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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 24AP0138-OA

DEAN PHILLIPS,

Petitioner,

v.

WISCONSIN ELECTIONS COMMISSION
and WISCONSIN PRESIDENTIAL
PREFERENCE SELECTION COMMITTEE,

Respondents.

RESPONSE OF RESPONDENTS WISCONSIN ELECTIONS COMMISSION AND 2024 WISCONSIN PRESIDENTIAL PREFERENCE SELECTION COMMITTEE

JOSHUA L. KAUL
Attorney General of Wisconsin

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

LYNN K. LODAHL
Assistant Attorney General
State Bar #1087992

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 957-5218 (CG)
(608) 264-6219 (LKL)
gibsoncj@doj.state.wi.us
lodahllk@doj.state.wi.us

TABLE OF CONTENTS

STATEMENT OF THE CASE 6

REASONS THE PETITION SHOULD BE DENIED 9

I. This Court should decline to exercise jurisdiction based on Phillips' unreasonable delay. 9

II. Even if this Court accepted jurisdiction, Phillips should be denied relief based on laches, lack of standing, and lack of grounds under mandamus for the relief he seeks. 12

A. Laches bars Phillips' claim. 12

B. Phillips does not have standing to challenge the Committee's decision about whether he is a nationally recognized candidate; his recourse was to gather signatures and file a petition with the Commission. 14

C. Phillips' requests are well beyond the scope of proper mandamus relief. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Democratic Party v. Wis. ex rel. LaFollette,
450 U.S. 107 (1981) 15

Diehl v. Dunn,
13 Wis. 2d 280, 108 N.W.2d 519 (1961) 10

Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.,
2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789..... 15

Friends of Black River Forest v. Kohler Co.,
2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342..... 14, 15

Hawkins v. WEC,
2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877..... 10, 13, 16

Klein v. DOR,
2020 WI App 56, 394 Wis. 2d 66, 949 N.W.2d 608..... 17

Lab. & Farm Party v. Elections Bd.,
117 Wis. 2d 351, 344 N.W.2d 177 (1984) 9, 17

Lake Bluff Hous. Partners v. City of S. Milwaukee,
197 Wis. 2d 157, 540 N.W.2d 189 (1995) 17

McCarthy v. Elections Board,
166 Wis. 2d 481, 480 N.W.2d 241 (1992) 6, 9, 18

Sawyer v. Midelfort,
227 Wis. 2d 124, 595 N.W.2d 423 (1999) 12

State ex rel. Lewandowski v. Callaway,
118 Wis. 2d 165, 346 N.W.2d 457 (1984) 17

State ex rel. Ryan v. Pietrzykowski,
42 Wis. 2d 457,167 N.W.2d 242 (1969) 18

Statutes

52 U.S.C. § 20301..... 8

Wis. Stat. § 7.08(2)(d) 7, 13, 16

Wis. Stat. § 7.10(3)..... 7

Wis. Stat. § 7.15(1)..... 8

Wis. Stat. § 8.12(1)(a) 6

Wis. Stat. § 8.12(1)(b) .....4, *passim*

Wis. Stat. § 8.12(1)(c)..... 7, 9, 15

Wis. Stat. § 8.12(2)..... 7

Wis. Stat. § 8.40 16

Dean Phillips has petitioned this Court for an original action, asking this Court to add him to the certified list of candidates for the upcoming presidential preference primary on April 2, 2024.

Respondents, the 2024 Wisconsin Presidential Preference Selection Committee created under Wis. Stat. § 8.12(1)(b) and the Wisconsin Elections Commission, recognize that this Court has previously recognized petitions like this one as matters *publici juris*. But this Court should decline to take jurisdiction here because Phillips sat on his rights and has arrived too late.

The statutes governing how individuals appear on the ballot as candidates in the presidential preference primary create a compressed schedule, running from the first Tuesday to the last Tuesday in January. First, the Committee meets and creates a list of candidates, which the Committee did here on January 2. Second, beginning January 2, individuals who would like to appear as candidates but were not selected by the Committee may gather 8,000 signatures from around the State and petition the Commission to appear on the ballot, filing their petition by the last Tuesday in January (January 30). Third, as soon as possible after that last Tuesday, the Commission takes the names from any petitions plus the names on the Committee's list and creates a certified list of candidates for the county clerks so the clerks may begin creating ballots.

During the critical four-week period between January 2 and January 30, Phillips did nothing until the eleventh hour. While his campaign knew on January 2 that the Committee had not included him as a candidate, he neither commenced a signature and petition effort nor sought judicial recourse until three days before the Commission should provide the certified list of all qualified candidates to the county clerks—deadlines that enable municipal clerks to meet mandatory deadlines for distributing ballots to military and overseas voters.

Even if this Court were to accept jurisdiction, the original action should be dismissed, for three reasons.

First, Phillips' action should be barred on laches grounds. He could have, but chose not to, either gather 8,000 signatures or at least promptly seek judicial relief. Instead, he waited to file suit until it was time for the Commission to send the certified list of qualified candidates to the county clerks, imperiling election preparations across the State.

Second, Phillips does not have standing to bring the claim he raises: that the Committee failed to discuss whether he was a nationally recognized candidate throughout the United States. The statute gives Phillips no protected interest in having the Committee have such a conversation. To the contrary, the statute says nothing about how the Committee decides whether an individual has that status, and its decision on that question is left to its "sole discretion." The statutes provide different recourse: an individual who wishes to appear in the presidential preference primary can simply gather 8,000 signatures from Wisconsinites around the State and file a petition with the Commission.

Third, mandamus is not an appropriate route for the two remedies Phillips seeks. Mandamus lies only to compel government officials to perform a plain, non-discretionary duty, and it does not allow courts to step in and perform discretionary tasks the Legislature has assigned to others. Phillips says the Committee should have discussed and considered him because he has an interest in being President, but no statute imposes such a duty, much less a plain duty, on the Committee. Phillips also asks that this Court act as the Committee, determining that he is a nationally recognized candidate. The statutes assign this job to the Committee in its "sole discretion," Wis. Stat. § 8.12(1)(b), not the judiciary, and mandamus relief affords no exception. That is doubly so here, where the exigency that allegedly justifies this extraordinary relief was caused by Phillips' own delay.

Because mandamus relief is not appropriate in this situation, if the Court reaches this question, it should revisit its 1992 holding in *McCarthy v. Elections Board*. There, the Court's majority did utilize a mandamus remedy in these ways. 166 Wis. 2d 481, 484, 480 N.W.2d 241 (1992).

Respondents ask this Court to deny the Petition by **February 2, 2024**. The Commission must send the certified list to the county clerks as soon as possible so that they can begin drafting and distributing ballots to the municipal clerks, ballots that must be mailed to overseas and military voters no later than February 15. After February 2, it will become increasingly difficult each day for the clerks to feasibly get the ballots ready, delivered, and mailed on time.

STATEMENT OF THE CASE

Phillips asks this Court to change the list of candidates for the presidential preference primary so that it includes his name.

The process for developing a list of qualified candidates for the April presidential preference primary has three steps, all taking place in a compressed four-week time period.

First, Wis. Stat. § 8.12(1)(b) provides that the presidential preference selection committee shall convene on "the first Tuesday in January" (this year, January 2) of each presidential election year to designate each major party's[1] primary candidates for the presidential primary. Wis. Stat. § 8.12(1)(b). The committee shall include the state chairpersons of each party's state organization, one national chairman and one national chairwoman from each party, the speaker and minority leader of the assembly, and the president and minority leader of the senate. *Id.*

[1] To participate in the committee, a party's candidate for governor in the most recent election must have received at least 10 percent of the total vote cast for that office. Wis. Stat. § 8.12(1)(a).

The committee shall certify 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). It is in the committee's "sole discretion" to determine whether an individual's candidacy satisfies that description: "The committee shall have sole discretion to determine that a candidacy is generally advocated or recognized in the national news media throughout the United States." *Id.*

Second, beginning on that first Tuesday in January, and regardless of the Committee's list, individuals who wish to appear on the ballot can gather at least 8,000 signatures—1,000 from each congressional district—and submit a petition to the Commission to appear on the ballot. Wis. Stat. § 8.12(1)(c). The deadline to accomplish that task is no later than the last Tuesday in January. *Id.*

Third, "as soon as possible" after the last Tuesday in January, the Commission takes the names on the Committee's list and those of any individuals who have filed a petition with the necessary signatures and sends a certified list of all candidates who "have qualified to have their names appear on the presidential preference primary ballot" to each county clerk. Wis. Stat. § 7.08(2)(d).[2]

This compressed schedule ensures that county clerks have the time they need to program, create, print, and deliver ballots by February 14 to each municipal clerk in his or her county. *See* Wis. Stat. § 7.10(3). The county clerks' compliance with that deadline allows the municipal clerks, in turn, to meet their February 15 deadline to deliver absentee ballots to military and overseas voters who have previously requested

[2] Another option is for supporters to write in a name on the ballot, space for which is provided on every primary ballot. Wis. Stat. § 8.12(2).

them, *see* Wis. Stat. § 7.15(1), and comply with the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. § 20301.

Here, the Committee met on Tuesday, January 2, 2024. (Pet. ¶ 12.) It selected Robert Lang, who in other capacities is the director of the Wisconsin Legislative Fiscal Bureau, as its chairperson. (Pet. ¶ 17.) It then made its designations and certified them in writing to the Wisconsin Elections Commission on January 2, 2024. Phillips' campaign was aware on January 2 that his name was not on the list. (Exhibit 1 to Affidavit of Jeffrey Weaver ("Weaver Aff.").)

Phillips asserts that he could have gathered the signatures to petition to appear on the ballot but claims that he should not have to do that.[3] (Pet. ¶ 7.) Instead, Phillips filed a petition for original action with this Court, waiting until January 26, 2024, to do so. He did not serve the Commission with his filing until the afternoon of January 29. (Affidavit of Riley Willman ("Willman Aff.") ¶ 3.)

Phillips' support for his view that he is a nationally recognized candidate throughout the United States relies on the number of mentions of him in online media, that two States have added him to their primary ballots, and that in the January 23 New Hampshire Democratic primary, where President Biden was not on the ballot, he received close to 20 percent of the vote. (Pet. ¶¶ 40–43.)[4]

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[3] After Phillips learned that the Committee had not included his name on its list of candidates, his campaign took the initial step of soliciting estimates from petition circulators in Wisconsin, but then apparently decided not to proceed with that process. (Weaver Aff. ¶ 11.)

[4] Of course, some of these events post-dated the January 2 date when the Committee was required to meet and make its determination.

REASONS THE PETITION SHOULD BE DENIED

Respondents accept that this Court has previously recognized petitions like this as matters *publici juris*. *McCarthy*, 166 Wis. 2d at 484; *Lab. & Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 352, 344 N.W.2d 177 (1984). But this Court should not accept jurisdiction here because Phillips has arrived too late. Even if this Court were to accept jurisdiction, it should deny relief for three reasons: (1) Phillips' claims are barred by laches; (2) he does not have standing to raise his sole statutory claim; and (3) the relief he seeks is outside the scope of a mandamus remedy.

I. This Court should decline to exercise jurisdiction based on Phillips' unreasonable delay.

This Court should decline to exercise jurisdiction because Phillips' own delay makes it infeasible for this Court to review his claims without disrupting the compressed time schedule for the Commission, county clerks, and municipal clerks to perform their statutory duties and mail out ballots by the statutory deadlines.

The Committee completed its work, naming candidates for the presidential preference primary ballot, on the morning of January 2, 2024. (Affidavit of Trevor Maloney ("Maloney Aff.") ¶¶ 3–14.) Because Phillips' political director attended the meeting, he knew that day he was not on the list. *Id.*

Phillips could have spent the month of January collecting the 8,000 signatures that would have guaranteed him a place on the ballot, *see* Wis. Stat. § 8.12(1)(c), but instead he opted to sit on his rights. And, for no apparent reason at all, he waited over three weeks to file this petition, filing just three business days before county clerks expect to receive the Commission's certified list of candidates.

Phillips now demands extraordinary relief beyond the final hour: an order from this Court bypassing the relevant statutory process and requiring that his name be included on the ballot. Phillips recognizes that it is too late to remand the matter to the Committee to fix its purported errors. (Pet. 12.) And the timing is even worse than he recognizes: ordering the Commission to include him on the certified list on February 9, as he proposes (Pet. 12), would not leave sufficient time for the county and municipal clerks to do their work.

Phillips' delay of more than three weeks dooms his case. That delay is ample reason for this Court to deny him relief and decline to exercise original jurisdiction. *See, e.g., Hawkins v. WEC*, 2020 WI 75, ¶ 10, 393 Wis. 2d 629, 948 N.W.2d 877.

It is black-letter law that a court of equity has broad discretion to deny untimely requests for relief. *See, e.g., Diehl v. Dunn*, 13 Wis. 2d 280, 286, 108 N.W.2d 519 (1961) ("Injunction is an equitable remedy, and a court in accordance with ancient doctrines and established decisions will lend its aid only to the vigilant, active and faithful."). And this Court has recognized that the consequences of unreasonable delay are particularly acute in the elections context.

In *Hawkins,* this Court considered a petition for leave to commence an original action filed by two Green Party candidates who were excluded from the 2020 general election ballot due to insufficient signatures on their nomination papers. 393 Wis. 2d 629, ¶¶ 1–2. Although the petitioners were notified of the Commission's decision on August 21, they did not file their petition with this Court until September 3. *Id.* ¶¶ 2, 4. The filing butted up against an election administration deadline: under Wis. Stat. § 7.10(3), each county clerk needed to deliver ballots for the general election to all the municipal clerks in his or her county by September 16. *Id.* ¶ 6.

The Court concluded that "the petitioners delayed in seeking relief in a situation with very short deadlines" and that under the circumstances, including the fact that the general election had "essentially begun," it was "too late" to grant them any form of relief that would be feasible and not cause undue damage to the election. *Id.* ¶ 5. The Court determined that the "best exercise" of its discretion was to deny the petitioners' petition for leave to commence the original action. *Id.* ¶ 10.

Here, Phillips' delay is even more substantial than the petitioners in *Hawkins*. While the *Hawkins* petitioners were found to have unreasonably delayed when they filed their petition 13 days following the ballot decision at issue, Phillips waited nearly *twice* as long, filing his petition 24 days following the ballot decision. And just as in *Hawkins,* the deadline for county clerks to prepare and distribute ballot materials to municipal clerks under Wis. Stat. § 7.10(3) is roughly two weeks away. It would not be feasible to require the county clerks to complete their ballot preparation work on the truncated timeline that Phillips' relief would necessitate. (*See* Willman Aff. ¶¶ 12, 14.) Under *Hawkins*, Phillips is not entitled to this Court's intervention, regardless of the potential merits of his claims.

Phillips was not vigilant in pursuing relief from the Committee's decision by any method, and he should not be rewarded for sitting on his rights. Given the unreasonableness of his inaction and the risk of damage to election preparations, the circumstances here do not warrant the Court's intervention. The petition should be denied.

II. Even if this Court accepted jurisdiction, Phillips should be denied relief based on laches, lack of standing, and lack of grounds under mandamus for the relief he seeks.

Even if this Court were to accept jurisdiction of the original action petition, it should deny Phillips the relief he seeks for three reasons: laches, lack of standing, and lack of basis under mandamus for the remedy he seeks.

A. Laches bars Phillips' claim.

As discussed above, Phillips waited out the critical January period when he could have sought signatures from Wisconsin supporters or filed for judicial relief. Laches bars his effort at this point.

Laches "is an equitable defense to an action based on the plaintiff's unreasonable delay in bringing suit under circumstances in which such delay is prejudicial to the defendant." *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). A defendant must establish three factors to obtain a dismissal on laches grounds: "1) the plaintiff unreasonably delayed in bringing the claim; 2) the defense lacked any knowledge that the plaintiff would assert the right on which the suit is based; and 3) the defense is prejudiced by the delay." *Id.*

All three factors are satisfied here. Phillips' delay was unreasonable and, until this action was filed, the Commission could not have known that he would bring a belated challenge to force his name onto the primary ballot. Further, the Commission and the entire statewide elections administration system is prejudiced by this delay. Had Phillips exercised his right to gather signatures and successfully done so, his deadline to file a petition would have been January 30—the day *before* the Commission should send its certified list to the county clerks. His last-minute court filing, in contrast, now is pending while the county clerks wait to begin creating the ballot forms.

As noted above, the Commission is presently under a statutory obligation to transmit the certified list of candidates for the presidential preference primary to county clerks "as soon as possible" following January 30, 2024, and county clerks must deliver ballots to municipalities clerks no later than February 14 for the presidential primary vote on April 2. Wis. Stat. § 7.08(2)(d); (Willman Aff. ¶¶ 6, 11). If a county clerk misses this February 14 deadline, the affected municipal clerks may not have sufficient time to fulfill absentee requests for military or overseas voters by February 15, the statutory deadline for responding to any such requests on file. (Willman Aff. ¶ 11.)

To meet these short deadlines, "county clerks need as much time as possible" between when they receive the certified list of candidates from the Commission and when they must provide ballots to municipal clerks on February 14. (*Id*. ¶ 12.) This work includes not only creating ballots but also programming, proofing, and testing ballot proofs before sending them to print. (*Id*.) And, if a county uses a printing vendor, additional time must be built in to allow the vendor to complete the order in time for the ballots to be disbursed to municipalities.[5] (*Id*.) In short, *each day* of delay matters when the county clerks are waiting to receive the certified list of candidates to begin these time sensitive tasks. Phillips' tardy petition for original action has already impacted this process, and the harms accumulate the longer his case is pending before this Court.

If this Court accepts jurisdiction, relief should be denied on laches grounds.

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[5] In *Hawkins,* this Court recognized that "[c]reating and printing ballots is a lengthy and laborious process," and that "[a]lmost all Wisconsin counties use specialized private vendors to print their ballots." *Hawkins v. WEC*, 2020 WI 75, ¶ 7, 393 Wis. 2d 629, 948 N.W.2d 877.

B. Phillips does not have standing to challenge the Committee's decision about whether he is a nationally recognized candidate; his recourse was to gather signatures and file a petition with the Commission.

Phillips also should be denied relief because he lacks standing to challenge the Commission's decision not to include him as a nationally recognized candidate. Phillips fails the second prong of the standing test, in which a plaintiff must show that his rights are protected under a statute or the constitution. No statute gives Phillips a right of judicial review of the Commission's decision about whether he is a nationally recognized candidate, and the Legislature instead provided that Phillips could obtain signatures from voters in each of Wisconsin's eight congressional districts.[6]

As recently reaffirmed in *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶ 18, 402 Wis. 2d 587, 977 N.W.2d 342, standing has two elements. It asks "(1) [whether] the challenged action causes the petitioner injury in fact and (2) [whether] the interest allegedly injured arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* ¶ 18 (citation omitted).

[6] *McCarthy* did not discuss the petitioners' standing. It is unclear whether respondents raised the issue there. Even if they had, Wisconsin's standing jurisprudence has evolved since 1992, providing a somewhat different framework for this Court's analysis. *See, e.g., Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342.

Even if Phillips' alleged injury—he would prefer not to have to seek petition signatures—is sufficient to be an injury in fact, he cannot show that his interest in being named on the Committee's list is within the zone of interests that are protected under the statute.[7]

The second prong of standing examines the statutory "provision on which the claim rests" and asks whether it "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.,* 2011 WI 36, ¶ 46, 333 Wis. 2d 402, 797 N.W.2d 789. To do so, the statute must contain textual intent for "the allegedly adversely affected interest to be one protected, recognized, or regulated by an identified law." *Friends of Black River Forest*, 402 Wis. 2d 587, ¶ 31.

Here, the statute on which Phillips rests his claim, Wis. Stat. § 8.12(1), provides no right of judicial relief from the Committee's determination that a person's candidacy is not generally advocated or recognized in the national news media through the United States. Instead, it offers a *non-judicial* remedy, one over which the Committee enjoys no veto power.

Starting on the first Tuesday in January—the date the Committee has met and certified its list of primary candidates—a person who believes she should be on the presidential preference primary ballot can gather 1,000 signatures from each of Wisconsin's congressional districts. Wis. Stat. § 8.12(1)(c). After collecting these, she then files a petition with the Commission by the last Tuesday in January, and if the signatures are valid, the Commission adds her to

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[7] Even if an individual appears on the ballot in the presidential preference primary, it is just a preference vote. As a matter of First Amendment associational rights, a political party's delegates are not bound to support the candidate who prevails at that election. *See Democratic Party v. Wis. ex rel. LaFollette*, 450 U.S. 107, 125–26 (1981).

the list of candidates. Wis. Stat. § 8.40. The certified list the Commission sends to county clerks includes not just the Committee's list, but all candidates "who have qualified to have their names appear on the presidential preference primary ballot." Wis. Stat. § 7.08(2)(d). The statutory process thus allows a candidate to collect 8,000 signatures from around the State, and the Committee cannot veto the individual's petition if the required number of signatures are collected and timely submitted.

From a timing standpoint, the signature and petition method, with its filing deadline of the last Tuesday in January, ensures that the Commission can timely compile the certified list of all qualified candidates and transmit it to the county clerks. A court proceeding, in contrast, offers no guarantee of a particular finish day. Phillips' proposed deadline for this Court to act—February 9—might sound expedited at first blush. But that date would not permit the Commission to send the certified list to clerks "as soon as possible" after the last Tuesday in January, Wis. Stat. § 7.08(2)(d), to allow county clerks to create, print, and deliver ballots to municipal clerks, who then must send them to military and overseas voters by February 15. This Court has recognized that the statutory deadlines related to ballot access—for candidates and election officials alike—are notoriously short and do not leave space for delay. *See Hawkins*, 393 Wis. 2d 629, ¶ 5 n.1 ("urg[ing] 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").

Phillips does not have standing to seek review of the Committee's decision. The Legislature provided an effective non-judicial remedy, and Phillips' preference not to utilize it does not give him standing.

C. Phillips' requests are well beyond the scope of proper mandamus relief.

Phillips should be denied relief for a third reason: his two requests go beyond the scope of a mandamus remedy. The Committee has no plain duty to discuss and consider Phillips' inclusion based on his desire to be President. And even if it did, mandamus does not allow a Court to carry out a discretionary task the statutes assign to the Committee in its "sole discretion." Wis. Stat. § 8.12(1)(b).

A writ of mandamus is appropriate to compel governmental officials to perform their statutory duties. *State ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 171, 346 N.W.2d 457 (1984). But the duty to act must be "clear and unequivocal," and based on a "specific legal right that is free from substantial doubt." *Id.*; *Klein v. DOR*, 2020 WI App 56, ¶ 36, 394 Wis. 2d 66, 949 N.W.2d 608.

Here, the Committee has no clear, unequivocal, or plain duty to consider all individuals who wish to be on the certified list, discussing them at its sole meeting. Instead, the statute leaves to the Committee's "sole discretion" whether to treat an individual as a nationally recognized candidate. In such cases, mandamus is not proper.[8] *State ex rel. Lewandowski*, 118 Wis. 2d at 171. Without a clear and unequivocal duty, free from any doubt, that the government has failed to perform, mandamus relief must be denied. *Lake Bluff Hous. Partners*

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[8] That is not to say that mandamus relief is unavailable against the Committee in all circumstances. The Committee has mandatory duties—for example, to convene on the first Tuesday in January—that could be enforced through mandamus. *See also Lab. & Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 357–58, 344 N.W.2d 177 (1984) (holding that the 1984 Committee had a mandatory duty not to apply a nationally-recognized test at all where it would leave one of the represented political parties with no candidate).

v. City of S. Milwaukee, 197 Wis. 2d 157, 169–70, 540 N.W.2d 189 (1995).

Further, mandamus is such a drastic remedy that it may be used only when no other plain, adequate, and complete remedy exists, including declaratory relief. *State ex rel. Ryan v. Pietrzykowski*, 42 Wis. 2d 457, 462,167 N.W.2d 242 (1969). Here, Phillips had a plain, adequate, and complete remedy: gathering 8,000 signatures and filing a petition with the Commission. Mandamus is thus not an available remedy to order the Committee to consider whether Phillips is a nationally recognized candidate throughout the United States.

Even if mandamus were an available remedy, Phillips' request for relief—that the Court substitute itself for the Committee and order that he be added to the list—is a non-starter. Mandamus relief does not allow a court to perform the very act the Legislature left to another body's "sole discretion," Wis. Stat. § 8.12(1)(b)—here, deciding who is a nationally recognized candidate. Phillips says this case is a special exception because there is no time for the Committee to meet again. But that crisis is one of Phillips' own making.

Respondents recognize that in *McCarthy*, the Court's majority utilized a mandamus remedy in these ways. *McCarthy*, 166 Wis. 2d at 492 (holding that the 1992 Committee had to develop a record of considering anyone expressing interest in being listed, and then ordering certain individuals to be added to the ballot). Respondents believe that case was wrongly decided. As the *McCarthy* dissent pointed out, mandamus is not an available remedy to compel a task left to the official's discretion. *See McCarthy*, 166 Wis. 2d at 495 (Ceci, J., dissenting). Should the Court need to reach this issue, Respondents would ask that the Court revisit that case.

CONCLUSION

Respondents ask this Court to deny the petition for original action by February 2, 2024, so that election preparations can timely proceed.

Dated this 31st day of January 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by Charlotte Gibson

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

LYNN K. LODAHL
Assistant Attorney General
State Bar #1087992

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 957-5218 (CG)
(608) 264-6219 (LKL)
(608) 294-2907 (Fax)
gibsoncj@doj.state.wi.us
lodahllk@doj.state.wi.us

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 31st day of January 2024.

Electronically signed by Charlotte Gibson
Charlotte Gibson
Assistant Attorney General