

**STATE OF WISCONSIN
BEFORE THE GOVERNMENT ACCOUNTABILITY BOARD**

IN RE PETITION
TO RECALL SENATOR DAVE HANSEN
OF THE 30th SENATE DISTRICT

AMICUS BRIEF OF KENNEDY ENTERPRISES, LLC

COMES NOW Kennedy Enterprises, LLC (“Kennedy”), by and through counsel Graves Bartle Marcus & Garrett LLC, and as friend of the Government Accountability Board, states as follows:

Introduction

On page one of his initial brief, Senator Dave Hansen gets right to the point. Employing an increasingly common tactic in petition litigation, he defames the “other side’s” signature-gatherers. The story is all too predictable. An officeholder’s opponents have hired someone who, ominously, comes from “out of state.” Worse, the out-of-staters are gathering signatures for “profit.” Finally, a Google search uncovers a few old press releases and blog posts from the circulators’ previous opponents, and without further inquiry, these are happily cited to “prove” the circulators’ long and dark history of defrauding unsuspecting citizens.

While such tales fire up the legislator’s supporters and create content for friendly blogs or local newspapers, they seriously undermine the petition process by skewing public perceptions and—occasionally—causing an agency or court to throw out even valid signatures. The targeted legislator’s political consultants tell him that this is a home run—and it is. What they do not tell him is that it is a net loss for voters and for our democracy.

When someone like Senator Hansen makes sweeping allegations of fraud, local proponents who hired a professional circulation firm understandably focus their efforts on ensuring the success of their own petition. But that is not the only interest at stake in a petition challenge. As Senator Hansen points out, the Government Accountability Board is tasked not just to resolve a dispute between the petition’s supporters and opponents; it must protect the process as a whole. It must ensure that Wisconsin’s voters will continue to enjoy the privilege—one enjoyed by citizens in just over half of the states—of a robust and open petition process.

Reckless and intemperate allegations of fraud, coupled with naked hostility to citizens of Wisconsin’s sister states who visit to engage in political speech with their fellow citizens, are transparent efforts to silence the “voices available” to Senator Hansen’s opponents “to convey political messages.” *Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir. 2000) (invalidating district-residency requirement for circulators) (quoting *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 210 (1999) (Thomas, J., concurring)). In a climate where Wisconsin citizens have leveled death threats against their own state legislators and their families, unmeasured allegations of fraud and criminal conduct against “dangerous” outsiders should not be allowed to chill the signature-gathering process by intimidating petition proponents or the associates that serve as their political voices. See *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2821, 177 L. Ed. 2d 493 (2010) (as-applied challenges can be mounted to compelled disclosure of petition signers’ names if there is “a reasonable probability” that disclosure “will subject them to threats, harassment, or reprisals from either Government officials or private parties”).

For this reason, Senator Hansen’s crude caricature of Kennedy Enterprises should play no role in the Board’s signature review. Wisconsin voters deserve a review process untainted by *ad hominem* attacks, unconstitutional bias against other states’ citizens, and false claims of fraud.

I. Kennedy Enterprises Has a Long and Successful History as a Petition Firm

Kennedy Enterprises, LLC, was founded in 1994 by Dan Kennedy.¹ Since that time, Kennedy's circulators have met with perhaps tens of millions Americans to discuss important public policy issues.² After weighing the issues, millions of citizens have signed the petitions of Kennedy's clients.³ Millions of citizens have not. Whether citizens agree to sign a petition or not, the United States Supreme Court recognizes all of this activity as "core political speech," the lifeblood of our democracy. *Meyer v. Grant*, 486 U.S. 414, 422 (1988) (striking down Colorado's ban on payments to petition circulators).

Kennedy is proud to have made a material contribution to this relatively recent expansion of democracy in the states. Among a handful of truly national signature collection firms, Kennedy has brought its experience to 16 states that recognize some form of direct democracy.⁴ Kennedy has gained substantial experience in dealing with a variety of challenges, including short signature-gathering periods, "blocking" campaigns mounted by opponents, and gross exaggerations about the company and its circulators.⁵ But in perhaps fifty million interactions between Kennedy circulators and voters over a 17-year period,⁶ there have been very few allegations of wrongdoing.

II. Senator Hansen's Challenge Makes False and Reckless Claims About Kennedy Enterprises' Record in an Attempt to Create "Circumstantial" Evidence in Wisconsin

On the first two pages of his challenge, Senator Hansen claims that Kennedy is "notorious" and promises that his attached "Exhibit 2" "document[s] misconduct and

¹ See Daniel Kennedy Affidavit, ¶ 3.

² *Id.*, ¶ 6.

³ *Id.*

⁴ *Id.*, ¶ 4.

⁵ *Id.*, ¶ 5.

⁶ *Id.*, ¶ 6.

controversy generated by Kennedy Enterprises' activities."⁷ But even a cursory review of Senator Hansen's attached exhibit, coupled with publicly-available press reports, shows that Senator Hansen has grossly misrepresented the record. As discussed below, each disembodied quotation has been traced through to the cited source. There have been no findings "documenting" that Kennedy committed "misconduct," and any *allegations* against Kennedy in other states were ultimately rejected as baseless.⁸

a. A Formal Complaint Alleging that Two Kennedy Clients Violated Their Tax Status and Failed to Register as an Issue Committee Has Nothing to Do With Kennedy Enterprises' Conduct or the Issue of Signature Fraud

Unnumbered page 5 of Exhibit 2 attempts to tar Kennedy with wrongdoing because of allegations against the sponsor of a petition drive, a Colorado non-profit named Active Citizens Together ("ACT"). The only formal complaint, filed in 2010, alleges that ACT violated state law *by not registering as an issue committee*.⁹ Obviously, this allegation has nothing to do with Dan Kennedy or Kennedy Enterprises, who served only as a vendor hired by ACT to collect signatures.¹⁰ The allegation relates to a campaign finance (and possibly tax) violation, and has nothing to do with signature or petition fraud. The suggestion that GAB should even consider such an allegation in deciding on the validity of Wisconsin signatures is ridiculous.

b. The Implication That Kennedy Enterprises was In Any Way Involved With Potential Fraudulent Activities by a Contractor of Silver Bullet, LLC, During

⁷ See Exhibit 2 of the Democratic Party's Challenge Consolidated Exhibits. Exhibit 2 boldly claims that "Dan Kennedy...[has] a history of election fraud using paid circulators that [sic] intentionally mislead voters." As discussed below, this reckless statement is objectively false.

⁸ Counsel's false representations to the contrary in this proceeding may or may not be protected by judicial or administrative privilege, but any person repeating false allegations about Kennedy in the media is subject to liability in tort.

⁹ John Schroyer, *Bruce a No-Show at Campaign Finance Hearing*, Colorado Springs Gazette (Dec. 12, 2010).

¹⁰ See Kennedy Affidavit, ¶ 9.a.

the 2010 Colorado Ballot-Access Campaign for Gubernatorial Candidate Joe Gschwendtner Is Entirely Without Merit

In 2010, allegations arose that the campaign of Colorado gubernatorial candidate Joe Gschwendtner had been the victim of fraudulent, and potentially criminal, activities by a contractor of the petition-gathering firm Silver Bullet, LLC.¹¹ See Exhibit 2, unnumbered page 4. During the final days of the signature-gathering process, in order to petition onto the primary ballot, Gschwendtner determined that his campaign needed a second firm to gather signatures. As a result, the campaign contracted with Kennedy Enterprises to help aid in its effort to petition onto the ballot.¹²

Kennedy Enterprises was not a contractor of Silver Bullet, LLC; instead, as even the cited article in Exhibit 2 discloses, Kennedy Enterprises contracted directly with the Gschwendtner campaign.¹³ There is no evidence whatsoever that Kennedy is connected to any criminal behavior or fraudulent activities surrounding Silver Bullet's contractor, nor is there even an "allegation" against Kennedy. Again, Senator Hansen's representation that Exhibit 2 somehow contains evidence of Kennedy's "misconduct" —let alone "documented" misconduct—is blatantly false.

c. The Lawsuit Filed by Jess Knox of Protect Colorado's Future Following the Petition Drive to Add Amendment 47 to the 2008 Ballot in Colorado Was Dismissed on All Counts

Senator Hansen cites only the *allegations* against Kennedy Enterprises arising from a successful petition drive in 2008, neglecting to mention that the lawsuit was dismissed on all

¹¹ Lynn Bartels, *Failed Name-Gathering; Fraud Alleged in Work By Firm*, Denver Post (June 19, 2010).

¹² See Kennedy Affidavit, ¶ 9.b.

¹³ *Id.*

counts. *See* Exhibit 2, unnumbered pages 1, 2.¹⁴ In 2008, Kennedy Enterprises was contracted to gather a sufficient amount of signatures in order to add Amendment 47 to the fall ballot in Colorado. Following the successful petition drive and certification of Amendment 47 to the ballot, Jess Knox of Protect Colorado’s Future filed a lawsuit alleging 29 violations of Colorado law by Kennedy Enterprises and another signature-gathering company.¹⁵ The lawsuit contained allegations that signature gatherers had evaded residency requirements, deceived voters, submitted duplicate signatures and used phony notaries in their efforts to obtain enough signatures to get the amendment certified on the 2008 ballot.¹⁶

Each and every one of the 29 counts was dismissed by Denver District Court Judge Christina Habas.¹⁷ In addition to finding the lawsuit to be frivolous, the ruling stated that the court was without the jurisdiction to alter a secretary of state’s certificate of sufficiency. Senator Hansen’s Exhibit 2—repeating a disturbing pattern—only mentions the lawsuit’s allegations without informing this Board that the lawsuit was dismissed or found to be frivolous. Again, Senator Hansen has failed to deliver on his promise to attach “documentation” of Kennedy’s prior misconduct.

d. The Protests Filed in the Recall Election of Two Colorado Springs School District 11 Board Members Were Found Not Only to Be Unsubstantiated, But Kennedy Enterprises Was Not Even Contractually Involved in the Petition Drive

Senator Hansen also cites several Colorado articles repeating allegations about circulators in a Colorado Springs School District recall drive in 2006. *See* Exhibit 2, unnumbered pages 2,

¹⁴ The allegations on page 1 of Exhibit 2 are simply pasted from a partisan Colorado blog, styled as the Colorado Independent, which in turn cites allegations raised in a Jess Knox lawsuit—discussed on page 2, footnote 3, of Exhibit 2—which was later dismissed as frivolous.

¹⁵ Chris Bragg, *Right-to-Work Backers Go Directly to Plan B*, The Colorado Statesman (July 4, 2008).

¹⁶ *Id.*

¹⁷ *Judge Dismisses Lawsuit to Stop Right-to-Work Amendment*, Denver Business Journal (Aug. 21, 2008); *see also* Kennedy Affidavit, ¶ 9.c.

3. During the petition drive for a possible recall election of Colorado Springs School Board members Sandy Shakes and Eric Christen, two protests were filed by Toby Norton and one was filed by Herbert Ruth.¹⁸ All three protests alleged that improper actions were taken by signature gatherers during the drive.

The El Paso County Clerk determined that the protests could not be verified by any evidence other than the protester's opinions, and dismissed the protests in their entirety.¹⁹ Further, Kennedy Enterprises had no contract to gather signatures for this recall election and did not run the drive.²⁰ Mr. Kennedy merely contacted petition circulators and directed them to the recall organizers, who contracted with the circulators and ran the drive.²¹ Once again, Senator Hansen reports only the allegations, not the outcome, and has failed to show any "documentation" of petition fraud by Kennedy or its circulators.

e. The Allegations Referencing a 2000 Indiana Investigation Into a Petition Drive to Get Gary Bauer Onto the Presidential Primary Ballot were the Result of a Rogue Petition-Gatherer Acting Outside the Guidelines of Kennedy Enterprises

In 2000, Kennedy Enterprises contracted to gather signatures in an attempt to get Gary Bauer onto the presidential primary ballot in Indiana. During a review of the signatures, a county clerk found the names of four deceased people, three forgeries, and twelve unregistered voters on the petitions.²² When Dan Kennedy was alerted to this, he immediately met with the

¹⁸ Shari Chaney Griffin, *Challenges Mounting in Possible D-11 Recall*, Colorado Springs Gazette (Sep. 6, 2006).

¹⁹ Jason Kosena, *Methods Used in Petition Drive Under Scrutiny*, Fort Collins Coloradoan (Jan. 16, 2008).

²⁰ See Kennedy Affidavit, ¶ 9.d.

²¹ *Id.*

²² Pam Zubeck, *Signs of Trouble / Names of Dead Found on Bauer Petitions*, Colorado Springs Gazette (Feb. 2, 2000).

Indiana State Police and aided them in locating the rogue circulator.²³ There was no allegation against Kennedy Enterprises or so much as a suggestion that Kennedy had committed any wrongdoing.²⁴ Indeed, rather than indicating that Kennedy Enterprises is a “notorious” or fraud-loving organization, this example of its good faith and indispensable effort to help locate a rogue circulator after a petition drive had ended show that the company takes its reputation seriously and is committed to clean elections.

f. Miscellaneous Other Press Excerpts Fail to Support Senator Hansen’s Allegations

Finally, Senator Hansen attaches miscellaneous other clippings from blogs or newspaper articles, perhaps hoping that “some news is bad news.” On unnumbered page 3 of Exhibit 2, an excerpt from a rambling blog entry mentions Kennedy Enterprises, but a review of the longer blog entry (at the back of the Exhibit) discloses that there were no allegations against Kennedy Enterprises in Oklahoma, and the Oklahoma work of another group, National Ballot Access, did not even generate allegations fraud. One article alleges mishaps by one Scott Lamm, which have nothing to do with elections, petitions, or Kennedy Enterprises. *See* Exhibit 2, unnumbered page 4. Another article involving Lamm and Kennedy allege no improprieties at all. *Id.*, unnumbered page 3.

g. Senator Hansen Fails to Show that “Many” Kennedy Circulators Have Criminal Backgrounds or Have Engaged in Voter Registration Fraud

Citing Exhibits 4 and 5, Senator Hansen claims that the credentials of “many” Kennedy circulators involved “long and colorful criminal histories” and “voter registration fraud.” But while the two exhibits attached by Senator Hansen do contain criminal histories of one circulator whom was fired by the campaign and one other circulator, *they indicate no criminal records—let*

²³ See Kennedy Affidavit, ¶ 9.e.

²⁴ *Id.*

alone allegations—for any other circulator. Further, Exhibits 4 and 5 contain no evidence whatsoever that any Kennedy circulator in Wisconsin had a “long and colorful history” (or for that matter, any history at all) of “voter registration fraud.” In short, Senator Hansen was unable or unwilling to back up with actual evidence the colorful allegations against Kennedy which were apparently so easy to scatter throughout his memorandum of law. The Board should discredit all of this innuendo, and instead consider each signature on the evidence.

III. The Board Should Approach Any Allegation of Fraud or Forgery With Skepticism

Finally, as it reviews the signatures gathered by Kennedy, the Board should view with skepticism any allegations of fraud or forgery. While fraud is by no means non-existent in American petition drives, a July 2010 study by the Citizens in Charge Foundation has found that in the last several election cycles, there have been very few verified instances of signature fraud. *See* Exhibit B (“Is the “F-Word Overused? A Truth in Governance Report on Petition Signature Fraud”). Citizens in Charge Foundation (“CIC”), a non-partisan social welfare organization, is “the only national organization committed to defending the ballot initiative process in states where it exists and expanding it to those states where citizens currently lack the process.”²⁵

CIC’s report was compiled by using open records (or “Sunshine”) laws in each of the 26 states that allow for some form of statewide initiative or referendum petition circulation. *Id.* at 6. CIC asked each Attorney General and Secretary of State to produce all records relating to instances in which a “court of law” had “verified forgery or fraud of signatures submitted for initiatives and referenda between 1999-2008.” *Id.* CIC then followed up with these offices, eventually contacting various state boards and local officials who would likely contain records of

²⁵ *See* the Citizens in Charge website at <http://www.citizensinchargefoundation.org/about-us/cicf>.

petition signature fraud. *Id.* The responses covered the five biannual election cycles from 2000 to 2008. *Id.*

Based on the responses, CIC determined that during the five election cycles, at least 81,635,847 signatures were submitted,²⁶ and there were just 17 verifiable cases of petition signature fraud. *See* Exhibit B at 8. Twelve states—including Colorado, Kennedy’s home state—indicated that they had *no* records of verified forgery or fraud of signatures on petitions. *Id.* at 7. Even assuming that only 81 million signatures were gathered during this time, there has been only one petition fraud conviction for every 4.7 million signatures submitted. *Id.* at 4.

Further, of the 17 cases of verifiable fraud, all but one involved in-state residents—not “out of state” circulators sometimes derisively referred to by petition opponents as “nomads.” *See* Exhibit B at 5. The “vast majority” of these cases were reported by states that, unlike Wisconsin, either limited petition circulation to state residents, or banned payments to petition circulators based on the number of signatures they collect. *Id.*

While it is true that the CIC study did not count mere allegations of fraud or civil court findings that certain circulators had engaged in “fraudulent” practices, this only adds to the accuracy of the survey. First, allegations of fraud have become a tactic, and as the CIC study points out, “fraud” is often used to describe a range of activities, most of which are not actually fraudulent (if they are wrongful at all). *See* Exhibit B at 6. Second, many judicial findings in petition litigation occur in abbreviated, “fast-track” civil proceedings in which the circulator and petition company are not themselves present or represented by counsel. A petition proponent

²⁶ CIC notes that many states only counted the number of signatures that were verified, meaning that officials stopped counting signatures once the number needed to qualify the petition was reached. *Id.* at 7. Further, “very few” states counted the number of signatures for petitions that failed to qualify for the ballot, and some states did not keep signature records for the full time period. *Id.* For this reason, CIC found that it was “reasonable to assume many millions of additional signatures had been submitted during the studied ten years.” *Id.*

may decide not to contest the allegations, focusing his or her limited resources and time on reclaiming blocks of challenged signatures that are easier to “claw back” because they do not involve contested issues of fact or can be recovered by reference to self-authenticating public records. In the absence of a defense by the proponent, some “findings” of fraud have been made based solely on out-of-court statements and affidavits, without any possibility of cross-examination and without confrontation by the affected circulator. Accordingly, the most reliable measure of actual fraud is criminal convictions, when there is no doubt that both sides were incented to fully litigate the issue.

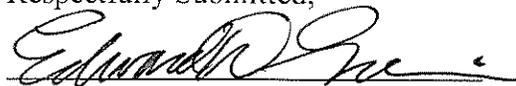
The frequency and scope of petition “signature fraud” have been vastly exaggerated by press reports and bloggers. Like the United States Supreme Court, this Board should recognize that “the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.” *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203-04 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 427 (1988)). Absent evidence to the contrary, the Board should reject Senator Hansen’s invitation to “assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.” *Id.* (citing *Meyer*, 486 U.S. at 426). CIC’s report shows that the national data for the past ten years bears out the intuition Justice Ginsburg expressed in *Buckley*.

Conclusion

Kennedy’s reputation for competence and integrity is its most important asset. If a circulator submits fraudulent or forged signatures, Kennedy loses as well—right alongside Wisconsin voters, the recall proponents, and Senator Hansen. As Justice Ginsburg observed in

Buckley, Kennedy has every incentive to use circulators with good reputations and good validity rates. Likewise, Kennedy's circulators—if they want to work for Kennedy again—have every incentive to follow the law and turn in valid signatures. While the circulator is ultimately responsible for his or her own conduct and each signature challenge will rise or fall on the quality of the proponent's and opponent's evidence, there is no rational reason to assume that Kennedy, its circulators, or any person in the initiative process is dishonest or lacks integrity. There is every reason to believe that the circulators are doing their jobs with honor, pride and integrity. For that reason, before casting aside any Wisconsin voter's signature based on the alleged "fraud" of a Kennedy circulator, the Board should be convinced that the voter did not in fact intend to sign the petition. This state's voters, and the future of direct democracy in Wisconsin, demand no less.

Respectfully Submitted,



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