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EXHIBIT C

Date: February 9, 2022

To: Wisconsin Elections Commission

Subject: 2021 EL 21-13: *Sickel v. Hitt, et al.*
Memorandum on Complaint under Wis. Stat. § 7.75 and 5.10

This matter involves an allegation that ten presidential elector nominees violated certain Wisconsin election laws when they met on December 14, 2020, to vote as presidential electors for Donald Trump and Michael Pence. That vote occurred after a statement of canvas certified election results in favor of Joseph Biden and Kamala Harris, after a recount was completed, but while court challenges to the election result were pending. Complainants argue that the December 14, 2020, meeting was an unlawful attempt to undermine the election, and the Respondents argue that the meeting was necessary to avoid missing a statutory deadline while legal challenges were pending. Based upon the text of the relevant statutes, and in light of the facts, historical precedent, and related federal authorities, this memorandum concludes that the Complaint does not raise a reasonable suspicion that Respondents violated Wisconsin election law.

Complainants also argue that eight of the Respondents forfeited any defenses by not filing separate responses to the Complaint. Under the Commission's procedures for deciding complaints of this nature, a respondent does not default by declining to individually respond.

I. Nature of the proceeding.

This action is commenced under Wis. Stat. § 5.05. In a section 5.05 complaint, the Commission makes one of three initial findings. It may (1) find by a preponderance of the evidence that a complaint is frivolous, (2) fail to find that there is reasonable suspicion of a violation and dismiss the complaint, or

(3) find that there is reasonable suspicion of a violation. Wis. Stat. §§ 5.05(2m)(c)2.am, 5.05(2m)(c)(4).

If the Commission finds that there is reasonable suspicion of a violation, it then has two options for how to proceed. First, it may authorize the commencement of an investigation. Wis. Stat. § 5.05(2m)(c)(4) ("if the commission believes that there is reasonable suspicion . . . the commission may by resolution authorize the commencement of an investigation.") At the end of such investigation, the Commission would determine whether probable cause exists to believe that a violation has occurred, whether to conduct further investigation, or whether to terminate the investigation due to lack of sufficient evidence to indicate a violation has occurred. Wis. Stat. § 5.05(2m)(c)(5). Additionally, "[a]t the conclusion of its investigation, the commission shall, in preliminary written findings of fact and conclusions based thereon, make a determination of whether or not probable cause exists to believe that a violation. . . has occurred or is occurring. Wis. Stat. § 5.05(2m)(c)(9).

Second, the Commission may make a finding of probable cause without an investigation. Wis. Stat. § 5.05(2m)(c)(6). The Commission could then authorize the administrator to file a civil complaint against the alleged violator or refer the matter to a district attorney. Wis. Stat. §§ 5.05(2m)(c)(6), (11).

No court decision has interpreted "reasonable suspicion" in the context of section 5.05. In other contexts, courts have indicated that reasonable suspicion exists when there is a particularized and objective basis to suspect there has been a violation of the law. This can be drawn using common sense inferences from everyday life, as well as the person's experiences. Reasonable suspicion is more than a hunch, but less than probable cause. *Kansas v. Glover*, 140 S.Ct. 1183 (2020); *see also State v. Newer*, 2007 WI App 236; *State v. Post*, 2007 WI 60, ¶ 18, 301 Wis. 2d 1, 11, 733 N.W.2d 634 ("this court has consistently maintained that the determination of reasonable suspicion is based upon the totality of the circumstances"); *State v. Young*, 212 Wis. 2d 417, 424, 569 N.W.2d 84, 88 (Wis. Ct. App. 1997) ("[t]he question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present. . ."); *State v. Patton*, 2006 WI App 235, ¶ 9, 297 Wis. 2d 415, 297 Wis.2d 415 (in the traffic stop context reasonable suspicion is a particularized and objective basis for suspecting the person stopped of criminal activity.")

Probable cause is a higher standard than reasonable suspicion. *State v. Houghton*, 2015 WI 79, ¶ 21, 364 Wis. 2d 234; *Patton*, 297 Wis.2d 415 ¶ 9. Probable cause is defined in Wis. Admin. Code § EL 20.02(4) to mean "the facts and reasonable inferences that together are sufficient to justify a reasonable, prudent person, acting with caution, to believe that the matter asserted is probably true."

II. Scope of the Complaint.

The Complaint alleges that the respondents violated Wisconsin Statutes sections 7.75 and 5.10 and "[b]y this sworn Complaint [requests] that the Wisconsin Elections Commission investigate the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl. ¶ 32.) It further requests that the Commission "initiate an investigation pursuant to Wis. Stat. § 5.05(2m)(c)4. of the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl.[1] ¶ 33; Compl. Form[2] p. 1)

The complaint documents state that the Complainants have separately requested that the District Attorney for Milwaukee County investigate apparent criminal violations including crimes affecting the administration of government and forgery. (Compl. ¶ 35.) Complainants note that such investigation is "distinct from the civil actions [Complainants] request the Wisconsin Elections Commission to undertake." (Compl. ¶ 36.)

Consistent with the Complaint, this memorandum addresses the facts and arguments that the parties have raised regarding Wis. Stats. §§ 5.10 and 7.75. This memorandum does not address other potential violations of law, such as election fraud under Wis. Stat. § 12.13 or matters that the Complainants have raised to other authorities or discussed in the media, such as forgery under Wis. Stat. § 943.38, false swearing under Wis. Stat. § 946.32, falsely assuming to act as a public officer under Wis. Stat. § 946.69, simulating legal process under Wis. Stat. § 946.68, misconduct in public office under Wis. Stat. § 946.12, conspiracy, aiding, or attempt to commit such acts, or any other matter outside the scope of the complaint.

III. Nature of the Complaint.

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[1] "Compl." refers to the document titled "Sworn Complaint against fraudulent electors under Wis. Stat. § 5.05."

[2] "Compl. Form" refers to the document titled "State of Wisconsin Elections Commission Complaint Form."

On February 15, 2021, Complainant Paul Sickel filed a Complaint against Andrew Hitt, Robert Spindell, Kathy Kiernan, Bill Feehan, Carol Brunner, Scott Grabins, Darryl Carlson, Pam Travis, Kelly Ruh, and Mary Buestrin (the "Respondents"). The Complaint and supporting briefs allege that the Respondents violated Wis. Stat. §§ 5.05 and 7.75.

The Complaint involves events following the November 3, 2020, presidential election. On November 19, 2020, the Commission issued an order for recount.[3] On November 30, 2020, the Chairperson of the Commission executed a statement of canvass certifying that electors for candidates Biden and Harris received the greatest number of votes. (Compl. Ex. D.) On the same day, Governor Evers executed a certificate of ascertainment, certifying that result. (Compl. Ex. E.)

Simultaneously with the canvassing, recount, and certification, several election-related lawsuits were pending in both state and federal court, including legal challenges to the results. *E.g.*, *Donald J. Trump, et al. v. Joseph R. Biden, et al.*, Milwaukee Cty. Case No. 20-CV-7092; *Donald J. Trump, et al. v. The Wisconsin Elections Commission, et al.*, E.D. Wis. 2:20-CV-01785-BHL. These lawsuits were not finally concluded until February and March 2021, when the U.S. Supreme Court denied certiorari review in both cases. As of December 14, 2020, the recount results had been upheld but appeals, or appeal opportunities, remained. (*See* timeline in Sur-Reply, p. 2–3.) In the state court case, on December 14, 2020, the Wisconsin Supreme Court rejected a Trump campaign challenge. The campaign then filed a petition for writ of certiorari with the United States Supreme Court on December 29, 2020, which was denied on February 22, 2021. In the federal case, the district court dismissed the Trump complaint on December 12, 2020, an appeal was filed on December 14, 2020, and the court of appeals affirmed the dismissal on December 24, 2020. The campaign then filed a petition for writ of certiorari with the United States Supreme Court on December 30, 2020, which was denied on March 8, 2021.

On December 11, 2020, the Trump plaintiffs in the state-court recount case filed a petition with the Wisconsin Supreme Court that addressed the meeting and electoral college votes in a footnote:

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[3] Available at *Order for Recount,* Wisocnsin Elections Commission, https://elections.wi.gov/sites/elections.wi.gov/files/2020-11/WEC%20-%20Final%20Recount%20Order_0.pdf (last accessed November 3, 2021.)

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

(Goehre Aff. Ex. A: 8 n.3.)

On December 14, 2021, the Respondents met in the state Capitol building as electors for candidates Trump and Pence. (Compl. Ex. G.) Each executed a "Certificate of the Votes of the 2020 Electors From Wisconsin" indicating presidential votes for Trump and Pence. (Compl. Ex. G.) Respondents Hitt and Ruh sent the document to the President of the United States Senate, the Wisconsin Secretary of State, the Archivist of the United States, and the Chief Judge for the Western District of Wisconsin. (Compl. Ex. G.) The transmittal letter has only one signature, which appears to be of Andrew Hitt. (Compl. Ex. G.)

In a social media post, Respondent Feehan indicated that the Trump and Pence electoral college votes were "[j]ust keeping our legal options open." (Compl. Ex. H.) The Republican Party of Wisconsin, via Respondent Hitt, stated: "While President Trump's campaign continues to pursue legal options for Wisconsin, Republican electors met today in accordance with statutory guidelines to preserve our role in the electoral process with the final outcome still pending in the courts." (Compl. Ex. I.)

The Complaint alleges that "[t]he only reasonable inference that can be drawn from these documents [indicating electoral votes for Trump and Pence] is that the fraudulent electors created and delivered these documents for the purpose, and with the intent, that they be received as valid documentation for the purpose of inducing the United States Congress to credit the wrong candidates with having earned Wisconsin's ten electoral votes." (Compl. ¶ 24.) This, the Complainants contend, constituted fraud and an intent to undermine the presidential election. (Compl. ¶ 26.)

The Respondents deny this allegation, and state that they "acted with the sole intent of preserving standing and ensuring that if any of the pending legal

cases were successful, the courts did not claim it was too late for the appropriate remedy to be awarded." (Resp. 2–3.)

IV. Issue 1: Whether the Respondents' December 14, 2020, meeting or execution of documents including a "Certificate of Nomination Presidential Electors Meeting: October 6, 2020" violated Wis. Stat. §§ 5.10 or 7.75.

The Complainants request that the Commission "initiate an investigation pursuant to Wis. Stat. § 5.05(2m)(c)4. of the apparent violations of Wis. Stats. §§ 5.10 and 7.75." (Compl. ¶ 33.)

a. Laws at issue:

Sections 5.10 and 7.75 state:

> 5.10 Presidential electors
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> Although the names of the electors do not appear on the ballot and no reference is made to them, a vote for the president and vice president named on the ballot is a vote for the electors of the candidates for whom an elector's vote is cast. Under chs. 5 to 12, all references to the presidential election, the casting of votes and the canvassing of votes for president, or for president and vice president, mean votes for them through their pledged presidential electors.
>
> 7.75 Presidential electors meeting
>
> (1) The electors for president and vice president shall meet at the state capitol following the presidential election at 12:00 noon the first Monday after the 2nd Wednesday in December. If there is a vacancy in the office of an elector due to death, refusal to act, failure to attend or other cause, the electors present shall immediately proceed to fill by ballot, by a plurality of votes, the electoral college vacancy. When all electors are present, or the vacancies filled, they shall perform their required duties under the constitution and laws of the United States.
>
> (2) The presidential electors, when convened, shall vote by ballot for that person for president and that person for vice president who are, respectively, the candidates of the political party which nominated them

> under s. 8.18, the candidates whose names appeared on the nomination papers filed under s. 8.20, or the candidate or candidates who filed their names under s. 8.185(2), except that at least one of the persons for whom the electors vote may not be an inhabitant of this state. A presidential elector is not required to vote for a candidate who is deceased at the time of the meeting.

Wis. Stat. §§ 5.10, 7.75. These statutes describe that Wisconsin voters select presidential electors by voting for the presidential candidates, and that electors shall meet on a certain date and cast electoral college votes for their candidates. In 2020, December 14 was the deadline for presidential electors to meet. After that date, the Section 7.75 deadline would have been missed.

b. Analysis:

The issue in this complaint is whether the Trump and Pence electors violated these statutes when they met, voted, and documented their votes, after the canvassing, recount, and certification were complete, but before court challenges to the recount outcome were complete.

Applying sections 5.10 and 7.75 begins with the plain language of the statutes. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Nothing in either statute prohibits or otherwise limits a party from meeting to cast electoral votes during a challenge to an election tabulation. Instead, section 5.10 merely says that while 'the presidential candidates' names appear on the ballot, votes for those candidates are votes for their electors. And section 7.75 merely lays out the procedure for presidential electors to cast their votes. They say nothing about an alternative set of electors casting votes and do not expressly prohibit a slate of electors form casting votes to preserve their votes in case pending legal challenges prove successful.

Petitioners contend that "Because the Republican candidates for the offices of President and Vice President of the United States did not win Wisconsin's statewide November 2020 election, the Republican Party's designees were not elected as Wisconsin's Presidential Electors. Accordingly, they had no legal duty to meet on December 14, 2020." (Compl. ¶ 17.) The argument, in essence, is that the Respondents were not "electors" to begin with, so they had no duty to meet and vote.

As an initial matter, even assuming the Complainants were right that the Respondents had no *duty* to meet, it does not necessarily follow that meeting violated the law. The remainder of this argument has some facial appeal because the U.S. Constitution describes presidential electors as a product of the state election process. U.S. Const. art. II, § 1, cl. 2 ("Presidential Electors Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.") In other words, individuals nominated by a party to be electors are not actually electors until the state process decides who won the election. However, the Complainant's argument—that the Respondents were not electors—presumes the outcome of the state procedures. And as noted above, Wisconsin law does not prohibit an alternative set of electors from meeting.

Respondents point out that the election outcome was still under judicial review, so their votes were a necessary protection against missing the deadline should the challenges to the November 30 canvassing have succeeded. Court pleadings, a news release, and social media indicate that the Respondents' intent was to avoid missing the December 14, 2020, deadline while court challenges were pending. Respondents point out that if they did not meet that day, they risked having no electoral votes that could possibly be counted if their legal challenges were successful and Trump were declared the successful candidate by legal process. Respondents' concern is reasonable; courts have found that candidates' delays can bar legal rights. *See Trump v. Biden*, 2020 WI 91, ¶¶ 13–22, 394 Wis. 2d 629, 951 N.W.2d 568 (barring claims where "[t]he Campaign offers no justification for this delay; it is patently unreasonable"); *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877 ("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"); *Joseph R. Santeler Complaint against Kanye West,* Case No. EL 20-30[4] (nomination papers rejected when submitted shortly after 5:00 p.m. deadline)

Complainants reply that if the intent was to preserve the deadline, the letter transmitting the record of Trump electoral votes could have stated expressly that the votes were contingent on the outcome of pending litigation,

[4] Meeting minutes available at *Notice of open and Closed Meeting,* Wisconsin Elections Commission, https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/August%2020%20Open%20Session%20Packet.pdf (last accessed November 3, 2021.)

which is what occurred in other states such as Pennsylvania and New Mexico. (Compl. Reply p. 2–3.) That is a valid criticism of the transmittal letter signed by Respondent Hitt. (Compl. Ex. G.) The letter would have been more accurate, and may have prevented confusion or concern, if it had expressly stated that the votes were being transmitted only to meet the statutory deadline in case they became operative after the lawsuits were resolved. That would have been better practice, and may have prevented this proceeding, but it likely not a violation of election statutes.

In addition to Pennsylvania and New Mexico in 2020, there is additional historical precedent for protective presidential elector votes. In the 1960 presidential election between Nixon and Kennedy, Hawaii's canvassing showed Nixon a winner by 141 votes and the governor issued a certificate of election to the Republican slate. The results were challenged in a lawsuit brought by Democratic voters, and a recount was commenced. The recount was not completed by the date that presential electors voted, December 19, and both the Democrats and Republicans met and cast their votes for their respective candidates. The recount concluded on December 28, and two days later the court declared that Kennedy had won the election by 115 votes. Ultimately, three certificates of electoral college votes and the court's judgment was submitted to Congress, and the votes were counted for Kennedy in light of the December 30 court ruling. (Goehre Aff. Ex. C–F.)

The Respondents actions here were similar to those of the Democratic presidential electors in Hawaii. They cast their votes, even though the canvass did not reflect a Trump victory, in order to preserve the opportunity for the votes to be counted if a court challenge found that Trump received the majority of votes. Petitioners point out a difference that the recount was still underway in Hawaii when the Democratic electors met, but in Hawaii it was the court decision that ultimately ended the dispute. As a federal court recognized in the 2020 election litigation, an election canvassing is not necessarily final while legal challenges are pending:

> The final determination of the next President and Vice President of the United States has not been made, however, and the issuance of a Certificate of Ascertainment is not necessarily dispositive on a state's electoral votes. . . . 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. The certificate of "determination" notifies the U.S. Congress of the state decision when Congress convenes . . . to count the electoral votes.

Trump v. Wisconsin Elections Comm'n, No. 20-CV-1785-BHL, 2020 WL 7318940, at *9 (E.D. Wis. Dec. 12, 2020). In the Wisconsin 2020 election, there was no final court decision by December 14.

Although the Commission's decision is confined to a state law inquiry, it is notable that federal law and Supreme Court commentary contemplate the possibility of multiple slates of electors. Federal statutes include procedures for Congress to follow "in such case of more than one return or paper purporting to be a return from a State" (3 U.S.C. § 15), and deadlines for state courts to resolve election-related disputes. 3 U.S.C. § 5. In a case involving the 2000 presidential election, the Supreme Court noted, in a dissent, that these rules "do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines." *Bush v. Gore*, 531 U.S. 98, 127, 121 S. Ct. 525 (2000) (J. Stevens, dissenting). These authorities acknowledge the possibility that state procedures may result in multiple electoral votes being transmitted to the federal legislature.

Finally, Complainants argue that the Respondents "met in a concerted effort to ensure that they would be mistaken, as a result of their deliberate forgery and fraud, for Wisconsin's legitimate Presidential Electors." (Compl. 25.) The record does not support this allegation. Before and after the December 14 meeting, the Respondents publicly stated, including in court pleadings, that they were meeting to preserve legal options while litigation was pending. (Compl. Ex. H–I; Goehre Aff. Ex. A: 8.)

Under the plain text of Wis. Stats. §§ 5.10 and 7.75, and in light of the facts, historical precedent, and related federal authorities, the Complaint does not raise a reasonable suspicion that Wis. Stats. §§ 5.10 or 7.75 were violated.

V. Issue 2: Whether Respondents Robert Spindell, Kathy Kiernan, Carol Brunner, Scott Grabins, Darryl Carlson, Pam Travis, Kelly Ruh, and Mary Buestrin defaulted this action.

The Commission received two responses to the Complaint; the Response to Complaint filed by counsel for Andrew Hitt and an email from Bill Feehan

stating that he joins the Hitt response. Complainants argue that all Respondents other than Hitt and Feehan have forfeited their opportunities to present facts and arguments or elected to not dispute the allegations. (Compl. Reply p. 1; Sur-Response p. 2.)

The statutes governing this complaint do not require a response and contain no provision for a default. The procedures in Wis. Stat. § 5.05 permit a respondent "to demonstrate to the commission . . that the commission should take no action against the person on the basis of the complaint," but there is no response requirement. Wis. Stat. § 5.05(2m)(c)2.a. There is no indication that a respondent defaults by not individually responding to a complaint. The Respondents other than Hitt and Feehan therefore did not default in this action by not submitting individual responses.

CONCLUSION

The allegations in the Complaint, and the supporting arguments and evidence, do not indicate that the Respondents violated Wis. Stats. §§ 5.10 or 7.75. Additionally, no Respondent is in default of those allegations.