



FOX | O'NEILL | SHANNON s.c.

622 North Water Street  
Suite 500  
Milwaukee, WI 53202  
Telephone: 414-273-3939  
Fax: 414-273-3947  
www.foslaw.com

January 13, 2020

Matthew W. O'Neill  
mwoneill@foslaw.com

**VIA HAND DELIVERY**

Ms. Julietta Henry  
Elections Director  
Milwaukee County Election  
Commission  
Milwaukee County Courthouse  
901 North Ninth Street, Room G-10  
Milwaukee, WI 53233

RE: In the Matter of Nomination Papers Filed by Bryan Kennedy for  
Spring Election for Milwaukee County Executive

Dear Ms. Henry:

Enclosed herewith is the original Verified Response of Bryan Kennedy to the Complaint of Theo Lipscomb. Attached to the response are the original Affidavits of Bryan Kennedy, Lesa Trotter, Alisha Pettis and Dominique Thomas. I will also email a copy of the Response to you for distribution to the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthew W. O'Neill', is written over the typed name.

MATTHEW W. O'NEILL

MWO:ljc

Enclosures

CC: Client

STATE OF WISCONSIN  
COUNTY OF MILWAUKEE  
BEFORE THE MILWAUKEE COUNTY ELECTION COMMISSION

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IN THE MATTER OF the Nomination Papers  
Filed by Bryan Kennedy with Respect to the  
Spring Election for Milwaukee County  
Executive

File No. \_\_\_\_\_

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**VERIFIED RESPONSE OF BRYAN KENNEDY**

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The Verified Complaint of Theodore A. Lipscomb, Sr. (“Complaint”) seeks to prevent Bryan Kennedy from being included on the ballot for the upcoming Milwaukee County Executive race by disqualifying 844 signatures Commission staff found to be valid. The Complaint should be rejected. The Complaint is based upon the fact that three canvassers for Kennedy had previously circulated nomination papers for another candidate for Milwaukee County Executive. The attached affidavits from the canvassers confirm this was an innocent error by a third-party vendor. The affidavit of Bryan Kennedy confirms that when he retained a vendor to help gather additional signatures (the majority of Kennedy’s 2,939 nomination signatures were collected by his campaign and its supporters), he specifically asked whether the vendor was collecting for any other candidate and was told “no.”

The Complaint does not challenge and therefore concedes that the signatures it seeks to remove are qualified electors who correctly completed the nomination process. Wis. Stat. § 5.01(1) instructs that the nomination paper requirements in Chapter 8, including Wis. Stat. § 8.04, the statute cited in the Complaint, “shall be construed to 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 their provisions.” The statutes must therefore be construed to allow for the challenged

signatures to be counted, despite the error by the canvassers, in order to give effect to the will of the electors who signed the petitions.

### **BACKGROUND**

Bryan Kennedy is the elected Mayor of Glendale and a candidate for Milwaukee County Executive for the Spring 2020 General Election. The Kennedy campaign submitted 2,939 signatures on nomination petitions to the Milwaukee County Election Commission on Monday, January 6, 2020 to place his name on the ballot for the February 18, 2020 primary. On January 13, 2019, Commission staff confirmed 2,684 of the signatures were valid.<sup>1</sup>

In addition to the approximately 1,500 signatures collected by Kennedy, his friends and family, and his campaign staff, the campaign contracted with Urban Media to employ a team of canvassers to collect approximately 1,400 additional signatures. *Bryan Kennedy Aff.*, ¶ 4. Kennedy specifically inquired whether Urban Media was collecting signatures for other campaigns. *Id.*, ¶ 5. He was informed that he was the only candidate for County Executive for whom they were canvassing. *Id.*

Urban Media apparently subcontracted with a team of canvassers to collect the signatures for Kennedy. *Kennedy Aff.*, ¶ 6. Unbeknownst to Kennedy, the retained canvassers had previously collected signatures for other campaigns, including other campaigns for Milwaukee County Executive. *See, e.g., Lesa Trotter Aff.*, ¶¶ 4-5.

The three canvassers in question confirmed that they had obtained signatures for another candidate prior to the time they obtained signatures for Mr. Kennedy. *See Affidavits of Alisha Pettis, Lesa Trotter and Dominique Thomas*, ¶¶ 4-6. The canvassers attested that they supported

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<sup>1</sup> The Commission's initial, partial review confirmed 2,289 signatures as of January 10, 2019 at 6:30 p.m. <https://county.milwaukee.gov/files/county/county-clerk/Election-Commission/Upcoming-Elections/2020SpringCandidateSpreadsheet2.pdf>. Shortly before submission of this Verified Response, the Commission emailed a spreadsheet confirming its final determination of 2,684 valid signatures.

both candidates being included on the primary ballot, to increase the quality choices for Milwaukee County residents. *Id.*, ¶ 7.

The paid canvassers were unaware of any legal restriction on collecting signatures for different candidates in the same race. *Affidavits of Pettis, Trotter and Thomas*, ¶ 8. The error was an innocent one, and the canvassers have asked that the Commission not disqualify the signatures of the qualified electors due to their inadvertent error. *Id.*, ¶ 10.

### ARGUMENT

**I. Wisconsin’s Election Statutes are Directory, Not Mandatory, Consistent with the Command of Wis. Stat. § 5.01(1) that the Statutes Must be Construed to “Give Effect to the Will of the Electors.”**

Wis. Stat. § 5.01(1) states:

CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs. 5 to 12 shall be construed to 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 their provisions.

This statutory charge to preserve and protect the will of the electorate despite errors in process was enacted over a century ago, in 1903. *State ex rel. Oaks v. Brown*, 211 Wis. 571, 578, 249 N.W. 50 (1933).

Consistent with this statutory guidepost, the Wisconsin Supreme Court has long recognized that election statutes are directory, not mandatory. *See State ex rel. Bancroft v. Stumpf*, 21 Wis. 586 (1867) (“[T]he statutory regulations for conducting an election are directory and not jurisdictional in their character; the main object of such laws being to afford all persons entitled to vote an opportunity to exercise the elective franchise, to prevent illegal votes, and to ascertain with certainty the true number of votes cast, and for whom”); *Petition of Anderson*, 12 Wis. 2d 530, 534, 107 N. W.2d 496 (1939) (absentee ballot procedures are directory, not mandatory);

*Sommerfeld v. Board of Canvassers*, 269 Wis. 299, 69 N. W. 2d 235 (1955) (applying the standard of § 5.01(1), when construing election laws “the word ‘shall’ can be construed to mean ‘may.’”).

The Wisconsin Supreme Court notes that, in analyzing the directory/mandatory issue, courts will look to whether the statute includes explicit language that non-compliance is fatal or will raise doubts as to the validity of an election: “Statutes giving directions as to the mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result, as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election.” *Lanser v. Koconis*, 62 Wis. 2d 86, 91, 214 N.W.2d 425 (1974) (citation omitted). For this reason, “[d]eviations from directory provisions of election statutes are usually termed ‘irregularities,’ and... do not vitiate an election.” *Id.*

In *Gradinjan v. Boho*, 29 Wis. 2d 674, 682, 139 N.W.2d 557 (1966), the Court explained the difference between a mandatory and directory statute:

In keeping with sec. 5.01(1), Stats., this court has quite consistently construed the provisions of election statutes as directory rather than mandatory so as to preserve the will of the elector. . .

An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid. Deviations from directory provisions of election statutes are usually termed ‘irregularities,’ and, as has been shown in the preceding subdivision, such irregularities do not vitiate an election.

*See also Roth v. La Farge Sch. Dist. Bd. of Canvassers*, 2001 WI App 221, ¶ 27, 247 Wis. 2d 708, 634 N.W.2d 882 (“Whereas compliance with a mandatory provision renders a ballot void, failure to comply with a directory provision will not invalidate the vote so long as there is ‘substantial

compliance' with the statute."); *Matter of Hayden*, 105 Wis. 2d 468, 483, 313 N.W.2d 869 (Ct. App. 1981) ("Strict compliance with a directory statute is not required.").

Statutes which have been held to be directory and not mandatory include Wis. Stat. §§ 6.23(11) ("no name so pasted shall be counted"); 6.41 (ballots without clerk's initials "shall be void"); 6.60 (methods for ballot security); and 6.87(6) (absentee ballots not "delivered as provided in this section shall not be counted"). *Gradinjan*, 29 Wis. 2d at 682; *Lanser*, 62 Wis. 2d at 90-94.

The Wisconsin Supreme Court in *Lanser* stressed that in the absence of any alleged fraud, the courts should and will view the election statutes as directory:

We are fully cognizant of possible abuses of the absentee voter's law and share the concern of the legislature in preventing any such abuse. If the record in this case indicated the slightest evidence of any fraud, connivance or attempted undue influence, we would have no hesitancy in declaring the absentee voters' ballots invalid. However, we are not inclined to disenfranchise these voters who acted in conformance with the statutory requirements. There is absolutely no evidence from which it could be inferred that the method of delivery by the municipal clerk in any way affected their vote.

62 Wis. 2d at 93. *See also Sommerfeld*, 269 Wis. at 304 ("There is no claim that any of the envelopes had been tampered with in any way, nor is there any claim of fraud in this case. The complaint as to the delivery of the ballots is purely technical. We conclude, therefore, that in order to fulfill the spirit of our election laws the last sentence of sec. 11.59, Stats., is directory only, and that a delivery of ballots by agent is a substantial compliance therewith.").

## **II. Wis. Stat. § 8.04 Should be Construed as Directory, Not Mandatory.**

The Complaint relies on Wis. Stat. § 8.04, which states in part: "If any person circulates a paper for 2 candidates for the same office in the same election at different times, the earlier paper is valid and the later paper is invalid."

Nothing in the text of the statute declares that noncompliance is “fatal,” or would otherwise cast doubt upon the results of an election. *Lanser*, 62 Wis. 2d at 91. Nothing in the statute suggests a higher-level directive of the legislature that compliance is mandatory and tied directly to concerns about election integrity. Rather, as in the case of the many statutes that have been held to be directory only, Wis. Stat. § 8.04 merely establishes the “mode or manner” for considering signatures submitted on a nomination paper.

The legislature knows how to ensure an election statute is mandatory. Wis. Stat. § 6.84(2) states as follows regarding the absentee voting process: “Notwithstanding s. 5.01 (1), with respect to matters relating to the absentee ballot process, ss. 6.86, 6.87 (3) to (7) and 9.01 (1) (b) 2. and 4. shall be construed as mandatory. Ballots cast in contravention of the procedures specified in those provisions may not be counted. Ballots counted in contravention of the procedures specified in those provisions may not be included in the certified result of any election.”

The lack of any similar language in Wis. Stat. § 8.04 confirms that the Commission should properly view it as directory. *See Matter of Hayden*, 105 Wis. 2d at 483 (where the legislature has not included an express and clear command, “the statutes should be construed as directory.”).

### **III. There is No Evidence of Any Fraud, but Rather an Inadvertent Mistake by the Paid Canvassers.**

The Complaint does not allege and there is no evidence of any “fraud, connivance or attempted undue influence” with respect to Kennedy’s nomination papers. *Lanser*, 62 Wis. 2d at 93. Kennedy’s verifying affidavit confirms that not only was he unaware that the retained circulators had previously circulated nomination papers for another candidate, he was informed that the vendor he retained, Urban Media, was not collecting for any other candidates in his race. *Kennedy Aff.*, ¶ 5.

The canvassers themselves confirmed under oath that they were unaware of the statute stating that signatures collected for a second candidate for the same race could be rejected. *See Pettis Aff.*, ¶ 8; *Trotter Aff.*, ¶ 8; *Thomas Aff.*, ¶ 8. Each confirmed that they collected the signatures in the manner they understood to be required, which is to get individual signatures, printed names, addresses and the date of the signature. *Pettis Aff.*, ¶ 3; *Trotter Aff.*, ¶ 3; *Thomas Aff.*, ¶ 3.

No evidence exists, therefore, from which the Commission could find or infer the type of fraud or undue influence that would justify construing Wis. Stat. § 8.04 as mandatory.

**IV. Counting the Challenged Signatures Despite the Error of the Circulators Will Give Effect to the Will of the Electors.**

It is conceded that the signatures gathered by Ms. Pettis, Ms. Trotter and Ms. Thomas for Kennedy failed to fully comply with Wis. Stat. § 8.04. As established above, however, the law allows the Commission to view the failure to comply with the directory provisions in Wis. Stat. § 8.04 as an “irregularity” which does not invalidate the signatures of those electors who stated their desire to include Mr. Kennedy on the primary ballot for Milwaukee County Executive.

Mr. Kennedy submitted 2,939 signatures, far in excess of the 2,000 signatures required to be included on the ballot for County Executive. Commission staff identified a small subset of signatures that were missing a circulator signature or had other defects, but the resulting 2,684 certified signatures far exceed the minimum required. By denying the Complaint and counting the signatures gathered by Ms. Pettis, Ms. Trotter and Ms. Thomas, the Commission will “give effect to the will of” those electors, consistent with Wis. Stat. § 5.01(1).

**CONCLUSION**

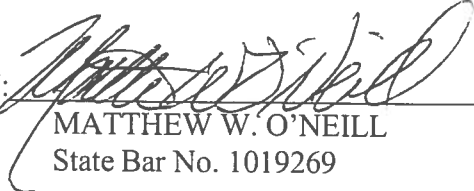
For these reasons, the Complaint should be denied and Bryan Kennedy should be included on the primary ballot for Milwaukee County Executive.



Dated this 13th day of January, 2020.

FOX, O'NEILL & SHANNON, S.C.  
Attorneys for Bryan Kennedy

BY:



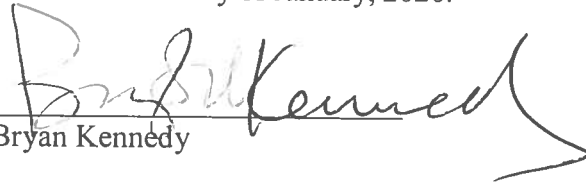
MATTHEW W. O'NEILL  
State Bar No. 1019269

P.O. Address:  
622 North Water Street, Suite 500  
Milwaukee, WI 53202  
(414) 273-3939

**VERIFICATION**

Bryan Kennedy, being first duly sworn, on oath, deposes and says that he has read the foregoing Verified Response of Bryan Kennedy and that all factual assertions it contains are true and accurate within his personal knowledge, except for those assertions expressly cited to another source.

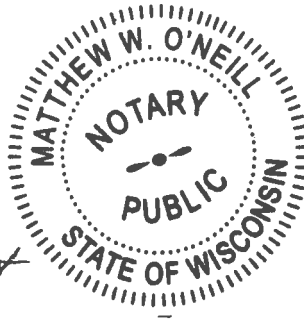
Dated this 13th day of January, 2020.

  
Bryan Kennedy

Subscribed and sworn to before me  
this 13th day of January, 2020.

  
Notary Public, State of Wisconsin

My commission expires: Permanant



STATE OF WISCONSIN  
COUNTY OF MILWAUKEE  
BEFORE THE MILWAUKEE COUNTY ELECTION COMMISSION

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IN THE MATTER OF the Nomination Papers  
Filed by Bryan Kennedy with Respect to the  
Spring Election for Milwaukee County  
Executive

File No. \_\_\_\_\_

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**AFFIDAVIT OF BRYAN KENNEDY**

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STATE OF WISCONSIN    )  
  ) ss.  
MILWAUKEE COUNTY    )

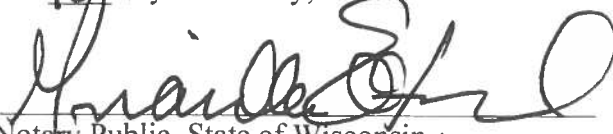
Bryan Kennedy, being first duly sworn on oath, deposes and states as follows:

1. I am a resident of the City of Glendale, a registered voter in Milwaukee County, the elected Mayor of the City of Glendale, and a candidate for Milwaukee County Executive for the Spring 2020 General Election.
2. I submit this affidavit in response to the Complaint filed by Theo Lipscomb challenging the nomination petitions I filed for the Milwaukee County Executive race.
3. My campaign submitted 2,939 signatures on nomination petitions to the Milwaukee County Election Commission on Monday, January 6, 2020 to place my name on the ballot for the February 18, 2020 primary.
4. In addition to the approximately 1,500+ signatures collected by me, my friends and family, and my campaign staff, my campaign contracted with Urban Media to employ a team of canvassers to collect approximately 1,400 additional signatures.
5. In the course of my dealings with Urban Media, I specifically asked Roemel Brown if Urban Media was collecting for other campaigns. He said that I was the only candidate for County Executive for whom they were canvassing.
6. It appears that Urban Media subcontracted with a team of canvassers that may have been collecting for multiple campaigns for the same office.

7. There are 844 Milwaukee County electors that signed my nomination papers, whose signatures were collected by circulators that collected for David Crowley prior to collecting for me. Those voters clearly intended to place my name on the ballot. They should not be denied the right to vote for their candidate of choice because of the error of a vendor or its employees.

  
Bryan Kennedy

Subscribed and sworn to before me  
this 12<sup>th</sup> day of January, 2020

  
Notary Public, State of Wisconsin

My Commission: 12/12/2020



STATE OF WISCONSIN  
COUNTY OF MILWAUKEE  
BEFORE THE MILWAUKEE COUNTY ELECTION COMMISSION

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IN THE MATTER OF the Nomination Papers  
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Spring Election for Milwaukee County  
Executive

File No. \_\_\_\_\_

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**AFFIDAVIT OF LESA TROTTER**

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STATE OF WISCONSIN    )  
                                  ) ss.  
MILWAUKEE COUNTY    )

LESA TROTTER, being first duly sworn on oath, deposes and states as follows:

1. I am a qualified elector and a resident of Milwaukee County, residing at 4305 N. 18<sup>th</sup> Street, Milwaukee, WI 53209.
2. During the past two months, I circulated nomination papers for individuals running for elected office. I did so as an employee of a vendor for the candidates.
3. In all cases I attempted to fully comply with the requirements for gathering and certifying the signatures of qualified electors.
4. Between December 16-22, 2019, I collected approximately 8 pages of signatures for David Crowley, who is running for Milwaukee County Executive.
5. Between December 29, 2019 and January 4, 2020, I collected approximately 16 pages of signatures for Bryan Kennedy, who is running for Milwaukee County Executive.
6. At no time was I circulating nomination papers for the two candidates at the same time.
7. I support both of their names being included on the ballot for Milwaukee County Executive, to give the voters of Milwaukee County more choices in the upcoming election.

8. I was unaware that a state statute, Wis. Stat. § 8.04, is written in a manner to preclude a person from circulating nomination papers for more than one candidate for the same office.

9. Had I known of the statute or been made aware of the statute, I would not have circulated papers for more than one candidate for the same race. It was an innocent error.

10. My error should not be used to disqualify the valid signatures of the qualified electors that I obtained on behalf of Bryan Kennedy.

Les Trotter  
Les Trotter

Subscribed and sworn to before me  
this 12<sup>th</sup> day of January, 2020.

Miranda Eizel  
Notary Public, State of Wisconsin

My Commission: 12/12/2020



STATE OF WISCONSIN  
COUNTY OF MILWAUKEE  
BEFORE THE MILWAUKEE COUNTY ELECTION COMMISSION

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IN THE MATTER OF the Nomination Papers  
Filed by Bryan Kennedy with Respect to the  
Spring Election for Milwaukee County  
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File No. \_\_\_\_\_

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**AFFIDAVIT OF ALISHA PETTIS**

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STATE OF WISCONSIN    )  
  ) ss.  
MILWAUKEE COUNTY    )

Alisha Pettis, being first duly sworn on oath, deposes and states as follows:

1. I am a qualified elector and a resident of Milwaukee County, residing at 2438A N. 54<sup>th</sup> Street, Milwaukee, WI 53210.
2. During the past two months, I circulated nomination papers for individuals running for elected office. I did so as an employee of a vendor working on behalf of the candidates.
3. In all cases I attempted to fully comply with the requirements for gathering and certifying the signatures of qualified electors.
4. On December 19, 2019, I collected approximately 9 pages of signatures for David Crowley, who is running for Milwaukee County Executive.
5. Between December 23, 2019 and January 5, 2020, I collected approximately 68 pages of signatures for Bryan Kennedy, who is running for Milwaukee County Executive.
6. At no time was I circulating nomination papers for the two candidates at the same time.
7. I support both of their names being included on the ballot for Milwaukee County Executive, to give the voters of Milwaukee County more choices in the upcoming election.

8. I was unaware that a state statute, Wis. Stat. § 8.04, is written in a manner to preclude a person from circulating nomination papers for more than one candidate for the same office.

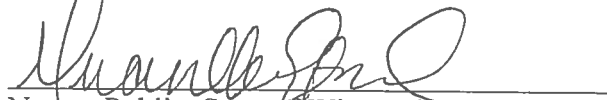
9. Had I known of the statute or been made aware of the statute, I would not have circulated papers for more than one candidate for the same race. It was an innocent error.

10. My error should not be used to disqualify the many hundreds of valid signatures of qualified electors that I obtained on behalf of Bryan Kennedy.



Alisha Pettis

Subscribed and sworn to before me  
this 12<sup>th</sup> day of January, 2020.

  
Notary Public, State of Wisconsin

My Commission: 12/12/2020





STATE OF WISCONSIN  
COUNTY OF MILWAUKEE  
BEFORE THE MILWAUKEE COUNTY ELECTION COMMISSION

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IN THE MATTER OF the Nomination Papers  
Filed by Bryan Kennedy with Respect to the  
Spring Election for Milwaukee County  
Executive

File No. \_\_\_\_\_

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**AFFIDAVIT OF DOMINIQUE THOMAS**

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STATE OF WISCONSIN    )  
                                  ) ss.  
MILWAUKEE COUNTY    )

Dominique Thomas, being first duly sworn on oath, deposes and states as follows:

1. I am a qualified elector and a resident of Milwaukee County, residing at 2878 N. 26<sup>th</sup> Street, Milwaukee, WI 53206.
2. During the past two months, I circulated nomination papers for individuals running for elected office. I did so as an employee of a vendor working on behalf of the candidates.
3. In all cases I attempted to fully comply with the requirements for gathering and certifying the signatures of qualified electors.
4. Between December 16-21, 2019, I collected approximately 19 pages of signatures for David Crowley, who is running for Milwaukee County Executive.
5. On December 29, 2019, I collected one page of signatures for Bryan Kennedy, who is running for Milwaukee County Executive.
6. At no time was I circulating nomination papers for the two candidates at the same time.
7. I support both of their names being included on the ballot for Milwaukee County Executive, to give the voters of Milwaukee County more choices in the upcoming election.

8. I was unaware that a state statute, Wis. Stat. § 8.04, is written in a manner to preclude a person from circulating nomination papers for more than one candidate for the same office.

9. Had I known of the statute or been made aware of the statute, I would not have circulated papers for more than one candidate for the same race. It was an innocent error.

10. My error should not be used to disqualify the valid signatures of qualified electors that I obtained on behalf of Bryan Kennedy.

Dominique Thomas  
Dominique Thomas

Subscribed and sworn to before me  
this 12<sup>th</sup> day of January, 2020.

Miranda Etzel  
Notary Public, State of Wisconsin

My Commission: 12/17/2020

