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**SENT BY EMAIL**  
[elections@wi.gov](mailto:elections@wi.gov)

Wisconsin Elections Commission  
212 East Washington Avenue  
Madison, WI 53707

Re: Equal Treatment of Absentee Ballots Cast in the April 7, 2020 Election

Dear Commissioners:

I represent the Jill Karofsky campaign. I am submitting this letter in advance of the public teleconference meeting this afternoon where the Commission will discuss how to treat the absentee ballots returned by voters.

There is no doubt the April 7<sup>th</sup> election, recklessly conducted during the COVID-19 pandemic at a time when the spread in Wisconsin was peaking, was a disaster. Thousands of Wisconsinites were disenfranchised because of personal health concerns about COVID-19. Voters were forced to choose between their own and their families' health and their right to vote. The absentee ballot mailing process was its own disaster, as thousands of Wisconsin voters who properly and timely requested absentee ballots did not receive those ballots on time.

All of that is wrong and should never have happened. Now, however, is not the time to lay blame for these issues. They are being investigated and the time will come soon to determine what changes need to be made to ensure such a debacle never happens again.<sup>1</sup>

**Now is the time to ensure that every single Wisconsin voter who put their absentee ballot in the mail on or before April 7th has their vote counted.** The Commission can, and should, take affirmative action to fight for these voters. To do any less will be yet another failure of our democracy.

The current issue is driven by the April 6, 2020 decision issued by the United States Supreme Court staying Judge Conley's order that would have allowed voters who received

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<sup>1</sup> We reserve any and all other legal issues that may need to be addressed in light of the widespread disenfranchisement in this election. Central among those issues are whether voters who timely requested but never received absentee ballots due to malfunctions in the WEC's MyVoteWI system, the USPS, or local clerks' overtaxed capacities, should be allowed to cast a ballot to remedy the constitutional violation.

absentee ballots after election day to complete those ballots and return them by April 13. The majority's *per curiam* opinion stated as follows in this regard:

Therefore, subject to any further alterations that the State may make to state law, in order to be counted in this election a voter's absentee ballot must be either (i) postmarked by election day, April 7, 2020, and received by April 13, 2020, at 4:00 p.m., or (ii) hand-delivered as provided under state law by April 7, 2020, at 8:00 p.m.

*RNC v. DNC*, April 6, 2020 Slip Op., p. 4.

The U.S. Supreme Court's use of the term "postmark" need not be held to its literal meaning and require rejection of any absentee envelope that does not contain a "postmark," for several reasons.

First, clerks have received hundreds of absentee ballots on April 8 and 9 that do not include any postmark at all. That is because not all mail receives a postmark (also referred to as a "cancellation"). The United States Postal Service's ("USPS") definition of "postmarks" confirms that metered mail does not receive any postmark: "Postmarks are not required for mailings bearing a permit, meter, or precanceled stamp for postage, nor to pieces with an indicia applied by various postage evidencing systems." [https://about.usps.com/handbooks/po408/ch1\\_003.htm](https://about.usps.com/handbooks/po408/ch1_003.htm). No Wisconsin voter who properly completed an absentee ballot and placed it in the mail on or before April 7, 2020 should be disenfranchised because their absentee envelope did not receive any postmark.

Second, there are many rural areas where the mail is picked up only once a day. In such cases an absentee ballot properly placed in the custody of the USPS on or before April 7, 2020 would not receive a postmark until April 8, 2020. No Wisconsin voter who properly completed an absentee ballot and placed it in the mail on or before April 7, 2020 should be disenfranchised because their absentee was not processed until the following day.

Third, the Supreme Court's opinion did not purport to define the term "postmark." Nor did it purport to address instances where metered mail does not receive a postmark, or cases where the USPS does not provide a postmark on the date the absentee ballot was placed in the mail. The opinion is ambiguous on these issues:

- a) One could certainly read the opinion literally and conclude that if there is no postmark a voter is out of luck and disenfranchised because his or her clerk uses metered envelopes or picks up the mail the next day.
- b) One could also, however, read the decision as requiring the voter to have completed the act of placing the absentee ballot in the mail on or before April 7, 2020 in order to be counted. After all, the only issue addressed by the Court was Judge Conley's decision allowing voters to mail absentee ballots after election day.

We submit the second interpretation is the correct interpretation. Under this construction the Supreme Court was simply confirming that no absentee voting would be allowed after April 7, 2020. This comports with the Court's stated rationale: "The District Court on its own ordered yet an additional extension, *which would allow voters to mail their ballots after election day*, which is extraordinary relief and would fundamentally alter the nature of the election by allowing voting for six additional days after the election." *RNC v. DNC*, April 6, 2020 Slip Op., p. 4 (emphasis supplied).

Moreover, this interpretation accords with Wisconsin's public policy of interpreting its election statutes in such a fashion as to support the constitutional franchise and give meaning to the intent of the voter. Wis. Stat. § 5.01(1) provides that "Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions." Wis. Stat. § 6.84(1) states: "The legislature finds that voting is a constitutional right, the vigorous exercise of which should be strongly encouraged."

While § 6.84 goes on to establish that absentee voting is a "privilege" that must be "carefully regulated to prevent the potential for fraud or abuse," there is no evidence or argument that the absentee voters in question – those whose absentee ballots were not given any postmark or whose absentee ballots were postmarked the day after they were placed in the mail – were engaged in or subject to any fraud or abuse. Each voter in question properly requested an absentee ballot, submitted a required photo ID, completed the ballot, included a signed witness verification, and placed the ballot in the mail before the deadline to do so expired.

Finally, counting postmarked absentee ballots and not counting non-postmarked ballots, where in all other respects the voters were similarly situated, would implicate Equal Protection. *See, e.g., American Party of Texas v. White*, 415 U.S. 767, 795 (1974) ("[I]t is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause."); *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."). These constitutional issues are avoided by counting all absentee ballots placed in the mail on or before April 7, 2020.

In sum, we believe the Commission should find that the Supreme Court's April 6, 2020 opinion allows Wisconsin to count every absentee ballot that was placed in the United States mail by a voter on or before April 7, 2020. In addition to all absentee ballots received on or before April 7, 2020, the Commission should instruct clerks to segregate and count all absentee ballots in the following categories: (1) all properly-completed absentee ballots received on April 8, 2020, regardless of whether they bear a postmark; (2) all absentee ballots received between April 9-13, 2020 bearing no postmark or an illegible postmark, if the date the ballot was placed in the mail can otherwise be ascertained and is on or before April 7, 2020; and (3) absentee ballots that bear a postmark of April 8, 2020 but were mailed from an area with limited mail pickup.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew W. O'Neill". The signature is fluid and cursive, with the first name "Matthew" and last name "O'Neill" clearly distinguishable.

MATTHEW W. O'NEILL