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October 26, 2020

**Hand Delivered**

**EMERGENCY FILING**

Supreme Court of Wisconsin  
Attn: Clerk  
110 East Main Street (Tenney Building) Ste. 215  
Madison WI 53701-1688

RE: *Lori O'Bright et al v. Kami Lynch et al.*

Dear Clerk:

Enclosed for EMERGENCY FILING is an original and ten (10) copies of Outagamie and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment along with a Memorandum in support of the same.

By copy of this letter, the respondents are being provided with a copy of the same.

Respectfully yours,

*Kyle J. Sargent*

Kyle J. Sargent  
Deputy Corporation Counsel  
Enclosure

FILED

OCT 26 2020

SUPREME COURT  
STATE OF WISCONSIN

CLERK OF SUPREME COURT  
OF WISCONSIN

---

IN RE THE PETITION OF LORI O'BRIGHT as CLERK FOR OUTAGAMIE  
COUNTY and BETH HAUSER as CLERK FOR CALUMET COUNTY,  
Petitioners

v.

KAMI LYNCH as CLERK FOR THE CITY OF APPLETON, SALLY KENNEY  
as CLERK FOR THE CITY OF KAUKAUNA, CHARLES PLUGER as CLERK  
FOR THE TOWN OF BOVINA, CYNTHIA SIERACKI as CLERK FOR THE  
TOWN OF BUCHANAN, AMY OLSON as CLERK FOR THE TOWN OF  
CENTER, LORI KLEVESAHL as CLERK FOR THE TOWN OF CICERO,  
BONNIE FISHER as CLERK FOR THE TOWN OF ELLINGTON, COLLEEN  
LAHA as CLERK FOR THE TOWN OF FREEDOM, ANGIE CAIN as CLERK  
FOR THE TOWN OF GRAND CHUTE, LYN M. NEUENFELDT as CLERK FOR  
THE TOWN OF HORTONIA, DEBRA VANDER HEIDEN as CLERK FOR THE  
TOWN KAUKAUNA, LORI KLEVESAHL as CLERK FOR THE TOWN OF  
MAINE, LYNETTE GITTER as CLERK FOR THE TOWN OF MAPLE CREEK,  
JENNIFER ANDERSEN as CLERK FOR THE TOWN OF ONEIDA, DARLENE  
SCHULTZ as CLERK FOR THE TOWN OF OSBORN, DARLENE SCHULTZ as  
CLERK FOR THE TOWN OF SEYMOUR, CORY SWEDBERG as CLERK FOR  
THE TOWN OF VANDENBROEK, BARBARA SCHUH as CLERK FOR THE  
VILLAGE OF BLACK CREEK, RACQUEL SHAMPO-GIESE as CLERK FOR  
THE VILLAGE OF COMBINED LOCKS, JANE BOOTH as CLERK FOR THE  
VILLAGE OF HORTONVILLE, DANIELLE BLOCK as CLERK FOR THE  
VILLAGE OF KIMBERLY, LINDA HOES as CLERK FOR THE VILLAGE OF  
NICHOLS, LAURIE SWEENEY as CLERK FOR THE VILLAGE OF  
SHIOCTON, JENNIFER WEYENBERG as CLERK FOR THE VILLAGE OF  
HARRISON and the WISCONSIN ELECTIONS COMMISSION.

Respondents.

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OUTAGAMIE COUNTY AND CALUMET COUNTY'S MEMORANDUM IN SUPPORT  
OF THE EMERGENCY PETITION FOR ORIGINAL JURISDICTION AND  
DECLARATORY JUDGMENT

---

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MEMORANDUM IN SUPPORT OF THE EMERGENCY PETITION FOR  
ORIGINAL JURISDICTION  
AND DECLARATORY JUDGMENT

III. INTRODUCTION

Petitioners bring this emergency action seeking a declaratory judgment to resolve an ongoing dispute affecting the voters of the State of Wisconsin in the upcoming November 3, 2020, election. Left unresolved, the dispute could ultimately disenfranchise thousands of Wisconsin voters who, through no fault of their own, exercised their fundamental right to vote.

IV. ORAL ARGUMENT AND PUBLICATION

Given the immediate and direct impact this Court's decision will have on the November 3, 2020, election, the importance of these issues justifies oral argument and an Emergency Declaratory Judgment as soon as practicable. Publication in this case is appropriate as it is an issue of substantial and continuing public interest, clarify and existing rule of law and possibly apply an established rule of law to a factual situation that is significantly different from those in published opinions. §§ 809.22, 809.23(1)(a), *Wis. Stat.*

## V. STATEMENT OF FACTS

Each election, Lori O'Bright (hereinafter "O'Bright"), Outagamie County Clerk, orders ballots on behalf of all municipalities in Outagamie County and the portions of the City of Appleton and the Town of Harrison that fall in Calumet and Winnebago Counties. On September 3<sup>rd</sup>, 2020, O'Bright approved the proof of the ballots provided by JP Graphics Inc., (hereinafter "JP"), and sent the ballots to the printer for test printing. Beginning September 8, 2020, through September 16, 2020, JP began delivering over 133,000 printed ballots to municipalities within Outagamie County for mail absentee voting for the upcoming national, state and county election on November 3, 2020. Beginning September 17, 2020, through October 7, 2020, said municipalities mailed absentee ballots to those registered voters who had made the request.

During that same time period, the municipalities also began preliminary testing of the polling place equipment. On October 7, 2020, it was discovered during testing that the voting equipment was unable to read some of the test ballots and as such, were not tabulated by the equipment. On October 8, 2020, the Outagamie County Clerk (hereinafter "County Clerk") obtained a sampling of the unreadable ballots from the municipality, and soon thereafter

discovered an anomaly, specifically a negative space, in a timing mark on the printed ballots. Following discussions with JP, the Wisconsin Elections Commission (hereinafter "WEC"), and Outagamie County Corporation Counsel, it was determined that at least 24 of the 79 utilized styles of ballots were impacted by the misprint, resulting in more than 13,500 affected ballots being mailed to absentee voters.

## VI. ISSUES

1. When a ballot is rejected by electronic tabulation equipment, is the exclusive remedy to duplicate that ballot as set forth by Wis. Stat. § 5.85(3)?
2. If the Court determines that duplicating a ballot is the exclusive or appropriate remedy for a defective ballot, is the requirement under Wis. Stat. § 7.51(5)(b) that municipal ballots be counted and returned by 4 p.m. the following day inapplicable under these circumstances?
3. In the alternative, in accordance with the Municipal Authorities' position, can the Court order a remedy that allows election officials to fill in an imperfection in one of the ballot's timing blocks thereby correcting any damaged or defective aspect of



the ballot without running afoul of Wis. Stat. § 12.13(2) which precludes the alteration of a ballot?

#### VII. STANDARD OF REVIEW

The issue before the Court is one of statutory interpretation and its applicability to the misprinted ballots at issue. Issues of statutory interpretation and application present questions of law. *Milwaukee Police Ass'n. v. City of Milwaukee*, 2018 WI 86, ¶ 17, 383 Wis. 2d 247, 914 N.W.2d 597. This Court, in exercising its original jurisdiction, may issue a declaratory judgment. § 806.04(1), *Wis. Stat.* There is no lower court opinion to review as it is an original action.

#### VIII. ARGUMENT

##### A. THE COURT HAS ORIGINAL JURISDICTION OVER THIS MATTER.

Article VII, § 3(2) of the Wisconsin Constitution grants this Court original jurisdiction to hear this case. "The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction." *Wis. Const. art. VII, § 3(2)*. The Court can exercise that jurisdiction when "the matter is one that should trigger the institutional responsibilities of the Supreme Court." *Wis. S. Ct. IOP III* (September 23, 2019). This court is "a court of first resort on all judicial

questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *Attorney General v. Railroad Companies*, 35 Wis. 425, 518 (1874). As this matter directly relates to the liberties of Wisconsin voters, exercising original jurisdiction is appropriate in this matter.

The matter before this Court is one of great urgency given the impending Presidential election and projected slim margin in votes. At issue are approximately 13,500 ballots, an amount that could be consequential at local or national levels in a tight race. Due to the quickly approaching election date, there is insufficient time to litigate the issue through the circuit courts. The WEC has taken the position that they do not have jurisdiction over the issue, and their proffered opinion on the issue does not create finality of the matter but rather invites a justiciable issue or further litigation of the matter beyond the circuit courts. To maintain voter confidence in the imminent and future elections, and to protect the fundamental rights of the affected voters in the present election, it is imperative that this Court exercise original jurisdiction over the matter.

B. PETITIONERS HAVE STANDING TO BRING THIS ACTION.

Petitioners have standing to invoke the Court's original jurisdiction in this case AS Petitioners are affected by the issues in controversy and thus have a stake in the outcome of the controversy. *Schill v. Wis. Rapids. Sch. Dist.*, 2010 WI 86, ¶ 38, 327 Wis. 2d 572, 786 N.W.2d 177 (2010). Specifically, Outagamie and Calumet Counties want to ensure all valid affected ballots are counted, and that they are all counted utilizing the same method across Respondent municipalities. Petitioners O'Bright and Calumet County Clerk Beth Hauser have an interest in the controversy as the chief election officers of their respective counties under § 59.23(2)(i), Wis. Stat. In their elected positions, they have a duty to prepare and distribute ballots, then canvass and return votes at general, special and judicial elections. *Id.* Thus, their specific duties under the law to ensure all ballots are properly counted cannot be fulfilled without guidance from this Court in this situation.

C. A DECLARATORY JUDGMENT REQUIRING DUPLICATION OF DEFECTIVE BALLOTS IS APPROPRIATE UNDER SECTION 5.85(3), WIS. STAT.

The courts have broad authority to issue a declaratory judgment in this matter pursuant to § 806.04, *Wis. Stat.*, known as the Uniform Declaratory Judgments Act. §§ 806.04(1), (16). The Act's "purpose is to settle and to

afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered."

§ 806.04(12), *Wis. Stat.*

A declaratory judgment is appropriate if the court finds that the following conditions exist: 1) there is a controversy in which a claim is asserted against a party with an interest in contesting it; 2) the controversy is between adverse parties; 3) the party seeking relief has a legally protected interest; and 4) the issue in controversy is ripe for determination. *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991). An issue is ripe for determination even if the plaintiff has not yet suffered an injury. *Milwaukee Dist. Council 48 v. Milwaukee County*, 2001 WI 65, ¶ 41, 244 Wis. 2d 333, 627 N.W.2d 866. However, a matter is not yet ripe until the facts are developed which allow the court to make a conclusive decree. *Id.*

The controversy in this matter is the applicable remedy for "correcting" thousands of defective ballots mailed to absentee voters. The matter is ripe for this Court to issue a determination as the facts of the controversy are fully developed. Furthermore, as Election

Day draws nearer every day, the issue is one of urgency as it affects thousands of Wisconsin voters.

The statutes do not define what makes a ballot "defective". However, the language of the statute can be interpreted to mean that if a ballot cannot be read by an electronic voting machine it is defective. Sec. 5.85(3), *Wis. Stat.* ("[I]f any ballot is damaged or defective so that it cannot be properly counted by the automatic tabulating equipment . . ."). When a ballot is deemed defective, the statute provides the specific remedy:

the election officials, in the presence of witnesses, shall make a true duplicate ballot of all votes on that ballot by using one of the marking devices so as to transfer all votes of the elector to an official ballot of that kind used by the elector who voted the original ballot in that election.

Sec. 5.85(3), *Wis. Stat.* (*emphasis added*)

The use of the word "shall" is to be construed as mandatory when it appears in a statute. See *Heritage Farms, Inc. v Markel Ins. Co.*, 2012 WI 26, ¶32, 339 Wis. 2d 125, 810 N.W.2d 465; *Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963); *Scanlon v. Menasha*, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962). Thus, the specific remedy for a defective ballot that cannot be read by the automatic tabulating equipment is for the election

officials to make a duplicate ballot pursuant to § 5.85(3), *Wis. Stat.*

Respondents take the position that the specific remedy of producing a duplicate ballot is not the only remedy available under the law. In its letter to Outagamie County Deputy Corporation Counsel Kyle Sargent, the WEC recommended Petitioners seek an order permitting the municipalities to correct the defect in the timing mark by approving the "careful application of black ink to that defective timing mark by election officials, thereby filling in the error." See Exhibit D.

Petitioners do not disagree that this method is more practical, more efficient and more expedient than the duplication method prescribed in § 5.85(3), *Wis. Stat.* As indicated in her affidavit, O'Bright estimates that the duplication method would require anywhere from 554 to 2,310 additional man hours to ensure all properly cast ballots are counted. See Exhibit B. This is an extraordinary amount of additional work. However, Petitioners cannot overlook the fact that this is not a remedy prescribed by the law, and the WEC provided no statutory authority or legal basis for this

recommended method. Pursuant to § 5.05(6a), for an advisory opinion of the WEC, formal or informal, to have legal force and effect, the opinion must be supported by specific legal authority. §

5.05(6a)(2), *Wis. Stat.* The WEC has failed to cite to any statutory or common law authority allowing this remedy because there is none.

Therefore, Plaintiffs respectfully request the Court issue a declaratory judgment ordering all municipalities within Petitioners' Counties to create duplicate ballots from those defective ballots cast in the election. Should the Court find that the defective ballots may be corrected in the manner recommended by Defendants, Plaintiffs respectfully request the Court issue an order requiring all municipalities within Petitioners' Counties to employ this method of correcting the defective ballots.

D. THE COURT SHOULD ISSUE A DECLARATORY JUDGMENT ORDERING THE CANVASSING OF ALL BALLOTS TO CONTINUE WITHOUT ADJOURNMENT UNTIL ALL BALLOTS ARE COUNTED PURSUANT TO § 7.51(1), WIS. STAT.

Pursuant to § 7.51(1), the canvassing of all ballots cast shall commence immediately after the polls are closed and "shall continue without

adjournment until the canvass of all ballots cast and received on or before election day is completed . . .” § 7.51(1), *Wis. Stat.* As this issue is a matter of first impression, no case law exists specifically addressing the issue of a deadline for duplicating and counting defective ballots. Thus, on its face, the statute would appear to require election officials to continuously canvass until all ballots are counted without deadline.

However, § 7.51(5)(b) requires municipal clerks to deliver to the county clerk the ballots, statements, tally sheets, lists and envelopes relating to the election no later than 4 p.m. the day after the election. § 7.51(5)(b), *Wis. Stat.* Considering the immense number of defective absentee ballots that have been mailed to the voters of Outagamie County, it is implausible to require the municipalities to comply with this deadline. As stated in her affidavit, O’Bright calculated the need for an additional 33 to 140 workers working non-stop from 7:00 a.m. on November 3, 2020, until 4 p.m. on November 4, 2020 to ensure all affected ballots are duplicated and counted. See Exhibit B.



Polling stations across the nation are already scrambling to find poll workers amid the global pandemic.<sup>1</sup> In Wisconsin, Governor Tony Evers has again activated the Wisconsin National Guard to assist communities who are unable to find poll workers.<sup>2</sup> With the present poll worker shortage, it is highly improbable that all the defective votes could be duplicated and counted by 4 p.m. the day after the election. Thus, a declaratory judgment ordering election officials to canvass until all votes are counted pursuant to § 7.51(1) will ensure all votes are counted.

E. A DECLARATORY JUDGMENT FINDING § 7.51(5) (b), WIS. STAT., INAPPLICABLE IS APPROPRIATE UNDER THESE EXTRAORDINARY CIRCUMSTANCES.

Enforcement of the deadline established in § 7.51(5) (b), *Wis. Stat.*, runs the risk of disenfranchising absentee voters through no fault of their own. The Supreme Court has repeatedly held

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<sup>1</sup> Kelly Mena, *States Scramble to Recruit Thousands of Polls Workers amid Pandemic Shortage*, CNN (Aug. 13, 2020, 8:12 AM), <https://www.cnn.com/2020/08/13/politics/poll-worker-shortage-2020-election/index.html>.

<sup>2</sup> Patrick Marley and Molly Beck, *51 Wisconsin Communities Face a Severe Shortage of Poll Workers But Can Get Help From the National Guard*, MILWAUKEE JOURNAL SENTINEL, (Oct. 15, 2020, 2:28 PM) <https://www.jsonline.com/story/news/politics/elections/2020/10/15/communities-poll-worker-shortages-get-help-national-guard/3667319001/>

that the right to vote and have one's vote counted is a fundamental right. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("The political franchise of voting . . . is regarded as a fundamental political right, because preservative of all rights."); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. . . . It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote and to have their votes counted."); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.").

Petitioners agree that there must be regulation of elections to ensure they are fair, honest, and orderly as part of the democratic process. *Storer v. Brown*, 415 U.S. 724, 730 (1974); see also *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7<sup>th</sup> Cir. 2004) ("[A]n unregulated election system would

be chaos . . .); *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 98, 357 Wis. 2d 469, 851 N.W.2d 262. However, some regulations may burden the right to vote, and there is no "litmus-paper test" that determines the validity of those regulations. *Storer*, 415 U.S. at 730. Thus the court must conduct an analysis of the challenged law.

In reviewing challenged election laws, the Supreme Court established the framework as guidance to the courts in *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). In *Burdick*, the Court held that a plaintiff's right to vote is severely burdened by enforcement of the State's laws, the law is only constitutional if it is advancement of a compelling state interest. *Burdick*, 504 U.S. at 434.

In *Anderson*, the Court examined the voters' rights to choose and association in an election against the State's interest in upholding statutory deadlines. *Anderson*, 460 U.S. at 782. The Court determined the examining court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff sees to vindicate."

*Id.* at 789. Then, the court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* The court must then "determine the legitimacy and strength of each of those interests" and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* Furthermore, "[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of Los Angeles, California v. Patel*, 135 S. Ct. 2443, 2451 (2015). Thus, the challenged law as applied must pass strict scrutiny by the court to be upheld.

In this case, the voters of Outagamie and Calumet Counties are now confronted with the risk of being disenfranchised should the deadline established in § 7.51(5)(b) be enforced. The extent of this burden, the loss of the fundamental right to vote and to have one's vote counted, is severe and cannot be overcome by a compelling state interest. The deadline established in § 7.51(5)(b), *Wis. Stat.*, is arbitrary and purely administrative. Disorder and chaos will not befall the State or

country if this section is deemed unconstitutional, nor will the State's interest in the orderly administration of elections be severely affected.

Additionally, the 4 p.m. deadline set forth in § 7.51(5)(b), *Wis. Stat.*, contradicts the requirement in § 7.51(1) that election officials must canvass votes without adjourning until all ballots cast on or before election day are counted. § 7.51(1), *Wis. Stat.* It is difficult to conclude the State has a compelling interest in enforcing the 4 p.m. deadline in this situation when contradictions within the statutory framework exist. Absent a compelling state interest, the severe burden placed on the affected voters cannot be overcome by enforcing the 4 p.m. deadline. Thus, a declaratory judgment rendering the deadline inapplicable ensures that all votes will be counted and that voters will not be disenfranchised through no fault of their own.

#### IX. CONCLUSION

Based on the above arguments, Petitioners respectfully request this Court take original jurisdiction of this case and issue a declaratory judgment requiring Respondents to duplicate the

defective ballots pursuant to § 5.85(3)(b), *Wis. Stat.*, continue canvassing without adjournment until all valid ballots cast on or before the close of the polls on Election Day pursuant to § 7.51(1), *Wis. Stat.*, and that the 4 p.m. deadline imposed in § 7.51(5)(b), *Wis. Stat.*, is unconstitutional as applied in this case.

Respectfully submitted this 26<sup>th</sup> day of October, 2020.

*Electronically signed by Kyle J. Sargent*

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