No. 2020AP002038

In the Supreme Court of Wisconsin

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

PETITIONERS/APPELLANTS,

v.

JOSEPH R. BIDEN, KAMALA D. HARRIS, MILWAUKEE COUNTY CLERK c/o GEORGE L. CHRISTENSON, Milwaukee County Clerk, MILWAUKEE COUNTY BOARD OF CANVASSERS c/o TIMOTHY H. POSNANSKI, Chairman of Milwaukee County Board of Canvassers, DANE COUNTY CLERK c/o SCOTT MCDONNELL, Dane County Clerk, DANE COUNTY BOARD OF CANVASSERS c/o ALAN A. ARNSTEN, Member of Dane County Board of Canvassers, WISCONSIN ELECTION COMMISSION, and ANN S. JACOBS, Chairperson Wisconsin Elections Commission,

RESPONDENTS/APPELLEES

ON APPEAL FROM A DECEMBER 11, 2020 DECISION AND ORDER AFFIRMING DETERMINATIONS OF CANVASSING BOARDS BY HONORABLE JUDGE STEPHEN SIMANEK IN MILWAUKEE COUNTY CASE NO. 2020CV7092

SUPPLEMENTAL BRIEF OF PETITIONERS/APPELLANTS PER DECEMBER 11, 2020 ORDER

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Wisconsin has made explicit choices on how it will conduct its elections, including a choice to treat absentee voting with great caution, guarded by mandatory rules. The Wisconsin Elections Commission ("WEC") made choices explicitly contradicting what those statutes required and then, either on WEC's advice or on their own volition, municipal clerks chose not to follow the absentee voting statutes.

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. May the State of Wisconsin establish mandatory procedures for absentee voting by law?

2. Were the procedures established by the laws of the State of Wisconsin for absentee voting complied with in Dane and Milwaukee Counties in the November 3, 2020 election?

3. Are the remedies prescribed by Wisconsin's election laws for violations of absentee-voting requirements mandatory?

II. STATEMENT OF THE CASE

A. Nature of the Case

This matter addresses certain irregularities, defects and mistakes arising out of the November 3, 2020 election for President and Vice President in the State of Wisconsin. It seeks to have this Court overturn the findings

and conclusions of the Dane County and Milwaukee County Canvassing Boards, and the Circuit Court's ruling that was based substantially on misinterpretations of law.

B. Procedural Status

The Appellants, as Petitioners, sought immediate review by Original Action before this Court and that Petition was denied. *Trump v. Evers*, Dec. 3, 2020 Order, No. 2020AP1971-OA. The Appellants timely filed a Notice of Appeal in the Circuit Courts of Dane and Milwaukee Counties and the matters were assigned by the Chief Justice to be heard before the Honorable Judge Stephen Simanek. (P. App. 537-541). After comprehensive filings and consideration by the Circuit Court, Judge Simanek entered a Final Order on December 11, 2020. (P. App. 542). The Appellants immediately filed a Notice of Appeal and filed a Petition for Bypass so that this Court may timely consider the matters raised.

C. Facts Relevant for Review

The facts relevant to this review are fully stated in the Proposed Findings of Fact and Conclusions of Law and Memorandum in Support of Judgment on Notice of Appeal in the Circuit Court provided to the Court on December 11, 2020. Other facts are noted below within the Argument.

III. STANDARD OF REVIEW

Review of a recount determination is governed by Wis. Stat. § 9.01(8)(d). As to findings of law or interpretations of statute, appellate review is *de novo.* The *de nov*o review, even before this Court, is to the determinations of the canvassing boards and, not the trial court. *Roth v. LaFarge Sch. Dist. Bd. of Canvassers*, 2004 WI 6, ¶15, 268 Wis. 2d 335, 677 N.W.2d 599 (citing *Bar Admission of Vanderperren*, 2003 WI 37, P20, 261 Wis. 2d 150, 661 N.W.2d 27; *"K" Care, Inc. v. Town of Lac Du Flambeau*, 181 Wis. 2d 59, 65, 510 N.W.2d 697 (Ct. App. 1993)).

As to factual findings, the canvassing boards are the finders of fact and a court may not substitute its judgment for that of the board of canvassers as to the weight of the evidence on any disputed finding of fact. Wis. Stat. § 9.01(8)(d). The court shall set aside the canvassing board's factual determinations if they are "not supported by substantial evidence." *Id.*

IV. ARGUMENT

A. Incorporation of Prior Arguments

The Appellants incorporate the Memorandum in Support of Judgment on Notice of Appeal in its entirety. That Memoranduam fully presented the following topics:

1. Failure to Obtain an Application Prior to Voting In-Person Absentee (Subtopics: (a) In-person Absentee Voting is NOT exempt from the Application Requirement; (b) The Legislature has Commanded Strict Compliance with the Application Requirement; (c) The Municipal Clerks in Milwaukee and Dane Counties did NOT Require Electors to Submit Applications for In-Person Absentee Voting; (d) Absentee Ballots Cast Without a Corresponding Application Must be Excluded from the Final Vote Totals);

2. Incomplete and Altered Absentee Envelopes;

3. COVID-19 and Unauthorized and Improper Attempts to Change Absentee Voting (Subtopics: (a) Abuse of Indefiniely Confined Status; (b) Democracy in the Park);

4. Relief for the Statutory Violations . . . (Subparts: (a) Absentee Voting Which Violates Wisconsin Statutes May Not Be Counted; (b) As the Wisconsin Recount Statutes Provide The Exclusive Judicial Remedy for Absentee Voting Violations, Laches and Other Equitalbe Defenses Do Not Apply).

In the course of the Recount, Appellants demonstrated four distinct areas in which the Wisconsin election laws were violated:

1. In-person absentee votes were cast without a separate application;

2. Absentee ballot certifications were incomplete or altered by the clerks;

3. Indefinitely Confined status was abused; and

4. Prohibited "Democracy in the Park" events were held.

As to each, the factual findings in the Record are undisputed as to the events or actions having occurred. The canvassing boards and Circuit Court, while acknowledging those facts, held the actions involved did not violate the law. As to identical matters raised before both Boards, the legal conclusions were the same (the allegations concerning "Democracy in the Park" are unique to Dane County) and, having determined that there were no violations, had no occasion to address the remedy sought by Appellants.

B. Additional Discussion

1. Relief For the Statutory Violations Must Include a Drawdown of Votes.

While the topic of relief was addressed in the Circuit Court filings, the Appellees raised a somewhat different issue not directly addressed. WEC argues

that a drawdown is strictly limited to three categories of claims, and is not otherwise an option. They are wrong.

First, the argument cannot be correct because Courts have, in fact, conducted drawdowns in categories beyond those three. *See*, *Lee v. Paulson (in re Ballot Recount),* 2001 WI App 19, 241 Wis. 2d 38, 623 N.W.2d 577; *Gradinjan v. Boho,* 29 Wis. 2d 674, 139 N.W.2d 557.

Second, WEC fails to consider subpart (e). *See* Wis. Stat. § 9.01(1)(b)(4)(e). The recount process results in a list of eligible voters and a fixed number of ballots. *Id.* at § 9.01(1)(b)(1). The eligible voter list can be reduced for a host of reasons, including residency, non-citizen, too young, improperly cast ballot, irregularity, etc. *Id.* at § 9.01(1)(b)(1). If the number of ballots exceed the list, then ballots are withdrawn. *Id.* at § 9.01(1)(b)(4)(e). This is the drawdown process of the Statute. *Id.* If WEC was correct, then there would be no method for dealing with patently non-qualified voters or improperly cast ballots.

Third, the only instances where drawdowns may not be appropriate are where the irregularities are so great that the election itself must be nullified. For example, in *McNally v. Tollander*, forty percent of the electorate were deprived the right to vote based on the election officials and municipal clerks failing to properly provide a referendum ballot to those voters. 100 Wis.2d 490, 505 (1981).

Because of the mass number of irregularities, public policy suggests that the election should be set aside because "public confidence in the integrity of the election and popular acceptance of the winner may be severly impaired. In such cases a new election might be justified to remedy these effects, regardless of the likelihood that the election's outcome was altered." *Id.*

2. The Requirement of a Separate Written Application is Fundemantal to the Allowance of Absentee Balloting.

Lest there be any doubt, the requirement of a separate written application is not mere form over substance. As the Legislature has made clear, because "voting by absentee ballot[ing is uniquely subject to] potential for fraud or abuse; … overzealous solicitation of absent electors who may prefer not to participate in an election; … undue influence on an absent elector to vote for or against a candidate …; or other similar abuses." Wis. Stat. § 6.84(1)&(2). These concerns articulated by the Legislature may not be given short shrift. Indeed, the only published case to have previously address the issue of applications noted: "Section 6.84(2) strict construction requirement, applicable to statutes relating to the absentee ballot process, is consistent with the guarded attitude with which the legislation views that process." *Lee v. Paulson, supra.*; State regulations or restrictions on absentee voting do not, as a general matter, violate a fundamental constitutional right. *McDonald v. Bd. of Election Comm'rs,* 394

U.S. 802 (1969); *Griffin v. Roupas,* 385 F.3d 1128 (7th Cir. 2004); *Prigmore v. Renfro,* 356 F.Supp. 427, 433 (N.D. Ala. 1972).

What then becomes clear is that the application is a fundamental part of solving the chain of custody issue with absentee ballots. An elector must request a ballot in writing before a clerk may issue it. Wis. Stat. §§ 6.86(1)(ar). Before an elector may receive an absentee ballot, the elector must also produce a photo ID. Wis. Stat. § §§ 6.86(1)(ac) & (ar), 6.87(1) & (2). The clerk must then compare the information on the application to the information on the photo ID. Wis. Stat. § 6.86(1)(ar) & (3)(c), 6.87(1) & (2). Once received, an elector may vote the ballot but only in the presence of a witness. Wis. Stat. § 6.87. Then the elector and the witness must sign the envelope attesting to the fact that the elector is who they claim to be and that they voted the ballot. Wis. Stat. § 6.87(1) & (2). If, even the witness fails to provide their address "the ballot shall not be counted." Wis. Stat. s 6.87(6d).

This process ensures a start-to-finish chain of custody for absentee ballots. It requires a systemic, step by step process that may not be violated or truncated, lest we allow the "potential for fraud or abuse; … overzealous solicitation of absent electors who may prefer not to participate in an election; … undue influence on an absent elector to vote for or against a candidate …; or other similar

abuses" to gain a foothold in our elections. Wis. Stat. § 6.84(1). Our Legislature has carefully balanced the advantages of allowing absentee balloting against the inherent risks in the process. It is not for this Court to second guess that balance. *See* United States Constitution, Article II, Section 1, Clause 2:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress …

(emphasis added).

3. WEC Advice is Not Law and Cannot Exonerate Violations of Wisconsin's Absentee Statutes.

"All parties seem to agree that Wis. Stat. § 9.01(2017-18) constitutes the 'exclusive judicial remedy' applicable to this claim. § 9.01(11)." *Trump v. Evers*, Dec. 3, 2020 Order, No. 2020AP1971-OA. Accordingly, it is not surprising that the Appellants have merged all their various claims into this action. However, WEC and others now suggest Wis. Stat. § 9.01(1) is not the exclusive remedy. They come to this conclusion by arguing that WEC advice, whether correct or incorrect under the statutes, is, for every municipal clerk following it, a complete exoneration of otherwise illegal or unauthorized behavior. And, from this they conclude the Appellants were required, prior to the election, to seek definitive legal decisions on WEC's

advice or be barred by laches. That position is categorically wrong for a number of reasons.

WEC's argument rests on an incorrect premise at the outset. The Appellants claims were complete and perfected with proof of individuals who cast ballots in a manner not allowed by a statute. That is it. Nothing more is required for each claim. Nothing in the Appellants' claims rests on the advice of WEC – right, wrong, or otherwise.

Instead, it is the canvassing boards' and Appellees' position that rests in whole or in part on: 1) either a direct affirmative defense that WEC's advice can be relied upon, or 2) its indirect counterpart that the Appellants were required to bring an action before the election to challenge the advice. It is the canvassing boards, not the Appellants, who must demonstrate that relying on WEC's advice is a defense recognized in the law. That they cannot do. Such advice is not law, and it cannot replace the law. This Court could not be more clear in describing what such advice means:

> They are not law, they do not have the force or effect of law, and they provide no authority for implementing or enforcing standards or conditions. They simply "explain" statutes and rules, or they "provide guidance or advice" about how the executive branch is "likely to apply" a statute or rule. They impose no obligations, set no standards, and bind no one. They are communications *about* the law—**they are not the law itself**. They communicate intended applications of the law—

> they are not the actual execution of the law. Functionally, and as a matter of law, they are entirely inert. That is to say, they represent nothing more than the knowledge and intentions of their authors.

SEIU, Local 1 v. Vos, 2020 WI 67, ¶102, 393 Wis. 2d 38, 946 N.W.2d 35 (bold emphasis added, italics original).

If advice is as meaningless as described in *SEIU,* reliance upon it is not a defense to violating the statute. If the Appellants claim that certain actions violated explicit absentee voting statutes, WEC's advice is no defense. WEC's advice does not replace the laws of this State. Of course, WEC itself recognizes this, acknowledging as it does that the canvassing boards must obtain their own independent advice. *See* WEC, Recount Manual at pp. 33-34, *available at* https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Recount%20Manual%20Final%20%2811-2020%29%20highlight.pdf (stating that, "Despite advice provided by [WEC] . . . ultimately [the Board of Canvassers] retains the authority and discretion to make decisions it deems appropriate.") (P. App. 460-496).

To be clear WEC can, and does, change its advice.[1] *Id.* at pp. 7-8, n. 5; *see also* Recount Manual August 2018, *available at* https://elections.wi.gov/sites/elections.wi.gov/files/2019-02/Recount%20Manual%20Final%20%288-2018%29.pdf (P. App. 501-533). WEC's guidance can be changed, enhanced, revoked, or ignored at any time as evidenced by the limitless number of advisories, letters, opinions, booklets, etc. that it generates constantly. *See* Elections Day Manual, (Sep. 2020) (P. App. 266-457); WEC forms EL-100-401 (300 different forms created by WEC). *See https://elections.wi.gov/forms/.* And WEC, as noted throughout this Brief, does not feel duty-bound to follow the law.[2]

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[1] In fact, at the meeting held by WEC only hours after the President filed his Recount Petition and paid the $3 million Recount fee, WEC changed the Recount Manual. In addition to several non-substantive changes made related to COVID protocols, WEC staff attempted to remove from the manual all of the language related to the Board of Canvassers' duty to review the absentee ballot applications. Thankfully, those changes were not made due to a 3-3 tie vote among the Commissioners. In any event, the fact that WEC attempted to change the rules of election procedure, after scrutiny of election irregularties had begun and with a specific focus on the President's princple argument, demonstrates exactly why laches is a poor fit for this case. *See* WEC Notice, WEC Orders Presidential Election Recount (Nov. 19, 2020), *available at* https://elections.wi.gov/node/7250.

[2] In the trial court, Appellees suggested that if Appellants contested the guidance provided by WEC, they must do so through Wis. Stat. § 227.40(1), which requires a declaratory judgment action before the election. That is inaccurate for a number of reasons. First, Appellants are not challenging WEC's mistaken guidance, they are challenging the already-cast unlawful ballots and the wrongul actions of the clerks based on WEC's guidance. Second, *SEIU, supra,* makes such an action a waste of time as the WEC guidance has no force of law. As anyone can choose to follow it or not, a legal action would not be ripe for adjudication before the election took place. Third, Appellees' reading – that the

4. Laches and Other Equitable Defenses Do Not Apply

Perhaps recognizing the futility of relying on WEC's advice as a defense, the Appellees construct a corollary: Appellants, they argue, were required to challenge the advice prior to the election, or be barred from any challenge related to it. That is nonsense. If the advice itself has no meaning and no force whatsoever, then one cannot be required to challenge it. Moreover, the advice can be properly ignored, as we know in the case of separate applications being required for in-person voters elsewhere in the state. *See* Dane Cty. Trans. 11/28/20 at 6:7-25 (P. App. 170), Ex. 16, Aff. Lori Opitz dated 11/20/20 (P. App. 31-32).

A claim brought on such a matter, where there is no certainty of application and the advice given is contrary to the statute itself, would not survive a basic motion to dismiss based on ripeness. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶43, 309 Wis. 2d 365, 749 N.W.2d 211. (even in the context of a declaratory judgment action, "The facts on which the court

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sole action an unsuccessful candidate can take when guidance/advice is involved is a declaratory action – would read out of existence Wis. Stat. § 9.01(11) as the exclusive judicial path in a recount. Finally, Wis. Stat. §227.40(3) expressly allows a party to challenge the invalidity of a guidance document when the guidance is raised as a defense. If the guidance is contrary to the statutes, it is most certainly invalid.

is asked to make a judgment should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment."); *Texas v. United States,* 523 U.S. 296, 300 (1968) (a claim is not ripe for adjudication if it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."). If a claim may not be ripe (or is even reasonably believed not to be ripe), failing to bring that action cannot be barred by laches. *What-A-Burger of VA., Inc. v Whataburger, Inc.,* 357 F.3d 441, 449-50 (4th Cir. 2004) (quoting 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §31: 19(4th ed. 2003). ("[o]ne cannot be guilty of laches until his right ripens into one entitled to protection. For only then can his torpor be deemed inexcusable.")

The implications of the Appellees' arguments on future elections are extraordinary. Candidates for office do not expect to lose. They expect to win. As such, they do not engage in game-theory analysis of 'what-ifs' for how a clerk might violate the law. If the election is not close, the candidate would have no reason to raise any matter. But, under Appellees' theory, he must nonetheless bring an action because 'maybe' the election will be close, and the difference 'could' be that behavior which the candidate thinks might be questionable. By the Appellees' logic, every candidate must bring every

challenge to illegal behavior of the clerks in every election, no matter how remote the possibility it would affect the outcome and no matter that the clerk could, in fact, decide to follow the law. This is contrary to Wisconsin law, which requires that challenges to irregular or improper conduct in an election be brought after the election. *See Clifford v. Sch. Dist.*, 143 Wis. 2d 581, 587, 421 N.W.2d 852, 854 (Ct. App. 1988) (citing Wis. Stat. § 9.01).

In any event, no matter how the Appellees frame laches and the related equitable arguments, such as estoppel or unclean hands, there would need to be evidence of the knowledge and intent of the candidate against whom laches is asserted. There must be, at a minimum, proof of a conscious decision by the candidate not to bring an action of which he is aware and he knows will be critical to the outcome. But here, the Appellees can point to no evidence that the Appellants knew about, or considered the implications of, the behaviors occurring before November 3 after which all actions merged into the recount. Wis. Stat. § 9.01(11). The Appellees introduce no evidence about the Appellants' pre-election knowledge or strategy. Absent evidence, the suggestion they make is nothing more than speculation and would apply to every candidate in every election. The implication itself demonstrates the plain lack of merit in the assertions about laches.

Of course, applying the doctrine of laches is particularly inappropriate in matters of public interest. *Carlson v. Oconto Cty. Bd. of Canvassers*, 2001 WI App 20, 240 Wis. 2d 438, 443-44, 623 N.W.2d 195, 197-98 (citing *State ex rel. Pelishek v. Washburn*, 223 Wis. 595, 600, 270 N.W. 541 (1936)) (the public policy of the election statutes is that substantial violations of the election law should operate to vacate an election); *McNally v. Tollander*, 100 Wis. 2d 490, 507 (Wis. Sup. Ct. 1981) (after forty percent of the electorate were issued the wrong ballot by their clerks, Court found "the processes of the law [were] so infected as to require nullification of the election"); *see also Jenkins v. Williamson-Butler*, 883 So.2d 537 (4th Cir. La. Ct. of App. 2004) (court set aside an election after mass irregularities deprived more than twenty percent of the electorate their right to vote due to no fault of their own); N.Y. Code § 3-108(1) (codifying a twenty-five percent statutory voter participation minimum).

Even perhaps more important than the general public policy problems the Appellees' position would cause, such an application of laches to this case would also place an intolerable burden on the exercise of a First Amendment right – the right of a citizen to run for public office by seeking to persuade other citizens to cast their votes for him or her by forcing

candidates, in the midst of an election, to continuously monitor ever-shifting election procedures and guess at which ones may impact the result and which procedure in a post-election challenge might be deemed barred under the doctrine of *laches*. The cloud of confusion, uncertainty, and ambiguity this regime would cast over all candidates in all elections would impose a massive burden on the First Amendment right to engage in election advocacy. *See e.g. Arizona Free Enterprise Club PAC v. Bennett*, 564 U.S. 721, 735-40 (2011); *Randall v. Sorrell*, 584 U.S. 230, 261-63 (2006); *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 834-42 (7th Cir. 2014). Appellees' argument would also violate the void-for-vagueness due process doctrine, a well-established aspect of due process jurisprudence. *See* e.g., *FCC v. Fox TV Stations, Inc.,* 567 U.S. 239, 253-54 (2012); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 478-79 (7th Cir. 2012).

V. CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's decision affirming the holdings of the Dane County and Milwaukee County Boards of Canvassers. So holding, the Court should direct a remedy consistent with the Statutes within sufficient time to determine the correct outcome for the Presidential election in Wisconsin.

Dated this 11th day of December, 2020.

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CERTIFICATION

I hereby certify that this memorandum conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this memorandum is 3,760 words, exclusive of the caption, Table of Contents and Authorities, Statement of Issues, signature page, and the Certification.

Dated this 11th day of December, 2020.

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