

FILED

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

CLERK OF SUPREME COURT  
OF WISCONSIN

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## In the Supreme Court of Wisconsin

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

PETITIONERS,

v.

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

RESPONDENTS.

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### MEMORANDUM IN SUPPORT OF PETITION FOR ORIGINAL ACTION

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## **ISSUES PRESENTED BY THE CONTROVERSY**

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

Contrary to the express provision of Wisconsin Statutes, allowing for a five day period to appeal the results of the recount, Governor Evers appears to have begun to take steps to issue a certificate of election and name Wisconsin's electors. Wis. Stat. § 7.70(5)(a) ("When a valid petition for recount is filed ... the governor or commission may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed ..."); Wis. Stat. § 9.01(6)(a) ("within 5 business days after completion of the recount determination by the commission chairperson ... any candidate ... aggrieved by the recount may appeal ..."). The Court must act in these proceedings to order the Governor to withdraw that certificate and to allow for the orderly recount process to continue.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

### STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

Wis. Stat. § 6.86(1)(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

Wis. Stat. § 6.87(9).

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



**E. “Democracy in the Park.”**

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

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

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

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

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

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