

**STATE OF WISCONSIN CIRCUIT COURT DANE
COUNTY**

ROBERT DALLAS NEWTON, JR.

135 W. Washington St.
Brandon, WI 53919,

JANE NEWTON

135 W. Washington St.
Brandon, WI 53919,

DESIREE FRANK

547 East Washington St.
Brandon, WI 53919,

ROBERT CHRISTOFFERSON

W9416 Parkway Dr.
Poynette, WI 53955,

RICHARD BAKER

W9432 Columbia Ct.
Poynette, WI 53955,

AMY PHIMISTER

3710 Glidden Dr.
Sturgeon Bay, WI 54235,

JENNIFER MEYER

4171 Nicolet Dr.
Green Bay, WI 54311,

ALVIN MEYER

4171 Nicolet Dr.
Green Bay, WI 54311,

Plaintiffs,

v.

**SCOTT WALKER, in his official capacity as
Governor of Wisconsin,**

115 East
State Capitol
Madison, WI 53707,

Defendant.

**PETITION FOR WRIT OF
MANDAMUS**

Case No. _____

30952: Petition for Writ of
Mandamus

A voter's right to cast a ballot for their representatives in public office "lies at the very basis of our Democracy[.]" and without it, "we will soon cease to be a Democracy." *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 613, 37 N.W.2d 473, 480 (1949). Plaintiffs are registered voters in State Assembly District 42 or State Senate District 1 who desire to exercise their clear legal right to elect representatives to the Wisconsin State Legislature (the "Legislature") in each of those districts. Both districts have been unrepresented in the Legislature since December 29, 2017, when the previous officeholders resigned to accept positions in Defendant Governor Scott Walker's administration.

A writ of mandamus is proper here—indeed, it is Plaintiffs' only available legal remedy—where Plaintiffs have a clear legal right to select new representation in a special election, and the Governor has a positive and plain non-discretionary legal duty to call for such an election to fill the vacancies "as promptly as possible", Wis. Stat. § 8.50(4)(d); *see also* Wis. Const. art. IV, § 14, but has failed to do so. To the contrary, Governor Walker has repeatedly publicly stated that he will *not* do so. As a result, and unless and until Governor Walker is compelled to do his legal duty, the voters in Assembly District 42 and Senate District 1 will remain unrepresented for *over a year*: they will not be able to select new representatives until the next regularly scheduled general election on November 6, 2018 and, even then, the individuals elected to those seats will not be sworn in until January 7, 2019.

Governor Walker's improper refusal to issue writs of election to hold a special election to fill the vacancies in State Assembly District 42 and State Senate District 1 as promptly as possible is therefore currently causing and will continue to cause substantial injury to Plaintiffs, who have been and will remain unrepresented. Plaintiffs have a clear legal right to elect representatives to fill those vacancies (and to representation in the Legislature) and Governor Walker has a plain legal duty to issue the writs of election to hold a special election as promptly as possible. Because Governor Walker is the only person authorized to do so, Plaintiffs have no other remedy at law to address their ongoing injury. For these reasons, Plaintiffs respectfully request that this Court act

quickly to issue an emergency writ of mandamus requiring Governor Walker to comply with Wis. Stat. § 8.50 and immediately issue writs of election to hold special elections to fill the vacant seats.

PARTIES

1. Plaintiff Robert Dallas Newton, Jr. is a registered Wisconsin voter and resident of Brandon, Wisconsin, which is located in State Assembly District 42. Prior to December 29, 2017, Mr. Newton's Representative in the State Assembly was Keith Ripp. Representative Ripp resigned from the State Assembly on December 29, leaving his seat vacant. Since that date, Mr. Newton has been unrepresented in the State Assembly. Under Wis. Stat. § 8.50(4)(d), Mr. Newton has a clear legal right to the opportunity to elect a Representative to the vacant seat in a special election, which must be called by the Governor "as promptly as possible" by issuing a writ of election. Mr. Newton also has a clear legal right to be represented in the Legislature. Unless Governor Walker promptly issues a writ of election to fill this vacancy in compliance with his plain legal duty under Wis. Stat. § 8.50(4)(d), Mr. Newton will remain unrepresented in the State Assembly until January 7, 2019.

2. Plaintiff Jane Newton is a registered Wisconsin voter and resident of Brandon, Wisconsin, which is located in State Assembly District 42. Prior to December 29, 2017, Ms. Newton's Representative in the State Assembly was Keith Ripp. Representative Ripp resigned from the State Assembly on December 29, leaving his seat vacant. Since that date, Ms. Newton has been unrepresented in the State Assembly. Under Wis. Stat. § 8.50(4)(d), Ms. Newton has a clear legal right to the opportunity to elect a Representative to the vacant seat in a special election, which must be called by the Governor "as promptly as possible" by issuing a writ of election. Ms. Newton also has a clear legal right to be represented in the Legislature. Unless Governor Walker promptly issues a writ of election to fill this vacancy in compliance with his plain legal duty under Wis. Stat. § 8.50(4)(d), Ms. Newton will remain unrepresented in the State Assembly until January 7, 2019.

3. Plaintiff Desiree Frank is a registered Wisconsin voter and resident of Brandon, Wisconsin, which is located in State Assembly District 42. Prior to December 29, 2017, Ms.

Frank's Representative in the State Assembly was Keith Ripp. Representative Ripp resigned from the State Assembly on December 29, leaving his seat vacant. Since that date, Ms. Frank has been unrepresented in the State Assembly. Under Wis. Stat. § 8.50(4)(d), Ms. Frank has a clear legal right to the opportunity to elect a Representative to the vacant seat in a special election, which must be called by the Governor "as promptly as possible" by issuing a writ of election. Ms. Frank also has a clear legal right to be represented in the Legislature. Unless Governor Walker promptly issues a writ of election to fill this vacancy in compliance with his plain legal duty under Wis. Stat. § 8.50(4)(d), Ms. Frank will remain unrepresented in the State Assembly until January 7, 2019.

4. Plaintiff Robert Christofferson is a registered Wisconsin voter and resident of Poynette, Wisconsin, which is located in State Assembly District 42. Prior to December 29, 2017, Mr. Christofferson's Representative in the State Assembly was Keith Ripp. Representative Ripp resigned from the State Assembly on December 29, leaving his seat vacant. Since that date, Mr. Christofferson has been unrepresented in the State Assembly. Under Wis. Stat. § 8.50(4)(d), Mr. Christofferson has a clear legal right to the opportunity to elect a Representative to the vacant seat in a special election, which must be called by the Governor "as promptly as possible" by issuing a writ of election. Mr. Christofferson also has a clear legal right to be represented in the Legislature. Unless Governor Walker promptly issues a writ of election to fill this vacancy in compliance with his plain legal duty under Wis. Stat. § 8.50(4)(d), Mr. Christofferson will remain unrepresented in the State Assembly until January 7, 2019.

5. Plaintiff Richard Baker is a registered Wisconsin voter and resident of Poynette, Wisconsin, which is located in State Assembly District 42. Prior to December 29, 2017, Mr. Baker's Representative in the State Assembly was Keith Ripp. Representative Ripp resigned from the State Assembly on December 29, leaving his seat vacant. Since that date, Mr. Baker has been unrepresented in the State Assembly. Under Wis. Stat. § 8.50(4)(d), Mr. Baker has a clear legal right to the opportunity to elect a Representative to the vacant seat in a special election, which must be called by the Governor "as promptly as possible" by issuing a writ of election. Mr. Baker also has a clear legal right to be represented in the Legislature. Unless Governor Walker promptly

issues a writ of election to fill this vacancy in compliance with his plain legal duty under Wis. Stat. § 8.50(4)(d), Mr. Baker will remain unrepresented in the State Assembly until January 7, 2019.

6. Plaintiff Amy Phimister is a registered Wisconsin voter and resident of Sturgeon Bay, Wisconsin, which is located in State Senate District 1. Prior to December 29, 2017, Ms. Phimister's Senator in the State Senate was Frank Lasee. Senator Lasee resigned from the State Senate on December 29, leaving his seat vacant. Since that date, Ms. Phimister has been unrepresented in the State Senate. Under Wis. Stat. § 8.50(4)(d), Ms. Phimister has a clear legal right to the opportunity to elect a Senator to the vacant seat in a special election, which must be called by the Governor "as promptly as possible" by issuing a writ of election. Ms. Phimister also has a clear legal right to be represented in the Legislature. Unless Governor Walker promptly issues a writ of election to fill this vacancy in compliance with his plain legal duty under Wis. Stat. § 8.50(4)(d), Ms. Phimister will remain unrepresented in the State Senate until January 7, 2019.

7. Plaintiff Jennifer Meyer is a registered Wisconsin voter and resident of Green Bay, Wisconsin, which is located in State Senate District 1. Prior to December 29, 2017, Ms. Meyer's Senator in the State Senate was Frank Lasee. Senator Lasee resigned from the State Senate on December 29, leaving his seat vacant. Since that date, Ms. Meyer has been unrepresented in the State Senate. Under Wis. Stat. § 8.50(4)(d), Ms. Meyer has a clear legal right to the opportunity to elect a Senator to the vacant seat in a special election, which must be called by the Governor "as promptly as possible" by issuing a writ of election. Ms. Meyer also has a clear legal right to be represented in the Legislature. Unless Governor Walker promptly issues a writ of election to fill this vacancy in compliance with his plain legal duty under Wis. Stat. § 8.50(4)(d), Ms. Meyer will remain unrepresented in the State Senate until January 7, 2019.

8. Plaintiff Alvin Meyer is a registered Wisconsin voter and resident of Green Bay, Wisconsin, which is located in State Senate District 1. Prior to December 29, 2017, Mr. Meyer's Senator in the State Senate was Frank Lasee. Senator Lasee resigned from the State Senate on December 29, leaving his seat vacant. Since that date, Mr. Meyer has been unrepresented in the State Senate. Under Wis. Stat. § 8.50(4)(d), Mr. Meyer has a clear legal right to the opportunity to

elect a Senator to the vacant seat in a special election, which must be called by the Governor “as promptly as possible” by issuing a writ of election. Mr. Meyer also has a clear legal right to be represented in the Legislature. Unless Governor Walker promptly issues a writ of election to fill this vacancy in compliance with his plain legal duty under Wis. Stat. § 8.50(4)(d), Mr. Meyer will remain unrepresented in the State Senate until January 7, 2019.

9. Defendant Scott Walker is sued in his official capacity as the Governor of Wisconsin. As Governor, he is responsible for issuing writs of election to fill legislative vacancies. Wis. Const. art. IV, § 14 (“The governor shall issue writs of election to fill such vacancies as may occur in either house of the legislature.”). Where a legislative seat is vacated before the second Tuesday in May of an election year—here, May 8, 2018—Wisconsin law mandates that the governor issue a writ of election so that the seat “shall be filled as promptly as possible by special election.” Wis. Stat. § 8.50(4)(d). The only exception to this plain legal duty contained in the statute is where a vacancy occurs “after the close of the last regular floorperiod of the legislature held during his or her term,” in which case a special election is necessary only where special sessions or other legislative activity is planned. *Id.* In this case, the seats at issue were both vacated on December 29, 2017, *almost five months before* both the statutory cut-off date of May 8 and the close of the last floorperiod on May 9. As a result, Governor Walker’s plain legal duty to issue a writ of election to fill the vacant seats by special election “as promptly as possible” was triggered and his refusal to do so constitutes a clear violation of that nondiscretionary duty. *See id.*

JURISDICTION & VENUE

10. Jurisdiction and venue are proper under Wis. Stat. § 801.50(2)(c) because Governor Walker maintains the Office of the Governor in Dane County and conducts substantial business there, and also under Wis. Stat. § 801.50(3)(a), which provides that “all actions in which the sole defendant is the state, any state board or commission, or any state officer, employee, or agent in an official capacity shall be venued in the county designated by the plaintiff unless another venue is specifically authorized by law.”

FACTUAL ALLEGATIONS

11. On December 29, 2017, Representative Ripp and Senator Lassee both resigned from the Legislature to begin employment in Governor Walker's administration. Their resignations were effective as of that day.

12. That same day, Governor Walker's spokesperson stated that the Governor would not issue writs of election to fill the vacated seats in a special election. Over the past several weeks, both Governor Walker and his staff have repeatedly reiterated that he will not issue writs of election. Governor Walker's refusal to allow voters to select new legislators has been the subject of intense public criticism, but he has remained firm. As recently as February 14, 2018, Governor Walker's press secretary confirmed that Governor Walker had no plans to issue writs of election.

13. As of the filing of this action, Governor Walker has failed to issue writs of election.

14. The next regularly scheduled general election will take place on November 6, 2018. Wis. Stat. § 5.02(5). Candidates elected in that election will not be sworn into office until January 7, 2019. Wis. Stat. § 13.02(1) (oaths of office administered on the "first Monday of January in each odd numbered year").

15. Unless Governor Walker is directed to comply with his plain legal duty to issue writs of election to hold a special election to fill these vacancies, the voters who reside in State Assembly District 42 and State Senate District 1 will remain unrepresented and those seats will remain vacant from December 29, 2017 to January 7, 2019, in violation of their clear legal right to select their representatives and have representation in the Legislature.

CLAIM: VIOLATION OF WIS. STAT. § 8.50(4)(d)

16. Plaintiffs incorporate herein all allegations set forth in the preceding paragraphs.

17. Mandamus may be employed to compel public officers to perform a duty that they are legally obligated to perform. The petitioner for the writ "must establish that: (1) he possesses a clear legal right to the relief sought; (2) the duty he seeks to enforce is positive and plain; (3) he will be substantially damaged by nonperformance of such duty; and (4) there is no other adequate

remedy at law.” *Law Enf’t Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89, 99–100 (1981).

18. Plaintiffs have a clear legal right to the requested relief. “Nothing can be clearer under our Constitution and laws than that the right of a citizen to vote is a fundamental, inherent right.” *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 15, 128 N. W. 1041, 35 L. R. A. (N. S.) 353. “It is a right which has been most jealously guarded and may not under our Constitution and laws be destroyed or even unreasonably restricted.” *State v. Circuit Court for Marathon Cty.*, 178 Wis. 468, 190 N.W. 563, 565 (1922). Plaintiffs also have a statutory right to select a new representative in a special election held “as promptly as possible” if a legislative seat becomes vacant prior to the statutory cutoff date. Wis. Stat. § 8.50(4)(d) (“Any vacancy in the office of state senator or representative to the assembly occurring before the 2nd Tuesday in May in the year in which a regular election is held to fill that seat shall be filled as promptly as possible by special election.”).

19. Plaintiffs Robert Dallas Newton, Jr., Jane Newton, Desiree Frank, Richard Baker, and Robert Christofferson live in State Assembly District 42 and have a clear legal right to elect a new Representative to the Assembly in a special election held “as promptly as possible.” Wis. Stat. § 8.50(4)(d). Plaintiffs Amy Phimister, Jennifer Meyer, and Alvin Meyer live in State Senate District 1 and have a clear legal right to elect a new Senator to the State Senate in a special election held “as promptly as possible.” *Id.*

20. Governor Walker has a positive and plain legal duty to call special elections by promptly issuing writs of election to fill the vacancies in State Assembly District 42 and State Senate District 1. Wis. Stat. § 8.50(4)(d) is explicit that, if a vacancy occurs “before the 2nd Tuesday in May in the year in which a regular election is held to fill that seat,” the Governor *must* issue writs of election to fill the vacancies by special election. Further, the Governor is the sole Wisconsin official vested with the power to issue writs of election to fill vacancies. Wis. Const. art. IV, § 14 (“The governor shall issue writs of election to fill such vacancies as may occur in either house of the legislature.”).

21. There is only one statutory exception, which does not apply here. Wis. Stat. § 8.50(4)(d) explicitly provides that no special election is necessary where a “vacancy occur[s] after the close of the last regular floorperiod of the legislature held during his or her term,” unless “a special session or extraordinary floorperiod of the legislature is called or a veto review period is scheduled during the remainder of the term.” The close of the last regular floorperiod during Representative Ripp’s and Senator Lassee’s terms is scheduled to end March 22, 2018; a limited purpose floorperiod is scheduled for April 17 to 19, 2018; and a veto review floorperiod is scheduled for May 8 and 9, 2018. Because the vacancies occurred in December 2017, nearly five months prior to May 9, the exception does not apply.

22. Here, the legislative seats were vacated on December 29, 2017. The applicable cutoff date—beyond which the Governor’s clear statutory duty to issue writs of election to promptly fill the vacancies by special election would not have been triggered—falls on May 8, 2018. Because the seats were vacant before the cutoff date of May 8, 2018, Governor Walker has a plain statutory duty under Wis. Stat. § 8.50(4)(d) to issue writs of election to hold a special election to fill the vacancies “as promptly as possible.”

23. Governor Walker’s refusal to comply with Wis. Stat. § 8.50(4)(d) and issue writs of election has caused and will continue to cause substantial injury to Plaintiffs. Governor Walker’s actions deprive Plaintiffs of their clear legal right to have representation in the Legislature and to select those representatives through a special election under the circumstances at issue here. Governor Walker’s refusal to promptly issue writs of election has already deprived Plaintiffs of representation for the first seven weeks of 2018, and that substantial injury will continue unless and until Governor Walker is ordered to comply with his clear legal duty to call a special election to fill the vacancies.

24. Legislative special sessions occur frequently in Wisconsin, and are by no means inconsequential; they are typically convened to consider important and sometimes controversial legislation. In 2017, for instance, two special legislative sessions were convened, and votes on important legislation were taken throughout the summer and well into September. Governor

Walker has already called for at least one special session to occur in 2018. Additionally, Governor Walker's failure to comply with his plain legal duty deprives Plaintiffs of access to constituent services provided to Wisconsin citizens living in every other district by their duly elected representatives to the Legislature. A right to representation in the lawmaking body is a bedrock of democracy, and Governor Walker's refusal to comply with his plain legal duty under Wis. Stat. § 8.50(4)(d) denies Plaintiffs that right, causing them substantial harm.

25. Unless this Court grants relief, Plaintiffs have no other adequate remedy at law. Governor Walker is the sole Wisconsin official empowered to fill legislative vacancies by issuing writs of election. Wis. Const. art. IV, § 14. Aside from petitioning this Court for a writ of mandamus, Wisconsin law provides no other avenue by which to challenge the Governor's failure to fulfill his plain legal duty here. Unless this Court directs Governor Walker to issue writs of election, the substantial harm currently suffered by Plaintiffs will continue.

RELIEF REQUESTED

WHEREFORE, Plaintiffs request that the Court grant the following relief:

1. An order declaring that Governor Walker is in violation of Wis. Stat. § 8.50(4)(d);
2. A writ of mandamus ordering Governor Walker to immediately issue writs of election for State Assembly District 42 and State Senate District 1 that schedule special elections for a date no later than five weeks following the Governor's issuance of the writ;
3. An award of Plaintiffs' reasonable attorneys' fees, actual costs and damages, pursuant to Wis. Stat. § 783.04;
4. Any and all other relief that the Court deems just and equitable.

DATED this 26th day of February, 2018.

By: Electronically signed by David L Anstaett
David L. Anstaett (WI# 1037884)

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