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Supreme Court of Wisconsin



110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WI 53701-1688

TELEPHONE (608) 266-1880

FACSIMILE (608) 267-0640

Web Site: [www.wicourts.gov](http://www.wicourts.gov)

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To:

Thomas C. Bellavia  
Steven C. Kilpatrick  
Colin Thomas Roth  
Assistant Attorneys General  
P.O. Box 7857  
Madison, WI 53707-7857

Kathryn Z. Block  
James Matthew Carroll  
Milwaukee City Attorney's Office  
200 E Wells St # 800  
Milwaukee, WI 53202-3515

Matthew M. Fernholz  
Cramer, Multhauf & Hammes, LLP  
P.O. Box 558  
Waukesha, WI 53187-0558

Michael R. Haas  
City of Madison  
210 Martin Luther King Jr. Blvd., Room 401  
Madison, WI 53703

Peter A. Patterson  
David H. Thompson  
Cooper & Kirk, PLLC  
1523 New Hampshire Avenue, NW  
Washington, DC 20036

Richard M. Esenberg  
Anthony LoCoco  
Brian W. McGrath  
Katherine D. Spitz  
Wisconsin Institute for Law & Liberty  
330 East Kilbourn Avenue, Suite 725  
Milwaukee, WI 53202-3141

\*Address list continued on page 7.

You are hereby notified that the Court has entered the following order:

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No. 2021AP428-OA

Fabick v. Wis. Elections Comm'n

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a "Motion for Permanent Injunction, or Alternatively a Temporary Injunction," a supporting legal memorandum, an appendix, and a reply have been filed on behalf of petitioner, Jeré Fabick. Responses to the petition and the motion for an injunction have been filed by (1) Wisconsin Elections Commission, its Commissioners in their official capacities, and its Administrator in her official capacity; (2) City of Madison and Maribeth Witzel-Behl, in her official capacity as City Clerk for the City of Madison; and (3) City of Milwaukee, City of Milwaukee Election Commission; Stephanie D. Findley, in her official capacity as Chair of the Milwaukee Election Commission, Jess Ripp, in his official capacity as Commissioner of the Milwaukee Election

Commission, and Claire Woodall-Vogg, in her official capacity as Executive Director of the Milwaukee Election Commission. Non-party memoranda amicus curiae were filed by (1) the Wisconsin Institute for Law and Liberty, (2) the Liberty Justice Center, and (3) the Wisconsin Voting Rights Coalition.

By order dated April 9, 2021, the court directed the parties to file supplemental legal memoranda addressing what is the effect, if any, of Wis. Stat. § 5.06 on the petition for leave to commence an original action. The court received a joint memorandum from the cities of Milwaukee and Madison and the respondents related to them; a memorandum from the WEC, its Commissioners, and its Administrator; and a memorandum from the petitioner.

The issues raised in this original action petition may warrant our attention. The unstated premise underlying the petition is that these issues would be cleanly presented with no obstacles to reaching the merits. This way, state and local election officials would have clear answers in preparation for the next election.<sup>1</sup>

To explore whether this premise is true, we offered the parties an opportunity to address one statute (Wis. Stat. § 5.06 (2019-20))<sup>2</sup> potentially on point.<sup>3</sup> The petitioner offered statutory and constitutional theories in response that, at a minimum, raise novel and unresolved questions.

First, the petitioner, a resident of Waukesha County, argues that he has an unfettered right to sue the City of Madison and the City of Milwaukee for how they conduct their elections, even though a resident of Madison or Milwaukee appears to be procedurally limited by Wis. Stat. § 5.06 when bringing an identical challenge. Madison and Milwaukee disagree, and say § 5.06 precludes a non-resident like Fabick from challenging their election practices before complying with the administrative remedy provisions articulated in that section.

The petitioner also contends that he is challenging Commission guidance, but seems to disavow that he is bound in any sense by Wis. Stat. § 227.40, the statute governing challenges to agency guidance documents. This raises significant uncertainties regarding what legal standards

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<sup>1</sup> The petition was originally framed as an emergency petition seeking clarification before the April 2021 election. However, this court has made clear that sitting on one's rights and asking for emergency relief in the middle of an election will not be warmly received. See, e.g., Hawkins v. Wisconsin Elections Comm'n, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877. The petitioner offered no reason why he waited until March to seek answers to issues known long before an election already underway.

<sup>2</sup> All subsequent references to the Wisconsin Statutes are to the 2019-20 version.

<sup>3</sup> See Kuechmann v. Sch. Dist. of La Crosse, 170 Wis. 2d 218, 487 N.W.2d 639 (Ct. App. 1992).

would govern our review, and what type of injury the petitioner would have to demonstrate to obtain relief.

Finally, the petitioner argues that even if Wis. Stat. § 5.06 and Wis. Stat. § 227.40 serve as procedural limitations on judicial review, they are unconstitutional as applied to this original action petition. In other words, as we understand it, the petitioner contends that Wisconsin law establishing processes and procedures governing when judicial review is available—what we ordinarily call competency questions—are unconstitutional and without effect as applied to the Wisconsin Supreme Court (or perhaps just to original action petitions). Maybe this is correct. But this court has been around for 173 years, and to our knowledge, we have never said this before.<sup>4</sup>

One might suggest, as the dissent does through its silence, that we should ignore these problems and just decide the legal questions because they are important and unresolved.<sup>5</sup> But judicial process matters. Whether and when the judicial power may be exercised is also a matter of law. It would be inappropriate to disregard this law simply because we are presented with legal questions we would like to address.

This is more than a technicality; it goes to the very core of our constitutional role. The Wisconsin Supreme Court is not, in the main, an advice-giving body. We generally do not take requests from government officials asking us for a legal green light or red light for a given course

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<sup>4</sup> The petitioner points out that the legislature cannot limit the jurisdiction granted to us under the constitution. This is true, of course, but it does not settle the matter. We have long recognized that the legislature can establish limitations on judicial review for the circuit court, and have generally understood these to go to competency, not jurisdiction. See Village of Trempealeau v. Mikrut, 2004 WI 79, ¶9, 273 Wis. 2d 76, 681 N.W.2d 190. The petitioner suggests that even if the legislature may do this for lower courts, it may not do so for us. If authority for this proposition exists, it was not raised in the petitioner's supplemental brief.

<sup>5</sup> Besides failing to consider the procedural impediments this petition presents, the dissent makes other missteps.

The dissent inaccurately asserts that two of the questions are the same as those raised in Trump v. Biden, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568. However, the only issue raised in the petition that was also raised in Trump concerns municipal election clerks adding missing witness information to absentee ballot certificates. Neither of the other two issues in the current petition were raised by the petitioners in Trump. Id., ¶2.

The dissent also seems to argue that simply because this court instructed parties to bring claims in a timely manner, that this somehow means a timely claim is all that is needed. While a timely claim is necessary, that does not mean it is sufficient. We still must consider the law, including the processes the legislature has enacted governing when and how election challenges can be made.

of action, nor are we on-call to answer questions from citizens, legislators, or executive branch officials whenever the answer to a statutory question is unclear. Rather, we are a case-deciding body. We decide disputes between parties. Among other things, this means that someone making a claim must have some recognized legal interest he or she seeks to vindicate, and standing to raise that claim.

These well-established judicial ground rules are not just a matter of judicial formalism, nor are they an exercise in avoiding hard questions. To be sure, this court has an obligation to say what the law is, but this is not a standalone duty. Our responsibility to declare the law arises in the context of our duty to decide cases—genuine and ripe disputes between parties with standing to raise them. It is not our institutional role to step in and answer every unsettled and interesting legal question with statewide impact. While this court must not shrink back from deciding challenging or politically fraught questions properly before us, neither should we be eager to insert ourselves at the expense of time-tested judicial norms. Our role under the constitution is limited. We are no less subject to the rule of law than the other branches of government.

All this is to say, the petition does not present a clear opportunity to address the merits of the questions presented. The petition bases its original action request on a set of novel procedural arguments that may preclude us from ever addressing the substantive questions. If the petitioner's procedural rebuttals are incorrect—and we do not decide whether they are or not—granting this petition will bring us no closer to reaching definitive answers to these election administration questions many months from now. This would be a poor use of judicial resources, and work counter to the timely clarity the petitioner seeks. Accordingly,

IT IS ORDERED that the petition for leave to commence an original action is denied. No costs.

PATIENCE DRAKE ROGGENSACK, J., (*dissenting*). Elections have winners and losers. That is the nature of elections. In a democracy, it is essential that the public accept the outcome of elections. The public will do so when its members believe that elections were fairly conducted. Purcell v. Gonzalez, 549 U.S. 1, 4 (2006).

Due to concerns about procedures applied in Wisconsin elections, Jeré Fabick petitioned for leave to commence an original action pursuant to Wis. Stat. § 809.70 relative to acts of (1) the Wisconsin Elections Commission (WEC), WEC's Commissioners in their official capacities, WEC's Administrator in her official capacity; (2) the City of Madison and Maribeth Witzel-Behl, in her official capacity as City Clerk for the City of Madison; and (3) City of Milwaukee, City of Milwaukee Election Commission, Stephanie D. Findley, in her official capacity as Chair of the Milwaukee Election Commission, Jess Ripp, in his official capacity as Commissioner of the Milwaukee Election Commission, and Claire Woodall-Vogg, in her official capacity as Executive Director of the Milwaukee Election Commission. In addition, non-party memoranda amicus curiae have been filed by (1) the Wisconsin Institute for Law and Liberty; (2) the Liberty Justice Center; and (3) the Wisconsin Voting Rights Coalition. I have considered all the filings.

Fabick's petition to commence an original action sets forth issues that are *publici juris*; they protect liberties and rights of the people throughout the state. In re Petition of Heil, 230 Wis. 428, 436-37, 284 N.W. 42 (1938). They are issues that cry for judicial resolution by the Wisconsin Supreme Court before the 2022 elections begin.

The majority order denies Fabick's petition. In order to do so, it labors on for four pages trying to excuse itself for preventing the court from reviewing critical issues of state-wide concern. As I read the majority order, I am reminded of a scene from Hamlet where Prince Hamlet asks the Queen what she thinks of what has been shown and she replies, "The Lady doth protest too much, methinks," meaning that the protestations are too excessive to be believed.<sup>6</sup> I feel the same way about the order to which I dissent. That is, instead of shouldering the Wisconsin Supreme Court's institutional responsibility, the majority spends four pages trying to justify why it is preventing the Court from acting.<sup>7</sup>

Fabick's petition brings three claimed election irregularities that arose from following WEC guidance documents: 1) clerks adding address information to absentee ballot witness certifications; 2) absentee ballots being returned to persons other than municipal clerks, including during Democracy in the Park in Madison; and 3) absentee ballot drop boxes being used at locations other than the municipal clerk's office.

Two of those three concerns have the same issues as claimed irregularities that were brought to the court's attention after the November 2020 election in Trump v. Biden, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568. At that time, the court refused to address Trump's contentions, and instead, applied laches because the majority concluded that the claimed irregularities were not proceeded upon soon enough. Id., ¶3. The majority opinion directed that "[p]arties bringing election-related claims have a special duty to bring their claims in a timely manner. . . . The issues raised in this case, had they been pressed earlier, could have been resolved long before the election. Failure to do so affects everyone, causing needless litigation and undermining confidence in the election results." Id., ¶30.

Justice Hagedorn, who authored the majority opinion, also authored a concurrence in which he agreed that laches should be applied to all claims. Id., ¶36 (Hagedorn, J., concurring). His concurrence identified issues of concern that were presented in Trump v. Biden as:

- (1) all in-person absentee ballots in Dane and Milwaukee Counties for want of an absentee ballot application;
- (2) all absentee ballots in Dane and Milwaukee Counties where municipal officials added witness address information on the

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<sup>6</sup> William Shakespeare, Hamlet, Queen Gertrude upon viewing The Mousetrap.

<sup>7</sup> I have been on the Wisconsin Supreme Court for 18 years, and I have never seen such an order in response to a Petition for Original Action.

certification; and (3) all ballots collected at two City of Madison 'Democracy in the Park' events occurring in late September and early October.

Id., ¶37 (Hagedorn, J., concurring).

Fabick's petition to commence an original action meets Justice Hagedorn's concurrence concerns, as well as those of the majority opinion because it was filed well in advance of the 2022 elections.

It was my view in Trump v. Biden that the court should have explained whether following the challenged guidance documents complied with election statutes. I expressed concern that four members of this court threw "the cloak of laches over numerous problems that will be repeated again and again, until this court has the courage to correct them. The electorate expects more of us, and we are capable of providing it." Id., ¶63 (Roggensack, C.J., dissenting).

I am of the same view today. WEC guidance documents that permit municipal clerks to add information to witness certifications and permit returning absentee ballots by means other than mailing them or "personally delivering" them to the municipal clerk remain in place and will be used as guidance in future elections. Although Democracy in the Park was a creation of the City of Madison in 2020, all municipalities need to know whether an event to collect ballots is permissible. And, the legality of drop boxes in locations other than a municipal clerk's office must be addressed as well.

Are these procedures lawful or contrary to Wisconsin statutes? The public deserves an answer, and it is the institutional obligation of this court to provide that answer. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (explaining that it is "the province and duty of the judicial department to say what the law is.").

We need elections whose results the public will accept because citizens believe that the elections were conducted fairly. Today, the cloak of laches is not available to the court, and Fabick has brought his election-related claims to the court in a timely manner. Furthermore, two of his claims present the same two issues that the court refused to hear in Trump v. Biden.<sup>8</sup>

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<sup>8</sup>The majority opinion says that this "dissent inaccurately asserts two of the issues are the same as those raised in Trump v. Biden." Majority op. note 5. The majority opinion is incorrect. Below are the two issues, in quotes, so the reader can decide if there are two issues presented by Fabick that the court refused to hear in Trump v. Biden:

(1) "[A]ll absentee ballots in Dane and Milwaukee Counties where municipal officials added witness address information on the certification." (Trump v. Biden, ¶37, Hagedorn, J., concurring); (1) "Wisconsin Elections Commission's policy and the City of Milwaukee's and Madison's practice of rehabilitating missing witness address information." (Fabick petition, ¶I);

(2) "[A]ll ballots collected at two City of Madison 'Democracy in the Park' events occurring

WEC's guidance, once again, underlies the concerns that Fabick has identified. Therefore, I would grant the petition to commence an original action as it relates to WEC conduct and deny it as it relates to claims against the City of Madison, the City of Milwaukee and their elected officials. I also would deny all temporary injunctive relief, study the issues presented in briefs and at oral argument, and participate in a decision that will ensure confidence in the integrity of Wisconsin elections.

Accordingly, because four members of this court refuse to permit the entire court to consider significant issues of state-wide concern that have been brought in a timely manner, I respectfully dissent from the above order.

I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER and Justice REBECCA GRASSL BRADLEY join this dissent.

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Sheila T. Reiff  
Clerk of Supreme Court

Address list continued:

Daniel R. Suhr  
Liberty Justice Center  
Suite 1690  
208 S. LaSalle St.  
Chicago, IL 60604

Mel Barnes  
Law Forward, Inc.  
P.O. Box 326  
Madison, WI 53703

Richard Manthe  
Jeffrey A. Mandell  
Douglas M. Poland  
Stafford Rosenbaum LLP  
P.O. Box 1784  
Madison, WI 53701-1784

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in late September and early October." (Trump v. Biden, ¶37, Hagedorn, J., concurring); (2) "Wisconsin Elections Commission's policy and the City of Milwaukee's and Madison's practice of accepting the return of absentee ballots from individuals other than the electors themselves." (Fabick petition, ¶II).