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,

s/ *Michelle M. Umberger*

Charles G. Curtis, Jr.
SBN 1013075
Michelle M. Umberger
SBN 1023801
Sopen B. Shah
SBN 1105013
Will M. Conley
SBN 1104680
PERKINS COIE LLP
One East Main St., Suite 201
Madison, WI 53703
(608) 663-7460
ccurtis@perkinscoie.com
mumberger@perkinscoie.com
sshah@perkinscoie.com
wconley@perkinscoie.com

Marc E. Elias*
John Devaney
Zachary J. Newkirk*
PERKINS COIE LLP
700 Thirteenth St., N.W.,
Suite 800
Washington, D.C. 20005
(202) 654-6200
melias@perkinscoie.com
jdevaney@perkinscoie.com
znewkirk@perkinscoie.com

Counsel for Proposed Respondent-Intervenor

Seth P. Waxman*
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

David S. Lesser
Jamie Dycus
Christopher Bouchoux*
Joseph J. Yu*
Charles Bridge*
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
david.lesser@wilmerhale.com
jamie.dycus@wilmerhale.com
christopher.bouchoux@wilmerhale.com
joseph.yu@wilmerhale.com
charles.bridge@wilmerhale.com

Matthew W. O'Neill
SBN 1019269
FOX, O'NEILL & SHANNON, S.C.
622 North Water Street,
Suite 500
Milwaukee, WI 53202
(414) 273-3939
mwoneill@foslaw.com

* *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