

SUPREME COURT  
STATE OF WISCONSIN

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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.

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VILLAGE OF HORTONVILLE, VILLAGE OF NICHOLS, VILLAGE OF  
SHIOCTON, TOWN OF BOVINA, TOWN OF ELLINGTON, TOWN OF FREEDOM,  
TOWN OF ONEIDA AND TOWN OF SEYMOUR RESPONSE TO OUTAGAMIE  
COUNTY AND CALUMET COUNTY'S EMERGENCY PETITION FOR ORIGINAL  
JURISDICTION AND DECLARATORY JUDGMENT

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### **JURISDICTION**

The Respondents agree that the Court has original jurisdiction to hear this dispute and issue orders concerning this dispute, as set forth in Section I.V. ORIGINAL JURISDICTION of the Petition.

### **STATEMENT OF THE CASE**

The Respondents generally agree with the facts as set forth in detail in Section VI. FACTUAL BASIS of the Petition. To avoid unnecessary repetition, the Respondents incorporate such facts herein by reference.

### **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?

The Respondents disagree with the Petitioners position that “Pursuant to Wis. Stat. § 5.85(3), all ballots which cannot be read by the tabulating equipment must be duplicated. The plain language of that statute appears to make it applicable to the scenario before the Court. The petitioners believe the language of Wis. Stat. § 5.85(3) applies.” Respondents assert that the statutory section must be read as a whole and that when reviewed in light of the facts in this matter, the ballots are not “damaged or defective” to the extent that they cannot be “properly counted by the automatic tabulating equipment.” It appears that the manufacturer of the electronic tabulation equipment believes that the timing mark can be corrected by filing in the blank with a ballot marking pen or black ball point pen. The implication is that the ballot would then be able to be properly counted by the automatic tabulating equipment. The interests of the Respondents are aligned with those respondents represented by the Herrling Clark Law Firm, and the Respondents join in and adopt their Arguments outlined in their response.

In light of the high absentee ballot count, it is imperative that the Respondent’s municipal clerks be provided with sound guidance on how affected ballots are to be handled.

### **RELIEF REQUESTED**

For the reasons set forth above, the Respondents request relief as follows:

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 27<sup>th</sup> day of October, 2020.

MENN LAW FIRM LTD.

Attorneys for Respondents, Village of Hortonville, Village of Nichols, Village of Shiocton, Town of Bovina, Town of Ellington, Town of Freedom , Town of Oneida and Town of Seymour

BY: /s/ Electronically signed by Steven J. Frassetto

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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 1719 words.

Dated this 27<sup>th</sup> day of October, 2020.

MENN LAW FIRM LTD.

Attorneys for Respondents, Village of Hortonville, Village of Nichols, Village of Shiocton, Town of Bovina, Town of Ellington, Town of Freedom, Town of Oneida and Town of Seymour

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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 27<sup>th</sup> day of October, 2020.

MENN LAW FIRM LTD.

Attorneys for Respondents, Village of Hortonville, Village of Nichols, Village of Shiocton, Town of Bovina, Town of Ellington, Town of Freedom, Town of Oneida and Town of Seymour

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## CERTIFICATION OF PERSONAL SERVICE

We certify that this Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment was mailed by first class mail to the Clerk of the Supreme Court at 110 East Main Street, Suite 215, Madison, Wisconsin, on the 27<sup>th</sup> day of October, 2020.

Dated this 27<sup>th</sup> day of October, 2020.

MENN LAW FIRM LTD.

Attorneys for Respondents, Village of Hortonville, Village of Nichols, Village of Shiocton, Town of Bovina, Town of Ellington, Town of Freedom , Town of Oneida and Town of Seymour

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