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CLERK OF WISCONSIN
SUPREME COURT

IN THE SUPREME COURT OF WISCONSIN

Case No. _____

DEAN PHILLIPS,

Petitioner,

v.

WISCONSIN ELECTION COMMISSION AND
WISCONSIN PRESIDENTIAL PREFERENCE SELECTION COMMITTEE,

Respondents.

EMERGENCY PETITION TO TAKE JURISDICTION OF AN ORIGINAL ACTION AND FOR WRIT OF MANDAMUS

Timothy W. Burns, SBN 1068086
Jesse J. Bair, SBN 1083779
Brian P. Cawley, SBN 1113251
BURNS BAIR LLP
10 East Doty Street, Suite 600
Madison, Wisconsin 53703
(608) 286-2808

Malcolm Seymour (*pro hac vice forthcoming*)
FOSTER GARVEY P.C.
100 Wall Street, 20th Floor
New York, New York 10005
(212) 965-4533

Counsel for Petitioner

ISSUE PRESENTED

1. Whether the Wisconsin Presidential Preference Selection Committee (the "Committee") and the Wisconsin Election Commission ("WEC") abused their discretion by refusing to place Petitioner on the 2024 Democratic Presidential Preference Primary (the "Primary") ballot, despite Petitioner's request, where no evidence indicates that Respondents considered whether Petitioner's "candidacy is generally advocated or recognized in the national news media throughout the United States" pursuant to Wis. Stat. § 8.12(1)(b) (the "Statute").

INTRODUCTION

2. Petitioner is a nationally recognized candidate in the Democratic presidential primaries, who recently received 19.5% of the primary vote in New Hampshire, making him the first runner-up and leading challenger to the incumbent candidate, President Joseph R. Biden. Notwithstanding Petitioner's obvious recognition in national news media, and the proven success of his candidacy, the Committee has omitted him from the ballot for Wisconsin's primary.

3. Wisconsin's ballot access Statute for presidential primaries contains a "media recognition" provision similar to those found across a number of other states. The primary purpose of these provisions is to ensure that voters have the opportunity to vote for candidates, like Petitioner, whom they have heard or read about in the news. A secondary purpose of such provisions is to reduce ballot access costs and impediments for candidates, like Petitioner, whose *bona fides* are a matter of objective public record.

4. Wisconsin voters experience disappointment, confusion and distrust when they arrive at polling locations only to find their preferred candidates missing from the ballot. To prevent this outcome and encourage voter participation, the Statute eliminates the unchecked discretion of political parties to place only candidates of their choosing on the Primary ballot.

5. The enactment of such controls for party primaries makes sense: when political parties choose to select candidates through state-run primaries (using state and municipal election equipment, state and municipal election facilities, and taxpayer money), they must comply with appropriate state election rules, including the media recognition provision of the Statute.

6. This Petition involves an open-and-shut question of statutory application. This Court has already decided the legal question at issue in Petitioner's favor. The Committee's failure to make an independent determination of whether Petitioner's candidacy "is generally advocated or recognized in the national news media throughout the United States" was an abuse of discretion. *McCarthy v. Elections Bd.*, 166 Wis. 2d 481, 490, 480 N.W.2d 241 (1992). The Committee's failure to make this determination is exacerbated by (1) widespread national recognition that Petitioner is a candidate seeking the Democratic Party's presidential nomination and (2) specific notice provided by Petitioner's campaign to members of the Committee that Petitioner was seeking placement on the Primary ballot.

7. Wisconsin voters subsidize the Wisconsin Democratic Party's primary election, and they deserve a true primary, in which they are free to vote for the same nationally recognized candidates who are appearing on other states' ballots. Petitioner should not have to waste resources to circulate petitions and gather signatures, when the Wisconsin legislature has determined that he and other "generally advocated or recognized" candidates should be spared that expense.

8. Owing to statutory deadlines for printing and distribution of absentee and overseas ballots (*see* Wis. Stat. § 7.10(2)), Petitioner respectfully requests that the Court take original jurisdiction over this matter on an emergency basis, and grant relief no later than **February 9, 2024**, or such earlier time as Respondents may indicate that they require. Petitioner further requests that the WEC refrain from submitting a certified list of Primary candidates to county clerks until this Petition can be resolved, or that this Court enjoin WEC from doing so.

PARTIES

9. Petitioner Dean Phillips is a United States Representative serving the 3rd District of Minnesota, and a nationally recognized candidate for the Democratic Party's nomination for the 2024 presidential election. Petitioner has been harmed by Respondents' failure to perform their non-discretionary duty, under the Statute, to evaluate whether Petitioner's "candidacy is generally advocated or recognized in the national news media throughout the United States" for purposes of placing him on the Primary ballot without the need for costly circulation of petitions pursuant to Wis. Stat. § 8.12(1)(c). Petitioner is not a Wisconsin "elector" having authority to file a complaint under Wis. Stat. § 5.06(1).

10. Respondent Wisconsin Presidential Preference Selection Committee is the entity organized under authority of the Statute to select "the names of all candidates of the political parties represented on the committee for the office of president of the United States" and "place the names of all candidates whose candidacy is generally advocated or recognized in the national news media throughout the United States on the ballot." The Committee certifies this list of candidates to the WEC. The Committee is not an "election official" within the meaning of Wis. Stat. § 5.06(1). *See* Wis. Stat. §5.02(4e) (defining election official as "an individual who is charged with any duties relating to the conduct of an election").

11. Respondent Wisconsin Election Commission is the state agency with general authority for administration of the Primary and "laws relating to elections and election campaigns, other than laws relating to campaign financing." Wis. Stat. § 5.05. WEC receives the list of candidates certified by the Committee pursuant to the Statute, and prescribes the form of ballots to be used in the Primary pursuant to Wis. Stat. § 8.12(2). WEC has the authority and statutory duty to "revise the official ballot forms to harmonize with legislation and the current official status of the political parties whenever necessary." Wis. Stat. § 7.08(1)(a). WEC has the statutory authority and duty to "transmit to each county clerk a certified list of candidates for

president who have qualified to have their names appear on the presidential preference primary ballot," "[a]s soon as possible after the last Tuesday in January of each year in which there is a presidential election." Wis. Stat. § 7.08(2)(d). WEC is not an "election official" within the meaning of Wis. Stat. § 5.06(1). *See* Wis. Stat. §5.02(4e); *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶¶ 46–47, 403 Wis. 2d 607, 976 N.W.2d 519.

STATEMENT OF FACTS

12. On January 2, 2024, at 10:00 a.m., the Committee convened the presidential candidate selection meeting (the "Meeting") required by the Statute. Affidavit of Trevor Maloney ("Maloney Aff."), ¶ 3.

13. WEC published notice and an official agenda for the Meeting on the "Wisconsin Public Meeting Notices & Minutes" website.[1] Maloney Aff., ¶ 4, Ex. 1.

14. The Meeting was open to the public, and was attended by Trevor Maloney, Political Director of Dean 24, the official presidential campaign of Representative Phillips (the "Campaign"). *Id.*, ¶¶ 3, 5.

15. WEC Deputy Administrator Robert Kehoe called the Meeting to order, and WEC staff member Riley Willman served as the Meeting's secretary, responsible for taking minutes. *Id.*, ¶¶ 6, 7.

16. The Committee proceeded through its eight-item agenda in approximately five minutes. *Id.*, ¶ 14.

17. Robert Lang, upon being nominated and voted in as chair of the Committee, requested that the chairs of the Republican and Democratic parties read their lists of proposed Primary candidates into the record. *Id.*, ¶¶ 8, 9.

18. Republican state party chair Brian Schimming announced the Republican party's list first, which included six names. *Id.*, ¶ 10.

[1] *Available at* https://publicmeetings.wi.gov/view/a012bd0f-fc7a-45a3-af38-9790ee0dc908 (last visited Jan. 20, 2024).

19. Ben Wikler, chairperson of the Democratic Party of Wisconsin ("WisDems"), announced the Democratic party's list second, which included only the name of President Joseph R. Biden. *Id.*, ¶ 11.

20. The Committee engaged in no debate or discussion of the proposed lists, or of additional candidates. *Id.*, ¶¶ 12, 13.

21. The Committee voted to approve both lists without any debate or discussion. *Id.*

22. At no point during the five-minute Meeting did the Committee endeavor to consider or determine whether the proposed lists included "the names of all candidates whose candidacy is generally advocated or recognized in the national news media throughout the United States." Wis. Stat. § 8.12(1)(b). *Id.*

23. This omission was made more glaring by the numerous requests made by Petitioner and his Campaign to the WisDems for Petitioner's inclusion on the Primary ballot.

24. On or about December 2, 2023, the Campaign's Senior Advisor, Jeff Weaver, contacted Mr. Wikler by text message to request a conversation about ballot access for the Primary. Affidavit of Jeffrey Weaver ("Weaver Aff."), ¶ 6, Ex. 1, p. 1.

25. Mr. Wikler responded to Mr. Weaver on December 3, 2023 indicating that the two could "connect this week." *Id.*, ¶ 7, Ex. 1, p. 1.

26. On December 6, 2023, Mr. Weaver was contacted over telephone by WisDems Executive Director Cassi Fenili. Mr. Weaver expressed to Ms. Fenili that Petitioner would be appearing on other states' primary ballots, and requested that the WisDems include Petitioner on the ballot for the Wisconsin Primary as well. *Id.*, ¶ 8.

27. Ms. Fenili acknowledged the Campaign's request and provided no indication that Petitioner would not be included in the WisDem's list of Primary candidates. *Id.*

28. Mr. Wikler sits on the Committee and participated in the Meeting. Maloney Aff., ¶ 11.

29. Wisconsin election laws impose a non-discretionary duty on the Committee to "place the names of all candidates whose candidacy is generally advocated or recognized in the national news media throughout the United States on the ballot." Wis. Stat. § 8.12(1)(b).

30. While the Statute provides that the Committee "shall have sole discretion to determine that a candidacy is generally advocated or recognized in the national news media," the Statute nevertheless requires the Committee to, at minimum, make this determination:

> The Selection Committee gave no consideration at all to the other persons who had declared their candidacy as Republican or Democrat for U.S. President or expressed to the Selection Committee their desire to be placed on the preference ballot of either of those parties. The Selection Committee did not consider whether any of these candidates should be placed on the preference ballot either under the news media advocacy or recognition standard or as "other candidates." *The Selection Committee's failure to exercise at all the discretion conferred upon it by statute constitutes an abuse of that discretion*.
>
> The law governing the selection of names for ballot placement in the presidential preference election is inclusionary, not exclusionary. While requiring ballot placement of the name of each candidate whose candidacy the Selection Committee determines meets the news media recognition advocacy or recognition test, the statute gives the Selection Committee broad discretion to certify other candidates for ballot placement. *The proper exercise of the Selection Committee's discretion does not permit it to ignore the names of persons known to have declared their candidacy of the Republican, the Democratic or any other party for the office of U.S. President or who had expressed to the Selection Committee interest in being placed on the preference ballot*.

McCarthy v. Elections Bd., 166 Wis. 2d 481, 490, 480 N.W.2d 241 (1992) (emphasis added).

31. The Committee abused its discretion by "ignor[ing] the names of persons known to have declared their candidacy of . . . the Democratic . . . party for the office of U.S. President," and specifically by ignoring Petitioner. *Id.*

32. The Committee abused its discretion by failing to exercise the discretion conferred upon it by the Statute to determine whether Petitioner's

"candidacy is generally advocated or recognized in the national news media throughout the United States." Wis. Stat. § 8.12(1)(b).

33. Wisconsin is one of a number of states that have adopted a media recognition provision for presidential ballot access, using the substantially identical standard of "generally advocated or recognized in the national news media." Wis. Stat. § 8.12(1)(b). *See, e.g.*, Conn. Gen. Stat. § 9-465(a) (Connecticut statute requiring ballot placement of candidates "generally and seriously advocated or recognized according to reports in the national or state news media"); Md. Elec. L. § 8-502 (Maryland); M.G.L.A. Ch. 53 § 70E (Massachusetts); Neb. Rev. Stat. § 32-614 (Nebraska); ORS 249.078(1)(a) (Oregon).

34. The intent of these media recognition provisions is to "increase[] the opportunities to get on the ballot and reduce[] the burdens on candidates." *LaRouche v. Kezer*, 990 F.2d 36, 38 (2d Cir. 1993) (analyzing Connecticut statute). *See also Kay v. Austin*, 621 F.2d 809, 812-13 (6th Cir. 1980) (purpose of the media recognition provision is "to open the ballot to more candidates" as "[t]he legislature has the right to determine that the state's electors should have the opportunity to vote for those people whom the national news media have identified as genuine candidates."); *LaRouche v. Sheehan*, 591 F. Supp. 917, 922 (D. Md. 1984) (media recognition provision is "designed to open the ballot to more candidates rather than to restrict ballot access, and . . . provides [] voters with an opportunity to vote for all widely recognized political candidates, regardless of the fact that some candidates may have chosen not to campaign actively in the [state's] primary"); *Belluso v. Poythress*, 485 F. Supp. 904, 913 (N.D. Ga. 1980) (media recognition test is a proxy for determining whether candidate has "a minimum degree of public support").

35. Similar principles underlie Wisconsin's Statute. As this Court has held:

> The purpose of the Wisconsin primary is clear.
>
> > "For over seventy-five years this state has conducted primary elections in the belief that the primary wrests the control over the selection of candidates from party bosses, caucuses and conventions and puts the control where it belongs—with the people of the state and that the open presidential preference primary (compared to a closed primary) increases the opportunity of the citizens of this state to participate at a critical stage of the process of electing a President."
>
> In order to accomplish that purpose the legislature refrained from giving any participating political party the power to veto the placement on its ballot of a person claiming to be its candidate.

McCarthy, 166 Wis. 2d at 491 (quoting *State ex rel. LaFollette v. Democratic Party*, 93 Wis. 2d 473, 482, 287 N.W.2d 519 (1980)).

36. Stated simply: the purpose of the Statute's media recognition provision is to ensure that Wisconsin voters – whose money subsidizes the Democratic party's state-run presidential primary – have the opportunity to vote for candidates they might read or hear about in the news. The Statute, like other media recognition provisions, seeks to avoid the disillusionment and confusion that result when voters turn out to the polls, only to find their preferred candidates missing from the ballot. To ensure this does not happen, the Statute deliberately removes the selection of primary candidates from the sole decision of the parties themselves.

37. Under any objective measure, Petitioner satisfies the Statute's media recognition standard, and should have been placed on the Primary ballot.

38. The poll aggregator website FiveThirtyEight identifies Petitioner as one of three "major candidates" for the 2024 Democratic primary, alongside President Biden and fellow challenger Marianne Williamson. Weaver Aff., ¶ 15.

39. FiveThirtyEight's overview of Democratic primary polls indicates that Petitioner has consistently averaged between three and seven percent support among would-be Democratic primary voters in head-to-head polls against other candidates in the field. *Id.*, ¶ 14.

40. Between October 26, 2023 (when Petitioner announced his candidacy) and December 28, 2023 (shortly before the Committee held the Meeting

at issue in this case), Petitioner's presidential candidacy was mentioned an estimated 13,951 times in national non-print (radio and television) media. *Id.*, ¶ 16, Ex. 2. These stories have reached a combined audience of approximately 832,285,230 non-unique viewers and listeners. *Id.* Over the last two months of 2023 alone, the estimated value of airtime (if it had all been purchased as paid advertisement) devoted to discussion of Petitioner's candidacy was roughly $55,689,291. *Id.*

41. Petitioner's candidacy has also generated attention in online news and social media, gathering over 70,000 known mentions, and over 2.5 million engagements (page views and reshares) between October 1, 2023, and December 28, 2023. *Id.*, ¶ 18, Ex. 3.

42. The states of Connecticut and Massachusetts, both of which have ballot access statutes requiring state officials to place any candidate on the ballot whose candidacy is generally advocated and recognized in national news media, have both placed Petitioner on their Democratic primary ballots. *Id.*, ¶¶ 20-21. Massachusetts Secretary of Commonwealth William Galvin, and Connecticut Secretary of State Stephanie Palmer, both stated in press releases announcing the states' respective slates of primary candidates that Petitioner was placed on the ballot because of the national media recognition of his candidacy. *Id.*, Exs. 4, 5.

43. On January 23, 2024, New Hampshire became the first state in the nation to hold a Democratic primary. While current results indicate that President Biden has received approximately 60% of the vote as a write-in candidate, they show that Petitioner leads among all remaining challengers with close to 20% of the vote.

44. One of the core purposes of the media recognition provision in the Statute is to ensure that Wisconsin voters have the opportunity to vote for candidates like Petitioner. The other is to reduce ballot access hurdles for candidates, like Petitioner, who objectively enjoy "a minimum degree of public support," obviating the costly petition process that otherwise winnows frivolous candidates from contention. *Belluso*, 485 F. Supp. at 913.

45. Petitioner's candidacy speaks for itself. He is the leading challenger to President Biden in this Democratic Primary, and the Wisconsin voters who are funding that Primary deserve to see him on their ballots.

CAUSES OF ACTION

46. Petitioner realleges and incorporates by reference all allegations above as though fully set forth in this paragraph.

47. The Committee abused its discretion by failing to consider whether Petitioner should be placed on the Primary ballot under the Statute's media recognition provision – despite Committee members' general knowledge that he had declared his candidacy, and Mr. Wikler's specific knowledge that Petitioner had requested ballot access.

48. The Committee abused its discretion by "ignor[ing] the names of persons known to have declared their candidacy of . . . the Democratic . . . party for the office of U.S. President," and specifically by ignoring Petitioner. *McCarthy*, 166 Wis. 2d at 490.

49. The Committee abused its discretion by failing to exercise the discretion conferred upon it by the Statute to determine whether Petitioner's "candidacy is generally advocated or recognized in the national news media throughout the United States." Wis. Stat. § 8.12(1)(b).

50. Petitioner is therefore entitled to injunctive and declaratory relief, and a writ of mandamus, as more fully set forth below.

STATEMENT OF RELIEF SOUGHT

If the Court grants this Petition, Petitioner will ask the Court to:

(1) declare that the Committee abused its discretion by failing to consider whether Petitioner should be placed on the ballot for Wisconsin's 2024 Democratic Presidential Preference Primary on grounds that Petitioner's "candidacy is generally advocated or recognized in the national news media throughout the United States." Wis. Stat. § 8.12(1)(b);

(2) direct Respondent WEC not to "transmit to each county clerk a certified list of candidates for president who have qualified to have their names appear on the presidential preference primary ballot," pursuant to Wis. Stat. § 7.08(2)(d) until this Petition can be decided;

(3) because time does not permit remand to the Committee to exercise its discretion and determine whether Petitioner is entitled to ballot placement under the foregoing standard, issue a writ of *mandamus*:

a. directing Respondent WEC to "transmit to each county clerk a certified list of candidates for president who have qualified to have their names appear on the presidential preference primary ballot," that includes Petitioner, pursuant to Wis. Stat. § 7.08(2)(d). The Court granted this very relief in *McCarthy*, 166 Wis. 2d at 492 ("because time does not permit remand to the Selection Committee for the proper exercise of discretion in respect to them, we direct that the names of Eugene McCarthy, Larry Agran and Lyndon H. LaRouche, Jr., be placed on the 1992 Democratic presidential preference ballot as candidates for the office of president of the United States");

b. in the event this Petition cannot be decided, or injunctive relief cannot be granted, before Respondent WEC has transmitted the foregoing certified list of candidates to each county clerk, directing Respondent WEC to amend its certified list consistent with Wis. Stat. §§ 7.08(2)(a) and 7.08(1)(a);

Petitioner requests that the foregoing relief be granted as soon as practicable, but in no event later than **February 9, 2024**, to avoid any conflict with the deadlines for county clerks and municipal clerks to distribute absentee and overseas ballots. *See* Wis. Stat. § 7.10(2) (setting forth deadlines by which county clerks must distribute ballots to municipal clerks for further distribution to voters).

To the extent Respondents maintain that an earlier decision is required to avoid such interference, Petitioner is prepared to have this Petition heard and decided on an expedited timeline of Respondents' choosing.

STATEMENT OF THE REASONS THE COURT SHOULD TAKE JURISDICTION

The Wisconsin Constitution and state rules of appellate procedure empower this Court to take original jurisdiction of certain matters. Wis. Const. art. VII, § 3; Wis. Stat. § 809.70. This Court has twice before taken original jurisdiction of ballot access lawsuits arising under the media recognition provision of the Statute, concluding that "this matter is *publici juris*, it is therefore appropriate for us to exercise our original jurisdiction." *Labor and Farm Party v. Elections Bd., State of Wis.*, 117 Wis. 2d 351, 352, 344 N.W.2d 177 (1984); *McCarthy*, 166 Wis. 2d at 485.

Original jurisdiction is more generally appropriate where "the questions presented are of such importance as under the circumstances 'to call for a speedy and authoritative determination by this court in the first instance.'" *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 99 n.9, 334 Wis. 2d 70, 798 N.W.2d 436 (Abrahamson, C.J., concurring in part and dissenting in part) (quoting *Petition of Heil*, 230 Wis. 428, 446, 284 N.W. 42 (1938) (per curiam)). Significantly:

> This court has previously taken original jurisdiction in two cases . . . [in which] the issue was narrow and an emergency existed with no other remedy available; an appeal could not be taken timely to get the person on the ballot within the statutory framework for printing ballots; review was necessary to protect Wisconsin citizens' right to vote for the candidate of their choosing.

Id. (citing *State of Wisconsin ex rel. Nader v. Circuit Court for Dane County,* No. 2004AP2559–W, unpublished order (2004)); *State ex rel. Barber v. Circuit Court for Marathon County*, 178 Wis. 468, 190 N.W. 563 (1922)).

Petitioner respectfully submits that the foregoing precedents warrant the Court's exercise of original jurisdiction over this Petition.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court take original jurisdiction and grant the emergency Petition, and such other, further and different relief as the Court deems just and proper.

Dated this 26th day of January 2024.

Respectfully submitted,

Electronically signed by Timothy W. Burns
Timothy W. Burns (State Bar No. 1068086)
Jesse J. Bair (State Bar No. 1083779)
Brian P. Cawley (State Bar No. 1113251)
BURNS BAIR LLP
10 E. Doty St., Suite 600
Madison, Wisconsin 53703
(608) 286-2808
tburns@burnsbair.com
jbair@burnsbair.com
bcawley@burnsbair.com

and

Malcolm Seymour (*pro hac vice forthcoming*)
FOSTER GARVEY P.C.
100 Wall St., 20th Floor
New York, New York 10005
(212) 965-4533
malcolm.seymour@foster.com