STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. 2012AP000032

FRIENDS OF SCOTT WALKER

and

STEPHAN THOMPSON

Plaintiffs-Respondents,

v.

Waukesha County Circuit

Court Case No. 2011-CV-4195

MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CAYNE, THOMAS BARLAND, and TIMOTHY VOCKE each in his official capacity as a member of the Wisconsin Government Accountability Board and KEVIN KENNEDY Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants-Respondents,

THE COMMITTEE TO RECALL WALKER, THE COMMITTEE TO RECALL KLEEFISCH, JULIE WELLS, THE COMMITTEE TO RECALL WANGGAARD, RANDOLPH BRANDT, THE COMMITTEE TO RECALL MOULTON, JOHN KIDD, THE COMMITTEE TO RECALL SENATOR PAM GALLOWAY, NANCY STENCIL and RITA PACHAL,

Proposed-Intervening Defendants-Appellants.

APPELLANTS' SECOND EMERGENCY MOTION FOR AN ORDER STAYING CIRCUIT COURT PROCEEDINGS IN CONNECTION WITH PLAINTIFFS' DEMANDS FOR DECLARATORY AND INJUNCTIVE RELIEF

Proposed-intervening defendants-appellants, The Committee to Recall Walker, The Committee to Recall Kleefisch, Julie Wells, The Committee to Recall Wanggaard, Randolph Brandt, The Committee to Recall Moulton, John Kidd, The Committee to Recall Senator Pam Galloway, Nancy Stencil, and Rita Pachal ("appellants"), by their Attorney Jeremy P. Levinson, hereby move the Court for an order staying the circuit court proceedings in connection with plaintiff-respondents' ("respondents") demands for declaratory and injunctive relief.

INTRODUCTION

This Court denied an earlier motion for a stay. Since then, the circuit court issued a verbal ruling changing in loosely defined terms the Government Accountability Board's ("GAB") process for handling recall petitions. (*See* Appx. A). The largest collection of recall petitions in Wisconsin history is due to be submitted to GAB on January 17, 2012 – and immediately subjected to an unknown review process that the GAB is scrambling to put in place.

This motion seeks a stay of the circuit court proceedings, including any order giving effect to its verbal ruling. Current recall efforts began on November 15, 2011. A stay is appropriate so that recall efforts conclude pursuant to established, known, and duly promulgated procedures rather than hastily implemented, unknown, and untested new ones that have yet to be finalized. The

recall petitions should be handled the same way previous recalls have been handled.

Section 9.10, Wis. Stats., contemplates a very swift process, one that relies on the proponent of a recall and the target to test the validity of the petitions in adversarial administrative litigation. The statute provides that the process should be completed within 31 days but permits a circuit court to extend the timeline for good cause. The statute establishes a short deadline to review the petitions, thereby indicating that the Legislature made promptness a high priority.

BACKGROUND

On November 15, 2011 appellants Julie Wells, Randolph Brandt, John Kidd, Nancy Stencil, and Rita Pachal duly registered The Committee to Recall Walker, The Committee to Recall Kleefisch, The Committee to Recall Wanggaard, The Committee to Recall Moulton, and The Committee to Recall Senator Pam Galloway with the Government Accountability Board pursuant to Art. XIII, § 12 of the Wisconsin Constitution and § 9.10, Wis. Stats. Many thousands of Wisconsin residents joined them in obtaining many hundreds of thousands of signatures in support of recall elections for these Republican incumbents. Well over one million signatures must be offered for filing with the GAB no later than January 17, 2012.

On December 15, 2011, Scott Walker's campaign committee and the Executive Director of the Wisconsin Republican party sued the Wisconsin

Government Accountability Board in the Circuit Court for Waukesha County seeking abrupt and fundamental changes to the process by which recall petitions that have been circulating for well over a month will be reviewed for sufficiency. Those petitions are due to be offered for filing with the GAB on January 17, 2012.

The respondents' complaint directly attacked the foundation of the petition review process. While it purported to assert that the GAB's procedures violate principles of equal protection, it actually demanded that the circuit court change the process established by § 9.10(2)(f), Wis. Stats., whereby the GAB is directed to "review a verified challenge to a recall petition." Section 9.10(2), Wis. Stats., provides, in relevant part, as follows:

> (g) The burden of proof for any challenge rests with the individual bringing the challenge.
>
> (h) Any challenge to the validity of signatures on the petition shall be presented by affidavit or other supporting evidence demonstrating a failure to comply with statutory requirements.
>
> (i) If a challenger can establish that a person signed the recall petition more than once, the 2nd and subsequent signatures may not be counted.
>
> (j) If a challenger demonstrates that someone other than the elector signed for the elector, the signature may not be counted, unless the elector is unable to sign due to physical disability and authorized another individual to sign in his or her behalf.
>
> (k) If a challenger demonstrates that the date of a signature is altered and the alteration changes the

> validity of the signature, the signature may not be counted.
>
> (l) If a challenger establishes that an individual is ineligible to sign the petition, the signature may not be counted.
>
> (m) No signature may be stricken on the basis that the elector was not aware of the purpose of the petition, unless the purpose was misrepresented by the circulator.
>
> (n) No signature may be stricken if the circulator fails to date the certification of circulator.
>
> (p) If a signature on a petition sheet is crossed out by the petitioner before the sheet is offered for filing, the elimination of the signature does not affect the validity of other signatures on the petition sheet.
>
> (q) Challenges are not limited to the categories set forth in pars. (i) to (l).

Additionally, § 9.10(3)(bm), Wis. Stats., provides that the party seeking a recall or the officer against whom the recall petition is filed may file a writ of mandamus with the circuit court challenging whether the recall petition is sufficient.

On December 21, 2011, appellants, recall committees including the one seeking the recall of Scott Walker (and the individuals who organized them and registered them with the GAB), moved to intervene as parties. At a December 29, 2011 hearing, the circuit court denied appellants' motion, leaving only Scott Walker's campaign committee, the Executive Director of the Republican Party,

and the GAB as parties.[1] The circuit court then scheduled a hearing for January 5, 2012 to take up both respondents' demands for injunctive and declaratory relief regarding their demands for changes in the process for petition review and the GAB's motion to dismiss the case.

On December 30, 2011, appellants filed a motion with the circuit court seeking a stay of any proceedings on respondents' demands for injunctive and declaratory relief. On January 3, 2012, appellants moved this Court for an order staying further circuit court proceedings in connection with respondents' demands.

On January 4, 2012, this Court ordered appellants to advise the Court as to the status of their motion to stay filed in the circuit court. After this Court issued that order, the circuit court scheduled a hearing on appellants' motion to stay for January 12, 2012 – one week after the January 5, 2012 hearing to resolve the case on the merits. On January 4, 2012 this Court denied both appellants' motion for a stay and the respondents' motion to dismiss the appeal.

On January 5, 2012, the Circuit Court took up respondents' motion for injunctive and declaratory relief seeking to change the petition review process and the GAB's motion to dismiss. Though counsel for the GAB requested that its motion be heard first, the circuit court decided that both motions should be

[1] The circuit court entered an order reflecting this ruling on January 4, 2012.

presented and heard simultaneously. It then issued a verbal ruling which to date has not been reduced to a written order. A transcript of the verbal ruling is appended hereto as Appendix A.

Section 9.10(3)(b), Wis. Stats., requires the GAB to "determine by careful examination whether the petition *on its face* is sufficient." (emphasis supplied). The statute also establishes a framework by which the incumbent who is the target of the recall can challenge petitions or signatures as invalid and such challenges can be litigated before the GAB. The statute further provides that a party dissatisfied with the GAB's ruling as to the sufficiency of a petition can seek relief in circuit court. § 9.10(3)(bm), Wis. Stats.

The GAB has long had in place rules and procedures for conducting a "careful examination [to determine] whether the petition *on its face* is sufficient." (emphasis supplied). Though the circuit court's verbal ruling speaks for itself, it declares that § 9.10, Wis. Stats., imposes on the GAB a duty to go beyond a facial review and to take undefined "affirmative" steps in reviewing petitions.

Though styled as a declaration rather than an injunction, the circuit court effectively ordered vaguely defined changes in the rules governing the GAB's handling of recall petitions just before the largest collection of recall petitions in Wisconsin's history are to be submitted to the GAB, triggering the review process. Though the circuit court's declaratory order has yet to be reduced to writing, the GAB is apparently setting about to change its longstanding petition

review processes. A day or two after the circuit court's ruling, the GAB's Executive Director and General Counsel stated in a televised interview that the GAB was trying to create a plan for entering every single signature into a database, something that the GAB has never done before. *See* http://www.wisn.com/video/30159459/detail.html (relevant commentary begins at approximately 3m 50s). He indicated that this will entail increased expense and will lengthen the review process.

Section 9.10, Wis. Stats., contemplates a very swift process, one that relies on the proponent of a recall and the target to test the validity of the petitions in adversarial administrative litigation. The statute provides that the process should be completed within 31 days but permits a circuit court to extend the timeline for good cause. Given the number of petitions anticipated, the GAB had estimated that it needed approximately 60 days to complete the process – under its established review protocols.

Now, mere days before the petitions are due – the nature of the process, the amount of time it is likely to take, and the standards to be used – are suddenly unknown. There has been no change to any statute or administrative rule. But the rules governing the GAB's review of recall petitions will be changed long after recall efforts began and just before that review is to begin. And appellants and all other Democratic Party interests were completely shut out of the process by which

Scott Walker and the Republican Party were able to get the rules changed at the last minute.

DISCUSSION

At its December 13, 2011 meeting, the members of the GAB were presented with a detailed plan proposed by the GAB's staff for reviewing what is anticipated to be an unprecedented volume of recall petitions pursuant to existing standards. *See 12 13 11 Open Agenda and Board Materials* at pages 13-21.[2] While minutes of that meeting have yet to be made available, it has been reported that the GAB adopted these procedures. *See* http://elections.wispolitics.com/2011/12/gab-approves-recall-procedures.html.

Absent a stay, the recall petitions that will be filed on January 17 will be subject to a review process different than that used for every other recall in Wisconsin history and different from that adopted by the GAB. The details of the process are unknown and, in all probability, not yet established. It is a certainty that the process will be an untested one. It will not be the process appellants anticipated and relied on in their efforts.

The GAB's Executive Director and General Counsel confirmed what is manifest: absent a stay – the process will take longer than anticipated. The recall

[2] http://gab.wi.gov/about/meetings/2011/december

efforts were planned and undertaken in reliance on the existing process and the GAB's estimate of a 60 day process. The length of the process controls the timing of ensuing recall elections.

And a more complex review process designed at the last moment is highly likely to be vulnerable to error and to generate more litigation over the results than would otherwise be the case. This will inject further uncertainty and delay.

A stay will also avoid a separate source of uncertainty and administrative chaos: if the decision below is found to be erroneous in excluding appellants from the proceedings, the court's order will be void or voidable. *See In Wisconsin Finance Corp. v. Garlock*, 140 Wis. 2d 506, 512, 410 N.W.2d 649 (Ct. App. 1987). Indeed, the circuit court for Waukesha may also lose jurisdiction over the case pursuant to § 801.50, Wis. Stats., because the GAB would no longer be the "sole" defendant.

Finally, absent a stay, appellants' efforts and those of many thousands of Wisconsin's voters will be subject to an unprecedented and untested administrative process born of a proceeding from which they were barred. It is appellants' efforts – their exercise of the constitutional rights guaranteed by Wis. Const. XIII § 12 – that will be adjudicated pursuant to these new procedures unless a stay issues. Absent a stay, if it is determined that they had a right to be a party to the underlying litigation, such ruling will come too late to protect their rights.

AN IMMEDIATE STAY IS WARRANTED

A stay pending appeal is appropriate where the moving party:

> (1) makes a strong showing that it is likely to succeed on the merits of the appeal;
>
> (2) shows that, unless a stay is granted, it will suffer irreparable injury;
>
> (3) shows that no substantial harm will come to other interested parties; and
>
> (4) shows that a stay will do no harm to the public interest.

State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). "These factors are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.*

> To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. It has been said that the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay. In other words, more of one factor excuses less of the other.

Id. at 441. "The harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant. *Id.* at 441-42.

I. APPELLANTS' CHANCES OF SUCCESS ON THE MERITS ARE OVERWHELMING.

The case below was a Republican attack on Democratic recall efforts. The committees and individuals behind those efforts and all Democratic Party interests

were excluded. Republican interests and the GAB were the only parties to the proceeding that changed the rules at the last minute. Denial of the motion to intervene was error.

Section 803.09(1), Wis. Stats., provides, in relevant part, as follows:

> [U]pon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

As set forth in *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, the party moving to intervene in an action must satisfy four requirements to satisfy the statutory standard:

> (1) The motion to intervene is timely;
>
> (2) The movant claims an interest sufficiently related to the subject of the action;
>
> (3) The disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and
>
> (4) The existing parties do not adequately represent the movant's interests.

307 Wis. 2d at 20-21, ¶ 38. The four criteria are analyzed together, and a strong showing with respect to one requirement will "contribute to the movant's ability to meet other requirements as well." *Id.* at 21-22, ¶ 39. The Court will "evaluate

the motion to intervene practically, not technically, with an eye toward 'disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 742-43, 601 N.W.2d 301 (Ct. App. 1999) (*quoting State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983)).

- It has not and cannot be suggested that appellants' motion to intervene was untimely;
- Appellants' interests are at least coextensive with those of Scott Walker and his campaign committee. It is the appellants' recall efforts that will be reviewed pursuant to the procedures changed by the circuit court. The interest claimed by appellants is more than "remotely related to the subject of the action," and there can be no doubt that the interest of the appellants is "of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment." *Helgeland*, 307 Wis. 2d at 25, ¶ 45. (citation omitted);
- In changing the settled procedures governing appellants' efforts, the circuit court confirmed that disposition of this matter – barring a stay – will impede their interests. The circuit court's order will change the decades long settled rules resulting from a proceeding

from which they were excluded. And if they were excluded erroneously, and they were, appellate relief will come too late to protect their interests;

- The GAB cannot and did not adequately represent appellants' interests. The GAB's interest is in overseeing, regulating, and administering elections and election-related matters such as the recall process. While the GAB presumably has an interest in doing so correctly, it has no interest in how the law it administers is shaped or changed or the substantive content thereof. Indeed, the record below indicates that, for institutional reasons, the GAB opted not to pursue discovery and certain defenses that appellants would have. (*See* Appendix 5 previously filed on January 3, 2012).

II. WITHOUT A STAY, APPELLANTS WILL SUFFER IRREPARABLE INJURY.

Without a stay, the appellants will suddenly be subject to a recall petition review process that differs from that which has existed for decades. The new process will greatly increase the time for an election. The GAB has long had in place rules and procedures for conducting a "careful examination [to determine] whether the petition *on its face* is sufficient." (emphasis supplied). Though the circuit court's verbal ruling speaks for itself, it declares that § 9.10, Wis. Stats.,

imposes on the GAB a duty to go beyond a facial review and to take undefined "affirmative" steps in reviewing petitions. Long standing administrative rules interpreting statues deserve judicial deference. *Harnischfeger Corp. v. Labor and Industry Review Com'n*, 196 Wis. 650, 659-660, 539 N.W.2d 98 (1995).

Though the circuit court's declaratory order has yet to be reduced to writing, the GAB is apparently setting about to change its longstanding petition review processes. A day or two after the circuit court's ruling, the GAB's Executive Director and General Counsel stated in a televised interview that the GAB was trying to create a plan for entering every single signature into a database, something that the GAB has never done before. *See* http://www.wisn.com/video/30159459/detail.html (relevant commentary begins at approximately 3m 50s). He indicated that this will entail increased expense and will lengthen the review process.

Absent a stay, the recall petitions that will be filed on January 17, 2012 will be subject to a review process different than that used for every other recall in Wisconsin history and different from that adopted by the GAB. The details of the process are unknown and, in all probability, not yet established. It is a certainty that the process will be an untested one. It will not be the process appellants anticipated and relied on in timing their efforts.

The GAB's Executive Director and General Counsel confirmed what is manifest: absent a stay – the process will take longer than anticipated. The recall

efforts were planned and undertaken in reliance on the existing process and the GAB's estimate of a 60 day process. The length of the process controls the timing of ensuing recall elections.

And a more complex review process designed at the last moment is highly likely to generate more litigation over the results than would otherwise be the case. This will inject further uncertainty and delay.

"The harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant." *Gudenschwager*, 191 Wis. 2d at 441-42. This Court in *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, ¶ 21, 237 Wis. 2d 498, 515, 614 N.W.2d 565, stated that "the court must consider the interests of the appellant in securing the fruits of the appeal if it is ultimately successful." This Court's concern in that case was whether the appellant, if successful on appeal, would be able to recover the money paid in execution of the judgment, and the time and effort involved in such recovery. *Id.* This Court held that "the right to appeal a money judgment is not a meaningful one if the money must be paid pending appeal and cannot later be recovered."

Like the appellant in *Scullion*, if a stay is not granted, the appellant's right to appeal will be meaningless. Without a stay, by the time any decision on the merits is reached by this Court, GAB's review process will have begun and

perhaps been completed pursuant to the new procedures ordered by the circuit court.

As a final matter, both the reality and perception of only Republican-aligned interests being permitted to participate in this case, to the exclusion of Democratic-aligned interests, will injure appellants, the administration of election law, the public interest and the institution of the Court.

III. THE STAY WILL CAUSE NO HARM TO THE RESPONDENTS OR THE PUBLIC INTEREST.

Respondents can suffer no harm because it is, at best, wholly speculative that the harm they claim to anticipate could or will ever come to pass. And if it did, they would have ample remedies available to them. For example, if respondents were dissatisfied with the GAB's handling of the petitions and an election was ordered, § 9.10(3)(bm), Wis. Stats., specifically authorizes the official subject to recall to seek a writ in the circuit court for the county where the recall petitions were filed. And, of course, nothing required the respondents to wait until the final days of the recall effort to bring this lawsuit.

Finally, the public's interest will be served by subjecting the recall efforts at issue to the review procedures previously and properly promulgated by the GAB while the appeal is heard. Those procedures have been deemed adequate for decades.

IV. SINCE APPELLANTS WERE NECESSARY PARTIES, THE PROCEEDINGS BELOW ARE VOID AND THE CIRCUIT COURT FOR WAUKESHA COUNTY DID NOT HAVE JURISDICTION TO HEAR THE MATTER.

As a separate matter, appellants were necessary parties to the proceedings below pursuant to § 803.03, Wis. Stats. And, in *In Wisconsin Finance Corp. v. Garlock*, 140 Wis. 2d 506, 512, 410 N.W.2d 649 (Ct. App. 1987), the court held that "[a] judgment may be void for failure to join a necessary party . . . ." "Necessary parties . . . are parties whose interests are inseparable such that a court would be unable to determine the rights of one party without affecting the rights of another." *Id.*; *see also Brotherhood of R.R. Trainmen v. Swan*, 214 F.2d 56 (7th Cir. 1954) (discussing decisions declared void because of the absence of necessary parties).

Historically, lawsuits against the State or its agencies were required to be brought in the circuit court encompassing the State's Capitol. Last year, § 801.50, Wis. Stats., was amended to permit a plaintiff suing the state to pick any county as venue if the "sole defendant" is the state, its agencies, agents, etc. The only reason the "sole" defendants here were the GAB and its members and Executive Director/General Counsel was because of the erroneous exclusion of appellants as intervening defendants. When that error is corrected, all prior rulings will be void and the case will have to be moved to Dane County for adjudication.

CONCLUSION

For the foregoing reasons, appellants respectfully request that the Court enter an order staying the circuit court proceedings.

Dated this 11th day of January, 2012.

FRIEBERT, FINERTY & ST JOHN, S.C.

By: _____

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STATE OF WISCONSIN
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Appeal No. 2012AP000032

FRIENDS OF SCOTT WALKER

and

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Proposed-Intervening Defendants-Appellants.

APPENDIX

STATE OF WISCONSIN CIRCUIT COURT BR. 7 WAUKESHA COUNTY

FRIENDS OF SCOTT WALKER,
STEPHAN THOMPSON,

Plaintiffs,

-vs-

Case No. 2011 CV 4195

MOTION HEARING
(Excerpt transcript)
(JUDGE'S ORAL RULING)

WISCONSIN GOVERNMENT
ACCOUNTABILITY BOARD,

MICHAEL BRENNAN, DAVID
DEININGER GERALD NICHOL,
THOMAS CANE, THOMAS BARLAND,
and TIMOTHY VOCKE, in their
official capacity as members
of the Wisconsin Government
Accountability Board, and

KEVIN KENNEDY,
in his official capacity as Director
and General Counsel of the
Government Accountability Board,

Defendants.

Proceedings held in the above-entitled matter on the 5th day of January, 2012, before the Honorable J. MAC DAVIS, Circuit Court Judge presiding in Circuit Court Branch 7, Waukesha County Courthouse, Waukesha, Wisconsin.

Gail M. Villwock
Official Court Reporter

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Appendix A

APPEARANCES:

MICHAEL, BEST & FRIEDRICH, by ATTORNEYS STEVEN M. BISKUPIC, JOSEPH OLSON, & ADAM WITKOV, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, WI 53202-4108, appeared on behalf of the Plaintiffs.

ASSISTANT ATTORNEY GENERAL LEWIS BEILIN, State of Wisconsin, Department of Justice, 17 West Main Street, P.O. Box 7857, Madison, WI 53707-7857, appeared on behalf of the Defendant.

TRANSCRIPT OF PROCEEDINGS (Excerpt)

THE COURT: I'm prepared to rule. First of all, I will not be issuing any injunction against future speech by the Government Accountability Board staff.

Even government employees, like Mr. Kennedy's subordinates and me, have certain protections in this country where the consequences for a silly, or stupid, or insensitive comment come afterwards, not before.

Secondly, I'm not going to enjoin the Government Accountability Board. There's a variety of reasons relating to the complexity of the issues involved here, the fact-driven nature of what has happened or might happen, and is going to happen.

I'm in no position to micromanage how the Government Accountability Board and its staff handle their responsibilities in this regard, although some other court may be in a position to micro second-guess how they did things. That would come later.

I question whether some of the standards for an injunction now have been met. Irreparable harm. And there is even uncertainty: Will a recall be ordered or not ordered?

I will, however, grant declaratory relief

under 806.04 to the plaintiff in certain respects.

First, let me discuss the issue of whether the time is right for any declaratory judgment to be granted. In the Court's view it is for the following reasons:

One is, we're talking about a critical and fundamental constitutional right, and set of rights here, the electoral franchise. Perhaps the most important right we have.

Now, there is more to the electoral franchise than just being able to go out and vote at election time. There's rights surrounding it. And some of the discussion we have here goes into that.

Those rights also revolve around how elections are scheduled, who causes them to be scheduled, how they're scheduled, when they're scheduled. It wouldn't be much good to have a right to vote if we never had any elections anymore, for example. So it is more than just the right to vote, it is also having elections, and how that is done.

Another reason to grant relief now is the timeline crunch we're facing. The Government Accountability Board will start reviewing, assuming there is a filing, in less than two weeks. And

they're under tight timelines. They can be extended

by a court, but there is never a guarantee of that. But even if is there an extension, it is not going to be indefinite extension. So we need to address things that can be addressed as soon as they can be addressed.

Another reason to issue some relief is that there has been lack of clarity from the Government Accountability Board staff as to how they will recommend proceeding. At times the published remarks of the Government Accountability Board staff, whether accurate or not, but the published remarks, have left the valid impression that they don't intend to follow the law. There is a subset of that issue that I will comment on. Counting a signature of Bugs Bunny is something only lawyers could try to make seem okay.

Additionally, in the Court's view, any qualified elector would be entitled to seek certain declarations of rights relating to the electoral process and their voting franchise, especially if constitutional rights are implicated. Once a voter's rights are denied or abridged it's often too late to fix it. If you're barred from voting at the polls, even though you're qualified, they're not going to have the election over for you.

And I think Mr. Biskupic is right, even if

your vote didn't change the result of the election,

the fact that you were denied the right to vote is a big deal, it's important, it's a right.

I'll try one more time at an analogy. Maybe I'll do better than I did with those I discussed with Mr. Beilin. But, for example, if a polling place decided to have steps to get up to vote, would most of us think it would be okay to let any elector challenge that, even if they were fully able to go up steps but knowing that the steps might make it impossible for certain electors not as incapable to get up the steps and vote.

And it's clear that both the plaintiffs here have a specific, immediate interest in the application of the laws and the administration of the laws respecting the recalls at this time.

Now I would like to discuss the Equal Protection arguments made by the plaintiff. They're legal arguments of first impression without precedent or direct precedent. They're rooted in the long line of one-man-one-vote rulings. Those rulings make it clear that Equal Protection provisions in the federal constitution and I think the state constitution apply to the context of elections.

Now it's proposed that those protections

apply in this context. It's important to have in mind that the pool of qualified electors at any given electoral district, I guess in this instance within the State of Wisconsin, is limited or finite at any point in time. They're so many and no more at a given

point in time.

Recalls require a written request, the petition of a certain number of people, and that number is calculated based as a proportion, 25 percent of the number of people who cast a vote in a specified prior election.

So, just doing the math a little bit, as was discussed by Mr. Biskupic, it appears that recall signatures would have to amount to somewhere between 10 and 20 percent, it's going to vary every time, but between 10 and 20 percent of the eligible pool. The reason I go through that is to try and examine whether there is an Equal Protection problem here, whether it matters. Because even the one-man-one-vote rulings don't require exactness. They recognize that it's just not practical, and at some level pointless, to try and have exactly equal electoral districts, or have a census every day to rebalance them. Some variance, a couple percentage points, has generally been allowed.

So, likewise here, if we're talking about a relatively small situation, say nomination papers, the ratio of the number of people who sign a nomination paper to get someone on the ballot is de minimus compared to the eligible electorate.

But here we have a different situation. This is substantial.

So, the argument is that if we let someone who is not qualified to sign a recall petition sign

it, each one of those signatures slightly erodes the rights of those who don't want to sign the recall, who don't want a recall. Because it's a limited pool, those nonqualified people are chiseling away at the qualified, non-signers' rights. There is merit in that argument. It is true. If the pool of qualified electors wasn't finite then this would not be an issue.

Now Mr. Beilin properly raised the issue: What are the categories here? The categories are nonqualified signers of a recall petition on one side, and qualified non-signers on the other. The universe is people who have a right or not have a right, but those who could either sign or not sign a recall petition.

If we let people that don't have a right,

that is nonqualified signers, be counted, we're taking away a portion of the rights of those who are qualified and choose not to sign.

Now there is no statute about this, but that is not required for an Equal Protection concern. Here the categories would be established by the Government Accountability Board if they act in such a way as the nonqualified signers are permitted to be counted.

Similar to where the Attorney General's opinion in the Arizona case cited here rejected what the Court decided were qualified signers.

This is novel. I hesitate to rely solely on it; and, therefore, I don't rely upon it as the basis

of the decisions here in the declaratory relief I'm granting. I'll rule on other grounds. I think this ground is legitimate and would support the Court's rulings.

I'm going to rule primarily on statutory grounds, statutory interpretation, interpreting the obligations and duties of the Elections Board.

So we have the three categories that we have been discussing: duplicate signatures, illegitimate signatures, made-up signatures, whatever you want to call those; fictitious-name signatures, and signers where it cannot be verified that they are electors,

mostly because they don't have an address or municipality that is either valid or recognizable.

It's only argument, and it is not a reason to lose on an issue, but I think it is of note that page eight of the defendant's brief at the bottom they indicate quote: The election officer is not relieved of its duty, and it's a duty to not count duplicate signatures if the evidence shows them.

In another place at the foot of page two it says: Everyone agrees that the Government Accountability Board has no authority to count duplicate or fictitious signatures.

So, when you hear that you think, well, it's obvious that the law requires the Government Accountability Board to strike duplicate signatures, to strike fictitious names, and to strike signers where it can't be verified that they are qualified

electors.

The defendants, however, argues that what amounts to a burden of proof shifting or an obligation, allows them to not do those things. I reject that interpretation of the statute. It is Section 9.10 that deals with recalls; and at 2 (e) there is a list of some of the things that are required.

And then it goes on to f's and g's and h's and so forth. And at "i" is one of the ones we discussed where it says: If a challenger can establish a person signed the recall petition more than once, the second and subsequent signatures may not be counted.

As their administrative rules properly recognize there's really two parts to that subsection: One is a substantive rule, the second and subsequent signatures are not to be counted. In the Court's view, that's a rule that the Government Accountability Board under the other provisions of the statute requiring them to administer election laws, the Government Accountability Board is obligated to honor.

Now the phrase preceding that is: If a challenger can establish a person signed the recall petition more than once. That doesn't relieve the Government Accountability Board of any of its obligation, that simply empowers challengers by making it clear that they can file challenges, and what the result is under certain circumstances. I guess you

could say it's a little awkward, perhaps they should have put all of the requirements in one list, and the challenges in another. But it's common enough in statutes. It's hard to write thousand page volumes

over and over and have them perfect.

But it is the Court's interpretation of this statute that there is an affirmative duty on the Government Accountability Board to do the things we have been talking about here. And that the language about challengers is simply an empowerment of the challengers in no way reducing or eliminating the defendant's obligation in these respects.

Accordingly, I'll determine it to be the law and declare that the defendant must take all reasonable steps to affirmatively protect the rights of electors in recall races and reviews. That obligation is limited by the resources and ability that they have, or are reasonably able to obtain through proper application.

And, specifically, the Government Accountability Board is obligated to take such reasonable steps to identify and strike duplicate signatures.

2. To identify and strike signers that cannot be verified to be electors, largely relating to addresses, municipality.

And, 3, to identify and strike fictitious names, since if they're fictitious they're obviously not electors.

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That's the primary declaration and order of the law here. I have used words like reasonable, and let me discuss a little bit what I mean by that. And there are some other issues that have been raised here.

I'm going to leave it to the Government Accountability Board to meet its obligations in properly supervising and overseeing its staff with respect to their comments about what is going to be done or not be done.

With respect to money and resources, the Government Accountability Board has some. And they apparently have applied for some more out of their usual course of business for this recall. They're obligated to use what they have consistent with all of their legal obligations. I'll leave it to the Government Accountability Board to prioritize what can wait or what can be dropped in order to get the recall review done.

And they're obligated to seek what is needed or at least lay the options before their funding source. It is not good enough where they have an obligation to administer the statutes and say: Oh, we don't have enough, tough luck, we're not going to do it. They have an affirmative obligation to go before

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what is presumably the legislature or executive branch

or both and say: Here is something that we could do that would be useful, here is what it would cost. And I understand that the fiscal agents will make that final decision.

How is the Government Accountability Board to deal with the knotty issue of the difference between Mickey Mouse and something maybe not so obvious? Like many, many, many things are dealt with by all of us, including government agencies: They're to apply sound judgment and discretion.

To me it would be obvious if it says, Mickey Mouse. I don't think any of us have ever heard of anyone being named Mickey Mouse, it's not impossible, but it would be highly, highly, highly unlikely. If you see that, any reasonably prudent person would take a moment to do something like was already mentioned, check the white pages. For a government agency they might have easy access to the Department of Motor Vehicle listings, or voter registration listings in their own files. If Mickey Mouse shows up there and correlates to that address, well, you have resolved that issue. And if they don't show up I think we can be probably beyond a reasonable doubt ascertain that that's a fictitious name.

And we could all imagine many, many, many other fictitious names that would trigger the same kind of application of discretion and judgment.

Others might not be so clear. You might run across a name that seems unusual, you might do a

superficial check. If found nothing but not able to rule it out then maybe the Government Accountability Board will say: Well, we're going to leave that one on. I'm not preventing that, I'm just making it clear that they can't hide behind the challenge language in the statute, because that's a mistaken interpretation of that statute.

I'm not requiring unlimited investigation, I know that's not practical. The Court's order were: reasonable.

And I'm not preventing the Government Accountability Board from setting priorities. Maybe they identify some things and set them aside. And then if a resolution on those is going to likely affect the outcome they might do more investigation.

On the other hand, if they've already counted up 700,000 valid signatures it may not be necessary to investigate whether Josef Stalin really is a qualified elector in a crossroads community in the state.

I'll require you, Mr. Biskupic, to draft the Court's rulings and submit them in written form either countersigned as to form by Mr. Beilin, or under the five-day rule of the Court.

Questions or other comments, Mr. Biskupic?

MR. BISKUPIC: No, your Honor.

THE COURT: Mr. Beilin?

MR. BEILIN: None, your Honor.

THE COURT: Thank you very much. Have a

good day.

(Hearing concluded)

(End of Excerpt)

STATE OF WISCONSIN)
) SS
COUNTY OF WAUKESHA)

I, Gail M. Villwock, Official Court Reporter for Br. 7 Waukesha County, State of Wisconsin, do hereby certify that the foregoing transcript is a true and correct transcription of my stenographic notes reported on said date, to the best of my belief and ability.

Dated this 5th day of January, 2012.

Gail M. Villwock, RMR