WISCONSIN COURT OF APPEALS DISTRICT I
Appeal No. 2023AP1350

IN THE MATTER OF:
Nomination Papers Filed By Paul Melotik
With Respect to the July 18, 2023 Special Election for
Representative to the Wisconsin Assembly – District 24

MORGAN HESS, Executive Director,
Assembly Democratic Campaign Committee,
7 North Pinckney Street, Suite 200
Madison, WI 53703,

Plaintiff-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION
201 West Washington Avenue, Second Floor
Madison, WI 53703,

Defendant-Respondent,

and

PAUL MELOTIK,

Intervenor-Defendant-Respondent.

Appeal from the Circuit Court for Dane County
The Honorable Stephen E. Ehlke, Presiding
Circuit Court Case No. 23-CV-1451

BRIEF OF APPELLANT

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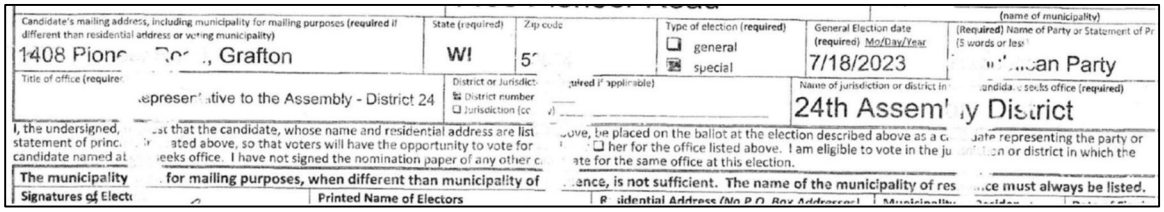
INTRODUCTION

Paul Melotik submitted nomination papers to the Wisconsin Elections Commission ("WEC") and asked to be placed on the ballot for the special election to fill the then-vacant seat in Wisconsin Assembly – District 24. But dozens of Melotik's nomination papers were cut off or obscured such that statutorily required information was not visible. For example:



(R. 4 at 48) Morgan Hess filed a verified complaint with WEC, pointing out that Melotik's papers failed to meet statutory requirements such that he did not qualify to appear on the ballot.

At the hearing on Hess's verified complaint, several Commissioners, on a bipartisan basis, criticized Melotik's nomination papers, referring to them as a "close call," and even suggesting that, if presented with a challenge to similar paperwork in the future, they would be inclined to exclude the candidate from the ballot:

> I think this is the first time we've seen nominating papers this bad, because they're terrible. Almost every page has a failure in printing. And my, my gut is that if I, if I were to see papers like this again, now that we've had a decision on it and we can (inaudible) the people listening, I don't think I would be voting in favor of a lot of these pages because it, it's, this is not rocket science.

(R. 4 at 185 at 41:5-42:1; *id.* at 186 at 43:17-21 ("it's really important that with the technology that's available today you should be able to print these off and have better quality copies."); *id.* at 186 at 45:6-9; Appx. 61-62)

Nonetheless, bucking both WEC precedent and binding Wisconsin law that apply a strict-compliance standard in ballot-access challenges, WEC in this instance said that substantial compliance was good enough. Neither any Commissioner nor WEC as an agency cited a single case, statute, regulation, or other authority to justify this departure from precedent to change the governing legal standard.

The only conceivable authority that WEC relied upon was Wis. Stat. § 5.01(1)'s assertion that election statutes should be "construed to give effect to the will of the electors[.]" However, our Supreme Court has expressly held that § 5.01(1) "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, 579, 249 N.W. 50 (1933).

Moreover, Wis. Stat. § 8.15(4)(a) requires the circulator of each individual nomination paper to certify that "he or she knows" certain things about the electors who sign that petition. After Hess challenged several demonstrably false circulator certifications (*i.e.*, where an elector who signed the page clearly lived outside the district, contrary to the certification), three circulators submitted sworn affidavits reneging on their certifications. The affidavits caveated that each affiant had made the earlier certification only "to the best of my knowledge." (R. 4 at 155, ¶6; *id.* at

158, ¶5; *id.* at 161, ¶5; Appx. 65, 68, 71) As case law underscores, that caveat creates a fundamentally different certification than the required attestation based on actual knowledge that is mandated in § 8.15(4)(a). WEC nevertheless accepted these hedged certifications.

Hess promptly sought judicial review in the Dane County Circuit Court. The circuit court proceedings lasted only seven days from complaint to final judgment, with the circuit court issuing its written decision approximately five hours after the last brief was submitted. The court acted so quickly out of necessity; the ballots were going to the printer the following day. After the circuit court ruling, which affirmed WEC's order on a basis never articulated by the agency, the ballots were printed to include Melotik's name and Melotik was elected to fill the vacant seat.

Even though the election is over, this Court should hear Hess's appeal. Given the statutory deadlines governing ballot-access challenges, each of four established mootness exceptions applies here. Indeed, the Wisconsin Supreme Court has asked the Legislature to modify the deadlines governing ballot-access challenges, noting that "the time between the date the Commission makes its rulings on ballot access and the date that ballots must be sent to voters is extremely short" and such that a court must "decide the matter on an extremely expedited basis." *Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶5 n.1, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam).

Moreover, WEC and the circuit court applied the substantial-compliance standard to Melotik, even though the Supreme Court has applied the strictest possible standard of compliance to electors (that is, actual voters). *E.g.*, *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶53, 403 Wis. 2d 607, 976 N.W.2d 519 ("Mandatory election requirements must be strictly adhered to and strictly observed." (cleaned up)). Consequently, if this Court does not correct WEC's erroneous interpretation of the law, professional politicians will continue to get away with shirking statutory mandates, even as ordinary voters are held to a far more demanding standard to exercise their constitutionally guaranteed right to vote. That distinction has no basis in the law, and the Court should say so.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to Wis. Stat. § 809.22, Appellant requests oral argument to fully present the issues on appeal and answer any questions the Court may have. Appellant also suggests that publication is appropriate under Wis. Stat. § 809.23(1)(a)(5), as the Court's opinion will decide a case of substantial and continuing public interest. In support of both requests, Appellant notes that this issue is of utmost importance to the proper operation of our elections, and it has been arising with greater frequency in recent years. This Court's ruling, in a precedential fashion, will be essential in improving not only the functioning of our democracy but also WEC's proceedings in adjudicating ballot-access complaints. Given the

import and the impact this decision will have, oral argument and publication are appropriate.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents four questions for review:

1. Whether the importance of the issues raised in this case, as well as the statutory deadlines making appellate review nearly impossible, mean one or more recognized mootness exceptions apply?

WEC's Answer: N/A

Circuit Court's Answer: N/A.

Appellant's Answer: Yes.

2. Whether WEC erroneously determined that substantial compliance with certain provisions of Wis. Stat. § 8.15 was sufficient, even though those provisions use "shall" language and WEC did not cite a single case, statute, regulation, or other legal authority in determining that substantial compliance is the appropriate standard?

WEC's Answer: No.

Circuit Court's Answer: No.

Appellant's Answer: Yes.

3. Whether WEC erroneously relied upon Wis. Stat. § 5.01(1) (relating to the "will of the electors") when evaluating a candidate's compliance with the laws governing ballot access, notwithstanding the fact that binding Supreme Court

authority holds that § 5.01(1) cannot be considered until the election has been conducted?

WEC's Answer: No.

Circuit Court's Answer: Yes, but harmless error.

Appellant's Answer: Yes.

4. Whether WEC erred in determining that a certification "to the best of my knowledge" complies with Wis. Stat. § 8.15(4)(a), which four times requires the circulator of nomination papers to certify that "he or she knows" certain things to be true?

WEC's Answer: No.

Circuit Court's Answer: Maybe, but agency deference.

Appellant's Answer: Yes.

STATEMENT OF THE CASE

A. The special election for Assembly District 24.

Governor Tony Evers called a special election to fill the seat of Assembly District 24, which was vacant due to the prior incumbent's resignation. *See* Executive Order #198.[1] The special election was held on July 18, 2023. *Id.*

Wisconsin law governing special elections provides: "Except as otherwise provided in this section, the provisions for the partisan primary under s. 8.15 are

[1] https://docs.legis.wisconsin.gov/code/executive_orders/2019_tony_evers/2023-198.pdf.

applicable to all partisan primaries held under this section[.]" Wis. Stat. § 8.50(3)(b). Consequently, candidates for the special election to Assembly District 24 were required to timely submit to WEC nomination papers containing at least 200 valid signatures of electors. Wis. Stat. § 8.15(6)(d).

To secure a place on the ballot, Melotik timely filed nomination papers with WEC on May 23, 2023. Wis. Stat. § 8.50(3); (R. 4 at 4). Upon initial review, WEC staff determined that Melotik submitted a total of 369 valid nominating signatures. (R. 4 at 10)

B. Hess files her WEC Complaint, raising three categories of challenges.

On May 26, 2023, Hess timely filed a verified complaint with WEC, challenging the sufficiency of Melotik's nomination papers and, accordingly, seeking his exclusion from the ballot for the special election. (R. 4 at 7) *See also* Wis. Stat. § 8.15(1); Wis. Admin. Code § EL 2.07(2)(a). WEC had jurisdiction over Hess's verified complaint, as provided in Wis. Stat. § 5.06 and Wis. Admin. Code § EL 2.07.

Hess challenged two-hundred-eighty-seven (287) of the signatures submitted by Melotik because they appeared on deficient nomination papers; this left only eighty-two (82) signatures appearing on valid nomination papers (the "Challenged Papers"). (R. 4 at 10) Hess identified the defects on a page-by-page basis. (*Id.* at 13) Those defects fell into three categories, including defects in the: (1) header; (2) signatory/elector certification, and (3) circulator certification.

1. The header requirement.

Wisconsin law provides that "[e]ach candidate ***shall*** include his or her mailing address on the candidate's nomination papers." Wis. Stat. § 8.15(5)(b) (emphasis added).

WEC warns candidates in clear, express terms that "[c]orrectly filling out the top three lines of the nomination paper form is one of the most important things a candidate can do." Wis. Elections Comm'n, *Candidate Ballot Access Procedures: Nomination Papers* (Apr. 2020).[2] "If any of the boxes in the header are filled out incorrectly, electors might not be provided with all candidate and election information as required by law. A header that is incorrectly filled out also presents the possibility of challenges being issued to the validity of those nomination papers, resulting in the disqualification of all signatures on those pages." *Id.*

2. The signatory/elector certification requirement.

Wisconsin law mandates that "[e]ach nomination paper ***shall*** have substantially the following words printed at the top" and then sets forth the following:

> I, the undersigned, request that the name of (insert candidate's last name plus first name, nickname or initial, and middle name, former legal surname, nickname or middle initial or initials if desired, but no other abbreviations or titles) residing at (insert candidate's street address) be placed on the ballot at the (general or special) election to be held on (date of election) as a candidate representing the (name of party) so that voters will have the opportunity to vote for (him or her)

[2] https://elections.wi.gov/sites/default/files/legacy/2020-04/Ballot%2520Access%2520Manual_2.pdf.

> for the office of (name of office). I am eligible to vote in (name of jurisdiction or district in which candidate seeks office). I have not signed the nomination paper of any other candidate for the same office at this election.

Wis. Stat. § 8.15(5)(a).

3. The circulator certification requirement.

The mandated certification by the circulator "shall appear at the bottom of each nomination paper" and must include assertions of the following:

> he or she personally circulated the nomination paper and personally obtained each of the signatures; ***he or she knows*** they are electors of the ward, aldermanic district, municipality or county, as the nomination papers require; ***he or she knows*** they signed the paper with full knowledge of its content; ***he or she knows*** their respective residences given; ***he or she knows*** each signer signed on the date stated opposite his or her name; and, that he or she, the circulator, is a qualified elector of this state, or if not a qualified elector of this state, is a U.S. citizen age 18 or older who, if he or she were a resident of this state, would not be disqualified from voting under s. 6.03; that he or she intends to support the candidate; ***and that he or she is aware that falsifying the certification is punishable under s. 12.13 (3) (a)***.

Wis. Stat. § 8.15(4)(a) (emphases added).

This certification requires the circulator to acknowledge that they are subject to Wis. Stat. § 12.13(3)(a), which, in turn, acknowledges the importance of pristine nomination papers, making it illegal to "[f]alsify any information in respect to" or "deface or destroy a … nomination paper[.]" *Id*. Violating § 12.13(3)(a) is a Class I felony, punishable by "a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both." Wis. Stat. §§ 12.60(1)(a), 939.50(3)(i).

The Wisconsin Administrative Code contemplates that circulators will perform some degree of due diligence on the signatories, rather than remaining willfully blind. The circulator must sign their certificate "after, not before, the paper is circulated." Wis. Admin. Code § EL 2.05(14). Then, "[a]fter a nomination paper has been signed, but before it has been filed, a signature may be removed by the circulator"—presumably if the circulator discovers that the signature is improper or the circulator is not able to certify upon penalty of perjury all of the required details relating to that signature. *Id.*, § EL 2.05(16).

C. Melotik's circulators renege on their certifications.

Melotik timely filed a verified response. (R. 4 at 128-162) Melotik supported his response with three correcting affidavits, including his own, pursuant to Wis. Admin. Code § EL 2.05(4). Each of the three affiants served as a circulator for Melotik; collectively, the three affiants gathered 265 of Melotik's 329 signatures. (R. 4 at 154-162; Appx. 64-72)

Each of the three affiants included an identical paragraph in which they swore:

> I knew ***(to the best of my knowledge)*** that each elector signing the nomination form was an elector of the district, that each elector signed the paper with full knowledge of its content, that each elector knew their respective residence given, and that each signer signed on the date stated opposite his or her name.

(*Id.* at 155, ¶6 (emphasis added); *id.* at 158, ¶5 (emphasis added); *id.* at 161, ¶5 (emphasis added); Appx. 64-72)

D. WEC rejects Hess's challenge.

Shortly after 10:00 am on Thursday, June 1, 2023, WEC convened for a special meeting.[3] The Commissioners promptly went into closed session for several hours. Around 1:00 pm, WEC reconvened in open session and turned to discussion of Hess's verified complaint. WEC Chair Don Millis allotted counsel for each side five minutes of argument time. Commissioners also had opportunities to ask questions of the parties' lawyers and of WEC staff. Both WEC staff counsel Brandon Hunzinger and WEC election specialist Riley Willman answered questions. With minimal discussion, the Commissioners dismissed Hess's verified complaint. (Dkt. 4 at 175-187; Appx. 51-63)

WEC issued a Findings and Order document the following day. (R. 4 at 206-207)

STANDARD OF REVIEW

Under Wis. Stat. § 5.06(9), the Court hears appeal from WEC "pursuant to the applicable standards for review of agency decisions under s. 227.57." *Id.* This Court must reverse a WEC decision if WEC erroneously applied the law. Wis. Stat. § 227.57(5).

Here, the Court should give no deference to the determinations of WEC or the circuit court. That is true for at least four reasons.

[3] https://wiseye.org/2023/06/01/wisconsin-election-commission-special-meeting/.

First, the Court gives no deference to WEC's or the circuit court's resolution of pure questions of law. *Wis. Prop. Tax Consultants, Inc. v. DOR*, 2022 WI 51, ¶8, 402 Wis. 2d 653, 976 N.W.2d 482; Wis. Stat. § 227.57(11); *Town of Lincoln v. City of Whitehall*, 2019 WI 37, ¶23, 386 Wis. 2d 354, 925 N.W.2d 520. Here, each question presented is one of law. (R. 2 at 28, ¶¶110-112; *see also id.* at 29, ¶117) Indeed, this is primarily a dispute as to whether § 8.15 is mandatory (such that strict compliance is required) or directory (such that substantial compliance is sufficient). "Whether a statute is mandatory or directory is a matter of statutory construction and, as such, is a question of law which we review without deference to the trial court." *Combined Investigative Servs., Inc. v. Scottsdale Ins. Co.,* 165 Wis. 2d 262, 273, 477 N.W.2d 82 (Ct. App. 1991); *accord Koenig v. Pierce Cnty. Dep't of Hum. Servs.*, 2016 WI App 23, ¶39, 367 Wis. 2d 633, 877 N.W.2d 632.

Second, there are no facts in dispute and therefore no reason to defer. Melotik's nomination papers, and the affidavits he provided, say what they say. *Topolski v. Topolski*, 2011 WI 59, ¶30, 335 Wis. 2d 327, 802 N.W.2d 482 ("Ordinarily the interpretation of a written document is a matter of law."). The only question is whether those papers sufficiently comply with the pertinent provisions of § 8.15, and "[a]pplication of a statute to undisputed facts is a question of law [this Court reviews] without deference to the circuit court." *State v. Adams*, 2015 WI App 34, ¶4, 361 Wis. 2d 766, 863 N.W.2d 640. Likewise, neither WEC nor the circuit court heard testimony or reviewed materials beyond the written record available to

this Court. *See Int. of A.N.B.*, 2021 WI App 50, ¶21, n.5, 963 N.W.2d 591 ("As the circuit court never heard testimony at any point, nor had other cause to make credibility determinations or resolve factual disputes, the documents control, and our review is de novo regardless."); *State v. James*, 2015 WI App 75, ¶17, 365 Wis. 2d 195, 870 N.W.2d 247 (collecting cases for the proposition that "*de novo* review was appropriate because the reasons for deference to the trial court did not exist, namely, the trial court had not conducted a hearing, heard testimony, or assessed credibility").

Third, even if deference were due to WEC under some circumstances, the perfunctory nature of WEC's proceedings here renders the general principles underlying agency deference inapplicable.

WEC Chair Millis allotted each party five minutes of argument; the Commissioners asked a handful of questions; and then, with minimal discussion and without any Commissioner explaining the reasoning for their vote, the Commissioners voted to dismiss Hess's verified complaint. (R. 4 at 175-87; Appx. 51-63) A terse written order—which does not cite to a single precedent—followed the next day. (R. 4 at 206-07; Appx. 49-50) WEC attempted before the circuit court to use its failure to articulate the basis of its decision to its benefit, purporting to rebut Hess's argument about Wis. Stat. § 5.01(1), for example, by observing that "[t]here is no evidence in the record that the Commission or its staff actually invoked this concept in its decision." (R. 20 at 25)

But WEC cannot claim a benefit from failing to disclose its rationale. WEC's time to reveal its reasoning was before, not after, Hess sought judicial review. "Discretion is more than a choice between alternatives without giving the rationale or reason behind the choice." *Reidinger v. Optometry Exam. Bd.*, 81 Wis. 2d 292, 297, 260 N.W.2d 270 (1977). As our Supreme Court has held:

> [T]here must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. ***The process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards***. ... [T]here should be evidence in the record that discretion was in fact exercised ***and the basis of that exercise of discretion should be set forth.***

Id. (cleaned up; emphases added); *see also Argonaut Ins. Co. v. LIRC*, 132 Wis. 2d 385, 391-92, 392 N.W.2d 837 (Ct. App. 1986) (reversible error for agency to deny continuance "without giving the parties or the reviewing court any inkling of the reasons underlying the decision").

Fourth, and relatedly, the Court should not afford any deference to WEC's *post-hoc* justifications for its conduct. WEC followed its two-page written order with a ***thirty-page*** brief in the circuit court. WEC cannot, through litigation, manufacture new rationales not previously disclosed. Just months ago, the D.C. Circuit Court underscored this point in rejecting the Federal Election Commission's attempt to provide a *post hoc* explanation for a decision, stating "[i]t hardly instills confidence that the reasons given are not simply convenient litigating positions" where WEC "withhold[s] the basis of its decision unless and until a lawsuit is

filed[.]" *End Citizens United Pac v. Fed. Election Comm'n*, 69 F.4th 916, 923 (D.C. Cir. 2023) (internal quotation omitted). Indeed, as that court noted, courts' insistence upon "[c]onsidering only contemporaneous explanations for agency action" supports proper government functioning because that "promotes agency accountability by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority[.]" *Id.* So, too, here.

ARGUMENT

I. Several mootness exceptions apply such that the Court should resolve the issues raised by this appeal on their merits.

The election at issue in this case has come and passed, and Hess does not seek to disturb the results. To that end, WEC or Melotik may contend that that Court should dismiss the appeal without reaching the merits. Not so.

To be sure, reviewing courts generally decline to hear moot cases. *Matter of Commitment of J.W.K.*, 2019 WI 54, ¶12, 386 Wis. 2d 672, 927 N.W.2d 509. But there "are several established exceptions under which this court may elect to address moot issues[]." *Id.* Those circumstances include:

> (1) the issues are of great public importance; (2) the constitutionality of a statute is involved; (3) the situation arises so often a definitive decision is essential to guide the trial courts; (4) the issue is likely to arise again and should be resolved by the court to avoid uncertainty; or (5) the issue is capable and likely of repetition and yet evades review.

Id. (internal quotations omitted). Exceptions (1), (3), (4), and (5) all apply here. Before turning to those exceptions, two general points bear emphasizing.

For one thing, the timeliness and importance of election cases often make them inherently appropriate for judicial review, notwithstanding the fact that the election has passed. The Supreme Court of the United States made precisely this point in a dispute involving independent candidates seeking placement on California's ballot:

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. […] The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Storer v. Brown, 415 U.S. 724, 737 n.8 (1974).

For another thing, in Wisconsin, ballot-access challenges occur regularly, with each election, and are governed by aggressive, statutory deadlines. Indeed, in declining to take a ballot-access case on original action, the Supreme Court has noted that "under the current statutory scheme, the time between the date the Commission makes its rulings on ballot access and the date that ballots must be sent to voters is extremely short." *Hawkins*, 2020 WI 75, ¶5 n.1 (per curiam). To that end, the Court "urge[d] the legislature to consider broadening the statutory timelines to afford a more reasonable amount of time for a party to file an action raising a ballot access issue." *Id.* The Legislature has not done so. This leaves WEC and the courts an impossibly small window for adjudicating ballot-access disputes. This Court cannot enlarge that window, but by deciding this appeal it can provide

guidance that will smooth future challenges and minimize the need for judicial review.

Specifically, nomination papers may be filed up to 28 days before the special election primary would be held. Wis. Stat. § 8.50(3).[4] In this case, that due date was May 23, 2023 and, according to WEC, in order for the printing of ballots to begin, "a final decision on the merits of this judicial review action must be issues before June 16[.]" (R. 24) In that twenty-four-day span, the following occurred:

Date	Event	Cite
May 23, 2023	Melotik filed his nomination paperwork.	R. 4 at 2-3
May 26, 2023	Hess challenged Melotik's paperwork.	*Id*. at 5-127
May 30, 2023	Melotik responded to Hess's challenge.	*Id*. at 128-62
May 31, 2023	WEC Staff published its memo to Commissioners.	*Id*. at 2-3
June 1, 2023	WEC convened for hearing on Hess's challenge.	*Id*. at 175-87; Appx. 51-63
June 2, 2023	WEC issued a Findings and Order Document.	*Id*. at 206-207; Appx. 49-50
June 8, 2023	Hess filed her Complaint and Appeal from WEC decision in Dane County.	R. 2; Appx. 19-48
June 13-14, 2023	WEC and Melotik filed their Opposition Briefs.	R. 20, 22
June 14-15, 2023	Hess filed Replies to WEC's and Melotik's Oppositions.	R. 21, 23
June 15, 2023	Circuit court entered its Decision and Order.	R. 25; Appx. 5-18
June 16, 2023	Date by which WEC represented that ballots must go to the printer.	R. 24

Consequently, the longest possible life-span for this case—and likely any similar ballot-access case—is 24 days from the candidate filing papers to request a

[4] Regular elections have similarly short schedules. *See* Wis. Stat. §§ 8.10(1)(2)(a), 8.12(1)(c), 8.15(1).

space on the ballot, through agency adjudication, judicial review, and final judgment in the circuit court.

With these principles in mind, mootness exceptions (1), (3), (4), and (5) all apply. Because this is a textbook example of the "capable of repetition, yet, evading review" exception, Hess begins with exception (5), and then turns to exceptions (1), (3), and (4).

A. Mootness exception (5)—the issues in this case are capable and likely of repetition yet evade review.

This appeal raises issues that—as a direct result of the statutory deadlines—are inherently capable of repetition yet will continue to evade review.

Election law cases often fit into this category of mootness exception. *Storer*, 415 U.S. at 737, n.8; *see also Gill v. Linnabary*, 63 F.4th 609, 613 (7th Cir. 2023) ("In election cases, the capable of repetition yet evading review exception remains appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks.") (internal quotations omitted).

Indeed, given the applicable statutory deadlines, virtually every ballot-access case "evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within the time that would have a practical effect upon the parties." *State v. Leitner*, 2002 WI 77, ¶14, 253 Wis. 2d 449, 646 N.W.2d 341 (internal quotations omitted). To that end, Wisconsin law holds that, where statutory deadlines preclude meaningful appellate review, the Court should

nonetheless take the case on the merits. *See Matter of Commitment of S.L.L.*, 2019 WI 66, ¶16, 387 Wis. 2d 333, 929 N.W.2d 140 (Resolving moot case on the merits because "[i]n the normal course of appellate proceedings, Chapter 51 commitment orders will expire before we have a chance to review them because their maximum statutory duration is only one year."); *In re C.R.*, 2016 WI App 24, ¶13 n.6, 367 Wis. 2d 669, 877 N.W.2d 408 ("given the maximum two-year period of time that a child abuse injunction may be issued, this issue is likely to arise in the future but may evade review prior to resolution of the appellate process.").

Hess and her colleagues at the Assembly Democratic Campaign Committee routinely review Republican candidates' nomination paperwork to ensure that the documents comply with all lawful requirements.[5] That diligence allowed Hess to timely file a challenge to Melotik's paperwork within three calendar days of his filing the papers. Hess will continue to monitor the lawfulness of nomination papers submitted to WEC in Assembly races, and is therefore likely to again encounter WEC applying the erroneous legal standards. It follows that the issues in this case are likely to recur, yet will continue to evade review. The Court should resolve this case on the merits and provide guidance for future ballot-access disputes.

[5] By all accounts, both parties will continue to raise ballot-access challenges. For example, last year, Republicans brought two unsuccessful challenges seeking to exclude Democratic Party Assembly candidates from the ballot. *See* https://elections.wi.gov/sites/default/files/documents/Open%20Session%20Minutes%20June%2010%2C%202022%20%28Approved%29.pdf.

B. Mootness exceptions (1), (3), and (4)— the issues raised by this appeal are important, arise regularly, will arise again, and should be resolved to avoid uncertainty.

"The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards." *State v. Conness*, 106 Wis. 425, 428, 82 N.W. 288 (1900); *see also Storer*, 415 U.S. at 730 ("There must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."). Ballot-access cases fall within that category of "prime importance."

Indeed, in one of the few ballot-access cases to go to Wisconsin's Supreme Court, the Court sharply divided, based largely on the feasibility of granting relief within the time restraints. WEC excluded a candidate from the ballot, and a majority of the Court refused to hear an original action challenging that decision, holding:

> [I]t is too late to grant petitioners any form of relief that would be feasible and that would not cause confusion and undue damage to both the Wisconsin electors who want to vote and the other candidates in all of the various races on the general election ballot.

Hawkins, 2020 WI 75, ¶5. The three dissenting Justices chastised the Court for what they viewed as "abdicat[ing] [the Court's] responsibility to correct ballot error" in a dispute they characterized as "perhaps one of the most important cases in a judicial lifetime." *Hawkins*, 2020 WI 75, ¶29 (Ziegler, J., dissenting).

In *Hawkins*, the party's delay in bringing suit rendered it impossible for the Court to grant relief or reach the merits. *Hawkins*, 2020 WI 75, ¶5. But this Court is

not so limited. *Hawkins* demonstrates that WEC and lower courts need further guidance on the rules governing ballot access and they need that guidance before, not after, the next rounds of high-profile ballot-access disputes in June and August 2024. Given the importance of election cases, the compressed statutory timelines, and the substantial division in the *Hawkins* decision, mootness exceptions (1), (3), and (4) all overwhelmingly apply and militate in favor of adjudication here.

II. WEC made three errors of law, which the circuit court erroneously ratified or refused to reverse.

A. WEC erred in applying a substantial-compliance standard.

1. The WEC Commissioners erroneously adopted the Staff Memo's recommendation of using an inapposite substantial-compliance standard.

The WEC Staff Memo applied a substantial-compliance standard. (*E.g.*, R. 4 at 3 ("The missing letters and words are apparent on the face of the nomination papers, however, staff determined that, with one exception, the nomination papers were substantially compliant[.]")) The Staff Memo did not cite a single case, statute, regulation, or other legal authority in determining that "substantial compliance" is the appropriate standard. (*See id.* at 2-3)

Hess's counsel expressly highlighted for WEC that the staff memorandum failed to identify any legal authority for the substantial-compliance standard. (R. 4 at 180 at 19:11-16; Appx. 56) Hess's counsel went further, explaining how the governing statutes, applicable case law, and WEC's own precedents and official

policy reject the substantial-compliance standard for nomination papers. (*Id.* at 19:17-20:16; Appx. 56) The Commissioners nonetheless, and without explanation, applied the substantial-compliance standard. (*Id.* at 181 at 23:19-23; Appx. 57)

The regulations set forth in Wis. Stat. § 8.15 are mandatory and require strict compliance for the following reasons:

First, "the word 'shall' is presumed mandatory when it appears in a statute." *Bank of New York Mellon v. Carson*, 2015 WI 15, ¶21, 361 Wis. 2d 23, 859 N.W.2d 422 (internal quotations omitted); *State v. Cox*, 2018 WI 67, ¶11, 382 Wis. 2d 338, 913 N.W.2d 780 ("Whenever we encounter a dispute over the meaning of 'shall,' we presume it is introducing a mandate."). Each of the three categories of challenges Hess raised—Header, Signatory/Elector, and Circulator—contains "shall" language dictating the content of the nomination papers. *See* Wis. Stat. §§ 8.15(5)(b), 8.15(5)(a), 8.15(4)(a), respectively.

Bolstering the application of this general rule in this specific context, § 8.15(1) expressly provides that non-compliance with its requirements results in exclusion from the ballot: "Only those candidates for whom nomination papers containing the necessary signatures acquired within the allotted time and filed before the deadline may have their names appear on the official partisan primary ballot."

Second, Supreme Court and WEC precedents alike dictate that a strict-compliance standard applies to ballot-access requirements. WEC has previously

held that "a regulation regarding the conduct of nomination paper circulators […] must be construed as mandatory and 'must be strictly enforced in order to insure the orderly exercise' of the nomination process and ballot access decisions." (R. 4 at 116 (*Sullivan*), 124 (*Kennedy*) (both quoting *Ahlgrimm v. State Elections Bd.*, 82 Wis. 2d 585, 596, 263 N.W.2d 152 (1978)))[6] "A candidate who does not vet their nomination papers prior to filing assumes the risks and mistakes resulting from circulators who are unaware of or do not comply with the regulations governing the circulation of nomination papers." (*Id.* at 118 (*Sullivan*), 126 (*Kennedy*))

As our Supreme Court has recognized, it may be an "unfortunate and regrettable" result to exclude a candidate from the ballot, but "nevertheless, the burden was on the petitioner to properly file." *Ahlgrimm*, 82 Wis. 2d at 597. Just last year, the Wisconsin Supreme Court reaffirmed *Ahlgrimm*, citing it for the proposition that "mandatory election requirements must be strictly adhered to and strictly observed." *Teigen*, 2022 WI 64, ¶53.

Hess and WEC agree on the inquiry at the heart of WEC's precedents, *Sullivan* and *Kennedy*: "substantial compliance with the law applies to the completeness of information on a nomination paper, not the process of circulating nomination papers." (R. 20 at 23-24 (quoting *Sullivan* and *Kennedy*)) So, the

[6] On this point, Wisconsin law is in accord with the prevailing rule, which holds that "[i]t is a prerequisite to the right of a candidate to have his or her name printed on the official ballot that the governing legal requirements be complied with." 29 C.J.S. Elections § 279.

question is whether the challenges here fall within the "process of circulating nomination papers." They clearly do.

Hess agrees that substantial compliance is sufficient when looking at the completeness of the handwritten information electors and circulators scribble on nomination forms. For example, in several instances, electors wrote their Municipality of Residence in the wrong column, WEC accepted the signature, and Hess did not challenge that decision or the validity of that signatures on that basis. (*See, e.g.*, R. 4 at 30-31) Likewise, some electors failed to check a box next to any of the "Town," "City," or "Village," choices, yet WEC accepted the signatures, and Hess did not challenge that decision. (*Id.* at 31) Those are the types errors in "completeness of information on a nomination paper" for which substantial compliance is sufficient.

Here, however, each of Melotik and his two most prolific circulators submitted affidavits explaining that the defects were "simply the result of poor photo copying and creases in the nomination form." (R. 4 at 155, ¶13; *id.* at 158, ¶12; *id.* at 161, ¶12) Thus, the errors here arise from the candidate's process, to which WEC consistently applied strict compliance—until now.

Third, Melotik argued before WEC that substantial compliance was sufficient because the regulations provide that, "[w]here any required item of information on a nomination paper is incomplete, the filing officer shall accept the

information as complete if there has been substantial compliance with the law." Wis. Adm. Code § EL 2.05(5). (*See also* R. 4 at 132)

But WEC cannot by administrative rule excuse non-compliance with Wis. Stat. § 8.15. *See* Wis. Stat. § 227.10(2) ("No agency may promulgate a rule which conflicts with state law."); *State ex rel. Castaneda v. Welch*, 2007 WI 103, ¶43, 303 Wis. 2d 570, 735 N.W.2d 131 ("A rule exceeds an agency's statutory authority if it conflicts with an unambiguous statute by contradicting either the language of a statute or legislative intent.").

Moreover, properly read, the Administrative Code dictates the same result as § 8.15: that noncompliance with any statutory requirement for nomination papers renders the entire noncompliant page invalid. The regulations provide that "[e]ach of the nomination papers shall be numbered" but that "the absence of a page number will not invalidate the signatures on that page." Wis. Admin. Code § EL 2.05(2). Under the doctrine of *expressio unius, exclusio alterius*, it follows that other defects in the requirements—including the Header, Signatory/Elector Certification, or Circulator Certification—***do*** "invalidate the signatures on that page." Wis. Admin. Code § EL 2.05(2); *see also, e.g.*, *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶25, 402 Wis. 2d 539, 976 N.W.2d 821 (Under the "the canon of statutory interpretation *expressio unius est exclusio alterius*, the expression of one thing implies the exclusion of others." (cleaned up)).

Fourth, Melotik's citation to *Sommerfeld v. Board of Canvassers of City of St. Francis*, 269 Wis. 299, 302, 69 N.W.2d 235 (1955), does not change that § 8.15's requirements are mandatory. (R. 4 at 132-133) For starters, *Sommerfeld* is a 67-year-old opinion, issued by a sharply divided court, which the Wisconsin Supreme Court recently characterized as "a nullity." *Teigen*, 2022 WI 64, ¶80.

Far more recently than *Sommerfeld*, the Supreme Court has clarified the mandatory-versus-directive distinction, stating that use of the word "shall" is "presumed to be mandatory when it appears in a statute, but may be construed as directory if necessary to carry out the legislature's clear intent." *Vill. of Elm Grove v. Brefka*, 2013 WI 54, ¶23, 348 Wis. 2d 282, 832 N.W.2d 121, *amended*, 2013 WI 86, ¶23, 350 Wis. 2d 724, 838 N.W.2d 87.

Moreover, the circumstances in *Sommerfeld* were radically different. There, the election had been conducted, specific ballots themselves were challenged, and the Court was being asked to disqualify voters retroactively in a way that would necessarily decide the winner of an already-conducted election—even though all parties involved conceded that the voters themselves had done nothing wrong and had followed the instructions of the municipal clerk. *Sommerfeld*, 269 Wis. at 299-301. The election statutes in effect at that time mandated that the statutes "shall be construed so as to give effect to the will of the electors, if that can be ascertained, notwithstanding informality or failure to comply with some of its provisions." *Id.* at 302. Given that mandate, the Court looked to "fulfill the spirit of our election laws"

and chose not to disqualify the ballots. *Id.* at 304. Stated differently, *Sommerfeld* interpreted "shall" as directory solely "to carry out the legislature's clear intent" of counting ballots already cast. *Vill. of Elm Grove*, 2013 WI 54, ¶23.

Courts no longer look to the spirit of our election laws, but to their text. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110.[7] Moreover, as set forth below (*see* Section II(C)), there is no statutory mandate to give effect to the will of the voters in reviewing nomination papers.

Finally, WEC advocates for a lawless result, under which it can enforce the law in some instances while unilaterally and arbitrarily excusing noncompliance whenever it deems fit. Specifically, WEC argued to the circuit court that, under Wis. Stat. § 8.30(1), the "Commission has the option to, but is not required to, refuse ballot access." (R. 20 at 16; *see also id.* at 15 (arguing that use of the word "may" indicates "that the provision is permissive and allows discretion")) WEC's argument is breathtaking once the Court reads § 8.30(1) in full:

> (1) Except as otherwise provided in this section, the official or agency with whom declarations of candidacy are required to be filed ***may refuse to place the candidate's name on the ballot if any of the following apply***:
>
> > (a) The nomination papers are not prepared, signed, and executed as required under this chapter.

[7] Factual distinctions and express abrogation in *Teigen* aside, *Sommerfeld* would shed limited light here, as it pre-dates the sea-change in statutory interpretation effectuated by *Kalal*, with a focus on the text of the statute. *State v. Rector*, 2023 WI 41, ¶22 n.6, 407 Wis. 2d 32, 990 N.W.2d 213 (stating that a precedent "was an accepted approach to statutory interpretation at the time" but the Supreme Court since clarified in *Kalal* that the proper methodology "requires that statutory interpretation focus primarily on the language of the statute.") (internal quotation omitted); *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶39, 402 Wis. 2d 587, 977 N.W.2d 342 (discrediting a case that applied the "pre-*Kalal* approach to ascertaining statutory meaning").

> (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.

Wis. Stat. § 8.30(1) (emphases added).

Under WEC's reading, it would also have the "option to, but [not be] required to, refuse ballot access" to candidates even where it "conclusively appears … that the candidate is ineligible to be nominated or elected" and even where the "candidate, if elected, could not qualify for the office sought." *Id.* Indeed, a future candidate who obtains 199 signatures, rather than the required 200 signatures, may well argue that they substantially complied and that WEC has the "option to" place them on the ballot even though their "nomination papers are not prepared, signed, and executed as required under this chapter." Wis. Stat. § 8.30(1)(a). That cannot possibly be the law. (And, once that happens, the next candidate will proffer 195 signatures as substantially compliant; the number will continue to tumble down a slippery slope of substantial compliance, nullifying the policy decisions the Legislature made.)

In fact, just one year ago, our Supreme Court held that "[m]andatory election requirements must be strictly adhered to and strictly observed." *Teigen*, 2022 WI 64, ¶53 (cleaned up). Before the circuit court, WEC diminished *Teigen*'s holding, arguing that the Supreme Court "stated only in the most general sense that

mandatory election requirements must strictly be followed." (R. 20 at 22) But "a good rule of thumb for reading [Supreme Court] decisions is that what they say and what they mean are one and the same[.]" *Mathis v. United States*, 579 U.S. 500, 514 (2016). And WEC's artificially narrow reading of *Teigen* undermines the Court's broader holding that, "whatever their motivations, WEC must follow Wisconsin statutes. Good intentions never override the law." *Teigen*, 2022 WI 64, ¶52.

2. The circuit court erred in justifying WEC's application of the substantial-compliance standard.

The circuit court affirmed WEC and held that the pertinent provisions of § 8.15 are directory, rather than mandatory. It did so for three reasons, each of which is incorrect as a matter of law.

First, the circuit court held that "election statutes are generally considered directory[.]" (R. 25 at 7 (citing *Lanser v. Koconis*, 62 Wis. 2d 86, 93, 214 N.W.2d 425 (1974), *Sommerfeld*, 269 Wis. at 303, and *Olson v. Lindberg*, 2 Wis. 2d 229, 85 N.W.2d 775 (1957); Appx. 11) Likewise, the Court held that statutes regulating the "mode and manner of conducting elections" are generally directory. (R. 25 at 9 (*quoting Lanser*, 62 Wis. 2d at 91); Appx. 13)

But *Lanser, Sommerfeld,* and *Olson* were each cases in which individuals' constitutionally-guaranteed rights to vote were at stake. *Lanser*, 62 Wis. 2d at 93 ("we are not inclined to disenfranchise these voters"); *Sommerfeld*, 269 Wis. at 303 ("Having made provision that these unfortunate people can vote, we cannot believe

that the legislature meant to disenfranchise them by providing a condition that they could not possibly perform."); *Olson*, 2 Wis. 2d at 234 ("it would be improper to deprive those persons who were qualified to vote in the election of their right to so vote because of the failure of the election officers to have performed their duty, and also because there was no fault on the part of such voters").

No elector's right to vote is at stake in this litigation. Rather, "[t]he State has the right and duty to establish reasonable regulations for the conduct of elections for state offices. There is no constitutional right to have one's name printed on the ballot." *Beller v. Kirk*, 328 F. Supp. 485, 486 (S.D. Fla. 1970) (three-judge court), *aff'd sub nom. Beller v. Askew*, 403 U.S. 925 (1971). "[L]imiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable." *Burdick v. Takushi*, 504 U.S. 428, 440 n.10 (1992).

WEC's regulations reflect these principles, directing that Melotik "has the responsibility to assure that his ... nomination papers are prepared, circulated, signed, and filed in compliance with statutory and other legal requirements." Wis. Admin. Code § EL 2.05(1); *see also* Wis. Stat. § 8.07; Wis. Admin. Code § EL 2.05(6). But WEC departed from these principles here, without explanation, and the circuit court erred in affirming its capricious decision.

Second, the circuit court reasoned that the pertinent subsections of § 8.15 are directory because "each subsection applies no penalty for any failure to obey[.]"

(R. 25 at 9 (citing *Midwest Mut. Ins. Co. v. Nicolazzi*, 138 Wis. 2d 192, 199, 405 N.W.2d 732 (Ct. App. 1987); Appx. 13) But *Nicolazzi* is no longer good law. It held that:

> In determining whether a statutory provision is mandatory or directory in character, we have previously said that a number of factors must be examined. These include the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations and whether a penalty is imposed for its violation.

Nicolazzi, 138 Wis. 2d at 198. But later opinions of our Supreme Court dictate that the Court n longer begins by looking to "a number of factors"; rather, it begins with the clear presumption that "shall" is mandatory. *Bank of New York Mellon*, 2015 WI 15, ¶21; *Cox*, 2018 WI 67, ¶11. The word "shall" is construed as directory only "if necessary to carry out the intent of the legislature." *Bank of New York Mellon*, 2015 WI 15, ¶22. Even though Hess cited both *Bank of New York Mellon* and *Cox*, the circuit court did not apply (or even acknowledge) those Supreme Court authorities, relying instead on a dated, contrary Court of Appeals decision that has been abrogated.

Third, the Court held that § 8.15 is directory because "the entirety of § 8.15 is directed against public officials." (R. 25 at 9 (citing *Nicolazzi*, 138 Wis. 2d at 200); Appx. 13) But, even if *Nicolazzi* were still good law (which, as discussed above, it is not), its "public official" distinction serves only to bolster the conclusion that § 8.15 is ***mandatory***, not directory.

To be sure, *Nicolazzi* acknowledges that compliance "often depends upon the proper performance by the designated officer, a person whose dereliction in that respect is beyond the direct and particular control of those whose rights are at stake" and that "such statutes are more likely to be construed as directory." *Nicolazzi*, 138 Wis. 2d at 199. But the case continues to explain that "as to private persons, the statute is more likely to be construed as mandatory." *Id.* at 200. "Where an individual is the person not strictly complying, he has no grounds for complaint." *Id.* (internal quotations omitted); *c.f. McNally v. Tollander*, 100 Wis. 2d 490, 502, 302 N.W.2d 440 (1981) (Elector should not be deprived of vote "through the failure of election officers to perform their duty, where the elector himself is not delinquent in the duty which the law imposes on him.") (internal quotation omitted).

Here, the defects in Melotik's paperwork were not caused by a public official, such as WEC or its staff. Rather, Melotik and his circulators expressly admit that the noncompliance was the result of their "poor photo copying[.]" (R. 4 at 155, ¶13; *id.* at 158, ¶12; *id.* at 161, ¶12; Appx. 65, 68, 71)[8]

Indeed, in *Sullivan* and *Kennedy*—where WEC excluded candidates and courts affirmed that ruling—the underlying deficiency occurred through no fault of the candidates. There, the two candidates each used circulators who also circulated

[8] Likewise, *Nicolazzi* explains that "[w]here the language is clear and unambiguous, a mandatory construction is more likely." 138 Wis. 2d at 198. Neither Melotik nor WEC has ever asserted that § 8.15 is ambiguous. Nor have they asserted any cause for the non-compliance, aside from Melotik's carelessness.

papers for a third candidate. Though the Milwaukee County Election Commission placed the candidates on the ballot, WEC overruled the decision and ordered both Sullivan and Kennedy to be excluded, even though the circulators admitted, under oath, that they misled the candidates, having overtly promised that they "would not circulate nomination papers on behalf of any other candidate for Milwaukee County Executive." (R. 4 at 114 and 122)

If WEC excludes candidates who, through no fault of their own, submit nominating papers that evidence errors in the "process of circulating," surely it must also exclude those candidates who make the errors themselves. So, under *Nicolazzi*'s fault analysis, strict compliance applies here.

B. WEC erred in invoking the will-of-the-voters standard set forth in Wis. Stat. § 5.01(1).

Wisconsin's election statutes "shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." Wis. Stat. § 5.01(1).

However, the Supreme Court has held that this provision "applies only after the holding of the election and the will of the electors has been manifested." *Oaks*, 211 Wis. at 249; *see also City of Chippewa Falls v. Town of Hallie*, 231 Wis. 2d 85, 91-92, 604 N.W.2d 300 (Ct. App. 1999) ("[O]ur supreme court has interpreted this

statute as applying only after an election has been held and the will of the electors manifested.").

While the Opinion and Order here does not explain WEC's reasoning in applying the substantial-compliance standard (*see* R. 4 at 206-07; Appx. 49-50), the Commissioners' limited discussion at the hearing suggests its determination was rooted in Wis. Stat. § 5.01(1). (R. 4 at 181 at 23:19-23 and 25:16-20; Appx. 57)

The circuit court agreed that § 5.01(1) applies only after the election. (R. 25 at 13; Appx. 33) However, the circuit court did not "agree that the error matters," concluding that WEC "reached the right answer for the wrong reasons." (*Id.*) But the error was far from harmless.

As set forth in Section II(A)(1) above, the applicable provisions of § 8.15 use the word "shall," which is presumptively mandatory. The only basis upon which WEC or Melotik sought to rebut that presumption is by invoking the will of the voters. For example, Melotik's response to Hess's verified complaint cited Wis. Stat. § 5.01 for the proposition that the Wisconsin statutes "plainly favor ballot access and allow for substantial compliance to be enough unless otherwise expressly provided by law." (R. 4 at 135) Multiple Commissioners vocalized support for this approach. (*See* R. 4 at 181 at 23:19-23 ("It just seemed to me that we should be looking to expand democracy. And I sort of like our staff's approach on substantial compliance and my thoughts are that we should let the voters have an election and not take this election away."); *id.* at 25:16-20 ("I understand you're saying that the

will of the people, I think your argument is, doesn't translate into -- is not an argument to weigh in favor of ballot access. But isn't, isn't ballot access in and of itself a legitimate goal?"); Appx. 57)

WEC's erroneous invocation of § 5.01(1) was a prerequisite to finding the pertinent provisions of § 8.15 directory, rather than mandatory. Absent § 5.01(1), WEC could not possibly have rebutted the presumption that "shall" means "shall." And without such a rebuttal, WEC could not have dismissed Hess's verified complaint and approved Melotik for the ballot. Consequently, WEC's error was not harmless, and the Court should declare that WEC erroneously relied upon § 5.01(1).

C. The WEC erroneously determined that a certification "to the best of my knowledge" complies with Wis. Stat. § 8.15(4)(a), and the circuit court erroneously deferred to WEC.

1. The certifications on most of Melotik's nominating papers failed to comply with Wis. Stat. § 8.15(4)(a).

Each nomination paper must include the circulator's certification, attesting that ***"he or she knows"*** certain things about the electors signing the nomination paperwork. Wis. Stat. § 8.15(4)(a) (emphasis added). Melotik's original nomination papers submitted to WEC—to the extent they are visible—bear circulator certifications that appear to mirror this statutory certification. (R. 4 at 24-67)

However, Melotik's three primary circulators (including Melotik himself) uniformly reneged on their earlier certifications. (*Id.* at 155, ¶6; *id.* at 158, ¶5; *id.* at 161, ¶5; Appx. 65, 68, 71) Those circulators—who collected 265 of Melotik's 369

submitted signatures—were no longer willing to affirm that they "know" their certifications to be true. Instead, each hedged their certifications to say only that they are true "to the best of my knowledge." (*Id.*)

But certification "to the best of my knowledge" is not sufficient; the statute uses the phrase "he or she knows" ***four*** separate times. Wis. Stat. § 8.15(4)(a). By inserting the caveat "to the best of my knowledge," each affiant watered down their circulator certifications and vitiated the efficacy of those certifications.

Under a strict-compliance standard, the 265 signatures on nomination papers circulated by Melotik, Marti, and Grabow must be stricken. Even if the Court finds substantial compliance sufficient—and there is no legal basis to do so—Melotik fares no better. This is true for three reasons.

First, the statutes demonstrate that swearing to a fact "to the best of my knowledge" is fundamentally different than actual knowledge. If the Legislature wanted to authorize a certification to the best of the circulator's knowledge it could have done so. *Jefferson v. Dane Cnty.*, 2020 WI 90, ¶21, 394 Wis. 2d 602, 951 N.W.2d 556 (noting, in the election-law context, that "[t]he purpose of statutory interpretation and application is to apply the meaning of the words the legislature chose").

Indeed, there are ***over forty instances*** across our statutes—including some elsewhere in the election chapters administered by WEC—where the Legislature

contemplates a person certifying to the best of their knowledge.[9] But Wis. Stat. § 8.15(4) is not among those statutory provisions. Section 8.15(4) plainly requires the circulator to certify that "he or she ***knows***" certain things. (Emphasis added). This Court should give effect to the Legislature's choice of language. *E.g.*, *United Am., LLC v. DOT*, 2021 WI 44, ¶13, 397 Wis. 2d 42, 959 N.W.2d 317 ("When the legislature chooses to use two different words, we generally consider each separately and presume that different words have different meanings.") (internal quotations omitted).

Second, case law likewise establishes that a certification "to the best of my knowledge" is not the same as actual knowledge. *See McChain v. City of Fond Du Lac*, 7 Wis. 2d 286, 290, 96 N.W.2d 607 (1959) ("An affidavit on information and belief is an anomaly. ***It is not an affirmance on knowledge.***" (emphasis added)); *Am.'s Best Inns v. Best Inns of Abilene,* 980 F.2d 1072, 1074 (7th Cir. 1992) (for an affidavit to have "any value," then "to the best of my knowledge and belief is insufficient."); *Draghi v. Cnty. of Cook*, 991 F. Supp. 1055, 1057 (N.D. Ill. 1998), *aff'd,* 184 F.3d 689 (7th Cir. 1999) ("[W]e are taught in law school (or we should be) that any statement that things are true 'to the best of someone's personal

[9] *See* Wis. Stat. §§ 6.29(2)(a)., 6.55(2)(a), 48.025(2)(d), 48.57(3n)(am)4m., 48.57(3p)(fm)2m., 50.94(2)(a)2., 53.32(1), 71.13(1), 100.65(3)(a), 100.65(4), 105.03, 106.57(3)(a)5., 106.57(3)(b)4., 118.25(2)(b), 121.52(3)(c), 155.30(3), 175.60(7)(b), 175.60(15)(b)2., 196.23(1)(a), 196.199(3)(c), 202.12(7)(b)3., 221.0207(2), 322.030, 440.094 (2)(a)2.b., 562.05(5)(c)1., 610.80(3)(a), 622.09(2), 628.92(1), 703.165(8), 707.37(5), 709.03, 709.033, 756.04(6)(am)3., 782.04(3), 802.05(2), 809.107(6)(am), 812.05(1), 812.05(2), 812.44(6), 822.35(1)(b), 853.04(1), 853.04(2), 858.09, and 891.09(2).

knowledge and belief' is really not an affidavit at all—it is wholly ineffective as a sworn statement of the *actual* truthfulness of the assertions referred to." (emphasis in original)).

Indeed, courts across the country hold that an affirmation "to the best of my knowledge" is fundamentally different from an actual affirmation. *See, e.g.*, *Muskin v. State Dep't of Assessments & Tax'n*, 30 A.3d 962, 975 (Md. 2011) ("The phrase 'to the best of my knowledge' implies an acceptable margin of error in the declarant's statement."); *Lopez-Carrasquillo v. Rubianes*, 230 F.3d 409, 414 (1st Cir. 2000) (affidavit to the "best of my knowledge" is "insufficient as a proffer of evidence because affidavits […] must be based on the affiants [*sic*] personal knowledge"); *Campbell v. Fort Worth Bank & Tr.*, 705 S.W.2d 400, 402 (Tex. App. 1986) ("The statements in appellant's affidavit based upon 'the best of his knowledge' constitute no evidence at all."); *Golden Rule Ins. Co. v. Schwartz*, 203 Ill. 2d 456, 465, 786 N.E.2d 1010, 1016 (2003) (collecting cases for the proposition that a certification based on "knowledge and belief […] bypasses the rigid standard of accuracy" because it "establishe[s] a lesser knowledge standard[.]" (cleaned up)).

Third, the reason courts, in Wisconsin and elsewhere, draw this line is clear. Like many certifications, the one spelled out in § 8.15(4)(a) subjects the circulator to the possibility of criminal penalties for making a knowingly false statement. *Id.* (requiring circulator to certify "that he or she is aware that falsifying the certification is punishable under s. 12.13(3)(a)."). But a "witness's false swearing to fact, which

he believes to be true to best of his knowledge, does not constitute perjury[.]" *Commonw. v. Morse*, 10 N.E.3d 1109, 1118 (Mass. 2014). A certification "to the best of my knowledge" is meaningless, as a "person could testify with impunity that to the best of his knowledge, there are twenty-five hours in a day, eight days in a week, and thirteen months in a year." *Campbell*, 705 S.W.2d at 402.

Thus, even if substantial compliance applied to the certification, "substantial compliance […] requires actual compliance in respect to the substance essential to every reasonable objective of the statute." *In re Smith*, 2008 WI 23, ¶62, n.52, 308 Wis. 2d 65, 746 N.W.2d 243. A certification "to the best of my knowledge" negates the possibility of prosecution, and therefore fails to comply with the objective of § 8.15(4). The possibility of prosecution for false certifications on election-related paperwork is not merely hypothetical.[10]

Third, there is no explanation for the circulators' "to the best of my knowledge" caveat other than that they were making a deliberate attempt to hedge their earlier certification.

Notably, it was undisputed that Melotik's circulators made false certifications. Hess identified, and WEC confirmed, several instances where the

[10] Just this summer, for example, a Milwaukee County Supervisor pleaded guilty to a violation to Wis. Stat. § 12.05 arising out of his false certification of nomination paperwork he submitted to be placed on the ballot. *See State of Wisconsin v. Shawn M. Rolland*, Milwaukee County Circuit Court Case No. 2023-CM-1757; *see also* https://www.jsonline.com/story/news/politics/2023/06/22/milwaukee-county-board-supervisor-shawn-rolland-faces-criminal-charges/70347710007/.

certifications were demonstrably wrong, including instances where the signatories listed addresses that either did not exist or were outside the district. (R. 4 at 18-19) Melotik conceded those challenges, stating: "For purposes of efficiency, the Respondent does not offer a response to alleged defects relating to signatories who listed addresses that lie outside of Assembly District 24 and signatories that listed addresses that allegedly do not exist." (*Id.* at 147 n.1)

During the hearing, one of the Commissioners asked Melotik's counsel why the affiants included the "to the best of my knowledge" language, and counsel had no answer:

> COMMISSIONER JACOBS: What is the purpose of putting in paragraph 5 on the affidavits regarding information to the best of the affiant's knowledge? Why was that included?
>
> MR. THOME: I, I don't know that I can speak to why that was included.
>
> * * *
>
> COMMISSIONER JACOBS: So you don't know why you put in "to the best of my knowledge" on paragraph 5 for those three affidavits?
>
> MR. THOME: I do not.

(R. 4 at 183 at 32:12-33:19; Appx. 59)

If Melotik had some explanation for the presence of this language ***other*** than the affiants' reneging on the certifications, his counsel would have said so. The only explanation is that the affidavits mean precisely what they say: the circulators are no longer willing to attest to the truth of their certifications that Wisconsin statutes require to appear on valid nomination papers.

WEC staff offered no analysis of or opinion about this argument. The Commissioners barely paid it more attention, arguing that because "to the best of my knowledge" expresses more certainty than "upon information and belief," the certifications remained valid. (R. 4 at 186 at 44:4-15; Appx. 62) But the question is not how "to the best of my knowledge" compares to "upon knowledge and belief"; instead, the dispositive question is how "to the best of my knowledge" applies to the actual personal knowledge expressly required by our statutes.

And the "information and belief" analogy suffers the same defect in statutory interpretation, *United Am.*, 2021 WI 44, ¶13, as the Legislature has adopted that standard elsewhere but chose not to do so here. *See, e.g.*, Wis. Stat. § 622.09(2) ("The summary report shall include the signature […] attesting ***to the best of his or her belief and knowledge***" that certain things are true. (emphasis added)).

The plain text of § 8.15(4) requires each circulator to certify that "he or she knows" certain facts. Certifying those facts "to the best of his or her knowledge" does not remotely comply with the statute. Indeed, it amounts to no certification at all.

2. The circuit court erroneously deferred to WEC's interpretation of the affidavits.

On Melotik's deficient certifications, the circuit court held that the "problem with Hess' arguments here is that I may agree [with her arguments] but still conclude WEC did not err when it found these nomination papers substantially complied with

§ 8.15(4)(a).” (R. 25 at 13-14; Appx. 17-18) Specifically, the circuit court affirmed WEC because it found that “due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved[.]” (*Id.* at 14 (quoting Wis. Stat. § 227.57(11)); Appx. 18)

The circuit court erroneously deferred to WEC. This is not an area where, due to technical or scientific expertise, the agency is better suited than the courts to resolve the question. *Compare, e.g.*, *State ex rel. Boehm v. Wis. Dep’t of Nat. Res.*, 174 Wis. 2d 657, 677, 497 N.W.2d 445 (1993) (“DNR is the state agency possessing staff, resources, and expertise in environmental matters. The courts are ill-equipped to determine the effects of a proposed project on the environment.”).

Rather, WEC was merely evaluating an affidavit to determine whether it complies with a statute. “The interpretation of documentary evidence is a question of law that is reviewed de novo.” *State v. Schmitt*, 2012 WI App 121, ¶9, 344 Wis. 2d 587, 824 N.W.2d 899; *see also Topolski*, 2011 WI 59, ¶30. Neither a certification nor an affidavit is unique to the election-law context in a way that supports deference to WEC’s specialized expertise. Melotik’s certifications were deficient as a matter of law, and there is no reason for the circuit court, or this Court, to defer to WEC’s legal error.

CONCLUSION

For all of the above reasons, Plaintiff-Appellant Morgan Hess respectfully requests that the Court enter an order declaring:

1. That WEC erroneously applied a substantial-compliance standard when evaluating a candidate's compliance with Wis. Stat. § 8.15;

2. That WEC erroneously relied upon Wis. Stat. § 5.01(1) when evaluating a candidate's compliance with Wis. Stat. § 8.15; and

3. That WEC erred in determining that a certification "to the best of my knowledge" complies with Wis. Stat. § 8.15(4)(a).

Dated: September 22, 2023

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. section 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is 10,597 words.

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CERTIFICATION BY ATTORNEY

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

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