

STATE OF WISCONSIN  
WISCONSIN ELECTIONS COMMISSION

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THE COMPLAINT OF:  
DEAN KNUDSON

Complainant,

v.

Case No. EL 20-28

GOVERNOR TONY EVERS  
Respondent.

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**VERIFIED RESPONSE OF RESPONDENT GOVERNOR TONY EVERS  
TO AMENDED COMPLAINT FILED DECEMBER 9, 2020**

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This response is submitted pursuant to Wis. Admin. Code §§ EL 20.03-.04 in answer to an amended complaint filed under Wis. Stat. § 5.06 regarding Governor Tony Evers’s signing and transmittal of a certificate of ascertainment for the November 3, 2020, presidential election.<sup>1</sup>

**INTRODUCTION**

Wisconsin held a general election on November 3, 2020. *See* Wis. Stat. §5.02(5). Once all of the county canvasses were timely transmitted to the Wisconsin Elections Commission (“WEC”), they indicated that the presidential race was reasonably close, with a margin of less than 1% of the

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<sup>1</sup> The initial complaint was signed on December 7, 2020 and submitted to the Wisconsin Elections Commission (“WEC”) on December 8, 2020. Complainant filed an amended complaint on December 9, 2020. WEC staff counsel advised undersigned counsel that, pursuant to Wis. Admin. Code § EL 20.04 and without seeking any extension, Governor Evers’s response would be timely if filed on or before December 30, 2020. On December 22, 2020, Deborah Meiners, special counsel for the WEC in this matter, sent an email extending Governor Evers’s response deadline to January 13, 2021. Undersigned counsel replied, confirming the new response deadline.

total votes cast separating the top two candidates. *Information Regarding Potential Recount for Office of President/Vice President – 2020 General Election*, Meagan Wolfe (Nov. 12, 2020).<sup>2</sup> On November 18, 2020, the second-place candidate, President Donald J. Trump, timely requested a recount of all ballots in Dane and Milwaukee Counties and made prepayment for the estimated costs of that partial recount. *WEC Receives Petition for Partial Recount; Recount to be Ordered Thursday*, WEC (Nov. 18, 2020);<sup>3</sup> *Trump Campaign Recount Petition* (Nov. 18, 2020).<sup>4</sup>

On November 30, 2020, following the completion of the recounts in Dane and Milwaukee Counties, the Chairperson of the WEC conducted the state canvass and determined and certified the results of the presidential election. *Statement of Canvass for President, Vice President and Presidential Electors*, WEC (Nov. 30, 2020).<sup>5</sup> Subsequently, in accord with state law, WEC staff prepared a certificate “showing the determination of the results of the canvass and the names of the persons elected” to be presidential electors, called a certificate of ascertainment under federal law. Wis. Stat. § 7.70(5)(b); 3 U.S.C. § 6. Likewise, in compliance with state and federal law, Governor Evers then: signed the certificate of ascertainment; had Secretary of State Doug La Follette affix the Great Seal of the state; caused one original signed and sealed certificate to be transmitted to each of the U.S. Administrator of General Services and the U.S. Archivist; and prepared six duplicate originals of the certificate for delivery to one of the presidential electors.

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<sup>2</sup>Available at [https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Communication\\_Presidential%20Recount\\_Final.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Communication_Presidential%20Recount_Final.pdf).

<sup>3</sup> Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/NR%20Elections%20-%20Wisconsin%20Recount%20Petition%20Received%2011-18-20.pdf>.

<sup>4</sup> Available at [https://elections.wi.gov/sites/elections.wi.gov/files/202011/Trump\\_%20Campaign%20Recount%20Petition.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/202011/Trump_%20Campaign%20Recount%20Petition.pdf).

<sup>5</sup>Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/Jacobs%20-%20Signed%20Canvass%20for%20President%20-%20Vice%20President.pdf>; see also *2020 Fall General Election Results*, WEC, available at <https://elections.wi.gov/elections-voting/results/2020/fall-general>.

Wis. Stat. § 7.70(5)(b); 3 U.S.C. § 6. Complainant now asserts that these actions were premature under state law.

State law expressly provides that complaints may not be filed under Wis. Stat. § 5.06 if the allegations arise in connection with a recount. Wis. Stat. § 5.06(10). Because the amended complaint alleges (erroneously) that Governor Evers acted in a manner that interfered with the recount process outlined in Wis. Stat. § 9.01, it is not properly before the WEC. Moreover, although relevant provisions of state and federal law charge the Governor with informing the federal government about the Wisconsin results of a presidential election, he has no duties relating to the conduct of the election itself and is not, therefore, an election official. It follows that no complaint may be filed against the Governor pursuant to Wis. Stat. § 5.06, as is attempted here. Finally, despite the amended complaint's assertions to the contrary, the Governor's actions in all relevant respects were informed by legal counsel and complied with both state and federal law. The amended complaint therefore fails, both procedurally and on the merits. It must be dismissed.<sup>6</sup>

## ARGUMENT

### **I. The Amended Complaint Must Be Dismissed because It Arose in Connection with a Recount and because the Governor is Not an Election Official under Wisconsin Law.**

The amended complaint at issue here purports to have been filed pursuant to Wis. Stat. § 5.06. (Amend. Cmplt. ¶6.) It also purports to be a complaint based, in part, on Wis. Stat. § 9.01, the state recount statute. (Amend. Cmplt. at 1 and ¶¶13-16, 23-24, 27.) The gravamen of the allegations is that Governor Evers signed and transmitted a certificate to the federal government before the time allowed under Wis. Stat. § 9.01 for pursuing an appeal of the recount results had expired. However, the last subdivision of Wis. Stat. § 5.06 expressly provides that “[t]his section

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<sup>6</sup> Respondent Governor Evers admits and stipulates to the allegations contained in paragraphs 1-4, 7-8, 10-13, 18, and 29 of the amended complaint. Governor Evers denies the allegations contained in all other paragraphs.

does not apply to matters arising in connection with a recount under s. 9.01.” Wis. Stat. § 5.06(10). In Wisconsin, “[s]tatutory language is given its common, ordinary, and accepted meaning.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110; *see also* Wis. Stat. § 990.01(1) (“words and phrases shall be construed according to common and approved usage”). Those charged with interpreting a statute “may use a dictionary to establish the common meaning of an undefined statutory term.” *State v. McKellips*, 2016 WI 51, ¶32, 369 Wis. 2d 437, 881 N.W.2d 258.

The Election Code does not define “in connection with,” but the phrase’s ordinary meaning leaves no doubt that the amended complaint was filed in connection with a recount under Wis. Stat. § 9.01. A “connection” is a “causal or logical relation” or a “contextual relation or association.” *Connection*, Merriam-Webster Dictionary (2020).<sup>7</sup> On its face, the amended complaint is directly related to a recount under Wis. Stat. § 9.01. But for the recount process, Complainant would have had no cause to initiate this proceeding; the amended complaint arises not as a result of Governor Evers transmitting a certificate of ascertainment for the 2020 election, but because he did so promptly after the conclusion of the recount. (Amend. Cmplt. ¶¶ 7, 13-16, 23-24, 26-28.) The amended complaint is causally linked to—and inextricably connected with—the recount process. Because the amended complaint clearly arises “in connection with a recount under s. 9.01,” it cannot be brought under Wis. Stat. § 5.06 and must be dismissed.

Even if the amended complaint did not arise in connection with a recount, which it obviously does, the Governor is not subject to a complaint brought under Wis. Stat. § 5.06. That statutory section authorizes Wisconsin voters to file complaints with the WEC against “an election

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<sup>7</sup> Available at <https://www.merriam-webster.com/dictionary/connection>.

official.” *Id.* § 5.06(1).<sup>8</sup> Because Governor Evers is not an election official, he does not fall within the ambit of Wis. Stat. § 5.06(1), and the amended complaint against him is not authorized by law.

Wisconsin law defines an election official as “an individual who is charged with any duties relating to the conduct of an election.” *Id.* § 5.02(4e). While this definition is broad, it does not reach the Governor, whose role is not in the *conduct* of the election of presidential electors, but only in informing the federal government of the results once conduct of the election is complete. Just last week, the WEC declined to adopt an expansive interpretation of who is an “election official” subject to a complaint under Wis. Stat. § 5.06(1), noting that not everyone who has “any fleeting or minimal ... ties to electoral processes” will be classified as an election official. *Sherry Seaman et al. v. Brian Noe et al, Town of Omro*, Case No. EL 20-21, 2-3 (Jan. 5, 2021).<sup>9</sup>

As noted by Complainant, Wis. Stat. ch. 7 is titled “ELECTION OFFICIALS; BOARDS; SELECTION AND DUTIES; CANVASSING.” (Amend. Cmplt. ¶6.) The mention of the Governor in that chapter does not alone make the Governor an election official. To assume that

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<sup>8</sup> Subd. (1) of Wis. Stat. 5.06 provides in full as follows:

*Whenever any elector of a jurisdiction or district served by an election official believes that a decision or action of the official or the failure of the official to act with respect to any matter concerning nominations, qualifications of candidates, voting qualifications, including residence, ward division and numbering, recall, ballot preparation, election administration or conduct of elections is contrary to law, or the official has abused the discretion vested in him or her by law with respect to any such matter, the elector may file a written sworn complaint with the commission requesting that the official be required to conform his or her conduct to the law, be restrained from taking any action inconsistent with the law or be required to correct any action or decision inconsistent with the law or any abuse of the discretion vested in him or her by law. The complaint shall set forth such facts as are within the knowledge of the complainant to show probable cause to believe that a violation of law or abuse of discretion has occurred or will occur. The complaint may be accompanied by relevant supporting documents. The commission may conduct a hearing on the matter in the manner prescribed for treatment of contested cases under ch. 227 if it believes such action to be appropriate.*

(Emphases added).

<sup>9</sup> Available at [https://elections.wi.gov/sites/elections.wi.gov/files/2021-01/Decision%20Letter%20Seaman%20et%20al.%20v.%20Town%20of%20Omro%20et%20al\\_Final.pdf](https://elections.wi.gov/sites/elections.wi.gov/files/2021-01/Decision%20Letter%20Seaman%20et%20al.%20v.%20Town%20of%20Omro%20et%20al_Final.pdf).

any individual mentioned in chapter 7 is necessarily an election official proves too much. For example, Wis. Stat. § 7.38 prescribes how political parties and their chairpersons are to fill vacancies in nominations, but such parties and their chairs do not become election officials by virtue of their inclusion. Similarly, the Secretary of State is mentioned in Wis. Stat. § 7.70(5), but that does not make him an election official.<sup>10</sup> Moreover, the plain language of the statutes and the structure of the chapter both support this conclusion.

*First*, it is well-established that in statutory interpretation, “words and phrases shall be construed according to common and approved usage.” Wis. Stat. § 990.01(1); *see also Kalal*, 2004 WI 58, ¶45 (“Statutory language is given its common, ordinary, and accepted meaning.”). As relevant here, the Merriam-Webster Dictionary provides that to “conduct” is to “direct or take part in the operation or management of” or to “lead from a position of command.” *Conduct*, Merriam-Webster Dictionary (2020).<sup>11</sup> It is also well-established that the constitutional power to “‘say how, when, and where’ elections shall be conducted” is vested in the Legislature. *League of Women Voters of Wis. v. Walker*, 2014 WI 97, ¶24, 357 Wis. 2d 360, 851 N.W.2d 302 (quoting *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473 (1949)). The Legislature has delegated some of its supervisory authority over elections to the WEC, but it has not expressly

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<sup>10</sup> The Wisconsin Legislative Reference Bureau describes the Wisconsin election process in detail in its annual publication of the Wisconsin Blue Book. Notably, in the 2019-20 edition, there is an extensive discussion of election administration, which is shared by various levels of government, but there is no mention of either the Secretary of State or the Governor having any role in election administration. Wisconsin Legislative Reference Bureau, *Elections in Wisconsin*, WISCONSIN BLUE BOOK 367-69 (2019-20 ed. 2019), available at [https://docs.legis.wisconsin.gov/misc/lrb/blue\\_book/2019\\_2020/100\\_elections\\_in\\_wisconsin.pdf](https://docs.legis.wisconsin.gov/misc/lrb/blue_book/2019_2020/100_elections_in_wisconsin.pdf). The Wisconsin Policy Forum has also noted that, as of 2015, Wisconsin was one of only six states in which the Secretary of State has no official role in the election process. Wisconsin Policy Forum, *Chipping Away at Tradition: Constitutional Offices Past and Present*, THE WISCONSIN TAXPAYER, Vol. 83, No. 3 (Mar. 2015), available at <https://wispolicyforum.org/research/chipping-away-at-tradition-constitutional-offices-past-and-present/>.

<sup>11</sup> Available at <https://www.merriam-webster.com/dictionary/conduct>.

delegated any such authority to the Governor.<sup>12</sup>

*Second*, Wis. Stat. ch. 7 is divided into two subchapters, titled “SELECTION AND DUTIES” and “CANVASS OF RETURNS AND CERTIFICATION,” respectively. While the titles of statutory subchapters are not part of the statutes, *see* Wis. Stat. § 990.001(6), they may be considered to resolve doubt as to statutory meaning. *State v. Lopez*, 2019 WI 101, ¶29, 389 Wis. 2d 156, 936 N.W.2d 125 (citations omitted). Subchapter I, “SELECTION AND DUTIES,” discusses election officials, including municipal and county clerks, boards of election commissioners, inspectors, voting machine custodians, and automatic tabulating equipment technicians, all of whom have duties before, on, and immediately after Election Day. *See* Wis. Stat. §§ 7.03-.41. Nowhere does subchapter I mention the Governor or assign the Governor any particular duty. *See id.* To the contrary, subchapter I expressly provides that “[o]nly election officials appointed under this section or s. 6.875<sup>[13]</sup> may conduct an election.” *Id.* § 7.30(2). The sole mention of the Governor in chapter 7 appears in Wis. Stat. § 7.70(5), the penultimate section in subchapter II, after the state canvass, and thus the election, is complete.

All of this underscores the simple fact that the Governor does not administer or otherwise participate in the conduct of Wisconsin elections. The Governor does not “direct or take part in the operation or management of” the election, nor does he “lead [the election] from a position of command.” *Conduct*, Merriam-Webster Dictionary (2020).<sup>14</sup> Thus, the Governor is not charged with any duties “relating to the *conduct* of an election,” Wis. Stat. § 5.02(4e) (emphasis added).

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<sup>12</sup> *See* Wisconsin Legislative Reference Bureau, *Elections in Wisconsin*, WISCONSIN BLUE BOOK 359-80 (2019-20 ed. 2019), available at [https://docs.legis.wisconsin.gov/misc/lrb/blue\\_book/2019\\_2020/100\\_elections\\_in\\_wisconsin.pdf](https://docs.legis.wisconsin.gov/misc/lrb/blue_book/2019_2020/100_elections_in_wisconsin.pdf).

<sup>13</sup> Wis. Stat. § 6.875 addresses the appointment of special voting deputies to assist voters in residential care facilities and retirement homes with casting their ballots.

<sup>14</sup> Available at <https://www.merriam-webster.com/dictionary/conduct>.

The Governor is not, therefore, an election official, as that term is defined and used in state law. It follows that the Governor is not properly the subject of a complaint under Wis. Stat. § 5.06. This alone requires dismissal of the amended complaint.

**II. The Governor Acted in Full Accord with State Law When He Signed and Caused To Be Transmitted a Certificate of Ascertainment for the 2020 Presidential Election.**

Even if the amended complaint can proceed against the Governor, its allegations have no merit. The amended complaint misreads the applicable statutory provisions and fails to distinguish between two entirely distinct certificates that the WEC prepares after elections.

Wisconsin law prohibits the issuance of certificates of election before the time for filing a recount appeal has expired. Wis. Stat. § 7.70(5)(a). The Governor did not sign or cause to be transmitted any certificate of election last fall. Rather, he signed and caused to be transmitted to the federal government a *certificate of ascertainment*, as he was required to do by both state and federal law. *Id.* § 7.70(5)(b); 3 U.S.C § 6. These are two separate and distinct certificates. The distinction between the two types of certificates—election and ascertainment—is clear in Wisconsin law (not only now but tracing back to statehood), tracks the federal Electoral Count Act, and makes sense as a matter of policy. The amended complaint’s failure to recognize this crucial distinction is fatal.

**A. Certificates of Ascertainment Are Distinct from Certificates of Election.**

As the amended complaint asserts, Wis. Stat. § 7.70(5)(a) provides that when a valid recount petition is filed, “the governor or [WEC] may not issue a certificate of election until the recount has been completed and time allowed for filing an appeal has passed, or if appealed until the appeal is decided.” (Amend. Cmpl. ¶7.) This is true, but irrelevant here, because neither the WEC nor the Governor issued certificates of election to presidential electors on November 30,



2020. Rather, WEC staff prepared and the Governor signed and transmitted a certificate of *ascertainment* as required by both state and federal law.

For any statewide election, the WEC Chairperson, or the Chairperson's designee, must publicly canvass the election returns that county clerks submit to the WEC and must make a statement about the total number of votes cast at the election for the offices involved in the election. Wis. Stat. § 7.70(3)(a), (d).<sup>15</sup> The Chairperson, or the Chairperson's designee, must also certify the results of the election and prepare a statement of determination that indicates who has been elected and must deliver each statement of certification and determination to the WEC. *Id.* § 7.70(3)(g). For a general election, the Chairperson, or the Chairperson's designee, must complete the state canvass no later than December 1. *Id.* § 7.70(3)(a).

Once the Chairperson or the Chairperson's designee has completed the state canvass, the WEC is required to record each certified statement and determination and then to make and transmit to each person declared elected a certificate of election under the seal of the WEC. *Id.* § 7.70(5)(a). Such certificates of election apply across the board to offices that cross county lines, including statewide officials, members of Congress, and members of the Wisconsin Legislature. Paragraph 7.70(5)(a) contains specific requirements for certificates of election for members of Congress; certificates for U.S. Senators in particular must be signed by the Governor and the Secretary of State. *Id.* "When a valid petition for recount is filed," neither the WEC nor the

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<sup>15</sup> Attorney General J.B. Van Hollen concluded that the public canvassing conducted by the WEC Chairperson is not subject to open meetings law, although, as a matter of practice, public notice of the state level canvass has been routinely given, including in November 2020. See OAG 05-14; *State Canvass of the Presidential Contest and Determination of the Results of the Recount*, WEC, available at <https://elections.wi.gov/node/7257>.

Governor may “issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided.” *Id.*

Separate and apart from the certificates of election governed by Wis. Stat. § 7.70(5)(a), the State must generate a distinct piece of paper unique to presidential electors—the certificate of ascertainment. That certificate is governed by Wis. Stat. § 7.70(5)(b) and provisions of federal law.<sup>16</sup> Paragraph 7.70(5)(b) requires the WEC to prepare this certificate showing the determination of the state canvass results in the presidential election and the names of the persons elected as presidential electors as a consequence of those results. *Id.* The Governor must sign, affix the great seal of the State, and transmit the certificate by registered mail to the U.S. Administrator of General Services. *Id.* (As a matter of federal law, an additional signed original must be sent to the Archivist of the United States. 3 U.S.C. § 6.) The Governor must also prepare six duplicate originals of the certificate and deliver them to one of the presidential electors on or before the date when the Electoral College convenes. Wis. Stat. § 7.70(5)(b); *see also id.* § 7.75(1).

That the two distinct paragraphs comprising Wis. Stat. § 7.70(5) address two distinct types of certificates is clear from a plain-language analysis and finds support in both statutory history and historical practice. Under Wis. Stat. § 7.70(5)(a), “[i]mmediately after the expiration of the time allowed to file a petition for recount, the [WEC] shall make and transmit to each person declared elected a *certificate of election* under the seal of the commission.” (Emphasis added). Wis. Stat. 7.70(5)(b), by contrast, requires the preparation and distribution of duplicate originals of a “certificate *showing the determination of the results of the canvass and the names of the persons elected.*” (Emphasis added).

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<sup>16</sup> State law does not specify the name of this certificate, but, pursuant to federal law, this certificate, and its duplicates, are called certificates of ascertainment. 3 U.S.C. § 6.

On its face, a certificate that shows the “determination of the results of the canvass and the names of the persons elected” differs from a “certificate of election.” Had the Legislature intended both paragraphs to address identical certificates of election, they would have used the same phrasing in both. *Augsburger v. Homestead Mut. Ins. Co.*, 2014 WI 133, ¶17, 359 Wis. 2d 385, 856 N.W.2d 874 (quoting *Pawłowski v. Am. Family Ins. Co.*, 2009 WI 105, ¶22, 322 Wis. 2d 21, 777 N.W.2d 67) (“When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings”); *Armes v. Kenosha Cty.*, 81 Wis. 2d 309, 318, 260 N.W.2d 515 (1977) (“Where the legislature uses two different phrases ... in two paragraphs in the same section, it is presumed to have intended the two phrases to have different meanings.”). Moreover, the federal Electoral Count Act makes clear that Wis. Stat. § 7.70(5)(b) refers not to certificates of election, which are creations of state law, but to certificates of ascertainment, which are creations of federal law and must be delivered to the United States Archivist and used by the presidential electors when they meet to cast the State’s electoral votes. *See* 3 U.S.C. §§ 6, 9.<sup>17</sup>

Because certificates of ascertainment are categorically different from certificates of election, Wis. Stat. § 7.70(5)(a)’s caveat that no certificate of election may be issued while a recount is pending has no relevance to certificates of ascertainment. Thus issuing a certificate of ascertainment under paragraph 7.70(5)(b)—as occurred here—does not conflict with paragraph 7.70(5)(a). To suggest otherwise, as the amended complaint does, is to read into Wis. Stat. § 7.70(5)(b) words that the Legislature chose not to include. Such an interpretation violates

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<sup>17</sup> Historically, including as recently as the 2016 election under this statutory regime, distinct certificates of election and certificates of ascertainment have been delivered to presidential electors. *Cf.* R.S. 1849 c. 6, ss. 79-81 and c. 7, s. 5. But it is far from clear that Wis. Stat. § 7.70(5) *requires* the WEC to issue certificates of election to presidential electors.

bedrock principles of statutory construction. *Jefferson v. Dane Cty.*, 2020 WI 90, ¶25, --- Wis. 2d ---, --- N.W.2d --- (citing *Dawson v. Town of Jackson*, 2011 WI 77, ¶42, 336 Wis. 2d 318, 801 N.W.2d 316) (“We will not add words into a statute that the legislature did not see fit to employ.”); *Cnty. of Dane v. Labor & Indus. Rev. Comm’n*, 2009 WI 9, ¶33, 315 Wis. 2d 293, 759 N.W.2d 571 (“We will not read into the statute a limitation the plain language does not evidence.”).

**B. Issuing a Certificate of Ascertainment is a Mandatory Ministerial Duty.**

The complaint argues an abuse of discretion where there is no discretion to be had. Once the state canvass is complete and the results are certified, the winning presidential electors are presumed elected. At that time, the WEC “*shall* prepare a certificate [of ascertainment] showing the determination of the results of the canvass and the names of the persons elected.” Wis. Stat. § 7.70(5)(b) (emphasis added). The same paragraph provides that the Governor “*shall* sign, affix the great seal of the state, and transmit the certificate by registered mail to the U.S. administrator of general services.” *Id.* (emphasis added).

Even if a duly elected presidential elector is entitled to receive a certificate of election, that certificate does not confer any right to hold office. Rather, it is the state canvass that determines the election of presidential electors, and the certificate is merely evidence of the results.<sup>18</sup> Certainly, the identity of Wisconsin’s presidential electors could change as the result of a recount

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<sup>18</sup> The Wisconsin Supreme Court recognized this clear distinction more than a century ago: “[T]here is a substantial right conferred by the canvass on the person declared to be elected, of which right the certificate is the legal evidence. The canvass is for a purpose. It is to determine who was elected to the office.... Not necessarily to determine the fact permanently or beyond the possibility of revision or reversal, but to determine the fact for the time being, and until a different result be reached in a proper proceeding to contest the title of the certificate holder to the office.” *State v. Oates*, 86 Wis. 634, 57 N.W. 296, 297 (1893); accord Wis. Stat. § 7.70(3)(g) (as part of state canvass, WEC Chairperson “shall prepare a statement certifying the results of the election and shall attach to the statement a certificate of determination which shall indicate the names of persons who have been elected”); *id.* § 8.25(1) (noting that presidential electors are elected as a result of the general election).

or an appeal from the recount.<sup>19</sup> But once the state canvass is complete and the results are certified, the winning presidential electors are presumed elected, thus triggering the remaining ministerial obligations under state and federal law, including the Governor's.

While Complainant alleges that the Governor abused the discretion vested in him by Wis. Stat. § 7.70(5) (Amend. Cmplt. ¶5), the statute makes clear that the Governor's duties with respect to the certificate of ascertainment are ministerial. State law does not allow for the exercise of discretion in fulfilling these duties.

**C. A Recount Delays Election Determinations, Certificates of Election, and Certificates of Ascertainment, But Not All in Equal Measure.**

State law prescribes a strict timeline for the conduct of the state canvass following an election involving statewide and national offices. Counties are required to complete their canvassing activities and submit their election returns to the WEC by no later than 14 days after the general election. Wis. Stat. § 7.60(5)(a). As discussed above, the WEC Chairperson, or the Chairperson's designee, must then, no later than December 1, publicly canvass the election returns and make a statement about the total number of votes cast at the election for the offices involved in the election. *Id.* § 7.70(3)(a), (d). The Chairperson, or the Chairperson's designee, must also certify the results of the election and prepare a statement of determination that indicates who has been elected and must deliver the statements to the WEC. *Id.* § 7.70(3)(g).

However, state law provides that the WEC Chairperson, or the Chairperson's designee, "may not make a determination in any election if a recount is pending before any county board of

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<sup>19</sup> Federal law accounts for what happens if a state must subsequently submit a corrected certificate. *First*, under the federal statute governing the counting of electoral votes, a state governor may issue a certificate of ascertainment based on the canvassing and then a subsequent certificate of "determination" upon the conclusion of all election challenges. 3 U.S.C. § 6. *Second*, as explained in note 13, *supra*, federal law provides guidance to Congress for how to handle the receipt of multiple, conflicting slates of electoral votes from one state. 3 U.S.C. § 15.

canvassers in that election.” *Id.* § 9.01(1)(ar)3. Likewise, the WEC “may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided.” *Id.* § 7.70(5)(a). In general, the WEC Chairperson, or the Chairperson’s designee, is permitted to canvass only the regular returns submitted by the counties, not any additional or supplemental returns, except in the case of a recount, when a timely submitted recount return is accepted in lieu of any prior return from the same county for the same office. *Id.* § 7.70(3)(i).

In the case of a statewide election, a petition for recount must be filed with the WEC, which must then “promptly by certified mail or other expeditious means order the proper county boards of canvassers to commence the recount.” *Id.* § 9.01(1)(ar)3. The counties must conduct the recount and submit election returns to the WEC “as soon as possible, but in no case later than 13 days from the date of the order.” *Id.* The WEC Chairperson, or the Chairperson’s designee, must then “publicly examine the returns and determine the results no later than 9 a.m. on the 3rd business day following receipt.” *Id.* § 9.01(5)(c). Read together, the statutes demonstrate that the effect of a properly filed recount petition is not to completely halt the conduct of the state canvass, but rather to delay it so that the results of the state canvass can be revised based on the review of supplemental county returns.<sup>20</sup>

That the WEC Chairperson, or the Chairperson’s designee, may continue to conduct the state canvass while a recount is pending makes sense for several policy reasons. *First*, because there are frequently multiple statewide candidates elected during a given election, halting the state

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<sup>20</sup> This conclusion is buttressed by a clear statutory mismatch. Consider: Wis. Stat. § 9.01(5)(c) sets a three-day deadline for the WEC Chairperson, or the Chairperson’s designee, to conduct the state canvass with the recounted county results, while Wis. Stat. § 9.01(6)(a) establishes a five-day window for an aggrieved candidate to file an appeal of the recount results. This necessarily shows that the Legislature anticipated the state canvass being completed—and certificates of ascertainment concomitantly being issued—even while there may yet be judicial review of recount results.

canvass completely for the recount of one office would unnecessarily hamstring the completion of the state canvass for other, uncontested offices. *Second*, state law allows ten days for the state canvass, but only three business days for the examination of recount returns. *Compare* Wis. Stat. § 7.70(3)(c) *with id.* § 9.01(5)(c). From this one can logically infer that the statutes contemplate that the state canvass as a whole requires much more work than the review of recount returns for a single office. *Third*, state law permits a candidate who petitions for a recount to withdraw that petition at any time. *Id.* § 9.01(1)(am). If the state canvass proceeds while a recount is pending, the WEC Chairperson, or the Chairperson's designee, can promptly certify the election results and issue a determination, and the entire process can thereby remain in substantial compliance with the default statutory timelines, in the event that a recount petition is withdrawn.

That leaves one loose end: the effect of a recount on the issuance of certificates of election and, in the case of a presidential election, the issuance of the certificate of ascertainment. Certificates of election are clearly governed by Wis. Stat. § 7.70(5)(a), which expressly provides that they cannot issue during the pendency of a recount or of any appeal from the results of the recount. The certificate of ascertainment is not similarly delayed, however, because Wis. Stat. § 7.70(5)(b) contains no similar provision.

Reading the delay provision in paragraph 7.70(5)(a) into paragraph 7.70(5)(b) is improper and leads to absurd results. Importing the provision into the latter paragraph, from which the Legislature chose to omit it, contravenes fundamental principles of statutory construction. *See Jefferson*, 2020 WI 90, ¶25; *Augsburger*, 2014 WI 133, ¶17; *Cnty. of Dane*, 2009 WI 9, ¶33; *Armes*, 81 Wis. 2d at 318. Such an overriding of the plain text also risks precluding Wisconsin's participation in the Electoral College and disenfranchising the State's voters from the process of

selecting the president and vice president.<sup>21</sup> That possibility cannot be countenanced; any statutory interpretation that could permit such an outcome is implausible and must be rejected.

In sum, the initiation of a recount delays issuance of a certificate of ascertainment until the state canvass for the contested office is complete and the WEC Chairperson, or the Chairperson's designee, has determined the results—but not until all time for possible appeal has expired. Here, President Trump requested a partial recount. The recount was timely completed, and the WEC Chairperson made a determination of the state canvass results after receiving the county recount returns. That determination triggered a mandatory duty to issue the certificate of ascertainment. The WEC and the Governor discharged that mandatory duty. As the facts in the amended complaint make clear, everything that transpired here was in full accord with Wisconsin law.

**D. Signing and Transmitting a Certificate of Ascertainment before All Time for the Appeal of Recount Results Has Expired Is Consistent with Past Practice.**

Complainant attempts to compare and contrast actions taken by then-Governor Scott Walker following the recount of the presidential election results in 2016 with the actions taken by Governor Evers, discussed above. Specifically, the amended complaint asserts that Governor

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<sup>21</sup> If no certificate of ascertainment may issue until the completion not only of the recount but also of all appeals from the result of the recount, then any aggrieved candidates will always (at least as long as the windows to prosecute appeal in Wis. Stat. § 9.01 remain unchanged) be able to prevent the slate of electors for the winning candidates from casting Wisconsin's electoral votes for the candidates chosen by the largest number of Wisconsin voters. That simply cannot be the proper interpretation of Wisconsin law.

Nor should there be concern that a certificate of ascertainment issued earlier in the recount process will allow Wisconsin's electoral votes to be cast for the wrong candidates. This is true for two reasons. *First*, the federal Electoral Count Act sets several deadlines in December of a presidential election year, though Congress does not meet to accept and count the Electoral College votes until January of the following year. For Wisconsin's electoral votes to be counted, Wisconsin must meet some of the December deadlines, which are the ones most imperiled by an erroneous interpretation of Wis. Stat. § 7.70(5)(b). *Second* and relatedly, the Electoral Count Act anticipates and provides guidance on how Congress shall proceed if it receives multiple, conflicting slates of electoral votes from one state. In other words, federal law contains mechanisms to deal with any necessary corrections to Wisconsin's certificate of ascertainment, *see* 3 U.S.C. § 15; the greater risk is in missing statutory deadlines entirely while awaiting the final results of a recount process that is, based on both historical evidence and the highly reticulated nature of Wisconsin's statutes setting forth election procedures, highly unlikely to reverse the ultimate outcome of the election.



Walker “sent his certificate of ascertainment just prior to the safe harbor deadline” and that the “statewide recount had been completed and no ‘controversy or contest concerning the appointment of all or any of the electors’ existed at the time he sent his certificate.” (Amend. Cmplt. ¶26.) This is an incomplete account of events in 2016 and a selective application of Wisconsin law.

Notably, the amended complaint provides no evidence establishing that, when Governor Walker issued the certificates of election and ascertainment in December 2016, there was no longer any controversy or contest. Governor Walker signed and transmitted a certificate of ascertainment on December 12, 2016, the *very same day* that the WEC Chairperson conducted the state canvass and certified the results. (Amend. Cmplt. Exh. 2.)<sup>22</sup> If the amended complaint’s interpretation of Wis. Stat § 7.70(5)(b) were correct, then Governor Walker violated the statute by issuing a certificate of ascertainment without waiting for the statutory window for an appeal of the recount result to close. The amended complaint points out that Governor Evers followed the practice of then-Governor Walker in issuing a certificate of ascertainment before the time allowed for filing a recount appeal under state law had passed. But the amended complaint fails to establish that either Governor Evers or then-Governor Walker acted contrary to law. With respect to past practice, the amended complaint demonstrates only that Governor Evers’s actions are consistent with those of his predecessors.<sup>23</sup> Consequently, Complainant’s allegations demonstrate that in signing and transmitting a certificate of ascertainment following the certification of the state canvass, but before all opportunity for a recount appeal had expired, Governor Evers acted consistently with past gubernatorial practice.

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<sup>22</sup> See also *2016 Fall General Election Results*, WEC, available at <https://elections.wi.gov/elections-voting/results/2016/fall-general>.

<sup>23</sup> Similarly, this shows that the actions of the current WEC Chairperson and Administrator with respect to the 2020 certificate of ascertainment are consistent with the actions of their predecessors, the then-WEC Chairperson and the then-Administrator with respect to the 2016 certificate of ascertainment.

\* \* \*

For all of these reasons—legal, factual, and historical—the amended complaint fails on the merits. Governor Evers acted properly, in full accord with Wisconsin law.

### CONCLUSION

For the foregoing reasons, the amended complaint must be dismissed. Review under Wis. Stat. § 5.06 does not apply to the amended complaint because it arose in connection with a recount under Wis. Stat. § 9.01 and the Governor is not subject to a complaint under Wis. Stat. § 5.06. Even if the amended complaint can reach the Governor, its allegations are without merit because the Governor acted in full compliance with state and federal law.

Dated this 13th day of January, 2021



Rachel E. Snyder

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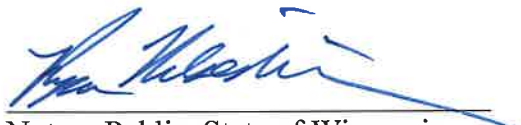
**VERIFICATION**

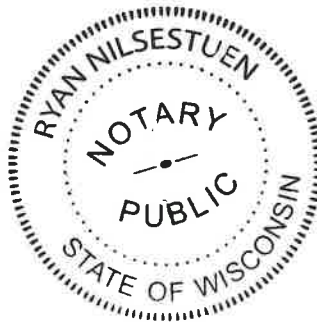
Tony Evers, being duly sworn, on oath, deposes and says:

1. That I, Tony Evers, am the current Governor of the state of Wisconsin.
2. That I, Tony Evers, have read the foregoing Verified Answer and that the same is true and correct, except as to those matters therein cited to another source, which matters I believe to be true.

Dated at Madison, Wisconsin this 12th day of January, 2021.

  
\_\_\_\_\_  
Governor Tony Evers

  
\_\_\_\_\_  
Notary Public, State of Wisconsin



My commission is permanent.

**CERTIFICATE OF SERVICE**

I, Rachel E. Snyder, hereby certify that, in addition to filing with special counsel for the Wisconsin Elections Commission via email, a true and correct copy of Respondent Governor Evers's Verified Response to the Amended Complaint Filed December 9, 2020 was sent via First Class Certified Mail to the Wisconsin Elections Commission on January 13, 2021 at the following address:

Wisconsin Elections Commission  
P.O. Box 7984  
Madison, WI 53707-7984

I further certify that a true and correct copy of Respondent Governor Evers's Verified Response to the Amended Complaint Filed December 9, 2020 was sent via email and via First Class Certified Mail to Complainant on January 13, 2021 at the following address:

Dean Knudson  
1753 Laurel Avenue  
Hudson, WI 54016

Dated this 13th day of January, 2021.



Rachel E. Snyder

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