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OF WISCONSIN

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

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## In the Supreme Court of Wisconsin

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

PETITIONERS,

v.

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

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

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### EMERGENCY PETITION TO BYPASS COURT OF APPEALS WITH MOTION TO ACCEPT OPENING BRIEF AND APPENDIX AND SET EXPEDITED SCHEDULE

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## INTRODUCTION<sup>1</sup>

A Presidential election is one of the most important matters in our Republic, representing to all Americans, and to the world, the sanctity of the rule of law. This matter poses the fundamental legal question regarding such an election: Do our state statutes governing elections mean what they say?

Wisconsin has made explicit choices on how it will conduct its elections, including a choice to treat absentee voting with great caution and guard it with 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.

This Court must address these fundamental issues immediately, as identifying the validly appointed Presidential Electors to represent Wisconsin must be done on a timetable set in the United States Constitution which cannot be changed. There is no time for review by the Court of Appeals, the issues posed are of extraordinary statewide importance, and these fundamental legal issues can only be authoritatively resolved by this Court.

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<sup>1</sup> Citations to “P. App. \_\_\_” refer to the page(s) of the Appendix filed with Petitioners’ Emergency Petition to Bypass the Court of Appeals in this matter; citations to the transcript of the Recount proceedings in Milwaukee County appear as “Milwaukee Cty. Trans. [date] at [page:line]”; and citations to the transcript of the Recount proceedings in Dane County appear as “Dane Cty. Trans. [date] at [page:line].”

### **ISSUES PRESENTED**

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?

### **RELIEF REQUESTED**

1. That this Court take jurisdiction of this matter.
2. That the Court set an expedited schedule for briefing and oral argument within a time period that will allow for complete resolution of this case prior to January 6, 2021, the date for consideration of electoral votes in the United States Congress. If the Brief submitted herewith is accepted as Appellants' Opening Brief, a schedule the Court could consider is: 1) Responsive Briefs of other Parties due Wednesday, December 16, 2020; 2) Appellants' Reply Brief due Saturday, December 19, 2020; and 3) oral argument the week of December 21, 2020.
3. That the Court consider this a Motion to Accept the Brief filed herewith as the Petitioner/Appellants' Opening Brief.

## STATEMENT OF THE CASE

### **I. Procedural Posture.**

This matter was previously before this Court on a request for Original Action. *Trump v. Evers*, No. 2020AP1971-OA, 2020 Wisc. LEXIS 191, at \*1 (Dec. 3, 2020). After this Court declined the Petitioners' request, Petitioners immediately began an action by Notice of Appeal in the Circuit Courts of Dane and Milwaukee Counties, the matters were consolidated, the parties presented the appeal, and the Circuit Court ruled. (P. App. 537-544). A Notice of Appeal of the Circuit Court's December 11, 2020 Final Order was immediately filed, and this Petition to Bypass was filed as quickly as possible with the Clerk of this Court. (P. App. 550).

### **II. Granting the Petition to Bypass is Essential to the Law of this State and to the Public Confidence in the Integrity of the Presidential Election and Future Elections.**

This Court should immediately take jurisdiction because there is an exigent and compelling public interest in obtaining a prompt and authoritative determination of the election for President and Vice President of the United States. A decision by this Court is essential both as to the November 3, 2020 election and to all future elections. A determination of the legal issues unquestionably will control the outcome of this case.

The outcome of this case will affect the voting rights of all the citizens of Wisconsin and, particularly, those voting as absentee electors. A failure to immediately address the fundamental legal issues would leave in doubt the outcome of the 2020 election for President and Vice President of the United States and would

forever negatively affect the public's confidence in our elections, as well as the capacity of the Judiciary to serve as the ultimate arbiter of legal disputes. Only this Court can act with authoritative finality.

**A. Bypass Rules.**

Wis. Stat. § 808.05(1) provides that this Court may take jurisdiction of an appeal if "[i]t grants direct review upon a petition to bypass filed by a party[.]" Wis. Stat. § 809.62(1r) sets out some of the criteria the Court will apply to determine if a Bypass will be granted, but notes those are "neither controlling nor fully measur[e] the Court's discretion . . ."

Wis. Stat. § (Rule) 809.60(1) provides that a party may file with this Court "a petition to bypass the court of appeals pursuant to § 808.05 no later than 14 days following the filing of the respondent's brief under § 809.19[.]" The petition to bypass "must include a statement of reasons for bypassing the court of appeals." *Id.*

This Court's Internal Operating Procedures also address a petition to bypass:

*2. Petition to Bypass, Certification and Direct Review.* A party may request the court to take jurisdiction of an appeal or other proceeding pending in the Court of Appeals by filing a petition to bypass pursuant to Wis. Stat. § (Rule) 809.60. A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1),<sup>2</sup> and one the court concludes it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues. At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.

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<sup>2</sup> The criteria for granting a petition for review in this Court are found in Wis. Stat. § (Rule) 809.62(1r).

Wisconsin Supreme Court Internal Operating Procedures, II.B.2.

**B. The Petition Satisfies the Criteria for Bypass and Should Be Granted.**

In our country, the Presidential election is one of the most solemn and significant events for all citizens. It represents the ultimate statement by all American citizens concerning the sanctity of the rule of law and the peaceful transfer of Executive power. It is unlike any other election, and its importance is recognized uniformly by American courts. *Bush v. Gore*, 531 U.S. 98, 112 (2000); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 594 (6th Cir. 2006); *Green Party of Ga. v. Kemp*, 171 F. Supp. 3d 1340, 1367 (N.D. Ga. 2016); *Nader v. Keith*, No. 04 C 4913, 2004 U.S. Dist. LEXIS 16660, at \*22 (N.D. Ill. Aug. 23, 2004)

As such, the legal issues raised during the Recount, addressed in this Appeal, are certainly as “special” and “important” as any case this Court is likely ever to hear. This Court has previously granted bypass in election-law cases of lesser moment. *Elections Bd. of Wisconsin v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 653, 670, 597 N.W.2d 721 (1999). *See also NAACP v. Walker*, 2014 WI 98, ¶¶1, 18, 357 Wis. 2d 469, 851 N.W.2d 262 (2014).

The legal issues posed are more fully described in the Brief of Petitioners filed simultaneously with this Petition, and Petitioners respectfully incorporate that Brief by reference. The circuit court’s decision has fully decided any factual matters, so no factual determinations remain to be made. The sole remaining issues are legal and, thus, fall squarely within the purview of the Court. Wis. Stat. § 809(1r)(3).

Ultimately, only this Court can issue a decision with statewide effect. Wis. Stat. § 809.62(1r)(2). A decision not to bypass would be, in effect, a decision by this Court never to allow a meaningful review of the Presidential election results in Wisconsin prior to January 6, 2021. A stop in the Court of Appeals would be little more than an exercise in futility with regard to one of the central errors committed during the election and Recount—the municipal clerk’s issuance of 170,140 absentee ballots without first having received a written application from the electors, and the Boards of Canvassers’ failure to exclude those ballots. (P. App. 18, 20-21, 29-30). That issue has already been addressed and decided in a published opinion of the Court of Appeals. *See Lee v. Paulson (in re Ballot Recount)*, 2001 WI App 19 (applying the plain language of Wis. Stat. §§ 6.84(2) & 6.86(1)(ar) and ordering the removal of all absentee ballots issued without a corresponding written application from the final vote totals and changing the outcome of an election). In light of *Lee*, the Court of Appeals cannot do anything other than reach the same conclusion in this case. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246, 256 (1997) (“we conclude that the constitution and statutes must be read to provide that only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals”). After the Court of Appeals conforms its ruling in this case to *Lee*, there is no doubt Respondents would then petition this Court to review the case. As to these, and the other matters of statutory construction, there is not sufficient time to follow that course.

In addition, there can be little doubt that the issues regarding the statutes governing absentee voting are of the type that will “recur unless resolved by the Supreme Court.” Wis. Stat. § 809.62(1r)(3). Absentee voting has dramatically increased over the years and will likely continue to increase. The issues raised by Petitioners concerning the mandatory character of the statutes, the remedies required for violations, and the legal effect of WEC advice, will most certainly recur in future recounts and elections and will control how future absentee voters cast their ballots. If this Court does not act, every future absentee voter will doubt if the vote they cast will be counted. The resulting lack of confidence in all future Wisconsin elections would be catastrophic.

**C. The Court Should Grant Bypass Because the Time for a Meaningful Decision is Too Short to Allow for Intermediate Appellate Review.**

In a more ordinary case— involving for example, the election of a member of a multi-member government body, such as a legislative chamber which can function without every member—this Court might wait for the Court of Appeals to issue a ruling before considering the case. However, here a grant of bypass is essential to ensure that the issues raised in this case are resolved so there can be a determination in Congress on January 6, 2021, of which slate of



electors, those pledged to Trump-Pence or those pledged to Biden-Harris, are properly counted as Wisconsin's votes for President and Vice President.<sup>3</sup>

Final resolution of judicial controversies can take as long as January 6th because, under the Constitution, none of the votes cast for President and Vice President are *opened* before that date. As the WEC explained in its earlier filing in this Court, the winner of Wisconsin's ten electoral votes can be certified "after the electors have convened and cast their electoral votes," and before January 6. Response of Respondents Wisconsin Elections Commission and Commissioner Ann Jacobs in Case. No. 20AP1971-OA, filed Dec. 1, 2020, at 8.<sup>4</sup>

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<sup>3</sup> Following the recommended approach to situations involving court challenges in Presidential elections which are not resolved by the time the Presidential electors must cast their votes pursuant to Art. II, § 1, cl. 4, and 3 U.S.C. § 7 (this year, December 14), the Trump-Pence Campaign has requested its electors to sign and send to Washington on that date their votes, to ensure that their votes will count on January 6 if there is a later determination that they are the duly appointed electors for Wisconsin.

This practice dates back at least as far as 1960, when the Kennedy electors in Hawaii voted on the date the Electoral College met, even though on that date the Nixon electors had been ascertained by the acting Governor to have won the state; only after further litigation were the votes of the Kennedy electors approved and ultimately counted in Congress. *See, e.g.,* Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N. Car. L. Rev. 1654, 1691-92 (2002). *See also* Michael L. Rosin & Jason Harrow, "How to Decide a Very Close Election for Presidential Electors: Part 2," Take Care Blog, Oct. 23, 2020 (<https://takecareblog.com/blog/how-to-decide-a-very-close-election-for-presidential-electors-part-2>) (visited Dec. 9, 2020) (concluding that if "a state wants to have its electoral votes counted, but which presidential electors were appointed by the voters on election day remains uncertain . . . there is only one possible solution: both potentially-winning slates of electors should cast electoral votes on the day required while the recount continues").

<sup>4</sup> *See also* *Bush v. Gore*, 531 U.S. 98, 144 (2000) (Ginsburg, J., dissenting) (noting that the date that has "ultimate significance" under federal law is "the sixth day of January," the date set by 3 U.S.C. § 15 on which "the validity of electoral votes" is determined); Laurence H. Tribe, *Comment: eroG .v hsuB and Its Disguises: Freeing Bush v. Gore From Its Hall of Mirrors*, 115 Harv. L. Rev. 170, 265-66 (2001) (noting that the only real deadline for a State's electoral votes to be finalized is "before Congress starts to count the votes on January 6").

We agree with WEC that because January 6, not December 14, is the real deadline, it is not “necessary to super-expedite state court proceedings . . .” *Id.* Nonetheless, any realistic prospect that this matter can be given due deliberation by this Court, and resolved soon enough that any aggrieved party would have a reasonable opportunity to seek United States Supreme Court review, *does* require that this Court grant bypass and set the appeal for expedited briefing and argument. It is simply not plausible that this appeal could be definitively concluded in the next three weeks or so if the parties were first required to brief and argue in the Court of Appeals.

#### **CONCLUSION**

This Court should grant the Petition for Bypass, and enter such other and further orders so as to ensure that the matter can be entirely resolved before January 6, 2021.

Dated this 11th day of December, 2020.

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