Appeal No. 2022-AP-91

SUPREME COURT OF WISCONSIN

RICHARD TEIGEN AND RICHARD THOM,

Plaintiffs-Respondents-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION,
Defendant-Co-Appellant-Respondents,

DEMOCRACTIC SENATORIAL CAMPAIGN COMMITTEE,
Intervenor-Defendant-Co-Appellant-Respondent,

DISABILITY RIGHTS WISCONSIN,
WISCONSIN FAITH VOICES FOR JUSTICE,
LEAGUE OF WOMEN VOTERS OF WISCONSIN,

Intervenors-Defendants-Appellants-Respondents.

On Appeal from the Circuit Court for Waukesha County
The Honorable Michael Bohren, Presiding
Circuit Court Case No. 21-CV-958

MEMORANDUM IN OPPOSITION TO PETITIONERS' EMERGENCY PETITION FOR BYPASS

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I. INTRODUCTION

Petitioners filed an emergency petition for bypass on January 26, 2022. This Court should deny Petitioner's emergency petition for bypass for two independent reasons. *First*, this matter involves a routine matter of statutory interpretation that the court of appeals is more than equipped to handle. *Second*, Petitioners' own delay in adjudicating these issues should be fatal to the Petition for emergency treatment.

II. PROCEDURAL HISTORY

Respondents' brief in opposition to the emergency motion to lift the stay contains the background necessary for both the response to the emergency motion to lift the stay and this response to the emergency petition for bypass. In an effort to avoid repetition, the Respondents simply incorporate and reply upon that recitation of the procedural history.

III. LEGAL STANDARD

Wisconsin Stat. § (Rule) 809.60(4) provides that this Court "may grant the petition [to bypass] upon such conditions as it considers appropriate." The Court's internal operating procedures ("IOP") further explain that "A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1), and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues." (IOP § III.B.2.)

For its part, the referenced Wis. Stat. § (Rule) 809.62 is far more specific. It expressly cautions that "Supreme court review is a matter of judicial discretion, not of right," and that such review "will be granted only when special and important reasons are presented." Wis. Stat. § (Rule) 809.62(1r). It then sets forth several non-controlling criteria for the Court's consideration, including:

> (a) A real and significant question of federal or state constitutional law is presented.
>
> (b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.
>
> (c) A decision by the supreme court will help develop, clarify or harmonize the law, and
>
> > 1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
> >
> > 2. The question presented is a novel one, the resolution of which will have statewide impact; or
> >
> > 3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.
>
> (d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.
>
> (e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

Id.

Bypass at a litigant's urging is rare in Wisconsin, and for good reason. The rules of civil procedure have been forged through time and experience to serve litigants and courts alike in the quest for justice. Deviations from those rules—including

the use of bypass to shortcut appellate procedures—must remain the exception if appellate review is to serve its intended function. For this reason, "[b]ypass should not be sought in cases involving only error correction, which is the principal responsibility of the court of appeals." Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 24.3 (6th ed. 2014).

IV. ARGUMENT

This Court should deny the Petition for two independent reasons. *First*, nothing about this case demands this Court's attention or necessitates departing from settled and developed rules of procedure. The legal questions presented here are garden-variety issues of statutory construction. That is the court of appeals' bread and butter work. *Second*, any urgency here is a result of Petitioners' own strategic choices. As discussed in Respondents' opposition to Petitioners' motion to vacate the stay, the circumstances cut against immediate action

by this Court. Moreover, because Petitioners have created any urgency of which they now complain, there is no need for this Court to jump to their tune.

A. This Case Presents a Straightforward Question of Statutory Interpretation that the Court of Appeals is Well-Equipped to Decide.

Petitioners have consistently acknowledged that this case presents a simple, straightforward question of statutory interpretation:

- "The law is not complicated here. It's only a few words, and those words are very straightforward. Ballots have to be mailed by the elector and delivered in person to the municipal clerk. It's not a complicated case." (App. 55)[1];
- "This case is straightforward: state law says one thing; WEC's memos another." (Dkt. 121 at 1)[2];
- "This case concerns the proper interpretation of Wisconsin's existing laws regarding the rules for

[1] All cites to "App." are to the Appendix to Petition for Bypass.

[2] As the appellate record has not yet been compiled, docket references are to the circuit court docket.

casting an absentee ballot in this State." (Dkt. 63 at 1);

- "This case raises one narrowly defined, purely legal issue." (Dkt. 36)

The court of appeals is well-equipped to interpret statutes, as it has done myriad times since its creation in 1978. It can also do so on an expedited basis, as it has already indicated it intends to do in this matter.

Petitioners argue that this case provides the Court with an opportunity to provide a clear ruling on the proper interpretation of Wis. Stat. §§ 6.87 and 6.855, and that the questions presented are novel and of statewide concern, such that bypass is merited. (Pet'rs' Br. at 28) This argument is flawed for two, interrelated reasons. *First*, while this case presents a question of interpreting statutory text not recently construed, the task at hand is in no way novel—the court of appeals routinely interprets statutes. *Second*, all interpretations of state statute are, axiomatically, of statewide concern and

matters in which this Court's decisions can help develop, clarify, or harmonize law. That an appeal presents a question of statutory interpretation is not a reason for bypass but a strike against using that procedure; indeed, the court of appeals was created to adjudicate (and to shield this Court from having to address the vast majority of) such matters. To the extent that the difference here arises from the timing of upcoming elections, the pending motion to stay is an effective and appropriate mechanism to tailor the proper procedural response to that circumstance.

Petitioners insist that the issues in this case are "ultimately bound for this Court 'regardless of how the Court of Appeals might decide the issues.'" (Pet'rs' Br. at 28) But the Petition provides no support for this assertion, which is bald speculation at best. In fact, the Court's lack of action on a pending petition for original action that involves this exact statutory interpretation question, filed all the way back on

November 15, 2021, indicates otherwise. See *Kleefisch v. WEC*, No. 2021AP1976.

If this Court ultimately grants review on this issue of statutory interpretation down the line, the Court will benefit from this case proceeding first in the court of appeals. That process will refine the parties' positions and result in a written opinion that will be useful to this Court in conducting its work. *See, e.g.*, *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶19, 286 Wis. 2d 252, 706 N.W.2d 110 ("Statutory interpretation and the application of a statute to a given set of facts are questions of law that we review independently, but benefiting from the analyses of the court of appeals and the circuit court."); *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't of Nat. Res.*, 2004 WI 40, ¶12, 270 Wis. 2d 318, 677 N.W.2d 612 (Even when "we apply a de novo standard of review, it is useful to have before us the analysis of another learned body concerning the issue presented.").

To see this principle in action, the court need look no further than just two terms ago. In January 2020, the Court denied a petition for bypass in *Zignego*, an election law case that involved a purely statutory interpretation question. *State ex rel. Zignego v. WEC*, No. 2020AP1742, Order (Wis. January 13, 2020). Upon denial of the petition to bypass, the court of appeals issued a thorough, carefully reasoned opinion adequately addressing the straightforward statutory interpretation question presented. *State ex rel. Zignego v. WEC*, 2020 WI App 17, 391 Wis. 2d 441, 941 N.W.2d 284. Petitioners then filed a petition for review, which the Court granted. After briefing and argument, the Court affirmed the court of appeals' well-reasoned statutory interpretation

analysis. *State ex rel. Zignego v. WEC*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208.[3]

Like *Zignego*, this case involves a straight-forward question of statutory interpretation. In *Zignego*, as here, the circuit court issued its order without a written opinion or detailed findings. In *Zignego*, as here, the court of appeals provided the first opportunity for a thorough textual exegesis. And here, as in *Zignego*, the Court, the development of the law, and the interests of the public are all best served by this Court allowing the case to be refined through standard, time-tested appellate procedures.

B. Petitioners' Own Delay in Adjudicating These Claims Should Be Fatal to the Petition.

There is another, independent reason this Court should deny the Petition: the urgency Petitioners use as a basis for

[3] This Court withdrew several portions of the court of appeals' decision, despite affirming the underlying statutory interpretation issue. *Zignego*, 2021 WI 32, ¶ 6 n.5

seeking to avoid normal order is entirely of their own making. The Court should not bend the rules or use extraordinary procedural mechanisms to resolve urgency that Petitioners themselves manufactured; this is especially true where, as here, doing so would have the Court put itself at risk of creating massive voter confusion.

Just last term the Court rejected a petition for original action in *Hawkins* due to those petitioners' delay in seeking relief that affected the distribution of absentee ballots. *Hawkins v. WEC*, 2020 WI 75, ¶5, 393 Wis. 2d 629, 948 N.W.2d 877 (per curiam). The Court concluded that the petitioners there had delayed in seeking relief such that, "under the circumstances, including the fact that the 2020 fall general election has essentially begun, it is too late to grant petitioners any form of relief that would be feasible and that would not cause confusion and undue damage to [] Wisconsin electors." *Id.* As in *Hawkins*, the Court should be extremely hesitant to

grant this Petition and take immediate action; caution is especially appropriate here because it is due to Petitioners' own delay and their attempt to manufacture urgency that the Court could inadvertently trigger voter confusion and undue damage.

WEC issued the guidance at issue in this case regarding absentee-ballot drop boxes and ballot assistance in March and August of 2020. Notably, both practices addressed in the memos—ballot assistance and municipal clerks' use of drop boxes for absentee ballot return—long preceded the issuance of these WEC memos and had never been challenged in court.

Even after WEC issued the memos, these practices were not controversial. In September 2020, legal counsel for Wisconsin State Assembly Speaker Robin Vos and then-Senate Majority Leader Scott Fitzgerald expressed in a letter to the City of Madison their "wholehearted[] support" for drop boxes, which they characterized as one of several "convenient, secure, and *expressly authorized* absentee-ballot-return

methods" in Wisconsin.[4] The statutory language on which Petitioners rely was the same then as it is now, yet Petitioners took no action leading up to the November 2020 election[5] with regard to WEC's guidance regarding drop boxes and ballot assistance, practices they now insist are contrary to Wisconsin law. And, despite claiming that municipal clerks across the State relied upon the Memos to set up over 500 drop boxes statewide, the Petitioners took no action *after* the presidential election. Indeed, the Petitioners allowed yet another set of elections—the nonpartisan spring primary and spring election in 2021—to be held before they initiated this action, two

[4] Letter from Attorney Misha Tseytlin, on behalf of Wisconsin State Assembly Speaker Robin Vos and Wisconsin State Senate Majority Leader Scott Fitzgerald, to Madison City Clerk Maribeth Witzel-Behl (Sept. 25, 2020), available at http://www.thewheelerreport.com/wheeler_docs/files/092520troutman.pdf (emphasis added).)

[5] Notably, Petitioners' counsel asked WEC to address "ballot harvesting" months before the 2020 election. (https://will-law.org/will-asks-wisconsin-elections-commission-to-ban-ballot-harvesting/.) When WEC declined the request, Petitioners' counsel could have brought suit. They chose not to do so until they raised this same issue here.

months after the spring 2021 election. In other words, between the time that WEC issued the guidance here, and Wisconsin's legislative leadership deemed drop boxes to be "expressly authorized," Petitioners sat on their hands through ***three*** elections before filing suit.

In mid-December 2020 this Court issued a decision in *Trump v. Biden*, asserting that laches precluded adjudication of some election-related issues raised and expressly warning parties to ensure not to unreasonably delay in bringing such claims. 2020 WI 91, ¶10, 394 Wis. 2d 629, 951 N.W.2d 568. Several separate writings discussed alternate absentee ballot sites under Wis. Stat. § 6.855 (a statutory interpretation question raised in this case). Additionally, Justice Roggensack foreshadowed an upcoming potential battle over the validity of absentee ballot drop boxes, like this one, in her dissent:

> Drop boxes are nothing more than another creation of WEC to get around the requirements of Wis. Stat. § 6.87(4)(b)1. … Drop boxes do not meet the legislature's mandatory directive. However, because drop boxes are

> not separately identified as a source of illegal voting in this lawsuit, I will not dwell on the accountability problems they create, but I do not doubt that challenges to drop boxes in general and in specific instances will be seen as problems in future elections.

Id., ¶¶101-02 (Roggensack, J., dissenting). Yet, Petitioners continued to sit idly by and opted not to raise these issues.

A different petitioner, represented by the same counsel that represents Petitioner here, finally took action over three months later, in mid-March 2021. That petitioner filed a petition for original action in *Fabick v. Wisconsin Elections Commission*, No. 2021AP428-OA, seeking this Court's intervention on questions related to absentee voting in Wisconsin, and specifically the Memos at issue here and an interpretation of Wis. Stat. § 6.87(4)(b)1. The Court denied the petition over three months later. No. 2021AP428-OA, Order (Wis. June 25, 2021). Falling short of a definitive conclusion that procedural noncompliance forbade the petition, this Court expressed deep skepticism about asserting its original

jurisdiction without authority to bypass the procedural requirements enunciated in Wis. Stat. §§ 5.06 or 227.40. *See id.* ("[W]e have never said this before.").

Only after the Court's denial of the *Fabick* petition, in the final days of June of 2021, did these Petitioners take any action to challenge the Memos, which they vehemently allege contravene the statutory text and exceed WEC's authority. This was over 15 months after issuance of the March memo and over 10 months after the August 2020 memo.[6]

[6] Even when Petitioners finally took action and filed suit in Waukesha County Circuit, they failed to take note of the Court's warnings in its order denying the *Fabick* petition. They failed to follow the procedural requirements plainly laid out in Wis. Stat. § 5.06 and begin their case with a sworn complaint with WEC, as required by law. For that reason, this suit is barred by sovereign immunity. *See Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 224-25, 487 N.W.2d 639 (Ct. App. 1992) (holding that circuit court lacked jurisdiction over election-related complaint filed not under Wis. Stat. § 5.06, but instead as an action for declaratory and injunctive relief).

Yet, in a different case filed the day after this action, counsel for the Petitioners properly filed a sworn complaint with WEC regarding allegations about absentee-ballot drop boxes. *Pelligrini v. Igl*, No. 21-35 (WEC). Petitioner's counsel filed the statutorily prescribed procedure in that case and now it is pending before the Waukesha County Circuit Court in Case No. 2022CV4, *Pellegrini vs. WEC, et al.* That is the proper lawful

Now, less than three weeks before the spring nonpartisan primary date—and after the election has already begun—Petitioners feign urgency and hypocritically assert that the Court must take "immediate jurisdiction over this appeal [to] provide certainty for municipal clerks and voters alike." (Pet'rs' Br. at 29) The election is already underway. Petitioners failed to take prompt action to address WEC guidance. Now they belatedly insist that guidance was inconsistent with state law, and they demand immediate, extraordinary relief. The Court should see through Petitioners' manufactured urgency and reject their request to bend the rules and employ extraordinary procedural mechanisms, none of which would be relevant but for their own inaction and delay.

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vehicle to resolves these allegations, not this rush to insist the Court employ extraordinary procedural mechanisms.

V. CONCLUSION

For the reasons addressed above, Respondents urge this Court to Deny the Petition for Bypass.

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