

IN THE SUPREME COURT OF WISCONSIN

No. _____

HOWIE HAWKINS and ANGELA WALKER,

Petitioners

v.

WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS in her official capacity as Chair of the Wisconsin Elections Commission, MARK L. THOMSEN in his official capacity as Vice-Chair of the Wisconsin Elections Commission, MARGE BOSTELMANN in her official capacity as Secretary of the Wisconsin Elections Commission, JULIE M. GLANCEY in her official capacity as a Commissioner on the Wisconsin Elections Commission, DEAN KNUDSON in his official capacity as a Commissioner on the Wisconsin Elections Commission, ROBERT F. SPINDELL, JR. in his official capacity as a Commissioner on the Wisconsin Elections Commission, and ALLEN ARNTSEN,

Respondents.

**EMERGENCY PETITION AND MEMORANDUM TO SUPREME COURT
TO TAKE JURISDICTION OF AN ORIGINAL ACTION, EMERGENCY
MOTION FOR A TEMPORARY INJUNCTION, AND AFFIDAVITS**

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STATEMENT OF THE ISSUES

1. Whether a writ of mandamus should issue from this Court because the Wisconsin Elections Commission (the “Commission”) violated state law, including Wis. Stat. § 5.64(b) and 5.64(em), when, after failing to sustain a challenge to the validity of 1,834 of the signatures in the nomination papers of Petitioners Howie Hawkins and Angela Walker (the “Candidates”), it nonetheless did not include the Candidates as independent candidates for President and Vice President of the United States on the ballot form for the 2020 General Election.

2. Whether this Court should issue an ex parte temporary mandatory injunction directing the Commission to include the Candidates on the 2020 General Election ballot pending resolution of this action or, alternatively, should temporarily suspend the Commission’s certification of the current ballot form pending resolution of this dispute.

INTRODUCTION

3. This Petition asks this Court to direct the Commission to do what state law requires it to do: place the names of the Candidates on the ballot for the November 3, 2020 general election. The Commission has certified that the Candidates’ nomination papers have 1789 valid signatures.

The Commission deadlocked 3-3 on a challenge to the validity of an additional 1834 signatures which, if accepted, would result in ballot access for the Candidates. Because there is a presumption of validity, and because the Commission has not made an affirmative determination that the 1834 signatures at issue are invalid—indeed, by voting 3-3 the Commission failed to sustain a challenge to those signatures—the Commission must treat the signatures as valid and include the Candidates’ names on the ballot.

4. Further, because county clerks are beginning the process of preparing and printing ballots for the 2020 General Election and must distribute the ballots to municipal clerks no later than September 16, 2020, time is of the essence. To that end, the Candidates make the following requests.

5. First, the Candidates respectfully request that this Court issue an ex parte temporary mandatory injunction directing the Commission to add the Candidates’ names to the ballot pending resolution of this action. The Candidates acknowledge that this is an unusual request—in that it would grant them the ultimate relief they seek in this action—but their right to ultimate relief in this action is clear. The legal basis for this request is set forth in pages 28-32 of this Petition and Memorandum. Alternatively, this

Court could issue an order temporarily enjoining the printing of any ballots or suspending the Commission's certification of all candidates on the candidate list for the election, which would have the effect of preventing counties from moving forward with printing (and thus avoiding irreparable harm to the Candidates) without granting the Candidates the ultimate relief they seek.

6. Second, the Candidates respectfully request that the Court set an expedited briefing schedule for the Respondents to respond to this Petition. The Candidates respectfully request that this Court set a briefing schedule under which (1) Respondents file any response to the emergency petition for original action by noon on Tuesday, September 8, 2020 and (2) the Candidates file any reply by 5 p.m. on Wednesday, September 9, 2020.

**REASONS WHY THIS COURT SHOULD TAKE JURISDICTION
OF THIS ORIGINAL ACTION**

7. The Petitioners Howie Hawkins and Angela Walker (collectively, the "Candidates") respectfully request that this Court take jurisdiction of this original action under Wis. Stat. § 809.70 and issue a writ of mandamus directing that the Respondent Wisconsin Elections Commission, (the "Commission") certify and include the Candidates as

independent candidates for President and Vice President of the United States on the ballot form for the 2020 General Election in Wisconsin.

8. This Court exercises original jurisdiction over “exceptional cases in which a judgment by the court significantly affects the community at large.” *Wisconsin Professional Police Ass’n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 529, 627 N.W.2d 807 (2001).

9. Indeed, in the past this Court has exercised its original jurisdiction under similar circumstances. In *Labor and Farm Party v. Elections Bd., State of Wis.*, 117 Wis. 2d 351, 344 N.W.2d 177 (1984), this Court exercised original jurisdiction to require the Elections Board to place the name of a candidate on the ballot in an upcoming presidential preference election. This Court noted that the matter was *publici juris* and that the “[t]he relevant facts in this case are undisputed.” *Id.* at 352-53. And, among other things, the Court recognized “the shortness of time available before the ballots are to be printed.” 117 Wis. 2d at 354; *see also id.* at 354 n.4. Similarly, in *McCarthy v. Elections Bd.*, this Court exercised its original jurisdiction to direct that names of candidates be included on presidential preference ballots. 166 Wis. 2d 481, 480 N.W.2d 241 (Wis. 1992).

10. This case presents the same considerations. The case is plainly *publici juris*—it involves ballot access for candidates for President and Vice President of the United States. And, there are no disputed issues of fact. Finally, this matter needs speedy resolution. On September 1, 2020, the Commission finalized the list of candidates for President and Vice President that will appear on the ballot for the upcoming Fall General Election and transmitted the certified list of all candidates for President and Vice President that are scheduled to appear on the ballot. Further, pursuant to Wis. Stat. § 7.10(3)(a), county clerks are required to distribute ballots to municipal clerks no later than September 16, 2020. And, on information and belief, several county clerks have already placed orders with third-party printing services to prepare ballots. In other words, some county clerks may already have commenced printing ballots. Immediate relief from this Court is necessary.

STATEMENT OF RELIEF SOUGHT

11. This Court should grant this petition and immediately direct that the Candidates' names be placed on the 2020 General Election Ballot in Wisconsin.

12. This Court should also issue an ex parte temporary mandatory injunction directing the Commission to add the Candidates' names to the ballot pending resolution of this action. Alternatively, this Court could issue an order temporarily enjoining the printing of any ballots or suspending the Commission's certification of all candidates on the candidate list for the election, which would have the effect of preventing counties from moving forward with printing.

STATEMENT OF FACTS

A. The Candidates and the Challenge

13. The Candidates are the Green Party's candidates for President and Vice President of the United States, respectively. On August 4, 2020, nomination papers for the Candidates were filed with the Wisconsin Election Commission (the "Commission") to secure them spots on the ballot for the November 3, 2020 election.

14. On August 7, 2020, Respondent Allen Arntsen ("Arntsen") filed a verified complaint with the Commission under Wis. Admin. Code § EL 2.07, Wis. Stat. § 5.05, and Wis. Stat. § 5.06. Ex. A. to Curtis Affidavit.² As relevant here, the complaint alleged that 2,046 of the

² The Curtis Affidavit is attached to this Petition.

signatures appeared on nomination papers that did not list a correct address for Ms. Walker. *Id.* at 2. The complaint alleged that those signatures appeared on nomination papers with the following address: 3204 TV Road, Room 231, Florence SC, but that Ms. Walker's correct address is 315 Royal Street, Apt. A, Florence, SC 29506. *Id.* The complaint identified three distinct categories of signatures within the 2,046 challenged signatures.

15. First, the complaint challenged 57 signatures on nomination papers in which the incorrect address had been crossed out on the nomination paper and the correct address handwritten on the nomination paper after the date the electors signed the paper. *Id.* at 3.

16. Second, the complaint challenged 48 signatures on nomination papers in which the incorrect address was crossed out and the correct address handwritten, but there were no initials or dates on the corrections. *Id.*

17. Third, the complaint challenged 1,834 signatures on nomination papers where the purportedly incorrect address was listed and had not been corrected. *Id.*

18. The complaint alleged that the Candidates' nomination papers included 3,880 signatures. *Id.* at 7. Thus, cumulatively, the invalidation of the 2,046 signatures at issue would result in the nomination papers containing

fewer than the 2,000 signatures required under state law. *See* Wis. Stat. §§ 8.20(4), 8.15(6).

B. The Commission’s Communications Regarding the Challenge³

19. On August 7, 2020, the Commission’s staff attorney, Mr. Nathan Judnic, sent an email to Ms. Andrea Mérida, the Campaign Manager for the Candidates’ presidential campaign, informing her of the challenge. Ms. Mérida responded, asking Mr. Judnic “what is the Commission’s position on this matter?” Ex. A to Mérida Affidavit.

20. Mr. Judnic responded “[t]he Commission will decide the validity of the challenge based on the complaint, any response to the complaint and any testimony the parties and the Commission staff present to the Commission at its meeting to decide challenges.” *Id.*

21. Ms. Mérida then sought clarification, asking “[t]o be clear, we have an option to EITHER file a written response or appear via Zoom, correct?” *Id.*

³ The Petitioners respectfully request that the Court take judicial notice of these communications, which are attached to the included Affidavit of Andrea Mérida. The Petitioners do not believe that inclusion of these communications creates any kind of fact dispute that would affect this Court’s ability to exercise jurisdiction over this action. However, in the event that this Court believes that the inclusion of these communications creates an issue that would otherwise lead this Court to decline to exercise original jurisdiction, the Petitioners request that this Court disregard the communications in this proceeding.

22. Mr. Judnic responded to Ms. Mérida, advising “[y]ou have the option to do both, and most candidates subject to a challenge exercise both options. They file a sworn written response, and then they appear at the meeting to defend their response and answer any questions the Commission may have. It is not an ‘either or’ situation, ***you can choose to do both, one or the other, or none.***” *Id.* (emphasis added).

23. Included with Mr. Judnic’s August 7, 2020 email was a letter from Mr. Judnic regarding challenges to nomination papers. Ex. B to Mérida Affidavit. The letter advised the campaigns “if you wish to contest the challenge to your nomination papers, it is highly recommended that you appear before the WEC at the meeting, either in person or by representation, or both. You may also file a written response to the challenge.” *Id.* (emphasis in original).

24. The letter attached a memorandum from the Commission to independent candidates, which similarly advised that “the candidate may appear before the Commission and/or by representation and be heard on the challenge,” “[a] challenged candidate may file a verified written response to a challenge,” and “[i]n addition to filing a written response, a challenged

candidate may appear, or by representation, before the Commission to explain why the challenge ought to be rejected.” Ex. C to Mérida Affidavit.

25. The memorandum also encouraged the candidates to refer to a January 2018 advisory, Nomination Paper Challenges. Ex. B to Curtis Affidavit. There, the Commission discussed a situation involving a candidate not specifying a municipality for voting purposes. *Id.* at 2-3. The memorandum suggested “[c]hallenges to petitions where the candidate has not specified a municipality for voting purposes have been rejected in the past.” *Id.* at 3. It goes on to note “[t]he established policy of the Commission in reviewing nomination papers has been to find substantial compliance with Wis. Stat. §§ 8.10 and 8.15 by presuming the validity of the information listed unless evidence to the contrary is presented.” *Id.*

C. The August 20, 2020 Commission Hearing

26. The Candidates did not file a written response to Mr. Arntsen’s challenge. Instead, at the August 20, 2020 Commission hearing, Ms. Mérida appeared on behalf of the Candidates to provide evidence in support of the Candidates’ nomination signatures and to address any legal claims brought forth by the complainant. Instead of allowing the introduction of evidence, Commission Chairwoman Ann Jacobs initially unilaterally determined the

Candidates would be limited to a ten minute presentation that could only address legal claims brought by the complainant. *See* August 20, 2020, WEC Zoom Hearing (“Zoom Hearing”) at 3:11:09-3:12:59.⁴

27. At the August 20, 2020, hearing, Ms. Mérida provided the following testimony (see Mérida Affidavit, ¶9; see also Zoom Hearing at 3:25:00-3:29:27):

a. Wisconsin voters want the Green Party nominees on the ballot. We submitted 680 pages containing 3,966 signatures of the nearly 6,000 that we actually collected and are willing to submit the excess for review.

b. It matters little to a voter who resides in Wisconsin, what the actual address of a vice presidential candidate in South Carolina actually is. A change of address, especially within the same city of Florence, SC, does not speak to the constitutional qualifications of the candidate, which in this case, are clearly met.

c. Making the address change an even more absurd reason to not allow the Green Party on the ballot is that in 1980, independent presidential candidate John B. Anderson submitted a Wisconsin petition showing Milton Eisenhower as his vice presidential running mate. Milton Eisenhower was only intended as a stand-in. After the petitioning deadline on August 27, former Wisconsin Governor Patrick Lucey became Anderson's real running mate and Lucey appeared on the Wisconsin ballot. If Wisconsin allows the running mate on the petition to withdraw and be replaced by someone else, surely it does not matter that a running mate moves down the road in the same city she lives in, in South Carolina.

⁴ The August 20, 2020, WEC Zoom Hearing is publicly available at <https://wiseye.org/2020/08/20/wisconsin-elections-commission-special-teleconference-meeting-10/>. In the event the Court so desires, Petitioners will provide a copy of the hearing in a transmittable form, such as a flash drive.

d. Unlike the assertions made public in other cases the Commission is reviewing today, neither the Hawkins/Walker campaign nor the circulators working on our behalf made any attempt to hide Ms. Walker's current address, as is evidenced by the manual changes made to some of the petition forms.

e. We feel that we have exercised more than enough due diligence in attempting to rectify the potential issue with the change of address, even though the Elections Commission staff have asserted that listing an address for this presidential ticket is not even required.

f. In summary, we have shown through our petitions that Wisconsin voters want the Green Party on the ballot. When the vice presidential nominee moved down the road within Florence, SC we notified the staff and followed their directions. Voters should not be denied the right to vote for the Green Party ticket for following the directions of the Board of Elections staff. If additional signatures are needed, we have thousands more that the Board can review but we have already shown that voters in Wisconsin want the Green Party on the ballot.

28. In addition to the above testimony, Ms. Mérida also referenced during her statements various communications that campaign staff had with Commission staff during the circulation period. Certain of these communications are also referenced in a memorandum that Commission staff prepared for the Commission for the August 20, 2020 meeting. Ex. C to Curtis Affidavit. That memorandum notes that Commission staff was contacted by the Hawkins-Walker campaign in late July and was informed that one of the candidates moved during the circulation period. *Id.* at 31. The Commission staff provided excerpts from its communications with the

campaign in which Commission staff provided guidance on how to deal with the situation:

Your candidate would need to amend their declaration of candidacy with the updated address if it has been submitted. If it has not been submitted, the DOC should contain current information at the time it is submitted. Ideally, the candidate would have updated their address on nomination paper petitions to reflect the address change in real time beginning on the day that the candidate began residing at a new address. If the move and address change occurred after all of the petitions had been circulated, they will reflect correct information at the time of circulation. (Via email, July 27, 2020)

Once the petition has been signed, no alterations may be made to the information in the header. When a candidate moved during the circulation period, we normally advise that they simply change the address on any nomination paper sheets to be used going forward. Candidates should not alter the information in the header, candidate section, once signatures have been collected on that page. (Via email, July 28, 2020)

Id.

29. During the August 20, 2020 hearing, the Commission voted 6-0 to sustain Mr. Arntsen's challenge to the set of 57 signatures in which the incorrect address had been crossed out on the nomination paper and the correct address handwritten on the nomination paper after the date the electors signed the paper, thereby invalidating those 57 signatures. *See Zoom Hearing at 4:27:30-4:28:39; see also Ex. C to Curtis Affidavit at 33; Ex. D. to Curtis Affidavit.*

30. The Commission also voted 6-0 to reject the challenge to the 48 signatures on nomination papers in which the incorrect address was crossed out and the correct address handwritten, but there were no initials or dates on the corrections. *See* Zoom Hearing at 4:27:30-4:28:39; *see also* Ex. C to Curtis Affidavit at 33; Ex. D. to Curtis Affidavit.

31. The Commission then voted on the following motion: “The Commission sustains the challenge to the 1834 signatures identified in the Complainant’s Exhibit B with a code of 3042 which represent nomination papers that were printed and circulated with an address of 3204 TV Road, Room 231, Florence SC address.” Ex. C to Curtis Affidavit at 33. The Commission deadlocked 3-3 on the motion to sustain Mr. Arntsen’s challenge to the 1,834 signatures. As a result, the motion failed. *See* Zoom Hearing at 4:28:40-4:29:39.

32. A motion was next made to give the Candidates access to the ballot. During a brief discussion of the motion, it was observed that the Commission staff memo found well over 3,000 valid signatures (assuming no invalidation of the disputed 1,834 signatures for which the challenge had just failed). Zoom Hearing at 4:29:40-4:33:40. That motion deadlocked as well, 3-3, and therefore failed.

33. Next, a motion was made to allow the introduction of evidence of whether and when Candidate Walker had moved addresses. This motion was followed by extended discussion, but ultimately also failed on a 3-3 deadlocked vote. *See* Zoom Hearing at 4:33:42-5:05:21.

34. The final motion was introduced by Commissioner Knudson, which was presented as follows: “Certify 1,789 signatures for the Green Party candidates and that the commission is deadlocked as to the validity of another 1,834 signatures based on insufficient evidence as to where the candidate lived at the time of circulation of the nomination papers.” Zoom Hearing at 5:19:32-5:19:57. In debating the motion, Commissioner Knudson addressed the impact of the filing of the declaration of candidacy and the shifting of the burden, or lack thereof, based on the evidence presented. He argued “the burden didn’t shift. There was no burden shift there. They had no obligation to disclose that first address – only that it be accurate at the time – in the papers as they were being signed. That was their burden. And I don’t think there is clear and convincing evidence that they didn’t do that right. They’ve got loads, hundreds, thousands ... because we have a longstanding presumption of validity, that we have to presume that it was accurate. And in fact, the burden shift hasn’t happened and that presumption

still carries the day unless there is evidence to the contrary, of which it's not in place here. So there was no burden shift. We have to presume that she lived there. And I think that with a little bit of investigation we would find out that's exactly what happened." Zoom Hearing at 4:57:17-4:58:57. After the lengthy debate between Chairwoman Jacobs and Commissioner Knudson, the Commission passed the motion on a 6-0 vote. *See* Zoom Hearing at 5:20:00-5:20:28; *see also* Ex. D. to Curtis Affidavit.

35. At the August 20, 2020, meeting, the Commission also took action related to granting ballot access to other candidates for President and Vice President based upon the Commission's actions with respect to the candidates' nomination papers. The Commission approved ballot access for the candidates representing the Libertarian Party and the candidates representing the American Solidarity Party. The Commission denied ballot access for the candidates representing the American Independent Party and the candidates representing the BDY Birthday Party. *See* Zoom Hearing at 5:21:00-5:25:24. The Commission deadlocked on whether to grant ballot access to the Candidates and, therefore, ballot access was deemed denied. *See* Zoom Hearing at 5:25:30-5:35:50.

36. On August 21, 2020, the Commission sent the Candidates a letter in which the Commission informed the Candidates that it had unanimously passed the following motion:

Motion: The Wisconsin Elections Commission certifies 1789 valid signatures for Howie Hawkins and Angela Walker that show an address of 315 Royal Street, Apt. A, Florence SC, 29506 and that the Commission stipulates that it has deadlocked 3-3 as to the validity of an additional 1834 signatures based upon insufficient evidence as to where the candidate lived at the time of circulation of the nomination papers.

Ex. D to Curtis Affidavit.

37. The August 21, 2020 letter informed the Candidates that, because they only had a certified total of 1789 valid signatures, their names would not appear on the 2020 General Election Ballot in Wisconsin. *Id.*

D. The Status of the Ballots at the Time of this Action

38. On September 1, 2020, the Commission voted to confirm the candidates for President and Vice President from the three ballot access parties. Together with the Commission's action on August 20, 2020, certifying ballot access for the independent candidates, the Commission's action on September 1, 2020, finalized the list of candidates for President and Vice President that would appear on the ballot for the upcoming Fall General Election.

39. On the afternoon of September 1, 2020, pursuant to Wis. Stat. § 7.08(2), the Commission transmitted the certified list of all candidates for President and Vice President that are scheduled to appear on the ballot. The Candidates are not contained in the certified list.

40. Pursuant to Wis. Stat. § 7.10(3)(a), county clerks are required to distribute ballots to municipal clerks no later than September 16, 2020.

41. On information and belief, several county clerks have already placed orders with third-party printing services to prepare ballots. If a county clerk has not already done so, he or she will be required to soon make such arrangements in order to meet the September 16, 2020, distribution deadline.

ARGUMENT

A. This Court Should Issue a Writ of Mandamus Directing that the Candidates' Names Be Placed on the 2020 General Election Ballot

1. Standard of Review

42. This Court reviews issues of constitutional and statutory interpretation de novo. *See League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶ 13, 387 Wis. 2d 511, 929 N.W.2d 209. This case also meets the requirements for a writ of mandamus. “A writ of mandamus has long been recognized as a summary, drastic, and extraordinary writ issued in the sound discretion of the court to direct a public officer to perform his plain

statutory duties.” *Madison Metropolitan Sch. Dist. v. Circuit Court for Dane Cty.*, 2011 WI 72, ¶ 75, 336 Wis. 2d 95, 800 N.W.2d 442. “Mandamus is a remedy that can be used to compel a public officer to perform a duty of his office presently due to be performed.” *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶ 11, 373 Wis. 2d 348, 891 N.W.2d 803 (internal quotation marks and citation omitted). “In order for a writ of mandamus to be issued, four prerequisites must be satisfied: (1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law.” *Id.* (internal quotation marks and citations omitted). This Court has previously used this power to direct that a candidate be included on a ballot. *McCarthy v. Elections Bd.*, 166 Wis.2d 481, 480 N.W.2d 241 (Wis. 1992); *Labor and Farm Party v. Elections Bd., State of Wis.*, 117 Wis. 2d 351, 344 N.W.2d 177 (Wis. 1984).

2. Clear Legal Right

43. This is a simple case. State law requires that “[t]he names of the candidates for the offices of president and vice president ... that are contained in nomination papers filed under s. 8.20 shall appear on the ballot in the form prescribed in s. 7.08(2)(a).” Wis. Stat. § 5.64(b) (emphasis added); *see also* Wis. Stat. 5.64(em) (“The names of the candidates for the

offices of president and vice president ... filed under s. 8.20 shall appear on the ballot in the form prescribed in s. 7.08(2)(a).”). Here, there is no dispute that the Candidates filed such nomination papers, which are presumed to be valid. Wis. Adm. Code § EL 2.05 (“Any information which appears on a nomination paper is entitled to a presumption of validity.”).

44. Of course, there are mechanisms through which the Commission can determine that a candidate’s papers are not valid and thus not include the candidates on the certified list of candidates that the Commission transmits to each county clerk. *See, e.g.*, Wis. Stat. § 7.08(2)(a). The Commission could, for example, sustain a challenge under Wis. Adm. Code § EL 2.07 to the validity of the nomination papers. That did not happen here, however: the challenge to the validity of the signatures *failed* when the Commission deadlocked 3-3 on the motion to sustain the challenge. *See Ex. C to Curtis Affidavit at 33; see also Zoom Hearing at 4:28:40-4:29:39.* Under these circumstances, the presumption of validity that applies to nomination papers controls and the 1834 signatures are treated as valid.

45. Once those 1834 signatures are treated as valid—as, absent an affirmative determination otherwise, they must be under Wis. Adm. Code

§ EL 2.05—that means the Candidates have 3,623 valid signatures.⁵ That is well in excess of the requirement that nomination papers contain a minimum of 2,000 signatures of Wisconsin electors. Wis. Stat. § 8.20(4). As the alleged failure to meet that requirement is the only reason the Commission provided for not including the Candidates on the 2020 General Election Ballot, there are no other issues to be resolved. In short, the Candidates have 3,623 valid signatures and a clear legal right to be placed on the ballot for the 2020 General Election.

3. Positive and Plain Duty

46. Given the failure of the challenge to the validity of the Candidates' nomination papers and the presumption of validity that otherwise applies, the Commission has a positive and plain duty to include the Candidates' names on the 2020 General Election Ballot. *See* Wis. Stat. § 5.64(b); Wis. Stat. 5.64(em). Some may argue that Wis. Stat. § 8.30(1)(a) provides the Commission with discretion under these circumstances. Not so. Wis. Stat. § 8.30(1)(a) simply provides that the Commission “may refuse to place the candidate’s name on the ballot if any of the following apply”:

⁵ The Commission has already certified the validity of 1789 signatures. *See* Zoom Hearing at 5:20:00-5:20:28; *see also* Ex. D. to Curtis Affidavit.

(a) The nomination papers are not prepared, signed, and executed as required under this chapter.

(b) It conclusively appears, either on the face of the nomination papers offered for filing, or by admission of the candidate or otherwise, that the candidate is ineligible to be nominated or elected.

(c) The candidate, if elected, could not qualify for the office sought within the time allowed by law for qualification because of age, residence, or other impediment.

47. In order for the Commission to exercise its authority to refuse to place the candidate's name on the ballot under this provision, there must be an affirmative determination that the nomination papers "are not prepared, signed, and executed under this chapter." In effect, this statute allows the Commission to independently assess the validity of a candidate's nomination papers in the absence of a challenge under Wis. Adm. Code § EL 2.07. Even then, however, the Commission's presumption is that the nomination papers are valid. If the Commission does not affirmatively determine the nomination papers are invalid, that presumption controls and Wis. Stat. § 8.30(1)(a) is of no import. Because the Commission deadlocked 3-3 on the question of the validity of the disputed signatures here, there has been no affirmative determination by the Commission that the signatures are invalid. The presumption of validity continues to control.

4. Substantial Damages and No Other Adequate Remedy at Law

48. This matter is *publici juris*—it is “a question of public right.” *State ex rel. Bolens v. Frear*, 148 Wis. 456, 134 N.W. 673, 681 (Wis. 1912). As already noted, this Court has repeatedly exercised its original jurisdiction to issue writs of mandamus directing the placement of names on the ballot, thus suggesting this Court recognizes the substantial damage that occurs when candidates are improperly excluded from the ballot. *McCarthy v. Elections Bd.*, 166 Wis.2d 481, 480 N.W.2d 241 (Wis. 1992); *Labor and Farm Party v. Elections Bd., State of Wis.*, 117 Wis. 2d 351, 344 N.W.2d 177 (Wis. 1984). The Candidates respectfully suggest that the damage they will suffer—and that the citizens of Wisconsin will suffer—if the Candidates are excluded from the ballot for the 2020 General Election is plain.

49. Nor is there any other adequate remedy at law. As already explained, time is of the essence; county clerks are starting to print ballots. There is no other venue to which the Candidates could or should go to obtain final resolution of this issue in time to be placed on the ballot.

B. The Merits of the Challenge to the Disputed Signatures Are Irrelevant to this Action

50. The Candidates submit that this Court should grant the requested relief for the reasons discussed above, and that no additional issues need resolution. The relevant question in this action is whether—after Mr. Arntsen’s challenge to the validity of nomination papers failed via a deadlocked 3-3 vote—the Commission could nevertheless fail (again, via a 3-3 vote) to include the candidates on the ballot. The answer under the law is clear for the reasons already discussed. There has been no finding of invalidity by the Commission and the Candidates must therefore be placed on the ballot.

51. As a matter of courtesy, and in order to ensure that all potentially interested parties are joined in this action, the Candidates have named Mr. Arntsen as a respondent in this action. And, in response to this action, Mr. Arntsen may attempt to insert into this dispute arguments as to the merits of his challenge to the disputed signatures in the Candidates’ nomination papers. If offered, this Court should not take the bait. Mr. Arntsen’s challenge to the validity of the disputed signatures failed. At present, Mr. Arntsen has made no attempt to seek judicial review of the Commission’s treatment of his challenge. Nevertheless, out of an abundance

of caution, the Candidates address the merits of Mr. Arntsen’s challenge below.

1. The Commission Correctly Refused to Sustain Mr. Arntsen’s Challenge

52. Mr. Arntsen challenged the disputed signatures pursuant to Wis. Adm. Code 2.07. Under Wis. Adm. Code 2.07(3)(a)—and consistent with the presumption of validity afforded to nomination papers under Wis. Adm. Code 2.05(4)—“[t]he burden is on the challenger to establish any insufficiency.” The challenger must meet this burden via clear and convincing evidence. Wis. Adm. Code § EL 2.07(4). If the challenger does meet that burden, the burden then shifts to the challenged candidate to establish the sufficiency of the challenged information via clear and convincing evidence. Wis. Adm. Code § EL 2.07(3)(a); 2.07(4).

53. Here, the Commission failed to sustain Mr. Arntsen’s challenge. Although there is no written decision from the Commission providing the Commission’s reasoning for doing so, a review of the comments and rulings of the commissioners during the Zoom hearing clarifies that Mr. Arntsen’s challenge failed because the Commission did not find that Mr. Arntsen had met his initial burden of demonstrating the

insufficiency of the signatures via clear and convincing evidence. *See* Ex. C to Curtis Affidavit at 33; *see also* Zoom Hearing at 4:28:40-4:29:39.

54. Accordingly, if this Court does review the merits of Mr. Arntsen's challenge, this Court must answer whether the Commission correctly refused to sustain Mr. Arntsen's challenge on the ground that Mr. Arntsen did not meet his initial burden of demonstrating the insufficiency of the signatures via clear and convincing evidence. The answer is yes.

55. There is no dispute that the address that Candidate Walker included in her Declaration of Candidacy, which was sworn on July 28, 2020 and filed on August 4, 2020, Ex. D to Mérida Affidavit, did not match the address on some of the nomination papers that were circulated for signatures. The circulation period began on July 1, 2020, however. And, of course, candidates can move.

56. The information in nomination papers is presumed valid. This is why a challenger must present clear and convincing evidence of invalidity in order to shift the burden to the candidate. Clear and convincing evidence is evidence indicating that a fact is "highly probable or reasonably certain." *State v. Harris*, 2010 WI 79, 326 Wis. 2d 685, 702, 786 N.W.2d 409. Given the presumption of validity afforded to information in nomination papers, it

cannot be the case that a candidate’s swearing to an address at or near the end of the circulation period makes it “highly probable or reasonably certain” that all signatures collected prior to that date—even those collected weeks prior—with a different address are invalid. In other words, declaring that “I live at address X as of July 28, 2020” is not clear and convincing evidence that all nomination papers from *before* July 28, 2020 going back to July 1, 2020 that contain a different address are incorrect.

57. This is especially true when, as here: (1) Commission staff acknowledged that it is “not unprecedented” that nomination papers are submitted with two addresses, *see* Ex. C to Curtis Affidavit at 32; (2) Commission staff informed the campaign that “the [Declaration of Candidacy] should contain current information at the time it is submitted” and “[w]hen a candidate moved during the circulation period, we normally advise that they simply change the address on any nomination paper sheets to be used *going forward*,” *see* Ex. C to Curtis Affidavit at 31 (emphasis added); and (3) the signatures were entitled to a presumption of validity.⁶ Simply put, Mr. Arntsen did not meet his initial burden of demonstrating by

⁶ Commission staff also recognized that the instructions to the Declaration of Candidacy provide, “federal candidates are not required to provide [address] information, however an address for contact purposes is helpful.” Ex. E to Curtis Affidavit.

clear and convincing evidence that the 1834 signatures at issue were invalid. Under these circumstances, the Commission acted appropriately when it failed to sustain Mr. Arnsten's challenge.

C. Request for Ex Parte Temporary Mandatory Injunction

58. Finally, the Candidates respectfully request that this Court issue an ex parte temporary mandatory injunction directing the Commission to add the Candidates' names to the ballot pending resolution of this action. The Candidates acknowledge that this is an unusual request and that it is almost always the rule that a temporary injunction should not give the a party the ultimate relief sought in the action. *See Shearer v. Congdon*, 25 Wis.2d 663, 131 N.W.2d 377 (Wis. 1964); *State ex rel. Attorney General v. Manske*, 231 Wis. 16, 285 N.W. 378, 380 (Wis. 1939).

59. But, this original action seeks equitable relief, and “[t]he court of equity has always had a traditional power to adapt its remedies to the exigencies and the needs of the case.” *American Medical Services, Inc. v. Mutual Federal Savings & Loan Assoc.*, 52 Wis. 2d 198, 205, 188 N.W.2d 529 (Wis. 1971).

60. And, numerous courts from other jurisdictions have acknowledged that in extraordinary circumstances a court can grant a

mandatory temporary injunction that grants the movant the ultimate relief to which the movant would be entitled. *See, e.g., Allen v. City and County of Denver*, 142 Colo. 487, 489, 351 P.2d 390, 391 (Colo. 1960) (“Only in rare cases if the complainant’s right to the relief is *clear and certain* will an injunction issue under such circumstances[.]”); *Moss Industries, Inc. v. Irving Metals Co.*, 140 N.J. Eq. 484, 486-87, 55 A.2d 30, 32 (N.J. Ch. 1947) (“[I]f the issuance on preliminary application of an injunctive order mandatory in nature will have the effect of granting to the complainant all the relief that he could obtain upon a final hearing, the application should be denied, except in very rare cases, and then only where the complainant’s right to relief is clear and reasonably certain.”); *Texas Pipe Line Co. v. Burton Drilling Co.*, 54 S.W.2d 190 (Tex. Civ. App. – Dallas 1932, no writ) (“If the issuance on preliminary application of an injunction mandatory in nature will have the effect of granting to the complainant all the relief that he could obtain upon a final hearing, the application should be refused except in very rare cases, and then only where complainant’s right to the relief is clear and certain.” (internal quotation marks omitted)).⁷

⁷ *See also Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1978) (“[W]e recognize that there may be situations justifying a mandatory temporary injunction compelling the defendant to take affirmative action.”); *Bourke v. Olcott Water Co.*, 84 Vt. 121, 78 A. 715, 716 (Vt.

61. Here, the Candidates' right to relief is "clear and certain." The challenge to the validity of the 1834 signatures at issue failed and there has been no affirmative determination by the Commission that the signatures are not valid. Under these circumstances, the signatures must be treated as valid and the Candidates' names placed on the ballot. What the Commission cannot do is what it did here: fail to sustain a challenge to the validity of a candidate's nominating papers, make no affirmative determination that the papers were invalid, and yet not include the candidate's name on the ballot. The Commission's refusal to act is a clear violation of the law and should be remedied immediately, especially given the exigencies of the situation.

62. The Candidates respectfully submit that the foregoing discussion adequately addresses the "necessary to preserve the status quo" and the "reasonable probability of success on the merits" elements of a temporary injunction. *See Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 659, 883 N.W.2d 154, 161 (listing elements). To the extent necessary, the Candidates submit that any

1911) ("[W]here mandamus would not be sufficiently prompt, equity could proceed by injunction." (citing *Baker v. Briggs*, 99 Va. 360, 38 S.E. 277)).

remaining elements for the issuance of a temporary injunction under these circumstances have been satisfied.

63. The Candidates face irreparable harm to the extent county clerks have or are about to print ballots without the Candidates' names on them. And, there is a looming deadline for distribution of the ballots to municipal clerks.

64. The Candidates have no other adequate remedy at law—for reasons already discussed, an original action with this Court is the only remedy that will provide an expeditious and conclusive resolution of this issue.

65. And, the balance of harms weighs in favor of a temporary injunction mandating that the Commission include the Candidates' names on the ballot. Again, the challenge to the Candidates' signatures *failed*. Yet, the Commission failed to include the Candidates' names on the ballot. It is the Commission that must justify its failure to act. Under these circumstances it is appropriate to grant temporary relief to the Candidates pending an explanation from the Commission, especially since any harm the Commission will suffer from such an order is insignificant compared to the harm the Candidates are currently experiencing.

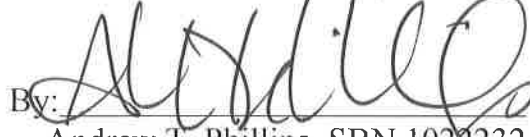
66. Alternatively, if this Court is concerned about issuing a temporary injunction that grants the Candidates the ultimate relief they seek, the Candidates respectfully request that the Court tailor an order that would prevent the Candidates from suffering irreparable harm while this action is resolved. The Candidates suggest that such an order could take the form of an order temporarily enjoining the printing of any ballots or suspending the Commission's certification of all candidates on the candidate list for the election, which would have the effect of preventing counties from moving forward with printing (and thus avoiding irreparable harm to the Candidates) without granting the Candidates the ultimate relief they seek.

CONCLUSION

67. For the foregoing reasons, the Candidates request the following relief: (1) a writ of mandamus directing that the Candidates' names be placed on the 2020 General Election Ballot in Wisconsin, and (2) an ex parte temporary mandatory injunction directing the Commission to add the Candidates' names to the ballot pending resolution of this action.

Respectfully submitted this 3rd day of September, 2020.

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CERTIFICATION

I hereby certify that this brief was produced with a proportional serif font. The length of this Petition and Memorandum is 6,840 words, exclusive of the cover page, tables, signature blocks, and certifications. Word processing software (Microsoft Word) was used to determine the length of this brief. The word count above is inclusive of all words in this brief's Statement of the Issue, Introduction, Reasons Why This Court Should Take Jurisdiction of this Original Action, Statement of Relief Sought, Statement of Facts, Argument, and Conclusion sections, including the text of all such sections' headings and footnotes.

Dated this 3rd day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition and Memorandum is being served on all opposing parties, as well as the Wisconsin Department of Justice, via electronic mail pursuant to agreement.

Dated this 3rd day of September, 2020.

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