HAND DELIVERED

STATE OF WISCONSIN
BEFORE THE GOVERNMENT ACCOUNTABILITY BOARD

IN RE VERIFIED COMPLAINT AGAINST THE REPUBLICAN PARTY OF WISCONSIN; GLADYS HUBER; ISAAC WEIX; GARY ELLERMAN; TAMRA LYNN VAREBROOK; JAMES ENGEL; AND JAMES BUCKLEY

Case No. EL 12-12

REPUBLICAN PARTY OF WISCONSIN'S RESPONSE TO THE VERIFIED COMPLAINT FILED APRIL 12, 2012

INTRODUCTION

The six Complainants in this matter have launched an assault on the very foundation of Wisconsin's open primary system. In fact, if Complainants are right, then Fighting Bob La Follette was a fraud and a felon when he ran for the office of President under the banner of the Progressive Party while concurrently sitting as a Republican United States Senator. The very absurdity of that proposition shows how baseless the Verified Complaint is.

Wisconsin's election system requires no candidate to demonstrate fidelity to a given political party's platform or mission as a prerequisite to candidacy and it does not limit participation in the candidate nomination process to party "members." Instead, any qualified individual may declare his or her candidacy for office and seek to represent any established political party. Any qualified elector – party "members" and nonmembers alike – may demonstrate support for such candidacy by signing the candidate's nomination paper. Neither the "members" nor the leaders of a political party can dictate who may and who may not stand for nomination as the party's candidate for office. Rather, once all prospective candidates have been duly nominated, the party's candidate is "the person who receives the greatest number of votes . . . [in the] partisan primary." Wis. Stat. § 8.16(1).

This has been the recognized law of the land in the State of Wisconsin for the last century and the Government Accountability Board ("GAB" or the "Board") must follow it. If Complainants are unhappy with Wisconsin's open primary system, they are free to take their concerns to the legislature, but they can not seek the equivalent of a statutory amendment by repeatedly parroting the words "fraud" and "fraudulent" in this proceeding.

Accordingly, Republican Party of Wisconsin, by its attorneys, Michael Best & Friedrich LLP, submits this response to the Verified Complaint. As outlined in detail below, Complainants have failed to establish any insufficiency in the nomination papers submitted by Gladys Huber, Isaac Weix, Gary Ellerman, Tamra Lynn Varebrook, James Engel and James Buckley (collectively, the "Candidates"), and Complainants are not entitled to the relief they seek.

ARGUMENT

I. EACH CANDIDATE HAS SATISFIED THE STATUTORY REQUIREMENTS AND IS ENTITLED TO BALLOT ACCESS

A. Background Principles

The Board is familiar with the standards it must apply when evaluating the sufficiency of a candidate's nomination papers. Those standards are built on the foundation of two bedrock principles established by the legislature – giving effect to the "will of the electors" and requiring "substantial compliance." See Wis. Stat. § 5.01(1) (directing that "[e]xcept 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").

Accordingly, the information contained on the Candidates' nomination papers "is entitled to a presumption of validity." Wis. Admin. Code § GAB 2.05(5). Doing so furthers the "object

of election laws" which is "to secure the rights of duly qualified electors and not to defeat them." *Stahovic v. Rajchel*, 122 Wis. 2d 370, 376, 363 N.W.2d 243 (Ct. App. 1894) (citing *State ex rel. Dithmar v. Bunnell*, 131 Wis. 198, 206, 110 N.W. 177 (1907)).

In order to overcome this presumption of validity, Complainants are required to prove that "the nonexistence of the presumed fact is more probable than its existence." Wis. Stat. § 903.01. Furthermore, they must do so by providing the Board "clear and convincing evidence" of any alleged invalidity. § GAB 2.07(4). While the clear and convincing evidence standard is frequently identified as the middle burden of proof, it is the highest burden of proof applicable to civil actions. *State v. Walberg*, 109 Wis. 2d 96, 102, 325 N.W.2d 687 (1983). The State's decision to impose this heightened burden of proof signals that the Board's consideration of a request to deny a candidate ballot access is a "case[] where public policy requires a higher standard of proof than in the ordinary civil action." *Id.*

In order to implement the statutory command to "give effect to the will of the electors," the Board's policy, and that of its predecessor, the Elections Board, "with respect to the nomination process has been to help or facilitate candidate ballot access, *not to find a justification for impeding that access.*" *See* Kevin J. Kennedy, Memorandum to the Board re Recall Nomination Paper Challenge Process, p. 2 (June 27, 2011) (emphasis added) (copy attached hereto as Exhibit 1). As explained next, the evidence before the Board compels it to facilitate, and not impede, the Candidates' ballot access.

B. Wisconsin Law Allows Any Candidate To Seek Any Party's Nomination

The Verified Complaint is premised on the unsupported legal theory that only committed party "affiliates" can lawfully seek a party's nomination in a partisan primary. As explained in detail in Section II, below, this theory runs directly contrary to a century's worth of statutory

interpretation. Notably, the Attorney General addressed the precise issue presented here in the following formal opinion authored in 1918:

> *Elections* – Democrat duly nominated for office as Republican candidate has right to have name placed on Republican ballot as such candidate.
>
> September 20, 1918.
>
> GEORGE F. MERRILL,
> *District Attorney,*
> Ashland, Wisconsin.
>
> In your communication of September 19 you state that at the primary in September in your county the Democratic party had no candidates for county officers; that two or three Democrats ran for nomination on the Republican ticket and that one of these received the most votes; that the one nominated has always been a Democrat and has never professed to be anything but a Democrat, and the question has arisen whether the county clerk should place his name upon the Republican ticket, at the November election. You ask for my opinion on this matter.
>
> Your question must be answered in the affirmative. There is nothing in our statutes which would militate against this party's having his name put upon the Republican ticket as long as he has received a sufficient number of votes, and as long as he is willing to have his name placed upon the Republican ticket. The candidate in question having complied with the requirement of the statute, it is the duty of the clerk to place his name on the ticket as the nomination papers call for. See sec. 5.17.

7 Op. Att'y Gen. 542 (Sept. 20, 1918).

As the Attorney General explained so many years ago, "[t]here is nothing in [the Wisconsin] statutes which would militate against" each of the Candidates seeking the Democratic nomination in their respective races, provided they have each filed sufficient nomination papers. This conclusion applies with equal force today.

The legislature has re-enacted the statutes governing the primary election a number of times since the Attorney General issued the above opinion, and has never forbidden members of one party from running in a different party's primary. In fact, the legislature considered and

rejected such a requirement just four months ago. See 2011 S.B. 340 (Dec. 19, 2011) (copy attached hereto as Exhibit 2).[1] "Under such circumstances the opinion of the attorney general is entitled to considerable weight," and "is regarded as presumptively the correct interpretation of the law." *Wisconsin Valley Imp. Co. v. Public Service Commission*, 9 Wis.2d 606, 617, 101 N.W.2d 798 (1960) (quoting *State ex rel. City of West Allis v. Dieringer*, 275 Wis. 208, 219-220, 81 N.W.2d 533 (1957)). "[T]he legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon re-enactment." *Id.*

C. The Candidates Have Met All Statutory Requirements And Each Is Entitled To Ballot Access

In the absence of a "party affiliation" litmus test, each Candidate was required to satisfy two filing requirements in order to obtain access to the ballot – filing with GAB a declaration of candidacy and submitting sufficient nomination papers.[2] The declaration of candidacy confirms each Candidate's willingness to serve, if elected, and the nomination papers evidence that the will of the electors is to have each Candidate stand for election. Each Candidate has complied with the relevant requirements.

1. The Candidates all filed valid Declarations of Candidacy.

It is undisputed that each Candidate timely filed a declaration of candidacy. In fact, the Complainants attached a copy of each declaration to the Verified Complaint. (Compl. Ex. L.)

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[1] GAB staff provided a report to the Board regarding this proposed legislation at the Board's March 20, 2012 meeting. See March 20, 2012 Open Session Board Materials at p. 22, available at: http://gab.wi.gov/sites/default/files/event/74/march_20_2012_open_session_all_board_materials_w_18420.pdf (last visited April 16, 2012).

[2] The Verified Complaint does not challenge any other technical or procedural requirement set forth in Wis. Stat. ch. 8 that would implicate the Candidates' ballot access.

The requirements for a valid declaration of candidacy are set forth in Wis. Stat. § 8.21(2), (4) which are:

- it must contain the candidate's name;
- it must contain the candidate's current residence and municipality of residence for voting purposes; and
- it must contain statements by the candidate that he or she:
    - is a candidate for a named office;
    - meets, or will meet at the time to assume office if elected, applicable, age, citizenship, residency and voting qualification requirements;
    - will otherwise qualify for office if nominated and elected; and
    - has not been convicted of a felony for which he or she has not been pardoned.

Complainants do not allege that any of the Candidates' declarations of candidacy failed to satisfy these statutory criteria.

Arguably, with respect to candidacy for partisan office, § 8.21(2), by its specific reference to § 8.15(5)(a), also requires the candidate to identify the name of the party the candidate *seeks to represent.* Section 8.15(5)(a) does not require a statement of fidelity to any party or particular ideology. Regardless whether this is actually a statutory mandate, the Board has adopted Form GAB-162 as a form declaration of candidacy for partisan office, which includes a space for the candidate to identify the political party he or she seeks to represent. Complainants do not allege that any of the Candidates' declarations of candidacy failed to provide the requisite information to identify the party each seeks to represent.

Thus, the Board need not rely on the relaxed standard of substantial compliance to find that each Candidate satisfied the statutory requirements for filing a declaration of candidacy set forth in § 8.21 – each Candidate actually and fully complied with § 8.21.

2. The sole purpose of the declaration of candidacy is to demonstrate that the candidate is eligible and willing to serve in office, if elected.

Complainants' lone challenge to the validity of the declarations of candidacy is the baseless assertion that each Candidate must be able to demonstrate a prior allegiance to or affiliation with the Democratic Party of Wisconsin in order to declare his or her candidacy. As explained in detail in Section II, below, Wisconsin's election laws simply impose no such obligation. Furthermore, this argument is based on a complete misunderstanding of the purpose the declaration of candidacy serves.

The purpose of the declaration of candidacy is to ensure that a candidate is eligible and willing to serve in office—*i.e.*, the candidate meets all age, citizenship, residency and voting qualification requirements, and has not been convicted of a felony, etc. *See* Wis. Stat. § 8.21(2). It is not a partisan purity test. The Attorney General addressed this issue in a formal opinion authored in 1934. 23 Op. Att'y Gen. 725 (Oct. 25, 1934). There, a candidate for the office of district attorney filed nomination papers (including a declaration of candidacy) under the Republican ticket. He then lost in the Republican primary, but received the highest number of write-in votes in the Progressive primary. He did not at any time file a declaration of candidacy specific to the Progressive Party. The Attorney General concluded "[t]he declaration [required by statute] is not limited by the statute to a declaration by the candidate that he will qualify if nominated and elected *on any particular ticket.*" *Id.* at 716. Rather, "[i]t is simply a declaration that he will qualify if nominated and elected in order that the people will not be casting their ballot for one who will refuse the office and thus create a vacancy." *Id.* at 716-17; *see also* 1 Op.

Att'y Gen 238, 239 (Sept. 24, 1912)("[T]he language of [the declaration] subsection should apply to the office and not the party designation," even though a candidate filed his declaration "as a republican candidate . . . he has complied with the provisions of the act and if he received the majority of the votes cast in the democratic primary he is not barred from the privilege of having his name placed upon the official ballot . . . .") In sum, Complainants' attempt to graft a partisan purity test into the declaration requirement runs counter to the longstanding and well-established understanding of the very purpose of the declaration requirement.

3. The Candidates all filed valid nomination papers.

It is undisputed that each Candidate timely filed nomination papers. The requirements for valid nomination papers are set forth in Wis. Stat. § 8.15. As Complainants have not challenged the validity of any of the nomination papers submitted by the Candidates, it is unnecessary to outline the statutory requirements in detail. Significantly, each nomination paper is required to include the following statement[3] above each signer's signature: "I, the undersigned, request that the name of [the Candidate] . . . be placed on the ballot . . . as a candidate representing the (name of party). . . ." Wis. Stat. § 8.15(5)(a). With respect to ballot access, the collective signatures of hundreds or thousands of qualified electors on a candidate's nomination papers constitute the quintessential evidence of the "will of the electors."

Complainants do not allege that the Candidates failed to meet the requirement that each signer sign below such a statement; they simply disagree with the choices made by the thousands of qualified electors who requested that the Candidates be placed on the ballot as candidates representing the Democratic Party. This is not a valid challenge.

[3] The statutory requirement is that the statement shall have "substantially" the words set forth in the statute. Wis. Stat. § 8.15(5)(a). Complainants have not contended that any of the Candidates' forms included improper language.

D. Complainants Have Not Provided Any Evidence To Establish The Invalidity Of The Candidates' Nomination Papers

Complainants imply that certain signers may have been misled into signing one of the Candidate's nomination papers. (Compl. ¶ 32.) However, they provide no evidence of even a single signer who was so misled. For this reason alone, challenges based on this theory of misrepresentation must be rejected. Furthermore, even if Complainants could identify an individual signer who, for whatever reason, did not intend to sign one of the Candidate's nomination papers, the Board could not rely on that evidence to strike other signatures from the same nomination paper page – much less the hundreds or thousands of other presumptively valid signatures on that Candidate's nomination papers. *Stahovic*, 122 Wis. 2d at 377 (noting that a filing officer has no authority "to reject otherwise valid signatures, representing the will of the electorate, because they appear on the same page as an invalid signature").

Complainants have failed to provide any evidence – much less clear and convincing evidence – that the Candidates' nomination papers are insufficient.

E. GAB Has No Authority To Deny The Candidates Ballot Access

The legislature has cabined GAB's authority to deny ballot access, and provided that the Board may refuse a candidate ballot access only if:

- the nomination papers fail to meet the statutory requirements;
- the candidate is ineligible to be nominated or elected;
- the candidate, if elected, could not qualify for the office sought within the time allowed by law for qualification;;
- the candidate fails to timely file a registration statement (Form GAB-1 form), declaration of candidacy or statement of economic interests; or

- the candidate is a Board member or employee or retained by GAB as a special investigator or special counsel.

Wis. Stat. § 8.30. All of the Candidates have cleared these hurdles, and the Board has been presented no evidence to the contrary. Accordingly, the Board has a statutory duty to place the Candidates' names on the respective ballots.

II. WISCONSIN HAS AN OPEN PRIMARY SYSTEM

Unable to establish that any of the Candidates failed to meet the statutory requirements for ballot access, Complainants launch a frontal attack on Wisconsin's open primary system in an effort to thwart the will of the electors. The sum and substance of the Complaint is that the Candidates have not, to date, demonstrated any fidelity to the Democratic Party. The Complaint must be rejected for the simple reason that for at least the last century, Wisconsin has imposed no such requirement as a condition to candidacy in a partisan primary.

A. Wisconsin Has A Rich History Of Candidates Appearing On "Another Party's" Ballot

Since Wisconsin adopted the direct open primary system in 1903, the *candidate*, and not the party leadership, selects the party from which he or she would like to seek the nomination. To be sure, the law has never required a citizen or a candidate to be "monogamous" to a single party. Quite the opposite, the law in this state has always understood its candidates to be free to join and leave parties on a whim, and, indeed free to affiliate with multiple parties at the same time (with the caveat that a candidate can only appear on one party's primary in a given election). Wisconsin's election laws have always included specific procedures in the event multiple parties seek to nominate the same candidate. Laws of Wis. Ch. 451, § 12.2 (1903) (stating that when multiple parties nominate a candidate the candidate gets to determine which ticket to run on); *see also* Wis. Stat. § 8.03. These procedures would be rendered surplusage if

Wisconsin's election laws require candidates to pledge unwavering fidelity to a party as a precondition to candidacy.

The direct primary system was the crowning achievement of Governor Robert La Follette, Senior, who himself ran for President on the Progressive ticket *while maintaining his seat in the United States Senate as a Republican.* The "Elasticity" of the La Follette Movement, Baltimore Sun, Nov. 18, 1924, at 12 ("One of the quixotic features of the unstable third party movement in the United States is the fact that Senator Robert M. La Follette, its late candidate for the Presidency, expects to retain his status in the Senate as a Republican . . . ."). Because La Follette was the architect of the modern Wisconsin primary, La Follette and his followers' own conduct is the best available evidence of the intent of the drafters – which is relevant if, for whatever reason, the Board believes that after a century of consistent application, Wis. Stat. ch. 8 is ambiguous on this point. *See Labor & Farm Party v. Elections Bd.*, 117 Wis. 2d 351, 355, 344 N.W.2d 177 (1984) (noting that the object of statutory construction is to determine the intent of the drafters and that "reference may be made to the history of the statute and other matters beyond the statutory language to determine its purpose and effect"). The drafters of the modern primary system did not intend to restrict candidates from switching parties or even from "affiliating" with multiple parties at the same time. Under Complainants novel legal theory, however, Fighting Bob La Follette himself would have been a "fraud" and a "felon."

B. Wisconsin's Election Laws Have Been Consistently Interpreted As Giving Candidates Control Over Their Candidacy

Complainants miss the entire point when they bemoan the lack of control that the party bosses have over which candidates seek election in the Democratic primary. As explained in Section I.B., above, the Wisconsin State Attorney General has acknowledged that nothing in Wisconsin law prohibits a lifelong supporter of one political party from running as a candidate

representing a different party. 7 Op. Att'y Gen. 542 (Sept. 20, 1918). This result is no accident; the sole purpose of the direct primary system was to decentralize candidate selection, wresting control from party bosses.

In the words of Bob La Follette, the direct primary was intended to reflect "the honest judgment of a large constituency [as opposed to] a machine-made convention majority which expresses the will of only a small coterie of political bosses." Milwaukee Free Press, October 1, 1902 (as quoted in Allen Fraser Lovejoy, La Follette and the Establishment of the Direct Primary in Wisconsin 1890-1904, 72 (Yale Press 1941)). The Seventh Circuit Court of Appeals agrees. *Swamp v. Kennedy*, 950 F.2d 383, 387-88 (7th Cir. 1992) (Fairchild concurring) (noting that under Wisconsin law, "a person is not prohibited from being a candidate in the primary of one party even if he has voted in, or been the candidate of, another party at an earlier election"). The *electors* determine which candidate "represents" which party. Wis. Stat. § 8.16(1). The party bosses are free to publicly endorse any candidates that they choose, but the party bosses lost their position as the gatekeepers of who gets access to the primary ballot over a century ago.

As yet further evidence that candidates are free to join and leave parties at will, the Wisconsin Attorney General has rendered at least three opinions that a candidate can switch parties *in the midst of a campaign*. *See* 1 Op. Att'y Gen 238, ; 23 Op. Att'y Gen. 643; 23 Op. Att'y Gen. 725. In all three cases, the candidate in question lost the primary for the party that he originally selected, but won as a write-in for a different party. Accordingly, the candidates switched parties between the primary and the general election. In two of the three races, the Attorney General advised that the candidate should appear on the ballot in the general election as

the chosen candidate of the party that nominated him by write-in, notwithstanding his candidacy in the primary for the opposing party.[4]

UW-Madison Professor Leon Epstein, in his time the preeminent scholar of political party systems, summed up the Wisconsin primary system as follows:

> [T]he Wisconsin voter can be a Republican at a September primary, a Democrat at the following November general election, and then a Republican again at the primary two years later.
>
> . . . The institution of the open primary in Wisconsin dates from 1906, and by now the political habits associated with it are deeply fixed. To many Wisconsin citizens, it would seem undemocratic to be asked to identify publically with a party as a prerequisite for primary voting, and to restrict oneself in advance to a given party's ballot would seem a foolish deprivation of the opportunity to vote for (or against) an important personality on another ticket. In particular, voters in Wisconsin are accustomed to taking a hand in county-level primaries of the local majority party even though they may be attached to another party at the state and national levels.
>
> . . . ***Nor, looked at from another point of view, is there any legal way to prevent a Democrat, for instance, from becoming a candidate in a Republican primary.*** Not only would he get his name on the ballot, but there would be no indication on the ballot of his Democratic connection.

Leon D. Epstein, Politics in Wisconsin 24-25 (1958) (emphasis added). In Wisconsin, a candidate like Ms. Huber is whoever *she* says she is. Moreover, the electors have the first and last word in telling the party bosses who their candidate will be, not the other way around.

C. In Light of This History, The Allegations Of "Election Fraud" Are Completely Baseless

It is clear from the foregoing that neither Republican Party of Wisconsin nor any of the Candidates has committed election fraud or otherwise violated Wis. Stat. ch. 12. However, even

[4] In the third case, the Attorney General determined that the candidate was entitled to be placed on the ballot, but stated that the candidate should appear in the independent column because he did not receive 10% of the primary votes, 1 Op. Att'y Gen 238, 239

if an argument could be made that filing declarations of candidacy and registration statements as candidates have done for over a century constitutes election fraud, the State would be precluded from prosecuting such violations in this instance.[5]

Citizens are entitled to "fair notice" of criminal statutes, and the Rule of Lenity typically prohibits "a new application of an old law." *United States v. Gradwell*, 243 U.S. 476, 486 (1917) (upholding dismissal of indictments for fraud against the government against defendants alleged to have, through bribery, "conspire[ed]to defraud the United States in the matter of its governmental right to have a candidate of the true choice and preference of the Republican and Democratic parties nominated for said office and one of them elected"). In Wisconsin, the Rule of Lenity applies "[w]hen a criminal statute is ambiguous and is not clarified by resort to legislative history." *State v. Morris*, 108 Wis. 2d 282, 322 N.W.2d 264, 267 (1982)(Abrahamson, J.)

Here, Wis. Stat. § 12.13(a) has been in force since 1973, and similar predecessor laws were in force decades before that. There have been no known prosecutions based upon a supposed "false" statement of party affiliation on a declaration of candidacy. As noted above, the purpose of the declaration of candidacy is to ensure that a candidate is eligible to serve in office—*i.e.*, the candidate meets the age, citizenship, residency and voting qualification requirements, and has not been convicted of a felony. *See* Wis. Stat. § 8.21(2). Nothing in the legislative history suggests that the declaration of candidacy was intended as a partisan "purity test." Accordingly, the State would violate the Candidates' right to fair notice of criminal

[5] As explained herein, Complainants' allegations of election fraud are completely baseless. However, if the Board or its Director determines that the Complaint does state probable cause for an investigation into potential violations of Wis. Stat. ch. 12, Republican Party of Wisconsin specifically reserves its right to provide a complete written response to the related allegations in the Complaint pursuant to GAB 20.04(1).

sanctions to apply Wis. Stat. § 12.13(a) in the novel and creative way suggested by Complainants.

Furthermore, the Attorney General has expressly determined, and published an opinion stating, that it is legal for a member of one party to run as a candidate in a different party's primary. 7 Op. Att'y Gen. 542 (Sept. 20, 1918). To that end, GAB staff has repeatedly stated that there is no lawful impediment to the Candidates seeking ballot access in precisely the manner they have in this instance. Kevin Kennedy, GAB's Executive Director and General Counsel has publicly stated that so-called "protest" candidacies are legal: "It really doesn't violate a law when you think about the fact that its all part of the political campaign. . . . We don't register voters by party; parties really don't have any control who runs under their ticket." Upfront with Mike Gousha, WISN-12 (June 12, 2011)(available at http://www.wisn.com/politics/28233682/detail.html). The Board's public information officer, Mr. Reid Magney, echoed this conclusion, noting that "as a candidate, you are what you say you are, and it's up to the voters to determine whether you get to represent the party." Dane101 "Total Recall" Blog, posted by Jesse Russell, Apr. 13, 2012 (available at http://www.dane101.com/current/2012/04/13/total_recall_zombie_candidates_ready_to_rise_on_may_8, last visited April 14, 2012).

Having already advised the public that the Candidates' filings are legal, the State would be prohibited under the doctrine of equitable estoppel from prosecuting the Candidates or Republican Party of Wisconsin. *Libby, McNeill & Libby v. Wisconsin Dept. of Taxation*, 260 Wis. 551, 560-61, 51 N.W.2d 796 (1952). Citizens are entitled to rely upon the conduct and representations made by governmental agencies. *Id.*

III. THE BOARD HAS NO AUTHORITY TO CREATE OUT OF WHOLE CLOTH A "PARTY PURITY" REQUIREMENT

A. Creating A "Party Purity" Test Would Be *Ultra Vires* Action By The Board

What the Complainants truly seek is for the Board to create and apply a wholly new prerequisite to candidacy that the legislature has never imposed. Indeed, the remedy Complainants seek would require the Board to take action that is directly contrary to the nomination procedures established by the legislature and set forth in Wis. Stat. ch. 8. This the Board may not do.

The Government Accountability Board is without authority to amend the clear mandate of §§ 8.15, 8.21 & 8.30, and may only amend or repeal the challenge procedures set forth in Wis. Admin. Code ch. GAB 2 through formal rulemaking. Administrative agencies are charged with the implementation of statutes duly enacted by the legislature. *See Plain v. Harder*, 268 Wis. 507, 512, 68 N.W.2d 47 (1955). However, there are clear limitations on the scope of an agency's power to implement and interpret legislation. *See State ex rel. Castaneda v. Welch*, 2007 WI 103, ¶ 26, 303 Wis. 2d 570, 735 N.W.2d 131. The power of a state agency is strictly limited to power conferred upon it by the legislature through an enabling statute. *Id.* An agency's enabling statute is strictly construed, and "'any reasonable doubt pertaining to an agency's implied powers'" must be resolved against the agency. *Id.* (citing *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶14, 270 Wis. 2d 318, 677 N.W.2d 612).

While an agency has the power to interpret legislative enactments, it may not do so where legislative intent is clearly stated in the statute. *Basic Products Corp. v. Wisconsin Dept. of Taxation*, 19 Wis. 2d 183, 186, 120 N.W.2d 161 (1963); *Plain*, 268 Wis. at 511 (holding that an agency's rulemaking power "does not extend beyond the power to carry into effect the purpose as expressed in the enactment of the legislature").

While reviewing courts often afford some degree of deference to an agency's interpretation of a statute, such deference is not afforded where an interpretation directly contravenes the words of the statute or is clearly contrary to the intent of the legislature. *Lisney v. Labor & Indus. Review Comm'n*, 171 Wis. 2d 499, 506, 493 N.W.2d 14 (1992); *Volvo Trucks North America v. State of Wisconsin Dept. of Transportation*, 2010 WI 15, ¶ 18, 323 Wis. 2d 294, 779 N.W.2d 423 (holding that an agency's interpretation and application of a statute may be upheld "if it is not contrary to the clear meaning of the statute") (citation omitted); *Mallo v. Wisconsin Dept. of Revenue*, 202 WI 70, ¶ 16, 253 Wis. 2d 391, 645 N.W.2d 85 (holding that a reviewing court's first duty is to the legislature and, as such, a court will not "uphold a rule that is contrary to the language of the statute").

Further, it is clear that "[a]n agency cannot promulgate a rule inconsistent with an unambiguous statute." *Oneida County v. Converse*, 180 Wis. 2d 120, 125, 508 N.W.2d 416 (1993); *Mallo*, 2002 WI 70, ¶ 15 (holding that "[n]o agency may promulgate a rule which conflicts with state law") (citations omitted). In fact, the Wisconsin Supreme Court has held that "a rule out of harmony with the statute is a mere nullity." *Plain*, 268 Wis. at 511 (citations omitted).

It follows that an agency's method of practice or interpretation that ignores the plain language of a statute cannot stand. Otherwise, the agency would be permitted to amend the statute, not construe it. *State ex rel. Stearns v. Zimmerman*, 257 Wis. 443, 446, 43 N.W.2d 681 (1950). This is particular relevant where, as here, the legislature recently considered and rejected a statutory amendment that would have compelled the result Complainants seek.

In the legislative session that concluded last month, the legislature considered adding to Wis. Stat. § 8.21(2)(d) a requirement that the declaration of candidacy for any candidate "who seeks to appear on the ballot of a recognized political party" include a statement that the

candidate "adheres to the principles of that party." 2011 S.B. 340 (Dec. 19, 2011) (see Exhibit 2, attached). Given the timing of the proposal, it is a near certainty that the legislature considered this amendment in response to the 2011 senate recall elections and in anticipation of the filing of the recall petitions that were then being circulated, and which paved the way for the candidacies at issue in this matter. The proposed amendment was rejected. See 2012-03-22 Senate Journal (S.B. 340 "adversely disposed of pursuant to Senate Joint Resolution 1"). Complainants now seek to achieve through GAB the result they were unable to achieve through the legislature.

Ultimately, "[t]he interests of the electors are served by a strict compliance" with the language of a statute where that language evinces a clear legislative intent. *State ex rel. McIntyre v. Bd. of Election Commissioners of the City of Milwaukee*, 273 Wis. 395, 402, 78 N.W.2d 752 (1956).

Here, to deny ballot access to the Candidates who have all declared their candidacies and been duly nominated by qualified electors in compliance with the plain language of Wis. Stat. ch. 8 would be tantamount to amending, rather than interpreting, the statute. *See State ex rel. Stearns*, 257 Wis. at 446. The Candidates all met the statutory requirements and are entitled to ballot access.

B. A "Party Purity" Test Would Violate the Candidates' First Amendment Rights.

The Board has no authority to deny the Candidates ballot access simply because the agency does not believe they are sufficiently "affiliated with" the Democratic Party. As an initial matter, as described in detail above, affiliation is not even a prerequisite to candidacy in Wisconsin's open primary system. Furthermore, there is no meaningful standard by which GAB could test the strength of such an affiliation.

Most significantly, however, an individual's statement of party affiliation is afforded the highest level of protection under the First Amendment. *Siefert v. Alexander*, 608 F.3d 974, 981 (7th Cir. 2010). Towards that end, "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 889 (2010). Such laws impermissibly chill political speech.

In this case, it would be unconstitutional to require a candidate, as a precondition to declaring his or her candidacy under Wisconsin's open primary system, to conduct "demographic marketing research" to determine what a critical mass of self-identifying Democrats believe about the issues facing our state. Indeed, it would be a fool's errand to try to determine what a "critical mass" is. Further, Wisconsin frequently has candidates that campaign on a single issue. Complainants' attack would cripple these candidacies by requiring candidates to toe whatever the political bosses define as "the party line" or risk being denied access to the ballot because party leadership decides that they are not sufficiently "affiliated" with the party.

Regrettably, Complainants' attack would slam the door on political outsiders attempting to persuade the electorate to adopt new viewpoints. Bob La Follette is the perfect example of a political outsider reshaping what a party stands for through persuasion, and nothing prevents politicians from moving between parties in an attempt to exert influence. There are numerous

other examples throughout both the state's and nation's relatively short history.[6] In sum, politics are fluid, not static. Complainants' arguments, if accepted, would require candidates to seek pre-approval from party leadership before announcing any candidacy for partisan office. Wisconsin does not require such pre-approval and the First Amendment precludes the Board from looking beyond the Candidates' Declarations of Candidacy to determine party "affiliation."

Complainants seem to suggest that this case is "different" because, they argue, the challenged Candidates do not actually want the Democratic Party, as defined by its political bosses, to succeed. Even assuming for the sake of argument that this is true, it is irrelevant. The First Amendment does not permit the State to inquire into the private motives and intentions of those exercising constitutionally protected political speech. Election laws restricting political speech cannot be based upon a "speaker's intent to affect an election." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007); *Buckley v. Valeo*, 424 U. S. 1, 14, 43-44 (1976); *Wisconsin Judicial Comm'n v. Gableman (In re Gableman)*, 2010 WI 62, ¶ 21, 325 Wis.2d 631, 784 N.W.2d 631. In this case, each Candidate has expressed his or her willingness to serve, if elected, as a representative of the Democratic Party. It may be that such service would include efforts to move the Party to more moderate or conservative stances. There is nothing impermissible or nefarious about this. Accordingly, the Board could not grant

[6] In addition to Bob La Follette's run for President as a Progressive Party candidate while remaining a Republican in the U.S. Senate, his son, Robert La Follette, Jr., won his fathers U.S. Senate seat as a Republican, was re-elected as a Republican, subsequently joined the Progressive Party while in office, and then later returned to the Republican party. Governor Lee Sherman Dreyfus, was a political independent until months before he ran for governor as a Republican. In the 1980 vice-presidential election, former Democratic Governor Patrick Lucey ran as an independent against Walter Mondale. (Governor Lucey's running mate, John Anderson, was an Illinois Republican that mounted an independent campaign after losing to Ronald Reagan in the Republican primary.) In recent years, Assemblyman Bob Ziegelbauer switched from Democrat to independent and Assemblyman Jeff Wood switched from Republican to independent. At the national level Arlen Specter, Joseph Lieberman, Jim Jeffords, Norm Coleman, Gary Johnson, Bob Barr, and Charlie Crist, among many others, have switched party affiliation. Some of the individuals have switched due to ideological differences with their former party, others have switched due to the perception that it presented more opportunities for their political careers.

Complainants the relief they seek without violating the Candidates' fundamental First Amendment rights.

The reality is that what the Candidates have done in this instance has been recognized as valid for nearly a century. In 1918, the Wisconsin Attorney General unequivocally concluded candidates are free to declare their candidacy for the party of their choosing, regardless of past allegiance or affiliation. More recently, the Seventh Circuit Court of Appeals acknowledged the open nature of Wisconsin's nomination process. Of course, this very Board certified recall election candidates under similar circumstances last year.[7]

CONCLUSION

For the reasons set forth above, the Republican Party of Wisconsin respectfully requests GAB dismiss the Verified Complaint and include each of the Candidates on the respective ballots for which they have been nominated.

Dated this 16th day of April, 2012.

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[7] In fact, in an overreaching effort to paint a picture of fraud and abuse, Complainants make various factual assertions in this proceeding that relate to prior elections and have no bearing on the nomination papers presently before the Board.

EXHIBIT 1

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the Meeting of June 27, 2011

TO: Members, Wisconsin Government Accountability Board

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

Prepared and Presented by:
Shane Falk and Michael Haas, Staff Counsels

SUBJECT: Recall Nomination Paper Challenge Procedure

June 21, 2011 was the deadline for filing nomination papers for offices to be elected in the July 19, 2011 Recall Elections for Senate Districts 12, 22, and 30. Invariably, after nomination papers are filed, challenges to those nomination papers are filed. The Board's members will be asked to rule on those challenges at the June 27, 2011 meeting. The challenge complaints received by the Friday, June 24, 2011 deadline were made available to the Board in advance of the Board meeting. To refresh Board members' familiarity with the challenge procedure, the following review is provided.

I. PROCEDURE

1. June 21, 2011 - Nomination papers must be filed not later than 5:00 p.m., (s.9.10, Stats.), for all nominations for the recall elections ordered for July 19, 2011.

2. June 24, 2011 - Challenges to nomination papers must be filed not later than 4:30 p.m. (Rule GAB 2.07). A copy of the complaint will be delivered by the Board's staff to the candidate whose papers are being challenged.

   a. Challenges must be made by verified complaint and must establish probable cause to believe that the paper or signature challenged does not comply with Wisconsin Statutes or the rules of the Government Accountability Board. (See annotation below.)

   b. The challenge should be accompanied by affidavits or other relevant documentation. Any challenge which is not established by the materials submitted as of the deadline for challenge is denied.

3. June 27, 2011 (Monday) - If received not later than 8:00 a.m., a written response to the challenge, (that will be photocopied or emailed for Board members for the June 27, 2011 meeting), may be filed by the candidate. A written response should also be verified and should also be accompanied by affidavits or other documentation. Just as the burden of establishing a challenge is upon the challenger, the burden of rebutting an established challenge is upon the candidate whose papers are challenged.

4. June 24 – 27, 2011 - The Board's staff will try to prepare a written report on the challenges and any available responses. To whatever extent possible, the Board's staff will contact circulators, affiants, and other persons with personal knowledge of the circumstances under which the signatures were obtained. Given the time frame involved, staff verification will probably be limited to close cases.

5. June 27, 2011 - The Board will meet to consider the challenges and responses, and hear any oral presentation. Attached is a copy of the relevant provisions of ch.8 of the Statutes governing nomination papers and nominations. Also attached are the Board's rules, GAB 2.05 and 2.07, governing treatment and sufficiency of nomination papers and challenges thereto.

   Please note: Because challenge proceedings are an administrative proceeding subject to statutory administrative procedures and potential court review, Board staff recommends that any challenge proceedings be handled on a case-by-case basis. In other words, rather than having the Board entertain public comments on all cases before considering staff recommendations, staff recommends that the Board Chair announce each file, request any public comments regarding that matter, consider the staff recommendation, and then vote on each case prior to calling the next file. This procedure would help the Board to recall the facts of each case and the public comments at the time of the Board's decision, and to create a concise record for any potential court review of a particular decision.

II. ANNOTATION

As a general rule, the policy of the former Elections Board and of the Government Accountability Board with respect to the nomination process has been to help or facilitate candidate ballot access, not to find a justification for impeding that access, and the challenge procedure was applied in that spirit. As much as possible, the selection and elimination of candidates should be left to the electorate.

To be considered by the Board, a challenge complaint must establish probable cause to believe that a violation of election law has occurred. A complaint must allege facts which, if true, would constitute a failure to comply with Wisconsin's election (not campaign finance) statutes. The complaint must allege a violation of ch.8, Stats., the statutory chapter governing nominations to the general election ballot. The statutory standard for compliance is "substantial compliance" as set forth in §.5.01(1), Stats., as follows:

> ***5.01 Scope.*** *(1) CONSTRUCTION OF CHS. 5 TO 12. 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.*

The Board's administrative rule, GAB 2.05, sets forth the standards for determining whether nomination papers comply with ch.8, Stats. And its rule, GAB 2.07, sets forth the bases and procedure for challenges to those papers. Note that GAB 2.05(4) provides that "Any information on a nomination paper is entitled to a presumption of validity." Consequently, any challenge to that information must rebut that presumption, (under §.903.01, Stats.), by clear and convincing evidence that "the nonexistence of the presumed fact is more probable than its existence."

Challenges must be based on the personal knowledge of the complainant or of a person whose affidavit or sworn statement accompanies the challenge. As an example: a challenge to the eligibility to sign of various signers of a nomination paper, based on non-residency of those signers, must be accompanied by reference to Voter Public Access or "Who is My Legislator?" web searches, a map of the district showing their address to be outside the district, or by a signed statement from the election official, (municipal clerk or deputy clerk), whose responsibility it is to determine the residency of electors of the district. The complainant challenger's allegation of the signers' non-residency, without these references, is not sufficient to sustain the challenger's burden of proof.

Challengers will be informed that new grounds for a challenge which are not raised in an initial complaint and which are raised after 4:30 p.m., Friday, June 24, 2011, will not be considered by the Board.

Challenge complaints are filed by delivering an original and a copy to the Government Accountability Board at its offices, pursuant to GAB 2.07, and by the Board's staff delivering a copy to the respondent whose nomination papers are being challenged.

III. CORRECTIONS TO NOMINATION PAPERS

Historically, the former Elections Board and this Board have recognized that some deficiencies in nomination papers, (or other petitions, for that matter), may be corrected by way of an affidavit from the circulator of the nomination paper (or petition). This is true whether the deficiencies were identified by staff review of the nomination paper or were identified by a challenge complaint. Consequently, signatures, which have been disallowed by the staff in its initial review of a nomination paper, have been "rehabilitated" by a correcting affidavit submitted after the deadline for filing nomination papers. Because of the potential for correction of nomination paper deficiencies, challengers have been advised to **not** assume that nomination papers, or some of the signatures on them, that have been disallowed as a result of staff review are forever barred, (i.e., do not need to be challenged). Any challenges to signatures disallowed (tentatively) by staff review also must be raised not later than 4:30 p.m., Friday, June 24, 2011, whether or not those papers or signatures have been corrected as of that time.

The basis for this application of the law is the distinction drawn by the courts between statutory requirements that are "mandatory" – the standard for compliance with which is strict, and those that are "directory" – the standard for compliance with which is substantial.

Errors that may be corrected:

a.) Elector errors:

i. The elector wrote in a date other than the one on which he/she signed or left line undated

ii. The elector used an address, which does not reflect his actual residence

iii. The elector wrote in a municipality which does not reflect his actual residence

b.) Certificate of Circulator errors:

The circulator failed to sign or otherwise complete the certificate, or entered inadvertently erroneous data (for instance: the circulator dated the certificate before circulation, not after).

Errors that may not be corrected:

a.) Signatures may not be added or replaced after the filing deadline nor after the certificate of circulator has been executed. (However, the date of certification may be corrected.)

b.) None of the information in the heading of the nomination paper, (i.e., candidate's name, candidate's address, political party represented, date of election, office sought, name of jurisdiction or district in which candidate seeks office), may be altered, amended, or added after circulation of the nomination paper. This is the nomination information that each signatory saw and relied upon in deciding to sign the paper.

c.) The date of signing may not be changed to a date other than the one on which the signatory actually signed; nor may any other signatory information be changed from that which was correct at the time the signatory signed.

Attachments: GAB 2.05, 2.07 Wis. Adm. Code
Sections. 8.15, 8.21, 8.30 Wis. Stats.

EXHIBIT 2

State of Wisconsin
2011 - 2012 LEGISLATURE

LRB-2881/2
JTK:kjf:jf

2011 SENATE BILL 340

December 19, 2011 - Introduced by Senators S. COGGS, HANSEN and TAYLOR, cosponsored by Representatives GRIGSBY, BERCEAU, BEWLEY, HULSEY and SINICKI. Referred to Committee on Transportation and Elections.

AN ACT ***to amend*** 9.10 (3) (c); and ***to create*** 8.21 (2) (d) of the statutes; **relating to:** requirements for candidates to appear on the ballot of a recognized political party.

Analysis by the Legislative Reference Bureau

Currently, any individual who seeks to have his or her name appear on the ballot at an election, including a recall election, must file a declaration of candidacy stating the candidate's name and affirming the fact that the signer is a candidate for a named office, and that the signer meets all of the necessary qualifications to hold the office and will qualify for the office if nominated and elected.

This bill provides, in addition, that if the individual seeks to appear on the ballot of a political party that has qualified for a separate ballot or a separate column or row on the ballot in partisan elections, the signer must state that he or she adheres to the principles of the party under which the signer's name will appear on the ballot.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 8.21 (2) (d) of the statutes is created to read:

8.21 **(2)** (d) In the case of a candidate who seeks to appear on the ballot of a recognized political party, that the signer adheres to the principles of that party.

SECTION 2. 9.10 (3) (c) of the statutes is amended to read:

9.10 **(3)** (c) The official against whom the recall petition is filed shall be a candidate at the recall election without nomination unless the official resigns within 10 days after the original filing of the petition. Candidates for the office may be nominated under the usual procedure of nomination for a special election by filing nomination papers together with a declaration of candidacy not later than 5 p.m. on the 4th Tuesday preceding the election and have their names placed on the ballot at the recall election.

SECTION 3. Initial applicability.

(1) This act first applies with respect to elections for which declarations of candidacy are due for filing on or after the effective date of this subsection.

(END)