

**STATE OF
WISCONSIN**

**WISCONSIN ELECTIONS
COMMISSION**

JANE BERNSTEIN,

Complainant,

v.

TIMOTHY J. MICHELS,

Respondent.

**VERIFIED RESPONSE OF TIMOTHY J. MICHELS IN OPPOSITION TO
COMPLAINT OF JANE BERNSTEIN**

INTRODUCTION

Timothy Michels is currently the front runner for the Republican gubernatorial nomination, and hundreds of thousands of Wisconsinites are eager to vote for him in the August primary. Pursuant to Wisconsin Statutes § 8.15(5)(b), the Michels' campaign filed nomination papers with the Wisconsin Election Commission containing 4,000 signatures—twice the required amount and the maximum amount allowed by law. The Commission accepted 3,861 of those signatures as valid. The complainant here, Jane Bernstein, does not allege that any of the accepted signatures are invalid. Nor does she aver that any of the signers were misled by information on the nomination form. Instead, she alleges that one version of the nomination forms was “legally deficient” because the mailing address printed on that form—6831 State Road 83 in the Village of Chenequa—did not include “Hartland, Wisconsin 53029.” Although Bernstein does not allege that mail sent to the address printed on that form would not be delivered to Michels' residence, she nevertheless claims that the 3,516 signatures collected on that form “must be disallowed and not counted,” leaving only 345 potentially valid signatures. On this slenderest of reeds, Bernstein rests an unprecedented demand: that a leading gubernatorial candidate of one of the two main parties

be kicked off the August and November ballots. But Bernstein has not come close to showing that such radical action is warranted here.

For starters, Bernstein has not shown that the mailing address on the challenged form is even *incorrect*. She does not demonstrate, for example, that mail sent to the printed address would be returned to sender or misdirected. And in fact, the United States Postal Service has confirmed that any mail directed to the printed address would be delivered to Michels (as would any mail sent to Michels' personal attention at the printed campaign address, a P.O. Box in Milwaukee). Nor is the printed address remotely likely to result in voter confusion, as the address containing "Hartland, Wisconsin 53029" is the first thing Google displays when one types "6831 State Road 83 in the Village of Chenequa" into the search engine. Because the nomination form contains Michels' "mailing address"—namely, an address that can be used to send mail to Michels—it easily satisfies the requirement of Section 8.15(5)(b).

In Bernstein's fantasy land, meanwhile, there is only One, True Address for every residence, and no variation from it will result in delivery. In reality, Wisconsinites from small towns without post offices receive mail *every day* that is addressed to their actual city or town of residence, even if it is not the city that USPS officially associates with their Zip Code. Not only that: they also routinely receive mail that misidentifies their "Road" as a "Street" or that misspells the municipality or state. If Bernstein were correct, state law would invalidate any signatures printed on any form containing a typo or other type of harmless error. Even a form misspelling "Hartland" as "Heartland" would, under Bernstein's bizarre view, render all signatures on that form invalid, even though the local postmaster probably encounters that mistake dozens of times a week—and probably doesn't even notice it. The fundamental right of ballot access does not turn on such pedantry.

Furthermore, even if the address printed on the challenged nomination form was technically incorrect (which it was not), Bernstein’s complaint is meritless. The Wisconsin Supreme Court has long held that election laws that simply specify the mode and manner of elections are directory, not mandatory, unless they specify that failure to comply is fatal—even when they say “shall.” The relevant statute here, § 8.15(5)(b), does not provide any such sanction for non-compliance. Separately, the Commission has likewise concluded that nomination forms will be accepted if they are in “substantial compliance” with the law, notwithstanding any technical deficiencies. In similar circumstances, the Commission has thus determined that technical defects on a nomination form did not invalidate the signatures on that form. The Commission should reach the same result here and uphold the signatures as valid.

Finally, even if the Commission were somehow to conclude that the nomination form is not in substantial compliance, the Commission should exercise its discretion to keep Michels on the ballot. The Legislature has provided that the Commission “*may refuse* to place the candidate’s name on the ballot if . . . [t]he nomination papers are not prepared, signed, and executed as required.” Wis. Stat. § 8.30(1)(a) (emphasis added). It does not say that the Commission “must” refuse or “shall” refuse to place the candidate on the ballot. Given the nature of the alleged defect here, the Commission should not impose the extreme sanction Bernstein proposes, which would have the effect of depriving hundreds of thousands of Wisconsinites of their right to vote for the candidate of their choice. Given the Wisconsin Supreme Court’s repeated admonition to liberally construe statutes that might hinder ballot access, and the long line of Supreme Court cases protecting the right to vote against undue burdens, the Commission should uphold the signatures as valid and list Michels on the ballot.

BACKGROUND FACTS

Timothy J. Michels, a Republican candidate for Wisconsin Governor whose campaign is run through Michels for Governor, Inc. (the “Campaign”), resides in the Village of Chenequa, Wisconsin. (*See* Michels Aff. ¶¶ 9, 10). However, because the Village of Chenequa does not have a post office, the post office in neighboring Hartland, Wisconsin, gathers and distributes mail to residents of Village of Chenequa. (*See* Miller Aff. ¶ 3.) To obtain the required signatures in accordance with Wis. Stat. § 8.15, the Campaign prepared a nomination form, which form stated that Michels resides at “6831 State Road 83, Hartland, WI 53209, in the Village of Chenequa.” (*See* Michels Aff. ¶9, Ex A). A total of 365 electors’ signatures were collected on those papers. (Michels Aff. ¶9).

Inadvertently, a different version of the nomination paper was uploaded to the Campaign’s webpage for the public’s use and dissemination. (Michels Aff. ¶¶10, 14, Ex. B). This second nomination form listed Michels’ residence as “6831 State Road 83 in the Village of Chenequa.” (Michels Aff. ¶10, Ex. B). A number of circulators printed this form off the website and used it to collect signatures. (Michels Aff. ¶12). According to the Commission, a total of 3,516 signatures were collected on the second nomination form. (Michels Aff. ¶ 13).

The address listed as Michels’ residence on the second nomination form, “6831 State Road 83 in the Village of Chenequa,” is an address at which Michels receives mail. (Michels Aff. ¶ 15). More, the United States Postal Service’s Zip Code lookup tool indicates that mail addressed to this location will be delivered in the same way that mail addressed using the municipality “Hartland” would be delivered. (Miller Aff., Exs. 3 &4). Indeed, both the Village of Chenequa and the Chenequa Police Department list their “mailing address[es]” as “Chenequa, WI,” despite the fact that USPS’s website indicates that the street address is in “Hartland, WI.” (Miller Aff., Exs. 6, 7,

8). And the Postal Service’s website states that mail missing a Zip Code will simply be “delay[ed]” because it will need to be processed manually. *See* (Miller Aff., Exs. 1 & 2). Finally, it is clear from Michels’ nomination papers that the address is located in Wisconsin, given that there is only one “Village of Chenequa” in the United States, *see* (Miller Aff., Ex. 9), and Michels is running for “the office of Governor of Wisconsin.” *See* (Michels Aff., Ex. B).

Moreover, this second nomination form (like the first form) also contained a “Return Address” of “P.O. Box 26909, Milwaukee, WI 53226.” *See* (Michels Aff., Ex. B). This, too, is an address at which Michels receives mail. *See* (McNulty Aff. ¶ 4).

The Michels campaign submitted all 4,000 signatures to the Commission on May 31, 2022. The Commission accepted 3,861 as valid. (Michels Aff. ¶¶7–8). Two days later, former President Donald J. Trump publicly endorsed Michels.¹ Even before the Trump endorsement, Michels was already the leading candidate amongst Wisconsin Republican voters according to at least one poll.²

On June 4, 2022, working in tandem with the Democratic Party of Wisconsin, Bernstein filed the instant complaint alleging that the second nomination form does not comport with Wis. Stat. § 8.15(5) because the listed residence omits the Zip Code and State and refers to the Village of Chenequa instead of Hartland. (Complaint ¶ 23.) Her complaint, prepared and filed by attorneys affiliated with a nonprofit that purports to work to “[p]rotect voting rights [and] access to the polls, and the fair administration of elections,”³ requests that the Commission deem the 3,516 signatures

¹ *See* Shawn Johnson, *Trump endorses Tim Michels in Wisconsin governor’s race, dealing blow to GOP frontrunner Rebecca Kleefisch*, Wisconsin Public Radio (June 2, 2022), available at <https://www.wpr.org/trump-endorses-tim-michels-wisconsin-governors-race-dealing-blow-gop-frontrunner-rebecca-kleefisch>.

² A.J. Bayatpour, *New poll shows Kleefisch, Michels even in GOP primary for governor*, WKOW.com (May 16, 2022), available at https://www.wkow.com/news/new-poll-shows-kleefisch-michels-even-in-gop-primary-for-governor/article_092f5912-d52f-11ec-9e2f-33605754b6f8.html (showing Michels ahead, 27 percent to 26).

³ *Our Work*, Law Forward, available at <https://lawforward.org/our-work> (last visited June 7, 2022); *see also About Us*, Law Forward, available at <https://lawforward.org/about-us> (last visited June 7, 2022).

on the second form invalid because of these alleged “errors.” (Complaint at 5–7). Although Bernstein does not provide any evidence that mail addressed to the residence listed in the second nomination form would not be delivered to or received by Michels, or that mail addressed to the PO Box would not be delivered to or received by Michels, the Complaint asks the Commission to take the extraordinary step of preventing Michels, the leading Republican candidate, from appearing on the August primary ballot.

On June 6, 2022, Michels filed with the Commission a correcting affidavit. (Michels Aff.). While Michels disputes that the nomination forms contain any material errors and believes that the forms are legally sufficient as submitted, Michels nevertheless “correct[ed]” the alleged “error” on these forms. (Michels Aff.). In particular, Michels explained that the circulators inadvertently used the version of the nomination form that was missing the words “Hartland, WI 53029,” and that he and the Campaign intended that the circulators use the version that contained those words. *See* (Michels Aff. ¶¶ 11–12).

ARGUMENT

I. Michels’ Nomination Papers Fully Comply with Wisconsin Statute § 8.15(5)

Wisconsin election law provides that “each candidate shall include his or her mailing address on the candidate’s nomination papers.” Wis. Stat. § 8.15(5)(b). Nowhere in the statute is the term “mailing address” defined. Nor does § 8.15(5)(b) dictate how the candidate’s mailing address should be specified, whether the address must be the candidate’s residential address, that the address cannot be shared by other persons or entities, or that the address must be candidate’s only (or even primary) mailing address.

Bernstein alleges that the mailing address on the second nomination form is inaccurate, but the Commission’s regulations provide that a nomination form is presumptively correct and that it

is the complainant's burden *to prove* any error by clear and convincing evidence. Wis. Admin. Code §§ EL 2.05(4); 2.07(3), (4). Bernstein has not provided any evidence—by affidavit or otherwise—that mail sent to “6831 State Road 83, Village of Chenequa” would not be delivered to Michels' residence. And simply alleging “upon information and belief” that there is an error, as Bernstein has done here, is insufficient to meet this burden. *See Hawkins v. Wis. Election Comm'n*, 2020 WI 75, ¶ 20 393 Wis. 2d 629, 948 N.W.2d 877 (Roggensack, C.J., dissenting from denial); *id.* ¶ 46 (Ziegler, J., dissenting from denial) (same). In all events, the second nomination form complies with section 8.15(5)(b) because the Chenequa address listed *can* be used to send mail to Michels, and the form contained a separate P.O. Box address that also could be used to send mail to Michels.

When a term is undefined, courts “look to the common meaning of the phrase,” and “often consult a dictionary” for guidance. *Stroede v. Soc'y Ins.*, 2021 WI 43, ¶12, 397 Wis. 2d 17, 959 N.W.2d 305. The dictionary defines the term “mailing address” as “an address to which mail can be sent,” *Mailing Address*, Merriam Webster,⁴ or “the address at which a person or business receives letters or packages, which can be different from the place where they work or live.” *Mailing Address*, Cambridge Dictionary.⁵

The address on the second nomination form, “6831 State Road 83 in the village of Chenequa,” meets that definition because mail to Michels can be sent to that address. First, that the municipality is listed as Village of Chenequa instead of Hartland is of no moment. The United States Postal Service's Zip Code lookup tool returns the same address and Zip Code for both 6831 State Road 83, Village of Chenequa, WI, and 6831 State Road 83, Hartland, WI. (Miller Aff., Exs.

⁴ <https://www.merriam-webster.com/dictionary/ mailing%20address>.

⁵ <https://www.merriam-webster.com/dictionary/ mailing%20address/>

3 & 4). And the Postal Service’s Customer Care Center confirmed that mail addressed to either municipality with a shared Zip Code would be delivered. (Miller Aff. ¶ 2). Indeed, the Village of Chenequa and the Chenequa Police Department both list their “mailing address” as “31275 W County Road K, Chenequa, WI 53029,” (Miller Aff. Exs. 6, 7), and these government entities undoubtedly receive mail at their listed “mailing address[es]” in Chenequa despite the fact that the Postal Service’s ZIP Code lookup tool lists the address as being in “Hartland, WI 53029.” (Miller Aff. Ex. 8). And, most importantly, Michels recalls that mail addressed to his attention at “6831 State Road 83” referencing the village of Chenequa, as opposed to Hartland, has been delivered to him in the past. (Michels Aff. ¶15).

Second, that the address does not contain a state or Zip Code does not affect its validity as a “mailing address.” The absence of a Zip Code will not prevent mail from being delivered to that address. According to the Postal Service’s website, mail missing a ZIP Code will simply be “delay[ed] because it will require manual look-up.” (Miller Aff. Exs. 1 & 2). And, although the word “Wisconsin” does not immediately follow “Chenequa” in the challenged nomination papers, Wisconsin is clearly the state for this address as it is the only state with a “Village of Chenequa,” and the papers explain that Michels is running “for the office of Governor of Wisconsin.” *See* (Michels Aff. Ex. B),

In addition to properly listing his home address, both iterations of the Campaign’s nomination papers include a return address of “P.O. Box 26909, Milwaukee, WI, 53226,” (Complaint Ex. B), which is also a “mailing address” for Michels. If anyone were to send mail to Michels at the P.O. Box address, a Campaign employee would open the mail, screen it, and, if warranted, provide it to Michels. (McNulty Aff. ¶ 4). The P.O. Box mailing address is thus an address to which mail can be sent and at which Michels receives mail. The inclusion of that address

on the second nomination form thus independently satisfies the requirements of Wis. Stat. § 8.15(5)(b).

That the Campaign, in addition to the candidate, may also receive mail at the P.O. Box address, (Complaint at ¶28), does not alter this conclusion. The statute does not require that the provided “mailing address” must be used only by the candidate. And such a reading of the statute’s language—that the candidate “shall include his or her mailing address,” Wis. Stat. § 8.15(5)(b)—would be absurd, given the prevalence of shared mailing addresses among families and businesses. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (statutes are interpreted “reasonably, to avoid absurd or unreasonable results.”).⁶

In short, because any mail directed to Michels and sent to “6831 State Road 83 in the Village of Chenequa,” or “P.O. Box 26909, Milwaukee, WI, 53226” would be delivered to Michels, the second nomination form contains at least one mailing address in compliance with § 8.15(5)(b).

II. Even if Bernstein Were Correct That the Papers Contain a Technical “Error,” Both Supreme Court Precedent and this Commission’s Own Rule Independently Forbid Denying Michels’ Access to the Ballot (and Citizens’ Right to Vote for Their Preferred Candidate) on That Basis

Even if “6831 State Road 83 in the village of Chenequa,” is somehow not Michels’ “mailing address” within the meaning of the statute (and the assuming the P.O. Box address does not satisfy the statutory requirement), the nomination papers and the signatures thereon are still valid for two independent reasons. *First*, election-law precedent establishes that § 8.15(5)(b) is a “directory” provision, the violation of which is a mere “irregularity” that does not “vitiate” the nomination papers. *Second*, consistent with that case law, the Commission has issued a rule (which

⁶ Nor does the statute’s language require that the mailing address included on the form be the candidate’s *only* mailing address. *See* Wis. Stat. § 8.15(5)(b). And, again, such a reading would be absurd, given that individuals commonly receive mail at more than one address. *See Kalal*, 2004 WI 58, ¶ 46.

it has repeatedly enforced) holding that nomination papers must be considered “complete” when they are in “substantial compliance,” as they are here. Wis. Admin. Code § EL 2.05(5).

A. Under Binding Case Law, Section 8.15(5)(b) Is “Directory” Rather Than “Mandatory” and Any Deviation From Its Requirements Is Thus a Mere “Irregularity” That Cannot “Vitiate” the Nomination Papers

It is well established that election “statute[s] should be interpreted to enable [] people to vote” for their preferred candidate. *Sommerfeld v. Board of Canvassers of City of St. Francis*, 269 Wis. 299, 302, 69 N.W.2d 235, 237 (1955); 29 C.J.S. Elections § 179 (2022) (“Laws governing nomination of candidates should be liberally construed to foster . . . the qualification for candidacy.”) (citing cases). This approach respects “the spirit of [Wisconsin’s] election laws,” which promote the freedom of voters to select their favored candidates from a field. *Sommerfeld*, 269 Wis. at 304; *see also Judge v. Quinn*, 624 F.3d 352, 354, 361 (7th Cir. 2010) (“[T]he effect of ballot access restrictions on candidates always has a correlative effect on the field of candidates among whom voters might choose” and, for that reason, such laws should be construed to facilitate candidacy) (citing cases).

It is equally well established, under the Wisconsin Supreme Court’s canonical decision in *Sommerfeld*, that “technical” violations of election statutes “do not vitiate an election,” much less one’s election papers, *Sommerfeld*, 269 Wis. at 303–04, and therefore cannot be applied to “suppress[] the people’s right to choose to vote for” their preferred candidate.” *Hawkins*, 2020 WI 75, ¶ 15 (Roggensack, C.J., dissenting). *Sommerfeld* explains that, while the Legislature can and must create the ground rules for the administration of elections, not all election “requirements” are created equal. In particular, provisions merely “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.” 269 Wis. at 303 (quoting 29 C.J.S. Election § 214 and emphasis added). Directory provisions include those

“merely provid[ing] that certain things *shall* be done in a given manner and time without declaring that conformity to such provision is essential to the validity of the election.” *Id.* (emphasis added). In other words, if the text of a statute governing the “mode and manner” of election administration does not couple non-compliance with invalidity—even if it says “*shall*”—the statute is directory, not mandatory. “The difference between mandatory and directory provisions of election statutes lies in the consequences of nonobservance: 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.” *Id.* “Deviations from directory provisions of election statutes are usually termed ‘irregularities.’” *Id.* “Whether a statute is mandatory or directory is a question of statutory construction.” *Cross v. Soderbeck*, 94 Wis. 2d 331, 341, 288 N.W. 2d 779 (1980).

Applying *Sommerfeld*’s binding interpretive rule to the later-enacted § 8.15(5)(b) is straightforward. See *Benson v. City of Madison*, 2017 WI 65, ¶ 30, 376 Wis. 2d 35, 897 N.W.2d 16 (the legislature drafts laws “against a background of clear interpretive rules” announced by the Court and therefore “know[s] the effect of the language it adopts”). The provision states that “[e]ach candidate shall include his or her mailing address on the candidate’s nomination papers.” Section 8.15(5)(b). This language supplies a “mode and manner” of “conducting elections” with respect to nomination papers while saying nothing about the consequences of “noncompliance.” *Sommerfeld*, 269 Wis. 299, 303. Section 8.15(5)(b) is therefore a directory provision according to its plain language. *Id.*; accord *In re Chairman in Town of Worcester*, 29 Wis. 2d 674, 682, 139 N.W.2d 557, 561 (1966) (The Wisconsin Supreme Court “has quite consistently construed the provisions of election statutes as directory rather than mandatory so as to preserve the will of the elector.”) (collecting cases); *Matter of Recall of Redner*, 153 Wis. 2d 383, 390, 450 N.W.2d 808

(Ct. App. 1989) (“The statutory requirements for preparation, signing, and execution” are considered “directory rather than mandatory.”).

Comparing § 8.15(5)(b) to its “surrounding provisions” that *do* describe the consequences of nonobservance further proves the point. *Clean Wisconsin, Inc. v. Pub. Serv. Comm’n of Wisconsin*, 2005 WI 93, ¶ 249, 282 Wis. 2d 250, 700 N.W.2d 768. For example, section 8.15(2) requires anyone signing a nomination form to “list his or her municipality of residence” “in order for the signature *to be valid.*” *Id.*; *see also e.g.*, § 8.28(2) (listing consequences, including a writ of quo warranto, for public officials failing to comply with “residency qualifications”); § 8.20(5) (stating that only “one signature per person for the same office is valid” for nominations of independent candidates). Unlike § 8.15(5)(b), each of these provisions expressly provides “the consequences of nonobservance,” making them “mandatory.” *Sommerfeld*, 269 Wis. at 303.

Applying this this same logic, Judge Martens of the Milwaukee County Circuit Court recently determined that a different election statute, Wis. Stat. § 8.04, was mandatory because it specifically provides that “[i]f any [person] circulates a nomination paper for 2 candidates for the same office in the same election at different times, the earlier paper is valid and the *later paper invalid.*” *Sullivan v. Wis. Elec. Comm’n*, Milwaukee County Cir. Ct. Case No. 2020CV573 (Jan. 24, 2020) (Fernholz Aff. ¶ 3, Ex. B, p. 23:13–15) (emphasis added). As Judge Martin recognized, “finding the statute to be directory is premised, or can be premised,” on whether the statute pertains to preparing, signing, and executing election documents. (Fernholz Aff. ¶ 3, Ex. B, p. 23:16–21). But because the alleged misconduct involved “actual acts taken by the circulators,” the court found the situation “very different” from “infirmities of the form itself.” (*Id.* p. 28:10–13).

Contrary to Bernstein’s assertion, the statute’s use of “shall” does not change this result. *Sommerfeld* could not be any clearer: a provision may state that a certain thing “shall be done” and

still be directory. 269 Wis. At 303. Other cases agree: “The word ‘shall’ ‘will be construed as directory if necessary to carry out the legislature’s clear intent.” *State of Wis. Higher Education Aids Bd. v. Hervey*, 113 Wis. 2d 634, 642, 335 N.W.2d 607 (1983) (collecting cases); *see also State ex rel. Werlein v. Elamore*, 33 Wis. 2d 288, 293–94, 147 N.W.2d 252 (1967) (collecting cases). In *Sommerfeld*, the Court held that the “shall” provision in the absentee-voting statute meant “may” because, when construing the relevant statutory provisions as a “whole” in light of their “reasons and spirit for [] adoption,” the provision at hand was meant to prevent tampering or fraud. 269 Wis. 299, 303–04. Because there was “no claim” of election “tamper[ing]” or “fraud” and the challenged conduct amounted to no more than an irregularity, the court did not invalidate the absentee ballots despite the “technical” violation. *Id.* at 304.

“[T]he consequences which would follow from [an] alternative interpretation[]” further militate in favor of interpreting § 8.15(b)(5) as “directory.” *Cross v. Soderbeck*, 94 Wis. 2d 331, 341, 288 N.W. 2d 779 (1980) (listing “a number of factors” to examine when “determining whether a statutory provision is mandatory or directory in character,” including “the objectives sought” by the statute, “its history,” and whether “a penalty is imposed for its violations) (citation omitted). If Bernstein is right, then millions of voters will be deprived of their right to select a candidate of their choosing, all because of an alleged technical error of no consequence given that the actual mailing address on the form is a perfectly acceptable mailing address for Michels.⁷ *See supra* Part I. Conversely, concluding that this provision is “directory” would allow these voters to exercise their constitutional and statutory rights. *See Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968) (acknowledging as long established that burdens on candidacy—usually in the context of

⁷ In 2020, more than 3.2 million Wisconsinites voted in the present election, with nearly half voting for the Republican candidate. *See* WEC Canvass Reporting System, *Canvass Results for 2020 General Election* (Nov. 2020), <https://tinyurl.com/yyc8uf4r>.

ballot restrictions—implicate “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively” (citation omitted)).⁸

In sum, it is clear that § 8.15(5)(b) is directory, not mandatory. Accordingly, the Commission should not suppress the right of voters to vote for their preferred candidate due to this harmless “irregularity.” Michels must remain on the ballot.

B. Under This Commission’s Own Binding Rule, Nomination Papers May Not Be Rejected If They Are, As Here, in “Substantial Compliance” With the Law

Consistent with these cases, the Commission has issued a regulation to the same effect, pursuant to its rulemaking authority under Wis. Stat. § 5.05(1)(f). And, as Bernstein implicitly concedes by her silence, that rule is a binding “law” that the Commission “[must] follow.” *Hawkins v. Wis. Elections Comm’n*, 2020 WI 75, ¶ 19, 393 Wis. 2d 629, 948 N.W.2d 877 (Roggensack, C.J., dissenting from denial) (addressing this specific provision); *compare id.* ¶¶ 1-10 (majority opinion, not disagreeing).

In addition to providing that “[a]ny information which appears on a nomination paper is entitled to a presumption of validity,” Wis. Admin. Code § 2.05(4), the Commission deems nomination papers “complete” if they are in “substantial compliance” with the election statutes. Wis. Admin. Code § EL 2.05(5). Specifically, “[w]here any required item of information on a nomination paper is incomplete, the filing officer shall accept the information as complete if there has been substantial compliance with the law.” *Id.* In February 2020, the Commission adopted

⁸ Bernstein contends that if a “candidate’s nomination paper is itself deficient, no signatures on that paper may be counted toward the statutorily required number of signatures.” Compl. ¶ 11 (citing Wis. Stat. § 8.07; Wis. Admin. Code § EL 2.07(3)(a)). But those authorities say no such thing. Section 8.07 simply states that the “commission shall promulgate rules . . . in determining the validity of nomination papers and signatures thereon.” Section 2.07(3)(a), in turn, discusses burdens as they relate to establishing “insufficiency” in information on nomination papers. In sharp contrast, there is no penalty provided for violating § 8.15(5)(b).

legal guidelines explaining that this rule applies to information related to the candidate. (Fernholz Aff. ¶¶ 4-5, Ex. C & D). Where, as in Michels’ situation, the candidate has provided an address which substantially complies with § 8.15(5)(b), the Commission is obliged to accept such information as complete. For the reasons set forth in Part I, *supra*, the second nomination form easily satisfies that standard, as it supplied *two* addresses that could be used to send mail to Michels.

In keeping with its rule, the Commission has consistently taken the position that technical irregularities on the nomination form do not invalidate the signatures on that form. For example, at its January 9, 2018 meeting, the Commission staff observed that two judicial candidates, William F. Kussel, Jr., and Mark T. Fuhr, listed their respective voting addresses, but not their mailing addresses on their nomination papers. Like § 8.15(5)(b), § 8.10(2)(c) directs that each candidate for the spring election “shall include his or her mailing address on the candidate’s nomination papers.” Similar to Michels’ nomination papers, Candidate Kussel’s nomination papers listed a voting residence in the Town of Wescott, but his mailing address “[was] the same as his voting address, except for the municipality, which is Shawano.” Wisconsin Election Commission, *Meeting of the Commission* 13 (Jan. 9, 2018).⁹ Candidate Fuhr’s nomination papers listed a voting address in the Town of Worcester, but Fuhr’s mailing address was in the municipality of Phillips. *Id.* Of note to the Commission was that “the United States Post Office website Zip Code finder indicates mail will be delivered if either municipality is listed on an envelope.” *Id.* Notwithstanding these irregularities, the Commission approved both Fuhr and Kussel to the ballot. *Id.*

⁹ <https://tinyurl.com/zcypj7cn>.

Furthermore, in 2018, the Commission promulgated a guidance document titled “Nomination Paper Challenges,” which explained that the Commission has rejected previous challenges on the basis of a candidate’s failure to include his or her municipality on a nomination paper. (Fernholz Aff. ¶9, Ex. H). In that scenario, “[t]he established policy of the Commission in reviewing nomination papers has been to find substantial compliance with Wis. Stat. § 8.15(5)(b)” (*Id.*, at p. 3.)

In light of the Commission’s binding regulation, guidance, and prior decisions, it follows that the Commission must deem Michels’ nomination papers referring to “6831 State Road 83 in the village of Chenequa” as substantially compliant with a directory statutory provision. Although the second nomination form used the municipality “Chenequa” and omitted the Zip Code and State, that did not introduce any confusion because the Zip Code and municipality can readily be located from the USPS website. *See* (Miller Aff., Ex. 3.) Moreover, if one types the address listed on the second nomination form into Google’s search engine, Google immediately displays the address listed on the first nomination form, along with a map. (Miller Aff., Ex. 5.) The address listed on the second form thus provides Wisconsin electors and USPS with sufficient information to send and deliver mail to Michels’ residence.

Significantly, Bernstein’s complaint does not include an affidavit from a signer-electoral (or anyone else) who claims to have been misled or defrauded by Michels’ nomination papers. Because the nomination papers are substantially compliant with the statute at issue, the Commission should deny Bernstein’s request to invalidate the 3,516 signatures supporting Michels’ nomination on the second nomination form.

III. In an Abundance of Caution, Michels Timely Filed a “Corrective” Affidavit Removing Any Alleged “Deficiency” or “Irregularity,” Mooting This Challenge

Even assuming that the second nomination form did not perfectly or even substantially comply with the statute, Michels cured any alleged defect when he timely filed his corrective affidavit on June 6, 2022, so this challenge is now entirely baseless.

A Commission rule provides that “[e]rrors in information contained in a nomination paper, committed by . . . a circulator, may be corrected by an affidavit . . . of the candidate.” Wis. Admin. Code § EL 2.05(4). It adds that the “[t]he person giving the correcting affidavit shall have personal knowledge of the correct information and the correcting affidavit shall be filed with the filing officer not later than three calendar days after the applicable statutory due date for the nomination papers.” *Id*; see *Frederickson v. Foley*, EL 18-05 at 7 (“Timely correcting affidavits, filed under Wis. Admin. Code EL § 2.05(4) can rehabilitate insufficiencies on a page, meaning if a date was inadvertently left off a page, or a circulator’s address was missing the municipality, etc.”).

Although there was no “error” to correct here, Michels timely filed a “corrective” affidavit in an abundance of caution. Assuming for the sake of argument that the challenged form was in “error” because it did not include what Bernstein insists is Michels’ official mailing address, the affidavit explains that this “error” was made by the “circulators,” who inadvertently used the “Village of Chenequa” form even though the candidate and campaign had intended that they use the “Hartland, WI” form. (Michels Aff. ¶¶ 11–12). The affidavit thus “corrects” this “error” by specifying that the address on the form that was intended for circulator use listed his city, state, and Zip Code as “Hartland, WI, 53209.” *Id*. The filing of this affidavit had the effect of amending Michels’ nomination papers, removing the alleged “error,” and completely mooting and foreclosing Bernstein’s challenge.

IV. In All Events, the Commission Should Decline Bernstein’s Radical Invitation To Exercise Its Discretion In Violation of the Constitutional Rights of Michels and His Supporters

Even if the Commission believes that there was an error, that the error was material (and invalidating), and that it was not cured, it should still exercise its discretion to keep Michels on the ballot. Wisconsin Statutes § 8.30(1)(a) provides that the Commission “*may* refuse to place the candidate’s name on the ballot if . . . [t]he nomination papers are not prepared, signed, and executed as required.” “The word ‘may’ is generally construed as allowing discretion.” *Rotfeld v. Wis. Dep’t of Nat. Res.*, 147 Wis.2d 720, 726, 434 N.W.2d 617 (Ct. App. 1988). So even if Bernstein is correct, the Commission still has discretion to put Michels on the ballot.

There are good reasons for such an exercise of discretion here. First, the Wisconsin Supreme Court has held that the right of ballot access should be construed liberally in favor of letting people on the ballot. *See Sommerfeld*, 269 Wis. at 303–04.¹⁰ Second, precluding Michels from the ballot due to a harmless technicality would deprive hundreds of thousands of Wisconsinites of their right to vote for their preferred candidate. Such an action would thwart the right to vote and undermine our democratic system of government. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (“[C]andidate eligibility requirements on voters implicate[] basic constitutional rights.”); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (“[F]or reasons too self-evident to warrant amplification here, [the Supreme Court has]

¹⁰ Likewise, courts across the nation have long held that election laws must be liberally construed in favor of ballot access. *See, e.g., Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020), *cert. denied sub nom. Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732 (2021) (“[T]he Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice.”); *State ex rel. Allen v. Warren Cnty. Bd. of Elections*, 874 N.E.2d 507, 510 (2007) (Election statutes “should be liberally construed in favor of those seeking to hold office, in order that the public may have the benefit of choosing from all persons who are qualified.”); *N.J. Democratic Party, Inc. v. Samson*, 175 N.J. 178, 190 (2002) (“[S]tatutes providing requirements for a candidate’s name to appear on the ballot” must “be interpreted ‘to allow the greatest scope for public participation in the electoral process [and] allow candidates to get on the ballot. . . .’”); *Owens v. State*, 64 Tex. 500, 509 (1885) (“All statutes tending to limit the citizen in his exercise of [voting] right should be liberally construed in [the voter’s] favor.”).

often reiterated that voting is of the most fundamental significance under our constitutional structure.”); accord *Wagner v. Milwaukee Cnty. Election Comm’n*, 2003 WI 103, ¶ 76, 263 Wis. 2d 709. The Supreme Court has repeatedly acknowledged that burdens on candidacy—usually in the context of ballot restrictions—implicate “the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968). For that reason, individuals have an “associational right to vote in a party primary without *undue* state-imposed impediment,” *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 204 (2008) (emphasis added), and “ballot access must be genuinely open to all, subject to *reasonable* requirements,” *Lubin v. Panish*, 415 U.S. 709, 719 (1974) (emphasis added). An order that ousts a candidate for failure to identify a mailing address’s municipality—notwithstanding the fact that the candidate provided an accurate mailing address at which he receives mail—unreasonably impairs the right of voters to associate and restricts the voters’ opportunity to cast a ballot for the candidate of their choice.

It would be particularly egregious, and even more obviously unconstitutional, were this Commission to jettison its own rule and thereby change state law in the middle of an election campaign and *after* the deadline to submit nomination papers had passed, which is precisely what Bernstein asks this Commission to do.

Therefore, even if the Commission deemed Michels’ nomination forms invalid, it should exercise its discretion and allow Michels on the ballot for the August 9, 2022, primary.

CONCLUSION

For the foregoing reasons, the Commission should reject Bernstein’s complaint and include Michels on the ballot.

Dated this 7th day of June, 2022.

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