No._____

In the Supreme Court of Wisconsin

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

v.

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

MEMORANDUM IN SUPPORT OF EMERGENCY PETITION FOR ORIGINAL ACTION

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INTRODUCTION

Under Article II, §1, the President of the United States is chosen by presidential electors selected by the State Legislatures. "[T]he state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several States for many years after the framing of our Constitution." *Bush v. Gore*, 531 U.S. 98, 104, 121 S. Ct. 525, 529 (2000) ("*Bush II*"). All states today have chosen to allow "the citizens themselves [to] vote for Presidential electors." *Bush II*, 531 U.S. at 104, 121 S. Ct. at 529. However, "[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. '[T]here is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated'" (quoting S.Rep. No. 395, 43d Cong., 1st Sess., 9 (1874)). *Bush II*, 531 U.S. at 104, 121 S. Ct. at 529–30. Moreover, if the states decide to allow the citizens to vote for Presidential electors, the manner in which the States conduct those elections are subject to constitutional rights including the right to equal protection of the laws under the Fourteenth Amendment. *Id.*

The Wisconsin State Legislature has by state law delegated to "the citizens themselves [to] vote for Presidential electors" in the November general election every four years. The Wisconsin State Legislature has also adopted very detailed election laws, subject to the equal protection clause, governing the conduct and administration of that election. Because the Wisconsin Constitution created three separate branches of government – legislative, executive and judiciary – the executive branch acting through

the Governor, the Wisconsin Elections Commission and various Board of Absentee Canvassers, are the persons or agencies who are charged with "faithfully" carrying out those election laws. As set forth in the Petition, those executive branch persons and agencies failed to faithfully carry out the November general election. Those executive branch persons and agencies disregarded Wisconsin statutes in the collection and voting of absentee ballots and, with respect to the Cities of Madison, Racine, Kenosha, Green Bay and Milwaukee, all strongholds of the Democratic party and therefore in electoral control of Democratic party elected officials, used $6,000,000 in funds provided by billionaire Democratic operative, Mark Zuckerberg, for election officials to carry out the election in those Cities in violation of Wisconsin state law.

As set forth in the statistical expert opinion, the failure of the executive branch persons and agencies to faithfully execute Wisconsin election law affected the outcome of the Presidential election. The executive branch failure to faithfully execute Wisconsin election law issue presented in this case is this: What is the remedy if the executive branch fails to faithfully execute Wisconsin election laws? In elections other than the election of Presidential electors, the Court could order a second election. However, because the Presidential electors must be selected by December 14, 2020, there is not sufficient time to conduct such an election. However, because the State Legislature retains plenary authority to select the Presidential electors, the Court can order that the State Legislature has the authority to select the Presidential electors by doing what State Legislatures did at the founding of our Republic – convene a session of the legislature and select the Presidential electors themselves.

LEGAL ARGUMENT

A. The State Legislature of Wisconsin Has Plenary Authority to Choose the Presidential Electors.

As a preliminary matter, it is important to confirm legally, as set forth above in *Bush II,* that the Wisconsin State Legislature has "plenary" (meaning "complete, entire, perfect, not deficient in any respect") authority to choose the Presidential electors. To begin, Art. II, Sec. 1 of the U.S. Constitution provides "[e]ach State shall appoint [the electors], in such Manner as the Legislature thereof may direct, ... U.S. Const. art. II, § 1, cl. 2. The time of choosing the electors is set by Congress. Congress enacted 3 U.S.C. §1 that the electors shall be chosen on the Tuesday after the first Monday in November every four years. However, recognizing the State Legislature's plenary authority, Congress adopted 3 U.S.C. § 3 which provides that if the electors are not chosen on that day, the electors may be chosen on any subsequent day.

As set forth above, *Bush II* unequivocally held that the State Legislature retains the authority to select the Presidential electors which the legislature can take back at any time – even after having an election: "'[T]here is no doubt of the right of the legislature to resume the power (to choose electors after granting the franchise to the voters) ***at any time, for it can neither be taken away nor abdicated***' ") (quoting S.Rep. No. 395, 43d Cong., 1st Sess., 9 (1874)). *Bush II,* 531 U.S. at 104, 121 S. Ct. at 529.

Two weeks ago, the Eighth Circuit confirmed the State Legislature's authority in issuing an injunction against the Minnesota Secretary of State from complying *with a State Court consent order governing the election of Presidential electors in Minnesota:*

> By its plain terms, the Electors Clause vests the power to determine the manner of selecting electors exclusively in the "Legislature" of each state. U.S. Const. art. II, § 1, cl. 2; *McPherson v. Blacker*, 146 U.S. 1, 27, 13 S.Ct. 3, 36 L.Ed. 869

> (1892) ("The constitution .... leaves it to the legislature exclusively[.]"). And this vested authority is not just the typical legislative power exercised pursuant to a state constitution. Rather, when a state legislature enacts statutes governing presidential elections, it operates "by virtue of a direct grant of authority" under the United States Constitution. *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000). Consequently, only the Minnesota Legislature, and not the Secretary, has plenary authority to establish the manner of conducting the presidential election in Minnesota.
>
> Simply put, the Secretary has no power to override the Minnesota Legislature. In fact, a legislature's power in this area is such that it "cannot be taken from them or modified" even through "their state constitutions."

Carson v. Simon, 20-3139, 2020 WL 6335967, at *6 (8th Cir. Oct. 29, 2020).

Lest there be any doubt, *Carson* described its analysis of this issue as "relatively straight forward." *Id.*

Simply put, the State Legislature retains authority at any time to change the manner in which Presidential electors are selected up until the time of their selection.

B. Wisconsin Election Officials Cannot Violate Wisconsin Election Laws in the Election of Presidential Electors.

As the Commission on Federal Election Reform, a bipartisan commission chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, and cited extensively by the United States Supreme Court, observed, "the 'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.'" Building Confidence in U.S. Election, Report of the Commission on Federal Election Reform, p. 46 (Sept. 2005) (available at https://bit.ly/3dXH7rU, and referred to and incorporated herein by reference) (hereinafter, the "Carter-Baker Report").

According to the Carter-Baker Report, mail-in voting is "the largest source of potential voter fraud." Carter-Baker Report, p. 46. Many well-regarded commissions

and groups of diverse political affiliation agree that "when election fraud occurs, it usually arises from absentee ballots." Michael T. Morley, Election Emergency Redlines, p. 2 (Mar. 31, 2020) (available at https://ssrn.com/abstract=3564829 or http://dx.doi.org/10.2139/ssrn.3564829, and referred to and incorporated herein by reference) (hereinafter, "Morley, Redlines").

Such fraud is easier to commit and harder to detect. As one federal court put it, "absentee voting is to voting in person as a take-home exam is to a proctored one." *Griffin v. Roupas,* 385 F.3d 1128, 1131 (7th Cir. 2004). *See also id.* at 1130-31 (voting fraud is a "serious problem" and is "facilitated by absentee voting.").

Courts have repeatedly found that mail-in ballots are particularly susceptible to fraud. As Justice Stevens has noted, "flagrant examples of [voter] fraud ... have been documented throughout this Nation's history by respected historians and journalists," and "the risk of voter fraud" is "real" and "could affect the outcome of a close election." Crawford, 553 U.S. at 195-96 (plurality op. of Stevens, J.) (collecting examples). Similarly, Justice Souter observed that mail-in voting is "less reliable" than in-person voting. *Crawford,* 553 U.S. at 212, n.4 (Souter, J., dissenting) ("'[E]lection officials routinely reject absentee ballots on suspicion of forgery.'"); *id.* at 225 ("[A]bsentee-ballot fraud . . . is a documented problem in Indiana."). *See also Veasey v. Abbott,* 830 F.3d 216, 239, 256 (5th Cir. 2016) (en banc) ("[M]ail-in ballot fraud is a significant threat" — so much so that "the potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting."). See also *id.* at 263 ("[M]ail-in voting . . . is far more vulnerable to fraud."); *id.* (recognizing "the far more prevalent issue of fraudulent absentee ballots".).

This risk of abuse by absentee or mail-in voting is magnified by the fact that "many states' voter registration databases are outdated or inaccurate." Morley, Redlines, p. 2. A 2012 study from the Pew Center on the States – which the U.S. Supreme Court cited in a recent case - found that "[a]pproximately 24 million – one of every eight – voter registrations in the United States are no longer valid or are significantly inaccurate"; "[m]ore than 1.8 million deceased individuals are listed as voters"; and "[a]pproximately 2.75 million people have registrations in more than one state." *See Pew Center on the States, Election Initiatives Issue Brief*, "Inaccurate, Costly, and Inefficient: Evidence That America's Voter Registration System Needs an Upgrade," (Feb. 2012) (available at https://www.issuelab.org/resources/13005/13005.pdf, and referred to and incorporated herein by reference) (cited in *Husted v. A. Philip Randolph Inst.,* 138 S. Ct. 1833, 1838 (U.S. 2018)).

As set forth in the Petition, the Wisconsin Elections Commission and the Elections Commissions and clerk's offices of the City of Racine, Kenosha, Milwaukee, Madison, and Green Bay violated State law in conducting and administering the November 3, 2020 election. Unfortunately, it appears that this happened for partisan reasons because the elected or appointed officials to each of these bodies is a Democratic Party member who favored Democratic candidate Joseph Biden over Republican candidate Donald J. Trump. In fact, the vote total published by the Milwaukee Elections Commission shows Democratic candidate Joseph Biden winning almost 80% of the vote. As a result, these Cities knew prior to the election that increasing the vote in their jurisdiction, particularly the absentee vote, would easily result in more votes for Joseph Biden than Donald J. Trump.

The problems were not minor. As set forth in the Petition, the City of Milwaukee Elections Commission directed its clerks to fill in the witness address on the back of the absentee ballot envelope in complete derogation of Wis. Stat. §6.86 and §6.87 (6d). Wis. Stat. §6.87 (6d) specifically provides that such ballots cannot be counted. Unlike every other community in Wisconsin, the CTCL Cities took in over $6,000,000 in private monies sourced to Mark Zuckerberg and used those funds to facilitate absentee voting by having those Cities hire additional staff. Wisconsin law and the federal Elections Clause do not allow municipalities to take in such private funding for anything much less engaging in actions contrary to Wisconsin's election laws.

C. The CTCL Cities Administration of Wisconsin Election Laws is a Violation of the Equal Protection Clause under *Bush II.*

In *Bush II*, the Supreme Court held that a state which provides for the general election of Presidential electors must conduct the election in a uniform manner throughout the state:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."

Bush II, 531 U.S. at 104-05 (2000).

The Equal Protection Clause requires States to "'avoid arbitrary and disparate treatment of the members of its electorate.'" *Charfauros v. Bd. of Elections*, 249 F.3d 941, 951 (9th Cir. 2001) (quoting Bush, 531 U.S. at 105). That is, each citizen "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Bloomstein*, 405 U.S. 330, 336 (1972). A qualified

voter "is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause." *Reynolds*, 377 U.S. at 568; see also *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [the Supreme Court's] decisions."). "[H]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush II*, 531 U.S. at 104-05.

Moreover, "[t]he right to vote extends to all phases of the voting process, from being permitted to place one's vote in the ballot box to having that vote actually counted. Thus, the right to vote applies equally to the 'initial allocation of the franchise' as well as 'the manner of its exercise.' Once the right to vote is granted, a state may not draw distinctions between voters that are inconsistent with the guarantees of the Fourteenth Amendment's equal protection clause." *Pierce*, 324 F. Supp. 2d at 695. "[T]reating voters differently" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *Charfauros*, 249 F.3d at 954. Indeed, a "minimum requirement for non-arbitrary treatment of voters [is] necessary to secure the fundamental right [to vote]." *Bush II*, 531 U.S. at 105.

The use of "standardless" procedures can violate the Equal Protection Clause. *Bush II*, 531 U.S. at 103. "The problem inheres in the absence of specific standards to ensure … equal application" of even otherwise unobjectionable principles. *Id.* at 106. Any voting system that involves discretion by decision makers about how or where voters will vote must be "confined by specific rules designed to ensure uniform

treatment." *Id. See also Thomas v. Independence Twp.*, 463 F.3d 285, 297 (3d Cir. 2006) (Equal Protection Clause prohibits the "selective enforcement" of a law based on an unjustifiable standard); *United States v. Batchelder,* 442 U.S. 114, 125 n.9, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).

Allowing a patchwork of different rules from county to county, and as between similarly situated absentee and mail-in voters, in a statewide election involving federal and state candidates implicates equal protection concerns. *Pierce*, 324 F. Supp. 2d at 698-99. See also *Gray*, 372 U.S. at 379-81 (a county unit system which weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties violates the Equal Protection Clause and its one-person, one-vote jurisprudence). The equal enforcement of election laws is necessary to preserve our most basic and fundamental rights. Moreover, the requirement of equal treatment is particularly stringently enforced as to laws that affect the exercise of fundamental rights, *see Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015), including the right to vote. *See, e.g., Gray v. Sanders*, 372 U.S. 368, 380 (1963) (every vote must be "protected from the diluting effect of illegal ballots."); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op. of Stevens, J.) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *accord Reynolds v. Sims*, 377 U.S. 533, 554-55 & n.29 (1964). The disparate treatment of Wisconsin voters, in subjecting one class of voters to greater burdens or scrutiny than another, violates Equal Protection guarantees because "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the

franchise." *Reynolds,* 377 U.S. at 555.

The State of Wisconsin, and the CTCL Cities in particular, violated the Equal Protection Clause by obtaining and providing more funding for the absentee voting than other counties who did not receive CTCL funding. Moreover, the manner in which the City of Milwaukee counted ballots, allowing city staff to fill in the address of the witness in direction violation of Wisconsin Statutes, while other counties did not complete the address, is a violation of equal protection.

D. Allowing for Arbitrary Enforcement of Wisconsin's Election Laws is a Violation of Due Process.

The right of qualified citizens to vote in a state election involving federal candidates is recognized as a fundamental right under the Fourteenth Amendment of the United States Constitution. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 665 (1966). See also *Reynolds*, 377 U.S. at 554 (The Fourteenth Amendment protects the "the right of all qualified citizens to vote, in state as well as in federal elections.").

Indeed, ever since *Slaughter-House Cases*, 83 U.S. 36 (1873), the United States Supreme Court has held that the Privileges or Immunities Clause of the Fourteenth Amendment protects certain rights of federal citizenship from state interference, including the right of citizens to directly elect members of Congress. *See Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing *Ex parte Yarbrough*, 110 U.S. 651, 663-64 (1884)). *See also Oregon v. Mitchell*, 400 U.S. 112, 148-49 (1970) (Douglas, J., concurring) (collecting cases). The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it "is preservative of other basic civil and political rights." *Reynolds*, 377 U.S. at 562.

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). "Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted" if they are validly cast. *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted" means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555, n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

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

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

Practices that promote the casting of illegal or unreliable ballots, or fail to contain basic minimum guarantees against such conduct, can violate the Fourteenth Amendment by leading to the dilution of validly cast ballots. *See Reynolds,* 377 U.S. at

555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

The Fourteenth Amendment Due Process Clause protects the right to vote from conduct by state officials which seriously undermines the fundamental fairness of the electoral process. *Marks v. Stinson,* 19 F.3d 873, 889 (3d Cir. 1994); *Griffin v. Burns,* 570 F.2d 1065, 1077-78 (1st Cir. 1978).

"When an election process 'reaches the point of patent and fundamental unfairness,' there is a due process violation." *Florida State Conference of N.A.A.C.P. v. Browning,* 522 F.3d 1153, 1183-84 (11th Cir. 2008) (quoting *Roe v. Alabama,* 43 F.3d 574, 580 (11th Cir.1995) (citing *Curry v. Baker,* 802 F.2d 1302, 1315 (11th Cir.1986))). See also *Griffin,* 570 F.2d at 1077 ("If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order."); *Marks v. Stinson,* 19 F.3d 873, 889 (3d Cir. 1994) (enjoining winning state senate candidate from exercising official authority where absentee ballots were obtained and cast illegally).

Part of courts' justification for such a ruling is the Supreme Court's recognition that the right to vote and to free and fair elections is one that is preservative of other basic civil and political rights. *See Black,* 209 F.Supp.2d at 900 (quoting *Reynolds*, 377 U.S. at 561-62 ("since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.")); *see also Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886) ("the political franchise of voting ...

is regarded as a fundamental political right, because [sic] preservative of all rights.").

"[T]he right to vote, the right to have one's vote counted, and the right to have ones vote given equal weight are basic and fundamental constitutional rights incorporated in the due process clause of the Fourteenth Amendment to the Constitution of the United States." *Black,* 209 F. Supp. 2d at 900 (a state law that allows local election officials to impose different voting schemes upon some portions of the electorate and not others violates due process). "Just as the equal protection clause of the Fourteenth Amendment prohibits state officials from improperly diluting the right to vote, the due process clause of the Fourteenth amendment forbids state officials from unlawfully eliminating that fundamental right." *Duncan,* 657 F.2d at 704.

"Having once granted the right to vote on equal terms, [Defendants] may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush II,* 531 U.S. at 104-05.

CONCLUSION

This Court should grant the Emergency Petition for Original Action and grant the relief sought because the Wisconsin election officials violated Wisconsin's elections laws in a material way which nullified a close Presidential election in Wisconsin.

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