

FILED

MAR 27 2020

CLERK OF SUPREME COURT
OF WISCONSIN

SUPREME COURT OF WISCONSIN

No. _____

MARK JEFFERSON; REPUBLICAN PARTY OF WISCONSIN,
PETITIONER,

v.

DANE COUNTY, WISCONSIN; SCOTT McDONNELL, IN HIS OFFICIAL
CAPACITY AS DANE COUNTY CLERK,
RESPONDENTS.

EMERGENCY PETITION FOR ORIGINAL ACTION

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ISSUES PRESENTED BY THE CONTROVERSY

(1) Whether the Dane County Clerk has the authority to issue an interpretation of Wisconsin's election laws allowing all voters in Dane County to request and cast an absentee ballot without providing a photo ID.

(2) Whether all Wisconsin voters may forgo State requirements to provide a photo ID when requesting an absentee ballot on grounds that Emergency Order #12 makes them "indefinitely confined because of age, physical illness or infirmity."

INTRODUCTION

“It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’ *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted). To ensure that the right to vote is fully realized, States must enact clear and uniform state guidelines to make elections “fair and honest” and to bring “order, rather than chaos, [to] the democratic process[].” *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The existence of a national and statewide emergency cannot—indeed, must not—change our structure of government. Under our constitution, the responsibility for drafting and revising our election laws lies with the legislature. Additional responsibility for elections lies with the Wisconsin Elections Commission, which has the exclusive authority to “[p]romulgate rules ... applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns ... or ensuring their proper administration.” Wis. Stat. § 5.05(1)(f).

Respondents, however, have claimed the authority through the county clerk to rewrite the State’s election laws and to issue authoritative declarations interpreting their provisions. Wisconsin

state law requires electors to present photo ID when voting absentee, and it authorizes only limited exceptions to this requirement. Specifically, state law provides that an elector need not provide photo ID if he or she “is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period.” Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)(5).

Despite this clear statutory text and their lack of authority to issue binding interpretations unique to their county, Respondents have declared that *all* Wisconsin voters—regardless of whether they are actually “indefinitely confined” or actually suffering a “physical illness or infirmity” due to COVID-19—can vote absentee in the upcoming election without presenting a photo ID.

This interpretation is wrong and requires this Court’s immediate correction. As the Wisconsin Legislative Reference Bureau recently concluded, “Emergency Order 12 by its very terms does not render all Wisconsin residents indefinitely confined.” *See Questions Related to “Indefinitely Confined” Absentee Ballots*, Wisconsin Legislative Reference Bureau at 5, (Mar. 26, 2020), bit.ly/3bGVOyD. Thus, county clerks have no legal authority “to encourage voters to claim to be indefinitely confined because of the

governor’s ‘safer at home’ order as a way to avoid presenting voter identification when requesting an absentee ballot.” *Id.* At 3. None of Respondents’ arguments to the contrary can overcome the plain language of Wisconsin’s election laws.

Without this Court’s intervention, the upcoming election will take place under two sets of different rules—one for voters in Dane county, and one for voters in the rest of the State. Even worse, Respondents’ declaration likely will disenfranchise those same voters that Respondents purport to protect, as those votes that were cast improperly cannot be counted. And at least one county (Milwaukee County) has released a similar interpretation, and it is possible that more counties will follow suit. This is guaranteed to bring additional chaos and confusion across the State.

The unprecedented circumstances arising from COVID-19 should not be deployed to sow doubt and confusion about the conduct of public elections, but that is what appears to be happening. County and municipal election officials across Wisconsin are claiming the unilateral authority to rewrite Wisconsin’s election laws. Lawsuits are being filed seeking changes to the upcoming election—often to invalidate longstanding provisions of law that have survived previous

challenges. *See, e.g., Lewis v. Knudson*, No. 20-cv-284 (W.D. Wis.) (seeking an order directing the WEC to postpone the current election). And voters are unsure of what comes next. This Court's guidance is urgently needed. The Court should grant this Petition for Original Action.

STATEMENT OF FACTS

1. Petitioner, Mark Jefferson, is an adult citizen and eligible elector in the State of Wisconsin who resides in the Town of Albion in Dane County, Wisconsin. Mr. Jefferson has already voted by absentee ballot and provided a photo ID in order to obtain his ballot. Mr. Jefferson is concerned that voters who improperly obtain a ballot without providing a photo ID will vote unlawfully, thereby diluting his lawful vote.

2. Petitioner, Republican Party of Wisconsin, is a state political party that supports Republican candidates in elections throughout the State of Wisconsin. Its office is located at 148 East Johnson St., Madison, WI 53703.

3. Respondent Dane County is a county in Wisconsin. Its office is located at 210 Martin Luther King Jr. Blvd., Madison, WI 53703.

4. Respondent Scott McDonell is the Clerk of Dane County. His office is located at City County Building, Room 106 A, 210 Martin Luther King Jr. Blvd., Madison, WI 53703.

5. Wisconsin will hold its Spring Election and Presidential Preference Primary on April 7, 2020. See WEC, *Spring 2020 Election and Presidential Preference Primary*, bit.ly/3dx84Ds.

6. The election, however, is already well underway. As of this filing, Wisconsin has received more than 700,000 absentee ballot requests. See WEC, *Absentee Requests for April 7 Spring Election*, bit.ly/33N2FDT; Craig Gilbert, *In a state used to political drama, Wisconsin's April 7 election is awash in doubt, dispute and uncertainty*, Milwaukee J. Sent. (Mar. 26, 2020), bit.ly/2UmXWFW. Registered voters can continue requesting absentee ballots until April 2, 2020. See WEC, *Important Information about COVID-19 Coronavirus*, bit.ly/3bt2kZr.

7. In March 2020, States across the country began taking measures to address the spread of COVID-19 (or the coronavirus).

8. On March 24, 2020, Governor Tony Evers issued Emergency Order #12, the "Safer at Home Order." See EO #12, bit.ly/2WLhHs8 (App. 1-16). That Order stated that "individuals

present within the State of Wisconsin are ordered to stay at home or at their place of residence.” Order § 1.

9. The Order, however, created numerous exceptions to the direction to stay at home. Individuals in Wisconsin may, for example, leave their homes to get groceries and household products, travel to and work at businesses that provide essential services, and engage in outdoor leisure activities. Order §§ 1, 11.

10. The next day, March 25, 2020, Respondent Dane County Clerk Scott McDonell issued the following statement on his Facebook page:

I have informed Dane County Municipal Clerks that during this emergency and based on the Governor's Stay at Home order I am declaring all Dane County voters may indicate as needed that they are indefinitely confined due to illness. This declaration will make it easier for Dane County voters to participate in this election by mail in these difficult times. I urge all voters who request a ballot and have trouble presenting [a] valid ID to indicate that they are indefinitely confined.

People are reluctant to check the box that says they are indefinitely confined but this is a pandemic....

The process works like this:

- A voter visits myvote.wi.gov to request a ballot.
- A voter can select a box that reads “I certify that I am indefinitely confined due to age illness, infirmity or disability and request ballots be sent to me for every election until I am no longer confined or fail to return a ballot.”

- The voter is then able to skip the step of uploading an ID in order to receive a ballot for the April 7 election.

Voters are confined due to the COVID-19 illness. When the Stay at Home order by the Governor is lifted, the voter can change their designation back by contacting their clerk or updating their information in myvote.wi.gov.

Voters who are able to provide a copy of their ID should do so and not indicate that they are indefinitely confined.

McDonnell Facebook Post (Mar. 25, 2020), bit.ly/39qLrNv (App. 17-21).

11. On March 25, 2020, Milwaukee County Clerk George L. Christenson issued a similar statement on the Office of the Milwaukee County Clerk's Facebook page:

I have informed municipal clerks in Milwaukee County that during this emergency, and based on the Governor's Safer at Home Order as well as guidance from the Wisconsin Election Commission, that it is appropriate that Milwaukee County voters requesting an absentee ballot may declare themselves as indefinitely confined to their homes. By declaring themselves indefinitely confined, it will be easier for Milwaukee County voters to participate in this election by mail in these difficult times.

I urge all voters who request a ballot and do not have the ability or equipment to upload a valid ID to indicate that they are indefinitely confined. Voters should not be reluctant to check the box that says they are indefinitely confined because this is a pandemic

and this option exists in state law to help preserve everyone's right to vote.

The process works like this:

- A voter visits myvote.wi.gov to request a ballot.
- A voter can select a box that reads "I certify that I am indefinitely confined due to age, illness, infirmity, or disability and request ballots to be sent to me for every election until I am no longer confined or fail to return a ballot."
- The voter is then able to skip the step of uploading an ID in order to receive a ballot for April 7th election.

Voters are confined to their homes due to COVID-19 illness. When the Safer at Home Order by the Governor is lifted, the voter can change the designation back by contacting their municipal clerk or by updating their information on myvote.wi.gov.

Christenson Facebook Post (Mar. 25, 2020), bit.ly/3aolAqS (App. 22-23).

12. As of the date of this filing, the Wisconsin Elections Commission has not issued any similar interpretation of Wisconsin's election laws. *See generally* Wisconsin Elections Commission, *Recent Clerk Communications*, bit.ly/2JgGqg0; *see also* Wisconsin Elections Commission, *COVID-19 FAQs and Updates: Online Voter Registration, Absentee Voting, Envelopes, Sanitizer and Poll Worker Recruitment* (Mar. 22, 2020), bit.ly/2y4WZZV.

STATEMENT OF RELIEF SOUGHT

If this Court grants the Petition, Petitioner will ask this Court to issue a declaratory judgment, *see, e.g.*, Wis. Stat. § 806.04, that makes clear that the Governor’s Emergency Order #12 does not and cannot affect the rules and procedures under the Wisconsin’s election laws and, in particular, (1) that Respondents lack the authority to issue an interpretation of Wisconsin’s election law allowing voters in Dane County to vote absentee without a photo ID; and (2) that the Governor’s Emergency Order #12, Safer at Home Order, does not authorize all Wisconsin voters—regardless of whether they are actually “indefinitely confined” or actually suffering a “physical illness or infirmity” due to COVID-19—to vote absentee without a photo ID. Petitioner is also seeking a preliminary injunction ordering Respondents to remove their interpretation from public display and issue new statements correcting their interpretation of Wisconsin’s election law.

STATEMENTS OF THE REASONS WHY THIS COURT SHOULD TAKE JURISDICTION

As discussed in more detail in the Memorandum in Support of Petition for Original Action, this Court should grant this Petition.

Ensuring that the upcoming election is administered through uniform and legally correct procedures is an issue of great public importance. It is also essential that this dispute be resolved as swiftly as possible. The election is set to occur on April 7 and absentee voting is ongoing. Without this Court's intervention, the upcoming election will take place under different legal rules throughout the State, and those who have voted in reliance on Respondents' improper interpretations risk being disenfranchised when their votes are later discounted. In addition, the purely legal issues presented by this petition are appropriate for this Court's review.

Respondents' actions, moreover, have no basis in law. It is the job of the *legislature*—not county clerks—to effect any change in election procedures. And any interpretations of the process for absentee voting must come from the Wisconsin Elections Commission, which is statutorily charged with promulgating rules “applicable to all jurisdictions for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns ... or ensuring their proper administration.” Wis. Stat. § 5.05(1)(f). County clerks have no authority to issue

their own interpretations of these absentee voting requirements unique to their own jurisdictions.

Even if Respondents had such interpretive authority, their declaration plainly violates the plain language of Wisconsin's election laws. Under Wisconsin law, an elector need not provide a photo ID only if he or she "is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period." Wis. Stat. §§ 6.86(2)(a), 6.87(4)(b)(5). None of the Respondents' arguments for allowing *all* Wisconsin electors to vote without a photo ID can override this plain statutory language.

CONCLUSION

This Court should grant the Petition.

Dated this 27th day of March, 2020.

By:



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