

RICHARD G. NIESS
CIRCUIT COURT, BR. 9

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

IN RE: PETITIONS TO
RECALL GOVERNOR SCOTT
WALKER, LIEUTENANT
GOVERNOR REBECCA
KLEEFISCH, SENATOR SCOTT
FITZGERALD, SENATOR PAM
GALLOWAY, SENATOR TERRY
MOULTON, SENATOR VAN
WANGGAARD,

120V0295

Case No. _____

GOVERNOR SCOTT WALKER,
LIEUTENANT GOVERNOR REBECCA KLEEFISCH,
SENATOR SCOTT FITZGERALD,
SENATOR PAM GALLOWAY,
SENATOR TERRY MOULTON,
SENATOR VAN WANGGAARD,

Classification Code: 30703
(Unclassified)

COMMITTEE TO RECALL WALKER,
COMMITTEE TO RECALL KLEEFISCH,
COMMITTEE TO RECALL SCOTT FITZGERALD
RECALL SENATOR PAM GALLOWAY,
COMMITTEE TO RECALL MOULTON,
COMMITTEE TO RECALL WANGGAARD,

and

GOVERNMENT ACCOUNTABILITY
BOARD,

Interested Parties.

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CARLO ESCOBEDA
CLERK OF CIRCUIT COURT

2012 JAN 23 PM 3:22
DANE CO. CIRCUIT COURT

**GOVERNMENT ACCOUNTABILITY BOARD'S NOTICE OF MOTION AND
MOTION FOR EXTENSION OF TIME TO MEET DEADLINES FOR GOOD
CAUSE SHOWN UNDER WIS. STAT. § 9.10(3)(b)**

NOTICE OF MOTION

TO: ALL PARTIES
By legal counsel

The Wisconsin Government Accountability Board ("GAB"), by its undersigned counsel, will bring a motion for an order or orders granting GAB relief from deadlines under Wis. Stat. § 9.10(3)(b) for good cause shown. The motion will be heard at the courthouse at 215 South Hamilton Street, Madison, Wisconsin, on a date and at a time to be set by the Court.

MOTION

The Wisconsin Government Accountability Board ("GAB"), by its undersigned counsel, hereby moves the Court for an order or orders granting GAB relief from the deadlines to file certifications of sufficiency or insufficiency regarding the petitions to recall Governor Scott Walker, Lieutenant Governor Rebecca Kleefisch, Senator Scott Fitzgerald, Senator Pam Galloway, Senator Terry Moulton, and Senator Van Wanggaard for good cause shown under Wis. Stat. § 9.10(3)(b).

GAB requests that the deadlines be extended from February 17, 2012, for last sixty days, and further requests that the Court retain jurisdiction over the matter and permit GAB to provide the Court with updated information on the progress of petition review and an opportunity to request additional time if needed.

GAB has been preparing for possible recall petitions for some time, and GAB intended to make a request for a specific amount of additional time to review petitions when it filed this motion. However, the recall petitions offered for filing on January 17, 2011, appear to contain considerably more signatures than GAB

estimated might be offered. In addition, on January 5, 2012, the Waukesha County Circuit Court issued a declaratory judgment ruling that placed certain additional burdens on GAB, primarily relating to the detection of possible duplicate signatures, that GAB has yet to figure out how to implement. GAB has been studying this issue, and alternative solutions, continuously since January 5. At this point, GAB knows that it will need 60 days to properly review and determine the sufficiency of the recall petitions filed on January 17, 2012. But GAB is unfortunately unable at this moment to make a definite estimate of the additional time needed. GAB anticipates that as it reviews the petitions, a clearer picture of how it can proceed will develop.

This motion is supported by the following points and authorities, and by the Affidavit of Kathryn Mueller filed herewith.

RECALL PETITIONS NOW PENDING BEFORE GAB

(1) On January 17, 2012, recall petitions were offered for filing with GAB respecting six officeholders. Their names, districts, the number of valid signatures required to trigger a recall election, and the approximate number of signatures offered with the petitions are set forth here.

<u>Officer Name</u>	<u>Needed</u>	<u>Offered¹</u>
Governor Scott Walker	540,208	1 million
Lieutenant Governor Rebecca Kleefisch	540,208	845,000
Senator Scott Fitzgerald (13 th Dist.)	16,742	20,600
Senator Pam Galloway (29 th Dist.)	15,647	21,000

¹ These approximate numbers were provided by the recall petitioners when the petitions were offered for filing with GAB on January 17, 2012; the agency has not attempted to estimate independently the number of signatures in the petitions.

Senator Terry Moulton (23 rd Dist.)	14,958	21,000
Senator Van Wanggaard (21 st Dist.)	15,353	24,000

(2) Under Wis. Stat. § 9.10(3)(b), GAB must complete a “careful examination” of these petitions, and certify either the sufficiency or insufficiency of the petitions, within 31 days of the date the petitions were offered for filing, which is Friday, February 17, 2012.

(3) For the reasons stated in this motion, GAB will be unable to complete its statutory duties with respect to these petitions by February 17, 2012.

**GAB’S PROCESS FOR REVIEW AND CERTIFICATION
OF RECALL PETITIONS**

(4) GAB is statutorily obligated to conduct a “careful examination,” Wis. Stat. § 9.10(3)(b), of each recall petition offered for filing to GAB. If GAB determines that a recall petition contains a sufficient number of valid signatures, the agency expresses that determination in a certificate that it attaches to the petition, which is then filed. (Note: recall petitions are not “filed” until certified as containing a sufficient number of valid signatures by the election officer, here GAB. A recall petitioner’s act of presenting a petition to the election officer is referred to as “offering” the petition for filing. See Wis. Stat. § 9.10(2)(d))

(5) If a recall petition is certified as sufficient, GAB must call a recall election to be held on the Tuesday of the 6th week commencing after the date of the filing of the petition. Wis. Const. art. XIII, §12(2).

(6) The process of careful examination involves review of the face of all of the pages of a petition for compliance with legal requirements.

Wis. Stat. § 9.10(3)(b) (“ . . . the official with whom the petition is offered for filing shall determine by careful examination whether the petition on its face is sufficient . . .”) Information on a recall petition is entitled to a presumption of validity. Wis. Admin. Code § GAB 2.05(4) (made applicable to recall petitions by Wis. Admin. Code § GAB 2.09.)

(7) GAB staff reviews each signature and each page of signatures to determine whether:

1. The page is clearly identified as a “RECALL PETITION” addressed to the Government Accountability Board for the recall of a particular officeholder and district.
2. There is a date for each signature.
3. The date for each signature is within the circulation period.
4. The date for each signature is the same or prior to the date on the certification for the sheet on which the signature appears.
5. The residency can be determined from the address given by each signature.
6. The municipality given for each signature is of a municipality within the district for which the elective official is being recalled.
7. The circulator has signed and dated the certification.
8. The circulator has provided sufficient information to determine that he or she is a qualified circulator.

See Wis. Stat. § 9.10(2)(a), (e)1. – 5., (em) 1. – 2.

(8) On January 5, 2012, the Circuit Court for Waukesha County in *Friends of Walker, et al. v. GAB, et al.*, Case No. 2011-CV-4195, issued a declaratory judgment orally from the bench, ruling that GAB has an affirmative obligation

under Wis. Stat. § 9.10 to take reasonable steps to identify and strike duplicate signatures, “fictitious” names, and names where the eligibility of the signer cannot be determined, principally relating to illegible addresses. As of the time of this writing, a final order has yet to be entered in that case.

(9) Under Wis. Stat. § 9.10(3)(b), an incumbent officeholder against whom a recall petition is offered for filing has ten calendar days to submit a challenge to the election officer to the recall petition offered for filing against him or her. The recall petitioner then has five calendar days from the date any challenge is filed, to file a rebuttal to the challenge. The incumbent officeholder then has two calendar days from the date of filing of the rebuttal to file any reply. See Wis. Stat. § 9.10(3)(b).

(10) Under Wis. Stat. § 9.10(3)(b), GAB has 31 days from the date a recall petition is offered for filing to complete its careful examination of the petition and to file a certificate indicating whether the petition is sufficient or insufficient.

(11) This court has authority under Wis. Stat. § 9.10(3)(b) to enlarge GAB’s 31-day period of time, and the challenge-related deadlines, “upon showing of good cause.”

(12) The 31-day time period applicable to GAB is independent of the time periods for challenge-related filings. That is, any court-ordered enlargement of a challenge-related time period would not automatically affect the 31-day period applicable to GAB.

**GOOD CAUSE EXISTS TO EXTEND EXISTING DEADLINES
UNDER S. 9.10(3)(b)**

GAB Staff Review

(13) GAB is proceeding with its review and analysis of the pending recall petitions but will be unable to complete this enormous task by the February 17, 2012, statutory deadline.

(14) The burdens on GAB staff raised by the petitions constitute good cause under Wis. Stat. § 9.10(3)(b) to extend the deadlines for the filing of certificates on the pending petitions. Additional considerations regarding the scheduling of possible recall elections arising from these petitions also contribute to a showing of good cause for an extension of time.

(15) The Affidavit of Kathryn Mueller, filed herewith, details the process under which GAB staff will conduct its careful examination of the petitions, and provide GAB with the information it needs to make its determinations of sufficiency. The key parts of that process are the following:

(a) GAB estimates the number of signatures contained in the six petitions offered for filing as **1.9 million**. That estimate is based upon the statement of each petitioner, provided at the time of offering of the petition, as to how many signatures are being offered.

(b) This number of signatures is approximately 26% higher than GAB estimated in December 2011 it might receive.

(c) The number of signatures on a single petition page may vary. GAB estimates, and has prepared for, receiving petitions that collectively contain up to 305,700 pages.

(d) In order to complete the review process, GAB is hiring up to 50 temporary workers. GAB has hired about 30 temporary workers at this time.

(e) Each petition is being fed into high-speed scanners to create PDF images of each petition page. At this time, scanning of the Senate petitions has been completed, but scanning of the Walker and Kleefisch petitions is expected to take several more days.

(f) The electronic PDF files will be made available to the officeholders, the recall petitioners, and the general public via the GAB website.

(f) Each petition will be reviewed twice by two different temporary staff workers, who will check the petitions for compliance with legal requirements. This review is of the information contained on the "face" of the petition, as provided for by Wis. Stat. § 9.10(3)(b), and will not involve the use of extrinsic sources.

(g) The staff will maintain a database to keep track of signatures that are identified as non-compliant with legal requirements. The database will track, for each petition page, how many signatures were identified by GAB staff as valid, how many were identified as invalid, and the reason(s) therefor. The database is necessary to calculate the number of valid signatures, to review and determine challenges filed by officeholders, and to develop a record and recommendations for the Board's determination of sufficiency.

(h) If GAB temporary staff encounters a signature that appears to be that of a fictitious person, staff will “flag” that signature for further review by staff.

(i) If GAB temporary staff encounters a signature with an address that is difficult to read, it will apply the following criteria:

1. If the street number is simply a scribble so that no part of it can be determined, the staff will identify the signature as noncompliant.
2. If the street name is simply a scribble so that no part of it can be determined, the staff will identify the signature as noncompliant.
3. If the reviewer can discern a possible street number and name, even without being sure of the exact street number and name, the signature is counted as valid.
4. If the first and second reviewers disagree as to the legibility of the street address, the signature is escalated for a review and determination by supervising staff. The reviewing staff will determine the validity of the signature by reviewing the face of the petition, without being required to consult extrinsic evidence, and recognizing the statutory presumption of validity of information on the petition. In the event that the reviewing staff determines that the signature is equally likely to be valid or invalid, the signature shall be counted during the staff's initial review and may be subject to further review if the signature is challenged.

(j) GAB has obtained the use of a computer software package that will be used to examine the PDF files of the petition pages in an effort to identify potentially duplicate signatures. This process has been implemented in furtherance of the circuit court declaratory ruling, cited above, concerning GAB's affirmative duty to attempt to identify and strike duplicate signatures. It is also a process that has not been included in GAB's previous review of recall petitions and may add to the time required to complete the review process.

(k) The software operates using optical character recognition. The only reason GAB believes this software might enable it to detect duplicates is because it is believed that many petition pages will contain printed names as well as signatures. (Only signatures are legally required – see Wis. Stat. § 9.10(2)(e)). The software cannot reliably translate handwriting into a database with an acceptable degree of confidence. The software requires that GAB staff members monitor the program as it operates, applying their judgment with regard to both the spelling of names generated by the software and the possible duplicates that the program detects.

(l) Given the very large approximate number of signatures offered for filing, in particular with the Walker and Kleefisch petitions, which appear to contain 185% and 150% more signatures, respectively, than are legally required, GAB staff has not yet decided whether it will be necessary to examine every petition signature individually to check for duplicates, or whether it will only be necessary to examine a certain portion of the pages to determine the rate at which duplicates appear in the petitions. GAB is committed to implementing and executing a reasonable process for detecting duplicates, recognizing the need not to delay a determination of sufficiency any more than is reasonably necessary. GAB is currently evaluating options for how to implement this process in as effective and time-efficient a manner as possible.

(m) As with previous recall petitions, GAB staff will request that any challenges to the petitions be filed electronically. If not filed electronically, GAB staff will hand enter information regarding the challenges into GAB's database. GAB staff will compare the challenges to the results of the staff's own review of the petitions. If a signature is challenged that was not identified by GAB staff as non-compliant with legal requirements, that signature will be reviewed by GAB staff for further consideration. If staff concurs with the challenge, it will record that information.

(n) The end result of this process is an electronic file or set of files that show, by petition page and line number, each signature that has been identified by GAB staff as non-compliant with legal requirements or identified as a duplicate by staff, and those challenged, with GAB staff's view on the validity of the challenges.

(o) GAB staff will prepare a memorandum for each petition, recommending whether the GAB should certify the petition as sufficient or not, with detailed reasons for the recommendation and supporting information from the review process and challenges received. In keeping with past practice, this memorandum will be made available to the petitioners, officeholders, and the public prior to the Board's meeting to determine the sufficiency of the petitions.

(16) Once staff review and recommendations are complete, GAB will hold an open meeting on each petition, giving time to the officeholder and the recall

petitioner to present their positions and arguments regarding the validity of the petition.

(17) As noted earlier, GAB has not yet been able to determine how exactly it will implement the decision of the Waukesha County Circuit Court that GAB must take reasonable steps to identify and strike duplicate signatures from recall petitions. GAB is trying to develop a process that will faithfully implement the court's declaration without delaying the process more than is reasonably necessary, and that will be consistent with the electorate's constitutional right to recall elected officers.

GAB's Deadline Should Be Set So That There Is a Separate Date for Recall Elections in 2012.

(18) In addition to possible recall elections, there are four regularly-scheduled statewide elections in Wisconsin in 2012:

- a. Tuesday, February 21, 2012. Spring Primary Election.
- b. Tuesday, April 3, 2012. Spring Election and Presidential Preference Primary.
- c. Tuesday, August 14, 2012. Fall Partisan Primary Election.
- d. Tuesday, November 6, 2012. Fall General Election.

(19) There is a public interest in ensuring that recall elections, if any, arising from the petitions offered for filing on January 17, be held on the same day, but not on any of the four days already scheduled for statewide elections in 2012.

(20) Each of the four affected Senate districts is also represented by the Lieutenant Governor and Governor, and those four districts therefore may have up to three recall election races each. Given that local election officials in those district must already plan for and coordinate four elections in 2012 in their

municipalities and counties, it is in the public interest to do what is possible to minimize the number of additional separate elections.

(21) Local election officials (“LEOs”) conduct elections using poll lists generated by the Statewide Voter Registration System (“SVRS”). Beginning on February 21, 2012, those poll lists will be based on wards created in 2011. After April 15, 2012, many wards may also be adjusted pursuant to 2011 Wisconsin Act 39 to reflect changes required by 2011 Wisconsin Acts 43 and 44, which created new legislative and congressional districts effective for the August and November 2012 partisan elections. (Note: these newly-established districts are currently subject to challenge in litigation. *Baldus, et al. v. Brennan, et al.*, Case No. 2011-CV-562 (Eastern District of Wisconsin Federal Court).)

(22) If the Senate recall petitions are found to be sufficient, GAB plans to conduct the elections using the wards in effect when the officeholders were elected in 2010, as provided in Section 10 (2), 2011 Wisconsin Act 43. (Note: this issue is the subject of litigation in two separate proceedings: *Clinard, et al. v. Brennan, et al.*, Case No. 2011-CV-3995 (Waukesha County Circuit Court) and *Baldus, et al. v. Brennan, et al.*, Case No. 2011-CV-562 (Eastern District of Wisconsin Federal Court).)

(23) By conducting the Senate recalls, if they are to occur, on one of the regularly-scheduled election dates in 2012, using the wards in effect when the Senate officeholders were elected in 2010, then significant administrative problems would arise. In the April election, LEOs would need to print two sets of poll lists –

one for the nonpartisan elections and presidential preference vote and one for the Senate recalls. If the recalls are held in conjunction with the November election two sets of poll lists also would be required - one for the regularly scheduled partisan elections and one for the Senate recalls.

(24) If this situation were to occur, poll workers would have significant extra work. They would have to avoid giving a recall ballot to someone not entitled to participate or denying a recall ballot to someone entitled to participate. Voters may be confused because they may not know if they are eligible to vote in the recall election depending on where they live. There are also different ballot printing and voting equipment programming deadlines. GAB provides a 6-week notice of the recall election, but ballots for the August and November elections must be ready 47 days before the election. *See Wis. Stat. §§ 7.10, 7.15.* Moreover, the filing deadline for candidates in a recall election is only four weeks prior to that election. *See Wis. Stat. § 9.10.*

(25) In addition, GAB respectfully requests that the Court consider whether good cause exists to set the deadlines for certification so that both the Senate and gubernatorial recall elections, if they occur, are held on the same date, or on dates that significantly reduce overall administrative burdens and conflicts for ballot preparation and delivery.

Challenge deadlines

(26) It can be expected that the other parties to this matter will present any requests they think necessary regarding extensions of the time to challenge the recall petitions.

(27) GAB does, however, suggest that following:

- (a) That whatever extensions of the periods to challenge may be granted, those periods should start to run only from the day that GAB provides the officeholders with an electronic copy of the petitions, rather than the date the petitions were offered for filing, i.e., January 17, 2012.
- (b) That whatever extensions of challenge deadlines are granted, GAB's deadline(s) needs to be a sufficient period of time after the end of the challenge processes, to enable GAB staff to analyze the challenges and make appropriate recommendations to the Board.

For the reasons stated herein, and supported by the Affidavit of Kathryn Mueller filed herewith, GAB respectfully requests that the Court enter an order or orders granting it relief from its deadlines under Wis. Stat. § 9.10(3)(b) to file certificates of sufficiency or insufficiency as to the petitions to recall Governor Walker, Lieutenant Governor Kleefisch, and Senators Fitzgerald, Galloway, Moulton and Wanggaard, from February 17, 2011, for sixty days. GAB further requests that the Court retain jurisdiction over this matter and permit GAB to

return with updated information on its progress in reviewing petitions and have an opportunity to request additional time.

Dated this 20th day of January, 2012.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

A handwritten signature in cursive script, appearing to read "Lewis Beilin".

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