APPENDIX

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APPENDIX A

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued May 31, 2023
Decided August 2, 2023

Before

ILANA DIAMOND ROVNER, Circuit Judge
DAVID F. HAMILTON, Circuit Judge
MICHAEL Y. SCUDDER, Circuit Judge

No. 22-2704

WILLIAM FEEHAN, *Plaintiff-Appellee*, v. TONY EVERS, in his official capacity as Wisconsin's Governor, *Defendant-Appellant*.	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 2:20-cv-01771-PP Pamela Pepper, *Chief Judge*.

ORDER

On December 1, 2020, plaintiff-appellee William Feehan filed this suit in the United States District Court for the Eastern District of Wisconsin. The complaint sought injunctive relief that would have compelled Wisconsin Governor Tony Evers and the

Wisconsin Elections Commission to "de-certify" the results of the 2020 presidential election in Wisconsin. Feehan also wanted the court to enjoin Governor Evers and the Commission from certifying Wisconsin's electoral votes for then-candidates Joseph R. Biden, Jr., and Kamala D. Harris and from transmitting those results to the Electoral College and Congress to be counted on January 6, 2021.

Eight days later, on December 9, 2020, the district court concluded that it lacked subject-matter jurisdiction and dismissed the case. The district court found that Feehan did not have Article III standing to bring the suit and that much of the requested relief was moot. The court also observed that Feehan's suit could not go forward because the defendants either could not be sued under 42 U.S.C. § 1983 or were protected from Feehan's claims by the Eleventh Amendment.

On December 10, Feehan appealed to this court. A few days later, he also sought emergency relief from the Supreme Court. On a joint motion of the parties, we dismissed the appeal as moot on February 1, 2021. Our mandate issued on February 23. The Supreme Court denied Feehan's petition on March 1.

On March 31, 2021, Governor Evers then returned to the district court and filed a motion for sanctions, which is the subject of this appeal. Arguing that Feehan's lawsuit had been, from its inception, legally and factually baseless, Governor Evers asked the district court to award attorney fees and costs under both 28 U.S.C. § 1927 and the court's inherent authority. The district court denied the motion for want of jurisdiction, and Governor Evers has appealed.

In Part I we address whether the district court had jurisdiction to entertain a motion for sanctions under Section 1927. We conclude that the district court correctly followed our precedent in finding that it did not have jurisdiction under Section 1927. In Part II we consider whether the same is true under the court's inherent authority. Although we conclude that the district court did have jurisdiction to award sanctions under its inherent authority, the district court made clear that it would not have treated this as the sort of rare case where post-judgment sanctions imposed under inherent authority would have been needed to protect the court's institutional integrity.

I. *Sanctions Under 28 U.S.C. § 1927*

The district court correctly concluded that it lacked jurisdiction to consider sanctions under Section 1927. As the court recognized, our decision in *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789 (7th Cir. 1983), forecloses jurisdiction over a Section 1927 sanctions motion where the motion is made after this court's mandate has issued. In *Overnite*, nearly three weeks after this court's mandate was docketed, the defendants moved under Section 1927 for the costs and attorney fees incurred in defending the suit. We framed the issue as whether the district court had "jurisdiction to entertain a motion to compel the payment of attorney's fees and costs after the district court's dismissal of the underlying action had been affirmed on appeal prior to the date of the motion for costs and attorney's fees." *Id.* at 791–92. We held there was no jurisdiction under those circumstances. *Id.*

As a general rule, an appeal from the district court "vests jurisdiction in the court of appeals." *Overnite*, 697 F.2d at 792, quoting *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972). The district court's power to hear and act continues during an appeal only where (a) "jurisdiction is reserved expressly by statute," (b) the district court "expressly reserves or retains" jurisdiction, or (c) the district court "is entertaining motions collateral to the judgment or motions which would aid in resolution of the appeal." *Id.* These exceptions to the general rule, that an appeal divests the district court of jurisdiction, apply only "to those motions filed with the district court while the appeal on the merits is pending." *Id.* Once this court dockets its mandate affirming the district court's dismissal of the action, the district court retains jurisdiction over only *pending* motions on collateral matters. *Id.*

This case is on all fours with *Overnite*. Feehan properly filed a notice of appeal with the district court on December 10, 2020, and the district court did not reserve jurisdiction over the case. Nor was jurisdiction reserved by statute. No motions concerning the case in chief were filed with this court or the district court while the appeal on the merits was pending. Under the reasoning of *Overnite*, the district court thus lacked jurisdiction to hear and rule on the motion for sanctions under Section 1927. *See* 697 F.2d at 792.

Governor Evers argues that we should either read *Overnite* to apply only where the sanctions motion is "unreasonably delayed" or overrule *Overnite* altogether. Neither argument is persuasive.

First, *Overnite*'s holding was not a passing reference that can be explained or distinguished away. Its discussion of jurisdiction was fulsome. Governor Evers argues that we should distinguish *Overnite* because this appeal moved so much more quickly than that one. In *Overnite*, over eight months had elapsed between the filing of the notice of appeal and this court's docketing of our mandate affirming the dismissal. 697 F.2d at 792. This appeal moved much faster, and Governor Evers argues that he acted with reasonable diligence in seeking sanctions.

We are not persuaded by the offered distinction. *Overnite* relied not on the pace of the appeal but on the issuance of the mandate. On this point, the governor's reliance on *Lightspeed Media Corp. v. Smith*, 761 F.3d 699 (7th Cir. 2014), is misplaced. Although *Lightspeed* cited *Overnite* to support the proposition that sanctions motions under Section 1927 "must not be unreasonably delayed," *Lightspeed* concluded that the district court retained jurisdiction over a sanctions motion because no appeal was pending and defendants' sanction motion was already before the court. *Id.* at 707–08. In other words, the circumstances in *Lightspeed* were "entirely different" from those in *Overnite* because the defendants had moved for sanctions while the district court still had jurisdiction over the underlying case. *Id.* at 708. The fact that the defendants had moved for sanctions only two weeks after the plaintiffs had voluntarily dismissed the case—as opposed to the more than eight months in *Overnite*—was simply irrelevant to *Lightspeed*'s holding. See *id.* at 707–08.

As for the suggestion that we overrule *Overnite*, Governor Evers acknowledges that "we need a compelling reason to overturn circuit precedent."

Federal Trade Comm'n v. Credit Bureau Center, 937 F.3d 764, 785 (7th Cir. 2019). This case does not present a compelling reason to do so.

An intervening Supreme Court decision that displaces the rationale of our precedent may offer such a compelling reason. *Credit Bureau Ctr.*, 937 F.3d at 776. But Governor Evers has not pointed to Supreme Court decisions that have *displaced* the reasoning of *Overnite*. To be sure, he has directed our attention to two relevant intervening Supreme Court decisions: *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), and *Willy v. Coastal Corp.*, 503 U.S. 131 (1992). But neither of these decisions nor the Supreme Court's decision in *White v. New Hampshire Dep't of Emp't Security*, 455 U.S. 445 (1982), undermines *Overnite*'s reasoning to the point where we should overrule it.

White, which preceded *Overnite*, simply had nothing to do with Section 1927. The question before the Court there was whether "a postjudgment request for an award of attorney's fees" under 42 U.S.C. § 1988, "is a 'motion to alter or amend the judgment,' subject to the 10-day timeliness standard of Rule 59(e) of the Federal Rules of Civil Procedure." 455 U.S. at 446–47. *White* held that such requests, which raise "issues collateral to the main cause of action," were not subject to that timeliness standard because Rule 59(e) applies only to "reconsideration of matters properly encompassed in a decision on the merits." *Id.* at 451–52. What's more, from a prudential point of view, such a time limit "could yield harsh and unintended consequences" because "Section 1988 provides for awards of attorney's fees only to a 'prevailing party,'" and in "civil rights actions, especially in those involving 'relief of an

injunctive nature that must prove its efficacy only over a period of time,'" it could be "unclear even to counsel which orders are and which are not 'final judgments.'" *Id.* at 451–53, quoting *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 722–23 (1974). Such prudential concerns are not implicated in this case. We therefore find no conflict between *White* and *Overnite*.

Cooter & Gell likewise had nothing to do with Section 1927, though the fact that the sanctions motion had been pending when the plaintiff voluntarily dismissed the case was the most important factor there. The plaintiff in *Cooter & Gell* filed the underlying complaint in November 1983. 496 U.S. at 389. Arguing that the allegations had no basis in fact, defendants moved for both dismissal and sanctions under Rule 11. Six months later, the plaintiff voluntarily dismissed the complaint. The issue before the Supreme Court was whether the district court could still impose Rule 11 sanctions after the plaintiff's voluntary dismissal. In keeping with the general principle that "a federal court may consider collateral issues after an action is no longer pending" and Rule 11's "central purpose" of "deter[ring] baseless filings in district court," the Court held that "district courts may enforce Rule 11 even after" the filing of a notice of dismissal. *Id.* at 393–95. The Court thus did not speak to whether a district court could entertain a motion for sanctions under Section 1927 or the district court's inherent authority—or even under Rule 11 for that matter—when that motion was not filed until after jurisdiction over the merits has ended.

Like *Cooter & Gell*, *Willy* dealt with a motion for sanctions under Rule 11, and not under Section 1927.

503 U.S. at 132. The plaintiff there filed an action in state court, and the defendant removed to federal court on the basis of federal-question jurisdiction. The defendant then moved both for dismissal and sanctions under Rule 11. The district court granted both motions. *Id.* at 132–33. On appeal, however, the Fifth Circuit concluded that the district court did not have federal-question jurisdiction and ordered the case remanded to state court. *Id.* at 133. The question before the Supreme Court was whether a district court "may impose sanctions pursuant to Rule 11 … in a case in which the district court is later determined to be without subject-matter jurisdiction." *Id.* at 132. *Willy* held that the district court, "in the circumstances presented" in the case before it, had authority to rule on the sanctions motion because a "final determination of lack of subject-matter jurisdiction … does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction." *Id.* at 132, 137. As in *Cooter & Gell*, since the district court in *Willy* was presented with the sanctions motion while it was exercising jurisdiction on the merits (or at least to decide its jurisdiction), *Willy* does not guide us in this case, where the motion was made after both the district court and this court no longer had jurisdiction over the underlying action.

In short, there is no conflict between *Overnite*, on the one hand, and *White*, *Cooter & Gell*, and *Willy* on the other. Contrary to Governor Evers' assertions, these decisions by the Supreme Court did not displace the reasoning underpinning *Overnite* so as to justify overruling circuit precedent. They affirmed the general principle that a district court retains

jurisdiction to hear and rule on collateral matters even after the court has lost (or if it never had) jurisdiction over the merits, but the Court's decisions assume that those matters are already pending before the district court before the appellate mandate issues.

Governor Evers next argues that we should overrule *Overnite* in light of decisions of other circuits. "When a number of other circuits reject a position that we have taken, and no other circuit accepts it, the interest in avoiding unnecessary intercircuit conflict" may justify abandoning our prior position if "we are persuaded that the other circuits have the better of the argument." *Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005), quoting *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995).

The decisions Governor Evers relies upon do not justify overruling *Overnite*. Most of them involved sanctions motions already pending when the district court lost jurisdiction on the merits of the underlying dispute, so they did not explicitly or implicitly reject *Overnite*. See *Hyde v. Irish*, 962 F.3d 1306, 1308–10 (11th Cir. 2020) (district court could decide sanctions motion filed before court determined that it lacked subject-matter jurisdiction); *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 930–31 (8th Cir. 2014) (approving entry of disqualification order on motion that was pending "prior to the district court's resolution of the merits" and before court of appeals determined district court lacked subject-matter jurisdiction); *Ratliff v. Stewart*, 508 F.3d 225, 227–29 (5th Cir. 2007) (district court could award costs and attorney fees more than a year after dismissal on motion that was pending when action was dismissed); *Red Carpet Studios Div. of Source Advantage, Ltd. v.*

Sater, 465 F.3d 642, 643–45 (6th Cir. 2006) (settlement reached after sanctions were granted, but not yet calculated, did not deprive court of jurisdiction to impose sanctions); *In re Jaritz Industries, Ltd.*, 151 F.3d 93, 96–97 (3d Cir. 1998) (approving district court's affirmance of bankruptcy court's sanctions order where motion was made prior to determination that bankruptcy judge "lacked authority to sit on the" district court, "depriving it of subject matter jurisdiction").

To be sure, a few cases support Governor Evers' position because they found jurisdiction over sanctions motions filed after jurisdiction on the merits had ended. *See Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 331–33 (2d Cir. 1999) (finding jurisdiction over sanctions motion filed after court of appeals issued mandate affirming judgment on merits); *In re Rubin*, 825 F.2d 977, 980–82 (6th Cir. 1987) (distinguishing *Overnite* and allowing jurisdiction over sanctions motion filed after mandate issued); *Hicks v. Southern Md. Health Systems Agency*, 805 F.2d 1165, 1166–67 (4th Cir. 1986) (expressly rejecting *Overnite*'s reasoning and finding jurisdiction to award costs and attorney fees where "defendants had requested an award of fees in their answer to the complaint, [but] the motion for the assessment of fees was not filed in the district court until after the conclusion of the appeal"). But only one of these decisions expressly rejects *Overnite*, and these decisions do not, taken together, convince us that *Overnite*'s reasoning is unsound.[1]

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[1] Governor Evers also argues that we should overrule *Overnite* because the decision conflicts with later decisions of this court. None of the cases on which he relies actually conflicts

Finally, we note two related pragmatic concerns that weigh in favor of following circuit precedent here. First, a party who wants to seek sanctions can easily comply with the *Overnite* rule by filing its sanctions motion while the case is still pending. We see no need to overrule circuit precedent to relieve a party of the effects of a rule it could have complied with so easily. Second, we take into account the process for making tactical and strategic choices in lawsuits, including high-speed, high-pressure lawsuits like this attempt to prevent certification of electoral votes in a presidential election. There may be several moments in a lawsuit when matters come to rest unless one party or the other takes further action. At those moments, a losing party often can choose to accept a loss and walk away without pursuing further relief or appeals. That choice may look very different if there is a pending motion for sanctions against the losing party. This lawsuit had reached that stage before Governor Evers filed the

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with *Overnite*. See *Matos v. Richard A. Nellis, Inc.*, 101 F.3d 1193, 1195–96 (7th Cir. 1996) (rejecting argument that defendant's successful evasion of service deprived district court of jurisdiction over Section 1927 motion where defendant was guilty of "failure to obey court orders, production of forged documents, and obstinate refusal to pay" judgment that included attorney fees and costs); *Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 925, 929–30 (7th Cir. 2000) (holding that a district court has jurisdiction to consider a motion for attorney fees and costs under 42 U.S.C. § 11046(f) because defending underlying suit creates redressable injury and victory on jurisdictional grounds makes defendant a "prevailing party," a necessary predicate for pursuing costs and fees under statute); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1076–78 (7th Cir. 1987) (approving consideration of Rule 11 sanctions motion, but not motion under Section 1988, filed 28 days after plaintiff voluntarily dismissed action).

motion for sanctions. Such a later motion can seem like a late ambush of a losing party who was prepared to accept his loss but without a pending motion for sanctions. It is not unfair to expect a winning party to seek sanctions before the losing party makes such a choice. The *Overnite* rule narrows that opportunity even if it does not remove it entirely.[2]

In sum, the district court correctly followed our precedent in *Overnite* in concluding that it lacked jurisdiction over Governor Evers' motion for sanctions under Section 1927.

II. *Sanctions Under the Court's Inherent Authority*

With respect to the district court's power to entertain post-mandate motions for sanctions under the court's inherent authority, we see things differently. The district court had jurisdiction, or at least would have had jurisdiction in theory in a sufficiently compelling case, to impose inherent-authority sanctions even after the mandate issued, but this is not a case for such sanctions. The Supreme

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[2] After briefing and oral argument, plaintiff-appellee Feehan filed with this court a motion to dismiss this appeal for want of jurisdiction. For the first time invoking the mandate rule, Feehan argued that our mandate of February 23, 2021, deprived the district court of subject-matter jurisdiction because that mandate ordered the case dismissed as moot. To the extent this argument adds anything new to the jurisdictional debate here, it seems to conflict with *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), and *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), which both teach that timely sanctions motions may be considered even if there is no Article III jurisdiction over the underlying case. We instead rely here on the district court's lack of jurisdiction over the *late* sanctions motion under *Overnite* and our discussion of inherent-authority sanctions below.

Court has long recognized that courts "are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991), quoting *Anderson v. Dunn*, 19 U.S. 204, 227 (1821). This power, as well as the power "to prevent abuse, oppression, and injustice" and "to protect [the court's] own jurisdiction and officers," are "inherent." *Krippendorf v. Hyde*, 110 U.S. 276, 283 (1884). In other words, these "powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers*, 501 U.S. at 43, quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962). Among these powers is "the capacity to sanction counsel for 'willful disobedience of a court order' and 'bad faith' conduct." *Schmude v. Sheahan*, 420 F.3d 645, 649–50 (7th Cir. 2005), quoting *Chambers*, 501 U.S. at 45–46.

That power to impose sanctions to protect the integrity and authority of the court persists beyond the disposition of the underlying case or controversy. See *United States v. Johnson*, 327 F.3d 554, 559–63 (7th Cir. 2003) (rejecting argument that district court was without subject-matter jurisdiction to invoke its inherent powers to sanction attorneys for unauthorized practice of law not in the underlying case, but in cases no longer before the court).

Under *Johnson*, the district court's power to impose sanctions under its inherent authority therefore did not abate when this court's mandate was docketed. Still, "[b]ecause of their very potency, inherent powers must be exercised with restraint and

discretion." *Chambers*, 501 U.S. at 44. This is not a case where those powers should be exercised after the mandate issued and the case was closed on the merits.

As the district court noted, "defendant's argument that the court should use its inherent authority to award sanctions is brief," and the only matter that gave the district court pause was defendants' claim "that the plaintiff 'fabricated a quote to support [his] position.'" If it had jurisdiction to consider the motion, the court went on, it would impose sanctions only if a hearing showed that plaintiff's counsel had "made deliberate misrepresentations of the law, as opposed to errors made in the context of extensive litigation proceeding in federal and state courts around the country at the same time." We do not need a hearing to conclude that a single inaccurate quotation would not justify the unusual step of imposing post-mandate sanctions under the district court's inherent authority.[3]

The district court's order denying sanctions is AFFIRMED.

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[3] To the extent that defendant suggested in the district court that sanctions under the court's inherent authority would be justified based on other factors, i.e., delays or haste in the proceedings, we affirm the district court's conclusion that the proceedings were not delayed and that plaintiff was not responsible for the fast pace of the litigation.

SCUDDER, *Circuit Judge*, concurring in the judgment. Since our court's decision in *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789 (7th Cir. 1983), we have not had the opportunity to consider three Supreme Court decisions that call *Overnite* into question. When read as a whole, *White v. New Hampshire Dep't of Emp't Security*, 455 U.S. 445 (1982), *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), and *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), make clear, in my view, that a district court does not lose authority to entertain a motion for sanctions after dismissing an action and entering judgment. These cases underscore that a motion for sanctions—which fairly seems to include a motion under 28 U.S.C. § 1927—is a collateral matter to the underlying adjudication of a merits question, or at minimum is potentially collateral and within the district court's discretion to review it as such. Neither in *Overnite* nor any subsequent decision have we wrestled with this line of reasoning from the Supreme Court. We need to do so in a future case. Suffice for now to say that I have a hard time seeing how *Overnite*'s bright-line prohibition on a district court entertaining a § 1927 sanctions motion after an appellate mandate survives the direction supplied by these Supreme Court decisions.

In the end, though, I arrive at the same outcome because any error in the district court's resolution of the question over its authority to impose sanctions is harmless. The district court made clear that it would not have imposed sanctions under § 1927 given the context of the litigation, its quick resolution, and the legal principles at issue. And, as today's order concludes, we need not weigh in on the scope of the

district court's inherent powers to sanction where it is sufficiently clear from the record that the district court had no intention to exercise those powers here.

In these circumstances, I too vote to AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, COMMISSIONER ANN S. JACOBS, MARK L. THOMSEN, JULIE M. GLANCEY, COMMISSIONER MARGE BOSTELMANN, COMMISSIONER DEAN KNUDSON, ROBERT F. SPINDELL, JR., and TONY EVERS,

Defendants.

Case No. 20-cv-1771-pp

[August 24, 2022]

ORDER DENYING DEFENDANT EVERS'S MOTION FOR ATTORNEY FEES (DKT. NO. 97), DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S MOTION FOR SANCTIONS (DKT. NO. 105) AND DENYING DEFENDANT EVERS'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF (DKT. NO. 112)

On December 1, 2020, the plaintiff filed this lawsuit alleging "massive election fraud, multiple violations of the Wisconsin Election Code, *see e.g.*,

Wis. Stat. §§ 5.03, et seq., in addition to the Election and Electors Clauses and Equal Protection Clause of the U.S. Constitution" based on "dozens of eyewitnesses and the statistical anomalies and mathematical impossibilities detailed in the affidavits of expert witnesses." Dkt. No. 1 at ¶ 1. Eight days later, the court granted the defendants' motions to dismiss, denied the plaintiff's motion for injunctive relief as moot and dismissed the case. Dkt. No. 83. The plaintiff appealed, dkt. no. 84, then filed an amended notice of appeal, dkt. no. 90. The plaintiff voluntarily dismissed the appeal. Dkt. No. 94. Three months later, defendant Governor Tony Evers filed a motion to recover attorney fees, dkt. no. 97, and the plaintiff filed a "Motion to Strike Defendant's Motion for Sanctions," dkt. no. 105. Several months later, defendant Evers filed a motion for leave to file a supplemental brief. Dkt. No. 112.

Because the court lacks jurisdiction over defendant Evers's motion to recover attorney fees, it will deny the motion. The court will deny for lack of jurisdiction and as moot the plaintiff's motion to strike the defendant's motion to recover fees and the defendant's motion for leave to file a supplemental brief.

I. Background

The fifty-two-page complaint, filed on December 1, 2020, asserted four causes of action: (1) violation of the Elections and Electors Clauses and 42 U.S.C. § 1983; (2) violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1983 and the "invalid enactment of regulations & disparate treatment of absentee vs. mail-in ballots"; (3) denial

of the Fourteenth Amendment due process right to vote and 42 U.S.C. § 1983; and (4) "wide-spread ballot fraud." Dkt. No. 1 at ¶¶ 106-138. As relief, the plaintiffs requested

1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results;
2. An order enjoining Governor Evers from transmitting the currently certified election results [sic] the Electoral College;
3. An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election;
4. An immediate emergency order to seize and impound all servers, software, voting machines, tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11 related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiffs;
5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;
6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;

7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. Const. Amend. XIV;
8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that invalidates the certified results if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;
9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;
10. A permanent injunction prohibiting the Governor and Secretary of State from transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;
11. Immediate production of 48 hours of security camera recording of all rooms used in the voting process at the TCF Center 1 for November 3, 2020 and November 4, 2020;
12. Plaintiffs further request the Court grant such relief as is just and proper including but not limited to, the costs of this action and their reasonable attorney fees and expenses pursuant to 42 U.S.C. § 1988.

Id. at ¶ 143. There were twenty-eight attachments to the complaint, totaling 331 pages. Dkt. Nos. 1-1 through 1-28.

On the same date that he filed the complaint, the plaintiff[1] filed a motion for a temporary restraining order, dkt. no. 2, and a supporting brief, dkt. no. 3. Almost seven hours later, the plaintiff filed a motion to amend or correct the motion for injunctive relief. Dkt. No. 6.

Two days later, the plaintiff filed an amended complaint, dkt. no. 9, accompanied by nineteen attachments, dkt. nos. 9-1 through 9-19. The amended complaint was fifty-one pages and the attachments totaled 303 pages. The plaintiff also filed another amended motion for injunctive relief, which asked the court to consider it in an "expedited manner." Dkt. No. 10. The plaintiff attached a proposed briefing schedule, indicating that the briefing would be conducted over the next two days (Friday, December 4 and Saturday, December 5). Dkt. No. 10-1.

Between December 3 and December 4, other parties—a proposed intervenor, defendant Evers—filed motions, but the next motion the plaintiff filed was his December 4, 2020 motion for leave to file excess pages. Dkt. No. 34. Two days later—on December 6, 2020—the plaintiff filed a brief in support of the second amended motion for injunctive

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[1] There were two named plaintiffs in the original complaint—the plaintiff and "Derrick Van Orden." Dkt. No. 1 at 1. The December 3, 2020 amended complaint removed Van Orden as a defendant. Dkt. No. 9.

relief. Dkt. No. 42. That same day, he filed a motion to file separate reply briefs, dkt. no. 43, and a motion to hold a consolidated evidentiary hearing, dkt. no. 44.

On December 7, 2020, the defendants moved to dismiss the amended complaint. Dkt. Nos. 51, 53. Over the next two days, the parties (and others seeking to file *amicus* briefs or to intervene) filed numerous pleadings, but only one was a new motion filed by the plaintiff—a December 9, 2020 motion to restrict some exhibits. Dkt. No. 76.

On December 9, 2020—eight days after the plaintiff had filed the complaint—the court granted the defendants' motions to dismiss. Dkt. No. 83. It concluded that (1) the plaintiff's status as a registered voter did not give him standing to sue, *id.* at 23; (2) the plaintiff's status as a nominee to be a Republican elector did not give him standing to sue, *id.* at 28, (3) most of the relief the plaintiff had requested was beyond the court's ability to grant, *id.* at 33; (4) the Eleventh Amendment barred the plaintiff's claims against the defendants in their official capacities and almost all the requested relief, *id.* at 37-38; and (5) the plaintiff's request for relief constituted "an extraordinary intrusion on state sovereignty from which a federal court should abstain under longstanding precedent," *id.* at 40.

The following day—*before* the clerk had docketed the judgment—the plaintiff filed a notice of appeal. Dkt. No. 84. A week later, *after* the clerk had docketed the judgment, the plaintiff filed an amended notice of appeal. Dkt. No. 90.

On February 1, 2021, the Seventh Circuit issued an order granting the joint motion of the parties to dismiss the appeal as moot. Dkt. No. 96. The court's order stated:

> Appellees have moved to dismiss this appeal as moot and appellant has filed a concurrence. We agree with the litigants that there is no ongoing case or controversy. Accordingly,
>
> **IT IS ORDERED** that the motion to dismiss is **GRANTED** to the extent that we **VACATE** the district court's decision and **REMAND** with instructions to dismiss the case is moot. This is the routine disposition of civil cases that become moot while on appeal, *see United State[s] v. Munsingwear*, 340 U.S. 36 (1950), and this court's instructions reflect no criticism of the district court's timely decision on the merits.

Dkt. No. 96 at 1-2.

On February 16, 2021[2] this court vacated its prior judgment and dismissed the case as moot. Dkt. No. 95. Six weeks later, defendant Evers filed the instant "Motion to Recover Attorney Fees." Dkt. No. 97.

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[2] The Seventh Circuit issued the decision on February 1, 2021. The mandate did not issue until February 23, 2021, *see* Fed. R. App. P. 41(b) ("The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later."), but because the parties had agreed to dismiss the appeal, this court did not wait until the mandate issued to dismiss the case.

II. Defendant's Motion to Recover Attorney Fees (Dkt. No. 97)

A. The Parties' Arguments

Defendant Evers asks the court to tax both the plaintiff and the plaintiff's attorneys for Evers's attorneys' fees of "approximately $106,000 to date" "using both statutory authority and the Court's inherent power to sanction attorneys for engaging in bad faith litigation." Dkt. No. 97 at 2 (citing 28 U.S.C. § 1927; *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 766 (1980)).

The defendant filed a twenty-nine-page brief in support of this motion. Dkt. No. 98. He began by asserting that the plaintiff's lawsuit was frivolous from inception, based on "fringe conspiracy theories, sourced to anonymous declarations submitted by ostensible experts who were later identified and revealed to be extreme partisans with neither experience nor qualifications to provide any type of opinion on the subject matter." *Id.* at 2. He argued that there was "no reason for Wisconsin taxpayers to bear the expense of this attempt to hijack the democratic process." *Id.* He says that "[w]orking on the extremely condensed timeline demanded by Plaintiff, despite a completely baseless claim, required a team of attorneys to work nearly around the clock performing all the necessary research and drafting the necessary filings to litigate both a motion to dismiss and Plaintiff's motion for preliminary injunctive relief all in one week." *Id.*

After recounting the history of the litigation, the defendant listed "legal mechanisms" that he indicated give the court the authority to impose

sanctions "for bad-faith conduct in the course of legal proceedings." *Id.* at 6. First, he cited 28 U.S.C. § 1927, arguing that this statute was designed to limit abuses of the judicial process, deter frivolous litigation and penalize attorneys who engage in dilatory conduct. *Id.* (citations omitted). Second, the defendant argued that the court could rely on its inherent authority to impose sanctions. *Id.* at 8. The defendant explained that because the case was pending for only eight days—because "Plaintiff field his complaint on December 1 and demanded resolution by December 6"—the defendant could not seek sanctions under Fed. R. Civ. P. 11, due to the rule's twenty-one-day safe harbor requirement; he argued that the plaintiff's "demand for an expeditious process cannot insulate Plaintiff and his attorneys from appropriate consequences for their egregious conduct." *Id.* at 6 n.2.

The defendant then detailed allegedly vexatious and bad-faith conduct by the plaintiff and his lawyers. *Id.* at 9-18. He alleged that the plaintiff had unreasonably delayed in filing the lawsuit, *id.* at 9; that there was no evidence of the election fraud the plaintiff had alleged, *id.* at 10; that the plaintiff's filings were rife with procedural errors, *id.* at 13; that the plaintiff's briefs misrepresented the applicable law, *id.* at 14; that the plaintiff based his claims on unreliable and inadmissible evidence, *id.* at 15; and that the relief the plaintiff had requested was, for the most part, unprecedented and impossible to grant, *id.* at 18. The defendant asked the court to impose sanctions, not only to punish the plaintiff, but to discourage similar behavior in the wake of future elections. *Id.* at 22.

The defendant also argued that his fee request was "timely," asserting that the Seventh Circuit's decision in *Overnite Transportation Co. v. Chi. Industrial Tire Co.*, 697 F.2d 789 (7th Cir. 1983) is an "outlier," "in tension (at minimum) with Supreme Court precedent and no other Circuit has adopted the Seventh Circuit's reasoning." *Id.* at 24. He argued that in *White v. New Hampshire Dep't of Emp. Sec.*, 455 U.S. 445, 452 (1982), the Supreme Court had "rejected" the logic of *Overnite*, "holding that fee motions under 42 U.S.C. § 1988 need not comply with time limits established by Rule 59(e) . . . ." *Id.* at 25. The defendant asserted that the Fourth, Third, Second, Sixth and Tenth Circuits had rejected the *Overnite* court's reasoning. *Id.* He argued that because *Overnite* "is out of step with Supreme Court precedent and that, even on its own terms, it should not apply in the circumstances of this case, there is no doubt" that the court should consider his motion timely, because he filed it within thirty days of the U.S. Supreme Court denying the plaintiff's appeal and within four months of this court issuing its order. *Id.* at 26. He concluded, "To consider it otherwise would be to overlook an egregious abuse of the judicial process." *Id.* Finally, the defendant argued that the fees he requested were reasonable. *Id.* And he asserted that the plaintiff and his lawyers should be held jointly and severally liable for the sanctions. *Id.* at 29.

The plaintiff responded that the court should deny the motion because "a request for sanctions based upon a well-plead, factually supported civil lawsuit is patently without merit." Dkt. No. 109 at 3. The plaintiff argued that the request was untimely

under 28 U.S.C. § 1927 and should be stricken. *Id.* He noted that the court had dismissed the case on procedural grounds, and on a motion to dismiss, rather than at the summary judgment stage after discovery. *Id.* The plaintiff asked that if the court did not grant his motion to strike the motion for sanctions, it schedule an evidentiary hearing and require the plaintiff to present evidence. *Id.* at 4.

In support of his argument that the sanctions motion was "out of time," the plaintiff cited *Overnite*, the Seventh Circuit decision that the defendant had characterized as an "outlier." *Id.* at 5. The plaintiff argued—citing several cases and making liberal use of the "bold" function in Word—that the defendant had not met the standard for sanctions under § 1927. *Id.* at 5-6. The plaintiff opined that although the defendant had characterized the plaintiff's filing as dilatory, most of the defendant's § 1927 argument asserted that the litigation had moved too quickly. *Id.* at 6. He opined that the plaintiff had not been forced to file numerous pleadings, pointing out that the case had survived only nine days. *Id.* at 8. The plaintiff maintained that if his claims had been as frivolous as the defendant characterized them to be, the defendant would not have been required to expend significant time with a team of attorneys to address them. *Id.*

The plaintiff argued that the defendant's assertion that his claims lacked a legal and factual basis ignored the fact the court never reached the merits of those claims. *Id.* at 9. Nonetheless, the plaintiff insisted that his claims had merit and that other courts had found as much. *Id.* at 9-13. He argued that while this court had concluded that he

did not have standing, the Eighth Circuit had come to a different conclusion. *Id.* at 13. The plaintiff explained why he believed he had a good-faith basis for arguing that the Eleventh Amendment did not bar his claims. *Id.* at 16. He asserted that in finding that laches barred his claims, this court had failed to "take an in depth look at" a Ninth Circuit case relied upon by the defendant. *Id.* at 17-18. He referenced evidence that he had cited in the amended complaint and its attachments. *Id.* at 18-23 (although he reiterated that this court dismissed the case on procedural grounds, not on the merits). Finally, he argued that dismissal on "equitable grounds" such as laches or mootness "are not grounds for a court to hold the relief requested is factually or legally baseless because of the purposefully flexible nature of equity." *Id.* at 23.

The defendant replied that the plaintiff "fundamentally misapprehend[ed] the issue" he presented in his motion for fees. Dkt. No. 110 at 1. He asserted that the question at the heart of his motion "is whether [the plaintiff's] lawsuit was filed in a proper way for a proper purpose;" asserting that it was not, the defendant said that both fees and sanctions are appropriate. *Id.* The defendant found it "worth briefly reviewing just how egregious Plaintiff and his attorneys' conduct was," listing seven bullet points in the review. *Id.* at 2. The defendant characterized as "bizarre" the plaintiff's argument that because the litigation moved so quickly it could not be characterized as "vexatious," asserting that under 28 U.S.C. § 1927, a "vexatious" action is one that exhibits bad faith. *Id.* at 3. The defendant asserted that this case was not a matter of first

impression, as evidenced by the fact that "many of Plaintiff's lawyers here were peddling the same conspiratorial claims around the country and uniformly failing on the same grounds this case was dismissed." *Id.* at 5. He alleged that both the original and the amended complaints were riddled with errors. *Id.* at 6. He criticized the experts the plaintiff cited in the amended complaint. *Id.* at 7.

The defendant pointed out that the plaintiff cited no authority in support of his argument that a dismissal on equitable grounds cannot provide a basis for sanctions. *Id.* at 8. He disputed the plaintiff's argument that the First Amendment forbids sanctions in these circumstances. *Id.* at 9. He distinguished—or, more accurately, deemed irrelevant—out-of-circuit cases cited by the plaintiff. *Id.* at 9-10.

The defendant argued that several of the attorneys who signed the amended complaint did not sign the plaintiff's response to the motion for sanctions, despite his explicit request that the court impose sanctions on the plaintiff and all his counsel. *Id.* at 11. He asserted that by failing to respond or "associate themselves with any filed response within the relevant time allotted, Julia Z. Haller, Brandon Johnson, Emily P. Newman, and L. Lin Wood have conceded that the Court can impose fees against them and that Governor Evers's fee request is reasonable." *Id.* Finally, he reiterated that his motion was timely because *Overnite* is an "outlier," distinguishable, is "of questionable validity" and is "in significant tension" with the Federal Rules of Civil Procedure. *Id.* at 12.

B. Governing Law

1. *28 U.S.C. § 1927*

Under 28 U.S.C. § 1927,

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

In its earlier iteration, the statute "permit[ted] a court to tax the excess 'costs' of a proceeding against a lawyer 'who so multiplies the proceedings . . . as to increase costs unreasonably and vexatiously . . . .'" *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 756 (1980). It provided "only for *excess* costs caused by the . . . attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation." *Id.* at 756 n.3 (quoting *Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1383 (5th Cir. 1979) (emphasis in the original)). The *Piper* Court focused on the vexatious multiplication of proceedings. *Id.* at 757, 757 n.4 ("Due to sloth, inattention, or desire to seize tactical advantage, lawyers have long indulged in dilatory practices. *Cf.* C. Dickens, Bleak House 2-5 (1948)."). Ten years later, in a brief comment in a separate opinion in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 412 (1990), Justice Stevens also focused on the multiplication of proceedings, agreeing that a court may "impose sanctions under 28 U.S.C. § 1927

against lawyers who have multiplied court proceedings vexatiously."

The statute allows a court to impose sanctions only against attorneys; it "says nothing about a court's power to assess fees against a party." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 48 (1991). Under the current version of the statute, a court "may require an attorney who unreasonably multiplies proceedings to pay attorney's fees incurred 'because of' that misconduct," which requires the court to "establish a causal link between misconduct and fees . . . ." *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 137 S. Ct. 1178, 1186 n.5 (2017) (citing *Piper*, 447 U.S. at 764).

As best the court can tell, the Seventh Circuit first approved a taxing of costs against an attorney under § 1927 in *Kiefel v. Las Vegas Hcienda, Inc.*, 404 F.2d 1163 (7th Cir. 1968). The court concluded that the attorney's conduct had caused "additional proceedings" and remanded the case to the district court to award expenses for printing a brief and additional appendix, as well as attorneys' fees. *Id.* at 1171.

In 1983, the Seventh Circuit examined § 1927 more closely. In *Overnite*, 697 F.2d at 791, the plaintiff sued in federal district court under the Interstate Commerce Act. The district court granted the defendant's motion to dismiss for lack of subject-matter jurisdiction and the plaintiff appealed. *Id.* Two weeks after the Seventh Circuit had affirmed the district court's decision and issued the mandate, the defendant returned to the district court and filed a motion under 28 U.S.C. § 1927 to recover the costs

and attorneys' fees it incurred in defending the lawsuit in federal court. *Id.* "The defendant argued that the plaintiff's filing of the lawsuit in federal court and the appeal of its dismissal constituted an unreasonable and vexatious multiplication of the proceedings entitling the defendant to the recovery of attorney's fees and expenses." *Id.* The district court agreed, granted the motion and awarded $1,392.50 in attorney's fees and costs based on "'[t]he vexatious character of plaintiff attorney's conduct in initiating this . . . lawsuit in federal court and [then] appealing its dismissal . . . ." *Id.* at 791-92 (quoting *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 535 F. Supp. 114, 115 (N.D. Ill. 1982)).

The plaintiff's attorneys appealed that decision to the Seventh Circuit. *Id.* at 792. The Seventh Circuit framed the issues on appeal this way:

> *Issue 1:* Did the district court have jurisdiction to entertain a motion to compel the payment of attorney's fees and costs after the district court's dismissal of the underlying action had been affirmed on appeal prior to the date of the motion for costs and attorney's fees?
>
> *Issue 2:* Did the district court abuse its discretion in awarding attorney's fees and costs?

Id.

Regarding the first issue—the issue of the district court's jurisdiction—the court began by observing the "well established general rule that the perfection of an appeal 'vests jurisdiction in the court of appeals

[and] further proceedings in the district court cannot then take place without leave of the court of appeals.'" *Id.* (quoting *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972)). The court concluded that jurisdiction had vested in the appellate court on the date the plaintiff properly filed his notice of appeal—July 9, 1981. *Id.*

The court explained, however, that there were exceptions to the rule that jurisdiction vests with the court of appeals upon the filing of a notice of appeal; as examples, it recounted that "jurisdiction continues in the district court if jurisdiction is reserved expressly by statute, or if the court expressly reserves or retains such jurisdiction, or while the court is entertaining motions collateral to the judgment or motions which would aid in resolution of the appeal." *Id.* (citations omitted). It clarified that "these exceptions only apply to those motions filed with the district court while the appeal on the merits is pending." *Id.* The court stated that once it had issued its decision and docketed the mandate affirming the district court's dismissal of the case, "no case or controversy any longer existed between the litigants herein." *Id.* The court of appeals concluded that the district court lacked jurisdiction to rule on the motion for costs and attorney's fees because (1) "the plaintiff properly filed a notice of appeal," (2) no party had filed a § 1927 motion in the eight-month period that had elapsed between the filing of the notice of appeal and issuance of the mandate affirming the district court's dismissal, (3) the district court had not reserved jurisdiction over the case, (4) no statute provided that the district court reserved jurisdiction and (5) "no motions concerning the case in chief were

directed to either [the court of appeals] or the district court during the eight months the appeal on the merits was pending." *Id.*

Observing the wasted delay and effort caused by "piecemeal appeals," the Seventh Circuit also concluded that "a motion for attorney's fees and costs under section 1927 is so inexorably bound to the underlying merits of the case that a party must bring a motion for fees and costs either before an appeal is perfected or during the pendency of the appeal on the merits." *Id.* at 793.

Nonetheless, the court went on to address the second issue—whether the district court had abused its discretion in awarding fees and costs under § 1927. *Id.* at 794. It stated that § 1927 "envisions a sanction against an attorney only when that attorney both (1) multiplies the proceedings, and (2) does so in a vexatious and unreasonable fashion." *Id.* The court looked at the legislative history—specifically, the House Conference Report—surrounding § 1927, observing that the report stated that the statute's purpose

> is "to broaden the range of increased expenses which an attorney who engages in *dilatory litigation practices* may be required by the judge to satisfy personally.… The amendment to section 1927 is one of several measures taken in this legislation to deter unnecessary *delays* in litigation." House Conference Report No. 96-1234, 96th Congress 2d Session, Reported in 1980 U.S. Code. Cong. & Admin. News 2716, 2781 at 2782 (emphasis supplied).

Id. (emphasis in the original).

The Seventh Circuit observed that while some courts had used § 1927 to sanction lawyers for filing and prosecuting lawsuits that the court deemed to be meritless, "these cases are limited to situations where the suit was without either a legal or factual basis and the attorney was or should have been aware of this fact." *Id.* The court found that the *Overnite* suit did not fall into that category; *Overnite*'s claim "was one of first impression." *Id.* The court concluded that the lawsuit was "not 'frivolous' and therefore *Overnite*'s attorneys did not 'multiply' the proceedings by filing an action in the federal district court." *Id.* The court also concluded that the appeal was not frivolous, stating that "[l]itigants and their attorneys must be free to pursue their appellate remedies except in truly unmeritorious and frivolous cases." *Id.* at 795. Noting its holding in *Kiefel* that "the power to assess costs on the attorney involved 'is a power which the courts should exercise *only* in instances of a *serious and studied disregard for the orderly process of justice*,'" the Seventh Circuit explained that the district court had identified no vexatious conduct other than the filing of the lawsuit and the subsequent appeal of its dismissal. *Id.* (quoting *Kiefel*, 404 F.2d at 1167). The court found that the defendant had "pointed to no instances where the attorneys for *Overnite* either at trial or on appeal engaged in intentional misconduct which was in 'disregard for the orderly process of justice.'" *Id.* It stated, "[t]he term 'vexatious' is defined as 'lacking justification and intended to harass.'" *Id.* (quoting Webster's International Dictionary (1971)). The court

held that the district court had abused its discretion in taxing fees and costs under § 1927. *Id.*

Since *Overnite*, the Seventh Circuit has held that vexatious means "either subjective or objective bad faith." *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184 (7th Cir. 1992) (citations omitted). It has reiterated that "Section 1927 sanctions should only be awarded when an attorney 'unreasonably and vexatiously' multiplies the proceedings." *Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 120 (7th Cir. 1994) (quoting 28 U.S.C. § 1927). It has explained that the statute is "punitive and thus must be construed strictly." *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984) (citing *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1166 (7th Cir. 1983)). It has emphasized that its purpose is "to penalize attorneys who engage in dilatory conduct," and a "court may impose section 1927 fees only to sanction needless delay by counsel." *Id.* "[S]ome degree of culpability on the part of counsel is required." *Id.* at 227 (citations omitted). "[B]efore a court may assess fees under section 1927, the attorney must intentionally file or prosecute a claim that lacks a plausible legal or factual basis," but the court "need not find that the attorney acted because of malice." *Id.* (citations omitted).

2. *Inherent Authority*

The Supreme Court has made clear that a statutory or rule-based sanctions scheme does not "displace[] the inherent power to impose sanctions" to discipline attorneys who appear before the court, to punish contempt, to vacate judgments secured by fraud, for willful disobedience of a court order and to

punish a party who has acted in bad faith, vexatiously, wantonly or for oppressive reasons. *Chambers*, 501 U.S. at 44-46 (citations omitted). "'It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" *Sanders v. Melvin*, 25 F.4th 475, 481 (7th Cir. 2022) (quoting *Chambers*, 501 U.S. at 43). "'For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."' *Id.* (quoting *Chambers*, 501 U.S. at 43). However, "implied powers, '[b]ecause of their very potency, … must be exercised with restraint and discretion.'" *Id.* (quoting *Chambers*, 501 U.S. at 44). "Among these powers is the ability of 'a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court.'" *Id.* (quoting *Chambers*, 501 U.S. at 44). "And if fraud is discovered prior to judgment, a court 'may impose appropriate sanctions to penalize and discourage misconduct.'" *Id.* (quoting *Ramirez v. T & H Lemont, Inc.*, 845 F.3d 772, 776 (7th Cir. 2016)). A court's inherent authority to impose sanctions is "subordinate to valid statutory directives and prohibitions." *Greyer v. Ill. Dept. of Corrs.*, 933 F.3d 871, 877 (7th Cir. 2019) (quoting *Law v. Siegel*, 571 U.S. 415, 421 (2014)).

C. Analysis

1. *Jurisdiction*

The parties spilled some ink arguing whether the defendant's motion for an award of attorney's fees was "timely." But § 1927 does not include a deadline by which such motions must be filed. The issue, as the Seventh Circuit explained in *Overnite*, is not "timelines," but whether this court has jurisdiction to decide a sanctions motion filed after the appellate court has affirmed this court's order dismissing the case and issued its mandate. *Overnite* made clear that it does not. The plaintiff filed the amended notice of appeal on December 15, 2020. Dkt. No. 90. At that point, jurisdiction vested with the Seventh Circuit. That court issued the mandate on February 23, 2021, vacating this court's order and dismissing the case as moot. Dkt. No. 96. This court did not reserve jurisdiction, no statute provided it with post-appeal jurisdiction and no party filed motions regarding the case during the two months that the appeal was pending. The defendant filed his motion for fees on March 31, 2021—over a month after the Seventh Circuit issued the mandate. Dkt. No. 97.

The defendant says that "both the extraordinary circumstances surrounding this case and *Overnite's* outlier status . . . militate against its application here." Dkt. No. 98 at 24. In attempting to distinguish *Overnite*, the defendant stresses the expedited schedule of this case and argues that the fact that the case was part of a "national, multi-pronged" effort to overturn the results of the 2020 presidential election "made it extremely difficult for Governor Evers or any other defendants to file a motion for fees prior to

the conclusion of the appeal." *Id.* The defendant asserts that "[o]nly after the Seventh Circuit dismissed Plaintiff's appeal as moot and the Supreme Court . . . denied Plaintiff's petition for mandamus was it clear that this case was resolved." *Id.*

The court agrees that in *Overnite*, the appeal was pending for eight months, while in this case it was pending for only two. The court also understands that while the appeal in this case was pending, the defendant and others were involved in other, similar lawsuits and were working—as the defendant has indicated—around the clock to address pleadings filed in multiple cases in multiple forums. But the *Overnite* court held once the mandate issues, there no longer is a case or controversy over which the district court may exercise Article III jurisdiction. The fact that counsel had little time to file a sanctions motion before the mandate issued cannot vest the court with jurisdiction.

As to the defendant's argument that *Overnite* effectively has been abrogated by the Supreme Court's decision in *White v. New Hampshire Dep't of Emp. Sec.*, the court cannot agree. In *White*, the parties settled civil rights litigation and the court entered judgment; one and a half months later, the petitioner filed a request for an award of fees under 42 U.S.C. § 1988. *White*, 455 U.S. at 447-448. Opposing counsel objected, asserting that he had believed that because the consent decree that effectuated the settlement was silent on the issue of fees, any claim to a fee award had been implicitly waived. *Id.* at 448. The district court granted the request for an award of fees and the opposing party moved to vacate the consent decree, arguing it would

not have entered into the settlement had it known it could face further liability. *Id.* The district court denied the motion to vacate the consent decree and the opposing party appealed. *Id.* On appeal, the First Circuit concluded that because the movant filed the motion for attorney's fees after the court had entered judgment, the motion constituted a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) and thus was required to be filed under the rule's then-applicable ten-day[3] deadline. *Id.*

The *White* Court focused its discussion on the relationship between Rule 59(e) and post-judgment attorney's fee requests, concluding that treating such requests as Rule 59(e) motions to alter or amend "could yield harsh and unintended consequences" in civil rights cases—particularly those involving requests for injunctive relief—which could make it difficult for counsel to determine which orders were final under Rule 59(e). *Id.* at 453. The Court found that Rule 59(e)'s then-applicable ten-day limit "also could deprive counsel of the time necessary to negotiate private settlements of fee questions." *Id.*

White did not involve a sanctions motion filed after appeal. It involved a post-*judgment* but pre-*appeal* motion for statutorily authorized attorney's fees. The jurisdictional problem identified by the *Overnite* court did not exist in *White*; the district court still had jurisdiction when it granted the award of attorney's fees. And even if the Supreme Court's expressed concerns about treating 42 U.S.C. § 1988

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[3] Currently, Rule 59(e) requires motions to alter or amend judgment to be filed within twenty-eight days of entry of judgment.

requests for fees as Rule 59(e) motions having application outside the context of civil rights litigation that seeks injunctive relief, the problem the Court identified—that a litigant might not be able to determine when a final order had issued—was not present here. This court dismissed the case. There could have been no confusion about whether that order was a final, dispositive order.

Further, as noted by another judge on this court in rejecting this same argument by the defendant in a different case, the Seventh Circuit has given no indication that it does not consider *Overnite* to be good law. *See Trump v. The Wisconsin Elections Commission, et al.*, Case No. 20-cv-1785-BHL (E.D. Wis.), Dkt. No. 178. The Seventh Circuit has cited and quoted *Overnite* in several decisions over the past forty years, including in *Badillo*, *Knorr Brake Corp.* and, most recently, *Lightspeed Media Corp. v. Smith*, 761 F.3d 699, 707 (7th Cir. 2014) (the appellants were "correct that motions under section 1927 must not be unreasonably delayed," citing *Overnite*).

Overnite precludes not only an award of sanctions under § 1927, but an award of sanctions under the court's inherent authority. Because there was no live case or controversy sufficient to give this court jurisdiction at the time the defendant asked for sanctions under the court's inherent authority, the court does not have jurisdiction to grant that request.

The defendant did not file his motion for sanctions until almost four months after this court dismissed the case, two months after the Seventh Circuit issued its decision and over a month after the

mandate issued. This court did not reserve jurisdiction. No statute gave the court post-appellate jurisdiction. This court does not have jurisdiction to decide the motion and the court must deny it.

2. *Merits*

In an abundance of caution, the court notes that if it did have jurisdiction to rule on the motion, it would not have awarded fees under 28 U.S.C. § 1927. The court would be hard-pressed to find that the plaintiff unreasonably and vexatiously "multiplied" the litigation; other than the original complaint, the plaintiff filed only eight affirmative pleadings—the original motion for injunctive relief and supporting brief, the motion to amend the motion for injunctive relief, the amended complaint, the second motion to amend the motion for injunctive relief, the motion for leave to file excess pages, the motion to file separate reply briefs, the motion for a consolidated evidentiary hearing and a motion to restrict. Some of the motions were extremely lengthy and accompanied by voluminous attachments. Others were sloppy. But the court has no basis on which to conclude that the plaintiff was "dilatory" or that he needlessly delayed proceedings; if anything (as the defendant also has argued), the plaintiff was pushing an extremely expedited schedule, which the court and the defendants struggled to accommodate.

The heart of the defendant's motion is his argument that the plaintiff should not have filed suit to begin with and that the claims the plaintiff brought were not just meritless, but frivolous. This argument harkens back to the *Overnite* court's reference to other courts that had imposed § 1927

sanctions for cases that were patently without merit. But this court never reached the merits of the plaintiff's claims. As the plaintiff has argued, the court dismissed the case on procedural grounds. The court is aware that other judges have dismissed as meritless claims similar to those made by the plaintiff in this case. Perhaps, had this court reached the merits of the plaintiff's claims, it would have come to the same conclusion. But it cannot agree that if it had jurisdiction to consider the defendant's motion, it would have had a basis for imposing § 1927 sanctions on the ground that the plaintiff's claims were wholly meritless and frivolous, because the court did not have the opportunity to make that determination.

The defendant also argues repeatedly that the pleadings the plaintiff's counsel filed were "riddled" with procedural errors. The court noted some of those in its order regarding the amended motion for injunctive relief (Dkt. No. 7), its order ruling on the amended motion for injunctive relief (Dkt. No. 29) and its order denying the plaintiff's motion to restrict (Dkt. No. 82). This is not, however, the first or only case the court has had in which attorneys have made procedural errors—even multiple procedural errors. And when the court issued orders identifying the plaintiff's errors, plaintiff's counsel attempted to address them. The procedural errors made more work for the defendants and the court, but they did not delay the proceedings.

As in *Trump v. WEC*, the allegation that comes closest to presenting a valid basis for an award of fees is the argument that much of the relief the plaintiff requested was not relief that a federal court either

had the authority to grant or had the practical ability to grant. *See Trump v. Wisconsin Elections Commission*, No. 20-cv-1785-BHL, 2021 WL 5771011, at *4 (E.D. Wis. Dec. 6, 2021). The plaintiff did not get to argue the bases for those requests for relief because the defendants (including the movant) successfully argued that the court should not reach those bases. Perhaps if the case had progressed further, the plaintiff might have withdrawn some of the requests for relief or retreated from certain arguments. While, as Judge Ludwig stated in the *Trump* decision, "[r]eady, fire, aim is not the preferred approach when litigating constitutional claims in federal court," *id.*, and while asking for the impossible in the hope that one may achieve the improbable is no less desirable an approach, the fact that the plaintiff's counsel did so is not a sufficient basis for awarding fees under § 1927.

The defendant's argument that the court should use its inherent authority to award sanctions is brief. Aside from arguing that the plaintiff brought meritless claims, he argues that the plaintiff "fabricated a quote to support their position." Dkt. No. 98 at 20. This is a reference to the following passage from this court's order of dismissal:

> The plaintiff also asserts that the "cutoff for election-related challenges, at least in the Seventh Circuit, appears to be the date that the electors meet, rather than the date of certification." Dkt. No. 72 at 24. He cites *Swaffer v. Deininger*, No. 08-CV-208, 2008 WL 5246167 (E.D. Wis. Dec. 17, 2008). *Swaffer* is not a Seventh Circuit case, and the court is not aware of a Seventh Circuit case

> that establishes a "cutoff for election-related challenges." And the plaintiff seems to have made up the "quote" in his brief that purports to be from *Swaffer*. The plaintiff asserts that these words appear on page 4 of the *Swaffer* decision: "even though the ***election*** has passed, the meeting of electors obviously has not, so plaintiff's claim here is hardly moot." Dkt. No. 72 at 24-25. The court has read page 4 of *Swaffer*—a decision by this court's colleague, Judge J.P. Stadtmueller—three times and cannot find these words. In fact, *Swaffer* did not involve a challenge to a presidential election and it did not involve electors. Mr. Swaffer sought to challenge a Wisconsin statute requiring individuals or groups promoting or opposing a referendum to file a registration statement and take other actions. *Swaffer*, 2008 WL 5246167, at *1. The defendants argued that the election (in which the plaintiff had taken steps to oppose a referendum on whether to allow liquor sales in the Town of Whitewater) was over and that Swaffer's claims thus were moot. *Id.* at 2. Judge Stadtmueller disagreed, finding that because Swaffer alleged that he intended to violate the statutes at issue in the future, a credible threat of prosecution remained. *Id.* at 3.

Dkt. No. 83 at 32-33.

This court did not hold that the plaintiff had fabricated a quote—it stated, based on its review of the case the plaintiff had cited, that he *appeared* to have done so. Even if the court had jurisdiction to

decide the sanctions motion, it would not have awarded sanctions—under its inherent authority or any other authority—for this misrepresentation without giving the plaintiff's counsel an opportunity to explain whether the drafter of the pleading mistakenly cited the wrong case or whether there was some other innocent reason for the apparently "fabrication."

The defendant asserts that the court should use its inherent authority to sanction the plaintiff and his lawyers because they "delayed the proceedings with a series of procedural errors and misrepresented the law on threshold issues of standing and pleading requirements." Dkt. No. 98 at 21-22. The court already has concluded that the procedural errors did not delay the proceedings. As for the plaintiff's legal arguments, the court disagreed with the plaintiff's interpretation of some cases he cited and found that others did not stand for the propositions he put forth. Dkt. No. 83. The court would not use its inherent authority to impose sanctions, however, without some further hearing to determine whether the plaintiff's counsel made deliberate misrepresentations of the law, as opposed to errors made in the context of extensive litigation proceeding in federal and state courts around the country at the same time.

Finally, the defendant argues that the court should exercise its inherent authority to sanction the plaintiff and his lawyers because "by acting in haste, Plaintiff and his attorneys precluded Defendants' opportunity to move for sanctions under Rule 11." Dkt. No. 98 at 22. He cites *Methode Electronics, Inc. v. Adam Technologies, Inc.*, 371 F.3d 923, 927-28 (7th Cir. 2004) for the proposition that it is appropriate

for a district court to exercise its inherent power to control proceedings by imposing sanctions.[4] *Id.* Even if the court had jurisdiction to entertain this claim, it would not have used its inherent power to impose sanctions on this basis. The defendant is correct that the court issued its order dismissing the case on December 9, 2020 because that was the date on which the plaintiff's counsel asked the court to rule. *See* Dkt. No. 71 at 1 (minutes of the December 8, 2020 status conference). But it was the court's decision to issue the order by that date; the court was not required to acquiesce to the plaintiff's scheduling requests. And while it is true that the defendant did not have time between the December 1, 2020 filing of the complaint and the December 9, 2020 order dismissing the case to comply with Rule 11's twenty-one-day safe-harbor provision, he had more than twenty-one days between the date of that order and the date the Seventh Circuit issued its decision.

If the court had jurisdiction, it would not impose sanctions under § 1927. It would consider sanctions under its inherent authority for possible fabrication of a quote and possible misstatement of applicable law only after a hearing at which the plaintiff's counsel would have the opportunity to explain whether those were innocent errors.

III. Plaintiff's Motion to Strike Defendant's Motion for Sanctions (Dkt. No. 105); Defendant

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[4] *Methode* contributes nothing to the analysis; it reiterated only what the Supreme Court had held in *Chambers*—that a court may invoke its inherent powers even if there is a statute or rule that would sanction the same conduct. *Methode*, 371 F.3d at 927.

Governor Tony Evers's Motion for Leave to File Supplemental Brief (Dkt. No. 112)

Just as the court does not have jurisdiction to decide the motion for an award of attorney's fees, it also does not have jurisdiction to decide the plaintiff's motion to strike or the defendant's motion for leave to file a supplemental brief. Given the fact that the court is denying the motion for sanctions, these motions also are moot.

IV. Conclusion

The court **DENIES** for lack of jurisdiction defendant Evers's motion to recover attorney fees. Dkt. No. 97.

The court **DENIES** for lack of jurisdiction and as moot the plaintiff's motion to strike the defendant's motion to recover attorney fees. Dkt. No. 105.

The court **DENIES** for lack of jurisdiction and as moot the defendant's motion for leave to file supplemental brief. Dkt. No. 112.

Dated in Milwaukee, Wisconsin this 24th day of August, 2022.

BY THE COURT:

/s/ Pamela Pepper

HON. PAMELA PEPPER
Chief United States District Judge

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 25, 2023

Before

ILANA DIAMOND ROVNER, Circuit Judge
DAVID F. HAMILTON, Circuit Judge
MICHAEL Y. SCUDDER, Circuit Judge

No. 22-2704

WILLIAM FEEHAN, *Plaintiff-Appellee*, v. TONY EVERS, in his official capacity as Wisconsin's Governor, *Defendant-Appellant*.	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 2:20-cv-01771-PP Pamela Pepper, *Chief Judge*.

ORDER

On consideration of defendant Tony Evers' petition for rehearing en banc, filed September 6, 2023, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition for rehearing.

Accordingly, the petition for rehearing en banc filed by defendant Tony Evers is **DENIED**.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WILLIAM FEEHAN,

Plaintiff,

v.

WISCONSIN ELECTIONS COMMISSION, COMMISSIONER ANN S. JACOBS, MARK L. THOMSEN, JULIE M. GLANCEY, COMMISSIONER MARGE BOSTELMANN, COMMISSIONER DEAN KNUDSON, ROBERT F. SPINDELL, JR., and TONY EVERS,

Defendants.

Case No. 20-cv-1771-pp

[December 9, 2020]

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (DKT. NOS. 51, 53), DENYING AS MOOT PLAINTIFF'S AMENDED MOTION FOR INJUNCTIVE RELIEF (DKT. NO. 6) AND DISMISSING CASE

At 8:24 a.m. on Tuesday, December 1, 2020—twenty-eight days after the November 3, 2020 general Presidential election, thirteen days after President Donald J. Trump petitioned for a recount in Milwaukee and Dane Counties and one day after

the Wisconsin Elections Commission and the Governor certified that Joseph R. Biden and Kamala D. Harris had received the highest number of votes following that recount—two plaintiffs filed this lawsuit in federal court for the Eastern District of Wisconsin. Although state law governs the election process, the plaintiffs brought the suit in a federal court, asking that federal court to order state officials to decertify the election results that state officials had certified the day before, order the Governor not to transmit to the Electoral College the certified results he'd transmitted the day before and order the Governor to instead transmit election results that declared Donald Trump to be "the winner of this election."

The election that preceded this lawsuit was emotional and often divisive. The pleadings that have been filed over the past week are passionate and urgent. People have strong, deep feelings about the right to vote, the freedom and opportunity to vote and the value of their vote. They should. But the legal question at the heart of this case is simple. Federal courts have limited jurisdiction. Does a federal court have the jurisdiction and authority to grant the relief this lawsuit seeks? The answer is no.

Federal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so. After a week of sometimes odd and often harried litigation, the court is no closer to answering the "why." But this federal court has no authority or jurisdiction to grant the relief the remaining plaintiff seeks. The court will dismiss the case.

I. Background

According to defendant the Wisconsin Elections Commission's November 18, 2020 canvass results, 3,297,352 Wisconsin residents voted in the November 3, 2020 general election for President. https://elections.wi.gov/sites/elections.wi.gov/files/Statewide%20Results%20All%20Offices%20%28pre-Presidential%20recount%29.pdf. Of those, 49.45%—1,630,673—voted for Biden for President and Harris for Vice-President. *Id.* Biden and Harris received approximately 20,600 more votes than Donald J. Trump for President and Michael R. Pence for Vice-President. *Id.*

Under Wis. Stat. § 9.01(1)(a)(1), any candidate in an election where more than 4,000 votes were cast for the office the candidate seeks and who trails the leading candidate by no more than 1 percent of the total votes cast for that office may petition for a recount. On November 18, 2020, Donald J. Trump filed a recount petition seeking a recount of "all ballots in all wards in every City, Village, Town and other voting unit in Dane and Milwaukee Counties." https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/WEC%20-%20Final%20Recount%20Order_0.pdf. The Wisconsin Elections Commission granted that petition and ordered a recount "using the ballot count method selected per Wis. Stat. § 5.90(1) unless otherwise ordered by a court per Wis. Stat. § 5.90(2)." *Id.* The WEC ordered the recount to be completed by 12:00 p.m. on December 1, 2020. *Id.*

The partial recount was completed on November 29, 2020. https://elections.wi.gov/elections-voting/recount. On November 30, 2020, the chair of

the Wisconsin Elections Commission signed the statement of canvass certifying that Joseph R. Biden and Kamala D. Harris received the greatest number of votes and certified their electors. https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20 President%20-%20Vice%20President.pdf. The same day—November 30, 2020—Wisconsin Governor Tony Evers announced that he had signed the Certificate of Ascertainment for the electors for Biden and Harris. https://content.govdelivery.com/accounts/WIGOV/bulletins/2aef6ff. The web site for the National Archives contains the Certificate of Ascertainment signed by Evers on November 30, 2020, certifying that out of 3,298,041 votes cast, Biden and Harris and their electors received 1,630,866 votes, while Trump and Pence and their electors received 1,610,184 votes. https://www.archives.gov/ files/electoral-college/2020/ ascertainment-wisconsin.pdf.

On December 1, 2020, Donald J. Trump filed a petition for an original action in the Wisconsin Supreme Court. *Trump v. Evers*, Case No. 2020AP001971-OA (available at https://wscca.wicourts.gov). On December 3, 2020, the court denied leave to commence an original petition because under Wis. Stat. § 9.01(6), appeals from the board of canvassers or the Wisconsin Elections Commission must be filed in circuit court. Dkt. No. 59-7. The same day—December 3, 2020—Donald J. Trump filed lawsuits in Milwaukee and Dane Counties. *Trump v. Biden*, Case No. 2020CV007092 (Milwaukee County Circuit Court); *Trump v. Biden*, Case No. 2020CV002514 (Dane County Circuit Court) (both

available at https://wcca.wicourts.gov). Those cases have been consolidated and are scheduled for hearing on December 10, 2020 at 1:30 (or for December 11, 2020 at 9:00 a.m. if the parties are litigating in another court).

Meanwhile, on December 2, 2020, Donald J. Trump filed suit in federal court for the Eastern District of Wisconsin, suing the defendants in this case and others. *Trump v. Wisconsin Elections Commission*, *et al.*, Case No. 20-cv-1785-BHL (E.D. Wis.). There is an evidentiary hearing scheduled for December 10, 2020 at 9:00 a.m. by videoconference. *Id.* at Dkt. No. 45.

II. Procedural History of the Case

On December 1, 2020—the day after Governor Evers signed the Certificate of Ascertainment—William Feehan and Derrick Van Orden filed a complaint in the federal court for the Eastern District of Wisconsin. Dkt. No. 1. Feehan identified himself as a resident of La Crosse, Wisconsin, a registered voter and "a nominee of the Republican Party to be a Presidential Elector on behalf of the State of Wisconsin." *Id.* at ¶ 23. Van Orden was identified as a resident of Hager City, Wisconsin and the 2020 Republican nominee for Wisconsin's Third Congressional District Seat for the U.S. House of Representatives. *Id.* at ¶ 26. The complaint alleged that "Mr. Van Orden 'lost' by approximately 10,000 votes to the Democrat incumbent," and stated that "[b]ecause of the illegal voting irregularities as will be shown below, Mr. Van Orden seeks to have a new election ordered by this court in the Third District, with that election being conducted under strict

adherence with the Wisconsin Election Code." *Id.* at ¶ 27.

The complaint alleged "massive election fraud, multiple violations of the Wisconsin Election Code, *see e.g.,* Wis. Stat. §§ 5.03, *et seq.,* in addition to the Election and Electors Clauses and Equal Protection Clause of the U.S. Constitution" based on "dozens of eyewitnesses and the statistical anomalies and mathematical impossibilities detailed in the affidavits of expert witnesses." Dkt. No. 1 at ¶ 1. The plaintiffs alleged four causes of action: (1) violation of the Elections and Electors Clauses and 42 U.S.C. § 1983; (2) violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1983 and the "invalid enactment of regulations & disparate treatment of absentee vs. mail-in ballots"; (3) denial of the Fourteenth Amendment due process right to vote and 42 U.S.C. § 1983; and (4) "wide-spread ballot fraud." *Id.* at ¶¶ 106-138. The plaintiffs asked for the following emergency relief:

> 1. An order directing Governor Evers and the Wisconsin Elections Commission to de-certify the election results:
>
> 2. An order enjoining Governor Evers from transmitting the currently certified election results [sic] the Electoral College;
>
> 3. An order requiring Governor Evers to transmit certified election results that state that President Donald Trump is the winner of the election;
>
> 4. An immediate emergency order to seize and impound all servers, software, voting machines,

tabulators, printers, portable media, logs, ballot applications, ballot return envelopes, ballot images, paper ballots, and all "election materials" referenced in Wisconsin Statutes § 9.01(1)(b)11 related to the November 3, 2020 Wisconsin election for forensic audit and inspection by the Plaintiffs;

5. An order that no votes received or tabulated by machines that were not certified as required by federal and state law be counted;

6. A declaratory judgment declaring that Wisconsin's failed system of signature verification violates the Electors and Elections Clause by working a de facto abolition of the signature verification requirement;

7. A declaratory judgment declaring that currently certified election results violate the Due Process Clause, U.S. Const. Amend. XIV;

8. A declaratory judgment declaring that mail-in and absentee ballot fraud must be remedied with a Full Manual Recount or statistically valid sampling that properly verifies the signatures on absentee ballot envelopes and that invalidates the certified results if the recount or sampling analysis shows a sufficient number of ineligible absentee ballots were counted;

9. A declaratory judgment declaring absentee ballot fraud occurred in violation of Constitutional rights, Election laws and under state law;

10. A permanent injunction prohibiting the Governor and Secretary of State from

> transmitting the currently certified results to the Electoral College based on the overwhelming evidence of election tampering;
>
> 11. Immediate production of 48 hours of security camera recording of all rooms used in the voting process at the TCF Center[1] for November 3, 2020 and November 4, 2020;
>
> 12. Plaintiffs further request the Court grant such relief as is just and proper including but not limited to, the costs of this action and their reasonable attorney fees and expenses pursuant to 42 U.S.C. § 1988.

Id. at 50.

With the complaint, the plaintiffs filed a motion for declaratory, emergency, and permanent injunctive relief, dkt. no. 2, and memorandum in support of that motion, dkt. no. 3. The motion stated that the specific relief the plaintiff requested was set out in an attached order, dkt. no. 2 at 1, but there was no order attached. The memorandum asked the court to grant the motion and enter the proposed order, dkt. no. 3 at 10; again, no proposed order was provided.

Later that day, the plaintiffs filed a corrected motion for declaratory, emergency, and permanent injunctive relief. Dkt. No. 6. The plaintiff did not file a memorandum in support of this motion but did file a proposed order. Dkt. No. 1. The relief described in the proposed order was almost identical to the relief

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[1] The plaintiff may be referring to the TCF convention center in Detroit, Michigan; the court is unaware of a "TCF Center" in Wisconsin.

requested in the complaint, with a notable exception. Instead of the request for an order requiring production of forty-eight hours of security camera footage from the TCF Center, the plaintiffs asked for an order prohibiting "any wiping or alteration of data or other records or materials" from voting machines, tabulations machines, servers, software and printers, and any alteration or destruction of ballot applications, ballot return envelopes, ballot images, paper ballots, registration lists, poll lists or other election materials, "across the state of Wisconsin." Dkt. No. 6-1 at 7-8.

Two days later, plaintiff Freehan filed an amended complaint removing Derrick Van Orden as a plaintiff. Dkt. No. 9. It differed from the original complaint only in the removal of Van Orden as a plaintiff.

Along with the amended complaint, the plaintiff filed a motion for temporary restraining order and preliminary injunction "to be considered in an expedited manner." Dkt. No. 10. The plaintiff did not file a memorandum in support of the motion; his main purpose in filing the amended motion appears to have been to ask the court to rule on the motion quickly. The plaintiff attached a proposed briefing schedule, suggesting that the court should require the defendants to respond by 8:00 p.m. on Friday, December 4, 2020 and require him to file his reply by 8:00 p.m. on Saturday, December 5, 2020; he proposed to submit the matter on briefs without argument. Dkt. No. 10-1. The defendants objected to this severely truncated schedule. Dkt. Nos. 25 (defendant Evers), 26 (defendants Wisconsin Election Commission and its members).

Construing the amended motion as a Civil L.R. 7(h) expedited, non-dispositive motion for an expedited briefing schedule, the court granted the request on December 4, 2020, setting a schedule that, while not as expedited as the plaintiff requested, gave the parties a short leash. Dkt. No. 29.

Wisconsin voter James Gesbeck filed a motion to intervene, dkt. no. 14, and later an expedited motion to intervene, dkt. no. 33. The Democratic National Committee (DNC) also sought to intervene. Dkt. No. 22. The court denied both requests, dkt. nos. 41 (DNC), 74 (Gesbeck), but allowed both to file *amicus curiae* briefs by the December 7, 2020 deadline it had set for the defendants to oppose the plaintiff's motion for injunctive relief, dkt. nos. 37 (Gesbeck), 41 (DNC).

Recall that the plaintiff had not filed a memorandum in support of the December 1, 2020 corrected motion for injunctive relief or in support of the December 3, 2020 amended motion. On Sunday, December 6, 2020, the plaintiff filed an amended memorandum in support of the motion. Dkt. No. 42. In the first paragraph, the plaintiff indicated that he filed the amended memorandum to "avoid possible confusion from removal of Mr. Van Orden is [sic] plaintiff." *Id.* at 1. He said that the memorandum was identical to the original memorandum "except for amending references to plaintiffs to refer to Mr. Meehan [sic] only and correcting several inadvertent references to the State of Georgia." *Id.*

On Sunday, December 6, the plaintiff also filed a motion asking the court to schedule an evidentiary hearing "on the merits" for Wednesday, December 9, 2020 at 9:00 a.m. Dkt. No. 44. Although the plaintiff

had not asked for a hearing in any prior motion, and had represented in the amended motion that he was submitting the matter on the briefs without argument, the plaintiff explained that he had changed his position based on the court's December 4, 2020 order. *Id.* at ¶4. The court denied the motion in a telephonic hearing on December 8, 2020, explaining that before it could reach the merits of the motion for injunctive relief, it must resolve issues regarding justiciability. Dkt. Nos. 70, 71.

In opposing the plaintiff's amended motion for injunctive relief, defendants Wisconsin Election Commission and its members argued that the case has jurisdictional and procedural defects that require dismissal. Dkt. No. 52 at 5. They asserted that the plaintiff lacks Article III standing, *id.* at 6, that the doctrine of laches bars consideration of his claims, *id.* at 8 and that the Eleventh Amendment shields them from the relief he seeks, *id.* at 10. They asserted that the complaint fails to state a claim for relief under the Election or Electors Clauses, *id.* at 11, or under the Equal Protection or Due Process Clauses, *id.* at 13, and they contended that the plaintiff's purported evidence fails to meet basic evidentiary standards, *id.* at 20.

In his brief opposing injunctive relief, defendant Governor Evers argued that there is no evidence of fraud in Wisconsin's election results, dkt. no. 55 at 10, that the plaintiff's witnesses and experts lack qualifications and are unreliable, *id.* at 12, and that the plaintiff has failed to state valid claims, *id.* at 22. Evers also argued that an adequate remedy at law exists because the recount procedures under Wis. Stat. § 9.01 unambiguously constitute the "exclusive

remedy" for challenging election results. *Id.* at 55. With respect to the balancing of harms, Evers argued that the requested relief would prejudice the defendants and "retroactively deprive millions of Wisconsin voters of their constitutional right to vote in the 2020 presidential election." *Id.* at 32.

James Gesbeck, filing as friend of the court, opposed the motion for injunctive relief on the grounds that the plaintiff has not established subject matter jurisdiction and that the court should defer to the Wisconsin courts and Wisconsin's procedural mechanism for resolving disputed elections. Dkt. No. 47 at 11, 12. Gesbeck applied the balancing analysis for injunctive relief, asserting that relief in this court would moot the Wis. Stat. § 9.01 challenge pending in the Wisconsin courts. *Id.* at 17. He argued that this, in turn, would put the "insurmountable weight of the Federal Government on the election result in Wisconsin and would be unbalancing the scale created by the system of checks and balances that have been maintained since the Constitution was adopted." *Id.* at 17.

Amicus DNC opposed the motion on many of the same grounds as the other defendants. Dkt. No. 57. The DNC argued that the plaintiff lacks standing, that the doctrine of laches bars the plaintiff's claims, that the defendants are immune from suit under the Eleventh Amendment, that principles of federalism and comity require abstention, and that the plaintiff fails to state a claim upon which relief can be granted. Dkt. No. 57. It asserted that the plaintiff cannot establish irreparable harm and has an adequate remedy of law. *Id.* at 36.

The defendants have filed motions to dismiss the case. The WEC and its members seek dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 53. Defendant Evers seeks dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), failure to plead fraud with particularity under Fed. R. Civ. P. 9(b) and failure to state a claim under Fed. R. Civ. P. 12(b)(6).

The Wisconsin State Conference of the NAACP and three of its members (Dorothy Harrell, Wendell J. Harris, Jr. and Earnestine Moss) sought leave to file an *amicus* brief on the question of whether the court should dismiss the case. Dkt. No. 56. The court granted that motion. Dkt. No. 69.

III. Procedural Posture

From the outset, the plaintiff has sought to have the claims in the complaint resolved through a motion for injunctive relief under Fed. R. Civ. P. 65. The relief he requests in the second iteration of his motion for injunctive relief is the same relief he requests in the lawsuit itself. As defendant Evers points out in his motion to dismiss, the plaintiff's December 6, 2020 motion for an evidentiary hearing (which the court has denied) "makes clear that what [the plaintiff] seeks—without any discovery or basic adversarial development of evidence—is a trial and final adjudication on the merits." Dkt. No. 51 at 2.

Evers points to Fed. R. Civ. P. 12(i), which states that "[i]f a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial." Because Evers has raised

defenses under Rule 12(b)(1) and (b)(6), and because in asking for a hearing the plaintiff sought what would have been a trial on the merits of the causes of action raised in the complaint, the court must resolve the defenses before moving to the merits.

As the court stated in the hearing on December 8, that requirement is more than a procedural nicety. The defendants and the *amici* have raised questions about this federal court's authority to decide the claims alleged in the amended complaint. If this court does not have jurisdiction to hear and decide those claims, any decision it might make regarding the merits of the claims would be invalid. For that reason, the court considers the motions to dismiss before considering the plaintiff's request for injunctive relief.

IV. The Motions to Dismiss

A. Legal Standards

1. *Rule 12(b)(1)—Lack of Subject Matter Jurisdiction*

In evaluating a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), "the court must first determine whether a factual or facial challenge has been raised." *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015) (citing *Apex Dig., Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009). A *factual* challenge alleges that even if the pleadings are sufficient, no subject matter jurisdiction exists. A *facial* challenge alleges that the complaint is deficient—that the plaintiff has not sufficiently alleged subject matter jurisdiction. *Id.* The difference matters—a court reviewing a factual

challenge "may look beyond the pleadings and view any evidence submitted to determine if subject matter exists," while a court reviewing a facial challenge "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff." *Id.*

2. *Rule 12(b)(6)—Failure to State a Claim*

A motion to dismiss for failure to state a claim under Rule 12(b)(6) challenges the legal sufficiency of the complaint. A complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint must contain enough facts, accepted as true, to "state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "[T]he plausibility determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *W. Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 676 (7th Cir. 2016).

3. *42 U.S.C. § 1983*

To state a claim for a civil rights violation under 42 U.S.C. § 1983, a plaintiff must allege that someone deprived him of a right secured by the Constitution or the laws of the United States and that whoever deprived him of that right was acting under the color of state law. *D.S. v. E. Porter Cty. Sch. Corp.*, 799 F.3d 793, 798 (7th Cir. 2015) (citing *Buchanan–*

Moore v. Cty. of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009)).

B. Subject Matter Jurisdiction

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Subject matter jurisdiction has to do with "the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (emphasis in the original). "Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" *Id.* at 102. The defendants raise a factual challenge to the court's subject matter jurisdiction, arguing that regardless of the pleadings, subject matter jurisdiction does not exist. The court may look outside the four corners of the complaint in considering that challenge.

1. *Standing*

Article III standing is an "essential component of Article III's case-or-controversy requirement," and therefore a "threshold jurisdictional question." *Apex Dig., Inc.*, 572 F.3d at 443 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Id.* "Standing is an element of subject-matter jurisdiction in a federal civil action . . . ." *Moore v.*

Wells Fargo Bank, N.A., 908 F.3d 1050, 1057 (7th Cir. 2018).

> The "irreducible constitutional minimum of standing contains three requirements." *Lujan v. Defenders of Wildlife*, [504 U.S. 555], at 560 [1992)]. First and foremost, there must be (and ultimately proved) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, [495 U.S. 149], at 149 [1990] (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 . . . (1983)). Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 . . . (1976). And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury. *Id.*, at 45-46 . . .; see also *Warth v. Seldin*, 422 U.S. 490, 505 . . . (1975). This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 . . . (1990).

Steel Co., 523 U.S. at 102-104.

Regarding the "injury in fact" leg of the triad, the injury must be "particularized," such that it "affect[s] the plaintiff in a personal and individual way."

Spokeo, Inc. v. Robins, ___ U.S. ___, 136 S. Ct. 1540, 1548 (2016) (citations omitted). The injury also must be "concrete"—it must be "real," not "abstract." *Id.* A plaintiff cannot show a particularized and concrete injury by showing "that he has merely a general interest common to all members of the public." *Ex parte Levitt*, 302 U.S. 633, 634 (1937). A plaintiff may not use a "federal court as a forum in which to air his generalized grievances about the conduct of government . . . ." *United States v. Richardson*, 418 U.S. 166, 174 (1974) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1942)).

As for the redressability leg of the triad, "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107. The plaintiff must show that it is "likely," not merely "speculative," that the injury the plaintiff alleges will be "redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38).

In addition to the Article III case-or-controversy requirement, there is a prudential limitation in Fed. R. Civ. P. 17(a), requiring that "[e]very action must be prosecuted in the name of the real party in interest," Fed. R. Civ. P. 17(a), and "requir[ing] that the complaint be brought in the name of the party to whom that claim 'belongs' or the party who 'according to the governing substantive law, is entitled to enforce the right.'" *Rawoof v. Texor Petroleum Co., Inc.*, 521 F.3d 750, 756 (7th Cir. 2008) (quoting *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 193 (2d Cir. 2003)); *see also RK Co. v. See*, 622 F.3d 846, 850 (7th Cir. 2010) ("the real party in interest rule is only

concerned with whether an action can be maintained in the plaintiff's name," and is "similar to, but distinct from, constitutional ... standing"). The real party in interest is "the one who by the substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Act II Jewelry, LLC v. Wooten*, 301 F. Supp. 3d 905, 910-911 (N.D. Ill. 2018) (quoting *Checkers, Simon & Rosner v. Lurie Corp.*, 864 F.2d 1338, 1343 (7th Cir. 1988) (internal citations omitted)). The purpose of the rule is to "protect the defendant against a subsequent action by the party actually entitled to recover." *RK Co.*, 622 F.3d at 850 (citing Fed. R. Civ. P. 17(a) advisory committee note (2009)).

The amended complaint alleges that the plaintiff has standing "as a voter and as a candidate for the office of Elector under Wis. Stat. §§ 5.10, *et seq* (election procedures for Wisconsin electors)." Dkt. No. 9 at 8. The defendants argue that the plaintiff lacks standing in either capacity. Dkt. No. 43 at 4-5; Dkt. No. 59 at 8-9.

a. Standing as a voter

The amended complaint does not assert that the plaintiff voted in the 2020 general Presidential election in Wisconsin. It says that he is a registered voter, but it does not affirmatively state that he voted in the election the results of which he asks the court to decertify. His counsel asserts in the brief in opposition to the defendants' motion to dismiss—filed eight days after the original complaint and five days after the amended complaint—that the plaintiff "voted for President Trump in the 2020 General

Election." Dkt. No. 72 at 17. For the first time at the motion to dismiss stage, the plaintiff provided his own declaration, in which he attests that he voted for President Donald J. Trump in the November 3, 2020 election. Dkt. No. 72-1.

The plaintiff claims that the 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 in violation of the United States Constitution guarantee of Equal Protection." Dkt. No. 9 at ¶ 116. He alleges that the defendants enacted regulations or issued guidance that, in intent and effect, favored Democratic absentee voters over Republican voters, and that these regulations and this guidance enable and facilitated voter fraud. *Id.* The plaintiff also asserts that he has a right to have his vote count and claims that a voter is injured if "the important of his vote is nullified." *Id.* at ¶ 127.

Several lower courts have addressed the plaintiff's theory that a single voter has standing to sue as a result of his vote being diluted by the possibility of unlawful or invalid ballots being counted. The district court for the Middle District of North Carolina catalogued a few of those decisions, all finding that the harm was too speculative and generalized—not sufficiently "concrete"—to bestow standing. These courts concluded that the vote dilution argument fell into the "generalized grievance" category. In *Moore v. Circosta*, the court wrote:

> Indeed, lower courts which have addressed standing in vote dilution cases arising out of

the possibility of unlawful or invalid ballots being counted, as Plaintiffs have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters. *See, e.g.*, *Donald Trump for President, Inc. v. Cegavske*, Case No. 2:20-CV-1445 JCM (VCF), __ F. Supp. 3d __, __, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more tangibly benefits them than it does the public at large.") (internal quotations and modifications omitted); *Martel v. Condos*, Case No. 5:20-cv-131, ___ F. Supp. 3d ___, ___, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926-27 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution [is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.")

> Although "[i]t would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because affects all voters," *Martel*, __ F. Supp.3d at __, 2020 WL 5755289, at *4, the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury necessary for Article III standing. Compared to a claim of gerrymandering, in which the injury is specific to a group of voters based on their racial identity or the district in which they live, all voters in North Carolina, not just Individual Plaintiffs, would suffer the injury Individual Plaintiffs allege. This court finds this injury to generalized to give rise to a claim of vote dilution . . . .

Moore v. Circosta, Nos. 1:20CV911, 1:20CV912, 2020 WL 6063332, at *14,

The court agrees. The plaintiff's alleged injuries are injuries that any Wisconsin voter suffers if the Wisconsin election process were, as the plaintiff alleges, "so riddled with fraud, illegality, and statistical impossibility that this Court, and Wisconsin's voters, courts, and legislators, cannot rely on, or certify, any numbers resulting from this election." Dkt. No. 9 at ¶ 5. The plaintiff has not alleged that, as a voter, he has suffered a particularized, concrete injury sufficient to confer standing.

The plaintiff argues that it is incorrect to say that his standing is based on a theory of vote dilution.

Dkt. No. 72 at 19. He then proceeds to opine that he has shown in great detail how his vote and the votes of others who voted for Republican candidates was diluted. *Id.* at 19-20. He says the vote dilution did not affect all Wisconsin voters equally, asserting that it had a negative impact on those who voted for Republican candidates and a positive impact on those who voted for Democratic candidates. *Id.* at 20. He asserts that he also has shown that the defendants sought to actively disenfranchise voters for Republican candidates. *Id.* These are the same arguments he made in the amended complaint and they still show no more than a generalized grievance common to any voter. Donald J. Trump carried some Wisconsin counties; the voters who voted for Joseph R. Biden in those counties could make the same complaints the plaintiff makes here.

The plaintiff says that his interests and injury are "identical to that of President Trump," and cites to *Bush v. Gore*, 531 U.S. 98 (2000), which he characterizes as holding that "then-candidate George W. Bush of Texas had standing to raise the equal protection rights of Florida voters that a majority of the Supreme Court deemed decisive." *Id.* at 21 (quoting *Hawkins v. Wayne Twp. Bd. of Marion Cty., Ind,* 183 F. Supp. 2d 1099, 1103 (S.D. Ind. 2002)). The court is stymied by the plaintiff's assertion that his interests and injury are identical to that of President Trump. As the court will explain in the next section, contrary to his assertions, the plaintiff is not a "candidate" in the way that President Trump was a candidate for office. President Trump's interest is in being re-elected, while the plaintiff has said that his interest is in having his vote count and not be

diluted. If his interest is solely in getting President Trump re-elected, as opposed to having his vote be counted as part of a valid election process, the court is aware of no constitutional provision that gives him the right to have his candidate of choice declared the victor.

Nor does the decision in *Bush v. Gore* say what the plaintiff claims it says. As far as the court can tell, the word "standing" does not appear in the majority opinion. In the Indiana decision the plaintiff cites, then-district court judge David Hamilton wrote: "If candidate Hawkins did not have standing to raise equal protection rights of voters, it would be difficult to see how then-candidate George W. Bush of Texas had standing to raise equal protection rights of Florida voters . . . in *Bush v. Gore*." *Hawkins*, 183 F. Supp.2d at 1103. But the Supreme Court in *Bush v. Gore* never explained how candidate Bush had standing, and even if it had, the plaintiff is not a candidate.

Nor has the plaintiff demonstrated redressability. He complains that his vote was diluted and that he wants his vote to count. But he asks the court to order the results of the election de-certified and then to order defendant Evers to certify the election for Donald J. Trump. Even if this *federal* court had the authority to order the governor of the *state* of Wisconsin to certify the results of a national presidential election for any candidate—and the plaintiff has presented *no* case, statute or constitutional provision providing the court with that authority—doing so would further invalidate and nullify the plaintiff's vote. The plaintiff wants Donald J. Trump to be certified as the winner of the

Wisconsin election *as a result of the plaintiff's vote*. But what he asks is for Donald J. Trump to be certified the winner *as a result of judicial fiat*. That remedy does not redress the plaintiff's alleged injury. Even the plaintiff concedes in his brief in opposition to dismissal that "[d]efendant Evers can . . . provide partial redress in terms of the requested injunctive relief, namely, by refusing to certify or transmit the election results, and providing access to voting machines, records and other 'election materials.'" Dkt. No. 72 at 21. The plaintiff is wrong in that regard, as the court will explain when it discusses the related doctrine of mootness; the point is that even from the plaintiff's perspective, the remedy he seeks will not fully redress the injury he claims.

Circling back to Article III's "case or controversy" requirement, the Supreme Court has held that "[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). In other words, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, ___ U.S. ___, 138 S. Ct. 1916, 1934 (2018) (citing *Cuno*, 547 U.S. at 353). Even if the plaintiff had alleged a particularized, concrete injury and even if the relief he seeks would redress that injury, that relief is not tailored to the alleged injury. As the Michigan court explained in *King v. Whitmer*, Case No. 20-13134 at Dkt. No. 62, page 25 (E.D. Mich. Dec. 7, 2020), "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."

The plaintiff's status as a registered voter does not give him standing to sue.

b. Standing as a nominee for elector

The amended complaint alleges that the plaintiff has standing to bring the suit "as a candidate for the office of Elector under Wis. Stat. §§ 5.10, et seq." Dkt. No. 9 at ¶26. The amended complaint cites to "Wis. Stat. §§ 5.10, et seq," but the court is not sure what the "*et seq.*"—"and what follows"—contributes to the plaintiff's belief that he has standing. Wis. Stat. § 5.10 is followed by Wis. Stat. § 5.15, which concerns the "Division of municipalities into wards," as well as other sections concerning polling places and voting machines. The court assumes the plaintiff meant to reference only Wis. Stat. § 5.10.

Wis. Stat. § 5.10 states:

> Although the names of the electors do not appear on the ballot and no reference is made to them, a vote for the president and vice president named on the ballot is a vote for the electors of the candidates for whom an elector's vote is cast. Under chs. 5 to 12, all references to the presidential election, the casting of votes and the canvassing of votes for president, or for president and vice president, mean votes for them through their pledged presidential electors.

Relying on this section, the amended complaint directs the court's attention to *Carson v. Simon*, 978

F.3d 1051, 1057 (8th Cir. 2020).[2] In *Carson*, two certified nominees of the Republican Party to be presidential electors sued the Minnesota secretary of state, challenging a consent decree that "essentially ma[de] the statutorily-mandated absentee ballot receipt deadline inoperative." *Id.* at 1054. As a result of the decree, the secretary of state had directed election officials "to count absentee ballots received up to a week after election day, notwithstanding Minnesota law." *Id.* The potential electors sought an injunction in federal court, but the district court found they lacked standing. *Id.*

The Eighth Circuit reversed, finding that the potential electors had standing as candidates "because the plain text of Minnesota law treats prospective presidential electors as candidates." *Id.* at 1057. The court found that candidates suffered particularized and concrete injury from an inaccurate vote tally. *Id.* at 1058.

The plaintiff urges this court to reach the same conclusion. An Eighth Circuit decision is not binding

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[2] The complaint also cites two Supreme Court cases: *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) and *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (*per curiam*). Neither address the Article III standing of an elector. In *McPherson*, the Court reviewed the Michigan supreme court's decision on the constitutionality of the Michigan statute governing selection of electors. While the parties who brought the suit in state court were nominees for presidential electors, the Court did not address their standing (or lack of it). The petitioner in *Bush* was the then-Republican candidate, George W. Bush, who was challenging the Florida supreme court's interpretation of its election statutes; again, the Court did not address (and had no need to address) the standing of an elector to sue.

on this court, but the question is whether the reasoning in that decision is persuasive. A member of the panel in *Carson* dissented from the majority opinion and expressed doubt about the potential electors' standing. Circuit Judge Jane Kelley wrote:

> . . . I am not convinced the Electors have Article III standing to assert claims under the Electors Clause. Although Minnesota law at times refers to them as "candidates," *see, e.g.*, Minn. Stat. § 204B.03 (2020), the Electors are not candidates for public office as that term is commonly understood. Whether they ultimately assume the office of elector depends entirely on the outcome of the state popular vote for president. *Id.* § 208.04 subdiv. 1 ("[A] vote cast for the party candidates for president and vice president shall be deemed a vote for that party's electors.") They are not presented to and chosen by the voting public for their office, but instead automatically assume that office based on the public's selection of entirely different individuals. But even if we nonetheless assume the Electors should be treated like traditional political candidates for standing purposes, I question whether these particular candidates have demonstrated the "concrete and particularized" injury necessary for Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 . . . (1992). To the contrary, their claimed injury—a potentially "inaccurate vote tally" . . .—appears to be "precisely the kind of undifferentiated, generalized grievance

> about the conduct of government: that the Supreme Court has long considered inadequate for standing. *Lance v. Coffman*, 549 U.S. 437, 442 . . . (2007) (examining standing in the context of a claim under the Elections Clause). Because the Electors, should they in fact assume that office, must swear an oath to mark their Electoral College ballots for the presidential candidate who won the popular vote, Minn. Stat. § 208.43 (2015), it is difficult to discern how they have more of a "particularized stake," *Lance*, 549 U.S. at 442 . . . , in Minnesota conducting fair and transparent elections than do the rest of the state's voters.

Id. at 1063.

Judge Kelly's reasoning is the more persuasive. Under Wisconsin law, a vote for the candidates of president and vice president is a vote for the electors of those candidates. Wis. Stat. § 5.65(3)(a). When the electors meet, they must vote for the candidates of the party that nominated the electors. Wis. Stat. § 7.75(2). Like Minnesota electors, Wisconsin electors may be referred to as "candidates" by statute but they are not traditional political candidates presented to and chosen by the voting public. Their interest in seeing that every valid vote is correctly counted and that no vote is diluted is no different than that of an ordinary voter. And the court has concluded, as did Judge Kelly, that the plaintiff's status as a voter does not give him standing.

The amended complaint does not mention the Elections Clause or the Electors Clause of the

Constitution in relation to standing. In his brief in opposition to the motions to dismiss, the plaintiff alleges that he has standing under "Electors and Elections Clause." Dkt. No. 72 at 17. He asserts that the Eighth Circuit found in *Carson* that electors had "both Article III and Prudential standing under the Electors and Elections Clauses." *Id.* The plaintiff reads *Carson* differently than does this court. The *Carson* majority did not mention the Electors or Elections Clause in its discussion of Article III standing. The entire discussion of Article III standing was based on Minnesota law. *See Carson*, 978 F.3d at 1-57-1058. In its discussion of *prudential* standing, the *Carson* majority stated that "[a]lthough the Minnesota Legislature may have been harmed by the Secretary's usurpation of its constitutional right under the Elector Clause, the Electors have been as well." *Id.* at 1058-59.

This court has found that the plaintiff does not have Article III standing, but even if had not, it disagrees that the Elector Clause[3] provides prudential standing to electors. Article II, Section 1, Clause 2 of the Constitution—known as the "Elector

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[3] The plaintiff cites the "Elector and Elections Clause" or "Clauses" in the same breath but does not discuss the text of either. It is not clear how the plaintiff sees the Elections Clause—Article II, Sec. 1, cl. 3—as providing him with standing and the plaintiff has not developed that argument. The court notes only that in *Lance v. Coffman*, the Supreme Court found that plaintiffs whose only alleged injury was that the Elections Clause had not been followed did not have standing because they alleged "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance*, 549 U.S. at 442.

Clause"—states that "[e]ach 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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." The clause confers on the *state* the right to appoint electors and confers on the *legislature* the right to decide the way those electors will be appointed. It confers no right on the *electors* themselves. Just a few months ago, the Supreme Court stated as much in *Chiafalo v. Washington*, ___ U.S. ___, 140 S. Ct. 2316, 2328 (July 6, 2020), in the context of considering whether a state could penalize an elector for breaking his pledge and voting for someone other than the candidate who won his state's popular vote:[4] "Article II and the Twelfth Amendment give States broad powers over electors, and give electors themselves no rights." The Court went on to say,

> Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like [the state of] Washington, it chooses to sanction an

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[4] Wisconsin's "pledge law"—Wis. Stat. § 7.75(1)—does not impose a penalty on a "faithless elector."

> elector for breaching his promise. Then, too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

Id.

The plaintiff's status as a nominee to be a Republican elector does not give him Article III or prudential standing.

2. *Mootness*

Mootness "has sometimes been called 'the doctrine of standing set in a time frame.'" *Chi. Joe's Tea Room, LLC v. Vill. of Broadview*, 894 F.3d 807, 812-13 (7th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)). A case becomes moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). "Mootness strips a federal court of subject-matter jurisdiction." *Id.* at 815 (citing *DJL Farm LLC v. EPA,* 813 F.3d 1048, 1050 (7th Cir. 2016). This is because "[a] case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III.'" *United States v. Sanchez-Gomez*, __ U.S. __, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC*, 568 U.S. at 91).

The amended complaint states that the plaintiff brought this suit "to prohibit certification of the

election results for the Office of President of the United States in the State of Wisconsin . . . ." Dkt. No. 9 at ¶ 27. The plaintiff asks the court to prohibit from occurring an event that already has occurred—an event that occurred the day before he filed this lawsuit and nine days before the court issues this order. He asks the court to enjoin defendant Evers from transmitting the certified election results, *id.* at ¶ 142—an event that already has occurred. He asks the court to order that certain votes not be counted, *id.*, when the vote counting has been over since November 29.

The plaintiff himself demonstrates the mootness problem in his brief in opposition to dismissal. He states that defendant Evers can provide partial redress for his alleged injuries "by refusing to certify or transmit the election results." Dkt. No. 72 at 21. But Evers already has certified and transmitted the elections results—he cannot refuse to do that which he already has done.

At the December 8 hearing, the plaintiff argued that there remains a live controversy because the electors have not yet voted and will not do so until Monday, December 14, 2020. Dkt. No. 70. This argument ignores the fact that several of the events that dictate which slate of nominees are certified to vote already have taken place and had taken place at the time the plaintiff filed his complaint. The votes have been counted. In two counties, they've been counted twice. The WEC chair has signed the canvass and certified electors for Biden/Harris. The governor has signed the Certificate of Ascertainment and the National Archive has that certificate.

In his brief in opposition to dismissal, the plaintiff points to this court's own order earlier in this case, determining that the plaintiff had not demonstrated why the December 8, 2020 "safe harbor" deadline under 3 U.S.C. § 5 was the date by which the plaintiff needed the court to issue a decision to preserve his rights. Dkt. No. 72 at 25 (citing Dkt. No. 29 at 7). The court noted in that order that the plaintiff's brief in opposition to a motion to reassign another case erroneously referred to December 8 as the date that the College of Electors was scheduled to meet. Dkt. No. 29 at 7. The court pointed out that that was incorrect, and that December 8 was the deadline by which the state would have to make its final determination of any election dispute in order to avoid congressional challenge. *Id.* The court then said, "Because the electors do not meet and vote until December 14, 2020, the court will impose a less truncated briefing schedule than the one the plaintiff proposes . . . ." Dkt. No. 29.

The plaintiff says that "[i]mplicit in this Court's determination" is the assumption that "this Court can still grant some or perhaps all of the relief requested and this Plaintiff's claims are not moot." Dkt. No. 72 at 25. The plaintiff reads more into the court's language than the court intended. In the plaintiff's earliest pleadings—the first motion for injunctive relief, the "corrected" motion for injunctive relief, the "amended" motion for injunctive relief—the plaintiff failed to identify a date by which he needed the court to act. The first time he identified such a date was in his brief in opposition to a motion to reassign another case—and then, the reference was

oblique. In his opposition brief, the plaintiff stated, "With the College of Electors scheduled to meet December 8, there could never be a clearer case of 'justice delayed is justice denied.'" Dkt. No. 18 at 1. From that, the court deduced that the plaintiff needed the court to act by the date the College of Electors was scheduled to meet. But the College of Electors was not scheduled to meet December 8—it was (and is) scheduled to meet December 14. So the court set a briefing schedule that would give the defendants a chance to respond, but would complete briefing ahead of the event the plaintiff deemed important—the electoral meeting and vote. That was not a decision by this court—implicit or explicit—on the mootness of the plaintiff's claims.

The plaintiff also asserts that the "cutoff for election-related challenges, at least in the Seventh Circuit, appears to be the date that the electors meet, rather than the date of certification." Dkt. No. 72 at 24. He cites *Swaffer v. Deininger*, No. 08-CV-208, 2008 WL 5246167 (E.D. Wis. Dec. 17, 2008). *Swaffer* is not a Seventh Circuit case, and the court is not aware of a Seventh Circuit case that establishes a "cutoff for election-related challenges." And the plaintiff seems to have made up the "quote" in his brief that purports to be from *Swaffer*. The plaintiff asserts that these words appear on page 4 of the *Swaffer* decision: "even though the ***election*** has passed, the meeting of electors obviously has not, so plaintiff's claim here is hardly moot." Dkt. No. 72 at 24-25. The court has read page 4 of *Swaffer*—a decision by this court's colleague, Judge J.P. Stadtmueller—three times and cannot find these words. In fact, *Swaffer* did not involve a challenge to

a presidential election and it did not involve electors. Mr. Swaffer sought to challenge a Wisconsin statute requiring individuals or groups promoting or opposing a referendum to file a registration statement and take other actions. *Swaffer*, 2008 WL 5246167, at *1. The defendants argued that the election (in which the plaintiff had taken steps to oppose a referendum on whether to allow liquor sales in the Town of Whitewater) was over and that Swaffer's claims thus were moot. *Id.* at 2. Judge Stadtmueller disagreed, finding that because Swaffer alleged that he intended to violate the statutes at issue in the future, a credible threat of prosecution remained. *Id.* at 3.

Some of the relief the plaintiff requests may not be moot. For example, he asks for an immediate order seizing voting machines, ballots and other materials relating to the physical mechanisms of voting. And there remain five days until the electors vote—as the events of this year have shown, anything can happen. But most of the relief the plaintiff seeks is beyond this court's ability to redress absent the mythical time machine.

3. *Conclusion*

The plaintiff does not have Article III standing to sue in federal court for the relief he seeks.

C. Other Arguments

Standing is the *sine qua non* of subject matter jurisdiction. Absent standing, the court does not have jurisdiction to consider the plaintiff's claims on the merits. Arguably, it has no jurisdiction to consider the other bases the defendants and *amici* assert for

why the court should dismiss the case. At the risk of producing dicta (and spilling even more ink on a topic that has received an ocean's worth by now), the court will briefly address some of the other bases for the sake of completeness.

1. *Eleventh Amendment Immunity*

The defendants argue that the plaintiff's claims are barred by the Eleventh Amendment. Dkt. No. 59 at 15; Dkt. No. 54 at 10. The Eleventh Amendment "bars most claims in federal court against a state that does not consent to suit." *Carmody v. Bd. of Trs. of Univ. of Ill.*, 893 F.3d 397, 403 (7th Cir. 2018) (citations omitted). States are immune from suit in federal court "unless the State consents to the suit or Congress has abrogated their immunity." *Tucker v. Williams,* 682 F.3d 654, 658 (7th Cir. 2012) (citing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)). This includes suits brought in federal court against nonconsenting states by their own citizens. *See*, *e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) ("Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?").

The plaintiff has sued the Governor of Wisconsin, Tony Evers, in his official capacity; the Wisconsin Elections Commission and each member of the WEC in his or her official capacity. Before going too much further down the Eleventh Amendment road, the court notes that the vehicle for the plaintiff to bring his constitutional claims—his claims under the

Elector Clause, the Elections Clause, the Equal Protection Clause and the Due Process Clause—is 42 U.S.C. § 1983. Section 1983 prohibits a "person" acting under color of state law from violating another's civil rights. The Wisconsin Elections Commission is not a "person." It is an arm of the state of Wisconsin, Wis. Stat. § 5.05, and "states are not suable 'persons' under 42 U.S.C. § 1983." *Phillips v. Baxter*, 768 F. App'x 555, 559-560 (7th Cir. 2019) (citing *Sebesta v. Davis*, 878 F.3d 226, 231 (7th Cir. 2017)). *See also*, *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 64 (1989) ("a State is not a person within the meaning of § 1983"). "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." *Will*, 491 U.S. at 66. The WEC is not the proper defendant for the plaintiff's constitutional claims.

The plaintiff faces the same problem with his claims against the individual defendants, all of whom are state officials whom he sues in their official capacities.[5]

> Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471 . . . (1985). As such, it is no different from a suit against the State itself. *See*, *e.g.*,

[5] Had the plaintiff sued the individual defendants in their *personal* capacities, he could have sought relief against them under 42 U.S.C. § 1983, assuming he had standing.

> *Kentucky v. Graham*, 473 U.S. 159, 165-66 . . . (1985); *Monell* [*v. New York City Dept. of Social Services*, 436 U.S. 658], at 690 [(1978)].

Id. at 71. Arguably, *none* of the defendants are subject to suit under 42 U.S.C. § 1983, which means that even if the plaintiff had standing, the court would have to dismiss Counts I, II and III of the amended complaint.

Circling back to the defendants' Eleventh Amendment argument, "The Eleventh Amendment extends to state agencies and departments and, subject to the *Ex Parte* Young doctrine, to state employees acting in their official capacities." *Nelson v. LaCrosse Cty. Dist. Atty.* (State of Wis.), 301 F.3d 820, 827 n.7 (7th Cir. 2002) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123-24 (1984)).

There are three exceptions to Eleventh Amendment immunity: (1) congressional abrogation, *Nuñez v. Ind. Dep't of Child Servs.*, 817 F.3d 1042, 1044 (7th Cir. 2016) (citing *Alden v. Maine*, 527 U.S. 706, 754-55 (1999); (2) "a state's waiver of immunity and consent to suit," *id.* (citing *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999)); and (3) a suit "against state officials seeking only prospective equitable relief," *id.* (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). None of the exceptions apply here.

Congress did not abrogate the sovereign immunity of the states when it enacted 42 U.S.C. § 1983. *Will*, 491 U.S. at 66. Wisconsin has not waived its immunity from civil actions under § 1983. *See Shelton v. Wis. Dep't of Corr.*, 376 Wis. 2d 525, *2

(Table) (Ct. App. 2017) (citing *Boldt v. State*, 101 Wis. 2d 566, 584-85 (1981)). And the *Ex parte Young* doctrine does not apply when a plaintiff asserts a claim—regardless of the relief requested—against a state official based on *state* law. *Pennhurst*, 465 U.S. at 106 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). "In determining whether the *Ex parte Young* doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry' into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997); *McDonough Assocs., Inc. v. Grunloh,* 722 F.3d 1043, 1051 (7th Cir. 2013)).

Count IV of the amended complaint alleges "[w]ide-spread ballot fraud," a *state*-law claim. The Eleventh Amendment bars that claim against the defendants in their official capacities. The Eleventh Amendment also bars the plaintiff's federal claims to the extent that the plaintiff seeks retrospective relief. The Supreme Court has refused to extend the *Ex Parte Young* doctrine to claims for retrospective relief. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citing Pennhurst, 465 U.S. at 102-103). The amended complaint seeks (1) a "temporary restraining order instructing Defendants to de-certify

the results of the General Election for the Office of President," dkt. no. 9 at 47; (2) "an order instructing the Defendants to certify the results of the General Election for Office of the President in favor of President Donald Trump," *id.*; (3) "a temporary restraining order" prohibiting the tabulation of unlawful votes," *id.*; (4) an order preserving voting equipment and data, *id.*; (5) "the elimination of the mail ballots from counting in the 2020 election," id. at 48; (6) the disqualification of Wisconsin's electors from participating in the 2020 election, *id.*; and (7) an order directing Wisconsin's electors to vote for President Donald Trump, *id.* As the court already has noted, with the possible exception of the request for an order preserving voting equipment and data, the relief the plaintiff requests is retrospective.

The plaintiff disagrees—he characterizes the certification of the election results as "ongoing violations of federal law . . . ongoing violations of the Electors and Elections Clauses, the Equal Protection and Due Process Clauses, as well as likely violations of federal law including the Voting Rights Act and the Help America Vote Act." Dkt. No. 72 at 25-26. The plaintiff has not brought claims under the latter two statutes and saying that a completed event is an ongoing violation doesn't make it so.

2. *Exclusive Remedy/Exhaustion/Abstention*

Defendant Evers moves to dismiss because Wisconsin provides a remedy to address irregularities or defects during the voting or canvassing process: Wis. Stat. § 9.01(11). Four days ago, the Wisconsin Supreme Court held that § 9.01(6) requires that a party aggrieved after a recount must appeal by filing

suit in circuit court. *Trump v. Evers*, No. 2020AP1971-OA, Order at *2 (Wis. Dec. 3, 2020). In a concurring opinion, Justice Hagedorn noted that Wis. Stat. § 9.01(11) provides that § 9.01 is the exclusive judicial remedy for an aggrieved candidate. Defendant Evers points out that President Trump has lawsuits pending in state circuit courts and argues that those cases raise many of the claims the plaintiff raises here. Dkt. No. 59 at 11. He argues that the process detailed in Wis. Stat. § 9.01 is designed to allow an aggrieved candidate to resolve election challenges promptly, and that for this court to permit the plaintiff to circumvent that process "would eviscerate Wisconsin's careful process for properly and quickly deciding election challenges." *Id.* at 11-12.

Of course, the plaintiff has no redress under Wis. Stat. § 9.01, because he is not a "candidate" in the sense of that statute. But Evers argues that there was a form of state-law relief available to the plaintiff. He asserts that the plaintiff should have filed a complaint with the Wisconsin Elections Commission under Wis. Stat. § 5.06. Dkt. No. 59 at 13. That statute allows a voter dissatisfied with the Wisconsin election process to file a written, sworn complaint with the elections board. Wis. Stat. § 5.06(1). The statute states that no voter may "commence an action or proceeding to test the validity of any decision, action or failure to act on the part of any election official" without first filing a complaint under § 5.06(1). Wis. Stat. § 5.06(2). Evers points out that the plaintiff has not demonstrated that he followed this procedure and thus that the

plaintiff did not exhaust his remedies before coming to federal court. Dkt. No. 59 at 14.

The plaintiff does not directly respond to the exhaustion argument. He simply maintains that he has a right to bring his constitutional claims in federal court, argues that there is no evidence that the statute Evers cites is an exhaustion requirement and asserts that the court has federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction over any state-law claims under 28 U.S.C. § 1367.[6] Dkt. No. 72 at 27-28. He neatly sidesteps the question of why he did not follow a procedure that would have allowed him to direct his concerns to the entity in charge of enforcing the state's election laws and in a way that likely would have brought those concerns to that entity's attention long before the election results were certified.

Because the court has concluded that the plaintiff does not have standing, and because the plaintiff has sued defendants who either are not suable under § 1983 or are protected by Eleventh Amendment immunity, the court will not accept the invitations of the defendants and *amici* to wade into the waters of the various types of abstention. If this court does not have subject matter jurisdiction, there is no case or controversy from which it should abstain. The court

[6] The court could exercise supplemental jurisdiction over state-law claims only if there remained federal claims to which those state-law claims related. As the court has noted, it likely would have been required to dismiss the federal claims because the plaintiff asserted them through § 1983 against state officials in their official capacities, which in turn would have required dismissal of any state claims for lack of subject matter jurisdiction.

agrees with the parties, however, that the relief the plaintiff requests—asking a federal judge to order a state governor to decertify the election results for an entire state and direct that governor to certify a different outcome—constitutes "an extraordinary intrusion on state sovereignty from which a federal court should abstain under longstanding precedent." Dkt. No. 57 at 28.

3. *Laches*

The defendants argue that the equitable defense of laches requires dismissal, because the plaintiff "inexplicably waited until after the election, after the canvassing, after the recount, after the audit, after results were certified, and indeed until the eve of the electoral college vote, to bring his claim of state law violations and widespread fraud . . . ." Dkt. No. 52 at 11. *See also*, Dkt. No 59 at 17 ("the doctrine of laches bars [the plaintiff's] claims because he has unreasonably delayed bringing his claims to the detriment not only of Defendants, but also of the nearly 3.3 million voters in Wisconsin who voted in this last election under the good-faith belief that they were following the correct procedures to have their votes counted.").

The doctrine of laches "addresses delay in the pursuit of a right when a party must assert that right in order to benefit from it." *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999). "For laches to apply in a particular case, the party asserting the defense must demonstrate: (1) an unreasonable lack of diligence by the party against whom the defense is asserted and (2) prejudice arising therefrom." *Id.* (citing *Cannon v. Univ. of*

Health Scis./The Chicago Med. Sch., 710 F.2d 351, 359 (7th Cir. 1983)). "Timeliness must be judged by the knowledge of the plaintiffs as well as the nature of the right involved." *Jones v. v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1061 (7th Cir. 2016).

"The obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept." *Id.* at 1060-61. In fact, the Seventh Circuit has held that such "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." *Id.* at 1061 (internal quotation marks and citations omitted).

The amended complaint asserts that the alleged problems with the Dominion voting machine software "have been widely reported in the press and have been subject to investigation." Dkt. No. 9 at ¶12. It cites to exhibits from January and August of 2020. Dkt. No. 9 at 5 n.1. It cites to the WEC's May 13, 2020 directive to clerks that they should not reject the ballots of "indefinitely confined" absentee voters. *Id.* at ¶ 40. It cites an October 18, 2016 memorandum issued by the WEC instructing clerks on how to handle absentee envelope certifications that did not bear the address of the witness. *Id.* at ¶ 44. It cites October 19, 2020 instructions by the WEC to clerks about filling in missing ballot information. *Id.* at ¶ 45.

Defendant Evers points out that the plaintiff's own allegations demonstrate that he has known about the Dominion voting machine issues since long before the election. Dkt. No. 59 at 17-18. He argues that the WEC guidance about which the plaintiff

complains came in directives issued in October 2016, May 2020 and October 2020. *Id.* He asserts that the plaintiff has made no effort "to offer a justifiable explanation for why he waited until weeks after the election to challenge" these issues. *Id.* at 18. The WEC defendants advise the court that the issue regarding "indefinitely confined" voters was litigated in state court almost eight months ago. Dkt. No. 54 at 9 (citing Pet. For Original Action dated March 27, 2020, Supreme Court of Wisconsin, No. 2020AP000557-OA). They assert that the plaintiff "waited to challenge widely-known procedures until after millions of voters cast their ballots in reliance on those procedures." *Id.* at 6. They state that "[i]f the doctrine of laches means anything, it is that Plaintiff here cannot overturn the results of a completed and certified election through preliminary relief in this late-filed case." *Id.*

The plaintiff first responds that laches is a defense and shouldn't be raised on a motion to dismiss. Dkt. No. 72 at 22. He then claims that he could not have known the bases of any of these claims until after the election. *Id.* at 22-23. He says that because Wisconsin election officials did not "announce or publicize their misconduct," and because, he alleges, they "prevented Republican poll watchers from observing the ballot counting and handling," it took him time to gather the evidence and testimony he attached to the amended complaint. *Id.* at 23. Finally, he alleges that the delay post-November 3, 2020 is attributable to the defendants' failure to timely complete the election count. *Id.* He insists that he filed this suit at the earliest possible moment—the day after the certification. *Id.*

The court has determined that the plaintiff does not have standing. That means that the court does not have jurisdiction to assess the plaintiff's credibility, and it will refrain from doing so.

4. *Failure to state a claim upon which relief can be granted*

Both defendants asked the court to dismiss the case for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Because the court does not have subject matter jurisdiction, it will not address the sufficiency of the substantive claims in the amended complaint.

5. *Requests for injunctive relief*

For the same reason, the court cannot address the merits of the plaintiff's request for preliminary injunctive relief.

V. Conclusion

This court's authority to grant relief is confined by the limits of the Constitution. Granting the relief the plaintiff requests would take the court far outside those limits, and outside the limits of its oath to uphold and defendant the Constitution. The court will grant the defendants' motion to dismiss.

The court **GRANTS** Defendant Governor Tony Evers's Motion to Dismiss Plaintiff's Amended Complaint. Dkt. No. 51.

The court **GRANTS** Defendant Wisconsin Elections Commission and Its Members' Motion to Dismiss. Dkt. No. 53.

The court **DENIES AS MOOT** Plaintiff's Corrected Motion for Declaratory, Emergency, and Permanent Injunctive Relief. Dkt. No. 6.

The court **DENIES AS MOOT** Plaintiff's Amended Motion for Temporary Restraining Order and Preliminary Injunction to be Considered in an Expedited Manner Dkt. No. 10.

The court **DISMISSES** the Amended Complaint for Declaratory, Emergency, and Permanent Injunctive Relief. Dkt. No. 9.

The court **ORDERS** that this case is **DISMISSED.**

Dated in Milwaukee, Wisconsin this 9th day of December, 2020.

BY THE COURT:
/S/
HON. PAMELA PEPPER
Chief United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

* * * [Seal] * * *

ORDER

February 1, 2021

Before

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-3448	WILLIAM FEEHAN, Plaintiff-Appellant v. WISCONSIN ELECTIONS COMMISSION, et al., Defendants - Appellees
Originating Case Information:	
District Court No.: 2:20-cv-01771-PP Eastern District of Wisconsin District Judge Pamela Pepper	

The following is before the court:

1. **JOINT MOTION OF APPELLEES TO DISMISS APPEAL IS MOOT**, filed on January 25 2021, by counsel for the appellees.
2. **NOTICE OF APPELLANT'S CONCURRENCE WITH JOINT MOTION OF APPELLEES TO DISMISS APPEAL**, filed on January 26, 2021, by counsel for the appellant.

Appellees have moved to dismiss this appeal as moot and appellant has filed a concurrence. We agree with the litigants that there is no ongoing case or controversy. Accordingly,

IT IS ORDERED that the motion to dismiss is **GRANTED** to the extent that we **VACATE** the district court's decision and **REMAND** with instructions to dismiss the case as moot. This is the routine disposition of civil cases that become moot while on appeal, *see United State v. Munsingwear*, 340 U.S. 36 (1950), and this court's instructions reflect no criticism of the district court's timely decision on the merits.