SUPREME COURT OF WISCONSIN

NOTICE
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No. 2020AP1488-OA

Howie Hawkins and Angela Walker,

Petitioners,

v.

Wisconsin Elections Commission, Ann S. Jacobs, in her official capacity as Chair of the Wisconsin Elections Commission, Mark L. Thomsen, in his official capacity as Vice-Chair of the Wisconsin Elections Commission, Marge Bostelmann, in her official capacity as Secretary of the Wisconsin Elections Commission, Julie M. Glancey, in her official capacity as Commissioner of the Wisconsin Elections Commission, Dean Knudson, in his official capacity as Commissioner of the Wisconsin Elections Commission, Robert F. Spindell, Jr., in his official capacity as Commissioner of the Wisconsin Elections Commission and Allen Arntsen,

Respondents.

FILED

SEP 14, 2020

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

The Court entered the following order on this date:

¶1 Petitioners, Howie Hawkins and Angela Walker, the Green Party's candidates for President and Vice President of the United

States, have filed a petition for leave to commence an original action pursuant to Wis. Stat. § (Rule) 809.70 and a motion for temporary injunctive relief. They ask this court to order that their names be placed on Wisconsin's 2020 fall general election ballot. Responses have been received from respondent Allen Arntsen and from respondents Wisconsin Elections Commission (Commission), Ann Jacobs, Mark Thomsen, Marge Bostelmann, Julie Glancey, Dean Knudson, and Robert Spindell. Petitioners filed a letter replying to the responses, accompanied by a supplemental affidavit. The respondents filed a motion to strike the letter reply and supplemental affidavit. On September 10, 2020, this court issued an order directing the Commission to obtain certain information from the county clerks and municipal clerks of this state, including how many absentee ballots had already been mailed to electors. The September 10, 2020 order also directed the Commission to advise all municipal clerks in this state not to mail any additional absentee ballots pending further order of this court. The Commission filed a response to the order indicating that hundreds, if not thousands, of absentee ballots have already been mailed to electors.

¶2 The underlying facts of the case are as follows. On August 4, 2020, the petitioners filed nomination papers with the Commission to be placed on the ballot for the November 3, 2020 general election. On August 7, 2020, respondent Arntsen filed a

verified complaint with the Commission alleging that 2046 of the signatures appearing on the petitioners' nomination papers did not list a correct address for Walker. On August 20, 2020, the Commission voted 6-0 to sustain Arntsen's challenge to 57 signatures, and the Commission also voted 6-0 to reject Arntsen's challenge to 48 signatures. The Commission then deadlocked 3-3 on Arntsen's challenge to the validity of 1834 signatures. On August 21, 2020, the Administrator for the Commission sent the petitioners a letter stating that since the Commission had only certified a total of 1789 valid signatures, less than the 2000 required for ballot access under Wis. Stat. § 8.20(4) and (8), the petitioners' names would not appear on Wisconsin's 2020 general election ballot.

¶3 On August 26, 2020, the Commission certified the list of independent candidates for President and Vice President who would appear on Wisconsin's 2020 fall general election ballot. The petitioners had opted to proceed as independent candidates, but their names did not appear on this certified list. On September 1, 2020, the Commission certified the remainder of the list of candidates for President and Vice President that would appear on that ballot. The petitioners' names also did not appear on this certified list.

¶4 The petitioners filed their petition for leave to commence an original action and motion for temporary injunctive relief on September 3, 2020. In addition to urging this court to

reject the petitioners' arguments on the merits, both Arntsen and the Commission point out that the petitioners waited two weeks after the Commission's failure to certify at least 2000 valid signatures at its August 20, 2020 meeting before asking this court for relief. The respondents argue, among other things, that the petitioners unreasonably delayed in seeking relief and that this court should decline to assume jurisdiction due to laches.

¶5 Although we do not render any decision on whether the respondents have proven that the doctrine of laches applies under these circumstances, having considered all of the parties' filings, we conclude that the petitioners delayed in seeking relief in a situation with very short deadlines and that under the circumstances, including the fact that the 2020 fall general election has essentially begun, it is too late to grant petitioners any form of relief that would be feasible and that would not cause confusion and undue damage to both the Wisconsin electors who want to vote and the other candidates in all of the various races on the general election ballot.[1] Accordingly, we exercise our

[1] Although we agree that the petitioners unduly delayed in seeking redress from the result of the Commission's August 20, 2020 hearing and that there is insufficient time for this court to grant petitioners any relief that would not also be likely to cause enormous chaos in the election process, we observe that, under the current statutory scheme, the time between the date the Commission makes its rulings on ballot access and the date that ballots must be sent to voters is extremely short. Even if a party launched an immediate challenge to an action or inaction by the Commission, a court would be required to decide the matter on an extremely

discretion to deny the petition for leave to commence an original action.

¶6 As both the petitioners and the respondents note, each county clerk is required by statute to deliver ballots for the 2020 general election to all of the municipal clerks in his or her county 48 days before the general election, i.e. by September 16, 2020. See Wis. Stat. § 7.10(3). Municipal clerks are statutorily required to deliver absentee ballots to electors who have previously requested them no later than 47 days before the general election, i.e. by September 17, 2020. See Wis. Stat. § 7.15(1). Under the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301-20311, municipalities must send ballots to all military and overseas voters who previously requested them no later than 45 days prior to the election, i.e. by September 19, 2020.

¶7 Because of the global COVID-19 pandemic, municipalities have more absentee ballot requests on file than ever before. Unofficial tallies for the August 2020 primary election indicate that over 80% of voters participated by mail, and both the Commission and local election officials are preparing for a volume of absentee voting for the general election at around the 80%

expedited basis. We urge the legislature to consider broadening the statutory timelines to afford a more reasonable amount of time for a party to file an action raising a ballot access issue.

level. There are already over 968,000 absentee ballot requests on file for the general election, and those ballots must be sent to voters by September 17, 2020. Creating and printing ballots is a lengthy and laborious process. Almost all Wisconsin counties use specialized private vendors to print their ballots, and only a small number of those vendors are available. In order to meet the September 17, 2020 deadline, counties have been working to distribute ballots to municipalities earlier than usual, and municipalities may begin sending ballots to voters as soon as they receive them from their counties.

¶8 Many ballots that do not contain the petitioners' names have already been printed. Given the Commission's response to this court's September 10, 2020 order, the most likely state of current affairs is that municipal clerks have already sent out hundreds, and more likely thousands, of those absentee ballots.[2] Ordering new ballots to be printed would be an expensive and time-consuming process that would not allow counties and municipalities

[2] The Commission's response indicates that it was able to obtain information about absentee ballots that had been mailed from only 25 of the approximately 1850 municipal clerks in this state (slightly more than one percent of the total number of municipal clerks). Those 25 municipal clerks indicated that they had already mailed absentee ballots to over 100 electors. If one extrapolates this to all of the municipal clerks across the state, the most likely estimate would be that absentee ballots have already been mailed to several thousand electors. Even if this court exercised its original jurisdiction and granted relief to the petitioners now, all of those electors would need to receive a second, revised ballot.

to meet the statutory deadlines for delivering and sending ballots. In addition, for this court to order the printing and mailing of replacement ballots containing the petitioners' names would create a substantial possibility of confusion among voters who had already received, and possibly returned, the original ballots. For these reasons, we decline to grant the petition for leave to commence an original action or the motion for temporary injunctive relief, and we do not reach the merits of the issues raised in the petition.

¶9 This is not the first occasion on which we have declined to exercise our original jurisdiction due to the lack of sufficient time to complete our review and award any effective relief. In Jensen v. Wisconsin Elections Bd., 2002 WI 13, ¶¶17, 21, 249 Wis. 2d 706, 639 N.W.2d 537, we noted, "There is no question but that this matter warrants this court's original jurisdiction . . . . Had our jurisdiction been invoked earlier, the public interest might well have been served by our hearing and deciding this case. As it stands, it is not." We also noted in Jensen that this court's involvement would take time, "and there is precious little of that left." While the statutes acknowledge that a court could order the correction of a ballot error, see Wis. Stat. § 7.10(3)(a), in this case the court realistically does not have even a "precious little" amount of time to reach a decision and potentially grant any form of relief that would be feasible. See also De La Fuente v. Wisconsin Government Accountability Board,

No. 2016AP330, unpublished order (Wis. Feb. 22, 2016) (denying petition for review and petition for leave to commence an original action.)

¶10 Even if we would ultimately determine that the petitioners' claims are meritorious, given their delay in asserting their rights, we would be unable to provide meaningful relief without completely upsetting the election. We agree with the Commission that requiring municipalities to print and send a second round of ballots to voters who already received, and potentially already returned, their first ballot would result in confusion and disarray and would undermine confidence in the general election results. Under the circumstances presented here, it would be unfair both to Wisconsin voters and to the other candidates on the general election ballot to interfere in an election that, for all intents and purposes, has already begun. For these reasons, we determine that the best exercise of our discretion is to deny the petitioners' petition for leave to commence an original action and motion for temporary injunctive relief.

¶11 IT IS ORDERED that the respondents' motion to strike petitioners' letter reply brief and supplemental affidavit is denied; and

¶12 IT IS FURTHER ORDERED that the directive in this court's September 10, 2020 order that "the Wisconsin Elections Commission

shall advise all municipal clerks in this state that they should not mail any absentee ballots until this court has issued a further order stating that absentee ballots may be mailed out or granting relief regarding the contents of the ballots for the November 3, 2020 general election" is hereby vacated; and

¶13 IT IS FURTHER ORDERED that the petition for leave to commence an original action and the motion for temporary injunctive relief are denied. No costs.

¶14 PATIENCE DRAKE ROGGENSACK, C.J. *(dissenting).* I write separately because the people of Wisconsin have the right to know the acts of the Commission that took the right of ballot access away from candidates of a small independent party, the Green Party of Wisconsin. Howie Hawkins and Angela Walker, Green Party candidates for President and Vice President, followed all the requirements of Wisconsin law necessary for ballot access, yet the Commission denied them and the people of Wisconsin the right to have Hawkins' and Walker's names on the ballot for the November 3, 2020 general election.

¶15 In so doing, the Commission suppressed the people's right to choose to vote for Green Party candidates who have maintained positions that are important to them.

¶16 The Order of the court gives some underlying facts, but it omits other undisputed facts that are important for the public to know. In so doing, the Order fails to disclose unlawful Commission actions to the public, which should be told what actually occurred here.

¶17 In her Declaration of Candidacy, Angela Walker declared that she was a "candidate for the office of Vice President of the United States representing The Green Party of the United States."[1] On August 4, 2020, the Green Party candidates filed nomination papers containing 3,966 signatures with the Commission. At least

[1] See attached Declaration of Candidacy, signed by Angela Walker.

2,000 signatures, but not more than 4,000 signatures must be filed to gain ballot access. Wis. Stat. §§ 8.20(4) and (8).

¶18 On August 7, 2020, Allen Arntsen filed a document entitled "Verified Complaint" wherein he alleged "upon information and belief," not upon personal knowledge, that 2,046 of the signatures the Green Party candidates submitted appear on nomination papers that did not contain a correct address for Walker. The Commission's attorney, Nathan Judnic, sent an email to the Hawkins-Walker campaign manager, Andrea Mérida, telling her of Arntsen's challenge. Judnic told Mérida that she had the options of filing a sworn written response or appearing at the August 20, 2020 Commission meeting to present evidence contesting Arntsen's challenge or doing both.

¶19 It is important for the public to know that there are election laws that bear on Arntsen's challenge, which the Commission refused to follow. First, the Commission was required to presume that the addresses listed on the nomination papers were the correct addresses for the dates listed because Wis. Admin. Code § EL 2.05(4) requires that "[a]ny information which appears on a nomination paper is entitled to a presumption of validity." Section EL 2.07(1) confirms that the Commission "shall apply the standards in § EL 2.05 to determine the sufficiency of nomination papers." Second, § EL 2.07(3)(a) requires that "[t]he burden is on the challenger to establish any insufficiency."

¶20 Here, Arntsen's challenge was based on "information and belief." He had no personal knowledge of where Walker lived on what date; therefore his allegation is insufficient to overturn

the presumption that the addresses listed on the nomination papers are correct. Since Crane v. Wiley, 14 Wis. 658 (1861), we have held that allegations based upon information and belief in a complaint make a verification insufficient for material facts. However, the Commission's votes showed it did not honor the presumption of the nomination papers' facts as Wis. Admin. Code § EL 2.05(4) requires; it did not require Arntsen to prove that the addresses on the nomination papers were incorrect as § EL 2.07(3)(a) requires; and it treated Arntsen's allegations made on information and belief as if they proved that Walker's address was incorrect on more than 1,800 nomination papers.

¶21 Mérida appeared on behalf of the Green Party candidates at the August 20, 2020 Commission meeting to present evidence about the dates that Walker lived at each address, as legal counsel for the Commission told her she could do.[2] However, Ann Jacobs, who served as chair of the Commission, prevented the presentation of evidence about the dates of Walker's move. The Commission then voted 6-0 to sustain Arntsen's challenge to 57 signatures and rejected it for 48 signatures. The Commission also voted on whether to sustain Arntsen's challenge to 1,834 signatures on nomination papers that contained Walker's earlier address. The Commission deadlocked, with 3 Democratic appointees voting to sustain Arntsen's challenge and 3 Republican appointees voting to deny it. Therefore, Arntsen failed to meet his burden to prove

[2] The meeting can be viewed in its entirety at https://wiseye.org/2020/08/20/wisconsin-elections-commission-special-teleconferencemeeting-10/.

any insufficiency of the addresses for Walker listed on the nomination papers. Wis. Admin. Code § EL 2.07(3)(a). At that point, the Green Party candidates had 3,909 presumptively valid signatures pursuant to § EL 2.05(4) (3,966 filed less 57 signatures rejected by the Commission).

¶22 However, notwithstanding the Commission's vote on August 20, 2020, on August 21, 2020, the Commission Administrator sent Hawkins and Walker a letter stating that since the Commission had certified a total of only 1,789 signatures, less than the 2,000 required for ballot access, Hawkins' and Walker's names would not be on the ballot for the November 3, 2020 general election. There is no explanation in that communication about how the Commission disallowed an additional 2,177 signatures that were presumptively valid after the Commission voted to invalidate only 57 of the 3,966 signatures submitted. The Commission Administrator must have treated Arntsen's challenge to 1,834 signatures as having been proved, even though the Commission had voted not to sustain his challenge.

¶23 On August 26, 2020, the Commission certified the independent candidates for President and Vice President. On September 1, 2020, the Commission certified the party candidates for President and Vice President to the county clerks. The September 1, 2020 communication notified the county clerks of the legal challenge to ballot access that had been filed by Kanye West and Michelle Tidball and that there were media statements from the Green Party candidates that they intended to file a court action to gain ballot access. Therefore, at least by September 1, 2020,

the county clerks knew that the Commission's certification may not be the final ballot for the November 3, 2020 general election.

¶24 The Green Party filed suit seeking ballot access on September 3, 2020. Perhaps, the Green Party could have filed suit on August 26, 2020, when the Commission certified the independent candidates. However, lawsuits take time to gather relevant documents and affidavits needed to proceed. In addition, the county clerks were on notice from September 1, 2020, when the Commission certified the final ballot for the November 3, 2020 election, that the Green Party would likely file suit and that Kanye West already had filed suit for ballot access.

¶25 This lawsuit is not about the Green Party sleeping on its rights. It is about the treatment that independent candidates from a small political party received from the Commission, who repeatedly refused to follow the law relative to nomination papers.

¶26 It has been said that transparency is the best medicine for curbing governmental practices that abuse the rights of those who must interact with government. The Commission ignored its legal obligations under Wis. Admin. Code §§ EL 2.05(4) and EL 2.07(3)(a), and in so doing it suppressed the rights of voters to choose Green Party candidates for President and Vice President. The court's Order is silent on the Commission's unlawful conduct and imposes no consequences for what it has done. The court's silence not only affirms lawless conduct by the Commission, but also provides no directive for the required treatment of nomination papers in the future.

¶27 Silently affirming lawless conduct that has been brought to the court's attention is an abdication of the court's obligation to stand with the law, even when doing so is uncomfortable. Accordingly, I respectfully dissent from the Order and join the opinion of Justice Annette Kingsland Ziegler that follows.

¶28 I am authorized to state that Justices ANNETTE KINGSLAND ZIEGLER and REBECCA GRASSL BRADLEY join this dissent.

Declaration of Candidacy

(See instructions for preparation on back)

FOR OFFICE USE ONLY

Is this an amendment?

☐ Yes (if you have already filed a DOC for this election) ☑ No (if this is the first DOC you have filed for this election)

I, Angela Walker (Candidate's name), being duly sworn, state that

I am a candidate for the office of Vice President of the United States (Official name of office - include district, branch or seat number)

representing The Green Party of the United States (If partisan election, name of political party or statement of principle - five words or less (Candidates for nonpartisan office may leave blank.))

and I meet or will meet at the time I assume office the applicable age, citizenship, residency and voting qualification requirements, if any, prescribed by the constitutions and laws of the United States and the State of Wisconsin, and that I will otherwise qualify for office, if nominated and elected.

I have not been convicted of a felony in any court within the United States for which I have not been pardoned.[1]

My present address, including my municipality of residence for voting purposes is:

House or fire no.	Street Name	Mailing Municipality and State	Zip code	Municipality of Residence for Voting
315	Apt. A Royal St.	Florence, South Carolina	29506	Town of ☐ Village of ☐ City of ☑ Florence

My name as I wish it to appear on the official ballot is as follows:

Angela Walker

(Any combination of first name, middle name or initials with surname. A nickname may replace a legal name.)

Angela Walker

(Signature of candidate)

STATE OF ~~WISCONSIN~~ South Carolina }
County of Florence } ss.
(County where oath administered)

Subscribed and sworn to before me this 28th day of July 2020.

Sandra Agurkis

(Signature of person authorized to administer oaths)

NOTARY SEAL REQUIRED, IF OATH ADMINISTERED BY NOTARY PUBLIC

☑ Notary Public or ☐ other official

(Official title, if not a notary)

TARSHA JACKSON
Notary Public, State of South Carolina
My Commission Expires 12/1/2025

Notary Public: My commission expires 12/01/2025 or ☐ is permanent.

[1] Information on this form is required by Wis. Stat. § 8.21, Art. XIII, Sec. 3, Wis. Const., and must be filed with the filing officer in order to have a candidate's name placed on the ballot. Wis. Stats. §§ 8.05 (1)(j), 8.10 (5), 8.15 (4)(b), 8.20 (6), 120.06 (6)(b), 887.01

EL-162 | Rev. 2013-08 | Wisconsin Elections Commission, P.O. Box 7984, Madison, WI 53707-7984
608-266-8005 | web: elections.wi.gov | email: elections@wi.gov

Exhibit D

(A pre-enactment) amendment bars any candidate convicted of a misdemeanor which violates the public trust from running for or holding a public office. However, the legislature has specified which misdemeanors violate the public trust. A candidate convicted of any misdemeanor is not barred from running for holding a public office until the legislature defines which misdemeanors apply.

¶29 ANNETTE KINGSLAND ZIEGLER, J. *(dissenting).* In the United States of America, and in the State of Wisconsin, the people deserve better. Courts can and should do better. Today this court abdicates its responsibility to correct ballot error and does so without explaining its reasoning in a full legal opinion. Instead, the court issues a perfunctory order in perhaps one of the most important cases in a judicial lifetime.

¶30 It is ultimate voter suppression when a candidate who presumptively belongs on the ballot is denied ballot access. Under the law, the Green Party is presumed to have submitted the requisite information necessary to be on the ballot, yet the court's order says nothing about the merits of the injustice committed by the Wisconsin Elections Commission ("Commission") and instead claims it cannot act because it is too late. Meanwhile, other state courts have acted with dispatch to decide and correct ballot issues.[1] My colleagues instead fault the candidate for not acting with more haste. In so doing, it leaves us all to guess what, when, and how the Green Party fell short.

¶31 At the time the Green Party filed this action, the record reflects that only one ballot had been sent out to a voter after

[1] See, e.g., Lohr v. Bolick, No. CV-20-0129-AP/EL, 2020 WL 5362196 (Ariz. Sept. 8, 2020) (ordering the name of candidate on ballot despite signature challenge); Warren City Council v. Buffa, No. 354663, 2020 WL 5246664 (Mich. Ct. App. Sept. 2, 2020) (reversing a lower court and ordering an official to certify ballot language for upcoming election); State ex rel. West v. LaRose, No. 2020-1044, 2020 WL 5417552 (Ohio Sept. 10, 2020) (denying ballot access based on the merits); Oversen v. Jaeger, No. 20200234, 2020 WL 5269223 (N.D. Sept. 4, 2020) (denying ballot access based on the merits).

the Commission certified all the candidates. Instead of acting swiftly, the court ducks behind its self-created "it is too late" timeline to preclude a party from ballot access and to prevent voters from choosing the candidate they believe is best qualified. Because the court has invented an unknown and unstated timeline entirely on its own, it should better explain its conclusions, address the law, and provide clarity for those who might be similarly situated in the future. In failing to do so, the majority does nothing more than exercise its will and not its judgment. Because the majority unilaterally imposes its self-determined and otherwise unknowable deadlines on the Green Party candidates to exclude them from the ballot——despite the law requiring otherwise——I dissent.

¶32 The majority abdicates its duty to right this wrong before the election. Giving no moment to the fact that the Commission illegally omitted the Green Party from the ballot,[2] its "too late" reasoning allows the tail to wag the dog. The court concludes that nearly two months before an election and well before the deadline for sending ballots to the counties, with relatively few ballots having been sent out at the time of the Green Party filing, without exploring how those ballots could be corrected, and without even considering governing law on the issue, it cannot do anything. In other words, the majority rationale goes something

[2] The court denies ballot access to candidates who complied with Wisconsin law, but whose nomination papers were nonetheless rejected by unknown and unaccountable Wisconsin Elections Commission staff, not by a majority vote of the Commission itself.

like this: The Green Party should have taken some other unknowable action, at some earlier unexplained and unknowable time and here, because this court did not act earlier and more ballots have gone to voters and a number of ballots were printed (even before certification of the candidates), it is now too late to correct the Commission's blatant illegal action. In essence, the court allows its hands to be tied. This abdication of responsibility undermines ballot access and voter choice. Today our court overrides the will of voters of Wisconsin in determining who the candidates will be——violating the sacred system of democracy that is the bedrock of the United States of America.

¶33 Moreover, the court claims that the Green Party acted untimely so the court cannot act; but, the law does not prohibit our court from requiring a corrected ballot to be printed and sent. If the court were applying the legal principle known as "laches," it would presumably say so, and address the elements that must be met. Instead, the majority undertakes virtually no analysis to support its determinations that too much time has passed and that the Green Party's filing should have occurred at some unknown earlier time. Would this logic equally apply to preclude ballot access to any other candidate, even if that candidate had timely filed in court——merely because some ballots have been printed by some counties and mailed? The majority arbitrarily self-imposes an unknown and unilaterally-determined deadline on the presumptive candidates, because some of the counties printed and mailed ballots, in some instances even before all the candidates were certified. Using the majority's parameters, no candidate could

ever file a timely challenge. Based upon the timeline of events, the facts, and the law, the decision of my colleagues falls far short. The record here shows that the Green Party candidates did not unreasonably delay in bringing their claim and that the Commission knew the Green Party would challenge its decision well in advance of this action being filed on September 3. At the challenge hearing, where the Commission deadlocked on the Green Party candidates' ballot access, over half of the commissioners commented that their decision would, and should, be challenged in court. Later, in two communications to county clerks prior to this action being filed, the Commission noted possible challenges to its decision on independent candidates for President and Vice President——including specifically referencing a possible challenge by the Green Party candidates. Two days after the Commission certified the list of all candidates for President and Vice President, the Green Party candidates filed this action contending that denying both Hawkins and Walker ballot access was unlawful.

¶34 Finally, the recent submission by the officials responsible for ballot production and dissemination demonstrates that this error can timely be corrected. Both state and federal law allow for corrections to be made and dates to be adjusted when ballots are improper or the law is not followed. Better to correct it now instead of making matters worse. While some counties rushed too quickly to print the ballots despite the ballot action disputes that have arisen, other counties have not. The record before the court demonstrates that the errors can be corrected, yet our court stands silent. The grievous error that a majority of the court

makes today may create much more chaos in the days to come——even post-election. See Hadnott v. Amos, 394 U.S. 358 (1969) (ordering a new election entirely after improperly denying black candidates access to the ballot).

¶35 In short, the constitution is not on the side of this court's order. It is the people who are empowered to decide which candidates appear on the ballot. Thousands of Wisconsinites nominated Howie Hawkins ("Hawkins") and Angela Walker ("Walker") to appear on the ballot for the November 3, 2020 election. This court should honor that choice as the law undisputedly supports it.

¶36 After a brief background of the relevant facts, I engage in an analysis of the law concerning whether the Green Party candidates should properly be on the ballot for the November 3, 2020 election. The answer is yes. A challenge was made to the Green Party candidates' nomination paperwork. The challenge proceeded before a deadlocked Commission. The law in Wisconsin presumes that, unless proven by clear and convincing evidence, the challenge to nomination papers will not be sustained. A 3-3 decision makes clear that the presumption of validity was not overcome. Accordingly, the Commission erred when it denied ballot access to the Green Party candidates.

I. BACKGROUND

¶37 On August 4, 2020, petitioners Hawkins and Walker (collectively the "Green Party" candidates), filed nomination

papers with the Commission containing 3,966 signatures.[3] On August 7, 2020, Allen Arntsen ("Arntsen") filed a verified (which means notarized) complaint, based solely on his "information and belief," with the Commission under Wis. Admin. Code § EL 2.07 and Wis. Stat. §§ 5.05-.06, alleging that 2,046[4] of the signatures appearing on the nomination papers did not list a correct address for Walker. When Walker was notified of Arntsen's challenge, her campaign contacted the Commission's attorney and asked what the Commission's position was on the challenge. Walker's campaign had already disclosed the change in address to the Commission, before actually filing the nomination papers, to ask how to handle her change of address. In response to the change-in-address inquiry, a Commission staff member, listed as an "Elections Administration Specialist," gave the following advice:

> Most importantly, any petitions circulated this week should have the updated address on them. Prior to gathering any signatures, campaign staff can amend the form with the correct address for Ms. Walker. Any nomination paper pages already containing voter signatures should be submitted to WEC without alteration to the candidate information. Once a voter has signed

[3] The Green Party candidates assert that they submitted 3,966 total signatures. Allen Arntsen asserts, upon his information and belief, that the Green Party candidates submitted 3,880 total signatures. The Commission's staff stated that it initially found 3,737 of the signatures submitted valid. The actual number of total signatures does not change the result in this case. Under any of these three numbers, the Green Party candidates submitted more than the necessary 2,000 signatures to appear on the ballot.

[4] At the challenge hearing before the Commission, Arntsen's lawyer noted that he was wrong when he used the number 2,046; the correct number was 2,019.

> the petition, no candidate information on that page may be changed.
>
> If Ms. Walker has previously filed a declaration of candidacy (EL-162) with the Wisconsin Elections Commission, it can be amended to reflect the address change. Technically speaking, however, federal candidates are not required to list an address on their declaration of candidacy. So, if Ms. Walker chooses to list her address on her declaration of candidacy, she can include the most current one.

(Emphasis added). Upon receiving that advice, the Green Party saw no issue with submitting nomination papers reflecting Walker's initial address (where she lived when she first started the process) and her new address.

¶38 Hence, upon hearing the nomination papers were challenged on that basis, the Green Party campaign manager wanted to know the Commission's position. The Commission's representative told Walker's campaign manager that she could attend the Commission's meeting on August 20, 2020, to provide evidence regarding when she moved, and in addition to appearing, she had the option of submitting a written response prior to the meeting. When Walker's campaign manager tried to clarify whether she should file a written response or simply appear, she was told she had the option to do both: "you can choose to do both, one or the other, or none." On August 7, 2020, the Commission then e-mailed Walker's campaign manager a letter advising: "if you wish to contest the challenge to your nomination papers, it is highly recommended that you appear before the WEC at the meeting either in person or by representation, or both. You may also file a written response to the challenge." The Commission's memorandum

also noted that candidates' nomination forms only require a finding of "substantial compliance" and that the information on the forms carry a "presumption of validity."

¶39 At the August 20, 2020 Commission hearing, Walker's representative appeared and was prepared to testify and counter Arntsen's claims. The Commission's chairperson unilaterally refused to afford Walker's representative the opportunity to introduce any evidence and arbitrarily limited her time to speak to only ten minutes. During the hearing, Walker's campaign manager, Andrea Mérida, repeatedly asked for permission to speak on a point, but was denied permission by the Commission's chairperson. After the presentation, several motions were considered. The Commission sustained, on a 6-0 vote, Arntsen's challenge made solely upon his "information and belief" to 57 signatures. It rejected, on a 6-0 vote, Arntsen's challenge to 48 signatures. With respect to Artnsten's challenge based solely on his "information and belief" as to the validity of the 1,834 signatures, the Commission deadlocked 3-3.

¶40 The Commission voted on the following motion: "The Commission sustains the challenge to the 1,834 signatures identified in [Arntsen's] Exhibit B with a code of 3024 which represent nomination papers that were printed and circulated with an address of 3204 TV Road, Room 231, Florence SC address." In other words, the Commission had to vote on whether to accept or reject 1,834 Wisconsinites who signed a paper requesting that the Green Party candidates appear on the November ballot. The

Commission deadlocked 3-3 on this motion.[5] When a motion deadlocks 3-3, it fails. See Wis. Stat. § 5.05(1e). The tie vote did not invalidate signatures on the Green Party candidates' nomination papers. "Any action by the commission . . . requires the affirmative vote of at least two-thirds of the members." Id. No decision was made by a two-thirds vote to invalidate these 1,834 signatures. No two-thirds vote sustained Arntsen's challenge to the 1,834 signatures. The Commission's inability to decide the challenge means the signatures remain valid, entitling the Green Party candidates to be placed on the ballot.

¶41 Despite the law, after these deadlocked votes, the Commission voted on the following motion:

> Certify 1,789 signatures for the Green Party candidates and that the Commission is deadlocked as to the validity of another 1,834 signatures based on insufficient evidence as to where the candidate lived at the time of circulation of the nomination papers.

A candidate needs to submit 2,000 valid signatures, and the Green Party submitted nearly double that number. In fact, Walker submits the Green Party collected almost 6,000 signatures. During the debate on the motion to certify 1,789 signatures, several commissioners noted that they were voting for this motion to narrow the issue when the Green Party inevitably would challenge their ruling in court. This motion passed 6-0, but because the previous deadlocked votes were incorrectly deemed to be motions that were

[5] Technically, there were three successive deadlocked 3-3 votes on three separate motions. But the bottom line is that in each instance the motion involved precluding the Green Party candidates from the ballot.

granted, the Green Party candidates were precluded from being on the ballot. The three members of this kangaroo commission who voted to deny ballot access to the Green Party, did so because they concluded Walker did not present evidence to support her claim——despite the fact that it was the Commission's chairperson herself who denied Walker the opportunity to do so.[6]

¶42 The next day, August 21, the Commission's administrator sent the Green Party candidates a letter summarizing the proceedings on August 20. The letter reiterated the final unanimous motion that the Commission passed, certifying 1,789 signatures and deadlocking on 1,834 signatures. The letter informed the Green Party candidates that they would be denied access to the ballot because the Commission did not certify the necessary 2,000 signatures for ballot access.

¶43 On August 26, the Commission sent a notice to the county clerks with the names of the independent candidates approved to be

[6] Mérida told the Commission part of the reason no written response was submitted had to do with timing. Mérida received the e-mail about the challenge on Friday evening, August 7, 2020, and was told if she opted to file a written response, it was due Monday, August 10, 2020, by 4:30 p.m. Mérida explained that because she was physically located in Colorado, Hawkins was in New York, and Walker was in South Carolina, giving her Saturday and Sunday to produce a written, verified response was just not possible. Mérida relied on the Commission's representations that she did not need to file a written response, but could refute the challenge to the address at the hearing. If the Commission had given Mérida more than a Saturday and Sunday in the midst of COVID-19, she would have filed a written response. The Commission's chairperson told Mérida that Wisconsin Statutes count Saturdays and Sundays when a deadline is less than 10 days and exclude the weekend days from the count when the deadline is more than 14 days.

on the November ballot. The Green Party is notably absent from that list. Following the list of independent candidates, Commission staff stated they would let the clerks know "if any court challenges are filed against the Commission's decisions for the independent presidential candidates."

¶44 On September 1, 2020, the Commission voted to confirm the presidential and vice presidential candidates for three parties, granting them ballot access. That same day, pursuant to Wis. Stat. § 7.08(2), the Commission transmitted the certified list of all presidential and vice presidential candidates that were to appear on the ballot. In that transmission, the Commission also noted that media reports said the Green Party intended to file in court to gain ballot access. Instead of waiting for a resolution of any potential challenges, the Commission denied the Green Party candidates ballot access and denied the people of the State of Wisconsin the freedom to choose candidates who should rightly be on the ballot in the upcoming election (and who almost 6,000 Wisconsin citizens nominated to be on the ballot).

¶45 On September 3, 2020, the Green Party candidates filed this action——a mere two days after the Commission certified the list of all candidates to the county clerks. This court sat on its decision until September 14, 2020, after requesting voluminous information from the Commission on September 10.

II. MERITS OF THE GREEN PARTY CANDIDATES' CLAIMS

¶46 The Commission deadlocked, 3 to 3, on the validity of 1,834 signatures based on Arntsen's allegation of "insufficient

evidence of where the candidate lived." However, the evidence was not insufficient. The nomination papers said where Walker lived, and that assertion is presumed to be correct. Wis. Admin. Code § EL 2.05(4). When information on a nomination paper is challenged, the challenger bears the burden of proof. Wis. Admin. Code § EL 2.07(3)(a). Here, the allegations underlying the challenge were made by Arntsen "upon information and belief," not on personal knowledge. They prove nothing about where Walker lived at the time the nomination papers were circulated.[7] In fact, both the Commission's staff attorney and Arntsen's counsel noted that the burden did not flip unless the Commission made a finding that Arntsen had proven his claim by clear and convincing evidence. The Commission never made that finding. Instead of allowing Walker's representative to straighten out why these nomination papers contained the change in address and when it occurred, the Commission chairperson prevented her from doing so.[8] The chairperson repeatedly insisted that the challenger needed to be treated fairly and that introducing any facts about Walker's moving date or prior address would be prejudicial to the challenger. Yet, the chairperson repeatedly refused to afford the same fairness and courtesy to the Green Party's representative. The commissioners

[7] Similarly, in the Commission's objection to the Green Party's filing dated September 9, 2020, the Commission asserts that the affidavit of the Jefferson County clerk means nothing because it was made upon "information and belief."

[8] The meeting can be viewed in its entirety at https://wiseye.org/2020/08/20/wisconsin-elections-commission-special-teleconferencemeeting-10/.

who voted against allowing the Green Party candidates access to the ballot seemed to believe that if a challenger raises a question as to nomination papers, he has proven by clear and convincing evidence that signatures should be invalidated. That is incorrect, particularly given Wisconsin law that nomination papers will be accepted if they substantially comply with the statutes and that the information contained therein is entitled to a presumption of validity. The chairperson mistakenly believed that because Walker's declaration of candidacy form swore to her present address, this rendered her previous address incorrect. The three commissioners who voted to deny ballot access ignored both the required burden of proof and the presumption of validity.

¶47 When the Commission deadlocked, the signatures on the nomination papers still possessed the presumption of validity. Instead of honoring this presumption, the Commission's administrator inexplicably concluded that Green Party candidates failed to obtain the necessary 2,000 signatures, ignoring that Arntsen, not the Green Party candidates, had the burden of proof. Under the applicable administrative rules on elections, the candidate wins in contests when the challenger does not meet his burden of proof. Arntsen presented no evidence that Walker did not live where the nominating papers said she lived when they were circulated. Thus, Arntsen failed to carry his burden of proof and the presumption of validity accorded the Green Party candidates stood unrebutted. Accordingly, the Green Party candidates presented at a minimum 3,623 valid signatures. This number far

exceeds the 2,000 signatures necessary for ballot access. Hawkins and Walker should have been certified to appear on the ballot.

¶48 Not only did the Green Party candidates have a right to appear on the ballot, but the Commission had a statutory obligation to place them on the ballot, which the Commission violated. Pursuant to Wis. Stat. §§ 5.64(1)(b) and (em), candidates for President and Vice President who filed under Wis. Stat. § 8.20, as the Green Party candidates did, "shall appear on the ballot." The Commission did not just fail the Green Party candidates. It failed the people of Wisconsin.

III. TIMING——MERE EXERCISE OF WILL

¶49 If the majority were relying upon that which was argued, laches, then it would have undertaken the legal analysis necessary to support its determination. Instead, the majority has invented its own form of laches that has no criteria other than the majority's undefined and previously unknown "smell test." We know that the majority does not rely upon the legal principle of laches, not only because it fails to vet the criteria necessary to rely upon laches, but also because those criteria cannot be met in the case at issue. The fact that the majority imposes its own unique and undefined standard further demonstrates that it exercises its will rather than its judgment.

¶50 Because the Commission clearly violated the law by not adding the Green Party candidates to the ballot for the November 3 general election, the majority is forced to rely on its made-up standard of "it is too late" in order to deny ballot access and

limit voter choice. Majority order, ¶5. The court claims it is too late to "upset[] the election" because ballots have already been sent out to voters. Id., ¶10. The timing here does not bar this court from addressing such an important issue.

¶51 In 2004, in another ballot access challenge, State ex rel. Nader v. Circuit Court for Dane Cty., No. 2004AP2559-W, unpublished order (Wis. Sept. 30, 2004), this court, "mindful of the importance of ballot access and voting" directed the State of Wisconsin Elections Board (a predecessor of the Wisconsin Elections Commission) to "certify the names of Ralph Nader and Peter Camejo" as candidates on the ballot for the November 2, 2004 general election. That order was issued on September 30, 2004—— notably weeks later than what the court here considers too late. The Nader matter involved a similar challenge to nomination papers found to be sufficient by the Elections Board based on its "staff report" but found insufficient by a Dane County circuit court. In an original action, this court ruled contrary to the circuit court, pointing out that Wisconsin Statutes require only "substantial compliance" with respect to nomination papers.

¶52 Of course ballot access challenges always will come close to elections; that is the nature of the process and it is unavoidable given statutory deadlines. It is this court's duty to act quickly so that candidates wronged by a prior decision have legal recourse. The majority refuses to act because some ballots have been printed and a small number of ballots have already been sent to voters. Excluding candidates on that basis is unlawful. Ballots can be reprinted and resent. Although reprinting ballots

would generate additional costs, doing so is the legally correct thing to do and would certainly cost less than having to hold an entirely new election should the United States Supreme Court reverse this court's order and order Wisconsin to hold a new election. And, although the Commission represents that about 120 ballots have already been sent to voters, most of those ballots were sent by e-mail. It would be very easy to send another e-mail advising the recipient of the ballot error and directing the recipient to destroy the ballot received and wait for the new ballot. Instead of following the law, a majority of this court ignores it, lets the blatant error by the Commission and its staff go uncorrected, and denies Hawkins and Walker their rightful place on Wisconsin's November 3, 2020 ballot.

¶53 Two other Wisconsin cases show that this court has previously chosen to act despite timing issues when candidates were unlawfully excluded from Wisconsin's ballots. In Labor & Farm Party v. Wis. Elections Bd., 117 Wis. 2d 351, 358, 344 N.W.2d 177 (1984), this court ordered the Labor & Farm Party's presidential candidate to be placed on the ballot. The candidates for the April 3, 1984, election were certified on February 2, 1984, and the Labor & Farm Party filed a petition with this court 11 days later. Id. at 352-53. This court issued a per curiam decision on February 28, 1984, ordering the Labor & Farm Party's candidate's name to appear on the ballot, which decision was issued 34 days before the April 3, 1984 election. Id. at 358.

¶54 In McCarthy v. Wis. Elections Bd., 166 Wis. 2d 481, 492, 480 N.W.2d 241 (1992), this court ordered multiple

candidates' names be placed on the April 7, 1992 ballot. The court's decision was issued by per curiam decision on March 2, 1992, which was 36 days before that election. Id. Had this court acted swiftly in the current case, a similar per curiam decision could have been issued 60 days before the election. Even using today's date, there are still 50 days before the election.

¶55 Perhaps the majority avoided directly addressing the Commission's laches defense because it would have had to conclude laches did not bar the Green Party's petition. As this court explained last term, "[l]aches is an affirmative, equitable defense designed to bar relief when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." Wisconsin Small Bus. United, Inc. v. Brennan, 2020 WI 69, ¶11, 393 Wis. 2d 308, 946 N.W.2d 101. In Wisconsin, a defendant must prove three elements for laches to bar a claim: "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay." Id., ¶12. Even if respondents carry their burden of proving all three elements of laches, "application of laches is left to the sound discretion of the court to apply this equitable bar." Id. The majority must be basing its "too late" doctrine on something other than laches because it avoids any attempt to address the law and the required elements of laches before applying its discretion.

A. The First Element: Unreasonable Delay

¶56 The first element of a laches defense requires the respondents to prove the Green Party candidates unreasonably

delayed in bringing the suit. "What constitutes a reasonable time will vary and depends on the facts of a particular case." Wisconsin Small Bus. United, 393 Wis. 2d 308, ¶14. To be clear, there is no specific statutory or administrative requirement that a suit be filed within an abbreviated time period.

¶57 The majority concludes that the Green Party candidates are at fault for not immediately filing suit. Nothing in the law requires such timing. In fact, filing before September 1 would have been premature because all candidates were not finally certified until then. See State ex rel. Cornerstone Developers, Ltd. v. Greene Cty. Bd. of Elections, 49 N.E.3d 273, ¶20 (holding that a party challenging an uncertified decision of an election official would be premature).

¶58 The Green Party candidates filed this action only two days after the certification of all candidates and the date the Commission allowed county clerks to begin printing ballots. The majority does not consider whether a claim asserting ballot access violation is clearly actionable until the Commission's official certification. This court has never addressed how quickly or promptly a petitioner must raise a claim regarding ballot access. In fact, the majority order implicitly acknowledges that the timing to assert this challenge was reasonable and urges the legislature to "broad[en] the statutory timelines to afford a more reasonable amount of time for a party to file an action raising a ballot access issue." Majority order, ¶5, n.1. Yet, at the same time, the majority refuses to grant relief, concluding the Green Party

challenge came too late, although it neglects to address any factors necessary to apply laches.

¶59 It is clear from a review of the case law that when a court applies laches to an election case, it typically applies laches in delays for months, not days. See, e.g., Clark v. Reddick, 791 N.W.2d 292, 294-96 (Minn. 2010) (holding that a two-month delay in challenging a ballot was an unreasonable delay); Knox v. Milwaukee Cty. Bd. of Election Comm'rs, 581 F. Supp. 399, 404 (E.D. Wis. 1984) (a challenge "made some 31 months after the approval of the tentative proposal and 22 months after the adoption of the final plan, is inexcusably delayed"); State ex rel. Ascani v. Stark Cty. Bd. of Elections, 700 N.E.2d 1234, 1236-37 (Ohio 1998) (holding a ten-week delay was unreasonable); Kay v. Austin, 621 F.2d 809, 811, 813 (6th Cir. 1980) (holding a three-week delay was unreasonable).

¶60 Here, a two-day delay is not unreasonable. The Green Party candidates did not sleep on their rights. The majority cannot point to a single case in which a party was not permitted to challenge an election ballot only two days after final certification. The majority cannot do so because no such case exists. The majority relies on Jensen v. Wisconsin Elections Bd., 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam), and De La Fuente v. Wisconsin Government Accountability Board, No. 2016AP330, unpublished order (Wis. Feb. 22, 2016). However, even these cases do not support the majority's conclusion.

¶61 In Jensen, this court was asked to review a redistricting dispute. 249 Wis. 2d 706, ¶1. The court declined to exercise

original jurisdiction because there was "precious little" time left. Id., ¶21. However, what the majority of this court today ignores is that the Jensen court was concerned with time due to the subsequent proceedings that would be required as a result of the court granting the petition for original action. Id. The court noted that two complex and consequential cases would have to run in both state and federal court. Id. Accordingly, the court declined to exercise its original jurisdiction over the case because of the complexity of the matter. Id., ¶22. That is not the case here.

¶62 In De La Fuente v. Wisconsin Gov't Accountability Bd., No. 2016AP330, unpublished order (Wis. Feb. 22, 2016), the court issued an order denying De La Fuente access to the Democratic primary ballot. The court denied access to the ballot because De La Fuente filed his petition after the county clerks' statutory deadline to deliver ballots to the municipal clerks. The court determined that this was far too late. De La Fuente is also distinguishable from the case at issue.

¶63 This court can act promptly when it chooses to do so. In fact, this court conducted a similar inquiry into statutory interpretation, in an even tighter timeframe, earlier this year. See Wisconsin Legislature v. Evers, No. 2020AP608-OA, unpublished order (Wis. Apr. 6, 2020) (conducting statutory interpretation in a matter of hours). The Green Party candidates filed this action on September 3. They asked for injunctive relief. The action was filed well before the statutory deadline for county clerks, unlike De La Fuente. In fact, according to the data provided to this

court by the Commission, only one ballot had been sent out between September 1 and September 3.

¶64 Thus, the Green Party candidates did not unreasonably delay in filing this original action, and this element of laches has not been proven. The timing of the Green Party's filing is an improper reason for this court to deny relief.

B. The Second Element: Knowledge

¶65 The Commission cannot credibly claim it lacked knowledge that the Green Party candidates would challenge the Commission's unlawful decision to deny them ballot access. The Commission acknowledged as early as August 20 that the Green Party would file suit to challenge their action. In the debate over the final motion, three separate commissioners noted that the motion would narrow the issues for a court when the Green Party filed suit. That same day, a different commissioner noted that the Green Party's claim was one that needed to go to court. In total, four of the six commissioners made reference to a future lawsuit by the Green Party's candidates, all while Arntsen's attorney was present.

¶66 Beyond the Commission's initial acknowledgement of an anticipated Green Party challenge, it noted such a possible challenge twice in communications to county clerks. On August 26, the Commission informed the county clerks that it would update the clerks "if any court challenges [were] filed against the Commission's decisions for the independent presidential candidates." On September 1, the Commission told the clerks that the Green Party candidates were making it known that that they

would challenge the Commission's decision to deny them ballot access.

¶67 The Commission had knowledge that the Green Party candidates would seek ballot access in a lawsuit. In fact, the commissioners encouraged such a lawsuit, even confidently stating their opinion that the Commission would be overturned by a court, and sought to assist in hastening judicial review. Accordingly, this element of laches cannot be proven.

C. The Third Element: Prejudice

¶68 Even if there had been an unreasonable delay and the Commission did not have knowledge that the Green Party would sue for ballot access, neither the Commission nor Arntsen are prejudiced by this delay. "What amounts to prejudice [] depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position." Wisconsin Small Bus. United, 393 Wis. 2d 308, ¶19. The third element of laches requires a party to "prove that the unreasonable delay prejudiced" the party. See State ex rel. Wren v. Richardson, 2019 WI 110, ¶32, 389 Wis. 2d 516, 936 N.W.2d 587. When interpreting prejudice, this court has recognized two different types: evidentiary and economic. Id., ¶33. The respondents claim economic prejudice. Economic prejudice occurs when "the costs to the defendant have significantly increased due to the delay." Id., ¶33 n.26.

¶69 Prejudice, in the context of laches, must be against the parties themselves, not third parties. Id. (referring to the costs to the defendant for economic prejudice). The respondents cannot

point to any significant increase in costs to Arntsen or to the Commission as a result of the Green Party candidates filing on September 3. In fact, the only claimed "prejudice" to either respondent is potential stress to the Commission from rectifying its own mistake.[9] Instead, the Commission improperly points to the increased costs to county and municipal clerks. If a party were able to do so, some entity will always be economically prejudiced by any type of unreasonable delay. Allowing a named party to rely on an unnamed party's alleged prejudice would, in effect, render the prejudice prong unnecessary. Accordingly, the Commission and Arntsen have failed to show, in any way, either economic or evidentiary prejudice. Accordingly, this element of laches cannot be shown either.

[9] There may be an argument that the Commission's unclean hands forbid it from bringing a laches defense. The Seventh Circuit has stated:

> A party's unclean hands may stand as an obstacle to the application of the doctrine of laches in certain circumstances. The notion of unclean hands working as a bar to the application of laches stems from the belief that an equitable defense, such as laches, cannot be used to reward a party's inequities or to defeat justice.

Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 825 (7th Cir. 1999). Courts further instruct that, in order to use the unclean hands doctrine to push back on a laches defense, "a plaintiff is required to show that the defendant has 'engaged in particularly egregious conduct which would change the equities significantly in plaintiff's favor.'" Serdarevic v. Advanced Med. Optics, Inc., 532 F.3d 1352, 1361 (Fed. Cir. 2008). And the Commission's indiscretions likely rise to this standard. But given that the respondents——and the majority for that matter——fail to substantively or persuasively show how laches applies at all, we need not further discuss how the unclean hands doctrine forecloses this defense.

D. Equitable Discretion

¶70 At most, the costs and effects on the counties are an equitable consideration. Even if the respondents could show that they satisfy all three elements of laches, this court must still weigh the equities to determine if it will apply laches. See Wren, 389 Wis. 2d 516, ¶15. In so doing, this court weighs not only what is at stake for the candidate and the electors, but also for the Commission, counties, and others. See Wisconsin Small Bus. United, 393 Wis. 2d 308, ¶27 (weighing the prejudicial effect against the respondents and other entities not part of the suit). In this case, the court must balance the important interests of ballot access and voter choice against other considerations. The balance of the equities weighs in favor of ballot access and voter choice and against applying laches. For example, we should have an interest in the Commission following the election laws. We also should have interest in having the proper people on the ballot. We should attempt to do that early in the election process rather than deal with post-election issues after votes have been cast. If need be, the statutes appear to allow the extension of mailing deadlines.

¶71 From the information before us, when the Green Party filed its original action in this court on September 3, 2020, it appears that only eight ballots had been sent to voters. However, of those eight ballots, only one was sent after September 1——the date on which the Commission certified the list of all presidential and vice presidential candidates. This begs the question: why are these municipalities sending a ballot to a voter prior to

September 1, before the Commission certified the final list of candidates? If, as requested by the Green Party on September 3, this court had issued the same order we issued on September 10, 2020, ordering local municipalities to delay in mailing ballots to absentee voters until this court could decide the important ballot access issue, we would be dealing with at most eight ballots. If this court had issued an order delaying the mailing of ballots pending a resolution in this case, then it may have resolved its own concern——few to no voters would have been mailed ballots. Might it be inequitable to hold the court's own delay against the petitioning party?

¶72 Moreover, the fixed deadlines are not necessarily fixed when there has been an error of law as is the case here. The respondents raise much concern about the Green Party's delay in filing this action. They complain that such a delay means that local clerks will be unable to meet statutory deadlines for mailing ballots to absentee voters. However, this concern is without consideration to the statutes that may remedy a ballot error. First, the state statutory deadline cannot be rigid when there is an error of law. The statutes allow the Commission, or a court, to order county clerks to reprint ballots to correct a ballot error. Wis. Stat. § 7.10(3)(a).

¶73 Under Wis. Stat. § 7.10(3)(a), "[i]f the commission transmits an amended certification under s. 7.08(2)(a) or if the commission or a court orders a ballot error to be corrected under s. 5.06(6) or 5.72(3) after ballots have been distributed, the county clerk shall distribute corrected ballots to the municipal

clerks as soon as possible." This provision clearly indicates that the Commission, or a court, possesses the power to compel a redistribution of ballots, as is requested here.

¶74 Specifically looking at Wis. Stat. § 5.06(6), the Commission could compel individual commissioners to correct their votes and submit a new certified list to the county clerks.

> The commission may, after such investigation as it deems appropriate, summarily decide the matter before it and, by order, require any election official to conform his or her conduct to the law, restrain an official from taking any action inconsistent with the law or require an official to correct any action or decision inconsistent with the law.

Wis. Stat. § 5.06(6) (emphasis added). If the Commission were to conduct an investigation and determine that it was in error based on the analysis outlined above, it could order that the Green Party candidates be added to the ballots.

¶75 Thus, the deadline has more flexibility than the majority determination appears to recognize.

¶76 Additionally, there are two reasons why the respondent's UOCAVA[10] assertions fail. First, uniformed service members and citizens living abroad who wish to vote (collectively referred to as "UOCAVA voters") need to receive ballots only 45 days prior to an election if they have requested ballots that far in advance. Under subsection (a)(8) of the UOCAVA, if UOCAVA voters request a

[10] The Uniformed and Overseas Citizens Absentee Voting Act requires states to provide citizens residing overseas and uniformed service members a federal right to absentee voting for federal offices. 52 U.S.C. §§ 20301-20311; cf. Pub. L. 107–107, div. A, title XVI, §1601, Dec. 28, 2001, 115 Stat. 1274.

ballot less than 45 days before an election, the state must issue them a ballot "in accordance with State law" and, if applicable, "in a manner that expedites the transmission of such absentee ballot." 52 U.S.C. § 20302(a)(8)(B). Thus, contrary to the respondent's argument, there is no requirement to send UOCAVA voters ballots 45 days prior to an election.

¶77 And second, for UOCAVA voters that do request a ballot prior to 45 days before an election, the "hardship exemption" can allow the state to justifiably delay sending ballots. Under subsection (g)(1), "undue hardship" can afford an exemption so long as the "chief State election official . . . request[s] that the Presidential designee grant a waiver to the State of the application of such subsection." 52 U.S.C. § 20302(g)(1). An "undue hardship" occurs when either "[t]he State's primary election date prohibits the State from complying with subsection (a)(8)(A)," "[t]he State has suffered a delay in generating ballots due to a legal contest," or "[t]he State Constitution prohibits the State from complying with" such subsection. § 20302(g)(2)(B). The second item is particularly apt: there is quite literally a legal contest that has created a delay in generating ballots, and this is more than adequate grounds for finding an "undue hardship" in sending UOCAVA voters their ballots. The guidance from the Federal Voting Assistance Program (FVAP) reinforces this point. In particular, FVAP provides four factors that inform whether an undue hardship exists. Two of the factors specifically consider "[t]he type of election for which the waiver is requested" and "[o]ther emergent circumstances, such as a ballot legality

challenge." "Guidance on Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) Ballot Delivery Waivers, "Bob Carey, Director, Federal Voting Assistance Program, Memo to Chief State Election Officials (Feb. 7, 2012), https://www.fvap.gov/uplaods/FVAP/EO/2012_waiver_guidance.pdf. And, it is hard to imagine how these factors would not apply here. There is a legal challenge to the validity of the ballots, and the type of election at stake could not be more critical: this is a presidential election that occurs only once every four years. It is absolutely imperative that this state accurately includes all candidates on the ballot who have a lawful right to participate. The Green Party candidates have this right. As such, any minor delays in sending the UOCAVA voters their ballots is warranted.

¶78 Further, the majority order's extrapolation from the Commission ballot data is inherently flawed and speculative. How can we assume all counties function the same when we know they have not? How do we know that the counties counted are representative of all counties in the State? We do not. Many counties have not sent their ballots yet. According to the data the Commission provided in response to this court's September 10, 2020 order, very few counties appear to have printed their ballots (21 counties). Some have only partially printed (16 counties). And nearly half of all counties did not report that they have printed ballots (35 of 72 counties).[11]

[11] Some of those counties reported not printing, some did not know the status of the printing, and some did not respond.

¶79 According to the data from the Commission, very few ballots have actually been sent. Only 24 out of 1,850 municipalities responded to the Commission's request for information and about 120 ballots have been sent, mostly to UOCAVA voters using e-mail. Because nearly all list either e-mails or overseas addresses as the mailing address, it is a reasonable assumption that these voters are UOCAVA voters, and most of them are specifically identified as such. Of the physical addresses listed within the United States, there are a maximum of eight addresses, but likely even less due to the anomalies in the data. Ballots already sent by e-mail could be quickly and easily retrieved by sending another e-mail directing the voter to ignore or destroy the first ballot as the court has ordered ballots reprinted and instructing that as soon as the new ballot is available, it will be e-mailed.

¶80 Moreover, when looking closely at the data, extrapolation is highly suspect. For example, the City of Ashland sent ballots prior to September 1, 2020——the date the Commission finalized the list of candidates for President and Vice President. Dane County submitted its order for printing its ballots on August 28, prior to receiving the final certification on September 1. The Commission's statewide data it provided to this court does not include some of the towns, such as Town of Lake Holcomb, which are reported to have sent ballots out in its specific ballot list of data. Certain large cities with clerks that work full-time, in counties that have completed ballot printing, did not respond to

the Commission's repeated requests for data in response to this court's September 10, 2020 order.

IV. CONCLUSION

¶81 The majority failed this state's and this country's election process. The majority's decision does more than just misread the law and misapply the facts. It deprives the Wisconsin people of a voice and strips them of one of the most fundamental tenets of this republic: the right to express one's will at the ballot box. But come November, important swaths of this state's electorate will go unheard. And for what purpose? To reward the Commission for its missteps and to deny the State of Wisconsin political choice? For the majority, apparently so. When Wisconsin electors signed the Green Party's nomination papers for President and Vice President of this country, what were they signing? Perhaps, as the majority seemingly endorses, they were signing their approval of Angela Walker's address in South Carolina. Or perhaps it was something more. Perhaps they were signing on behalf of their right to vote for a candidate of their choice, and to exercise one of their most important liberties that a democratic country can offer.

¶82 Troublingly, the majority loses sight of this right——an error, no less, entirely divorced from the law of this state. Under Wisconsin law, there was no unreasonable delay in the Green Party raising this action. And under the facts of this case, it is not too late to correct this grievous error on the ballot, contrary to the majority's mere guess as to the number of ballots

that have been sent. There is no room for speculation when it comes to the integrity of America's election process. The law does not think so, and neither do I. I dissent.

¶83 I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice REBECCA GRASSL BRADLEY join this dissent.

¶84 REBECCA GRASSL BRADLEY, J. *(dissenting).* The majority upholds the Wisconsin Elections Commission's violation of Wisconsin law, which irrefutably entitles Howie Hawkins and Angela Walker to appear on Wisconsin's November 2020 general election ballot as candidates for President and Vice President of the United States, as the dissents of Chief Justice Patience Drake Roggensack and Justice Annette Ziegler make clear. Mr. Hawkins and Ms. Walker satisfied all requirements necessary to secure their spot on the ballot as candidates of the Green Party, but the Wisconsin Elections Commission, with the outrageous acquiescence of the majority, denies them their rightful place. Excluding them irreparably harms the citizens of Wisconsin, along with the integrity of Wisconsin's entire election process.

¶85 America has witnessed such tactics in the past. History repeats itself, as Wisconsin's highest court rewards rather than rebuffs such unlawful maneuvers. In 1968, Alabama state officials left black candidates off the November general election ballot, in response to some comparably concocted but meritless challenge.[1] The United States Supreme Court ordered Alabama to hold a new election, with the excluded candidates appearing on the ballot.[2] Ironically, the majority in this case adopts the mantra of the Wisconsin Elections Commission, caving to its fearmongering invocation of "chaos" should the court dare to right this wrong. The majority ignores the pandemonium that would ensue following

[1] Hadnott v. Amos, 394 U.S. 358, 360 (1969).

[2] Id. at 367.

its refusal to right this wrong, should the United States Supreme Court order Wisconsin to repeat the November election—next time in accordance with the law.

¶86 The majority pretends the court lacks "sufficient time to complete our review and award any effective relief." What nonsense. Wisconsin law unquestionably requires that Mr. Hawkins and Ms. Walker appear on the ballot. The court could have ordered their certification as candidates before any ballots were mailed to voters. Instead, the court refuses to perform its duty to faithfully apply the law and allows the Wisconsin Elections Commission to flout it, thereby signaling to the WEC that it may disregard the law at whim, with no accountability to the people for its transgressions. In dodging its responsibility to uphold the rule of law,[3] the majority ratifies a grave threat to our republic, suppresses the votes of Wisconsin citizens, irreparably

[3] A majority of this court has repeatedly neglected its institutional responsibility to promptly hear and decide cases involving Wisconsin's 2020 elections. See SXR Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued January 13, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("In declining to hear a case presenting issues of first impression immediately impacting the voting rights of Wisconsin citizens and the integrity of impending elections, the court shirks its institutional responsibilities to the people who elected us to make important decisions, thereby signaling the issues are not worthy of our prompt attention."); SXR Zignego v. Wis. Elec. Comm'n, 2020AP123-W (S. Ct. Order issued June 1, 2020 (Rebecca Grassl Bradley, J., dissenting)) ("It is the duty of Wisconsin's highest court to decide cases presenting novel issues of statewide significance."; recognizing this court's failure to do so is an abdication of its responsibility).

impairs the integrity of Wisconsin's elections, and undermines the confidence of American citizens in the outcome of a presidential election. I dissent.