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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 CENTER, TOWN OF CICERO, TOWN OF GRAND CHUTE, TOWN OF MAINE, TOWN OF OSBORN, VILLAGE OF HARRISON, AND VILLAGE OF KIMBERLY RESPONSE TO OUTAGAMIE COUNTY AND CALUMET COUNTY'S EMERGENCY PETITION FOR ORIGINAL JURISDICTION AND DECLARATORY JUDGMENT

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Wis. Stat. § 806.04

Wis. Stat. § 809.70

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

Criteria for Review

Outagamie County and Calumet County’s Emergency Petition for Original Jurisdiction and Declaratory Judgment (the “Petition”) was submitted pursuant to Wis. Stat. § 809.70, which authorizes requests for “the supreme court to take jurisdiction of an original action.”

Whether the Supreme Court exercises its original jurisdiction rests to a large extent in the discretion of the Court. *See generally State v. Shaughnessey*, 86 Wis. 646, 57 N.W. 1105 (1894); *Attorney Gen. v. City of Eau Claire*, 37 Wis. 400 (1875). In determining whether to exercise its original jurisdiction, the Supreme Court will consider the importance of the issues presented as well as the inadequacy of relief in the circuit court. *See Labor & Farm Party v. Elections Bd., State of Wis.*, 117 Wis. 2d 351, 344 N.W.2d 177 (1984); *Petition of Heil*, 230 Wis. 428, 284 N.W. 42 (1938).

In *Labor and Farm Party v. Elections Board, State of Wisconsin*, a petition for exercise of original jurisdiction was brought seeking “an order from [the Supreme Court] directing the Elections Board to place [a candidate’s] name on the presidential preference ballot.” *Labor & Farm*

Party, 117 Wis. 2d at 354. The Court held, in relevant part, “Because we conclude that this matter is *publici juris*, it is therefore appropriate for us to exercise our original jurisdiction.” *Id.* at 352. The Court explained:

Although this court's jurisdiction is not exclusive inasmuch as the action could have been brought in circuit court, under the particular circumstances of this case, including the shortness of time available before the ballots are to be printed, the dispatch within which the petitioners filed their petition in this court, and the statewide importance of the issues raised, we conclude that we should exercise our original jurisdiction and resolve the issues presented.

Id. at 354.

This case is not unlike *Labor and Farm Party v. Elections Board, State of Wisconsin*. This case also involves election ballot issues of statewide (and nationwide) importance, and there is a very short time before a conclusive decision must be reached on how to address such issues. As in *Labor and Farm Party v. Elections Board, State of Wisconsin*, this Court should exercise its original jurisdiction and resolve the issues presented.

Standard of Review

Respondents, Town of Center, Town of Cicero, Town of Grand Chute, Town of Maine, Town of Osborn, Village of Harrison, and Village of Kimberly (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 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.

We wish to emphasize, however, the following specific concerns of the Respondents:

1. Three Respondents (Town of Grand Chute, Village of Harrison, and Village of Kimberly) estimate that they have received approximately 2,000 abnormal absentee ballots (each) to date and that there are an unknown number of abnormal ballots still in the possession of voters which have not yet been received by the Respondents.
2. The exact amount of time it will take for the Respondents to carry out the duplication and verification process of this number of ballots under Wis. Stat. § 5.85(3) cannot be predicted with absolute certainty, and these ballots cannot be opened for examination and counting until the day of the election.
3. The 4:00 p.m. deadline provided in Wis. Stat. § 7.51(5)(b) is the time by which the ballot count must be transferred to the County. The Respondents estimate that the actual counting must be finished at least

two hours before the 4:00 p.m. deadline for the Respondents to make a proper (and timely) submission to the County of the required information.

4. An additional concern of at least one of the Respondents (the Village of Kimberly) is that its polling place does not include sufficient area to accommodate the additional staff needed to duplicate all abnormal ballots under Wis. Stat. § 5.85(3) by the 4:00 p.m. deadline in Wis. Stat. § 7.51(5)(b) and, at the same time, maintain the COVID-19 safety protocols required by the Wisconsin Election Commission guidelines, including social distancing.
5. To the extent the Respondents are required to comply with the ballot duplication requirements set forth in Wis. Stat. § 5.85(3), they will be unable to comply with the timing requirements of Wis. Stat. § 7.51(5)(b) due to the extraordinary number of problem ballots and the significant number of man hours it will take to duplicate them.

For the reasons above, the Respondents strongly prefer a decision that allows poll workers the ability to correct the abnormal ballots by filling in the blemished timing mark using the procedure recommended by the manufacturer of the Respondents' tabulation machines. This simplified

procedure will ensure that the Respondents can make a timely submission of the voter count to the County without risk of error, without the risk of having some ballots excluded from the final count because they could not be duplicated in time, and will minimize the potential for future controversy.¹

¹ Note to the Court: The undersigned counsel filing this Response to Outagamie County and Calumet County's Emergency Petition for Original Jurisdiction and Declaratory Judgment learned this morning that the Village of Little Chute, which is another municipal client of the Herrling Clark Law Firm Ltd., may have also received affected ballots as described in this action. The Village of Little Chute has not yet been named as a party to this action but has requested that the Court be informed that the Village of Little joins in this Response.

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 believe the answer is “yes.”

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.

In Paragraph 30 of the Petition, the Petitioners assert: “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.”

The Respondents disagree; the language of Wis. Stat. § 5.85(3) does not apply because a timing mark can be easily fixed to allow the election ballots at issue to be properly counted by the automatic tabulating equipment. Herein lies the controversy.

In arguing that the language of Wis. Stat. § 5.85(3) applies to the election ballots at issue in this case, the Petitioners focus on the words “damaged or defective”. However, the election ballots at issue in this case must be more than just “damaged or defective” for the ballot duplication requirements of Wis. Stat. § 5.85(3) to be triggered. Specifically, the election

ballots must be “damaged or defective *so that [they] cannot be properly counted by the automatic tabulating equipment.*” Wis. Stat. § 5.85(3) (emphasis added).

In this case, it is worth emphasizing the Legislature’s inclusion of the word “properly” in Wis. Stat. § 5.85(3). See *United Am., LLC v. Wisconsin Dep’t of Transportation*, 2020 WI App 24, ¶ 14, 392 Wis. 2d 335, 944 N.W.2d 38 (“[W]e must ‘assume that the legislature used all the words in a statute for a reason.’ *State v. Matasek*, 2014 WI 27, ¶ 18, 353 Wis. 2d 601, 846 N.W.2d 811. Generally, every word that appears in a statute should contribute to the statute's construction.”). The inclusion of “properly” in Wis. Stat. § 5.85(3) must be given appropriate weight as it suggests that a ballot is not “damaged or defective” if, in fact, it can be “properly counted by the automatic tabulating equipment”. Wis. Stat. § 5.85(3). In this case, although the election ballots at issue are arguably “damaged or defective” due to the timing mark blemish, they still can “be properly counted by the automatic tabulating equipment” by applying a small amount of ink to said timing mark.

As indicated in the Affidavit of Michael Dvorak, a Senior Product Manager for Election Systems & Software, LLC (“ES&S”) (the manufacturer of the Respondents’ tabulation machines), a copy of which

Affidavit was submitted by the Petitioners as **Exhibit E** to the Petition and the Petitioners' Memorandum in Support of Petition, Mr. Dvorak "recommends a solution of using an ES&S ballot marking pen or other black ballpoint pen to fill in the damaged timing mark." Mr. Dvorak further avers that, "[b]ased upon [his] knowledge and experience, the filling in of the timing [sic] on the affected ballots with an ES&S ballot marking pen or other black ballpoint pen will not affect any of the selections made by the voter."

Finally, Mr. Dvorak offers that:

In support of these facts, the County provided ES&S with ten (10) sample non-voted ballots which contained the damaged timing mark. ES&S filled in the damaged timing mark on all ten (10) ballots and ran them through an ES&S DS200 which contained the same firmware version being used by the County. All ten (10) ballots were successfully accepted and tabulated by the ES&S DS200.

Further, the statements contained in the Affidavit of Michael Dvorak referenced above are also supported by, and consistent with, the statements set forth in the Affidavit of Jeffrey King, an Outagamie County Deputy Clerk. In the Affidavit of Jeffrey King submitted by the Petitioners as **Exhibit F** to the Petition and the Petitioners' Memorandum in Support of Petition, Mr. King avers as follows:

6) In my capacity as the Deputy County Clerk of Outagamie County, I ran a test of 50 ballots with the deficient timing mark. Upon feeding the ballots with the deficient timing mark into the tabulator, the ballots were

rejected by the tabulator without counting said ballots. The cause of the ballots being rejected as unreadable appears to be the deficient timing mark.

7) It was determined the deficient timing mark could be filled in to allow the tabulator to read the ballot by testing this theory. Also, our election equipment vendor, Elections, Systems, & Software (ES&S) provided, in writing, that filling in the timing mark was a reasonable solution to the issue and would allow the ballot to be read by the tabulator.

8) I tested 50 ballots by marking the ballots in various ways as a voter would vote a ballot. This included casting several votes for each candidate and write-in position on the ballot. The ballots were then fed into a tabulator. Each ballot in which the deficient timing mark was filled in with ink read said ballot. The results tape provided by the tabulator matched the chart of predetermined results without exception.

Thus, based on the Affidavit of Jeffrey King, in addition to the Affidavit of Michael Dvorak, the election ballots at issue in this case can “be properly counted by the automatic tabulating equipment” with one very small coloring exercise to fill in the timing mark blemish.

The Respondents believe that a ballot requiring a simple corrective measure to allow for its proper counting, whether before or after being cast, is not a ballot that is “damaged or defective” as that phrase is used in Wis. Stat. § 5.85(3). All parties agree that the ballots with the timing mark blemish were problematic before being cast, as the ballots were provided to the Respondents with the timing mark blemish originating from the ballot

printer. However, these ballots could have been corrected prior to being mailed to voters and, as indicated in both the Affidavit of Michael Dvorak and the Affidavit of Jeffrey King, can be easily corrected now without affecting the votes already cast. In fact, by authorizing the Respondents to simply fill in the timing mark blemish as recommended by ES&S, the original ballots as cast by the voters will be counted by the automatic tabulating equipment. Not only is this a more efficient remedy to the issue at hand, but it also seems to be a far less risky one—one with less room for error.

Finally, the Petitioners raise the question of whether allowing the Respondents to fill in the timing mark blemish runs afoul to Wis. Stat. § 12.13(2)(b)2., which prohibits election officials from “[i]llegally alter[ing] a ballot on election day.” The Respondents ask the Court to find that it does not. Correcting a timing mark blemish to allow a voter’s original ballot to be cast and counted by the automatic tabulating equipment is not what the Legislature had in mind when it enacted a statute prohibiting the illegal altering of ballot. The Legislature likely intended to prohibit the altering of votes so as to potentially affect the outcome of an election, which is supported by the title of Wis. Stat. § 12.13—“Election fraud”.

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.

If the Court agrees with the Petitioners on the applicability of Wis. Stat. § 5.85(3), such that the Respondents are required to duplicate all ballots containing the timing mark blemish, the Respondents agree with the Petitioners that the Court should then declare the deadlines set forth in Wis. Stat. § 7.51(5)(b) inapplicable. Because the Respondents join the Petitioners on this issue, the Respondents will not repeat the Petitioners’ arguments regarding the inapplicability of Wis. Stat. § 7.51(5)(b), but instead the Respondents incorporate such arguments herein by reference. That said, it is worth noting that the Respondents have confirmed that, to the extent they are required to comply with the ballot duplication requirements set forth in Wis. Stat. § 5.85(3), they will be unable to comply with the timing requirements

of Wis. Stat. § 7.51(5)(b) due to the extraordinary number of problem ballots and the significant number of man hours it will take to duplicate them.

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 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, THEN WIS. STAT. § 5.85(3) AND WIS. STAT. § 7.51(5)(B) ARE UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE.²

In *Mayo v. Wisconsin Injured Patients and Families Compensation*

Fund, the Wisconsin Supreme Court explained as follows:

There are two general types of constitutional challenges to statutes: facial and as-applied. *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 13, 357 Wis. 2d 360, 851 N.W.2d 302. We previously have explained that:

² Because the constitutionality of Wis. Stat. § 5.85(3) and Wis. Stat. § 7.51(5)(b) are being challenged herein, the Attorney General will be served with a copy of this Response to Outagamie County and Calumet County’s Emergency Petition for Original Jurisdiction and Declaratory Judgment pursuant to Wis. Stat. § 806.04(11).

A party may challenge a law . . . as being unconstitutional on its face. Under such a challenge, the challenger must show that the law cannot be enforced “under any circumstances.” . . . In contrast, in an as-applied challenge, we assess the merits of the challenge by considering the facts of the particular case in front of us, “not hypothetical facts in other situations.” Under such a challenge, the challenger must show that his or her constitutional rights were actually violated.

Id. (quoting *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63).

2018 WI 78, ¶ 24, 383 Wis. 2d 1, 914 N.W.2d 678. The Court further explained:

Generally, Wisconsin courts have employed two levels of scrutiny when addressing equal protection challenges. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 38, 235 Wis. 2d 610, 612 N.W.2d 59. Strict scrutiny is applied to statutes that restrict a fundamental right. *League of Women Voters*, 357 Wis. 2d 360, ¶¶ 139-40, 851 N.W.2d 302 (concluding that the right to vote is fundamental). Strict scrutiny is also applied to the regulation of protected classes. *Thorp*, 235 Wis. 2d 610, ¶ 38, 612 N.W.2d 59.

When strict scrutiny is applied, the statute must serve a compelling state interest; the statute must be necessary to serving that interest; and the statute must be narrowly tailored toward furthering that compelling state interest. *Id.*

Mayo, 383 Wis. 2d at ¶ 28.

In this case, the Court should apply strict scrutiny. If the Court determines that both the ballot duplication requirements of Wis. Stat. § 5.85(3) and the deadline requirements of Wis. Stat. § 7.51(5)(b) apply, then those two statutes, as applied in this case, have the effect of restricting a fundamental right—that is, the right to vote.

When strict scrutiny is applied to the facts of this case, the Respondents ask the Court to conclude that the application of both the ballot duplication requirements of Wis. Stat. § 5.85(3) and the deadlines of Wis. Stat. § 7.51(5)(b) to the Respondents are unconstitutional, as the statutes are not narrowly tailored toward furthering a compelling state interest.³

³ The Respondents recognize that, as a general rule, a municipality or state agency cannot question the constitutionality of a statute. *State ex rel. City of La Crosse v. Rothwell*, 25 Wis. 2d 228, 233, 130 N.W.2d 806, 808–09 (1964). However, “[t]he general rule is subject to two exceptions: (1) It is the agency’s official duty to do so, or the agency will be personally affected if it fails to do so and the statute is held invalid, and (2) if the issue is of ‘great public concern.’” *Id.* Such exceptions apply in this case.

Although Respondents agree that both Wis. Stat. §§ 5.85(3) and 7.51(5)(b) serve a compelling state interest (namely, that of running organized elections), Wis. Stat. §§ 5.85(3) and 7.51(5)(b) read together are not narrowly tailored toward furthering that state interest, as the state interest of running organized elections (and, more specifically, rectifying the issue at hand in this case) can be accomplished by far less arduous means. For example, instead of requiring the Respondents to duplicate thousands of ballots in an incredibly short time frame, which will inevitably result in the disenfranchisement of certain voters whose ballots are not duplicated and counted in time, the Respondents should be allowed to follow the recommendations of the manufacturer of the tabulation machines, ES&S, by simply filling in the timing mark blemish.

To the extent this Court agrees that the ballot duplication requirements of Wis. Stat. § 5.85(3) and the deadline requirements of Wis. Stat. § 7.51(5)(b), when read together, and as applied to the facts of this case, are unconstitutional, the Respondents respectfully request that this Court either “apply a limiting construction to rehabilitate the statute” or “cure the constitutional defect by severing the unconstitutional provisions of [the] statute and leav[e] the remainder of the legislation intact” as outlined as two

potential options by this Court in *State v. Stevenson*, 2000 WI 71, ¶ 15, 236 Wis. 2d 86, 93–94, 613 N.W.2d 90, 94.

In this case, the Respondents request that the Court apply a limiting construction to rehabilitate Wis. Stat. § 5.85(3) by ruling that the duplication requirements of Wis. Stat. § 5.85(3) do not apply to easily fixable timing mark blemishes of the type at issue here. Alternatively, the Respondents request that the Court cure the constitutional defect by severing the 4:00 p.m. deadline from Wis. Stat. § 7.51(5)(b) while leaving the remainder of Wis. Stat. § 7.51(5)(b) intact.

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 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, 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 as applied, the Court should allow correction of the timing mark blemishes using the procedure outlined herein as opposed to ballot duplication under Wis. Stat. § 5.85(3); or, alternatively, the Court

should rule that the Respondents do not have to comply with the deadlines set forth in Wis. Stat. § 7.51(5)(b).

Dated this 27th day of October, 2020.

HERRLING CLARK LAW FIRM LTD.

Attorneys for Respondents, Town of Center, Town of Cicero, Town of Grand Chute, Town of Maine, Town of Osborn, Village of Harrison, and Village of Kimberly

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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 5,314 words.

Dated this 27th day of October, 2020.

HERRLING CLARK LAW FIRM LTD.

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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.

HERRLING CLARK LAW FIRM LTD.
Attorneys for Respondents, Town of Center, Town of Cicero, Town of Grand Chute, Town of Maine, Town of Osborn, Village of Harrison, and Village of Kimberly

BY: /s/ Electronically signed by Charles D. Koehler
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BY: /s/ Electronically signed by Andrew J. Rossmeissl

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BY: /s/ Electronically signed by Tyler J. Claringbole

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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 hand delivered 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.

HERRLING CLARK LAW FIRM LTD.

Attorneys for Respondents, Town of Center, Town of Cicero, Town of Grand Chute, Town of Maine, Town of Osborn, Village of Harrison, and Village of Kimberly

BY: /s/ Electronically signed by Charles D. Koehler

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