STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2020AP164

JIM SULLIVAN and BRYAN KENNEDY,

Plaintiffs-Petitioners,

v.

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

Defendants-Respondents.

INTERLOCUTORY APPEAL FROM ORDER DENYING PLAINTIFFS' JOINT EMERGENCY MOTION FOR EX PARTE TEMPORARY RESTRAINING ORDER AND FOR TEMPORARY INJUNCTION, ENTERED ON JANUARY 24, 2020, BY THE MILWAUKEE COUNTY CIRCUIT COURT,THE HONORABLE KEVIN E. MARTENS, PRESIDING

# RESPONDENT WISCONSIN ELECTIONS COMMISSION'S OPPOSITION TO PETITIONERS' EMERGENCY MOTION TO EXPEDITE INTERLOCUTORY BALLOT ACCESS APPEAL AND FOR TEMPORARY RELIEF PURSUANT TO WIS. STAT. § (RULE) 809.52

Plaintiffs-Petitioners James Sullivan and Bryan Kennedy seek discretionary interlocutory review in this spring 2020 ballot-access case, where ballots need to be printed *today* and given to absentee voters *tomorrow*. They cannot meet their burden to demonstrate that interlocutory review is appropriate under these circumstances, especially because the Commission and circuit court have applied the express terms of the statute in question. This Court should not grant review because doing so would disrupt election procedures. Likewise, this Court should deny their request for temporary relief.

Sullivan and Kennedy want to be on the ballot for Milwaukee County Executive. They did not meet nomination requirements, and the Wisconsin Elections Commission (the "Commission") determined that they will not appear on the ballot. They filed an action in Milwaukee County seeking to force the Commission and the Milwaukee County Elections Commission ("Milwaukee Commission") to include them. The circuit court denied their injunction request and ordered that ballots be printed today, January 27, 2020, by 4 p.m. This timing is critical because, by statute, municipalities are required to send ballots to certain absentee voters tomorrow, January 28. Sullivan and Kennedy now seek review here on the day that ballots need to be printed.

Substantively, this is a simple statutory interpretation case. Plaintiffs used commercial signature-gatherers to circulate their nomination papers. Earlier, those same signature-gatherers had gathered signatures for another candidate for the same office. There is a state statute that says exactly what happens under those circumstances; the earlier paper is valid, and the later paper is invalid:

> 8.04. Nomination paper signatures
>
> If any person signs nomination papers for 2 candidates for the same office in the same election at

> different times, the earlier signature is valid and the later signature is invalid. *If 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 is invalid.*

Wis. Stat. § 8.04. The Commission applied the statute and concluded that the later papers were invalid, resulting in Sullivan and Kennedy not having nearly enough nomination signatures.

In circuit court, Sullivan and Kennedy asked the court to ignore the statute and grant an injunction putting them on the ballot. After briefing and a hearing, the circuit court denied their request.

Interlocutory appeals are disfavored, but review is particularly inappropriate here. Accepting appellate review on the day that ballots are being printed would cause uncertainty at minimum and may disrupt the election timing. Additionally, Sullivan and Kennedy cannot make the necessary showing of likelihood of success on the merits, as the circuit court applied the clear language of the statute. Interlocutory review should be denied.

Sullivan and Kennedy additionally request that this Court order that ballots be either delayed, or that multiple sets of ballots be printed. For the same reasons that review is unwarranted, that request should be denied, and the election should continue under the statutory timeline.

## BACKGROUND

### I. Factual background and administrative proceedings; Sullivan and Kenney used commercial signature-gatherers who previously supported someone else for nomination.

Candidates seeking office in Wisconsin are required to submit nomination signatures. Wis. Stat. § 8.10. Here,

Sullivan and Kennedy both sought nomination for the Office of Milwaukee County Executive, where the requirement is 2,000 qualifying signatures. (Compl. ¶¶ 2–3, 7.)

Sullivan and Kennedy each hired a commercial vendor to help get the required signatures; Sullivan hired the vendor Simon Warren (Sullivan R. 28); and Kennedy hired Urban Media (Kennedy R. 23).[1] Each of those vendors hired subcontractors to do the actual signature collection. (Sullivan R. 28; Kennedy R. 23). Simon Warren and Urban Media hired some of the same subcontractors. (Sullivan R. 33–44; Kennedy R. 25–30.) Separately, non-party David Crowley was attempting to obtain nomination signatures, and some of the same subcontractors hired by Simon Warren and Urban Media were collecting signatures for Crowley. (*See* Sullivan R. 7–10.) Affidavits from the subcontractors indicate that petitions for David Crowley were circulated first. (Kennedy R. 25, 27, 29; Sullivan R. 33, 36, 39.)

Sullivan submitted his nomination papers to the Milwaukee Commission with 2,960 signatures. (Sullivan R. 159.) Kennedy filed 2,939 signatures. (Kennedy R. 145.) The Milwaukee Commission conducted an initial review of the signatures and concluded that Kennedy's application included 2,684 valid signatures (Kennedy R. 145), and Sullivan's included 2,450 valid signatures (Sullivan R. 159).

Lipscomb, who is another candidate for Milwaukee County Executive, filed a challenge to Sullivan's and Kennedy's nomination papers with the Milwaukee Commission. (Kennedy R. 1, 6–11; Sullivan R. 6–11.) His verified complaint demonstrated that the same circulators

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[1] The official administrative record relating to the Nomination Papers of Jim Sullivan and the records from the Bryan Kennedy administrative proceeding were filed in the circuit court, are included in the appendix filed with this response, and are cited as the "Sullivan R.", are cited as "Kennedy R."

that Kennedy and Sullivan relied upon for their nomination papers previously circulated papers in support of Crowley. (Sullivan R. 6–11; Kennedy R. 6–11.) He argued that the signatures obtained by those circulators could only count for Crowley under Wis. Stat. § 8.04, not Sullivan or Kennedy. (Sullivan R. 6–11; Kennedy R. 6–11.) That would reduce Sullivan's valid signatures by 1,001, and Kennedy's by 844, leaving neither of them with the required 2,000 signatures.

Sullivan and Kennedy each filed responses and supporting affidavits in the Milwaukee Commission proceeding. (Sullivan R. 14–44; Kennedy R. 14–30.) Their filings included affidavits from the circulators, proving that they had circulated petitions for Crowley before Sullivan or Kennedy. (*See, e.g.*, Kennedy R. 27, 29.) The Milwaukee Commission then held a hearing, where Sullivan and Kennedy were represented by counsel, and a had vote on whether to strike the later-circulated signatures. (Kennedy R. 32–144; Sullivan R. 46–158.) Of three possible voting members, one was not present and one each voted for and against striking. (Kennedy R. 142.) With no majority, the motion to strike the signatures did not pass.

Lipscomb then sought review before the Commission. (Sullivan R. 1–5; Kennedy R. 1–5.) The Milwaukee Commission did not file a formal response, but instead directed the Commission to the materials from the administrative proceedings before the Milwaukee Commission. (Sullivan R. 45; Kennedy R. 31.) Although Sullivan and Kennedy were not parties to the Commission proceedings, the Commission reviewed and considered their submissions from the Milwaukee Commission proceedings. (Sullivan R. 160; Kennedy R. 146.)

In substantially identical decisions, the Commission concluded that the signatures from the later-circulated petition papers of both Sullivan and Kennedy should be struck. (Sullivan R. 165; Kennedy R. 151.) It noted that there

was no dispute that individuals circulated petitions for candidates for the same office at different times, that situation is addressed by the plain language of section 8.04, and that no exception applies. (Kennedy R. 147.) The Commission, under Wisconsin Supreme Court precedent, concluded that the nomination procedures are mandatory, not directory. (Kennedy R. 148 (citing *State ex rel. Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 597, 263 N.W.2d 152 (1978)).) And it further concluded that a defect in process is not subject to a substantial compliance exception, which applies to incomplete information, not improper circulation of papers. (Kennedy R. 149.) This conclusion is consistent with the statute's legislative history, which specifically eliminated a circulator's ability to collect signatures for multiple candidates. (Kennedy R. 150.)

Ultimately, the Commission found that Sullivan and Kennedy are responsible for properly obtaining nominating signatures, and the undisputed failure here is not excusable because of their delegation to circulators who did not comply with the nomination regulations. (Kennedy R. 151.)

## II. Circuit court proceedings; the parties briefed and argued their position, and the court made an oral ruling.

Sullivan and Kennedy filed a Complaint and Joint Emergency Motion for Ex Parte Temporary Restraining Order and for Temporary Injunction on January 22, 2020. The Commission accepted service that day, and filed a brief in opposition the next day on January 23. In its brief in opposition, the Commission highlighted the critical timing concerns in this case and requested an expedited decision,

explaining that that voters need to start receiving ballots on January 28. (Commission Opp'n[2] 3.)

The circuit court held a hearing the next afternoon, Friday, January 24. Sullivan and Kennedy were each represented by counsel. The court heard arguments and then issued an oral ruling denying the motion for a preliminary injunction. A written order followed that evening, which ordered the Milwaukee County Clerk to submit ballots to the printer at 4 p.m. *today*, January 27, 2020. (Order, Jan. 24, 2020.)

## ARGUMENT

This Court should not grant discretionary interlocutory review because ballots need to be printed today, and the circuit decision correctly applied the express statutory language of Wis. Stat. § 8.04.

### I. Interlocutory appeals are discretionary and disfavored.

Interlocutory appeals are disfavored. *State ex rel. A.E. v. Circuit Ct. for Green Lake Cty.*, 94 Wis. 2d 98, 102, 288 N.W.2d 125, *on reconsideration*, 94 Wis. 2d 98, 292 N.W.2d 114 (1980) ("interlocutory appeals are undesirable"). The decision whether to grant permissive interlocutory appeals under Wis. Stat. § 808.03(2) rests within the sound discretion of this Court. *State v. Jenich*, 94 Wis. 2d 74, 76, 292 N.W.2d 348 (1980).

This Court grants interlocutory review only "in those limited instances when we conclude that the necessity of immediate review outweighs our general policy against the

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[2] The Wisconsin Elections Commission's Brief in Opposition to Plaintiffs' Joint Emergency Motion for Ex Parte Temporary Restraining Order and for Temporary Injunction is referred to as the "Commission Opposition."

piecemeal disposal of litigation." *Cascade Mountain, Inc. v. Capitol Indem. Corp.*, 212 Wis. 2d 265, 268 n.2, 569 N.W.2d 45 (Ct. App. 1997).

The petitioner must demonstrate "a substantial likelihood of success on the merits." *State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108, 112 (1991); *Cascade Mountain*, 212 Wis. 2d at 268 n.2 ("petitioner must demonstrate that . . . there is a substantial likelihood that this court will reverse the trial court's nonfinal order.").

## II. Given that the circuit court correctly applied the plain language of the statute, this Court should not grant interlocutory review because ballots need to be printed today.

The Spring Primary Election will be held on February 18, 2020.[3] By statute, municipal clerks are required to send ballots to electors who have requested absentee ballots no later than 21 days before the primary. Wis. Stat. § 7.15(1)(cm). Therefore, clerks are required to send absentee ballot to electors *tomorrow*, Tuesday, January 28, 2020. Wis. Stat. §§ 5.02(22), 7.15(1)(cm).

It takes time to finalize and print ballots. Mailing them tomorrow requires that they be printed, at the absolute latest, overnight tonight. Under the circuit court's order, they will be printed starting at 4 p.m. today.

This statutorily-mandated timing weighs heavily against granting an interlocutory appeal today. If this appeal were pending while ballots were printed and mailed, voters and clerks would be operating under uncertainty regarding the form of ballots that have been already distributed. It could also result in voters at the polls on election day having different ballots than absentee voters, effectively resulting in

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[3] *Spring 2020 Election and Presidential Preference Primary*, Wis. Elections Commission, https://elections.wi.gov/node/6524.

two different elections for the same race, which would undermine confidence in the election outcome.

Delaying printing could shorten the time for delivery and return of absentee ballots, which may cause some people's ballots not to be returned in time, potentially causing delay in the election, voter confusion, and administrative expense.

Especially in light of the plain language of the statute, discussed below, this is not one of the "limited instances" where "the necessity of immediate review outweighs our general policy against the piecemeal disposal of litigation." *Cascade Mountain, Inc.*, 212 Wis. 2d at 268 n.2. Interlocutory review should be denied.

## III. Sullivan and Kennedy do not have a substantial likelihood of success on the merits.

Sullivan and Kennedy ask for discretionary review of an order denying a motion for a preliminary injunction. Sullivan and Kennedy would need to show that the circuit court acted outside its discretion on the temporary injunction standards. *Sch. Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997) ("A decision to grant or deny a temporary injunction is within the circuit court's discretion and will only be reversed for an erroneous exercise of discretion."). Those standards are: probability of ultimate success on the merits, preservation of the status quo, and lack of adequate remedy at law. *See Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 259 N.W.2d 310 (1977). They are unlikely to meet their burden on any individual factor, and particularly not the most important factors in this case; likelihood of success on the merits and preservation of the status quo.

### A. The circuit court decision was correct.

This case involves a straightforward application of an unambiguous statute to undisputed facts. Plaintiffs'

nomination papers were circulated by subcontractors who previously circulated papers on behalf of another candidate. Section 8.04 plainly dictates that the later signatures are invalid, and the circuit court correctly concluded that this mandate required denying the injunction.

### 1. The circuit court and Commission correctly interpreted and applied Wis. Stat. § 8.04.

The statutory-interpretation issue is straightforward. Wisconsin Stat. § 8.04 states:

> If any person signs nomination papers for 2 candidates for the same office in the same election at different times, the earlier signature is valid and the later signature is invalid. If 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 is invalid.

Here, it is undisputed that Sullivan and Kennedy's subcontracted signature-gatherers "circulate[d] a nomination paper for 2 candidates for the same office in the same election at different times." *Id.* (*See* Sullivan R. 14–44; Kennedy R. 14–30.) It is also uncontested that nomination papers for Sullivan and Kennedy were circulated by the gatherers later than the papers for Crowley. (*See, e.g.*, Kennedy R. 27, 29.) Accordingly, "the earlier paper is valid and the later paper is invalid," meaning the Sullivan and Kennedy papers are invalid. The signatures do not count toward the nomination requirement. Wis. Stat. § 8.04.

That is the conclusion reached by the Commission and the circuit court, and it is correct. Plaintiffs' counterarguments are simply attempting to avoid the consequence of the statute.

The circuit court applied the correct legal standards for statutory interpretation, found in the *Kalal* decision. (*See e.g.*

Tr. 6–7, 21–22.)[4] *Kalal*'s most basic instruction is that "statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110 (citation omitted). That rule controls here. This case involves a straightforward application of an unambiguous statute to undisputed facts. The only correct reading of section 8.04 is that Sullivan and Kennedy's serially-circulated signatures do not count toward their nomination total.

The circuit court also addressed Sullivan and Kennedy's defenses. (*See* Tr. 8.) Their argument was that a general statute, Wis. Stat. § 5.01(1), and its language that election laws "shall be construed to give effect to the will of the electors, if that can be ascertained" should essentially render the specific effect of section 8.04 a nullity here.

The circuit court carefully evaluated how section 5.01(1) has been interpreted, including the 1933 Wisconsin Supreme Court case of *State ex rel. Oaks v. Brown*. (Tr. 10–24.) It held that the "will of electors" guidance applies only *after* an election has been held and the will of electors is manifested:

> It is manifest that section 5.01(6)[5] applies only after the holding of the election and the will of the electors has been manifested.

*State ex rel. Oaks v. Brown*, 211 Wis. 571, 249 N.W. 50, 53 (1933); (Tr. 21.)

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[4] The circuit court made its decision in an oral ruling last Friday afternoon, January 24. An excerpt of the oral ruling is now available and is included with the Commission's appendix. Citations to the ruling correspond with the page number of the transcript excerpt.

[5] Wis. Stat. § 5.01(6) is the predecessor to current Wis. Stat. § 5.01(1).

That principle has been affirmed and applied in the 87 years since *Oaks,* including by the Wisconsin Supreme Court in *State ex rel. Ahlgrimm v. State Elections Bd.,* 82 Wis.2d 585, 263 N.W.2d 152 (1978), and this Court, most recently in 1999 in *City of Chippewa Falls,* which affirmed that the section 5.01(1) interpretive principle does not apply until there is an election:

> § 5.01(1) is inapplicable to the instant case, as there was no election from which the will of the electors had manifested.

*City of Chippewa Falls v. Town of Hallie*, 231 Wis. 2d 85, 92, 604 N.W.2d 300 (Ct. App. 1999).

This well-established legal principle is important to election administration. Clerks and the Commission review hundreds of thousands of signatures each election cycle. Applying the 5.01(1) interpretive rule to each analysis would be entirely unworkable.

Appropriately relying upon *Oaks*, *Ahlgrimm*, and *City of Chippewa Falls*, the circuit court declined to nullify section 8.04 based on an interpretive principle from section 5.01(1) that applies only after an election.

Sullivan's and Kennedy's Petition, like their argument below, claims that *City of Chippewa Falls* incorrectly read *Oaks* and *Ahlgrimm*. (Pet. 14–17.) That is incorrect. *Oaks* could not have been clearer about when the section 5.01(1) interpretive principle applies: "only after the holding of the election." *Oaks,* 249 N.W. at 53.

Sullivan's and Kennedy's primary counterargument in circuit court was reference to *Matter of Recall of Redner,* a case involving recall procedures, not nominations, that did not consider or interpret section 5.01(1). *Matter of Recall of Redner*, 153 Wis. 2d 383, 450 N.W.2d 808 (Ct. App. 1989). Recalls are governed by their own statute, and *Redner* did not address nomination requirements. Wis. Stat. § 9.10 ("Recall").

Instead, the issue was whether the specific wording on a recall form substantially complied with recall procedures. *Id.* at 387. Substantial compliance in the wording on forms is a separate issue from the section 5.01(1) "will of the electorate" interpretive principle. *See In re Jensen*, 121 Wis. 2d 467, 469, 360 N.W.2d 535 (Ct. App. 1984) (explaining substantial compliance); *see also* Wis. Stat. § 8.15(15)(5)(a) ("each nomination paper shall have substantially the following words printed at the top"). The case does not advance their argument that section 8.04 should be ignored here.

In their Petition, Sullivan and Kennedy continue to rely on *Redner*, even stating that it "cited to Wis. Stat. § 5.01(1)." (Pet. 2.) That is simply inaccurate; *Redner* does not mention 5.01(1) a single time. As close as it gets is simply citing a case that in turn quotes section 5.01. *Redner,* 153 Wis. at 395. *Redner* did not interpret section 5.01 or section 8.04, at all, much less does it support treating section 8.04 as a nullity here.

The Petition also cites, for the first time, the 1984 *Stahovic* decision. *See Stahovic v. Rajchel*, 122 Wis. 2d 370, 363 N.W.2d 243 (Ct. App. 1984). This argument is not preserved—it was not raised below and should not be considered now, especially not in a petition for leave to appeal posture.

In addition, even if preserved, *Stahovic* was again a recall case, which is controlled by its own statute and procedures. Wis. Stat. § 9.10 ("Recall"). It involved a decision by a city clerk to disallow an entire page of signatures whenever he found a single defective signature on the page, in conformity with a proposed rule that existed at the time. *Stahovic*, 122 Wis. 2d at 373, 378–79. *Stahovic* was not analyzed under substantial-compliance or interpretive doctrines; it was decided under the specific recall section of the statute and state constitution: the rule was "inconsistent with sec. 9.10(7), Stats., and thus with art. XIII, sec. 12, of the

Wisconsin Constitution. Section 12 of art. XIII, entitled 'Recall of elective officers.'" *Id.* at 378.

Where *Stahovic* was resolved under recall statutes, there is a specific statue here addressing the relevant nomination paper question, titled "Nomination paper signatures." Wis. Stat. § 8.04. It directly answers the relevant question and was properly applied by the circuit court.

Finally, for the sake of argument, even if section 8.04 is intended to be interpreted broadly, the result is not that the circuit court should be reversed. It just means that the Commission had discretion to determine whether the serially-circulated papers were valid, and its conclusion was still correct. It would ignore the plain language of Wis. Stat. § 8.04 to conclude that the words "the later paper is invalid" must be disregarded. *See Kalal*, 271 Wis. 2d 633 ¶ 46. ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."). Plaintiffs' statutory interpretation would not give reasonable effect to every word in the second sentence of Wis. Stat. § 8.04. Instead, it would read out key language.

In summary, this is a rare statutory interpretation case where no party disputes the effect of the plain language of the applicable statute, section 8.04. Plaintiffs' argument is simply that the statute should be ignored here, based on an inapplicable interpretive principle. The circuit court correctly applied the statute's plain language—to interpret it otherwise would give it no effect at all. It did not abuse its discretion in applying the unambiguous language of 8.04 to undisputed facts, and Sullivan and Kennedy cannot show substantial likelihood of reversal.

### 2. Sullivan and Kennedy cannot show likelihood of reversal on their due process argument.

Below, Sullivan and Kennedy made a broad argument that the Commission violated their due process rights, generally citing the United States and Wisconsin constitutions. (Pls.' Br. 21–22.) However, they were not parties to Lipscomb's administrative challenge to the Milwaukee Commission's decision, and they identified no authority granting protected due process rights in this context.

Further, it is well-established that "the range of interests protected by procedural due process is not infinite." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–70 n.7 (1972). Indeed, courts correctly recognize that, where there are no material factual disputes, procedural due process is not even in play. *See, e.g., Murphy v. Rychlowski*, 868 F.3d 561, 566 (7th Cir. 2017) (no procedural due process right where party seeks to challenge a legal determination by the government). Having made no meaningful connection between their complaints about the Commission proceedings to any due process problem, they were unable to show likelihood of success on the merits. Additionally, they have now had the benefit of briefing and argument in the circuit court, and there is no tenable due process concern.

## B. A temporary restraining order would have disrupted the status quo at a very late hour for preparing ballots.

The status quo, at the time of the hearing and now, is that the Commission's decisions are in force, and Sullivan and Kennedy may not appear on the ballot. Plaintiffs seek to upset the status quo, not preserve it.

### C. The balance of equities supported denying the temporary injunction.

Plaintiffs were asking the circuit court to enjoin the enforcement of the plain language of Wis. Stat. § 8.04. The State suffers irreparable harm if the Commission's decisions applying Wis. Stat. § 8.04 are enjoined, even temporarily. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

## IV. Alternatively, this Court should affirm the circuit court today, before 4 p.m.

If this Court is inclined to grant discretionary review, it should affirm the circuit court decision before ballots start printing to facilitate orderly election processes. That would require a decision before 4 p.m.

The reasons for affirmance are stated in Argument section III, *infra*, the Commission Opposition that is included in the appendix being filed with this brief, and in the circuit court decision. This case involves a straightforward application of an unambiguous statute to undisputed facts, and an affirmance therefore would be appropriate.

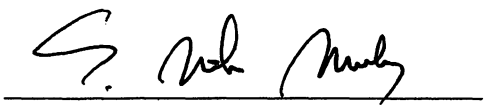
## CONCLUSION

This Court should decline to exercise discretionary review of this interlocutory appeal and deny Sullivan and Kennedys' motion for temporary relief.

Dated this 27th day of January, 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



S. MICHAEL MURPHY
Assistant Attorney General
State Bar #1078149

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

Attorneys for Defendant-Respondent
Wisconsin Elections Commission

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5457 (SMM)
(608) 266-8549 (CPK)
(608) 267-2223 (Fax)
murphysm@doj.state.wi.us
kawskicp@doj.state.wi.us