendment. [*Id.* at ¶¶ 206-15]. Plaintiffs asserted that the implementation of the foregoing (*i.e.*, mail-in ballot drop boxes, the verification of mail-in ballot applications, and the counting of non-compliant ballots) was different in different counties, thereby treating voters across the state in an unequal fashion. [*Id.* at ¶¶ 211-13].

***4** In Count III, Plaintiffs asserted a violation of the Pennsylvania State Constitution. [*Id.* at ¶¶ 216-22]. Plaintiffs alleged that the same actions and conduct that comprised Counts I and II also violated similar provisions of the Pennsylvania Constitution. [*Id.* at ¶ 220].

Finally, in Counts VI and VII, Plaintiffs alleged that Defendants violated provisions of the federal and state constitutions by disregarding the Election Code's notice and selection requirements applicable to "polling places." [*Id.* at ¶¶ 237-52]. Plaintiffs alleged that drop boxes are "polling places," and thus subject to certain criteria for site selection and the requirement that county election boards provide 20 days' public notice. [*Id.* at ¶¶ 239-42]. Plaintiffs asserted that Defendants' failure to provide this notice or select appropriate "polling places" in the primary election, if repeated in the general election, would create the risk of voter fraud and vote dilution. [*Id.* at ¶¶ 243-246].

2. Poll-watcher claims.

The second category of claims in the first amended complaint consisted of challenges to the constitutionality of Election-Code provisions related to poll watchers.

In Count IV, Plaintiffs alleged violations of the 1st and 14th Amendments. These claims had both a facial and an as-applied component. [ECF 234, ¶ 230 ("On its face and as applied to the 2020 General Election ...")].

First, Plaintiffs alleged that 25 P.S. § 2687 was facially unconstitutional because it "arbitrarily and unreasonably" limits poll watchers to serving only in their county of residence and to monitoring only in-person voting at the polling place on election day. [*Id.* at ¶ 226]. Second, Plaintiffs alleged that the same provision was unconstitutional as applied in the context of Pennsylvania's new vote-by-mail system, because these poll-watcher restrictions, combined with insecure voting procedures, create unacceptable risks of fraud and vote dilution. [*Id.* at ¶ 228]. Plaintiffs contended that these limitations make it "functionally impracticable" for candidates to ensure that they have poll watchers present where ballots are deposited and collected, given the widespread use of remote drop boxes and other satellite collection sites. [*Id.*].

Count V was the same as Count IV, but alleged that the same poll-watching restrictions violated the Pennsylvania Constitution, too. [*Id.* at ¶ 234].

3. In-person voting claims.

The third category of claims consisted of challenges to the procedures for allowing electors to vote in person after requesting a mail-in ballot.

That is, in Counts VIII and IX, Plaintiffs asserted that the Election Code permits an elector that has requested a mail-in ballot to still vote in person so long as he remits his spoiled ballot. [ECF 234, ¶¶ 253-267]. Plaintiffs asserted that during the primary, some counties allowed such electors to vote in person, while others did not, and they fear the same will happen in the general election. [*Id.* at ¶¶ 255, 259]. Plaintiffs also asserted that some counties allowed electors who had voted by mail to vote in person, in violation of the Election Code. [*Id.* at ¶¶ 257-58]. Plaintiffs alleged that this conduct also violates the federal and state constitutional provisions concerning the right to vote and equal protection. [*Id.* at ¶¶ 261, 265].

B. The Court's decision to abstain.

***5** Upon consideration of Defendants' and Intervenors' motions to dismiss the first amended complaint, on August 23, 2020, the Court issued an opinion abstaining under *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and temporarily staying the case. [ECF 409, 410].

In doing so, the Court determined that the three requisite prongs for *Pullman* abstention were met, and that the discretionary considerations weighed in favor of abstention. [ECF 409, p. 3 ("[Under *Pullman*, federal courts abstain] if (1) doing so requires interpretation of 'unsettled questions of state law'; (2) permitting resolution of the unsettled state-law questions by state courts would 'obviate the need for, or substantially narrow the scope of adjudication of the constitutional claims'; and (3) an 'erroneous construction of state law would be disruptive of important state policies[.]' " (citing *Chez Sez III Corp. v. Township of Union*, 945 F.2d 628, 631 (3d Cir. 1991))); *id.* at p. 30 (explaining that after the three prongs of *Pullman* abstention are met, the court must "make a discretionary determination of whether abstention is appropriate given the particular facts of this case," which requires weighing "such factors as the availability of an adequate state remedy, the length of time the litigation has been pending, and the impact of delay on the litigants." (cleaned up))].

The Court found that abstaining under *Pullman* was appropriate because of several unresolved ambiguities in Pennsylvania's Election Code. Specifically, the Court found that there were significant ambiguities as to whether the Election Code (1) permitted delivery of ballots to locations other than the county election board's headquarters, such as drop boxes, (2) permitted counties to count ballots that were not placed within the "secrecy envelope" (*i.e.*, "naked ballots"), (3) considered drop boxes and other ballot-collection sites as "polling places," as defined in the Election Code, and (4) required counties to automatically verify ballot applications for mail-in ballots (where the person applied for the ballot in person), even if there was no "bona fide objection" to the application. [ECF 409, pp. 17-23].

The Court explained that each of these ambiguities, if settled, would significantly narrow—or even resolve—some of Plaintiffs' claims. As the Court explained, for example, if a state court interpreted the Election Code to disallow drop boxes, Plaintiffs would obtain their requested relief (*i.e.*, no drop boxes); alternatively, if drop boxes were authorized by the Election Code, then Plaintiffs' allegations that drop boxes were illegal would be eliminated, which would, in turn, significantly affect the constitutional analysis of Plaintiffs' claims. [*Id.* at pp. 25-28]. The same held true for "naked ballots," the breadth of coverage of "polling places," and the requisite verification for personal ballot applications.

The Court then explained that it was appropriate for it to abstain until a state court could interpret the ambiguous state law. [*Id.* at pp. 28-30]. The Court concluded that if it interpreted the ambiguous state law, there was a sufficient chance that a state court could disagree with the interpretation, which would render this Court's interpretation not only advisory, but disruptive to state policies. The Court noted that especially in the election context, states have considerable discretion to implement their own policies without federal intervention. Accordingly, because these were questions of uninterpreted state law that were sufficiently ambiguous, federalism and comity demanded that a state court, not this Court, be the first interpreter.

***6** Finally, the Court explained that, despite the imminence of the election, abstention was still proper. [*Id.* at pp.

30-33]. The Court noted that state-court litigation was already pending that would resolve some of the statutory ambiguities at issue. [*Id.* at p. 31]. Further, the Court highlighted three courses Plaintiffs could immediately take to resolve the statutory ambiguities: intervene in the pending state-court litigation; file their own state-court case; or appeal this Court's abstention decision to the Third Circuit, and then seek certification of the unsettled state-law issues in the Pennsylvania Supreme Court. [*Id.* at pp. 31-33].

Additionally, the Court explained that it would stay the entire case, despite several of Plaintiffs' claims not being subject to *Pullman* abstention as they were not based on ambiguous state law. [*Id.* at pp. 34-37]. That's because, in its discretion, the Court determined it would be more efficient for this case to progress as a single proceeding, rather than in piecemeal fashion. [*Id.*]. However, the Court allowed any party to move to lift the stay as to the few claims not subject to *Pullman* abstention, if no state-court decision had been issued by October 5, 2020. [*Id.*].

On August 28, 2020, five days after the Court abstained, Plaintiffs moved to modify the Court's stay, and moved for a preliminary injunction. [ECF 414]. Plaintiffs requested, among other things, that the Court order Defendants to segregate, and not pre-canvass or canvass, all ballots that were returned in drop boxes, lacked a secrecy envelope, or were delivered by a third party. [*Id.*]. Plaintiffs also requested that the Court lift the stay by September 14, 2020, instead of October 5, 2020. [*Id.*].

The Court denied Plaintiffs' motion for preliminary injunctive relief, finding that Plaintiffs failed to show they would be irreparably harmed. [ECF 444; ECF 445]. The Court also declined to move up the date when the stay would be lifted. [*Id.*]. The Court noted that, at the request of Secretary Boockvar, the Pennsylvania Supreme Court had already exercised its extraordinary jurisdiction to consider five discrete issues and clarify Pennsylvania law in time for the general election. [*Id.* at p. 1]. Since that case appeared to be on track, the Court denied Plaintiffs' motion without prejudice, and the Court's abstention opinion and order remained in effect.

C. The Pennsylvania Supreme Court's decision.

On September 17, 2020, the Pennsylvania Supreme Court issued its decision in *Pennsylvania Democratic Party v. Boockvar*, —— Pa. ——, —— A.3d ——, 2020 WL 5554644 (Sept. 17, 2020). The court clarified three issues of state election law that are directly relevant to this case.

1. Counties are permitted under the Election Code to establish alternate ballot-collection sites beyond just their main county office locations.

The Pennsylvania Supreme Court first considered whether the Election Code allowed a Pennsylvania voter to deliver his or her mail-in ballot in person to a location other than the established office address of the county's board of election. *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *8. The court further considered the means by which county boards of election could accept hand-delivered mail-in ballots. *Id.*

Consistent with this Court's abstention opinion, the court found that "the parties' competing interpretations of the Election Code on [these questions] are reasonable, rendering the Code ambiguous" on these questions. *Id.* After applying traditional principles of statutory interpretation, the court held that "the Election Code should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes." *Id.* at.——, 2020 WL 5554644, at *9. The court reached this conclusion due to "the clear legislative intent underlying Act 77 ... to provide electors with options to vote outside of traditional polling places." *Id.*

***7** The respondents in that case further argued that this interpretation would cause county boards of election to "employ myriad systems to accept hand-delivered mail-in ballots," which would "be unconstitutionally disparate from one another in so much as some systems will offer more legal protections to voters than others will provide" and violate the Equal-Protection Clause *Id.* The court rejected this argument. It found that "the exact manner in which each county board of election will accept these votes is entirely unknown at this point; thus, we have no metric by which to measure whether any one system offers more legal protection than another, making an equal protection analysis impossible at this time." *Id.*

2. Ballots lacking inner secrecy envelopes should not be counted.

The court next considered whether the boards of elections "must 'clothe and count naked ballots,' *i.e.*, place ballots

that were returned without the secrecy envelope into a proper envelope and count them, rather than invalidate them." *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *21. The court concluded that they should not.

The court held that "the Legislature intended for the secrecy envelope provision [in the Election Code] to be mandatory." *Id.* at ——, 2020 WL 5554644, at *24. In other words, the relevant provisions "make clear the General Assembly's intention that, during the collection and canvassing processes, when the outer envelope in which the ballot arrived is unsealed and the sealed ballot removed, it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted." *Id.* The secrecy envelope "properly unmarked and sealed ensures that result," and "[w]hatever the wisdom of the requirement, the command that the mail-in elector utilize the secrecy envelope and leave it unblemished by identifying information is neither ambiguous nor unreasonable." *Id.*

As a result, the court ultimately concluded, "a mail-ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified." *Id.* at ——, 2020 WL 5554644, at *26

3. Pennsylvania's county-residency requirement for poll watchers is constitutional.

The final relevant issue the court considered was whether the poll-watcher residency requirement found in 25 P.S. § 2687(b) violates state or federal constitutional rights. *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *26. Relying on *Republican Party of Pennsylvania v. Cortés*, 218 F. Supp. 3d 396 (E.D. Pa. 2016), the court concluded that the poll-watcher residency provision "impose[d] no burden on one's constitutional right to vote and, accordingly, requires only a showing that a rational basis exists to be upheld." *Id.* at ——, 2020 WL 5554644, at *30. The court found rational-basis review was appropriate for three reasons.

First, "there is no individual constitutional right to serve as a poll watcher; rather, the right to do so is conferred by statute." *Id.* (citation omitted). Second, "poll watching is not incidental to the right of free association and, thus, has no distinct First Amendment protection." *Id.* (cleaned up). Third, "poll watching does not implicate core political speech." *Id.* (citation omitted).

The court went on to find that there was a "clear rational basis for the county poll watcher residency requirement[.]" *Id.* That is, given "Pennsylvania has envisioned a county-based scheme for managing elections within the Commonwealth," it is "reasonable that the Legislature would require poll watchers, who serve within the various counties of the state, to be residents of the counties in which they serve." *Id.*

In upholding the constitutionality of the "county poll watcher residency requirement," the court rejected the claim that "poll watchers are vital to protect against voter fraud and that because of the distribution of voters throughout Pennsylvania, the residency requirement makes it difficult to identify poll watchers in all precincts." *Id.* The court concluded that the claims of "heightened election fraud involving mail-in voting" were "unsubstantiated" and "specifically belied by the Act 35 report issued by [Secretary Boockvar] on August 1, 2020." *Id.* Moreover, the court held that the "speculative claim that it is 'difficult' for both parties to fill poll watcher positions in every precinct, even if true, is insufficient to transform the Commonwealth's uniform and reasonable regulation requiring that poll watchers be residents of the counties they serve into a non-rational policy choice." *Id.*

***8** Based on the foregoing, the court declared "that the poll-watcher residency requirement does not violate the state or federal constitutions." *Id.* at ——, 2020 WL 5554644, at *31.

D. Plaintiffs' notice of remaining claims.

Following the Pennsylvania Supreme Court's decision, this Court lifted the stay it had imposed pursuant to the *Pullman* abstention doctrine and ordered the parties to identify the remaining viable claims and defenses in the case. [ECF 447].

In their notice, Plaintiffs took the position that nearly all their claims remained viable, with a few discrete exceptions. Plaintiffs conceded that their "federal and state constitutional claims of voter dilution solely on the basis that drop boxes and other collection sites are not statutorily authorized by the Pennsylvania Election Code [were] no longer viable." [ECF 448, p. 4]. They also stated that their "facial challenge to the county residency requirement under 25 P.S. § 2687 is no longer a viable claim." [*Id.* at p. 10]. Plaintiffs also moved for leave to amend their complaint a second time to add new allegations and a new claim relating to Secretary Boockvar's recent signature-comparison guidance. [ECF 451].

Defendants and Intervenors, for their part, suggested that Plaintiffs' claims had been substantially narrowed, if not outright mooted, by the Pennsylvania Supreme Court's decision, and reminded the Court that their arguments for dismissal remained outstanding.

E. The Court's September 23, 2020, memorandum orders.

In response to the notices filed by the parties and Plaintiffs' motion for leave to amend the first amended complaint, the Court issued an order granting Plaintiffs' motion, narrowing the scope of the lawsuit, and establishing the procedure for resolving the remaining claims. [ECF 459].

As to Plaintiffs' proposed amendment to their complaint, the Court found that the new claim and allegations were relatively narrow, and thus amendment wouldn't prejudice Defendants and Intervenors. [*Id.* at pp. 3-4]. As a result, the Court granted the motion. [*Id.* at p. 4].

The Court, however, did inform the parties that it would "continue to abstain under *Pullman* as to Plaintiffs' claim pertaining to the notice of drop box locations and, more generally, whether the "polling place" requirements under the Election Code apply to drop-box locations." [*Id.* at p. 5]. This was so because those claims involve still-unsettled issues of state law. The Court explained that the "fact that the Pennsylvania Supreme Court did not address this issue in its recent decision is immaterial" because the "propriety of *Pullman* abstention does not depend on the existence of parallel state-court proceedings." [*Id.* (citing *Stoe v. Flaherty*, 436 F.3d 209, 213 (3d Cir. 2006))]. Moreover, Plaintiffs had several other avenues to pursue prompt interpretation of state law after this Court abstained. [*Id.* at p. 6].

The Court also informed the parties, for similar reasons, that it would continue to abstain with respect to Plaintiffs' claims regarding Secretary Boockvar's guidance that personal applications for mail-in ballots shall be accepted absent a "bona fide objection." [ECF 460].

The Court found that "no Article III 'case or controversy' remain[ed] with respect to the claims on which the Pennsylvania Supreme Court effectively ruled in Plaintiffs' favor on state-law grounds (*e.g.*, illegality of third-party ballot delivery; excluding 'naked ballots' submitted without inner-secrecy envelopes)." [ECF 459, p. 6]. Because there was "no reason to believe Defendants plan to violate what they themselves now agree the law requires," the Court held that Plaintiffs' claims were premature and speculative. [*Id.* at p. 7]. The Court therefore dismissed those claims as falling outside of its Article III power to adjudicate. [*Id.* (citations omitted)].

***9** To resolve the remaining claims, the Court directed the parties to file cross-motions for summary judgment presenting all arguments for dismissal or judgment under Federal Rule of Civil Procedure 56. [*Id.* at pp. 8-10]. Before briefing on those motions, the Court authorized additional expedited discovery. [*Id.* at pp. 4-5]. The parties completed discovery and timely filed their motions; they identified no material disputes of fact; and therefore, the motions are now fully briefed and ready for disposition.

F. The claims now at issue.

Based on the Pennsylvania Supreme Court's prior ruling, this Court's prior decisions, Plaintiffs' nine-count Second Amended Complaint, and recent guidance issued by Secretary Boockvar, the claims remaining in this case are narrow and substantially different than those asserted at the outset of the case.

Drop Boxes (Counts I-III). Plaintiffs still advance a claim that drop boxes are unconstitutional, but in a different way. Now that the Pennsylvania Supreme Court has expressly held that drop boxes are authorized under the Election Code, Plaintiffs now assert that the use of "unmanned" drop boxes is unconstitutional under the federal and state constitutions, for reasons discussed in more detail below.

Signature Comparison (Counts I-III). Plaintiffs' newly added claim relates to signature comparison. Secretary Boockvar's September 2020 guidance informs the county boards that they are not to engage in a signature analysis of mail-in ballots and applications, and they must count those ballots, even if the signature on the ballot does not match the voter's signature on file. Plaintiffs assert that this guidance is unconstitutional under the federal and state constitutions.

Poll Watching (Counts IV, V). The Pennsylvania Supreme Court already declared that Pennsylvania's county-residency requirement for poll watchers is ***facially*** constitutional. Plaintiffs now only assert that the requirement, ***as applied***, is unconstitutional under the federal and state constitutions.

The counts that remain in the Second Amended Complaint, but which are ***not*** at issue, are the counts related to where poll watchers can be located. That is implicated mostly by Counts VI and VII, and by certain allegations in Counts IV

and V. The Court continues to abstain from reaching that issue. Plaintiffs have filed a separate state lawsuit that would appear to address many of those issues, in any event. [ECF 549-22; ECF 573-1]. Counts VIII and IX concern challenges related to voters that have requested mail-in ballots, but that instead seek to vote in person. The Secretary issued recent guidance, effectively mooting those claims, and, based on Plaintiffs' positions taken in the course of this litigation, the Court deems Plaintiffs to have withdrawn Counts VIII and IX. [ECF 509, p. 15 n.4 ("[I]n the September 28 guidance memo, the Secretary corrected [her] earlier guidance to conform to the Election Code and states that any mail-in voter who spoils his/her ballot and the accompanying envelopes and signs a declaration that they did not vote by mail-in ballot will be allowed to vote a regular ballot. Therefore, Plaintiffs agree to withdraw this claim from those that still are being pursued.")].

II. Factual Background

A. Pennsylvania's Election Code, and the adoption of Act 77.

1. The county-based election system.

Pennsylvania's Election Code, first enacted in 1937, established a county-based system for administering elections. *See* 25 P.S. § 2641(a) ("There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of [the Election Code]."). The Election Code vests county boards of elections with discretion to conduct elections and implement procedures intended to ensure the honesty, efficiency, and uniformity of Pennsylvania's elections. *Id.* §§ 2641(a), 2642(g).

2. The adoption of Act 77.

***10** On October 31, 2019, the Pennsylvania General Assembly passed "Act 77," a bipartisan reform of Pennsylvania's Election Code. *See* [ECF 461, ¶¶ 91]; 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421).

Among other things, by passing Act 77, Pennsylvania joined 34 other states in authorizing "no excuse" mail-in voting by all qualified electors. *See* [ECF 461, ¶¶ 92]; 25 P.S. §§ 3150.11-3150.17; [ECF 549-11, p. 5 ("The largest number of states (34), practice no-excuse mail-in voting, allowing any persons to vote by mail regardless of whether they have a reason or whether they will be out of their jurisdiction on Election Day.")]. Previously, a voter could only cast an "absentee" ballot if certain criteria were met, such as that the voter would be away from the election district on election day. *See* 1998 Pa. Legis. Serv. Act. 1998-18 (H.B. 1760), § 14.

Like the previous absentee voting system, Pennsylvania's mail-in voting system requires voters to "opt-in" by requesting a ballot from either the Secretary or the voter's county board of elections. *See* 25 P.S. §§ 3146.2(a), 3150.12(a). When requesting a ballot, the voter must provide, among other things, his or her name, date of birth, voting district, length of time residing in the voting district, and party choice for primary elections. *See* 25 P.S. §§ 3146.2(b), 3150.12(b). A voter must also provide proof of identification; namely, either a driver's license number or, in the case of a voter who does not have a driver's license, the last four digits of the voter's Social Security number, or, in the case of a voter who has neither a driver's license nor a Social Security number, another form of approved identification. 25 P.S. § 2602(z.5)(3). In this respect, Pennsylvania differs from states that automatically mail each registered voter a ballot—a practice known as "universal mail-in voting." [ECF 549-11, p. 6] ("[N]ine states conduct universal vote-by-mail elections in which the state (or a local entity, such [as] a county or municipality) mails all registered voters a ballot before each election without voters' [sic] having to request them.").

3. The COVID-19 pandemic.

Since early 2020, the United States, and Pennsylvania, have been engulfed in a viral pandemic of unprecedented scope and scale. [ECF 549-8, ¶ 31]. In that time, COVID-19 has spread to every corner of the globe, including Pennsylvania, and jeopardized the safety and health of many people. [*Id.* at ¶¶ 31, 38-39, 54-55, 66]. As of this date, more than 200,000 Americans have died, including more than 8,000 Pennsylvanians. *See* Covid in the U.S.: Latest Map and Case Count, The New York Times, available at https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last visited Oct. 10, 2020); COVID-19 Data for Pennsylvania, Pennsylvania Department of Health, available at https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx (last visited Oct. 10, 2020).

There have been many safety precautions that Pennsylvanians have been either required or urged to take, such as limiting participation in large gatherings, maintaining social distance, and wearing face coverings. [ECF 549-8, ¶¶ 58, 63-65]. The threat of COVID-19 is likely to persist through the November general election. [*Id.* at ¶¶ 53-56, 66-68].

B. Facts relevant to drop boxes.

***11** Pennsylvania's county-based election system vests county boards of elections with "jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions" of the Election Code. 25 P.S. § 2641(a). The Election Code further empowers the county boards to "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." *Id.* at § 2642(f). The counties are also charged with the responsibility to "purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines." *Id.* at § 2642(c).

As noted above, in *Pennsylvania Democratic Party v. Boockvar*, the Pennsylvania Supreme Court interpreted the Election Code, which allows for mail-in and absentee ballots to be returned to the "county board of election," to "permit[ ] county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes." —— A.3d at ——, 2020 WL 5554644, at *10.

Thus, it is now settled that the Election Code permits (but does not require) counties to authorize drop boxes and other satellite-collection locations for mailed ballots. 25 P.S. § 3150.16(a). Pennsylvania is not alone in this regard—as many as 34 other states and the District of Columbia authorize the use of drop boxes or satellite ballot collection sites to one degree or another. [ECF 549-11, p. 8, fig. 4]. Indeed, Secretary Boockvar stated that as many as 16% of voters nationwide had cast their ballots using drop boxes in the 2016 general election, including the majority of voters in Colorado (75%) and Washington (56.9%). [ECF 547, p. 18 (citing ECF 549-16)].

1. Secretary Boockvar's guidance with respect to drop boxes.

Since the passage of Act 77, Secretary Boockvar has issued several guidance documents to the counties regarding the counties' implementation of mail-in voting, including guidance with respect to the use of drop boxes. [ECF 504-21; 504-22; 504-23; 504-24; 504-25; 571-1, Ex. E]. In general terms, the Secretary's guidance as to drop boxes informed the counties that the use of drop boxes was authorized by the Election Code and recommended "best practices" for their use. Her latest guidance offered standards for (1) where drop boxes should be located, [ECF 504-23, § 1.2], (2) how drop boxes should be designed and what signage should accompany them, [*id.* at §§ 2.2-2.3], (3) what security measures should be employed, [*id.* at § 2.5], and (4) what procedures should be implemented for collecting and returning ballots to the county election office, [*id.* at §§ 3.1-3.3, 4].

As to the location of drop boxes, the Secretary recommended that counties consider the following criteria, [*id.* at § 1.2]:

- Locations that serve heavily populated urban/suburban areas, as well as rural areas;
- Locations near heavy traffic areas such as commercial corridors, large residential areas, major employers and public transportation routes;
- Locations that are easily recognizable and accessible within the community;
- Locations in areas in which there have historically been delays at existing polling locations, and areas with historically low turnout;
- Proximity to communities with historically low vote by mail usage;
- Proximity to language minority communities;
- Proximity to voters with disabilities;
- Proximity to communities with low rates of household vehicle ownership;
- Proximity to low-income communities;
- Access to accessible and free parking; and
- The distance and time a voter must travel by car or public transportation.

With respect to drop-box design criteria, the Secretary recommended to counties, [*id.* at § 2.2]:

***12** • Hardware should be operable without any tight grasping, pinching, or twisting of the wrist;

• Hardware should require no more than 5 lbs. of pressure for the voter to operate;

• Receptacle should be operable within reach-range of 15 to 48 inches from the floor or ground for a person utilizing a wheelchair;

• The drop-box should provide specific points identifying the slot where ballots are inserted;

• The drop-box may have more than one ballot slot (e.g. one for drive-by ballot return and one for walk-up returns);

• To ensure that only ballot material can be deposited and not be removed by anyone but designated county board of election officials, the opening slot of a drop-box should be too small to allow tampering or removal of ballots; and

• The opening slot should also minimize the ability for liquid to be poured into the drop-box or rainwater to seep in.

The Secretary's guidance as to signage recommended, [*id.* at § 2.3]:

• Signage should be in all languages required under the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10503);

• Signage should display language stating that counterfeiting, forging, tampering with, or destroying ballots is a second-degree misdemeanor pursuant to sections 1816 and 1817 of the Pennsylvania Election Code (25 P.S. §§ 3516 and 3517);

• Signage should also provide a statement that third-party return of ballots is prohibited unless the person returning the ballot is rendering assistance to a disabled voter or an emergency absentee voter. Such assistance requires a declaration signed by the voter and the person rendering assistance; and

• Signage should provide a statement requesting that the designated county elections official should be notified immediately in the event the receptacle is full, not functioning, or is damaged in any fashion, and should provide a phone number and email address for such purpose.

With respect to ballot security, the Secretary stated that county boards should implement the following security measures, [*id.* at § 2.5]:

• Only personnel authorized by the county board of elections should have access to the ballots inside of a drop-box;

• Drop-boxes should be secured in a manner to prevent their unauthorized removal;

• All drop-boxes should be secured by a lock and sealed with a tamper-evident seal. Only authorized election officials designated by the county board of elections may access the keys and/or combination of the lock;

• Drop-boxes should be securely fastened in a manner as to prevent moving or tampering, such as fastening the drop-box to concrete or an immovable object;

• During the hours when the staffed return site is closed or staff is unavailable, the drop-box should be placed in a secure area that is inaccessible to the public and/or otherwise safeguarded;

• The county boards of election should ensure adequate lighting is provided at all ballot return sites when the site is in use;

• When feasible, ballot return sites should be monitored by a video security surveillance system, or an internal camera that can capture digital images and/or video. A video security surveillance system can include existing systems on county, city, municipal, or private buildings. Video surveillance should be retained by the county election office through 60 days following the deadline to certify the election; and

***13** • To prevent physical damage and unauthorized entry, the drop-box at a ballot return site located outdoors should be constructed of durable material able to withstand vandalism, removal, and inclement weather.

With respect to ballot collection and "chain of custody" procedures, the Secretary stated that counties should adhere to the following standards, [*id.* at §§ 3.1-3.2]:

- Ballots should be collected from ballot return sites only by personnel authorized by the county board of elections and at times determined by the board of elections, at least every 24 hours, excluding Saturdays and Sundays;

- The county board of elections should designate at least two election officials to collect voted ballots from a ballot return site. Each designated election official should carry identification or an official designation that identifies them as an election official authorized to collect voted ballots;

- Election officials designated to collect voted ballots by the board of elections should sign a declaration declaring that he or she will timely and securely collect and return voted ballots, will not permit any person to tamper with a ballot return site or its contents, and that he or she will faithfully and securely perform his or her duties;

- The designated election officials should retrieve the voted ballots from the ballot return site and place the voted ballots in a secure ballot transfer container;

- The designated election officials should note on *Ballot Return Site Collection Forms* the site and unique identification number of the ballot return site and the date and time of retrieval;

- Ballots collected from any ballot return site should be immediately transported to the county board of elections;

- Upon arrival at the office of the county board of elections, the county board of elections, or their designee(s), should note the time of arrival on the same form, as described above;

- The seal number should be verified by a county election official or a designated representative;

- The county board of elections, or their designee(s), should inspect the drop-box or secure ballot transfer container for evidence of tampering and should receive the retrieved ballots by signing the retrieval form and including the date and time of receipt. In the event tampering is evident, that fact must be noted on the retrieval form;

- The completed collection form should be maintained in a manner proscribed by the board of elections to ensure that the form is traceable to its respective secure ballot container; and

- The county elections official at the county election office or central count location should note the number of ballots delivered on the retrieval form.

And finally, as to election day and post-election day procedures with respect to drop boxes, the Secretary provided as follows, [*id.* at §§ 3.3, 4]:

- The county board of elections should arrange for authorized personnel to retrieve ballots on election night and transport them to the county board of elections for canvassing of the ballots;

- Authorized personnel should be present at ballot return sites immediately prior to 8:00 p.m. or at the time the polls should otherwise be closed;

- At 8:00 p.m. on election night, or later if the polling place hours have been extended, all ballot return sites and drop-boxes must be closed and locked;

***14** - Staff must ensure that no ballots are returned to the ballot return site after the close of polls;

- After the final retrieval after the closing of the polls, the drop-box must be removed or locked and/or covered to prevent any further ballots from being deposited, and a sign shall be posted indicating that polling is closed for the election; and

- Any ballots collected from a return site should be processed in the same manner as mail-in ballots personally delivered to the central office of the county board of elections official by the voter and ballots received via the United States Postal Service or any other delivery service.

The Secretary and her staff developed this guidance in consultation with subject-matter experts within her Department and after review of the policies, practices, and laws in other states where drop boxes have been used. [ECF 549-6, pp. 23:14-22]. The evidence reflects at least one instance in which the Secretary's deputies reiterated that these "best practices" should be followed in response to inquiries from county officials considering whether to use drop boxes. [ECF 549-32 ("Per our conversation, the list of items are things the county must keep in mind if you are going to provide a box for voters to return their ballots in person.")].

Approximately 24 counties plan to use drop boxes during the November general election, to varying degrees. [ECF 549-28; ECF 504-1]. Of these, about nine counties intend to staff the drop boxes with county officials, while about 17 counties intend to use video surveillance in lieu of having staff present. [ECF 549-28].

2. Defendants' and Intervenors' evidence of the benefits and low risks associated with drop boxes.

Secretary Boockvar advocates for the use of drop boxes as a "direct and convenient way" for voters to deliver cast ballots to their county boards of elections, "thereby increasing turnout." [ECF 547, p. 22 ¶ 54 (citing 549-11 at pp. 10-11)]. The Secretary also touts the special benefits of expanding drop-box use in the ongoing COVID-19 pandemic. Specifically, she asserts that drop boxes reduce health risks and inspire voter confidence because "many voters understandably do not wish to cast their votes in person at their polling place on Election Day" due to COVID-19. [*Id.* at ¶¶ 55, 57 (citing ECF 549-2 ¶ 39; ECF 549-11 at p. 10; 549-8, ¶ 95)]. Drop boxes, she says, allow voters to vote in person without coming into "close proximity to other members of the public, compared to in-person voting or personally delivering a mail-in ballot to a public office building." [*Id.* at ¶ 57].

Secretary Boockvar also states that drop boxes are highly convenient, and cost-saving, for both counties and voters. For counties, she notes that "24-hour secure ballot drop boxes" are "cost-effective measures ... as they do not have to be staffed by election judges." [*Id.* at p. 24 ¶ 62 (citing ECF 549-11 at p. 11); ECF 549-9 at ¶ 34]. As for voters, the Secretary explains that, in a state where "ten counties ... cover more than 1,000 square miles" and "two-thirds" of counties "cover more than 500 square miles," many Pennsylvania voters "could be required to drive dozens of miles (and perhaps in excess of 100 miles) if he or she wished to deposit his or her mail-in ballot in person at the main county board of elections office." [*Id.* at ¶ 58 (citing ECF 549-29)].

***15** In addition to any tangible benefit drop boxes may have for voter access and turnout, Secretary Boockvar also states that drop boxes have a positive impact on voter confidence. In particular, she cites a recent news article, and a letter sent by the General Counsel of the U.S. Postal Service regarding Pennsylvania's absentee and mail-in ballot deadline, which have raised concerns over the timeliness and reliability of the U.S. Postal Service. [*Id.* at ¶¶ 60-61 (citing ECF 549-13; ECF 549-14); ECF 549-17; ECF 549-2 ¶¶ 42-43]. Voters' fears that votes returned by mail will not be timely counted could, the Secretary worries, "justifiably dissuade voters from wanting to rely upon the Postal Service for return of their mail-in or absentee ballot." [ECF 547, ¶ 61]. Drop boxes, she says, can address this concern by allowing voters to safely return mail-in ballots to an in-person location.

In exchange for these benefits, the Secretary insists that any potential security risk associated with drop boxes is low. She notes that the federal Department of Homeland Security has released guidance affirming that a "ballot drop box provides a secure and convenient means for voters to return their mail ballot," and recommending that states deploy one drop box for every 15,000 to 20,000 registered voters. [*Id.* at ¶¶ 63-65 (citing ECF 549-24, p. 1)]. She also points to a purported lack of evidence of systemic ballot harvesting or any attempts to tamper with, destroy, or otherwise commit voter fraud using drop boxes, either in Pennsylvania's recent primary election, or in other states that have used drop boxes for many years. [*Id.* at ¶¶ 68-74 (citations omitted)]. And she asserts that "[i]n the last 20 years in the entire state of Pennsylvania, there have been fewer than a dozen confirmed cases of fraud involving a handful of absentee ballots" among the many millions of votes cast during that time period. [*Id.* at ¶ 70 (citing ECF 549-10, pp. 3-4)].

Finally, the Secretary, and other Defendants and Intervenors, argue that Pennsylvania already has robust measures in place to prevent fraud, including its criminal laws, voter registration system, mail-in ballot application requirement, and canvassing procedures. [*Id.* at ¶¶ 66-67 (citing 25 P.S. §§ 3516 - 3518)]; [ECF 549-9, p. 15, ¶¶ 46-47 ("These allegations are not consistent with my experience with drop box security, particularly given the strong voter verification procedures that are followed by elections officials throughout the country and in Pennsylvania. Specifically, the eligibility and identity of the voter to cast a ballot is examined by an election judge who reviews and confirms all the personal identity information provided on the outside envelope. Once voter eligibility is confirmed, the ballot is extracted and separated from the outside envelope to ensure the ballot remains secret. During this step, election judges confirm that there is only one ballot in the envelope and checks for potential defects, such as tears in the ballot.... Regardless of the receptacle used for acceptance of the ballot (drop box versus USPS mailbox), ballot validation occurs when

the ballot is received by the county board of elections. The validation is the same regardless of how the ballots are collected or who delivers the ballot, even where that delivery contravenes state law.")].

Defendants and Intervenors also point to several expert reports expressing the view that drop boxes are both low risk and beneficial. These experts include:

Professor Matthew A. Barreto, a Professor of Political Science and Chicana/o Studies at UCLA. [ECF 549-7]. Professor Barreto offers the opinion that ballot drop boxes are an important tool in facilitating voting in Black and Latino communities. Specifically, he discusses research showing that Black and Latino voters are "particularly concerned about the USPS delivering their ballots." [*Id.* at ¶ 22]. And he opines that ballot drop boxes help to reassure these voters that their vote will count, because "there is no intermediary step between the voters and the county officials who collect the ballot." [*Id.* at ¶ 24].

***16 Professor Donald S. Burke**, a medical doctor and Distinguished University Professor of Health Science and Policy, Jonas Salk Chair in Population Health, and Professor of Epidemiology at the University of Pittsburgh. [ECF 549-8]. Professor Burke details the "significant risk of exposure" to COVID-19 in "enclosed areas like polling places." [*Id.* at ¶ 69]. He opines that "depositing a ballot in a mailbox and depositing a ballot in a drop-box are potential methods of voting that impart the least health risk to individual voters, and the least public health risk to the community." [*Id.* at ¶ 95].

Amber McReynolds, the CEO of the National Vote at Home Institute, with 13 years of experience administering elections as an Elections Director, Deputy Director, and Operations Manager for the City and County of Denver, Colorado. [ECF 549-9]. Ms. McReynolds opines that "[b]allot drop-boxes can be an important component of implementing expanded mail-in voting" that are "generally more secure than putting a ballot in post office boxes." [*Id.* at ¶ 16 (a)]. She notes that "[d]rop boxes are managed by election officials ... delivered to election officials more quickly than delivery through the U.S. postal system, and are secure." [*Id.*].

Ms. McReynolds also opines that Secretary Boockvar's guidance with respect to drop boxes is "consistent with best practices and advice that NVAHI has provided across jurisdictions." [*Id.* at ¶ 35]. But she also notes that "[b]est practices will vary by county based on the county's available resources, population, needs, and assessment of risk." [*Id.* at ¶ 52].

More generally, Ms. McReynolds argues that "[d]rop-boxes do not create an increased opportunity for fraud" as compared to postal boxes. [*Id.* at ¶ 44]. She also suggests that Pennsylvania guards against such fraud through other "strong voter verification procedures," including "ballot validation [that] occurs when the ballot is received by the county board of elections" and "[r]econciliation procedures adopted by election officials ... [to] protect against the potential risk of double voting." [*Id.* at ¶¶ 46-48]. She notes that "Pennsylvania's balloting system requires that those who request a mail-in vote and do not return the ballot (or spoil the mail-in ballot at their polling place), can only vote a provisional ballot" and "[i]f a mail-in or absentee ballot was submitted by an individual, their provisional ballot is not counted." [*Id.* at ¶ 48].

Professor Lorraine C. Minnite, an Associate Professor and Chair of the Department of Public Policy and Administration at Rutgers University-Camden. [ECF 549-10]. Professor Minnite opines that "the incidence of voter fraud in contemporary U.S. elections is exceedingly rare, including the incidence of voter impersonation fraud committed through the use of mail-in absentee ballots." [*Id.* at p. 3]. In Pennsylvania specifically, she notes that "[i]n the last 20 years ... there have been fewer than a dozen confirmed cases of fraud involving a handful of absentee ballots, and most of them were perpetrated by insiders rather than ordinary voters." [*Id.* at pp. 3-4]. As a "point of reference," she notes that 1,459,555 mail-in and absentee ballots were cast in Pennsylvania's 2020 primary election alone. [*Id.* at 4].

Professor Robert M. Stein, a Professor of Political Science at Rice University and a fellow in urban politics at the Baker Institute. [ECF 549-11]. Professor Stein opines that "the Commonwealth's use of drop boxes provides a number of benefits without increasing the risk of mail-in or absentee voter fraud that existed before drop boxes were implemented because (manned or unmanned) they are at least as secure as U.S. Postal Service ('USPS') mailboxes, which have been successfully used to return mail-in ballots for decades in the Commonwealth and elsewhere around the U.S." [*Id.* at p. 3]. According to Professor Stein, the use of drop boxes "has been shown to increase turnout," which he suggests is particularly important "during a global pandemic and where research has shown that natural and manmade disasters have historically had a depressive effect on voter turnout." [*Id.* at

p. 4]. Professor Stein notes that "[d]rop boxes are widely used across a majority of states as a means to return mail-in ballots" and he is "not aware of any studies or research that suggest that drop boxes (manned or unmanned) are a source for voter fraud." [*Id.*]. Nor is he aware "of any evidence that drop boxes have been tampered with or led to the destruction of ballots." [*Id.*].

***17 Professor Paul Gronke**, a Professor of Political Science at Reed College and Director of the Early Voting Information Center. [ECF 545-7]. Professor Gronke recommends that "drop boxes should be provided in every jurisdiction that has significant (20% or more) percentage[ ] of voters casting a ballot by mail, which includes Pennsylvania" for the general election. [*Id.* at ¶ 6]. He avers that "[s]cientific research shows that drop boxes raise voter turnout and enhance voter confidence in the elections process." [*Id.* at ¶ 7]. Voters, he explains, "utilize drop boxes heavily—forty to seventy percent of voters in vote by mail states and twenty-five percent or more in no-excuse absentee states." [*Id.*]. Professor Gronke further states that he is "not aware of any reports that drop boxes are a source for voter fraud" despite having "been in use for years all over the country." [*Id.* at ¶ 8]. And he suggests that the use of drop boxes is "especially important" in an election "that will be conducted under the cloud of the COVID-19 pandemic, and for a state like Pennsylvania that is going to experience an enormous increase in the number of by-mail ballots cast by the citizenry of the state." [*Id.* at ¶ 9].

Based on this evidence, and the purported lack of any contrary evidence showing great risks of fraud associated with the use of drop boxes, Defendants and Intervenors argue that Pennsylvania's authorization of drop boxes, and the counties' specific implementation of them, furthers important state interests at little cost to the integrity of the election system.

3. Plaintiffs' evidence of the risks of fraud and vote dilution associated with drop boxes.

Plaintiffs, on the other hand, argue that the drop boxes allow for an unacceptable risk of voter fraud and "illegal delivery or ballot harvesting" that, when it occurs, will "dilute" the votes of all lawful voters who comply with the Election Code. *See, e.g.,* [ECF 461, ¶¶ 127-128]. As evidence of the dilutive impact of drop boxes, Plaintiffs offer a combination of anecdotal and expert evidence.

Foremost among this evidence is the expert report of Greg Riddlemoser, the former Director of Elections and General Registrar for Stafford County, Virginia from 2011 until 2019. [ECF 504-19]. According to Mr. Riddlemoser, "voter fraud exists." [*Id.* at p. 2]. He defines the term "voter fraud" to mean any "casting and/or counting of ballots in violation of a state's election code." [*Id.*]. Examples he gives include: "Voting twice yourself—even if in multiple jurisdictions," "voting someone else's ballot," and "[e]lection officials giving ballots to or counting ballots from people who were not entitled to vote for various reasons." [*Id.* at pp. 2-3]. All of these things, he asserts, are "against the law and therefore fraudulent." [*Id.*].[3]

Mr. Riddlemoser argues that "ballot harvesting" (which is the term Plaintiffs use to refer to situations in which an individual returns the ballots of other people) "persists in Pennsylvania." [*Id.* at p. 3]. He points to the following evidence to support this opinion:

- Admissions by Pennsylvania's Deputy Secretary for Elections and Commissions, Jonathan Marks, that "several Pennsylvania counties permitted ballot harvesting by counting ballots that were delivered in violation of Pennsylvania law" during the recent primary election, [*Id.*];
- "[S]everal instances captured by the media where voters in the June 2020 Primary deposited multiple ballots into unstaffed ballot drop boxes," [*Id.* at p. 4];
- "Other photographs and video footage of at least one county's drop box (Elk County) on Primary Election day" which "revealed additional instances of third-party delivery," [*Id.*]; and
- "Documents produced by Montgomery County" which "reveal that despite signs warning that ballot harvesting is not permitted, people during the 2020 Primary attempted to deposit into the five drop boxes used by that county ballots that were not theirs," [*Id.*].

***18** With respect to the use of "unstaffed" or "unmanned" ballot drop boxes, Mr. Riddlemoser expresses the opinion that "the use of unmanned drop boxes presents the easiest opportunity for voter fraud" and "certain steps must be taken to make drop boxes 'secure' and 'monitored.' " [*Id.* at p. 16].

He states that, to be "secure," drop boxes must be "attended" by "sworn election officials" at all times (*i.e.*, "never left

unattended at any time they are open for ballot drop-off."). [*Id.*]. He further suggests that officials stationed at drop boxes must be empowered, and required, to "verify the person seeking to drop off a ballot is the one who voted it and is not dropping off someone else's ballot." [*Id.*]. Doing so, he says, would, in addition to providing better security, also "allow the election official to ask the voter if they followed the instructions they were provided ... and assist them in doing so to remediate any errors, where possible, before ballot submission." [*Id.*].

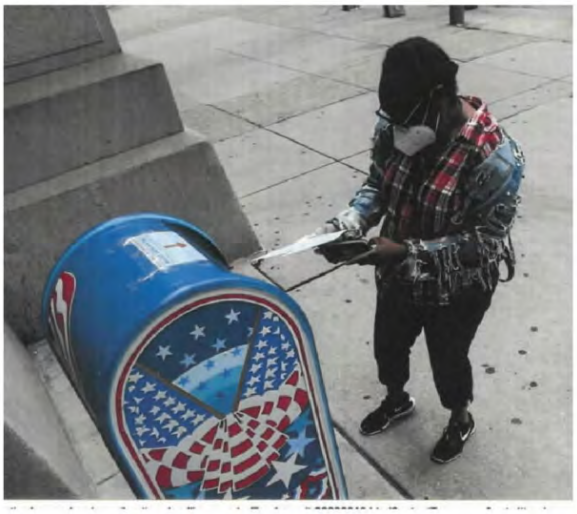
In addition to being "manned," Mr. Riddlemoser suggests that certain procedures with respect to ballot collection are necessary to ensure the integrity of votes cast in drop boxes. For example, he suggests that, at the end of each day, drop boxes, which should themselves be "tamperproof," should "be verifiably completely emptied into fireproof/tamperproof receptacles, which are then sealed and labeled by affidavit as to whom, where, when, etc." [*Id.*] Once sealed, the containers "must then be transported by sworn officials in a county owned vehicle (preferably marked law enforcement) back to the county board where they are properly receipted and safeguarded." [*Id.*]. Emptied drop boxes should also be sealed at the end of each day "such that they are not able to accept any additional ballots until they are 'open' again[.]" [*Id.*]. And boxes should be "examined to ensure no ballots are in the box, that nothing else is inside the box, and that the structural integrity and any security associated with the box remains intact." [*Id.*]. All of this, he suggests, should also be "available for monitoring by poll watchers." [*Id.*].

According to Mr. Riddlemoser, anything short of these robust procedures won't do. In particular, "video cameras would not prevent anyone from engaging in activity that could or is designed to spoil the ballots inside the box; such as dumping liquids into the box, lighting the ballots on fire by using gasoline and matches, or even removing the box itself." [*Id.* at p. 17]. Even if the "identity of the person responsible may be determined ... the ballots themselves would be destroyed —effectively disenfranchising numerous voters." [*Id.*]. And given "recent footage of toppled statues and damage to government buildings" in the news, Mr. Riddlemoser finds the "forcible removal of ballot drop boxes" to be "a distinct possibility." [*Id.*]. In addition to increasing the risk of ballot destruction, Mr. Riddlemoser notes that reliance on video cameras would also "not prohibit someone from engaging in ballot harvesting by depositing more than one ballot in the drop box[.]" [*Id.*].

Beyond Mr. Riddlemoser's expert testimony, Plaintiffs proffer several other pieces of evidence to support their claims that drop boxes pose a dilutive threat to the ballots of lawful voters. Most notably, they present photographs and video stills of, by the Court's count, approximately seven individuals returning more than one ballot to drop boxes in Philadelphia and Elk County (the same photographs referenced by Mr. Riddlemoser). [ECF 504-19, PDF pp. 49-71].

***19** Those photographs depict the following:

- **An unidentified woman holding what appear to be two ballots at a Philadelphia drop box.**



- **Instagram user "thefoodiebarrister" posing for a selfie with two ballots in Philadelphia; captioned, in part, "dropping of [sic] my votes in a designated ballot drop box."**

- **A photograph posted to social media showing a hand placing two ballots in a drop box; captioned, in part, "Cory and I voted!"**

- **A photograph of an unidentified man wearing a "Philadelphia Water" sweater and hat, placing two ballots in a Philadelphia drop box.**

- **Several video stills that, according to Plaintiffs, show voters depositing more than one ballot in an Elk County drop box.**

In addition to these photographs and video stills, Plaintiffs also provide a May 24, 2020, email sent by an official in Montgomery County (which placed security guards to monitor its drop boxes) observing that security "have turned people away yesterday and today without incident who had ballots other than their own." [ECF 504-28].

Separate and apart from this evidence specific to the use of drop boxes, Plaintiffs and their expert also provide evidence of instances of election fraud, voter fraud, and illegal voting generally. These include, for example:

- A case in which a New Jersey court ordered a new municipal election after a city councilman and councilman-elect were charged with fraud involving mail-in ballots. [ECF 504-19, p. 3].

- A New York Post article written by an anonymous fraudster who claimed to be a "master at fixing mail-in ballots" and detailed his methods. [*Id.*].

- Philadelphia officials' admission that approximately 40 people were permitted to vote twice during the 2020 primary elections. [*Id.*].

- A YouTube video purporting to show Philadelphia election officials approving the counting of mail-in ballots that lacked a completed certification on the outside of the envelope. [*Id.* (citation omitted)].

- The recent guilty plea of the former Judge of Elections in South Philadelphia, Domenick J. DeMuro, to adding fraudulent votes to voting machines on election day. [ECF 461, ¶ 61]; *see United States v. DeMuro*, No. 20-cr-112 (E.D. Pa. May 21, 2020).

- The 2014 guilty plea of Harmar Township police chief Richard Allen Toney to illegally soliciting absentee ballots to benefit his wife and her running mate in the 2009 Democratic primary for town council, [ECF 461, ¶ 69];

- The 2015 guilty plea of Eugene Gallagher for unlawfully persuading residents and non-residents of Taylor, in Lackawanna County, Pennsylvania, to register for absentee ballots and cast them for him during his councilman candidacy in the November 2013 election, [*Id.*];

***20** - The 1999 indictment of Representative Austin J. Murphy in Fayette County for forging absentee ballots for residents of a nursing home and adding his wife as a write-in candidate for township election judge, [*Id.*];

- The 1994 Eastern District of Pennsylvania and Third Circuit case *Marks v. Stinson*, which involved an alleged incident of extensive absentee ballot fraud by a candidate for the Pennsylvania State Senate, *see Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994); *Marks v. Stinson*, No. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994), [ECF 461, ¶ 78]; and

- A report from the bipartisan Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which observed that absentee voting is "the largest source of potential voter fraud" and proposed that states "reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." [ECF 461, ¶¶ 66-67, 80].

C. Facts relevant to signature comparison.

Many of the facts relevant to Plaintiffs' signature-comparison claim relate to the verification procedures for mail-in and absentee ballots, on one hand, and those procedures for in-person voting, on the other. These are described below.

1. Mail-in and absentee ballot verification.

As noted above, Pennsylvania does not distribute unsolicited mail-in and absentee ballots. Rather, a voter must apply for the ballot (and any voter can). [ECF 549-2, ¶ 64]. As part of the application for a mail-in ballot,[4] an applicant must provide certain identifying information, including name, date of birth, length of time as a resident of the voting district, voting district if known, party choice in the primary, and address where the ballot should be sent. 25 P.S. § 3150.12(b). In applying for a mail-in ballot, the applicant must also provide "proof of identification," which is defined by statute as that person's driver's license number, last four digits of Social Security number, or another specifically approved form of identification. [ECF 549-2, ¶ 64; ECF 549-27]; 25 P.S. § 2602(z.5)(3). A signature is not mentioned in the definition of "proof of identification." 25 P.S. § 2602(z.5)(3). However, if physically capable, the applicant must sign the application. *Id.* at § 3150.12(c)-(d).

Upon receiving the mail-in ballot application, the county board of elections determines if the applicant is qualified by "verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant's permanent registration card." 25 P.S. § 3150.12b(a). The county board of elections then either approves the application[5] or "immediately" notifies the applicant if the application is not approved. *Id.* at § 3150.12b(a), (c). Upon approval, the county mails the voter the mail-in ballot.

***21** After receiving the ballot, the mail-in voter must "mark the ballot" with his or her vote, insert the ballot into the "secrecy" envelope, and place the "secrecy" envelope into a larger envelope. *Id.* at § 3150.16(a). Then, the voter must "fill out, date and sign the declaration printed on [the larger] envelope. [The larger] envelope shall then be securely sealed and the elector shall send [it] by mail ... or deliver it in person to said county board of election." *Id.* The declaration on the larger envelope must be signed, unless the voter is physically unable to do so. *Id.* at § 3150.16(a)-(a.1).

Once the voter mails or delivers the completed mail-in ballot to the appropriate county board of elections, the ballot is kept "in sealed or locked containers until they are to be canvassed by the county board of elections." *Id.* at § 3146.8(a). The county boards of elections can begin pre-canvassing and canvassing the mail-in ballots no earlier than election day. *Id.* at § 3146.8(g)(1.1).

When pre-canvassing and canvassing the mail-in ballots, the county boards of elections must "examine the declaration on the [larger] envelope of each ballot ... and shall compare the information thereon with that contained in the ...Voters File." *Id.* at § 3146.8(g)(3). The board shall then verify the "proof of identification" and shall determine if "the declaration [on the larger envelope] is sufficient." *Id.* If the information in the "Voters File ... verifies [the elector's] right to vote," the ballot shall be counted. *Id.*

2. In-person voting verification.

When a voter decides to vote in-person on election day, rather than vote by mail, the procedures are different. There is no application to vote in person. Rather, on election day, the in-person voter arrives at the polling place and "present[s] to an election officer proof of identification," which the election officer "shall examine." *Id.* at § 3050(a). The in-person voter shall then sign a voter's certificate" and give it to "the election officer in charge of the district register." *Id.* at § 3050(a.3)(1). Next, the election officer shall "announce the elector's name" and "shall compare the elector's signature on his voter's certificate with his signature in the district register." *Id.* at § 3050(a.3)(2). If the election officer believes the signature to be "genuine," the in-person voter may vote. *Id.* But if the election officer does not deem the signature "authentic," the in-person voter may still cast a provisional ballot and is given the opportunity to remedy the deficiency. *Id.*

3. The September 11, 2020, and September 28, 2020, sets of guidance.

In September 2020, Secretary Boockvar issued two new sets of guidance related to signature comparisons of mail-in and absentee ballots and applications. The first, issued on September 11, 2020, was titled "Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes." [ECF 504-24]. The guidance stated, in relevant part, the "Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections." [*Id.* at p. 3]. The second set of guidance, issued on September 28, 2020, was titled, "Guidance Concerning Civilian Absentee and Mail-

In Ballot Procedures." [ECF 504-25]. This September 28, 2020, guidance stated, in relevant part, "The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis. ... No challenges may be made to mail-in and absentee ballots at any time based on signature analysis." [*Id.* at p. 9]. Thus, as evidenced by these two sets of guidance, Secretary Boockvar advised the county boards of elections not to engage in a signature-comparison analysis of voters' signatures on ballots and applications for ballots.

***22** Most of the counties intend to follow the Secretary's guidance and will not compare signatures on mail-in ballots and applications for the upcoming general election. *E.g.*, [ECF 504-1]. A few counties, however, stated their intent to not comply with the guidance, and instead would compare and verify the authenticity of signatures. *E.g.*, [*id.* (noting the counties of Cambria, Elk, Franklin, Juniata, Mifflin, Sullivan, Susquehanna, and Wyoming, as not intending to follow Secretary Boockvar's guidance to not compare signatures)].

According to Defendants, there are valid reasons to not require signature comparisons for mail-in and absentee ballots. For example, Secretary Boockvar notes that signature verification is a technical practice, and election officers are not "handwriting experts." [ECF 549-2, p. 19, ¶ 68]. Secretary Boockvar also notes that voters' signatures can change over time, and various medical conditions (*e.g.*, arthritis) can impact a person's signature. [*Id.*] Defendants' expert, Amber McReynolds, also finds that "signature verification" involves "inherent subjectivity." [ECF 549-9, p. 20, ¶ 64]. Ms. McReynolds further notes the "inherent variability of individuals' signatures over time." [*Id.*] And according to Secretary Boockvar, these are just some reasons Pennsylvania implements verification procedures other than signature comparisons for mail-in voters, who, unlike in-person voters, are not present when their signature would be verified. [ECF 549-2, p. 20, ¶ 69].

Plaintiffs' expert, Greg Riddlemoser, on the other hand, states that signature comparison is "a crucial security aspect of vote-by-mail" and failing to verify signatures on mail-in ballots would "undermine voter confidence and would increase the possibility of voter fraud." [ECF 504-19, pp. 10-11]. Mr. Riddlemoser asserts that Secretary Boockvar's September 11, 2020, and September 28, 2020, guidance "encourage, rather than prevent, voter fraud." [*Id.* at p. 12]. As such, Mr. Riddlemoser explains that mail-in voters should be subject to the same signature-comparison requirement as in-person voters. [*Id.* at pp. 13-14].

4. Secretary Boockvar's King's Bench petition.

In light of this case and the parties' disagreement over whether the Election Code mandates signature comparison for mail-in ballots, Secretary Boockvar filed a "King's Bench" petition with the Pennsylvania Supreme Court on October 4, 2020. In that petition, she asked the Pennsylvania Supreme Court to exercise its extraordinary jurisdiction, in light of the impending election, to clarify whether the Election Code mandates signature comparison of mail-in and absentee ballots and applications. [ECF 556, p. 11; ECF 557].

On October 7, 2020, several groups, including Donald J. Trump for President, Inc. and the Republican National Committee—who are Plaintiffs in this case—moved to intervene as Respondents in the Pennsylvania Supreme Court case. [ECF 571-1]. The Pennsylvania Supreme Court has not yet decided the motion to intervene or whether to accept the case. The petition remains pending.

D. Facts relevant to poll-watcher claims.

The position of "poll watcher" is a creation of state statute. *See* 25 P.S. § 2687. As such, the Election Code defines how a poll watcher may be appointed, what a poll watcher may do, and where a poll watcher may serve.

1. The county-residency requirement for poll watchers.

***23** The Election Code permits candidates to appoint two poll watchers for each election district. 25 P.S. § 2687(a). The Election Code permits political parties and bodies to appoint three poll watchers for each election district. *Id.*

For many years, the Pennsylvania Election Code required that poll watchers serve only within their "election district," which the Code defines as "a district, division or precinct, ... within which all qualified electors vote at one polling place." 25 P.S. § 2687(b) (eff. to May 15, 2002) (watchers "shall serve in only one district and must be qualified registered electors of the municipality or township in which the district where they are authorized to act is located"); 25 P.S. § 2602(g). Thus, originally, poll watching was confined to a

more limited geographic reach than one's county, as counties are themselves made up of many election districts.

Then, in 2004, the General Assembly amended the relevant poll-watcher statute to provide that a poll watcher "shall be authorized to serve in the election district for which the watcher was appointed and, when the watcher is not serving in the election district for which the watcher was appointed, in any other election district in the county in which the watcher is a qualified registered elector." 25 P.S. § 2687(b) (eff. Oct. 8, 2004).

This county-residency requirement is in line with (or is, in some cases, more permissive than) the laws of at least eight other states, which similarly require prospective poll watchers to reside in the county in which they wish to serve as a watcher or (similar to the pre-2004 Pennsylvania statute) limit poll watchers to a sub-division of the county. *See, e.g.*, Fla. Stat. Ann. § 101.131(1) (Florida); Ind. Code Ann. § 3-6-8-2.5 (Indiana); Ky. Rev. Stat. Ann. § 117.315(1) (Kentucky); N.Y. Elec. Law § 8-500(5) (New York); N.C. Gen. Stat. Ann. § 163-45(a) (North Carolina); Tex. Elec. Code Ann. § 33.031(a) (Texas); S.C. Code Ann. § 7-13-860 (South Carolina); Wyo. Stat. Ann. § 22-15-109(b) (Wyoming). However, at least one state (West Virginia) does not provide for poll watchers at all. *See* W. Va. Code Ann. § 3-1-37; W. Va. Code Ann. § 3-1-41

The General Assembly has not amended the poll-watcher statute since 2004, even though some lawmakers have advocated for the repeal of the residency requirement. *See Cortés*, 218 F. Supp. 3d at 402 (observing that legislative efforts to repeal the poll-watcher residency requirement have been unsuccessful).

As part of its September 17, 2020, decision, the Pennsylvania Supreme Court found that the county-residency requirement does not violate the U.S. or Pennsylvania constitutions. *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *31.

2. Where and when poll watchers can be present during the election.

The Pennsylvania Election Code sets forth the rules for where and when poll watchers are permitted to be present.

The Election Code provides that poll watchers may be present "at any public session or sessions of the county board of elections, and at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines under" the Code. 25 P.S. § 2650. Additionally, one poll watcher for each candidate, political party, or political body may "be present in the polling place ... from the time that the election officers meet prior to the opening of the polls ... until the time that the counting of votes is complete and the district register and voting check list is locked and sealed." 25 P.S. § 2687(b).

***24** During this time, poll watchers may raise objections to "challenge any person making application to vote." *Id.* Poll watchers also may raise challenges regarding the voters' identity, continued residence in the election district, or registration status. 25 P.S. § 3050(d).

Although Pennsylvania has historically allowed absentee ballots to be returned by U.S. Postal Service or by in-person delivery to a county board of elections office, the Election Code does not provide (and has never provided for) any right to have poll watchers in locations where absentee voters fill out their ballots (which may include their home, office, or myriad other locations), nor where those votes are mailed (which may include their own mailbox, an official U.S. Postal Service collection box, a work mailroom, or other places U.S. Postal Service mail is collected), nor at county board of elections offices. [ECF 549-2, ¶¶ 86-90].

Before Act 77, absentee ballots were held in election districts rather than centralized at the county board of elections. *See* 25 P.S. § 3146.8 (eff. Mar. 14, 2012 to Oct. 30, 2019) ("In all election districts in which electronic voting systems are used, absentee ballots shall be opened at the election district, checked for write-in votes in accordance with section 1113-A and then either hand-counted or counted by means of the automatic tabulation equipment, whatever the case may be.").

At such time (again, before Act 77), poll workers opened those absentee ballots at each polling place after the close of the polls. *Id.* ("Except as provided in section 1302.1(a.2), the county board of elections shall then distribute the absentee ballots, unopened, to the absentee voter's respective election district concurrently with the distribution of the other election supplies. Absentee ballots shall be canvassed immediately and continuously without interruption until completed after the close of the polls on the day of the election in each election district. The results of the canvass of the absentee ballots shall then be included in and returned to the county board with the returns of that district." (footnote omitted)).

With the enactment of Act 77, processing and counting of mail-in and absentee ballots is now centralized in each county board of elections, with all mail-in and absentee ballots in such county held and counted at the county board of elections (or such other site as the county board may choose) without regard to which election district those ballots originated from. 25 P.S. § 3146.8(a) (eff. Mar. 27, 2020); [ECF 549-2, ¶ 81].

Under Act 12, counties are permitted to "pre-canvass" mail-in or absentee ballots received before Election Day beginning at 7:00 a.m. on Election Day. 25 P.S. § 3146.8(g)(1.1). Counties are further permitted to "canvass" ballots received after that time beginning "no earlier than the close of the polls on the day of the election and no later than the third day following the election." *Id.* § 3146.8(g)(2).

The Election Code permits "[o]ne authorized representative of each candidate" and "one representative from each political party" to "remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed." 25 P.S. § 3146.8(g)(1.1). Similarly, during canvassing, the Election Code permits "[o]ne authorized representative of each candidate" and "one representative from each political party" to "remain in the room in which the absentee ballots and mail-in ballots are canvassed." 25 P.S. § 3146.8(g)(2).

***25** The Election Code provisions pertaining to the "pre-canvass" and "canvass" do not make any separate reference to poll watchers, instead referring only to the "authorized representatives" of parties and candidates. *See* 25 P.S. § 3146.8.

On October 6, 2020, Secretary Boockvar issued guidance concerning poll watchers and authorized representatives. [ECF 571-1]. The guidance states that poll watchers "have no legal right to observe or be present at ... ballot return sites," such as drop-box locations. [ECF 571-1, Ex. E, p. 5]. The guidance also states that while a candidate's authorized representative may be present when mail-in ballots are opened (including during pre-canvass and canvass), the representative cannot challenge those ballots. [*Id.* at Ex. E, p. 4].

On October 9, 2020, in a separate lawsuit brought by the Trump Campaign in the Philadelphia County Court of Common Pleas, the state court there confirmed Secretary Boockvar's guidance. Specifically, the state court held that satellite ballot-collection locations, such as drop-box locations, are not "polling places," and therefore poll watchers are not authorized to be present in those places. [ECF 573-1, p. 12 ("It is clear from a reading of the above sections [of the Election Code] that the satellite offices where these activities, and only these activities, occur are true 'offices of the Board of Elections' and are not polling places, nor public sessions of the Board of Elections, at which watchers have a right to be present under the Election Code.")]. Immediately after issuance of this decision, the Trump Campaign filed a notice of appeal, indicating its intention to appeal the decision to the Commonwealth Court of Pennsylvania. Having just been noticed, that appeal remains in its infancy as of the date of this Opinion.

3. Plaintiffs' efforts to recruit poll watchers for the upcoming general election.

In order to become a certified poll watcher, a candidate must meet certain criteria. [ECF 504-20, ¶ 9]. That is, a poll watcher needs to be "willing to accept token remuneration, which is capped at $120 under Pennsylvania state law" and must be able to take off work or otherwise make arrangements to be at the polling place during its open hours on Election Day, which can mean working more than 14 hours in a single day. [*Id.*].

The Pennsylvania Director for Election Day Operations for the Trump Campaign, James J. Fitzpatrick, stated that the Trump Campaign wants to recruit poll watchers for every county in Pennsylvania. [ECF 504-2, ¶ 30]. To that end, the RNC and the Trump Campaign have initiated poll-watcher recruitment efforts for the general election by using a website called DefendYourBallot.com. [ECF 528-14, 265:2-15, 326:14-329-7]. That website permits qualified electors to volunteer to be a poll watcher. [*Id.*]. In addition, Plaintiffs have called qualified individuals to volunteer to be poll watchers, and worked with county chairs and conservative activists to identify potential poll watchers. [*Id.*].

Despite these efforts, the Trump Campaign claims it "is concerned that due to the residency restriction, it will not have enough poll watchers in certain counties." [ECF 504-2, ¶ 25]. Mr. Fitzpatrick, however, could not identify a specific county where the Trump Campaign has been unable to obtain full coverage of poll watchers or any county where they have tried and failed to recruit poll watchers for the General Election. [ECF 528-14, 261:21-262:3, 263:8-19, 265:2-266:3].

***26** In his declaration, Representative Reschenthaler shared Mr. Fitzpatrick's concern, stating that he does not believe that

he will "be able to recruit enough volunteers from Greene County to watch the necessary polls in Greene County." [ECF 504-6, ¶ 12]. But Representative Reschenthaler did not provide any information regarding his efforts to recruit poll watchers to date, or what he plans to do in the future to attempt to address his concern. *See generally* [*id.*].

Representative Kelly stated in his declaration that he was "likely to have difficulty getting enough poll watchers from within Erie County to watch all polls within that county on election day." [ECF 504-5, ¶ 16]. Representative Kelly never detailed his efforts (*e.g.*, the outreach he tried, prospective candidates he unsuccessfully recruited, and the like), and he never explained why those efforts aren't likely to succeed in the future. *See generally* [*id.*].

In his declaration, Representative Thompson only stated that based on his experience, "parties and campaigns cannot always find enough volunteers to serve as poll watchers in each precinct." [ECF 504-4, ¶ 20].

According to statistics collected and disseminated by the Pennsylvania Department of State, there is a gap between the number of voters registered as Democrats and Republicans in some Pennsylvania counties. [ECF 504-34]. Plaintiffs' expert, Professor Lockerbie, believes this puts the party with less than a majority of voters in that county at a disadvantage in recruiting poll watchers. [ECF 504-20, ¶ 15]. However, despite this disadvantage, Professor Lockerbie states that "the Democratic and Republican parties might be able to meet the relevant criteria and recruit a sufficient population of qualified poll watchers who meet the residency requirement[ ]." [*Id.* at ¶ 16].

Additionally, Professor Lockerbie finds the gap in registered voters in various counties to be especially problematic for minor political parties. [*Id.* at ¶ 16]. As just one example, according to Professor Lockerbie, even if one were to assume that all third-party voters were members of the same minor party, then in Philadelphia County it would require "every 7th registrant" to be a poll watcher in order for the third party to have a poll watcher observing each precinct." [*Id.*].

Professor Lockerbie believes that disruptions to public life caused by the COVID-19 pandemic "magnified" the difficulties in securing sufficient poll watchers. [*Id.* at ¶ 10].

Nothing in the Election Code limits parties from recruiting only registered voters from their own party. [ECF 528-14, 267:23-268:1]. For example, the Trump Campaign utilized at least two Democrats among the poll watchers it registered in the primary. [ECF 528-15, P001648].

4. Rationale for the county-residency requirement.

Defendants have advanced several reasons to explain the rationale behind county-residency requirement for poll watchers.

Secretary Boockvar has submitted a declaration, in which she has set forth the reasons for and interests supporting the county-residency requirement. Secretary Boockvar states that the residency requirement "aligns with Pennsylvania's county-based election scheme[.]" [ECF 549-2, p. 22, ¶ 77]. "By restricting poll watchers' service to the counties in which they actually reside, the law ensures that poll watchers should have some degree of familiarity with the voters they are observing in a given election district." [*Id.* at p. 22, ¶ 78].

***27** In a similar vein, Intervenors' expert, Dr. Barreto, in his report, states that, voters are more likely to be comfortable with poll watchers that "they know" and are "familiar with ... from their community." [ECF 524-1, p. 14, ¶ 40]. That's because when poll watchers come from the community, "there is increased trust in government, faith in elections, and voter turnout[.]" [*Id.*].

At his deposition, Representative Kelly agreed with this idea: "Yeah, I think – again, depending how the districts are established, I think people are probably even more comfortable with people that they – that they know and they recognize from their area." [ECF 524-23, 111:21-25].

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). At summary judgment, the Court must ask whether the evidence presents "a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In making that determination, the Court must "consider all evidence in the light most favorable to the party

opposing the motion." *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791, 794 (3d Cir. 2007).

The summary-judgment stage "is essentially 'put up or shut up' time for the non-moving party," which "must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." *Berckeley Inv. Grp. Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006). If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial," summary judgment is warranted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

"The rule is no different where there are cross-motions for summary judgment." *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008). The parties' filing of cross-motions "does not constitute an agreement that if one is rejected the other is necessarily justified[.]" *Id.* But the Court may "resolve cross-motions for summary judgment concurrently." *Hawkins v. Switchback MX, LLC*, 339 F. Supp. 3d 543, 547 (W.D. Pa. 2018). When doing so, the Court views the evidence "in the light most favorable to the non-moving party with respect to each motion." *Id.*

DISCUSSION & ANALYSIS

Plaintiffs, Defendants, and Intervenors all cross-move for summary judgment on all three of Plaintiffs' remaining claims, which the Court refers to, in the short-hand, as (1) the drop-box claim, (2) the signature-comparison claim, and (3) the poll-watching claim. The common constitutional theory behind each of these claims is vote dilution. Absent the security measures that Plaintiffs seek, they fear that others will commit voter fraud, which will, in turn, dilute their lawfully cast votes. They assert that this violates the federal and Pennsylvania constitutions.

The Court will address only the federal-constitutional claims. For the reasons that follow, the Court finds that Plaintiffs lack standing to bring their federal-constitutional claims because Plaintiffs' injury of vote dilution is not "concrete" for Article III purposes.

But even assuming Plaintiffs had standing, the Court also concludes that Defendants' regulations, conduct, and election guidance here do not infringe on any right to vote, and if they do, the burden is slight and outweighed by the Commonwealth's interests—interests inherent in the Commonwealth's other various procedures to police fraud, as well as its overall election scheme.

***28** Finally, because the Court will be dismissing all federal-constitutional claims, it will decline to exercise supplemental jurisdiction over any of the state-constitutional claims and will thus dismiss those claims without prejudice.

I. Defendants' procedural and jurisdictional challenges.

At the outset, Defendants and Intervenors raise a number of jurisdictional, justiciability, and procedural arguments, which they assert preclude review of the merits of Plaintiffs' claims. Specifically, they assert (1) the claims are not ripe and are moot, (2) there is a lack of evidence against certain county boards, and those boards are not otherwise necessary parties, and (3) Plaintiffs lack standing. The Court addresses each argument, in turn.

A. Plaintiffs' claims are ripe and not moot.

Several Defendants have argued that Plaintiffs' claims in the Second Amended Complaint are not ripe and are moot. The Court disagrees.

1. Plaintiffs' claims are ripe.

The ripeness doctrine seeks to "prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1246-47 (3d Cir. 1996) (cleaned up). The ripeness inquiry involves various considerations including whether there is a "sufficiently adversarial posture," the facts are "sufficiently developed," and a party is "genuinely aggrieved." *Peachlum v. City of York*, 333 F.3d 429, 433-34 (3d Cir. 2003). Ripeness requires the case to "have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Wyatt, Virgin Islands, Inc. v. Gov't of the Virgin Islands*, 385 F.3d 801, 806 (3d Cir. 2004) (quoting *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 244, 73 S.Ct. 236, 97 L.Ed. 291 (1952)). "A dispute is not ripe for judicial determination if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.*

Ultimately, "[r]ipeness involves weighing two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review." *Artway*, 81 F.3d at 1247. Unlike standing, ripeness is assessed at the time of the court's decision (rather than the time the complaint was filed). *See Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 139-40, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974).

The Court finds that Plaintiffs' claims are ripe. Applying the two-factor test here, the Court first concludes that the parties would face significant hardship if the Court were to hold that the case was unripe (assuming it was otherwise justiciable). The general election is less than one month away, and Plaintiffs assert claims that could significantly affect the implementation of Pennsylvania's electoral procedures. Further, if the Court were to find that Plaintiffs' claims were not ripe, Plaintiffs would be burdened. This is because Plaintiffs would then have to either wait until after the election occurred—and thus after the alleged harms occurred—or Plaintiffs would have to bring suit on the very eve of the election, and thus there would be insufficient time for the Court to address the issues. This hardship makes judicial review at this time appropriate. The first factor is met.

***29** Some Defendants argue that because some of the Secretary's guidance was issued after the 2020 primary election, Plaintiffs' claims that rely on such guidance are not ripe because the guidance has not been implemented in an election yet. The Court disagrees. Both the allegations in the Second Amended Complaint, and the evidence presented on summary judgment, reveal that the guidance issued after the primary election will apply to the upcoming general election. This is sufficient to make this a properly ripe controversy.[6]

The second factor the Court must consider in determining ripeness is "the fitness of the issues for judicial review." *Artway*, 81 F.3d at 1247. "The principal consideration [for this factor] is whether the record is factually adequate to enable the court to make the necessary legal determinations. The more that the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa." *Id.* at 1249.

Under this framework, the Court concludes that the issues are fit for review. The parties have engaged in extensive discovery, creating a developed factual record for the Court to review. Further, as shown below, the Court finds it can assess Plaintiffs' claims based on the current factual record and can adequately address the remaining legal questions that predominate this lawsuit. As such, the Court finds Plaintiffs' claims fit for judicial review.

Thus, Plaintiffs' claims are presently ripe.

2. Plaintiffs' claims are not moot.

Some Defendants also assert that Plaintiffs' claims are moot because Plaintiffs reference allegations of harm that occurred during the primary election, and since then, Secretary Boockvar has issued new guidance and the Pennsylvania Supreme Court has interpreted the Election Code to clarify several ambiguities. The Court, however, concludes that Plaintiffs' remaining claims are not moot.

Mootness stems from the same principle as ripeness, but is stated in the inverse: courts "lack jurisdiction when 'the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *Merle v. U.S.*, 351 F.3d 92, 94 (3d Cir. 2003) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). Like ripeness and unlike standing, mootness is determined at the time of the court's decision (rather than at the time the complaint is filed). *See U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). When assessing mootness, the Court may assume (for purposes of the mootness analysis) that standing exists. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citation omitted).

***30** Here, the Court finds that Plaintiffs' claims are not moot, as the claims Plaintiffs are proceeding with are "live." First, Plaintiffs' claims are based on guidance that issued after the primary election and are to be applied in the upcoming general election. As such, the *harms* alleged are not solely dependent on the already-passed primary election. Second, Defendants, by and large, have made clear that they intend to abide by guidance that Plaintiffs assert is unlawful or unconstitutional. Third, Plaintiffs sufficiently show that certain Defendants intend to engage in the conduct (*e.g.*, use unmanned drop-boxes) that Plaintiffs say infringes their constitutional rights. Thus, these issues are presently "live" and are not affected by the completion of the primary election.[7] Plaintiffs' claims are not moot.

3. All named Defendants are necessary parties to this lawsuit.

Many of the county boards of elections that are Defendants in this case argue that the claims against them should be dismissed because Plaintiffs did not specifically allege or prove sufficient violative facts against them. Plaintiffs argue in response that all county boards have been joined because they are necessary parties, and the Court cannot afford relief without their presence in this case. The Court agrees with Plaintiffs, and declines to dismiss the county boards from the case. They are necessary parties.

Federal Rule of Civil Procedure 19(a) states that a party is a necessary party that must be joined in the lawsuit if, "in that [party's] absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A).

Here, if the county boards were not named defendants in this case, the Court would not be able to provide Plaintiffs complete relief should Plaintiffs prove their case. That's because the Court could not enjoin the county boards if they were not parties. *See* Fed. R. Civ. P. 65(d)(2).[8] This is important because each individual county board of elections manages the electoral process within its county lines. As one court previously summarized, "Election procedures and processes are managed by each of the Commonwealth's sixty-seven counties. Each county has a board of elections, which oversees the conduct of all elections within the county." *Cortés*, 218 F. Supp. 3d at 403 (citing 25 P.S. § 2641(a)). "The county board of elections selects, fixes and at times alters the polling locations of new election districts. Individual counties are also tasked with the preservation of all ballots cast in that county, and have the authority to investigate fraud and report irregularities or any other issues to the district attorney[.]" *Id.* (citing 25 P.S. §§ 2726, 2649, and 2642). The county boards of elections may also make rules and regulations "as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f).

***31** Indeed, Defendants' own arguments suggest that they must be joined in this case. As just one example, a handful of counties assert in their summary-judgment brief that the "[Election] Code permits Boards to exercise discretion in certain areas when administering elections, to administer the election in a manner that is both legally-compliant and meets the unique needs of each County's citizens." [ECF 518, p. 6]. Thus, because of each county's discretionary authority, if county boards engage in unconstitutional conduct, the Court would not be able to remedy the violation by enjoining only Secretary Boockvar.[9]

To grant Plaintiffs relief, if warranted, the Court would need to enter an order affecting all county boards of elections—which the Court could not do if some county boards were not joined in this case. Otherwise, the Court could only enjoin violative conduct in some counties but not others. As a result, inconsistent rules and procedures would be in effect throughout the Commonwealth. While some counties can pledge to follow orders issued by this Court, the judicial system cannot rely on pledges and promises, regardless of the county boards' good intent. The only way to ensure that any illegal or unconstitutional conduct is uniformly remedied, permanently, is to include all county boards in this case.

Thus, because the county boards are necessary parties, the Court cannot dismiss them.

4. Plaintiffs lack Article III standing to raise their claims of vote dilution because they cannot establish a "concrete" injury-in-fact.

While Plaintiffs can clear the foregoing procedural hurdles, they cannot clear the final one—Article III standing.

Federal courts must determine that they have jurisdiction before proceeding to the merits of any claim. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of (1) injury in fact, (2) causation, and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Standing is particularly important in the context of election-law cases, including a case like this one, that challenge the laws, regulations, and guidance issued by elected and appointed state officials through the democratic processes. As the Supreme Court has explained, the standing "doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (cleaned up). The doctrine "limits

the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Id.* In this way, "Article III standing serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id.* Nowhere is that concern more acute than in a case that challenges a state's exercise of its core constitutional authority to regulate the most deeply political arena of all—elections.

***32** Here, Defendants and Intervenors claim that Plaintiffs lack standing, largely arguing that Plaintiffs' injury is too speculative. [ECF 547, pp. 43-50]. The Court agrees and finds that Plaintiffs lack Article III standing for this reason.

Initially, to frame the standing inquiry, understanding the specific claims at issue is important. As discussed above, there are essentially three claims remaining in this case: (1) a challenge to Secretary Boockvar's guidance that does not require all drop boxes to have manned security personnel; (2) a challenge to Secretary Boockvar's guidance that counties should not perform a signature comparison for mail-in ballots; and (3) a challenge to Pennsylvania's county-residency restriction for poll-watchers. *See* [ECF 509, pp. 4-5]. The theory behind all of these claims and the asserted injury is one of vote dilution due to the heightened risk of fraud; that is, without the above measures in place, there is an imminent risk of voter fraud (primarily by mail-in voters); and if that fraud occurs, it will dilute the votes of many of Plaintiffs, who intend to vote in person in the upcoming election. [ECF 551, p. 12 ("As qualified electors who will be voting in the November election, Plaintiffs will suffer an injury through their non-equal treatment and/or the dilution or debasement of their legitimately case votes by absentee and mail-in votes that have not been properly verified by matching the voters' signatures on their applications and ballots to the permanent voter registration record and/or that have been improperly delivered by others to drop boxes or other mobile collection sites in manners that are different[ ] from those offered or being used in their counties of residence.")].

Turning to the familiar elements of Article III standing, the first and, in the Supreme Court's estimation, "foremost" element—injury-in-fact—is dispositive. *See Gill v. Whitford*, —— U.S. ——, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018). Specifically, the Court finds that Plaintiffs' theory of vote dilution, based on the evidence presented, is insufficient to establish standing because Plaintiffs' injury-in-fact is not sufficiently "concrete."

With respect to injury-in-fact, the Supreme Court has made clear that an injury must be "concrete" and "particularized." *See Spokeo*, 136 S. Ct. at 1548. Defendants argue that the claimed injury of vote dilution caused by possible voter fraud here is too speculative to be concrete. The Court agrees.

To establish a "concrete" injury, Plaintiffs rely on a chain of theoretical events. They first argue that Defendants' lack of election safeguards (poll watchers, drop-box guards, and signature-comparison procedures) creates a risk of voter fraud or illegal voting. *See* [ECF 461, ¶¶ 230-31, 240, 256]. That risk, they say, will lead to potential fraudsters committing voter fraud or ballot destruction. [*Id.*]. And if that happens, each vote cast in contravention of the Election Code will, in Plaintiffs' view, dilute Plaintiffs' lawfully cast votes, resulting in a constitutional violation.

The problem with this theory of harm is that this fraud hasn't yet occurred, and there is insufficient evidence that the harm is "certainly impending."

To be clear, Plaintiffs need not establish actual fraud at this stage; but they must establish that fraud is "certainly impending," and not just a "possible future injury." *See Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 ("Thus, we have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient.") (cleaned up).

***33** This case is well past the pleading stage. Extensive fact and expert discovery are complete. [ECF 462]. Nearly 300 exhibits have been submitted on cross-motions for summary judgment (including 68 by Plaintiffs alone). Plaintiffs bear the burden of proof on this issue, and unlike on a motion to dismiss, on summary judgment, they must come forward with proof of injury, taken as true, that will prove standing, including a concrete injury-in-fact. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice ... In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts ... which for purposes of the summary judgment motion will be taken to be true.") (cleaned up).

Based on the evidence presented by Plaintiffs, accepted as true, Plaintiffs have only proven the "possibility of future injury" based on a series of speculative events—which falls short of the requirement to establish a concrete injury. For

example, Plaintiffs' expert, Mr. Riddlemoser, opines that the use of "unstaffed or unmanned" drop boxes merely "increases the ***possibility*** for voter fraud (and vote destruction)[.]" [ECF 504-19, p. 20 (emphasis added)]. That's because, according to him (and Plaintiffs' other witnesses), theoretical bad actors ***might*** intentionally "target" a drop box as the "easiest opportunity for voter fraud" or with the malicious "intent to destroy as many votes ... as possible." [*Id.* at pp. 16-18; *see also* ECF 504-2, ¶ 12 (declaring that drop boxes "***may*** serve as a target for bad actors that may wish to tamper with lawfully case ballots before such ballots are counted") (emphasis added)]. But there's no way of knowing whether these independent actors will ever surface, and if they do, whether they will act as Mr. Riddlemoser and Plaintiffs predict.

Similarly, Mr. Riddlemoser concludes that, at most, not conducting signature analysis for mail-in and absentee ballots "open[s] the door to the potential for massive fraud through a mechanism already susceptible to voter fraud." [ECF 504-19, p. 20].

This increased susceptibility to fraud and ballot destruction is the impetus for Plaintiffs, in their various capacities, to express their concerns that vote dilution might occur and disrupt their right to a "free and fair election." *See, e.g.,* [504-3, ¶ 6; 504-4, ¶ 7; ECF 504-6, ¶¶ 6-8; ECF 504-7, ¶¶ 5-9]. But these concerns, as outlined above, are based solely on a chain of unknown events that may never come to pass.

In addition to Plaintiffs' expert report, Plaintiffs' evidence consists of instances of voter fraud in the past, including an article in the N.Y. Post purporting to detail the strategies of an anonymous fraudster, as well as pointing to certain prior cases of voter fraud and election irregularities (*e.g.*, Philadelphia inadvertently allowing 40 people to vote twice in the 2020 primary election; some counties counting ballots that did not have a completed declaration in the 2020 primary election). [ECF 461, ¶¶ 63-82; ECF 504-19, p. 3 & Ex. D]. Initially, with one exception noted directly below, none of this evidence is tied to individuals using drop boxes, submitting forged mail-in ballots, or being unable to poll watch in another county —and thus it is unclear how this can serve as evidence of a concrete harm in the upcoming election as to the specific claims in this case.

***34** Perhaps the best evidence Plaintiffs present are the several photographs and video stills, which are depicted above, and which are of individuals who appear to be delivering more than one ballot to a drop box during the primary election. It is undisputed that during the primary election, some county boards believed it be appropriate to allow voters to deliver ballots on behalf of third parties. [ECF 504-9, 92:4-10; ECF 504-10, 60:3-61:10; ECF 504-49].

But this evidence of past injury is also speculative. Initially, the evidence is scant. But even assuming the evidence were more substantial, it would still be speculative to find that third-party ballot delivery will also occur in the general election. It may; it may not. Indeed, it may be less likely to occur now that the Secretary issued her September 28, 2020, guidance, which made clear to all county boards that for the general election, third-party ballot delivery is prohibited. [ECF 504-25 ("Third-person delivery of absentee or mail-in ballots is not permitted, and any ballots delivered by someone other than the voter are required to be set aside. The only exceptions are voters with a disability, who have designated in writing an agent to deliver their ballot for them.")]. It may also be less likely to occur in light of the Secretary's other guidance, which recommends that county boards place signs near drop boxes, warning voters that third-party delivery is prohibited.

It is difficult—and ultimately speculative—to predict future injury from evidence of past injury. This is why the Supreme Court has recognized that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130 (cleaned up).

In fact, based on Plaintiffs' theory of harm in this case, it is almost impossible for them to present anything other than speculative evidence of injury. That is, they would have to establish evidence of a certainly impending illegal practice that is likely to be prevented by the precautions they seek. All of this sounds in "possible future injury," not "certainly impending" injury. In that way, this case is very much like the Supreme Court's decision in *Clapper*.

In *Clapper*, plaintiffs-respondents were attorneys, other advocates, and media groups who communicated with clients overseas whom they feared would be subject to government surveillance under a FISA statute. 568 U.S. at 406, 133 S.Ct. 1138. The plaintiffs there alleged that the FISA statute at issue created a risk of possible government surveillance, which prevented them from communicating in confidence with their clients and compelled them to travel overseas instead and

incur additional costs. *Id.* at 406-07, 133 S.Ct. 1138. Based on these asserted injures, the plaintiffs filed suit, seeking to invalidate provisions of FISA. *Id.* at 407, 133 S.Ct. 1138.

The Supreme Court held that plaintiffs there lacked standing because their risk of harm was not concrete—rather, it was attenuated and based on a series of speculative events that may or may not ever occur. *Id.* at 410, 133 S.Ct. 1138 (finding that "respondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts).

***35** In the end, the Court found that it would not "endorse standing theories that rest on speculation about the decisions of independent actors." *Id.* at 414, 133 S.Ct. 1138.

Like *Clapper*, here, Plaintiffs' theory of harm rests on speculation about the decisions of independent actors. For drop boxes, that speculation includes that unknown individuals will utilize drop boxes to commit fraud or other illegal activity; for signature comparison, that fraudsters will submit forged ballots by mail; for poll watchers, that illegal votes will not be sufficiently challenged; and for all these claims, that other security measures in place to monitor drop boxes, to verify ballot information, and to challenge ballots will not work.

All of this may occur and may result in some of Plaintiffs' votes being diluted; but the question is whether these events are "certainly impending." The evidence outlined above and presented by Plaintiffs simply fails to meet that standard.

This is not to say that claims of vote dilution or voter fraud never give rise to a concrete injury. A plaintiff can have standing to bring a vote-dilution claim—typically, in a malapportionment case—by putting forth statistical evidence and computer simulations of dilution and establishing that he or she is in a packed or cracked district. *See Gill*, 138 S. Ct. at 1936 (Kagan, J., concurring). And a plaintiff can have standing to bring a voter-fraud claim, but the proof of injury there is evidence of actual fraud in the election and thus the suit will be brought after the election has occurred. *See, e.g., Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994). But, at least based on the evidence presented here, a claim of vote dilution brought in advance of an election on the theory of the risk of potential fraud fails to establish the requisite concrete injury for purposes of Article III standing.

Plaintiffs advance three other theories of harm here, in order to establish standing—none of which establish a concrete injury-in-fact.

First, Plaintiffs assert that since some of them are Republican candidates and that Republicans are more likely to vote in person and Democrats more likely to vote by mail, that their injury here is a competitive disadvantage in the electoral process. [ECF 551, pp. 16-18 ("The challenged guidance will further harm the RNC through the institutional prioritization of voting by mail and the potential disenfranchisement of Republican voters, who prefer to vote in person in the upcoming General Election.")]. This too is a speculative, non-concrete injury. There is nothing in the record to establish that potential voter fraud and dilution will impact Republicans more than Democrats.

***36** To be sure, the information that Plaintiffs present shows that more Democrats are likely to use mail-in ballots. [ECF 551, p. 31 ("[I]n Pennsylvania, of the 1.9 million absentee or mail-in ballots that have been requested for the November 3, 2020 General Election, 'nearly 1.5 million Democrats have requested a mail-in ballot—nearly three times the requests from Republicans.' ") (quoting L. Broadwater, "Both Parties Fret as More Democrats Request Mail Ballots in Key States," New York Times (Sept. 30, 2020), *available at* https://www.nytimes.com/2020/09/30/us/mail-voting-democrats-republicans-turnout.html)]. But it doesn't necessarily follow that more Democrats will commit voter fraud, such as through the destruction of drop boxes or third-party ballot harvesting, and thus more Republicans' votes will be diluted.

In fact, as Plaintiffs' expert, Mr. Riddlemoser, explains, fraudsters from either party could target drop boxes in specific areas in order to destroy ballots, depending on who may be the predominant party in the area. [ECF 504-19, at pp. 17-18 ("In short, nothing would prevent someone from intentionally targeting a drop box in a predominantly Republican or

predominantly Democratic area with an intent to destroy as many votes for that political party or that party's candidate(s) as possible.")]. Indeed, the more important fact for this theory of harm is not the party of the voter, but the party of the fraudster—and, on this, Plaintiffs present no evidence that one party over the other is likely to commit voter fraud.

Second, Plaintiffs also argue that the RNC, the Congressional Plaintiffs, and the Trump Campaign have organizational standing because they "have and will continue to devote their time and resources to ensure that their Pennsylvania supporters, who might otherwise be discouraged by the Secretary's guidance memos favoring mail-in and absentee voting and Defendants' implementation thereof, get out to the polls and vote on Election Day." [ECF 551, p. 19]. This is a similar argument raised by the plaintiffs in *Clapper*, and rejected there by the Supreme Court. Because Plaintiffs' harm is not "certainly impending," as discussed above, spending money in response to that speculative harm cannot establish a concrete injury. *Clapper*, 568 U.S. at 416, 133 S.Ct. 1138 ("Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."); *see also Donald J. Trump for President, Inc. v. Cegavske*, —— F. Supp. 3d ——, ——, 2020 WL 5626974, at *5 (D. Nev. Sept. 18, 2020) ("Outside of stating 'confusion' and 'discouragement' in a conclusory manner, plaintiffs make no indication of how AB 4 will discourage their member voters from voting. If plaintiffs did not expend any resources on educating their voters on AB4, their voters would proceed to vote in-person as they overwhelmingly have in prior elections.").

Third, with respect to the poll-watching claim, Plaintiffs argue that at least one of the Plaintiffs, Ms. Patterson, is a prospective poll watcher who is being denied the right to poll watch based on the county-residency restriction, and thus she meets the Article III requirements. [ECF 551, p. 34 (citing ECF 551-3, ¶¶ 9-10)]. However, Ms. Patterson cannot establish standing because, by Plaintiffs' own concession, the theory of harm in this case is not the denial of the right to poll watch, but instead dilution of votes from fraud caused from the failure to have sufficient poll watchers. [ECF 509, p. 67 ("But, the core of the as-applied challenge here is not that the Plaintiffs cannot staff a particular polling place, it is that a candidate and his or her party is presented with the Hobson's choice of selecting limited polling places to observe due to the residency requirement and accept that unobserved polling places must exist due to the inability to recruit a sufficient force of poll watchers due to the necessity that candidates be county residents.")].

***37** And the remedy sought here is much broader than simply allowing Ms. Patterson to poll watch in a certain county, but is tied to the broader harm of vote dilution that Plaintiffs assert. [ECF 503-1, p. 3, ¶ 3 ("Plaintiffs shall be permitted to have watchers present at all locations where voters are registering to vote, applying for absentee or mail-in ballots, voting absentee or mail-in ballots, and/or returning or collecting absentee or mail-in ballots, including without limitation any satellite or early voting sites established by any county board of elections.")]. Standing is measured based on the theory of harm and the specific relief requested. *See Gill*, 138 S. Ct. at 1934 ("We caution, however, that 'standing is not dispensed in gross': A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."). As with all of the claims, the poll-watching claim rests on evidence of vote dilution that does not rise to the level of a concrete harm.

In sum, Plaintiffs here, based on the evidence presented, lack Article III standing to assert their claims. Because they lack standing, the Court will enter judgment in Defendants' favor and dismiss all claims.[10] However, because of the novelty of Plaintiffs' claims and theories, a potential appeal in this case, and the short time before the general election, out of an abundance of caution, the Court will, in the alternative, proceed to examine the claims on the merits.

II. Defendants and Intervenors are entitled to summary judgment on Plaintiffs' claim that drop boxes violate the U.S. Constitution.

Plaintiffs' drop-box claim has materially changed since the Pennsylvania Supreme Court's decision authorizing the use of drop boxes. Plaintiffs now allege that drop boxes effectively allow third parties to return the ballots of voters other than themselves because, they say, no one is there to stop them. Absent an in-person guard or poll worker to monitor the drop boxes and prevent the return of ballots cast in a manner contrary to what the Election Code permits, Plaintiffs assert that they face an unacceptable risk of vote dilution, which burdens their right to vote. Plaintiffs also argue that the "uneven" use of drop boxes in Pennsylvania, by some counties but not others, violates equal protection by subjecting voters in different counties to different amounts

of dilutive risk, and perhaps by diluting lawful votes cast by individuals who failed to comply with the Election Code.

The evidence relevant to these claims is undisputed. *See* [ECF 509, p. 45 ("After the completion of extensive discovery, including numerous depositions and responses to discovery requests, no genuine dispute of material fact exists regarding Plaintiffs' constitutional claims.")]. Viewed in the light most favorable to Plaintiffs, the Court could conclude from this evidence, and will assume for purposes of this decision, that (1) drop boxes allow for greater risk of third-party ballot delivery in violation of the Election Code than in-person polling locations or manned drop boxes, and (2) that the use of drop boxes is "uneven" across Pennsylvania due to its county-based election system—*i.e.*, some counties are using "unmanned" drop boxes with varying security measures, some are using "manned" drop boxes, some are using dozens of drop boxes in a variety of locations, some are using one drop box in a county office building, and some are not using drop boxes at all. The question before the Court is whether this state of affairs violates equal protection or due process.

***38** The Court finds that it does not. The uneven use of drop boxes across counties does not produce dilution as between voters in different counties, or between "lawful" and "unlawful" voters, and therefore does not present an equal-protection violation. But even if it did, the guidelines provided by Secretary Boockvar are rational, and weighing the relative burdens and benefits, the Commonwealth's interests here outweigh any burden on Plaintiffs' right to vote.

A. Pennsylvania's "uneven" use of drop boxes does not violate federal equal-protection rights.

Plaintiffs' primary claim concerns the uneven use of drop boxes across the Commonwealth, which they contend violates the Equal-Protection Clause of the 14th Amendment.

The 14th Amendment's Equal-Protection Clause commands that "no State shall ... deny to any person within its jurisdiction the equal protection of laws." U.S. Const. amend. XIV, § 1. This broad and simple promise is "an essential part of the concept of a government of laws and not men." *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

But while the Constitution demands equal protection, that does not mean all forms of differential treatment are forbidden. *See Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) ("Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications."). Instead, equal protection "simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* (citation omitted). What's more, "unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.* (citations omitted).

Of course, the right of every citizen to vote is a fundamental right. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) ("[F]or reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure.") (citations omitted). Indeed, it is a foundational right "that helps to preserve all other rights." *Werme v. Merrill*, 84 F.3d 479, 483 (1st Cir. 1996); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). And its scope is broad enough to encompass not only the right of each voter to cast a ballot, but also the right to have those votes "counted without dilution as compared to the votes of others." *Minn. Voters Alliance v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013) (cleaned up).

As a result, Plaintiffs are quite correct when they suggest that a state election procedure that burdens the right to vote, including by diluting the value of votes compared to others, must "comport with equal protection and all other constitutional requirements." *Cortés*, 218 F. Supp. 3d at 407. That much, at least, is not in dispute.

At the same time, however, the Constitution "confers on the states broad authority to regulate the conduct of elections, including federal ones." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (citing U.S. Const. Art. I, § 4, cl. 1). This authority includes "broad powers to determine the conditions under which the right of suffrage may be exercised." *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 543, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (cleaned up). Indeed, "[c]ommon sense, as well as constitutional law, compels the conclusion" that states must be free to engage in "substantial regulation of elections" if "some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992)

(cleaned up). And all "[e]lection laws will invariably impose some burden upon individual voters." *Id.*

***39** If the courts were "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest," it "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id.* The "machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501, 51 S.Ct. 228, 75 L.Ed. 482 (1931). Thus, when faced with a constitutional challenge to a state election law, or to the actions of state officials responsible for regulating elections, a federal court must weigh these competing constitutional considerations and "make the 'hard judgment' that our adversary system demands." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008).

The Supreme Court has supplied lower courts guidance as to how to make these hard judgments, by "forg[ing]" the "flexible standard" for assessing the constitutionality of election regulations into "something resembling an administrable rule." *Id.* at 205, 128 S.Ct. 1610 (Scalia, J. concurring) (citing *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059).

Under this standard, first articulated in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) and then refined in *Burdick*, the fact "[t]hat a law or state action imposes some burden on the right to vote does not make it subject to strict scrutiny." *Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir. 1993); *see also Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006) ("[V]oting regulations are not automatically subjected to heightened scrutiny."). Instead, any "law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process," is subjected to "a deferential 'important regulatory interests' standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote." *Crawford*, 553 U.S. at 204, 128 S.Ct. 1610 (Scalia, J. concurring).

In practice, this means that courts must weigh the "character and magnitude of the burden the State's rule imposes" on the right to vote "against the interests the State contends justify that burden, and consider the extent to which the State's concerns make that burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (cleaned up). If the state imposes a "severe" burden on the right to vote, strict scrutiny applies—the rule may survive only if it is "narrowly tailored" and only if the state advances a "compelling interest." *Id.* But if the state imposes only "reasonable, nondiscriminatory restrictions," its "important regulatory interests will usually be enough" to justify it. *Id.* Indeed, where state regulations are "minimally burdensome and nondiscriminatory" a level of scrutiny "closer to rational basis applies[.]" *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016). And where the state imposes no burden on the "right to vote" at all, true rational basis review applies. *See Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004) ("Biener also cannot establish an infringement on the fundamental right to vote ... As the [election] filing fee does not infringe upon a fundamental right, nor is Biener in a suspect class, we consider the claims under a rational basis test.") (citation omitted); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 310 (S.D.N.Y. 2020) ("Under this framework, election laws that impose no burden on the right to vote are subject to rational-basis review.").

***40** This operates as a "sliding scale"—the "more severe the burden imposed, the more exacting our scrutiny; the less severe, the more relaxed our scrutiny." *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1090 (9th Cir. 2019); *see also Fish v. Schwab*, 957 F.3d 1105, 1124 (10th Cir. 2020) ("We, and our sister circuits and commentators, have referred to this as a 'sliding scale' test."); *Libertarian Party of New Hampshire v. Gardner*, 638 F.3d 6, 14 (1st Cir. 2011) ("We review all of the First and Fourteenth Amendment claims under the sliding scale approach announced by the Supreme Court in *Anderson* ... and *Burdick*[.]"); *Burdick,* 504 U.S. at 434, 112 S.Ct. 2059 ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.").

Against that backdrop, the Court now turns to Plaintiffs' claim that the use of unmanned drop boxes by some Pennsylvania counties, but not others, violates equal protection. As will be discussed, Plaintiffs' equal-protection claim fails at the threshold, without even reaching *Anderson-Burdick*, because Plaintiffs have not alleged or shown that Pennsylvania's system will result in the dilution of votes in certain counties and not others. Furthermore, even if the Court applies *Anderson-Burdick*, the attenuated "burden" Plaintiffs have identified—an increased risk of vote dilution created by the use of unmanned drop boxes—is more than justified

by Defendants' important and precise interests in regulating elections.

1. Plaintiffs have not shown that Pennsylvania treats equivalent votes in different counties differently.

Plaintiffs' equal-protection claim asserts differential treatment on a theory of vote dilution. As far as the Court can discern, this claim has two dimensions.

First, the main thrust concerns differential treatment as between counties. Plaintiffs assert that some counties will use drop boxes in certain ways (specifically, without in-person guards or in varying number and locations), while others will not—resulting in differential treatment. *See, e.g.,* [ECF 551, p. 44 ("Plaintiffs assert (and have proven) that Defendants have adopted, and intend to implement in the General Election, an election regime that applies Pennsylvania's Election Code in a way that treats the citizens of Pennsylvania unequally depending on ... the location where they happen to live: in some counties, voters will have around-the-clock access to 'satellite election offices' at which they can deposit their vote, but in other counties, voters will have no access at all to such drop boxes; in some counties those drop boxes will be staffed and secure, but in other counties drop boxes will be unmonitored and open to tampering[.]")]; [*Id.* at p. 46 ("Defendants' ongoing actions and stated intentions ensure that votes will not be counted the same as those voting in other counties, and in some instances, in the same Congressional district. For instance, the harm flowing from those actions will fall disproportionately on the Republican candidates that bring suit here because many Democrat-heavy counties have stated intentions to implement the Secretary's unconstitutional ... ballot collection guidance, and many Republican-heavy counties have stated intentions to follow the Election Code as it is written.")].

***41** Second, although less clear, Plaintiffs' equal-protection claim may also concern broader differential treatment between law-abiders and scofflaws. In other words, Plaintiffs appear to suggest that Pennsylvania discriminates against all law-abiding voters by adopting policies which tolerate an unacceptable risk of a lawfully cast votes being diluted by each unlawfully cast vote anywhere in Pennsylvania. *See, e.g.,* [ECF 509, p. 55 ("The use of unstaffed drop boxes ... not only dilutes the weight of *all* qualified Pennsylvanian electors, it curtails a sense of security in the voting process.") (emphasis in original)]; [ECF 509 p. 68 ("There will be no protection of one-person, one-vote in Pennsylvania, because her policies ... allowing inconsistently located/used drop boxes will result in illegal ballots being cast and counted with legitimate votes[.]")].

As discussed below, both of these species of equal protection fail because there is, in fact, no differential treatment here—a necessary predicate for an equal-protection claim.

Initially, Plaintiffs "have to identify a burden before we can weigh it." *Crawford*, 553 U.S. at 205, 128 S.Ct. 1610 (Scalia, J. concurring). In the equal-protection context, this means the plaintiff "must present evidence that s/he has been treated differently from persons who are similarly situated." *Renchenski v. Williams*, 622 F.3d 315, 337 (3d Cir. 2010) (cleaned up). And not just any differential treatment will do. As discussed above, differences in treatment raise equal-protection concerns, and necessitate heightened scrutiny of governmental interests, only if they burden a fundamental right (such as the right to vote) or involve a suspect classification based on a protected class. *See Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) ("If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used.").

Plaintiffs argue that equal protection is implicated because Pennsylvania has permitted counties to use drop boxes to varying extents, and with varying degrees of security. Some, like Delaware County, intend to use dozens of drop boxes. *See generally* [ECF 549-28]. Many others will not use drop boxes at all. *See generally* [ECF 504-1]. And among the counties that *do* use drop boxes, some will staff them with county officials, while others will monitor them only with video surveillance or not at all. *See generally* [ECF 549-28].

In this respect, Plaintiffs argue that they suffer an equal-protection harm similar to that found by the Supreme Court in *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). There, the Supreme Court held that the Florida Supreme Court violated equal protection when it "ratified" election recount procedures that allowed different counties to use "varying standards to determine what was a legal vote." *Id.* at 107, 121 S.Ct. 525. This meant that entirely equivalent votes might be counted in one county but discounted in another. *See, e.g., id.* ("Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly

disproportionate to the difference in population between the counties."). Given the absence of uniform, statewide rules or standards to determine which votes counted, the Court concluded that the patchwork recount scheme failed to "satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right [to vote]." *Id.*

***42** While the Supreme Court expressly limited its holding in *Bush* "to the present circumstances" of a standardless "statewide recount under the authority of a single state judicial officer," *id.* at 109, 121 S.Ct. 525, a few courts have found its reasoning to be persuasive as a broader principle of equal protection. *See Stewart v. Blackwell*, 444 F.3d 843, 859 (6th Cir. 2006) ("Somewhat more recently decided is *Bush v. Gore*, ... which reiterated long established Equal Protection principles."); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 598 (6th Cir. 2012) ("We agree with all of the parties and the district court that the consent decree likely violates the equal protection principle recognized in *Bush v. Gore*."); *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F. Supp. 2d 684, 705 (W.D. Pa. 2003) (Conti, J.) ("As noted above, the court finds that the facts presented raise a serious equal protection claim under a theory similar to that espoused by the United States Supreme Court in *Bush v. Gore, supra.*"); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) ("The Court is certainly mindful of the limited holding of Bush. However, we believe that situation presented by this case is sufficiently related to the situation presented in Bush that the holding should be the same.").

Indeed, *Bush*'s core proposition—that a state may not take the votes of two voters, similarly situated in all respects, and, for no good reason, count the vote of one but not the other—seems uncontroversial. It also seems reasonable (or at least defensible) that this proposition should be extended to situations where a state takes two equivalent votes and, for no good reason, adopts procedures that greatly increase the risk that one of them will not be counted—or perhaps gives more weight to one over the other. *See, e.g.*, *Black*, 209 F. Supp. 2d at 899 ("Plaintiffs in this case allege that the resulting vote dilution, which was found to be unacceptable in *Bush* without any evidence of a disproportionate impact on any group delineated by traditional suspect criteria, is impacting African American and Hispanic groups disproportionately.... Any voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional."); *see also Reynolds*, 377 U.S. at 555, 84 S.Ct. 1362 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

That is the sort of equal-protection claim Plaintiffs purport to be asserting—a claim that voters in counties that use drop boxes are subjected to a much higher risk of vote dilution than those in other counties that do not. But that characterization falls apart under scrutiny. Indeed, despite their assertions, Plaintiffs have not actually alleged, let alone proven, that votes cast in some counties are diluted by a greater amount relative to votes cast in others. Rather, they have, at best, shown only that events causing dilution are more likely to occur in counties that use drop boxes. But, importantly, the effect of those events will, by Plaintiffs' own admission, be felt by every voter across all of Pennsylvania. [ECF 509, p. 55. ("The use of unstaffed drop boxes places the security of unknown hundreds (if not thousands) of ballots in jeopardy of theft, destruction, and manipulation. This not only dilutes the weight of *all* qualified Pennsylvanian electors, it curtails a sense of security in the voting process.") (citations omitted) (emphasis in original)]. Such dilution impacts the entire electorate equally; not just voters in the county where it occurs.

To illustrate this distinction, consider, for example, a presidential election. The Court agrees with Plaintiffs that the relevant electoral unit in such an election is "the entire Commonwealth of Pennsylvania." [ECF 551, p. 55 ("The electoral unit in this election is the entire Commonwealth of Pennsylvania.")]. Indeed, on election night, votes cast in each of Pennsylvania's 67 counties will be canvassed, counted, and ultimately added to a statewide vote total that decides who wins Pennsylvania's 20 electoral votes. So, ask: what is the dilutive impact of a hypothetical illegal vote cast in Philadelphia during that election? Does it cause, in any sense, an "unequal evaluation of ballots" cast in different counties, *Bush*, 531 U.S. at 106, 121 S.Ct. 525, such that lawful ballots cast in Philadelphia will be less likely to count, worth less if they do, or otherwise disfavored when compared to votes cast in other counties? The answer is evident—it does not. Rather, the hypothetical illegal vote cast in Philadelphia dilutes *all lawful votes* cast in the election *anywhere* in the Commonwealth by the exact same amount.

***43** The same reasoning holds in elections that occur within part of a state, rather than statewide. For example, consider a hypothetical legislative district covering two counties—one that uses drop boxes and one that does not. There may well be a greater risk that illegal voting will occur in the county that

uses drop boxes. But any dilutive impact of those votes will be felt equally by voters in *both* counties.

This is categorically different from the harm at issue in *Bush* and cases like it. In *Bush*, Florida's arbitrary use of different recount standards in different counties meant that the state was counting equivalent ballots differently in different counties, meaning that voters in some counties were more likely to have their votes counted than those in others.

In *Black v. McGuffage*, an Illinois district-court case on which Plaintiffs heavily rely, the plaintiffs alleged that the type of voting machines used in some Illinois counties were statistically much more likely to result in equivalent votes being discounted at a much higher frequency in some counties than others, and that the worst machines were those being used in counties with high populations of minority groups. 209 F. Supp. 2d at 899. As a result, voters (and, specifically, minority voters) were much more likely to have their votes discounted, based just on the county in which they lived. *See id.* ("As a result, voters in some counties are statistically less likely to have their votes counted than voters in other counties in the same state in the same election for the same office. Similarly situated persons are treated differently in an arbitrary manner.... In addition, the Plaintiffs in this case allege that the resulting vote dilution ... is impacting African American and Hispanic groups disproportionately.").

Finally, *Stewart v. Blackwell*, another case cited by Plaintiffs, was the same as *Black*—voters in counties that used punch-card voting were "approximately four times as likely not to have their votes counted" as a voter in a different county "using reliable electronic voting equipment." 444 F.3d at 848.

What ties these cases together is that each of them involves a state arbitrarily "valu[ing] one person's vote over that of another," *Bush*, 531 U.S. at 104-05, 121 S.Ct. 525, by permitting counties to either apply different standards to decide what votes count (*Bush*) or use different voting technologies that create a great risk of votes being discounted in one county that does not exist in others (*Black* and *Stewart*). It is this sort of "differential treatment ... burden[ing] a fundamental right" that forms the bedrock of equal protection. *Sullivan v. Benningfield*, 920 F.3d 401, 409 (6th Cir. 2019).

Plaintiffs, in contrast, have shown no constitutionally significant differential treatment at all.

Instead, as discussed, if Plaintiffs are correct that the use of drop boxes increases the risk of vote dilution, all votes in the relevant electoral unit—whether that is statewide, a subset of the state, or a single county—face the same degree of increased risk and dilution, regardless of which county is most at fault for elevating that risk.

What Plaintiffs have really identified, then, are not uneven ***risks of vote dilution***—affecting voters in some counties more than equivalent voters in others—but merely different voting procedures in different counties that may contribute different amounts of vote dilution ***distributed equally across the electorate as a whole***. The Court finds that this is not an equal-protection issue.

44** To be clear, the reason that there is no differential treatment is solely based on Plaintiffs' theory of harm in this case. In the more "routine" vote-dilution cases, the state imposes some restriction or direct impact on the plaintiff's right to vote—that results in his or her vote being weighed less (*i.e.*, diluted) compared to those in other counties or election districts. *See Gill,* 138 S. Ct. at 1930, (explaining that "the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were individual and personal in nature, because the claims were brought by voters who alleged facts showing disadvantage to themselves as individuals") (cleaned up). In this case, though, Plaintiffs complain that the state is ***not imposing a restriction on ***someone else's*** right to vote, which, they say, raises the risk of fraud, which, if it occurs, could dilute the value of Plaintiffs' vote. The consequence of this inverted theory of vote dilution is that all other votes are diluted in the same way; all feel the same effect.

Finally, the Court's ruling in this regard is consistent with the many courts that have recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state. *See, e.g., Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006) ("Plaintiffs do not contend that equal protection requires a state to employ a single kind of voting system throughout the state. Indeed, local variety in voting systems can be justified by concerns about cost, the potential value of innovation, and so on.") (cleaned up); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983) ("A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state."); *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) ("[T]he appellants' reading of the Supreme Court's

voting cases would essentially bar a state from implementing any pilot program to increase voter turnout. Under their theory, unless California foists a new system on all fifty-eight counties at once, it creates 'unconstitutional vote-dilution' in counties that do not participate in the pilot plan. Nothing in the Constitution, the Supreme Court's controlling precedent, or our case law suggests that we can micromanage a state's election process to this degree."); *Fla. State Conference of N.A.A.C.P. v. Browning*, 569 F. Supp. 2d 1237, 1258 (N.D. Fla. 2008) ("[A]s with countless public services delivered through Florida's political subdivisions—such as law enforcement and education—resource disparities are to some degree inevitable. They are not, however, unconstitutional."); *Green Party of State of New York v. Weiner*, 216 F. Supp. 2d 176, 192 (S.D.N.Y. 2002) ("Even in that situation, [*Bush v. Gore*] did not challenge, and the Court did not question, the use of entirely different technologies of voting in different parts of the state, even in the same election."); *Paher v. Cegavske*, No. 20-243, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020) ("[I]t cannot be contested that Clark County, which contains most of Nevada's population—and likewise voters (69% of all registered voters [ ])—is differently situated than other counties. Acknowledging this as a matter of generally known (or judicially noticeable) fact and commonsense makes it more than rational for Clark County to provide additional accommodations to assist eligible voters."); *Ron Barber for Cong. v. Bennett*, No. 14-2489, 2014 WL 6694451, at *5 (D. Ariz. Nov. 27, 2014) ("[T]he [*Bush v. Gore*] Court did not invalidate different county systems regarding implementation of election procedures."); *Tex. Democratic Party v. Williams*, No. 07-115, 2007 WL 9710211, at n.4 (W.D. Tex. Aug. 16, 2007) ("In *Bush v. Gore*, the Supreme Court specifically noted: 'The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.' ").

***45** Equal protection does not demand the imposition of "mechanical compartments of law all exactly alike." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S.Ct. 9, 67 L.Ed. 107 (1922). Rather, "the Constitution is sufficiently flexible to permit its requirements to be considered in relation to the ... contexts in which they are invoked." *Merchants Nat'l Bank of Mobile v. Dredge Gen. G. L. Gillespie*, 663 F.2d 1338, 1343 (5th Cir. 1981). And in this context, "few (if any) electoral systems could survive constitutional scrutiny if the use of different voting mechanisms by counties offended the Equal Protection Clause." *Trump v. Bullock*, —— F.3d ——, ——, 2020 WL 5810556, at *14 (D. Mont. Sept. 30, 2020).

The distinction—between differences in county election procedures and differences in the treatment of votes or voters between counties—is reflected in *Bush* itself. There, the Supreme Court took pains to clarify that the question before it was "not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Bush*, 531 U.S. at 109, 121 S.Ct. 525; *see also id.* at 134, 121 S.Ct. 525 (Souter, J. dissenting) ("It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on."); *Bullock*, —— F.3d at ——, 2020 WL 5810556, at *14 ("[T]he Supreme Court was clear in *Bush v. Gore* that the question was not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.") (cleaned up).

Thus, coming back to the theory of Plaintiffs' case, Plaintiffs contend that Secretary Boockvar's drop-box guidance will result in differences between counties and differing risks of fraud. But the result of that uneven implementation will not be votes in certain counties being valued less than others. And the result won't be that voters who vote in person will have their votes valued less, either. Instead, if Plaintiffs are right, any unlawful votes will dilute all other lawful votes in the same way. While certainly voter fraud and illegal voting are bad, as a matter of equal protection, there is no unequal treatment here, and thus no burden on Plaintiffs' rights under the Equal Protection Clause.

In addition to their equal-protection claim based on county differences, Plaintiffs also appear to allude to a more general type of equal-protection violation. They assert that Pennsylvania comprises a single election unit. [ECF 551, p. 55 ("The electoral unit in this election is the entire Commonwealth of Pennsylvania.")]. They assert that they intend to cast their ballots lawfully. *See, e.g.,* [ECF 504-3, ¶ 4 ("As a Pennsylvania qualified registered elector, I have always voted in-person at primary and general elections, and I intend to vote in-person at the upcoming November 3, 2020 General Election.")]. And they assert that unmanned drop boxes across the Commonwealth (regardless of the county) will, on a statewide basis, dilute their votes. *See, e.g.,* [*id.* at ¶ 6 ("As a Pennsylvania qualified registered elector who votes in-person, I do not want my in-person vote diluted or cancelled by votes that are cast in a manner contrary

to the requirements enacted by the Pennsylvania General Assembly.")]. For example, if one "qualified elector" casts a lawful ballot, but a fraudulent voter casts ten ballots, then that elector's vote will, under Plaintiffs' theory, be diluted by a magnitude of ten—resulting in differential treatment.

***46** The problem with this theory is that there does not appear to be any law to support it. Indeed, if this were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's "interest" in failing to do more to stop illegal activity. This is not the law. To the contrary, it is well-established that even violations of state election laws by state officials, let alone violations by unidentified third parties, do not give rise to federal constitutional claims except in unusual circumstances. *See Shipley v. Chicago Bd. of Election Commissioners*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("A violation of state law does not state a claim under § 1983, and, more specifically, a deliberate violation of state election laws by state election officials does not transgress against the Constitution.") (cleaned up); *Martinez v. Colon*, 54 F.3d 980, 989 (1st Cir. 1995) ("[T]he Constitution is not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations—no matter how egregious those violations may appear within the local legal framework.").

Thus, this type of equal-protection claim fails as a matter of law, as well.

2. If Pennsylvania's "uneven" use of drop boxes indirectly burdens the right to vote at all, that burden is slight, and justified by important state interests.

Even assuming that Plaintiffs could establish unequal treatment to state an equal-protection claim, their claim nonetheless fails because the governmental interests here outweigh any burden on the right to vote.

Initially, the Court finds that the appropriate level of scrutiny is rational basis. Defendants' failure to implement a mandatory requirement to "man" drop boxes doesn't directly infringe or burden Plaintiffs' rights to vote at all. Indeed, as discussed above in the context of standing, what Plaintiffs characterize as the burden or harm here is really just an ancillary 'increased risk' of a theoretical harm, the degree of which has not been established with any empirical precision. *See Obama*, 697 F.3d at 429 ("If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used."); *Brehm*, 432 F. Supp. 3d at 310 ("Under this framework, election laws that impose no burden on the right to vote are subject to rational-basis review.").

On rational-basis review, the Secretary's guidance here passes constitutional muster. Her guidance certainly provides some flexibility in how counties may use drop boxes, but the guidance overall is rationally related to a legitimate governmental interest—namely, the implementation of drop boxes in a secure manner, taking into account specific county differences. That Plaintiffs feel the decisions and actions of the Pennsylvania General Assembly, Secretary Boockvar, and the county Defendants are insufficient to prevent fraud or illegal voting is of no significance. "[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

As detailed above, Secretary Boockvar's guidance provides lawful, comprehensive, and reasonable standards with respect to (1) selecting the location of drop boxes, (2) drop-box design criteria, (3) signage, (4) drop-box security measures, and (5) drop-box ballot collection and chain of custody procedures. Of particular note, with respect to ballot security, the Secretary's guidance calls for the use of reasonably robust measures like video surveillance, durable and tamperproof design features, regular ballot collection every 24 hours, chain-of-custody procedures to maintain ballot traceability, and signage advising voters that third-party delivery is prohibited, among other things.

To be sure, the Secretary's guidance doesn't insist on the use of security personnel—though some counties have decided to post security guards outside of drop boxes on their own. But the Court can't say that either the Secretary's failure to provide that requirement, or the decision of some counties to proceed with drop boxes "unmanned," is irrational. For example, the evidence presented demonstrates that placing a security guard outside of a drop box at all times is costly, particularly for cash-strapped counties—at least $13 per hour or about $104 (8 hours) to $312 (24 hours) per day, according to Defendants' expert, Professor Robert McNair. [ECF 549-11, p. 11] In the context of a broader election system that detects and deters fraud at many other stages of the voting process, and given

that that there are also no equivalent security measures present at U.S. postal mailboxes (which constitute an arguably more tempting vehicle for the would-be ballot harvester), the Court finds that the lack of any statewide requirement that all drop boxes be manned or otherwise surveilled is reasonable, and certainly rational.

***47** But even assuming Plaintiffs are right that their right to vote here has been burdened (and thus a heightened level of scrutiny must apply), that burden is slight and cannot overcome Defendants' important state interests under the *Anderson-Burdick* framework. Indeed, courts routinely find attenuated or ancillary burdens on the right to vote to be "slight" or insignificant, even burdens considerably *less* attenuated or ancillary than any burden arguably shown here. *See, e.g.*, *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) ("Under *Burdick*, the use of touchscreen voting systems is not subject to strict scrutiny simply because this particular balloting system may make the possibility of some kinds of fraud more difficult to detect.").[11]

To begin with, application of the *Anderson-Burdick* framework here presents something of a "square peg, round hole" dilemma. After all, that test assumes there is some constitutional injury to "weigh" against the state's "important" regulatory interests in the first place. And without differential treatment of votes or voters, there isn't any equal-protection injury for the Court to balance.

The *Anderson-Burdick* test is also ill-fitted to Plaintiffs' claims for another reason. Typically, *Anderson-Burdick* is invoked where the government takes some direct action to burden or restrict a plaintiff's right to vote. Here, in contrast, Plaintiffs complain that Pennsylvania has indirectly burdened the right to vote through ***inaction***—*i.e.*, by not imposing ***enough*** regulation to secure the voting process it has adopted, which, Plaintiffs say, will allow third parties to vote in an unlawful way, which, if it happens, will dilute (and thus burden) the right to vote.

***48** This unusual causal daisy-chain makes it difficult to apply *Anderson-Burdick*'s balancing approach. After all, it is one thing to assess the government's interest in taking a specific action that imposed burdens on the right to vote. It is much less natural for a court to evaluate whether the government had a good reason for not doing something differently, or for failing to do more to prevent (or reduce the risk of) misconduct by third parties that could burden the right to vote.

To the extent *Anderson-Burdick* applies in such circumstances, the appropriate course would, in this Court's view, be to weigh any burden stemming from the government's alleged failures against the government's interest in enacting the broader election scheme it has erected, of which the challenged piece is usually only one part. Focusing solely on the allegedly inadequate procedure being challenged, such as the state's authorization of "drop boxes" here, would ignore the fact that Election Code provisions and regulations operate as part of a single, complex organism balancing many competing interests, all of which are "important" for purposes of the *Anderson-Burdick* analysis. *See, e.g.*, *Crawford*, 553 U.S. at 184, 128 S.Ct. 1610 ("deterring and detecting voter fraud"); *Tedards v. Ducey*, 951 F.3d 1041, 1067 (9th Cir. 2020) ("voter turnout"); *Lunde v. Schultz*, 221 F. Supp. 3d 1095, 1106 (S.D. Iowa 2014) ("expanding ballot access to nonparty candidates"); *Greenville Cnty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 671 (D.S.C. 2011) ("promoting voter participation in the electoral process"); *Mays v. LaRose,* 951 F.3d 775, 787 (6th Cir. 2020) ("orderly administration of elections"); *Dudum*, 640 F.3d at 1115 ("orderly administration of ... elections"); *Paher v. Cegavske* , 457 F.Supp.3d 919, ——, 2020 WL 2089813, at *7 (2020) ("protect[ing] the health and safety of ... voters" and "safeguard[ing] the voting franchise"); *Nemes*, —— F. Supp. 3d at ——, 2020 WL 3402345, at *13 ("implementing voting plans that provide for a free and fair election while attempting to minimize the spread of COVID-19").

Thus, on the "burden" side of the equation is Plaintiffs' harm of vote dilution predicated on a risk of fraud. As discussed above in the context of lack of standing, that burden is slight, factually, because it is based on largely speculative evidence of voter fraud generally, anecdotal evidence of the mis-use of certain drop boxes during the primary election, and worries that the counties will not implement a "best practice" of having poll workers or guards man the drop boxes. *See* [ECF 461, ¶¶ 63-82; ECF 504-2, ¶ 12; 504-3, ¶ 6; 504-4, ¶7;; ECF 504-6, ¶¶ 6-8; ECF 504-7, ¶¶ 5-9; ECF 504-9, 92:4-10; ECF 504-10, 60:3-61:10; 504-19, pp. 3, 16-18, 20 & Ex. D; ECF 504-25; ECF 504-49; ECF 509, p. 67; ECF 551, p. 34].

This somewhat scant evidence demonstrates, at most, an increased risk of some election irregularities—which, as many courts have held, does not impose a meaningful burden under *Anderson-Burdick*. "Elections are, regrettably, not always free from error," *Hutchinson v. Miller*, 797 F.2d

1279, 1286–87 (4th Cir. 1986), let alone the "risk" of error. In just about every election, votes are counted, or discounted, when the state election code says they should not be. But the Constitution "d[oes] not authorize federal courts to be state election monitors." *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1980). It is "not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations." *Fournier v. Reardon*, 160 F.3d 754, 757 (1st Cir. 1998). Nor is it "an election fraud statute." *Minnesota Voters*, 720 F.3d at 1031.

***49** "Garden variety" election irregularities, let alone the "risk" of such irregularities, are simply not a matter of federal constitutional concern "even if they control the outcome of the vote or election." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). And as discussed above, most often, even "a deliberate violation of state election laws by state election officials does not transgress against the Constitution." *Shipley*, 947 F.3d at 1062. *see, e.g.*, *Lecky v. Virginia State Bd. of Elections*, 285 F. Supp. 3d 908, 919 (E.D. Va. 2018) ("[E]ven assuming the Fredericksburg officials' failure to provide provisional ballots amounted to a violation of state law, it would not rise to the level of an equal protection violation.").

Compared, then, to Plaintiffs' slight burden, the Commonwealth has put forward reasonable, precise, and sufficiently weighty interests that are undisputed and that can be distilled into three general categories: (1) the benefits of drop boxes, (2) the Commonwealth's interests in furthering its overall election-security plan concerning drop boxes, and (3) the interests inherent in the Commonwealth's general mail-in ballot scheme.

The first category concerns the benefits of drop boxes generally. Secretary Boockvar has pointed out the Commonwealth's interests generally in using drop boxes—including, (1) the increase of voter turnout, (2) the protection of voters' health in the midst of the ongoing pandemic, (3) the increase of voter satisfaction, in light of ongoing U.S. Postal Service issues, and (4) the reduction of costs for counties. [ECF No. 547, at pp. 22-25; ECF No. 549-2, ¶¶ 36-39, 42-44]. Plaintiffs do not dispute any of these interests.

The second category of interests concerns the Commonwealth's interests in implementing drop boxes with appropriate and effective safety measures and protocols in place. That is, Secretary Boockvar has, in her capacity as the chief state official charged with overseeing elections, issued uniform guidance to all counties regarding the use of drop boxes, which is noted above. That guidance includes (1) advising counties that the Election Code permits the use of drop boxes, and (2) setting forth best practices that the counties should "consider" with respect to their use. Among other things, the Secretary advised that counties should maintain a traceable chain of custody for mail-in and absentee ballots retrieved from drop boxes; utilize drop boxes with various security features (*e.g.,* anti-tampering features, locks, video surveillance, and removal when the site is closed or cannot be monitored); and designate sworn county personnel to remove ballots from drop boxes. And evidence suggests that the Secretary's deputies have emphasized these best practices when queried by county officials. [ECF 549-32 ("Per our conversation, the list of items are things the county must keep in mind if you are going to provide a box for voters to return their ballots in person.")].

This guidance is lawful, reasonable, and non-discriminatory, and so does not create any constitutional issue in its own right. With this guidance, the Secretary has diminished the risks tolerated by the legislature in adopting mail-in voting and authorizing drop-boxes, by encouraging the counties to adopt rather comprehensive security and chain-of-custody procedures if they do elect to use drop boxes. Conversely, the legislature's decision to leave the counties with ultimate discretion when it comes to how, and to what extent, to use drop boxes (as opposed to adopting a scheme in which the Secretary could enforce compliance with her guidance) is also reasonable, and justified by sufficiently weighty governmental interests, given the many variations in population, geography, local political culture, crime rates, and resources. [ECF 549-9 ("There is no logical reason why ballot receptacles such as drop boxes must be uniform across different counties; particularly because the verification of the voter is determined by election officials upon receipt of the ballot. Counties vary in size and need. Across the country, best practices dictate that counties determine what type of box and size works for them. The needs of a large county are very different from the needs of a smaller county."); ECF 549-11, p. 9 ("Such variation between counties even within a state makes sense, since the needs of different counties vary and their use of drop boxes reflects those considerations (e.g., the geographic size of a county, the population of the county, and the ease with which voters in the county can access other locations to return mail-in ballots).").].

***50** The third category of interests is, more generally, the interests of the Commonwealth in administering its overall

mail-in ballot regime, including the various security and accountability measures inherent in that legislative plan.

Pennsylvania did not authorize drop boxes in a vacuum. Last year, the Pennsylvania legislature "weigh[ed] the pros and cons," *Weber*, 347 F.3d at 1107, and adopted a broader system of "no excuse" mail-in voting as part of the Commonwealth's Election Code. As the Pennsylvania Supreme Court has now confirmed, that system left room for counties to authorize drop boxes and other satellite locations for returning ballots to the county boards of elections. *See Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *9 ("[W]e need not belabor our ultimate conclusion that the Election Code should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes.").

Inherent in any mail-in or absentee voting system is some degree of increased risk of votes being cast in violation of other provisions of the Election Code, regardless of whether those ballots are returned to drop boxes, mailboxes, or some other location. For example, there is simply no practical way to police third party delivery of ballots to any mailbox anywhere in the Commonwealth, where Plaintiffs do not dispute that such ballots can be lawfully returned. It is also likely that more (and perhaps many more) voters than usual will be disenfranchised by technicalities this year, for failing to comply with the procedural requirements associated with mail-in ballots, such as the requirement that such ballots be placed in "inner secrecy envelopes."

But in enacting the "no excuse" mail-in voting system that it did, the Pennsylvania legislature chose to tolerate the risks inherent in that approach. And the key point is that the legislature made that judgment in the context of erecting a broader election scheme that authorizes other forms of voting and has many other safeguards in place to catch or deter fraud and other illegal voting practices. These safeguards include voter registration; a mail-in ballot application and identity verification process, 25 P.S. §§ 3146.2, 3150.12; a system for tracking receipt of mail-in ballots, 25 P.S. §§ 3146.3(a), 3150.13(a); and, perhaps most important of all, a pre-canvassing and canvassing process during which mail-in ballots are validated before being counted. In addition, Pennsylvania law also seeks to deter and punish fraud by imposing criminal penalties for unlawful voting, 25 P.S § 3533; voting twice in one election, 25 P.S § 3535; forging or destroying ballots, 25 P.S § 3517; unlawful possession or counterfeiting of ballots 25 P.S § 3516; and much more of the conduct Plaintiffs fear, *see* 25 P.S. § 3501, *et seq.*

In this larger context, the Court cannot say that the balance Pennsylvania struck across the Election Code was unreasonable, illegitimate, or otherwise not "sufficiently weighty to justify," *Crawford*, 553 U.S. at 191, 128 S.Ct. 1610, whatever ancillary risks may be associated with the use of drop boxes, or with allowing counties to exercise discretion in that regard. Pennsylvania may balance the many important and often contradictory interests at play in the democratic process however it wishes, and it must be free to do so "without worrying that a rogue district judge might later accuse it of drawing lines unwisely." *Abbott*, 961 F.3d at 407.

***51** Thus, balancing the slight burden of Plaintiffs' claim of dilution against the categories of interests above, the Court finds that the Commonwealth and Defendants' interests in administering a comprehensive county-based mail-in ballot plan, while both promoting voting and minimizing fraud, are sufficiently "weighty," reasonable, and justified. Notably, in weighing the burdens and interests at issue, the Court is mindful of its limited role, and careful to not intrude on what is "quintessentially a legislative judgment." *Griffin*, 385 F.3d at 1131. "[I]t is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems." *Weber*, 347 F.3d at 1106. "So long as their choice is reasonable and neutral, it is free from judicial second-guessing." *Id.*; *see also Abbott,* 961 at 407, ("That the line might have been drawn differently ... is a matter for legislative, rather than judicial, consideration.") (cleaned up); *Trinsey v. Com. of Pa.*, 941 F.2d 224, 235 (3d Cir. 1991) ("We take no position on the balancing of the respective interests in this situation. That is a function for which the legislature is uniquely fitted.").

Thus, even under the *Anderson-Burdick* framework, the Court finds that Plaintiffs' constitutional challenge fails as a matter of law.

B. Pennsylvania's use of drop boxes does not violate federal due process.

In addition to their equal-protection challenge to the use of drop boxes, Plaintiffs also appear to argue that the use of unmanned drop boxes violates substantive due process protected by the 14th Amendment. This argument is just a variation on their equal-protection argument—*i.e.*, the uneven use of drop boxes will work a "patent and fundamental unfairness" in violation of substantive due process principles. *See Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978)

(substantive due process rights are violated "[i]f the election process itself reaches the point of patent and fundamental unfairness[.]"). The analysis for this claim is the same as that for equal protection, and thus it fails for the same reasons.

But beyond that, this claim demands even stricter proof. Such a claim exists in only the most extraordinary circumstances. *See Nolles v. State Comm. for Reorganization of Sch. Districts*, 524 F.3d 892, 898 (8th Cir. 2008) ("A canvass of substantive due process cases related to voting rights reveals that voters can challenge a state election procedure in federal court only in limited circumstances, such as when the complained of conduct discriminates against a discrete group of voters, when election officials refuse to hold an election though required by state law, resulting in a complete disenfranchisement, or when the willful and illegal conduct of election officials results in fraudulently obtained or fundamentally unfair voting results.") (cleaned up); *Yoshina,* 140 F.3d at 1226 ("We have drawn a distinction between 'garden variety' election irregularities and a pervasive error that undermines the integrity of the vote. In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election.") (citation omitted); *Bennett v. Mollis*, 590 F. Supp. 2d 273, 278 (D.R.I. 2008) ("Before an election error becomes a key that unlocks the restraints on the federal court's authority to act, the Plaintiffs must demonstrate either an intentional election fraud or an unintentional error resulting in broad-gauge unfairness.").

Indeed, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense"—the "executive action must be so ill-conceived or malicious that it 'shocks the conscience.' " *Miller v. City of Phila.*, 174 F.3d 368, 375 (3d Cir. 1999) (cleaned up).

Based on the slight burden imposed here, and the Commonwealth's interests in their overall county specific voting regime, which includes a host of other fraud-prevention measures, the Court finds that the drop-box claim falls short of the standard of substantive due process.

III. Defendants and Intervenors are entitled to summary judgment on Plaintiffs' signature-comparison claims.

***52** Plaintiffs' next claim concerns whether the Secretary's recent guidance on signature comparison violates the federal Constitution. Plaintiffs frame their claims pertaining to signature comparison in two ways—one based on due process and the other based on equal protection.

Plaintiffs initially assert that the Election Code requires a signature comparison for mail-in and absentee applications and ballots. Thus, according to Plaintiffs, Secretary Boockvar's guidance, which says the opposite, is creating unconstitutional vote dilution, in violation of due-process principles—*i.e.*, certain unlawful, unverified ballots will now be counted, thereby diluting the lawful ones cast by other voters (such as in-person voters, whose signatures are verified). Plaintiffs also appear to argue more generally that absent signature comparison, there is a heightened risk of voter fraud, and therefore a heightened risk of vote dilution of lawful votes.

In addition to due process, Plaintiffs argue that the guidance violates equal-protection principles—first, by counties engaging in a patchwork of procedures (where some counties intend to do a signature comparison for mail-in ballots, while others do not); and second, by implementing different standards between mail-in ballots and in-person ones.

In contrast, Defendants and Intervenors take the position that state law does not require signature comparison, and for good reason. According to them, requiring such comparisons is fraught with trouble, as signatures change over time and elections officials are not signature-analysis experts. This leaves open the possibility for arbitrary and discriminatory application that could result in the disenfranchisement of valid voters.

For the reasons that follow, the Court will dismiss the signature-comparison claims and enter judgment in favor of Defendants. A plain reading of the Election Code demonstrates that it does not impose a signature-comparison requirement for mail-in ballots and applications, and thus Plaintiffs' vote-dilution claim sounding in due process fails at the outset. Further, the heightened risk of fraud resulting from a lack of signature comparison, alone, does not rise to the level of a federal constitutional violation. Finally, the equal-protection claims fail because there are sound reasons for the different treatment of in-person ballots versus mail-in ballots; and any potential burdens on the right to vote are outweighed by the state's interests in their various election security measures.

A. The Election Code does not require signature comparison for mail-in and absentee ballots or ballot applications.

Plaintiffs' federal-constitutional claims in Count I of their Second Amended Complaint are partially based on the Secretary's guidance violating state law. That is, Plaintiffs' first theory is that by the Secretary violating state law, unlawful votes are counted and thus lawfully cast votes are diluted. According to Plaintiffs, this violates the 1st and 14th Amendments, as well as the Elections Clause (the latter of which requires the legislature, not an executive, to issue election laws).[12]

***53** Thus, a necessary predicate for these constitutional claims is whether the Election Code mandates signature comparison for mail-in and absentee ballots. If it doesn't, as the Secretary's guidance advises, then there can be no vote dilution as between lawful and unlawful votes, nor a usurpation of the legislature's authority in violation of the Elections Clause.

After carefully considering the parties' arguments and the relevant law, the Court finds that the plain language of the Election Code imposes no requirement for signature comparison for mail-in and absentee ballots and applications.[13] In other words, the Secretary's guidance is consistent with the Election Code, and creates no vote-dilution problems.[14]

Plaintiffs, in advancing their claim, rely on section 3146.8(g)(3)-(7) of the Election Code to assert that the Code requires counties to "verify" the signatures on mail-in and absentee ballots (*i.e.*, examine the signatures to determine whether they are authentic). Plaintiffs specifically point to section 3146.8(g)(3) as requiring this signature verification. [ECF 509, pp. 17-18].

Section 3146.8(g)(3) states:

> When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots ... the board shall examine the declaration on the envelope of each ballot ... and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

***54** 25 P.S. § 3146.8(g)(3).

According to Plaintiffs, Section 3146.8(g)(3)'s requirement to verify the proof of identification, and compare the information on the declaration, is tantamount to signature comparison. The Court disagrees, for at least three reasons.

First, nowhere does the plain language of the statute require signature comparison as part of the verification analysis of the ballots.

When interpreting a statute enacted by the Pennsylvania General Assembly, courts apply Pennsylvania's Statutory Construction Act, 1 Pa. C.S. §§ 1501-1991. And as the Act instructs, the "object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa C.S. § 1921(a). If the words of the statute are clear and unambiguous, the letter of the law applies. *Id.* at § 1921(b). Otherwise, courts may consider a variety of factors to determine the legislature's intent, including "other statutes upon the same or similar subjects" and "[t]he consequences of a particular interpretation." *Id.* at § 1921(c)(5)-(6).

Section 3146.8(g)(3) does not expressly require any signature verification or signature comparison. 25 P.S. § 3146.8(g)(3). It instead requires election officials to (1) "examine the declaration on the envelope of each ballot," (2) "compare the information thereon with that contained in the ... 'Voters file' [or] the absentee voters' list," and (3) if "the county board has [a] verified the proof of identification as required under this act and [b] is satisfied that the declaration is sufficient and the information contained in the [Voter's file] ... verifies his right to vote," the election official shall include the ballot to be counted. *Id.*

Under the express terms of the statute, then, the information to be "verified" is the "proof of identification." *Id.* The Election Code defines "proof of identification" as the mail-in/absentee voter's driver's license number, last four digits of their Social Security number, or a specifically approved form of identification. 25 P.S. § 2602(z.5)(3)(i)-(iv).[15] The only other "verification" the election official must conduct is to determine whether "the information contained in the [Voter's file] ... verifies his right to vote."

***55** Nowhere does this provision require the election official to compare and verify the authenticity of the elector's signature. In fact, the word "signature" is absent from the provision. It is true that the elector must fill out and sign the declaration included on the ballot. 25 P.S. §§ 3146.6(a), 3150.16(a). However, while section 3146.8(g)(3) instructs the election official to "examine the declaration ... and compare the information thereon with that contained in the [Voter's file]," the provision clarifies that this is so the election official can be "satisfied that the declaration is sufficient." 25 P.S. § 3146.8(g)(3). In other words, the election official must be "satisfied" that the declaration is "fill[ed] out, date[d] and sign[ed]," as required by sections 3150.16(a) and 3146.6(a) of the Election Code. Notably absent is any instruction to verify the signature and set aside the ballot if the election official believes the signature to be non-genuine. There is an obvious difference between checking to see if a signature was provided at all, and checking to see if the provided signature is sufficiently authentic. Only the former is referred to in section 3146.8(g)(3).

Second, beyond the plain language of the statute, other canons of construction compel the Court's interpretation. When interpreting statutes passed by the General Assembly, Pennsylvania law instructs courts to look at other aspects of the statute for context. *See* 1 Pa. C.S. § 1921(c)(5) ("When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering ... other statutes upon the same or similar subjects."); *O'Rourke v. Commonwealth*, 566 Pa. 161, 778 A.2d 1194, 1201 (2001) ("The cardinal rule of all statutory construction is to ascertain and effectuate the intent of the Legislature. To accomplish that goal, we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear." (citation omitted)).

Context here is important because the General Assembly mandated signature comparison for in-person voting elsewhere in the Election Code—thus evidencing its intention not to require such comparison for mail-in ballots. *See Fonner v. Shandon, Inc.*, 555 Pa. 370, 724 A.2d 903, 907 (1999) ("[W]here a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent.") (citation omitted).

In addressing in-person voting, the General Assembly explicitly instructs that the election official shall, after receiving the in-person elector's voter certificate, immediately "***compare the elector's signature*** on his voter's certificate with his signature in the district register. If, upon such comparison, the signature upon the voter's certificate appears to be genuine, the elector who has signed the certificate shall, if otherwise qualified, be permitted to vote: Provided, That ***if the signature on the voter's certificate, as compared with the signature as recorded in the district register, shall not be deemed authentic*** by any of the election officers, such elector shall not be denied the right to vote for that reason, but shall be considered challenged as to identity and required to [cure the deficiency]." 25 P.S. § 3050(a.3)(2) (emphasis added).

Elsewhere, the General Assembly also explicitly accounts for signature comparison of in-person voters: "[I]f it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, ***the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, shall count the ballot*** if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election. ... [But a] provisional ballot shall not be counted if ... the signature[s] required ... are either not genuine or are not executed by the same individual ..." 25 P.S. § 3050(a.4)(5)(i)-(ii) (emphasis added); *see also* 25 P.S. § 2936 ("[When reviewing nomination papers], the Secretary of the Commonwealth or the county board of elections, although not hereby required so to do, ***may question the genuineness of any signature or signatures appearing thereon***, and if he or it shall thereupon find that any such signature or signatures are not genuine, such signature or signatures shall be disregarded[.]" (emphasis added)).

***56** Clearly then, the General Assembly, in enacting the Election Code, knew that it could impose a signature-comparison requirement that requires an analysis to determine whether a signature is "genuine." And when that was its intent, the General Assembly explicitly and unequivocally imposed that requirement. It is thus telling, from a statutory construction standpoint, that no such explicit requirement is imposed for returned mail-in or absentee ballots. Indeed, the General Assembly is aware—and in fact, requires—that a voter must sign their application for an absentee or mail-in ballot, and must sign the declaration on their returned ballot. 25 P.S. §§ 3146.2(d) (absentee-ballot application), 3150.12(c) (mail-in-ballot application), 3146.6(a) (absentee-voter declaration), 3150.16(a) (mail-in voter declaration). Despite this, the General Assembly did

not mention a signature-comparison requirement for returned absentee and mail-in ballots.

The Court concludes from this context that this is because the General Assembly did not intend for such a requirement. *See, e.g.*, *Mishoe v. Erie Ins. Co.*, 573 Pa. 267, 824 A.2d 1153, 1155 (2003) ("In arriving at our conclusion that the foregoing language does not provide for the right to a jury trial, we relied on three criteria. First, we put ***substantial emphasis*** on the fact that the PHRA was silent regarding the right to a jury trial. As we explained, 'the General Assembly is well aware of its ability to grant a jury trial in its legislative pronouncements,' and therefore, 'we can presume that the General Assembly's express granting of trial by jury in some enactments means that it did not intend to permit for a jury trial under the PHRA.' " (cleaned up) (emphasis added)); *Holland v. Marcy*, 584 Pa. 195, 883 A.2d 449, 456, n.15 (2005) ("We additionally note that the legislature, in fact, did specify clearly when it intended the choice of one individual to bind others. In every other category addressed by Section 1705(a) other than (a)(5) which addressed uninsured owners, the General Assembly specifically referenced the fact that the decision of the named insured ... binds other household members.... Similar reference to the ability of the uninsured owner's deemed choice to affect the rights of household members is conspicuously missing from Section 1705(a)(5).").

Accordingly, the Court finds that the General Assembly's decision not to expressly refer to signature comparisons for mail-in ballots, when it did so elsewhere, is significant.

Third, this Court is mindful that Pennsylvania's election statutes are to be construed in a manner that does not risk disenfranchising voters. *See, e.g.*, 1 Pa. C.S. § 1922(3) ("In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: ... That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth."); *id.* at § 1921(c)(6) (in interpreting a statute, the court may consider "[t]he consequences of a particular interpretation").

As the Pennsylvania Supreme Court emphasized last month, "[I]t is well-settled that, although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote. Indeed, our goal must be to enfranchise and not to disenfranchise the electorate." *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *9 (cleaned up); *see also id.* ("[A]lthough both Respondent and the Caucus offer a reasonable interpretation of Section 3150.16(a) as it operates within the Election Code, their interpretation restricts voters' rights, as opposed to the reasonable interpretation tendered by Petitioner and the Secretary. The law, therefore, militates in favor of this Court construing the Election Code in a manner consistent with the view of Petitioner and the Secretary, as this construction of the Code favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate.").

***57** Here, imposing a signature-comparison requirement as to mail-in and absentee ballots runs the risk of restricting voters' rights. This is so because election officials, unstudied and untested in signature verification, would have to subjectively analyze and compare signatures, which as discussed in greater detail below, is potentially problematic.[16] [ECF 549-2, p. 19, ¶ 68]; [ECF 549-9, p. 20, ¶ 64]. And perhaps more importantly, even assuming an adequate, universal standard is implemented, mail-in and absentee voters whose signatures were "rejected" would, unlike in-person voters, be unable to cure the purported error. *See* 25 P.S. § 3146.8(a) (stating that in-person and absentee ballots "shall [be safely kept] in sealed or locked containers until they are to be canvassed by the county board of elections," which § 3146.8(g)(1.1)-(2) states is no earlier than election day); *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *20 ("[A]lthough the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the 'notice and opportunity to cure' procedure sought by Petitioner. To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature."). As discussed in more detail below, unlike in-person voters, whose signatures are verified in their presence, mail-in and absentee voters' signatures would be verified at a later date outside the presence of the voter. *See generally* 25 P.S. § 3146.8(a), (g) (requiring mail-in and absentee ballots to be kept secured in a sealed container until Election Day). Unbeknownst to the voter, then, and without an opportunity to remedy the purported error, these mail-in and absentee voters may not have their votes counted. Based on this risk of disenfranchisement, which the Court must consider in interpreting the statute, the Court cannot conclude that this was the General Assembly's intention.

The Court is not persuaded by Plaintiffs' arguments to the contrary.

Plaintiffs argue that section 3146.8(g)(5)-(7) provides a voter, whose ballot-signature was rejected, notice and an opportunity to cure the signature deficiency. [ECF 509, pp. 13, 18, 50]. That section, however, refers to when a person raises a specific challenge to a specific ballot or application on the grounds that the elector is not a "qualified elector." 25 P.S. § 3146.8(g)(4) (stating that mail-in and absentee ballots shall be counted unless they were challenged under §§ 3146.2b or 3150.12b, which allow challenges on the grounds that the elector applying for a mail-in or absentee ballot wasn't qualified). Thus, the "challenges" referenced in § 3146.8(g)(5)-(7) refer to a voter's qualifications to vote, not a signature verification.

Plaintiffs similarly argue that section 3146.8(h) provides mail-in voters notice and opportunity to cure signature deficiencies. [ECF 552, p. 60]. But that section relates to "those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified." 25 P.S. § 3146.8(h). As discussed above, "proof of identification" is a defined term, and includes the voter's driver's license number, last four digits of their Social Security number, or a specifically approved form of identification. 25 P.S. § 2602(z.5)(3)(i)-(iv). Not included is the voter's signature.[17]

***58** At bottom, Plaintiffs request this Court to impose a requirement—signature comparison—that the General Assembly chose not to impose. Section 3146.8(g)(3) does not mention or require signature comparison. The Court will not write it into the statute.

For the same reasons that the Election Code does not impose a signature-comparison requirement for mail-in and absentee ballots, the Election Code does not impose a signature-comparison requirement for mail-in and absentee ballot ***applications.*** While the General Assembly imposed a requirement that the application be signed, there is no mention of a requirement that the signature be verified, much less that the application be rejected based solely on such verification. 25 P.S. §§ 3146.2(d) (absentee-ballot application), 3150.12(c) (mail-in-ballot application). Again, finding no explicit instructions for signature comparison here (unlike elsewhere in the Code), the Court concludes that the General Assembly chose not to include a signature-comparison requirement for ballot applications.

The Court again finds Plaintiffs' arguments to the contrary unavailing. Plaintiffs argue that "there is no other proof of identification required to be submitted with the ballot applications," and thus, a signature comparison must be required. [ECF 509, p. 16].

But the Election Code expressly requires the applicant to include several pieces of identifying information, including their name, mailing address, and date of birth. 25 P.S. §§ 3146.2(b), 3150.12(b). And after receiving the applicant's application, the election official must "verify[ ] the proof of identification [a defined term as discussed above] and compar[e] the information provided on the application with the information contained on the applicant's permanent registration card."[18] *Id.* at §§ 3146.2b(c), 3150.12b(a). Thus, contrary to Plaintiffs' argument, the General Assembly provided for certain methods of identification as to ballot applications. Signature verification isn't one of them.

For these reasons, the Court concludes that the Election Code does not impose a signature-comparison requirement for absentee and mail-in ballots and applications. As such, the Secretary's September 11, 2020, and September 28, 2020, guidance is consistent with the Election Code. Plaintiffs' claims of vote dilution based on this guidance will therefore be dismissed.

B. The lack of a signature comparison does not violate substantive due process.

In addition to alleging that the Secretary's guidance violates the Election Code, Plaintiffs appear to also argue that their right to vote is unconstitutionally burdened and diluted due to a risk of fraud. That is, regardless of what the Election Code requires, Plaintiffs assert that absent signature comparison, mail-in and absentee ballots will be prone to fraud, thereby diluting other lawful ballots. [ECF 509, pp. 45-50; 504-19, pp. 10-15]. Plaintiffs argue that this significantly burdens their fundamental right to vote, resulting in a due-process violation, and thus strict scrutiny applies. The Court disagrees.

***59** As discussed above in the context of Plaintiffs' drop-box claim, Plaintiffs' claim here simply does not rise to the high level for a substantive due process claim. To violate substantive due process in the voting-rights context, the infringements are much more severe. Only in extraordinary circumstances will there be "patent and fundamental unfairness" that causes a constitutional harm. *See Bonas v. Town of North Smithfield*, 265 F.3d 69, 74 (1st

Cir. 2001); *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005).

Here, Plaintiffs' signature-comparison claim does not meet this high standard. This isn't a situation of malapportionment, disenfranchisement, or intentional discrimination. And the risk of voter fraud generally without signature comparison —as a matter of fact and law—does not rise to "patent and fundamental unfairness."

Indeed, as discussed above, Plaintiffs' evidence of potential voter fraud here is insufficient to establish "patent and fundamental unfairness." In their summary-judgment brief, Plaintiffs argue that "the Secretary's September 2020 guidance memos promote voter fraud." [ECF 509, p. 48]. Plaintiffs then offer a hypothetical where a parent signs a ballot application on their child's behalf because the child is out-of-state. [ECF 509, p. 48]. Plaintiffs assert that without signature comparisons, such "fraud" could proceed unchecked. [*Id.*]. Plaintiffs continue, arguing that the "fraud" would "snowball," so that "spouses, neighbors, acquaintances, strangers, and others" were signing applications and ballots on others' behalf. [*Id.* at pp. 48-49]. To prevent such fraud, Plaintiffs' expert, Mr. Riddlemoser, asserts that signature comparison is needed. [ECF 504-19, p. 10 ("Not only does enforcing the Election Code's requirement of a completed and signed declaration ensure uniformity, which increases voter confidence, it also functions to reduce fraud possibilities by allowing signature verification.")].

Mr. Riddlemoser first highlights that in Philadelphia in the primary, ballots were counted "that lacked a completed declaration." [*Id.* at p. 11]. Mr. Riddlemoser further opines that the September 11, 2020, guidance and September 28, 2020, guidance, in instructing that signature comparison is not required for mail-in and absentee ballots and applications, "encourage[s], rather than prevent[s], voter fraud." [*Id.* at pp. 12-13]. Mr. Riddlemoser also notes that signature comparison is "the most common method" to verify ballots and that the Secretary's guidance "leave the absentee/mail-in ballots subject to the potential for unfettered fraud." [*Id.* at p. 14]. He concludes that the guidance "invites the dilution of legitimately cast votes." [*Id.*].

Based on this evidentiary record, construed in Plaintiffs' favor, the Court cannot conclude that there exists "patent and fundamental unfairness." Rather, Plaintiffs present only the possibility and potential for voter fraud. In their briefing, Plaintiffs relied on hypotheticals, rather than actual events. [ECF 509, p. 48]. Mr. Riddlemoser admits that failing to verify signatures only creates "the potential" for fraud and "invites" vote dilution. [ECF 504-19, pp. 14, 15]. Even assuming an absence of signature comparison does indeed invite the potential for fraud, the nondiscriminatory, uniform practice and guidance does not give rise to "patent and fundamental unfairness" simply because of a "potential" for fraud. Plaintiffs have not presented evidence to establish a sufficient burden on their constitutional right to vote.

***60** Indeed, even if the Court assumed some "forged" applications or ballots were approved or counted, this is insufficient to establish substantial, widespread fraud that undermines the electoral process. Rather, limited instances of "forged" ballots—which according to Plaintiffs' definition, includes an individual signing for their spouse or child—amount to what the law refers to as "garden variety" disputes of limited harm. As has long been understood, federal courts should not intervene in such "garden variety" disputes. *Hutchinson*, 797 F.2d at 1283 ("[C]ourts have uniformly declined to endorse action under § 1983 with respect to garden variety election irregularities.") (cleaned up); *Yoshina*, 140 F.3d at 1226 ("In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election." (collecting cases)); *Curry v. Baker*, 802 F.2d 1302, 1314-15 (11th Cir. 1986) ("[I]f the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots." (cleaned up)).

To be clear, the Court does not take Plaintiffs' allegations and evidence lightly. Election fraud is serious and disruptive. And Plaintiffs could be right that the safer course would be to mandate signature comparison for all ballots. But what Plaintiffs essentially complain of here is whether the procedures employed by the Commonwealth are sufficient to prevent that fraud. That is a decision left to the General Assembly, not to the meddling of a federal judge. *Crawford*, 553 U.S. at 208, 128 S.Ct. 1610 (Scalia, J. concurring) ("It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class."). *Griffin*, 385 F.3d at 1131-32 ("[S]triking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment

with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.").

C. Plaintiffs' federal equal-protection claims based on signature comparison fail.

Plaintiffs present two federal equal-protection claims. The Court will address each in turn.

1. County differences over signature comparison do not violate federal equal-protection rights.

Plaintiffs' first federal equal-protection claim is based on some county boards of elections intending to verify the signatures on mail-in and absentee ballots and applications, while others do not intend to do so. To that end, Plaintiffs have presented evidence that some, but not all, counties do intend to verify signatures. *E.g.*, [ECF 504-1].[19] According to Plaintiffs, this arbitrary and differential treatment of mail-in and absentee ballots among counties—purportedly caused by the Secretary's September 11, 2020, and September 28, 2020, guidance—violates the Equal-Protection Clause because voters will be treated differently simply because of the county in which they reside. The Court, however, finds no equal-protection violation in this context.

The Secretary's guidance about which Plaintiffs complain is uniform and nondiscriminatory. It was issued to all counties and applies equally to all counties, and by extension, voters. Because the uniform, nondiscriminatory guidance is rational, it is sound under the Equal-Protection Clause. *See Gamza*, 619 F.2d at 453 (5th Cir. 1980) ("We must, therefore, recognize a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual's vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause.") (citation omitted). Indeed, the guidance merely instructs counties to abide by the Election Code—an instruction to follow the law is certainly rational and related to an obviously rational government interest.

61** In fact, if there is any unequal application now, it is caused by those counties that are ***not following the guidance and are going above and beyond the Election Code to impose a signature-comparison requirement. That claim, though, is not before the Court, as Plaintiffs here do not assert that imposing a signature-comparison requirement violates the Constitution (they allege the opposite).

In any event, to the extent there was uncertainty before, this decision informs the counties of the current state of the law as it relates to signature comparison. If any county still imposes a signature-comparison requirement in order to disallow ballots, it does so without support from the Secretary's guidance or the Election Code. Further, counties that impose this signature-comparison requirement to reject ballots may be creating a different potential constitutional claim for voters whose ballots are rejected. *Boockvar*, ––– A.3d at ––––, 2020 WL 5554644, at *34, n.16 (Wecht, J. concurring) (noting that courts around the country have found due process issues with signature-comparison requirements; and collecting cases).

For these reasons, Plaintiffs' equal-protection claim falls short.

2. Different treatment between in-person ballots and mail-in ballots also does not violate federal equal-protection rights.

Plaintiffs also assert a second federal equal-protection claim on the grounds that the Election Code, by not requiring signature comparison for mail-in and absentee ballots, treats such ballots differently than in-person ballots (which require signature comparisons). Plaintiffs argue that this is an unconstitutionally arbitrary and unequal treatment. The Court disagrees.

It is well-settled that states may employ in-person voting, absentee voting, and mail-in voting and each method need not be implemented in exactly the same way. *See Hendon*, 710 F.2d at 181 ("A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state.")

"Absentee voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures." *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) (citations omitted). It is an "obvious fact that absentee voting is an inherently different procedure from in-person voting." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 830-31 (S.D. Ind. 2006). Because in-person voting

is "inherently different" from mail-in and absentee voting, the procedures for each need not be the same. *See, e.g.*, *Santillanes*, 546 F.3d at 1320-21 ("[B]ecause there are clear differences between the two types of voting procedures, the law's distinction is proper."); *Rokita*, 458 F. Supp. 2d at 831 ("[I]t is axiomatic that a state which allows for both in-person and absentee voting must therefore apply different requirements to these two groups of voters."); *Billups*, 439 F. Supp. 2d at 1356-57 ("[A]bsentee voting and in-person voting are inherently different processes, and both processes use different standards, practices, and procedures.").

Plaintiffs argue that while absentee and mail-in voting "is a fundamentally different process from in-person voting," Defendants have "no justification in this instance to create such an arbitrary and disparate rule between absentee/mail-in voters and in-person voters." [ECF 509, p. 51]. Not so.

***62** Because of the "inherent" differences between in-person voting and mail-in and absentee voting, Pennsylvania's requirement for signature comparison for in-person ballots, but not mail-in and absentee ballots, is not arbitrary. By way of example, Secretary Boockvar articulated several valid reasons why Pennsylvania implements different verification procedures for mail-in and absentee voters versus in-person voters. [ECF 504-12; ECF 549-2].

In her deposition, Secretary Boockvar explained that for in-person voters, the only possible verification is signature comparison and verification. [ECF 504-12, 55:19-56:19]. This is because, unlike mail-in and absentee voters who must apply for a ballot, in-person voters may simply show up at the polls on Election Day and vote. In contrast, for mail-in and absentee voters, there are several verification steps implemented before the voter's mail-in/absentee ballot is counted, such as checking their application and their drivers' license number or social security number. [*Id.* at 56:8-19]. Thus, counties don't need to resort to a signature comparison to identify and verify the mail-in or absentee voter.

This is important, as Defendants and Intervenors present valid concerns about the uniformity and equality of signature comparisons, in part, due to the technical nature of signature analysis, the subjective underpinnings of signature analysis, and the variety of reasons that signatures can naturally change over time. [ECF 549-2, pp. 19-20, ¶ 68; ECF 549-9, p. 20, ¶¶ 63-64]. Such factors can reasonably justify not requiring a signature comparison when the elector is not physically present.

For example, Secretary Boockvar notes the concern with non-handwriting-expert election officials comparing signatures, without uniform standards. [ECF 549-2, pp. 19-20, ¶ 68]. She also notes that people's signatures can change over time, due to natural and unavoidable occurrences, like injuries, arthritis, or the simple passage of time. [*Id.*]. Such reasons are valid and reasonable. *See Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *34 (Wecht, J. concurring) ("Signature comparison is a process fraught with the risk of error and inconsistent application, especially when conducted by lay people.").

Secretary Boockvar further asserts that signature comparison is justified for in-person voting, but not mail-in or absentee voting, because the in-person voter is notified of his or her signature deficiency, and afforded an opportunity to cure. [ECF 549-2, pp. 19-20, ¶¶ 66-68 (explaining that in-person voters can be immediately notified of the signature deficiency, but mail-in/absentee voters cannot)]. Secretary Boockvar's justifications are consistent with the Election Code's framework.

When a voter votes in person, he or she signs the voter's certificate, and the election official immediately, in the voter's presence, verifies the signature. 25 P.S. § 3050(a.3)(1)-(2). If the election official finds the signature to be problematic, the in-person voter is told as such. *Id.* at § 3050(a.3)(2). Notably, however, the in-person voter may still cast a ballot. *Id.* ("[I]f the signature on the voter's certificate ... shall not be deemed authentic by any of the election officers, such elector shall not be denied the right to vote for that reason[.]"). The in-person voter whose signature is questioned must, after casting the ballot, "produce at least one qualified elector of the election district as a witness, who shall make affidavit of his identity or continued residence in the election district." *Id.* at § 3050(d). Thus, the in-person voter whose signature is not verified is immediately notified, is still allowed to cast a ballot, and is given the opportunity to remedy the signature-deficiency.

***63** In contrast, a voter who casts a mail-in or absentee ballot cannot be afforded this opportunity. Absentee and mail-in ballots are kept in "sealed or locked containers" until they are "canvassed by the county board of elections." 25 P.S. § 3146.8(a). The pre-canvassing and canvassing cannot begin until Election Day. *Id.* at § 3146.8(g)(1.1)-(2). As such, the absentee and mail-in ballots cannot be verified until Election Day, regardless of when the voter mails the ballot. Further, even if there were sufficient time, a voter cannot cure these

types of deficiencies on their mail-in or absentee ballot. *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *20 ("[A]lthough the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the "notice and opportunity to cure" procedure sought by Petitioner.").

Therefore, if mail-in and absentee ballots were subject to signature comparison, an election official—who is unstudied in the technical aspects of signature comparison—could deem a voter's signature problematic and not count the ballot, which would effectively disenfranchise that voter. Unlike the in-person voter, the mail-in or absentee voter may not know that his or her signature was deemed inauthentic, and thus may be unable to promptly cure the deficiency even if he or she were aware.

Accordingly, the Court concludes that the inherent differences and opportunities afforded to in-person voters compared to mail-in and absentee voters provides sufficient reason to treat such voters differently regarding signature comparison. The Court concludes that the lack of signature comparison for mail-in and absentee ballots is neither arbitrary, nor burdens Plaintiffs' equal-protection rights.

For these reasons, the Court will dismiss Plaintiffs' federal equal-protection claims related to signature comparison.

3. The Election Code provisions related to signature comparison satisfy *Anderson*-*Burdick*.

Finally, even assuming the Election Code's absence of a signature-comparison requirement imposes some burden on Plaintiffs' constitutional rights, Plaintiffs' constitutional claims still fail.

As discussed above with respect to Defendants' drop-box implementation, *Anderson*-*Burdick* does not apply neatly to this claim either. This is because Plaintiffs aren't challenging a specific regulation affecting their right to vote, but are instead challenging the ***lack*** of a restriction on someone else's right to vote. This makes both the burden difficult to assess and also the state's interests in ***not*** doing something more abstract. As such, the Court finds that the proper application of the *Anderson*-*Burdick* framework here includes weighing the burden involving Plaintiffs' risk of vote dilution against the state's interests and overall plan in preventing against voter fraud, including with respect to forged mail-in ballots.

Weighing these considerations compels a conclusion that there is no constitutional violation here. With respect to any burden on Plaintiffs' right to vote, that burden is slight, at best. A failure to engage in a signature comparison may, crediting Plaintiffs' evidence, increase the risk of voter fraud. But even then, this remains a largely speculative concern. This burden too is lessened by the numerous other regulations imposed by the Election Code, including the detailed verification procedure as to the information on mail-in ballots (discussed above), and the deterrence furthered by criminal sanctions for those engaging in such voter fraud.

Against these burdens, the Commonwealth has precise and weighty interests in verifying ballot applications and ballots in an appropriate manner to ensure that they are accurate. As discussed above, the Commonwealth determined that the risk of disenfranchising mail-in and absentee voters, did not justify signature comparison for those voters. [ECF 549-2, pp. 19-20, ¶¶ 66-69]. Unlike for in-person voters, there are other means of identifying and verifying mail-in and absentee voters, such as having to specifically apply for a mail-in or absentee ballot and provide various categories of identifying information. [ECF 504-12, 55:19-56:19]; 25 P.S. §§ 3146.2(b), 3150.12(b). And ultimately, due to the slight burden imposed on Plaintiffs, Pennsylvania's regulatory interests in a uniform election pursuant to established procedures is sufficient to withstand scrutiny. *Timmons*, 520 U.S. at 358, 117 S.Ct. 1364.

***64** The General Assembly opted not to require signature comparisons for mail-in and absentee ballots and applications. And as previously discussed, absent extraordinary reasons to, the Court is not to second-guess the legislature.

IV. Defendants and Intervenors are entitled to summary judgment on Plaintiffs' as-applied, federal constitutional challenge to the county-residency requirement for poll watchers.

Plaintiffs next take exception with the provision of the Election Code that restricts a registered voter from serving as a poll watcher outside the county of his or her residence. [ECF 461, ¶ 217].

Plaintiffs argue that "[a]s applied to the 2020 General Election, during the midst of the COVID-19 pandemic, Pennsylvania's residency requirement for watchers violates equal protection." [ECF 509, p. 58]. That's because, according

to Plaintiffs, the "current pandemic severely challenges the ability of parties to staff watchers[.]" [*Id.* at p. 60]. And not having enough poll watchers in place "puts into danger the constitutionally-guaranteed right to a transparent and undiluted vote," [*id.* at p. 68], by "fostering an environment that encourages ballot fraud or tampering," [ECF 461, ¶ 256]. As such, Plaintiffs believe that the county residency requirement "is not rationally connected or reasonably related to any interest presented by the Commonwealth." [ECF 509, p. 63].

Defendants and Intervenors have a markedly different view.

As an initial matter, the Democratic Intervenors argue that Plaintiffs "are precluded from relitigating their claim that the Commonwealth lacks a constitutionally recognized basis for imposing a county-residence restriction for poll watchers" based on the doctrine articulated in *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). [ECF 529, p. 16]. That doctrine requires that after a federal court has abstained under *Pullman*, the plaintiff must expressly reserve the right to litigate any federal claims in federal court while litigating state-law issues in state court. *England*, 375 U.S. at 419, 421-22, 84 S.Ct. 461. Defendants and Intervenors contend that Plaintiffs (specifically, the Trump Campaign, the RNC, and the Republican Party) failed to do so in the proceedings before the Pennsylvania Supreme Court.

And if the *England* doctrine doesn't bar this claim, Defendants and Intervenors argue that "Plaintiffs' as-applied challenge simply fails to state a constitutional claim." *See, e.g.*, [ECF 547, p. 65]. They believe that the county-residency requirement does not infringe on a fundamental right or regulate a suspect classification (such as race, sex, or national origin). [*Id.*]. As a result, the Commonwealth need only provide a rational basis for the requirement, which Defendants and Intervenors believe the Commonwealth has done. [*Id.*].

After carefully reviewing the record and considering the parties' arguments and evidence, the Court finds that the *England* doctrine does not bar Plaintiffs' ability to bring this claim. Even so, after fully crediting Plaintiffs' evidence, the Court agrees with Defendants and Intervenors that Plaintiffs' as-applied challenge fails on the merits.

A. The *England* doctrine does not bar Plaintiffs' federal challenge to the county-residency requirement.

***65** In *England*, the Supreme Court established that after a federal court abstains under *Pullman*, "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then ... he has elected to forgo his right to return to the District Court." 375 U.S. at 419, 84 S.Ct. 461. To reserve those rights, a plaintiff forced into state court by way of abstention must inform the state court that he is exposing the federal claims there only to provide the proper context for considering the state-law questions. *Id.* at 421, 84 S.Ct. 461. And that "he intends, should the state court[ ] hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." *Id.* Essentially, in *England*, the Supreme Court created a special doctrine of *res judicata* for *Pullman* abstention cases.

The Democratic Intervenors argue that because none of the three Plaintiffs who participated in the Pennsylvania Supreme Court case as either intervenors or *amici* "reserved the right to relitigate [Plaintiffs' poll-watcher claim] in federal court," they are now "precluded" from doing so. [ECF 529, p. 17]. The Court is not convinced that this doctrine bars Plaintiffs' claim for at least two reasons.

First, in its original abstention decision, the Court noted that "[n]one of Plaintiffs' poll-watching claims directly ask the Court to construe an ambiguous state statute." [ECF 409, p. 24]. Instead, these claims resided in a *Pullman* gray area, because they were only indirectly affected by other unsettled state-law issues. In light of that, the Court finds that the *England* doctrine was not "triggered," such that Plaintiffs needed to reserve their right to return to federal court to litigate the specific as-applied claim at issue here.

Second, even if it were triggered, not all of the Plaintiffs here were parties in the Pennsylvania Supreme Court case, and only one (the Republican Party) was even given intervenor status. But even the Republican Party, acting as an intervenor, did not have an opportunity to develop the record or present evidence relevant to its as-applied challenge. Thus, this claim wasn't "fully litigated" by any of the Plaintiffs, which is a necessary condition for the claim to be barred under the *England* doctrine. *Cf. Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1073 (3d Cir. 1990) (explaining that a litigant "may not relitigate an issue s/he fully and unreservedly litigated in state court").

Thus, Plaintiffs are not precluded by the *England* doctrine from bringing their remaining as applied poll-watcher claim. The Court will now address the claim on the merits.

B. The county-residency requirement, as applied to the facts presented and the upcoming general election, does not violate the U.S. Constitution.

Originally, Plaintiffs raised a facial challenge to the county-residency requirement under 25 P.S. § 2687. That is, Plaintiffs first took the position that there was no conceivable constitutional application of the requirement that an elector be a resident of the county in which he or she seeks to serve. But, as Plaintiffs' concede, that facial challenge is no longer viable in light of the Pennsylvania Supreme Court's recent decision. [ECF 448, p. 10]. As a result, Plaintiffs now focus solely on raising an as-applied challenge to the county-residency requirement.

"[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

At a fundamental level, a "facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case. *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010). By contrast, an "as-applied attack" on a statute "does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right." *Id.* The distinction between facial and an as-applied attack, then, "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United*, 558 U.S. at 331, 130 S.Ct. 876; *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 362 (3d Cir. 2016) ("The distinction between facial and as-applied constitutional challenges, then, is of critical importance in determining the remedy to be provided).

***66** Because the distinction is focused on the available remedies, not the substantive pleading requirements, "[t]he substantive rule of law is the same for both challenges." *Edwards v. D.C.*, 755 F.3d 996, 1001 (D.C. Cir. 2014); *see also Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 509, n.5 (D.C. Cir. 2016) ("Indeed, the substantive rule of law is the same for both as-applied and facial First Amendment challenges.") (cleaned up); *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 608 F.3d 1084, 1096 (9th Cir. 2010) ("The underlying constitutional standard, however, is no different [in an as-applied challenge] th[a]n in a facial challenge.").

"In other words, *how* one must demonstrate the statute's invalidity remains the same for both type of challenges, namely, by showing that a specific rule of law, usually a constitutional rule of law, invalidates the statute, whether in a personal application or to all." *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 228 (2d Cir. 2006), *abrogated on other grounds by Bond v. United States*, 564 U.S. 211, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011).

In determining whether a state election law violates the U.S. Constitution, the Court must "first examine whether the challenged law burdens rights protected by the First and Fourteenth Amendments." *Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 95 F.3d 253, 258 (3d Cir. 1996). "Where the right to vote is not burdened by a state's regulation on the election process, ... the state need only provide a rational basis for the statute." *Cortés*, 218 F. Supp. 3d at 408. The same is true under an equal protection analysis. "If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used." *Obama*, 697 F.3d at 428 (6th Cir. 2012); *see also Biener*, 361 F.3d at 214-15 (applying rational basis where there was no showing of an "infringement on the fundamental right to vote."); *Donatelli*, 2 F.3d at 515 ("A legislative classification that does not affect a suspect category or infringe on a fundamental constitutional right must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (cleaned up)).

But where the law imposes at least some burden on protected rights, the court "must gauge the character and magnitude of the burden on the plaintiff and weigh it against the importance of the interests that the state proffers to justify the burden." *Patriot Party*, 95 F.3d at 258 (citations omitted).

Consistent with the Pennsylvania Supreme Court's recent decision, but now based on a complete record, this Court finds that the county-residency requirement for poll watching does not, as applied to the particular circumstances of this election, burden any of Plaintiffs' fundamental constitutional rights, and so a deferential standard of review should apply.

See Boockvar, —— A.3d at ——, 2020 WL 5554644, at *30. Under a rational-basis review and considering all the relevant evidence before the Court, the county-residency requirement is rational, and thus constitutional. But even if the requirement burdened the right to vote, that burden is slight—and under the *Anderson-Burdick* test, the Commonwealth's interests in a county-specific voting system, viewed in the context of its overall polling-place security measures, outweigh any slight burden imposed by the county-residency restriction.

1. The county-residency requirement neither burdens a fundamental right, including the right to vote, nor discriminates based on a suspect classification.

***67** At the outset, "there is no individual constitutional right to serve as a poll watcher[.]" *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30 (citing *Cortés*, 218 F. Supp. 3d at 408); *see also Dailey v. Hands*, No. 14-423, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015) ("[P]oll watching is not a fundamental right protected by the First Amendment."); *Turner v. Cooper*, 583 F. Supp. 1160, 1162 (N.D. Ill. 1983) ("Plaintiffs have cited no authority ..., nor have we found any, that supports the proposition that [the plaintiff] had a first amendment right to act as a poll watcher.").

"State law, not the Federal Constitution, grants individuals the ability to serve as poll watchers and parties and candidates the authority to select those individuals." *Cortés*, 218 F. Supp. 3d at 414; *see also Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30 (the right to serve as a poll watcher "is conferred by statute"); *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979) ("The number of poll-watchers allowed, the manner of their appointment, their location within the polling place, the activities permitted and the amount of compensation allowed are all dictated by [25 P.S. § 2687]."). Given the nature of the right, "[i]t is at least arguable that the [Commonwealth of Pennsylvania] could eliminate the position of poll watcher" without offending the constitution. *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364 (S.D.N.Y. 2007). In fact, one neighboring state—West Virginia—has eliminated poll watchers. W. Va. Code Ann. § 3-1-37; W. Va. Code Ann. § 3-1-41.

Nor does the county-residency requirement hinder the "exercise of the franchise." *Cortés*, 218 F. Supp. 3d at 408. It doesn't in any way limit voters' "range of choices in the voting booth"—voters can still "cast ballots for whomever they wish[.]" *Id.* And, as Plaintiffs admit, the county-residency requirement doesn't make the actual act of casting a vote any harder. *See* [ECF 524-24, 67:1-6]. Indeed, at least one of the plaintiffs here, Representative Joyce, testified that he was unaware of anyone unable to cast his ballot because of the county-residency requirement for poll watchers [*Id.*].

Finally, Plaintiffs' claim that Pennsylvania's "poll watching system" denies them "equal access" to the ability to observe polling places in the upcoming election does not, on its own, require the Court to apply anything other than rational-basis scrutiny. [ECF 551, p. 75]. To the extent Plaintiffs are denied equal access (which discussed below, as a matter of evidence, is very much in doubt), it isn't based on their membership in any suspect classification.

For a state law to be subject to strict scrutiny, it must not only make a distinction among groups, but the distinction must be based on inherently suspect classes such as race, gender, alienage, or national origin. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Political parties are not such a suspect class. *Greenville Republican Party*, 824 F. Supp. 2d at 669 ("[T]his court is unfamiliar with, and Plaintiffs have not cited, any authority categorizing political parties as an inherently suspect class.") Likewise, "[c]ounty of residence is not a suspect classification warranting heightened scrutiny[.]" *Short*, 893 F.3d at 679.

Plaintiffs don't dispute this. [ECF 509, p. 65 ("To be clear, the right at issue here is the right of **candidates** and **political parties** to participate in an election where the process is transparent and open to observation and the right of the **voters** to participate in such election." (emphasis in original))]. Rather, Plaintiffs' theory as to how the county-residency requirement burdens the right to vote is based on the same threat of vote dilution by fraud that they have advanced with their other claims. In other words, Plaintiffs' claim that the county-residency requirement for poll watchers limits the ability to find poll watchers, which, in turn, limits the ability for poll watchers to detect fraud and ballot tampering. [ECF 461, ¶¶ 256-57]. The resulting fraudulent or destroyed ballots cause the dilution of lawfully cast ballots. [ECF 509, pp. 64-68].

***68** Thus, based on this theory, to establish the burden flowing from the county-residency restriction, Plaintiffs must show (1) the county-residency requirement prevents them from recruiting enough registered Republican poll watchers in every county, (2) the absence of these Republican poll

watchers creates a material risk of increased fraud and ballot tampering, and (3) this risk of fraud and ballot tampering will dilute the value of honestly cast votes.

There are both factual and legal problems fatal to Plaintiffs' vote-dilution theory in this context. Factually, Plaintiffs' evidence, accepted as true, fails to establish that they cannot find enough poll watchers because of the county-residency requirement. But even if they made that factual showing, the inability to find poll watchers still does not burden any recognized constitutional right in a way that would necessitate anything more than deferential review.

2. Plaintiffs' evidence does not establish any factual predicate for their theory.

Even accepting as true Plaintiffs' version of events, Plaintiffs have not established that the county-residency requirement is responsible for an inability to find enough poll watchers for at least two reasons.

First, Plaintiffs' evidence stops short of demonstrating any actual shortfall of desired poll watchers.

For example, in his declaration, James J. Fitzpatrick, the Pennsylvania Director for Election Day Operations for the Trump Campaign, stated only that the "Trump Campaign is ***concerned*** that due to the residency restriction, it will not have enough poll watchers in certain counties." [ECF 504-2, ¶ 25 (emphasis added)]. Notably, however, Mr. Fitzpatrick, even when specifically asked during his deposition, never identified a single county where the Trump Campaign has ***actually*** tried and failed to recruit a poll watcher because of the county-residency requirement. *See, e.g.*, [ECF 528-14, 261:21-25] ("Q: Which counties does the Trump campaign or the RNC contend that they will not be able to obtain what you refer to as full coverage of poll watchers for the November 2020 election? A: I'm not sure. I couldn't tell you a list.").

Nor do any of Plaintiffs' other witness declarations establish an actual, inability to recruit poll watchers in any specific county. Representative Reschenthaler stated only that he was "concerned" that he "will not be able to recruit enough volunteers from Greene County to watch the necessary polls in Greene County." [ECF 504-6, ¶ 12].

Representative Kelly stated that he was "likely to have difficulty getting enough poll watchers from within Erie County to watch all polls within that county on election day." [ECF 504-5, ¶ 16]. "Likely difficulty" isn't the same as an "actual inability." That aside, the declaration doesn't provide any basis for Representative Kelly's assessment of this "likely difficulty." Nowhere does he detail the efforts he took (*e.g.*, the outreach he tried, prospective candidates he unsuccessfully recruited, and the like), nor did he explain why those efforts aren't likely to succeed in the future.

The same goes for Representative Thompson's declaration. Representative Thompson stated that during some unspecified prior elections, unidentified parties and campaigns did not "always find enough volunteers to serve as poll watchers in each precinct." [ECF 504-4, ¶ 20]. But this undetailed statement doesn't help Plaintiffs' cause, because it doesn't identify the elections during which this was a problem, the parties and campaigns affected by a lack of poll watchers, or the precincts for which no poll watcher could be found.

***69** Representative Joyce's declaration doesn't even express a "concern" about "likely difficulty" in recruiting poll watchers. He simply stated his belief that "[p]oll watchers play a very important role in terms of protecting the integrity of the election process[.]" [ECF 504-7, ¶ 11]. While he may be right, it has no bearing on whether Plaintiffs can find enough people to play that "very important role."

Indeed, Plaintiffs' prediction that they will "likely" have difficulty finding poll watchers is belied by the uncontested Pennsylvania voter registration statistics for 2019 that they included as an exhibit to their summary-judgment brief. [ECF 504-34]. Those statistics suggest that there is no shortage of registered Republican voters who are qualified to serve as poll watchers. [*Id.*]. Even in the three specific counties in which Plaintiffs warn that "Democratic registered voters out-number ... their Republican counterparts" (*i.e.*, Philadelphia, Delaware, and Centre), there are still significant numbers of registered Republicans. *See* [ECF 504-34 (Philadelphia – 118,003; Delaware – 156,867; and Centre – 42,903)]. And only a very small percentage of the registered Republicans would be needed to fill all the necessary poll watcher positions in those allegedly problematic counties. *See, e.g.*, *Cortés*, 218 F. Supp. 3d at 410 (noting that, in 2016, the Republican Party "could staff the entirety of the poll watcher allotment in Philadelphia county with just 4.1% of the registered Republicans in the county."). While Plaintiffs argue that these statistics don't show the number of registered Republicans *willing* to serve as a poll watcher, the Court is hard pressed to see, nor do Plaintiffs show, how among the

tens—or hundreds—of thousands of registered Republicans in these counties, Plaintiffs are unable to find enough poll workers.[20]

Plaintiffs have not presented any evidence that would explain how, despite these numbers, they will have a hard time finding enough poll watchers. In fact, Plaintiffs' own expert, Professor Lockerbie, admits that "the Democratic and Republican parties might be able to meet the relevant criteria and recruit a sufficient population of qualified poll watchers who meet the residency requirements[.]" [ECF 504-20, ¶ 16].

Professor Lockerbie's report makes clear, and Plaintiffs appear to agree, that the county-residency requirement only potentially burdens other, "minor" political parties' ability to recruit enough poll watchers. [ECF 509, p. 61 (citing ECF 504-20, ¶¶ 16-17)]. Regardless, any burden on these third parties is not properly before the Court. They are not parties to this litigation, and so the Court doesn't know their precise identities, whether they have, in fact, experienced any difficulty in recruiting poll watchers, or, more fundamentally, whether they even want to recruit poll watchers at all.[21]

***70** Additionally, Plaintiffs failed to present evidence that connects the county-residency requirement to their inability to find enough poll watchers. To succeed on their theory Plaintiffs cannot just point to difficulty recruiting poll watchers, they need to also show that "Section 2687(b) is responsible for their purported staffing woes." *Cortés*, 218 F. Supp. 3d at 410. Plaintiffs fail to show this, too.

Plaintiffs argue that the ongoing COVID-19 pandemic greatly reduces the number of people who would be willing to serve as a poll watcher, which further exacerbates the alleged problem caused by the county-residency requirement. [ECF 509, p. 60]. The primary problem with this argument, though, is that Plaintiffs have not presented any evidence to support it. Plaintiffs have not put forward a statement from a single registered voter who says they are unwilling to serve as a poll watcher due to concerns about contracting COVID-19.

Despite this shortcoming, the Court also acknowledges that COVID-19 generally has made it more difficult to do anything in person, and it is entirely plausible that the current pandemic will limit Plaintiffs from recruiting poll watchers to man polling places on election day. But that is likely true for just about every type of election rule and regulation. For example, the effects of the ongoing pandemic coupled with the requirement that the poll watcher be a registered voter (a requirement that unquestionably narrows the pool of potential candidates) would also make it harder to recruit poll watchers. There is no basis to find that the current public-health conditions, standing alone, render the county-residency requirement irrational or unconstitutional.

To bolster their concerns over COVID-19, Plaintiffs point to *Democratic Nat'l Committee v. Bostelmann*, No. 20-249, —— F.Supp.3d ——, 2020 WL 5627186 (W.D. Wis. Sept. 21, 2020), where the court there enjoined Wisconsin's statute that requires that each election official (*i.e.*, poll worker) be an elector of the county in which the municipality is located. That case is distinguishable in at least two important ways.

First, *Bostelmann* concerned poll ***workers***, not poll ***watchers***. *Id.* at ——, 2020 WL 5627186, at *7. The difference between the two is significant. Poll workers are a more fundamental and essential aspect of the voting process. Without poll workers, counties cannot even open polling sites, which creates the possibility that voters will be completely disenfranchised. In fact, in *Bostelmann*, the plaintiffs presented evidence that Milwaukee was only able to open 5 of its normal 180 polling places. *Id.* A failure to provide voters a place to vote is a much more direct and established constitutional harm than the one Plaintiffs allege here.

Second, the plaintiffs in *Bostelmann* actually presented evidence that they were unable to find the poll workers they needed due to the confluence of the COVID-19 pandemic and the challenged restriction. *Id.* As discussed above, Plaintiffs here have presented no such evidence.

To succeed on summary judgment, Plaintiffs need to move beyond the speculative concerns they offer and into the realm of proven facts. But they haven't done so on two critical fronts —they haven't shown an actual inability to find the necessary poll watchers, or that such an inability is caused by the county-residency requirement. Because Plaintiffs have not pointed to any specific "polling place that Section 2687(b) prevents [them] from staffing with poll watchers," Plaintiffs' theory of burden is doomed at launch. *Cortés*, 218 F. Supp. 3d at 409.

3. Even if Plaintiffs could establish a factual predicate for their theory, it would fail as a matter of law.

***71** As the Pennsylvania Supreme Court concluded last month, Plaintiffs' "speculative claim that it is 'difficult' for

both parties to fill poll watcher positions in every precinct, ***even if true***, is insufficient to transform the Commonwealth's uniform and reasonable regulation requiring that poll watchers be residents of the counties they serve into a non-rational policy choice." *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30 (emphasis added).[22] The fundamental constitutional principles undergirding this finding are sound.

Plaintiffs' only alleged burden on the right to vote is that Defendants' lawful imposition of a county-residency requirement on poll watching will result in an increased risk of voter irregularities (*i.e.*, ballot fraud or tampering) that will, in turn, potentially cause voter dilution. While vote dilution is a recognized burden on the right to vote in certain contexts, such as when laws are crafted that structurally devalue one community's or group of people's votes over another's, there is no authority to support a finding of burden based solely on a speculative, future possibility that election irregularities might occur. *See, e.g.*, *Minnesota Voters,* 720 F.3d at 1033 (affirming dismissal of claims "premised on potential harm in the form of vote dilution caused by insufficient pre-election verification of EDRs' voting eligibility and the absence of post-election ballot rescission procedures"); *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 15 (1st Cir. 2020) (rejecting the claim that a ballot witness signature requirement should not be enjoined during a pandemic because it would allegedly increase the risk of voter fraud and put Republican candidates at risk); *Cook Cnty. Rep. Party v. Pritzker*, No. 20-4676, 2020 WL 5573059, at *4 (N.D. Ill. Sept. 17, 2020) (denying a motion to enjoin a law expanding the deadline to cure votes because plaintiffs did not show how voter fraud would dilute the plaintiffs' votes).

Without a recognized burden on the right to vote, Plaintiffs' "argument that the defendants did not present an adequate justification is immaterial." *Green Party of Tennessee v. Hargett*, No. 16-6299, 2017 WL 4011854, at *4 (6th Cir. May 11, 2017). That's because the Court need not apply the *Anderson-Burdick* framework, and its intermediate standards, in this situation. *See Donatelli*, 2 F.3d at 514 & n.10. Instead, just as the Pennsylvania Supreme Court held, the Commonwealth here need only show "that a rational basis exists [for the county-residency requirement] to be upheld. *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30 (citing *Cortes*, 218 F. Supp. 3d at 408); *see also Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 899 (5th Cir. 2012) (applying rational basis review as opposed to the *Anderson-Burdick* balancing test because state election law did not implicate or burden specific constitutional rights); *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1227 (4th Cir. 1995) (concluding that a ballot access law "fails the *Anderson* balancing test only if it also does in fact burden protected rights").

***72** "Under rational-basis review, the challenged classification must be upheld 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Donatelli*, 2 F.3d at 513 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). "This standard of review is a paradigm of judicial restraint." *FCC*, 508 U.S. at 314, 113 S.Ct. 2096. It "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* at 313, 113 S.Ct. 2096. Nor is it the Court's "place to determine whether the [General Assembly's decisions] were the best decisions or even whether they were good ones." *Donatelli*, 2 F.3d at 518.

Applying this deferential standard of review, the Pennsylvania Supreme Court found that given Pennsylvania's "county-based scheme for conducting elections, it is reasonable that the Legislature would require poll watchers, who serve within the various counties of the state, to be residents of the counties in which they serve." *Boockvar*, —— A.3d at ——, 2020 WL 5554644, at *30 (citing *Cortés*, 218 F. Supp. 3d at 409). The Court agrees.

There are multiple reasons for this. As Secretary Boockvar advises, "[b]y restricting poll watchers' service to the counties in which they actually reside, the law ensures that poll watchers should have some degree of familiarity with the voters they are observing in a given election district." [ECF 549-2, p. 22, ¶ 78]. In a similar vein, Intervenors' expert, Dr. Barreto, in his report, states that, voters are more likely to be comfortable with poll watchers that "they know and they recognize from their area." [ECF 524-1, ¶40 ("Research in political science suggests that voters are much more comfortable and trusting of the process when they know or are familiar with poll workers who are from their community.")]. When poll watchers come from the community, "there is increased trust in government, faith in elections, and voter turnout[.]" [*Id.*].

At his deposition, Representative Kelly agreed with this idea: "Yeah, I think – again, depending how the districts are established, I think people are probably even more comfortable with people that they – that they know and they recognize from their area." [ECF 524-23, 111:21-25].

Whether requiring poll watchers to be residents of the county in which they will serve is the best or wisest rule is not the issue before the Court. The issue is whether that rule is *reasonable* and rationally advances Pennsylvania's legitimate interests. This Court, like multiple courts before it, finds that it does.

4. Plaintiffs' poll-watcher claim fails under the *Anderson*-*Burdick* framework.

Even if rational-basis review did not apply and Plaintiffs had established a burden on their right to vote, their claim nonetheless fails under the *Anderson*-*Burdick* framework.

Viewing Plaintiffs' evidence in the best possible light, at most, the county-residency requirement for poll watching places only an indirect, ancillary burden on the right to vote through an elevated risk of vote dilution.

Against this slight burden, the Commonwealth has sound interests in imposing a county-residency requirement, including, as noted above, local familiarity with rules, regulations, procedures, and the voters. Beyond this, in assessing the Commonwealth's interest in imposing the county-based restriction, that interest must be viewed in the overall context of the Commonwealth's security measures involving polling places that are designed to prevent against fraud and vote dilution.

As the court in *Cortés* recognized, "while poll watchers may help guard the integrity of the vote, they are not the Election Code's only, or even best, means of doing so." 218 F. Supp. 3d at 404.

***73** Each county has the authority to investigate fraud and report irregularities to the district attorney. 25 P.S. § 2642(i). Elections in each district are conducted by a multimember election board, which is comprised of an election judge, a majority inspector, and a minor inspector. 25 P.S. § 2671. Each voting district may also use two overseers of election, who are appointed from different political parties by the Pennsylvania Courts of Common Pleas, and "carry greater authority than poll watchers." *Cortés*, 218 F. Supp. 3d at 403 (citing 25 P.S. § 2685). "Election overseers have the right to be present with the officers of an election 'within the enclosed space during the entire time the ... election is held." *Id.* "Poll watchers have no such right," they must "remain 'outside the enclosed space' where ballots are counted or voting machines canvassed." *Id.* (citing 25 P.S. § 2687(b)). Election overseers can also challenge any person offering to vote, while poll watchers have no such authority. 25 P.S. § 2687. For these reasons, concerns "over potential voter fraud —whether perpetrated by putative electors or poll workers themselves—appear more effectively addressed by election overseers than poll watchers[.]" *Id.* at 406.

Plaintiffs complain that poll watchers may not be present during the pre-canvass and canvass meetings for absentee and mail-in ballots. But the Election Code provides that "authorized representatives" of each party ***and*** each candidate can attend such canvassing. 25 P.S. § 3146.8(g)(1.1), (2). That means if, for example, 15 Republican candidates appear on ballots within a particular county (between both the state and federal elections), there could be up to 16 "authorized representatives" related to the Republican Party (one for each candidate and one for the party as a whole) present during canvassing. Adding poll watchers to that mix would just be forcing unnecessary cooks into an already crowded kitchen.[23] *See* [ECF 549-2, p. 23, ¶ 83 ("If every certified poll watcher within a county was permitted to attend the pre-canvass meeting, the elections staff could be overwhelmed by the vast numbers of poll watchers, and the pre-canvassing process could become chaotic and compromised.")].

***74** Further, Secretary Boockvar testified that Pennsylvania has adopted new voting systems that will provide an additional layer of security. [ECF 524-27, 237:21-238:11]. That is, there will now be a paper trail in the form of verifiable paper ballots that will allow voters to confirm their choice, and the state recently piloted a new program that will help ensure that votes can be properly verified. [*Id.*].

On balance, then, it is clear that to the extent any burden on the right to vote exists, it is minimal. On the other hand, the Commonwealth's interest in a county-specific voting system, including with county-resident poll watchers, is rational and weighty, particularly when viewed in the context of the measures that the Commonwealth has implemented to prevent against election fraud at the polls. As such, under the flexible *Anderson*-*Burdick* standard, Plaintiffs have failed to establish that the county-residency requirement is unconstitutional.

5. The Court will continue to abstain from deciding where the Election Code permits poll watching to occur.

Plaintiffs also appear to challenge any attempts to limit poll watching to "monitoring only in-person voting at the polling place on Election Day." [ECF 461, ¶ 254]. That is, in their proposed order accompanying their Motion for Summary Judgement, Plaintiffs seek a declaration that they are "permitted to have watchers present at all locations where voters are registering to vote, applying for absentee or mail-in ballots, voting absentee or mail-in ballots, and/or returning or collecting absentee or mail-in ballots, including without limitation any satellite or early voting sites established by any county board of elections." [ECF 503-1, ¶ 3].

Plaintiffs also argue that Secretary Boockvar's October 6, 2020, guidance expressly, and unlawfully, prohibits poll watchers from being present at county election offices, satellite offices, and designated ballot-return sites. [ECF 571].

This challenge, however, is directly related to the unsettled state-law question of whether drop boxes and other satellite locations are "polling places" as envisioned under the Election Code. If they are, then Plaintiffs may be right in that poll watchers must be allowed to be present. However, the Court previously abstained under *Pullman* in addressing this "location" claim due to the unsettled nature of the state-law issues; and it will continue to do so. [ECF 459, p. 5 ("The Court will continue to abstain under *Pullman* as to Plaintiffs' claim pertaining to the notice of drop box locations and, more generally, whether the 'polling place' requirements under the Election Code apply to drop-box locations. As discussed in the Court's prior opinion, this claim involves unsettled issues of state law.")].

Moreover, Plaintiffs have filed a lawsuit in the Court of Common Pleas of Philadelphia to secure access to drop box locations for poll watchers. The state court held that satellite ballot-collection locations, such as drop-box locations, are not "polling places," and therefore poll watchers are not authorized to be present in those places. [ECF 573-1, at p. 12]. The Trump Campaign immediately filed a notice of appeal of that decision. Regardless of what happens on appeal, Plaintiffs appear to be on track to obtain resolution of that claim in state court. [ECF 549-22]. Although this isn't dispositive, it does give the Court comfort that Plaintiffs will be able to seek timely resolution of these issues, which appear to be largely matters of state law. *See Barr v. Galvin*, 626 F.3d 99, 108 n.3 (1st Cir. 2010) ("Though the existence of a pending state court action is sometimes considered as a factor in favor of abstention, the lack of such pending proceedings does not necessarily prevent abstention by a federal court.").

V. The Court will decline to exercise supplemental jurisdiction over Plaintiffs' state-constitutional claims.

***75** In addition to the federal-constitutional claims addressed above, Plaintiffs assert violations of the Pennsylvania Constitution in Counts III, V, VII, and IX of the Second Amended Complaint. Because the Court will be dismissing all federal-constitutional claims in this case, it will decline to exercise supplemental jurisdiction over these state-law claims.

Under 28 U.S.C. § 1367(c)(3), a court "may decline to exercise supplemental jurisdiction over state law claims if it has dismissed all claims over which it has original jurisdiction[.]" *Stone v. Martin*, 720 F. App'x 132, 136 (3d Cir. 2017) (cleaned up). "It 'must decline' to exercise supplemental jurisdiction in such circumstances 'unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for [exercising supplemental jurisdiction].' " *Id.* (quoting *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000) (emphasis in original)).

Courts have specifically applied this principle in cases raising federal and state constitutional challenges to provisions of the state's election code. *See, e.g., Silberberg v. Bd. of Elections of New York*, 272 F. Supp. 3d 454, 480–81 (S.D.N.Y. 2017) ("Having dismissed plaintiffs' First and Fourteenth Amendment claims, the Court declines to exercise supplemental jurisdiction over plaintiffs' state law claims."); *Bishop v. Bartlett*, No. 06-462, 2007 WL 9718438, at *10 (E.D.N.C. Aug. 18, 2007) (declining "to exercise supplemental jurisdiction over the state constitutional claim" following dismissal of all federal claims and recognizing "the limited role of the federal judiciary in matters of state elections" and that North Carolina's administrative, judicial, and political processes provide a better forum for plaintiffs to seek vindication of their state constitutional claim), *aff'd*, 575 F.3d 419 (4th Cir. 2009).

Beyond these usual reasons to decline to exercise supplemental jurisdiction over the state-constitutional claims, there are two additional reasons to do so here.

First, the parties do not meaningfully address the state-constitutional claims in their cross-motions for summary judgment, effectively treating them as coextensive with the federal-constitutional claims here. The Pennsylvania Supreme Court, however, has held that Pennsylvania's "Free

and Equal Elections" Clause is not necessarily coextensive with the 14th Amendment. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 812-813 (2018) (referring to the Pennsylvania Free and Equal Elections Clause as employing a "separate and distinct standard" than that under the 14th Amendment to the U.S. Constitution). Given the lack of briefing on this issue and out of deference to the state courts to interpret their own state constitution, the Court declines to exercise supplemental jurisdiction.

Second, several Defendants have asserted a defense of sovereign immunity in this case. That defense does not apply to Plaintiffs' federal-constitutional claims under the *Ex parte Young* doctrine. *See Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 627 (E.D. Pa. 2018) ("Here, the doctrine of *Ex parte Young* applies to Plaintiffs' constitutional claims for prospective injunctive and declaratory relief, and therefore the First and Fourteenth Amendment claims are not barred by the Eleventh Amendment. Secretary Cortés, as an officer of the Pennsylvania Department of State, may be sued in his individual and official capacities 'for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law.' "). But sovereign immunity may apply to the state-law claims, at least those against Secretary Boockvar. The possibility of sovereign immunity potentially applying here counsels in favor of declining supplemental jurisdiction to decide the state-law claims.

***76** As such, all state-constitutional claims will be dismissed without prejudice.

CONCLUSION

For the foregoing reasons, the Court will enter judgment in favor of Defendants and against Plaintiffs on all federal-constitutional claims, decline to exercise supplemental jurisdiction over the remaining state-law claims, and dismiss all claims in this case. Because there is no just reason for delay, the Court will also direct entry of final judgment under Federal Rule of Civil Procedure 54(b). An appropriate order follows.

All Citations

--- F.Supp.3d ----, 2020 WL 5997680

Footnotes

1 "Drop boxes" are receptacles similar to U.S. Postal Service mailboxes. They are made of metal, and have a locking mechanism, storage compartment, and an insert or slot into which a voter can insert a ballot. *See generally* [ECF 549-9].

2 Intervenors include the Pennsylvania State Democratic Party, the League of Women Voters, the NAACP Pennsylvania State Conference, Common Cause Pennsylvania, Citizens for Pennsylvania's Future, the Sierra Club, the Pennsylvania Alliance for Retired Americans, and several affiliated individuals of these organizations.

3 As noted above, Plaintiffs and Mr. Riddlemoser use the term "voter fraud" to mean "illegal voting"—*i.e.*, voter fraud is any practice that violates the Election Code. For purposes of the Court's decision and analysis of Plaintiffs' vote-dilution claims, the Court accepts this definition.

4 The procedure for absentee ballots and applications largely resembles the procedure for mail-in ballots and applications.

5 If the application is approved, the approval is "final and binding," subject only to challenges "on the grounds that the applicant was not a qualified elector." 25 P.S. § 3150.12b(a)(2). An unqualified elector would be, for example, an individual who has not "been a citizen of the United States at least one month." Pa. Const. Art. 7, § 1; *see also* 25 P.S. § 2602(t) (defining "qualified elector" as "any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election").

6 In her summary-judgment brief, Secretary Boockvar argues that Plaintiffs' as-applied challenge to Pennsylvania's county-residency requirement is unripe. [ECF 547, pp. 60-63]. The Secretary reasons that Plaintiffs have not shown sufficient evidence that they are harmed by the county-residency requirement. This argument is directed more towards a lack of standing and a lack of evidence to support the claim on the merits. As the sufficiency of the evidence of harm is a separate issue from ripeness (which is more concerned with timing), the Court does not find Plaintiffs' as-applied challenge to the county-residency requirement unripe. *See Progressive Mountain Ins. Co. v. Middlebrooks*, 805 F. App'x 731, 734 (11th Cir. 2020) ("The question of ripeness frequently boils down to the same question as questions of Article III standing, but the distinction between the two is that standing focuses [on] whether the type of injury alleged is qualitatively sufficient to fulfill the requirements of Article III and whether the plaintiff has personally suffered that harm, whereas ripeness centers on whether that injury has occurred yet." (cleaned up) (citations omitted)).

7 In their briefing, the parties focused on the "capable of repetition yet evading review" exception to the mootness doctrine. The Court, however, does not find that it needs to rely on this exception. Nearing the eve of the election, it is clear that Defendants intend to engage in the conduct that Plaintiffs assert is illegal and unconstitutional. Thus, the claims are presently live, and are not "evading review" in this circumstance.

8 While Rule 65(d)(2)(C) states that an injunction binds "[non-parties] who are in active concert or participation" with the parties or the parties' agents, the Court does not find that Rule 65(d) helps the county boards. As discussed, the county boards manage the elections and implement the electoral procedures. While the Court could enjoin Secretary Boockvar, for example, from using unmanned drop boxes, each individual county election board could still use unmanned drop boxes on their own. Doing so would not result in the counties being in "active concert or participation" with Secretary Boockvar, as each county is independently managing the electoral process within their county lines. *See Marshak v. Treadwell*, 595 F.3d 478, 486 (3d Cir. 2009) ("[N]on-parties guilty of aiding or abetting or acting in concert with a named defendant or his privy in violating the injunction may be held in contempt." (cleaned up) (citations omitted)). In other words, each county elections board would not be "aiding or abetting" Secretary Boockvar in violating the injunction (which would implicate Rule 65(d)(2)(C)); rather, the counties would be utilizing their independent statutory authority to manage elections within their county lines.

9 As evidence of the county boards' indispensability, one court recently found that the failure to join local election officials in an election case can make the harm alleged not "redressable." It would be a catch-22 to say that county boards cannot be joined to this case as necessary parties, but then dismiss the case for lack of standing due to the boards' absence. *Cf. Jacobson v. Florida Secretary of States*, 974 F.3d 1236, —— – ——, 2020 WL 5289377, at *11-12 (11th Cir. Sept. 3, 2020) ("The problem for the [plaintiffs] is that Florida law tasks the [county] Supervisors, independently of the Secretary, with printing the names of candidates on ballots in the order prescribed by the ballot statute. ... The Secretary is responsible only for certifying to the supervisor of elections of each county the names of persons nominated ... Because the Secretary didn't do (or fail to do) anything that contributed to [plaintiffs'] harm, the voters and organizations cannot meet Article III's traceability requirement." (cleaned up)).

10 The organizational Plaintiffs also raise certain associational and organizational standing arguments, asserting that they represent their members' interests. The associational standing arguments are derivative of their members' interests. That is, because the Court has found no concrete injury suffered by the individual voters, which would include the members of the organizational Plaintiffs, there are no separate grounds to establish standing for these organizations. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1997) (an organization only has standing to sue on behalf of its members when "its members would otherwise have standing to sue in their own right") (citation omitted).

11 *See, also, e.g., Dudum v. Arntz*, 640 F.3d 1098, 1117 (9th Cir. 2011) ("If the aspects of the City's restricted IRV scheme Dudum challenges impose any burdens on voters' constitutional rights to vote, they are minimal at best."); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354–55 (11th Cir. 2009) ("The district court determined that the burden imposed on Georgia voters who lack photo identification was not undue or significant, and we agree.... The NAACP and voters are unable to direct this Court to any admissible and reliable evidence that quantifies the extent and scope of the burden imposed by the Georgia statute."); *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1183 (9th Cir. 1988) ("Appellants claim that Hawaii's absentee voting law fails to prohibit 'the solicitation, examination and delivery of absentee ballots by persons other than the voters' and that such activities occurred during the special election ... We agree with the district court that the Hawaii absentee ballot statute and the regulations adopted under it adequately protect the secrecy and integrity of the ballot. Although Hawaii has not adopted a regulation to prevent the delivery of ballots by persons other than the voter, the Hawaii regulations go into great detail in their elaboration of procedures to prevent tampering with the ballots."); *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) ("[A]lthough ballot format has an effect on the fundamental right to vote, the effect is somewhat attenuated."); *Nemes v. Bensinger*, —— F. Supp. 3d ——, ——, 2020 WL 3402345, at *13 (W.D. Ky. June 18, 2020) ("The burden imposed by the contraction to one polling place is modest, and the identified groups are afforded various other means under the voting plans to easily and effectively avoid disenfranchisement. As already discussed, Defendants have offered evidence of the substantial government interest in implementing voting plans that provide for a free and fair election while attempting to minimize the spread of COVID-19."); *Paralyzed Veterans of Am. v. McPherson*, No. 06-4670, 2008 WL 4183981, at *22 (N.D. Cal. Sept. 9, 2008) ("Plaintiff Bohlke's listed burdens rely on speculative risk or the ancillary effects of third party assistance, but not on evidence of any concrete harm. Such speculations or effects are insufficient under Supreme Court and Ninth Circuit precedent to demonstrate a severe burden on the fundamental right to vote.").

12 The parties do not specifically brief the elements of an Elections-Clause claim. This is typically a claim brought by a state legislature, and the Court has doubts that this is a viable theory for Plaintiffs to assert. *See Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007). Regardless, if state law does not require signature comparison, then there is no difference between the Secretary's guidance and the Election Code, and the Elections-Clause claim necessarily fails.

13 Several Defendants and Intervenors have asked this Court to abstain from deciding this issue on the basis of *Pullman*. As this Court previously discussed, a court can abstain under *Pullman* if three factors are met: "(1) [the dispute] requires interpretation of "unsettled questions of state law,"; (2) permitting resolution of the unsettled state-law questions by state courts would "obviate the need for, or substantially narrow the scope of adjudication of the constitutional claims"; and (3) an "erroneous construction of state law would be disruptive of important state policies[.]" " [ECF 409, p. 3 (quoting *Chez Sez*, 945 F.2d at 631)]. But if, on the other hand, the answer to the state law dispute is "clear and unmistakable," abstention is not warranted. [*Id.* at p. 15 (citing *Chez Sez*, 945 F.2d at 632)]. Here, the Court concludes (as discussed below) that the Election Code is clear that signature comparison is not required and further, that Plaintiffs' competing interpretation is not plausible. As such, the Court cannot abstain under *Pullman*.

The *Pullman* analysis does not change simply because Secretary Boockvar has filed a "King's Bench" petition with the Pennsylvania Supreme Court, requesting that court to clarify whether the Election Code mandates signature comparison of mail-in and absentee ballots and applications. [ECF 556, p. 11; ECF 557]. The fact that such a petition was filed does not change this Court's conclusion that the Election Code is clear. The *Pullman* factors remain the same. And they are not met here.

14 The Secretary's September 11, 2020, guidance, stated that the "Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections." [ECF 504-24, p. 3, § 3]. Similarly, the Secretary's September 28, 2020, guidance stated that "Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis. ... No challenges may be made to mail-in and absentee ballots at any time based on signature analysis." [ECF 504-25, p. 9, § 5.2].

15 The Election Code's definition of "proof of identification" in full provides:

> The words "proof of identification" shall mean ... For a qualified absentee elector ... or a qualified mail-in elector ...:
>
> i. in the case of an elector who has been issued a current and valid driver's license, the elector's driver's license number;
>
> ii. in the case of an elector who has not been issued a current and valid driver's license, the last four digits of the elector's Social Security number;
>
> iii. in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1) [*i.e.*, "a valid-without-photo driver's license or a valid-without-photo identification card issued by the Department of Transportation"]; or
>
> iv. in the case of an elector who has not been issued a current and valid driver's license or Social Security number, a copy of a document that satisfies paragraph (2) [*i.e.*, "a document that shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register; shows a photograph of the individual to whom the document was issued; includes an expiration date and is not expired, except (A) ... or (B) ...; and was issued by" the federal, state, or municipal government, or an "accredited Pennsylvania public or private institution of higher learning [or] "a Pennsylvania are facility."].

25 P.S. § 2602(z.5)(3).

16 While election officials must engage in signature comparison for in-person voters, that requirement is explicitly required by the Election Code, unlike for mail-in ballots. 25 P.S. § 3050(a.3)(2). And as discussed below, in-person voters, unlike mail-in voters, are immediately notified if their signatures are deficient.

17 Plaintiffs also argue that signature comparison for mail-in and absentee ballots is supported by historical case law. [ECF 552, pp. 58-59]. Plaintiffs cite to two cases from the 1960s that the Court of Common Pleas decided. [*Id.*]. The first, *Appeal of Fogleman*, concluded that under the then-applicable election law, an absentee voter had to sign a declaration to show that he was a proper resident who had not already voted in that election. 36 Pa. D. & C.2d 426, 427 (Pa. Ct. Comm. Pl. 1964). Regarding the voter's signature, the court simply stated, "[i]f the elector fails or refuses to attach his or her signature, then such elector has not completed the declaration as required by law of all voters." *Id.* Thus, no signature comparison or verification was implicated there; rather, the court simply stated that the declaration must be signed (*i.e.*, completed). The second case Plaintiffs cite, *In re Canvass of Absentee Ballots of Gen. Election* [ECF 552, pp. 58-59], arose from individual, post-election challenges to 46 individual absentee ballots. 39 Pa. D. & C.2d 429, 430 (Pa. Ct.

Comm. Pl. 1965). Thus, a universal and mandatory signature-comparison requirement was not at issue there, unlike what Plaintiffs contest here. This Court finds neither case persuasive.

18 This identifying information on a ballot application includes much of the same information expressly listed for what a voter must provide in initially registering to vote. 25 Pa. C.S.A. § 1327(a) (stating that the "official voter registration application" shall request the applicant's: full name, address of residence (and mailing address if different), and date of birth).

19 The counties that intend to compare and verify signatures in the upcoming election include at least the following counties: Cambria, Elk, Franklin, Juniata, Mifflin, Sullivan, Susquehanna, and Wyoming. [ECF 504-1].

20 Plus, these figures do not even tell the whole story because they do not take into account the hundreds of thousands of voters who are registered to other parties who could also conceivably serve as poll watchers for the Trump Campaign and the candidate Plaintiffs. [504-34]. While that may not be the ideal scenario for Plaintiffs, they concede there's nothing in the Election Code that limits them to recruiting only registered voters from the Republican Party. [ECF 528-14, 267:23-268:1 (Q: And you don't have to be a registered Republican to serve as a poll watcher for the Trump campaign, do you? A: No.)]. To that point, the Trump Campaign utilized at least two Democrats among the poll watchers it registered in the primary. [ECF 528-15, P001648].

21 To the extent that Plaintiffs are attempting to bring their claim on behalf of these third parties (which is unclear), they would lack standing to do so. Ordinarily, "a litigant must assert his or her own legal rights and interests and cannot rest a claim of relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The only time a litigant can bring an action on behalf of a third party is when "three important criteria are satisfied." *Id.* "The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interest." *Id.* at 410-11, 111 S.Ct. 1364 (cleaned up). Plaintiffs cannot satisfy the second or third criteria.

Plaintiffs claim that they "have a close relationship with these minor parties such that it will act as an effective advocate for the minor parties." [ECF 551, p. 30]. It is hard to see how Plaintiffs can be said to have a close relationship with rival political parties who are their direct adversaries in the upcoming election.

Plaintiffs also argue that these "minor parties are hindered from protecting their own interests, particularly in this action when there are no minor party intervenors." [*Id.*]. But that doesn't hold water either. Just because these other parties have not asked to intervene, it does not mean they were incapable of intervening or seeking relief elsewhere. Indeed, these parties and their candidates have demonstrated time and again that they can raise their own challenges to election laws when they so desire, including by filing suit in federal district court. *See, e.g.*, *Stein v. Cortés*, 223 F. Supp. 3d 423 (E.D. Pa. 2016) (Green Party Presidential candidate Jill Stein seeking recount); *Libertarian Party of Conn. v. Merrill*, No. 20-467, 2020 WL 3526922 (D. Conn. June 27, 2020) (seeking to enjoin Connecticut's ballot access rules that required minor party candidates to petition their way onto the ballot); *Green Party of Ark. v. Martin*, 649 F.3d 675 (8th Cir. 2011) (challenging Arkansas' ballot access laws).

22 The Sierra Club Intervenors argue this should end the analysis. [ECF 542, p. 14 ("Even 'as applied,' Plaintiffs' claim has already been rejected")]. While the Court finds the Pennsylvania Supreme Court's apparent ruling on Plaintiffs' as-applied challenge instructive, it is not outcome determinative. That is because the Pennsylvania Supreme Court did not have the benefit of the full evidentiary record that the Court has here.

23 After the briefing on the cross-motions for summary judgment had closed, on October 6, 2020, Secretary Boockvar issued additional guidance, which Plaintiffs then raised with the Court the following day. [ECF 571]. This new guidance confirms that poll watchers cannot be present during the pre-canvassing and canvassing of mail-in ballots. It also makes clear that while the authorized representative can be present, the representative cannot make any challenges to the ballots. The Court finds that this new guidance has minimal relevance to the current disputes at issue here. The scope of duties of a representative is not before the Court. Of sole relevance here is whether this new guidance changes how this Court weighs the burdens and benefits of the county-residency restriction for poll watchers. The Court finds that the representative's inability to challenge mail-in ballots does appear to provide less protection to Plaintiffs; but in the grand election scheme, particularly in light of the role of the election overseers, the Court does not find the new guidance to materially upset the Commonwealth's interests in its overall election-monitoring plan.

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United States District Court,
S.D. Texas, Houston Division.

Steven HOTZE, M.D., Wendell Champion, Hon. Steve Toth, and Sharon Hemphill, Plaintiffs,

v.

Chris HOLLINS, in his official capacity as Harris County Clerk, Defendant.

Civil Action No. 4:20-cv-03709
|
Signed 11/02/2020

Attorneys and Law Firms

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ORDER

Andrew S. Hanen, United States District Judge

***1** The Court has before it the Motion for Preliminary Injunction (Doc. No. 3) filed by Plaintiffs Steven Hotze, M.D., Wendell Champion, Hon. Steve Toth, and Sharon Hemphill (collectively, "Plaintiffs"), the Response in Opposition (Doc. No. 22) filed by Defendant Chris Hollins in his official capacity as Harris County Clerk (hereinafter, "Defendant"), and various Motions to Intervene filed on behalf of forty-eight individuals and/or entities. The Court also has before it *amicus curiae* briefs filed by the Texas Coalition of Black Democrats, The Lincoln Project, the Libertarian Party of Texas, Joseph R. Straus, III, and election law professor, Benjamin L. Ginsberg.

I.

Due to the time constraints given the issue involved, this Court cannot issue the formal opinion that this matter deserves. Consequently, given those confines, this Order must suffice. The Court first notes that it appreciates the participation of all counsel involved and the attention each gave to this important topic on such short notice.

This Court's overall ruling is that the Plaintiffs do not have standing (as explained below). While this ruling is supported by general Equal Protection and Election Clause cases, it is somewhat without precedent with regard to the Plaintiffs (or Intervenors) who are actual candidates for elected office. Therefore, the Court, in anticipation of an appeal or petition for writ of mandamus and knowing that the appellate court could draw a distinction in that regard and hold that standing exists, has gone further to indicate what its ruling would have been in that case.

II.

The Court finds that Plaintiffs lack standing to sue. Federal courts must determine whether they have jurisdiction before proceeding to the merits. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94–95 (1998). Article III of the Constitution limits federal jurisdiction to "Cases" and "Controversies." One component of the case or controversy requirement is standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The Supreme Court has repeatedly held that an individual plaintiff raising only a generalized grievance about government does not meet the Article III requirement of a case or controversy. *Id.* at 573–74. This Court finds that the Plaintiffs here allege only a "generalized grievance about the conduct of government." *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

The Plaintiffs' lack of a particularized grievance is fatal to their claim under the Equal Protection Clause. "The rule against generalized grievances applies with as much force in the equal protection context as in any other." *U.S. v. Hays*, 515 U.S. 737, 743 (1995). Plaintiffs' general claim that Harris County's election is being administered differently than Texas's other counties does not rise to the level of the sort of particularized injury that the Supreme Court has required for constitutional standing in elections cases. *See id.; Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (no standing in equal protection case when alleged injury involved "group political interests" and not "individual legal rights").

***2** Further, it is unclear that individual plaintiffs have standing to assert claims under the Elections Clause at all. The Supreme Court has held that individual plaintiffs, like those here, whose only asserted injury was that the Elections Clause had not been followed, did not have standing to assert such a claim. *See Lance*, 549 U.S. at 442. Conversely, the Court has held that the Arizona Legislature did have standing to allege a violation of the Elections Clause as it was "an institutional plaintiff asserting an institutional injury." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015). In addition, the Supreme Court has also held plaintiffs had such standing when they were state senators whose "votes had been completely nullified" by executive action. *Id.* at 803 (citing *Raines v. Byrd*, 521 U.S. 811, 822–23 (1997)). These cases appear to stand for the proposition that only the state legislature (or a majority of the members thereof) have standing to assert a violation of the Elections Clause.

The Court finds that the Plaintiffs here are akin to those in *Lance v. Coffman*, in which the Supreme Court held that private citizens, whose primary alleged injury was that the Elections Clause was not followed, lacked standing to bring a claim under the Elections Clause. 549 U.S. at 442. To summarize the Plaintiffs' primary argument, the alleged irreparable harm caused to Plaintiffs is that the Texas Election Code has been violated and that violation compromises the integrity of the voting process. This type of harm is a quintessential generalized grievance: the harm is to every citizen's interest in proper application of the law. *Lujan*, 504 U.S. at 573–74; *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (holding that the right, possessed by every citizen, to require that the Government be administered according to the law does not entitle a private citizen to institute a lawsuit in federal court). Every citizen, including the Plaintiff who is a candidate for federal office, has an interest in proper execution of voting procedure. Plaintiffs have not argued that they have any specialized grievance beyond an interest in the integrity of the election process, which is "common to all members of the public." *United States v. Richardson*, 418 U.S. 166, 176–77.[1]

1 This Court finds the answer to this question to be particularly thorny, given that some of the Plaintiffs are actual candidates who have put in time, effort, and money into campaigning, to say nothing of the blood, sweat, and tears that a modern campaign for public office entails. This Court would readily understand if some appellate court finds that these Plaintiffs have standing despite the fact they cannot individualize their damage beyond their rightful feeling that an election should be conducted lawfully. Neither this Court's research nor the briefing of the parties have brought forth any precedent to support this concept under either of the two pleaded causes of action based upon claimed violations of Equal Protection or the "Elections Clause." Given the timing of this case and the impact that such a ruling might have, this Court finds it prudent to follow the existing precedent.

III.

If the Court had plaintiffs with standing, it would have denied in part and granted in part the motion for preliminary injunction.[2] A preliminary injunction is an "extraordinary remedy" that should only be granted if the movant has "clearly carried the burden of persuasion" on all four factors. *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192, 196 (5th Cir. 2003). The movant, however, "need not prove his case." *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 (5th Cir. 1991) (citing *H & W Indus. v. Formosa Plastics Corp.*, 860 F.2d 172, 179 (5th Cir. 1988)). Before a court will grant a preliminary injunction, the movants must clearly show "(1) a substantial likelihood that they will prevail on the merits, (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted, (3) that their substantial injury outweighs the threatened harm to the party whom they seek to enjoin, and (4) granting the preliminary injunction will not disserve the public interest." *City of El Cenizo v. Texas*, 890 F.3d 164, 176 (5th Cir. 2018) (quoting *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012)); *see also Winter v. NRDC*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). "The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).

2 The Defendant and Intervenors suggested both in oral argument and in their written presentations that the Court should abstain under either *Pullman, Colorado River*, or *Rooker-Feldman* doctrine. Since standing is jurisdictional and since this Court is dismissing this action, it need not analyze these arguments. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61

S. Ct. 643 (1941); *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

***3** This Court finds that there is a difference between the voting periods presented to it. The merits need to be analyzed separately by early voting and election day voting. With respect to the likelihood of success, the Court would find that the Plaintiffs do not prevail on the element of likelihood of success with respect to early voting. First, § 85.062 of the Texas Election Code provides for "temporary branch polling places" during early voting. Tex. Elec. Code. § 85.062. The statute authorizes county election officials to use "movable structure[s]" as polling places. *Id.* § 85.062(b). The Code does not define "structure," but Black's Law Dictionary defines the term as: "Any construction, production, or piece of work artificially built up or composed of parts purposefully joined together." Black's Law Dictionary (11th ed. 2019). The Court finds, after reviewing the record, the briefing, and considering the arguments of counsel, that the tents used for drive-thru voting qualify as "movable structures" for purposes of the Election Code. The Court is unpersuaded by Plaintiffs' argument that the voters' vehicles, and not the tents, are the polling places under the drive-thru voting scheme. Consequently, the Court finds that drive-thru voting was permissible during early voting. Moreover, the Plaintiffs failed to demonstrate under the Texas Election Code that an otherwise legal vote, cast pursuant to the instructions of local voting officials, becomes uncountable if cast in a voting place that is subsequently found to be non-compliant.

Additionally, the promptness with which one brings an injunction action colors both the elements of likelihood of success on the merits and irreparable harm. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685 (2014) ("In extraordinary circumstances, however, the consequences of a delay in commencing suit may be of sufficient magnitude to warrant, at the very outset of the litigation, curtailment of the relief equitably awardable."); *Environmental Defense Fund, Inc. v. Alexander*, 614 F.2d 474, 478 (1980) ("equitable remedies are not available if granting the remedy would be inequitable to the defendant because of the plaintiff's long delay."). Here, the Court finds that the Plaintiffs did not act with alacrity. There has been an increasing amount of conversation and action around the subject of implementing drive-thru voting since earlier this summer. The Defendant has argued, and no one has refuted, that discussions were held with leaders of both major political parties, and, using that input, a drive-thru voting plan was developed. The Harris County Commissioners Court approved a budget for drive-thru voting in late September. Finally, actual drive-thru voting began October 13, 2020. At virtually any point, but certainly by October 12, 2020, Plaintiffs could have filed this action. Instead, they waited until October 28, 2020 at 9:08 p.m. to file their complaint and did not file their actual motion for temporary relief until mid-day on October 30, 2020—the last day of early voting. The Court finds this delay is critical. It is especially important in this compact early voting timeframe, in a particularly tense election, where each day's voting tally functionally equated to many days or even weeks of early voting in different situations.

Therefore, this Court finds the Plaintiffs do not prevail on the first element.

With regard to the second element, "irreparable injury," this point is covered more thoroughly in the standing discussion, but suffice it to say, in response to the Court's question during oral argument, Plaintiff's counsel described their injuries as the concern for the voting law to be accurately enforced and voting to be legal. In response to the Court's questions, Plaintiffs' Counsel said their irreparable injury was that the election process was being compromised, and that it prevents there being uniformity in the manner of voting throughout Texas. While certainly valid concerns, those are not the kind of injuries that separate Plaintiffs from other concerned citizens. Plaintiffs have no evidence of individualized irreparable injuries.

The one element that the Court finds the Plaintiffs have prevailed on is the harm to the party defendant. The Court finds that there would be no harm to Harris County. The only suggested harm is that the County has spent millions of dollars to implement drive-thru voting. While these funds may have been better spent, their loss does not prevail over tens of thousands of potentially illegal votes. Further, if granted, the injunction would only require the Defendant to conduct elections as Harris County has conducted them in the past without drive-thru voting.

***4** The last element must, like the first, take on extraordinary significance in this context. That element concerns the public interest. Plaintiffs argue, correctly, that the public has an interest in seeing that elections are carried out pursuant to the Election Code. This is no doubt true; however, this generalized interest is offset by two somewhat stronger factors. First, the drive-thru early voting as designed and implemented is, to this Court's reading, legal as described

above. Second, there have been over 120,000 citizens who have legally voted utilizing this process. While Plaintiffs have complained about anecdotal reports of irregularities, the record reflects that the vast majority were legal voters, voting as instructed by their local voting officials and voting in an otherwise legal manner. The only claimed widespread illegality is the place of voting—a tent outside the polling place instead of inside the actual building. To disenfranchise over 120,000 voters who voted as instructed the day before the scheduled election does not serve the public interest.

Therefore, if the Court had found standing existed, it would have denied an injunction as to the drive-thru early voting.

The Court finds the issue as to Election Day to cut the opposite direction. On Election Day, as opposed to early voting, there is no legislative authorization for movable structures as polling places. The Election Code makes clear that, on Election Day, "[e]ach polling place shall be located inside a building." Tex. Elec. Code § 43.031(b). The term "building" is not defined in the Code. Nevertheless, Black's Law Dictionary defines "building" as: "A structure with walls and a roof, esp. a permanent structure." Black's Law Dictionary (11th ed. 2019). The Court finds, after reviewing the record and arguments of counsel, that the tents used for drive-thru voting are not "buildings" within the meaning of the Election Code. Further, they are not inside, they are clearly outside. Accordingly, if the Plaintiffs had standing, the Court would have found that the continuation of drive-thru voting on Election Day violates the Texas Election Code.

It also finds that, unlike in early voting, the Plaintiffs prevail when one weighs the various elements that underlie the issuance of an injunction. First, as stated above, the Court does not find a tent to be a building. Therefore, under the Election Code it is not a legal voting location. Second, the Plaintiffs' request for injunctive relief is timely. While it could and should have been made earlier, it was made days before the election. The Court would have found that the Plaintiffs had a likelihood of success. The analysis of the second element remains the same. With regard to the loss that the Defendant might suffer, the Court finds this to be minimal. While it apparently spent millions in implementing the drive-thru voting system, it had over 120,000 voters use it—so it is money well-spent. The fact it would not be used on Election Day does not diminish its benefit. The analysis of the last element, public interest, swings in favor of the Plaintiffs. No one should want votes to be cast illegally or at an illegal polling place. No one has voted yet—so no one is being disenfranchised. Moreover, for those who are injured or worried that their health would be compromised should they be compelled to enter the building to vote, curbside voting is available under § 64.009 of the Texas Election Code.[3] Lastly, there are very few citizens who would want their vote to be in jeopardy, so it is incumbent on election officials to conduct voting in a proper location—not one which the Attorney General has already said was inappropriate. Consequently, this Court, had it found that standing existed, would have granted the injunction prospectively and enjoined drive-thru voting on Election Day and denied all other relief.

3 This Court is quite cognizant of the Texas Supreme Court ruling (in a slightly different context) that fear of contracting COVID-19 does not establish an exception. *In re State*, 602 S.W.3d 549 (Tex. 2020).

***5** Nevertheless, since it found standing does not exist, this action is hereby dismissed.

All Citations

Slip Copy, 2020 WL 6437668

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865 F.2d 264
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION. (The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Ninth Circuit.

G. Donald MASSEY; Bruce L. Bax; Donna L. Sergi, Plaintiffs–Appellants,

v.

A. COON, District Judge; Circuit Court of Oregon for Josephine County; Supreme Court of the State of Oregon; L.A. Cushing, District Judge, Defendants–Appellees.

No. 87–3768.
|
Submitted[*] Nov. 28, 1988.
|
Decided Jan. 3, 1989.

[*] The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed.R.App.P. 34(a), Ninth Circuit Rule 34–4.

Synopsis
D.Or.

AFFIRMED.

Appeal from the United States District Court for the District of Oregon; James A. Redden, District Judge, Presiding.

Before CHOY, TANG and O'SCANNLAIN, Circuit Judges.

MEMORANDUM[**]

***1** G. Donald Massey, Bruce L. Bax, and Donna L. Sergi appeal *pro se* the district court's judgment dismissing their action for injunctive and declaratory relief.

Massey, Bax, and Sergi filed an action in federal district court seeking declaratory and injunctive relief against the Oregon Supreme Court, the Circuit Court of Oregon for Josephine County, Oregon State District Judge A. Coon, and Oregon Circuit Judge L.A. Cushing. The complaint alleged that the defendants violated the plaintiffs' federal due process and equal protection rights by unlawfully assigning Coon to serve as circuit court judge *pro tem* in plaintiffs' quiet title action in state court. Defendants moved to dismiss the complaint for failure to state a claim. The magistrate recommended granting dismissal and the district court adopted the magistrate's findings and recommendations and dismissed the action. The appeal now comes before this court.

A. *Jurisdiction Over Bax and Sergi*
This court does not have jurisdiction to hear an appeal by *pro se* appellants who do not personally sign the notice of appeal. *Carter v. Commissioner,* 784 F.2d 1006, 1008 (9th Cir.1986). Bax and Sergi signed neither the original nor the amended notices of appeal. Therefore, Bax and Sergi's appeals must be dismissed.

B. *Massey's Appeal*
Massey contends that Article VII Section 2(a)(3) of the Oregon Constitution and several Oregon statutes (1) prohibit the appointment of a state circuit judge *pro tem* to serve in the judicial district for which the judge was elected; and (2) forbid a state circuit judge to name a judge *pro tem* as that power is reserved to the Oregon Supreme Court.

Massey also contends that such assignment, because it is contrary to state law, violates the due process and equal protection clauses of the Constitution. Assuming, arguendo, that Massey has correctly interpreted state law, we nonetheless conclude that the eleventh amendment bars his suit.

The eleventh amendment prevents federal courts from hearing suits brought against a state without its consent, regardless of the type of relief sought. *See Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984). Massey has failed to indicate any explicit waiver of Oregon's immunity to suit in federal court. He contends that the eleventh amendment is inapplicable because his suit is not in substance brought against the state. He further argues that this suit is excepted from the general jurisdictional bar by the principles of *Ex Parte Young,* 209 U.S. 123 (1908). We reject both arguments.

The eleventh amendment bars any suit nominally brought against individual state officials where the state is the real party in interest.[1] *Pennhurst,* 465 U.S. at 101. A suit for non-monetary relief is in substance against the sovereign if "the effect of the judgment would be 'to restrain the Government from acting or compel it to act.' " *Pennhurst,* 465 U.S. at 101 n. 11 (citing *Dugan v. Rank,* 372 U.S. 609, 620 (1963)). Here, the relief sought would require the state, acting through its officials, to conform its conduct to state law by appointing a judge from another district to serve as judge *pro tem* in this case.

***2** Massey contends that this suit is not brought against the state for purposes of the eleventh amendment because defendants' actions were outside their delegated power. However, a state official is not entitled to eleventh amendment immunity only when he acts "without any authority whatever." *Pennhurst,* 465 U.S. at 101 n. 11 (citing *Florida Dept. of State v. Treasure Salvors, Inc.,* 458 U.S. 670, 697 (1982) (plurality opinion)). "A claim of error in the exercise of [an official's delegated] power is therefore not sufficient" to support a claim of ultra vires. *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 690 (1949). Oregon's Constitution and statutes clearly did provide a mechanism for appointing judges *pro tem,* even though the procedures may not have been followed correctly in this case. Therefore, this case does not fall within the narrow scope of the ultra vires doctrine as enunciated by the Supreme Court. The action against Judges Coon and Cushing was thus in substance an action against the state.

Massey argues that if the suit is deemed to be one against the state, it is not barred by the eleventh amendment because it falls under the exception enunciated in *Ex Parte Young. Young* provides that a suit for injunctive relief challenging a state official's action under the Constitution is not considered a suit against the state for purposes of the eleventh amendment. *Young,* 209 U.S. at 167. Although on its face the complaint states a claim under the due process and equal protection clauses of the Constitution, these constitutional claims are entirely based on the failure of defendants to conform to state law. "[W]hen a plaintiff alleges that a state official has violated *state* law.... the entire basis for the doctrine of *Young* ... disappears." *Pennhurst,* 465 U.S. at 106 (emphasis in original). Therefore, the *Young* exception does not apply and the district court correctly dismissed the suit against Judges Coon and Cushing.

Finally, the district court properly dismissed Massey's action without leave to amend. Where amendment of the complaint would have served no purpose because the acts complained of could not constitute a cognizable claim for relief, it is not error to dismiss a complaint without leave to amend. *See Jones v. Community Redevelopment Agency,* 733 F.2d 646, 650 (9th Cir.1984). No restatement of Massey's claim could constitute a claim for relief cognizable in federal court.[2]

AFFIRMED.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36–3.

1 We consider only the claims against Judges Coon and Cushing because Massey does not argue on appeal that the district court erred in its determination that the state court defendants are immune from suit in federal court.

2 We also deny Massey's motion to file an amended opening brief. The amended brief adds no new arguments and would have no effect on the outcome of this case.

All Citations

865 F.2d 264 (Table), 1989 WL 884

2020 WL 736303
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

AGUILA MANAGEMENT LLC, Plaintiff,

v.

INTERNATIONAL FRUIT GENETICS LLC, Defendant.

No. CV-19-00173-PHX-DJH

Signed 02/13/2020

Attorneys and Law Firms

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ORDER

Honorable Diane J. Humetewa, United States District Judge

***1** Pending before the Court is a Motion to Dismiss ("the Motion") filed by Defendant International Fruit Genetics, LLC ("IFG") (Doc. 20). The Motion seeks to dismiss the Complaint filed by Plaintiff Aguila Management LLC ("Aguila"). (Doc. 20 at 1). Plaintiff filed a Response (Doc. 28), and Defendant filed a Reply (Doc. 31).[1]

[1] Both parties requested oral argument on this matter. The Court denies the request because the issues have been fully briefed and oral argument will not aid the Court's decision. *See* Fed.R.Civ.P. 78(b) (court may decide motions without oral hearings); LRCiv 7.2(f) (same).

I. Background

Plaintiff initiated this action on January 10, 2019 (Doc. 1). The Complaint alleges Federal Trademark Infringement in violation of 15 U.S.C. § 1114(1), Federal Unfair Competition and False Designation of Origin in violation of 15 U.S.C. § 1125(a), and Dilution in violation of 15 U.S.C. § 1125(c), as well as Common Law Unfair Competition and Common Law Trademark Infringement. (Doc. 1 at 8-12).

Plaintiff Aguila is the managing entity of a fruit and vegetables business which conducts transactions in the retail and wholesale marketplaces. (Doc. 1 at 3). Defendant IFG is a fruit-breeding business focused on creating new fruit varietals. (Doc. 20 at 4). Plaintiff's fruit and vegetables business utilizes trademarks "CANDY" for "Fresh Fruit-Namely, Apples, Peaches, Pears, Fresh Prunes and Plums;" "CANDY" for "Fresh Fruit;" and "KANDY" for "Fresh Fruit and Fresh Vegetables." (Doc. 1 at 4-5). Subsequent to Plaintiff, Defendant registered "COTTON CANDY" for "Fruits, Namely, Fresh Grapes," among other phrases. (Doc. 20 at Ex. 6). In the Complaint, Plaintiff alleges that Defendant knowingly and willingly infringed upon its trademarks by adopting and using "Cotton Candy" as well as other "Candy" related terms. (Doc. 1 at 5-6). Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant moves to dismiss on all counts for failure to state a claim upon which relief can be granted, arguing that the affirmative defense of laches bars Plaintiff's claims. (Doc. 20 at 1-2).

II. Discussion

A. Legal Standard for Rule 12(b)(6) Motion

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint. *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). Complaints must contain a "short and plain statement showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). This requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A complaint need not contain detailed factual allegations to avoid a Rule 12(b)(6) dismissal; it must simply plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. 544, 570 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* at 678 (citation omitted).

***2** The Court must interpret facts alleged in the complaint in the light most favorable to the plaintiff, while also accepting all well-pleaded factual allegations as true. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). That rule does not apply, however, to legal conclusions. *Iqbal*, 556 U.S. at 678. A complaint that provides "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Nor will a complaint suffice if it presents nothing more than "naked assertions" without "further factual enhancement." *Id.* at 557.

B. Laches

Laches is an affirmative defense distinct from a statute of limitations defense. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002) (citation omitted). It is "an equitable time limitation on a party's right to bring suit." *Id.* (quoting *Boone v. Mech Specialties Co.*, 609 F.2d 956, 958 (9th Cir. 1979)). In a trademark infringement claim under the Lanham Act, it is well established that laches may be presented as an equitable defense. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1209 (9th Cir. 2000). If a suit is filed beyond the "analogous state limitations period" for a claim arising from the Lanham Act, the Court presumes laches applies. *Jarrow*, 304 F.3d at 836 (citations omitted). Arizona's analogous statute of limitations for trademark infringement and unfair competition bars claims after three years. *See Ranch Realty v. DC Ranch Realty*, LLC, 614 F. Supp. 2d 983, 989-90 (D. Ariz. 2007).

To evaluate the application of laches, the Court first applies a two-prong test. *Danjaq LLC v. Sony corp.*, 263 F.3d 942, 951 (9th Cir. 2001). The first prong asks whether plaintiff unreasonably delayed filing suit, and the second prong asks whether defendant suffered prejudice as a result of the delay. *Id.*

The first prong begins with the length of delay, which is measured from the time the plaintiff knew or should have known about its potential cause of action. *Jarrow*, 304 F.3d at 838 (citing *Kling v. Hallmark Cards Inc.*, 225 F.3d 1030, 1036 (9th Cir. 2000); *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1241 (9th Cir. 1989)). Next, the Court decides whether the plaintiff's delay was reasonable. *Id.* (citing *Danjaq*, 263 F.3d at 954-55; *Couveau v. American Airlines*, 218 F.3d 1078, 1083 (9th Cir. 2000)). The reasonableness of the plaintiff's delay is considered in light of the time allotted by the analogous limitations period. *Id.* (citing *Sandvik v. Alaska Packers Ass'n*, 609 F.2d 969, 971 (9th Cir. 1979)). The Court also considers whether the plaintiff has proffered a legitimate excuse for its delay. *Id.* (citing *Danjaq*, 263 F.3d at 954-55).

In the second prong, a defendant must prove either evidentiary prejudice or expectations-based prejudice. *Danjaq*, 263 F.3d at 955. Evidentiary prejudice includes such things as lost, stale, or degraded evidence, or witnesses whose memories have faded or who have died. *Id.* (citations omitted). A defendant may demonstrate expectations-based prejudice by showing that it took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly. *Id.* (citation omitted). However, when laches is presented as a defense to a trademark infringement claim, a finding of expectations-based prejudice requires more. *Internet Specialties West, Inc. v. Milon-Digiorgio Enters., Inc.*, 559 F.3d 985, 991 (9th Cir. 2009). The court must determine whether the claim of prejudice is based on mere expenditures in promoting the infringed name or whether it is based on an investment in the mark as the identity of the business in the minds of the public. *Id.* at 991-93 (citations omitted) (quotation omitted).

***3** Finally, in addition to the *Jarrow* two-prong test, courts analyze six factors to determine whether laches precludes a trademark infringement claim: "1) the strength and value of trademark rights asserted; 2) plaintiff's diligence in enforcing mark; 3) harm to senior user if relief denied; 4) good faith ignorance by junior users; 5) competition between senior and junior users; and 6) extent of harm suffered by junior user because of senior user's delay." *E-Systems, Inc. v. Monitek, Inc.*, 720 F.2d 604, 607 (9th Cir. 1983).

C. Analysis

In the Motion, Defendant argues Plaintiff's claims are barred by the equitable doctrine of laches. (Doc. 20 at 7). Courts in this district have previously applied laches in a motion to dismiss, noting that "where the elements of laches are apparent on the face of a complaint, it may be asserted on a motion to dismiss." *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Com'n*, 366 F. Supp. 2d 887, 912 n.19 (D. Ariz. 2005) (citation omitted). Defendant first argues the facts require the presumption that laches applies. (Doc. 20 at 8). Second, Defendant argues Plaintiff unreasonably delayed suit. *Id.* at 9. Third, Defendant argues it is prejudiced by Plaintiff's alleged unreasonable delay in bringing suit. *Id.* at 10. Finally, Defendant argues the six-factor *E-Systems* test weighs in favor of dismissing Plaintiff's claims. *Id.* at 11-14. For the following reasons, the Court will deny the Motion.

1. The Presumption of Laches

Plaintiff does not dispute that in 2011 it had knowledge of Defendant's "COTTON CANDY" Intent-To-Use Trademark Application at the U.S. Patent Trademark Office ("USPTO"). (Doc. 28 at 9-10). Plaintiff argues an intent-to-use application does not trigger laches because the Lanham Act requires infringement by "use in commerce" for laches to be triggered. *Id.* at 9 (citing *United Am. Indus., Inc. v. Cumberland Packing Corp.*, No. CV-06-1833PHX-FJM, 2007 WL 38279 at *3 (D. Ariz. Jan 5, 2007)). In this instance, however, the Court need not reach whether an intent-to-use application triggers laches under the Lanham Act because Defendant's "COTTON CANDY" mark was later registered with the USPTO on March 6, 2012. (Doc. 20 at Ex. 6). The registration also indicated use in commerce as early as August 26, 2011. *Id.*

As a matter of public record not subject to reasonable dispute, the Court takes judicial notice of Defendant's 2012 "COTTON CANDY" mark registration. *See Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 f.3d 1048, 1052 (9th Cir. 2007); Fed. R. Evid. 201(b); *Tallyho Enterprises, LLC. V. PremierGarage Sys., LLC*, No. CV-07-01791-PHX-SRB, 2008 WL 11338891, at *7 n.1 (D. Ariz. Apr. 29, 2008). Plaintiff thus had constructive notice of the March 6, 2012 registration of "COTTON CANDY" mark by Defendant. *See Kling*, 225 F.3d at 1036 (when laches is raised, the law charges Plaintiff with "such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry"). Given that Plaintiff was aware of the relevant intent-to-use application prior to Defendant's March 6, 2012 "COTTON CANDY" mark registration, the Court finds Plaintiff reasonably had a duty of inquiry and is assumed to have had knowledge of the registration as of March 6, 2012.

The current action was filed January 10, 2019, far later than the would-be March 6, 2015 deadline for suit under Arizona's analogous statute. The Court thus initially proceeds under the assumption laches applies. *See Jarrow*, 304 F.3d at 836.

2. Plaintiff's Unreasonable Delay

***4** Plaintiff filed suit nearly seven years following Defendant's March 6, 2012 "COTTON CANDY" mark registration. Plaintiff's delay is greater than double the maximum time to file suit under Arizona's analogous statute of limitations. Plaintiff does not establish any justifiable reason for the delay. The Court finds the length of Plaintiff's delay to be unreasonable.

3. Defendant Must Show it is Prejudiced by Plaintiff's Unreasonable Delay

Plaintiff's delay in bringing suit is unreasonable, but Defendant does not claim evidentiary prejudice and has not proven expectations-based prejudice. The Complaint does allege that "IFG has both licensed the Infringing Marks ... and sold products bearing the Infringing Marks." (Doc. 1 at 7). The claim that Defendant licensed and sold products bearing infringing marks, however, does not establish prejudice in the laches context. *See Internet Specialties*, 559 F.3d at 991-93. Laches is meant to protect an infringer whose efforts have been aimed at "build[ing] a valuable business *around its trademark*" and "an important reliance *on the publicity of [its] mark.*" *Id.* at 991-92 (quoting 6 McCarthy on Trademarks and Unfair Competition § 31:12) (citations omitted) (emphases added). Proof of efforts to build a valuable business around the marks in question is necessary because "if this prejudice could consist merely of expenditures in promoting the infringed name, then relief would have to be denied in practically every case of delay." *Id.* at 991 (quoting *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609, 615 (7th Cir. 1965)).

Defendant has not shown at this stage that its alleged infringement rests on "an investment in the mark [ ] as the identity of the business in the minds of the public." *Id.* at 992; *see also Jarrow*, 304 F.3d at 839 (if plaintiff had filed the action sooner, defendant "could have invested its resources in shaping an alternative identity ... in the minds of the public"). Defendant's statement that "the history of IFG's uncontested growth as documented in the Complaint and in the USPTO register are precisely what evidence Courts rely upon" when analyzing prejudice understates the burden of proof required when asserting laches against a Lanham Act trademark infringement claim. (Doc. 31 at 2). Defendant's statement that its efforts regarding brand recognition are sufficiently demonstrated "by its development, registration, use, and licensing of its numerous CANDY-formative marks" also misapprehends the burden of proof required to show expectations-based prejudice. *Id.* at 8. The Court is unable to conclude, at this early stage of the litigation, that Defendant has invested in the relevant marks as the identity of its

business. Even finding a presumption in favor of laches, the application of laches at this stage is inappropriate because prejudice is not apparent on the face of the Complaint.[2] Therefore, the Court will deny the Motion to Dismiss.

2 The Court need not reach the *E-Systems* factors because the Motion fails to establish prejudice under the *Jarrow* test. *See Internet Specialties*, 559 F.3d at 991 (citing *Jarrow*, 304 F.3d at 839) (holding that notwithstanding the result of the *E-Systems* analysis, defendant must still satisfy the second prong of the laches test).

III. Conclusion

The Court finds the application of laches inappropriate because the Defendant failed to establish prejudice at this stage.

***5** Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss (Doc. 20) is **DENIED**.

All Citations

Slip Copy, 2020 WL 736303

End of Document

2001 WL 736794
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

SOLOW BUILDING COMPANY, LLC, Plaintiff,

v.

NINE WEST GROUP, INC. and Nine West Development Corporation, Defendants.

No. 00 Civ. 7685(DC).
|
June 29, 2001.

Attorneys and Law Firms

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Fried Frank Harris Shriver & Jacobson, By: Ira S. Sacks, Rita M. Odin, Andrea R. Rosenblum, New York, New York, for Defendants.

MEMORANDUM DECISION

CHIN, J.

***1** Plaintiff, a real estate corporation, is headquartered at 9 West 57th Street in New York City, a building with a large red sculpture—the numeral "9"—on the sidewalk in front of the property. Although plaintiff has never used the name in its business, it contends that its building has acquired the nickname "9 West." Defendants, manufacturers and retailers of shoes, clothing, and accessories, have used the mark "Nine West" since 1980. Plaintiff sues defendants for trademark dilution, false designation of origin, trademark infringement, and unfair competition.

Defendants move to dismiss the Second Amended Complaint (the "Complaint") on the grounds that plaintiff's claims are barred by laches and fail to state a claim upon which relief may be granted. As discussed below, because the Complaint demonstrates that plaintiff has known of defendants' use of the "Nine West" mark since 1980, has inexcusably delayed the commencement of this action, and has prejudiced defendants by its delay, the Court agrees that the laches defense applies; moreover, even assuming this action is not untimely, the Complaint fails to allege likelihood of confusion and plaintiff's ownership rights to the "9 West" name. Accordingly, plaintiff's Complaint is dismissed.

BACKGROUND

A. *The Parties*

Plaintiff Solow Building Company, LLC ("Solow"), a New York corporation, is a real estate company engaged in constructing and renting commercial and residential properties. It is headquartered at 9 West 57th Street, New York, New York, which is plaintiff's "premier property." (Sec.Am.Compl.¶¶ 1, 10). On the sidewalk in front of its headquarters, plaintiff has placed a nine-foot by five-foot red sculpture of the numeral "9." (*Id.* ¶ 13). Plaintiff's red numeral "9" is a registered mark with the United States Patent and Trademark Office (the "USPTO"). (*Id.* ¶ 12). In addition, plaintiff has registered the mark "SOLO9W57" (*id.* ¶ 14), and it alleges that "the public has derived the nickname '9 West' from Solow's numeral '9' and/or the SOLOW9W57 service marks as an identification of 9 West 57."[1] (*Id.* ¶ 16).

1 In its Complaint, plaintiff identifies its service mark as both "SOLO9W57" and "SOLOW9W57." (*See, e.g.,* Sec. Am. Compl. ¶¶ 14, 15, 16). It is unclear which version is the proper mark.

Defendant Nine West Group, Inc. is a manufacturer and retailer of shoes, clothing, and accessories. It is a Delaware corporation with its principal place of business in White Plains, New York. (*Id.* ¶ 2). Defendant Nine West Development Corp. is a wholly owned subsidiary of Nine West Group.[2] (*Id.* ¶ 3).

2 The Court shall refer to defendants collectively as "Nine West ."

B. *Defendants' "Nine West" Mark*

Fisher Camuto Retail Corporation ("Camuto") was the predecessor of Nine West. (*Id.* ¶ 18). Camuto was a tenant in 9 West 57th Street from July 1977 through June 1982. (*Id.*). In or about 1980, Camuto began doing business under the name "9 West," employing the numeral "9" on its corporate logo similar to plaintiff's "9" sculpture. (*Id.* ¶¶ 19, 20). In 1981, in

response to plaintiff's demands to cease using the "9" logo, Camuto began using a "script numeral '9.' " (*Id.* ¶ 21).

***2** In 1990, Camuto began using "Nine West" as its corporate logo, and, in 1993, it also began using the name "9 & Co." (*Id.* ¶¶ 22–24). Defendants use the marks "for use in connection with the retail sale of women's shoes and handbags." (*Id.* ¶¶ 23, 24). Defendants registered both names with the USPTO in 1991 and 1995, respectively. (*Id.*).

In 1996, defendants began using their "Nine West" mark in connection with the retail sale of clothing (such as hosiery, jackets, and sleepwear) and accessories (such as sunglasses, watches, and hats). (*Id.* ¶¶ 26–28). Defendants filed trademark applications on their "Nine West" name to cover these products. (*Id.*).

C. *Investigations of Defendants*

In 1997, the Securities and Exchange Commission began investigating defendants for accounting irregularities and, along with the United States Customs Service, for circumstances surrounding Brazilian imports. (*Id.* ¶ 34). More recently, the Federal Trade Commission (the "FTC") and all of the state attorney generals investigated defendants for alleged price-fixing, which resulted in a settlement agreement whereby defendants agreed to pay approximately $34 million in fines. (*Id.* ¶¶ 35, 36).

DISCUSSION

Plaintiff's Complaint asserts four causes of action: trademark dilution under the Lanham Act; false designation under the Lanham Act; common law trademark infringement and unfair competition; and trademark dilution under New York law. Defendants move to dismiss the Complaint in its entirety, arguing that plaintiff's claims are barred by laches. In addition, defendants argue that the Complaint must be dismissed because, among other things, plaintiff failed to sufficiently plead likelihood of confusion and its ownership in the mark "9 West."

I. *Motion to Dismiss Standard*

A complaint may not be dismissed on a motion to dismiss unless it " 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." ' *Allen v. WestPoint–Pepperell, Inc.,* 945 F.2d 40, 44 (2d Cir.1991) (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957)). Therefore, the issue before the Court " 'is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." ' *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378 (2d Cir.1995) (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 235–36 (1974)).

Although the pleading requirements under Federal Rule of Civil Procedure 8(a) are construed liberally, "[l]iberal construction has its limits, for the pleading must at least set forth sufficient information for the court to determine whether some recognized legal theory exists upon which relief could be accorded the pleader. If it fails to do so, a motion under Rule 12(b)(6) will be granted." *Levisohn, Lerner, Berger & Langsam v. Medical Taping Sys., Inc.,* 10 F.Supp.2d 334, 344 (S.D.N.Y.1998) (internal quotation omitted); *accord Scholastic, Inc. v. Stouffer,* 124 F.Supp.2d 836, 841 (S.D.N.Y.2000).

II. *Laches*

***3** To prevail on the defense of laches, defendants must establish three elements: (1) plaintiff had knowledge of defendants' use of its marks; (2) plaintiff inexcusably delayed taking action; and (3) defendants will be prejudiced by permitting plaintiff to assert its rights now. *See Fourth Toro Family Ltd. P'ship v. PV Bakery, Inc.,* 88 F.Supp.2d 188, 196 (S.D.N.Y.2000) (citation omitted). Although the burden of establishing these factors is usually on defendants, the Second Circuit has instructed that "when the suit is brought after the statutory time has elapsed, the burden is on the complainant to [allege] ... the circumstances making it inequitable to apply laches in [its] case." *Conopco, Inc. v. Campbell Soup Co.,* 95 F.3d 187, 191 (2d Cir.1996); *cf. Jose Armando Bermudez & Co. v. Bermudez Int'l,* No. 99 Civ. 9346(AGS), 2000 WL 1225792, at *8 (S.D.N.Y. Aug. 29, 2000) (conducting this analysis on a motion to dismiss).

The limitations period that courts apply to Lanham Act cases is six years.[3] *See Bermudez,* 2000 WL 1225792, at *8 n. 10 (citing *Conopco,* 95 F.3d at 191–92). Here, plaintiff acknowledges that Camuto "adopted the corporate logo '9 West' and began doing business under that name" in 1980, and that in 1991 "Camuto filed a trademark application ... on the name 'Nine West' for use in connection with the retail sale of women's shoes and handbags." (Sec.Am.Compl.¶¶ 19, 23). Plaintiff commenced this suit on October 12, 2000. Accordingly, because the statute of limitations has run, *see Bermudez,* 2000 WL 1225792, at *8 n. 10 (noting that the

period begins to run "when plaintiff purportedly discovered the alleged infringements"), "a presumption of laches ... appl[ies] and plaintiff must show why the laches defense ought not be applied in the case."[4] *Conopco,* 95 F.3d at 191.

3 The Second Circuit has explained that "laches is an equitable defense that courts employ instead of a statutory time-bar.... Because the Lanham Act establishes no limitations period ..., and ... there is no corresponding federal statute of limitations, we look to the most appropriate state statute of limitations for laches purposes." *Conopco,* 95 F.3d at 191. Hence, courts in this circuit apply New York's six-year fraud statute to Lanham Act claims. *See id.; accord Fourth Toro Family,* 88 F.Supp.2d at 196.

4 Even if the statute of limitations has not run, the laches defense may still be applicable. *See Peyser v. Searle Blatt & Co.,* No. 99 Civ. 10785(WK), 2000 WL 1071804, at *5 (S.D.N.Y. Aug. 2, 2000). In such a situation, however, there is no presumption of laches, and, thus, the burden remains on the defendant to prove the defense. *Conopco,* 95 F.3d at 191.

Plaintiff argues that its case should not be dismissed for laches for three reasons. First, plaintiff asserts that laches is not a proper issue for determination on a motion to dismiss. Second, plaintiff asserts that it has not inexcusably delayed taking action. Last, plaintiff asserts that its delay has not prejudiced defendants .[5] I address, and ultimately reject, each of these arguments in turn.

5 In its memorandum in opposition to defendants' motion to dismiss, plaintiff states that the "presumption" of laches "has no basis in law, or logic." (Pl. Mem. at 18). Hence, plaintiff's arguments actually read, *"Defendants Have Failed to Establish* an Unreasonable and Inexcusable Delay in Filing Suit," and *"Defendants Have Failed to Establish* Prejudice." (*Id.* at 17, 18 (emphasis added)). As already noted, however, the Second Circuit has specifically stated that "once the ... statute has run, a presumption of laches will apply," *Conopco,* 95 F.3d at 191, and the Complaint here clearly indicates that plaintiff commenced this action outside the limitations period. *See Bermudez,* 2000 WL 1225792, at *8 n. 10. Nonetheless, even if the burden is on defendants to establish laches, as discussed more fully below, defendants have satisfied this burden.

A. *Resolving Laches on Motion to Dismiss*

This Court has held: "[W]hen the defense of laches is clear on the face of the complaint, and where it is clear that the plaintiff can prove no set of facts to avoid the insuperable bar, a court may consider the defense on a motion to dismiss." *Lennon v. Seaman,* 63 F.Supp.2d 428, 439 (S.D.N.Y.1999) (citing *Oshiver v. Levin Fishbein Sedrin & Berman,* 38 F.3d 1380, 1385 n. 1 (3d Cir.1994); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure:* Civil 2d § 1357); *accord Bermudez,* 2000 WL 1225792, at *8. Hence, although the defense is fact-specific, the Court can consider laches on a motion to defense.

B. *Inexcusable Delay*

***4** Although plaintiff acknowledges that it has known of defendants' use of the "Nine West" mark since at least 1981 (Sec.Am.Compl.¶ 21), plaintiff argues that it has not inexcusably delayed the commencement of this action because its claims are based on "actions taken by Defendants beginning in 1996 and continuing through 2000...." (Pl. Mem. at 17). To support its position, plaintiff relies exclusively on the decision in *Fourth Toro Family,* 88 F.Supp.2d 188. (Pl. Mem. at 18). There, in a dispute between bagel sellers each claiming the right to use the "H & H" name, defendant argued that the action was barred by laches because it had used the name for 12 years prior to plaintiff's suit. The court, however, rejected the defense, noting a number of actions in the intervening years that excused the delay: defendant had "increased the aggressiveness and the scope of its advertising" by imitating plaintiff's campaigns; defendant changed its marketing focus from Manhattan to nation-wide; defendant changed its mark to one that was much more similar to plaintiff's mark; defendant adopted a "confusingly similar '800' number"; and defendant traded on plaintiff's kosher certification. *Fourth Toro Family,* 88 F.Supp.2d at 197. These actions, according to the court, "creat[ed] instances of both actual, reported confusion and the likelihood of increasing confusion." *Id.* In addition, the court noted that, prior to suing defendant, plaintiff had taken action with the "Trademark Office" on at least three separate occasions and, in fact, obtained "exclusive trademark protection" from the office. *Id.* at 197–98. Thus, the court concluded that "plaintiff's filing of [the] lawsuit ... was a direct and timely response to defendant's tactics." *Id.* at 198 (citation omitted).

In contrast, plaintiff here took no action against defendants until it commenced this action in October 2000, and defendants took no actions that increased the likelihood of confusion between the parties' marks or their services.

Defendants have used the "Nine West" mark, with plaintiff's knowledge, since 1980. In 1981, plaintiff demanded that Camuto alter his "9 West" logo because it allegedly violated plaintiff's red numeral "9" trademark. (Sec.Am.Compl.¶ 21). For the next two decades, however, plaintiff took no action even as defendants "continued to use the name[s] ... openly and notoriously...." (*Id.* ¶ 25). Plaintiff does not allege that it sought exclusive protection for the "9 West" mark, *cf. Fourth Toro Family,* 88 F.Supp.2d at 197–98, it does not allege that it notified defendants of its concerns, *cf. Bermudez,* 2000 WL 1225792, at *8 (declining to apply laches, in part, because plaintiff had "notified [defendant] of its concerns relat[ing] to possible infringement," and because defendant, in response, had represented that it would no longer engage in the allegedly infringing conduct), and it does not allege that it conducted an "investigation into the merits of [its] case."[6] *Cf. Peyser,* 2000 WL 1071804, at *6 (noting that a "reasonable investigation into the merits ... will in effect toll the laches period").

6 In its memorandum in opposition to defendants' motion to dismiss, plaintiff does not assert that it took any of these actions.

***5** In addition, plaintiff does not allege that defendants' use of the "Nine West" mark, including their post–1996 use, "increas[ed] the likelihood of confusion" between its real estate business or its properties and defendants' shoe and clothing business. The crux of the *Fourth Toro Family* decision was that in the intervening years defendant's actions "altered the competitive environment between plaintiff and defendant." 88 F.Supp.2d at 198. Here, plaintiff does not, and cannot, make such an allegation. Rather, plaintiff merely alleges that defendants' actions during that time "expanded the public's awareness of [*defendants'*] 'Nine West' name."[7] (Sec. Am. Compl. ¶ 26 (emphasis added)). Accordingly, the Complaint does not sufficiently allege that the filing of this lawsuit in October 2000, more than 20 years after defendants began using the "Nine West" name, was either a direct or a timely response to defendants' actions. *Cf. Fourth Toro Family,* 88 F.Supp.2d at 198.

7 Plaintiff also argues that the SEC's and FTC's investigations of defendants, beginning in 1997, and the resulting "negative publicity," "caused the public to associate [defendants' marks] with dishonesty, fraudulent practices and illegal conduct." (Sec.Am.Compl.¶ 37). This argument is meritless. First, the Complaint does not allege that the investigations increased the likelihood of confusion between the parties. Second, as discussed by the Fifth Circuit, plaintiff is proposing that a "trademark owner has a property right in his mark, but only so long as he personally is not unpopular with the general public." *Exxon Corp. v. Oxxford Clothes, Inc.,* 109 F.3d 1070, 1084 (5th Cir.1997). Like the Fifth Circuit, I "reject this highly unorthodox view of trademark law." *Id.*

C. *Prejudice to Defendants*

"A defendant has been prejudiced when the assertion of a claim available some time ago would be 'inequitable' in light of the delay in bringing that claim. Specifically, prejudice is present when a 'defendant has changed his position in a way that would not have occurred if the plaintiff had not delayed.' " *Bermudez,* 2000 WL 1225792, at *8 (quoting *Conopco,* 95 F.3d at 192). Here, the Complaint alleges the following: in 1980, Camuto began using a variation on the "Nine West" name; in 1981, plaintiff demanded that Camuto alter the style of his logo; in 1990, Camuto began using "Nine West" as its corporate logo; in 1991, Camuto filed a trademark application on the name "Nine West"; in 1993, defendants began to use the name "9 & Co.," and, in 1995, they applied for trademark protection for the name; from 1996 through 2000 defendants expanded its line of consumer products from shoes and handbags to include certain types of clothing apparel and accessories, and defendants filed trademark applications to cover these products under their "Nine West" name. Thus, in part because of plaintiff's inaction as to defendants' use of the "Nine West" mark, defendants have used the name for more than 20 years "in the manufacture and retail sale of clothing and accessories...." (Sec.Am.Compl.¶ 2). Aside from the one concern that it raised in 1981, plaintiff has allowed defendants to use the "Nine West" name uncontested for two decades.

Nonetheless, plaintiff argues that defendants have not suffered prejudice because "since 1996, Defendants have changed the manner in which they used the 'Nine West' name by expanding their business activities to include a wide variety of consumer products...."[8] (Pl. Mem. at 19). This argument, however, supports the opposite conclusion—that plaintiff's inaction prejudiced defendants—as defendants decided to "expand [their] business activities" after 16 years of selling shoes and handbags with no action from plaintiff. (Sec.Am.Compl.¶ 26). *Cf. Peyser,* 2000 WL 1071804, at *7–8 (noting that "courts have had little tolerance for cries of

'prejudice' from defendants who ... were put on notice of an infringement").

[8] Plaintiff's additional argument that defendants have failed to "establish" prejudice because "since 1997, [they] have been engaged in a series of illegal activities which have lent notoriety to the 'Nine West' name" is irrelevant. The issue before the Court is whether defendants have suffered prejudice because of *plaintiff's* inactions.

***6** Accordingly, because plaintiff has known of defendants' use of the "Nine West" name since 1980, has inexcusably delayed the commencement of an action against defendants, and has allowed defendants to maintain and expand their business activities by its delay, thus prejudicing defendants, plaintiff's claims are barred by laches. Laches is clear on the face of plaintiff's Complaint; it is clear that plaintiff "can prove no set of facts to avoid the insuperable bar," *Lennon,* 63 F.Supp.2d at 439; and there is no reason why the Court "should permit plaintiff[ ] to 'sleep on [its] rights' to sue under any of [its] claims." *Peyser,* 2000 WL 1071804, at *9.

III. *Additional Grounds for Dismissal*

A. *Likelihood of Confusion*

Even assuming the Complaint is not barred by laches, plaintiff's cause of action also fails because the Complaint fails to sufficiently allege any likelihood of confusion between the parties' marks, as required by the Lanham Act and New York common law. *See Nabisco, Inc. v. Warner–Lambert Co.,* 220 F.3d 43, 45–46 (2d Cir.2000). Although the existence of consumer confusion is generally a question of fact, "[i]n considering a motion to dismiss pursuant to Rule 12(b)(6), the Court may ... make an initial finding as to whether or not a jury would find a likelihood of confusion as to source." *Textile Deliveries, Inc. v. Stagno,* No. 90 Civ.2020(JFK), 1990 WL 155709, at *6 (S.D.N.Y. Oct. 9, 1990); *accord Schieffelin & Co. v. Jack Co. of Boca, Inc.,* 725 F.Supp. 1314, 1323 (S.D.N.Y.1989) (noting that for a motion to dismiss "courts retain an important authority to monitor the outer limits of substantial similarity within which a jury is permitted to make the factual determination whether there is a likelihood of confusion as to source" (quoting *Warner Bros., Inc. v. American Broadcasting Cos.,* 720 F.2d 231, 246 (2d Cir.1983))). Thus, the Court, accepting the facts as alleged in plaintiff's Complaint as true, must conclude whether a legal claim exists based on those facts. Here, plaintiff has failed to allege the existence of likelihood of confusion.[9]

[9] This is in contrast to the facts in *Solow v. BMW (US) Holding Corp.,* No. 97 Civ. 1373(DC), 1998 WL 717613, at *4 (S.D.N.Y. Oct. 14, 1998), where I denied a motion to dismiss a complaint filed by Solow that did allege a likelihood of confusion. There, in a case involving BMW's use—in a television commercial—of a red numeral "5" sculpture in front of a building similar in style to plaintiff's 9 West 57th Street property, Solow "unequivocally" alleged likelihood of confusion. *See id.* Moreover, in that case, unlike here, Solow did not wait 20 years to commence its action.

In addressing likelihood of confusion, courts apply the eight-factor test set forth in *Polaroid Corp. v. Polaroid Elecs. Corp.,* 287 F.2d 492, 495 (2d Cir.1961):(i) strength of plaintiff's mark; (ii) similarities of the parties' marks; (iii) proximity of the parties' products in the marketplace; (iv) likelihood that plaintiff will bridge the gap between the products; (v) actual confusion; (vi) defendants' intent in adopting their mark; (vii) quality of defendants' product; and (viii) sophistication of the relevant consumer group. *See also Nabisco,* 220 F.3d at 46. As the Second Circuit has noted, "the ultimate question [is] whether consumers are likely to be confused." *Id.* (quotation and citation omitted).

Here, the Complaint makes no allegations at all as to five of the *Polaroid* factors (iii, iv, vi, vii, and viii). The absence of any such discussion is not surprising, as those factors all weigh against a finding of confusion. As to the "ultimate question" of the likelihood of consumer confusion, the Complaint provides that plaintiff is a "corporation engaged in the business of real estate construction and the rental of distinctive commercial and residential properties." (Sec.Am.Compl.¶ 1). Defendants, in turn, manufacture and sell women's footwear, handbags, and, for the last six years, additional items such as hosiery, sunglasses, watches, and bed sheets. (*Id.* ¶¶ 24–28). Thus, there is clearly no proximity between the parties' businesses or their products, and there is simply no competition between the parties. *See Charles Atlas, Ltd v. DC Comics, Inc.,* 112 F.Supp.2d 330, 339 (S.D.N.Y.2000) (noting that because the parties "are simply not in direct competition ... the likelihood of confusion is greatly reduced"). Moreover, consumers who seek real estate construction or property rentals surely will not be confused by a company that manufactures and sells women shoes, handbags, clothing, and accessories.

***7** Accordingly, the Court concludes that the Complaint's allegations exceed the "outer limits ... within which a jury

is permitted to make the factual determination [that] there is a likelihood of confusion as to source." Based on the facts alleged, no legal claim exists.

B. *Plaintiff's "9 West" Mark*

In the Complaint, plaintiff alleges that "the public has derived the nickname '9 West' ... [and] uses the nickname '9 West' to identify 9 West 57 and has come to uniquely associate the nickname '9 West' with the building." (Sec.Am.Compl.¶ 16). The Complaint does not allege, however, that *plaintiff* uses, or has ever used, the nickname "9 West," or that *plaintiff* uses, or has ever used, the nickname to identify the building at 9 West 57. Hence, defendants argue that plaintiff "cannot have acquired ownership rights in the mark '9 West." ' (Defs. Mem. at 12–13); *see* 15 U.S.C. § 1127 (defining "trademark" as "any word, name, symbol, or device ... *used by [the applicant]"* seeking trademark protection (emphasis added)).

In response, plaintiff does not challenge defendants' assertion that it does not use the nickname, but, instead, relies on *National Cable Television Ass'n v. American Cinema Editors, Inc.,* 937 F.2d 1572 (Fed.Cir.1991), for its argument that "even without 'use' of trademark directly by the claimant ..., nicknames of trademarks or names used only by the public give rise to protectable rights...." (Pl. Mem. at 20). While the court there did state, in dicta, that public-created nicknames do give rise to protectable rights, the court's holding rested on the fact that *plaintiff* had "made significant use of [the nickname] as its trade name...." *National Cable Television,* 937 F.2d at 1577–78.

In *Harley–Davidson, Inc. v. Grottanelli,* 164 F.3d 806, 812 (2d Cir.1999), a case involving a motorcycle manufacturer's and a motorcycle repairer's competing use of the word "hog," the Second Circuit noted the *National Cable Television* decision but did not indicate "[w]hether or not we agree with [the] decision[ ]...." The court did note, however, that the nickname "hog," like plaintiff's alleged nickname "9 West," differed "significantly" from the nickname at issue in *National Cable Television* in that the nickname "hog" was "a generic term in the language as applied" to motorcycles.[10] *Id.* The court stated: "The public has no more right than a manufacturer to withdraw from the language a generic term, already applicable to the relevant category of products, and accord it trademark significance, at least as long as the term retains some generic meaning."[11] *Id.*

10 As noted by the Second Circuit, the term "hog" was used "to refer to motorcycles generally and large motorcycles in particular." *Harley–Davidson,* 164 F.3d at 808.

11 Moreover, the Second Circuit denied trademark protection to plaintiff's use of "hog" despite the fact that plaintiff itself had begun to use the term in connection with its merchandise, advertising, and promotion. *Harley–Davidson,* 164 F.3d at 809. Here, as already noted, the Complaint does not allege that plaintiff itself ever used the nickname "9 West."

There is a "9 West" on almost every cross-street in Manhattan, and, thus, "9 West" surely retains a "generic meaning" in the "language" of building addresses, which is how plaintiff uses the name. Under the reasoning of *Harley–Davidson,* therefore, plaintiff would not be permitted to accord trademark significance to the public-created nickname "9 West" in an action against another building that sought to use it. Hence, if plaintiff cannot enforce the nickname against another real estate company, then plaintiff should not be permitted to enforce the "9 West" nickname against a shoe and clothing company.

***8** Accordingly, plaintiff has no trademark right to the term "9 West," a nickname that, according to the Complaint, was created and is used only by the public, and one that is generic.

CONCLUSION

Based on the foregoing, all of plaintiff's claims are barred by the laches defense. In addition, plaintiff has failed to sufficiently allege likelihood of confusion and ownership rights in the name "9 West." Hence, the Second Amended Complaint is dismissed in its entirety, with prejudice, and the Clerk of Court shall enter judgment accordingly.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2001 WL 736794

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

William Feehan,

Plaintiff,

vs.

Case No. 2:20-cv-1771

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancey, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Defendants.

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR EMERGENCY INJUNCTIVE RELIEF OF AMICUS CURIAE WISCONSIN STATE CONFERENCE NAACP, DOROTHY HARRELL, WENDELL J. HARRIS, SR., AND EARNESTINE MOSS

INTRODUCTION

This lawsuit should be dismissed with prejudice on the pleadings. It is but one of 40-plus cases that have been filed around the country by President Trump or his political allies seeking to invalidate the results of the November 3, 2020 presidential election. It is the fifth such suit in Wisconsin alone, and a sixth has since been filed. The substance and timing of the instant case and the extreme and unprecedented relief it seeks constitute a continuation of an equally unprecedented abuse of the court system, to which credence need not and should not be given.

Plaintiff has already placed a significant enough burden on the Court, so the Wisconsin State Conference NAACP and its three participating members, Dorothy Harrell, Wendell J. Harris, Sr., and Earnestine Moss (collectively the "Wisconsin NAACP") will endeavor to not repeat the

substantive arguments that we expect the parties will make. Rather, we seek to highlight some of the stronger reasons why this Court should summarily dismiss this action. Three issues stand out: (1) federal courts in particular are not the proper forum for suits like this; (2) Plaintiff's inexcusable delay in filing this action deprives him of the right to the relief he seeks; and (3) the relief he seeks—the invalidation of approximately 3.2 million votes lawfully cast by eligible Wisconsin voters—is so inapt, so wrong, indeed so absurd as to mandate rejection of Plaintiff's plea without further proceedings.

In offering this perspective, the proposed amici rely on the lessons taught by federal district court and appellate judges in Pennsylvania, Georgia, and Michigan, who ruled that gussying up run-of-the-mill state law claims and unsupported voter fraud claims as federal constitutional claims is insufficient to invoke the jurisdiction of federal courts, and that suits brought even earlier than this one were still brought too late. We rely also on the opinions of members of the Wisconsin Supreme Court who, even while disagreeing on whether that court was the proper forum for an original action challenging Wisconsin's election results, raised serious threshold questions about the availability of the extraordinary relief requested by the President and his allies in those cases.

Before proceeding, we offer one final thought. Wisconsin NAACP is not simply an organization whose mission includes ensuring that voters' votes are counted, important as that mission is. It is dedicated specifically to advancing the interests of Black voters in our democracy. To that end, the national NAACP has partnered with one of the country's leading civil rights organizations, the Lawyers' Committee for Civil Rights Under Law, to work with experienced local counsel in several states, including Wisconsin, to ensure that the votes of Black voters are not invalidated in this election. It is no accident that Plaintiff's focus in this case is on the voters of Milwaukee County, home to Wisconsin's largest city and Black population. This follows a

pattern wherein the Trump Campaign and its allies have singled out alleged "corruption" in other cities with large Black populations.[1]

Wisconsin NAACP respectfully asks this Court to scrutinize Plaintiff's claims in that light, and recognize them not only as an existential threat to our democracy—which they are—but also as a particular threat to the votes of members of minority populations whose access to the ballot box has been historically obstructed.

Plaintiff's Complaint does not deserve a day in court.

ARGUMENT

I. THESE CASES DO NOT BELONG IN FEDERAL COURT.

On November 9, 2020, the Trump Campaign filed suit in the Middle District of Pennsylvania alleging a series of election improprieties, similar (and equally frivolous) to those alleged by Plaintiff here. *Donald J. Trump for President, Inc. v. Kathy Boockvar*, No. 4:20-cv-02078, 2020 WL 6821992 (Nov.21, 2020).[2] Initially, United States District Court Judge Matthew Brann scheduled an evidentiary hearing on the plaintiffs' motion for preliminary relief, but after hearing oral argument on the defendants' motion to dismiss, he not only adjourned the hearing without resetting it, but denied the plaintiffs' motion for leave to file a second amended complaint. *Trump v. Boockvar*, 2020 WL 6821992 at *3-4, 14. On appeal, a unanimous panel of the Third Circuit affirmed the denial of the request to amend the complaint, with Judge Stephanos Bibas writing for the Court and ruling that the sort of claims asserted by the plaintiffs, even though

[1] *See e.g.*, Transcript of Oral Argument Proceedings in Re: Motion to Dismiss, *Donald J. Trump for President v. Boockvar*, No. 20-3371 (M.D. Pa., Nov. 17, 2020), at 18-19 (President Trump's lawyer Rudy Giuliani alleging massive voter fraud in Philadelphia, Pittsburgh, Detroit, Milwaukee, and Atlanta).

[2] As here, the claims included allegations that election officials improperly cured absentee ballots and restricted observers.

repackaged as federal due process and equal protection claims, "boil down to issues of state law." *Donald J. Trump for President, Inc v. Pa.*, No. 20-3371, 2020 WL 7012522 at *1 (3d Cir. Nov 27, 2020).

Similar claims led to the identical result in a suit filed on November 13, 2020 in the Northern District of Georgia by L. Lin Wood, Jr.—who also serves as counsel for Plaintiff in this action—in which he alleged a series of election irregularities as frivolous as are Plaintiff's. claims here. *L. Lin Wood, Jr. v. Brad Raffensperger*, No. 1:20-cv-04651-SDG, 2020 WL 6817513 (N.D. Ga., Nov. 20, 2020).[3] The district court held a hearing, then denied Wood's request for a temporary restraining order. This past Saturday, December 5, the Eleventh Circuit, in an opinion by Chief Judge Pryor, unanimously affirmed on grounds that the case was not justiciable in the first instance, because federal courts are "courts of limited jurisdiction" and "may not entertain post-election contests about garden-variety issues of vote counting and misconduct that may properly be filed in state courts." *Wood v. Raffensperger*, No. 20-14418, 2020 WL 7094866 at *1 (11th Cir., Dec. 5, 2020).

Most recently, Judge Linda Parker of the Eastern District of Michigan also denied the Plaintiffs' Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief challenging the election results in Michigan, particularly in Detroit, in a case brought by Sidney Powell—lead counsel for plaintiff in this case—and others on November 25. *King v. Whitmer*, No. 20-13134, slip op. (E.D. Mich., Dec. 7, 2020). The district court ruled without hearing oral argument. *Id.* at 6. The court found that Plaintiffs' claims were not justiciable in federal court because they were effectively state law claims brought against state officials. *Id.* at 10-13.

[3] Wood alleged, among other things, that defendant had improperly accepted absentee ballots without signature verification and restricted observers to the counting.

This case presents no reason for the Court to veer from the path taken by these sister courts. The claims are substantially the same: alleged deviations from state court laws that govern the handling and counting of absentee ballots and wild conspiracy theories about voting machines. As in the Michigan, Georgia, and Pennsylvania cases, there are no allegations that any specific voter was not qualified to vote or that any specific vote was fraudulently cast, and certainly no evidence beyond mere speculation by Plaintiff and non-credible analyses by unqualified "experts" that there were a sufficient number of fraudulent votes to affect the outcome of the Presidential election. There is no reason for this Court to continue this case, and, as explained below, every reason for this Court not to. This is even more true because there is an active suit in state circuit court brought by President Trump alleging noncompliance with Wisconsin election law that will be decided at a hearing on December 10, 2020.

II. PLAINTIFF'S DELAY DEPRIVES HIM OF THE RIGHT TO SEEK RELIEF.[4]

Plaintiff knew of the bases for the claims he has brought in this suit earlier than December 1, 2020 when he filed this suit. For example, the guidance by the Wisconsin Elections Commission (the "Commission") to local clerks regarding application of the "indefinitely confined" category of eligibility for obtaining an absentee ballot during the COVID-19 pandemic was issued on **March 29, 2020**, with an additional directive issued **May 13, 2020**, as Plaintiff himself alleges. (Compl., ¶ 40.)[5] Likewise, the practice of local clerks filling in missing witness address information on absentee ballot envelopes without requiring the presence of the voter has been

[4] Wisconsin NAACP does not agree that Plaintiff has standing to bring this case in the first instance under the Electors or Elections Clause, *see Lance v. Coffman*, 549 U.S. 437, 442 (2007); *Corman v. Torres*, 287 F.Supp.3d 558, 573 (M.D. Pa. 2018); *Bognet v. Sec'y Commw. of Pa.*, No. 20-3214, 2020 WL 6686120, at *6-9 (3d Cir. Nov. 13, 2020); *Wood v. Raffensperger, et. al.*, No. 1:20-CV-04651-SDG, 2020 WL 6817513, at *5 (N.D. Ga. Nov. 20, 2020); *King*, slip op. at 26-29, or under the due process and equal protection clauses. *See King*, slip op. at 24-25. We assume that the parties will make the same argument and therefore will not repeat it here.

[5] The related instructions from the Dane County Clerk were issued on March 25, 2020.

mandated by the Commission since at least **October 18, 2016**, as Plaintiff himself alleges.[6] (Compl., ¶ 44.) Plaintiff's utterly baseless claims about widespread coordinated manipulation of voting machines amount to nothing more than wild conspiracy theories, based principally on a single redacted declaration from an anonymous witness. (*See* Compl., Exh. 1.) But even that declaration was purportedly signed on **November 15, 2020**, and the declarant purported to have knowledge of the bases for Plaintiff's allegations as early as a decade prior. (Compl., Exh. 1, ¶¶ 11-26.)

Nevertheless, Plaintiff did not file suit until a month after Election Day, waiting until well after he learned on November 4 that President Trump had lost the election in Wisconsin and indeed until after that result had been certified. Laches bars this suit because of Plaintiff's lack of diligence and the prejudice resulting from the delay. Indeed, in the Northern District of Georgia post-election lawsuit, involving a state election that was called against the President much later than Wisconsin's and still filed **seventeen days before this lawsuit**, the district court found that laches applied. *Wood*, 2020 WL 6817513 at * 6-9. Additionally, in the Eastern District of Michigan lawsuit, filed five days before this case, the district court also found that laches applied. *King*, slip op. at 19 ("Plaintiffs could have lodged their constitutional challenges much sooner than they did, and certainly not three weeks after Election Day and one week after certification of almost three million votes. The Court concludes that Plaintiffs' delay results in their claims being barred by laches.").

The Georgia court's decision squares with how courts have handled similar cases in the past. Plaintiff may not "'lay by and gamble upon [his favored candidate] receiving a favorable decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action."

[6] It was merely reiterated on October 19, 2020, (Compl., ¶ 45), still weeks before the election, and a month and a half before Plaintiff filed this suit.

Hendon v. N.C. State Bd. of Elections, 710 F.2d 177, 182 (4th Cir. 1983) (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)).

Laches applies with particular rigor to election challenges, requiring "any claim against a state electoral procedure [to] be expressed expeditiously." *Fulani*, 916 F.2d at 1031. Before an election, laches requires such claims to be promptly raised lest last-minute court orders confuse voters, disincentivizing voting and undermining public confidence in the fairness of elections. *See, e.g., Purcell v. Gonzales*, 549 U.S. 1, 4-5 (2006); *Bognet v. Sec'y Commw. of Pa.*, No. 20-3214, 2020 WL 668120, at *17-18 (3d Cir. Nov. 13, 2020). And, after an election, laches generally bars parties from challenging the election on grounds they could have raised beforehand. *Soules v. Kauaians for Nukoli Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988). Moreover, applying laches avoids the "judicial fire drill[s]" and "mad scramble[s]" required to adjudicate belated challenges to election procedures before post-election deadlines mandated by state law for certification of results. *Stein v. Cortés*, 223 F.Supp.3d 423, 436 (E.D. Pa. 2016) (internal quotation marks omitted).

Plaintiff offers no justification for delaying in asserting these claims until now—nor could he, because there is none. Further, the delay is prima facie prejudicial, as the relief he requests would void an entire election of more than 3.2 million eligible Wisconsin voters. *See Hawkins v. Wis. Elections Comm'n*, 393 Wis.2d 629, 635 (2020) (denying petitioners' ballot access claim because, "given their delay in asserting their rights, [the court] would be unable to provide meaningful relief without completely upsetting the election."). And, by overturning the democratic will of the people as expressed through their votes, Plaintiff's requested relief would seriously and irreparably undermine the Commission's efforts to ensure public trust and confidence in Wisconsin's electoral system, including the trust and confidence of voters like those represented

by the Wisconsin NAACP, who have always had to fight for recognition as equals and access to the vote. *See Hawkins*, 393 Wis.2d at 635-636 (denying relief in ballot access case against the Commission where it would cause "confusion and disarray and would undermine confidence in the general election results."). Most important, it would severely prejudice more than 3.2 million Wisconsin voters who cast ballots for the presidential candidate of their choice during the 2020 General Election. Equity cannot possibly sanction such a result.

III. THE REMEDY REQUESTED IS PROHIBITED AS A MATTER OF LAW.

Overturning the results of an election—as Plaintiff asks this Court to do—would be an extraordinary intervention by the judiciary into democratic processes. Again, the recent Georgia, Michigan, and Pennsylvania cases provide useful guidance. The District Court in Georgia captured the compelling reasons why relief should not be granted in cases like this:

> The Court finds that the threatened injury to Defendants as state officials and the public at large far outweigh any minimal burden on Wood. To reiterate, Wood seeks an extraordinary remedy: to prevent Georgia's certification of the votes cast in the General Election, after millions of people had lawfully cast their ballots. To interfere with the result of an election that has already concluded would be unprecedented and harm the public in countless ways. [citations]. Granting injunctive relief here would breed confusion, undermine the public's trust in the election, and potentially disenfranchise of over one million Georgia voters. Viewed in comparison to the lack of any demonstrable harm to Wood, this Court finds no basis in fact or in law to grant him the relief he seeks.

Wood, 2020 WL 6817513 at * 13.

Similarly, as the Third Circuit stated, granting the kind of relief requested by Plaintiff here—"**throwing out millions of votes—is unprecedented.**" *Trump v. Pa.*, 2020 WL 7012522 at *7 (emphasis in original). In Pennsylvania, the Third Circuit rightly concluded that, "[v]oters, not lawyers, choose the President. Ballots, not briefs, decide elections." *Id.* at *9. Judge Parker of the Eastern District of Michigan reached a similar conclusion: "[T]he Court finds that

Plaintiffs are far from likely to succeed in this matter. In fact, this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic orderly statutory scheme established to challenge elections and to ignore the will of millions of voters. This, the Court cannot, and will not, do. ¶ The People have spoken." *King*, slip op., 35-36. Indeed, granting Plaintiff's requested relief would violate the longstanding principle that "all qualified voters have a constitutionally protected right to vote and to have their votes counted." *Reynolds v. Sims,* 377 U.S. 533, 554 (1963) (citing *Ex parte Yarbrough,* 110 U.S. 651 (1884) and *United States v. Mosley*, 238 U.S. 383 (1915)).

It is hard to imagine such a remedy could ever be appropriate, but certainly it is not here, where Plaintiff has failed to put forth any credible evidence demonstrating that a single unlawful vote was counted or valid ballot discarded. Nor has he pled a single cognizable claim. Plaintiff instead alleges what amounts to a laundry list of speculative and circumstantial claims about the **potential** for fraud and about the conduct of the election as a whole, which he asserts led to a "fail[ure] to conduct the general election in a uniform manner," (Compl., ¶ 117) and "disparate treatment of Wisconsin voters," (Compl., ¶ 144) related to the widespread use of mail-in ballots by Wisconsin voters necessitated by the COVID-19 pandemic. But even if Plaintiff's claims were legitimate, invalidating the ballots of Wisconsin voters—who justifiably relied on the voting procedures made available to them by the Wisconsin Legislature and the Commission—cannot possibly be the appropriate remedy. Tossing out votes cast by eligible voters in reliance on official instructions how to vote would violate the due process rights of every voter. *See, e.g.*, *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 595, 597–98 (6th Cir. 2012) (holding that rejecting ballots invalidly cast due to poll worker error likely violates due process).

Further, contrary to Plaintiff's allegations, this is not *Bush v. Gore*. There, the Supreme Court specifically distinguished the issue before it—whether there existed arbitrary and disparate variations in the standards applied to whether a ballot should be counted—from "[t]he question … whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. The prevailing rule is that, absent such arbitrary differences in the standards used to determine whether individual ballots should be counted or not—an issue not even hinted at in Plaintiff's blunderbuss challenge here—differences in election administration between local entities are not only permissible, but expected. *See, e.g., Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018); *Ne. Ohio Coal. for Homeless v. Husted*, 837 F.3d at 636; *Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d at 181; *Paher v. Cegavske*, No. 20-243, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5997680, at *44-45.

Plaintiff's request for injunctive relief—directing Defendants to "de-certify the election results," "enjoining transmitting the currently certified results the Electoral College [sic]," and "requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election," *inter alia*, Compl., ¶ 142, is beyond bizarre. Federal courts lack the authority to determine which results a state must certify, let alone to "de-certify" results that have already been certified—and slate of Electors already submitted—under lawful constitutionally-determined and state-law-provided mechanisms, so Plaintiff's request cuts against the institutional role of each branch of the republic and each level of government. Here, the Wisconsin Legislature has already acted within its authority: it vested the right to vote for President in the people of Wisconsin, and the right to vote includes the right to have that vote counted. *See*

Reynolds, 377 U.S. at 554 (1964); *U. S. v. Classic*, 313 U.S. 299, 315 (1941); *U.S. v. Mosley*, 238 U.S. 383, 386 (1915).

In that vein, the Wisconsin Supreme Court has recognized that a remedy that would nullify the votes of millions of voters is simply a bridge too far. In the past two weeks, three original actions were brought directly to the Wisconsin Supreme Court to change the result of the election. In each, a majority of that court held that such actions need to be brought in the circuit court first, if they can be brought at all. *Trump v. Evers*, No. 2020AP1971-OA (Wis. S. Ct., Dec. 3, 2020); *Mueller v. Wis. Elections Comm'n*, No. 2020AP1958-OA (Wis. S. Ct. Dec. 4, 2020): *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930-OA (Wis. S. Ct., Dec, 4, 2020).

Beyond simply disposing of the cases, Justice Hagedorn, in his concurrence joined by three justices who comprised the majority in *Wisconsin Voters Alliance,* made clear that the remedies sought by President Trump and his supporters would cause irreparable damage to our democracy if granted or even given serious thought:

> Something far more fundamental than the winner of Wisconsin's electoral votes is implicated in this case. At stake, in some measure, is faith in our system of free and fair elections, a feature central to the enduring strength of our constitutional republic. It can be easy to blithely move on to the next case with a petition so obviously lacking, but this is sobering. The relief being sought by the petitioners is the most dramatic invocation of judicial power I have ever seen. Judicial acquiescence to such entreaties built on so flimsy a foundation would do indelible damage to every future election. Once the door is opened to judicial invalidation of presidential election results, it will be awfully hard to close that door again. This is a dangerous path we are being asked to tread. The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable.

Wis. Voters Alliance, (slip. op. at 3) (Wis. Sup. Ct., Dec, 4, 2020) (Hagedorn, J., concurring).[7]

[7] Even Chief Justice Roggensack, while dissenting in all three cases on the grounds that the Wisconsin Supreme Court should exercise original jurisdiction, acknowledged in one of her dissents that "[t]he remedy Petitioners seek may be out of reach for a number of reasons." *Trump v. Evers*, No. 2020AP1971-OA (slip. op. at 6) (Wis. S. Ct., Dec, 3, 2020) (Roggensack, C.J., dissenting).

CONCLUSION

For the reasons set forth above, Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., and Earnestine Moss respectfully requests that this Court summarily dismiss this case.

Dated this 7th day of December 2020.

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UNITED STATES DISTRICT COURT

for the

Eastern District of Wisconsin

WILLIAM FEEHAN and DERRICK VAN ORDEN *Plaintiff* v. WISCONSIN ELECTIONS COMMISSION, et al. *Defendant*	)	Case No. 2:20-cv-01771-PP

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for:

Intervenor - Democratic National Committee .

Date: 12/09/2020

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

WILLIAM FEEHAN and DERRICK VAN ORDEN,

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Case No.: 20CV1771

Defendants.

NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant Governor Tony Evers files this Notice of Supplemental Authority to alert the Court that the District of Arizona just dismissed a nearly-identical suit filed by Plaintiff's counsel there, *Bowyer v. Ducey*, No. 2:20-cv-2321 (Dec. 9, 2020). The Opinion and Order granting the Motion to Dismiss is attached as Exhibit A.

The *Bowyer* Opinion rules against Plaintiffs on all grounds. First, it finds that Plaintiffs have no standing under the Electors/Elections Clause or for their vote dilution claims. Ex. A. at 4-11. Second, it finds that abstention applies. *Id*. at 11-14. Third, the court holds that Eleventh Amendment Immunity bars Plaintiffs' claims. *Id*. at 14-16. Fourth, the court rules that laches bars Plaintiffs' claims. *Id*. at 16-21. Fifth, it holds that the case is moot. *Id*. at 21-22. Sixth, the court finds that Plaintiffs have failed to state a claim. *Id*. at 22-27. Finally, the court finds that Plaintiffs

do not meet any of the other requirements to obtain an injunction and in fact the requested injunction would "greatly harm the public interest." *Id.* at 28.

All these reasons apply in this nearly-identical case.

Respectfully submitted this 9th day of December 2020.

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Exhibit A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Tyler Bowyer, et al., Plaintiffs, v. Doug Ducey, et al., Defendants.	No. CV-20-02321-PHX-DJH **ORDER**

Plaintiffs bring their Complaint seeking injunctive relief from this Court, specifically, to "set aside the results of the 2020 General Election," because they claim the election process and results were "so riddled with fraud, illegality and statistical impossibility . . . that Arizona voters, courts and legislators cannot rely on or certify" its results. (Doc. 1 at 2). By any measure, the relief Plaintiffs seek is extraordinary. If granted, millions of Arizonans who exercised their individual right to vote in the 2020 General Election would be utterly disenfranchised. Such a request should then be accompanied by clear and conclusive facts to support the alleged "egregious range of conduct in Maricopa County and other Arizona counties . . . at the direction of Arizona state election officials." (*Id.*) Yet the Complaint's allegations are sorely wanting of relevant or reliable evidence, and Plaintiffs' invocation of this Court's limited jurisdiction is severely strained. Therefore, for the reasons stated herein, the Complaint shall be dismissed.

I. Background

In Arizona, more than 3.4 million voters participated in the November 3, 2020,

General Election. Thereafter, pursuant to A.R.S. § 16-602, several counties performed a hand count of sample ballots to test the tabulation equipment, and either no discrepancies were found or, if there were, they were "within the acceptable margin."[1] Arizona law also requires the secretary of state, in the governor's presence, to certify the statewide canvas on the fourth Monday after a general election. A.R.S. § 16-648. On November 30, 2020, Secretary of State Katie Hobbs, in the presence of Governor Doug Ducey, certified the statewide canvas. (Doc. 40 at 4). The Canvas shows that former Vice President Joseph Biden prevailed over President Donald Trump by more than ten thousand votes.[2] On that same day, Governor Ducey signed the Certificate of Ascertainment for Vice President Biden's presidential electors. (Doc. 40 at 4). The Certificate was then transmitted to the United States Archivist pursuant to the Electoral Count Act. (*Id.*); s*ee also* 3 U.S.C. § 6.

In their Complaint and the accompanying Motion for Temporary Restraining Order ("TRO") filed on December 2, Plaintiffs "contest" the election and ask this Court to compel the Governor to "de-certify" these results. (Docs. 1 ¶ 145; 2 at 10). The Complaint also requests that this Court grant a permanent injunction "enjoining Secretary Hobbs and Governor Ducey from transmitting the currently certified election results to the Electoral College," declare the election results unconstitutional, and seize all voting machines, equipment, software, and other election-related records and materials, including all ballots cast.[3] (Doc. 1 at 51–52). The Complaint claims to show "multifaceted schemes and artifices implemented by Defendants and their collaborators" to defraud the election. (*Id.* at ¶ 3). And these schemes allegedly resulted in "the unlawful counting, or fabrication, of hundreds of thousands of illegal, ineligible, duplicate or purely fictitious ballots." (*Id.*)

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[1] Ariz. Sec'y of State, *Summary of Hand Count Audits–2020 General Election* (Nov. 17, 2020), https://azsos.gov/election/2020-general-election-hand-count-results.

[2] Ariz. Sec'y of State, State of Arizona Official Canvass, https://azsos.gov/sites/default/files/2020_General_State_Canvass.pdf.

[3] Under 3 U.S.C. § 5, if a state enacts and applies procedures to decide election controversies before election day, and a decision regarding a contested election is made at least six days before the electors' meetings, then the decision is conclusive and will apply in counting the electoral votes. That deadline, referred to as the "safe harbor" deadline, was December 8, 2020, as the Electoral College will meet on December 14, 2020. *See* 3 U.S.C. § 7.

Of the fourteen named Plaintiffs, three are registered voters and GOP Chairs for various Arizona counties. (*Id.* at ¶¶ 29–31). The remaining eleven are Republican nominees for Arizona's presidential electors. (*Id.* at ¶ 28). One of the eleven, Dr. Kelli Ward, filed suit in state-court over allegations of fraud in this election. *See Ward v. Jackson*, Case No. CV2020-015285, slip. op. (Ariz. Super. Ct. Dec. 4, 2020) (finding no evidence of alleged fraud and dismissing claims of election misconduct); (Doc. 55-1). In that case, on December 8, 2020, the Arizona Supreme Court affirmed the Maricopa County Superior Court's findings that there was no evidence of fraud or misconduct in Arizona's election. (*Ward v. Jackson*, CV2020-015285 (Ariz. 2020); (Doc. 81-1).

Plaintiffs' Complaint contains four counts, three of which assert 42 U.S.C. § 1983 claims for violations of the Constitution's Elections and Electors Clauses, as well as the Fourteenth Amendment's Due Process and Equal Protection guarantees. (Doc. 1 ¶¶ 103–34). The final count, which does not specify a cause of action, is for "Wide-Spread Ballot Fraud." (*Id.* at ¶¶ 135–41).

On December 3, the day after Plaintiffs filed their Complaint, the Court received a Motion to Intervene from the Arizona Democratic Party, which was subsequently denied.[4] (Docs. 26 and 69). The Court also received a Motion to Intervene from the Maricopa County Board of Supervisors and Maricopa County Recorder Adrian Fontes, which was granted. (Docs. 27 and 32). The Court held a status conference on the same day, in which it scheduled a December 8 hearing on the TRO. (Doc. 28). By subsequent Order (Doc. 43), the Court converted that hearing to oral argument on the Motions to Dismiss filed on December 4. (Docs. 36, 38, and 40). Plaintiffs have filed their Response to the Motions (Doc. 44), and Defendants have filed their Replies. (Docs. 53, 54, and 55). On December 8, 2020, the Court held oral argument on the Motions to Dismiss and took this matter under advisement. Being fully briefed on the matter, the Court now issues its ruling.

…

[4] The Arizona Democratic Party sought intervention under theories of permissive joinder. While the Court did not believe the Motion was inappropriate, the Court did not find their presence necessary to this lawsuit and therefore denied the Motion to Intervene.

II. Analysis

Given the import of the overarching subject—a United States Presidential Election—to the citizens of Arizona, and to the named Plaintiffs, the Court is compelled to make clear why it finds it inappropriate to reach the merits of Plaintiffs' Complaint and why it must grant the Motions to Dismiss this matter in its entirety. The Court will endeavor to lay bare the independent reasons for its conclusions, including those related to Article III standing, abstention, laches, mootness, and the federal pleading standards, which govern its review.

A. Article III Standing

"To ensure that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society, a plaintiff may not invoke federal-court jurisdiction unless he can show a personal stake in the outcome of the controversy." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (internal citations omitted). Article III provides that federal courts may only exercise judicial power in the context of "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). For there to be a case or controversy, the plaintiff must have standing to sue. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("*Spokeo II*"). Whether a plaintiff has standing presents a "threshold question in every federal case [because it determines] the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 341 (2006). A suit brought by a plaintiff without Article III standing is not a "case or controversy," and an Article III federal court therefore lacks subject matter jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998).

"[A] plaintiff seeking relief in federal court must first demonstrate . . . a personal stake in the outcome," *Baker v. Carr*, 369 U.S. 186, 204 (1962), distinct from a "generally available grievance about government," *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per

curiam). "That threshold requirement ensures that we act as judges, and do not engage in policymaking properly left to elected representatives." *Gill*, 138 S. Ct. at 1923. To establish standing, a plaintiff has the burden of clearly demonstrating that she has: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo II*, 136 S. Ct. at 1547 (*quoting Warth*, 422 U.S. at 518); *accord Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (noting the party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss).

To establish an injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo,* 136 S. Ct. at 1548 (*quoting Lujan,* 504 U.S. at 560). "When we have used the adjective 'concrete, we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Id*. The plaintiff must establish a "particularized" injury, which means that "the injury must affect the plaintiff in a personal and individual way." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). Moreover, "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Where a plaintiff has not established the elements of standing, the case must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

Rule 12(b)(1) authorizes a court to dismiss claims over which it lacks subject-matter jurisdiction. A Rule 12(b)(1) challenge may be either facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the court may dismiss a complaint when the allegations of and documents attached to the complaint are insufficient to confer subject-matter jurisdiction. *See Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). In this context, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir.

1996). In contrast, when a court evaluates a factual challenge to jurisdiction, a court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Safe Air for Everyone*, 373 F.3d at 1039 ("In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment.").

1. Elections and Electors Clause – Count One

Plaintiffs allege in Count One that Defendants violated the Elections and Electors Clauses and 28 U.S.C. § 1983 by, among other things, losing or destroying absentee ballots, and/or replacing those ballots with "blank ballots filled out by election workers, Dominion or other third parties" sending thousands of absentee ballots to someone besides the registered voter that "could have been filled out by anyone." (Doc. 1 at 41). Defendants argue that Plaintiffs do not have standing to assert such a claim. (Doc. 40 at 8–9).

The Elections Clause of the United States Constitution states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]" U.S. Const. art. I, § 4, cl. 1. The Elections Clause authorizes the state governments to regulate federal elections held in the state, while Congress retains "exclusive control" to alter a state's regulations. *Colegrove v. Green*, 328 U.S. 549, 554 (1946). A separate provision, the "Electors Clause" of the Constitution, states: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." U.S. Const. art. II, § 1, cl. 2.[5]

Plaintiffs' Complaint alleges that Defendants violated the Elections Clause. However, the Complaint does not allege grounds for standing to assert this claim, nor does it distinguish between the status of the groups of Plaintiffs. At oral argument, Plaintiffs'

[5] While the Electors Clause and Elections Clause are separate Constitutional provisions, they share "considerable similarity." *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839, (2015) (Roberts, C.J., dissenting). These provisions are therefore often considered together. *See Bognet v. Sec'y of Commonwealth of Pa.*, 980 F.3d 336, 348–52 (3d Cir. 2020) (analyzing standing for Elections Clause and Electors Clause under the same test); *Wood v. Raffensperger*, 2020 WL 6817513, at *1 (N.D. Ga. Nov. 20, 2020) (same); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995) (holding that state's "duty" under Elections Clause "parallels the duty" described by Electors Clause). Plaintiffs do not meaningfully distinguish between the two clauses in their Complaint or briefing.

counsel stated that eleven of the Plaintiffs were Republican Party nominees to be electors, and the other three were county GOP Chairs. As an initial matter, Plaintiffs' briefing does not contain any arguments that the GOP Chairs have standing to assert this claim and the Court will dismiss the claim as to the GOP Chairs outright.

Plaintiffs argue that the Plaintiff Electors should be considered "candidates," and thus that they have standing under the Electors and Elections Clause pursuant to an Eighth Circuit case, *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). (Doc. 44 at 5). That case, which is based on the operation of Minnesota state election law, allowed electors to bring claims under the Elections Clause because electors were treated as candidates for office under Minnesota law and thus would be injured by the governor's failure to seat them if chosen as the state's electors. *See Carson*, 978 F.3d at 1057.

Plaintiff Electors likewise assert that under Arizona law they should also be considered "candidates." (Doc. 44 at 5–6) (citing A.R.S. § 16-344). However, the Electors are not candidates for office as the term is generally understood. Arizona law makes clear that the duty of an Elector is to fulfill a ministerial function, which is extremely limited in scope and duration, and that they have no discretion to deviate at all from the duties imposed by the statute. *See* A.R.S. § 16-212(C) ("After the secretary of state issues the statewide canvass containing the results of a presidential election, the presidential electors of this state ***shall cast their electoral college votes for the candidate for president and the candidate for vice president who jointly received the highest number of votes*** in this state as prescribed in the canvass.") (emphasis added). Arizona voters do not show up to vote for any single Electors listed next to the presidential candidates' names; they vote for their preferred presidential candidate. By specifying that the electors "shall be enclosed in a bracketed list" next to "the surname of the presidential candidate and vice-presidential candidate," A.R.S. § 16-507(B) clarifies and distinguishes the Electors' ministerial status from that of the presidential candidate running for office, the latter who unquestionably suffers the discrete injury required for standing.[6] Notably, the Republican candidate whose

[6] A.R.S. § 16-507(B) in its entirety reads: "Presidential electors, which, shall be enclosed in a bracketed list and next to the bracketed list shall be printed in bold type the surname

name was on the ballot is not a plaintiff in this case.

Other circuit courts to reach the issue have cited the *Carson* decision with disapproval, noting that there was no precedent for expanding standing in the way that it did.[7] *See Bognet v. Sec'y of Commonwealth of Pa.*, 980 F.3d 336, 351 n.6 (3d Cir. 2020) ("Our conclusion departs from the recent decision of an Eighth Circuit panel which, over a dissent, concluded that candidates for the position of presidential elector had standing under *Bond* [*v. United States*, 564 U.S. 211 (2011)] to challenge a Minnesota state-court consent decree that effectively extended the receipt deadline for mailed ballots. . . . The *Carson* court appears to have cited language from *Bond* without considering the context—specifically, the Tenth Amendment and the reserved police powers—in which the U.S. Supreme Court employed that language. There is no precedent for expanding *Bond* beyond this context, and the *Carson* court cited none."). Indeed, as numerous other courts have held, where, as here, the injury alleged by plaintiffs is that defendants failed to follow the Elections Clause, the Supreme Court has stated that the "injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance." *Lance*, 549 U.S. at 442.

Elector Plaintiffs have not established they can personally bring suit, and therefore, they do not have standing to bring Count One.[8] Therefore, the Court will dismiss Count

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of the presidential candidate and vice-presidential candidate who is seeking election jointly with the presidential candidate shall be listed directly below the name of the presidential candidate. The indicator for the selection of the presidential and vice-presidential candidates shall be directly next to the surname of the presidential candidate, and one mark directly next to a presidential candidate's surname shall be counted as a vote for each elector in the bracketed list next to the presidential and vice-presidential candidates."

[7] *See also Carson,* 78 F.3d at 1063 (Kelly, J., dissenting) ("I am not convinced the Electors have Article III standing to assert claims under the Electors Clause. Although Minnesota law at times refers to them as 'candidates,' *see, e.g.*, Minn. Stat. § 204B.03 (2020), the Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president. *Id.* § 208.04 subdiv. 1 ('[A] vote cast for the party candidates for president and vice president shall be deemed a vote for that party's electors.'). They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals.").

[8] The Court notes that Count One of the Complaint makes passing references to the "VRA and HAVA," (the Voting Rights Act and the Help America Vote Act of 2002) but does not bring any claims under these statutes. (Doc. 1 ¶ 106).

One.

2. Vote Dilution – Count Two

In Count Two, Plaintiffs allege Equal Protection violations based on Defendants' failure to comply with Arizona law by permitting "illegal votes," allowing "voting fraud and manipulation," and in preventing "actual observation and access to the elector process," which allegedly resulted in "the dilution of lawful votes . . . and the counting of unlawful votes." (Doc. 1 at 45). Plaintiffs ask the Court to order that "no ballot processed by a counting board in Arizona can be included in the final vote tally unless a challenger [i]s allowed to meaningfully observe the process." (Doc 1 ¶ 120). Absent from the Complaint is an allegation that Plaintiffs (or any registered Arizona voter for that matter) were deprived of their right to vote. Instead, they bring baseless claims of "disparate treatment of Arizona voters, in subjecting one class of voters to greater burdens or scrutiny than another." (Doc. 1 ¶ 115). They do not allege what "class" of voters were treated disparately. Nor do the Elector Plaintiffs cite to any authority that they, as "elector delegates," are a class of protected voters. Defendants contend that Plaintiffs do not have standing to assert these claims and point out that these allegations are nothing more than generalized grievances that any one of the 3.4 million Arizonans who voted could make if they were so allowed. The Court agrees.

Here, Plaintiffs have not alleged a concrete harm that would allow the Court to find Article III Standing for their vote dilution claim. As courts have routinely explained, vote dilution is a very specific claim that involves votes being weighed differently and cannot be used generally to allege voter fraud. "Contrary to the Voter Plaintiffs' conceptualization, vote dilution under the Equal Protection Clause is concerned with votes being weighed differently." *Bognet*, 980 F.3d at 355; *see also Rucho v. Common Cause*, – — U.S. ——, 139 S. Ct. 2484, 2501 (2019) ("[V]ote dilution in the one-person, one-vote cases refers to the idea that each vote must carry equal weight."). "This conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment. Violation

of state election laws by state officials or other unidentified third parties is not always amenable to a federal constitutional claim." *Bognet*, 980 F.3d at 355; *see also Shipley v. Chicago Bd. of Election Comm'rs*, 947 F.3d 1056, 1062 (7th Cir. 2020) ("A deliberate violation of state election laws by state election officials does not transgress against the Constitution."); *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (rejecting Equal Protection claim where allegations of state's erroneous counting of votes cast by voters unqualified to participate).

Additionally, Plaintiffs cannot sustain their Equal Protection Clause claim on a vote dilution theory. *See Bognet*, 980 F.3d at 355 (rejecting Equal Protection theory and explaining "[t]his conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause of the Fourteenth Amendment"); *see also Shipley*, 947 F.3d at 1062 ("A deliberate violation of state election laws by state election officials does not transgress against the Constitution") (internal citations omitted); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) (holding that allegations of "vote dilution" as a result of alleged voting process irregulates "[are] speculative and, as such, are more akin to a generalized grievance about the government than an injury in fact."); *Powell*, 436 F.2d at 88 (rejecting Equal Protection Clause claim arising from state's erroneous counting of votes cast by voters unqualified to participate in closed primary); *Snowden v. Hughes*, 321 U.S. 1, 11 (1944) ("It was not intended by the Fourteenth Amendment . . . that all matters formerly within the exclusive cognizance of the states should become matters of national concern.").

Setting aside that Plaintiffs' claims regarding the election are not viable vote dilution claims, Plaintiffs also have not requested relief that is redressable in a tailored way as is required. *See Gill*, 138 S. Ct. at 1934 ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."). Therefore, even if Plaintiffs could somehow establish that

their vote dilution claim was more than a generalized grievance to the point of asserting an injury, Plaintiffs have not established that the Court can redress this grievance. To give Plaintiffs the relief they desire would disenfranchise the nearly 3.4 million Arizonans that voted in the 2020 General Election. Under Plaintiffs' theory of dilution, this would transform all of the alleged diluted votes from being "diluted" to being destroyed. As Plaintiffs raise "only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large," the Court finds that Plaintiffs' Count Two "does not state an Article III case or controversy." *See Lance*, 549 U.S. 437 at 439. Therefore, Plaintiffs do not have standing to bring suit in this forum.[9]

B. Abstention

Defendants also argue the Court should abstain from reaching Plaintiffs' claims based on their similarities with ongoing state court cases. Yesterday, the Arizona Supreme Court ruled on one such case—filed by Dr. Kelli Ward—seeking to "set aside the 2020 General Election results." *See Ward*, CV 2020-015285 (Ariz. 2020); (Doc. 81-1). That case was filed pursuant to A.R.S. § 16-672 and was also filed after Governor Ducey certified the election results on November 30, 2020. (Doc. 58-1 at 17). The *Ward* plaintiffs alleged an insufficient opportunity to observe election officials, an overcounting of mail-in ballots by not adequately comparing signatures on the ballot envelopes, and errors in the ballot duplication process. (*Id.* at 17–21). After an evidentiary hearing, the Maricopa County Superior Court issued a ruling on December 4, 2020, finding that there was no misconduct, fraud, or effect on the outcome of the election.[10] (*Id.*) This ruling was

[9] Having established that the Court does not have jurisdiction over Plaintiffs' Counts One through Three, the Court will decline to exercise supplemental jurisdiction over Count Four, which pleads no federal cause of action and is entirely based on alleged fraud under Arizona law.

[10] Judge Randall H. Warner of the Maricopa County Superior Court addressed Ward's allegations of election misconduct. First, Ward argued that there was an insufficient opportunity to observe the actions of election officials. The State Court dismissed that claim as untimely, holding that "[t]he observation procedures for the November general election were materially the same as for the August primary election, and any objection to

unanimously affirmed by an *en banc* panel of the Arizona Supreme Court on expedited review.[11]

Here, Plaintiffs' Complaint similarly relies upon A.R.S. § 16-672 and its provisions related to bringing suit for alleged election misconduct, including illegal votes and erroneous counting. (Doc. 1 at ¶ 15). A.R.S. § 16-672 also provides that an elections contest brought under this statute should be filed in the superior court of the county in which the person contesting resides or in the superior court of Maricopa county. A.R.S. § 16-672(B). Plaintiffs aver that their claims seek federal action under federal statutes, and therefore, their claims are distinguishable from the claims being litigated in the state court. The Court disagrees.

Generally, a federal court has a duty to exercise the jurisdiction conferred by Congress. However, under certain circumstances, it is prudent for a federal court to abstain from hearing a matter. "Indeed, we have held that federal courts may decline to exercise its jurisdiction, in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an important countervailing interest." *Quackenbush v. Allstate Ins.*

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them should have been brought at a time when any legal deficiencies could have been cured," and citing *Lubin v. Thomas*, 144 P.3d 510, 511 (Ariz. 2006) ("In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice."). Second, Ward alleged that "election officials overcounted mail-in ballots by not being sufficiently skeptical in their comparison of signatures on the mail-in envelope/affidavits with signatures on file." The state court allowed Ward to examine a sampling of mail-in ballots, and the court held that "[t]he evidence does not show that these affidavits are fraudulent, or that someone other than the voter signed them. There is no evidence that the manner in which signatures were reviewed was designed to benefit one candidate or another, or that there was any misconduct, impropriety, or violation of Arizona law with respect to the review of mail-in ballots." Lastly, Ward alleged errors with duplication of ballots. The state court also allowed Ward to examine a sampling of duplicate ballots and held that '[t]he duplication process prescribed by the Legislature necessarily requires manual action and human judgment, which entail a risk of human error. Despite that, the duplication process for the presidential election was 99.45% accurate. And there is no evidence that the inaccuracies were intentional or part of a fraudulent scheme. They were mistakes. And given both the small number of duplicate ballots and the low error rate, the evidence does not show any impact on the outcome." The state court concluded by holding that "[t]he Court finds no misconduct, no fraud, and no effect on the outcome of the election." *Ward*, CV 2020-015285 (Ariz. Super. Ct. Dec. 4, 2020); (Doc. 58-1).

[11] "The Court concludes, unanimously, that the trial judge did not abuse his discretion in denying the request to continue the hearing and permit additional inspection of the ballots." *Ward*, CV 2020-015285, at *7 (Ariz. 2020); (Doc. 81-1).

Co., 517 U.S. 706, 716 (1996) (citing *County of Allegheny v. Frank Mashuda Co*., 360 U.S. 185, 189 (1959)). Abstention may be "warranted by considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration." *Id.* *Colorado River* abstention permits a federal court to abstain from exercising jurisdiction over a matter in deference to a state court suit regarding similar claims and allegations. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 817 (1976).

The Ninth Circuit has enumerated an eight-part test for whether *Colorado River* abstention is warranted, stressing that the factors are "not a mechanical checklist," with some factors that "may not have any applicability to a case." *Seneca Ins. Co., Inc. v. Strange Land, Inc*., 862 F.3d 835, 841–42 (9th Cir. 2017). The factors are: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court. *Id.*

Factors two through seven all support abstaining from this case.[12] To begin, this federal forum is less convenient than the state forum, considering the state election law violations alleged, the claims are brought against state actors, and the interplay of state election law. Moreover, the present suit reflects the very essence of "piecemeal litigation," with many of the same parties and attorneys litigating related matters in both forums. As to the primacy of cases, this case was the last filed case. All of the state court litigation filed related to the election preceded this action. As to the nature of the claims, while Plaintiffs bring their claims under federal laws, the crux of their arguments, and the statutes upon which they rely, involve Arizona election law and the election procedures carried out at the county and state level by state officials. The state courts are adequately equipped to

[12] The Court finds that the first factor is not relevant to the facts alleged herein.

protect the rights of the named Plaintiffs, especially considering that Plaintiff Ward already pursued her grievances there. Moreover, as Congress has conferred concurrent jurisdiction on state courts to adjudicate Section 1983 claims, there is no concern that the state is unable to adjudicate Plaintiffs' Section 1983 claims. *Felder v. Casey*, 487 U.S. 131, 139 (1988). Lastly, abstention would alleviate the necessity to consider whether this matter was filed in this Court as a form of forum shopping, especially considering that a number of other related state court lawsuits have already been disposed of. The eighth factor is the only factor that weighs against abstention, as it does not appear that Plaintiffs' allegations of widespread fraud in relation to the tabulation systems and software were before the state court. However, as discussed *infra*, the Court finds that claim lacks Rule 9(b) particularity and plausibility.

Moreover, when considering abstention, "proper constitutional adjudication, regard for federal-state relations, or wise judicial administration," also inform this Court. *Quackenbush*, 517 U.S. at 716. If the Court were to reach the merits of Plaintiffs' claims, it would be entirely possible today for it to reach a different legal determination, or the same conclusion but with a different analysis, than the Arizona Supreme Court reached in *Ward v. Jackson*. The Court cannot think of a more troubling affront to "federal-state relations" than this. *See Quackenbush*, 517 U.S. at 716. Therefore, the Court finds that abstention of these parallel issues is appropriate and indeed necessary.

C. Eleventh Amendment

Defendants also argue that the Eleventh Amendment bars Plaintiffs' demands for relief because they, as state officials who have not consented to being sued, are immune from suit. Further, they argue that no exception applies, that the relief Plaintiffs seek is not prospective, and that the claims are barred.

The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Such immunity applies when a citizen brings a claim against their own state. *See Hans v. Louisiana*, 134 U.S. 1, 19 (1890). The immunity extends to "suit[s] against state officials when the state is the real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). "This jurisdictional bar applies regardless of the nature of the relief sought." *Id.* "When the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself." *Id.* at 101. "The general rule is that a suit is against the sovereign . . . if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

There are three recognized exceptions to the above: (1) Congress has abrogated the immunity within a federal statute; (2) the State has waived immunity and allowed individuals to sue it pursuant to specific state statutes; and (3) in "claims seeking *prospective* injunctive relief against state officials to remedy a state's *ongoing* violation of *federal* law." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) (citing *Ex parte Young*, 209 U.S. 123 (1908)) (emphasis added).

None of these exceptions are present here. As for Plaintiffs' 42 U.S.C. § 1983 claims, Congress did not abrogate the states' immunity from suit in the enacting language of Section 1983, and therefore, the Eleventh Amendment bars those claims. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) (holding that Section 1983 "does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties"). Plaintiffs provided no argument or authority that the state has explicitly waived its immunity for elections challenges. Therefore, the second exception does not apply. As for the remaining claims, the Court must determine whether Plaintiffs are seeking prospective relief to cure an ongoing violation of federal law.

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645

(2002) (internal citations omitted). However, where the claims are state law claims, masked as federal law claims, *Ex parte Young* is inapplicable and the Eleventh Amendment clearly bars the suit. *See Massey v. Coon*, 865 F.2d 264 (9th Cir. 1989) (affirming dismissal where "on its face the complaint states a claim under the due process and equal protection clauses of the Constitution, [but] these constitutional claims are entirely based on the failure of defendants to conform to state law"); *see also Pennhurst*, 465 U.S. at 90 ("[W]hen a plaintiff alleges that a state official has violated state law" and "when a federal court instructs state officials on how to conform their conduct to state law, this conflicts directly with the principles of federalism that underlie the Eleventh Amendment."). This is true whether the relief requested is "prospective or retroactive" in nature. *Pennhurst*, 465 U.S. at 106.

Here, Plaintiffs face a number of difficulties in their attempt to pierce Defendants' sovereign immunity. Defendants argue that all of Plaintiffs' allegations are actually state law allegations masked under federal law. Defendants point to numerous instances in Plaintiffs' Complaint where Arizona state election law is relied on, including their catch-all fraud claims, which are entirely based on state law. The Eleventh Amendment clearly bars such claims. *See Pennhurst*, 465 U.S. at 106 ("On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

However, even assuming that Plaintiffs established that their claims are indeed independent federal claims, it is unclear what *ongoing* violation of federal law is being asserted. Plaintiffs allege Due Process and Equal Protection claims, along with a catch-all fraud claim, that arise from Defendants' alleged failure to follow Arizona state election laws. (Doc. 1 at ¶¶ 106–120). These numerous alleged violations—related to alleged issues with signature verification, ballot duplication, and poll observation—concern past conduct.[13] The relief requested—compelling the Governor to decertify the election—

[13] These include objections regarding poll watchers' ability to observe ballot counting, issues related to the manner and process by which Arizona election officials matched signatures on absentee ballots (Doc. 1 at ¶¶ 46–48); issues related to the process and role assigned to poll referees in settling unresolved disputes between adjudicators (*Id.* at ¶ 49);

similarly seeks to alter past conduct. Plaintiffs have not identified an ongoing violation to enjoin. In short, "Plaintiffs are seeking to undo what has already occurred, as their requested relief reflects." *See King v. Whitmer*, 2020 WL 7134198, at *5 (E.D. Mich. Dec. 7, 2020).

The Eleventh Amendment bars the injunctive relief sought.

D. Laches

Defendants also argue that the doctrine of laches bars Plaintiffs' claims. Laches will bar a claim when the party asserting it shows the plaintiff unreasonably delayed in filing the action and the delay caused prejudice to the defendant or the administration of justice. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 951–52 (9th Cir. 2001) (noting that laches requires a "defendant [] prove both an unreasonable delay by the plaintiff and prejudice to itself"). Laches can bar untimely claims for relief in election cases, even when the claims are framed as constitutional challenges. *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1181 (9th Cir. 1988); *U.S. v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 9 (2008) ("[A] 'constitutional claim can become time-barred just as any other claim can.'") (*quoting Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 292 (1983)).

Plaintiffs filed their Complaint and request for TRO seeking to "de-certify" the election results on December 2, 2020, nearly a month after the General Election on November 3, 2020. Plaintiffs conclusively argue that they waited this long because they "could not have known the basis of their claim, or presented evidence substantiating their claim, until after the election." (Doc. 44 at 9). They further state that, because "Arizona election officials and other third parties did not announce or publicize their misconduct, and in fact prevented Republican poll watchers from observing the ballot counting and handling, it took Plaintiffs additional time post-election to gather the fact and expert witness testimony presented in the Complaint." (*Id.*) During oral argument, Plaintiffs' counsel repeatedly stated that the alleged fraud related to the Dominion voting machines

"irregularities" with the voting machines (*Id.* at ¶¶ 50–52); and certification of the Dominion voting system on November 18, 2020 (*Id.* at ¶ 53).

was not known until election night, when their experts noted a "blip" in their reporting data that showed an increase in votes for Joe Biden around 8:00 p.m. Plaintiffs also argue that A.R.S. §16-673 supports the timeliness of their Complaint because it requires an elector to file a challenge to the election in state court within five days of certification of the election.

Plaintiffs' Complaint includes a hodge-podge of alleged misconduct by Arizona elections officials, occurring on various dates over the past weeks, months, and even years. In addition to the objections regarding poll watchers' inability to observe ballot counting and handling, Plaintiffs also object to the manner and process by which Arizona election officials matched signatures on absentee ballots (Doc. 1 ¶¶ 46–48); to the process and role assigned to poll referees in settling unresolved disputes between adjudicators (*Id.* at ¶ 49); to "irregularities" with the voting machines on Election Day and before (*Id.* at ¶¶ 50–52); and to the certification of the Dominion voting system on November 18, 2020 (*Id.* at ¶ 53).

The affidavits or declarations upon which Plaintiffs rely clearly shows that the basis for each of these claims was either known well before Election Day or soon thereafter, and thus cannot be excused by a lack of knowledge nor an inability to substantiate their claims through December 2. For example, Plaintiffs' Complaint cites to documents showing that Plaintiffs were in possession of information about suspected irregularities with the Dominion voting machines as early as 2018. (*Id.* at ¶¶ 21, 69, 71–73) (referencing "publicly available evidence (including judicial and administrative proceedings)" that discuss concerns with security flaws in Dominion voting machines dating back to 2018); (Doc. 1-10 at 19, Ex. 20, Declaration of Mark Paul Law dated November 24, 2020 (describing his concerns over Maricopa County Dominion voting machine security and observations while poll watching on October 25, 2020 and November 1, 2020); *id.* at 30, Ex. 22, Declaration of Gregory Wodynski dated November 23, 2020 (describing his concerns over Maricopa County Dominion voting machine security and his perception that "Bruce," a Dominion employee, could manually manipulate voter data files while poll watching on October 24, 2020 and November 1, 2020).

Plaintiffs also include documents showing that the facts underlying their allegations

of ballot counting and verification misconduct occurred weeks before Election Day. Canvassing in Arizona began in October, and the poll watcher declarations and affidavits attached to the Complaint object to the signature verification and ballot process during this time. (*See* Doc. 1-3 at 7, Ex. 5) (containing unsigned Declaration dated October 25, 2020 from poll watcher objecting to "NO EFFECTIVE oversight" in signature verification rooms); *id.* at 9, Ex. 5A (document listing poll watcher objections made on 10/7/20, 10/23/20, 10/24/20, 10/29/20); (Doc. 1-10 at 25, Ex. 21) (containing a Declaration of poll watcher Judith Burns dated November 16, 2020 and noting her objections in observing the signature verification and ballot processing on October 17, 2020 and October 21, 2020). In a statement from Ms. Linda Brickman, the First Vice-Chair of the Maricopa County Republican Committee, she represents that she had ongoing concerns regarding the signature verification for early and mail-in ballots during her time as an elections worker "from 10/19/20 to 11/11/20" (Doc. 1-10 at 38, Ex. 23) and had objections to the Logic and Accuracy Certification of the Dominion voting systems that occurred on November 18, 2020. (*Id.* at 35). Indeed, at least one Plaintiff has already raised some of these complaints in state court.[14] *Ward*, CV2020-015285 (Super. Ct. of Ariz. Dec. 4, 2020) (dismissing the Petition with prejudice); (Doc. 58-1 at 14, Ex. B). Dr. Ward clearly knew the basis of her claim before December 2, 2020 but offers no reasonable explanation for the delay in bringing this suit in federal court. When contesting an election, any delay is prejudicial, but waiting until a month after Election Day and two days after certification of the election is inexcusable. *See Kelly v. Penn.*, 2020 WL 7018314, at *1 (Pa. Nov. 28, 2020) ("Petitioners failed to act with due diligence in presenting the instant claim" when they waited until November 21 to sue to invalidate Pennsylvania's election); *Kistner v. Simon*, No. A20-1486, slip op. at 3–4 (Minn. Dec. 4, 2020); *see also, e.g., Ariz. Libertarian Party*

[14] As she does here, Ms. Ward's state court action claimed that poll watchers were given insufficient opportunity to observe the actions of election officials. Notably, the state court judge found this claim barred by the doctrine of laches, as Ms. Ward had failed to assert it during a time when it could have been corrected. (Doc. 1-10 at 19 ("The observation procedures for the November general election were materially the same as for the August primary election, and any objection to them should have been brought at a time when any legal deficiencies could have been cured.").

v. Reagan, 189 F. Supp. 3d 920, 922–23 (D. Ariz. 2016).

The Court does not find that the Arizona state election challenge deadline excuses delay on Plaintiffs' part in these circumstances. *See* A.R.S. §16-673. As noted above, the facts underlying the suspected irregularities complained of were either known to Plaintiffs prior to Election Day or soon thereafter. Although Arizona electors may have a deadline by which to file election contests in Arizona state court, Plaintiffs here opted to file their federal constitutional challenges in federal court. The exhibits to the Complaint confirm that the events complained of occurred on or before Election Day. Accordingly, the Court rejects Plaintiffs' self-serving statement that they did not know the basis for their claims before December 2, 2020. The documents they submit with their Complaint plainly shows the contrary is true, and the delay—which has resulted in a rush by this Court and Defendants to resolve these issues before the Electoral College meeting deadline of December 14, 2020—is unreasonable.

The second part of the laches test—prejudice—is also unquestionably met. First, the prejudice to the Defendants and the nearly 3.4 million Arizonans who voted in the 2020 General Election would be extreme, and entirely unprecedented, if Plaintiff were allowed to have their claims heard at this late date. *SW Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented."). As an Eastern District of Michigan Court stated in a nearly identical case, "[the prejudice] is especially so considering that Plaintiffs' claims for relief are not merely last-minute—they are after the fact. While Plaintiffs delayed, the ballots were cast; the votes were counted; and the results were certified. The rationale for interposing the doctrine of laches is now at its peak." *King*, 2020 WL 7134198, at *7.

Second, the challenges that Plaintiffs assert quite simply could have been made weeks ago, when the Court would have had more time to reflect and resolve the issues. "Unreasonable delay can prejudice the administration of justice by compelling the court to steamroll through . . . delicate legal issues in order to meet election deadlines." *Arizona*

Libertarian Party, 189 F. Supp. 3d at 923 (quotation marks and citations omitted). Plaintiffs offer no reasonable explanation why their claims were brought in federal court at this late date. Their delay and the resulting prejudice bars their claims by laches.

E. Mootness

Defendants also argue that this case is moot. (Docs. 38 at 5; 40 at 22). The Court agrees. "Mootness is a jurisdictional issue, and 'federal courts have no jurisdiction to hear a case that is moot, that is, where no actual or live controversy exists.'" *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) (quoting *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999)). In addition, a case is moot when a party cannot obtain relief for its claim. *Id.*; *see also Ruvalcaba v. City of L.A.*, 167 F.3d 514, 521 (9th Cir. 1999).

Plaintiffs request an injunction that (a) enjoins Governor Ducey from transmitting the certified results, (b) orders Defendants to "de-certify" the election results, (c) nullifies votes tabulated by uncertified machines, (d) declares that illegal ballot fraud occurred in violation of the Electors and Elections Clauses and the Fourteenth Amendment's Due Process and Equal Protections Clauses, (e) mandates a manual recount or statistical sampling of all mail-in and absentee ballots, and (f) allows Plaintiffs to seize and inspect voting hardware and software as well as security camera recordings "of all rooms used in Maricopa County" from November 3 to 4. (Doc. 1 at ¶ 145).

Obviously, the Court cannot enjoin the transmission of the certified results because they have already been transmitted. (Doc. 40 at 4). Plaintiffs' counsel orally argued that Defendants had the power to de-certify the election under 3 U.S.C. § 6. Nothing in that statute authorizes this Court to de-certify the results. The manner provided to contest elections under Arizona law requires election contest claims to be brought, "in the superior court of the county in which the person contesting resides or in the superior court of Maricopa County." A.R.S. § 16-672. Therefore, if de-certification were possible, it would only be possible through an action brought in Arizona superior court. In other words, this Court has no power to de-certify the results. But even assuming the Court were able to grant the extraordinary relief requested, ordering Governor Ducey to de-certify the

election, such relief would necessarily run afoul of 3 U.S.C. § 6 by ignoring Arizona law. In this instance, the Court cannot allow Plaintiffs to circumvent both federal and Arizona law.

Because this Court cannot de-certify the results, it would be meaningless to grant Plaintiffs any of the remaining relief they seek. *See Wood v. Raffensperger*, 2020 WL 7094866, at *6 (11th Cir. Dec. 5, 2020) ("[I]t is not possible for us to delay certification nor meaningful to order a new recount when the results are already final and certified."); *King*, 2020 WL 7134198, at *5 n.3 ("[T]he evidence Plaintiffs seek to gather by inspecting voting machines and software and security camera footage only would be useful if an avenue remained open for them to challenge the election results."). Plaintiffs' claims are moot.

F. Failure to State a Claim

"A motion to dismiss a complaint or claim 'grounded in fraud' under Rule 9(b)[15] for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). In a Rule 12(b)(6) context, courts must consider all well-pleaded factual allegations as true and interpret them in the light most favorable to the plaintiff. *Schlegal v. Wells Fargo Bank, NA,* 720 F.3d 1204, 1207 (9th Cir. 2013). Dismissal is proper when there is either (1) a lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011), *cert. denied, Blasquez v. Salazar*, 565 U.S. 1261 (2012).

When pleading allegations concerning fraudulent conduct, Rule 9(b) requires something more than Rule 8: particularity. *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009);

[15] Although Plaintiffs strenuously argue that they can bring their Arizona election law-based claims in federal court because of the presence of federal allegations, they also boldly assert in their Reply that they need not follow the heightened pleading standard of Federal Rule of Civil Procedure 9(b) in pleading their fraud claims with particularity, because the federal rules are somehow abrogated by "controlling Arizona Supreme Court precedent.[15]" (Doc. 44 at 23). Plaintiffs cannot have it both ways. Plaintiffs have not provided any authority that a state court decision can alter the pleading requirements in federal court established by United States Supreme Court precedent and the Federal Rules of Civil Procedure.

see also Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). "This particularity requirement demands a higher degree of notice than that required for other claims. The claim must identify who, what, where, when, and how." *U.S. ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003).

Moreover, "claims of fraud or mistake . . . must, in addition to pleading with particularity, also plead plausible allegations. That is, the pleading must state enough facts to raise a reasonable expectation that discovery will reveal evidence of the misconduct alleged." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc*., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal citations omitted). Indeed, "Rule 9(b) serves not only to give notice to defendants of the specific fraudulent conduct against which they must defend, but also 'to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.'" *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (citing *In re Stac Elec. Sec. Litig*., 89 F.3d 1399, 1405 (9th Cir. 1996)).

Establishing the plausibility of a complaint's allegations is a two-step process that is "context-specific" and "requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. 679. First, a court must "identif[y] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id*. Then, assuming the truth only of well-pleaded factual allegations, a court must "determine whether they plausibly give rise to an entitlement to relief." *Id*.; *see also Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (identifying the two-step process for evaluating pleadings). Although a plaintiff's specific factual allegations may be consistent with a plaintiff's claim, a district court must assess whether there are other "more likely explanations" for a defendant's conduct such that a plaintiff's claims cannot cross the line "'from conceivable to plausible.'" *Iqbal*, 556 U.S. at 680

(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard represents a balance between Rule 8's roots in relatively liberal notice pleading and the need to prevent "a plaintiff with a largely groundless claim" from "'tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of settlement value.'" *Twombly*, 550 U.S. at 557–58 (quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

Advancing several different theories, Plaintiffs allege that Arizona's Secretary of State and Governor conspired with various domestic and international actors to manipulate Arizona's 2020 General Election results allowing Joseph Biden to defeat Donald Trump in the presidential race. The allegations they put forth to support their claims of fraud fail in their particularity and plausibility. Plaintiffs append over three hundred pages of attachments, which are only impressive for their volume. The various affidavits and expert reports are largely based on anonymous witnesses, hearsay, and irrelevant analysis of unrelated elections. Because the Complaint is grounded in these fraud allegations, the Complaint shall be dismissed. *Vess*, 317 F.3d at 1107 ("When an entire complaint, or an entire claim within a complaint, is grounded in fraud and its allegations fail to satisfy the heightened pleadings requirements of Rule 9(b), a district court may dismiss the complaint or claim.").

Plaintiffs first "describe specific violations of Arizona law" to support their fraud claims.[16] In doing so, they attach declarations from poll watchers that observed election officials during the November General Election. (Doc. 1 ¶¶ 46–53). As Intervenor-Defendant Maricopa County points out, these are the only declarants offered by Plaintiffs with first-hand observation of the election administration. (Doc. 36 at 4). But these four declarants do not allege fraud at all. (*See* Doc. 1-10 at 18–24). Instead, they raise objections to the manner and process by which Arizona election officials matched signatures on absentee ballots (Doc. 1 ¶¶ 46–48); to the process and role assigned to poll

[16] Plaintiffs' often scattershot pleadings allege that "Defendants failed to administer the November 3, 2020 election in compliance with the manner prescribed by the ***Georgia legislature***." (Doc 2 at 6) (emphasis added). Plaintiffs also nonsensically include references to Wisconsin state statutes. (Doc. 1 at 33).

referees in settling unresolved disputes between adjudicators (*Id.* at ¶ 49); to "irregularities" with the voting machines on Election Day and before (*Id.* at ¶¶ 50–52); and to the certification of the Dominion voting system on November 18, 2020 (*Id.* at ¶ 53). These objections to the manner in which Arizona officials administered the election cannot serve to overturn the results of the 2020 presidential election in Arizona because they fail to present evidence that supports the underlying fraud claim. At most, these are the type of "garden variety election irregularities" federal courts are "not equipped nor empowered to supervise . . . ." *Griffin v. Burns*, 570 F.2d 1065, 1076, 1077 (1st Cir. 1978) ("If every election irregularity or contested vote involved a federal violation, the court would be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitioners, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.").

Plaintiffs next argue that they have expert witnesses who can attest to widespread voter fraud in Arizona. As an initial matter, none of Plaintiffs' witnesses identify Defendants as committing the alleged fraud, or state what their participation in the alleged fraudulent scheme was. Instead, they allege that, absentee ballots "*could have* been filled out by anyone and then submitted in the name of another voter," "*could be* filled in by third parties to shift the election to Joe Biden," or that ballots were destroyed or replaced "with blank ballots filled out by election workers, Dominion or other third parties." (Doc. 1 ¶¶ 54–58) (emphasis added). These innuendoes fail to meet Rule 9(b) standards. But perhaps more concerning to the Court is that the "expert reports" reach implausible conclusions, often because they are derived from wholly unreliable sources.

Plaintiffs' expert Mr. William Briggs ("Briggs"), for example, concludes that "troublesome" errors by Arizona election officials "involving unreturned mail-in ballots [] are indicative of voter fraud" and that the election should consequently be overturned. (Doc. 1 at ¶ 54). Briggs relies on data provided by an unknown person named "Matt Braynard," a person who may or may not have tweeted a "Residency Analysis of ABS/EV Voters" on his Twitter account on November 20, 2020 (Doc. 1-2 at 14, Ex. 2); (*Id.* at 52,

Ex. 3). Apart from a screenshot of Mr. Braynard's tweets that day, Plaintiffs offer nothing further about Mr. Braynard's identity, qualifications, or methodologies used in conducting his telephone "survey." But according to the Briggs' report, Mr. Braynard conducted his survey of unknown size and to unknown persons in Georgia, Michigan, Wisconsin, Arizona, and Pennsylvania regarding absentee ballots, and his "findings" were conveyed to Mr. Briggs. (*Id.*) In concluding that there were "clearly a large number of troublesome ballots in each state," Mr. Briggs assumed Mr. Braynard's "survery [sic] respondents [were] representative and the data [was] accurate." (*Id.*) This cavalier approach to establishing that hundreds of thousands of Arizona votes were somehow cast in error is itself troublesome. The sheer unreliability of the information underlying Mr. Briggs' "analysis" of Mr. Braynard's "data" cannot plausibly serve as a basis to overturn a presidential election, much less support plausible fraud claims against these Defendants.

The Complaint is equally void of plausible allegations that Dominion voting machines were actually hacked or compromised in Arizona during the 2020 General Election. Plaintiffs are clearly concerned about the vulnerabilities of voting machines used in some counties across Arizona and in other states. They cite sources that attest to knowledge of "well-known" vulnerabilities, have included letters from concerned citizens, Arizona elected officials, and United States senators. Plaintiffs even attach an affidavit of an anonymous witness with connections to the late Venezuelan dictator Hugo Chavez claiming to be privy as to how officials in Venezuela rigged their elections with the help of a voting systems company whose software "DNA" is now used in voting machines in the United States. (Doc. 1-1, Ex. 1). These concerns and stated vulnerabilities, however, do not sufficiently allege that any voting machine used in Arizona was in fact hacked or compromised in the 2020 General Election. Rather, what is present is a lengthy collection of phrases beginning with the words "could have, possibly, might," and "may have." (Doc. 1 ¶¶ 8, 53, 55, 57, 60, 66, 77, 88, 91, 108, 109, 122). To lend support to this theory, Plaintiffs offer expert Russell Ramsland, Jr., who asserts there was "an improbable, and *possibly impossible* spike in processed votes" in Maricopa and Pima Counties at 8:46 p.m.

on November 3, 2020. (Doc. 1 ¶ 60); (Doc. 1-9, Ex. 17) (emphasis added). He suggests that this spike "could easily be explained" by presuming that Dominion "pre-load[ed] batches of blank ballots in files such as Write-Ins or other adjudication-type files then casting them almost all for Biden using the Override Procedure . . . ." (Doc. 1-9 at 9, Ex. 17). This scenario is conceivable. However, Defendant Hobbs points to a much more likely plausible explanation: because Arizona begins processing early ballots before the election, the spike represented a normal accounting of the early ballot totals from Maricopa and Pima Counties, which were reported shortly after in-person voting closed. (Doc. 40 at 17–18). Thus, the Court finds that while this "spike" *could* be explained by an illicit hacking of voting machinery in Arizona, the spike is "not only compatible with, but indeed was more likely explained by, lawful, unchoreographed" reporting of early ballot tabulation in those counties. *See Iqbal*, 556 U.S. at 680. Plaintiffs have not moved the needle for their fraud theory from conceivable to plausible, which they must do to state a claim under Federal pleading standards. *Id.*

Because Plaintiffs have failed to plead their fraud claims with particularity and because the Complaint is grounded in these claims, it must be dismissed.[17]

G. Motion for TRO and Preliminary Injunction

There are multiple independent grounds upon which to dismiss Plaintiffs' Complaint. Accordingly, it is not necessary to reach the merits of Plaintiffs' requests for a temporary restraining order and preliminary injunction and the Court will therefore only briefly addresses those Motions here.

"The standard for issuing a temporary restraining order is identical to that for issuing a preliminary injunction." *Taylor-Failor v. Cty of Hawaii*, 90 F. Supp. 3d 1095, 1098 (D. Haw. 2015). Under normal circumstances, both are extraordinary and drastic remedies,

[17] Throughout their pleadings, Plaintiffs allege that there were "spikes" of votes for Joe Biden that occurred in Arizona, which also occurred in other states that certified the election for Joe Biden, including Georgia, Wisconsin, Michigan, and Pennsylvania. Regardless of whether these "spikes" shifting the vote majorities from President Trump to Vice President Biden occurred in other states, Plaintiffs have presented nothing to support the claim that these same "spikes" occurred in Arizona, where Biden never trailed Trump in the vote tally.

and "should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)); *see also Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right.") (citation omitted). A plaintiff seeking a temporary restraining order or preliminary injunction must show that (1) he or she is likely to succeed on the merits, (2) is likely to suffer irreparable harm without an injunction, (3) the balance of equities tips in his or her favor, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20.

Plaintiffs simply cannot establish they have a likelihood of success on their claims. Plaintiffs face serious jurisdictional impediments in bringing their claims to federal court at the eleventh hour. These insurmountable legal hurdles are exacerbated by insufficiently plead allegations of fraud, rendered implausible by the multiple inadmissible affidavits, declarations, and expert reports upon which their Complaint relies.

Furthermore, granting Plaintiffs the injunctive relief they seek would greatly harm the public interest. As stated by Defendant Hobbs, "the requested relief would cause enormous harm to Arizonans, supplanting the will of nearly 3.4 million voters reflected in the certified election results and potentially imperiling Arizona's participation in the Electoral College. It would be more difficult to envision a case in which the balance of hardships would tip more strongly against a plaintiff." (Doc. 40 at 24). The Court agrees. The significant weight of these two *Winters* factors requires that the Court deny Plaintiffs' requests for injunctive relief. [18]

III. Conclusion

Not only have Plaintiffs failed to provide the Court with factual support for their extraordinary claims, but they have wholly failed to establish that they have standing for the Court to consider them. Allegations that find favor in the public sphere of gossip and innuendo cannot be a substitute for earnest pleadings and procedure in federal court. They

[18] The Court will vacate the hearing on Plaintiffs' TRO and Request for Preliminary Injunction scheduled for December 10, 2020.

most certainly cannot be the basis for upending Arizona's 2020 General Election. The Court is left with no alternative but to dismiss this matter in its entirety.

Accordingly,

IT IS HEREBY ORDERED that Defendants' Governor Doug Ducey, Secretary of State Katie Hobbs, and Intervenor Defendants Maricopa County Board of Supervisors and Adrian Fontes' Motions to Dismiss the Complaint (Docs. 36, 38, and 40) are **GRANTED** for the reasons stated herein.

IT IS FURTHER ORDERED that all remaining pending motions (Docs. 14, 62, 65 and 66) are **denied as moot,** and the hearing on Plaintiffs' TRO and Preliminary Injunction set for December 10, 2020 is **vacated**.

IT IS FINALLY ORDERED that this matter is dismissed, and the Clerk of Court is kindly directed to terminate this action.

Dated this 9th day of December, 2020.

Honorable Diane J. Humetewa
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN ,

Plaintiff,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION,
COMMISSIONER ANN S. JACOBS,
MARK L. THOMSEN, COMMISSIONER MARGE BOSTELMANN,
JULIE M. BLANCEY, COMMISSIONER DEAN KNUDSON,
ROBERT F. SPINDELL, JR., and TONY EVERS ,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO FILE UNREDACTED COPIES OF EXHIBITS 1 AND 12 TO PLAINTIFF'S AMENDED COMPLAINT UNDER SEAL AND EXHIBITS 4, 13, AND 19 UNDER PROTECTIVE ORDER (DKT. NO. 75)

After the plaintiff filed his reply brief in support of his motion for injunctive relief, he filed a separate motion to file unredacted copies of Exhibits 1 and 12 under seal and to file Exhibits 4, 13 and 19 as restricted to all attorneys of record. Dkt. No. 75. The plaintiff previously had filed redacted versions of these documents with the amended complaint, concealing the affiants' identities and some additional material. Dkt. Nos. 9-1, 9-4, 9-12, 9-13, 9-19.

The general local rule governing confidential matters requires that a movant certify in the motion that the parties have conferred in a good faith attempt to avoid the motion or to limit the scope of the documents or materials

subject to sealing under the motion. Gen. L.R. 79(d)(4). The plaintiff filed an email from Attorney Jeffrey Mandell, who represents defendant Governor Tony Evers, objecting to the use of declarations, affidavits or reports or otherwise pressing forward with evidentiary issues. Dkt. No. 75-1 at 1. The plaintiff has not indicated whether he attempted to confer with counsel for the Wisconsin Election Commission and its members.

General Local Rule 79(d)(2) requires the motion to describe the general nature of the information withheld from the public record. Any motion to restrict access or seal must be supported by sufficient facts demonstrating good cause for withholding the document or material from the public record. Gen. L. R. 79(d)(3). "The Seventh Circuit has emphasized that 'the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding.' *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999)." Roumann Consulting Inc. v. T.V. John & Son, Inc., No. 17-C-1407, 2019 WL 3501513, at *8 (E.D. Wis. Aug. 1, 2019). A party may override this interest only if its privacy interest surmounts the public's interest; "that is, only if there is good cause for sealing a part or the whole of the record in that case." Id.

The plaintiff maintains that good cause exists to restrict the affiants' identities. Dkt. No. 76 at 2. He asserts that sealing to protect identities is routine. Id. at 3 (citing Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346, 348-49 (7th Cir. 2006), abrogated on other grounds by RTP LLC v. ORIX Real Estate Capital, 827 F.3d 689, 691-92 (7th Cir. 2016); Roe v. City of Milwaukee, 37 F.

Supp. 2d 1127 (E.D. Wis. 1999)). It is unclear what portion of Hicklin plaintiff relies on for this understanding. Hicklin addresses whether a *judicial decision* may be sealed. Hicklin, 439 F.3d at 348-49.

The Seventh Circuit imposes a high burden on a party seeking to seal court documents, and it is anything but "routine." See, *e.g.*, Bond v. Utreras, 585 F.3d 1061, 1075 (7th Cir. 2009) ("documents . . . 'used in [a court] proceeding' . . . are therefore presumptively open to public inspection unless they meet the definition of trade secret or other categories of bona fide long-term confidentiality.") (citing Fed. R. Civ. P. 5(d)). "It is beyond dispute that most documents filed in court are presumptively open to the public." Id. at 1073. In fact, a judge in this district has stated that "[t]he party seeking to seal items has the burden of showing cause and must 'analyze in detail document by document, the propriety of secrecy, providing reasons and legal citations.'" E.E.O.C. v. Abbott Labs., No. 10-C-0833, 2012 WL 2884882, at *1 (E.D. Wis. July 12, 2012) (quoting Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 548 (7th Cir. 2002)).

The motion does not explain why the plaintiff believes the court needs the unredacted material this stage of the litigation. The plaintiff previously took the position that "the plaintiff's amended complaint and motion present material dispositive issues that are questions of law that may be resolved without factual investigation or determination." Dkt. No. 10 at ¶6. At the telephonic hearing on December 8, the court told the parties that it needed to decide threshold issues of justiciability before it could consider any evidence.

Dkt. Nos. 70, 71. The plaintiff asked the court to rule on those justiciability issues on December 9, 2020; the court is working hard to do that.

As for the plaintiff's concern that the court protect the identities of the declarants, the plaintiff says that the affiants (declarants) are "in reasonable fear of harassment and threats to their physical safety and their livelihoods in retaliation for their coming forward with testimony." Dkt. No. 76 at 4. Exhibit 1 was prepared by a Venezuela whistleblower and Exhibit 2 was prepared by an individual known as "Spider" who describes him- or herself as an electronic intelligence analyst. Id. at 5. According to plaintiff, both individuals showed "great courage in coming forward at a critical moment to deliver the truth to the court about matters of great importance." Dkt. No. 76 at 6. He says that the authors of exhibits 4, 13 and 19 fear attacks against their reputation, professional career and personal safety. Id. at 7.

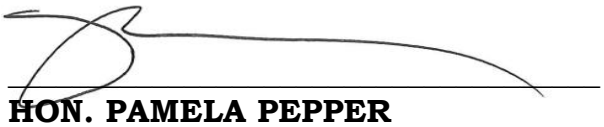
The court will not require the plaintiff to disclose the identities of the individuals at this time. Their identities are not relevant to the justiciability issues the court is working to resolve. If and when the time comes to discuss presentation of evidence, the plaintiff may renew his motion.

The court **DENIES WITHOUT PREJUDICE** Plaintiff's Motion to File Unredacted Copies of (1) Exhibits 1 and 12 to Plaintiff's Amended Complaint

Under Seal and (2) Exhibits 4, 3 and 19 Under Protective Order. Dkt. No. 75.

Dated in Milwaukee, Wisconsin this 9th day of December, 2020.

BY THE COURT:



HON. PAMELA PEPPER
Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION,
COMMISSIONER ANN S. JACOBS,
MARK L. THOMSEN, JULIE M. GLANCEY,
COMMISSIONER MARGE BOSTELMANN,
COMMISSIONER DEAN KNUDSON,
ROBERT F. SPINDELL, JR. and TONY EVERS,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (DKT. NOS. 51, 53), DENYING AS MOOT PLAINTIFF'S AMENDED MOTION FOR INJUNCTIVE RELIEF (DKT. NO. 6) AND DISMISSING CASE

At 8:24 a.m. on Tuesday, December 1, 2020—twenty-eight days after the November 3, 2020 general Presidential election, thirteen days after President Donald J. Trump petitioned for a recount in Milwaukee and Dane Counties and one day after the Wisconsin Elections Commission and the Governor certified that Joseph R. Biden and Kamala D. Harris had received the highest number of votes following that recount—two plaintiffs filed this lawsuit in federal court for the Eastern District of Wisconsin. Although state law governs the election process, the plaintiffs brought the suit in a federal court, asking that federal court to order state officials to decertify the election results that state officials had certified the day before, order the Governor not to transmit to the Electoral

College the certified results he'd transmitted the day before and order the Governor to instead transmit election results that declared Donald Trump to be "the winner of this election."

The election that preceded this lawsuit was emotional and often divisive. The pleadings that have been filed over the past week are passionate and urgent. People have strong, deep feelings about the right to vote, the freedom and opportunity to vote and the value of their vote. They should. But the legal question at the heart of this case is simple. Federal courts have limited jurisdiction. Does a federal court have the jurisdiction and authority to grant the relief this lawsuit seeks? The answer is no.

Federal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so. After a week of sometimes odd and often harried litigation, the court is no closer to answering the "why." But this federal court has no authority or jurisdiction to grant the relief the remaining plaintiff seeks. The court will dismiss the case.

I. Background

According to defendant the Wisconsin Elections Commission's November 18, 2020 canvass results, 3,297,352 Wisconsin residents voted in the November 3, 2020 general election for President. https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf. Of those, 49.45%—1,630,673—voted for Biden for President and Harris for Vice-President. Id. Biden and Harris received

approximately 20,600 more votes than Donald J. Trump for President and Michael R. Pence for Vice-President. Id.

Under Wis. Stat. §9.01(1)(a)(1), any candidate in an election where more than 4,000 votes were cast for the office the candidate seeks and who trails the leading candidate by no more than 1 percent of the total votes cast for that office may petition for a recount. On November 18, 2020, Donald J. Trump filed a recount petition seeking a recount of "all ballots in all wards in every City, Village, Town and other voting unit in Dane and Milwaukee Counties." https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/WEC%20-%20Final%20Recount%20Order_0.pdf. The Wisconsin Elections Commission granted that petition and ordered a recount "using the ballot count method selected per Wis. Stat. § 5.90(1) unless otherwise ordered by a court per Wis. Stat. § 5.90(2)." Id. The WEC ordered the recount to be completed by 12:00 p.m. on December 1, 2020. Id.

The partial recount was completed on November 29, 2020. https://elections.wi.gov/elections-voting/recount. On November 30, 2020, the chair of the Wisconsin Elections Commission signed the statement of canvass certifying that Joseph R. Biden and Kamala D. Harris received the greatest number of votes and certified their electors. https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President.pdf. The same day—November 30, 2020—Wisconsin Governor Tony Evers announced that he had signed the Certificate of Ascertainment for the electors for Biden and Harris.

https://content.govdelivery.com/accounts/WIGOV/bulletins/2aef6ff. The web site for the National Archives contains the Certificate of Ascertainment signed by Evers on November 30, 2020, certifying that out of 3,298,041 votes cast, Biden and Harris and their electors received 1,630,866 votes, while Trump and Pence and their electors received 1,610,184 votes. https://www.archives.gov/files/electoral-college/2020/ascertainment-wisconsin.pdf.

On December 1, 2020, Donald J. Trump filed a petition for an original action in the Wisconsin Supreme Court. Trump v. Evers, Case No. 2020AP001971-OA (available at https://wscca.wicourts.gov). On December 3, 2020, the court denied leave to commence an original petition because under Wis. Stat. §9.01(6), appeals from the board of canvassers or the Wisconsin Elections Commission must be filed in circuit court. Dkt. No. 59-7. The same day—December 3, 2020—Donald J. Trump filed lawsuits in Milwaukee and Dane Counties. Trump v. Biden, Case No. 2020CV007092 (Milwaukee County Circuit Court; Trump v. Biden, Case No. 2020CV002514 (Dane County Circuit Court) (both available at https://wcca.wicourts.gov). Those cases have been consolidated and are scheduled for hearing on December 10, 2020 at 1:30 (or for December 11, 2020 at 9:00 a.m. if the parties are litigating in another court).

Meanwhile, on December 2, 2020, Donald J. Trump filed suit in federal court for the Eastern District of Wisconsin, suing the defendants in this case and others. Trump v. Wisconsin Elections Commission, *et al.*, Case No. 20-cv-

1785-BHL (E.D. Wis.). There is an evidentiary hearing scheduled for December 10, 2020 at 9:00 a.m. by videoconference. Id. at Dkt. No. 45.

II. Procedural History of the Case

On December 1, 2020—the day after Governor Evers signed the Certificate of Ascertainment—William Feehan and Derrick Van Orden filed a complaint in the federal court for the Eastern District of Wisconsin. Dkt. No. 1. Feehan identified himself as a resident of La Crosse, Wisconsin, a registered voter and "a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin." Id. at ¶23. Van Orden was identified as a resident of Hager City, Wisconsin and the 2020 Republican nominee for Wisconsin's Third Congressional District Seat for the U.S. House of Representatives. Id. at ¶26. The complaint alleged that "Mr. Van Orden 'lost' by approximately 10,000 votes to the Democrat incumbent," and stated that "[b]ecause of the illegal voting irregularities as will be shown below, Mr. Van Orden seeks to have a new election ordered by this court in the Third District, with that election being conducted under strict adherence with the Wisconsin Election Code." Id. at ¶27.

The complaint alleged "massive election fraud, multiple violations of the Wisconsin Election Code, *see e.g.,* Wis. Stat. §§5.03, *et seq.,* in addition to the Election and Electors Clauses and Equal Protection Clause of the U.S. Constitution" based on "dozens of eyewitnesses and the statistical anomalies and mathematical impossibilities detailed in the affidavits of expert witnesses." Dkt. No. 1 at ¶1. The plaintiffs alleged four causes of action: (1) violation of the

Elections and Electors Clauses and 42 U.S.C. §1983; (2) violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §1983 and the "invalid enactment of regulations & disparate treatment of absentee vs. mail-in ballots"; (3) denial of the Fourteenth Amendment due process right to vote and 42 U.S.C. §1983; and (4) "wide-spread ballot fraud." Id. at ¶¶106-138. The plaintiffs asked for the following emergency relief:

> 1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results:
>
> 2. An order enjoining Governor Evers from transmitting the currently certified election results [sic] the Electoral College;
>
> 3. An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election;
>
> 4. An immediate emergency order to seize and impound all servers, software, voting machines, tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes §9.01(1)(b)11 related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiffs;
>
> 5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;
>
> 6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;
>
> 7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. Const. Amend. XIV;
>
> 8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that invalidates the certified results if

the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;

9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;

10. A permanent injunction prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;

11. Immediate production of 48 hours of security camera recording of all rooms used in the voting process at the TCF Center[1] for November 3, 2020 and November 4, 2020;

12. Plaintiffs further request the Court grant such relief as is just and proper including but not limited to, the costs of this action and their reasonable attorney fees and expenses pursuant to 42 U.S.C. §1988.

Id. at 50.

With the complaint, the plaintiffs filed a motion for declaratory, emergency, and permanent injunctive relief, dkt. no. 2, and memorandum in support of that motion, dkt. no. 3. The motion stated that the specific relief the plaintiff requested was set out in an attached order, dkt. no. 2 at 1, but there was no order attached. The memorandum asked the court to grant the motion and enter the proposed order, dkt. no. 3 at 10; again, no proposed order was provided.

Later that day, the plaintiffs filed a corrected motion for declaratory, emergency, and permanent injunctive relief. Dkt. No. 6. The plaintiff did not file a memorandum in support of this motion but did file a proposed order. Dkt.

[1] The plaintiff may be referring to the TCF convention center in Detroit, Michigan; the court is unaware of a "TCF Center" in Wisconsin.

No. 1. The relief described in the proposed order was almost identical to the relief requested in the complaint, with a notable exception. Instead of the request for an order requiring production of forty-eight hours of security camera footage from the TCF Center, the plaintiffs asked for an order prohibiting "any wiping or alteration of data or other records or materials" from voting machines, tabulations machines, servers, software and printers, and any alteration or destruction of ballot applications, ballot return envelopes, ballot images, paper ballots, registration lists, poll lists or other election materials, "across the state of Wisconsin." Dkt. No. 6-1 at 7-8.

Two days later, plaintiff Freehan filed an amended complaint removing Derrick Van Orden as a plaintiff. Dkt. No. 9. It differed from the original complaint only in the removal of Van Orden as a plaintiff.

Along with the amended complaint, the plaintiff filed a motion for temporary restraining order and preliminary injunction "to be considered in an expedited manner." Dkt. No. 10. The plaintiff did not file a memorandum in support of the motion; his main purpose in filing the amended motion appears to have been to ask the court to rule on the motion quickly. The plaintiff attached a proposed briefing schedule, suggesting that the court should require the defendants to respond by 8:00 p.m. on Friday, December 4, 2020 and require him to file his reply by 8:00 p.m. on Saturday, December 5, 2020; he proposed to submit the matter on briefs without argument. Dkt. No. 10-1. The defendants objected to this severely truncated schedule. Dkt. Nos. 25

(defendant Evers), 26 (defendants Wisconsin Election Commission and its members).

Construing the amended motion as a Civil L.R. 7(h) expedited, non-dispositive motion for an expedited briefing schedule, the court granted the request on December 4, 2020, setting a schedule that, while not as expedited as the plaintiff requested, gave the parties a short leash. Dkt. No. 29.

Wisconsin voter James Gesbeck filed a motion to intervene, dkt. no. 14, and later an expedited motion to intervene, dkt. no. 33. The Democratic National Committee (DNC) also sought to intervene. Dkt. No. 22. The court denied both requests, dkt. nos. 41 (DNC), 74 (Gesbeck), but allowed both to file *amicus curiae* briefs by the December 7, 2020 deadline it had set for the defendants to oppose the plaintiff's motion for injunctive relief, dkt. nos. 37 (Gesbeck), 41 (DNC).

Recall that the plaintiff had not filed a memorandum in support of the December 1, 2020 corrected motion for injunctive relief or in support of the December 3, 2020 amended motion. On Sunday, December 6, 2020, the plaintiff filed an amended memorandum in support of the motion. Dkt. No. 42. In the first paragraph, the plaintiff indicated that he filed the amended memorandum to "avoid possible confusion from removal of Mr. Van Orden is [sic] plaintiff." Id. at 1. He said that the memorandum was identical to the original memorandum "except for amending references to plaintiffs to refer to Mr. Meehan [sic] only and correcting several inadvertent references to the State of Georgia." Id.

On Sunday, December 6, the plaintiff also filed a motion asking the court to schedule an evidentiary hearing "on the merits" for Wednesday, December 9, 2020 at 9:00 a.m. Dkt. No. 44. Although the plaintiff had not asked for a hearing in any prior motion, and had represented in the amended motion that he was submitting the matter on the briefs without argument, the plaintiff explained that he had changed his position based on the court's December 4, 2020 order. Id. at ¶4. The court denied the motion in a telephonic hearing on December 8, 2020, explaining that before it could reach the merits of the motion for injunctive relief, it must resolve issues regarding justiciability. Dkt. Nos. 70, 71.

In opposing the plaintiff's amended motion for injunctive relief, defendants Wisconsin Election Commission and its members argued that the case has jurisdictional and procedural defects that require dismissal. Dkt. No. 52 at 5. They asserted that the plaintiff lacks Article III standing, id. at 6, that the doctrine of laches bars consideration of his claims, id. at 8 and that the Eleventh Amendment shields them from the relief he seeks, id. at 10. They asserted that the complaint fails to state a claim for relief under the Election or Electors Clauses, id. at 11, or under the Equal Protection or Due Process Clauses, id. at 13, and they contended that the plaintiff's purported evidence fails to meet basic evidentiary standards, id. at 20.

In his brief opposing injunctive relief, defendant Governor Evers argued that there is no evidence of fraud in Wisconsin's election results, dkt. no. 55 at 10, that the plaintiff's witnesses and experts lack qualifications and are

unreliable, id. at 12, and that the plaintiff has failed to state valid claims, id. at 22. Evers also argued that an adequate remedy at law exists because the recount procedures under Wis. Stat. §9.01 unambiguously constitute the "exclusive remedy" for challenging election results. Id. at 55. With respect to the balancing of harms, Evers argued that the requested relief would prejudice the defendants and "retroactively deprive millions of Wisconsin voters of their constitutional right to vote in the 2020 presidential election." Id. at 32.

James Gesbeck, filing as friend of the court, opposed the motion for injunctive relief on the grounds that the plaintiff has not established subject matter jurisdiction and that the court should defer to the Wisconsin courts and Wisconsin's procedural mechanism for resolving disputed elections. Dkt. No. 47 at 11, 12. Gesbeck applied the balancing analysis for injunctive relief, asserting that relief in this court would moot the Wis. Stat. §9.01 challenge pending in the Wisconsin courts. Id. at 17. He argued that this, in turn, would put the "insurmountable weight of the Federal Government on the election result in Wisconsin and would be unbalancing the scale created by the system of checks and balances that have been maintained since the Constitution was adopted." Id. at 17.

Amicus DNC opposed the motion on many of the same grounds as the other defendants. Dkt. No. 57. The DNC argued that the plaintiff lacks standing, that the doctrine of laches bars the plaintiff's claims, that the defendants are immune from suit under the Eleventh Amendment, that principles of federalism and comity require abstention, and that the plaintiff

fails to state a claim upon which relief can be granted. Dkt. No. 57. It asserted that the plaintiff cannot establish irreparable harm and has an adequate remedy of law. Id. at 36.

The defendants have filed motions to dismiss the case. The WEC and its members seek dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 53. Defendant Evers seeks dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), failure to plead fraud with particularity under Fed. R. Civ. P. 9(b) and failure to state a claim under Fed. R. Civ. P. 12(b)(6).

The Wisconsin State Conference of the NAACP and three of its members (Dorothy Harrell, Wendell J. Harris, Jr. and Earnestine Moss) sought leave to file an *amicus* brief on the question of whether the court should dismiss the case. Dkt. No. 56. The court granted that motion. Dkt. No. 69.

III. Procedural Posture

From the outset, the plaintiff has sought to have the claims in the complaint resolved through a motion for injunctive relief under Fed. R. Civ. P. 65. The relief he requests in the second iteration of his motion for injunctive relief is the same relief he requests in the lawsuit itself. As defendant Evers points out in his motion to dismiss, the plaintiff's December 6, 2020 motion for an evidentiary hearing (which the court has denied) "makes clear that what [the plaintiff] seeks—without any discovery or basic adversarial development of evidence—is a trial and final adjudication on the merits." Dkt. No. 51 at 2.

Evers points to Fed. R. Civ. P. 12(i), which states that "[i]f a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial." Because Evers has raised defenses under Rule 12(b)(1) and (b)(6), and because in asking for a hearing the plaintiff sought what would have been a trial on the merits of the causes of action raised in the complaint, the court must resolve the defenses before moving to the merits.

As the court stated in the hearing on December 8, that requirement is more than a procedural nicety. The defendants and the *amici* have raised questions about this federal court's authority to decide the claims alleged in the amended complaint. If this court does not have jurisdiction to hear and decide those claims, any decision it might make regarding the merits of the claims would be invalid. For that reason, the court considers the motions to dismiss before considering the plaintiff's request for injunctive relief.

IV. The Motions to Dismiss

A. Legal Standards

1. *Rule 12(b)(1)—Lack of Subject Matter Jurisdiction*

In evaluating a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), "the court must first determine whether a factual or facial challenge has been raised." Silha v. ACT, Inc., 807 F.3d 169, 173 (7th Cir. 2015) (citing Apex Dig., Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443 (7th Cir. 2009). A *factual* challenge alleges that even if the pleadings are

sufficient, no subject matter jurisdiction exists. A *facial* challenge alleges that the complaint is deficient—that the plaintiff has not sufficiently alleged subject matter jurisdiction. Id. The difference matters—a court reviewing a factual challenge "may look beyond the pleadings and view any evidence submitted to determine if subject matter exists," while a court reviewing a facial challenge "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff." Id.

2. *Rule 12(b)(6)—Failure to State a Claim*

A motion to dismiss for failure to state a claim under Rule 12(b)(6) challenges the legal sufficiency of the complaint. A complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint must contain enough facts, accepted as true, to "state a claim for relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "[T]he plausibility determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." W. Bend Mut. Ins. Co. v. Schumacher, 844 F.3d 670, 676 (7th Cir. 2016).

3. *42 U.S.C. § 1983*

To state a claim for a civil rights violation under 42 U.S.C. §1983, a plaintiff must allege that someone deprived him of a right secured by the Constitution or the laws of the United States and that whoever deprived him of that right was acting under the color of state law. D.S. v. E. Porter Cty. Sch. Corp., 799 F.3d 793, 798 (7th Cir. 2015) (citing Buchanan–Moore v. Cty. of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009)).

B. Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). Subject matter jurisdiction has to do with "the courts' statutory or constitutional *power* to adjudicate the case." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 (1998) (emphasis in the original). "Article III, §2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" Id. at 102. The defendants raise a factual challenge to the court's subject matter jurisdiction, arguing that regardless of the pleadings, subject matter jurisdiction does not exist. The court may look outside the four corners of the complaint in considering that challenge.

1. *Standing*

Article III standing is an "essential component of Article III's case-or-controversy requirement," and therefore a "threshold jurisdictional question." Apex Dig., Inc., 572 F.3d at 443 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). "[N]o principle is more fundamental to the judiciary's proper

role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Raines v. Byrd, 521 U.S. 811, 818 (1997). "Standing to sue is part of the common understanding of what it takes to make a justiciable case." Id. "Standing is an element of subject-matter jurisdiction in a federal civil action . . . ." Moore v. Wells Fargo Bank, N.A., 908 F.3d 1050, 1057 (7th Cir. 2018).

> The "irreducible constitutional minimum of standing contains three requirements. *Lujan v. Defenders of Wildlife*, [504 U.S. 555], at 560 [1992)]. First and foremost, there must be (and ultimately proved) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, [495 U.S. 149], at 149 [1990] (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 . . . (1983)). Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 . . . (1976). And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. *Id.*, at 45-46 . . .; see also *Warth v. Seldin*, 422 U.S. 490, 505 . . . (1975). This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 . . . (1990).

Steel Co., 523 U.S. at 102-104.

Regarding the "injury in fact" leg of the triad, the injury must be "particularized," such that it "affect[s] the plaintiff in a personal and individual way." Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 1548 (2016) (citations omitted). The injury also must be "concrete"—it must be "real," not "abstract." Id. A plaintiff cannot show a particularized and concrete injury by showing "that he has merely a general interest common to all members of the public." *Ex parte* Levitt, 302 U.S. 633, 634 (1937). A plaintiff may not use a

"federal court as a forum in which to air his generalized grievances about the conduct of government . . . ." United States v. Richardson, 418 U.S. 166, 174 (1974) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1942)).

As for the redressability leg of the triad, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." Steel Co., 523 U.S. at 107. The plaintiff must show that it is "likely," not merely "speculative," that the injury the plaintiff alleges will be "redressed by a favorable decision." Lujan, 504 U.S. at 561 (quoting Simon, 426 U.S. at 38).

In addition to the Article III case-or-controversy requirement, there is a prudential limitation in Fed. R. Civ. P. 17(a), requiring that "[e]very action must be prosecuted in the name of the real party in interest," Fed. R. Civ. P. 17(a), and "requir[ing] that the complaint be brought in the name of the party to whom that claim 'belongs' or the party who 'according to the governing substantive law, is entitled to enforce the right.'" Rawoof v. Texor Petroleum Co., Inc., 521 F.3d 750, 756 (7th Cir. 2008) (quoting Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 193 (2d Cir. 2003)); see also RK Co. v. See, 622 F.3d 846, 850 (7th Cir. 2010) ("the real party in interest rule is only concerned with whether an action can be maintained in the plaintiff's name," and is "similar to, but distinct from, constitutional ... standing"). The real party in interest is "the one who by the substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." Act II Jewelry, LLC v. Wooten, 301 F. Supp. 3d 905, 910-911 (N.D.

Ill. 2018) (quoting Checkers, Simon & Rosner v. Lurie Corp., 864 F.2d 1338, 1343 (7th Cir. 1988) (internal citations omitted)). The purpose of the rule is to "protect the defendant against a subsequent action by the party actually entitled to recover." RK Co., 622 F.3d at 850 (citing Fed. R. Civ. P. 17(a) advisory committee note (2009)).

The amended complaint alleges that the plaintiff has standing "as a voter and as a candidate for the office of Elector under Wis. Stat. §§ 5.10, *et seq* (election procedures for Wisconsin electors)." Dkt. No. 9 at 8. The defendants argue that the plaintiff lacks standing in either capacity. Dkt. No. 43 at 4-5; Dkt. No. 59 at 8-9.

a. Standing as a voter

The amended complaint does not assert that the plaintiff voted in the 2020 general Presidential election in Wisconsin. It says that he is a registered voter, but it does not affirmatively state that he voted in the election the results of which he asks the court to decertify. His counsel asserts in the brief in opposition to the defendants' motion to dismiss—filed eight days after the original complaint and five days after the amended complaint—that the plaintiff "voted for President Trump in the 2020 General Election." Dkt. No. 72 at 17. For the first time at the motion to dismiss stage, the plaintiff provided his own declaration, in which he attests that he voted for President Donald J. Trump in the November 3, 2020 election. Dkt. No. 72-1.

The plaintiff claims that the defendants failed to comply "with the requirements of the Wisconsin Election Code and thereby diluted the lawful

ballots of the Plaintiff and of other Wisconsin voters and electors in violation of the United States Constitution guarantee of Equal Protection." Dkt. No. 9 at ¶116. He alleges that the defendants enacted regulations or issued guidance that, in intent and effect, favored Democratic absentee voters over Republican voters, and that these regulations and this guidance enable and facilitated voter fraud. Id. The plaintiff also asserts that he has a right to have his vote count and claims that a voter is injured if "the important of his vote is nullified." Id. at ¶127.

Several lower courts have addressed the plaintiff's theory that a single voter has standing to sue as a result of his vote being diluted by the possibility of unlawful or invalid ballots being counted. The district court for the Middle District of North Carolina catalogued a few of those decisions, all finding that the harm was too speculative and generalized—not sufficiently "concrete"—to bestow standing. These courts concluded that the vote dilution argument fell into the "generalized grievance" category. In Moore v. Circosta, the court wrote:

> Indeed, lower courts which have addressed standing in vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted, as Plaintiffs have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters. See, e.g., Donald Trump for President, Inc. v. Cegavske, Case No. 2:20-CV-1445 JCM (VCF), __ F. Supp. 3d __, __, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more tangibly benefits them than it does the public at large.") (internal quotations and modifications omitted); Martel v. Condos, Case No. 5:20-cv-131, ___ F. Supp. 3d ___, ___, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); Paher v. Cegavske, 457 F. Supp.

> 3d 919, 926-27 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); Am. Civil Rights Union v. Martinez-Rivera, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution [is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.")
>
> Although "[i]t would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because affects all voters," Martel, __ F. Supp.3d at __, 2020 WL 5755289, at *4, the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury necessary for Article III standing. Compared to a claim of gerrymandering, in which the injury is specific to a group of voters based on their racial identity or the district in which they live, all voters in North Carolina, not just Individual Plaintiffs, would suffer the injury Individual Plaintiffs allege. This court finds this injury to generalized to give rise to a claim of vote dilution . . . .

Moore v. Circosta, Nos. 1:20CV911, 1:20CV912, 2020 WL 6063332, at *14,

The court agrees. The plaintiff's alleged injuries are injuries that any Wisconsin voter suffers if the Wisconsin election process were, as the plaintiff alleges, "so riddled with fraud, illegality, and statistical impossibility that this Court, and Wisconsin's voters, courts, and legislators, cannot rely on, or certify, any numbers resulting from this election." Dkt. No. 9 at ¶5. The plaintiff has not alleged that, as a voter, he has suffered a particularized, concrete injury sufficient to confer standing.

The plaintiff argues that it is incorrect to say that his standing is based on a theory of vote dilution. Dkt. No. 72 at 19. He then proceeds to opine that he has shown in great detail how his vote and the votes of others who voted for Republican candidates was diluted. Id. at 19-20. He says the vote dilution did not affect all Wisconsin voters equally, asserting that it had a negative impact

on those who voted for Republican candidates and a positive impact on those who voted for Democratic candidates. Id. at 20. He asserts that he also has shown that the defendants sought to actively disenfranchise voters for Republican candidates. Id. These are the same arguments he made in the amended complaint and they still show no more than a generalized grievance common to any voter. Donald J. Trump carried some Wisconsin counties; the voters who voted for Joseph R. Biden in those counties could make the same complaints the plaintiff makes here.

The plaintiff says that his interests and injury are "identical to that of President Trump," and cites to Bush v. Gore, 531 U.S. 98 (2000), which he characterizes as holding that "then-candidate George W. Bush of Texas had standing to raise the equal protection rights of Florida voters that a majority of the Supreme Court deemed decisive." Id. at 21 (quoting Hawkins v. Wayne Twp. Bd. of Marion Cty., Ind, 183 F. Supp. 2d 1099, 1103 (S.D. Ind. 2002)). The court is stymied by the plaintiff's assertion that his interests and injury are identical to that of President Trump. As the court will explain in the next section, contrary to his assertions, the plaintiff is not a "candidate" in the way that President Trump was a candidate for office. President Trump's interest is in being re-elected, while the plaintiff has said that his interest is in having his vote count and not be diluted. If his interest is solely in getting President Trump re-elected, as opposed to having his vote be counted as part of a valid election process, the court is aware of no constitutional provision that gives him the right to have his candidate of choice declared the victor.

Nor does the decision in Bush v. Gore say what the plaintiff claims it says. As far as the court can tell, the word "standing" does not appear in the majority opinion. In the Indiana decision the plaintiff cites, then-district court judge David Hamilton wrote: "If candidate Hawkins did not have standing to raise equal protection rights of voters, it would be difficult to see how then-candidate George W. Bush of Texas had standing to raise equal protection rights of Florida voters . . . in *Bush v. Gore*." Hawkins, 183 F. Supp.2d at 1103. But the Supreme Court in Bush v. Gore never explained how candidate Bush had standing, and even if it had, the plaintiff is not a candidate.

Nor has the plaintiff demonstrated redressability. He complains that his vote was diluted and that he wants his vote to count. But he asks the court to order the results of the election de-certified and then to order defendant Evers to certify the election for Donald J. Trump. Even if this *federal* court had the authority to order the governor of the *state* of Wisconsin to certify the results of a national presidential election for any candidate—and the plaintiff has presented *no* case, statute or constitutional provision providing the court with that authority—doing so would further invalidate and nullify the plaintiff's vote. The plaintiff wants Donald J. Trump to be certified as the winner of the Wisconsin election *as a result of the plaintiff's vote*. But what he asks is for Donald J. Trump to be certified the winner *as a result of judicial fiat*. That remedy does not redress the plaintiff's alleged injury. Even the plaintiff concedes in his brief in opposition to dismissal that "[d]efendant Evers can . . . provide partial redress in terms of the requested injunctive relief, namely, by

refusing to certify or transmit the election results, and providing access to voting machines, records and other 'election materials.'" Dkt. No. 72 at 21. The plaintiff is wrong in that regard, as the court will explain when it discusses the related doctrine of mootness; the point is that even from the plaintiff's perspective, the remedy he seeks will not fully redress the injury he claims.

Circling back to Article III's "case or controversy" requirement, the Supreme Court has held that "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006) (quoting Lewis v. Casey, 518 U.S. 343, 357 (1996)). In other words, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." Gill v. Whitford, ___ U.S. ___, 138 S. Ct. 1916, 1934 (2018) (citing Cuno, 547 U.S. at 353). Even if the plaintiff had alleged a particularized, concrete injury and even if the relief he seeks would redress that injury, that relief is not tailored to the alleged injury. As the Michigan court explained in King v. Whitmer, Case No. 20-13134 at Dkt. No. 62, page 25 (E.D. Mich. Dec. 7, 2020), "Plaintiffs' alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others *their* right to vote."

The plaintiff's status as a registered voter does not give him standing to sue.

b. Standing as a nominee for elector

The amended complaint alleges that the plaintiff has standing to bring the suit "as a candidate for the office of Elector under Wis. Stat. §§ 5.10, et seq." Dkt. No. 9 at ¶26. The amended complaint cites to "Wis. Stat. §§5.10, et seq," but the court is not sure what the "*et seq.*"—"and what follows"—contributes to the plaintiff's belief that he has standing. Wis. Stat. §5.10 is followed by Wis. Stat. §5.15, which concerns the "Division of municipalities into wards," as well as other sections concerning polling places and voting machines. The court assumes the plaintiff meant to reference only Wis. Stat. §5.10.

Wis. Stat. §5.10 states:

> 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.

Relying on this section, the amended complaint directs the court's attention to Carson v. Simon, 978 F.3d 1051, 1057 (8th Cir. 2020).[2] In Carson,

[2] The complaint also cites two Supreme Court cases: McPherson v. Blacker, 146 U.S. 1, 27 (1892) and Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (*per curiam*). Neither address the Article III standing of an elector. In McPherson, the Court reviewed the Michigan supreme court's decision on the constitutionality of the Michigan statute governing selection of electors. While the parties who brought the suit in state court were nominees for presidential electors, the Court did not address their standing (or lack of it). The petitioner in Bush was the then-Republican candidate, George W. Bush, who was challenging the Florida supreme court's interpretation of its election statutes; again, the Court did not address (and had no need to address) the standing of an elector to sue.

two certified nominees of the Republican Party to be presidential electors sued the Minnesota secretary of state, challenging a consent decree that "essentially ma[de] the statutorily-mandated absentee ballot receipt deadline inoperative." Id. at 1054. As a result of the decree, the secretary of state had directed election officials "to count absentee ballots received up to a week after election day, notwithstanding Minnesota law." Id. The potential electors sought an injunction in federal court, but the district court found they lacked standing. Id.

The Eighth Circuit reversed, finding that the potential electors had standing as candidates "because the plain text of Minnesota law treats prospective presidential electors as candidates." Id. at 1057. The court found that candidates suffered particularized and concrete injury from an inaccurate vote tally. Id. at 1058.

The plaintiff urges this court to reach the same conclusion. An Eighth Circuit decision is not binding on this court, but the question is whether the reasoning in that decision is persuasive. A member of the panel in Carson dissented from the majority opinion and expressed doubt about the potential electors' standing. Circuit Judge Jane Kelley wrote:

> . . . I am not convinced the Electors have Article III standing to assert claims under the Electors Clause. Although Minnesota law at times refers to them as "candidates," see, e.g., Minn. Stat. § 204B.03 (2020), the Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president. Id. § 208.04 subdiv. 1 ("[A] vote cast for the party candidates for president and vice president shall be deemed a vote

> for that party's electors.") They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals. But even if we nonetheless assume the Electors should be treated like traditional political candidates for standing purposes, I question whether these particular candidates have demonstrated the "concrete and particularized" injury necessary for Article III standing. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 . . . (1992). To the contrary, their claimed injury—a potentially "inaccurate vote tally" . . .—appears to be "precisely the kind of undifferentiated, generalized grievance about the conduct of government: that the Supreme Court has long considered inadequate for standing. Lance v. Coffman, 549 U.S. 437, 442 . . . (2007) (examining standing in the context of a claim under the Elections Clause). Because the Electors, should they in fact assume that office, must swear an oath to mark their Electoral College ballots for the presidential candidate who won the popular vote, Minn. Stat. § 208.43 (2015), it is difficult to discern how they have more of a "particularized stake," Lance, 549 U.S. at 442 . . . , in Minnesota conducting fair and transparent elections than do the rest of the state's voters.

Id. at 1063.

Judge Kelly's reasoning is the more persuasive. Under Wisconsin law, a vote for the candidates of president and vice president is a vote for the electors of those candidates. Wis. Stat. § 5.65(3)(a). When the electors meet, they must vote for the candidates of the party that nominated the electors. Wis. Stat. §7.75(2). Like Minnesota electors, Wisconsin electors may be referred to as "candidates" by statute but they are not traditional political candidates presented to and chosen by the voting public. Their interest in seeing that every valid vote is correctly counted and that no vote is diluted is no different than that of an ordinary voter. And the court has concluded, as did Judge Kelly, that the plaintiff's status as a voter does not give him standing.

The amended complaint does not mention the Elections Clause or the Electors Clause of the Constitution in relation to standing. In his brief in

opposition to the motions to dismiss, the plaintiff alleges that he has standing under "Electors and Elections Clause." Dkt. No. 72 at 17. He asserts that the Eighth Circuit found in Carson that electors had "both Article III and Prudential standing under the Electors and Elections Clauses." Id. The plaintiff reads Carson differently than does this court. The Carson majority did not mention the Electors or Elections Clause in its discussion of Article III standing. The entire discussion of Article III standing was based on Minnesota law. See Carson, 978 F.3d at 1-57-1058. In its discussion of *prudential* standing, the Carson majority stated that "[a]lthough the Minnesota Legislature may have been harmed by the Secretary's usurpation of its constitutional right under the Elector Clause, the Electors have been as well." Id. at 1058-59.

This court has found that the plaintiff does not have Article III standing, but even if had not, it disagrees that the Elector Clause[3] provides prudential standing to electors. Article II, Section 1, Clause 2 of the Constitution—known as the "Elector Clause"—states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of

[3] The plaintiff cites the "Elector and Elections Clause" or "Clauses" in the same breath but does not discuss the text of either. It is not clear how the plaintiff sees the Elections Clause—Article II, Sec. 1, cl. 3—as providing him with standing and the plaintiff has not developed that argument. The court notes only that in Lance v. Coffman, the Supreme Court found that plaintiffs whose only alleged injury was that the Elections Clause had not been followed did not have standing because they alleged "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." Lance, 549 U.S. at 442.

Trust or Profit under the United States, shall be appointed an Elector." The clause confers on the *state* the right to appoint electors and confers on the *legislature* the right to decide the way those electors will be appointed. It confers no right on the *electors* themselves. Just a few months ago, the Supreme Court stated as much in Chiafalo v. Washington, ___ U.S. ___, 140 S. Ct. 2316, 2328 (July 6, 2020), in the context of considering whether a state could penalize an elector for breaking his pledge and voting for someone other than the candidate who won his state's popular vote:[4] "Article II and the Twelfth Amendment give States broad powers over electors, and give electors themselves no rights." The Court went on to say,

> Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like [the state of] Washington, it chooses to sanction an elector for breaching his promise. Then, too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

Id.

The plaintiff's status as a nominee to be a Republican elector does not give him Article III or prudential standing.

[4] Wisconsin's "pledge law"—Wis. Stat. §7.75(1)—does not impose a penalty on a "faithless elector."

2. *Mootness*

Mootness "has sometimes been called 'the doctrine of standing set in a time frame.'" Chi. Joe's Tea Room, LLC v. Vill. of Broadview, 894 F.3d 807, 812-13 (7th Cir. 2018) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 189 (2000)). A case becomes moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam)). "Mootness strips a federal court of subject-matter jurisdiction." Id. at 815 (citing DJL Farm LLC v. EPA, 813 F.3d 1048, 1050 (7th Cir. 2016). This is because "[a] case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III.'" United States v. Sanchez-Gomez, __ U.S. __, 138 S. Ct. 1532, 1537 (2018) (quoting Already, LLC, 568 U.S. at 91).

The amended complaint states that the plaintiff brought this suit "to prohibit certification of the election results for the Office of President of the United States in the State of Wisconsin . . . ." Dkt. No. 9 at ¶27. The plaintiff asks the court to prohibit from occurring an event that already has occurred—an event that occurred the day before he filed this lawsuit and nine days before the court issues this order. He asks the court to enjoin defendant Evers from transmitting the certified election results, id. at ¶142—an event that already has occurred. He asks the court to order that certain votes not be counted, id., when the vote counting has been over since November 29.

The plaintiff himself demonstrates the mootness problem in his brief in opposition to dismissal. He states that defendant Evers can provide partial redress for his alleged injuries "by refusing to certify or transmit the election results." Dkt. No. 72 at 21. But Evers already has certified and transmitted the elections results—he cannot refuse to do that which he already has done.

At the December 8 hearing, the plaintiff argued that there remains a live controversy because the electors have not yet voted and will not do so until Monday, December 14, 2020. Dkt. No. 70. This argument ignores the fact that several of the events that dictate which slate of nominees are certified to vote already have taken place and had taken place at the time the plaintiff filed his complaint. The votes have been counted. In two counties, they've been counted twice. The WEC chair has signed the canvass and certified electors for Biden/Harris. The governor has signed the Certificate of Ascertainment and the National Archive has that certificate.

In his brief in opposition to dismissal, the plaintiff points to this court's own order earlier in this case, determining that the plaintiff had not demonstrated why the December 8, 2020 "safe harbor" deadline under 3 U.S.C. §5 was the date by which the plaintiff needed the court to issue a decision to preserve his rights. Dkt. No. 72 at 25 (citing Dkt. No. 29 at 7). The court noted in that order that the plaintiff's brief in opposition to a motion to reassign another case erroneously referred to December 8 as the date that the College of Electors was scheduled to meet. Dkt. No. 29 at 7. The court pointed out that that was incorrect, and that December 8 was the deadline by which the state

would have to make its final determination of any election dispute in order to avoid congressional challenge. Id. The court then said, "Because the electors do not meet and vote until December 14, 2020, the court will impose a less truncated briefing schedule than the one the plaintiff proposes . . . ." Dkt. No. 29.

The plaintiff says that "[i]mplicit in this Court's determination" is the assumption that "this Court can still grant some or perhaps all of the relief requested and this Plaintiff's claims are not moot." Dkt. No. 72 at 25. The plaintiff reads more into the court's language than the court intended. In the plaintiff's earliest pleadings—the first motion for injunctive relief, the "corrected" motion for injunctive relief, the "amended" motion for injunctive relief—the plaintiff failed to identify a date by which he needed the court to act. The first time he identified such a date was in his brief in opposition to a motion to reassign another case—and then, the reference was oblique. In his opposition brief, the plaintiff stated, "With the College of Electors scheduled to meet December 8, there could never be a clearer case of 'justice delayed is justice denied.'" Dkt. No. 18 at 1. From that, the court deduced that the plaintiff needed the court to act by the date the College of Electors was scheduled to meet. But the College of Electors was not scheduled to meet December 8—it was (and is) scheduled to meet December 14. So the court set a briefing schedule that would give the defendants a chance to respond, but would complete briefing ahead of the event the plaintiff deemed important—the

electoral meeting and vote. That was not a decision by this court—implicit or explicit—on the mootness of the plaintiff's claims.

The plaintiff also asserts that the "cutoff for election-related challenges, at least in the Seventh Circuit, appears to be the date that the electors meet, rather than the date of certification." Dkt. No. 72 at 24. He cites Swaffer v. Deininger, No. 08-CV-208, 2008 WL 5246167 (E.D. Wis. Dec. 17, 2008). Swaffer is not a Seventh Circuit case, and the court is not aware of a Seventh Circuit case that establishes a "cutoff for election-related challenges." And the plaintiff seems to have made up the "quote" in his brief that purports to be from Swaffer. The plaintiff asserts that these words appear on page 4 of the Swaffer decision: "even though the ***election*** has passed, the meeting of electors obviously has not, so plaintiff's claim here is hardly moot." Dkt. No. 72 at 24-25. The court has read page 4 of Swaffer—a decision by this court's colleague, Judge J.P. Stadtmueller—three times and cannot find these words. In fact, Swaffer did not involve a challenge to a presidential election and it did not involve electors. Mr. Swaffer sought to challenge a Wisconsin statute requiring individuals or groups promoting or opposing a referendum to file a registration statement and take other actions. Swaffer, 2008 WL 5246167, at *1. The defendants argued that the election (in which the plaintiff had taken steps to oppose a referendum on whether to allow liquor sales in the Town of Whitewater) was over and that Swaffer's claims thus were moot. Id. at 2. Judge Stadtmueller disagreed, finding that because Swaffer alleged that he intended

to violate the statutes at issue in the future, a credible threat of prosecution remained. Id. at 3.

Some of the relief the plaintiff requests may not be moot. For example, he asks for an immediate order seizing voting machines, ballots and other materials relating to the physical mechanisms of voting. And there remain five days until the electors vote—as the events of this year have shown, anything can happen. But most of the relief the plaintiff seeks is beyond this court's ability to redress absent the mythical time machine.

3. *Conclusion*

The plaintiff does not have Article III standing to sue in federal court for the relief he seeks.

C. Other Arguments

Standing is the *sine qua non* of subject matter jurisdiction. Absent standing, the court does not have jurisdiction to consider the plaintiff's claims on the merits. Arguably, it has no jurisdiction to consider the other bases the defendants and *amici* assert for why the court should dismiss the case. At the risk of producing dicta (and spilling even more ink on a topic that has received an ocean's worth by now), the court will briefly address some of the other bases for the sake of completeness.

1. *Eleventh Amendment Immunity*

The defendants argue that the plaintiff's claims are barred by the Eleventh Amendment. Dkt. No. 59 at 15; Dkt. No. 54 at 10. The Eleventh Amendment "bars most claims in federal court against a state that does not

consent to suit." Carmody v. Bd. of Trs. of Univ. of Ill., 893 F.3d 397, 403 (7th Cir. 2018) (citations omitted). States are immune from suit in federal court "unless the State consents to the suit or Congress has abrogated their immunity." Tucker v. Williams, 682 F.3d 654, 658 (7th Cir. 2012) (citing Seminole Tribe v. Florida, 517 U.S. 44 (1996)). This includes suits brought in federal court against nonconsenting states by their own citizens. See, *e.g.*, Edelman v. Jordan, 415 U.S. 651, 663 (1974); Hans v. Louisiana, 134 U.S. 1, 15 (1890) ("Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?").

The plaintiff has sued the Governor of Wisconsin, Tony Evers, in his official capacity; the Wisconsin Elections Commission and each member of the WEC in his or her official capacity. Before going too much further down the Eleventh Amendment road, the court notes that the vehicle for the plaintiff to bring his constitutional claims—his claims under the Elector Clause, the Elections Clause, the Equal Protection Clause and the Due Process Clause—is 42 U.S.C. §1983. Section 1983 prohibits a "person" acting under color of state law from violating another's civil rights. The Wisconsin Elections Commission is not a "person." It is an arm of the state of Wisconsin, Wis. Stat. §5.05, and "states are not suable 'persons' under 42 U.S.C. § 1983." Phillips v. Baxter, 768 F. App'x 555, 559-560 (7th Cir. 2019) (citing Sebesta v. Davis, 878 F.3d 226, 231 (7th Cir. 2017)). See also, Will v. Mich. Dept. of State Police, 491 U.S. 58,

64 (1989) ("a State is not a person within the meaning of § 1983"). "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." Will, 491 U.S. at 66. The WEC is not the proper defendant for the plaintiff's constitutional claims.

The plaintiff faces the same problem with his claims against the individual defendants, all of whom are state officials whom he sues in their official capacities.[5]

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471 . . . (1985). As such, it is no different from a suit against the State itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-66 . . . (1985); *Monell* [*v. New York City Dept. of Social Services*, 436 U.S. 658], at 690 [(1978)].

Id. at 71. Arguably, *none* of the defendants are subject to suit under 42 U.S.C. §1983, which means that even if the plaintiff had standing, the court would have to dismiss Counts I, II and III of the amended complaint.

Circling back to the defendants' Eleventh Amendment argument, "The Eleventh Amendment extends to state agencies and departments and, subject to the *Ex Parte* Young doctrine, to state employees acting in their official capacities." Nelson v. LaCrosse Cty. Dist. Atty. (State of Wis.), 301 F.3d 820,

[5] Had the plaintiff sued the individual defendants in their *personal* capacities, he could have sought relief against them under 42 U.S.C. §1983, assuming he had standing.

827 n.7 (7th Cir. 2002) (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123-24 (1984)).

There are three exceptions to Eleventh Amendment immunity: (1) congressional abrogation, Nuñez v. Ind. Dep't of Child Servs., 817 F.3d 1042, 1044 (7th Cir. 2016) (citing Alden v. Maine, 527 U.S. 706, 754-55 (1999); (2) "a state's waiver of immunity and consent to suit," id. (citing College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999)); and (3) a suit "against state officials seeking only prospective equitable relief," id. (citing *Ex parte* Young, 209 U.S. 123, 159-60 (1908)). None of the exceptions apply here.

Congress did not abrogate the sovereign immunity of the states when it enacted 42 U.S.C. §1983. Will, 491 U.S. at 66. Wisconsin has not waived its immunity from civil actions under §1983. See Shelton v. Wis. Dep't of Corr., 376 Wis. 2d 525, *2 (Table) (Ct. App. 2017) (citing Boldt v. State, 101 Wis. 2d 566, 584-85 (1981)). And the *Ex parte* Young doctrine does not apply when a plaintiff asserts a claim—regardless of the relief requested—against a state official based on *state* law. Pennhurst, 465 U.S. at 106 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). "In determining whether the *Ex parte* Young doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward

inquiry' into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 636 (2002) (quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296 (1997); McDonough Assocs., Inc. v. Grunloh, 722 F.3d 1043, 1051 (7th Cir. 2013)).

Count IV of the amended complaint alleges "[w]ide-spread ballot fraud," a *state*-law claim. The Eleventh Amendment bars that claim against the defendants in their official capacities. The Eleventh Amendment also bars the plaintiff's federal claims to the extent that the plaintiff seeks retrospective relief. The Supreme Court has refused to extend the *Ex Parte* Young doctrine to claims for retrospective relief. Green v. Mansour, 474 U.S. 64, 68 (1985) (citing Pennhurst, 465 U.S. at 102-103). The amended complaint seeks (1) a "temporary restraining order instructing Defendants to de-certify the results of the General Election for the Office of President," dkt. no. 9 at 47; (2) "an order instructing the Defendants to certify the results of the General Election for Office of the President in favor of President Donald Trump," id.; (3) "a temporary restraining order" prohibiting the tabulation of unlawful votes," id.; (4) an order preserving voting equipment and data, id.; (5) "the elimination of the mail ballots from counting in the 2020 election," id. at 48; (6) the disqualification of Wisconsin's electors from participating in the 2020 election, id.; and (7) an order directing Wisconsin's electors to vote for President Donald Trump, id. As the court already has noted, with the possible exception of the

request for an order preserving voting equipment and data, the relief the plaintiff requests is retrospective.

The plaintiff disagrees—he characterizes the certification of the election results as "ongoing violations of federal law . . . ongoing violations of the Electors and Elections Clauses, the Equal Protection and Due Process Clauses, as well as likely violations of federal law including the Voting Rights Act and the Help America Vote Act." Dkt. No. 72 at 25-26. The plaintiff has not brought claims under the latter two statutes and saying that a completed event is an ongoing violation doesn't make it so.

2. *Exclusive Remedy/Exhaustion/Abstention*

Defendant Evers moves to dismiss because Wisconsin provides a remedy to address irregularities or defects during the voting or canvassing process: Wis. Stat. §9.01(11). Four days ago, the Wisconsin Supreme Court held that §9.01(6) requires that a party aggrieved after a recount must appeal by filing suit in circuit court. Trump v. Evers, No. 2020AP1971-OA, Order at *2 (Wis. Dec. 3, 2020). In a concurring opinion, Justice Hagedorn noted that Wis. Stat. §9.01(11) provides that §9.01 is the exclusive judicial remedy for an aggrieved candidate. Defendant Evers points out that President Trump has lawsuits pending in state circuit courts and argues that those cases raise many of the claims the plaintiff raises here. Dkt. No. 59 at 11. He argues that the process detailed in Wis. Stat. §9.01 is designed to allow an aggrieved candidate to resolve election challenges promptly, and that for this court to permit the

plaintiff to circumvent that process "would eviscerate Wisconsin's careful process for properly and quickly deciding election challenges." Id. at 11-12.

Of course, the plaintiff has no redress under Wis. Stat. §9.01, because he is not a "candidate" in the sense of that statute. But Evers argues that there was a form of state-law relief available to the plaintiff. He asserts that the plaintiff should have filed a complaint with the Wisconsin Elections Commission under Wis. Stat. §5.06. Dkt. No. 59 at 13. That statute allows a voter dissatisfied with the Wisconsin election process to file a written, sworn complaint with the elections board. Wis. Stat. §5.06(1). The statute states that no voter may "commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official" without first filing a complaint under §5.06(1). Wis. Stat. §5.06(2). Evers points out that the plaintiff has not demonstrated that he followed this procedure and thus that the plaintiff did not exhaust his remedies before coming to federal court. Dkt. No. 59 at 14.

The plaintiff does not directly respond to the exhaustion argument. He simply maintains that he has a right to bring his constitutional claims in federal court, argues that there is no evidence that the statute Evers cites is an exhaustion requirement and asserts that the court has federal question jurisdiction under 28 U.S.C. §1331 and supplemental jurisdiction over any state-law claims under 28 U.S.C. §1367.[6] Dkt. No. 72 at 27-28. He neatly

[6] The court could exercise supplemental jurisdiction over state-law claims only if there remained federal claims to which those state-law claims related. As the court has noted, it likely would have been required to dismiss the federal

sidesteps the question of why he did not follow a procedure that would have allowed him to direct his concerns to the entity in charge of enforcing the state's election laws and in a way that likely would have brought those concerns to that entity's attention long before the election results were certified.

Because the court has concluded that the plaintiff does not have standing, and because the plaintiff has sued defendants who either are not suable under §1983 or are protected by Eleventh Amendment immunity, the court will not accept the invitations of the defendants and *amici* to wade into the waters of the various types of abstention. If this court does not have subject matter jurisdiction, there is no case or controversy from which it should abstain. The court agrees with the parties, however, that the relief the plaintiff requests—asking a federal judge to order a state governor to decertify the election results for an entire state and direct that governor to certify a different outcome—constitutes "an extraordinary intrusion on state sovereignty from which a federal court should abstain under longstanding precedent." Dkt. No. 57 at 28.

3. *Laches*

The defendants argue that the equitable defense of laches requires dismissal, because the plaintiff "inexplicably waited until after the election, after the canvassing, after the recount, after the audit, after results were

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claims because the plaintiff asserted them through §1983 against state officials in their official capacities, which in turn would have required dismissal of any state claims for lack of subject matter jurisdiction.

certified, and indeed until the eve of the electoral college vote, to bring his claim of state law violations and widespread fraud . . . .” Dkt. No. 52 at 11. See also, Dkt. No 59 at 17 (“the doctrine of laches bars [the plaintiff’s] claims because he has unreasonably delayed bringing his claims to the detriment not only of Defendants, but also of the nearly 3.3 million voters in Wisconsin who voted in this last election under the good-faith belief that they were following the correct procedures to have their votes counted.”).

The doctrine of laches “addresses delay in the pursuit of a right when a party must assert that right in order to benefit from it.” Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 820 (7th Cir. 1999). “For laches to apply in a particular case, the party asserting the defense must demonstrate: (1) an unreasonable lack of diligence by the party against whom the defense is asserted and (2) prejudice arising therefrom.” Id. (citing Cannon v. Univ. of Health Scis./The Chicago Med. Sch., 710 F.2d 351, 359 (7th Cir. 1983)). “Timeliness must be judged by the knowledge of the plaintiffs as well as the nature of the right involved.” Jones v. v. Markiewicz-Qualkinbush, 842 F.3d 1053, 1061 (7th Cir. 2016).

“The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept.” Id. at 1060-61. In fact, the Seventh Circuit has held that such “claims must be brought expeditiously . . . to afford the district court sufficient time in advance of an election to rule without disruption of the electoral cycle.” Id. at 1061 (internal quotation marks and citations omitted).

The amended complaint asserts that the alleged problems with the Dominion voting machine software "have been widely reported in the press and have been subject to investigation." Dkt. No. 9 at ¶12. It cites to exhibits from January and August of 2020. Dkt. No. 9 at 5 n.1. It cites to the WEC's May 13, 2020 directive to clerks that they should not reject the ballots of "indefinitely confined" absentee voters. Id. at ¶40. It cites an October 18, 2016 memorandum issued by the WEC instructing clerks on how to handle absentee envelope certifications that did not bear the address of the witness. Id. at ¶44. It cites October 19, 2020 instructions by the WEC to clerks about filling in missing ballot information. Id. at ¶45.

Defendant Evers points out that the plaintiff's own allegations demonstrate that he has known about the Dominion voting machine issues since long before the election. Dkt. No. 59 at 17-18. He argues that the WEC guidance about which the plaintiff complains came in directives issued in October 2016, May 2020 and October 2020. Id. He asserts that the plaintiff has made no effort "to offer a justifiable explanation for why he waited until weeks after the election to challenge" these issues. Id. at 18. The WEC defendants advise the court that the issue regarding "indefinitely confined" voters was litigated in state court almost eight months ago. Dkt. No. 54 at 9 (citing Pet. For Original Action dated March 27, 2020, Supreme Court of Wisconsin, No. 2020AP000557-OA). They assert that the plaintiff "waited to challenge widely-known procedures until after millions of voters cast their ballots in reliance on those procedures." Id. at 6. They state that "[i]f the doctrine of laches means

anything, it is that Plaintiff here cannot overturn the results of a completed and certified election through preliminary relief in this late-filed case." Id.

The plaintiff first responds that laches is a defense and shouldn't be raised on a motion to dismiss. Dkt. No. 72 at 22. He then claims that he could not have known the bases of any of these claims until after the election. Id. at 22-23. He says that because Wisconsin election officials did not "announce or publicize their misconduct," and because, he alleges, they "prevented Republican poll watchers from observing the ballot counting and handling," it took him time to gather the evidence and testimony he attached to the amended complaint. Id. at 23. Finally, he alleges that the delay post-November 3, 2020 is attributable to the defendants' failure to timely complete the election count. Id. He insists that he filed this suit at the earliest possible moment—the day after the certification. Id.

The court has determined that the plaintiff does not have standing. That means that the court does not have jurisdiction to assess the plaintiff's credibility, and it will refrain from doing so.

4. *Failure to state a claim upon which relief can be granted*

Both defendants asked the court to dismiss the case for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Because the court does not have subject matter jurisdiction, it will not address the sufficiency of the substantive claims in the amended complaint.

5. *Requests for injunctive relief*

For the same reason, the court cannot address the merits of the plaintiff's request for preliminary injunctive relief.

V. Conclusion

This court's authority to grant relief is confined by the limits of the Constitution. Granting the relief the plaintiff requests would take the court far outside those limits, and outside the limits of its oath to uphold and defendant the Constitution. The court will grant the defendants' motion to dismiss.

The court **GRANTS** Defendant Governor Tony Evers's Motion to Dismiss Plaintiff's Amended Complaint. Dkt. No. 51.

The court **GRANTS** Defendant Wisconsin Elections Commission and Its Members' Motion to Dismiss. Dkt. No. 53.

The court **DENIES AS MOOT** Plaintiff's Corrected Motion for Declaratory, Emergency, and Permanent Injunctive Relief. Dkt. No. 6.

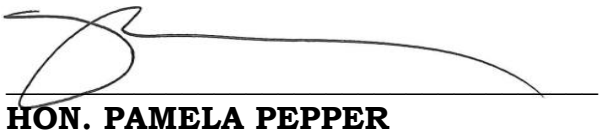
The court **DENIES AS MOOT** Plaintiff's Amended Motion for Temporary Restraining Order and Preliminary Injunction to be Considered in an Expedited Manner Dkt. No. 10.

The court **DISMISSES** the Amended Complaint for Declaratory, Emergency, and Permanent Injunctive Relief. Dkt. No. 9.

The court **ORDERS** that this case is **DISMISSED.**

Dated in Milwaukee, Wisconsin this 9th day of December, 2020.

BY THE COURT:



HON. PAMELA PEPPER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

CASE NO. 2:20-cv-1771

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that William Feehan, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the District Court's Order dated December 9, 2020, ECF Dkt. No.83, dismissing his Amended Complaint for Declaratory, Emergency, and Permanent Injunctive Relief, Dkt. No. 9, and denying as moot his Corrected Motion for Declaratory, Emergency, and Permanent Injunctive Relief, Dkt. No. 6, and Amended Motion for Temporary Restraining Order and Preliminary Injunction to be Considered in an Expedited Manner, Dkt. No. 10.

Dated December 10, 2020.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

JUDGMENT IN A CIVIL CASE

v.

Case No. 20-cv-1771-pp

WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and TONY EVERS,

Defendants.

☐ **Jury Verdict.** This case came before the court for a trial by jury. The parties have tried the issues, and the jury has rendered its verdict.

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

THE COURT ORDERS AND ADJUDGES that judgment is entered in favor of the defendants and against the plaintiff.

THE COURT ORDERS that this case is **DISMISSED**.

Approved and dated in Milwaukee, Wisconsin this 9th day of December, 2020.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

GINA M. COLLETTI
Clerk of Court

s/ *Cary Biskupic*
(by) Deputy Clerk

APPEAL,ATTYOPEN,RF

United States District Court
Eastern District of Wisconsin (Milwaukee)
CIVIL DOCKET FOR CASE #: 2:20−cv−01771−PP

Feehan et al v. Wisconsin Elections Commission et al
Assigned to: Chief Judge Pamela Pepper
Cause: 42:1983 Civil Rights Act

Date Filed: 12/01/2020
Jury Demand: None
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

Plaintiff

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Plaintiff

Derrick Van Orden
TERMINATED: 12/03/2020

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V.

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V.

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Movant

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represented by **James Gesbeck**
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Date Filed	#	Page	Docket Text
12/01/2020	1		COMPLAINT against All Plaintiffs by William Feehan. (Filing Fee PAID $400 receipt number AWIEDC−3652059) (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit, # 20 Exhibit, # 21 Exhibit, # 22 Exhibit, # 23 Exhibit, # 24 Exhibit, # 25 Exhibit, # 26 Exhibit, # 27 Exhibit)(Dean, Michael) (Additional attachment(s) added on 12/1/2020: # 28 Civil Cover Sheet) (jcl).
12/01/2020	2		MOTION for Temporary Restraining Order by All Plaintiffs. (Dean, Michael)
12/01/2020	3		BRIEF in Support filed by All Plaintiffs re 2 MOTION for Temporary Restraining Order . (Dean, Michael)
12/01/2020			NOTICE Regarding assignment of this matter to Chief Judge Pamela Pepper; Consent/refusal forms for Magistrate Judge Joseph to be filed within 21 days; the consent/refusal form is available here. Pursuant to Civil Local Rule 7.1 a disclosure statement is to be filed upon the first filing of any paper and should be filed now if not already filed. (jcl)
12/01/2020	4		Magistrate Judge Jurisdiction Form filed by All Plaintiffs. (NOTICE: Pursuant to Fed.R.Civ.P. 73 this document is not viewable by the judge.) (Dean, Michael)
12/01/2020	5		DISCLOSURE Statement by All Plaintiffs. (Dean, Michael)
12/01/2020	6		MOTION to Amend/Correct Docket # 2: PLAINTIFFS MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF by All Plaintiffs. (Attachments: # 1 Text of Proposed Order)(Dean, Michael)
12/02/2020	7		ORDER signed by Chief Judge Pamela Pepper on 12/2/2020 re 6 Amended Motion for Injunctive Relief. (cc: all counsel)(cb)
12/02/2020	8		NOTICE of Appearance by Sidney Powell on behalf of All Plaintiffs. Attorney(s) appearing: Sidney Powell (Powell, Sidney)
12/03/2020	9		AMENDED COMPLAINT *removing Derrick Van Orden as Plaintiff* against All Defendants filed by William Feehan. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, #

			15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit)(Dean, Michael)
12/03/2020	10		Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF by William Feehan. (Attachments: # 1 Information Sheet Proposed Briefing Schedule)(Dean, Michael)
12/03/2020	11		NOTICE of Appearance by Jeffrey A Mandell on behalf of Tony Evers. Attorney(s) appearing: Jeffrey A. Mandell (Mandell, Jeffrey)
12/03/2020	12		NOTICE of Appearance by Rachel E Snyder on behalf of Tony Evers. Attorney(s) appearing: Rachel E. Snyder (Snyder, Rachel)
12/03/2020	13		NOTICE of Appearance by Howard Kleinhendler on behalf of William Feehan. Attorney(s) appearing: Howard Kleinhendler (Kleinhendler, Howard)
12/03/2020	14		MOTION to Intervene by James Gesbeck. (Attachments: # 1 Proposed Answer, # 2 Certificate of Service)(asc)
12/03/2020	15		BRIEF in Support filed by James Gesbeck re 14 MOTION to Intervene. (asc)
12/03/2020	16		MOTION Reassign Case Pursuant to Civil L.R. 3(b) by Tony Evers. (Attachments: # 1 Exhibit 1 − Notice from Case 20−CV−1785)(Mandell, Jeffrey)
12/03/2020	17		NOTICE of Appearance by Sean Michael Murphy on behalf of Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission. Attorney(s) appearing: Sean Michael Murphy, Jody J. Schmelzer, Colin T. Roth (Murphy, Sean)
12/03/2020	18		RESPONSE to Motion filed by William Feehan re 16 MOTION Reassign Case Pursuant to Civil L.R. 3(b) . (Dean, Michael)
12/03/2020	19		ORDER signed by Chief Judge Pamela Pepper on 12/3/2020 DENYING 16 defendant Tony Evers's motion to reassign case pursuant to Civil L.R. 3(b). (cc: all counsel)(cb)
12/03/2020	20		NOTICE of Appearance by Charles G Curtis, Jr on behalf of Democratic National Committee. Attorney(s) appearing: Charles G. Curtis (Curtis, Charles)
12/03/2020	21		NOTICE of Appearance by Michelle M Umberger on behalf of Democratic National Committee. Attorney(s) appearing: Michelle M. Umberger (Umberger, Michelle)
12/03/2020			Party Derrick Van Orden terminated. (amb) (Entered: 12/04/2020)
12/04/2020	22		MOTION to Intervene by Democratic National Committee. (Attachments: # 1 Exhibit 1−Proposed Answer, # 2 Text of Proposed Order)(Umberger, Michelle)
12/04/2020	23		BRIEF in Support filed by Democratic National Committee re 22 MOTION to Intervene . (Umberger, Michelle)
12/04/2020	24		DISCLOSURE Statement by Democratic National Committee. (Umberger, Michelle)
12/04/2020	25		

			REPLY filed by Tony Evers *to Plaintiff's Proposed Briefing Schedule*. (Mandell, Jeffrey)
12/04/2020	26		REPLY filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission *to Plaintiff's Proposed Briefing Schedule*. (Murphy, Sean)
12/04/2020	27		NOTICE of Appearance by Justin A Nelson on behalf of Tony Evers. Attorney(s) appearing: Justin A. Nelson (Nelson, Justin)
12/04/2020	28		NOTICE of Appearance by Davida Brook on behalf of Tony Evers. Attorney(s) appearing: Davida Brook (Brook, Davida)
12/04/2020	29		ORDER signed by Chief Judge Pamela Pepper on 12/4/2020. 10 Plaintiff's amended motion GRANTED IN PART to extent that it is Civil L.R. 7(h) expedited non−dispositive motion for expedited briefing schedule; defendant's opposition to plaintiff's amended motion due by 5:00 PM on 12/7/2020, plaintiff's reply due by 5:00 PM on 12/8/2020. The court DEFERS RULING on plaintiff's amended motion to extent that it asks the court to issue TRO or preliminary injunction. (cc: all counsel)(cb)
12/04/2020	30		NOTICE of Appearance by Stephen Shackelford, Jr on behalf of Tony Evers. Attorney(s) appearing: Stephen L. Shackelford, Jr. (Shackelford, Stephen)
12/04/2020	31		NOTICE of Appearance by Richard Manthe on behalf of Tony Evers. Attorney(s) appearing: Richard A. Manthe (Manthe, Richard)
12/04/2020	32		NOTICE of Appearance by Paul M Smith on behalf of Tony Evers. Attorney(s) appearing: Paul M. Smith (Smith, Paul)
12/04/2020	33		7(h) Expedited NON−DISPOSITIVE MOTION to Intervene by James Gesbeck. (Attachments: # 1 Certificate of Service)(lz)
12/04/2020	34		MOTION for Leave to File Excess Pages by Tony Evers. (Mandell, Jeffrey)
12/04/2020	35		NOTICE of Appearance by Sidney Powell on behalf of All Plaintiffs. Attorney(s) appearing: Sidney Powell (Powell, Sidney)
12/04/2020	36		TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/4/2020 re 34 MOTION for Leave to File Excess Pages filed by Tony Evers: The defendant seeks leave to file a brief in excess of the thirty pages allowed by Civil L.R. 7(f) because he proposes to both oppose the plaintiff's amended motion for injunctive relief and support his own, not yet filed motion to dismiss in the same pleading. The court appreciates any party's effort to streamline litigation, but would prefer that the defendant file separate briefs opposing the plaintiff's amended motion and supporting his own. This will avoid confusion when the plaintiff responds. The court **DENIES** the defendant's motion for leave to file excess pages. **NOTE: There is no document associated with this text−only order.** (cc: all counsel)(Pepper, Pamela)
12/04/2020	37		ORDER signed by Chief Judge Pamela Pepper on 12/4/2020 allowing James Gesbeck to file *amicus curiae* brief by 5:00 PM on 12/7/2020. (cc: all counsel, via mail to James Gesbeck)(cb)
12/05/2020	38		TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/5/2020 re 22 MOTION to Intervene filed by Democratic National Committee signed by

			Chief Judge Pamela Pepper on 12/5/2020: Under Civil L.R. 7(b), the plaintiff's response is due by December 25, 2020; because December 25 is a federal holiday, the court **ORDERS** that the plaintiff's response is due by December 28, 2020. **NOTE: There is no document associated with this text−only order.** (cc: all counsel)(Pepper, Pamela)
12/05/2020	39		TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/05/2020 re 33 MOTION to Intervene filed by James Gesbeck: Under Civil L.R. 7(h), the plaintiff's response is due by Friday, December 11, 2020. **NOTE: There is no document associated with this text−only order.** (cc: all counsel)(Pepper, Pamela)
12/05/2020	40		Expedited MOTION to Intervene by Democratic National Committee. (Umberger, Michelle)
12/06/2020	41		ORDER signed by Chief Judge Pamela Pepper on 12/6/2020. 40 Movant DNC's expedited motion to intervene GRANTED to extent that court has expedited its ruling on original motion to intervene. 22 Movant DNC's original motion to intervene DENIED. Movant DNC may file *amicus curiae* brief by 5:00 PM on 12/7/2020. (cc: all counsel)(cb)
12/06/2020	42		BRIEF in Support filed by William Feehan re 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF *Amended Brief*. (Dean, Michael)
12/06/2020	43		MOTION To File Separate Reply Briefs by William Feehan. (Dean, Michael)
12/06/2020	44		MOTION To Hold Consolidated Evidentiary Hearing/Trial by William Feehan. (Dean, Michael)
12/07/2020	45		TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/7/2020 re 43 MOTION To File Separate Reply Briefs filed by William Feehan: The court **GRANTS** the plaintiff's motion for leave to file separate reply briefs. If the defendants file a single opposition brief, the plaintiff must file one reply to that brief. If the defendants file separate opposition briefs, the plaintiff may file a reply for each opposition brief. The plaintiff also may file a separate reply for each brief filed by an amicus. (In other words, the plaintiff could file up to four reply briefs if the defendants file separate briefs and each amicus files a brief.) If the defendants file a separate motion to dismiss, the plaintiff may file an opposition brief of up to thirty pages under Civil L.R. 7(b). **NOTE: There is no document associated with this text−only order.** (cc: all counsel)(Pepper, Pamela)
12/07/2020			NOTICE of Hearing: Status Conference set for 12/8/2020 at 11:00 AM by telephone before Chief Judge Pamela Pepper. The parties are to appear by calling the court's conference line at 888−557−8511 and entering access code 4893665#. (cc: all counsel)(cb)
12/07/2020	46		RESPONSE to Motion filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 44 MOTION To Hold Consolidated Evidentiary Hearing/Trial . (Murphy, Sean)
12/07/2020	47		

			AMICUS BRIEF in Opposition to 6 MOTION for Injunctive Relief filed by James Gesbeck. (asc)
12/07/2020	48		NOTICE of Appearance by David S Lesser on behalf of Democratic National Committee. Attorney(s) appearing: David S. Lesser (Lesser, David)
12/07/2020	49		NOTICE of Appearance by Jamie Dycus on behalf of Democratic National Committee. Attorney(s) appearing: Jamie S. Dycus (Dycus, Jamie)
12/07/2020	50		NOTICE of Appearance by Stephen Morrissey on behalf of Tony Evers. Attorney(s) appearing: Stephen E. Morrissey (Morrissey, Stephen)
12/07/2020	51		MOTION to Dismiss *Plaintiff's Amended Complaint* by Tony Evers. (Mandell, Jeffrey)
12/07/2020	52		RESPONSE to Motion filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 2 MOTION for Temporary Restraining Order . (Murphy, Sean)
12/07/2020	53		MOTION to Dismiss by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission. (Murphy, Sean)
12/07/2020	54		BRIEF in Support filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 53 MOTION to Dismiss . (Murphy, Sean)
12/07/2020	55		BRIEF in Opposition filed by Tony Evers re 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF . (Attachments: # 1 Exhibit 1 WVA v. WEC, # 2 Exhibit 2 Trump v. Boockvar, # 3 Exhibit 3 Wood v. Raffensperger, # 4 Exhibit 4 Wood v. Raffensperger (11th Cir.), # 5 Exhibit 5 King v. Whitmer TRO Decision, # 6 Exhibit 6 Zilisch v. R.J. Reynolds, # 7 Exhibit 7 Consolidate Water v..40 Acres, # 8 Exhibit 8 Jefferson v. Dane County, # 9 Exhibit 9 Bognet v. Secretary of Commonwealth, # 10 Exhibit 10 O'Bright v. Lynch Order, # 11 Exhibit 11 Trump v. Evers Order)(Mandell, Jeffrey)
12/07/2020	56		MOTION for Leave to File *Amicus Curiae Brief* by Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss. (Goode, Joseph)
12/07/2020	57		BRIEF in Opposition filed by Democratic National Committee re 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF . (Attachments: # 1 Exhibit 1 − Washington Voters Alliance Case, # 2 Exhibit 2 − Trump v. Evers Case, # 3 Exhibit 3 − Mueller v. Jacobs Case, # 4 Exhibit 4 − King v. Benson Case, # 5 Exhibit 5 − March 29, 2020 Guidance, # 6 Exhibit 6 − Jefferson v. Dane Case, # 7 Exhibit 7 − October 18, 2016 Guidance, # 8 Exhibit 8 − Election Manual, # 9 Exhibit 9 − November 10, 2020 Guidance)(Umberger, Michelle)
12/07/2020	58		UNPUBLISHED Decision *Pursuant to Civil L.R. 7(J)* filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission (Attachments:

			# 1 Exhibit 1− Martel v. Condos, # 2 Exhibit 2− Moore v. Circosta, # 3 Exhibit 3− Donald J. Trump for President v. Cegavske, # 4 Exhibit 4− Bognet v. Secretary of the Commonwealth of Pennsylvania, # 5 Exhibit 5− Donald J. Trump for President v. Boockvar, # 6 Exhibit 6− Donald J. Trump for President v. Pennsylvania, # 7 Exhibit 7− Wood v. Raffensperger, # 8 Exhibit 8− King v. Whitmer)(Murphy, Sean)
12/07/2020	59		BRIEF in Support filed by Tony Evers re 51 MOTION to Dismiss *Plaintiff's Amended Complaint* . (Attachments: # 1 Exhibit 1 Whitake v. Kenosha, # 2 Exhibit 2 Bognet v. Secretary of Commenwealth, # 3 Exhibit 3 Hotze v. Hollins, # 4 Exhibit 4 Wood v. Raffensperger, # 5 Exhibit 5 Wood v. Raffensperger (11th Cir.), # 6 Envelope 6 Moore v. Circosta, # 7 Exhibit 7 Trump v. Evers, # 8 Exhibit 8 WVA v. WEC, # 9 Exhibit 9 Trump Notice of Appeal, # 10 Exhibit 10Trump v. Biden Consolidation Order, # 11 Exhibit 11 Andino v. Middleton, # 12 Exhibit 12 Massey v. Coon, # 13 Exhibit 13 Balsam v. New Jersey, # 14 Exhibit 14 Thompson v. Alabama, # 15 Exhibit 15 Braynard Expert Report)(Mandell, Jeffrey)
12/07/2020	60		BRIEF in Opposition filed by Tony Evers re 44 MOTION To Hold Consolidated Evidentiary Hearing/Trial . (Mandell, Jeffrey)
12/08/2020	61		NOTICE of Appearance by Jon Greenbaum on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Jon Greenbaum (Greenbaum, Jon)
12/08/2020	62		NOTICE of Appearance by Allison E Laffey on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Allison E. Laffey (Laffey, Allison)
12/08/2020	63		NOTICE of Appearance by John W Halpin on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: John W. Halpin (Halpin, John)
12/08/2020	64		NOTICE of Appearance by Mark M Leitner on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Mark M. Leitner (Leitner, Mark)
12/08/2020	65		NOTICE of Appearance by Joseph S Goode on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Joseph S. Goode (Goode, Joseph)
12/08/2020	66		NOTICE of Appearance by Ezra D Rosenberg on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Ezra D. Rosenberg (Rosenberg, Ezra)
12/08/2020	67		NOTICE of Appearance by Jacob Conarck on behalf of Wisconsin State Conference NAACP. Attorney(s) appearing: Jacob P. Conarck (Conarck, Jacob)
12/08/2020	68		NOTICE of Appearance by Seth P Waxman on behalf of Democratic National Committee. Attorney(s) appearing: Seth P. Waxman (Waxman, Seth)
12/08/2020	69		ORDER signed by Chief Judge Pamela Pepper on 12/8/2020 GRANTING 56 Motion for Leave to File *Amicus Curiae Brief* filed by Earnestine Moss, Dorothy Harrell, Wisconsin State Conference NAACP, Wendell J. Harris, Sr. (cc: all counsel)(cb)

12/08/2020	70		Audio of statue conference held on 12/8/2020 at 11:08 a.m.; File Size (51.1 MB) (kgw)
12/08/2020	71		Court Minutes and Order from the Status Conference held before Chief Judge Pamela Pepper on 12/8/2020. The court **DENIES** the 44 Motion for Consolidated Evidentiary Hearing and Trial on the Merits. The court **ORDERS** the plaintiff to file his responses to the motions to dismiss (Dkt. Nos. 51 and 53) and reply brief in support of his motion for injunctive relief (Dkt. No. 10) by December 8, 2020 at 5 p.m. CST. The court **ORDERS** that if the defendants and amici wish to file reply briefs in support of the motions to dismiss, they must do so by December 9, 2020 at 3 p.m. CST. (Court Reporter Thomas Malkiewicz.) (kgw)
12/08/2020	72		BRIEF in Opposition filed by William Feehan re 51 MOTION to Dismiss *Plaintiff's Amended Complaint*, 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF , 53 MOTION to Dismiss *and Consolidated in Reply/Response to Response Briefs of Defendants and Opposition Briefs of Amici*. (Attachments: # 1 Exhibit, # 2 Exhibit)(Dean, Michael)
12/09/2020	73		REPLY BRIEF in Support filed by Tony Evers re 51 MOTION to Dismiss *Plaintiff's Amended Complaint* . (Attachments: # 1 Exhibit 1 American Commercial Barge Lines v. Reserve FTL, # 2 Exhibit 2 Trump v. Secretary of Pennsylvania)(Mandell, Jeffrey)
12/09/2020	74		ORDER signed by Chief Judge Pamela Pepper on 12/9/2020. 14 James Gesbeck's motion to intervene DENIED. 33 James Gesbeck's Civil LR 7(h) motion to intervene GRANTED to extent it asks the court to expedite ruling on motion to intervene and DENIED to extent it asks the court to grant motion to intervene. (cc: all counsel)(cb)
12/09/2020	75		MOTION to Seal Document *Public Motion Prior to Filing Sealed/Restricted Exhibits* by William Feehan. (Attachments: # 1 Exhibit, # 2 Exhibit)(Dean, Michael)
12/09/2020	76		BRIEF in Support filed by William Feehan re 75 MOTION to Seal Document *Public Motion Prior to Filing Sealed/Restricted Exhibits* . (Dean, Michael)
12/09/2020	77		REPLY BRIEF in Support filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 53 MOTION to Dismiss . (Murphy, Sean)
12/09/2020	78		UNPUBLISHED Decision *Pursuant to Civil L.R. 7(J)* filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission (Attachments: # 1 Exhibit 1− King, # 2 Exhibit 2− Bognet, # 3 Exhibit 3− Boockvar, # 4 Exhibit 4− Hotze, # 5 Exhibit 5− Massey, # 6 Exhibit 6− Aguila Management, # 7 Exhibit 7− Solow Building Co.)(Murphy, Sean)
12/09/2020	79		BRIEF in Opposition filed by Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP re 6 MOTION to Amend/Correct Docket # 2: PLAINTIFFS MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF , 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED

			MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF . (Goode, Joseph)
12/09/2020	80		NOTICE of Appearance by Christopher Bouchoux on behalf of Democratic National Committee. Attorney(s) appearing: Christopher Bouchoux (Bouchoux, Christopher)
12/09/2020	81		NOTICE by Tony Evers *Notice of Supplemental Authority* (Brook, Davida)
12/09/2020	82		ORDER signed by Chief Judge Pamela Pepper on 12/9/2020 DENYING 75 plaintiff's Motion to Seal Document *Public Motion Prior to Filing Sealed/Restricted Exhibits*. (cc: all counsel)(cb)
12/09/2020	83		ORDER DISMISSING CASE signed by Chief Judge Pamela Pepper on 12/9/2020. 51 Defendant Evers's motion to dismiss plaintiff's amended complaint GRANTED. 53 Defendants Wisconsin Elections Commission and its Members motion to dismiss GRANTED. 6 Plaintiff's corrected motion for declaratory, emergency and permanent injunctive relief DENIED as moot. 10 Plaintiff's amended motion for temporary restraining order and preliminary injunction to be considered in an expedited manner DENIED as moot. 9 Plaintiff's amended complaint for declaratory, emergency and permanent injunctive relief DISMISSED. (cc: all counsel)(cb)
12/10/2020	84		NOTICE OF APPEAL as to 83 Order Dismissing Case,,, Terminate Motions,, by William Feehan. Filing Fee PAID $505, receipt number AWIEDC−3664794 (cc: all counsel) (Dean, Michael)
12/10/2020	85		JUDGMENT signed by Deputy Clerk and approved by Chief Judge Pamela Pepper on 12/9/2020. (cc: all counsel)(cb)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

CASE NO. 2:20-cv-1771

v.

WISCONSIN ELECTIONS COMMISSION, and its members ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMAN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., in their official capacities, GOVERNOR TONY EVERS, in his official capacity,

Defendants.

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that William Feehan, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the District Court's Order dated December 9, 2020, ECF Dkt. No.83, dismissing his Amended Complaint for Declaratory, Emergency, and Permanent Injunctive Relief, Dkt. No. 9, and denying as moot his Corrected Motion for Declaratory, Emergency, and Permanent Injunctive Relief, Dkt. No. 6, and Amended Motion for Temporary Restraining Order and Preliminary Injunction to be Considered in an Expedited Manner, Dkt. No. 10.

Dated December 10, 2020.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

Case No. 20-cv-1771-pp

v.

WISCONSIN ELECTIONS COMMISSION,
COMMISSIONER ANN S. JACOBS,
MARK L. THOMSEN, JULIE M. GLANCEY,
COMMISSIONER MARGE BOSTELMANN,
COMMISSIONER DEAN KNUDSON,
ROBERT F. SPINDELL, JR. and TONY EVERS,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (DKT. NOS. 51, 53), DENYING AS MOOT PLAINTIFF'S AMENDED MOTION FOR INJUNCTIVE RELIEF (DKT. NO. 6) AND DISMISSING CASE

At 8:24 a.m. on Tuesday, December 1, 2020—twenty-eight days after the November 3, 2020 general Presidential election, thirteen days after President Donald J. Trump petitioned for a recount in Milwaukee and Dane Counties and one day after the Wisconsin Elections Commission and the Governor certified that Joseph R. Biden and Kamala D. Harris had received the highest number of votes following that recount—two plaintiffs filed this lawsuit in federal court for the Eastern District of Wisconsin. Although state law governs the election process, the plaintiffs brought the suit in a federal court, asking that federal court to order state officials to decertify the election results that state officials had certified the day before, order the Governor not to transmit to the Electoral

College the certified results he'd transmitted the day before and order the Governor to instead transmit election results that declared Donald Trump to be "the winner of this election."

The election that preceded this lawsuit was emotional and often divisive. The pleadings that have been filed over the past week are passionate and urgent. People have strong, deep feelings about the right to vote, the freedom and opportunity to vote and the value of their vote. They should. But the legal question at the heart of this case is simple. Federal courts have limited jurisdiction. Does a federal court have the jurisdiction and authority to grant the relief this lawsuit seeks? The answer is no.

Federal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so. After a week of sometimes odd and often harried litigation, the court is no closer to answering the "why." But this federal court has no authority or jurisdiction to grant the relief the remaining plaintiff seeks. The court will dismiss the case.

I. Background

According to defendant the Wisconsin Elections Commission's November 18, 2020 canvass results, 3,297,352 Wisconsin residents voted in the November 3, 2020 general election for President. https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf. Of those, 49.45%—1,630,673—voted for Biden for President and Harris for Vice-President. Id. Biden and Harris received

approximately 20,600 more votes than Donald J. Trump for President and Michael R. Pence for Vice-President. Id.

Under Wis. Stat. §9.01(1)(a)(1), any candidate in an election where more than 4,000 votes were cast for the office the candidate seeks and who trails the leading candidate by no more than 1 percent of the total votes cast for that office may petition for a recount. On November 18, 2020, Donald J. Trump filed a recount petition seeking a recount of "all ballots in all wards in every City, Village, Town and other voting unit in Dane and Milwaukee Counties." https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/WEC%20-%20Final%20Recount%20Order_0.pdf. The Wisconsin Elections Commission granted that petition and ordered a recount "using the ballot count method selected per Wis. Stat. § 5.90(1) unless otherwise ordered by a court per Wis. Stat. § 5.90(2)." Id. The WEC ordered the recount to be completed by 12:00 p.m. on December 1, 2020. Id.

The partial recount was completed on November 29, 2020. https://elections.wi.gov/elections-voting/recount. On November 30, 2020, the chair of the Wisconsin Elections Commission signed the statement of canvass certifying that Joseph R. Biden and Kamala D. Harris received the greatest number of votes and certified their electors. https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President.pdf. The same day—November 30, 2020—Wisconsin Governor Tony Evers announced that he had signed the Certificate of Ascertainment for the electors for Biden and Harris.

https://content.govdelivery.com/accounts/WIGOV/bulletins/2aef6ff. The web site for the National Archives contains the Certificate of Ascertainment signed by Evers on November 30, 2020, certifying that out of 3,298,041 votes cast, Biden and Harris and their electors received 1,630,866 votes, while Trump and Pence and their electors received 1,610,184 votes. https://www.archives.gov/files/electoral-college/2020/ascertainment-wisconsin.pdf.

On December 1, 2020, Donald J. Trump filed a petition for an original action in the Wisconsin Supreme Court. Trump v. Evers, Case No. 2020AP001971-OA (available at https://wscca.wicourts.gov). On December 3, 2020, the court denied leave to commence an original petition because under Wis. Stat. §9.01(6), appeals from the board of canvassers or the Wisconsin Elections Commission must be filed in circuit court. Dkt. No. 59-7. The same day—December 3, 2020—Donald J. Trump filed lawsuits in Milwaukee and Dane Counties. Trump v. Biden, Case No. 2020CV007092 (Milwaukee County Circuit Court; Trump v. Biden, Case No. 2020CV002514 (Dane County Circuit Court) (both available at https://wcca.wicourts.gov). Those cases have been consolidated and are scheduled for hearing on December 10, 2020 at 1:30 (or for December 11, 2020 at 9:00 a.m. if the parties are litigating in another court).

Meanwhile, on December 2, 2020, Donald J. Trump filed suit in federal court for the Eastern District of Wisconsin, suing the defendants in this case and others. Trump v. Wisconsin Elections Commission, *et al.*, Case No. 20-cv-

1785-BHL (E.D. Wis.). There is an evidentiary hearing scheduled for December 10, 2020 at 9:00 a.m. by videoconference. Id. at Dkt. No. 45.

II. Procedural History of the Case

On December 1, 2020—the day after Governor Evers signed the Certificate of Ascertainment—William Feehan and Derrick Van Orden filed a complaint in the federal court for the Eastern District of Wisconsin. Dkt. No. 1. Feehan identified himself as a resident of La Crosse, Wisconsin, a registered voter and "a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin." Id. at ¶23. Van Orden was identified as a resident of Hager City, Wisconsin and the 2020 Republican nominee for Wisconsin's Third Congressional District Seat for the U.S. House of Representatives. Id. at ¶26. The complaint alleged that "Mr. Van Orden 'lost' by approximately 10,000 votes to the Democrat incumbent," and stated that "[b]ecause of the illegal voting irregularities as will be shown below, Mr. Van Orden seeks to have a new election ordered by this court in the Third District, with that election being conducted under strict adherence with the Wisconsin Election Code." Id. at ¶27.

The complaint alleged "massive election fraud, multiple violations of the Wisconsin Election Code, *see e.g.,* Wis. Stat. §§5.03, *et seq.,* in addition to the Election and Electors Clauses and Equal Protection Clause of the U.S. Constitution" based on "dozens of eyewitnesses and the statistical anomalies and mathematical impossibilities detailed in the affidavits of expert witnesses." Dkt. No. 1 at ¶1. The plaintiffs alleged four causes of action: (1) violation of the

Elections and Electors Clauses and 42 U.S.C. §1983; (2) violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. §1983 and the "invalid enactment of regulations & disparate treatment of absentee vs. mail-in ballots"; (3) denial of the Fourteenth Amendment due process right to vote and 42 U.S.C. §1983; and (4) "wide-spread ballot fraud." Id. at ¶¶106-138. The plaintiffs asked for the following emergency relief:

> 1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results:
>
> 2. An order enjoining Governor Evers from transmitting the currently certified election results [sic] the Electoral College;
>
> 3. An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election;
>
> 4. An immediate emergency order to seize and impound all servers, software, voting machines, tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes §9.01(1)(b)11 related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiffs;
>
> 5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;
>
> 6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;
>
> 7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. Const. Amend. XIV;
>
> 8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that invalidates the certified results if

the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;

9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;

10. A permanent injunction prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;

11. Immediate production of 48 hours of security camera recording of all rooms used in the voting process at the TCF Center[1] for November 3, 2020 and November 4, 2020;

12. Plaintiffs further request the Court grant such relief as is just and proper including but not limited to, the costs of this action and their reasonable attorney fees and expenses pursuant to 42 U.S.C. §1988.

Id. at 50.

With the complaint, the plaintiffs filed a motion for declaratory, emergency, and permanent injunctive relief, dkt. no. 2, and memorandum in support of that motion, dkt. no. 3. The motion stated that the specific relief the plaintiff requested was set out in an attached order, dkt. no. 2 at 1, but there was no order attached. The memorandum asked the court to grant the motion and enter the proposed order, dkt. no. 3 at 10; again, no proposed order was provided.

Later that day, the plaintiffs filed a corrected motion for declaratory, emergency, and permanent injunctive relief. Dkt. No. 6. The plaintiff did not file a memorandum in support of this motion but did file a proposed order. Dkt.

[1] The plaintiff may be referring to the TCF convention center in Detroit, Michigan; the court is unaware of a "TCF Center" in Wisconsin.

No. 1. The relief described in the proposed order was almost identical to the relief requested in the complaint, with a notable exception. Instead of the request for an order requiring production of forty-eight hours of security camera footage from the TCF Center, the plaintiffs asked for an order prohibiting "any wiping or alteration of data or other records or materials" from voting machines, tabulations machines, servers, software and printers, and any alteration or destruction of ballot applications, ballot return envelopes, ballot images, paper ballots, registration lists, poll lists or other election materials, "across the state of Wisconsin." Dkt. No. 6-1 at 7-8.

Two days later, plaintiff Freehan filed an amended complaint removing Derrick Van Orden as a plaintiff. Dkt. No. 9. It differed from the original complaint only in the removal of Van Orden as a plaintiff.

Along with the amended complaint, the plaintiff filed a motion for temporary restraining order and preliminary injunction "to be considered in an expedited manner." Dkt. No. 10. The plaintiff did not file a memorandum in support of the motion; his main purpose in filing the amended motion appears to have been to ask the court to rule on the motion quickly. The plaintiff attached a proposed briefing schedule, suggesting that the court should require the defendants to respond by 8:00 p.m. on Friday, December 4, 2020 and require him to file his reply by 8:00 p.m. on Saturday, December 5, 2020; he proposed to submit the matter on briefs without argument. Dkt. No. 10-1. The defendants objected to this severely truncated schedule. Dkt. Nos. 25

(defendant Evers), 26 (defendants Wisconsin Election Commission and its members).

Construing the amended motion as a Civil L.R. 7(h) expedited, non-dispositive motion for an expedited briefing schedule, the court granted the request on December 4, 2020, setting a schedule that, while not as expedited as the plaintiff requested, gave the parties a short leash. Dkt. No. 29.

Wisconsin voter James Gesbeck filed a motion to intervene, dkt. no. 14, and later an expedited motion to intervene, dkt. no. 33. The Democratic National Committee (DNC) also sought to intervene. Dkt. No. 22. The court denied both requests, dkt. nos. 41 (DNC), 74 (Gesbeck), but allowed both to file *amicus curiae* briefs by the December 7, 2020 deadline it had set for the defendants to oppose the plaintiff's motion for injunctive relief, dkt. nos. 37 (Gesbeck), 41 (DNC).

Recall that the plaintiff had not filed a memorandum in support of the December 1, 2020 corrected motion for injunctive relief or in support of the December 3, 2020 amended motion. On Sunday, December 6, 2020, the plaintiff filed an amended memorandum in support of the motion. Dkt. No. 42. In the first paragraph, the plaintiff indicated that he filed the amended memorandum to "avoid possible confusion from removal of Mr. Van Orden is [sic] plaintiff." Id. at 1. He said that the memorandum was identical to the original memorandum "except for amending references to plaintiffs to refer to Mr. Meehan [sic] only and correcting several inadvertent references to the State of Georgia." Id.

On Sunday, December 6, the plaintiff also filed a motion asking the court to schedule an evidentiary hearing "on the merits" for Wednesday, December 9, 2020 at 9:00 a.m. Dkt. No. 44. Although the plaintiff had not asked for a hearing in any prior motion, and had represented in the amended motion that he was submitting the matter on the briefs without argument, the plaintiff explained that he had changed his position based on the court's December 4, 2020 order. Id. at ¶4. The court denied the motion in a telephonic hearing on December 8, 2020, explaining that before it could reach the merits of the motion for injunctive relief, it must resolve issues regarding justiciability. Dkt. Nos. 70, 71.

In opposing the plaintiff's amended motion for injunctive relief, defendants Wisconsin Election Commission and its members argued that the case has jurisdictional and procedural defects that require dismissal. Dkt. No. 52 at 5. They asserted that the plaintiff lacks Article III standing, id. at 6, that the doctrine of laches bars consideration of his claims, id. at 8 and that the Eleventh Amendment shields them from the relief he seeks, id. at 10. They asserted that the complaint fails to state a claim for relief under the Election or Electors Clauses, id. at 11, or under the Equal Protection or Due Process Clauses, id. at 13, and they contended that the plaintiff's purported evidence fails to meet basic evidentiary standards, id. at 20.

In his brief opposing injunctive relief, defendant Governor Evers argued that there is no evidence of fraud in Wisconsin's election results, dkt. no. 55 at 10, that the plaintiff's witnesses and experts lack qualifications and are

unreliable, id. at 12, and that the plaintiff has failed to state valid claims, id. at 22. Evers also argued that an adequate remedy at law exists because the recount procedures under Wis. Stat. §9.01 unambiguously constitute the "exclusive remedy" for challenging election results. Id. at 55. With respect to the balancing of harms, Evers argued that the requested relief would prejudice the defendants and "retroactively deprive millions of Wisconsin voters of their constitutional right to vote in the 2020 presidential election." Id. at 32.

James Gesbeck, filing as friend of the court, opposed the motion for injunctive relief on the grounds that the plaintiff has not established subject matter jurisdiction and that the court should defer to the Wisconsin courts and Wisconsin's procedural mechanism for resolving disputed elections. Dkt. No. 47 at 11, 12. Gesbeck applied the balancing analysis for injunctive relief, asserting that relief in this court would moot the Wis. Stat. §9.01 challenge pending in the Wisconsin courts. Id. at 17. He argued that this, in turn, would put the "insurmountable weight of the Federal Government on the election result in Wisconsin and would be unbalancing the scale created by the system of checks and balances that have been maintained since the Constitution was adopted." Id. at 17.

Amicus DNC opposed the motion on many of the same grounds as the other defendants. Dkt. No. 57. The DNC argued that the plaintiff lacks standing, that the doctrine of laches bars the plaintiff's claims, that the defendants are immune from suit under the Eleventh Amendment, that principles of federalism and comity require abstention, and that the plaintiff

fails to state a claim upon which relief can be granted. Dkt. No. 57. It asserted that the plaintiff cannot establish irreparable harm and has an adequate remedy of law. Id. at 36.

The defendants have filed motions to dismiss the case. The WEC and its members seek dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 53. Defendant Evers seeks dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), failure to plead fraud with particularity under Fed. R. Civ. P. 9(b) and failure to state a claim under Fed. R. Civ. P. 12(b)(6).

The Wisconsin State Conference of the NAACP and three of its members (Dorothy Harrell, Wendell J. Harris, Jr. and Earnestine Moss) sought leave to file an *amicus* brief on the question of whether the court should dismiss the case. Dkt. No. 56. The court granted that motion. Dkt. No. 69.

III. Procedural Posture

From the outset, the plaintiff has sought to have the claims in the complaint resolved through a motion for injunctive relief under Fed. R. Civ. P. 65. The relief he requests in the second iteration of his motion for injunctive relief is the same relief he requests in the lawsuit itself. As defendant Evers points out in his motion to dismiss, the plaintiff's December 6, 2020 motion for an evidentiary hearing (which the court has denied) "makes clear that what [the plaintiff] seeks—without any discovery or basic adversarial development of evidence—is a trial and final adjudication on the merits." Dkt. No. 51 at 2.

Evers points to Fed. R. Civ. P. 12(i), which states that "[i]f a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial." Because Evers has raised defenses under Rule 12(b)(1) and (b)(6), and because in asking for a hearing the plaintiff sought what would have been a trial on the merits of the causes of action raised in the complaint, the court must resolve the defenses before moving to the merits.

As the court stated in the hearing on December 8, that requirement is more than a procedural nicety. The defendants and the *amici* have raised questions about this federal court's authority to decide the claims alleged in the amended complaint. If this court does not have jurisdiction to hear and decide those claims, any decision it might make regarding the merits of the claims would be invalid. For that reason, the court considers the motions to dismiss before considering the plaintiff's request for injunctive relief.

IV. The Motions to Dismiss

A. Legal Standards

1. *Rule 12(b)(1)—Lack of Subject Matter Jurisdiction*

In evaluating a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), "the court must first determine whether a factual or facial challenge has been raised." Silha v. ACT, Inc., 807 F.3d 169, 173 (7th Cir. 2015) (citing Apex Dig., Inc. v. Sears, Roebuck & Co., 572 F.3d 440, 443 (7th Cir. 2009). A *factual* challenge alleges that even if the pleadings are

sufficient, no subject matter jurisdiction exists. A *facial* challenge alleges that the complaint is deficient—that the plaintiff has not sufficiently alleged subject matter jurisdiction. Id. The difference matters—a court reviewing a factual challenge "may look beyond the pleadings and view any evidence submitted to determine if subject matter exists," while a court reviewing a facial challenge "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff." Id.

2. *Rule 12(b)(6)—Failure to State a Claim*

A motion to dismiss for failure to state a claim under Rule 12(b)(6) challenges the legal sufficiency of the complaint. A complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint must contain enough facts, accepted as true, to "state a claim for relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). "[T]he plausibility determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." W. Bend Mut. Ins. Co. v. Schumacher, 844 F.3d 670, 676 (7th Cir. 2016).

3. *42 U.S.C. § 1983*

To state a claim for a civil rights violation under 42 U.S.C. §1983, a plaintiff must allege that someone deprived him of a right secured by the Constitution or the laws of the United States and that whoever deprived him of that right was acting under the color of state law. D.S. v. E. Porter Cty. Sch. Corp., 799 F.3d 793, 798 (7th Cir. 2015) (citing Buchanan–Moore v. Cty. of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009)).

B. Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994). Subject matter jurisdiction has to do with "the courts' statutory or constitutional *power* to adjudicate the case." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 (1998) (emphasis in the original). "Article III, §2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" Id. at 102. The defendants raise a factual challenge to the court's subject matter jurisdiction, arguing that regardless of the pleadings, subject matter jurisdiction does not exist. The court may look outside the four corners of the complaint in considering that challenge.

1. *Standing*

Article III standing is an "essential component of Article III's case-or-controversy requirement," and therefore a "threshold jurisdictional question." Apex Dig., Inc., 572 F.3d at 443 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). "[N]o principle is more fundamental to the judiciary's proper

role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Raines v. Byrd, 521 U.S. 811, 818 (1997). "Standing to sue is part of the common understanding of what it takes to make a justiciable case." Id. "Standing is an element of subject-matter jurisdiction in a federal civil action . . . ." Moore v. Wells Fargo Bank, N.A., 908 F.3d 1050, 1057 (7th Cir. 2018).

> The "irreducible constitutional minimum of standing contains three requirements. *Lujan v. Defenders of Wildlife*, [504 U.S. 555], at 560 [1992)]. First and foremost, there must be (and ultimately proved) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, [495 U.S. 149], at 149 [1990] (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 . . . (1983)). Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 . . . (1976). And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. *Id.*, at 45-46 . . .; see also *Warth v. Seldin*, 422 U.S. 490, 505 . . . (1975). This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 . . . (1990).

Steel Co., 523 U.S. at 102-104.

Regarding the "injury in fact" leg of the triad, the injury must be "particularized," such that it "affect[s] the plaintiff in a personal and individual way." Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 1548 (2016) (citations omitted). The injury also must be "concrete"—it must be "real," not "abstract." Id. A plaintiff cannot show a particularized and concrete injury by showing "that he has merely a general interest common to all members of the public." *Ex parte* Levitt, 302 U.S. 633, 634 (1937). A plaintiff may not use a

"federal court as a forum in which to air his generalized grievances about the conduct of government . . . ." United States v. Richardson, 418 U.S. 166, 174 (1974) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1942)).

As for the redressability leg of the triad, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." Steel Co., 523 U.S. at 107. The plaintiff must show that it is "likely," not merely "speculative," that the injury the plaintiff alleges will be "redressed by a favorable decision." Lujan, 504 U.S. at 561 (quoting Simon, 426 U.S. at 38).

In addition to the Article III case-or-controversy requirement, there is a prudential limitation in Fed. R. Civ. P. 17(a), requiring that "[e]very action must be prosecuted in the name of the real party in interest," Fed. R. Civ. P. 17(a), and "requir[ing] that the complaint be brought in the name of the party to whom that claim 'belongs' or the party who 'according to the governing substantive law, is entitled to enforce the right.'" Rawoof v. Texor Petroleum Co., Inc., 521 F.3d 750, 756 (7th Cir. 2008) (quoting Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 193 (2d Cir. 2003)); see also RK Co. v. See, 622 F.3d 846, 850 (7th Cir. 2010) ("the real party in interest rule is only concerned with whether an action can be maintained in the plaintiff's name," and is "similar to, but distinct from, constitutional ... standing"). The real party in interest is "the one who by the substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." Act II Jewelry, LLC v. Wooten, 301 F. Supp. 3d 905, 910-911 (N.D.

Ill. 2018) (quoting Checkers, Simon & Rosner v. Lurie Corp., 864 F.2d 1338, 1343 (7th Cir. 1988) (internal citations omitted)). The purpose of the rule is to "protect the defendant against a subsequent action by the party actually entitled to recover." RK Co., 622 F.3d at 850 (citing Fed. R. Civ. P. 17(a) advisory committee note (2009)).

The amended complaint alleges that the plaintiff has standing "as a voter and as a candidate for the office of Elector under Wis. Stat. §§ 5.10, *et seq* (election procedures for Wisconsin electors)." Dkt. No. 9 at 8. The defendants argue that the plaintiff lacks standing in either capacity. Dkt. No. 43 at 4-5; Dkt. No. 59 at 8-9.

a. Standing as a voter

The amended complaint does not assert that the plaintiff voted in the 2020 general Presidential election in Wisconsin. It says that he is a registered voter, but it does not affirmatively state that he voted in the election the results of which he asks the court to decertify. His counsel asserts in the brief in opposition to the defendants' motion to dismiss—filed eight days after the original complaint and five days after the amended complaint—that the plaintiff "voted for President Trump in the 2020 General Election." Dkt. No. 72 at 17. For the first time at the motion to dismiss stage, the plaintiff provided his own declaration, in which he attests that he voted for President Donald J. Trump in the November 3, 2020 election. Dkt. No. 72-1.

The plaintiff claims that the defendants failed to comply "with the requirements of the Wisconsin Election Code and thereby diluted the lawful

ballots of the Plaintiff and of other Wisconsin voters and electors in violation of the United States Constitution guarantee of Equal Protection." Dkt. No. 9 at ¶116. He alleges that the defendants enacted regulations or issued guidance that, in intent and effect, favored Democratic absentee voters over Republican voters, and that these regulations and this guidance enable and facilitated voter fraud. Id. The plaintiff also asserts that he has a right to have his vote count and claims that a voter is injured if "the important of his vote is nullified." Id. at ¶127.

Several lower courts have addressed the plaintiff's theory that a single voter has standing to sue as a result of his vote being diluted by the possibility of unlawful or invalid ballots being counted. The district court for the Middle District of North Carolina catalogued a few of those decisions, all finding that the harm was too speculative and generalized—not sufficiently "concrete"—to bestow standing. These courts concluded that the vote dilution argument fell into the "generalized grievance" category. In Moore v. Circosta, the court wrote:

> Indeed, lower courts which have addressed standing in vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted, as Plaintiffs have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters. See, e.g., Donald Trump for President, Inc. v. Cegavske, Case No. 2:20-CV-1445 JCM (VCF), __ F. Supp. 3d __, __, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more tangibly benefits them than it does the public at large.") (internal quotations and modifications omitted); Martel v. Condos, Case No. 5:20-cv-131, ___ F. Supp. 3d ___, ___, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); Paher v. Cegavske, 457 F. Supp.

> 3d 919, 926-27 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); Am. Civil Rights Union v. Martinez-Rivera, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution [is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.")
>
> Although "[i]t would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because affects all voters," Martel, __ F. Supp.3d at __, 2020 WL 5755289, at *4, the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury necessary for Article III standing. Compared to a claim of gerrymandering, in which the injury is specific to a group of voters based on their racial identity or the district in which they live, all voters in North Carolina, not just Individual Plaintiffs, would suffer the injury Individual Plaintiffs allege. This court finds this injury to generalized to give rise to a claim of vote dilution . . . .

Moore v. Circosta, Nos. 1:20CV911, 1:20CV912, 2020 WL 6063332, at *14,

The court agrees. The plaintiff's alleged injuries are injuries that any Wisconsin voter suffers if the Wisconsin election process were, as the plaintiff alleges, "so riddled with fraud, illegality, and statistical impossibility that this Court, and Wisconsin's voters, courts, and legislators, cannot rely on, or certify, any numbers resulting from this election." Dkt. No. 9 at ¶5. The plaintiff has not alleged that, as a voter, he has suffered a particularized, concrete injury sufficient to confer standing.

The plaintiff argues that it is incorrect to say that his standing is based on a theory of vote dilution. Dkt. No. 72 at 19. He then proceeds to opine that he has shown in great detail how his vote and the votes of others who voted for Republican candidates was diluted. Id. at 19-20. He says the vote dilution did not affect all Wisconsin voters equally, asserting that it had a negative impact

on those who voted for Republican candidates and a positive impact on those who voted for Democratic candidates. Id. at 20. He asserts that he also has shown that the defendants sought to actively disenfranchise voters for Republican candidates. Id. These are the same arguments he made in the amended complaint and they still show no more than a generalized grievance common to any voter. Donald J. Trump carried some Wisconsin counties; the voters who voted for Joseph R. Biden in those counties could make the same complaints the plaintiff makes here.

The plaintiff says that his interests and injury are "identical to that of President Trump," and cites to Bush v. Gore, 531 U.S. 98 (2000), which he characterizes as holding that "then-candidate George W. Bush of Texas had standing to raise the equal protection rights of Florida voters that a majority of the Supreme Court deemed decisive." Id. at 21 (quoting Hawkins v. Wayne Twp. Bd. of Marion Cty., Ind, 183 F. Supp. 2d 1099, 1103 (S.D. Ind. 2002)). The court is stymied by the plaintiff's assertion that his interests and injury are identical to that of President Trump. As the court will explain in the next section, contrary to his assertions, the plaintiff is not a "candidate" in the way that President Trump was a candidate for office. President Trump's interest is in being re-elected, while the plaintiff has said that his interest is in having his vote count and not be diluted. If his interest is solely in getting President Trump re-elected, as opposed to having his vote be counted as part of a valid election process, the court is aware of no constitutional provision that gives him the right to have his candidate of choice declared the victor.

Nor does the decision in Bush v. Gore say what the plaintiff claims it says. As far as the court can tell, the word "standing" does not appear in the majority opinion. In the Indiana decision the plaintiff cites, then-district court judge David Hamilton wrote: "If candidate Hawkins did not have standing to raise equal protection rights of voters, it would be difficult to see how then-candidate George W. Bush of Texas had standing to raise equal protection rights of Florida voters . . . in *Bush v. Gore*." Hawkins, 183 F. Supp.2d at 1103. But the Supreme Court in Bush v. Gore never explained how candidate Bush had standing, and even if it had, the plaintiff is not a candidate.

Nor has the plaintiff demonstrated redressability. He complains that his vote was diluted and that he wants his vote to count. But he asks the court to order the results of the election de-certified and then to order defendant Evers to certify the election for Donald J. Trump. Even if this *federal* court had the authority to order the governor of the *state* of Wisconsin to certify the results of a national presidential election for any candidate—and the plaintiff has presented *no* case, statute or constitutional provision providing the court with that authority—doing so would further invalidate and nullify the plaintiff's vote. The plaintiff wants Donald J. Trump to be certified as the winner of the Wisconsin election *as a result of the plaintiff's vote*. But what he asks is for Donald J. Trump to be certified the winner *as a result of judicial fiat*. That remedy does not redress the plaintiff's alleged injury. Even the plaintiff concedes in his brief in opposition to dismissal that "[d]efendant Evers can . . . provide partial redress in terms of the requested injunctive relief, namely, by

refusing to certify or transmit the election results, and providing access to voting machines, records and other 'election materials.'" Dkt. No. 72 at 21. The plaintiff is wrong in that regard, as the court will explain when it discusses the related doctrine of mootness; the point is that even from the plaintiff's perspective, the remedy he seeks will not fully redress the injury he claims.

Circling back to Article III's "case or controversy" requirement, the Supreme Court has held that "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006) (quoting Lewis v. Casey, 518 U.S. 343, 357 (1996)). In other words, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." Gill v. Whitford, ___ U.S. ___, 138 S. Ct. 1916, 1934 (2018) (citing Cuno, 547 U.S. at 353). Even if the plaintiff had alleged a particularized, concrete injury and even if the relief he seeks would redress that injury, that relief is not tailored to the alleged injury. As the Michigan court explained in King v. Whitmer, Case No. 20-13134 at Dkt. No. 62, page 25 (E.D. Mich. Dec. 7, 2020), "Plaintiffs' alleged injury does not entitle them to seek their requested remedy because the harm of having one's vote invalidated or diluted is not remedied by denying millions of others *their* right to vote."

The plaintiff's status as a registered voter does not give him standing to sue.

b. Standing as a nominee for elector

The amended complaint alleges that the plaintiff has standing to bring the suit "as a candidate for the office of Elector under Wis. Stat. §§ 5.10, et seq." Dkt. No. 9 at ¶26. The amended complaint cites to "Wis. Stat. §§5.10, et seq," but the court is not sure what the "*et seq.*"—"and what follows"—contributes to the plaintiff's belief that he has standing. Wis. Stat. §5.10 is followed by Wis. Stat. §5.15, which concerns the "Division of municipalities into wards," as well as other sections concerning polling places and voting machines. The court assumes the plaintiff meant to reference only Wis. Stat. §5.10.

Wis. Stat. §5.10 states:

> 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.

Relying on this section, the amended complaint directs the court's attention to Carson v. Simon, 978 F.3d 1051, 1057 (8th Cir. 2020).[2] In Carson,

[2] The complaint also cites two Supreme Court cases: McPherson v. Blacker, 146 U.S. 1, 27 (1892) and Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (2000) (*per curiam*). Neither address the Article III standing of an elector. In McPherson, the Court reviewed the Michigan supreme court's decision on the constitutionality of the Michigan statute governing selection of electors. While the parties who brought the suit in state court were nominees for presidential electors, the Court did not address their standing (or lack of it). The petitioner in Bush was the then-Republican candidate, George W. Bush, who was challenging the Florida supreme court's interpretation of its election statutes; again, the Court did not address (and had no need to address) the standing of an elector to sue.

two certified nominees of the Republican Party to be presidential electors sued the Minnesota secretary of state, challenging a consent decree that "essentially ma[de] the statutorily-mandated absentee ballot receipt deadline inoperative." Id. at 1054. As a result of the decree, the secretary of state had directed election officials "to count absentee ballots received up to a week after election day, notwithstanding Minnesota law." Id. The potential electors sought an injunction in federal court, but the district court found they lacked standing. Id.

The Eighth Circuit reversed, finding that the potential electors had standing as candidates "because the plain text of Minnesota law treats prospective presidential electors as candidates." Id. at 1057. The court found that candidates suffered particularized and concrete injury from an inaccurate vote tally. Id. at 1058.

The plaintiff urges this court to reach the same conclusion. An Eighth Circuit decision is not binding on this court, but the question is whether the reasoning in that decision is persuasive. A member of the panel in Carson dissented from the majority opinion and expressed doubt about the potential electors' standing. Circuit Judge Jane Kelley wrote:

> . . . I am not convinced the Electors have Article III standing to assert claims under the Electors Clause. Although Minnesota law at times refers to them as "candidates," see, e.g., Minn. Stat. § 204B.03 (2020), the Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president. Id. § 208.04 subdiv. 1 ("[A] vote cast for the party candidates for president and vice president shall be deemed a vote

> for that party's electors.") They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals. But even if we nonetheless assume the Electors should be treated like traditional political candidates for standing purposes, I question whether these particular candidates have demonstrated the "concrete and particularized" injury necessary for Article III standing. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 . . . (1992). To the contrary, their claimed injury—a potentially "inaccurate vote tally" . . .—appears to be "precisely the kind of undifferentiated, generalized grievance about the conduct of government: that the Supreme Court has long considered inadequate for standing. Lance v. Coffman, 549 U.S. 437, 442 . . . (2007) (examining standing in the context of a claim under the Elections Clause). Because the Electors, should they in fact assume that office, must swear an oath to mark their Electoral College ballots for the presidential candidate who won the popular vote, Minn. Stat. § 208.43 (2015), it is difficult to discern how they have more of a "particularized stake," Lance, 549 U.S. at 442 . . . , in Minnesota conducting fair and transparent elections than do the rest of the state's voters.

Id. at 1063.

Judge Kelly's reasoning is the more persuasive. Under Wisconsin law, a vote for the candidates of president and vice president is a vote for the electors of those candidates. Wis. Stat. § 5.65(3)(a). When the electors meet, they must vote for the candidates of the party that nominated the electors. Wis. Stat. §7.75(2). Like Minnesota electors, Wisconsin electors may be referred to as "candidates" by statute but they are not traditional political candidates presented to and chosen by the voting public. Their interest in seeing that every valid vote is correctly counted and that no vote is diluted is no different than that of an ordinary voter. And the court has concluded, as did Judge Kelly, that the plaintiff's status as a voter does not give him standing.

The amended complaint does not mention the Elections Clause or the Electors Clause of the Constitution in relation to standing. In his brief in

opposition to the motions to dismiss, the plaintiff alleges that he has standing under "Electors and Elections Clause." Dkt. No. 72 at 17. He asserts that the Eighth Circuit found in Carson that electors had "both Article III and Prudential standing under the Electors and Elections Clauses." Id. The plaintiff reads Carson differently than does this court. The Carson majority did not mention the Electors or Elections Clause in its discussion of Article III standing. The entire discussion of Article III standing was based on Minnesota law. See Carson, 978 F.3d at 1-57-1058. In its discussion of *prudential* standing, the Carson majority stated that "[a]lthough the Minnesota Legislature may have been harmed by the Secretary's usurpation of its constitutional right under the Elector Clause, the Electors have been as well." Id. at 1058-59.

This court has found that the plaintiff does not have Article III standing, but even if had not, it disagrees that the Elector Clause[3] provides prudential standing to electors. Article II, Section 1, Clause 2 of the Constitution—known as the "Elector Clause"—states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of

[3] The plaintiff cites the "Elector and Elections Clause" or "Clauses" in the same breath but does not discuss the text of either. It is not clear how the plaintiff sees the Elections Clause—Article II, Sec. 1, cl. 3—as providing him with standing and the plaintiff has not developed that argument. The court notes only that in Lance v. Coffman, the Supreme Court found that plaintiffs whose only alleged injury was that the Elections Clause had not been followed did not have standing because they alleged "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." Lance, 549 U.S. at 442.

Trust or Profit under the United States, shall be appointed an Elector." The clause confers on the *state* the right to appoint electors and confers on the *legislature* the right to decide the way those electors will be appointed. It confers no right on the *electors* themselves. Just a few months ago, the Supreme Court stated as much in Chiafalo v. Washington, ___ U.S. ___, 140 S. Ct. 2316, 2328 (July 6, 2020), in the context of considering whether a state could penalize an elector for breaking his pledge and voting for someone other than the candidate who won his state's popular vote:[4] "Article II and the Twelfth Amendment give States broad powers over electors, and give electors themselves no rights." The Court went on to say,

> Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like [the state of] Washington, it chooses to sanction an elector for breaching his promise. Then, too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

Id.

The plaintiff's status as a nominee to be a Republican elector does not give him Article III or prudential standing.

[4] Wisconsin's "pledge law"—Wis. Stat. §7.75(1)—does not impose a penalty on a "faithless elector."

2. *Mootness*

Mootness "has sometimes been called 'the doctrine of standing set in a time frame.'" Chi. Joe's Tea Room, LLC v. Vill. of Broadview, 894 F.3d 807, 812-13 (7th Cir. 2018) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 189 (2000)). A case becomes moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam)). "Mootness strips a federal court of subject-matter jurisdiction." Id. at 815 (citing DJL Farm LLC v. EPA, 813 F.3d 1048, 1050 (7th Cir. 2016). This is because "[a] case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III.'" United States v. Sanchez-Gomez, __ U.S. __, 138 S. Ct. 1532, 1537 (2018) (quoting Already, LLC, 568 U.S. at 91).

The amended complaint states that the plaintiff brought this suit "to prohibit certification of the election results for the Office of President of the United States in the State of Wisconsin . . . ." Dkt. No. 9 at ¶27. The plaintiff asks the court to prohibit from occurring an event that already has occurred—an event that occurred the day before he filed this lawsuit and nine days before the court issues this order. He asks the court to enjoin defendant Evers from transmitting the certified election results, id. at ¶142—an event that already has occurred. He asks the court to order that certain votes not be counted, id., when the vote counting has been over since November 29.

The plaintiff himself demonstrates the mootness problem in his brief in opposition to dismissal. He states that defendant Evers can provide partial redress for his alleged injuries "by refusing to certify or transmit the election results." Dkt. No. 72 at 21. But Evers already has certified and transmitted the elections results—he cannot refuse to do that which he already has done.

At the December 8 hearing, the plaintiff argued that there remains a live controversy because the electors have not yet voted and will not do so until Monday, December 14, 2020. Dkt. No. 70. This argument ignores the fact that several of the events that dictate which slate of nominees are certified to vote already have taken place and had taken place at the time the plaintiff filed his complaint. The votes have been counted. In two counties, they've been counted twice. The WEC chair has signed the canvass and certified electors for Biden/Harris. The governor has signed the Certificate of Ascertainment and the National Archive has that certificate.

In his brief in opposition to dismissal, the plaintiff points to this court's own order earlier in this case, determining that the plaintiff had not demonstrated why the December 8, 2020 "safe harbor" deadline under 3 U.S.C. §5 was the date by which the plaintiff needed the court to issue a decision to preserve his rights. Dkt. No. 72 at 25 (citing Dkt. No. 29 at 7). The court noted in that order that the plaintiff's brief in opposition to a motion to reassign another case erroneously referred to December 8 as the date that the College of Electors was scheduled to meet. Dkt. No. 29 at 7. The court pointed out that that was incorrect, and that December 8 was the deadline by which the state

would have to make its final determination of any election dispute in order to avoid congressional challenge. Id. The court then said, "Because the electors do not meet and vote until December 14, 2020, the court will impose a less truncated briefing schedule than the one the plaintiff proposes . . . ." Dkt. No. 29.

The plaintiff says that "[i]mplicit in this Court's determination" is the assumption that "this Court can still grant some or perhaps all of the relief requested and this Plaintiff's claims are not moot." Dkt. No. 72 at 25. The plaintiff reads more into the court's language than the court intended. In the plaintiff's earliest pleadings—the first motion for injunctive relief, the "corrected" motion for injunctive relief, the "amended" motion for injunctive relief—the plaintiff failed to identify a date by which he needed the court to act. The first time he identified such a date was in his brief in opposition to a motion to reassign another case—and then, the reference was oblique. In his opposition brief, the plaintiff stated, "With the College of Electors scheduled to meet December 8, there could never be a clearer case of 'justice delayed is justice denied.'" Dkt. No. 18 at 1. From that, the court deduced that the plaintiff needed the court to act by the date the College of Electors was scheduled to meet. But the College of Electors was not scheduled to meet December 8—it was (and is) scheduled to meet December 14. So the court set a briefing schedule that would give the defendants a chance to respond, but would complete briefing ahead of the event the plaintiff deemed important—the

electoral meeting and vote. That was not a decision by this court—implicit or explicit—on the mootness of the plaintiff's claims.

The plaintiff also asserts that the "cutoff for election-related challenges, at least in the Seventh Circuit, appears to be the date that the electors meet, rather than the date of certification." Dkt. No. 72 at 24. He cites Swaffer v. Deininger, No. 08-CV-208, 2008 WL 5246167 (E.D. Wis. Dec. 17, 2008). Swaffer is not a Seventh Circuit case, and the court is not aware of a Seventh Circuit case that establishes a "cutoff for election-related challenges." And the plaintiff seems to have made up the "quote" in his brief that purports to be from Swaffer. The plaintiff asserts that these words appear on page 4 of the Swaffer decision: "even though the ***election*** has passed, the meeting of electors obviously has not, so plaintiff's claim here is hardly moot." Dkt. No. 72 at 24-25. The court has read page 4 of Swaffer—a decision by this court's colleague, Judge J.P. Stadtmueller—three times and cannot find these words. In fact, Swaffer did not involve a challenge to a presidential election and it did not involve electors. Mr. Swaffer sought to challenge a Wisconsin statute requiring individuals or groups promoting or opposing a referendum to file a registration statement and take other actions. Swaffer, 2008 WL 5246167, at *1. The defendants argued that the election (in which the plaintiff had taken steps to oppose a referendum on whether to allow liquor sales in the Town of Whitewater) was over and that Swaffer's claims thus were moot. Id. at 2. Judge Stadtmueller disagreed, finding that because Swaffer alleged that he intended

to violate the statutes at issue in the future, a credible threat of prosecution remained. Id. at 3.

Some of the relief the plaintiff requests may not be moot. For example, he asks for an immediate order seizing voting machines, ballots and other materials relating to the physical mechanisms of voting. And there remain five days until the electors vote—as the events of this year have shown, anything can happen. But most of the relief the plaintiff seeks is beyond this court's ability to redress absent the mythical time machine.

3. *Conclusion*

The plaintiff does not have Article III standing to sue in federal court for the relief he seeks.

C. Other Arguments

Standing is the *sine qua non* of subject matter jurisdiction. Absent standing, the court does not have jurisdiction to consider the plaintiff's claims on the merits. Arguably, it has no jurisdiction to consider the other bases the defendants and *amici* assert for why the court should dismiss the case. At the risk of producing dicta (and spilling even more ink on a topic that has received an ocean's worth by now), the court will briefly address some of the other bases for the sake of completeness.

1. *Eleventh Amendment Immunity*

The defendants argue that the plaintiff's claims are barred by the Eleventh Amendment. Dkt. No. 59 at 15; Dkt. No. 54 at 10. The Eleventh Amendment "bars most claims in federal court against a state that does not

consent to suit." Carmody v. Bd. of Trs. of Univ. of Ill., 893 F.3d 397, 403 (7th Cir. 2018) (citations omitted). States are immune from suit in federal court "unless the State consents to the suit or Congress has abrogated their immunity." Tucker v. Williams, 682 F.3d 654, 658 (7th Cir. 2012) (citing Seminole Tribe v. Florida, 517 U.S. 44 (1996)). This includes suits brought in federal court against nonconsenting states by their own citizens. See, *e.g.*, Edelman v. Jordan, 415 U.S. 651, 663 (1974); Hans v. Louisiana, 134 U.S. 1, 15 (1890) ("Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?").

The plaintiff has sued the Governor of Wisconsin, Tony Evers, in his official capacity; the Wisconsin Elections Commission and each member of the WEC in his or her official capacity. Before going too much further down the Eleventh Amendment road, the court notes that the vehicle for the plaintiff to bring his constitutional claims—his claims under the Elector Clause, the Elections Clause, the Equal Protection Clause and the Due Process Clause—is 42 U.S.C. §1983. Section 1983 prohibits a "person" acting under color of state law from violating another's civil rights. The Wisconsin Elections Commission is not a "person." It is an arm of the state of Wisconsin, Wis. Stat. §5.05, and "states are not suable 'persons' under 42 U.S.C. § 1983." Phillips v. Baxter, 768 F. App'x 555, 559-560 (7th Cir. 2019) (citing Sebesta v. Davis, 878 F.3d 226, 231 (7th Cir. 2017)). See also, Will v. Mich. Dept. of State Police, 491 U.S. 58,

64 (1989) ("a State is not a person within the meaning of § 1983"). "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." Will, 491 U.S. at 66. The WEC is not the proper defendant for the plaintiff's constitutional claims.

The plaintiff faces the same problem with his claims against the individual defendants, all of whom are state officials whom he sues in their official capacities.[5]

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471 . . . (1985). As such, it is no different from a suit against the State itself. See, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 165-66 . . . (1985); *Monell* [*v. New York City Dept. of Social Services*, 436 U.S. 658], at 690 [(1978)].

Id. at 71. Arguably, *none* of the defendants are subject to suit under 42 U.S.C. §1983, which means that even if the plaintiff had standing, the court would have to dismiss Counts I, II and III of the amended complaint.

Circling back to the defendants' Eleventh Amendment argument, "The Eleventh Amendment extends to state agencies and departments and, subject to the *Ex Parte* Young doctrine, to state employees acting in their official capacities." Nelson v. LaCrosse Cty. Dist. Atty. (State of Wis.), 301 F.3d 820,

[5] Had the plaintiff sued the individual defendants in their *personal* capacities, he could have sought relief against them under 42 U.S.C. §1983, assuming he had standing.

827 n.7 (7th Cir. 2002) (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123-24 (1984)).

There are three exceptions to Eleventh Amendment immunity: (1) congressional abrogation, Nuñez v. Ind. Dep't of Child Servs., 817 F.3d 1042, 1044 (7th Cir. 2016) (citing Alden v. Maine, 527 U.S. 706, 754-55 (1999); (2) "a state's waiver of immunity and consent to suit," id. (citing College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999)); and (3) a suit "against state officials seeking only prospective equitable relief," id. (citing *Ex parte* Young, 209 U.S. 123, 159-60 (1908)). None of the exceptions apply here.

Congress did not abrogate the sovereign immunity of the states when it enacted 42 U.S.C. §1983. Will, 491 U.S. at 66. Wisconsin has not waived its immunity from civil actions under §1983. See Shelton v. Wis. Dep't of Corr., 376 Wis. 2d 525, *2 (Table) (Ct. App. 2017) (citing Boldt v. State, 101 Wis. 2d 566, 584-85 (1981)). And the *Ex parte* Young doctrine does not apply when a plaintiff asserts a claim—regardless of the relief requested—against a state official based on *state* law. Pennhurst, 465 U.S. at 106 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). "In determining whether the *Ex parte* Young doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward

inquiry' into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 636 (2002) (quoting Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 296 (1997); McDonough Assocs., Inc. v. Grunloh, 722 F.3d 1043, 1051 (7th Cir. 2013)).

Count IV of the amended complaint alleges "[w]ide-spread ballot fraud," a *state*-law claim. The Eleventh Amendment bars that claim against the defendants in their official capacities. The Eleventh Amendment also bars the plaintiff's federal claims to the extent that the plaintiff seeks retrospective relief. The Supreme Court has refused to extend the *Ex Parte* Young doctrine to claims for retrospective relief. Green v. Mansour, 474 U.S. 64, 68 (1985) (citing Pennhurst, 465 U.S. at 102-103). The amended complaint seeks (1) a "temporary restraining order instructing Defendants to de-certify the results of the General Election for the Office of President," dkt. no. 9 at 47; (2) "an order instructing the Defendants to certify the results of the General Election for Office of the President in favor of President Donald Trump," id.; (3) "a temporary restraining order" prohibiting the tabulation of unlawful votes," id.; (4) an order preserving voting equipment and data, id.; (5) "the elimination of the mail ballots from counting in the 2020 election," id. at 48; (6) the disqualification of Wisconsin's electors from participating in the 2020 election, id.; and (7) an order directing Wisconsin's electors to vote for President Donald Trump, id. As the court already has noted, with the possible exception of the

request for an order preserving voting equipment and data, the relief the plaintiff requests is retrospective.

The plaintiff disagrees—he characterizes the certification of the election results as "ongoing violations of federal law . . . ongoing violations of the Electors and Elections Clauses, the Equal Protection and Due Process Clauses, as well as likely violations of federal law including the Voting Rights Act and the Help America Vote Act." Dkt. No. 72 at 25-26. The plaintiff has not brought claims under the latter two statutes and saying that a completed event is an ongoing violation doesn't make it so.

2. *Exclusive Remedy/Exhaustion/Abstention*

Defendant Evers moves to dismiss because Wisconsin provides a remedy to address irregularities or defects during the voting or canvassing process: Wis. Stat. §9.01(11). Four days ago, the Wisconsin Supreme Court held that §9.01(6) requires that a party aggrieved after a recount must appeal by filing suit in circuit court. Trump v. Evers, No. 2020AP1971-OA, Order at *2 (Wis. Dec. 3, 2020). In a concurring opinion, Justice Hagedorn noted that Wis. Stat. §9.01(11) provides that §9.01 is the exclusive judicial remedy for an aggrieved candidate. Defendant Evers points out that President Trump has lawsuits pending in state circuit courts and argues that those cases raise many of the claims the plaintiff raises here. Dkt. No. 59 at 11. He argues that the process detailed in Wis. Stat. §9.01 is designed to allow an aggrieved candidate to resolve election challenges promptly, and that for this court to permit the

plaintiff to circumvent that process "would eviscerate Wisconsin's careful process for properly and quickly deciding election challenges." Id. at 11-12.

Of course, the plaintiff has no redress under Wis. Stat. §9.01, because he is not a "candidate" in the sense of that statute. But Evers argues that there was a form of state-law relief available to the plaintiff. He asserts that the plaintiff should have filed a complaint with the Wisconsin Elections Commission under Wis. Stat. §5.06. Dkt. No. 59 at 13. That statute allows a voter dissatisfied with the Wisconsin election process to file a written, sworn complaint with the elections board. Wis. Stat. §5.06(1). The statute states that no voter may "commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official" without first filing a complaint under §5.06(1). Wis. Stat. §5.06(2). Evers points out that the plaintiff has not demonstrated that he followed this procedure and thus that the plaintiff did not exhaust his remedies before coming to federal court. Dkt. No. 59 at 14.

The plaintiff does not directly respond to the exhaustion argument. He simply maintains that he has a right to bring his constitutional claims in federal court, argues that there is no evidence that the statute Evers cites is an exhaustion requirement and asserts that the court has federal question jurisdiction under 28 U.S.C. §1331 and supplemental jurisdiction over any state-law claims under 28 U.S.C. §1367.[6] Dkt. No. 72 at 27-28. He neatly

[6] The court could exercise supplemental jurisdiction over state-law claims only if there remained federal claims to which those state-law claims related. As the court has noted, it likely would have been required to dismiss the federal

sidesteps the question of why he did not follow a procedure that would have allowed him to direct his concerns to the entity in charge of enforcing the state's election laws and in a way that likely would have brought those concerns to that entity's attention long before the election results were certified.

Because the court has concluded that the plaintiff does not have standing, and because the plaintiff has sued defendants who either are not suable under §1983 or are protected by Eleventh Amendment immunity, the court will not accept the invitations of the defendants and *amici* to wade into the waters of the various types of abstention. If this court does not have subject matter jurisdiction, there is no case or controversy from which it should abstain. The court agrees with the parties, however, that the relief the plaintiff requests—asking a federal judge to order a state governor to decertify the election results for an entire state and direct that governor to certify a different outcome—constitutes "an extraordinary intrusion on state sovereignty from which a federal court should abstain under longstanding precedent." Dkt. No. 57 at 28.

3. *Laches*

The defendants argue that the equitable defense of laches requires dismissal, because the plaintiff "inexplicably waited until after the election, after the canvassing, after the recount, after the audit, after results were

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claims because the plaintiff asserted them through §1983 against state officials in their official capacities, which in turn would have required dismissal of any state claims for lack of subject matter jurisdiction.

certified, and indeed until the eve of the electoral college vote, to bring his claim of state law violations and widespread fraud . . . .” Dkt. No. 52 at 11. See also, Dkt. No 59 at 17 (“the doctrine of laches bars [the plaintiff’s] claims because he has unreasonably delayed bringing his claims to the detriment not only of Defendants, but also of the nearly 3.3 million voters in Wisconsin who voted in this last election under the good-faith belief that they were following the correct procedures to have their votes counted.”).

The doctrine of laches “addresses delay in the pursuit of a right when a party must assert that right in order to benefit from it.” Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 820 (7th Cir. 1999). “For laches to apply in a particular case, the party asserting the defense must demonstrate: (1) an unreasonable lack of diligence by the party against whom the defense is asserted and (2) prejudice arising therefrom.” Id. (citing Cannon v. Univ. of Health Scis./The Chicago Med. Sch., 710 F.2d 351, 359 (7th Cir. 1983)). “Timeliness must be judged by the knowledge of the plaintiffs as well as the nature of the right involved.” Jones v. v. Markiewicz-Qualkinbush, 842 F.3d 1053, 1061 (7th Cir. 2016).

“The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept.” Id. at 1060-61. In fact, the Seventh Circuit has held that such “claims must be brought expeditiously . . . to afford the district court sufficient time in advance of an election to rule without disruption of the electoral cycle.” Id. at 1061 (internal quotation marks and citations omitted).

The amended complaint asserts that the alleged problems with the Dominion voting machine software "have been widely reported in the press and have been subject to investigation." Dkt. No. 9 at ¶12. It cites to exhibits from January and August of 2020. Dkt. No. 9 at 5 n.1. It cites to the WEC's May 13, 2020 directive to clerks that they should not reject the ballots of "indefinitely confined" absentee voters. Id. at ¶40. It cites an October 18, 2016 memorandum issued by the WEC instructing clerks on how to handle absentee envelope certifications that did not bear the address of the witness. Id. at ¶44. It cites October 19, 2020 instructions by the WEC to clerks about filling in missing ballot information. Id. at ¶45.

Defendant Evers points out that the plaintiff's own allegations demonstrate that he has known about the Dominion voting machine issues since long before the election. Dkt. No. 59 at 17-18. He argues that the WEC guidance about which the plaintiff complains came in directives issued in October 2016, May 2020 and October 2020. Id. He asserts that the plaintiff has made no effort "to offer a justifiable explanation for why he waited until weeks after the election to challenge" these issues. Id. at 18. The WEC defendants advise the court that the issue regarding "indefinitely confined" voters was litigated in state court almost eight months ago. Dkt. No. 54 at 9 (citing Pet. For Original Action dated March 27, 2020, Supreme Court of Wisconsin, No. 2020AP000557-OA). They assert that the plaintiff "waited to challenge widely-known procedures until after millions of voters cast their ballots in reliance on those procedures." Id. at 6. They state that "[i]f the doctrine of laches means

anything, it is that Plaintiff here cannot overturn the results of a completed and certified election through preliminary relief in this late-filed case." Id.

The plaintiff first responds that laches is a defense and shouldn't be raised on a motion to dismiss. Dkt. No. 72 at 22. He then claims that he could not have known the bases of any of these claims until after the election. Id. at 22-23. He says that because Wisconsin election officials did not "announce or publicize their misconduct," and because, he alleges, they "prevented Republican poll watchers from observing the ballot counting and handling," it took him time to gather the evidence and testimony he attached to the amended complaint. Id. at 23. Finally, he alleges that the delay post-November 3, 2020 is attributable to the defendants' failure to timely complete the election count. Id. He insists that he filed this suit at the earliest possible moment—the day after the certification. Id.

The court has determined that the plaintiff does not have standing. That means that the court does not have jurisdiction to assess the plaintiff's credibility, and it will refrain from doing so.

4. *Failure to state a claim upon which relief can be granted*

Both defendants asked the court to dismiss the case for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Because the court does not have subject matter jurisdiction, it will not address the sufficiency of the substantive claims in the amended complaint.

5. *Requests for injunctive relief*

For the same reason, the court cannot address the merits of the plaintiff's request for preliminary injunctive relief.

V. Conclusion

This court's authority to grant relief is confined by the limits of the Constitution. Granting the relief the plaintiff requests would take the court far outside those limits, and outside the limits of its oath to uphold and defendant the Constitution. The court will grant the defendants' motion to dismiss.

The court **GRANTS** Defendant Governor Tony Evers's Motion to Dismiss Plaintiff's Amended Complaint. Dkt. No. 51.

The court **GRANTS** Defendant Wisconsin Elections Commission and Its Members' Motion to Dismiss. Dkt. No. 53.

The court **DENIES AS MOOT** Plaintiff's Corrected Motion for Declaratory, Emergency, and Permanent Injunctive Relief. Dkt. No. 6.

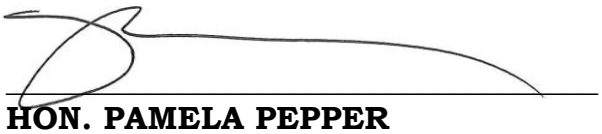
The court **DENIES AS MOOT** Plaintiff's Amended Motion for Temporary Restraining Order and Preliminary Injunction to be Considered in an Expedited Manner Dkt. No. 10.

The court **DISMISSES** the Amended Complaint for Declaratory, Emergency, and Permanent Injunctive Relief. Dkt. No. 9.

The court **ORDERS** that this case is **DISMISSED.**

Dated in Milwaukee, Wisconsin this 9th day of December, 2020.

BY THE COURT:



HON. PAMELA PEPPER
Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

JUDGMENT IN A CIVIL CASE

v.

Case No. 20-cv-1771-pp

WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, MARK L. THOMSEN, MARGE BOSTELMANN, JULIE M. GLANCEY, DEAN KNUDSON, ROBERT F. SPINDELL, JR., and TONY EVERS,

Defendants.

☐ **Jury Verdict.** This case came before the court for a trial by jury. The parties have tried the issues, and the jury has rendered its verdict.

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

THE COURT ORDERS AND ADJUDGES that judgment is entered in favor of the defendants and against the plaintiff.

THE COURT ORDERS that this case is **DISMISSED**.

Approved and dated in Milwaukee, Wisconsin this 9th day of December, 2020.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

GINA M. COLLETTI
Clerk of Court

s/ *Cary Biskupic*
(by) Deputy Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN
OFFICE OF THE CLERK

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December 10, 2020

Michael D Dean, et al.
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Re: Feehan, et al. v. Wisconsin Elections Commission, et al.
USDC Case No.: 20-C-1771

Dear Counsel:

The Notice of Appeal to the U.S. Court of Appeals for the Seventh Circuit was filed on December 10, 2020. If a transcript is necessary, you will need to complete the "7th Circuit Transcript Information Sheet" and the "Transcript Request Form". Both forms are available on our website at http://wied.uscourts.gov by clicking on Forms and selecting the "Transcript Request Form" and "Seventh Circuit Transcript Information Sheet" link.

The District Court will ensure that the record is complete and made available electronically to the Court of Appeals within 14 days of filing the notice of appeal. Any confidential record or exhibit that is not available electronically will be prepared and held by the District Court until requested by the Court of Appeals. Counsel must review the docket sheet within 21 days of filing the notice of appeal to ensure that the record is complete.

Motions to correct or modify, supplement, or strike a pleading from the record must first be filed with the District Court. The District Court's ruling on the motion will become part of the record and notice of the decision will be sent to the Court of Appeals.

If a Docketing Statement, as required by Circuit Rule 3(c), was not filed with the Notice of Appeal, it should be filed directly with the Clerk of Court for the U.S. Court of Appeals for the Seventh Circuit. If you have any questions, please feel free to call.

Very truly yours,

GINA M. COLLETTI
Clerk of Court

By: /s/ L M Forseth
Deputy Clerk

Enclosure
cc: All Counsel of Record

United States District Court
Eastern District of Wisconsin (Milwaukee)
CIVIL DOCKET FOR CASE #: 2:20−cv−01771−PP

Feehan et al v. Wisconsin Elections Commission et al
Assigned to: Chief Judge Pamela Pepper
Cause: 42:1983 Civil Rights Act

Date Filed: 12/01/2020
Jury Demand: None
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

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V.

Movant

James Gesbeck

represented by **James Gesbeck**
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Date Filed	#	Docket Text
12/01/2020	1	COMPLAINT against All Plaintiffs by William Feehan. (Filing Fee PAID $400 receipt number AWIEDC−3652059) (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit, # 20 Exhibit, # 21 Exhibit, # 22 Exhibit, # 23 Exhibit, # 24 Exhibit, # 25 Exhibit, # 26 Exhibit, # 27 Exhibit)(Dean, Michael) (Additional attachment(s) added on 12/1/2020: # 28 Civil Cover Sheet) (jcl).
12/01/2020	2	MOTION for Temporary Restraining Order by All Plaintiffs. (Dean, Michael)
12/01/2020	3	BRIEF in Support filed by All Plaintiffs re 2 MOTION for Temporary Restraining Order . (Dean, Michael)
12/01/2020		NOTICE Regarding assignment of this matter to Chief Judge Pamela Pepper; Consent/refusal forms for Magistrate Judge Joseph to be filed within 21 days; the consent/refusal form is available here. Pursuant to Civil Local Rule 7.1 a disclosure statement is to be filed upon the first filing of any paper and should be filed now if not already filed. (jcl)
12/01/2020	4	Magistrate Judge Jurisdiction Form filed by All Plaintiffs. (NOTICE: Pursuant to Fed.R.Civ.P. 73 this document is not viewable by the judge.) (Dean, Michael)
12/01/2020	5	DISCLOSURE Statement by All Plaintiffs. (Dean, Michael)
12/01/2020	6	MOTION to Amend/Correct Docket # 2: PLAINTIFFS MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF by All Plaintiffs. (Attachments: # 1 Text of Proposed Order)(Dean, Michael)
12/02/2020	7	ORDER signed by Chief Judge Pamela Pepper on 12/2/2020 re 6 Amended Motion for Injunctive Relief. (cc: all counsel)(cb)
12/02/2020	8	NOTICE of Appearance by Sidney Powell on behalf of All Plaintiffs. Attorney(s) appearing: Sidney Powell (Powell, Sidney)
12/03/2020	9	AMENDED COMPLAINT *removing Derrick Van Orden as Plaintiff* against All Defendants filed by William Feehan. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit, # 15 Exhibit, # 16 Exhibit, # 17 Exhibit, # 18 Exhibit, # 19 Exhibit)(Dean, Michael)
12/03/2020	10	Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF by William Feehan. (Attachments: # 1 Information Sheet Proposed Briefing Schedule)(Dean, Michael)

12/03/2020	11	NOTICE of Appearance by Jeffrey A Mandell on behalf of Tony Evers. Attorney(s) appearing: Jeffrey A. Mandell (Mandell, Jeffrey)
12/03/2020	12	NOTICE of Appearance by Rachel E Snyder on behalf of Tony Evers. Attorney(s) appearing: Rachel E. Snyder (Snyder, Rachel)
12/03/2020	13	NOTICE of Appearance by Howard Kleinhendler on behalf of William Feehan. Attorney(s) appearing: Howard Kleinhendler (Kleinhendler, Howard)
12/03/2020	14	MOTION to Intervene by James Gesbeck. (Attachments: # 1 Proposed Answer, # 2 Certificate of Service)(asc)
12/03/2020	15	BRIEF in Support filed by James Gesbeck re 14 MOTION to Intervene. (asc)
12/03/2020	16	MOTION Reassign Case Pursuant to Civil L.R. 3(b) by Tony Evers. (Attachments: # 1 Exhibit 1 − Notice from Case 20−CV−1785)(Mandell, Jeffrey)
12/03/2020	17	NOTICE of Appearance by Sean Michael Murphy on behalf of Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission. Attorney(s) appearing: Sean Michael Murphy, Jody J. Schmelzer, Colin T. Roth (Murphy, Sean)
12/03/2020	18	RESPONSE to Motion filed by William Feehan re 16 MOTION Reassign Case Pursuant to Civil L.R. 3(b) . (Dean, Michael)
12/03/2020	19	ORDER signed by Chief Judge Pamela Pepper on 12/3/2020 DENYING 16 defendant Tony Evers's motion to reassign case pursuant to Civil L.R. 3(b). (cc: all counsel)(cb)
12/03/2020	20	NOTICE of Appearance by Charles G Curtis, Jr on behalf of Democratic National Committee. Attorney(s) appearing: Charles G. Curtis (Curtis, Charles)
12/03/2020	21	NOTICE of Appearance by Michelle M Umberger on behalf of Democratic National Committee. Attorney(s) appearing: Michelle M. Umberger (Umberger, Michelle)
12/03/2020		Party Derrick Van Orden terminated. (amb) (Entered: 12/04/2020)
12/04/2020	22	MOTION to Intervene by Democratic National Committee. (Attachments: # 1 Exhibit 1−Proposed Answer, # 2 Text of Proposed Order)(Umberger, Michelle)
12/04/2020	23	BRIEF in Support filed by Democratic National Committee re 22 MOTION to Intervene . (Umberger, Michelle)
12/04/2020	24	DISCLOSURE Statement by Democratic National Committee. (Umberger, Michelle)
12/04/2020	25	REPLY filed by Tony Evers *to Plaintiff's Proposed Briefing Schedule*. (Mandell, Jeffrey)
12/04/2020	26	REPLY filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission *to Plaintiff's Proposed Briefing Schedule*. (Murphy, Sean)
12/04/2020	27	NOTICE of Appearance by Justin A Nelson on behalf of Tony Evers. Attorney(s) appearing: Justin A. Nelson (Nelson, Justin)
12/04/2020	28	NOTICE of Appearance by Davida Brook on behalf of Tony Evers. Attorney(s) appearing: Davida Brook (Brook, Davida)
12/04/2020	29	ORDER signed by Chief Judge Pamela Pepper on 12/4/2020. 10 Plaintiff's amended motion GRANTED IN PART to extent that it is Civil L.R. 7(h) expedited non−dispositive motion for expedited briefing schedule; defendant's opposition to plaintiff's amended motion due by 5:00 PM on 12/7/2020, plaintiff's reply due by 5:00 PM on 12/8/2020. The court DEFERS RULING on plaintiff's amended motion to extent that it asks the court to issue TRO or preliminary injunction. (cc: all counsel)(cb)
12/04/2020	30	NOTICE of Appearance by Stephen Shackelford, Jr on behalf of Tony Evers. Attorney(s) appearing: Stephen L. Shackelford, Jr. (Shackelford, Stephen)
12/04/2020	31	NOTICE of Appearance by Richard Manthe on behalf of Tony Evers. Attorney(s) appearing: Richard A. Manthe (Manthe, Richard)

12/04/2020	32	NOTICE of Appearance by Paul M Smith on behalf of Tony Evers. Attorney(s) appearing: Paul M. Smith (Smith, Paul)
12/04/2020	33	7(h) Expedited NON−DISPOSITIVE MOTION to Intervene by James Gesbeck. (Attachments: # 1 Certificate of Service)(lz)
12/04/2020	34	MOTION for Leave to File Excess Pages by Tony Evers. (Mandell, Jeffrey)
12/04/2020	35	NOTICE of Appearance by Sidney Powell on behalf of All Plaintiffs. Attorney(s) appearing: Sidney Powell (Powell, Sidney)
12/04/2020	36	TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/4/2020 re 34 MOTION for Leave to File Excess Pages filed by Tony Evers: The defendant seeks leave to file a brief in excess of the thirty pages allowed by Civil L.R. 7(f) because he proposes to both oppose the plaintiff's amended motion for injunctive relief and support his own, not yet filed motion to dismiss in the same pleading. The court appreciates any party's effort to streamline litigation, but would prefer that the defendant file separate briefs opposing the plaintiff's amended motion and supporting his own. This will avoid confusion when the plaintiff responds. The court **DENIES** the defendant's motion for leave to file excess pages. **NOTE: There is no document associated with this text−only order.** (cc: all counsel)(Pepper, Pamela)
12/04/2020	37	ORDER signed by Chief Judge Pamela Pepper on 12/4/2020 allowing James Gesbeck to file *amicus curiae* brief by 5:00 PM on 12/7/2020. (cc: all counsel, via mail to James Gesbeck)(cb)
12/05/2020	38	TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/5/2020 re 22 MOTION to Intervene filed by Democratic National Committee signed by Chief Judge Pamela Pepper on 12/5/2020: Under Civil L.R. 7(b), the plaintiff's response is due by December 25, 2020; because December 25 is a federal holiday, the court **ORDERS** that the plaintiff's response is due by December 28, 2020. **NOTE: There is no document associated with this text−only order.** (cc: all counsel)(Pepper, Pamela)
12/05/2020	39	TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/05/2020 re 33 MOTION to Intervene filed by James Gesbeck: Under Civil L.R. 7(h), the plaintiff's response is due by Friday, December 11, 2020. **NOTE: There is no document associated with this text−only order.** (cc: all counsel)(Pepper, Pamela)
12/05/2020	40	Expedited MOTION to Intervene by Democratic National Committee. (Umberger, Michelle)
12/06/2020	41	ORDER signed by Chief Judge Pamela Pepper on 12/6/2020. 40 Movant DNC's expedited motion to intervene GRANTED to extent that court has expedited its ruling on original motion to intervene. 22 Movant DNC's original motion to intervene DENIED. Movant DNC may file *amicus curiae* brief by 5:00 PM on 12/7/2020. (cc: all counsel)(cb)
12/06/2020	42	BRIEF in Support filed by William Feehan re 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF *Amended Brief*. (Dean, Michael)
12/06/2020	43	MOTION To File Separate Reply Briefs by William Feehan. (Dean, Michael)
12/06/2020	44	MOTION To Hold Consolidated Evidentiary Hearing/Trial by William Feehan. (Dean, Michael)
12/07/2020	45	TEXT ONLY ORDER signed by Chief Judge Pamela Pepper on 12/7/2020 re 43 MOTION To File Separate Reply Briefs filed by William Feehan: The court **GRANTS** the plaintiff's motion for leave to file separate reply briefs. If the defendants file a single opposition brief, the plaintiff must file one reply to that brief. If the defendants file separate opposition briefs, the plaintiff may file a reply for each opposition brief. The plaintiff also may file a separate reply for each brief filed by an amicus. (In other words, the plaintiff could file up to four reply briefs if the defendants file separate briefs and each amicus files a brief.) If the defendants file a separate motion to dismiss, the plaintiff may file an opposition brief of up to thirty pages under Civil L.R. 7(b). **NOTE: There is no document associated with this text−only order.** (cc: all counsel)(Pepper, Pamela)

12/07/2020		NOTICE of Hearing: Status Conference set for 12/8/2020 at 11:00 AM by telephone before Chief Judge Pamela Pepper. The parties are to appear by calling the court's conference line at 888−557−8511 and entering access code 4893665#. (cc: all counsel)(cb)
12/07/2020	46	RESPONSE to Motion filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 44 MOTION To Hold Consolidated Evidentiary Hearing/Trial . (Murphy, Sean)
12/07/2020	47	AMICUS BRIEF in Opposition to 6 MOTION for Injunctive Relief filed by James Gesbeck. (asc)
12/07/2020	48	NOTICE of Appearance by David S Lesser on behalf of Democratic National Committee. Attorney(s) appearing: David S. Lesser (Lesser, David)
12/07/2020	49	NOTICE of Appearance by Jamie Dycus on behalf of Democratic National Committee. Attorney(s) appearing: Jamie S. Dycus (Dycus, Jamie)
12/07/2020	50	NOTICE of Appearance by Stephen Morrissey on behalf of Tony Evers. Attorney(s) appearing: Stephen E. Morrissey (Morrissey, Stephen)
12/07/2020	51	MOTION to Dismiss *Plaintiff's Amended Complaint* by Tony Evers. (Mandell, Jeffrey)
12/07/2020	52	RESPONSE to Motion filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 2 MOTION for Temporary Restraining Order . (Murphy, Sean)
12/07/2020	53	MOTION to Dismiss by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission. (Murphy, Sean)
12/07/2020	54	BRIEF in Support filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 53 MOTION to Dismiss . (Murphy, Sean)
12/07/2020	55	BRIEF in Opposition filed by Tony Evers re 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF . (Attachments: # 1 Exhibit 1 WVA v. WEC, # 2 Exhibit 2 Trump v. Boockvar, # 3 Exhibit 3 Wood v. Raffensperger, # 4 Exhibit 4 Wood v. Raffensperger (11th Cir.), # 5 Exhibit 5 King v. Whitmer TRO Decision, # 6 Exhibit 6 Zilisch v. R.J. Reynolds, # 7 Exhibit 7 Consolidate Water v..40 Acres, # 8 Exhibit 8 Jefferson v. Dane County, # 9 Exhibit 9 Bognet v. Secretary of Commonwealth, # 10 Exhibit 10 O'Bright v. Lynch Order, # 11 Exhibit 11 Trump v. Evers Order)(Mandell, Jeffrey)
12/07/2020	56	MOTION for Leave to File *Amicus Curiae Brief* by Wisconsin State Conference NAACP, Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss. (Goode, Joseph)
12/07/2020	57	BRIEF in Opposition filed by Democratic National Committee re 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF . (Attachments: # 1 Exhibit 1 − Washington Voters Alliance Case, # 2 Exhibit 2 − Trump v. Evers Case, # 3 Exhibit 3 − Mueller v. Jacobs Case, # 4 Exhibit 4 − King v. Benson Case, # 5 Exhibit 5 − March 29, 2020 Guidance, # 6 Exhibit 6 − Jefferson v. Dane Case, # 7 Exhibit 7 − October 18, 2016 Guidance, # 8 Exhibit 8 − Election Manual, # 9 Exhibit 9 − November 10, 2020 Guidance)(Umberger, Michelle)
12/07/2020	58	UNPUBLISHED Decision *Pursuant to Civil L.R. 7(J)* filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission (Attachments: # 1 Exhibit 1− Martel v. Condos, # 2 Exhibit 2− Moore v. Circosta, # 3 Exhibit 3− Donald J. Trump for President v. Cegavske, # 4 Exhibit 4− Bognet v. Secretary of the Commonwealth of Pennsylvania, # 5 Exhibit 5− Donald J. Trump for President v. Boockvar, # 6 Exhibit 6− Donald J. Trump for President v. Pennsylvania, # 7 Exhibit 7− Wood v. Raffensperger, # 8 Exhibit 8− King v. Whitmer)(Murphy, Sean)

12/07/2020	59	BRIEF in Support filed by Tony Evers re 51 MOTION to Dismiss *Plaintiff's Amended Complaint* . (Attachments: # 1 Exhibit 1 Whitake v. Kenosha, # 2 Exhibit 2 Bognet v. Secretary of Commenwealth, # 3 Exhibit 3 Hotze v. Hollins, # 4 Exhibit 4 Wood v. Raffensperger, # 5 Exhibit 5 Wood v. Raffensperger (11th Cir.), # 6 Envelope 6 Moore v. Circosta, # 7 Exhibit 7 Trump v. Evers, # 8 Exhibit 8 WVA v. WEC, # 9 Exhibit 9 Trump Notice of Appeal, # 10 Exhibit 10Trump v. Biden Consolidation Order, # 11 Exhibit 11 Andino v. Middleton, # 12 Exhibit 12 Massey v. Coon, # 13 Exhibit 13 Balsam v. New Jersey, # 14 Exhibit 14 Thompson v. Alabama, # 15 Exhibit 15 Braynard Expert Report)(Mandell, Jeffrey)
12/07/2020	60	BRIEF in Opposition filed by Tony Evers re 44 MOTION To Hold Consolidated Evidentiary Hearing/Trial . (Mandell, Jeffrey)
12/08/2020	61	NOTICE of Appearance by Jon Greenbaum on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Jon Greenbaum (Greenbaum, Jon)
12/08/2020	62	NOTICE of Appearance by Allison E Laffey on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Allison E. Laffey (Laffey, Allison)
12/08/2020	63	NOTICE of Appearance by John W Halpin on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: John W. Halpin (Halpin, John)
12/08/2020	64	NOTICE of Appearance by Mark M Leitner on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Mark M. Leitner (Leitner, Mark)
12/08/2020	65	NOTICE of Appearance by Joseph S Goode on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Joseph S. Goode (Goode, Joseph)
12/08/2020	66	NOTICE of Appearance by Ezra D Rosenberg on behalf of Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP. Attorney(s) appearing: Ezra D. Rosenberg (Rosenberg, Ezra)
12/08/2020	67	NOTICE of Appearance by Jacob Conarck on behalf of Wisconsin State Conference NAACP. Attorney(s) appearing: Jacob P. Conarck (Conarck, Jacob)
12/08/2020	68	NOTICE of Appearance by Seth P Waxman on behalf of Democratic National Committee. Attorney(s) appearing: Seth P. Waxman (Waxman, Seth)
12/08/2020	69	ORDER signed by Chief Judge Pamela Pepper on 12/8/2020 GRANTING 56 Motion for Leave to File *Amicus Curiae Brief* filed by Earnestine Moss, Dorothy Harrell, Wisconsin State Conference NAACP, Wendell J. Harris, Sr. (cc: all counsel)(cb)
12/08/2020	70	Audio of statue conference held on 12/8/2020 at 11:08 a.m.; File Size (51.1 MB) (kgw)
12/08/2020	71	Court Minutes and Order from the Status Conference held before Chief Judge Pamela Pepper on 12/8/2020. The court **DENIES** the 44 Motion for Consolidated Evidentiary Hearing and Trial on the Merits. The court **ORDERS** the plaintiff to file his responses to the motions to dismiss (Dkt. Nos. 51 and 53) and reply brief in support of his motion for injunctive relief (Dkt. No. 10) by December 8, 2020 at 5 p.m. CST. The court **ORDERS** that if the defendants and amici wish to file reply briefs in support of the motions to dismiss, they must do so by December 9, 2020 at 3 p.m. CST. (Court Reporter Thomas Malkiewicz.) (kgw)
12/08/2020	72	BRIEF in Opposition filed by William Feehan re 51 MOTION to Dismiss *Plaintiff's Amended Complaint*, 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF , 53 MOTION to Dismiss *and Consolidated in Reply/Response to Response Briefs of Defendants and Opposition Briefs of Amici*. (Attachments: # 1 Exhibit, # 2 Exhibit)(Dean, Michael)
12/09/2020	73	REPLY BRIEF in Support filed by Tony Evers re 51 MOTION to Dismiss *Plaintiff's Amended Complaint* . (Attachments: # 1 Exhibit 1 American Commercial Barge Lines v. Reserve FTL, # 2 Exhibit 2 Trump v. Secretary of Pennsylvania)(Mandell, Jeffrey)

12/09/2020	74	ORDER signed by Chief Judge Pamela Pepper on 12/9/2020. 14 James Gesbeck's motion to intervene DENIED. 33 James Gesbeck's Civil LR 7(h) motion to intervene GRANTED to extent it asks the court to expedite ruling on motion to intervene and DENIED to extent it asks the court to grant motion to intervene. (cc: all counsel)(cb)
12/09/2020	75	MOTION to Seal Document *Public Motion Prior to Filing Sealed/Restricted Exhibits* by William Feehan. (Attachments: # 1 Exhibit, # 2 Exhibit)(Dean, Michael)
12/09/2020	76	BRIEF in Support filed by William Feehan re 75 MOTION to Seal Document *Public Motion Prior to Filing Sealed/Restricted Exhibits* . (Dean, Michael)
12/09/2020	77	REPLY BRIEF in Support filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission re 53 MOTION to Dismiss . (Murphy, Sean)
12/09/2020	78	UNPUBLISHED Decision *Pursuant to Civil L.R. 7(J)* filed by Marge Bostelmann, Julie M Glancey, Ann S Jacobs, Dean Knudson, Robert F Spindell, Jr, Mark L Thomsen, Wisconsin Elections Commission (Attachments: # 1 Exhibit 1− King, # 2 Exhibit 2− Bognet, # 3 Exhibit 3− Boockvar, # 4 Exhibit 4− Hotze, # 5 Exhibit 5− Massey, # 6 Exhibit 6− Aguila Management, # 7 Exhibit 7− Solow Building Co.)(Murphy, Sean)
12/09/2020	79	BRIEF in Opposition filed by Dorothy Harrell, Wendell J. Harris, Sr., Earnestine Moss, Wisconsin State Conference NAACP re 6 MOTION to Amend/Correct Docket # 2: PLAINTIFFS MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF , 10 Emergency MOTION to Amend/Correct Docket # 6: PLAINTIFFS CORRECTED MOTION FOR DECLARATORY, EMERGENCY, AND PERMANENT INJUNCTIVE RELIEF . (Goode, Joseph)
12/09/2020	80	NOTICE of Appearance by Christopher Bouchoux on behalf of Democratic National Committee. Attorney(s) appearing: Christopher Bouchoux (Bouchoux, Christopher)
12/09/2020	81	NOTICE by Tony Evers *Notice of Supplemental Authority* (Brook, Davida)
12/09/2020	82	ORDER signed by Chief Judge Pamela Pepper on 12/9/2020 DENYING 75 plaintiff's Motion to Seal Document *Public Motion Prior to Filing Sealed/Restricted Exhibits*. (cc: all counsel)(cb)
12/09/2020	83	ORDER DISMISSING CASE signed by Chief Judge Pamela Pepper on 12/9/2020. 51 Defendant Evers's motion to dismiss plaintiff's amended complaint GRANTED. 53 Defendants Wisconsin Elections Commission and its Members motion to dismiss GRANTED. 6 Plaintiff's corrected motion for declaratory, emergency and permanent injunctive relief DENIED as moot. 10 Plaintiff's amended motion for temporary restraining order and preliminary injunction to be considered in an expedited manner DENIED as moot. 9 Plaintiff's amended complaint for declaratory, emergency and permanent injunctive relief DISMISSED. (cc: all counsel)(cb)
12/10/2020	84	NOTICE OF APPEAL as to 83 Order Dismissing Case,,, Terminate Motions,, by William Feehan. Filing Fee PAID $505, receipt number AWIEDC−3664794 (cc: all counsel) (Dean, Michael)
12/10/2020	85	JUDGMENT signed by Deputy Clerk and approved by Chief Judge Pamela Pepper on 12/9/2020. (cc: all counsel)(cb)
12/10/2020	86	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 84 Notice of Appeal (lmf)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

NOTICE OF DOCKETING - Short Form

December 10, 2020

The below captioned appeal has been docketed in the United States Court of Appeals for the Seventh Circuit:

Appellate Case No: 20-3396 Caption: WILLIAM FEEHAN, Plaintiff - Appellant v. WISCONSIN ELECTIONS COMMISSION, et al., Defendants - Appellees
District Court No: 2:20-cv-01771-PP District Judge Pamela Pepper Clerk/Agency Rep Gina M. Colletti Date NOA filed in District Court: 12/10/2020

If you have any questions regarding this appeal, please call this office.

form name: **c7_Docket_Notice_short_form**(form ID: **188**)