IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GREAT AMERICA PAC, et al.,

Plaintiffs,

v. Case No. 16CV0795

WISCONSIN ELECTIONS COMMISSION, et al.,

Defendants.

DEFENDANTS' BRIEF IN OPPOSITION TO ENTRY OF PRELIMINARY INJUNCTION

Wisconsin's recount procedures are constitutional, and the plaintiffs' request for preliminary relief should be denied. The recount is already underway. It is going smoothly and is on schedule. The plaintiffs' request for a stay would alter the status quo rather than preserve it. It would cause, rather than remedy, a problem with the progress of the recount. Their allegations of harm are speculative and do not support standing, let alone preliminary relief.

They also have no likelihood of success on the merits. The equal protection claims fail because Wisconsin has uniform rules for counting ballots. This is not a case like *Bush v. Gore* because state courts here have not established post-election, non-uniform counting procedures. And their due process claims fail because there is no non-speculative evidence of any problem with Wisconsin's recount procedures, and no protected due process interest in

stopping a statewide recount because of purely hypothetical risks. And public policy weighs in favor of effectuating the statutes, enacted by the state legislature, for conducting a recount. The motion should be denied.

BACKGROUND

This case involves Wisconsin's statewide recount of presidential votes from the 2016 general election. Presidential candidates in that election included Jill Stein of the Green Party, as well as Democrat Hillary Clinton and Republican Donald Trump.[1] Jill Stein received 31,006 votes in Wisconsin.

Wisconsin election procedures provide that "[a]ny candidate voted for at any election . . . may petition for a recount," subject to certain timing requirements and pre-payment of the cost of the recount. Wis. Stat. § 9.01. Candidate Jill Stein timely filed a petition[2] and made the required payment.[3]

The Commission accordingly ordered municipal clerks to commence a recount at 9:00 a.m. on Thursday, December 1, 2016.[4] The start date was

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[1] Pre-recount canvass results are available at http://elections.wi.gov/sites/default/files/Statewide%20Report-all%20offices.pdf (last visited Dec. 7, 2016).

[2] A copy of the petition is available at http://elections.wi.gov/sites/default/files/news/wisconsin_recount_petition_of_jill_stein_00268242_12391.pdf (last visited Dec. 7, 2016).

[3] The fee payment information is available at http://elections.wi.gov/node/4457 (last visited Dec. 7, 2016).

[4] A copy of the order is available at http://elections.wi.gov/sites/default/files/memo/20/recount_order_president_pdf_23987.pdf (last visited Dec. 6, 2016).

widely publicized.[5] A week later, the plaintiffs filed this lawsuit. It seeks to stop the recount midstream.

PRELIMINARY INJUNCTION STANDARDS

The purpose of a preliminary injunction is to maintain the status quo—that is, to preserve the relative positions of the parties. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 264 (7th Cir. 1981). A preliminary injunction is an extraordinary remedy that is only available if the plaintiff carries its burden of proof as to all of the prerequisites for obtaining the injunction. *Fox Valley Harvestore v. A.O. Smith Harvestore Prod.*, 545 F.2d 1096, 1097 (7th Cir. 1976). Granting a preliminary injunction is "an exercise of very far-reaching power, never to be indulged in except in a case clearly demanding it." *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 389 (7th Cir. 1984).

The preliminary injunction analysis proceeds in two phases: a threshold phase and a balancing phase. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U. S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008).

In the first phase, the a moving plaintiff must show that: (1) absent a preliminary injunction, it will suffer irreparable harm prior to a final

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[5] *See, e.g.*, The Wall Street Journal article from November 28, 2016, titled, "Wisconsin Presidential Recount to Begin Thursday" available at http://www.wsj.com/articles/wisconsin-presidential-recount-to-begin-thursday-1480352509 (last visited Dec. 2, 2016).

determination of the case; (2) traditional legal remedies would be inadequate; and (3) it has some likelihood of prevailing on the merits of its claims. *Id.* (citing cases). If the plaintiff fails to meet any of those requirements, the injunction must be denied; only if all three requirements are met, does the analysis proceed to the second, balancing phase. *Id.*

In the second phase, the court must balance the nature and degree of the threatened harm to the plaintiff against the harm that an injunction would impose on the other parties and on the public interest. *Id.* "In so doing, the court employs a sliding scale approach: '[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor.'" *Id.* (quoting *Roland Mach Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984)). Finally, taking all of these factors into account, the court must exercise its discretion and make a decision based on its evaluation of the import of the various factors and the nature of the case. *Id.*, (citing *Lawson Prods., Inc. v. Avnet, Inc.,* 782 F.2d 1429, 1433 (7th Cir. 1986)).

Here, the plaintiffs cannot carry their burden on any of the preliminary injunction factors: a preliminary injunction would disturb, not preserve, the status quo; the plaintiffs have no irreparable harm–indeed they do not even have an interest sufficient for standing; the plaintiffs have no likelihood of success on the merits; and the State of Wisconsin and the public would be

irreparably harmed by any injunction that disrupts the statutory recount procedures.

ARGUMENT

The plaintiffs' request to halt the recount should be denied because they lack standing, cannot show irreparable harm, and do not demonstrate a likelihood of success on the merits. The recount is being conducted properly under established statutory procedures, it is proceeding on time without any major problems, and the plaintiffs have no valid claim.

I. The plaintiffs lack standing because their alleged harm is only conjectural or hypothetical.

As a threshold matter, the plaintiffs do not even possess the requisite standing to invoke this Court's jurisdiction under Article III of the U.S. Constitution. A plaintiff bears the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Standing requires an injury in fact that is "'actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560. For many of the same reasons that the plaintiffs cannot establish harm, they also cannot establish standing.

Court have previously found lack of standing for similar claims, such as theoretical risks of miscounting ballots by automatic tabulation machines. *Landes v. Tartaglione*, No. CIV.A. 04-3163, 2004 WL 2415074, at *3 (E.D. Pa. Oct. 28, 2004), *aff'd*, 153 F. App'x 131 (3d Cir. 2005), *cert. denied* 547 U.S. 1040 (U.S. 2006) ("[plaintiff] argues that voting machines are vulnerable to

manipulation or technical failure, but [plaintiff] does not assert that the voting machines in question have actually suffered from these issues in the past or that they will definitively malfunction or be tampered with during the upcoming election").

The plaintiffs here have likewise alleged only speculation about what could possibly go wrong. They offer no support that the individual-voter plaintiff or any members of the PACs will sustain a concrete and particularized injury. This is not a case where the plaintiffs allege that they are harmed by any state or local law or policy that systematically disadvantages some group, or even supporters of one candidate or another. Their contention is simply that any recount *could possibly* include some errors that *could* dilute some votes. The same could be said of every vote count in every election, including both initial counts and recounts. That would mean that, under their interpretation, every voter in every election would have Article III standing to bring a federal constitutional case on the grounds that the vote count was not perfect. Standing does not include such broad hypothetical harms.

II. The plaintiffs cannot show irreparable harm because the recount procedures are sound, and the recount is proceeding smoothly and is on track for timely completion.

Plaintiffs fail to make the required showing for a preliminary injunction that they will suffer "'irreparable harm' if preliminary [injunctive] relief is denied." *E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 703 (7th Cir. 2005) (citation omitted). Absent such a showing, "a court's inquiry is over and the injunction must be denied." *Id.* (citation omitted). Moreover, "speculative injuries do not justify this extraordinary remedy." *Id.* at 704.

Plaintiffs simply assert that they "will suffer irreparable injury from violation of their fundamental right to vote under the Due Process and Equal Protection Clauses," without any further explanation. (Pls. Br. 2.) This conclusory assertion does not suffice, especially since the plaintiffs concede that they were able to exercise their "fundamental right to vote" by voting in the 2016 general election. (Compl. ¶¶ 1–4.) Moreover, "equitable relief depends on irreparable harm, even when constitutional rights are at stake." *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 682 (7th Cir. 2012).

A closer examination of the plaintiffs' theory reveals that continuing Wisconsin's recount will not inflict on them any irreparable harm. Indeed, the plaintiffs concede that they are concerned only with "risks" of various purported issues with Wisconsin's recount—a "risk" that it will not be

completed before the "safe harbor" date, and a "risk" that unspecified votes will be erroneously counted. (Pls. Br. 1–2.) But both supposed "risks" are entirely speculative and thus cannot constitute irreparable harm. Plaintiffs have submitted no meaningful evidence in support of this claim.

As for the recount's completion date—leaving aside how such dates cannot amount to an "injury," as explained below—the plaintiffs can only speculate about when that date will occur. The recount is currently set to be completed on December 12, 2016, and the plaintiffs simply guess that it will not be done by then.[6] Mere speculation that this risk will materialize does not amount to an irreparable injury requiring immediate injunctive relief.

To the contrary, all indications are that the "Wisconsin Recount Proceeding is on Schedule without any Major Problems." (Haas Dec. ¶ 7, Ex. A.)[7] The Wisconsin State Journal has reported that the recount, which began on Thursday, December 1, "[brought] no major surprises," and it quoted a Wisconsin Elections Commission spokesman as saying "[s]o far, things are going smoothly."[8] WEC is monitoring the recount, and the WEC administrator

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[6] *See* http://elections.wi.gov/sites/default/files/memo/20/recount_order_president_pdf_23987.pdf (last accessed Dec.7, 2016).

[7] The Declaration of Michael Haas in support of Defendant's Brief in Opposition to Preliminary Injunction is referred to as the "Haas Declaration."

[8] *See* http://host.madison.com/wsj/news/local/govt-and-politics/no-major-surprises-as-presidential-recount-begins-in-wisconsin/article_783fcdf9-3bd0-59d2-8885-45ec5c4551f3.html (last accessed Dec. 7, 2016).

is unaware of any problems related to inconsistent counting standards, or any other problem with the recount that would affect its accuracy. (Haas Dec. ¶¶ 2, 7.)

Status reports on the progress of the recount are being publicly released at a webpage maintained by the WEC: http://elections.wi.gov/elections-voting/recount/2016-presidential. (Haas Dec. ¶¶ 2–3.) As of the night of Tuesday, December 6, 2016, 2,116,669 of 2,975,313 votes had already been recounted. (Haas Dec. ¶ 5.) That means that the recount was 71% complete as of December 6. (Haas Dec. ¶ 5.)

As of the afternoon of Wednesday, December 7, 2016, thirty-four of Wisconsin's seventy-two counties have completed their recount and sent verified results to WEC. (Haas Dec. ¶¶ 4–5.)[9] In other words, over forty-seven percent of Wisconsin's counties are already finished. Based upon the current status, WEC expects the recount to be complete by December 13, 2016. (Haas Dec. ¶ 6.)

Moreover, speculation that the recount *might* miscount the plaintiffs' votes cannot support a finding of irreparable harm. For this reason, the

[9] Counties that have completed their recount as of the afternoon of Wednesday, December 7 are: Adams, Barron, Bayfield, Columbia, Crawford, Dodge, Door, Douglas, Florence, Fond du Lac, Forest, Green, Green Lake, Iron, Jackson, Juneau, LaCrosse, Lafayette, Langlade, Menominee, Ozaukee, Pepin, Pierce, Polk, Price, Sawyer, Shawano, St. Croix, Taylor, Vernon, Walworth, Washburn, Washington, and Waupaca.

Eleventh Circuit affirmed the denial of a similar injunctive request in *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000). Like here, the plaintiffs in *Siegel* sought to enjoin a recount, but they did not show with evidence that the recount did (or would) affect their particular votes:

> No voter Plaintiff claims that in this election he was prevented from registering to vote, prevented from voting or prevented from voting for the candidate of his choice. Nor does any voter claim that his vote was rejected or not counted. The cases called to our attention by the parties that have warranted immediate injunctive relief have involved these kind of circumstances.

Siegel, 234 F.3d at 1177. The same is true for these plaintiffs. They simply guess that Wisconsin's recount may miscount some voters' ballots, but they offer no evidence to support their guess—let alone evidence related to their particular ballots.[10]

For all these reasons, the plaintiffs have not established irreparable harm and the requested injunction, therefore, must be denied.

[10] Of course, the PAC entities named as plaintiffs did not directly cast ballots, but they purport to assert standing based on their members who reside in Wisconsin and cast votes there. (Compl. ¶ 3.) Defendants reserve the right to dispute this argument, but, at most, it establishes that any purported "harm" here was suffered by individual voters. Moreover, the PAC plaintiffs never explain how their "institutional interests" would be harmed by the recount; this conclusory, unsupported assertion should be disregarded. (Compl. ¶ 3.)

III. The plaintiffs have no likelihood of success on the merits.

To obtain an injunction, the plaintiffs must also show at least a reasonable likelihood of ultimately prevailing on the merits of their claims. *Machlett Labs., Inc.*, 665 F.2d at 796–97. In this case, the plaintiffs have no reasonable probability of succeeding on either their equal protection or due process claim.

A. Wisconsin's recount procedures do not violate equal protection.

Plaintiffs are not likely to succeed on the merits of their equal protection claim because Wisconsin's recount procedures are uniform and sound. The plaintiffs argue that, under the U.S. Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), the current Wisconsin presidential recount is being conducted under standards that do not satisfy the Equal Protection Clause of the Fourteenth Amendment. The argument fails because *Bush v. Gore* is distinguishable on its facts and because the plaintiffs' sweeping claims about the alleged deficiencies of Wisconsin's election statutes go far beyond the narrow holding in that case. *Bush* specifically held that: "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Id.* at 109.

1. *Bush v. Gore* is factually distinguishable from this case.

In *Bush v. Gore*, the U.S. Supreme Court addressed a unique factual situation regarding the 2000 presidential election in Florida, and held that any recount conducted under standards and procedures which had been mandated by the Florida Supreme Court would not satisfy equal protection requirements. 531 U.S. at 110.

The decision was issued against a complex background of multiple Florida state court decisions affecting the recount procedures, standards, and timelines. *See id.* at 100–03. Initially, pursuant to Florida statutes, candidate Al Gore had requested a full recount in four counties that he had selected. *Id.* at 101. A dispute over the statutory timeline for that recount process went to the Florida Supreme Court, which waived a statutory deadline, and then went to the U.S. Supreme Court, which vacated the Florida Supreme Court decision and remanded the case. *Id.* On remand, the Florida Supreme Court reinstated the deadline date it had previously imposed and, on that date, state election officials certified the election results and declared candidate George W. Bush the winner of the election. *Id.* Gore subsequently filed a complaint in Florida circuit court contesting the certification. *Id.* The circuit court ruled that Gore failed to carry his burden of proof for changing the election results. *Id.* Gore appealed and the case again made its way to the Florida Supreme Court. *Id.*

The Florida Supreme Court reversed and remanded the case to the circuit court with specific instructions that directly affected how votes would be counted in specific circumstances: (1) add additional votes to Gore's total from Palm Beach County, which had not completed its recount by the deadline previously established by the Florida Supreme Court; (2) add a net gain of 168 votes for Gore based on the recount process in Miami-Dade County, which had not been completed at all; and (3) conduct a manual recount of approximately 9,000 undervoted[11] ballots in Miami-Dade County. *Id.* at 102–03. The Florida Supreme Court also strongly suggested, without commanding, that the trial court should conduct a statewide recount of all undervoted ballots—a suggestion that the trial court adopted. *Id.* at 102.

Bush then asked the U.S. Supreme Court for an emergency stay of the Florida Supreme Court's decision. *Id.* at 100. The U.S. Supreme Court granted the stay, treated the stay application as a certiorari petition, and granted certiorari. *Id.* On the merits, a majority of the U.S. Supreme Court held that the recount procedures ordered by the Florida Supreme Court were inconsistent with the minimum procedures necessary to afford equal protection to each voter's fundamental right to vote. *Id.* at 109. On that basis,

[11] An undervoted presidential ballot is a ballot on which no vote was registered for the presidential race, but votes were registered for one or more other races or questions on the ballot.

the judgment of the Florida Supreme Court ordering a recount to proceed was reversed. *Id.* at 110.

The *Bush v. Gore* majority described several ways in which the Florida recount caused unequal treatment of voters.

First, different standards for ascertaining a voter's intent from identically punched ballots had been applied in different counties and at different times within single counties. *Id.* at 107–09. In particular, ballots with punch holes that had been dented, but not fully punched through ("dimpled chads"), were treated differently in different counties and at different times. *Id.* at 106–07. In addition, the Florida Supreme Court had construed state law governing the ascertainment of voter intent in a way that "ratified this uneven treatment" and the state circuit court, at the Florida Supreme Court's urging, had ordered a statewide recount of undervoted ballots pursuant to that uneven treatment. *Id.* at 107. This uneven treatment resulted in certain kinds of ballots being more likely to be counted as legal votes in some places than in others, thus discriminating against some voters, based on where they happened to reside.

Second, in addition to the actions of county election officials, there was also concern at the U.S. Supreme Court that actions by the Florida Supreme Court substantially changed previously established standards and procedures

for reviewing and counting ballots after the election had taken place. *See id.* at 107–08; *see also id.* at 113–14 (Rehnquist, C.J., concurring).

Third, the recount system approved by the Florida Supreme Court resulted in different sets of ballots being recounted in different counties. Initially, all ballots were recounted only in the four counties that had been selected by Gore. *Id.* at 101. By the end of the litigation in Florida, a statewide recount had been ordered, but the statewide recount only counted certain "undervote[d]" ballots, not all ballots. *Id.* at 107. Under this approach, all ballots that were overvoted[12] and ballots that were neither over nor undervoted would not be recounted in any counties except the four counties chosen by Gore. The recount procedure that had been approved by the Florida Supreme Court thus would not have ascertained the will of all Florida voters, but only of that subset of voters who either had cast undervoted ballots or who resided in one of the counties that Gore alone had chosen for a full recount.

Fourth, the Florida Supreme Court had allowed Gore's certified vote total to include the results of a partial recount process in Miami-Dade County that had not been completed. *Id.* at 108. In effect, the court ratified a decision to stop in the middle of the recount in that county and award one candidate

[12] An overvoted presidential ballot is a ballot on which a vote was registered for more than one presidential candidate, resulting in no presidential vote being counted for that ballot.

the net number of new votes he had picked up by that point in time. Because ballots are counted precinct-by-precinct, this necessarily meant that ballots cast in some parts of the county were included in the recount, while ballots cast in other parts of the county were not included.

Fifth, the U.S. Supreme Court was concerned by the fact that the statewide recount of undervotes was being conducted by ad hoc teams of judges with no prior training in handling and interpreting ballots, and was being conducted without giving candidates an opportunity to register contemporaneous objections to the counting of any ballot. *Id.* at 109.

The Wisconsin recount at issue in the present case does not share any of the problematic features of the Florida recount that were identified in *Bush v. Gore*.

First, with regard to standards for ascertaining voter intent, the plaintiffs have provided no evidence that the current recount in Wisconsin shares the problematic features of the 2000 Florida recount. Wisconsin is using the uniform statutory standards for determining voter intent mandated in Wis. Stat. § 7.50. Plaintiffs contend that those standards—in particular, the standards in Wis. Stat. § 7.50(2)(c) and (cm), which govern the interpretation of marks and erasures on ballots—give local election officials too much discretion to accord different treatment to similarly marked ballots. Unlike the Florida situation, however, there is no record evidence here that local election

officials have construed those statutory standards differently in different counties, or differently at different times within a single county. Nor has any Wisconsin state court ratified disparate standards for interpreting ballots, as was the case in Florida. All that has happened here is that a recount has commenced pursuant to state statutes and the plaintiffs have sought to enjoin the recount process based on what is, in effect, a claim that Wis. Stat. § 7.50(2)(c) and (cm) facially violate the Equal Protection Clause. That is not analogous to the situation in *Bush v. Gore*.

Second, there are no new, post-election standards for reviewing and tabulating presidential ballots in Wisconsin. The standards and procedures in place for Wisconsin's recount are the same standards and procedures used for initially tabulating the ballots. To the extent that Wis. Stat. §§ 7.50 and 7.51 call upon canvassers to examine a ballot for the purpose of determining for whom a vote was cast, the canvassers are required to apply the same standards in a recount that were applied in the initial canvass. *See* Wis. Stat. § 9.01(1)(b)5m. ("Except as otherwise provided in this section, the recount shall be conducted in accordance with s. 7.51."). These standards present no equal protection problem because the treatment is uniform and identical to normal counting procedures, unlike the state-court-modified recount procedures in *Bush v. Gore*. Plaintiffs are making the unprecedented argument that the

procedures used in the original count are unconstitutional when performed in a recount. This claim is meritless.

Third, unlike in Florida, Wisconsin is not recounting only a subset of all ballots and is not recounting different sets of ballots in different parts of the state, but rather is conducting a statewide recount of all ballots cast in the presidential election. Wisconsin's recount is designed to ascertain the will of everyone who cast a legal vote.

Fourth, unlike in Florida, the Wisconsin Elections Commission has not certified any vote totals for any candidate based on partial or incomplete recounts in any part of the state and there is no basis for speculating that the Commission will take any such action in the future. No ballots cast in Wisconsin will be excluded from the recount based on the order in which ballots are being tabulated.

Fifth, unlike the court-ordered recount in *Bush v. Gore*, Wisconsin's statutory recount process affords representatives of all candidates an opportunity to contemporaneously object to the counting of any ballot, *see* Wis. Stat. § 9.01(1)(b)11., and Wisconsin statutes require that a statewide recount be conducted not by inexperienced personnel, but by the same county canvassing boards that previously canvassed the initial vote count. Wis. Stat. §§ 7.60, 9.01(1)(ar)3. If any original member of a county canvassing board is unavailable at the time of the recount, Wisconsin law requires the appointment

of qualified individuals to fill the temporary vacancy. *See* Wis. Stat. § 7.60(2); *see also* Wisconsin Elections Commission, "Election Recount Procedures," at 4.[13]

For the above reasons, Wisconsin's current recount does not share any of the equal protection problems that were identified in *Bush v. Gore* and the plaintiffs thus have no likelihood of success on the merits of their equal protection claim.

2. The plaintiffs' sweeping claims go far beyond the narrow holding in *Bush v. Gore*.

The plaintiffs fail to account for the many factual differences between this case and *Bush v. Gore*. They also make legal arguments that go far beyond what that decision contemplated. They contend that Wisconsin's statutory standards for interpreting ballot markings and erasures facially violate equal protection because they allegedly give too much interpretative discretion to local election officials. The statutory standards attacked by the plaintiffs apply whenever votes are tabulated in Wisconsin—whether in a recount or in an initial canvass. *Bush v. Gore*, however, did not invalidate Florida's entire canvassing system, nor did it hold that any canvassing rules that require local election officials to exercise some judgment in discerning voter intent automatically violate equal protection. To the contrary, the Court explicitly

[13] The Election Recount Procedures manual is available online at: http://elections.wi.gov/manuals/recount. (last visited Dec. 7, 2016).

acknowledged that equal protection principles do not entirely preclude states from allowing any disparities at all in election procedures and standards throughout the state. *See* 531 U.S. at 109 ("The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."); *see also* 531 U.S. at 134 ("the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voter's intentions") (Souter, J., dissenting).

What *is* required, according to *Bush v. Gore*, is that there must be "uniform *rules* to determine intent." 531 U.S. at 106 (emphasis added). In other words, it is permissible (probably even inevitable) for election officials to exercise some judgment in discerning voter intent, provided that all the election officials doing so are guided by the same set of uniform rules. One of the problems in Florida in 2000 was that, after the votes had been cast, the Florida Supreme Court had ratified recounts throughout that state that were using new and non-uniform rules for discerning voter intent. In the present case, in contrast, there has been no judicially-ordered, post-election change in the standards for discerning voter intent. To the contrary, the only Wisconsin state court that has issued an order regarding the present recount declined a request to order a statewide hand recount and, in doing so, adhered closely to

the existing, legislatively-prescribed standard for when hand recounts can be ordered. That cautious approach to judicial involvement and careful adherence to existing legislative standards is very different from the approach that was taken by the Florida Supreme Court in 2000, with which the *Bush v. Gore* majority found fault.

While the plaintiffs' equal protection claim in the present case is very different from the equal protection claims in *Bush v. Gore*, it is much more closely analogous to an equal protection claim advanced in another case that arose out of the 2000 presidential election in Florida. *See Siegel v. LePore*, 120 F. Supp. 2d 1041 (S.D. Fla. 2000), *aff'd, Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000). Similar to the plaintiffs here, the *Siegel* plaintiffs sought to enjoin recounts from going forward on the grounds, in part, that Florida's statutory procedures and standards for ascertaining voter intent on a ballot allowed too much room for discretion by county canvassing boards and thereby violated the Equal Protection Clause. *Siegel*, 120 F. Supp. 2d at 1044, 1050. The district court rejected that claim, holding that the statutory provision, "[w]hile discretionary in its application, . . . [was] not wholly standardless." *Id.* at 1050. Rather, the court found the provision to be "the type of state electoral law often upheld in federal legal challenges." *Id.* In the present case, likewise, the plaintiffs have no reasonable likelihood of succeeding in their sweeping attack on the facial validity of procedures and standards for

interpreting voter intent that are commonplace in state election laws throughout the nation.

B. Wisconsin's recount procedures do not violate due process.

Plaintiffs also have no likelihood of success on either aspect of their due process claim. To establish a due process violation, the plaintiffs must prove that Wisconsin's recount will deprive them of a fundamental right, and/or a protected and recognized liberty or property interest without due process.[14] But they identify no such right entitling them to an order cancelling a properly-requested recount administered under state statutes. Nor do they offer any non-speculative evidence that Wisconsin's recount is deficient. To the contrary, the recount is proceeding without any significant problems.

Likewise, the plaintiffs do not identify a recognized due process right or protected interest for presidential recounts to be completed by December 13. In any event, the plaintiffs simply speculate that Wisconsin might not complete the recount by the federal "safe harbor" date, even though WEC has directed all counties to complete their recounts by December 12, the day before the December 13 deadline, and the recount is already underway and on schedule.

[14] It is unclear whether the plaintiffs are asserting a procedural or substantive due process right. Either claim would fail because Wisconsin's recount procedures do not infringe on their right to vote, and do not deprive them of a protected liberty or property interest without procedural process.

1. Wisconsin's recount procedures are sound, and are not constitutionally defective.

Plaintiffs effectively ask this Court to invent a new constitutional due process right to have a recount completed using some specific procedures, which they do not identify. There is no due process right to particular measures meant to prevent hypothetical errors when recounting ballots. This Court should decline the plaintiffs' invitation to create such a right, since it would effectively require federal courts to police states' procedures for counting and recounting ballots, without any clear standard for doing so.

The plaintiffs assert that their votes have been unconstitutionally diluted but the vote dilution cases they cite are distinguishable. Those cases involved plainly unconstitutional conduct like ballot-stuffing or state laws or policies—such as imbalanced legislative apportionment schemes and poll taxes—that systematically gave too much or too little weight to certain groups of voters. The plaintiffs here have not alleged that any ballot boxes have been "stuffed" or that a recount conducted pursuant to Wisconsin's statutes will systematically disadvantage the plaintiffs, or even supporters of one candidate or another. There is no allegation that any of the plaintiffs were prevented from casting their vote or any other problem of constitutional magnitude. The plaintiffs identify no case where due process has been extended to invalidate sound recount procedures established by a state legislature.

Plaintiffs first cite *Anderson v. United States*, 417 U.S. 211, 226 (1974). That case does not establish any due process right to specific ballot counting procedures. (Pls. Br. 5–6.) Instead, *Anderson* concerned fraudulent ballot-stuffing. 417 U.S. at 226–27. There is no allegation of ballot-stuffing here, and nowhere in *Anderson* did the Court mention a due process right to specific vote counting procedures. (Pls. Br. 5.)

Plaintiffs also resort to *Reynolds v. Sims*, 377 U.S. 533 (1964). (Pls. Br. 6.) *Reynolds* explained that the constitutional "right of all qualified citizens to vote" precludes certain "attempts to deny or restrict the right of suffrage," such as outright denials, ballot alterations, ballot-box stuffing, or racially-based gerrymandering. 377 U.S. at 554–55. Again, the plaintiffs here do not allege any such problems with Wisconsin's recount process.

And even if there were a hypothetical due process right at issue, the plaintiffs identify no evidence that suggests Wisconsin's recount procedures are deficient, but rather rely on speculation about problems. However, reports have stated that counties have made the necessary plans and arrangements to recount ballots.[15] There is no evidence that any county's recount method has "erroneously count[ed] invalid votes, disregard[ed] valid votes, or attribut[ed]

[15] *See* http://elections.wi.gov/node/4481#attachments (last accessed Dec. 7, 2016).

valid votes to the wrong candidate." (Pls. Br. 6.) To the contrary, all indications are that the recount is going smoothly and is on schedule.

As for the prior Wisconsin recount that the plaintiffs reference—the 2011 recount of a state supreme court election—they simply speculate that all recounts must take as long as that one to be accurate. (Pls. Br. 6.) That speculation has no connection to the current recount because the 2011 state election was not subject to the same deadline as here, so there was no reason for clerks to make arrangements to complete the recount within any particular timeframe. Here, there is a timeframe, and all indications are that the clerks have made arrangements to comply with it.

2. There is no due process right to a particular recount deadline, and no evidence that the current recount will not be timely completed.

There is no evidence that the recount will not be completed by the December 13, 2016, "safe harbor" date. But even then, the plaintiffs fail to identify a recognized due process right requiring presidential recounts to be completed by that date. In this respect, too, the plaintiffs' reliance on *Bush v. Gore* is misplaced. The *Bush* decision was premised on a finding that Florida's legislature intended recounts to be completed by the safe harbor date. 531 U.S. at 110 (citing *Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000)); *see also Bush*, 531 U.S. at 111 ("[T]he Florida Supreme Court has said that the Florida Legislature intended to

obtain the safe-harbor benefits of 3 U.S.C. § 5 . . . ."). Due to the Florida legislature's intent, the Court found that Florida had to complete its recount by the safe harbor date. It does not follow that Wisconsin, with its own legislature and its own statutes, needs to follow the same timeline as a matter of federal constitutional law.

The Wisconsin Legislature has *not* tied the meeting of Wisconsin's presidential electors to the federal safe harbor statute, contrary to the plaintiffs' assertion (Compl. ¶ 30.) Wisconsin Stat. § 7.75 does not mention the safe harbor deadline. Instead, Wis. Stat. § 7.75(1) only sets a schedule for the *final* meeting and vote of Wisconsin's presidential electors:[16]

> 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. . . . When all electors are present, or the vacancies filled, they shall perform their required duties under the constitution and laws of the United States.

This timeline tracks the federal deadline for electors to meet and give their votes, which is not until December 19, 2016. *See* 3 U.S.C. § 7 (electors meet and give votes the first Monday after the second Wednesday in December.)

Even though Wisconsin is on track to complete a recount by December 13, the electors will not vote until the 19th, anyway. And, in any event, there also is no evidence that the current recount will not be completed by the

[16] Subsection (2) of the statute does not concern timing; instead, it sets forth who the electors must vote for. *See* Wis. Stat. § 7.75(2).

December 13 "safe harbor" date. WEC has ordered that "[t]he recount shall be completed by the county boards of canvassers immediately, but no later than 8:00 p.m. on December 12, 2016,"[17] the day before the safe harbor date. Plaintiffs identify no evidence that the current recount will not proceed according to schedule, and all indications are that the recount will be completed on time.

For all of these reasons, the plaintiffs' have no likelihood of prevailing on their due process claim. For this reason, too, the requested preliminary injunction must be denied, without need for the Court to proceed to the balancing phase of the analysis. *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1086.

IV. The public interest and the balance of harms compel denying the request for a preliminary injunction.

Even if the Court were to reach the balancing analysis, the plaintiffs' injunction motion would fail. To succeed in the balancing phase, the plaintiffs must establish that granting the injunction will not harm the public interest and that the threatened injury to themselves outweighs the harm that the requested injunction would impose upon the State of Wisconsin and the public. *See Machlett Labs., Inc.*, 665 F.2d at 796–97. They cannot carry that burden.

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[17] *See* http://elections.wi.gov/sites/default/files/memo/20/recount_order_president_pdf_23987.pdf (last accessed Dec. 7, 2016).

First, a preliminary injunction would undermine the public interest by changing the status quo, which is the opposite of what a preliminary injunction is intended to do. Preliminary relief exists to preserve the status quo pending a final decision. *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1330 (7th Cir. 1980) ("The purpose of a preliminary injunction is to preserve the status quo pending a final hearing on the merits.").

The plaintiffs here seek to change, rather than preserve, the status quo. They want this Court to halt the state-wide presidential recount that is currently underway in every county of the state. It is both inappropriate and contrary to the public interest to request the extraordinary remedy of preliminary injunctive relief to disrupt an ongoing statewide program that bears upon a core function of state government, namely, the election process.

Permitting such disruption of the ordinary and orderly course of state government would be particularly inappropriate where, as here, the plaintiffs have waited to file a lawsuit until after the recount began. The timely filing of a recount petition and WEC's intention to honor that petition were widely publicized more than a week ago.[18] Also widely publicized was WEC's intention

[18] *See*, *e.g.*, Washington Post article from November 25, 2016, titled, "Election recount will take place in Wisconsin, after Stein files petition" available at https://www.washingtonpost.com/news/powerpost/wp/2016/11/25/election-recount-underway-in-wisconsin-after-stein-files-petition/?utm_term=.bd3235ed4e98 (last visited Dec. 7, 2016).

to start the recount on December 1, 2016.[19] Indeed, the plaintiffs' complaint includes as an attachment a November 25, 2016 news article explaining that a recount will occur. (Dkt. 1-4.) Another attachment to their complaint is a November 29 article explaining that the recount was expected to start the Thursday of that week. (Dkt. 1-5.) In addition to the other failings, having failed to promptly assert their claims before the recount process was under way, the plaintiffs should not now be allowed to harm the public interest by halting that process and disrupting the status quo.

Second, the harm that the requested injunction would impose upon the State of Wisconsin and the public outweighs any potential injury to the plaintiffs.

Enjoining the enforcement of democratically enacted legislation irreparably harms both the State and the public by restraining state officials from implementing the will of the people that they represent. *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes

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[19] *See, e.g.*, The Wall Street Journal article from November 28, 2016, titled, "Wisconsin Presidential Recount to Begin Thursday" available at http://www.wsj.com/articles/wisconsin-presidential-recount-to-begin-thursday-1480352509 (last visited Dec. 7, 2016).

enacted by representatives of its people, it suffers a form of irreparable injury.")*; Coal. For Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.").

The public interest in the enforcement of laws enacted by the Legislature is especially great where, as here, the laws in question relate to the appointment of presidential electors. Article II, § 1, cl. 2 of the U.S. Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. The U.S. Supreme Court has said that this constitutional provision "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment of electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). When it comes to the appointment of presidential electors, it is clear that the public's interest in enforcing laws duly enacted by the state legislature must be respected.

The federal safe harbor statute, 3 U.S.C. § 5, on which the plaintiffs seek to rely, likewise acknowledges the important interests the states have in their own processes for resolving controversies over the appointment of electors. For a federal court to enjoin a state recount that is in progress because it is merely possible that it might not be completed before the safe harbor deadline

would be directly contrary to the compelling interest of the State and its people in regulating the appointment of presidential electors.

On the other side of the balance of harms, the plaintiffs have only imprecise and speculative assertions of possible injury, if preliminary injunctive relief is denied and the recount is allowed to continue. As already shown above, plaintiffs' allegations do not even satisfy the basic requirement of irreparable harm needed to obtain a preliminary injunction. Absent such a showing, the plaintiffs also cannot establish that any harm to themselves outweighs the harm that a preliminary injunction would cause to the State's interest in carrying out its legislatively mandated functions and to the public's interest in maintaining the orderly course of state government. Under these circumstances, the public interest and the balance of harms weigh against the requested injunction.

CONCLUSION

The plaintiffs' request for an injunction should be denied. State procedures that are already in progress and should not be halted because of a speculative concern that the process might not be completed in time. The plaintiffs have provided no legal basis for obtaining an injunction. The defendants request that this Court deny the requested injunctive relief.

Dated this 7th day of December, 2016.

Respectfully submitted,

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