

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

APR 23 2020

JOHN D. HADDEN
CLERK

THE LEAGUE OF WOMEN VOTERS OF)
OKLAHOMA, ANGELA ZEA PATRICK, AND)
PEGGY JEANNE WINTON,)
)
Petitioners,)
)
v.)
)
PAUL ZIRIAX, Secretary of the Oklahoma State)
Election Board, in his official capacity,)
)
Respondent.)

Sup. Ct. Case No.

#118765

**BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION
AND REQUEST FOR EXTRAORDINARY RELIEF**

CLYDE A. MUCHMORE, OBA # 6482
MELANIE WILSON RUGHANI, OBA #30421
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)
clyde.muchmore@crowedunlevy.com
melanie.rughani@crowedunlevy.com

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BACKGROUND

As the Court is aware, Oklahoma is currently in the midst of a global pandemic. The Governor has issued a state of emergency and “safer at home” order; mayors across the state have issued “shelter in place” orders; and the CDC and other organizations have strongly advised individuals to halt public gatherings and limit their contact with other individuals as much as possible to avoid the spread of the novel coronavirus, 2019-nCoV.¹ The need to drastically curtail person-to-person contacts to limit exposure to this highly contagious virus is expected to continue for many months, and potentially until a vaccine can be produced and widely distributed.² As a result, if Oklahoma is anything like other states that have recently attempted to hold elections during a pandemic,³ an unprecedented number of Oklahomans will seek to vote by absentee ballot in the upcoming June, August, and November elections.

Unlike voters in almost every other state, however, Oklahomans seeking to vote absentee must overcome a substantial obstacle. Oklahoma is one of *only three states* in the entire country⁴ where—at least according to Respondent, the Secretary of the State Election

¹ See, e.g., “OKC Mayor confirms local transmission of coronavirus, declares state of emergency” (March 15, 2020), <https://kfor.com/news/local/okc-mayor-confirms-local-transmission-of-coronavirus-declares-state-of-emergency/>; “State of Emergency Declared in Oklahoma City Due to Coronavirus” (Mar. 15, 2020), <https://www.news9.com/story/41897408/state-of-emergency-declared-in-oklahoma-city-due-to-coronavirus>; Executive Order, <https://www.sos.ok.gov/documents/executive/1913.pdf>.

² See, e.g., Ed Yong, “Our Pandemic Summer,” *The Atlantic* (April 14, 2020).

³ See, e.g., Rachel Orey & Tim Harper, Wisconsin’s Election Debacle a Cautionary Tale for States, Bipartisan Policy Center (Apr. 13, 2020), *available at* <https://bipartisanpolicy.org/blog/wisconsins-election-debacle-a-cautionary-tale-for-states/> (discussing the debacle that occurred recently in Wisconsin, where a “tidal wave of absentee ballot requests overwhelmed election officials”).

⁴ See National Conference of State Legislatures, “Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options,” (April 14 2020), *available at* <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>

Board—an absentee ballot must be accompanied by an affidavit *notarized in person by a notary public*. See App. Tab A (ballot form and instructions).

This obstacle is not a small one—particularly during a pandemic. Many places of business where notaries ordinarily may be found have closed their doors to the public and/or sent their workers home,⁵ and Oklahoma law prevents notaries from otherwise notarizing any more than **20** absentee ballots per election. 26 O.S. 14-108.1. Furthermore, to obtain a notary’s signature, voters must leave their home (where many have been ordered to shelter in place), locate a qualified notary available and willing to notarize a document free of charge, and interact with that notary face to face—including physically transferring the affidavit form between them. See, e.g., App. Tab A (instructing voters that a notary public or other official “who notarizes, verifies, acknowledges or attests to the signature of an absentee voter on the Affidavit without that voter actually appearing in person before said Notary Public or other official authorized to administer oaths, shall be guilty of a felony”⁶) (emphasis added).⁷ Such a requirement is burdensome in ordinary times. In the time of COVID-19, it could be deadly.

⁵ See, e.g., Journal Record, “Arvest closing lobbies, in-store branches” (March 19, 2020) <https://journalrecord.com/2020/03/19/arvest-closing-lobbies-in-store-branches/>; American Banker, “Banks cutting back on branch services to contain spread of coronavirus” (March 16, 2020), available at <https://www.americanbanker.com/news/banks-cutting-back-on-branch-services-to-contain-spread-of-coronavirus>.

⁶ Notably, this, too, is incorrect under current law, which now theoretically permits remote online notarization. See 49 O.S. § 201 et seq. However, because the particularized technology required for remote notarization is expensive, there are currently only a handful of such notaries in Oklahoma, and conducting a remote notarization requires the gathering of background information that can take a substantial period of time, this is unlikely to be a feasible option for most Oklahomans—even if the electronic notarization could somehow be transferred onto the absentee ballot affidavit form. See, e.g., Oklahoma Bar Association, Oklahoma Remote Online Notary Act, available at https://www.okbar.org/lpt_articles/oklahoma-remote-online-notary-act/.

⁷ It is worth noting that *time* to obtain a notary’s signature may also be an issue. If Oklahoma is anything like other states, and experiences a rush on absentee ballots that it is ill equipped to process timely, and/or if mail continues to be delayed, voters may receive their ballots

Fortunately, the Legislature took care of this problem in 2002, when it enacted 12

O.S. § 426. The statute provides:

Whenever, under any law of Oklahoma or under any rule, order, or requirement made pursuant to the law of Oklahoma, **any matter is required** or permitted **to be supported**, evidenced, established, or proved **by the sworn** statement, declaration, verification, certificate, oath, or **affidavit**, in writing of the person making the same (other than a deposition, or any oath of office, or an oath required to be taken before a specified official other than a notary public), **the matter may with like force and effect be supported**, evidenced, established, or proved **by the unsworn statement in writing of the person made and signed under penalty of perjury** setting forth the date and place of execution and that it is made under the laws of Oklahoma. The statement under penalty of perjury may be substantially in the following form:

"I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

(Date and Place)

(Signature)"

The signed statement under penalty of perjury shall constitute a legally binding assertion that the contents of the statement to which it refers are true. This section shall not affect any requirement for acknowledgment of an instrument affecting real property.

12 O.S. § 426 (emphasis added).

Unfortunately, in the years since, the Election Board has not updated its ballot forms or instructions to facilitate—or even notify Oklahomans of—this additional statutory procedure. To the contrary: the current ballot forms and instructions continue to inform voters that, “[i]n order to be counted,” the affidavit form “must be filled out completely, signed by the voter, and notarized by a Notary Public or other official authorized to administer oaths.” *See* App. Tab A (affidavit form and instructions) (emphasis added).

with little time within which to mark them and mail them back—much less seek out a notary. *See, e.g.,* Opinion and Order, *Dem. Nat’l Comm’ee v. Bostelmann*, No. 3:20-cv-00284, 2020 WL 1320819 (W.D.Wis., April 2, 2020) (describing the substantial delays experienced by voters in Wisconsin attempting to obtain and cast their absentee ballots).

This inaccuracy would be problematic at any time. But it has taken on increasing urgency in recent weeks, as it has become clear that a robust absentee ballot system that allows voters to stay at home and engage in as few face-to-face interactions as possible will be critical to protecting both public health and Oklahomans' fundamental right to vote.

After informal communications in late March and early April failed to gain any traction, on April 20, 2020, a broad coalition of healthcare associations, voting rights organizations, and other concerned Oklahoma public interest groups sent a formal letter to Respondent, the Secretary of the Oklahoma State Election Board. App. Tab B. In this letter, they outlined the applicable law, and requested that the Secretary accordingly ensure the ballot forms and instructions for the upcoming June, August, and November 2020 elections make clear that voters who wish to vote by absentee ballot may do so *either* by having their ballot affidavits verified by a notary public *or* by personally making a signed statement under penalty of perjury, pursuant to 12 O.S. § 426. *Id.* The Secretary declined. App. Tab C. Accordingly, Petitioners were forced to seek judicial intervention.

Petitioners respectfully request that this Court assume original jurisdiction and issue all appropriate extraordinary relief, including but not limited to: 1) a declaration that, in lieu of an affidavit notarized by a notary public, an absentee voter may submit a personally signed statement made under penalty of perjury pursuant to the dictates of 12 O.S. § 426; 2) a writ of prohibition, barring the Secretary from sending voters absentee ballot forms and instructions that improperly suggest that an affidavit notarized by a notary public is required for their ballots to be counted; and/or 3) a writ of mandamus, directing the Secretary to send absentee voters ballot forms and materials that clearly facilitate the making of a proper “under penalty of perjury” statement pursuant to 12 O.S. § 426.

ARGUMENT AND AUTHORITIES

I. This Court has the Authority to Issue the Requested Relief

This Court may assume original jurisdiction and issue extraordinary relief if there is no adequate remedy at law, or where the usual appellate process “does not provide ‘plain speedy and adequate relief’ under the circumstances.” *Stewart v. Judge of 15th Jud. Dist.*, 1975 OK 156, ¶¶ 6-7, 542 P.2d 945, 947. And particularly where, as here, a matter is *publici juris*, this Court has “jurisdiction to provide declaratory relief so as to afford a party a means to vindicate a judicially cognizable interest.” *Ethics Comm'n of State of Okl. v. Cullison*, 1993 OK 37, ¶¶ 6-7, 850 P.2d 1069, 1073; *see also, e.g., Sierra Club v. State ex rel. Oklahoma Tax Comm'n*, 2017 OK 83, ¶ 5, 405 P.3d 691, 694.

There is no statutory procedure for an appeal from an act, or refusal to act, by the Secretary of the State Election Board. *Gray v. State ex rel. State Election Bd.*, 1998 OK 85, ¶ 3, 962 P.2d 1, 2. But this Court is vested with “general superintending control over ... all Agencies, Commissions and Boards created by law (Article 7, s 4, of the Oklahoma Constitution).” *Hallman v. Cty. Election Bd. of Oklahoma Cty.*, 1973 OK 24, 509 P.2d 459, 460. Accordingly, on numerous occasions, this Court has assumed original jurisdiction and intervened “to correct an abuse of discretion or to compel action” by the Election Board, “where the action taken or the refusal to act is arbitrary,” *Box v. State Election Bd. of Oklahoma*, 1974 OK 104, 526 P.2d 936, 939, or where the Board has “misconstrue[d]” the state’s election laws, *Hallman*, 1973 OK 24, ¶ 13; *see also, e.g., Gray*, 1998 OK 85; *Arthur v. Payne Cty. Election Bd.*, 1998 OK 86, ¶ 7, 964 P.2d 213, 215; *Daxon v. State Election Bd.*, 1978 OK 112, 582 P.2d 1315, 1318.

Furthermore, time is of the essence in this matter. Oklahoma’s next election is scheduled for **June 30, 2020**.⁸ And it is a highly consequential one: in addition to the numerous state and federal primary contests and local matters that will appear on the June ballot, the Governor also recently set this date for a special statewide election regarding State Question 802, the initiative petition to expand Medicaid in Oklahoma.⁹ With surging demand for absentee ballots and deadlines looming, resolution of this question is needed urgently. Where, as here, the matter is one of “public importance” and there is a “need for an early determination of the question,” this Court is empowered to intervene. *Elk City v. Johnson*, 1975 OK 97, 537 P.2d 1215, 1216; *see also State ex rel. Heartsill v. Cty. Election Bd. of Carter Cty.*, 1958 OK 138, 326 P.2d 782, 786.

II. A signed statement made under penalty of perjury, in lieu of a notarized affidavit, is sufficient to satisfy Oklahoma’s absentee ballot laws

Despite what the absentee ballot materials prepared by the Secretary suggest, Oklahoma law does not, in fact, require that an absentee ballot be accompanied by an affidavit subscribed and sworn before a notary public, so long as the voter personally avers that his or her statement is signed under “penalty of perjury.”

Enacted in 1979, Oklahoma’s absentee voting statutes require absentee ballots to be accompanied by “an affidavit stating that the voter is qualified to vote and that the voter has personally marked the ballots, and has not exhibited the marked ballots to any other person.” 26 O.S. § 14-107. Section 14-108, which instructs voters on the “Return of Ballots,” directs the voter to, among other things, “fill out completely and sign the affidavit, such signature to be notarized at no charge by a notary public.” 26 O.S. § 14-108.

⁸ *See, e.g.*, https://www.ok.gov/elections/Election_Info/2020_Election_Calendar.html.

⁹ *See, e.g.*, Kayla Branch, “Medicaid proposal set for June 30 ballot,” *the Oklahoman* (April 18, 2020).

But a notarized affidavit, whether there is a fee for the notarization or not, is now not the only way to satisfy the requirements of Oklahoma’s absentee voting law. In 2002—decades after the 1979 absentee voting statute requiring an affidavit was enacted—the Legislature promulgated 12 O.S. § 426:

Whenever, under any law of Oklahoma or under any rule, order, or requirement made pursuant to the law of Oklahoma, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or any oath of office, or an oath required to be taken before a specified official other than a notary public), the matter may with like force and effect be supported, evidenced, established, or proved by the unsworn statement in writing of the person made and signed under penalty of perjury setting forth the date and place of execution and that it is made under the laws of Oklahoma. The statement under penalty of perjury may be substantially in the following form:

"I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

(Date and Place)

(Signature)"

The signed statement under penalty of perjury shall constitute a legally binding assertion that the contents of the statement to which it refers are true. This section shall not affect any requirement for acknowledgment of an instrument affecting real property.

Id. (emphasis added).

The Election Board has, in past elections, provided absentee voters with a form affidavit that, mirroring the language of 26 O.S. § 14-107, requires voters to swear that they are “qualified to vote in the election ... for which ballots are enclosed; I have marked these ballots myself; and I have not shown these marked ballots to any other person.” App. Tab A. Immediately below this form affidavit appears a form verification statement, with space for a notary public to aver that the affidavit was “subscribed and sworn before me on this date.” *Id.* This form properly facilitates notarization of the voter’s affidavit by a notary public. Without

an additional form similarly facilitating an “under penalty of perjury” statement pursuant to 12 O.S. § 426, however, it also incorrectly suggests to the voter that a notary’s signature *must* be included for the vote to be counted. And in case this suggestion was not clear, the accompanying instructions for absentee ballots are explicit: despite the 2002 change in the law, the Secretary’s instructions continue to inform voters that, “[i]n order to be counted,” “[t]he” affidavit form “**must** be filled out completely, signed by the voter, and notarized by a Notary Public or other official authorized to administer oaths.” App. Tab A (emphasis added).

Under 12 O.S. § 426, however, this is incorrect. While the 1979 statute might require ballots to be accompanied by a sworn “affidavit stating that the voter is qualified to vote and that the voter has personally marked the ballots, and has not exhibited the marked ballots to any other person,” 26 O.S. § 14-107, the 2002 statute makes clear that this sworn affidavit requirement may be fulfilled, “**with like force and effect,**” by “the unsworn statement in writing of the person made and signed under penalty of perjury.” 12 O.S. § 426 (emphasis added); *see also, e.g., State ex rel. Wright v. Okla. Corp. Comm’n*, 2011 OK CIV APP 91, ¶¶ 11-12, 259 P.3d 899 (statute requiring that document be “verified,” though typically meaning sworn and notarized, could nevertheless be satisfied by an unsworn statement under penalty of perjury pursuant to 12 O.S. § 426); *Video Game Tech. v. Rogers County Bd. of Tax Roll Corrections*, 2019 OK 83, n.1 (“An unsworn declaration, signed under penalty of perjury, may be used in place of an affidavit.”).¹⁰

¹⁰ *See also, e.g., Buckwalter v. Eighth Jud. Dist. Ct.*, 234 P.3d 920 (Nev. 2010); *Broxterman v. Falley’s, Inc.*, 2008 WL 756084, at *2 (D.Kan., Mar. 20, 2008); Kansas Attorney General Op. No. 94-84 (June 21, 1994) (applying effectively identical statutes).

Respondent, the Secretary of the State Election Board, has the authority, and obligation, to “prescribe all forms to be used in administering absentee ballot provisions of the law.” 26 O.S. § 14-127. But the forms he prescribes cannot be incorrect or misleading. If the materials provided by the Secretary do not adequately notify voters that a signed statement under penalty of perjury is sufficient to satisfy the statutory affidavit requirement, many voters who wish to vote by mail in upcoming elections will be left under the mistaken impression they cannot do so without obtaining the signature of a notary public—potentially causing them to unnecessarily risk virus exposure, or preventing them from voting at all.

The Secretary appears to believe he lacks the authority to change the ballot forms to reference the § 426 “penalty of perjury” procedure. App. Tab C. Although he has declined to provide a legal basis for this belief, *id.*, it might be because one of the absentee ballot provisions, 26 O.S. § 14-108, specifically references a “notary public.” But the fact that 26 O.S. § 14-108 makes clear that a notary public cannot charge for notarizing an absentee ballot affidavit does not somehow nullify all other general rules applicable to the making of affidavits. Indeed, the Secretary has already recognized this fact: even though 26 O.S. § 14-108 specifically mentions the signature of a “notary public,” the Secretary’s ballot instructions nevertheless indicate—correctly—that a ballot affidavit can also be verified by any “*other official authorized to administer oaths*,” pursuant to other provisions of Oklahoma law. *See* App. Tab A (emphasis added). There is no reason 12 O.S. § 432 (which provides that an affidavit may be made “before any person authorized to administer oaths”) operates any differently than 12 O.S. § 426 (which permits an unsworn statement “under penalty of perjury” to be used in lieu of such an affidavit) in the absentee ballot context.

Perhaps even more tellingly, Section 426 contains a number of specific *exceptions* to the general rule that an unsworn statement signed under penalty of perjury will suffice—one of which is where a statute requires “an oath ... to be taken before a specified official *other than a notary public*.” 12 O.S. § 426 (emphasis added). The clear implication of this language: where a statute specifically requires that an oath be taken before a *notary public*, and none of the other exceptions applies,¹¹ the § 426 alternative procedure may be employed.

Nor does 26 O.S. § 14-152(B), a provision of the Uniform Military and Overseas Voters Act that expressly notes “[n]otarization is not required for the execution of a document under this act,” prevent 12 O.S. § 426 from applying in the ordinary absentee ballot context.¹² Section 14-152(B) was adopted verbatim from the Uniform Military and Overseas Voters Act, a uniform law proposed by the Uniform Laws Commission.¹³ The fact that the Oklahoma Legislature—like the legislatures of many states without any notary requirement to begin with¹⁴—adopted this uniform law, making clear that military and other voters living overseas need not obtain notarization of any voting-related document, says nothing about the Oklahoma Legislature’s intended construction of 26 O.S. § 14-107, 26 O.S. § 14-108, and 12 O.S. § 426.

¹¹ Indeed, the fact that 12 O.S. § 426 lists specific areas where its terms do *not* apply, such as in real property transactions, indicates that the Legislature intended for it to apply in all *other* areas, including elections.

¹² It does, however, mean that—despite the Secretary’s suggestion otherwise, App. Tab C at 1—absentee ballots that must be timely mailed overseas, and ***which already contain a “penalty of perjury” statement*** in lieu of notarization, would not be affected by this action.

¹³ See Laws 2011, SB 115, c. 340, § 17, eff. November 1, 2011; see also Uniform Law Commission, Military and Overseas Voters Act, available at <https://www.uniformlaws.org/viewdocument/final-act-8?CommunityKey=6acb3a89-34a9-4df0-a4bc-42f1b35581d8&tab=librarydocuments>.

¹⁴ See, e.g., Hawaii Rev. Stat. §15D-16; Va. Code Ann. § 24.2-467; Ky. Rev. St. § 177A.160; Utah Code Ann. § 20A-16-503; D.C. Code § 1-1061.17.

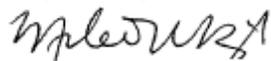
CONCLUSION

The right to vote is a fundamental right enshrined in the Constitution. *See* Okla. Const. Art. 2, § 4; Art. 3, § 5; *see also* *Gentges v. Oklahoma State Election Bd.*, 2014 OK 8, ¶ 9, 319 P.3d 674, 677.¹⁵ Oklahomans should not be asked to risk their lives, or the lives of others, in order to exercise that right—particularly where, as here, the Oklahoma election statutes in no way demand it. Petitioners thus respectfully request that, beginning with the upcoming June 2020 elections, the Secretary be required to provide absentee voters with accurate and readily understandable instructions notifying them of their ability to comply with Oklahoma law *either* by obtaining the signature of a notary or other officer permitted to give oaths *or* by personally signing a statement made under penalty of perjury pursuant to 12 O.S. § 426, and with a form or forms facilitating both procedures.¹⁶

¹⁵ To the extent there is any doubt as to the construction of these provisions, then, this Court is obligated to adopt the construction that furthers that right, and thus avoids constitutional implications. *See, e.g., Young v. Station 27, Inc.*, 2017 OK 68, ¶ 18, 404 P.3d 829, 838 (“the meaning of the statute’s language is construed so that it does not contradict either itself or the constitution”); *City of Oklahoma City v. Oklahoma Tax Comm’n*, 1990 OK 27, 789 P.2d 1287, 1292 (“Whenever possible, statutes will be interpreted to avoid constitutional conflict. If a statute is susceptible of two constructions—one which will uphold the statute, and one which will strike it down—it is our duty to apply constitutional construction.”); *see also, e.g., 29 C.J.S. Elections § 24* (“election laws are to be construed liberally, particularly in favor of the right to vote, and all statutes tending to limit a citizen’s exercise of the right of suffrage should be liberally construed in the voter’s favor”) (citing cases).

¹⁶ A proposed form is provided in the Appendix. App. Tab D. In the event absentee ballot materials for the June 2020 election have already been printed by the time this litigation is complete, and the Secretary can show that it would not be feasible to reprint those materials, the Election Board could print a *supplemental* form and instructions regarding the “penalty of perjury” statement, and include that supplement with any already printed ballot materials. This, along with a declaration from the Court regarding the sufficiency of the 12 O.S. § 426 procedure in the context of absentee ballots, could facilitate this process for the June election without unnecessary cost or delay.

Respectfully Submitted,



CLYDE A. MUCHMORE, OBA #6482
MELANIE WILSON RUGHANI, OBA #30421
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)
clyde.muchmore@crowedunlevy.com
melanie.rughani@crowedunlevy.com

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served by email and U.S. Mail, postage prepaid, this 23rd day of April, 2020, to:

Paul Ziriak, Secretary
Oklahoma State Election Board
P.O. Box 53156
Oklahoma City, Oklahoma 73152

Office of the Oklahoma Attorney General
313 NE 21st St
Oklahoma City, Oklahoma 73105
thomas.schneider@oag.ok.gov

