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John Barrett
Clerk of Circuit Court
2020CV007092

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

DONALD J. TRUMP, MICHAEL R. PENCE, et al.

Plaintiffs/Appellants,
v.

Milwaukee County Case No.: 2020CV7092
Dane County Case No.: 2020CV2514

JOSEPH R. BIDEN, KAMALA D. HARRIS, et al.

Defendants/Appellees,

**ANSWER OF JOSEPH R. BIDEN AND KAMALA D. HARRIS
TO DANE COUNTY COMPLAINT**

Defendants/Appellees, Joseph R. Biden and Kamala D. Harris (collectively “Defendants”), by their undersigned counsel of record, pursuant to Wis. Stat. § 9.01(7)(b) and the Court’s December 4, 2020 Order, hereby respond to the Complaint of the Plaintiffs/Appellants, as follows:

THE PARTIES

1. Plaintiff, Donald J. Trump, is the sitting President of the United States. President Trump is a resident of the State of Florida with an address of 1100 South Ocean Boulevard, Palm Beach, FL 33480.

ANSWER NO. 1: Admit

2. Plaintiff, Michael R. Pence, is the sitting Vice President of the United States. Vice President Pence is a resident of the State of Indiana and has a residence of 4750 North Meridian Street, Indianapolis, Indiana 46208.

ANSWER NO. 2: Admit.

3. Plaintiff, Donald J. Trump for President, Inc., is the Presidential Campaign of the sitting President of the United States. The Trump Campaign’s principal office is located at 725 Fifth Avenue, New York, NY 10022.

ANSWER NO. 3: Admit.

4. Defendant, Joseph R. Biden, is the Democratic Party Candidate for the President of the United States and former Vice President of the United States. Former Vice President Biden is a resident of the State of Delaware with an address of 1209 Barley Mill Road, Wilmington, Delaware 19807.

ANSWER NO. 4: Admit that Joseph R. Biden was the Democratic Party Candidate for President of the United States, and that he is now President-elect of the United States. Admit that President-elect Biden is a resident of Delaware and resides at the stated address.

5. Defendant, Kamala D. Harris, is the Democratic Party candidate for Vice President of the United States and is a United States Senator. Senator Kamala D. Harris is a resident of the State of California with an address of 435 N. Kenter Avenue, Los Angeles, California 90049.

ANSWER NO. 5: Admit that Senator Kamala D. Harris was the Democratic Party Candidate for Vice President of the United States, and that she is now Vice President-elect of the United States. Admit that Vice President-elect Harris is a resident of California and resides at the stated address.

6. Defendant, Dane County Clerk, with a principal office located at 210 Martin Luther King Blvd., Madison, Wisconsin 53703. Scott McDonell is the sitting Dane County Clerk.

ANSWER NO. 6: Admit.

7. Defendant, Dane County Board of Canvassers, with a principal office located at 210 Martin Luther King Jr. Blvd., Madison, Wisconsin 53703. Scott McDonell is the Chairman of the Dane County Board of Canvassers.

ANSWER NO. 7: Admit.

8. Defendant, Wisconsin Election Commission (“WEC”), with a principal office located at 212 E. Washington Avenue, Third Floor, Madison, Wisconsin 53703.

ANSWER NO. 8: Admit.

9. Defendant, Ann S. Jacobs, is the Chairman of WEC, with her principal office, in her official capacity, located at 212 E. Washington Avenue, Third Floor, Madison, Wisconsin 53705.

10. **ANSWER NO. 9:** Admit Ms. Jacobs is the Chairperson, not “Chairman” of WEC.

JURISDICTION AND VENUE

10. This Court has jurisdiction over Defendants pursuant to Wis. Stat. § 9.01(6) and § 801.05(1).

ANSWER NO. 10: Admit.

11. Venue is proper in the Wisconsin Circuit Court pursuant to Wis. Stat. § 9.01(6), § 801.50(2)(a) and (c) as it is the county in which the recount took place and the recount determination was made.

ANSWER NO. 11: Admit.

BACKGROUND

12. The unofficial results of the Election indicate that President Donald J. Trump and Vice President Michael R. Pence's electors received 1,610,076 votes and Former Vice President Joseph R. Biden's and Senator Kamala D. Harris' elector's received 1,630,503 votes, a difference of 20,427 votes or 0.620%, which was within the 1% margin required for an aggrieved candidate to request a recount. THE WISCONSIN ELECTIONS COMMISSION, UNOFFICIAL RESULTS FOR THE NOVEMBER 3, 2020 GENERAL ELECTION, <https://elections.wi.gov/node/7234>.

ANSWER NO. 12: Admit.

13. According to WEC, of the total votes submitted in the Election, 1,957,514 votes were submitted by absentee ballot, which represents more than half of all votes cast in the Election. THE WISCONSIN ELECTIONS COMMISSION, ABSENTEE BALLOT REPORT – NOVEMBER 3, 2020 GENERAL ELECTION, <https://elections.wi.gov/node/7236> (file entitled "AbsenteeCounts_County 11-6-2020.csv").

ANSWER NO. 13: Admit.

14. On November 18, 2020, Plaintiffs, President Trump and Vice President Pence, formally submitted a Verified Recount Petition to require a recount of the results of the Election, pursuant to Wis. Stat. § 9.01(1)(a)1, based on information and belief that either a mistake and/or fraud had occurred in Milwaukee County and Dane County, and that other defects, irregularities and illegalities existed (the "Recount"). A true and correct copy of that Verified Recount Petition is attached and marked as **Exhibit 1**.

ANSWER NO. 14: Admit.

15. The Recount Petition indicated, among other things:

- a. That clerks throughout Dane County issued absentee ballots to electors in direct contravention to Wis. Stat. § 6.86(1)(ar), which states that "the

municipal clerk shall not issue an absentee ballot unless the clerk receives a written application therefor from a qualified elector of the municipality.”

- b. That clerks throughout Dane County improperly altered absentee ballot certifications by adding missing or correcting missing witness addresses in contravention to the statutory instruction that, “If a certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d).
- c. That Dane County clerks improperly and incorrectly communicated to voters that they can declare themselves to be “indefinitely confined” pursuant to Wis. Stat. § 6.86(2), which allows the mailing of absentee ballots without showing or providing identification as proof of a voter’s identity, and such communications led to ballots cast by those claiming to be “indefinitely confined” who were not in fact indefinitely confined.
- d. That pursuant to Wis. Stat. § 6.84(1) and (2), “voting by absentee ballot is a privilege that must be carefully regulated to prevent the potential for fraud or abuse” and that matters relating to the absentee ballot process are “mandatory,” which requires that any ballot cast in contravention of that process “may not be included in the certified result of any election.”
- e. Substantial and additional mistakes and improper actions were expected to be discovered.

ANSWER NO. 15: Admit only that the Recount Petition made allegations as set forth in the document and deny any allegations inconsistent therewith; deny the allegations set forth in subsections (a) to (e).

16. A copy of the Verified Recount Petition was hand delivered to, and filed with, WEC on November 18, 2020. WEC ordered a recount as requested of Dane and Milwaukee Counties.

ANSWER NO. 16: Admit.

17. The Ordered Recount began on November 20, 2020 and was completed on November 29, 2020 in Dane County. It was limited to Dane and Milwaukee Counties. A true and correct copy of the Transcript from the Dane County Recount is attached and marked as **Exhibit 2**.

ANSWER NO. 17: Admit the Recount in Dane County started on November 20, 2020 and was completed on November 29, 2020. Admit the Appellants have filed a transcript of the Dane County recount proceedings.

18. The statewide totals following the Recount reported by WEC on November 30, 2020 were President Donald J. Trump's and Vice President Michael R. Pence's electors received 1,610,184 votes and Joseph R. Biden's and Senator Kamala D. Harris' electors received 1,630,866 votes (the "WEC Determination"). WEC, Signed Canvass for President – Vice President, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President.pdf>

ANSWER NO. 18: Admit.

19. A Notice of Appeal was filed pursuant to Wis. Stat. § 9.01(6), within five business days of the completion of the Recount. WEC expressly indicated to Plaintiffs that the filing of this matter would be timely if made on or before December 4, 2020.

ANSWER NO. 19: Admit.

20. This Appeal seeks to set aside, modify and overturn certain findings and conclusions of the Boards of Canvassers of Milwaukee and Dane Counties.

ANSWER NO. 20: Admit.

21. As more fully described below, the Recount revealed irregularities, defects, mistakes and/or fraud.

ANSWER NO. 21: Deny.

ALLEGATIONS

Ballots Were Issued Without the Elector Having First Submitted a Written Application As Required By Law

22. During the Recount, the Board of Canvassers for Dane County found that 61,193 in-person ballots were issued by municipal clerks and cast by voters in the County. Those ballots were issued during the 14 day period allowed for in-person absentee balloting.

ANSWER NO. 22: Admit the Dane County Board of Canvassers confirmed that 61,193 voters in Dane County voted in-person absentee ballots between October 20, 2020 and November 1, 2020.

23. In the course of the Recount, the Plaintiffs discovered, and the Board confirmed, that the clerks of Dane County did not obtain a separate written application for those in-person absentee ballots ("In-Person Absentee Ballots"). The Board found and held that all of those in-person ballots satisfied the legal requirement for an application because they were delivered to the clerks in a Form EL-122 absentee ballot envelope ("Ballot Envelope"). The Board held that the Form EL-122 Ballot Envelope satisfies the obligation for a written application.

ANSWER NO. 23: Deny. Plaintiffs' allegation misstates the statutory requirement of Wis. Stat. § 6.87(1)(ar) as requiring a "separate" written application. The word "separate" is not in the statutory text. Plaintiffs are correct that all voters who voted in person during the early voting absentee period completed WEC Form EL-122, which is entitled "Official Absentee Ballot Application/Certification" and which is the written application for an absentee ballot for such voters. Admit that the Dane County Board of Canvassers concluded that the completed Form EL-122 constituted a written application for an absentee ballot by voters who voted in person during the early voting period.

24. In order to reach that conclusion, the Board of Canvassers erroneously interpreted the applicable Wisconsin Statutes. That legal conclusion, that the EL-122 Ballot Envelope constitutes a sufficient written application is contrary to the express words of the Statutes.

ANSWER NO. 24: Deny the allegation that Form EL-122, which is entitled "Official Absentee Ballot Application," is not a "sufficient written application" or is otherwise contrary to a statute requiring a "written application." In short, an "application" is an "application."

25. Plaintiffs timely objected to the inclusion of those in-person absentee ballots based on a variety of statutory provisions, and the Board denied that Objection.

ANSWER NO. 25: Deny that Plaintiffs timely objected to the inclusion of these in-person absentee ballots, as Plaintiffs did not register any objection to use of the EL-122 Form on or before November 3, 2020, and did so only after Election Day when it filed its Recount Petition. Admit that during the recount proceedings, Plaintiffs preserved their objection to all in-person absentee ballots and admit the Board denied Plaintiffs' objection.

26. That legal determination by the Board was clearly erroneous as it is contrary to at least the following Statutory provisions: Wis. Stat. §§ 6.84(1), 6.86(1)(a), 6.86(1)(b), 6.86(1)(ar), 6.84(2), 6.86(1)(b), 7.52(4)(i).

ANSWER NO. 26: Deny, and provide the following specific answers as to the list of statutory references:

- (a) Wis. Stat. § 6.84(1) – Statute does not state anything regarding written applications.
- (b) Wis. Stat. § 6.86(1)(a) – The statute requires that an absent elector “make written application to the municipal clerk” for a ballot by one of six potential methods, including “in-person at the office of the municipal clerk or at an alternate site under s. 6.855, if applicable.”
- (c) Wis. Stat. § 6.86(1)(b) – Nothing in the statute specifies the specific form of a written application for an absentee ballot.
- (d) Wis. Stat. § 6.86(1)(ar) – The statute states that a clerk may not issue an absentee ballot “unless the clerk receives a written application therefore;” the statute does not specify in what form the written application must be received, or otherwise indicate state Form EL-122 cannot be used as the written application.
- (e) Wis. Stat. § 6.84(2) – The statute talks about certain subsections as mandatory regarding absentee balloting and does not make any reference to applications.
- (f) Wis. Stat. § 7.52(4)(i) – The statute says nothing about absentee ballot applications.

27. The Dane County Board of Canvassers was wrong, as a matter of law, to include in the Recount In-Person Absentee Ballots issued without a corresponding separate written application.

ANSWER NO. 27: Deny. Nothing in the statutes cited or relied upon by Plaintiffs mandates a “separate” written application, or otherwise precludes or prohibits municipalities from using the absentee ballot envelope, marked “Official Absentee Ballot Application,” as the written application for an absentee ballot.

28. The EL-122 Ballot Envelope is not a legal application, and so each of the votes cast solely with the EL-122 Ballot Envelope was not cast with an application and was, accordingly, not a legal vote.

ANSWER NO. 28: Deny, and affirmatively allege that an “application” is an “application.” Basic statutory interpretation, constitutional protections, and the reliance of voters on Form EL-122 for more than 10 years prohibits disenfranchising 170,000 voters in Milwaukee

and Dane Counties, and deeming “illegal” votes cast by 650,000 voters statewide, based upon an argument that an “application” is not an “application.”

29. Wisconsin's statutes forbid clerks from issuing an absentee ballot to an elector unless the elector first submits a written application therefor: “[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.” Wis. Stat. § 6.86(1)(ar) (emphasis added).

ANSWER NO. 29: Admit the Complaint accurately quotes Wis. Stat. § 6.86(1)(ar).

30. Our Statutes require a separate written application for an in-person absentee ballot.

Any elector of a municipality who is registered to vote whenever required and who qualifies under ss. 6.20 and 6.85 as an absent elector may make written application to the municipal clerk of that municipality for an official ballot by one of the following methods:

* * *

2. In person at the office of the municipal clerk or at an alternate site under s. 6.855, if applicable.

Wis. Stat. § 6.86(1)(a).

ANSWER NO. 30: Deny the Wisconsin Statutes use the word “separate,” and affirmatively allege it is a term made up of whole cloth by the Plaintiffs in an attempt to disenfranchise hundreds of thousands of voters who submitted a “written application” and complied with all laws regarding voting, including providing photo identification in person to the municipal clerk.

31. Clear and unambiguous statutory law and associated case law dictates that all In-Person Absentee Ballots issued by municipalities without the required application “***may not be counted***” and if such ballots were erroneously counted, they “***may not be included in the certified result of any election.***” Wis. Stat. § 6.84(2) (emphasis added); *see also 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, and the removal of the 5 ballots changed the outcome of the election).

ANSWER NO. 31: Deny, and affirmatively allege basic rules of statutory interpretation confirm that the plain text of the statute is controlling. *See, e.g., State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (“Statutory language is given its common, ordinary and accepted meaning,” and “if the meaning of the statute is plain, we ordinarily stop the inquiry.”). Plaintiffs’ citation to *Lee v. Paulson* has no bearing, as the voters in question in that case did not submit any written applications; in the present case, all challenged voters submitted an “Official Absentee Ballot Application.”

32. The Board of Canvassers for Dane County in direct contravention of the unambiguous law, improperly included in the Recount totals the In-Person Absentee Ballots despite the lack of a written application. The determinations of the Board of Canvassers for Dane County was based on erroneous interpretations of law.

ANSWER NO. 32: Deny.

Incomplete and Altered Certification Envelopes

33. In the course of the Recount, the Plaintiffs discovered that a total of 2,238 ballots were cast in Dane County with incomplete or incorrect EL-122 Ballot Envelopes.

ANSWER NO. 33: Deny.

34. In particular, ballot envelopes were allowed that did not contain the clerk’s initials and clerks altered or completed EL-122 Ballot Envelopes after they had been submitted by supplying missing witness address information and Ballot Envelopes were left incomplete (such as, missing the municipal clerk’s initials). The Board of Canvassers improperly counted the corresponding ballots (collectively, the “Incomplete or Altered-Certification Absentee Ballots”).

ANSWER NO. 34: Deny, and affirmatively allege that in the Dane County Recount, the Dane County Board of Canvassers rejected Plaintiffs’ challenge to 2,233 absentee ballots in the Town of Westport that did not have clerk’s initials confirming the voter submitted a photo ID based upon the testimony of the Town Clerk that his office confirmed a photo ID from every voter before issuing an absentee ballot but made a clerical error in not initialing the envelopes (11/23/20 Dane Co. Tr., pp. 50-53; P. App. 56); further affirmatively allege that

municipal officials in some cases added missing witness address information, consistent with long-standing guidance by the Wisconsin Elections Commission (“WEC”) dating back to October 18, 2016. Deny Plaintiffs’ designation of such ballots as “Incomplete or Altered-Certification Absentee Ballots.”

35. During the Recount, Plaintiffs objected to the counting of any Incomplete or Altered-Certification Absentee Ballots.

ANSWER NO. 35: Admit.

36. The Dane County Board of Canvassers overruled Plaintiffs’ objections to the counting of Altered-Certification Absentee Ballots, and such ballots were counted and included in the Recount.

ANSWER NO. 36: Admit.

37. The Dane County Board of Canvassers was wrong, as a matter of law, to include the 2,238 Incomplete or Altered-Certification Absentee Ballots in the Recount.

ANSWER NO. 37: Deny.

38. Absentee ballots submitted to a municipal clerk must be signed by the elector in the presence of a witness who is an adult U.S. citizen pursuant to Wis. Stat. § 6.87(4)(b)1 and as explained by WEC in its Elections Day Manual, stating:

Note: If the envelope has been opened or resealed, the signature of either the elector or the witness is missing or the witness’ address is missing, the absentee ballot certificate envelope is insufficient, and the absentee ballot must be rejected.

THE WISCONSIN ELECTIONS COMMISSION, ELECTION DAY MANUAL FOR WISCONSIN ELECTION OFFICIALS (Sept. 2020), <https://elections.wi.gov/sites/elections.wi.gov/files/202011/Election%20Day%20Manual%20%282020-09%29.pdf> (emphasis added).

ANSWER NO. 38: Admit that an absentee voter must have his or her absentee ballot certificate envelope signed by a witness and admit the WEC’s Election Day Manual includes the quoted statement at page 93.

39. Furthermore, Wisconsin law expressly provides that if an absentee ballot “certificate is missing the address of a witness, the ballot may not be counted.” Wis. Stat. § 6.87(6d).

ANSWER NO. 39: Admit.

40. The only process under Wisconsin law to correct an absentee ballot certificate (which is part of the Ballot Envelope) that is missing a signature or a witness' address is to return it to the elector to correct the defect. Wis. Stat. § 6.87(9).

ANSWER NO. 40: Deny, and affirmatively allege Wis. Stat. § 6.87(9) does not state it is an exclusive process and it is not within the statutes deemed to be “mandatory” by Wis. Stat. § 6.84(2). Further, WEC guidance specifically *requires* election workers to add missing witness address information when feasible.

41. Despite the aforementioned Wisconsin Statutes and its prior Election Day guidance, WEC has issued guidance that directly contradicts Wisconsin law stating that a missing witness signature or address on the certificate means the ballot cannot be counted.

ANSWER NO. 41: Deny that WEC issued guidance that directly contradicts Wisconsin law or its own guidance, and affirmatively allege that the WEC on October 18, 2016 – following a unanimous 6-0 vote of the Commission – issued guidance instructing municipal clerks that in reviewing absentee ballot envelopes received in their office missing witness address information, the clerks “must take corrective actions in an attempt to remedy a witness address error.” *See* October 18, 2016 WEC Guidance re Missing or Insufficient Address on Absentee Certificate Envelopes.

42. As recent as October 19, 2020, WEC wrongly directed local clerks to alter absentee ballot certifications by adding missing addresses for witnesses “through reliable information (personal knowledge, voter registration information, through a phone call with the voter or witness)” rather than the witness personally writing in the missing information as required by law. *See* WISCONSIN ELECTIONS COMMISSION, SPOILING ABSENTEE BALLOT GUIDANCE (October 19, 2020), <https://elections.wi.gov/sites/elections.wi.gov/files/202010/Spoiling%20Ballot%20Memo%2010.2020.pdf>.

ANSWER NO. 42: Admit WEC provided the cited guidance on October 19, 2020, consistent with its prior guidance of October 18, 2016; deny that the guidance was incorrect.

43. The conclusions and findings of the Dane County Board of Canvassers to allow the counting of ballots associated with incomplete and altered certifications was based on an

erroneous interpretation of Wisconsin Statutes. In particular, that erroneous interpretation included interpretation of at least the following statutes: Wis. Stat. §§ 6.86(1)(ar), 6.87(1), 6.87(2), 6.87(6d), 6.84(2), 6.87(9).

ANSWER NO. 43: Deny the Dane County Board of Canvassers made any interpretation of Wisconsin law, and affirmatively allege the Board concluded that municipalities within Dane County complied with WEC's longstanding guidance on the issue and refused to disenfranchise voters who did nothing wrong. Affirmatively allege the exclusive procedure to challenge WEC guidance on the witness address issue is under Wis. Stat. § 227.40(1), and Plaintiffs failed to do so prior to the election and have not done so since.

44. 2,231 Incomplete or Altered-Certification Absentee Ballots were improperly counted and unlawfully included in the Election results as a result of the erroneous interpretation of the laws by the Board of Canvassers.

ANSWER NO. 44: Deny.

Massive Surge in Indefinitely Confined Absentee Ballot Voters in 2020

45. Wisconsin statutory law expressly requires that all eligible electors must provide proof of identification in order to register to vote, and each time they vote. Wis. Stat. §§ 6.79(2)(a), 6.87(1).

ANSWER NO. 45: Admit Wis. Stat. §§ 6.79(2)(a) and 6.87(1) require, with certain exceptions, eligible electors to provide proof of identification in order to register to vote, and each time they vote.

46. Photo identification is also required when requesting to vote by absentee ballot. Wis. Stat. §§ 6.86(1)(ac), (ar), and 6.87(1).

ANSWER NO. 46: Admit.

47. 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 order to qualify for this 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 (7th Cir. 2014).

ANSWER NO. 47: Admit Wis. Stat. § 6.86(2)(a) includes an exception to the requirement for photo identification for voters who certify that they are “indefinitely confined because of age, physical illness or infirmity or [are] disabled for an indefinite period”; deny that the opinion in *Frank v. Walker* changed the statutory definition in any way.

48. Pursuant to Wis. Stat. § 6.86(2)(a), anyone “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,” and does not need to provide photo identification.

ANSWER NO. 48: Admit.

49. As such, a qualified “indefinitely confined” absentee ballot elector is a limited exception to the rule requiring that a voter provide photo identification in order to vote and, by that very fact, makes it more susceptible to fraud or abuse than other forms of absentee ballot voting.

ANSWER NO. 49: Admit a person who is “indefinitely confined” falls within an exception to the requirement to provide photo identification, deny that the exception for such voters necessarily makes it more susceptible to fraud or abuse, and affirmatively allege Plaintiffs have not demonstrated any such fraud or abuse by any competent evidence, by a single voter.

50. The number of Indefinitely Confined Absentee Voters increased dramatically in 2020. In part, that increase was a direct result of incorrect advice provided by the Clerks of Dane and Milwaukee Counties.

ANSWER NO. 50: Admit the number of indefinitely confined absentee voters increased in 2020 from prior years; deny the increase was a “direct result” of advice by the Clerks of Dane and Milwaukee Counties, and affirmatively allege the increase more likely relates to the fact that the country is in the midst of the worst pandemic in over 100 years.

51. One cause for the massive increase in “indefinitely confined” absentee ballot voters is due to the Milwaukee County and Dane County Clerks’ public Facebook posts suggesting that voters could broadly declare themselves to be “indefinitely confined” solely due to the Governor’s Safer at Home Order and the COVID-19 pandemic, and thereby avoid having to provide photo identification.

ANSWER NO. 51: Deny, and affirmatively allege Plaintiffs did not provide any evidence that a single voter relied upon “public Facebook posts” by any county clerk.

52. Such posts were an invitation to the public to abuse the “indefinitely confined” absentee ballot requirements, which specifically requires that the voter be “indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period.” Wis. Stat. § 6.86(2)(a).

ANSWER NO. 52: Deny.

53. In *Jefferson v. Dane*, No. 2020AP557-OA, the Supreme Court of Wisconsin issued an Order addressing certain concerns about the Indefinitely Confined status. In that Order the Court acknowledged that on March 25, 2020, the Dane County Clerk and the Milwaukee County Clerk publicly approved the use of Indefinitely Confined status by all voters due to the pandemic. *See, e.g.*, 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.”).

ANSWER NO. 53: Admit the Wisconsin Supreme Court in a March 31, 2020 Order concluded that social media advice posted by the Dane County Clerk was incorrect, and affirmatively allege the Wisconsin Supreme Court in the same Order cited the WEC’s March 29, 2020 “Guidance for Indefinitely Confined Electors” and held: “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.” *Jefferson v. Dane County*, Case No. 2020AP557-OA (March 21, 2020 Order, at 2). Affirmatively allege further that this WEC guidance ratified by the Wisconsin Supreme Court remained in effect for the November 2020 election.

54. During the Recount, Plaintiffs objected to the counting of any indefinitely confined absentee ballots and, as the review of recount materials progressed, objected more narrowly to a specific subset of the group identified.

ANSWER NO. 54: Admit that during the Recount, Plaintiffs objected to the counting of any vote cast by an indefinitely confined voter, and that Plaintiffs' targeted category of indefinitely confined voters to disenfranchise changed over time during the Recount.

55. Based on data provided by WEC and the Board, the names and dates of those claiming the status of Indefinitely Confined was identified. From that data, a subset could be developed that more precisely determined the impact of the Clerks' improper advice. Specifically, those persons who registered under the status after March 25, 2020, who actually voted and had no photo identification on file or otherwise did not present a photo identification. The total of that group is 8,907.

ANSWER NO. 55: Admit Plaintiffs claim to have created a spreadsheet identifying a total of 8,907 valid Dane County voters who registered as "indefinitely confined" subsequent to March 25, 2020, who actually voted and did not have a photo identification on file; deny the accuracy of Plaintiffs' calculations, as no testimony was presented to create a foundation for the spreadsheet presented by Plaintiffs, which spreadsheet was objected to by Defendants.

56. Plaintiffs objected to the inclusion of that precise subgroup and the objection was denied, and all those ballots were improperly counted in the Recount.

ANSWER NO. 56: Admit Plaintiffs attempted to disenfranchise 8,907 Dane County voters based upon Plaintiffs' spreadsheet and Plaintiffs' unfounded and unproven suppositions about the voters; deny any such ballots were improperly counted during the Recount.

57. The Dane County Board of Canvassers was wrong, as a matter of law, to include the specific subset of Indefinitely Confined Absentee Ballots in the Recount.

ANSWER NO. 57: Deny.

58. Municipal Clerks are expressly charged with the responsibility to review and expunge from the voter rolls those claiming to be Indefinitely Confined voters when the Clerk has "reliable information that [the]... elector no longer qualifies for the service." Wis. Stat. 6.86(2)(b). Electors who claimed they were Indefinitely Confined, but were not themselves physically, ill, infirm, elderly, or disabled were also obligated to take steps to be removed from that status prior to the November 3, 2020, election. Wis. Stat. § 6.86(2)(a).

ANSWER NO. 58: Deny the statute creates an affirmative obligation of municipal clerks to “review and expunge” voters claiming indefinite confinement status; affirmatively allege Wis. Stat. § 6.86(2)(b) provides in relevant part: “The 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.” Admit that § 6.86(2)(a) states in part: “If an elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.” Affirmatively allege Plaintiffs did not submit any competent evidence that any voter claiming such status was no longer indefinitely confined.

59. Those registering for such status after March 25, 2020, were necessarily suspect and include numerous persons easily identified.

ANSWER NO. 59: Deny the allegation that any voter is “necessarily suspect,” and affirmatively allege Plaintiffs’ spurious allegation willfully disregards the impact of the current pandemic on Wisconsin voters.

60. Though expressly required by statute to take appropriate measures to ensure the legitimacy of the voting rolls, Wis. Stat. §§ 6.50 and 9.01(1)(b)1., and to examine suspect Indefinitely Confined voters, Wis. Stat. § 6.86(2)(b) and 9.01(1)(b)2. The Board’s conclusion to overrule the objection is based on an erroneous interpretation of the obligations of the clerks to perform a reasonable inquiry into the status claimed. That is particularly true in that the actions of the Dane County Clerk had encouraged the illegal behaviors.

ANSWER NO. 60: Deny, and affirmatively allege clerks in Dane County acted no differently than other clerks throughout the State of Wisconsin with respect to indefinitely confined voters, and did so consistent with the Wisconsin Supreme Court’s March 31, 2020 Order.

61. All indefinitely confined absentee ballots issued to those claiming that status after March 25, 2020, without the required photo identification, were issued in violation of law and must be excluded from any certified results of the Election. Wis. Stat. § 6.86(2)(a). The Dane County Board of Canvassers improperly included those ballots in the Recount totals. The determinations of the Board of Canvassers for Dane County was based on erroneous interpretations of law.

ANSWER NO. 61: Deny, and affirmatively allege that mass disenfranchisement of all voters within Dane County who claimed indefinite confinement status after March 25, 2020 would violate the constitutional rights of those voters and would violate the Equal Protection Clause of the United States Constitution.

“Democracy in the Park”

62. 17,271 absentee ballots were improperly completed and/or delivered to employees of the City of Madison on September 26, 2020, and October 3, 2020, at 206 separate locations in an event dubbed “Democracy in the Park.”

ANSWER NO. 62: Admit that voters hand-delivered 17,271 absentee ballots to election officials during the “Democracy in the Park” events on September 26, 2020 and October 3, 2020; deny any such ballots were improperly completed or improperly delivered.

63. The Madison City Clerk widely advertised the events. 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-clerkmaribeth-witzel-behl-regarding-democracy-in-the-park>.

ANSWER NO. 63: Admit the Madison City Clerk advertised the event.

64. During the events, representatives of the City Clerk’s Office registered voters, received ballots, helped in the completion of Ballot Envelopes, instructed on the ballot process, and acted as witnesses for voters.

ANSWER NO. 64: Admit, and affirmatively allege the City Clerk, during the “Democracy in the Park” events, did not allow any voters to apply for absentee ballots and did not issue any absentee ballots to voters.

65. During the Recount, Plaintiffs objected to the counting of ballots collected during the “Democracy in the Park” events.

ANSWER NO. 65: Admit.

66. As a matter of law, these absentee ballots cannot be counted. Wisconsin’s careful regulation of absentee balloting requires that all absentee ballots must “be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” Wis. Stats. § 6.87(4)(b)1; *accord 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).

ANSWER NO. 66: Deny, and affirmatively allege that all ballots submitted as part of the "Democracy in the Park" events were "delivered in person" by the voter to "the municipal clerk," which is exactly what is required by Wis. Stat. § 6.87(4)(b)1. Deny any allegation, factual or legal, that the "Democracy in the Park" events bear any relation to the clerk's personal visits to voters' houses in *Olson v. Lindberg*, 2 Wis.2d 229, 236, 85 N.W.2d 775, 780 (1957).

67. In the alternative, these "Democracy in Park" event locations were not legally established alternate absentee ballot sites because they failed to meet many of Wis. Stat. § 6.855(1) obligations. For example, the sites were not established by an act of the governing body—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-witzelbehl-regarding-democracy-in-the-park>. Alternate absentee ballot sites 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, "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)

ANSWER NO. 67: Admit the "Democracy in the Park" events were not alternate absentee ballot sites under Wis. Stat. § 6.855(1), as that statute had no application to the process undertaken by the City of Madison.

68. The 17,271 absentee ballots received at the "Democracy in the Park" should not have been counted in the Recount as their receipt by the City of Madison was contrary to at least Wis. Stat. §§ 6.855(1) & 6.84(2) & 6.87(4)(b)1. The determinations of the Board of Canvassers for Dane County was based on erroneous interpretations of law.

ANSWER NO. 68: Deny that the "Democracy in the Park" events were at all inconsistent with Wis. Stat. §§ 6.855(1) (alternate absentee sites for early absentee voting), 6.84(2) (certain absentee ballot procedures are mandatory), or 6.87(4)(b)(1) (absentee ballots must be mailed by an elector or delivered in person to the municipal clerk).

PLAINTIFFS' CLAIMS FOR RELIEF

69. The actions taken and determinations made by the Dane County Board of Canvassers were contrary to Wisconsin law.

ANSWER NO. 69: Deny.

70. In particular, the Dane County Board of Canvassers acted contrary to law by not excluding the following from the Recount results:

- a. Absentee ballots submitted in-person by an elector who did not submit a prior written application for an absentee ballot in violation of Wis. Stat. §§ 6.86(1)(ar), 6.86(1)(a), and 6.84(2).
- b. Absentee ballots issued to electors who submitted absentee ballot certifications with missing information, including, but not limited to, missing signatures, missing clerk initials and missing witness addresses, and absentee ballot certifications that were altered by the municipal clerk or employees of the clerk in violation of Wis. Stat. §§ 6.86(1)(ar), 6.87(1), 6.87(2), 6.87(6d), 6.87(9), and 6.84(2).
- c. Absentee ballots issued to electors who submitted absentee ballot certifications without the required photo identification and who were not indefinitely confined due to being elderly, physically ill or infirm or disabled for an indefinite period in violation of Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)2, and 6.84(2).
- d. Absentee ballot envelopes and ballots submitted to a "Democracy in the Park" location in the City of Madison in violation of Wis. Stats. §§ 6.84(2), 6.87(4)(b)1, 6.855(1).

ANSWER NO. 70: Deny the Dane County Board of Canvassers acted contrary to the law, and further respond to the allegations as follows:

- (a) Deny in-person voters did not submit a written application, and affirmatively allege each such voter submitted Form EL-122, which is the "Official Absentee Ballot Application" for in-person absentee voters;
- (b) Deny any ballots were counted that were missing a voter signature or witness signature, and affirmatively allege all such envelopes were rejected by the Dane County Board of Canvassers, except those where the Clerk testified

that the absentee ballot was voted in-person and the missing information was a mistake by the clerk, and not the voter; deny any ballots were improperly counted where absentee envelopes were missing clerk initials, as the Clerks testified that the missing initials was a clerical error; deny any absentee ballot was improperly counted where the municipal clerk added missing witness address information, as such clerks were acting pursuant to the long-standing guidance of the WEC, which was not challenged in a timely fashion by the Plaintiffs (or by any other party);

- (c) Deny Plaintiffs introduced any competent evidence that any voter claiming “indefinite confinement status” was anything other than properly indefinitely confined.
- (d) Deny any absentee ballot personally delivered by a voter to the City of Madison Clerk during the Democracy in the Park events was contrary to any statute.

71. By failing to reject the aforementioned absentee ballots, or absentee ballot envelopes and certifications, the Dane County Board of Canvassers caused harm to Plaintiffs by counting votes cast in contravention of the Wisconsin Statutes, which were then included in the Recount totals and directly impacted the outcome of the Election.

ANSWER NO. 71: Deny.

72. In addition, Wis. Stat. § 9.01(1)(b)11 expressly requires that “all materials and ballots” be “viewed and identified” by the candidates during a recount.

ANSWER NO. 72: Admit.

73. Despite the clear requirement that all the candidates be allowed to view “all materials and ballots,” the Dane County Board of Canvassers also refused to allow Plaintiffs the opportunity to view any written absentee ballot application forms.

ANSWER NO. 73: Deny, and affirmatively allege that the “materials” referenced in Wis. Stat. § 9.01(1)(b)11 do not include absentee ballot applications, as such materials are not referenced in the Recount procedures outlined in Wis. Stat. § 9.01(1)(b)1-10, and further affirmatively allege that regarding all of the early in-person absentee voters challenged by Plaintiffs, Plaintiffs were, in fact, allowed to view all of the written absentee ballot applications, as the Form EL-122 applications were reviewed as part of the Recount.

74. The failure of the Dane County Board of Canvassers to enforce Wisconsin’s stringent absentee voting and recount procedures by excluding illegal votes has, in effect, harmed a corresponding number of Wisconsin voters who legally voted in the Election.

ANSWER NO. 74: Deny, and affirmatively allege it is Plaintiffs who are attempting to “harm” hundreds of thousands of valid Wisconsin voters by disenfranchising them, on a targeted basis, when the voters did nothing wrong.

75. As a result, Plaintiffs are entitled to a drawdown of equal to the number of absentee ballots and absentee ballot envelopes or certifications, that were improperly counted or included in the Recount, which totals at least 80,609. The drawdown of these ballots is likely to change the outcome of the Election.

ANSWER NO. 75: Deny Plaintiffs are entitled to any drawdown based upon their challenges to the manner in which the election was conducted, deny any ballots were improperly counted or included in the Recount, and deny Plaintiffs have the right to attack Wisconsin voting procedures after the election, on a selective basis, in a cynical attempt to disenfranchise targeted voters in 2 counties while allowing similarly situated voters in the other 70 counties in the state to have their votes counted.

AFFIRMATIVE DEFENSES

Defendants incorporate by reference as affirmative defenses all of the arguments set forth in the Opposition of Defendants Joseph R. Biden and Kamala D. Harris to Plaintiffs' Motion for Judgment on Notice of Appeal and Complaint.

WHEREFORE, based upon the foregoing answers, and based upon Defendants' brief filed herewith, Defendants Joseph R. Biden and Kamala D. Harris, respectfully request that the Court affirm the determination of the Milwaukee County Elections Commission pursuant to Wis. Stat. § 9.01(8)(a).

Dated this 9th day of December, 2020.

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**Pro hac vice application forthcoming*