

SUPREME COURT
STATE 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 OF KAUKAUNA LORI KLEVESAHL as CLERK FOR THE TOWN OF MAINE, LYNETTE GITTER as CLERK FOR THE TOWN OF MAPLE CREEK, JENNIFER ANDERSON as CLERK FOR THE TOWN 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 WISCONSIN ELECTIONS COMMISSION.

Respondents.

TOWN OF BUCHANAN, TOWN OF MAPLE CREEK, AND VILLAGE OF
COMBINED LOCKS RESPONSE TO OUTAGAMIE COUNTY AND CALUMET
COUNTY'S EMERGENCY PETITION FOR ORIGINAL JURISDICTION AND
DECLARATORY JUDGMENT

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State v. Wood, 2010 WI 17, 323 Wis. 2d 321, 780 N.W.2d 63

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Labor & Farm Party v. Elections Bd., State of Wis., 117 Wis. 2d 351, 344 N.W.2d 177 (1984)

League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302

Mayo v. Wisconsin Injured Patients & Families Comp. Fund, 2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678

Petition of Heil, 230 Wis. 428, 284 N.W. 42 (1938)

United Am., LLC v. Wisconsin Dep't of Transportation, 2020 WI App 24, 392 Wis. 2d 335, 944 N.W.2d 38

Wisconsin Statutes

Wis. Stat. § 5.85

Wis. Stat. § 7.51

Wis. Stat. § 12.13

Wis. Stat. § 806.04

Wis. Stat. § 809.70

**STATEMENT OF CRITERIA FOR REVIEW AND STANDARD OF
REVIEW**

Criteria for Review

Respondents, Town of Buchanan, Town of Maple Creek, and Village of Combined Locks (collectively, the “Respondents”), agree with the Criteria for Review as set forth by the Respondents, Town of Grand Chute, Town of Osborn, Village of Harrison, and Village of Kimberly and incorporate the same herein by reference.

Standard of Review

Respondents, Town of Buchanan, Town of Maple Creek, and Village of Combined Locks (collectively, the “Respondents”), agree with the Standard of Review set forth in Section VII. STANDARD OF REVIEW of Outagamie County and Calumet County’s Memorandum in Support of the Emergency Petition for Original Jurisdiction and Declaratory Judgment (the “Petitioners’ Memorandum in Support of Petition”).

STATEMENT OF THE CASE

The Respondents agree with the facts as set forth in detail in Section VI. FACTUAL BASIS of the Petition and Section V. STATEMENT OF FACTS of the Petitioners' Memorandum. As such, the Respondents incorporate fully herein said facts.

In addition, the Respondents write to stress the importance of immediate action concerning the affected absentee ballots. The Town of Buchanan, Town of Maple Creek, and Village of Combined Locks are smaller municipalities within Outagamie County with limited resources for election day. It is estimated that one in six of the absentee ballots sent in each of the Respondents' municipalities has the timing mark blemish. The Respondents are concerned that, if forced to complete the duplication process under Wis. Stat. § 5.85(3), they will not be able to count all ballots before the deadline under 7.51(5)(b). Allowing the timing mark blemish to be remediated pursuant to the manufacturer's specifications is the most efficient and practical solution to ensure that every vote cast on election day will be properly counted.

ISSUES PRESENTED

1. Are the election ballots at issue “damaged or defective so that [they] cannot be properly counted by the automatic tabulating equipment” as that phrase is used in Wis. Stat. § 5.85(3) such that the ballot duplication requirements of Wis. Stat. § 5.85(3) apply to the Respondents? The Respondents believe that the answer is “no.”
2. If the answer to Issue No. 1 above is “yes”, must the Respondents comply with the deadlines set forth in Wis. Stat. § 7.51(5)(b) concerning the delivery of final ballots, statements, tally sheets, lists, and envelopes related to the election to their respective county clerk? The Respondents believe the answer is “no.”
3. If the answers to both Issue No. 1 and Issue No. 2 above are “yes”, then are Wis. Stat. § 5.85(3) and Wis. Stat. § 7.51(5)(b) unconstitutional as applied to the facts of this case?

ARGUMENT

I. THE ELECTION BALLOTS AT ISSUE ARE NOT “DAMAGED OR DEFECTIVE SO THAT [THEY] CANNOT BE PROPERLY COUNTED BY THE AUTOMATIC TABULATING EQUIPMENT” AS THAT PHRASE IS USED IN WIS. STAT. § 5.85(3); AND, ACCORDINGLY, THE BALLOT DUPLICATION REQUIREMENTS OF WIS. STAT. § 5.85(3) DO NOT APPLY TO THE RESPONDENTS.

The Respondents fully agree with the arguments set forth by the Respondents, Town of Grand Chute, Town of Osborn, Village of Harrison, and Village of Kimberly and incorporate the same herein by reference.

As to the Petitioners’ question of whether allowing the Respondents to remedy the timing blemish mark with a pen on election day is a violation of Wis. Stat. § 12.13(2)(b)2, the Respondents believe no violation would occur. This statute was designed to prevent election fraud and prevent election workers from altering a voter’s choice for a preferred candidate. Allowing a remediation of this blemish would in no way alter a voter’s choice for an elected official. It would, in fact, ensure that the voter’s choice is properly counted allowing his/her voice to be heard. If the Respondents are forced to duplicate ballots under Wis. Stat. § 5.85(3), the duplication process creates a higher risk of human error than simply remedying the blemish. This risk of human error is eliminated if the Court allows the remediation by pen.

II. IF THE COURT DETERMINES THAT THE ELECTION BALLOTS AT ISSUE ARE “DAMAGED OR DEFECTIVE SO THAT [THEY] CANNOT BE PROPERLY COUNTED BY THE AUTOMATIC TABULATING EQUIPMENT” AS THAT PHRASE IS USED IN WIS. STAT. § 5.85(3) AND, ACCORDINGLY, THAT THE BALLOT DUPLICATION REQUIREMENTS OF WIS. STAT. § 5.85(3) DO APPLY TO THE RESPONDENTS, THEN THE RESPONDENTS SHOULD NOT HAVE TO COMPLY WITH THE DEADLINES SET FORTH IN WIS. STAT. § 7.51(5)(B) FOR THE DELIVERY OF FINAL BALLOTS, STATEMENTS, TALLY SHEETS, LISTS, AND ENVELOPES RELATED TO THE ELECTION TO THEIR RESPECTIVE COUNTY CLERK.

The Respondents fully agree with the arguments set forth by the Respondents, Town of Grand Chute, Town of Osborn, Village of Harrison, and Village of Kimberly and incorporate the same herein by reference.

The Respondents are concerned that, if required to follow the duplication process of Wis. Stat. § 5.85(3), they may not be able to count all of the ballots in the time set forth in Wis. Stat. § 7.51(5)(b). In municipalities with very limited resources, it would be an extreme burden to duplicate one in six absentee ballots.

Additionally, these Respondents are unique in that their resources are very limited. The Town of Buchanan, for example, currently has only one fulltime employee. Many of the Town’s residents who have traditionally volunteered to staff Town Hall, the Town’s single polling location, on

election day are not willing or able to volunteer as a result of the current health pandemic. These limited resources make it unlikely that the Respondents would be able to duplicate ballots within a day, or even a few days, of the election.

The printing error on the ballots is not a “defect.” Remediation of the timing blemish provides a solution to the printing error without requiring additional staff and without modifying any portion of the ballot concerning the voter’s choice. However, if this Court determines that the ballots are defective as set forth in Wis. Stat. § 5.85(3), then these Respondents will need additional time to duplicate the same so that all votes which have been properly submitted may be counted.

III. IF THE COURT DETERMINES THAT THE ELECTION BALLOTS AT ISSUE ARE “DAMAGED OR DEFECTIVE SO THAT [THEY] CANNOT BE PROPERLY COUNTED BY THE AUTOMATIC TABULATING EQUIPMENT” AS THAT PHRASE IS USED IN WIS. STAT. § 5.85(3) AND, ACCORDINGLY, THAT THE BALLOT DUPLICATION REQUIREMENTS OF WIS. STAT. § 5.85(3) DO APPLY TO THE RESPONDENTS, AND IF THE COURT DETERMINES THAT THE RESPONDENTS DO HAVE TO COMPLY WITH THE LIMITED TIME CONSTRAINTS SET FORTH IN WIS. STAT. § 7.51(5)(B) FOR THE DELIVERY OF FINAL BALLOTS, STATEMENTS, TALLY SHEETS, LISTS, AND ENVELOPES RELATED TO THE ELECTION TO THEIR RESPECTIVE COUNTY CLERK, THEN WIS. STAT. § 5.85(3) AND WIS. STAT. § 7.51(5)(B) ARE UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE.

The Respondents fully agree with the arguments set forth by the Respondents, Town of Grand Chute, Town of Osborn, Village of Harrison, and Village of Kimberly and incorporate the same herein by reference.

CONCLUSION

For the reasons set forth above, the Respondents request the following:

1. That the Court declare that the election ballots at issue are **not** “damaged or defective so that [they] cannot be properly counted by the automatic tabulating equipment” as that phrase is used in Wis. Stat. § 5.85(3); and, accordingly, that the ballot duplication requirements of Wis. Stat. § 5.85(3) do **not** apply to the Respondents.
2. That the Court declare that the Respondents shall be allowed to correct any timing mark blemishes by using an ES&S ballot marking pen or other black ballpoint pen to fill in the damaged timing marks per the recommendation of the manufacturer of the Respondents’ tabulation machines, ES&S.
3. As the second alternative, if the Court determines that the election ballots at issue are “damaged or defective so that [they] cannot be properly counted by the automatic tabulating equipment” as that

phrase is used in Wis. Stat. § 5.85(3) and, accordingly, that the ballot duplication requirements of Wis. Stat. § 5.85(3) do apply to the Respondents, then that the Court declare that the Respondents do **not** have to comply with the deadlines set forth in Wis. Stat. § 7.51(5)(b) for the delivery of final ballots, statements, tally sheets, lists, and envelopes related to the election to their respective county clerk.

4. As the third alternative, if the Court determines that the election ballots at issue are “damaged or defective so that [they] cannot be properly counted by the automatic tabulating equipment” as that phrase is used in Wis. Stat. § 5.85(3) and, accordingly, that the ballot duplication requirements of Wis. Stat. § 5.85(3) do apply to the Respondents, and if the Court determines that the Respondents do have to comply with the limited time constraints set forth in Wis. Stat. § 7.51(5)(b) for the delivery of final ballots, statements, tally sheets, lists, and envelopes related to the election to their respective county clerk, then that the Court declare that Wis. Stat. § 5.85(3) and Wis. Stat. § 7.51(5)(b) are unconstitutional as applied to the facts of this case. In the event that the Court finds the statutes are unconstitutional,

the Court should allow correction of the timing mark blemishes using the procedure outlined herein.

Dated this 27th day of October, 2020.

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CERTIFICATION OF FORM AND LENGTH

We hereby certify that this Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment conforms with the rules contained in Wis. Stat. § 809.19(8)(b) and (d), as required by Wis. Stat. § 809.62(4), for a document produced using proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum 2 points, maximum of 60 characters per full line of body text. The length of this Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment is 1,409 words.

Dated this 27th day of October, 2020.

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CERTIFICATION OF ELECTRONIC COPY

We hereby certify that we have submitted an electronic copy of this Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment which complies with the requirements of Wis. Stat. § 809.19(12).

We further certify that the electronic Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment is identical in content and format to the printed form of the Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment.

A copy of this certification has been served with the paper copies of this Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment and filed with the Supreme Court and served on all opposing parties.

Dated this 27th day of October, 2020.

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CERTIFICATION OF MAILING

We certify that this Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment was delivered via U.S. Mail to the Clerk of the Supreme Court at 110 East Main Street, Suite 215, Madison, Wisconsin, on the 27th day of October, 2020.

Dated this 27th day of October, 2020.

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