STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Appeal No. _____

FRIENDS OF SCOTT WALKER

and

STEPHAN THOMPSON

Plaintiffs-Respondents,

v.

Waukesha County Circuit

Court Case No. 2011-CV-4195

WISCONSIN ACCOUNTABILITY BOARD,
And Members of the Wisconsin Government
Accountability Board, each and only in
his official capacity:

MICHAEL BRENNAN, DAVID DEININGER,
GERALD NICHOL, THOMAS CAYNE, THOMAS
BARLAND, and TIMOTHY VOCKE, and

KEVIN KENNEDY, in his official capacity as director
and general counsel for the Wisconsin Government
Accountability Board,

Defendants,

APPELLANTS' EMERGENCY MOTION FOR AN ORDER STAYING CIRCUIT COURT PROCEEDINGS IN CONNECTION WITH PLAINTIFFS' DEMANDS FOR DECLARATORY AND INJUNCTIVE RELIEF

Appellants, The Committee to Recall Walker, The Committee to Recall Kleefisch, Julie Wells, The Committee to Recall Wanggaard, Randolph Brandt, The Committee to Recall Moulton, John Kidd, The Committee to Recall Senator Pam Galloway, Nancy Stencil, and Rita Pachal, by their Attorney Jeremy P. Levinson, hereby move the Court for an order staying the circuit court proceedings in connection with plaintiffs' demands for declaratory and injunctive relief.

Appellants have appealed the circuit court's order to District IV pursuant to § 752.21(2), Wis. Stats.

INTRODUCTION

Scott Walker's campaign committee and the Executive Director of the Wisconsin Republican party have sued the Wisconsin Government Accountability Board seeking abrupt and fundamental changes to the process by which recall petitions that have been circulating for well over a month will be reviewed for sufficiency. (Appx. 1). At the last minute, Scott Walker has demanded that the Circuit Court for the County of Waukesha issue an order changing the law governing recall petitions to make it more advantageous for him and other incumbents facing recall. Appellants are recall committees (and the individuals who organized them and registered them with the GAB) who are presently gathering signatures due to be offered for filing with the GAB on January 17, 2012. The law Scott Walker wants suddenly changed governs them and their

efforts every bit as much as it affects the incumbent Republican officials facing recall.

Appellants promptly moved to intervene in the lawsuit so that both sides of the ongoing recall process could be heard in this attempt to change the law defining that process. (Appx. 3-4). The Circuit Court, the Honorable J. Mac Davis presiding, denied the motion to intervene on December 29, 2011. The circuit court then scheduled a hearing for January 5, 2012 at which it intends to take up both plaintiffs' demands for injunctive and declaratory relief changing the law of recall and the GAB's motion to dismiss the case. On December 29, 2011, plaintiffs' counsel submitted a proposed order reflecting the denial of the motion to intervene and the scheduled hearing. (Appx. 9). On December 30, 2011, appellants filed a motion with the circuit court seeking a stay of any proceedings on plaintiffs' demands for injunctive and declaratory relief. (Appx. 10). Appellants' filing also advised the circuit court that neither they nor the GAB had any objections to the form of the proposed order and requested that it be signed as promptly as possible.

Appellants have appealed from the denial of their motion to intervene. Barring an immediate stay by the circuit court of proceedings on plaintiffs' demands for injunctive or declaratory relief, appellants seek an emergency stay from this Court of such proceedings pursuant to §§ 808.07 and 809.12, Wis.

Stats.[1] Absent a stay, proceedings on plaintiffs' claims will harm the public interest and injure appellants because those proceedings would give Scott Walker and the Republican Party a forum in which to attack and disparage the recall process and the integrity of Wisconsin's electoral process, a forum from which the opposing side has been excluded.

Scott Walker and the Republican Party will be free to attack the recall efforts free from the law's most fundamental protector of the truth, a genuine adversarial process. It would foster and magnify uncertainty and confusion regarding the recall process and it would give Scott Walker an undo political advantage. And if the circuit court were to grant the plaintiffs' requested relief, appellants would almost certainly have no opportunity to seek further review before they are required to offer their petitions for filing, subjecting them to the process with which plaintiffs seek to tinker.

It cannot be disputed that the ongoing recalls reflect a larger and historic confrontation of a Republican incumbent Governor, Lieutenant Governor, and allied State Senators by hundreds of thousands of Wisconsin residents. Thousands of members and allies of the Democratic Party have worked to ensure the rights of Wisconsin's voters to petition for the recall of incumbents and to oust them at the ballot box. In the circuit court, Scott Walker is trying to get the rules

[1] It should be noted that § 809.12, Wis. Stats., provides in part: "A judge of the court may issue an ex parte order granting temporary relief pending a ruling by the court on a motion filed pursuant to this rule."

changed at the last minute to give him an advantage. Unless relief is granted, the Republican Party interests alone will have a voice in the legal debate over whether to change the law of recall and that supporters and allies of the recall efforts and the Democratic Party will not.

BACKGROUND

On November 15, 2011 appellants Julie Wells, Randolph Brandt, John Kidd, Nancy Stencil, and Rita Pachal duly registered The Committee to Recall Walker, The Committee to Recall Kleefisch, The Committee to Recall Wanggaard, The Committee to Recall Moulton, and The Committee to Recall Senator Pam Galloway with the Government Accountability Board pursuant to Art. XIII, § 12 of the Wisconsin Constitution and § 9.10, Wis. Stats. Many thousands of Wisconsin residents joined them in obtaining many hundreds of thousands of signatures in support of recall elections for these Republican incumbents. Well over one million signatures must be offered for filing with the GAB no later than January 17, 2012.

On December 15, 2011, the Executive Director of the Wisconsin Republican Party, Stephan Thompson, and Scott Walker's campaign committee, Friends of Scott Walker, filed Waukesha Case No. 2011CV 4195.[2] The lawsuit names the GAB, its members, and its executive director and general counsel as

[2] The complaint alleges that Waukesha County is a proper venue pursuant to recently amended § 801.50(3)(a), Wis. Stats., which allows plaintiffs suing the state or its agencies to do so in any county.

the only defendants. The complaint demands declaratory and injunctive relief changing the long-established statutory and administrative processes by which recall petitions offered for filing with the GAB are reviewed for validity and sufficiency. The complaint misstates and distorts several statements made by the GAB or one of its agents and asks for an injunction precluding the GAB from "publicly stating" certain things.

Of greater substance, the complaint directly attacks the foundation of the petition review process. While it purports to assert that the GAB's procedures violate principles of equal protection, it actually demands that the circuit court change the process established by § 9.10(2)(f), Wis. Stats., whereby the GAB is directed to "review a verified challenge to a recall petition." Section 9.10(2), Wis. Stats., provides, in relevant part, as follows:

> (g) The burden of proof for any challenge rests with the individual bringing the challenge.
>
> (h) Any challenge to the validity of signatures on the petition shall be presented by affidavit or other supporting evidence demonstrating a failure to comply with statutory requirements.
>
> (i) If a challenger can establish that a person signed the recall petition more than once, the 2nd and subsequent signatures may not be counted.
>
> (j) If a challenger demonstrates that someone other than the elector signed for the elector, the signature may not be counted, unless the elector is unable to sign due to physical disability and authorized another individual to sign in his or her behalf.

> (k) If a challenger demonstrates that the date of a signature is altered and the alteration changes the validity of the signature, the signature may not be counted.
>
> (l) If a challenger establishes that an individual is ineligible to sign the petition, the signature may not be counted.
>
> (m) No signature may be stricken on the basis that the elector was not aware of the purpose of the petition, unless the purpose was misrepresented by the circulator.
>
> (n) No signature may be stricken if the circulator fails to date the certification of circulator.
>
> (p) If a signature on a petition sheet is crossed out by the petitioner before the sheet is offered for filing, the elimination of the signature does not affect the validity of other signatures on the petition sheet.
>
> (q) Challenges are not limited to the categories set forth in pars. (i) to (l).

The statute reflects a process that has been well established – and has functioned effectively – for many decades. If petitioners show substantial compliance with the procedure for circulating and offering petitions for filing, including the proper certification of petitions by circulators, the petitions are given a presumption of validity. "A proper affidavit of personal circulation satisfies the evidentiary burden of proving substantial compliance, unless it is rebutted by the officeholder." *In re*

Jensen, 121 Wis. 2d 467, 469-70, 360 N.W.2d 535 (Ct. App. 1984) (*citing State ex rel. Boulton v. Zimmerman*, 25 Wis. 2d 457, 465, 130 N.W.2d 753 (1964)). Section 9.10(3), Wis. Stats., specified the procedure by which challenges to petitions can be made, responded to, and otherwise addressed by interested parties.

The main thrust of the complaint is the allegation that "it will be a practical impossibility for [Friends of Scott Walker] and/or Thompson to *review, identify, and challenge multiple signatures.*" (Appx 1, Complaint at ¶ 27). While the complaint characterizes the GAB as placing a burden on Scott Walker's campaign committee to review the recall petitions and mount challenges if appropriate, it claims that the statutory challenge process violates "Equal protection rights and the rights of recall under the Wisconsin Constitution." (*Id.* at ¶ 34). Plaintiffs seek "temporary and permanent injunctions prohibiting GAB from . . . placing the burden" on Scott Walker's campaign committee to identify and raise challenges to recall petitions. (*Id.*)

These demands seek to extinguish the basic structure of a statutorily defined administrative procedure in which recall proponents and targeted incumbents have adversarial roles in litigating before the

GAB alleged defects in the petitions. Appellants, the other party to that administrative process, were entitled to intervene as of right.[3]

DISCUSSION

The denial of appellants' motion to intervene is a final order from which an appeal may be taken. *Becker v. Becker*, 66 Wis. 2d 731, 735, 225 N.W.2d 884 (1975). However, given plaintiffs' decision to wait until shortly before recall petitions are required to be offered for filing and review – and the circuit court's agreement to proceed to the merits of the case immediately – appellants' right to appeal will almost certainly be rendered totally moot absent a stay.

If the circuit court proceeds to hear plaintiffs' demands for injunctive and declaratory relief, other harms will ensue and they will reach far beyond the appellants. Proceedings on plaintiffs' claims will harm the public interest and injure appellants because those proceedings would give Scott Walker and the Republican Party a forum in which to attack and disparage the recall process and the integrity of Wisconsin's electoral process, a forum from which the opposing side has been excluded and the opposing view point silenced. Scott Walker and the Republican Party will be free to attack the recall efforts free from the

[3] Indeed, they are likely necessary parties pursuant to § 803.03, Wis. Stats.

law's most fundamental protector of the truth, a genuine adversarial process. It would foster and magnify uncertainty and confusion regarding the recall process and it would give Scott Walker an undo political advantage. Finally, proceeding to hear Scott Walker's demand to change the rules for his recall and those of his fellow incumbents after excluding Democratic interests from participation would damage the courts as an institution.

AN IMMEDIATE STAY IS WARRANTED

A stay pending appeal is appropriate where the moving party:

> (1) makes a strong showing that it is likely to succeed on the merits of the appeal;
>
> (2) shows that, unless a stay is granted, it will suffer irreparable injury;
>
> (3) shows that no substantial harm will come to other interested parties; and
>
> (4) shows that a stay will do no harm to the public interest.

State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). "These factors are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.*

> To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. It has been said that the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the

> plaintiff will suffer absent the stay. In other words, more of one factor excuses less of the other.

Id. at 441. "The harm alleged must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant. *Id.* at 441-42.

Likelihood of success.

Because a motion for a stay pending appeal asks a judge to ascertain the likelihood that his or her own decision was in error, "a high probability of success on appeal is not necessarily required for a stay; rather, the likelihood of success is weighed along with the other factors, and the degree of likelihood of success that justifies a stay in a particular case will depend on the relative strength of the other factors." *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, ¶ 18 n. 14, 237 Wis. 2d 498, 513, 614 N.W.2d 565.

Here, the appellants have precisely the same type and degree of interest that plaintiffs have in the subject of this action. Plaintiffs seek to change the rules governing Scott Walker's anticipated administrative litigation with appellants. It is beyond dispute that both parties to the anticipated administrative litigation have the same exact interest in the rules that govern. In denying intervention, the Court gave only one side a role in evaluating and possibly changing the rules.

The Court also erred in holding that appellants' interests were adequately represented by the GAB. The GAB has no interest in whether a recall succeeds or fails. It has an interest in only administering the law, not in what the substance of

the law is or whether it is changed. Appellants specifically sought to obtain and present evidence challenging several of plaintiffs' key factual claims, *e.g.*, "it will be a practical impossibility for FOSW and/or Thompson to review, identify and challenge multiple signatures." (Appx. 1, Complaint at ¶ 27). For rather apparent institutional reasons, the GAB has already indicated that it does not intend to seek the discovery and evidence the appellants sought. For these and the other reasons set out in the brief in support of intervention, the GAB cannot be deemed to represent appellants' interests. (Appx. 4).

Harm absent a stay.

Without a stay, the recall committees may be suddenly subject to a recall petition review process that differs from that which existed when they planned and undertook their efforts. They, the GAB, and the public will be further injured by the confusion and uncertainty produced by further proceedings. And both the reality and perception of only Republican-aligned interests being permitted to participate in this case, to the exclusion of Democratic-aligned interests, will injure proposed intervenors, the administration of election law, the public interest and the institution of the Court.

The Stay will Cause no Harm.

Plaintiffs can suffer no harm because it is, at best, wholly speculative that the harm they claim to anticipate could or will ever come to pass. And if it did, they would have ample remedies available to them. For example, if plaintiffs

were dissatisfied with the GAB's handling of the petitions and an election was ordered, § 9.10(3), Wis. Stats., specifically authorizes the official subject to recall to seek a writ in the circuit court for the county where the recall petitions were filed. And, of course, nothing required them to wait until the final days of the recall effort to bring this lawsuit.

CONCLUSION

For the foregoing reasons, appellants respectfully request that the Court enter an order staying the circuit court proceedings in connection with plaintiffs' demands for declaratory and injunctive relief.

Dated this 3rd day of January, 2012.

FRIEBERT, FINERTY & ST JOHN, S.C.

By: _____

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APPENDIX
