

# SUPREME COURT OF WISCONSIN

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CASE NO.: 2006AP2452-OA

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COMPLETE TITLE:

Green for Wisconsin and Mark Green,  
Petitioners,

v.

State of Wisconsin Elections Board and Kevin J.  
Kennedy, in his official capacity as Executive  
Director of the State of Wisconsin Elections  
Board,

Respondents.

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OPINION FILED: April 25, 2007

SUBMITTED ON BRIEFS:

ORAL ARGUMENT:

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SOURCE OF APPEAL:

COURT:

COUNTY:

JUDGE:

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JUSTICES:

CONCURRED: Crooks, J., concurs (opinion filed).  
Prosser, J., concurs (opinion filed).

DISSENTED:

NOT PARTICIPATING:

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ATTORNEYS:

# SUPREME COURT OF WISCONSIN

## NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 2006AP2452-OA

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Green for Wisconsin and Mark Green,

Petitioners,

v.

State of Wisconsin Elections Board and Kevin J. Kennedy , in his official capacity as Executive Director of the State of Wisconsin Elections Board,

Respondents.

**FILED**

**APR 25, 2007**

David R. Schanker  
Clerk of Supreme Court  
Madison, WI

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The Court entered the following order on this date:

The parties have agreed that this case may be dismissed, with prejudice, without costs, and without further notice to any party.

IT IS ORDERED that the original action is dismissed, with prejudice and without costs to any party.

¶1 N. PATRICK CROOKS, J. (*concurring*). While I concur in the order dismissing this matter, based on the unopposed motion of the petitioners, I write in order to respond to the lengthy concurrence of Justice David T. Prosser.

¶2 Several years ago, Grant County Circuit Court Judge Richard W. Orton, a distinguished trial judge, ordered summary judgment in a case. In doing so, he characterized the plaintiffs' case as "hogwash, pure hogwash." That phrase aptly fits those portions of the concurrence of Justice Prosser where he denigrates the actions of members of this court. The following unfair and inaccurate phrases are used in his concurrence: the court "used every imaginable pretext to avoid making a decision" (¶16); the "court did not care" (¶17); was "indifferent" to the facts of the case (¶23); was "overwhelmed by the difficulty of the facts and issues" and "threw up its hands" (¶28).

¶3 The fact is that this court spent many, many hours working on the petition asking to commence an original action, as well as on the various submissions of the petitioners, the respondents, and the amicus. The October 31, 2006 order of this court accurately sets forth the extensive efforts that were made to try to get this matter into an appropriate posture, so that a decision could be made as to whether to grant the petition, and thus, take this case invoking our original jurisdiction. We did, of course, ultimately take the case once there were no factual disputes. This court grants petitions for original jurisdiction "'with the greatest reluctance . . . especially

where questions of fact are involved . . . ." Petition of Heil, 230 Wis. 428, 436, 284 N.W. 42 (1939) (citing State ex rel. Hartung v. City of Milwaukee, 102 Wis. 509, 78 N. W. 756 (1899)).

¶4 The March 12, 2007 order of this court came in response to the changes brought about by the legislature and the governor in eliminating the State Elections Board and the State Ethics Board, and in creating a new Government Accountability Board. That new board has the authority to review, and, by its action or inaction, to affirm or nullify decisions by the two boards that were eliminated. See 2007 Wis. Act 1, § 209(2)(e). The settlement of this case came shortly after we issued that order, asking the parties whether oral argument should be scheduled despite the changes, or whether it was prudent to wait until the new Government Accountability Board had an opportunity to act or decline to act.

¶5 Much is made in the concurrence of Justice Prosser about how this court was once a "great court," and how we no longer fit that description. Justice Prosser's concurrence, ¶¶16, 37. In order to be a "great court," I believe that the members of such a court must be persons who care deeply about truth, justice, and fairness. I have great respect for my colleagues on the Wisconsin Supreme Court, but it is for others, not for us, to judge whether we continue to be a "great court." What I observed in the handling of this case by my colleagues convinced me that each of them cared deeply about truth, justice, and fairness for the parties. To denigrate, now, their



actions is wrong and I must, therefore, respond to such unfair and inaccurate characterizations of the court and its actions in this case. Accordingly, I respectfully concur.

¶6 DAVID T. PROSSER, J. (*concurring*). The petitioners, Green for Wisconsin and Mark Green, move this court for an order to dismiss their original action. Their motion is based upon a Stipulation of the parties to settle the case. The petitioners' motion was filed by an assistant attorney general representing the respondents, which underscores the settlement agreement. In view of the settlement, I reluctantly concur in the Order to dismiss the action. Nonetheless, because this case always warranted the court's urgent attention, I believe additional comment is necessary.

## I

¶7 There have been many notable cases in the history of this court. By all accounts, one of the most significant was The Attorney General ex rel. Bashford v. Barstow, 4 Wis. 567 (1856). See Joseph A. Ranney, Trusting Nothing to Providence 84-88 (1999); John Bradley Winslow, The Story of a Great Court 96-107 (1912). The case involved a disputed election for governor in which the court in essence removed a governor from office.

¶8 In 1855 Governor William A. Barstow ran for re-election. Although his party dominated Wisconsin politics, Barstow had apparently antagonized many voters, and he ran well behind the rest of the ticket. The election was very close and remained unresolved for weeks. On December 17, 1855, the last day allowed by law, the state board of canvassers certified Barstow's reelection by 157 votes. Winslow, supra, at 97.

¶9 Barstow's opponent, Coles Bashford, claimed fraud. He asserted that slow returns from Chippewa, Waupaca, and several other northern counties contained fictitious precincts and manufactured votes. Winslow, supra, at 97, 101. Bashford moved to file a writ of quo warranto in the supreme court, challenging Barstow's election and his right to hold the office of governor. Winslow, supra, at 99.

¶10 The newly elected attorney general took control of the quo warranto so that a member of Barstow's party could manage the action. Eventually, however, he stepped aside. Winslow, supra, at 99, 101.

¶11 Barstow vigorously opposed the court's jurisdiction to hear the case. Winslow, supra, at 102. When the court decided otherwise, Barstow refused to file a substantive answer, thereby permitting a default judgment. Barstow's attorneys withdrew after delivering a communication from Barstow threatening to resist any removal order from the court "with all the force vested in this department." Winslow, supra, at 104-05.<sup>1</sup>

¶12 The court was not deterred. Rather than enter a default against Barstow, however, it required Bashford to make his proofs and demonstrate his title to office. He did.

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<sup>1</sup> As Justice Winslow later wrote: "This was plainly a threat of armed resistance in case the Court proceeded to seat Bashford. Especially significant was the threat in view of the fact that arms were known to have been stored in the state house for use in case of an emergency." John Bradley Winslow, The Story of a Great Court 105 (1912). Joseph Ranney adds: "Tensions ran high. Militia units from areas supporting Barstow came to Madison for his inauguration and stayed to fight for him if necessary." Joseph A. Ranney, Trusting Nothing to Providence 84 (1999).

Winslow, supra, at 106. Once the "irregularities and fraudulent returns were amply proven," the court entered judgment. Winslow, supra, at 106. Several days before judgment, Barstow resigned, transferring the office to the lieutenant governor who promptly honored the court's order. Winslow, supra, at 107.

¶13 In explaining the court's jurisdiction to decide this "political case," Chief Justice Edward Whiton observed that the court "is the mere instrument provided by the constitution to ascertain and enforce [Bashford's and Barstow's] rights as fixed by that instrument. Its office is the same as in all controversies between party and party; not to create rights, but to ascertain and enforce them." Ranney, supra, at 85 (quoting Bashford, 4 Wis. at 659).

¶14 Throughout the proceedings, the court was united. Justice Abram D. Smith, a member of Barstow's party, wrote on every important issue before the court. Future Chief Justice Edward G. Ryan, also a member of Barstow's party, played a leading role in arguing and proving Bashford's case. Ranney, supra, at 84; Winslow, supra, at 99.

¶15 The case of Bashford v. Barstow, according to historian Joseph A. Ranney, "conclusively established [the Supreme Court's] role as the final interpreter of the law." Ranney, supra, at 84. It also assured the integrity of the electoral process. It thus represented a pivotal moment in Wisconsin legal history.

## II

¶16 Bashford v. Barstow was decided more than a century-and-a-half ago. We live now in different times. If there is

ever a sequel to Justice Winslow's The Story of a Great Court, the Green case will not be included. In the midst and aftermath of an important gubernatorial election, this court did nothing to ascertain and enforce rights, or to assure the integrity of the electoral process. Instead, it used every imaginable pretext to avoid making a decision.

¶17 Some citizens believe that petitioner Green and his committee were campaign violators, even though the Elections Board deprived them of the opportunity to use lawfully collected, publicly reported political contributions in Green's campaign. Other citizens believe that Green was the victim of an abuse of government power. No matter how one sees it, history will show that this court did not care.

¶18 From the outset, Green contended that he and his committee had complied in every respect with existing state and federal law. The Elections Board now stipulates that:

[W]hen Green for Wisconsin . . . converted the disputed funds from Petitioner Mark Green's federal campaign committee to his state campaign committee on January 25, 2005, it complied with: (1) previous Board determinations with respect to similar matters; (2) ElBd 1.39, as written and interpreted at the time; and (3) instructions provided by the Board's staff.

¶19 What more is there to say? When the parties also "acknowledge that the Board's position in this litigation was based on the Board's current interpretation of the relevant statutes," the parties acknowledge an irrelevancy. (Emphasis added.)

¶20 This court recognized in Elections Board v. Wisconsin Manufacturers & Commerce, 227 Wis. 2d 650, 597 N.W.2d 721

(1999), that retroactive rulemaking—at least in the area of speech—is a violation of due process of law. This court said: "Because we assume that [persons are] free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." Id. at 676-77 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)). "Such notice is a basic requirement of due process." Id. (citing Grayned, 408 U.S. at 108).

¶21 The court went on: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." Id. at 677 (quoting Buckley v. Valeo, 424 U.S. 1, 41 n.48 (1976)).

¶22 When Justice Department attorneys were called upon to defend the Elections Board's rules and "order," they were not content with trying to defend retroactive rulemaking. They publicly and repeatedly accused Green of violating federal law, a position that directly contradicted the Elections Board's formal interpretation of federal law.<sup>2</sup> This astounding and

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<sup>2</sup> The Elections Board's explanation of its emergency rule reads in part:

The Elections Board finds that an emergency exists in the recent change in federal law that permits the transfer of the funds in a federal candidate campaign committee's account to the candidate's state campaign committee account . . . .

In November, 2004, Congress amended the Federal Election Campaign Act . . . to permit the transfer of a federal candidate's campaign committee's funds to the candidate's state campaign committee, if state law permitted, and subject to the state law's requirements and restrictions.

disturbing position may be the reason why former Attorney General Peggy Lautenschlager's name is conspicuously missing from all the briefs Department attorneys filed in this case.

¶23 To these hard facts the court has been indifferent. The extensive procedural history of this case is set out below.

¶24 On October 9, 2006, Green filed a petition for an original action in this court.

¶25 On October 11, 2006, this court responded promptly by issuing two orders. One ordered the Elections Board to file a response by October 16, 2006. The other ordered Green to secure and transfer to this court records from the Elections Board relating to its proceedings, its Emergency Rule of January 26, 2005, and its September 6, 2006, "order," as well as all papers and transcripts from Green's unsuccessful effort to obtain an injunction against the Board's "order" in the Dane County Circuit Court (Case No. 2006CV3055).

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Because of Congress' action in November, 2004, money which had not been available to a state committee under BICRA, and which might not have qualified for use for political purposes in a state campaign because of its source or because of other noncompliance with state law, could now be transferred to a state committee, if state law permitted. Wisconsin law, under the Board's current rule, ElBd 1.39 Wis. Adm. Code, allows for conversion of federal campaign committees, and their funds, to a state campaign committee without regard to the source of those funds and without regard to contribution limitations. (Emphasis added.)

¶26 On October 18, 2006, this court ordered the petitioners and respondents to file answers to 11 questions by October 19, 2006. See Appendix A.

¶27 On October 31, 2006, the court issued a third order. 2006 WI 120, \_\_\_ Wis. 2d \_\_\_, 723 N.W.2d 418. The order stated that:

The court has worked diligently to assess and determine the legal and factual issues presented by the parties and to reach a consensus on how to proceed; we have explored the difficult substantive and procedural issues in an attempt to bring order out of complex and confusing filings, all to no avail. (Emphasis added.)

¶28 Seemingly overwhelmed by the difficulty of the facts and issues, the court threw up its hands and ordered the petitioners to file an amended petition "in the form of a complaint which, in numbered paragraph form, specifies the precise facts and legal theories upon which they rely." The respondents were then ordered to answer the new "complaint." The order stated that the court would then submit these documents to a reserve judge who would determine "what factual issues are in dispute and whether they relate to the identified legal issues." The court went on at length about the alleged jumble of disputed facts:

This court has on two occasions issued orders asking the parties to clarify the facts upon which the court would have to resolve the matter and to identify disputed facts, if any. It appears from the parties' submissions in response to those orders that there are truly contested issues of fact.

The parties do not appear to agree on what facts are relevant, nor do they agree on the characterization of many facts. The parties' stipulation of facts was for the circuit court



proceeding and it does not cover all of the facts at issue here. The respondent says the only relevant facts are the Elections Board's record in creating the emergency rule and issuing the September 6, 2006 order. Petitioners say that the court must also consider the history of the Elections Board's actions regarding previous "conversions" of federal campaign accounts to state campaign accounts. Petitioners' "record" for purposes of an original action would apparently consist of the "record" transmitted by the Dane County Circuit Court from the earlier circuit court case, the Elections Board record, documents regarding the complaint filed with the Federal Election Commission, and "factual assertions offered by the parties." In response, although the respondent's filings have cited certain paragraphs in the petitioners' filings to which it takes exception, it has failed to identify clearly the specific factual allegations that it allegedly disputes. The parties' seemingly inconsistent statements on the existence of disputed factual issues impinges upon this court's ability to evaluate at this point in time whether the case is of the type that should be resolved through the court's original jurisdiction, which is designed to resolve important legal questions but not to referee factual disputes.

¶29 Three justices dissented from this order. Justice Jon Wilcox wrote: "Further pleadings and factual development will not shed any more light on whether this court should decide to exercise its original jurisdiction. . . . Further pleadings are unnecessary." Green, \_\_\_ Wis. 2d \_\_\_, ¶¶2, 4 (Wilcox, J., dissenting). Justice Patience Roggensack wrote: "Neither further factual development nor further pleading is necessary for this court to decide whether to exercise its original jurisdiction. . . . The . . . order unnecessarily delays making a decision on this issue until after the November 7, 2006 election . . . ." Id., ¶¶23, 24 (Roggensack, J., dissenting).

¶30 On November 8, 2006, the court issued an order appointing the Honorable William F. Eich to conduct the proceedings described in its October 31, 2006, order.

¶31 On December 12, 2006, Judge Eich issued his report. He noted that petitioners' amended petition listed "thirty separate paragraphs" reciting facts. He stated that "Respondents admit each of the thirty factual allegations of the Amended Petition." He stated that the parties agreed on the legal issues. Then he declared: "The parties have agreed and represented that the material facts necessary to determination of the above issues are, as contained in the pleadings, matters of record and, in any event, are undisputed." (Emphasis added.) See Appendix B.

¶32 Six weeks later, on January 23, 2007, the court issued a fourth order, accepting original jurisdiction, setting a briefing schedule, and enumerating eight issues. See Appendix C.

¶33 On March 12, 2007, the court issued a fifth order, asking the parties whether it was "desirable and prudential to delay oral arguments in this matter until the [newly created] Government Accountability Board has acted." See Appendix D. This order hinted at delaying argument until late 2007 or even 2008.

¶34 Four days later, the parties settled the case and filed a motion to dismiss.

¶35 At no time did the court schedule oral argument.

¶36 This procedural record speaks for itself.

¶37 If there is ever a sequel to The Story of a Great Court, this case will not be included. But with many more cases like this one, there is not likely to be a sequel.



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**Supreme Court of Wisconsin**

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October 18, 2006

**To:**

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Madison, WI 53703

Christopher J. Blythe  
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Scott W. Hansen  
Daniel Kelly  
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Milwaukee, WI 53201-2965

You are hereby notified that the Court has entered the following order:

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No. 2006AP2452-OA      Green for Wisconsin v. State of Wisconsin Elections Board

Upon consideration of the petitioners' Memorandum and Supplemental Appendix, including the document issued by the State of Wisconsin Ethics Board on October 13, 2006, and the respondent's Response to Petition for Original Action of October 16, 2006, all filed in response to this court's order dated October 11, 2006,

IT IS ORDERED that the petitioners, Green for Wisconsin and Mark Green, and the respondent, State of Wisconsin Elections Board (the Elections Board), shall file statements by 2:00 p.m. on Thursday, October 19, 2006, addressing the following issues:

1. Is the September 6, 2006 document issued by the Elections Board an order? Is it enforceable? How? What is it and what legal effect, if any, does it have?
2. Was any filing by the Wisconsin Democracy Campaign a complaint under Wis. Admin. Code ch. EIBd 10? If so, was it a valid complaint under that chapter?

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3. Was the September 6, 2006 action by the Elections Board a resolution of a filing by the Wisconsin Democracy Campaign or an action by the Elections Board independent of any third-party complaint?
4. If the September 6, 2006 action was in response to a filing by the Wisconsin Democracy Campaign, did the Elections Board follow the procedures set forth in Wis. Admin. Code ch. EIBd 10?
5. If the September 6, 2006 document was not issued in response to a filing by the Wisconsin Democracy Campaign, under what specific authority and procedure was it issued?
6. Does the September 6, 2006 action by the Elections Board require or allow the petitioners to proceed under Wis. Stat. §§ 227.40, 227.52, 227.53 and/or 227.57 in the circuit court? If so, why? If not, why not?
7. Does the September 6, 2006 action by the Elections Board allow the petitioners to proceed under Wis. Stat. § 806.04?
8. Whether, even if the September 6, 2006 action of the Elections Board is not an "order" or an "enforceable order", is there a justiciable action ripe for this court's consideration?
9. Are there any disputes of fact with respect to the numbered paragraphs that appear on pages 38-40 of Petitioners' Memorandum and Supplemental Appendix in Response to the Order of the Court Dated October 11, 2006?
10. What facts, if any, in the stipulation of facts filed in the Dane County Circuit Court in the action captioned Green for Wisconsin v. State of Wisconsin Elections Board (Dane County Circuit Court Case No. 06-CV-3055) (the Dane County Action) are disputed?
11. If the court grants jurisdiction, what are the material facts upon which the court should decide this case? What are the specific disputes of material fact, if any? If there are such disputes, list them.

The parties shall file an original and twelve copies of their statements and any supporting materials.

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The listing of the issues set forth above should not be construed as an indication as to whether or not the court intends to grant jurisdiction in this case. The court will decide that matter after consideration of all of the materials submitted by the parties and the documents in the proceedings requested in the court's order dated October 11, 2006.

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*Cornelia G. Clark*  
*Clerk of Supreme Court*

Appendix A-3

**FILED**

**DEC 12 2006**

**CLERK OF SUPREME COURT  
OF WISCONSIN**

**SUPREME COURT OF WISCONSIN**

GREEN FOR WISCONSIN

&

MARK GREEN,

PETITIONERS

Vs.

STATE OF WISCONSIN ELECTIONS BOARD

&

KEVIN KENNEDY, in his official capacity  
As Executive Director of the State of  
Wisconsin Elections Board,,

RESPONDENTS

**REFEREE'S REPORT**  
**TO THE COURT**  
**DECEMBER 11, 2006**

ORIGINAL ACTION  
CASE No. 2006AP002452-OA

**INTRODUCTION**

On October 31, 2006, the Court issued an order indicating that, after having considered a petition for leave to commence an original action on behalf of Mark Green and the Green for Wisconsin committee, together with various other submissions of the parties, it was unable to ascertain whether the facts were in dispute, and, as a result, was unable to fully evaluate whether it was an appropriate case for original jurisdiction—a proceeding described by the Court as “designed to resolve important legal questions but not to referee factual disputes.” Accordingly, the Court directed Petitioners to file an amended petition “setting forth the precise facts and legal theories upon which they rely,” and instructed Respondents to reply. The Court also directed both parties to submit “a detailed list of the issues of law which [they intend] to brief and which [they believe] the court must decide...”

Appendix B-1



The October 31 Order also indicated that the Court would appoint a reserve judge, to whom the documents would be transmitted, and who would then

... conduct such proceedings as he/she may deem necessary within the exercise of his/her discretion, including of an evidentiary nature, to determine what factual issues are in dispute and whether they relate to the identified legal issues.

On November 8, 2006, I was appointed to undertake that task. The submissions required by the October 31st order were transmitted to me on or about November 28, 2006, and I was directed by the Court to "submit ... findings on disputed relevant facts, if any," by January 15, 2007.

Pursuant to the court's directives, I convened a conference with all counsel for the purpose of determining the factual and legal issues in the proceeding, and, if necessary, to chart future courses of action consistent with the court's orders. The meeting was held on December 6, 2006, with the following appearances:

For Petitioners, Attys. Scott W. Hansen and Don M. Millis,  
Reinhart, Boerner, Van Dueren, S.C., Milwaukee.

For Respondents, Christopher J. Blythe and Jennifer Sloan Lattis,  
Assistant Attorneys General, Wisconsin Department of Justice.

For The Wisconsin Democracy Campaign, *amicus curiae*, Atty.  
Tamara Beth Packard, Cullen, Weston, Pines & Bach, Madison.

Based on the court's orders and the proceedings outlined above, I make the following report to the court.

#### REPORT

##### A. The Amended Pleadings



Petitioners' amended petition for original jurisdiction begins with thirty separate paragraphs reciting the history of other campaigns, notably the 2000 Barrett campaign, in which funds in the hands of a federal-office campaign committee were transferred to the candidate's state campaign committee. It then sets forth applicable state and federal laws and regulations on the subject, emphasizing the emergency rule (ElBd 1.395) published by the Wisconsin Elections Board on February 3, 2005, a week or so after Petitioner Green transferred funds from his federal campaign committee to his state committee, Green for Wisconsin. The rule provided that such transferred (or "converted") funds may not be used in Wisconsin "if the contribution of those funds to the federal ... committee would not have complied with Wisconsin law if the contribution had been made directly to a Wisconsin campaign committee," and required the state committee to "divest itself of such money..."

Petitioners' remaining factual allegations relate to the adoption of the Emergency Rule (including its suspension by the Joint Committee for Review of Administrative Rules), the history of disbursements by the Green committee, and the Board's order of September 6, 2006, directing the committee to divest itself "of all amounts received from PACs that were not registered in Wisconsin," and, in particular, "of all PAC money received in excess of the PAC limit of \$485,190, including amounts received from the federal campaign fund, as such amounts are in violation of ... Emergency Rule .... ElBd 1.395, Chapter 11 of the Wisconsin Statutes, and other applicable Wisconsin law."

Based on those factual allegations, the petition seeks declarations that: [1] the Emergency Rule and September 6th Order are unconstitutional as violative of "Petitioners' rights to freedom of speech and due process of law;" and [2] the Emergency Rule is void because (a) the Board failed to hold the public hearing required by Wis. Stat. § 227.24, (b) the 150-day limit for the existence of emergency rules, also set forth in § 227.04, had expired before issuance of the September 6th Order, and (c) the Board lacked authority to promulgate the Emergency Rule, as it conflicts with campaign contribution limitations, and seeks to regulate funds not within its jurisdiction. Finally, petitioners

seek an order enjoining the Board from enforcing either the Emergency Rule or the Order against them.

Responding to the Petitioner's constitutional claim, Respondents admit each of the thirty factual allegations of the Amended Petition. They then set forth seven additional (and briefly-stated) facts relating to the dates on which various pleadings and papers were filed in Petitioner's circuit court action for injunctive and declaratory relief. Respondents also admit that "an actual and justiciable controversy exists ... as to whether the Emergency Rule and the ... Order are lawful or enforceable," but they deny any constitutional violation and assert that the appropriate forum for adjudication of the dispute is the circuit court, in proceedings commenced under Wis. Stat., ch. 227. They respond in a similar manner to Petitioners' claim that the Rule and Order are void under state law—admitting the existence of the controversy, denying any law violations, and asserting that the circuit court (in a ch. 227 proceeding) is the appropriate forum for adjudication of the issues presented.

Finally, Respondents assert two "counterclaims," should the Court elect to accept original jurisdiction over the dispute. The counterclaims are mirror-images of the results sought in the Amended Petition in that respondents seek (a) a declaratory ruling that Petitioners' actions violated the Emergency Rule, and (b) an order directing Petitioners to comply with the Rule and the subsequent divestiture order.

Petitioners have not made any submissions challenging any of the additional facts alleged in Respondents' Answer and Counterclaim.

#### **B. Legal Issues**

The parties agree that the legal issues as framed in the Amended Petition and the Answer and Counterclaim are as follows:

##### **[1] Procedural Issue: Should the Court Take Original Jurisdiction?**

[a] The effect of the 2006 circuit court action

[b] The applicability and/or exclusivity of proceedings under Wis. Stat., ch. 227.

[c] Whether the legal standards for original jurisdiction stated in *Petition of Heil*, 238 Wis. 428 (1930), and succeeding cases, are met.

[2] **Substantive Legal Issues**

[a] Whether the Emergency Rule and the September 6th divestiture order violate the Free Speech and/or Due Process provisions of the United States and Wisconsin Constitutions.

[b] Whether, under applicable federal and state laws, the conversion of federal campaign funds to a state committee constitutes a "contribution" within the meaning of Wisconsin's campaign contribution laws and regulations.

[c] Whether the Rule and Order are valid under Wisconsin law

[i] Do they comply with applicable statutory requirements for emergency rules?

[ii] Did the Elections Board have legal authority to promulgate the Rule and issue the Order?

[d] Whether, if the Emergency Rule is determined to have been validly promulgated:



[i] Petitioners violated its provisions;

[ii] The Board should be estopped from enforcing the rule against Petitioners.

**Disputes of Material Fact**

The parties have agreed and represented that the material facts necessary to determination of the above issues are, as contained in the pleadings, matters of record and, in any event, are undisputed.

**Miscellaneous**

Because Respondents' Counterclaim raises no new issues, the parties have agreed that no response is required from Petitioners.

Respectfully submitted this 11th day of December, 2006

A handwritten signature in black ink, appearing to read 'William Eich', with a long horizontal flourish extending to the right.

William Eich  
Reserve Judge

Appendix C-1



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January 23, 2007

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(Additional addressees on Page Four)

You are hereby notified that the Court has entered the following order:

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No. 2006AP2452-OA      Green for Wisconsin v. State of Wisconsin Elections Board

The court having considered a petition for leave to commence an original action filed on behalf of petitioners, Green for Wisconsin and Mark Green, a response filed on behalf of respondents, State of Wisconsin Elections Board (Elections Board) and Kevin Kennedy (in his official capacity as executive director of the State of Wisconsin Elections Board), further responses filed by the parties in response to the court's orders of October 11, 2006, and October 18, 2006, and a nonparty brief filed on behalf of the Wisconsin Democracy Campaign.

On October 31, 2006, the court issued an order directing (1) the petitioners to file an amended petition in the form of a complaint, specifying the facts and legal theories on which they rely, (2) the respondents to file an answer to the amended petition, and (3) both parties to submit a detailed list of the legal issues they intended to present to the court. The October 31, 2006 order also provided that the court would appoint a reserve judge to conduct whatever

## Appendix C-2

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January 23, 2007

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proceedings were necessary to determine what factual issues were in dispute and whether those factual disputes, if any, relate to the legal issues identified by the parties. On November 8, 2006, the court appointed the Honorable William F. Eich, reserve judge, to conduct the proceedings contemplated by the October 31, 2006 order.

After reviewing the parties' amended pleadings and lists of legal issues, Judge Eich convened a meeting with counsel to discuss the factual and legal issues in this proceeding. On December 12, 2006, Judge Eich filed his report in conformance with the October 31, 2006 order of the court. Judge Eich's report noted that the amended petition had set forth 30 numbered paragraphs of factual allegations (see Petitioners' Statement of the Issues of Law and Amended Petition for Original Action at 2-8), all of which the respondents had admitted in their answer to the amended petition. Judge Eich further noted that the respondents had set forth seven additional factual allegations (see Respondents' Answer to Petitioners' Statement of the Law and Amended Petition for Review at 4-5), which the petitioners have not challenged. In light of these pleadings and the parties' agreement at the meeting with counsel, Judge Eich concluded that the parties had now agreed that the material facts necessary to the determination of the legal issues are undisputed and contained in the pleadings or otherwise matters of record. Judge Eich's report also stated that the parties had agreed to the legal issues to be presented to this court, as set forth in the parties' amended pleadings, which he listed under procedural and substantive headings. No party has filed any document objecting to Judge Eich's report or its characterization of the facts and legal issues.

Upon consideration of all of the foregoing,

IT IS ORDERED that the petition for leave to commence an original action is granted; and

IT IS FURTHER ORDERED that the factual basis for the court's consideration of this case shall be the factual allegations contained in the paragraphs numbered 1-30 on pages 2-8 of the Petitioners' Statement of the Issues of Law and Amended Petition for Original Action (filed November 10, 2006), the factual allegations contained in the paragraphs numbered 1-7 on pages 4-5 of the Respondents' Answer to Petitioners' Statement of the Law and Amended Petition for Review (filed November 20, 2006), the documents produced by the Elections Board in response to the court's October 11, 2006 order, numbered E.B. 101-465, the documents from Dane County Case No. 06CV3055 that were produced by the Dane County Circuit Court in response to the court's October 11, 2006 order, and the documents attached to the pleadings or otherwise of record in this proceeding. No facts outside of the record in this proceeding shall be referenced by the parties in their briefs or in oral argument; and

IT IS FURTHER ORDERED that the parties shall file any objections to any of the documents within the record of this proceeding, as described in the preceding paragraph, within 7 calendar days of the date of this order. Such objections shall specifically identify the document or portion thereof that is the subject of the objection and shall state the specific basis of the objection. A response to any objection shall be filed within 7 calendar days following the filing of the objection; and



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IT IS FURTHER ORDERED that any stipulation to supplement the record in this original action shall be filed within 10 calendar days of the date of this order; and

IT IS FURTHER ORDERED that the legal issues the parties are to address in their briefs to this court shall be the legal issues set forth in Judge Eich's report, namely:

1. The effect of the 2006 circuit court action (Dane County Case No. 2006CV3055) on this proceeding;
2. The applicability and/or exclusivity of proceedings under Wis. Stat. ch. 227;
3. Whether Emergency Rule § EIBd 1.395 and the September 6, 2006 "Order" issued by the Elections Board violate the Free Speech and/or Due Process provisions of the United States and Wisconsin Constitutions;
4. Whether, under applicable federal and state laws, the conversion of a candidate's federal campaign funds to a state campaign committee constitutes a "contribution" within the meaning of Wisconsin's campaign contribution laws and regulations;
5. Whether the Emergency Rule and the September 6, 2006 "Order" comply with applicable statutory requirements for emergency rules;
6. Whether the Elections Board had legal authority to promulgate the Emergency Rule and issue the September 6, 2006 "Order";
7. Whether, if the Emergency Rule is determined to have been validly promulgated, the petitioners violated its provisions; and
8. Whether, if the Emergency Rule is determined to have been validly promulgated, the Elections Board should be estopped from enforcing the Emergency Rule against the petitioners; and

IT IS FURTHER ORDERED that on or before February 22, 2007, the petitioners shall file their initial brief; on or before March 14, 2007, the respondents shall file their response brief; on or before March 26, 2007, the petitioners shall file a reply brief or a statement that no reply brief will be filed; and

IT IS FURTHER ORDERED that the parties shall be notified of the date and time for oral argument in this action in due course.

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*A. John Voelker*  
*Acting Clerk of Supreme Court*

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Additional Addressees:

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William Eich

Appendix C-4



Appendix D-1



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March 12, 2007

**To:**

Hon. Richard G. Niess  
Dane County Circuit Court Judge  
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Madison, WI 53703

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(Additional addressees on Page Two)

You are hereby notified that the Court has entered the following order:

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IT IS ORDERED that within 10 days from the date of this order the petitioners, Green For Wisconsin and Mark Green, and the respondents, State of Wisconsin Elections Board and Kevin Kennedy, in his official capacity as Executive Director of the State of Wisconsin Elections Board, shall file, simultaneously, supplemental letter briefs in this court. The supplemental briefs shall address the following question:

In light of the passage of 2007 Wisconsin Act 1, which creates a Government Accountability Board to take over the duties and responsibilities of the Elections Board and the Ethics Board, and recognizing that Sec. 209 (2)(e) of the Act states that, within one year of the initiation date, the Board shall hold a public hearing on the question of whether it will reaffirm each rule or order previously promulgated by the Elections Board, and it appearing that if the board does not reaffirm a rule or order it will no longer have any effect, is it desirable and prudent to delay oral arguments in this matter until the Government Accountability Board has acted?

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In answering this question the parties shall address all relevant considerations including the doctrine of separation of powers, as well as the question of comity toward the Legislative and Executive Branches of the government of the State of Wisconsin.

---

*A. John Voelker  
Acting Clerk of Supreme Court*

Additional Addressees:

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