

**STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I**

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JIM SULLIVAN and  
BRYAN KENNEDY,

Plaintiffs-Petitioners,

v.

Appeal No. \_\_\_\_\_

WISCONSIN ELECTIONS  
COMMISSION, THEODORE A.  
LIPSCOMB, SR., and MILWAUKEE  
COUNTY ELECTIONS COMMISSION,

(Milwaukee County Case No. 20-CV-573)

Defendants-Respondents.

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**PETITIONERS' EMERGENCY MOTION  
TO EXPEDITE INTERLOCUTORY BALLOT ACCESS APPEAL  
AND FOR TEMPORARY RELIEF PURSUANT TO WIS. STAT. § 809.52**

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Petitioners Jim Sullivan and Bryan Kennedy are seeking immediate interlocutory review of the January 24, 2020 decision by Judge Kevin Martens holding they are not entitled to be on the spring 2020 primary ballot for Milwaukee County Executive. If this Court does not act **by 4:00 p.m. today, January 27, 2020**, Milwaukee County will proceed with printing ballots that do not include Sullivan and Kennedy, which may render this appeal moot. Judge Martens ordered:

The Milwaukee County Clerk shall submit the 2020 Spring Primary Election Ballots to the printer at 4:00 p.m. Monday, January 27, 2020 and deliver the same to local municipalities as soon as practicable thereafter, unless otherwise instructed by the Wisconsin Court of Appeals.

*January 24, 2020 Order*, ¶3 (App. 0002). On the record at the end of the hearing, Judge Martens verbally granted Petitioners' motion to pursue an interlocutory appeal of his legal decision.

The Petition for Leave to Appeal filed along with this motion is a merits brief fully addressing the issues presented by the interlocutory appeal, along with a separate appendix including the underlying record from the WEC proceedings and the transcript of Judge Martens' decision. There are no facts in dispute, and Petitioners believe the entire appeal can be decided on these submissions alone, along with any response submitted by Respondents.

### **MOTIONS**

1. Petitioners hereby move the Court, pursuant to Wis. Stat. §§ 809.20, 809.12, and 809.14, to expedite the resolution of this interlocutory appeal.

2. Petitioners hereby move the Court, pursuant to Wis. Stat. § 809.52, for temporary relief pending the disposition of the Petition for Leave, specifically ordering Respondent Milwaukee County Elections Commission to either: (a) not commence printing the ballots for the February 18, 2020 primary ballot until the Court has ruled on the Petition; or (b) commence printing duplicate ballots for the February 18, 2020 primary election, one set including Petitioners Sullivan and Kennedy and a second set not including Sullivan and Kennedy.

3. Petitioners also move the Court, under Wis. Stat. §§ 809.20, 809.12, and 809.14, to expedite the resolution of this motion, including any response time of Respondents.

### **BACKGROUND FACTS**

Petitioners are running for Milwaukee County Executive. Both submitted more than 2,000 signatures of Milwaukee County electors, and the Milwaukee County Elections Commission (“MCEC”) ordered that they be included on the ballot.

On January 10, 2020, Supervisor Theodore Lipscomb, Sr., filed challenges to Petitioners' nomination papers. The MCEC denied the challenges on January 14, 2020.

On January 17, 2020, Lipscomb filed an appeal from the MCEC's decisions with the Wisconsin Elections Commission ("WEC"). On January 21, 2020, the WEC issued decisions reversing the MCEC and ordering Sullivan and Kennedy removed from the ballot.

On January 22, 2020, Petitioners filed a joint statutory appeal of the WEC's decisions in Milwaukee County circuit court.

On January 24, 2020, Judge Kevin Martens heard and denied Petitioners' motion for injunctive relief, and ordered Milwaukee County to proceed with the printing of ballots not including Sullivan or Kennedy at 4:00 p.m. on January 27, 2020, unless this Court orders otherwise.

The spring primary election is scheduled for **February 18, 2020**. Counsel for the Milwaukee County Elections Commission has advised that the County needs to begin the ballot printing process on **January 28, 2020** in order to distribute the ballots to municipalities and absentee voters. The goal of all parties is to have a final decision on the purely legal issues in time for the ballot printing to commence on Tuesday, January 28, 2020.

### **GROUNDS FOR THE MOTIONS**

Pursuant to Wis. Stat. § 809.20, Petitioners identify the following factors which support immediate consideration and resolution of this appeal.

#### **The Nature of the Public and Private Interest at Issue.**

This is a ballot access appeal. Resolution of the legal issue will determine whether Sullivan and Kennedy will appear on the primary ballot for Milwaukee County Executive, giving voters choices among six candidates or four candidates. It is a matter of paramount public interest.

### **Issues Presented By The Appeal.**

Judge Martens found several of the petition circulators for Sullivan and Kennedy had previously circulated for another candidate for the same race, invalidating those signatures under Wis. Stat. § 8.04. Sullivan and Kennedy believe Wis. Stat. § 5.01(1) and *Matter of Recall of Redner*, 153 Wis. 2d 383, 450 N.W.2d 808, 811 (Ct. App. 1989), compel the conclusion that § 8.04 is directory, not mandatory, and the honest errors of the circulators do not require the invalidation of the qualified electors who expressed their will that Sullivan and Kennedy be included on the primary ballot.

Accordingly, the issues presented by the appeal are:

1. As a matter of law, does Wis. Stat. § 5.01(1), which mandates that, unless otherwise provided, “Chapters 5-12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions,” apply to nomination papers signed by qualified electors?
2. As a matter of law, is Wis. Stat. § 8.04 a mandatory or directory statute?
3. If Wis. Stat. § 5.01(1) applies and/or Wis. Stat. § 8.04 is directory, do the errors of the circulators in circulating for more than one candidate require the signatures of qualified electors to be invalidated, where the record demonstrates the candidates acted in good faith and made all reasonable attempts to comply with the law?

### **The Impending Deadline to Print and Distribute Ballots Requires Immediate Action.**

If this motion is not granted on an expedited basis, this appeal may be rendered moot. The County will proceed to print the ballots that exclude Sullivan and Kennedy, with no way to “add them back” once the ballots are distributed to municipalities and absentee electors.

Approximately 5,000 qualified electors who signed nomination papers for Sullivan and Kennedy will be prejudiced, because they will not have the opportunity to vote for their choice of candidate on the primary ballot. Milwaukee County voters as a whole will be deprived of a complete slate of candidates for County Executive.

The legislature recognized the prejudice which could befall an aggrieved candidate, establishing in Wis. Stat. § 5.06(9) that a court reviewing a decision by the WEC “shall summarily hear and determine all contested issues of law....” Although this sentence’s context is as to the circuit court, the same policies apply to the timing of this Court’s resolution of this appeal.

### **CONCLUSION**

Sullivan and Kennedy are acting with all dispatch to pursue their rights to a final decision on the legal issues. They are attempting, in a six-day window, to obtain effective judicial review of the WEC decision removing them from the ballot. The circuit court did its part, holding a hearing two days after the statutory appeal was filed, issuing a decision on the merits at the close of the hearing, and granting leave to appeal his decision.

Sullivan and Kennedy respectfully request that this Court do the same, in order to ensure that if the Court agrees they *should* be on the ballot, they *can* be on the ballot. To the extent a final decision cannot be rendered by the Court’s 4:00 p.m. deadline today, January 27, 2020, Petitioners request an order pursuant to Wis. Stat. § 809.52 either staying the ballot printing process or requiring that alternate ballots be printed in order to protect their rights.

Dated: January 27, 2020

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