IN THE SUPREME COURT OF WISCONSIN

Case No. 2024AP000138

DEAN PHILLIPS,

Petitioner,

v.

WISCONSIN ELECTION COMMISSION AND
WISCONSIN PRESIDENTIAL PREFERENCE SELECTION COMMITTEE,

Respondents.

REPLY IN FURTHER SUPPORT OF EMERGENCY PETITION TO TAKE JURISDICTION OF AN ORIGINAL ACTION AND FOR WRIT OF MANDAMUS

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INTRODUCTION

Petitioner could be added to the Presidential Preference Primary ballot with just a few keystrokes, by appending his name to the list of candidates WEC[1] will transmit to county clerks for printing on the ballot.[2] *See* Wis. Stat. § 7.08(2)(d). Respondents admit no ballots have been printed. Adding Petitioner's name to that list would take seconds and would not delay preparations for the upcoming primary.

Respondents do not dispute that Petitioner is a nationally recognized candidate who meets the Statute's criteria for ballot inclusion. Nor could they, as WEC Chairperson Don Millis has publicly stated that "even the most casual observer has to admit that Rep. Phillips is generally advocated and recognized in the national news media throughout the nation as a candidate for president for the Democratic Party. Therefore, he meets the statutory criteria."[3]

And Respondents do not dispute – let alone attempt to justify – the Committee's failure to consider Petitioner for ballot inclusion at its January 2, 2024 Meeting. *See* Wis. Stat. § 8.12(1)(b); *McCarthy v. Elections Bd.*, 166 Wis. 2d 481, 490, 480 N.W.2d 241 (1992). Respondents' strategy is to obfuscate this failure by shifting blame onto Petitioner. But it was Respondents who violated the Statute, it was Respondents who disobeyed the legislature's clear mandate, and it is Respondents who now have the power to correct these violations with minimal effort and zero disruption.

The simple solution would be for Respondents to take responsibility and add Petitioner's name to WEC's certified list of candidates for the Democratic primary.

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[1] Capitalized terms herein have the same meanings given in the Petition.

[2] Respondents request that the Court decide this petition on or before February 2, 2024 so that this list may be timely transmitted. As stated in the Petition, Petitioner does not object to hearing this case on any timeline that Respondents believe is appropriate. *See* Petition, ¶ 8.

[3] *See* Jessie Opoien, *Wisconsin Supreme Court may hear Dean Phillips bid to be on Democratic presidential primary ballot*, MILWAUKEE JOURNAL SENTINEL (Jan. 29, 2024), *available at* https://www.jsonline.com/story/news/politics/elections/2024/01/29/wisconsin-court-to-hear-dean-phillips-bid-to-be-on-presidential-ballot/72400314007/ (last visited Jan. 31, 2024).

Instead, they have opted to submit 18 pages of legal argument requesting that the Petition be denied on various technical grounds – even though nobody denies Petitioner is "generally advocated or recognized in the national news media," and his absence from the ballot could have been remedied in a fraction of the time it took to write the Response. Any hardship Respondents might experience by reason of their choice to resist this Petition, instead of simply certifying Petitioner's name to the ballot, is self-inflicted.

Respondents' arguments for rejecting the Petition omit important context that reveals a glaring irony. Respondents argue that the timing of the Petition will cause them hardship, requiring denial of the Petition on grounds of laches.[4] In the next breath they claim that Petitioner's "recourse was to gather signatures and file a petition with the Commission."[5] But Respondents omit to mention that if Petitioner had filed a nominating petition with WEC, this would have forced WEC to prepare ballots on an even tighter schedule. This is because Wisconsin's ballot access regulations allow time for WEC to review petitions, for parties to challenge petitions, for candidates to oppose challenges, and for WEC to resolve challenges.

Respondents' claims of prejudice are vague and exaggerated. If Petitioner had submitted a nominating petition, the earliest WEC could have certified a list of candidates to county clerks would have been February 3, 2024; and if Petitioner's nominating petition had been challenged, the earliest WEC could have certified this list would have been February 5 or 6, if not later. Respondents have requested, and Petitioner consents to, a decision on the Petition by February 2, 2024. If the case follows that timeline, Respondents will be able to certify a list of names to county clerks earlier than if Petitioner had submitted a nominating petition. If this case

[4] *See* Response of Respondents Wisconsin Election Commission and 2024 Wisconsin Presidential Preference Selection Committee ("Response"), p. 13.

[5] Response, p. 14.

takes longer, it is only because Respondents have chosen to jeopardize their own election timeline by vainly contesting this Petition on every ground but its merits.

Respondents' arguments concerning standing and mandamus fare no better. Respondents concede that their positions are irreconcilable with the Court's decision in *McCarthy*, which they would have this Court overrule.[6] This is an extraordinary request to make. The Court might question why Respondents ask it to reverse decades of precedent just so that they can avoid adding one nationally recognized name to an uncrowded ballot, as the Statute compels them to do. The Court need not await an answer to this question. Respondents' standing and mandamus arguments are meritless, and Petitioner addresses them below.

Respondents have not and cannot demonstrate prejudice resulting from the timing of this Petition. It is undisputed that Petitioner meets the Statute's criteria for inclusion on the Democratic primary ballot. And this Court should not void 30 years of precedent to save Respondents from a clear violation of the Statute that serves only to deny Wisconsin Democrats a proper primary.

ARGUMENT

I. LACHES DO NOT BAR THE PETITION

Respondents' laches argument focuses on Petitioner's supposed delay in bringing the Petition, making only conclusory assertions about the prejudice caused by this alleged delay.[7] This is fatal, as Respondents bear the burden of demonstrating prejudice, and such unspecific claims are insufficient to carry that burden. *See Clarke v. Wisconsin Elections Comm'n*, 2023 WI 79, ¶ 43, 998 N.W.2d 370 (laches defense fails where "[t]he only harms Respondents cite are litigation costs . . . and vague assertions about disruption to the status quo"); *Trump v. Biden*, 2020 WI 91, ¶ 10, 394 Wis. 2d 629, 951 N.W.2d 568.

[6] Response, p. 18.

[7] *See* Response, p. 13 (county clerks "need as much time as possible" to print ballots, without identifying the latest date by which WEC could certify candidates, or any harm caused to date by alleged delay).

The question of prejudice cannot be understood without examining the "recourse" that Respondents claim Petitioner should have pursued – gathering signatures and submitting a nominating petition pursuant to Wis. Stat. § 8.12(1)(c). If Petitioner had submitted a nominating petition, it would have been legally impossible for WEC to certify a list of candidates to county clerks any earlier than February 3, 2024. In the likely scenario that Petitioner's signatures had been challenged, WEC could not have certified a list of candidates to county clerks before February 5 or 6, 2024. The following timeline of relevant deadlines illustrates the fallacy of Respondents' laches theory:

- **January 30, 2024**: Deadline to submit nominating petitions for presidential primary (Wis. Stat. § 8.12(1)(c));
- **February 2, 2024**: Would-be deadline for presidential candidates to submit affidavits of correction to nominating petitions, and for challenges to nominating petitions or accompanying signatures (Wis. Admin. Code §§ EL 2.05(4), 2.07(2)(a)) ("within three calendar days after the filing deadline for the challenged nomination papers");
- **February 3, 2024**: Earliest date that WEC could have certified a list of candidates to county clerks, assuming prompt review of nominating petitions (Wis. Admin. Code. § EL 2.05(3) (requiring WEC to review nominating petitions to determine facial sufficiency);
- **February 5, 2024**: Deadline for candidate to respond to any challenge made to nominating petition (Wis. Admin. Code § EL 2.07(2)(b)) ("within three calendar days of the filing of the challenge");
- **February 5-6, 2024**: WEC must decide challenges to nominating petitions "After the [February 5, 2024] deadline for filing a response to a challenge, but not later than the date for certifying candidates to the ballot." *Id*. (emphasis added).

Accordingly, WEC's own regulations contemplate that: (1) challenges to the validity of nominating petitions might not be resolved until February 5 or 6, 2024,

or even later; and (2) that this February 5 or 6, 2024 date, by definition, could not be "later than the date for certifying candidates to the ballot." *Id*. While WEC staffer Riley Willman states that he "had planned to submit the certified list of presidential candidates to county clerks on Wednesday, January 31, 2024,"[8] he could only have submitted the list at such an early date because no nominating petitions had been received from Democratic primary candidates. WEC's own regulations intentionally build in a buffer period between the close of nominating petition submissions and the certification of candidate lists. The parties are currently within that buffer period, and county clerks routinely receive candidate lists at the conclusion of that period. No harm has been done. No delay has been caused.

The sequencing of these mechanics is also the key to understanding why Respondents' leading case on laches, *Hawkins v. Wisconsin Elections Comm'n*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877, stood on different footing. Respondents mistakenly cite *Hawkins* for the proposition that a delay of three weeks in bringing the Petition is *per se* excessive. But this argument treats laches as if it were a statute of limitations that invalidates any claim made after a given period of time. That is not how laches works. Laches requires a fact-specific analysis of the prejudice caused by any purported delay. *See Riegleman v. Krieg*, 2004 WI App 85, ¶ 22, 271 Wis. 2d 798, 679 N.W.2d 857. In *Hawkins*, prejudice was found where the petitioner had waited two weeks after a very different date: the date WEC adjudicated a challenge to his nominating petition and determined that it contained too few signatures. *See Hawkins*, 2020 WI 75, ¶ 2. It took WEC 13 days to decide the nominating petition challenge in that case – meaning that Petitioner's estimate of a February 5-6, 2024 decision date above is generous to Respondents. *See id.* (challenge filed August 7 and decided August 20). Crucially for purposes of laches, because the decision at issue in *Hawkins* was one regarding a challenge to a

[8] Affidavit of Riley Willman ("Willman Aff."), ¶ 7.

nominating petition, WEC had to certify its list of candidates to county clerks as soon as possible after resolution of the challenge. *See* Wis. Admin. Code § EL 2.07(2)(b). WEC did so within six days. *Hawkins,* 2020 WI 75, ¶ 2. Consequently, by the time of that lawsuit, "hundreds, if not thousands of absentee ballots ha[d] already been mailed to electors," and "the 2020 fall general election ha[d] essentially begun." *Id.,* ¶¶ 1, 5. These facts were central to the Court's holding. *See id.* (Court requested information from WEC and county clerks concerning number of ballots distributed before ruling on laches).

Here, Petitioner challenges a decision that occurred six weeks (not six days) before the deadline to print and distribute absentee ballots. Petitioner took care to seek relief before any of these crucial milestones had passed. He otherwise reasonably balanced the timing of his Petition with other legitimate campaign objectives. Under the logic of *Hawkins*, it is not just the length of time of time in bringing suit that matters. In the absence of prejudice to Respondents, laches should not apply.

It bears repeating that WEC could have already eliminated the specter of potential prejudice by adding Petitioner's name to its list of certified candidates. As previously stated, Petitioner does not object to the Court deciding this matter by Respondents' requested deadline of February 2, 2024. If the Court does so, there is no conceivable prejudice to Respondents, who would have had to wait until at least February 3, 2024 to certify candidates to county clerks if Petitioner had submitted a nominating petition. If the decision comes later, Respondents have only themselves to blame for any prejudice they might suffer because they fought this Petition instead of righting their own wrongs.

II. PETITIONER HAS STANDING TO SEEK A WRIT OF MANDAMUS, AND IS ENTITLED TO MANDAMUS RELIEF

This Court's decision in *McCarthy* establishes as a matter of law that a presidential candidate entitled to ballot placement under the Statute has standing to seek a writ of mandamus compelling the Committee to determine whether the

candidate meets the Statute's criteria or, in the alternative, compelling WEC to add the candidate to the ballot. *McCarthy*, 166 Wis.2d at 492. Understanding that there is no credible basis to distinguish this case from *McCarthy*, Respondents argue instead that *McCarthy* was wrongly decided.[9]

Respondents' principal argument – that *McCarthy* was wrong because the Statute confers discretion on the Committee – ignores the clear non-discretionary language of the Statute. "The committee shall 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) (emphasis added). And it does not address this Court's detailed analysis of that language, much less explain why it was erroneous. *See McCarthy*, 166 Wis.2d at 488-89. Respondents' argument for overturning *McCarthy* boils down to a complaint that the case compels a result they disagree with. This is insufficient to warrant a departure from principles of *stare decisis*:

> [P]roper respect for the doctrine of stare decisis means that this court will rarely overturn prior decisions and only when certain criteria are met. The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed.
>
> Moreover, stare decisis concerns are paramount where a court has authoritatively interpreted a statute because the legislature remains free to alter its construction. When a party asks this court to overturn a prior interpretation of a statute, it is his burden to show not only that the decision was mistaken but also that it was objectively wrong, so that the court has a compelling reason to overrule it.
>
> Thus, the function of this court today is not to interpret [the statute] de novo. It is not a sufficient basis to overrule . . . that this court disagrees with its rationale.

Progressive N. Ins. Co. v. Romanshek, 2005 WI 67, ¶¶ 44-46, 281 Wis. 2d 300, 697 N.W.2d 417 (cleaned up). This Court authoritatively interpreted the Statute in *McCarthy*. Respondents have scarcely addressed the rationale of the Court's interpretation, let alone established that it was "objectively wrong." *Id.* That decision should control the outcome here.

[9] Response, p. 18.

Even if *McCarthy* were not dispositive – which it is – Petitioner is clearly among the class of persons with standing to bring a mandamus petition to enforce the Statute. Respondents' contention that Petitioner lacks standing because "[n]o statute gives Phillips a right of judicial review of the Commission's decision about whether he is a nationally recognized candidate"[10] conflates standing with the existence of a private right of action under the Statute. The two are distinct. *Compare Friends of Black River Forest v. Kohler Co.,* 2022 WI 52, ¶¶ 16-21, 402 Wis. 2d 587, 977 N.W.2d 342 (standing asks "whether the petition alleges injuries that are a direct result of the agency action" and petitioner is within the "zone of interests" protected by the statute) (internal quotations omitted); *with DSG Evergreen Fam. Ltd. P'ship v. Town of Perry*, 2020 WI 23, ¶ 47, 390 Wis. 2d 533, 939 N.W.2d 564 (statute must create private right of action before "private parties may sue public officers for damages based on their failure to comply with statutory obligations").

Petitioner clearly has standing. Petitioner has cited – and Respondents have not addressed – cases holding that one purpose of the "generally advocated or recognized" standard 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).[11] Another purpose of Wisconsin's Statute is to avoid "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. Primary candidates are squarely among the class of persons the Statute aims to protect and benefit. They are harmed when they are subjected to the burdens from which the legislature intended to spare them. Respondents' contention that Petitioner is limited to the "non-judicial remedy" of a nominating petition – exposing him to the very burden

[10] Response, p. 14.

[11] *See also*, Petition, ¶¶ 33-36.

and $300,000 expense[12] that the legislature deemed improper – turns the intent of the Statute on its head.

Nor must Petitioner rely on the Statute to afford him a private right of action. The writ of mandamus provides a cause of action at common law when the following are met: "(1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law." *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶ 11, 373 Wis. 2d 348, 891 N.W.2d 803 (cleaned up). *See also State ex rel. Milwaukee Cnty. Pers. Rev. Bd. v. Clarke*, 2006 WI App 186, ¶¶ 7, 36, 296 Wis. 2d 210, 723 N.W.2d 141 (standing for mandamus does not require statutory authorization); *State ex rel. Cabott, Inc. v. Wojcik*, 47 Wis. 2d 759, 762-63, 177 N.W.2d 828 (1970) (cause of action exists when mandamus criteria met).

Petitioner satisfies each of these elements. *McCarthy* held that the Statute establishes a clear legal right for candidates, and a positive and plain duty for the Committee to determine whether Petitioner met the Statute's criteria for ballot placement. *See McCarthy*, 166 Wis. 2d at 490. Petitioner has demonstrated substantial damage, since the Statute is supposed to spare him the burden and expense of circulating nominating petitions. Respondents' contention that Petitioner had another adequate remedy in the form of a nominating petition ignores the nature of Petitioner's harm and dishonors the Statute's purpose.

There is still time to add Petitioner to the list of names WEC will certify to county clerks. Respondents have never explained why they cannot or should not do so. Instead, they have hidden behind a smokescreen of illusory procedural objections. None of these should eclipse Respondents' statutory obligation to give Wisconsin voters the Democratic primary they deserve.

[12] Affidavit of Jeffrey Weaver, ¶ 11.

CONCLUSION

Petitioner requests that the Court take original jurisdiction and issue a writ of mandamus compelling Respondents to add Petitioner's name to the list of certified candidates for the Democratic Presidential Preference Primary.

Dated this 1st day of February 2024.

Respectfully submitted,

Electronically signed by Timothy W. Burns

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s.809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,000 words.

Dated this 1st day of February 2024.

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