

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

MICHAEL J. GABLEMAN, IN HIS OFFICIAL CAPACITY AS SPECIAL COUNSEL TO THE WISCONSIN ASSEMBLY,

Plaintiff

v.

Case No.: _____

SATYA RHODES-CONWAY, PERSONALLY, AND IN HER OFFICIAL CAPACITY AS MAYOR OF MADISON, WISCONSIN;

MARIBETH WITZEL-BEHL, PERSONALLY, AND IN HER OFFICIAL CAPACITY AS CITY CLERK OF MADISON, WISCONSIN,

ERIC GENRICH, PERSONALLY, AND IN HIS OFFICIAL CAPACITY AS MAYOR OF GREEN BAY, WISCONSIN, and

CELESTINE JEFFRIES, PERSONALLY, AND IN HER OFFICIAL CAPACITY AS CITY CLERK OF GREEN BAY, WISCONSIN,

Defendants

MEMORANDUM IN SUPPORT of

I. PETITION for ORDERS TO COMPEL COMPLIANCE with LEGISLATIVE SUBPOENA

AND

II. PETITION for ORDERS TO SHOW CAUSE

OVERVIEW AND INTRODUCTION

Wisconsin law has long endorsed legislative subpoenas as a function of oversight and investigation into its own legislation. The judiciary is empowered to enforce legislative subpoenas but has no authority over the requirements to be performed by the subpoena. Instead, the United States Supreme Court has held that the only valid objection to the judiciary to a legislative subpoena is a due process one before being punished for noncompliance.

Legislative subpoenas were properly issued and served upon the defendants. The defendants failed to fully respond or comply with the subpoenas. The Special Counsel has petitioned this court to enforce the subpoenas. This brief is in support of that petition.

ARGUMENT

I. The legislature has the power to issue its own subpoenas and the subpoenas in this case were validly issued.

Legislative subpoena power was created by statute. Wis. Stat. § 13.31. “The attendance of witnesses before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter, may be procured by subpoenas signed by the presiding officer and chief clerk of the senate or assembly.” *Id.* A legislative subpoena must “state when, where, and before whom the witness is required to appear.” *Id.* The legislative subpoena may also require the production of “books, records, documents, and papers” as designated by the subpoenas. *Id.*

The first case in Wisconsin challenging a legislative subpoena was in 1859. *In re Falvey*, 7 Wis. 630 (1859). In *Falvey*, the legislature appointed a committee to

investigate allegations of fraud, bribery, and corruption of legislators or in legislative acts. *Id.* at 631. As a result, the legislature issued subpoenas to Thomas Falvey using the same requirements contained in § 13.31. *Id.* at 632–33. Falvey failed to appear before the committee and give testimony. *Id.* at 633. Falvey was arrested for contempt and petitioned the Wisconsin judiciary for his release. *Id.* at 633–34. He argued to the court that the legislature did not have the power to resolve and direct an investigation or issue subpoenas. *Id.* at 634.

The Wisconsin Supreme Court held that the judiciary has the authority to inquire into the authority of the legislature to investigate, whether the subject matter of the investigation at issue “was a proper subject for the investigation of the legislature,” and “whether the investigation could be made in the manner contemplated by the resolution.” *Id.* at 635. The supreme court recognized the ability of the legislature to issue subpoenas in furtherance of its legislative investigation. *Id.* It found that the subpoena not only requires a witness to appear but that the refusal to appear or answer questions is “a breach of the privileges of the body issuing the subpoena.” *Id.* at 639. *Falvey* makes clear that the legislature can issue its own subpoenas and they are enforceable if they are validly issued.

The subpoenas in this case validly issued. They were signed by the presiding officer of the Assembly, Speaker Robin Vos, and the chief clerk of the Assembly. *See* Exhibits 2–5. The Wisconsin Assembly resolved on March 17, 2021, and directed “the Assembly Committee on Campaigns and Elections to investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January

1, 2019.” *See* Exhibit One (2021 Assembly Resolution 15). The Special Counsel was created and appointed on August 21, 2021, by the Speaker of the Assembly to “direct an elections integrity investigation, assist the Elections and Campaigns Committee, and hire investigators and other staff to assist in the investigation.” *See id.* (Ballot 21-06). As such, the legislative subpoenas which commanded an appearance for a deposition before the Special Counsel was a demand to appear before the authorized agent of the Committee on Elections and Campaigns investigation in fulfillment of 2021 Assembly Resolution 15. While the defendants partially performed by providing documents, they did not appear and give testimony. Enforcement is now ripe as to those depositions.

II. The Wisconsin Judiciary has the power to enforce a legislative subpoena.

Enforcement of legislative subpoenas is also a creation of statute. Wis. Stat. § 885.12. “If any person without reasonable excuse, fails to attend as a witness, or to testify as lawfully required before any . . . committee, or other officer or person authorized to take testimony, any judge of a court of record . . . in the county where the person was obliged to attend may, upon sworn proof of the facts, issue an attachment for the person.” *Id.* This has been the recommended method of enforcement of legislative subpoenas in Wisconsin since 1931. 20 Wis. Opp, Att’y Gen. 765, 769 (“In case the witness shall fail to attend and testify, I advise you to proceed under [statutory enforcement]” because “[t]hat section provides ample authority in judicial officers to compel attendance by attachment and commit the witness until he shall purge himself of his contempt by testifying”).

The Special Counsel has filed a petition and a sworn statement of facts with this court seeking the enforcement of the legislative subpoenas. The defendants did not object to testifying and has provided no reasonable excuse for their willful failure to comply with the subpoenas. Even if they had objected, the objections are limited and enforced by the federal judiciary.

III. The only recognized objection to a legislative subpoena does not apply to instant case.

The United States Supreme Court expressly recognizes the power of the houses of the Congress to punish contemptuous conduct and leave little question that the Constitution imposes no general barriers to the legislative exercise of such power. *Groppi v. Leslie*, 404 U.S. 496, 499–500 (1972) (citing *Journey v. MacCracken*, 294 U.S. 125 (1935); *Anderson v. Dunn*, 6 Wheat. 204 (1821)). The Court’s only concern is with the procedures that the Due Process Clause of the Federal Constitution requires a state legislature to meet in imposing punishment for contemptuous conduct committee in its presence. *Id.* The panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings. *Id.* at 501.

Reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence. *Id.* at 502 (citations omitted). This fundamental principle has been emphasized where rights of less standing than personal liberty were at stake. *Id.* (citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Morgan v. United States*, 304 U.S. 1, 18 (1938); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). “Many controversies have raged about the

cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Id.* at 502–03 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, (1950)).

Compliance with a legislative subpoena is mandatory. Punishment can only come after notice and an opportunity to be heard. However, the Special Counsel is not asking this court to punish the defendants. Instead, the Special Counsel is asking this court to order the defendants to comply with the subpoenas by appearing and giving testimony on a specific date or showing cause for why they failed to do so. The only objection the defendants can make, is that they have no due process under the federal constitution in being punished for failing to comply with the subpoenas—but punishment is not the relief sought in the case at bar. Based on *Groppi* and *Falvey*, this court has the authority and should order the defendants to appear and give testimony.

REQUESTED RELIEF

1. Order the defendants to appear at a date and time certain to give testimony to the Special Counsel, who is an agent of the Committee on Elections and Campaigns.

2. Alternatively, order the defendants to appear and show cause as to why they failed to appear or comply with the subpoenas.

3. Permit the Special Counsel to file a motion for attorney's fees and costs pursuant to Wis. Stat. § 885.11.

RESPECTFULLY SUBMITTED,

Michael Gableman, WI Bar No.: 1024325

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