STATE OF WISCONSIN          CIRCUIT COURT          DANE COUNTY

_____

In the Matter of the Recount of
Votes for Wisconsin Supreme
Court Justice:

WISCONSIN GOVERNMENT
ACCOUNTABILITY BOARD
212 East Washington Avenue
Madison, Wisconsin 53703,

           Petitioner,

   v.                                        Case No. 2011CV_____ **11CV1863**

                         Declaratory Judgment: 30701

DAVID PROSSER
57 Golf Course Road, Unit F
Madison, Wisconsin 53704

and

JOANNE KLOPPENBURG
2318 Rowley Avenue
Madison, Wisconsin 53726,

           Respondents.

_____

SUMMONS

_____

THE STATE OF WISCONSIN, To each person named above as a Respondent:
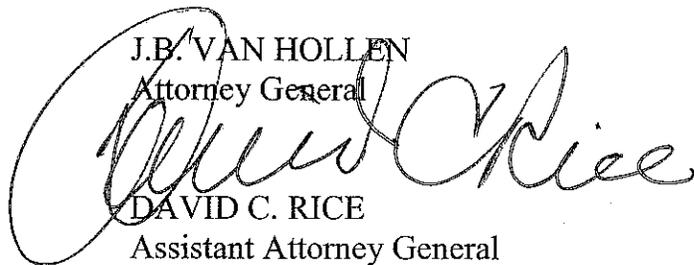
    You are hereby notified that the Petitioner named above has filed a lawsuit or

other legal action against you. The complaint, which is attached, states the nature and

basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is 215 S. Hamilton Street, Madison, Wisconsin, 53703-3285, and to Petitioner's attorney whose address appears below. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be en forced by garnishment or seizure of property.

Dated at Madison, Wisconsin, this 21st day of April, 2011.

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DAVID C. RICE
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## COMPLAINT

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The Wisconsin Government Accountability Board, by Wisconsin Assistant Attorney General David C. Rice, brings this action for declaratory judgment pursuant to Wis. Stat. § 806.04, and respectfully alleges as follows:

**Parties**

1. The Wisconsin Government Accountability Board (GAB) is an agency of the State of Wisconsin, created under Wis. Stat. §§ 15.07 and 15.60, with powers and duties set forth in Wis. Stat. § 5.05, including general responsibility for the administration of Wisconsin laws relating to elections, *see* Wis. Stat. § 5.05(1), and specific authority to commence actions in circuit court to enforce any law regulating the conduct of elections or to ensure its proper administration, *see* Wis. Stat. § 5.05(1)(d) and (9).

2. David Prosser and Joanne Kloppenburg were candidates for the position of Wisconsin Supreme Court Justice in the April 2011 spring election.

**Venue**

3. Venue is in Dane County because it is a county where the claim arose or where the respondents reside or do substantial business. *See* Wis. Stat. § 801.50(2).

**Statement of Claim**

4. On April 15, 2011, after a statewide canvass of votes by the boards of canvassers in each of the 72 counties, *see* Wis. Stat. § 7.60, the statements submitted by the county boards of canvassers show a total of 1,498,880 votes cast for the office of Supreme Court Justice. Mr. Prosser received 752,323 votes, Ms. Kloppenburg received 745,007 votes, and there were 1,550 votes reported as scattering. Mr. Prosser had 7,316 more votes than Ms. Kloppenburg. GAB may not make or transmit a certificate of election until after the expiration of the time allowed to file a petition for a recount. *See* Wis. Stat. § 7.70(5).

5. On April 20, 2011, Ms. Kloppenburg filed a petition for a recount pursuant to Wis. Stat. § 9.01(1).

6. A petition for a recount must allege, on information or belief, that a mistake or fraud was committed in a specific ward or municipality in the counting and return of the votes cast for the office, or that another defect, irregularity, or illegality occurred in the conduct of the election. *See* Wis. Stat. § 9.01(1)(a)2. The petition also must specify each ward, or each municipality if no wards exist, in which a recount is desired, unless a recount is requested for all wards within a jurisdiction. *See* Wis. Stat. § 9.01(1)(a)3. A petitioner is not required to pay a fee for the recount if the difference between the votes cast for the two candidates is not more than 0.5% of the total votes cast for the office. *See* Wis. Stat. § 9.01(1)(ag)1.

7. In her petition for a recount, Ms. Kloppenburg alleges, upon information and belief, that mistakes have been committed in the counting and return of votes cast in the wards, municipalities, and counties in the State of Wisconsin for the office of Justice of the Wisconsin Supreme Court. She requests a recount of **all** the wards, municipalities, and counties in the State of Wisconsin for the office of Justice of the Wisconsin Supreme Court in the April 2011 spring election. GAB has determined that the petition meets the requirements of Wis. Stat. § 9.01(1)(a)2.

8. When GAB receives a valid petition for a recount, it must "promptly" order the proper county boards of canvassers to commence the recount. *See* Wis. Stat. § 9.01(ar)3. County boards of canvassers must convene no later than the second day after receipt of

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the GAB order and must transmit the returns from the recount to GAB as soon as possible, but not later than 13 days from the date of the GAB order. *See id.*

9. Wisconsin election laws, *see* Wis. Stat. chs. 5 through 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 comply with some of their provisions." *See* Wis. Stat. § 5.01(1).

10. **Under applicable law, recounts of votes cast on an electronic voting system must be conducted in the manner prescribed in Wis. Stat. § 9.01, and the boards of canvassers must recount the ballots cast on such systems with automated tabulating equipment.** *See* **Wis. Stat. § 5.90(1). If an electronic voting machine utilizes a detachable record of votes cast, the record must be re-tabulated under Wis. Stat. § 5.90,** *i.e.,* **with automated tabulating equipment.** *See* **Wis. Stat. § 9.01(1)(b)6.**

11. Wis. Stat. 7.23(1) regulates the destruction of all materials and supplies associated with an election. Under this provision, detachable recording units for use with tabulating equipment for an electronic voting system may be cleared or erased 21 days after a non-primary election. *See* Wis. Stat. § 7.23(1)(g). **If a recount is pending, however, or if the time for filing a recount petition has not expired, no materials may be destroyed until after the recount is completed and the applicable time period has expired.** *See* **Wis. Stat. § 7.23(2). In addition, if there is litigation pending with respect to a recount, materials may be destroyed and recording units may be cleared or erased only by order of the court in which the litigation is pending.** *See id.*

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12. Thirty-one counties in Wisconsin, specifically Adams (partial–2 municipalities), Brown, Dane, Eau Claire, Fond du Lac, Grant (partial-1 municipality), Green Lake (partial-9 municipalities), Jefferson, La Crosse, Lafayette (partial-1 municipality), Langlade (partial-1 municipality), Manitowoc (partial-2 municipalities), Marinette (partial-2 municipalities), Menominee, Milwaukee (partial-entire City of Milwaukee and 14 other municipalities), Monroe (partial-4 municipalities), Oconto (partial-16 municipalities), Oneida (partial-10 municipalities), Outagamie (partial-7 municipalities), Pierce (partial-12 municipalities), Portage (partial-4 municipalities), Racine, Rock (partial-18 municipalities), Rusk (partial-1 municipality), Shawano (partial-3 municipalities), Sheboygan, Trempealeau (partial-3 municipalities), Vernon (partial-1 municipality), Waukesha (partial-34 municipalities), Waupaca (partial-2 municipalities), and Wood (partial-2 municipalities), use electronic voting systems with automated tabulating equipment called the Optech Eagle that utilize removable memory cartridges containing the record of the votes cast. Under Wis. Stat. § 7.23(2), such memory cartridges may not be cleared or erased while a recount is pending. At the same time, memory cartridges must be used in the automated tabulating equipment in order for a board of canvassers to recount the ballots as required by Wis. Stat. §§ 5.90(1) and 9.01(1)(b). If the memory cartridges that contain the number of votes cast on election day, however, also are used for automated tabulating of votes for the recount, GAB is advised and believes that the election day voting data on the memory cartridges must be cleared and erased so that the cartridges can be reprogrammed to re-tabulate the votes in the recount.

13. GAB has been advised that the memory cartridges no longer are manufactured, insufficient memory cartridges are available from the manufacturer or other sources (for instance, one manufacturer has only 246 reserve memory cartridges, but three jurisdictions alone need memory cartridges exceeding this amount – the City of Milwaukee requires 160, Dane County requires 136, and Brown County requires 88), and the counties that will use the Optech Eagle for the recount have insufficient reserve memory cartridges in addition to the ones which were used in the April 2011 spring election, which contain the record of the votes cast, and which cannot be cleared or erased under Wis. Stat. § 7.23(2). As a result, GAB believes that the counties cannot comply with the requirement of Wis. Stat. §§ 5.90(1) and 9.01(1)(b), without violating the requirement of Wis. Stat. § 7.23(2), and vice versa.

14. On the next business day following the last day for filing a petition for a recount (in this case on April 21, 2011), any candidate may petition the circuit court for an order requiring that ballots be counted by hand or by another method approved by the court. *See* Wis. Stat. § 5.90(2). In such an action, the petitioning candidate "bears the burden of establishing by clear and convincing evidence that due to an irregularity, defect, or mistake committed during the voting or canvassing process the results of a recount using automatic tabulating equipment will produce incorrect recount results and that there is a substantial probability that recounting the ballots by hand or another method will produce a more correct result and change the outcome of the election." *See id.* GAB also may petition the circuit court. See Wis. Stat. § 5.05(9). The circuit court must hear the petition as expeditiously as possible, without a jury, and may order a

recount of the ballots by hand or another method only if it determines that the petitioner has satisfied his or her burden. *See* Wis. Stat. § 5.90(3).

**Request for Relief**

15. GAB respectfully requests that the court enter a declaratory judgment that the boards of canvassers in the counties which utilize Optech Eagle automated tabulating equipment with removable memory cartridges may use those memory cartridges to automatically tabulate votes during the recount, notwithstanding the fact that the use of the memory cartridges will result in the clearing and erasure of the record of the votes cast using the automated tabulating equipment and memory cartridges from the April 2011 spring election. GAB believes that such a declaratory judgment will allow for a timely and accurate recount that will give effect to the will of the electors and will, to the extent possible, comply with the intent of the legislature as set forth in Wis. Stat. §§ 5.90(1) and 9.01(1)(b).

16. Alternatively, GAB acknowledges that one or both candidates may petition the circuit court for a hand recount or a recount by another method approved by the circuit court, pursuant to Wis. Stat. § 5.90(2). If a petitioning candidate establishes a right to a hand recount or a recount by another method approved by the circuit court, and the circuit court enters judgment providing for a hand recount or a recount by another method approved by the circuit court, the circuit court need not decide whether the memory cartridges may be cleared and erased during the recount.
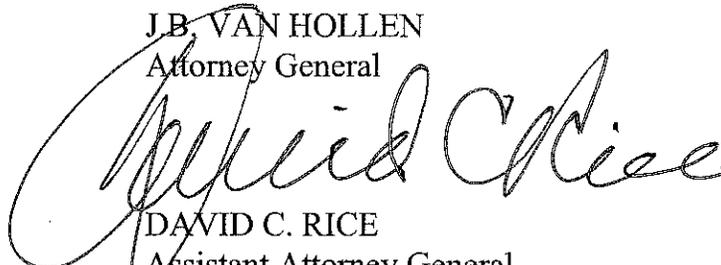
16. GAB respectfully requests that the court grant such further relief, based upon the declaratory judgment, as may be necessary or proper. *See* Wis. Stat. § 806.04(8).

17. GAB respectfully requests that the court grant temporary injunctive relief pursuant to Wis. Stat. § 813.02, staying the time for GAB to order the commencement of the recount under Wis. Stat. § 9.01(a)3 until such time as the court enters judgment in this action.

18. GAB respectfully requests that the court set a date for hearing GAB's requests for temporary injunctive relief and for declaratory relief as promptly as possible.

Dated at Madison, Wisconsin, this 21st day of April, 2011.

J.B. VAN HOLLEN
Attorney General

DAVID C. RICE
Assistant Attorney General
State Bar #1014323

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