



**ORIGINAL**

Case No. 118,765

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

APR 29 2020

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JOHN D. HADDEN  
CLERK

THE LEAGUE OF WOMEN VOTERS OF OKLAHOMA,  
ANGELA ZEA PATRICK, and PEGGY JEANNE WINTON,

*Petitioners,*

v.

P. Received:	4-29-20
U.S. Filed:	
Marshall:	/s/
COA/OKC:	
COA/TUL:	

PAUL ZIRIAX, Secretary of the Oklahoma State Election Board, in his official capacity,

*Respondent.*

**SECRETARY PAUL ZIRIAX'S RESPONSE TO  
PETITIONERS' APPLICATION TO ASSUME ORIGINAL JURISDICTION AND  
REQUEST FOR EXTRAORDINARY RELIEF**

**THOMAS R. SCHNEIDER, OBA No. 33047**

*Assistant Attorney General*

**NIKI BATT, OBA No. 20157**

*Vice Deputy Attorney General*

OKLAHOMA OFFICE OF ATTORNEY GENERAL

313 N.E. 21st St.

Oklahoma City, OK 73105

Telephone: (405) 521-3921

Facsimile: (405) 522-4436

Thomas.Schneider@oag.ok.gov

Niki.Batt@oag.ok.gov

COUNSEL FOR PAUL ZIRIAX, Secretary of  
the Oklahoma State Election Board, in his  
official capacity

Dated this 29th day of April, 2020.

Case No. 118,765

---

**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

---

THE LEAGUE OF WOMEN VOTERS OF OKLAHOMA,  
ANGELA ZEA PATRICK, and PEGGY JEANNE WIN'ON,

*Petitioners,*

v.

PAUL ZIRIAX, Secretary of the Oklahoma State Election Board, in his official capacity,

*Respondent.*

---

**SECRETARY PAUL ZIRIAX'S RESPONSE TO  
PETITIONERS' APPLICATION TO ASSUME ORIGINAL JURISDICTION AND  
REQUEST FOR EXTRAORDINARY RELIEF**

---

**THOMAS R. SCHNEIDER, OBA No. 33047**

*Assistant Attorney General*

**NIKI BATT, OBA No. 20157**

*Vice Deputy Attorney General*

OKLAHOMA OFFICE OF ATTORNEY GENERAL

313 N.E. 21st St.

Oklahoma City, OK 73105

Telephone: (405) 521-3921

Facsimile: (405) 522-4436

Thomas.Schneider@oag.ok.gov

Niki.Batt@oag.ok.gov

COUNSEL FOR PAUL ZIRIAX, Secretary of  
the Oklahoma State Election Board, in his  
official capacity

Dated this 29th day of April, 2020.

**INDEX**

	<b>Page(s)</b>
Okla. S. Ct. R. 1.1911 .....	1
<b>BACKGROUND AND INTRODUCTION.....</b>	<b>1</b>
OKLA. CONST. art. 4, § 1 .....	1
<b>I. PETITIONERS LACK CLEAR LEGAL RIGHT REQUIRED TO RECEIVE EXTRAORDINARY RELIEF.....</b>	<b>1</b>
<i>Baby F. v. Oklahoma County Dist. Court,</i> 2015 OK 24, 348 P.3d 1080 .....	3
<i>Keating v. Johnson,</i> 1996 OK 61, 918 P.2d 51 .....	4-5
<i>Edmonson v. Pearce,</i> 2004 OK 23, 91 P.3d 605 .....	4
<i>Elk City v. Johnson,</i> 1975 OK 97, 537 P.2d 1215 .....	2-3
<i>Ethics Comm’n of State of Okla. v. Cullison,</i> 1993 OK 37, 850 P.2d 1069 .....	5
<i>James v. Rogers,</i> 1987 OK 20, 734 P.2d 1298 .....	3
<i>Maree v. Neuwirth,</i> 2016 OK 62, 374 P.3d 750 .....	2-3
<i>Purcell-Lexington Toll Bridge Co. v. Leeper,</i> 1931 OK 21, 296 P. 969.....	2
<i>Sierra Club v. State ex rel. Oklahoma Tax Commission,</i> 2017 OK 83, 405 P.3d 691 .....	4
U.S. CONST. amend. XIV, § 1 .....	2
12 O.S. 2011, § 426 .....	5
26 O.S. 2011, § 14-108 .....	2

	Page(s)
<b>II. PETITIONERS' MISAPPLICATION OF 12 O.S. § 426 IS CONTRARY TO LAW.....</b>	<b>6</b>
<i>Bryant v. Comm'r of the Dep't of Pub. Safety, State of Okla., 1996 OK 134, 937 P.2d 496 .....</i>	8
<i>Independent Finance Institute v. Clark, 1999 OK 43, 990 P.2d 845 .....</i>	7
<i>Keating v. Edmondson, 2001 OK 110, 37 P.3d 882 .....</i>	10
<i>Lierly v. Tidewater Petroleum Corp., 2006 OK 47, 139 P.3d 897 .....</i>	10
<i>Medina v. State, 1993 OK 121, 871 P.2d 1379 .....</i>	8
<i>Phillips v. Hedges, 2005 OK 77, 124 P.3d 227 .....</i>	10
<i>Odom v. Penske Truck Leasing Co., 2018 OK 23, 415 P.3d 521 .....</i>	8
<i>Okla. Pub. Emps. Ass'n v. State ex rel. Okla. Office of Pers. Mgmt., 2011 OK 68, 267 P.3d 838 .....</i>	10
<i>Snider Bros., L.L.C. v. State ex rel. Oklahoma Employment Sec. Comm'n, 2008 OK CIV APP 80, 194 P.3d 771 .....</i>	7
<i>State ex rel. Wright v. Okla. Corp. Comm'n, 2011 OK CIV APP 91, 259 P.3d 899 .....</i>	8-9
<i>Sw. Bell Tel. Co. v. Oklahoma Cnty. Excise Bd., 1980 OK 97, 618 P.2d 915 .....</i>	10
<i>Velasco v. Ruiz, 2019 OK 46, 457 P.3d 1014 .....</i>	10
<i>Video Gaming Techs., Inc. v. Rogers Cty. Bd. of Tax Roll Corr., 2019 OK 83, ___ P.3d ___, .....</i>	9
<i>Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).....</i>	8
OKLA. CONST. art. V, § 57 .....	6

	<b>Page(s)</b>
12 O.S. 2011, § 422.....	6
12 O.S. 2011, § 426.....	6-10
12 O.S. 2011, § 431.....	7
26 O.S. 2011, § 14-108.....	6, 8-11
26 O.S. 2011, 5-115.....	9
26 O.S. 2011, § 5-116.....	9
26 O.S. 2011, § 5-116.1.....	9
26 O.S. 2011, § 10-112.....	9
26 O.S. 2011, § 20-102.....	9
49 O.S. 2011, § 5.....	8
49 O.S. 2011, § 112.....	11
49 O.S. 2011, § 114.....	11
62 O.S. 1991 & 2001, § 373.....	8-9
HB 1939, 2002 O.S.L. 468, § 2.....	6
<b>III. ALLOWING 12 O.S. § 426 WOULD UNDERMINE THE SECURITY AND INTEGRITY OF OKLAHOMA ELECTIONS.....</b>	<b>11</b>
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	13-14
<i>Gentges v. Oklahoma State Election Bd.</i> , 2014 OK 8, 319 P.3d 674.....	13
<i>Gentges v. State Election Bd.</i> , 2018 OK 39, 419 P.3d 224.....	13
<i>Heath v. Guardian Interlock Network, Inc.</i> , 2016 OK 18, 369 P.3d 374.....	14
<i>Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n.</i> , 1988 OK 117, 764 P.2d 172.....	14

	<b>Page(s)</b>
<i>McIntosh v. Watkins</i> , 2019 OK 6, 441 P.3d 1094.....	14
OKLA. CONST. art. III, § 4.....	11
52 U.S.C. § 20302.....	12
12 O.S. 2011, § 426.....	11-12, 14
26 O.S. § 4-112.....	12
26 O.S. § 7-114.....	13
26 O.S.2011, § 14-108.....	11-12, 14
26 O.S. 2011, § 14-108.1.....	12
26 O.S. § 14-136.....	12
49 O.S. 2011, § 113.....	11
SQ 746, Leg. Ref. No. 347.....	13
HB 2725, 2004 O.S.L. 5.....	14
HB 2576, 2014 O.S.L. 347.....	12
SB 173, 2015 O.S.L. 333.....	12
HB 1302, 2016 O.S.L. 237.....	14
<b>CONCLUSION</b> .....	<b>15</b>
26 O.S.2011, § 14-108.....	15

Respondent, Paul Ziriak, Secretary of the State Election Board, in his official capacity, pursuant to Okla. S. Ct. R. 1.191 and Order of the Supreme Court dated April 24, 2020, by and through his counsel of record, Assistant Attorney General Thomas R. Schneider and Vice Deputy Attorney General Niki Batt, submits the following Response to Petitioners' Application to Assume Original Jurisdiction and Request for Extraordinary Relief.

### **BACKGROUND AND INTRODUCTION**

Petitioners' Application to Assume Original Jurisdiction and Request for Extraordinary Relief, in addition to its Brief in Support, seeks to resolve a temporary problem by inventing a permanent solution. Indeed, Petitioners' Application and Request asks this Court to exceed its authority and exercise legislative power to fundamentally change how the State of Oklahoma processes and accepts absentee ballots. An exercise of the legislative power by this Court would be violative of OKLA. CONST. art. 4, § 1. For the reasons set forth below, the Respondent respectfully requests this Court to deny the Petitioners' Application to Assume Original Jurisdiction and Request for Extraordinary Relief.

#### **I. PETITIONERS LACK CLEAR LEGAL RIGHT REQUIRED TO RECEIVE EXTRAORDINARY RELIEF.**

Petitioners request this court to issue the following: (1) declaratory judgment holding that an absentee voter may submit a personally signed statement made under penalty of perjury instead of a notarized affidavit; (2) a writ of prohibition barring Secretary Ziriak from sending absentee ballot forms and instructions stating that an affidavit notarized by a notary public is required; and (3) a writ of mandamus directing Secretary Ziriak to send absentee voters ballot forms and materials that clearly facilitate the making of a "under the penalty of perjury" statement. *See Pet'rs' Application to Assume Original Jurisdiction and Req. for Extraordinary Relief*, p. 1.

In order to receive mandamus relief, a petitioner must show "no plain and adequate remedy in the ordinary course of the law;" a "clear legal right to the relief sought;" that respondent has a

“plain legal duty regarding the relief sought,” that “the respondent has refused to perform that duty;” and that “the respondent’s duty does not involve the exercise of discretion<sup>1</sup>.” *Maree v. Neuwirth*, 2016 OK 62, ¶ 6, 374 P.3d 750, 752-53; *see also Purcell-Lexington Toll Bridge Co. v. Leeper*, 1931 OK 21, ¶ 8, 296 P. 969, 970. In *Leeper*, an Oklahoma corporation sought a writ of mandamus after it demanded the Secretary of State to furnish it an amended charter. *Id.* at ¶ 1, 296 P. at 969-70. The statute in question required the Secretary of State to issue an amended charter upon the charter being signed by the Governor. *Id.* at ¶ 3, 296 P. at 970. It was unknown whether the Governor didn’t sign or refused to sign, but the Court held that it could not direct the Secretary of State to issue the amended charter because absent the Governor’s signature, the statute did not allow the Secretary to issue it. *Id.* at ¶ 10, 296 P. at 970. In short, the Court reasoned that the Secretary could not compel the Governor to sign the charter. *Id.* Much like the Petitioner in *Leeper*, the Petitioners here ask Secretary Ziriak to do something that it is not within his power but solely within the power of the Legislature. Since Secretary Ziriak cannot compel the Legislature to amend 26 O.S. 2011, § 14-108, and he cannot unilaterally amend it himself, Petitioners fail to show that they have a clear legal right here, as well as Secretary Ziriak having a plain legal duty.

Petitioners’ reliance on *Elk City v. Johnson* is also unpersuasive. 1975 OK 97, 537 P.2d 1215. In *Johnson*, the Court held unconstitutional a provision of the Oklahoma Constitution that restricted who could vote on a bond issuance under the Fourteenth Amendment’s Equal Protection Clause. *See* U.S. CONST. amend. XIV, § 1. In essence, the state constitutional provisions created different classes of voters. *Johnson*, at ¶¶ 3-4, 537 P.2d at 1216. The same provisions **required** the Mayor to proclaim the election results following the election, and the mayor refused,

---

<sup>1</sup> To the extent that Secretary Ziriak may possess some discretion on what to do in special circumstances, he cannot be directed by writ of mandamus to exercise such discretion to usurp the Legislature’s constitutional mandate to “prescribe the time and manner of holding and conducting all elections, and enact such laws as may be necessary to detect and punish fraud in such elections.” OKLA. CONST. art. 3, § 4.



citing that his proclamation of the results would be subject expense and legal problems since all qualified voters were allowed to vote rather than qualified taxpaying voters. *Johnson*, at ¶ 4, 537 P.2d at 1216 (emphasis added). Elk City sought a writ of mandamus to compel the Mayor to proclaim the results, and in striking down the state constitutional provision, the court granted writ of mandamus to Elk City. *Johnson*, at ¶¶ 11-12, 537 P.2d at 1217. The mayor's plain legal duty in *Johnson* stands in clear contrast to the lack of a plain legal duty on Secretary Ziriak. Moreover, the mayor's performance of the duty in *Johnson* did not encompass any discretion. Accordingly, Petitioners fall short in their request for a writ of mandamus.

The *Maree* case also ruled on a writ of prohibition. In analyzing whether a petitioner is entitled to a writ of prohibition, the Court reiterated its precedents that “[the] petitioner must show: 1) a court, officer, or person has or is about to exercise judicial or quasi-judicial power; 2) the exercise of said power is unauthorized by law; and 3) the exercise of that power will result in injury for which there is no other adequate remedy.” *Maree*, at ¶ 6, 374 P.3d 750, 752 (citing *Baby F. v. Oklahoma County Dist. Court*, 2015 OK 24, ¶ 8, 348 P.3d 1080; *James v. Rogers*, 1987 OK 20, ¶ 5, 734 P.2d 1298). Petitioners also contend that *State ex rel. Heartsill v. Cnty. Election Bd. of Carter Cnty.* provides support for the court to grant extraordinary relief in this matter. 1958 OK 138, 326 P.2d 782. But the issue in *Heartsill* centers on whether or not the Court should grant a writ of prohibition against the Carter County Election Board, preventing it from keeping a candidate off the ballot due to a candidate's recent felony conviction. The *Heartsill* Court found that a person, although convicted of a felony, may stand for election until such time that he or she exhausts all appeals and is finally adjudged. *Heartsill*, at ¶ 9, 326 P.2d at 786. Defendants in *Heartsill* claimed that they were exercising “a purely ministerial duty or exercise of executive power,” an argument with which the Court emphatically disagreed. *Id.* “Where the act involved is quasi-judicial, rather

than ministerial, and the public has an interest, or the refusal of this court to take jurisdiction would result in a practical denial of justice, our power to grant such a writ is beyond question.” *Id.*

Unlike the defendants in *Heartsill*, who were clearly acting in a judicial or quasi-judicial capacity when hearing the contest of candidacy, the same cannot be said here of Secretary Ziriak. Sending out ballots and instructions to absentee voters undoubtedly invokes a ministerial duty or exercise of executive power. Issuing a writ of prohibition in this matter would be in clear contravention of this Court’s previous holdings. Secretary Ziriak is not acting in accordance with a judicial or quasi-judicial power when sending absentee ballots and instructions to absentee voters, as such there is no way for his exercise of the power (or omission thereof) to be unauthorized by law in the context of judicial or quasi-judicial power. Moreover, a lack of the exercise of judicial or quasi-judicial power cannot create an injury which is actionable. Thus, granting a writ of prohibition here would be contrary to law.

Among the numerous cases involving this Court’s assumption of original jurisdiction to decide whether or not to grant declaratory relief, it should be noted that most of the cases involve the review of a statute for its constitutionality or a constitutional collision. In *Ethics Comm’n of State of Okla. v. Cullison*, which Petitioners rely upon, this Court reviewed the constitutionality of legislative enactments which were challenged by the Oklahoma Ethics Commission as encroachment on their constitutional duties. 1993 OK 37, 850 P.2d 1069; Pet’rs’ Br. in Support, pg. 5. Petitioners also cited to *Sierra Club v. Oklahoma Tax Comm’n*, 2017 OK 83, ¶ 5, 405 P.3d 691, in which this Court ruled that a fee on hybrid and electric cars violated revenue provisions of the State Constitution. *See* Pet’rs’ Br. in Support, p. 5. Ruling on the constitutionality of a criminal law that was enacted through an initiative petition, this Court granted declaratory relief and ultimately upheld the facial constitutionality of a criminal law banning cockfighting. *Edmonson v. Pearce*, 2004 OK 23, 91 P.3d 605. Finally, in *Keating v. Johnson* where this Court denied original jurisdiction, it

noted, “[O]nly in rare circumstances should this Court assume original jurisdiction to grant a form of declaratory relief.” 1996 OK 61, 918 P.2d 51, 57 (citing *Cullison*, at ¶ 4, 850 P.2d at 1072). Here, Petitioners have made no showing that they possess a constitutional interest in applying 12 O.S. 2011, § 426 to the Oklahoma Election Code under Title 26. So, their request for declaratory relief must be denied.

In support of their claims that this Court can issue the extraordinary relief requested, Petitioners cited to multiple Oklahoma cases that do not offer the Court much guidance in the present matter. In fact, the case law shows that this Court has never taken the same or similar action concerning the State Election Board or a county election board that Petitioners propose here. In *Gray v. State ex rel. State Election Board*, the case involved the State Election Board holding a contest of candidacy hearing, misconstruing a statute and striking a judicial candidate from the ballot. 1998 OK 85, ¶ 3, 962 P.2d 1. The Court issued a writ of mandamus restoring Judge Gray’s name to the ballot. In *Box v. State Election Board*, the State Election Board sitting in a judicial or quasi-judicial capacity struck a candidate for the State House from the ballot despite the clear weight of the evidence and Oklahoma law showing his intent to reside within the district and his actual residency in the house district., 1974 104, 526 P.2d 936. The Court ordered that Mr. Box’s name be placed on the ballot. *Id.* In *Hallman v. Cnty. Election Bd. of Okla. Cnty.*, the county election board did not allow a candidate for city councilor to put on evidence at hearing to show that her opponent failed to meeting qualifications for office. 1973 OK 24, 509 P.2d 459. The *Hallman* Court stated that the county election board erroneously denied Hallman this right and ordered the county election Board to conduct a contest of candidacy hearing. The Court in *Arthur v. Payne Cnty. Election Bd.* held that the county election board’s mistakes and errors created the “ineligibility” and thus could not preclude Arthur’s candidacy when he factually met all qualifications to run. 1998 OK 86, 964 P.2d 213. Finally, the Court in *Daxon v. State Election Bd.* held that candidate

Daxon could not be excluded from running for the new office of State Auditor and Inspector. 1978 OK 112, 582 P.2d 1315. The Court reasoned that the State Election Board decided that his age of 30 precluded him from being the requisite age and being a qualified elector for ten years. Instead, the *Daxon* Court reasoned that the Constitution allowed Daxon to reach the requisite age and number of years as a qualified elector by the time he would assume office when both houses of the Legislature meet and declare winners. The common thread in all of these cases is that the Court reviewed an election board's actions with respect to its final decisions or lack thereof in contests of candidacy. The case before this Court involves no contest of candidacy and thus no exercise of judicial or quasi-judicial power.

## **II. PETITIONERS' MISAPPLICATION OF 12 O.S. § 426 IS CONTRARY TO LAW.**

Petitioners asserts that 12 O.S. § 426 can be applied to or substituted for the notary public requirement under 26 O.S. 2011, § 14-108. But 12 O.S. § 426 is a statute that governs civil procedure. First, the statute that Petitioners implore the Court to apply today emanates from an "Act relating to Civil Procedure."<sup>2</sup> *See* HB 1939, 2002 O.S.L. 468, § 2. In addition to inserting the language to allow for statements under the penalty of perjury, HB 1939 also imposed an automatic stay on execution of judgments or final orders against the state or its departments; provided a template for an affidavit used in small claims; amended the time period in which parties can apply for attorney's fees; enacted the "Choice in Mediation Act;" and either amended existing or added new civil procedure laws.

Second, Petitioners claim that Section 426 applies to any and all affidavits in Oklahoma, but they ignore that the term "affidavit" for purposes of Title 12 is defined as "a written declaration, under oath, made without notice to the adverse party." 12 O.S.2011 § 422. Thus,

---

<sup>2</sup> Under OKLA. CONST. art. V, § 57, "[e]very act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title ...." On the face of the bill title alone, 12 O.S. 2011, § 426 applies to civil procedure and within the context of Title 12 *only*.

“affidavit” for purposes of Title 12 clearly contemplates *only* affidavits used in judicial or quasi-judicial proceedings, since it must be “without notice to the adverse party.” *Id.* But when a voter executes the absentee ballot affidavit, he or she never does so with the expectation of it being used in a complaint or cause of action against any “adverse party.” Therefore, Section 426 is simply not applicable to the absentee ballot affidavit.

Third, 12 O.S. 2011 § 431 states, “an affidavit may be used to verify a pleading, to prove the service of summons, notice or other process in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion or in any other case permitted by law.” But again, this shows that affidavits under Title 12 are simply not the same as absentee voter affidavits under Title 26. When a voter executes his or her absentee ballot affidavit, he or she is not verifying a pleading, proving the service of summons, notice or other process in an action, obtaining a provisional remedy, examining a witness, obtaining a stay in proceedings, or on a motion or in any other case permitted by law. As each of these provisions relate to one another, it is important to note this Court’s jurisprudence concerning related statutory provisions. “In construing statutes, relevant provisions must be considered together whenever possible to give full force and effect to each.” *Independent Finance Institute v. Clark*, 1999 OK 43, 990 P.2d 845 (citing *Snider Bros., L.L.C. v. State ex rel. Oklahoma Employment Sec. Comm’n*, 2008 OK CIV APP 80, ¶ 20, 194 P.3d 771, 776). When considering 12 O.S. 2011, § 426 in light of §§ 422 and 431, as well as the fact that § 426 was enacted as one section of a comprehensive bill amending the State’s civil procedure code, 12 O.S. 2011, § 426 should only be construed in the context of civil procedure. Petitioners’ unrestrained interpretation of 12 O.S. 2011, § 426 expands its supposed breadth in such a way that both neglects and exceeds its underlying intent. The late Justice Antonin Scalia characterized this as “hid[ing] elephants in mouseholes.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

Petitioners' argument would essentially render Title 49 of the Oklahoma Statutes concerning notary publics a nullity. If Section 426 applied everywhere, even outside judicial and quasi-judicial proceedings, it would be hard to see why a notary would ever be required for anything. Moreover, it would impact every provision of the Oklahoma Statutes that specifically requires a notarized affidavit for verification, including 26 O.S. 2011, § 14-108. This cannot be the case. This Court has recently held in *Odom v. Penske Truck Leasing Co.*, "Statutes must be read to render every part operative, and to avoid rendering it superfluous or useless." *Odom*, at ¶ 36, 415 P.3d 521, 532 (citing *Bryant v. Comm'r of the Dep't of Pub. Safety, State of Okla.*, 1996 OK 134, ¶ 11, 937 P.2d 496; *Medina v. State*, 1993 OK 121, ¶ 8 n. 10, 871 P.2d 1379). Thus, Petitioner's reading of 12 O.S. 2011, § 426 cannot stand as it would in all likelihood prevent every part of Title 49 and other statutes specifically requiring a notary public to witness a signature from being operative. Put another way, it would render acts of the Legislature useless. The Court in *Bryant* stated, "[1]he Legislature is never presumed to have done a vain or useless thing." *Bryant*, at ¶ 11, 937 P.2d 496. Here, the Legislature has specifically required that voters "shall . . . fill out completely and sign the affidavit, such signature to be notarized at no charge by a notary public . . ." 26 O.S. 2011, § 14-108(A). As will be explained below, the Legislature specifically intended for the notarization of absentee ballots to be a part of our State's absentee voting process.<sup>3</sup>

Petitioners cursorily cite to two Oklahoma cases that effectively offer little insight into how Oklahoma Courts have in fact interpreted § 426's breadth. In *State ex rel. Wright v. Okla. Corp. Comm'n*, the Court analyzed a statute that allowed taxpayers to bring a *qui tam* action against a state agency. 2011 OK CIV APP 91, 259 P.3d 899. In *Wright*, the case turned on amendments to 62 O.S. § 373. The amendments required the taxpayers to provide a "written demand signed, verified,

---

<sup>3</sup> In 49 O.S. 2011, § 5, the Legislature has implicitly cross-referenced 26 O.S. 2011, § 14-108(A), which prohibits a notary public from charging to notarize an absentee ballot affidavit.

and served upon them [applicable public official or agency] by ten resident taxpayers of the state . . . .” *Id.* at (2001); *Wright*, at ¶ 9, 259 P.3d at 901. Prior to the amendments being enacted, § 373 only required that “written demand [be] made upon them.” *See* 62 O.S. 1991, § 373. The Court held that all ten signatures had to be verified and that 12 O.S. § 426 could have been used to achieve that verification. *Wright*, ¶ 12, 259 P.3d at 901. Notably, 62 O.S. § 373 only requires verification, but does not specify the method of verification. And it does so in the context of judicial or quasi-judicial proceedings, where Title 12’s conception of an affidavit is conceivably applicable. This is in sharp contrast with 26 O.S. 2011, § 14-108, which does specify the method of verification—notarization. Additionally, the signing and verification of the written demand under 62 O.S. § 373 precedes the filing of a *qui tam* action in district court. Petitioners also cite to *Video Gaming Techs., Inc. v. Rogers Cnty. Bd. of Tax Roll Corr.*, asserting without expounding on case facts that a footnote authorizes any person to execute “[a]n unsworn declaration, signed under penalty of perjury . . . in place of an affidavit.” 2019 OK 83, n. 1, \_\_\_ P.3d \_\_\_. In this case, the plaintiff proffered “a list of undisputed material facts which it supported with declarations.” *Id.* at ¶ 4. These declarations were filed with the plaintiff’s motion for summary judgment. As stated above in light of *Wright*, the declarations in *Video Gaming Techs., Inc.* were made to substantiate arguments set forth in its motion for summary judgment—a motion most commonly filed in a civil proceeding in district court.

Petitioners’ next misstep in applying 12 O.S. 2011, § 426 to 26 O.S. 2011, § 14-108’s notarization requirement is that the statute governs a specific subject matter. Applying this as Petitioners wish would essentially render useless numerous<sup>4</sup> notarial act requirements under Title 26 of the Oklahoma Statutes. Even if Secretary Ziriak was to assume that the Petitioners’ position

---

<sup>4</sup> In addition to 26 O.S. 2011, § 14-108, §§ 5-115, 5-116, 5-116.1, 10-112, and 20-102(A) require notarization.

concerning 12 O.S. 2011, § 426 was correct, this creates a plain and direct conflict to 26 O.S. 2011, § 14-108. If the conflict involves a statute of general application and a specific statute that applies more narrowly, “the statute enacted for the purpose of dealing with the subject matter controls over the general statute.” *Phillips v. Hedges*, 2005 OK 77, ¶ 12, 124 P.3d 227, 231; see also *Sw. Bell Tel. Co. v. Oklahoma Cnty. Excise Bd.*, 1980 OK 97, ¶ 12, 618 P.2d 915, 919 (“[I]t is a longstanding rule of construction in this jurisdiction that where there are two statutory provisions, one of which is special and clearly includes the matter in controversy, and prescribes different rules and procedures from those in a general statute, the special statute and not the general statute applies.”). Okla. Stat. tit. 26, § 14-108 (2011) is a “statute enacted for the purpose of dealing with the subject matter . . .,” the absentee ballot process. *Phillips*, at ¶ 12, 124 P.3d at 231. Further, 26 O.S. 2011, § 14-108 undoubtedly is a provision “which is special and clearly includes the matter in controversy, and prescribes different rules and procedures from those in a general statute.” *Sw. Bell Tel. Co.*, at ¶ 12, 618 P.2d at 919.

The third and final misstep Petitioners make is ignoring the word “shall” in 26 O.S. 2011, § 14-108(A), which states, “[t]he voter shall . . . fill out completely and sign the affidavit, such signature to be notarized at no charge by a notary public . . . .” The Legislature’s intent is unmistakable, and it is clear from the statute’s language that the requirement is not on the Secretary of the State Election Board or any county election board secretaries. In *Velasco v. Ruiz*, this Court affirmed its longstanding interpretation of the Legislature’s use of the word “shall” to be considered mandatory. *Velasco*, 2019 OK 46, at ¶ 9, 457 P.3d 1014, 1017-18 (citing *Okla. Pub. Emps. Ass’n v. State ex rel. Okla. Office of Pers. Mgmt.*, 2011 OK 68, ¶ 13 n. 18, 267 P.3d 838, 845). In *Lierly v. Tidewater Petroleum Corp.*, this Court stated unless otherwise unclear, “shall” implies “a mandatory command rather than a permissive directive.” 2006 OK 47, n 6, 139 P.3d 897, 905 (citing *Keating v. Edmondson*, 2001 OK 110, ¶ 13, 37 P.3d 882, 888). The plain, clear, unmistakable,



and unambiguous language in 26 O.S. 2011, § 14-108(A) compels the voter to have his or her absentee ballot affidavit notarized.

As previously discussed, mandamus may only issue when a petitioner possesses “clear legal right” and a respondent is under a “plain legal duty.” To the extent that there is any ambiguity or discretion in the statutes set forth above, they cannot be used as a basis for issuing a writ of mandamus.

### **III. ALLOWING 12 O.S. § 426 WOULD UNDERMINE THE SECURITY AND INTEGRITY OF OKLAHOMA ELECTIONS.**

As previously indicated, the Oklahoma Constitution commands the Legislature “to prescribe the time and manner of holding and conducting all elections, and enact such laws as may be necessary to detect and punish fraud in such elections.” OKLA. CONST. art. III, § 4. By enacting 26 O.S. 2011, § 14-108, the Legislature has upheld its constitutional duty. As a part of the Oklahoma Election Code’s election security features, the notarization requirement under 26 O.S. 2011, § 14-108 requires the signature on the affidavit to be witnessed.<sup>5</sup> (Resp’t’s App. Tab A). In addition, the notary public must conduct preliminary identity proofing in order to verify the identity of the individual presenting themselves to sign the absentee ballot affidavit.<sup>6</sup> *See* 49 O.S. 2011, § 113. As a longstanding and essential feature of our absentee voting process, the

---

<sup>5</sup> More than a majority of states (44) impose ballot verification measures in their absentee voting process. Most states conduct ballot verification through signature comparison, which is a process and capability that Oklahoma lacks. *See* Verification of Absentee Ballots, NATIONAL CONFERENCE OF STATE LEGISLATURES, January 1, 2020, <https://www.ncsl.org/research/elections-and-campaigns/verification-of-absentee-ballots.aspx#1>. (Resp’t’s App. Tab A).

<sup>6</sup> Petitioners attempt to make material the fact that voters are allowed to sign their absentee voter ballot affidavit in front of an official authorized to administer oaths. *See* Pet’rs’ Br. in Support, p. 9. Under Oklahoma law, a notary public is a notarial officer. 49 O.S. 2011, § 112(5). A notarial officer is a notary public or any other person authorized to perform notarial acts in the place in which the act is performed.” *Id.* Under 49 O.S. 2011, § 114(A), persons who may perform notarial acts include notaries public, a judge, secretary-bailiff of a judge, clerk of a court, deputy clerk of a court, certain judge advocates, and “any other person authorized to perform the specific act by the law of this state.”

notarization requirement relates directly to our State's unfortunate history of absentee voter fraud.<sup>7</sup> To further detect and punish fraud, the Legislature has amended 26 O.S. 2011, § 14-108.1 twice<sup>8</sup> since § 14-108.1 enactment in 2012. In short, this provision initially placed extensive limits on notaries public who choose to notarize absentee ballots, but the 2014 and 2015 amendments loosened the constraints to provide absentee voters greater access. These constraints were likely an answer to a notary public who in the 2004 Adair County Primary election allegedly notarized 265 absentee ballots out of a total of 465 absentee ballots cast and mailed to the Adair County Election Board.<sup>9</sup>

Furthermore, Oklahomans are not required to “verify” their identity to request an absentee ballot. *See* Resp't's App. Tab C. They simply sign an oath at the bottom of the form. Based on the information required on the form, one could simply request an absentee ballot with only the first and last names of a voter and their birth date, which makes the design of Oklahoma's notarization requirement under 26 O.S. 2011, § 14-108 as a fraud deterrent all the more important.<sup>10</sup> If this Court were to hold that 12 O.S. 2011, § 426 applies to 26 O.S. 2011, § 14-108, Oklahoma would have no way of verifying returned absentee ballots. While Petitioners note that the Uniform

---

<sup>7</sup> Oklahoma Speaker Tried In Vote Fraud Case, THE NEW YORK TIMES, August 14, 1983, <https://www.nytimes.com/1983/08/14/us/oklahoma-speaker-tried-in-vote-fraud-case.html>; Joyce Peterson, “Dan Draper's Luck Runs Out In Muskogee,” THE DAILY OKLAHOMAN, August 21, 1983, <https://oklahoman.com/article/2036444/dan-drapers-luck-runs-out-in-muskogee> (“You promise to pay them a little. Give them something. You just use the tactics that they want,” she said.” and “But it wasn't just promises of money or favors for votes . . . .”); Sheila Stogsdill, “Absentee Ballot Fraud Charges Filed,” THE TULSA WORLD, July 16, 2010, [https://www.tulsaworld.com/news/state-and-regional/absentee-ballot-fraud-charges-filed/article\\_3d2e2785-9a82-5407-ac65-5a4881df2479.html](https://www.tulsaworld.com/news/state-and-regional/absentee-ballot-fraud-charges-filed/article_3d2e2785-9a82-5407-ac65-5a4881df2479.html).

<sup>8</sup> HB 2576, 2014 O.S.L. 347, § 1; SB 173, 2015 O.S.L. 333, § 1.

<sup>9</sup> *See* THE TULSA WORLD, n 5.

<sup>10</sup> By visiting <http://www.oklahomadata.com/>, anyone get a voter's first name, last name, and date of birth as voter registration records are public. *See* 26 O.S. § 4-112(H). A nefarious, enterprising actor could essentially request a number of ballots and request that they be sent to any address he or she chooses, hence why notarization is imperative.

Military and Overseas Voters Act (“UMOVA”)<sup>11</sup> does not require notarization and cite to multiple jurisdictions who have adopted the uniform law, this is not because Oklahoma policymakers don’t want to protect and secure the integrity of our elections.<sup>12</sup>

Just ten (10) years ago, Oklahoma voters overwhelmingly voted in favor of statutory changes to the Election Code.<sup>13</sup> Among other changes, SQ 746 amended 26 O.S. § 7-114 to require voter to provide of a form of identification at the polls in order to vote. In light of the broad support for this change to Oklahoma election law, it would be reasonable to assume that voters of this State sought to impose a reasonable burden on themselves and other qualified electors by requiring all voters to provide an acceptable form of identification prior. When reviewing the constitutionality of the Oklahoma Voter ID Act, the *Gentges* Court observed, “[w]hile the people have made it clear by constitutional command that they do not want the civil or military power of the State to interfere to prevent the free exercise of the right of suffrage, the people have made it equally clear by a coordinate constitutional command that they want the right of suffrage protected from fraud.” *Gentges v. Oklahoma State Election Bd.*, 2014 OK 8, ¶ 21, 319 P.3d 674, 679 (*Gentges I*). The Court in *Gentges II*, which ultimately upheld the Oklahoma Voter ID Act, reviewed how the Voter ID statutes established qualifications. *Gentges v. State Election Bd.*, 2018 OK 39, ¶ 19, 419 P.3d 224, 230 (*Gentges II*). In doing so, the Court leaned heavily on *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), in which the U.S. Supreme Court reflected when declaring an Ohio election law<sup>14</sup> unconstitutional, “[e]lection laws will invariably impose some burden upon individual voters. Each provision of a code, ‘whether it governs the registration and qualifications of voters, the selection

---

<sup>11</sup> UMOVA is codified at 26 O.S. § 14-136 *et seq.*

<sup>12</sup> The Uniform and Overseas Citizen Absentee Voting Act (“UOCAVA”), 52 U.S.C. § 20302(i)(1) (2018) explicitly prohibits States from requiring notarization. In effect, the Federal Government has preempted the State as it relates to voting restrictions on military and overseas voters.

<sup>13</sup> Oklahoma Voter ID Act, SQ 746, Leg. Ref. No. 347. The State Question passed by a margin of almost 75% in the affirmative. *See*, <https://www.sos.ok.gov/documents/questions/746.pdf>.

<sup>14</sup> The law at issue required independent candidates to file in the month of March.

and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.” *Gentges II*, at ¶ 19, 419 P.3d at 230. Taking into account the people’s constitutional command to protect their right of suffrage from fraud and the fact that election laws may “impose some burden,” the notarization requirement is no more burdensome than necessary to protect the security and integrity of our elections. *Anderson*, 460 U.S. at 788.

Even more, 26 O.S. 2011, § 14-108 has been twice amended since 2002 when 12 O.S. § 426 was enacted.<sup>15</sup> At no time did the Legislature amend 26 O.S. 2011, § 14-108 to incorporate 12 O.S. 2011, § 426 by reference, or amend and add the same or substantially similar language from 12 O.S. 2011, § 426. The Legislature’s refusal to do so speaks volumes; it views notarization as a vitally important ballot verification feature of our absentee voting process.

Considering the history of voter fraud, the specifics of our absentee voting process, and recent legislative history, it would be absurd to now open the gates and provide for no verification for absentee ballots but still requiring in-person voters to present a valid proof of identification. “Statutory construction that would lead to an absurdity must be avoided and a rational construction should be given to a statute if the language fairly permits.” *McIntosh v. Watkins*, 2019 OK 6, ¶ 4, 441 P.3d 1094, 1096, reh’g denied (Apr. 29, 2019) (citing *Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Comm’n.*, 1988 OK 117, ¶ 7, 764 P.2d 172). Furthermore, this Court has also instructed, “[t]he Court presumes that the Legislature expressed its intent and that it intended what it expressed. Statutes are interpreted to attain that purpose, championing the broad public policy purposes underlying them.” *Heath v. Guardian Interlock Network, Inc.*, 2016 OK 18, ¶ 14, 369 P.3d 374, 379. Taken together, there is little doubt that the broad public policy purpose of Oklahoma’s election statutes intends to protect the security and integrity of elections by imposing

---

<sup>15</sup> HB 2725, 2004 O.S.L. 5, § 17; HB 1302, 2016 O.S.L. 237, § 2.

notarization requirements on candidates and voters who seek to run for office or cast their ballot by absentee.

### **CONCLUSION**

Petitioners have failed to demonstrate that they possess a clear legal right to be vindicated and that Secretary Ziriak has a plain legal duty to vindicate that right. Furthermore, Petitioners cannot show that Secretary Ziriak would be exercising judicial or quasi-judicial power. Even more, 26 O.S.2011, § 14-108 is a statute of specific application and thus the exclusive legal authority as to how to “verify” absentee ballots. If this Court were to grant Petitioner’s requested relief, such act would invade the province of the Legislature and the express will of Oklahoma voters. For these reasons, Secretary Ziriak respectfully requests this Court to deny Petitioners’ requests for declaratory judgment, writ of mandamus, and writ of prohibition and asks for any such further relief that this Court deems just and proper.

Respectfully Submitted,



**THOMAS R. SCHNEIDER, OBA No. 33047**

*Assistant Attorney General*

**NIKI BATT, OBA No. 20157**

*Vice Deputy Attorney General*

OKLAHOMA OFFICE OF ATTORNEY GENERAL

313 N.E. 21st St.

Oklahoma City, OK 73105

Telephone: (405) 521-3921

Facsimile: (405) 522-4436

Thomas.Schneider@oag.ok.gov

Niki.Batt@oag.ok.gov

COUNSEL FOR PAUL ZIRIAX, Secretary of  
the Oklahoma State Election Board, in his  
official capacity

**CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK**

I hereby certify that a true and correct copy of the Respondent Secretary Paul Ziriak's Response to Application and Brief was mailed this 29th day of April, 2020, by depositing it in the U.S. Mail, postage prepaid or by electronic mail to:

Ms. Melanie Wilson Rughani  
Mr. Clyde A. Muchmore  
**CROWE & DUNLEVY**  
A Professional Corporation  
Braniff Building  
324 North Robinson Avenue, Suite 100  
Oklahoma City, Oklahoma 73102

*Counsel for Petitioners*

I further certify that a copy of the Respondent Secretary Paul Ziriak's Response to Application and Brief was mailed to, or filed in, the Office of Court Clerk on 29th day of April, 2020:

  
**THOMAS R. SCHNEIDER**