

State of Wisconsin \ Government Accountability Board

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MEMORANDUM

DATE: For the June 8, 2011 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Nathaniel E. Robinson
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Government Accountability Board

Prepared and Presented by:

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SUBJECT: Recall Petition Challenge: Circulator Residence and Fraud Allegations
Senator Dave Hansen, Senator Jim Holperin, and Senator Robert Wirth

I. Introduction:

Staff has prepared this Memorandum to summarize staff's review of the recall petition and any challenges, rebuttal, or reply thereto as they relate specifically to circulator residence and fraud allegations for the recall petitions against Senators Dave Hansen, Jim Holperin, and Robert Wirth (hereafter "Senators".) The legal analysis in this Memorandum applies to the recall petitions involving all three Senators. The Memorandum also addresses the Brief of Amicus Curiae Kennedy Enterprises, LLC and any replies submitted thereto.

A. Senators' Verified Challenges

The Senators' Verified Challenges (paragraphs 5-11) and as further supported by Exhibits 1 - 75, present the following challenges to the recall petitions upon the basis of the circulators' residences and fraud:

5. Many circulators were paid on a per-signature basis to circulate recall petitions in the relevant Senate Districts.
6. The circulators directed additional individuals to collect signatures, also paying on a per-signature basis.
7. Certain circulators provided false addresses in the certifications executed on the recall petitions that they submitted.

8. Certain circulators executed certifications on recall petitions that they did not circulate.
9. Certain circulators obtained signatures from Wisconsin electors by misrepresenting the purpose of the recall petition.
10. Certain circulators forged signatures on the recall petition.
11. The systematic impropriety utilized in obtaining purported signatures is so pervasive that it invalidates each of the implicated signatures, contradicts the circulators' certification, and invalidates all petition pages purportedly obtained by numerous circulators.

The Senators' Verified Challenges as further supported by Exhibit 63-30, 63-12, and 63-22, present the following additional challenges to individual signatures:

- a. A specified number of signatures appear on recall petition pages with circulator address issues, such as two different municipalities listed for the circulator in different handwriting and incomplete circulator addresses.
- b. A specified number of signatures are fake, or forged by the circulator or signer.
- c. A specified number of signatories claim not to have signed the recall petition (name forged) or were tricked into signing the recall petition.

The Senators' Verified Challenges are further supported by Exhibit 59 (Affidavit of Michael L. Pfohl), which summarizes a telephone survey allegedly documenting fraud as well as the fact that out-of-state circulators account for 8,565 signatures, or 44.65% of the total signatures offered for filing against Senator Dave Hansen; 8,474 signatures, or 36.64% of the total signatures offered for filing against Senator Jim Holperin; and 6,073 signatures, or 33.12% of the total signatures offered for filing against Senator Robert Wirth.

B. Memoranda In Support of Challenges To Circulators' Residences and Fraud

In the Introduction and Sections I – II(A-D) of the Memorandum in Support of the Senators' Challenges to Petitions, the Senators advance several arguments supporting various claims of fraud, misrepresentation, indifference and other misconduct, which, they allege, taints the recall petitions. As a result, the Senators argue that the recall petitions do not reflect the will and intent of the electors, but rather only reflects a for-profit signature drive largely concerned with filling petition pages as quickly as possible without regard for Wisconsin's laws or residents. In sum, the Senators make the following allegations and arguments:

1. A paid circulator does not circulate a petition because they support it, but rather because they are paid to do so, therefore, circulator certifications of "support" for the recall are false. Since the certification of circulator is false, each petition page bearing a certification of a paid circulator should be excluded.
2. Circulators provided false residential addresses in the certifications they executed rendering them ineligible to circulate and rendering the petition pages they circulated invalid.

3. Evidence establishes a pattern of circulators obtaining fraudulent signatures (people who purportedly never signed the petition and deceased persons) and signatures obtained through fraud (misrepresentation of the purpose of the recall petition.)
4. Certain circulators certified signatures actually obtained by other persons.
5. Where fraud is established by a circulator or signor, the entirety of signatures on all implicated petition pages must be excluded.

The Senators rely primarily upon *Stahovic v. Rajchel*, 122 Wis.2d 370, 380, 363 N.W.2d 243 (Wis. Ct. App. 1984), where the Court of Appeals specifically held that “the spirit of Wisconsin law requires that, absent fraud, only invalid signatures be disallowed in a petition for recall,” that such a “rule does not impugn the integrity of the recall process and it avoids thwarting the will of the electors.” In addition, the Senators argue that “no presumption of regularity arises when a petition is filed without a proper affidavit of personal circulation” and “substantial compliance” with the requirements for executing petitions “requires that petitions be circulated in a manner that protects against fraud and that assures that signers know the content of the petition.” *Jensen v. Miesbauer*, 121 Wis.2d 467, 360 N.W.2d 535 (Wis. Ct. App. 1984).

The Senators request that the Board find that the pattern of fraud is sufficient to apply *Stahovic* and *Jensen*, and thereby excluding entire petition pages containing the certification of certain circulators. In addition to citing Wisconsin case law, the Senators cite cases in other States in support of this proposition.

In the Senators’ Reply in Support of Their Challenge to the Petitions, the Senators challenge the Petitioners’ assertions that the G.A.B. has no authority to strike more than individual signatures, even in the context of established fraud. The Senators argue that the Petitioner claims the G.A.B. is powerless to protect the integrity of the recall process absent signature-by-signature proof. The Senators further argue that the recall petitions are so riddled by fraud and other misconduct that they do not reliably reflect the will of the electorate.

The memoranda in support of each Senator’s challenge to the petitions, the Senators’ replies in support of their challenges to the petitions, and Exhibits 59 and 63-30, 63-12, 63-22 can be found on the G.A.B. website at: <http://gab.wi.gov/publications/other/recall-challenge-documents>.

C. Petitioners’ Rebuttals to the Senators’ Challenges

In the Petitioners’ rebuttal memoranda in response to each Senators’ challenge, the Petitioners argue that the certifications provided by out-of-state circulators are valid because people move, do not have permanent homes, and sometimes use nicknames. The Petitioners argue that the Senators have “brazenly” misstated Wisconsin law in an effort to disenfranchise a substantial portion of the electorate of each Senate District. The Petitioners argue that it is nonsense that “Wisconsin law requires that where fraud can be established on the part of a circulator, all sheets submitted by such circulator should be stricken.” Instead, the Petitioners argue that challenges must address individual signatures, as is evidenced by the Legislative intent expressed in §9.10(2)(m-p), Wis. Stats.; however, the Petitioners do admit that pursuant

to §9.10(2)(em), Wis. Stats., no signature on a petition sheet may be counted if the circulator fails to sign the certification of circulator or the circulator is not qualified. Arguing that Wisconsin Courts do not permit the wholesale exclusion of entire petition pages, the Petitioners argue that the Senators cited to dicta in the *Stahovic* decision and that the Senators have perhaps intentionally ignored the true holding and clear directive that individual signatures should be counted whenever possible.

Each Petitioner's rebuttal memoranda in response to the Senators' challenges, the Affidavits of John W. Hogan, and the Petitioners' affidavits numbered 1-27 against Senator Hansen, 1-25 against Senator Holperin, and 1-4 against Senator Wirth can be found on the G.A.B. website at: <http://gab.wi.gov/publications/other/recall-challenge-documents>.

D. Petitioners' Objection to the Senators' Replies

By letter dated May 18, 2011, the Petitioners assert that the Senators' replies and specifically Exhibit Nos. 64-73 which do not address any new matter raised in the rebuttal, impermissibly introduce new evidence and signature challenges that should not be considered by the Board. However, the Petitioner does concede that portions of Exhibit 74-30 (SD30HrA, SD30HrB, SD30HrE, and SD30HrF,) Exhibit 74-12 (SD12HrA, SD12HrB,) Exhibit 74-22 (SD22HrA, SD22HrB, and SD22HrE), and related affidavit paragraphs are permissible in that they respond to new matters raised in the rebuttals.

II. Circulator Residence Challenges

A. The Senators' Challenges to Certain Circulators' Residences

In Paragraph 7 of the Senators' Verified Challenges, the Senators allege that certain circulators provided false residential addresses in the certification of circulator. In their memoranda in support of their challenges to Petitions, generally pages 5-7, the Senators argue that the failure to provide a "residence with street and number" violates §8.40(2), Wis. Stats., requirements for the certification of circulator, thus disqualifying the circulator and invalidating all petition pages. In the Senators' replies in support of their challenges to Petitions, generally page 9, the Senators cite §2.05(14), Wis. Adm. Code, which provides: "No signature may be counted when the residency of the circulator cannot be determined by the information given on the" recall petition.

The Senators identify a number of circulators for whom a "residence" cannot be determined by the information given on the recall petition, especially in the context of other supporting evidence submitted with the challenges which calls into question the place of residence for certain circulators. In their memoranda in support of their challenges to Petitions, the Senators specifically challenge the following circulators:

Richard Madrill
Richard Salaway
Jay Taylor
Jonathan Megie
Jacqueline Morales
Jean Stussie
Richard Riscoll

In the Senators' replies in support of their challenges to Petitions, the Senators specifically challenge the following circulator:

Michael Alexander

B. Legal Background:

The certification of a qualified circulator stating his or her "residence with street and number," if any, shall appear at the bottom of each separate sheet of each petition stating that he or she personally circulated the petition and personally obtained each of the signatures . . . that the circulator is a qualified elector of this state, or if not a qualified elector of this state, that the circulator 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 §6.03, Wis. Stats. §8.40(2), Wis. Stats. The certification of circulator must also contain a notice that falsifying the certification is punishable under §12.13(2)(a), Wis. Stats. §8.40(2), Wis. Stats. Furthermore, §2.05(14), Wis. Adm. Code, as applied to recall petitions by §2.09(1), Wis. Adm. Code, provides: "No signature may be counted when the residency of the circulator cannot be determined by the information given on the nomination paper."

In the context of Chapters 5-10, Wis. Stats., "elector residence" is defined as "the residence of a person is the place where the person's habitation is fixed, without any present intent to move and to which, when absent, the person intends to return." §6.10(1), Wis. Stats. Further, a qualified elector must comply with the 10-day residency requirement to be eligible to vote, which was in effect prior to passage of 2011 Wisconsin Act 23. §6.02(2), Wis. Stats.

Requiring circulators to be residents of the political subdivision in which they circulate nomination papers or other petitions violates the 1st Amendment right of free speech. *Frami v. Ponto*, 255 F. Supp.2d 962 (Eastern District of Wisconsin 2003). Following the *Frami* decision, the Legislature amended §8.40(2), Wis. Stats., to address its constitutionality and removed a requirement that circulators had to be residents of the political subdivision in which they circulate nomination papers or other petitions. However, the Legislature did not remove the requirement that a circulator state his or her "residence with street and number" in the certification of circulator.

No presumption of regularity arises when a petition is filed without a proper affidavit of personal circulation. *Jensen v. Miesbauer*, 121 Wis.2d 467, 469, 360 N.W.2d 535 (Wis. Ct. App. 1984)(citing *State ex rel. Boulton v. Zimmerman*, 25 Wis.2d 457, 465, 130 N.W.2d 753 (Wis. 1964)). The failure to file a proper affidavit does not automatically void the petition, however, because the statutory requirements for the preparation, signing, and execution of petitions are directory, rather than mandatory. *Id.* (citing *Ahlgrimm v. State Elections Board*, 82 Wis.2d 585, 596, 263 N.W.2d 152 (Wis. 1978)). "Nevertheless, substantial compliance with recall procedures is necessary because of the significant interest of the officeholder retaining his position." *Id.* (citing *Beckstrom v. Kornsi*, 63 Wis.2d 375, 387, 217 N.W.2d 283 (Wis. 1974)). Substantial compliance requires that petitions be circulated in a manner that protects against fraud and that assures signers know the content of the petition. *Id.* at 469-70.

A proper affidavit of personal circulation satisfies the evidentiary burden of proving substantial compliance, unless it is rebutted by the officeholder. *Jensen*, 121 Wis.2d at 470. In the absence of a proper affidavit, the person filing a petition bears the burden of proving substantial compliance by other evidence. *Id.* Such evidence may include affidavits or testimony from persons who actually circulated the petition or from the signatories of the petition. *Id.*

In *Jensen v. Miesbauer*, the Court of Appeals determined that the trial court improperly accepted the petition of Miesbauer without requiring competent evidence showing substantial compliance with the recall procedures. *Id.* at 470. The officeholder had objected to 21 entire petition pages because of an improper affidavit of circulator. The circulator had signed the affidavit; however, he did not actually personally obtain the signatures, having left them at businesses and subsequently retrieving them. The officeholder challenged these entire 21 petition pages as void because the affidavits of personal circulation were false. *Id.* 468-69.

However, in 1983, an administrative rule originally proposed by the G.A.B.'s predecessor, the State Elections Board, attempted to provide that "none of the signatures on a separate petition sheet will be counted if ... any signature on the sheet is signed by a person who is not a resident of the district of the elected official being recalled." *Stahovic v. Rajchel*, 122 Wis.2d 370, 378, 363 N.W.2d 243 (Wis. Ct. App. 1984). (citing to proposed EIBd §2.09(6)(a), Wis. Adm. Code). Subsequent to the *Jensen* decision, the Wisconsin Court of Appeals determined in *Stahovic* that the proposed administrative rule hampered, restricted and impaired the right of recall of elected officials by denying qualified petitioners their right to be heard in violation of Article XIII, Section 12(7), Wisconsin Constitution. *Id.* at 379. The court reasoned that the proposed rule was inconsistent with the legislative intent expressed in §9.10(7), Wis. Stats., which provides that §9.10 as a whole has the purpose to facilitate the operation of Article XIII, Section 12, of the Wisconsin Constitution. *Id.* at 378. Further, the court noted that the recall rights established in Article XIII, Section 12, "shall be self-executing and mandatory." *Id.* The court found that Article XIII, Section 12, contained no provision authorizing the invalidation of otherwise valid recall signatures simply because they appear on a petition page with a defective signature. *Id.*

C. Analysis and Recommendations:

The Senators argue that the following circulators failed to execute a proper certification of circulator because their residence not only cannot be determined by information on the petition, but in fact, contrary evidence of the circulators' residential address was presented:

Richard Madrill—certified a residence of 1065 S. Ames Street, Lakewood, CO 80226 (e.g. Exhibit 6,) but officers confirmed a residence of 1828 Depew Street, Lakewood, CO 80214 in several interactions with Wisconsin law enforcement while circulating recall petitions (Exhibit 7.) The Petitioners mention Mr. Madrill as having resided elsewhere in the past in the rebuttal; however, did not provide any additional evidence. The Senators point out that the Petitioners provided no rebuttal or explanation.

Richard Salaway—certified a residence at 23A Johnson Rd., Latham, NY 12110 on 132 petition pages while circulating in Senate District 22, but certified a residence at 5826 Brierly Lane, Houston, TX 77084 on 31 petition pages while circulating in Senate District 30. (See

e.g. Exhibit 8.) In rebuttal, the Petitioners did provide a plausible affidavit that explains Mr. Salaway lives with his parents and they moved from New York to Houston during the time he was circulating petitions.

Jay Taylor—certified a residence at 9461 Charleville Blvd., #204, Beverly Hills, CA 90212; however, this is not an actual dwelling, but rather a mail forwarding service and simply a mailbox number. Exhibits 9-10. The Petitioners mention an affidavit on page 8 of their rebuttals; however, no affidavit was provided. The Senators point out that the Petitioners provided no rebuttal or explanation.

Jonathan Megie—certified a residence at 2125 NW 124th Street, Miami, FL 33167; however, that address is a business address. Exhibits 11-12. In addition, throughout February 2011, Megie represented himself in Florida state court using the address 523 E. Tennessee Street, Tallahassee, FL. Exhibit 68. In rebuttal, the Petitioners attempt to provide evidence that Mr. Megie substantially complied with the requirements of §8.40(2), Wis. Stats., but his affidavit simply re-asserts the unexplained Miami address. The Senators point out that the affidavit was executed in Leon County where Tallahassee is found and that claiming the Miami residence also contradicts his Florida court documents establishing a different residence for the same time period as he circulated in Wisconsin.

Jacqueline Morales—certified a residence as 7271 NW 174 Terrace, Hialeah, FL 33015 (Exhibit 13); however, just last year when circulating petitions in Colorado, she claimed to reside at 3612 W. Colorado Ave., Colorado Springs, Colorado (Exhibit 12.) The Petitioners mention Ms. Morales as having resided elsewhere in the past in their rebuttals; however, did not provide any additional evidence. The Senators point out that the Petitioners provided no rebuttal or explanation.

Jean Stussie—certified a residence as St. John, Missouri, but she resides in St. Louis, Missouri (Exhibit 14.) In rebuttal, the Petitioners did provide an affidavit from Ms. Stussie adequately explaining that she does reside in St. John, Missouri, but it does not have its own zip code, so her mailing address is St. Louis, Missouri.

Richard Riscoll—certified a residence as 1201 S. Nevada Street, Colorado Springs, CO 80903, when in fact that is the “Chateau Motel” (Exhibit 15.) The Petitioners mention an affidavit on page 8 of their rebuttals; however, no affidavit was provided. The Senators point out that the Petitioners provided no rebuttal or explanation.

Michael Alexander—certified a residence as 56 Murdock St., Brighton, Massachusetts, but public records show that he resides at 22 N. Kirk St., North Falmouth, Massachusetts (Exhibit 71). Petitioners object to this challenge as new in the reply and not responsive to anything new raised in the Petitioners’ rebuttals.

Pursuant to *Jensen v. Miesbauer*, the Board could determine that the Senators have presented sufficient evidence to rebut certain circulators’ substantial compliance with the requirements to complete a certification of circulator pursuant to §8.40(2), Wis. Stats. The burden would then shift to the Petitioners to prove substantial compliance by other evidence, such as affidavits from the circulators. The Board could determine that the Petitioners failed to meet their burden to prove substantial compliance with the requirements of §8.40(2), Wis.

Stats., with respect to Madrill, Taylor, Megie, Morales, and Riscal. The Board could determine that the Petitioners met their burden to prove substantial compliance with respect to Salaway and Stussie. Finally, the Board could determine that the challenge to Alexander was not timely, as it was not filed with the initial challenges and by the deadline for filing those challenges.

Recommendations:

Staff recommends that the Board determine whether it will enforce the provisions of §8.40(2), Wis. Stats., and §2.05(14), Wis. Adm. Code, which appear to require a circulator to provide a “residence” address in the certification of circulator and that “no signature may be counted when the residency of the circulator cannot be determined by the information given on the” recall petition.

If the Board determines that a circulator is required by §8.40(2), Wis. Stats., to provide his or her residence address in the certification of circulator and if the Board determines that §2.05(14), Wis. Adm. Code, is enforceable, then the Board may strike all petition pages circulated by the above-identified circulators (assuming the Board determines that the Senators have provided sufficient evidentiary proof.)

III. Circulator and Other Fraud Challenges:

A. Introduction

In their Verified Challenges and memoranda in support of the Senators’ challenges to petitions, the Senators argue that the recall petitions do not reflect the will and intent of the electors, but rather only reflect a for-profit signature drive largely concerned with filling petition pages as quickly as possible without regard for Wisconsin’s laws or residents. The Senators specifically assert several fraud challenges as set forth in Section I(B)(1-4), above. The Senators argue that at a minimum, the evidence shows a pattern of fraud that requires invalidation of whole petition pages.

In asserting their fraud challenges, the Senators rely primarily upon *Stahovic v. Rajchel*, 122 Wis.2d 370, 380, 363 N.W.2d 243 (Wis. Ct. App. 1984), where the Court of Appeals specifically held that “the spirit of Wisconsin law requires that, **absent fraud**, only invalid signatures be disallowed in a petition for recall,” that such a “rule does not impugn the integrity of the recall process and it avoids thwarting the will of the electors.” In addition, the Senators argue that “no presumption of regularity arises when a petition is filed without a proper affidavit of personal circulation” and “substantial compliance” with the requirements for executing petitions “requires that petitions be circulated in a manner that **protects against fraud and that assures that signers know the content of the petition.**” *Jensen v. Miesbauer*, 121 Wis.2d 467, 360 N.W.2d 535 (Wis. Ct. App. 1984).

In their rebuttals, the Petitioners argue that it is nonsense that “Wisconsin law requires that where fraud can be established on the part of a circulator, all sheets submitted by such circulator should be stricken.” Instead, the Petitioners argue that challenges must address individual signatures, as is evidenced by the Legislative intent expressed in §9.10(2)(m-p), Wis. Stats.; however, the Petitioners do admit that pursuant to §9.10(2)(em), Wis. Stats., no

signature on a petition sheet may be counted if the circulator fails to sign the certification of circulator or the circulator is not qualified.

Staff has reviewed all of the relevant controlling Wisconsin authority, as well as persuasive authority from other states offered by the Senators, and acknowledges that fraud can be a basis for invalidating more than individual signatures in the recall petition process. However, the controlling Wisconsin authority does not prescribe clear factors or thresholds for evaluating when fraud in the recall petition process sufficiently impugns the integrity of the recall process, thus thwarting the will of the electors.

In Section III(B) immediately below, the legal background and analysis of controlling Wisconsin authority and other persuasive authority is provided. In Section III(C-E) below, the application of the legal principles will be applied to assist the Board in determining whether to invalidate individual signatures, whole petition pages, or entire petitions as a result of various forms of fraud.

B. Legal Background

Wisconsin Constitution

A recall petition must be signed by electors equaling at least twenty-five percent of the vote cast for the office of governor at the last preceding election in the district which the incumbent represents. (Article XIII, Section 12(1)). Article XIII, Section 12(7) specifically provides: "This section shall be self-executing and mandatory. Laws may be enacted to facilitate its operation but no law shall be enacted to hamper, restrict or impair the right of recall."

Will of the Electors

When construing election laws, one must begin with the fundamental principle that the will of the electorate is to be furthered. *Stahovic v. Rajchel*, 122 Wis.2d 370, 376, 363 N.W.2d 243 (Wis. Ct. App. 1984). "Except as otherwise provided, chs.5 to 12 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 comply with some of their provisions." §5.01(1), Wis. Stats. To reject otherwise valid signatures in a recall petition because one or more signatures on a particular petition page was defective for any reason would be to defeat the legislatively adopted policy to give effect to the will of the electors. *Stahovic*, 122 Wis.2d at 376. "The object of election laws is to secure the rights of duly qualified electors and not to defeat them." *Id.* (citing *State ex rel. Dithmar v. Bunnell*, 131 Wis. 198, 206, 110 N.W. 177 (Wis. 1907)).

Substantial Compliance with Recall Procedures

The statutory requirements for preparation, signing, and execution of petitions for recall are directory rather than mandatory. *Matter of Recall of Redner*, 153 Wis.2d at 390. See also *Jensen v. Miesbauer*, 121 Wis.2d 467, 469, 360 N.W.2d 535 (Wis. Ct. App. 1984). Only substantial compliance with the recall procedure is necessary and that merely requires the petitions to be circulated in a manner that protects against fraud and assures the signers knew the contents of the petitions. *Id.* at 390-91. See also *Matter of Recall of Haase*, 120 Wis.2d at

46. Substantial compliance with recall procedures is necessary because of the significant interest of the officeholder retaining his position. *Jensen*, 121 Wis.2d 469. (citing *Beckstrom v. Kornsi*, 63 Wis.2d 375, 387, 217 N.W.2d 283 (Wis. 1974)).

Standards for the Treatment and Sufficiency of Recall Petitions

The standards for determining the treatment and sufficiency of recall petitions are set forth in §9.10(2)(e-r), Wis. Stats. Additional standards for determining the treatment and sufficiency of election petitions, including recall petitions, are set forth in GAB §2.05, Wis. Adm. Code. See GAB §2.09(1) and (5), Wis. Adm. Code. “Any information which appears on a nomination paper is entitled to a presumption of validity.” GAB §2.05(4), Wis. Adm. Code. “If a signature on a petition sheet is crossed out by the petitioner before the sheet is offered for filing, the elimination of the signature does not affect the validity of other signatures on the petition sheet.” §9.10(2)(p), Wis. Stats.

No signature on a petition page may be counted if the circulator fails to sign the certification of circulator or the circulator is not qualified. §9.10(2)(em), Wis. Stats. No signature may be stricken on the basis that the elector was not aware of the purpose of the petition, unless the purpose was misrepresented by the circulator. §9.10(2)(m), Wis. Stats. Challenges are not limited to the categories set forth in §9.10(2)(i) – (L), Wis. Stats.

In 1983, an administrative rule originally proposed by the G.A.B.’s predecessor, the State Elections Board, attempted to provide that “none of the signatures on a separate petition sheet will be counted if ... any signature on the sheet is signed by a person who is not a resident of the district of the elected official being recalled.” *Stahovic*, 122 Wis.2d at 378 (citing to proposed EIBd §2.09(6)(a), Wis. Adm. Code). The Wisconsin Court of Appeals determined that the proposed administrative rule hampered, restricted and impaired the right of recall of elected officials by denying qualified petitioners their right to be heard in violation of Article XIII, Section 12(7), Wisconsin Constitution. *Id.* at 379. The court reasoned that the proposed rule was inconsistent with the legislative intent expressed in §9.10(7), Wis. Stats., which provides that §9.10 as a whole has the purpose to facilitate the operation of Article XIII, Section 12, of the Wisconsin Constitution. *Id.* at 378. Further, the court noted that the recall rights established in Article XIII, Section 12, “shall be self-executing and mandatory.” *Id.* The court found that Article XIII, Section 12, contained no provision authorizing the invalidation of otherwise valid recall signatures simply because they appear on a petition page with a defective signature. *Id.* Most importantly, the Wisconsin Court of Appeals held that “the spirit of Wisconsin law requires that, absent fraud, only invalid signatures be disallowed in a petition for recall,” that such a “rule does not impugn the integrity of the recall process and it avoids thwarting the will of the electors.” *Id.* at 380.

Authority of G.A.B.

The G.A.B. *shall* review a verified challenge to a recall petition, if it is made prior to certification. §9.10(2)(f), Wis. Stats. (emphasis added.) See also §§2.07(1) and 2.11(1), Wis. Adm. Code. Furthermore, the G.A.B. “*shall review any evidence* offered by the parties when reviewing a complaint challenging the sufficiency” of a petition. §§2.07(4) and 2.11(1), Wis. Adm. Code. Any information which appears on a petition is entitled to a presumption of validity. §§2.05(4) and 2.09(1), Wis. Adm. Code. “Any challenge to the validity of signatures

on the petition shall be presented by affidavit *or other supporting evidence* demonstrating a failure to comply with the statutory requirements.” §9.10(2)(h), Wis. Stats. (emphasis added.) See also §§2.07(2)(a) and 2.11(1), Wis. Adm. Code. If the officeholder establishes the information on the petition is insufficient, the burden is on the petitioner to establish its sufficiency. §§2.07(3)(a) and 2.11(1), Wis. Adm. Code. Finally, the G.A.B. shall decide the challenge with or without a hearing. §§2.07(2)(b) and 2.11(1), Wis. Adm. Code.

Challenger’s Burden of Proof

The officeholder bears the burden of proof on challenges and that burden is clear and convincing evidence of an insufficiency. §9.10(2)(g), Wis. Stats. See also GAB §§2.07(3)(a) and (4) and 2.11(1), Wis. Adm. Code. “Any challenge to the validity of signatures on the petition shall be presented by affidavit or other supporting evidence demonstrating a failure to comply with the statutory requirements.” §9.10(2)(h), Wis. Stats.

In Wisconsin, this middle burden of proof requires a greater degree of certitude than that required in ordinary civil cases, but a lesser degree than that required to convict in a criminal case. *Kruse v. Horlamus Industires, Inc.*, 130 Wis.2d 357, 363, 387 N.W.2d 64 (Wis. 1986) (citing: *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 299, 294 N.W.2d 437 (1980)). The Supreme Court has generally required the middle burden of proof “[i]n the class of cases involving fraud, of which undue influence is a specie, gross negligence, and civil actions involving criminal acts.” *Id.* (citing: *Kuehn v. Kuehn*, 11 Wis.2d 15, 26, 104 N.W.2d 138 (1960)). In general, “clear preponderance” has only been considered substantially equivalent to “clear, satisfactory and convincing evidence” where the civil case involved a crime, fraud or gross negligence. *Id.* (citing e.g.: *Trzebietowski v. Jereski*, 159 Wis. 190, 149 N.W. 743 (1914) (civil case involving a crime), and *Hafemann v. Seymer*, 191 Wis. 174, 210 N.W. 373 (1926) (gross negligence), both cited in *Kuehn*, supra, 11 Wis.2d at 27, 104 N.W.2d 138.)

Controlling Wisconsin Precedent

Most importantly, the Wisconsin Court of Appeals has held that “the spirit of Wisconsin law requires that, ***absent fraud***, only invalid signatures be disallowed in a petition for recall,” that such a “rule does not impugn the integrity of the recall process and it avoids thwarting the will of the electors.” *Stahovic*, 122 Wis.2d at 380. Furthermore, substantial compliance with the recall procedure is necessary and that requires the petitions to be ***circulated in a manner that protects against fraud and assures the signers knew the contents of the petitions***. *Jensen*, 121 Wis.2d at 469.

In *Jensen v. Miesbauer*, the Court of Appeals had before it a case where the officeholder alleged that the recall petition contained false circulator certifications. The Court of Appeals determined that the trial court improperly accepted the petition of Miesbauer without requiring competent evidence showing substantial compliance with the recall procedures. 121 Wis.2d at 470. The officeholder had objected to 21 entire petition pages because of an improper affidavit of circulator. The circulator had signed the affidavit; however, he had not actually personally obtained the signatures, having left them at businesses and retrieved them later. The officeholder challenged these entire 21 petition pages as void because the affidavits of personal circulation were false. *Id.* 468-69.

Furthermore and in the context of setting aside an actual election, the Wisconsin Supreme Court held that where deprivations of the right to vote are so significant in number or so egregious in character as to seriously undermine the appearance of fairness, such an election must be set aside, even where the outcome of the election might not be changed. *McNally v. Tollerander*, 100 Wis.2d 490, 505, 302 N.W.2d 440 (Wis. 1981). The Supreme Court noted examples from other jurisdictions and encouraged courts to use their discretion to avoid elections where proven violations have undermined the appearance of fairness in the election. *Id.* Specifically, when many voters see election officials stuffing ballot boxes, or when large numbers of voters are prevented from voting, public confidence in the integrity of the election and public acceptance of the winner may be severely impaired. *Id.* “In such cases, a new election might be justified to remedy these effects, regardless of the likelihood that the election’s outcome was altered.” *Id.* at 506. The Supreme Court specifically noted that even though there was no fraud, the disenfranchisement of 40% of the electorate constitutes circumstances in which the processes of the law are so infected as to require nullification of the election. *Id.* Furthermore, the Court of Appeals had upheld the election and stated: “The exclusion of legal votes *not fraudulently*, but through error in judgment will not defeat an election.” *Id.* at 499. The Supreme Court agreed with that statement as a general rule, but found that the facts of the case before it set it apart from the usual election contest case because 40% of the electorate was not permitted to vote. *Id.* at 500.

Definitions of Fraud and Relevant Applicable Types of Fraud

“Fraud” is defined as “1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment, 2. A misrepresentation made recklessly without belief in its truth to induce another person to act, 3. A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment.” *Black’s Law Dictionary*, Seventh Edition, p. 670, Garner, Bryan A., West Group, (1999).

“False statement” is defined as “An untrue statement knowingly made with the intent to mislead.” *Id.* at p. 619.

“Falsify” is defined as “To make something false; to counterfeit or forge.” *Id.*

“Misrepresentation” is defined as “1. The act of making a false or misleading statement about something, usually with the intent to deceive, 2. The statement so made; an assertion that does not accord with the facts.” *Id.* at p. 1016.

Falsifying any information in respect to or fraudulently defacing or destroying a recall petition; or filing a recall petition knowing any part is falsely made constitutes election fraud. §12.13(3)(a), Wis. Stats.

In Wisconsin, misrepresentation is a generic concept separable into the three familiar tort classifications: intent (sometimes called fraudulent misrepresentation, deceit or intentional deceit), negligence and strict responsibility. *Ollerman v. O'Rourke Co.*, 94 Wis.2d 17, 24, 288 N.W.2d 95 (Wis. 1980). Intentional misrepresentation exists when a seller makes a misrepresentation of fact that he or she believes to be false or carelessly misrepresents a fact without regard to its truth. *Vandehey v. City of Appleton*, 146 Wis.2d 411, 414, 437 N.W.2d

550 (Wis. Ct. App. 1988). Strict responsibility misrepresentation exists when the misrepresentation is made on a seller's personal knowledge or under circumstances in which he or she necessarily ought to have known the truth or untruth of the statement. *Id.* Negligent misrepresentation exists when a seller fails to exercise ordinary care in making the misrepresentation or in ascertaining the facts. *Id.*

Persuasive Authority

Montana---

The case most directly on point, and in fact involving one of the circulators hired to circulate recall petitions in Wisconsin, is from Montana. In *Montanans for Justice v. McGrath*, the Montana Supreme Court addressed a circumstance where proponents of three ballot initiatives primarily relied upon out-of-state signature gatherers to obtain an overwhelming majority of the signatures ultimately filed. 146 P.3d 759, 764, ¶11 (Mont. 2006). The uncontradicted evidence established that the proponents of three ballot initiative paid over \$633,000.00 to out-of-state signature gatherers who collected signatures for the initiatives. *Id.*

Some of the signature gatherers attested to signatures that were obtained by other persons outside the presence of the attesting affiant. *Id.* at p. 772, ¶52. The Court concluded that in order to lawfully swear under oath, with personal knowledge, that the affiant “gathered or assisted in gathering” signatures, and to swear that the affiant believes that the signatures are genuine and the signers knew the contents of the petition before signing it, the affiant must be present at the time the petition is signed. *Id.* at p. 773, ¶57.

The Court found that some of the out-of-state circulators provided addresses which were hotels, retail stores, shopping centers, apartment complexes or personal residences at which the signature gatherer was not listed as a resident and some addresses simply did not exist. *Id.* at ¶61. The Court relied upon testimony of one of the signature gatherers in an Oklahoma case where he stated under oath that it was a common practice for signature gatherers to use false or fictitious addresses in an effort to conceal personal information, avoid harassment, and “leave no trail.” *Id.* at ¶62. Montana only required circulators to provide an address; however, since the address requirement had a purpose to provide a mechanism by which circulators can be contacted by elections officials during the certification process, the Court imposed a requirement to provide an address at the place where they can be reached or contacted. *Id.* at p. 774, ¶69. Since the circulators provided false information as to their addresses, the Court determined that the petition pages were tainted with illegality. *Id.* The Court stopped short of requiring specifically a residential address. *Id.* at p. 775, ¶70.

The Court also found that a presumption of validity for initiative petitions may be rebutted and overcome by affirmative proof of willful fraud or procedural noncompliance. *Id.* at ¶72. Furthermore, once evidence is presented to rebut the presumption of validity, it is incumbent upon the party endorsing the validity of the signatures to come forward with evidence to rebut or counter the damaging evidence. *Id.*

Finally, the Court upheld a finding by the District Court that it was more probable than not that a significantly large percentage of the paid, out-of-state signature gatherers working for the proponents of the initiatives employed a “bait and switch” tactic to induce people who

knowingly signed one petition to unknowingly sign the two others. *Id.* at ¶74. Evidence considered included affidavits of persons stating that they heard other signature gatherers misleading persons into signing all three petitions by the circulator claiming that they needed to have three signatures because they lacked carbon paper. *Id.* The Court also permitted consideration of substantial hearsay evidence regarding the widespread use of this tactic. *Id.* at p. 776, ¶76.

The District Court concluded that these three unlawful practices resulted in legally defective certification affidavits and constituted a “pervasive and general pattern and practice of fraud and conscious circumvention of procedural safeguards. The Supreme Court agreed and concluded that the filing of a false affidavit by a circulator is “more than a mere technicality” in that it destroys the primary procedural safeguard for ensuring the integrity of the signature gathering process. *Id.* at pp. 776-77, ¶¶80 and 83. The circulator’s role in an initiative is pivotal and the integrity of the process in many ways hinges on the trustworthiness and veracity of the circulator. In addition to obtaining truthful information from the circulator, the oath is intended to assure that the circulator is impressed with the seriousness of his or her obligation to honesty and to assure that the person taking the oath is clearly identified, should questions arise regarding particular signatures. *Id.* at p. 777, ¶83.

The Montana Supreme Court recognized the argument that invalidating signatures due to a bait-and-switch tactic is not warranted as many persons arguably signed the petition voluntarily and knowingly. The Court also noted that some may claim that invalidating signatures due to the use of false addresses is excessive and an elevation of form over substance. However, the Supreme Court ultimately ruled that, given the totality of the circumstances of the claims and the totality of the un rebutted evidence, the entire petitions for all out-of-state circulators should be rejected. *Id.* at ¶85.

Illinois---

In *Huskey v. Municipal Officers Electoral Bd. For Village of Oak Lawn*, an appellate court in Illinois considered a case involving testimony from over 30 witnesses that a circulator had verified false signatures and falsely swore that she circulated certain petition sheets. 509 N.E.2d 555, 556, 156 Ill.App.3d 201 (Ill. App. 1 Dist. 1987). Witnesses stated that they had signed for other members of their family in the presence of the circulator and that a granddaughter of the circulator actually had circulated many of the petition sheets. *Id.*

The Electoral Board determined that the testimony clearly disclosed a pattern of fraud, false swearing, and a total disregard for the election law by the circulator and it invalidated 8 of the 10 sheets the circulator had filed. The Court of Appeals upheld the Electoral Board’s decision and found that the entire petition sheets must be invalidated, not just individual signatures, because of the clear evidence of fraud permeating the entire petition circulation process. *Id.* at 557.

The Court stressed that the circulator’s affidavit is one of the primary safeguards against fraudulent nomination petitions and that the circulator’s false affidavit tainted the entire petition sheet. *Id.* The circulator had admitted that at least half the time, she was not the person who presented the petition for signature and she permitted people to sign for others. *Id.*

Relying upon the state's legitimate interest in guarding the integrity of the electoral system, the Court of Appeals upheld the invalidation of the entire petitions sheets because they failed to provide an accurate showing of the candidate's support as a direct result of the improper methods by which the petitions were circulated. *Id.* at p. 558.

C. Analysis Relating to Invalidating Individual Signatures

Stahovic is often cited for the fact that the Court held that "only invalid signatures be disallowed in a petition for recall," that such a "rule does not impugn the integrity of the recall process and it avoids thwarting the will of the electors." However, the *Stahovic* court held that only invalid signatures should be disallowed, absent fraud. The *Stahovic* court did not specify what showing is required to find fraud sufficient to disallow more than just invalid individual signatures on a petition page. The closest Wisconsin case is *Jensen*, where the officeholder challenged a number of whole petition pages because the circulator filed a false certificate claiming to have personally circulated the petitions when in fact he had left them at businesses unattended. The Court of Appeals remanded *Jensen* to permit the petitioner to attempt to provide evidence that he substantially complied with the requirements of §8.40, Wis. Stats.

The Petitioners argue that the G.A.B. does not have any authority to invalidate entire petition pages and that the Board is restricted to determinations on individual signatures upon individual proof meeting a clear and convincing burden. In the opinion of staff, this assertion seems to be contradicted by the clear holding in *Stahovic* as well as the language of §9.10(2)(em), Wis. Stats., in which the Legislature clearly prescribed authority to invalidate all signatures on a petition sheet in at least two instances, i.e. if the circulator failed to sign the certification of circulator or the circulator is not qualified. In addition, the Legislature specifically provides that challenges are not limited to the categories set forth in §9.10(2)(i-L), Wis. Stats.

If the Board adopts the position that challengers must present a separate affidavit or other similar evidence showing fraud for each individual signature, the requirements to do so may make it more challenging to maintain the integrity of the petition process, especially in the compressed timeframe of the recall challenge process. The Senators have alleged widespread and pervasive fraud and misrepresentation, but note that additional evidence could have been forthcoming if the 10-day window to review petitions of thousands of pages, contact signors, and obtain affidavits was more reasonable. However, as Petitioners argue, the Senators did not seek a Court order granting them additional time to obtain the evidence.

The Board was presented with the accompanying Memoranda for each of the Senators, which does address individual affidavits supporting specific allegations of fraud and misrepresentation. If the Board adopts staff's recommendations in the accompanying Memoranda and requires individual evidence of fraud for each signature, then the Board need only address the sufficiency of Exhibits 59, 63-30, 63-12, and 63-22 as they relate specifically to challenges of fraud or misrepresentation. These exhibits document hearsay evidence from a phone survey covering additional allegations of fraud or misrepresentation by circulators, alleged forgeries, and allegations that duplicate signatures are actually additional instances of circulator or signor forgeries.

D. Analysis Relating to Invalidating Petition Pages

The *Stahovic* court clearly carved out an exception to the general rule that only invalid signatures should be discounted from petitions. That exception is when there is a showing of fraud, which may permit the invalidation of all signatures on an affected petition page. There are numerous allegations of fraud, false certifications, or misrepresentation in all three of the recall petitions, most allegations of which are centered around the paid out-of-state circulators hired by the Petitioners to assist with circulating the recall petitions. If the Board were to find that the Senators produced sufficient evidence to establish that fraud occurred on a particular petition page and the Petitioners did not provide sufficient evidence to establish substantial compliance with statutory requirements, the Board could find that the fraud taints the entire petition page such that all signatures on the page should be invalidated.

Courts in Montana and Illinois have directly confronted these issues, particularly Montana where the questions of out-of-state circulators of ballot initiatives were at issue. In both states, the appellate courts found that the state had a legitimate interest in guarding the integrity of the electoral system, or in the instant matter the recall election system, which justified invalidation of entire petition pages where the will of the electors could not be adequately determined. The following specific allegations and evidence are relevant to the question of whether to invalidate complete petition pages related to Senators Hansen, Holperin, and Wirch.

1. Recall Senator Dave Hansen Admission


Of concern regarding this petitioner's recall petition is the acknowledgment that "out of town" petitioners signed the petition with an "obviously bogus name or address." Included in Exhibit 2 and unrebutted in the Affidavit of David Vander Leest is the following:



Jill Brooks

Can I ask a question regarding the signatures in question from "out of town" petitioners. If someone signed the petition with an obviously bogus name or address....what should have been done? Should it have been lined out? Voided? Or do you just hand EVERYTHING in and let it be sorted out by the GAB?

Tuesday at 8:23pm · Like · Comment

 View all 5 comments



Recall Senator Dave Hansen I lined out mine, the **RPW** should have given me the money, the job would have been done a little more professional. Oh well 5000 extra signature are plenty. -David Vander Leest

Tuesday at 11:11pm · Like

Write a comment...

Clearly, the Recall Senator Dave Hansen group, and specifically David Vander Leest was aware that the "out of town" petitioners were submitting fraudulent signatures on petition pages. While Mr. Vander Leest states that he lined out the fraudulent signatures on his petition pages, he never provides further detail in response to the above evidence to explain how he addressed the fraud being committed by the "out of town circulators."

In addition, in an attempt to rehabilitate hundreds of signatures, David Vander Leest submitted an affidavit in which he confirms that a circulator's name was "Nelsston" and that he knows him; however, the name is actually "Greg Decastor." This affects the credibility of Mr. Vander Leest's affidavit as it is clear he did not know at least one of the circulators well enough to spell his name correctly, let alone swear under oath that he has personal knowledge and knows Mr. Decastor. Staff largely discounted Mr. Vander Leest's correcting affidavit for failure to have personal knowledge of the things he sought to correct as is required by §2.05(4), Wis. Adm. Code.

2. False Circulator Statement—Residence

The Senators have alleged that the following circulators certified false addresses in their certifications of circulators:

Richard Madrill
Richard Salaway

Jay Taylor
Jonathan Megie
Jacqueline Morales
Jean Stussie
Richard Riscoll

As discussed above in Section II(C), staff recommends that the Board accept rehabilitating affidavits to remedy or explain an initially alleged false statement of residence with respect to Richard Salaway and Jean Stussie. Staff also recommends that the Board reject the challenge to Michael Alexander as untimely.

However, the Board could consider the totality of the evidence provided by the Senators sufficient to shift the burden to the Petitioners to show substantial compliance with the circulator requirements in §8.40, Wis. Stats., and §2.05(14), Wis. Adm. Code. The Board could also consider the fact that the Petitioners did not provide any additional evidence to refute the Senators' proofs with respect to Richard Madrill, Jay Taylor, Jonathan Megie, Jacqueline Morales, and Richard Riscoll.

If the Board were to consider a finding of fraud for false statements concerning residence of each of these circulators, it could consider invalidating the petition pages and signatures for each as found in staff's exhibits: Senator Hansen Exhibit M, Senator Holperin Exhibit N, and Senator Wirch Exhibit K.

3. Sherri Ferrell—Misrepresentation

Exhibit 59 at page 3 documents a summary of a telephone survey completed with 384 signers of the recall petitions for Senators Hansen and Holperin. Of these contacts, 136 signers reported that they either did not sign the petition or that Ms. Ferrell misrepresented the purpose of the petition. This equates to 35.42% of those contacted. Exhibits 63-30 and 63-12 further support these challenges. Staff's exhibits: Senator Hansen Exhibit N and Senator Holperin Exhibit O document the number of petition pages and signatures affected by this allegation.

4. Mark Vigil and Rubin S. Avila—False Circulator Certification

The Senators argue that Mark Vigil certified petitions actually circulated by Rubin S. Avila. The Senators provide specific supporting documentation in the form of photographs and affidavits, as well as a police report. The Petitioners simply argue that "Rubin" is Mark's nickname, but do not provide any evidence to dispute the fact that law enforcement records establish that there is a real person named Rubin S. Avila, affidavits support that he was circulating petitions, yet he never signed any of them. The Senators identified two specific pages in Senator Hansen's recall petition, number 1007 and 1010, where this occurred. Exhibits 60 and 61.

In addition, Exhibit 61 establishes Rubin misrepresented the purpose of the petition to a man named William Compton who then obtained the assistance of a Deputy Sherriff to get his name removed from the recall petition after he discovered that he was misled. In addition to an affidavit from William Compton, Senator Hansen also provided an affidavit from William's wife, Dorothy, and two other witnesses named Megan Kuehl and Jesse Rouse. All witnesses confirmed the same allegations of misrepresentation and that the circulators were Ruben, Loren and Gloria, with no Mark Vigil present. (In addition, Jesse Rouse's affidavit also attests to misrepresentation by circulator Karen Garr at the Weidner Center where there was a Jerry Seinfeld performance.)

In light of the unrefuted evidence, the Board could determine that this falsification of specific circulator certifications is sufficient evidence of fraud to invalidate any petition pages purportedly circulated by Mark Vigil. Staff's exhibits provide a summary of the petition pages and signatures affected: Senator Hansen Exhibit O and Senator Holperin Exhibit P.

5. Christopher Baxter—False Circulator Certification

The Senators argue that Christopher Baxter, a male circulator, certified petitions offered for filing against Senators Hansen and Wirch that included signatures of people who provided separate affidavits attesting that a woman obtained their signatures. Exhibit 62. This evidence was un rebutted by the Petitioners. Upon a finding that Senators Hansen and Wirch provided sufficient evidence of a false circulator statement, the Board could invalidate the entire petition page number 2009 for Senator Hansen and petition page number 2237 for Senator Wirch.

6. Kevin Pursell—Recall Petitions against Senator Wirch

Senator Wirch provides a forensic document examination report from a handwriting expert regarding petition pages circulated by Kevin Pursell which appears to substantiate fraud or forgery, or at a minimum falsification of the certification statements with respect Bill Pocan's signature on page 362, line 10. According to the documentation, Mr. Pocan has been deceased for 20 years and therefore he could not have signed the petition and the circulator could not have known him at the time that name was placed in the petition. If the Board accepts Exhibit 1, which also includes a statement from Mr. Pocan's surviving spouse and which has not been rebutted by the Petitioner, the Board could invalidate the following entire pages from the recall petition against Senator Wirch: 311, 320, 362, 405, 759, and 769.

7. Duplicate Forgeries

Senator Hansen submitted the Affidavit of Michael L. Pfohl (Exhibit 74-30) in response to the Petitioner's rebuttal. In this affidavit Mr. Pfohl responds to the Affidavit of John W. Hogan, which was submitted in support of the recall

petition. Mr. Hogan had attempted to rehabilitate many duplicate signatures, declaring that they are different people because they are clearly different handwriting. Mr. Pfohl's affidavit raises the concern that one of the signatures is a forgery because they are the same name and address, but appear to be completely different handwriting. Circulators involved include Mr. Vander Leest and Noel Lapp, David Fritsch and Annette Lord, as well as Karen Garr and Mark Vigil.

Mr. Pfohl's affidavit identifies 325 instances where out-of-state circulators account for duplicate names in the original challenges submitted for all the Senators. He suggests a more thorough review is warranted by an investigatory body to determine which of these duplicate signatures are forgeries. The Senators did not provide any additional handwriting analysis reports or evidence to further substantiate the alleged forgeries, but even Mr. Hogan admits that certain signatures are clearly in different handwriting.

8. Telephonic Survey

The Senators have produced Exhibits 59, 63-30, 63-12, 63-22, and 75. Exhibits 59 and 75 are affidavits from Michael L. Pfohl, who conducted a telephone survey of individuals listed on the recall petitions. The Petitioners claim via letter dated May 18, 2011 that they first became aware that the Senators were challenging thousands of signatures with the submission of Exhibit 75 which accompanied the Senators' replies to the Petitioners' rebuttals. However, these challenges were specified in Exhibit 59 and submitted with the Senators' Verified Challenges, where it was alleged that out-of-state circulators had disproportionately high rates of misrepresentation or forgery claims and accounted for the following totals of signatures:

Senator Hansen—8,565 (44.65% of the total signatures)
Senator Holperin—8,474 (36.64% of the total signatures)
Senator Wirch—6,073 (33.12% of the total signatures)

The Senators argue that, in light of having only 10 days to review the thousands of petition pages, contact signors, and obtain affidavits, they could have obtained many more affidavits similar to what they have submitted. The Senators request that the Board consider the telephone survey evidence in determining whether to invalidate all petition pages submitted by certain circulators. The Senators point out that the Petitioners have not rebutted this evidence in any way; however, the Petitioners argue out that this evidence is not sufficient to meet a clear and convincing burden.

If the Board accepts the evidence based upon the telephonic survey and determines that it is clear and convincing, it may conclude that the signature totals listed above for each petition should be invalidated.

9. Other Affidavits of Misrepresentation

To be provided in supplemental materials and as an exhibit.

E. Analysis—Invalidate Entire Petition

While the *McNally* standard for setting aside an election is not necessarily analogous, the end result of a recall petition process is a potential election. In effect, if the Board were to invalidate an entire recall petition based upon a finding of fraud, the end result would be no election and frustration of the potential will of the electorate.

The Board may wish to apply the *McNally* standard to these recall petitions, even though the Supreme Court clearly pointed out that it was not presented with proof of fraud, but rather the disenfranchisement of 40% of an electorate. The Wisconsin Supreme Court did hold that where deprivations of the right to vote are so significant in number or so egregious in character as to seriously undermine the appearance of fairness, such an election must be set aside. If the Board were inclined to determine that an entire recall petition should be invalidated and set aside, it may consider the *McNally* standard as the appropriate threshold -- proof of substantial and pervasive fraud that is so egregious in character as to seriously undermine the appearance of fairness. The Board may consider whether the evidence establishes facts similar to the Montana case where the percentages of people that signed the first initiative and also signed the two others were dramatically similar and high (60%), coupled with evidence of circulators committing a substantial number of individual instances of fraud or submitting false certifications of circulators.

Invalidating an entire petition based on the allegations of fraud would require the Board to determine what standard or factors apply, and then determine whether the recall petitions against the Senators meet that standard.

IV. Brief of Amicus Curiae Kennedy Enterprises, LLC

Kennedy Enterprises, LLC, is the company that was apparently hired by the Republican Party of Wisconsin to provide circulators for the recall petitions against Senators Hansen, Holperin, and Wirth. Counsel for Kennedy Enterprises, LLC, contacted staff and requested permission to submit an amicus filing in these three recall matters. Staff informed Counsel that receipt and admission of the amicus filing was subject to Board approval.

The Brief of Amicus Curiae Kennedy Enterprises, LLC, can be found on the G.A.B. web site at: <http://gab.wi.gov/publications/other/recall-challenge-documents>. Essentially, the amicus filing suggests that Kennedy Enterprises, LLC has a long and successful history. Kennedy Enterprises, LLC, takes issue with the Senators' assertions of fraud and what it considers to be libelous speech. The amicus filing addresses several lawsuits with which the Senators have alleged Kennedy Enterprises, LLC, may have been involved; however, Kennedy Enterprises, LLC, distances itself from those specific litigation matters.

Interestingly, Kennedy Enterprises, LLC, does note on page 7 that one of its circulators was involved in fraudulent conduct in an Ohio signature effort in 2008 to place Gary Bauer on

the presidential primary ballot. In that instance, a county clerk discovered that the names of four deceased people, three forgeries, and twelve unregistered voters appeared on the petitions. Dan Kennedy of Kennedy Enterprises, LLC, states that he immediately met with Indiana State Police and aided them in locating the rogue circulator, showing the good faith and indispensable effort to help locate the circulator after the petition drive had ended. Dan Kennedy provided a sworn affidavit along with the amicus filing.

Kennedy Enterprises, LLC, states that it takes its reputation seriously and urges the Board to approach any allegation of fraud or forgery with skepticism.

Attorney McLeod did not reply to the amicus filing on behalf of the Petitioners, but Attorney Levinson replied to the amicus filing on behalf of the Senators. Attorney Levinson initially appears to object to the amicus filing as untimely among other things, but ultimately stops short of that assertion and points out that the amicus filing is devoid of substance. Attorney Levinson points out that Kennedy Enterprises, LLC, did not actually address any of the specific facts, evidence, or issues before the G.A.B.

Attorney Levinson then goes on to itemize the 210 affidavits and witness statements attesting to fraud and/or forgeries, summarizes the telephone survey results suggesting high rates of fraud, forgery, or misrepresentation by certain circulators, identifies two circulators that allegedly fraudulently certified petitions circulated by others, itemizes circulators that allegedly provided false residences on the certification of circulator, notes that William Pocan (deceased for 20 years) appeared on one of the petitions, among other claims. None of those allegations were addressed by Kennedy Enterprises, LLC, nor did Dan Kennedy suggest that he would be looking into the matters raised by the Senators' challenges.