

This memorandum responds to your request for my office to further analyze the issue of recalling electors or decertifying Wisconsin's 2020 presidential electors. I adhere to the view that questions concerning certification of those electors are within the plenary authority of the Wisconsin Legislature to answer. However, that fact is not—and cannot—be the end of the analysis. I included a discussion of the decertification question in my Second Interim Report in order to address an issue of great public interest and to underscore that, while decertification of the 2020 presidential election is theoretically possible, it is unprecedented and raises numerous substantial constitutional issues that would be difficult to resolve. Thus, the legal obstacles to its accomplishment render such an outcome a practical impossibility. Given these numerous and substantial legal obstacles, it is difficult to imagine an expenditure of state resources that would be more imprudent as it would require an unimaginable amount of time and money and at best yield a result that is important only from a symbolic standpoint.

#### **A. Reasons Decertification is a Practical Impossibility**

The first reason decertification is a practical impossibility relates to the absence of any statutory process or procedure for its accomplishment. Although I included a discussion of the absence of any statutory process or procedure for this in both my Second Interim Report and during my presentation of the reports findings to the Assembly Committee on Campaigns and Elections, I do not believe it garnered a level of attention commensurate with its significance. Put simply, there are no rules governing the hypothetical proceedings by which decertification would be accomplished.

It is axiomatic that procedures affecting even the slightest of personal or property interests (not to mention the questions inherent in a legitimate decertification proceeding) must be governed by rules which comport with fundamental fairness and justice. While the construction of such a statutory scheme that passes constitutional muster might be possible, such a construction, and resolution of the legal issues surrounding it, is simply not possible in the time remaining before the question becomes practically irrelevant, i.e., the 2024 presidential election.

The second reason decertification is a practical impossibility is closely related to the first: the absence of precedent for the completion of the decertification process in a presidential election. And just as the absence of any statutory process or procedure for the act of decertification would—of necessity—require their construction while the proceeding is underway, similarly, the absence of precedent would require the legislature to “make it up as it goes along,” as it considers the substantive question. This will be tied up in court for years and will virtually paralyze the Legislature in terms of all other business and there is no possibility that anything will be achieved other than a de facto full employment program for election law lawyers.

My best advice to anyone whose paramount concern is ensuring fair, honest, and transparent elections in Wisconsin is to set aside any impulse to waste finite time, effort, and energy in pursuit of an end that, like Macbeth's ruminations are, "full of sound and fury, signifying" at best a symbolic result.

However, there is a fruitful path forward, which is to implement the recommendations I have made that would help restore the People's faith in the integrity of our election: (1) pursue justice for the five Wisconsin Elections Commissioners who knowingly and deliberately engaged in criminal conduct when they willfully disobeyed the laws providing protections to vulnerable voters living in continuing care facilities; (2) renew efforts to engage citizens from across the state to serve as poll workers; (3) insist that Wisconsin's voter rolls accurately reflect the identities of actual voters, who live at the addresses they said they lived at when they registered to vote; (4) make those voter rolls freely available to the public; (5) make available to the public the lists of those who voted which now are available only to those who have the means to pay tens of thousands of dollars in order to obtain them; and (6) dismantle the Wisconsin Elections Commission. The first two are not directly within the purview of the Legislature, however, the remaining necessary reforms are and ought to be pursued as soon as practicable, which means as soon as Wisconsin has a governor who will sign such common sense and meaningful legislation.

At several points during my presentation to the Assembly Committee on Campaigns and Elections a little over two weeks ago, I repeatedly made all of the points recited in this memo as support for why I did not—and do not—advocate for decertification. Unfortunately, supporters as well as critics seemed to hear only those parts of my presentation that they wanted to hear. In the end, my position on the current state of the law is not ambiguous and therefore the Legislature has the constitutional obligation to make a policy decision as to whether to pursue decertification, understanding its doubtful benefit and the substantial obstacles to it. While I am charged with making a recommendation, questions regarding certification are for the legislature to make. I am not empowered to make that decision for you.

Thank you for this opportunity to renew and clarify my position on the question of decertification.