No. 20-883

In the Supreme Court of the United States

DONALD J. TRUMP, PETITIONER

v.

WISCONSIN ELECTIONS COMMISSION, ET AL.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER PURSUANT TO SUPREME COURT RULE 15.8

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INTRODUCTION

Supreme Court Rule 15.8 provides: "any party may file a supplemental brief at any time while a petition for writ of certiorari is pending, calling attention to . . . [any] intervening matter not available at the time of the party's last filing." After Petitioner's December 30, 2020, filing the U.S. Congress accepted electoral votes for President of the United States from the State of Wisconsin for President Joseph R. Biden, and President Biden was sworn in as the forty-sixth President of the United States. These intervening events have mooted aspects of the relief initially sought by Petitioner. At the same time, key issues are not moot based on the "capable of repetition yet evading review" doctrine.

Had any Respondent submitted a brief in opposition, Petitioner would have addressed the issue of mootness in Petitioner's reply. As no response briefs were filed, Petitioner addresses these intervening matters pursuant to Rule 15.8.

DISCUSSION

This Court has frequently applied the exception to mootness known as "capable of repetition yet evading review," to reach the merits of election disputes. *See*, *e.g.*, *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007) (recognizing the propriety of applying the exception in the context of election cases) (citing *Storer v. Brown,* 415 U.S. 724, 737, n. 8 (1974)); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 n.48 (1996) (applying exception to challenge to registration fees required to attend political party's state convention as a delegate); *Norman v. Reed*, 502 U.S. 279, 288 (1992) (applying exception to access to ballot challenge); *Anderson v. Celebrezze*,

460 U.S. 780, 784 n.3 (1983) (applying exception to presidential candidate's challenge to Ohio's early filing deadline for independent candidates); *Brown v. Chote*, 411 U.S. 452, 457 n.4 (1973) (applying "evading review" doctrine to candidate's challenge to validity of candidate filing fees); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) (applying exception to challenge to political party enrollment requirements as condition to voting in primaries); *Dunn v. Blumstein*, 405 U.S. 330, 332 n.2 (1972) (applying exception to voter's challenge to durational residence requirements for voting); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (applying exception to challenge to number of signatures required on nominating petitions for new political parties).

"The exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Fed. Election Comm'n*, 551 U.S. at 462 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

First, the "capable of repetition" doctrine is particularly important in the context of a presidential election which affords only an extremely compressed time frame in which post-election litigation may be completed. For instance, here the complaint was filed on December 2, 2020, a merits hearing was held on December 10, and final judgment was rendered December 14. The Seventh Circuit issued its decision December 24, and the petition was filed with this Court on December 30.

Of course, presidential elections are conducted on the first Tuesday after the first Monday in November.[1] By statute Congress counts the electoral votes on January 6[2] and the Constitution requires the new President be inaugurated by January 20 at noon.[3] Therefore, cases initiated in the period after a presidential election present the epitome of an action for which the duration is too short to be fully litigated prior to expiration of the relevant period, in this case the consideration of electors by Congress and the inauguration of the new president.

The narrow window in which legal disputes may be resolved following a presidential election weighs heavily in favor of applying the "capable of repetition" doctrine to resolve issues capable of reoccurring. Otherwise, non-legislative state actors may be emboldened in future presidential elections to make even more last-minute changes to state election laws contrary to the Electors Clause than occurred in this year's election.

Second, Petitioner clearly satisfies the element that there is a reasonable expectation he may in the future be subject to the same action. There is no legal impediment to him running for re-election.[4] National media and political pundits have highlighted Petitioner as a potential presidential candidate in 2024 and report that he would be the GOP frontrunner should he run again. This reporting is objectively

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[1] 3 U.S.C. § 1.

[2] 3 U.S.C. § 15.

[3] U.S. CONST., Amendment XII.

[4] U.S. CONST., Amendment XXII.

based upon polling data and Petitioner's access to the financial resources needed to run.[5] Therefore, Petitioner easily satisfies the second element of the capable of repetition standard.

Significantly, his petition raises important issues capable of repetition which could be critical in a subsequent presidential election. Petitioner has raised the inherent conflict between this Court's guidance in *Purcell v. Gonzalez*, 549 U.S.1 (2006), instructing that federal courts not intervene in ongoing elections (and interpreted by federal courts to apply at the point in an election in which absentee ballots have been mailed or their mailing is imminent), and the doctrine of laches frequently applied by courts in this election cycle (including by the Seventh Circuit in this case) to find that a post-election challenge to conduct occurring during or immediately before the *Purcell* window

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[5] *See*, *e.g.*, "Inauguration Day isn't the end of the Trump era. It's just the beginning." *USA Today*, January 17, 2021 ("President Donald Trump would enjoy an almost-certain early favorite status in an open 2024 Republican primary"), *available at*: https://www.usatoday.com/story/news/politics/2021/01/17/paleologos-poll-trump-era-just-getting-started/4196345001/; "It's still Trump's party," *Axios*, January 14, 2020 ("57% of Republicans said Trump should be the 2024 GOP candidate . . . [t]hat's a formidable base for Trump, who also controls the $150 million+ he has raised for his super PAC since the election") *available at*: https://www.axios.com/trump-republicans-impeachment-support-10c11b10-2149-406f-ab6a-4a94db8d1226.html.

(*i.e.*, the period between the imminent mailing of ballots and election day) is untimely. *See* Petition for Certiorari (Pet. Cert.) at 36-39. Application of laches in the circumstances of this case also conflicts with the Electors Clause, Article II, § 1, cl. 2 of the United States Constitution, because a judge-made equitable doctrine should not control when important public rights are at stake. The application of laches further places an intolerable burden upon exercise of the First Amendment right to run for public office. *Id.* at 36. These issues pertaining to laches, the Electors Clause, the First Amendment, and *Purcell* are likely to recur in future cases.

Also, the Seventh Circuit entered a decision in conflict with this Court's decisions in *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000); and *McPherson v. Blacker*, 146 U.S. 1 (1892), in which this Court confirmed the Electors Clause was intended by the Framers to preserve the plenary and exclusive authority of the state legislatures to establish the manner in which presidential electors are chosen. *See* Pet. Cert. at 3-6. The Seventh Circuit's statement that Article II may be interpreted (as the District Court in this case interpreted it) to have been satisfied merely by conducting the presidential election by popular vote, even if the state legislature's directives concerning *how* the election was to be conducted were not followed, may cause confusion in future elections. It is also in conflict with the Eighth Circuit's recent decision in *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). *See* Pet. Cert. at 23-25. This is another issue likely to recur.

Re-affirmation of the principle that the Electors Clause vests exclusive authority in the state legisla-

tures to set the rules – not just the means for appointing electors -- for presidential elections is not only evidently important to future elections based on this case, but, *in addition*, there were numerous other cases during this election cycle in which this constitutional principle appears *not* to have been fully understood and/or respected by non-legislative state actors. *See*, *e.g.*, *Republican Party v. Boockvar*, 141 S. Ct. 1, 2 (2000) (Statement of Alito, J. joined by Thomas and Gorsuch JJ) ("[T]he constitutionality of the [Pennsylvania] Supreme Court's decision [extending the statutory date for receipt of mail-in ballots beyond Election Day] . . . has national importance, and there is a strong likelihood that the State Supreme Court decision violates the Federal Constitution."); *Carson* 978 F.3d at 1059-1060 ("Secretary's actions in altering the deadline for mail-in ballots likely violates the Electors Clause"); *Moore v. Circosta*, 2020 WL 6063332, *7 (M.D.N.C. 2020) (state's election administrator "contravene[d] the duly enacted laws of the [Legislature] and . . . permit[ted] ballots to be counted that do not satisfy the fixed rules or procedures the state legislature has deemed necessary to prevent illegal voting").[6]

The foregoing issues are likely to recur in future presidential elections. To avoid confusion resulting from the erroneous decisions below and prevent need for re-litigation of these issues the "capable of repetition" exception should be applied.

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[6] Each of the identified cases were cited in the Petition, although the complete citation to the *Moore* case was inadvertently left out.

Respectfully submitted,

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