STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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.

PETITION FOR EXPEDITED INTERLOCUTORY APPEAL OF BALLOT ACCESS DECISION, AND BRIEF ON THE MERITS

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INTRODUCTION

This appeal seeks an immediate and final determination of whether James Sullivan and Bryan Kennedy will be on the spring primary ballot for Milwaukee County Executive. The challenge to their nomination papers is based on the fact that, unbeknownst to the campaigns, their vendors hired several individual circulators who had previously circulated for another candidate for the same office. The legal issue is whether Wis. Stat. § 8.04—which designates the later-collected signatures "invalid"—is mandatory, or whether it is directory and falls within the scope of the Legislature's command in Wis. Stat. § 5.01(1) that the "will of the electors" shall prevail over a "failure to fully comply" with Wisconsin's election laws.

If the appeal is not heard and decided immediately, it will be rendered moot and Petitioners will suffer irreparable harm. That is because Milwaukee County plans to start printing ballots for the primary on Tuesday, January 28, 2020.

With one exception, all parties have acted with urgency to reach a final decision on this important matter. Here is the remarkable chronology:

- **Tuesday, January 7, 2020** – Deadline by which all candidates for Milwaukee County Executive filed their nomination papers with the Milwaukee County Election Commission ("MCEC").

- **Friday, January 10, 2020** – At the close of business, Theodore A. Lipscomb, Sr., another candidate for Milwaukee County Executive, filed with the MCEC separate verified challenges to Petitioners' nomination papers, asserting they were insufficient because some circulators acted invalidly. (App. 0009-16, 0162-69.)

- **Monday, January 13, 2020** – Petitioners filed with the MCEC verified responses, including affidavits from all of the circulators in question. (App. 0017-33, 0170-200.)

- **Tuesday, January 14, 2020** – The MCEC held a hearing beginning at 9:00 am; after hearing argument from all parties, the MCEC denied the challenges. (App. 0112, 0114.)

- **Friday, January 17, 2020** – Lipscomb filed separate verified complaints with Wisconsin Elections Commission ("WEC") challenging the MCEC's decisions. (App. 0004-08, 0157-161.)[1] The MCEC filed a letter stating it would not be taking a position on the complaint. (App. 0034.)

- **Monday, January 20, 2020 (MLK Day)** – Sullivan's counsel provided notice to the WEC that Sullivan would be requesting intervention the following day. (App. 0215.)

- **Tuesday, January 21, 2020** – The WEC issued functionally identical Decisions and Orders reversing the MCEC and ordering Petitioners removed from the primary ballot. (App. 0148-155, 0207-214.) Less than one hour later, Sullivan filed his intervention petition and position statement with the WEC. (App. 0217-247.) After the close of business, the WEC's Staff Counsel notified Sullivan's counsel that the intervention request is denied. (App. 0248-251.)

- **Wednesday, January 22, 2020** – Petitioners filed in Milwaukee County circuit court their joint statutory appeal from the WEC decisions, a motion for a temporary injunction, and a brief addressing the merits. (Dkt. 5, 16, 19.)[2]

- **Thursday, January 23, 2020** – WEC filed its response brief addressing the merits. (Dkt. 33.)

- **Friday, January 24, 2020** – Judge Martens held hearing on the injunction motion, issued a decision on the merits and granted Petitioners leave to seek interlocutory review. (App. 0001-02.)

Petitioners now ask, respectfully, that this Court grant leave to hear this appeal and decide the legal issues in an expedited fashion, so that the parties can achieve a final decision before, not after, the ballots are printed.

This Court is uniquely positioned to render that final decision, as both sides contend prior Court of Appeals precedent is dispositive. Petitioners rely on *In re Recall of Redner*, where this Court, in the context of a challenge to recall petitions, cited to Wis. Stat. § 5.01(1) and held: "The

[1] The three-day delay between the MCEC decision and Lipscomb's filing of complaints with the WEC is the sole instance where a party did not act with urgency.

[2] Because the circuit court record has not been transmitted, references to the docket are to the numbers of the CCAP entries.

statutory requirements for preparation, signing, and execution of petitions are directory rather than mandatory." 153 Wis. 2d 383, 390, 395, 450 N.W.2d 808, 811 (Ct. App. 1989); *see also Stahovic v. Rajchel*, 122 Wis. 2d 370, 377, 363 N.W.2d 243 (Ct. App. 1984) (applying § 5.01(1) to petition signatures and noting they represent "the will of the electorate"). Respondents rely on *City of Chippewa Falls v. Town of Hallie*, where this Court, in the context of annexation referendum petitions, held that Wis. Stat. § 5.01(1) applies "only after an election has been held and the will of the electors manifested." 231 Wis. 2d 85, 91, 604 N.W.2d 300 (Ct. App. 1999).

As set forth below, the holdings in *Redner* and *Stahovic* applying § 5.01(1) to the petitioning electors remain controlling law because this Court cannot "overrule, modify or withdraw" language from a prior published opinion. *In re Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

STATEMENT OF ISSUES PRESENTED

1. As a matter of law, does Wis. Stat. § 5.01(1), which mandates that, "[e]xcept as otherwise provided, chs. 5 to 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 Chapter 8's provisions regarding 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 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 attempted to comply with the law?

STATEMENT OF FACTS

Petitioners Jim Sullivan and Bryan Kennedy are running for Milwaukee County Executive, along with four other candidates. The Sullivan and Kennedy campaigns—like the Lipscomb

campaign and the David Crowley campaign—utilized paid circulators to collect some of the signatures required to qualify for the ballot. (App. 0026-27, 0071-72, 0183-186.) This is a common practice and consistent with Wisconsin law.

The Sullivan campaign contracted with a vendor, Simon Warren, who in turn subcontracted with four individual circulators. *Affidavit of William Williams*, ¶¶9-11 (App. 0184-85). Mr. Warren confirmed to the Sullivan campaign that his subcontractors were not circulating petitions for any other candidate. *Id.* Unbeknownst to the Sullivan campaign, however, the circulators Mr. Warren used had previously circulated nomination papers for David Crowley, a different candidate for County Executive. *Id*.

The Kennedy campaign contracted with Urban Media to help collect elector signatures. *Affidavit of Bryan Kennedy*, ¶4 (App. 0026). Mr. Kennedy asked whether Urban Media was collecting signatures for any other candidate for County Executive and was told they were not. *Id.*, ¶5. Urban Media subsequently subcontracted some or all of the work to three individuals who had previously collected signatures for Crowley.

On January 6, 2020, the Kennedy campaign filed nominating papers that included 2,939 signatures of Milwaukee County electors. (App. 0018.) On January 7, 2020, the Sullivan campaign filed nominating papers that included 2,690 signatures of Milwaukee County electors. (App. 0171.) Following a review of the nominating papers, the MCEC staff determined that Sullivan had submitted 2,450 valid signatures, and Kennedy had submitted 2,684 valid signatures. (App. 0041-42.) Both campaigns thus surpassed the requirement of 2,000 valid signatures to qualify for inclusion on the ballot for the office of Milwaukee County Executive.

On Friday, January 10, 2020, Lipscomb filed verified complaints with the MCEC challenging Sullivan and Kennedy's nomination papers. (App. 0009-16, 0162-169.) The

complaints asserted that 1,101 of Sullivan's signatures and 844 of Kennedy's signatures should be invalidated because the circulators had previously circulated nomination papers for another candidate for the same office, in violation of Wis. Stat. § 8.04. Importantly, the complaints did not challenge—and at the MCEC meeting addressing the complaints, Lipscomb expressly conceded—that the signatures they sought to remove were provided by qualified electors. (App. 0050, 0107).

Sullivan and Kennedy filed verified responses to Lipscomb's complaints on Monday, January 13, 2020. The next morning, January 14, 2020, the MCEC held a hearing at which it considered Lipscomb's challenges. Nancy Penn, Chair of the MCEC, was excused from the hearing and did not participate. (App. 0036). Commissioner Tim Posnanski presided at the meeting, and Commissioner Rick Baas also participated. (App. 0035-114).

As part of its consideration, the MCEC found that both the Sullivan and Kennedy campaigns had taken all reasonable precautions to ensure that individuals collecting signatures on their behalf were not collecting for other candidates as well.[3] (App. 0107-110.) First, both campaigns were assured by their respective vendors that the vendors were not collecting signatures for any other candidate for County Executive. (App. 0026, 0184-85.) Second, the Sullivan campaign gave written instructions to all canvassers that they could not collect signatures for the Sullivan campaign if they had also collected for another candidate. (App. 0092.) Third, all of the individual circulators at issue assured the Sullivan campaign that they were collecting signatures for only one candidate for Milwaukee County Executive. *Affidavits of Alisha Pettis, Keith Pettis, Lesa Trotter* and *Dominique Thomas*, ¶7 (App. 0190, 0193, 0196, 0199).

[3] During the meeting, in response to a question from Commissioner Posnanski, Lipscomb himself recognized that there was no reasonable way for a campaign that utilized paid circulators to review other campaigns' nomination papers before they are submitted. (App. 0074.)

The MCEC deliberated in closed session before reconvening in open session to vote on successive motions to sustain each of Lipscomb's complaints and strike the challenged signatures. (App. 0145.) Immediately before those MCEC votes, Commissioners Posnanski and Baas summarized their analyses. (App. 0106-112.)

Commissioner Posnanski explained that, from his perspective, Wisconsin statutes and Supreme Court case law "constrain" MCEC's decisions. (App. 0108.) He concluded that, had the Legislature wanted section 8.04 to have the meaning Lipscomb seeks to impart, it could have—but has not—amended the provision to expressly provide for such an approach. (App. 0109.) He concluded that the will of the electors is clearly discernable in this instance and that requires denying Lipscomb's challenges. (App. 0110-111.)

Commissioner Baas then explained that, from his perspective, the paramount concern is clarity in the election process. (App. 0111.) He acknowledged that MCEC had heard discussion of legal precedents but dismissed those arguments as "lawyer talk." (App. 0112.) He then concluded that Lipscomb's complaints should be sustained. (*Id.*)

The motions to sustain Lipscomb's complaints and strike the challenged signatures failed on a vote of 1-1. (App. 0112, 0114.) As a result, the presumption of the signatures' validity prevailed and the MCEC proceeded with plans for a primary ballot including both Sullivan and Kennedy.

Three days later, on Friday, January 17, 2020, Lipscomb filed verified complaints with the WEC appealing the MCEC's decisions with respect to both Sullivan and Kennedy. (App. 0004-08, 0157-161.) Lipscomb's complaints named only the MCEC, its commissioners, and other Milwaukee County officials—but neither Sullivan nor Kennedy—as respondents. (App. 0004-05, 0157-158.) The MCEC filed a one-page letter in response to Lipscomb's complaints; that letter

declared the MCEC's decision not to take a position and instead provided links to the parties' submission, the MCEC Meeting Minutes, and a video of the MCEC hearing. (App. 0034.) The letter noted that the "parties to the challenge are represented by legal counsel fully capable of bringing all relevant facts and legal arguments before the Wisconsin Election Commission." (*Id.*)

Counsel for Sullivan promptly reached out to WEC Staff Counsel Haas to inquire about a timeline to respond to Lipscomb's complaint. Haas responded that there is no "role [before the WEC] for the candidate who was challenged when the appeal is filed by the challenger." (App. 0215.) Nevertheless—in light of MCEC's non-response to Lipscomb's complaint and because Sullivan was the real party in interest—on Monday, January 20, Sullivan's counsel notified Haas that Sullivan intended to request intervention before the WEC and share Sullivan's position on the merits. (*Id..*)

On the morning of Tuesday, January 21, 2020—without waiting for the Sullivan campaign to file its motion to intervene[4]—the Commission issued essentially identical Decisions and Orders in WEC Case Nos. EL 20-04 and EL 20-05 ("WEC Decisions") reversing the determinations of the MCEC and ordering the MCEC to strike the challenged signatures and exclude Sullivan and Kennedy from the ballots for Milwaukee County Executive. (App. 0148-155, 0207-214.)

The WEC Decisions note—incorrectly—that Sullivan and Kennedy "chose not to file a reply to the MCEC's response to the complaint[s]" (App. 0149, 0209), even though the WEC's Staff Counsel had expressly told Sullivan's counsel that the candidates had no role in the WEC's

[4] The WEC mistakenly sent only the Kennedy Decision to Sullivan's counsel. Sullivan proceeded to submit his intervention request and position paper to the WEC, as Sullivan's counsel reasonably believed that the WEC had not yet issued a decision on the complaint about the Sullivan campaign, especially in light of the email to Haas the day before, informing the WEC that an intervention request and position paper were forthcoming.

adjudication of Lipscomb's complaints and the WEC knowingly issued its Decisions without waiting for the response that Haas knew Sullivan was preparing to submit. (App. 0215.)

As to the merits, the WEC Decisions address whether Wis. Stat. § 8.04 is mandatory or directory. The WEC Decisions attempt to distinguish between election laws involving "the mode or manner of conducting an election" and those addressing "completing nomination papers and qualifying for ballot access." (App. 0151-152, 0210-11.) The WEC Decisions conclude that § 8.04 falls into the latter category and therefore is a mandatory statute. (*Id.*) The WEC Decisions also assert that § 8.04 contains an "express and clear command," making it mandatory, because, by using the term "is," the statute leaves no room for discretion. (App. 0153, 0212.) Finally, the WEC Decisions, while admitting that "[i]t is true that a violation of Wis. Stat. § 8.04 cannot be detected by simply reviewing the candidate's own nomination papers," offer merely that campaigns should try harder to meet the statutory requirements. (App. 0154, 0213.)

The following day, Wednesday, January 22, 2020, Sullivan and Kennedy filed in the Milwaukee County circuit court a Complaint and Joint Appeal from the WEC's decisions, pursuant to Wis. Stat. § 5.06(8), and an Emergency Motion for Ex Parte Temporary Restraining Order and for a Temporary Injunction (Dkt. 5, 16.) The parties jointly contacted the circuit court's clerk and scheduled a hearing for January 24, 2020, obviating the need for *ex parte* relief. (Dkt. 21.)

On January 24, 2020, Judge Martens held a hearing on the injunction motion. All parties appeared and participated. At the outset, Judge Martens outlined the facts established before the MCEC, including that neither Sullivan nor Kennedy knew that their vendors were using circulators who had previously circulated for Crowley, and that both campaigns had made efforts to confirm that their respective vendors were not working on behalf of any other candidate for County

Executive. After hearing arguments from and questioning the parties, Judge Martens issued his decision from the bench. (Dkt. 34.)

Judge Martens found that Wis. Stat. § 8.04 was plain on its terms, and when applied to the challenged Sullivan and Kennedy nominations papers, rendered those signatures "invalid."

Judge Martens discussed each of the cases cited by the parties relating to Wis. Stat. § 5.01(1) and the "mandatory v. directory" issue. He concluded that Wis. Stat. § 5.01(1) is not applicable in the "pre-election" context, and thus does not apply to any statutory provisions relating to nomination petitions, including § 8.04. In particular, he concluded that the *Chippewa Falls* decision held that the statute did not apply to the petitioning process, and only applies after an election. Judge Martens distinguished the contrary language in *Redner* by finding its reference to the standard of § 5.01(1) in relation to recall petitions was "dicta," and noting the defects in the petitions at issue in *Redner* were "technical" and had been "fixed."

Judge Martens acknowledged that *Redner*, *Ahlgrimm*, and other cases had held that statutes regarding "preparation, signing and execution" of nomination papers were directory and not mandatory. However, he went on to conclude that the circulation of nomination papers does not fall within the definition of "preparation," "signing," or "execution." He therefore held Wis. Sat. § 8.04 is mandatory and that the WEC properly ordered the challenged signatures to be invalid.

Judge Martens reiterated that nothing in the record indicates either candidate did anything wrong and it appears there was nothing further they could have done to prevent or discover the prior circulation by the four individuals. He found the statutes included no exception for an "honest mistake."

As to the due process challenge, Judge Martens was not persuaded that Petitioners were likely to prevail on the issue. He noted that the statutes allow the WEC to review decisions of the

MCEC without requiring the impacted candidates to be named as parties. He further noted the compressed timeframe to decide nomination paper challenges, and that the WEC had reviewed the candidates' submissions to and arguments before the MCEC.

After the decision was issued, counsel for Milwaukee County presented and the court signed a proposed order (the form of which the parties had agreed to in advance), ordering the County to submit the 2020 Spring Primary Ballots to the printer at 4:00 p.m. Monday January 27, 2020 "unless otherwise instructed by the Wisconsin Court of Appeals." (App. 0002.) The Order states: "This is a final Order for purposes of appeal." (*Id.*)

Kennedy's counsel then moved Judge Martens for leave to seek an immediate interlocutory appeal, noting that the court's decision on the merits of the injunction motion was for all practical purposes the final decision in the matter. Judge Martens granted the motion.

STANDARD FOR INTERLOCUTORY REVIEW

The Court may grant interlocutory review where the appeal will: (a) materially advance the termination of the litigation; (b) protect the petitioner from substantial or irreparable injury; or (c) clarify an issue of general importance in the administration of justice. *See* Wis. Stat. §§ 808.03(2), 809.50(1). All three criteria are met here.

First, a decision by this Court will terminate the circuit court proceedings and provide a final decision on whether Sullivan and Kennedy are included on the ballot. Supreme Court review, in this already compressed time-frame, appears impossible.

Second, interlocutory review will protect Sullivan and Kennedy from the potential irreparable harm of being removed from a primary ballot despite meeting the requirement to submit signatures of over 2,000 qualified electors who support them appearing on the ballot.

Third, a decision from this Court will clarify whether the standard of Wis. Stat. § 5.01(1), which expressly applies to all of Chapters 5 to 12 "except as otherwise provided," reaches Chapter 8's requirements for nomination petitions. Put another way, a decision will clarify whether the term "will of the electors" in § 5.01(1) includes within its scope the will of an "elector" who signs a nomination paper asking that candidate be included on the ballot.

ARGUMENT

I. The "Will of the Electors" Standard of Wis. Stat. § 5.01(1) Applies to the Nomination Petition Provisions in Chapter 8, Including § 8.04.

At the very outset of our election statutes, Wis. Stat. § 5.01(1) expressly provides that all provisions of the election statutes, except for those expressly saying otherwise, "shall be construed to give effect to the will of the electors." Both by its own express terms and the faithful application of precedent, it reaches Wis. Stat. § 8.04.

A. The Plain Language of Wis. Stat. § 5.01(1) States that it Applies to § 8.04.

Wis. Stat. § 5.01(1) states in full:

> CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs. 5 to 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.

This statutory charge to preserve and protect the will of the electorate despite errors in process was enacted in 1903. *State ex rel. Oaks v. Brown*, 211 Wis. 571, 578, 249 N.W. 50 (1933).

By its plain text, the statute applies to the entirety of Chapter 8, which sets forth the statutory requirements for nominations, primaries and elections. *See State ex rel. Kalal v. Cir. Ct. for Dane Cty*., 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 ("If the meaning of the statute is plain, we ordinarily stop the inquiry."). This includes Wis. Stat. § 8.04, which does not "otherwise provide" that the standard does not apply. *Compare, e.g.*, Wis. Stat. 6.84(2)

("Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. shall be construed as mandatory.").

There is no dispute that the individuals who signed the Sullivan and Kennedy nomination petitions were exercising their will as "electors." All ballot access and petition statutes refer to "electors," including Wis. Stat. § 8.10(3)(cm), which requires a candidate seeking to run for Milwaukee County Executive to submit signatures of "not less than 2,000 nor more than 4,000 electors."

B. This Court Held in *Redner* and *Stahovic* that Wis. Stat. § 5.01(1) Applies to the Petitioning Process.

In *Redner*, this Court reviewed a challenge to a petition to recall Mayor Thomas Redner of Hudson. Among other challenges, Mayor Redner attacked defects in the recall petition signatures contrary to Wis. Stat. § 8.15, including the failure to list each signer's municipality, the failure to include the date of each signature, and the failure to have the word "recall" and the certification on the same page. 153 Wis. 2d at 391-92.

The Court began by noting: "The statutory requirements for preparation, signing, and execution of petitions are directory rather than mandatory." *Id.* at 390 (citing *Jensen v. Meisbauer*, 121 Wis. 2d 467, 469, 360 N.W.2d 535 (Ct. App. 1984)). After rejecting Mayor Redner's challenges to the petitions, the Court held that Wis. Stat. § 5.01(1) required the Court to carry out the "will of the electors" as set forth in the petitions:

> "Chapters 5 to 12 shall 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 its provisions." *Stahovic v. Rajchel*, 122 Wis. 2d 370, 376, 363 N.W.2d 243, 246 (Ct. App. 1984). The petitions are not free of error. However, no one seriously disputes that, at least as of six months ago, a sufficient number of electors wished to vote on Mayor Redner's recall.

Id. at 395.

Stahovic, the case cited in *Redner*, involved challenges to petitions to recall Greendale Mayor Francis Havey and Alderman John Gazvoda. When the Greenfield City Clerk reviewed the petitions, he threw out every page that contained at least one defective signature. 122 Wis. 2d at 373. His theory was that the defect "impeached" the certification of the circulator and thus the entire page was invalid. After applying this zealous invalidation method, there remained an insufficient number of valid signatures to require a recall. The Milwaukee County circuit court upheld the Clerk's decisions. While the petitioners' appeal was pending, the case was mooted when Mayor Havey chose not to run for re-election and Alderman Gazvoda was defeated. *Id.* at 374. The Court nevertheless decided the appeal because of the significance and importance of the issues. *Id.*

The Court began its analysis by holding that Wis. Stat. § 5.01(1) applied in full to the petition process:

> We begin with the fundamental principle that, in construing election laws, the will of the electorate is to be furthered. Section 5.01(1), Stats., entitled "Scope: Construction of Chs. 5 to 12," provides as follows: "Chapters 5 to 12 shall 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 its provisions." ***To reject otherwise valid signatures in a petition because one signature on the page was defective would be to defeat the above-stated policy***. "The object of election laws is to secure the rights of duly qualified electors and not to defeat them." *State ex rel. Dithmar v. Bunnell*, 131 Wis. 198, 206, 110 N.W. 177, 181 (1907).

Stahovic, 122 Wis. 2d at 376 (emphasis supplied). The Court held that when electors sign a petition, they are exercising their will as that term is used in § 5.01(1): "We are persuaded that it would not be in keeping with the provisions of sec. 5.01, Stats., to reject otherwise valid signatures, ***representing the will of the electorate***, because they appear on the same page as an invalid

signature." *Id* at 377 (emphasis supplied). *See also id.* at 380 (retaining the signatures "avoids thwarting the will of the electors").

These precedents leave no doubt that, consistent with its plain text, Wis. Stat. § 5.01(1) applies to electors participating in the nominating process set forth in Chapter 8.

C. The *Chippewa Falls* Decision Relied Upon by the WEC and Judge Martens Misread the Supreme Court's *Oaks* and *Ahlgrimm* Opinions.

In reaching a conclusion contrary to the text of Wis. Stats. § 5.01(1) and the holdings of *Redner* and *Stohavic*, the WEC and Judge Martens relied heavily on *City of Chippewa Falls v. Town of Hallie*, 231 Wis. 2d 85, 604 N.W.2d 300 (Ct. App. 1999), reading the opinion as establishing a bright-line rule that § 5.01(1) does not apply to electors signing nomination papers. (App. 0152.)

Chippewa Falls involved a petition to hold a referendum on a proposed annexation. The annexation statute, Wis. Stat. § 66.021(5), requires that petition signers must "resid[e] in the area proposed to be annexed," and that the petitions "conform[] to the requirements of s. 8.40." The challenge arose because the petition circulators did not reside in the area to be annexed. Section 8.40 requires that the circulator "reside within the jurisdiction or district within which the petition is circulated." Reading that language "in context and in conjunction with Wis. Stat. § 66.021(5)," the court held the terms "jurisdiction or district" refer to the proposed area of annexation, and thus the petitions were invalid. *Id*., 231 Wis. 2d at 89-91.

The Town of Hallie argued in the alternative that the defect should not be fatal, in light of § 5.01(1)'s command to give effect to the "will of the electors" notwithstanding a failure to comply with statutory requirements. Rejecting this alternative argument, the Court held:

> [O]ur supreme court has interpreted this statute as applying only after an election has been held and the will of the electors manifested. *See State ex rel. Oaks v. Brown*, 211 Wis. 571, 579,

> 249 N.W. 50, 53 (1933). This holding remained undisturbed by our supreme court's decision in *State ex. rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 263 N.W.2d 152 (1978). Accordingly, § 5.01(1) is inapplicable to the instant case, as there was no election from which the will of the electors had manifested.

231 Wis. 2d at 91-92. Based on this language, the WEC and Judge Martens concluded that § 5.01(1) has no application to the nomination petitioning process because, by definition, the petition process occurs before the election.

However, a closer examination of *Oaks* and *Ahlgrimm* suggest that the Court in *Chippewa Falls* misread the context and scope of those decisions.

Oaks involved a challenge to a referendum changing Oshkosh from a commission form of government to an aldermanic form of government. After the referendum passed, the new mayor, George Oaks, asked the prior city manager, Taylor Brown, to cede his office. Brown refused "on the ground that the proceedings had were insufficient" because the city clerk failed to properly call the special election, in violation of several procedural requirements set forth in Chapter 10. *Oaks*, 211 Wis. at 574, 576. There was no challenge to the petition process: "No question is raised in regard to the sufficiency of the petition and the qualifications of the signers thereto." *Id.* at 573.

The Court rejected Brown's challenges and ruled in favor of Mayor Oak. The Court relied in part on Wis. Stat. § 5.01(6), which included the same operative language as the current § 5.01(1). The Court held: "It is quite obvious that the legislature intended to say that if from the proceedings had pursuant to the statute the will of the electors has been in fact ascertained, that will shall be given effect notwithstanding the informality of procedure or failure to comply with all of the requirements of the statute." *Oaks*, 211 Wis. at 579.

The Court noted, however, that the statute "affords no excuse for the non-performance of prescribed official duty." *Id*. at 579. The Court hypothesized that if the challenge to the failure to

properly notice the special election been filed before the election occurred, the analysis would be different:

> If it had been sought to enjoin holding of the election on April 5, 1932, on the ground that the ordinance had not been published or notice given as required by law, an entirely different question would be presented. It is manifest that sec. 5.01(6) applies only after the holding of the election and the will of the electors has been manifested. When the matter has been allowed to proceed to that point, the will of the electors is to be given effect even though there may have been informalities or in some respect a failure to comply with the statute.

Id. Considering the opinion in full makes clear that the *Oaks* Court was not stating a general rule that § 5.01(6) (now 5.01(1)) is categorically inapplicable to electors when signing nomination papers; rather, the Court was pointing out that, when the challenged conduct relates to an official's pre-election failure to follow the law—which has nothing to do with any electors—the challenge must be filed before the election.

State ex. rel. Ahlgrimm v. State Elections Bd., 82 Wis. 2d 585, 263 N.W.2d 152 (1978), the other case referenced in *Chippewa Falls*, likewise does not contain the broad ruling that the WEC and Judge Martens ascribe to it. To the contrary, the Court therein specifically held that the statutes regarding the "preparation, signing and execution" of nomination petitioning process are directory in nature. 82 Wis. 2d at 596. The case arose after Judge John Ahlgrimm filed his nomination papers with the Racine County Clerk rather than the State Elections Board. Judge Ahlgrimm argued that § 5.01(1) should be applied and his mistake forgiven. *Id.* at 589-90. The Elections Board cited to *Oaks* and argued § 5.01 did not apply because there had been no election. *Id*. at 590. The Supreme Court did not rule on these competing arguments, stating instead: "Be that as it may, we conclude no construction of sec. 8.10(6) is necessary or appropriate." *Id.* The Court held that "[f]iling deadlines have consistently been treated as mandatory by this court," and that to "enlarge" the time

allowed by applying § 5.01(1) "would be to amend the statute, not to construe it." *Id.* at 592-93 (citation omitted).

Neither *Oaks* nor *Ahlgrimm*, then, stands for the broad proposition suggested in the *Chippewa Falls* decision—that is, a categorical holding that the rule of construction set forth in Wis. Stat. § 5.01(1) can never be applied to a nomination, recall, or referendum petition to "give effect to the will of the electors" who signed the petition.

D. *Chippewa Falls* Did Not Overrule the Court's Prior Holdings in *Redner* and *Stahovic* that Wis. Stat. § 5.01(1) Applies to the Petitioning Process.

Chippewa Falls did not cite *Redner* or *Stahovic*. It did not include any language suggesting the cases were overturned, wrong, or withdrawn. Nor could it. The Wisconsin Supreme Court has held that "the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals." *In re Cook v. Cook*, 208 Wis. 2d at 190. Only the Supreme Court has the authority to do so. *Id*. at 189-90. It follows that, to the extent *Chippewa Falls* can be read as inconsistent with *Redner* and *Stahovic*, which predate *Chippewa Falls* by 10 and 15 years respectively, *Chippewa Falls* does not change the law.

Petitioners suggest the contrary language in *Chippewa Falls* amounts to *dicta* that cited language from prior decisions out of context and for a proposition broader than the cases actually support. The real reason § 5.01(1) was inapplicable to the annexation petition at issue in *Chippewa Falls* is because the petition was required to conform to Wis. Stat. § 66.021(5), which benefits from no similar statutory rule of construction.

II. Wis. Stat § 8.04 Is a Directory, Not a Mandatory, Statute.

In accord with Wis. Stat. § 5.01(1), Wisconsin courts have consistently and repeatedly held that election statutes are directory, rather than mandatory. *See, e.g.*, *Gradinjan v. Boho*, 29 Wis. 2d 674, 682, 139 N.W.2d 557 (1966) (citing cases in support of assertion that, in keeping with the

Legislature's express instructions, "this court has quite consistently construed the provisions of election statutes as directory rather than mandatory so as to preserve the will of the elector"); *State ex rel. Bancroft v. Stumpf*, 21 Wis. 586 [*579], 587-88 [*580–*81] (1867) ("the statutory regulations for conducting an election are directory and not jurisdictional in their character; the main object of such laws being to afford all persons entitled to vote an opportunity to exercise the elective franchise, to prevent illegal votes, and to ascertain with certainty the true number of votes cast, and for whom").

"The difference between mandatory and directory provisions of election statutes lies in the consequence of non-observance: An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid." *Olson v. Lindberg*, 2 Wis. 2d 229, 235, 85 N.W.2d 775 (1957) (quoting 29 C.J.S. Elections § 214).

"Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result." *Id*. Where, however, the Legislature has not included an express and clear command, "the statutes should be construed as directory." *Matter of Hayden*, 105 Wis. 2d 468, 483, 313 N.W.2d 869 (Ct. App. 1981). "A statute which merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election should be construed as directory." *Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶27, 247 Wis. 2d 708, 634 N.W.2d 882 (quoting *Hayden*, 105 Wis. 2d at 483).

Wisconsin courts have "consistently sought to preserve the will of the electors by construing election provisions as directory if there has been substantial compliance with their

terms." *Roth*, 2001 WI App 221, ¶27 (quoting *McNally v. Tollander*, 100 Wis. 2d 490, 497, 302 N.W.2d 440 (1981)). "Strict compliance with a directory statute is not required." *Hayden*, 105 Wis. 2d at 483.

In *Lanser v. Koconis*, 62 Wis. 2d 86, 93, 214 N.W.2d 425 (1974), the Supreme Court noted that it is "fully cognizant of possible abuses of the absentee voter's law and share[s] the concern of the legislature in preventing any such abuse." But, the Court held, without "evidence of any fraud, connivance, or attempted undue influence," there is no basis "to disenfranchise these voters who acted in conformance with the statutory requirements." *Id*. Accordingly, Wisconsin courts seek "to fulfil[l] the spirit of our election law," construing statutory provisions as "directory only" and accepting "substantial compliance therewith." *Sommerfeld v. Bd. of Canvassers*, 269 Wis. 299, 304, 69 N.W. 2d 235 (1955).

Wis. Stat. § 8.04 sets out two principles. First, if an elector signs nomination papers for multiple candidates, only the earliest signature is valid. Second, if a person circulates nominating papers for more than one candidate seeking the same office in the same election, only the "earlier paper" is valid. Section 8.04 contains no language—much less an express declaration—that would support construing the provision as mandatory rather than directory. Nothing in the text of the statute states that non-compliance is "fatal" or "will change or render doubtful the result." *Olson*, 2 Wis. 2d at 235. There can be no doubt that, where the Legislature means for a provision of the election statutes to be mandatory, it knows how to so provide. *See, e.g.*, Wis. Stat. § 6.84(2) ("Notwithstanding s. 5.01(1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87(3) to (7) and 9.01(1)(b)2. and 4. ***shall be construed as mandatory***. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted

in contravention of the procedures specified in those provisions may not be included in the certified result of any election.") (emphasis supplied).

Wisconsin courts have "long been committed to the principle that a construction given to a statute by the court becomes a part thereof, unless the legislature subsequently amends the statute to effect a change." *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶52, 281 Wis. 2d 300, 697 N.W.2d 417 (citation omitted). It follows that "legislative silence with regard to new court-made decisions indicates legislative acquiescence in those decisions." *Id*. For that reason, the Supreme Court has declined, for example, to depart from its prior statutory interpretations where the Legislature had not amended the statute in the years since the prior decision. *See, e.g., Bauman v. Gilbertson*, 7 Wis. 2d 467, 469-70, 96 N.W.2d 854 (1959) (11 years); *Romanshek*, 2005 WI 67, ¶¶52-57 (over 20 years).

If the Legislature intended Wis. Stat. § 8.04 to be mandatory, or to be excluded from the construction required by § 5.01(1), it would have amended the statute in a fashion similar to § 6.84(2) regarding absentee ballots. Its failure to do so represents an acknowledgment that *Redner* and *Stahovic* were correctly decided and § 8.04, like the balance of the provisions in Chapter 8 regarding nomination, recall and referendum petitions, is both subject to § 5.01(1) and directory in nature.

Section 8.04 exemplifies an election statute that "merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election." *Roth*, 2001 WI App 221, ¶27. It follows that, without "evidence of any fraud, connivance, or attempted undue influence" there is no basis "to

disenfranchise these voters who acted in conformance with the statutory requirements." *Lanser*, 62 Wis. 2d at 93.

To construe § 8.04 as mandatory would override the will of each and every one of the more than 5,000 electors who validly signed nomination papers to include Jim Sullivan and Bryan Kennedy on the ballot.

III. Petitioners' Campaigns Substantially Complied with Wis. Stat. § 8.04 and the Failure of the Individual Circulators to Comply with the Law Should Not Thwart the Will of the Electors to Include Sullivan and Kennedy on the Ballot.

In the context of circulating election papers for signatures by electors, "[s]ubstantial compliance requires the petitions be circulated in a manner that protects against fraud and that assures the signers known the content of the petition." *Redner*, 153 Wis. 2d at 391. *See also Lanser*, 62 Wis. 2d at 92 ("substantial compliance" with a directory statute is sufficient). In the same vein, Wis. Stat. § 5.01(1) declares that where the "will of the electors" can be ascertained, it shall be "give[n] effect" even when there was a "failure to fully comply with" the statutory requirements. *Lanser* cautions, however, that such an application will not apply if there is "the slightest evidence of any fraud, connivance or attempted undue influence." *Lanser*, 62 Wis. 2d at 93.

The challenges to Sullivan and Kennedy's nomination papers were analogous to—although far narrower than—the challenges in *Redner*. Lipscomb never even suggested, must less tried to prove, "that any defect rose to the level where it facilitated misrepresentation." *Redner*, 153 Wis. 2d at 390, 392. Lipscomb conceded the validity of the more than 5,000 signatures that MCEC validated on Sullivan and Kennedy's nominating papers. His sole complaint is that the individuals who circulated a fraction of those papers, while legally qualified to serve as circulators, had previously performed the same function for another candidate. In the circumstances here, where it is uncontested that the Sullivan and Kennedy campaigns took every reasonable step available to

them to ensure compliance (*see* App. 0026-27, 0074, 183-185), this complaint cannot defeat substantial compliance.

Instead, the Court should do as Wis. Stat. § 5.01(1) directs. By directing Milwaukee County to include Sullivan and Kennedy on the ballot, the Court would "give effect to the will of the electors" who signed their nomination papers, despite the failure of the circulators to "comply" with § 8.04.

IV. There Is No Evidence of Fraud; This Was an Honest Mistake.

Absent evidence establishing "fraud, connivance, or attempted undue influence," there is no basis "to disenfranchise [] voters who acted in conformance with the statutory requirements." *Lanser*, 62 Wis. 2d at 93. The evidence in the record showed—and the MCEC found—that the Sullivan and Kennedy campaigns had taken all reasonable steps to ensure compliance with the law and that paid canvassers had made a mistake. (App. 0107-10.)

The campaigns took affirmative steps to ensure that their paid canvassers were not circulating nominating papers for any other candidates in the same race. *Kennedy Affidavit*, ¶5 (App. 0026); *Circulator Affidavits,* ¶7 (App. 0190, 0193, 0196, 0199.) Neither Sullivan nor Kennedy, and neither of their campaigns, had any intent to stray from Wisconsin's election procedures in any way. *Williams Affidavit*, ¶11 (App. 0185); *see also* App. 0095. None of the individual canvassers at issue had any intention to harm the campaign of any candidate for Milwaukee County Executive, to conduct themselves in a way inconsistent with the process

directed by Wisconsin law, or to interfere with the election process. *Circulator Affidavits,* ¶¶8-9 (App. 0190, 0193, 0196, 0199.).

V. The WEC Decisions Should Also Be Reversed Due to the WEC's Violation of Sullivan and Kennedy's Due Process Rights.

In addition to the substantive errors below that entitle Sullivan and Kennedy to relief, there is another independent basis for restoring them to the ballot: in excluding them, the WEC violated Sullivan and Kennedy's constitutionally guaranteed rights to due process. WIS. CONST. art. I, § 1; U.S. CONST. amend. XIV, § 1. By acting without affording Sullivan and Kennedy—the ones excluded from the ballot by the WEC decisions—any opportunity to participate in the proceedings, the WEC denied them the most basic protections of due process. *See, e.g.*, *State ex rel. Universal Processing Servs. of Wis., LLC v. Cir. Ct. of Milwaukee Cty.*, 2017 WI 26, ¶100, 374 Wis. 2d 26, 892 N.W.2d 267 ("Basic to due process is procedural fairness—notice, the opportunity to be heard, and the accurate and fair adjudication of disputes."). This deprivation is not a minor issue, especially given the stakes here.

The WEC violated due process in several ways. Most fundamentally, the WEC excluded Sullivan and Kennedy from the ballot without affording them any opportunity to be heard, which is a cornerstone of due process. Once the Milwaukee County respondents declined to defend Sullivan and Kennedy's inclusion on the ballot (*see* App. 0034), the WEC chose to informally adjudicate the issue after hearing only one side's argument. The Milwaukee County respondents never imagined the WEC would proceed in such a manner, expressly anticipating that counsel for Sullivan and Kennedy would get to address the merits of the complaints and fill the void left by respondents. (*Id.*) WEC's false assertion that Sullivan and Kennedy chose to remain silent (App. 0149, 0209)—even after the WEC's Staff Counsel had rebuffed inquiries from Sullivan's counsel about participating in the proceedings and after Sullivan's counsel had provided notice of plans to

promptly request intervention and fill the advocacy gap left by the Milwaukee County respondents' letter (App. 0215)—reveals that the WEC recognized the importance of providing Sullivan and Kennedy the opportunity to be heard.

The WEC compounded its violation by relying upon sources not previously discussed at the MCEC hearing. The WEC introduced, analyzed, and acted upon new sources that had not been tested by any adversarial process. It did so in a rushed fashion, over a holiday weekend, without providing interested parties any opportunity to review and address those sources. Underscoring the importance of due process's guarantee that all interested parties have an opportunity to be heard, the WEC omitted relevant sources, including but not limited to this Court's *Redner* decision, and materially misinterpreted other's authority, including the *Ahlgrimm*, *Chippewa Falls*, and *Oaks* decisions necessary to the WEC's result. (App. 0152-153, 0211.)

Nor is incomplete legal research the only WEC mistake that due process would likely have prevented; the WEC also used tautological reasoning to undermine the MCEC's (uncontested) finding that the Sullivan and Kennedy campaigns had taken all reasonable and available steps to avoid violating Wis. Stat. § 8.04. The WEC glibly dismissed the campaigns' efforts and asserted that candidates must ensure compliance with requirements like § 8.04, without identifying any way that could possibly be done. (App. 0154, 0213.) Had the WEC provided Sullivan and Kennedy an opportunity to be heard, or even held a meeting at which all of the Commissioners and members of the public could have engaged with the staff's reasoning, this fallacy likely would have been exposed—and the WEC's determination may well have changed. (Notably, MCEC Commissioner Posnanski found the lack of any further steps the campaigns could have taken to ensure compliance persuasive. (*See* App. 0110.))

Finally, the WEC violated Sullivan and Kennedy's due process rights by excluding them from the ballot without consideration by the full Commissioner. Although the WEC has authority to "summarily decide" some matters, that authority applies only "after such investigation as [the WEC] deems appropriate." Wis. Stat. § 5.06(6). To accord with due process, the WEC's decision about the extent of "appropriate" investigation must be reasonable.[5] Here, as discussed above, a rushed process that did not allow an opportunity for Sullivan and Kennedy even to be heard, omitted relevant legal authority and misconstrued material cases, avoided consideration of this sea change in legal interpretation by all Commissioners at a public hearing, and resulted in shoddy reasoning cannot be understood to be reasonable basis for the momentous decision the WEC made to exclude Sullivan and Kennedy from the ballot. Accordingly, the WEC failed to meet the requirements of due process.

The WEC's failure to provide due process is fatal to its decisions to exclude Sullivan and Kennedy from the ballot. This provides an independent basis on which this Court should restore them to the primary ballot.

[5] Such an investigation must include consideration by all Commissioners on questions, like which candidates should appear on the ballot, that are inherently political. Recognizing the political potency of some issues that come before the WEC, the Legislature designed the WEC to comprise an equal number of Republican and Democratic Commissioners. Where, as here, the WEC decides politically salient questions without input from all Commissioners, it undermines that design. It is fundamentally problematic—and inconsistent with due process—that the bipartisan-by-design WEC excluded Sullivan and Kennedy, both Democrats, from the ballot on the basis of a determination approved only by one commissioner, a former Republican legislator. Compounding the violation, the decision to deny Sullivan's intervention request—a significant point in this process that shortchanged the investigation and cemented the due process violation—was made by the WEC staff, without consulting any commissioner. (App. 0248-250.)

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court take immediate action on this interlocutory appeal and enter an order restoring Jim Sullivan and Bryan Kennedy to the spring 2020 primary ballot for Milwaukee County Executive.

Dated: January 27, 2020

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CERTIFICATION OF FORM AND LENGTH

I certify that this petition meets with the form and length requirements of Wis. Stat. §§ 809.50(1) and (4). This petition is produced in proportional serif font, and the total word count (excluding caption, table of content and table of authorities) is 7,975 words.

Dated: January 27, 2020

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CERTIFICATION OF SERVICE

I hereby certify that on January 27, 2020, I filed the Petition for Expedited Interlocutory Appeal of Ballot Access Decision, and Brief on the Merits, the corresponding Appendix, and Petitioners' Emergency Motion To Expedite Interlocutory Ballot Access Appeal by hand-delivering the same to the Clerk for the Wisconsin Court of Appeals, and served copies of the same by electronic mail and first-class mail (if requested) to all counsel of record in this matter.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, as a separate document, is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinions of the courts below; (3) a copy of any unpublished opinion cited under Wis. Stat. § (Rule) 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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