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April 19, 2011

Via Fax (608)267-0500 & Email (kevin.kennedy@wi.gov)

Mr. Kevin Kennedy
Wisconsin Government Accountability Board
212 East Washington Avenue, Third Floor
P.O. Box 7984
Madison, WI 53707-7984

Re: In Re Petition to Recall Senator Dan Kapanke of the 32nd Senate District

Dear Mr. Kennedy:

Enclosed please find the Petitioners' Rebuttal of Senator Kapanke's Challenges to Petitions in the above-entitled matter. By copy of this letter, we are providing copies of same to Attorney McLeod by facsimile and mail this date.

Very truly yours,

FRIEBERT, FINERTY & ST. JOHN, S.C.

Jeremy P. Levinson
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JPL/jlm
Enclosures

cc.: Eric M. McLeod, Esq. (via fax & U.S. Mail)

BEFORE THE WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD

IN RE: PETITION FOR RECALL OF STATE
SENATOR DAN KAPANKE OF THE 32ND
SENATE DISTRICT

**PETITIONERS' REBUTTAL OF
SENATOR KAPANKE'S CHALLENGES TO PETITIONS**

INTRODUCTION

On March 2, 2001 the Committee to Recall Kapanke ("the Committee") filed its Campaign Registration Statement, GAB-1. As required, a Statement of Intent of Circulate Recall Petition was appended to the GAB-1 form and executed by Patrick Scheller, a qualified elector and resident of State Senator Dan Kapanke's ("Kapanke") Senate district. The GAB duly accepted these documents and established a May 2 due date by which properly executed petitions bearing the signatures of 15,588 of the district's qualified electors had to be submitted in order for the GAB to order the recall election sought by Kapanke's constituents.

On April 1, less than half-way through the time allotted, the Committee offered approximately 23,000 signatures for filing with the GAB, approximately 7,500 more signatures than required. Two weeks later, Kapanke submitted purported challenges to the Committee's petitions.

The first point he raises is a purely legal one. Kapanke attempts to argue that because the Committee is the subject of the GAB-1 Campaign Finance Registration and an individual,

Patrick Scheller, executed the Notice of Intent appended to the GAB-1 form – no notice of intent was filed for the Committee and no Campaign Finance Registration was filed for Scheller. Based on the artificial distinction between the Committee and its representative (agent), Schueller, Kapanke asks the GAB to summarily dismiss the formalized demand of over 20,000 of Kapanke’s constituents for a recall election. If there were a glimmer of substance to the argument, it might charitably be deemed to be at the furthest flung edges of hypertechnical, insubstantial, potshots. But the argument is devoid of substance or merit; it defies common sense, established practice approved by GAB, and it undermines the most basic purposes of the statutes it seeks to reinvent.

The second point Kapanke raises is not a challenge at all; it is a concession that thousands of valid signatures beyond the number required for recall have been submitted. He attempts to question less than a thousand signatures. Though the bulk of these do not constitute actual challenges, *i.e.*, sworn identification of specific and actual insufficiencies,¹ and most are subject to easy and permitted correction, Kapanke’s purported attacks do not and cannot call the sufficiency of the recall filing into any question. Even if Kapanke’s attacks succeeded with respect to each signature at which they are aimed, there is no dispute that the Committee’s filing would still contain many thousands of signatures more than necessary to trigger a recall election.

¹ The bulk of these attacks are conclusory and they tend to pose questions rather than present evidence or specifics.

DISCUSSION

KAPANKE’S EFFORTS TO UNDERMINE THE CONSTITUTIONAL RIGHTS OF HIS CONSTITUENTS TO SEEK A RECALL ELECTION REST ON A FALSE PREMISE, CONFLICT WITH THE TEXT AND PURPOSE OF THE GOVERNING STATUTES, AND CONTRADICT ESTABLISHED AND ORDERLY PRACTICE AND ADMINISTRATION

Kapanke’s entire argument rests on the premise that the Committee filed its GAB-1 Campaign Finance Registration but no Statement of Intent, and that Scheller filed the latter but not the former. Kapanke further ignores the facts by assuming, inexplicably, that the Committee and Scheller represent different recall efforts and are required to both independently fulfill the requirements necessary as a predicates to the circulation of recall petitions. Devoid of legal merit, this entire argument also teeters on a demonstrably false premise.

The filings actually submitted to and accepted by the GAB in connection with the Kapanke are a matter of record: The Committee filed its GAB-1 Campaign Finance Registration to which it appended a Statement of Intent. The GAB-1 was executed as required by the Committee’s treasurer, and the appended Statement of Intent was executed by another representative of the Committee, Scheller, who is a qualified elector from Kapanke’s district, as is also required. When Scheller delivered the Committee’s petitions to the GAB, he was given a receipt that correctly identified the petitions and Scheller’s role as a contact for the Committee.

The very first paragraph of Kapanke’s argument on page 2 of his memorandum of law wholly mischaracterizes the indisputable state of the GAB’s official records. Kapanke states: “At no time has the recall committee filed a statement of intent to circulate a recall petition.” The Committee did precisely this on March 2, 2011, appending it to its GAB-1 form as properly instructed. Scheller is the Committee representative who executed the statement because he is an

elector of Kapanke's district and because a "committee" can neither be an elector nor hold a pen. A Committee can act only through representatives. *See, e.g.*, § 11.01(4), Stats. The Committee's submission was entirely proper, effective, and consistent with the GAB's guidance.² Kapanke's argument to the contrary proceeds from a false factual premise and ignores the law and basic administrative realities.

Article 13, § 12 of the Wisconsin Constitution guarantees the right of electors to pursue recall of their elected officials. Section 9.10, Stats., facilitates the exercise of this right. Unsurprisingly, it requires *electors* of the applicable political district to petition for the recall of the official representing that district. § 9.10, (1)(a), Stats. Section 9.10(2)(d) brings recall-related activity within the sphere of campaign finance regulation and disclosure.

No petition may be offered for filing for the recall of an officer unless the petitioner first files a registration statement under s. 11.05(1) or (2) with the filing officer with whom the petition is filed. The petitioner shall append to the registration a statement indicating his or her intent to circulate a recall petition, [and] the name of the officer for whom recall is sought . . .

The statute tracks the constitutional provision by limiting the right to recall to electors represented by the official that is the subject of the recall effort. By definition, an elector is an individual; organizations such as "committees" are not electors. The statute also subjects the financial activity associated with recall efforts to regulation by Chapter 11, requiring registration pursuant to § 11.05, Stats., and specifically permitting registration as a committee pursuant to § 11.05(1), Stats. The statutes anticipate exactly what occurred here: Scheller, the individual, serves as the required elector from Kapanke's district and the Committee, of which he is part, a

² It is worth noting that Kapanke's challenge directly contradicts the guidance the GAB has provided on these matters. This guidance carefully and correctly reflected the requirements of the statutes at issue and settled practice. The Committee was and remains justified in relying on and accepting that guidance.

creature of campaign finance regulation, is specifically permitted.³ The Committee filed its GAB-1, appended to which was a Statement of Intent executed, as is required, by an elector.

The GAB's recall manual clearly and correctly lays all of this out. Likewise, the GAB appropriately deemed the Committee's GAB-1 registration and the appended Statement of Intent proper. *Cf. American Recall Coalition Notice of Rejection and Insufficiencies.pdf* (the GAB rejecting recall registration filings for failing to include individual elector of district); *see also Open Session Board Materials Packet for GAB March 22-23, 2011 Meeting at 74 et seq.* (further reflecting the application and administration of the statutes as described above).

Kapanke's attempt to conjure some ambiguity or confusion as to the controlling statutes and the GAB's procedures fails on the facts and the law. Even if this were not so readily apparent, his sole challenge could not succeed in depriving his constituents of the recall election they have demanded. The Wisconsin constitution specifically guarantees electors the right to seek recall of their elected officials. Statutory provisions relating to recall are to be liberally interpreted in favor of electorate. *Matter of Recall of Redner*, 153 Wis. 2d 383, 450 N.W. 2d 808 (Ct. App. 1989). Finally, the statutes themselves mandate that even if Kapanke's challenge were not devoid of merit (was merely profoundly hypertechnical), it could not defeat the call of over 20,000 of his constituents for a recall election. "Chapters 5 to 12 shall give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of its provisions." § 5.01(1), Stats.

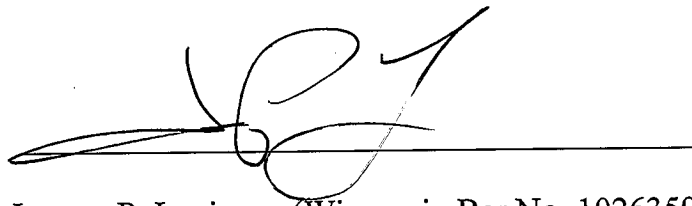
³ Another gimmick Kapanke uses to is give the word "petitioner" an absurdly rigid and limited meaning. As is clear from the statute, the word has a broad meaning that includes committees, individual electors, and signatories of recall petitions.

Given that Kapanke's best efforts confirm that far more than the required number of proper signatures have been submitted in support of a recall election, there can in no event be any doubt about "the will of the electors."

CONCLUSION

A recall election should be ordered for Wisconsin Senate's 32nd District, currently held by Senator Dan Kapanke. As his challenge confirms, well more than the required number of signatures have been properly submitted.

Respectfully submitted this 19 th day of April, 2011.



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