Appeal No. 19-AP-559

SUPREME COURT OF WISCONSIN

League of Women Voters of Wisconsin, Disability Rights Wisconsin, Inc., Black Leaders Organizing for Communities, Guillermo Aceves, Michael J. Cain, John S. Greene and Michael Doyle, in his official capacity as Clerk of Green County,

Plaintiffs-Respondents,

v.

Tony Evers, in his official capacity as Governor of the State of Wisconsin,

Defendant-Respondent,

Wisconsin Legislature,

Intervening Defendant-Appellant.

On Appeal from the Circuit Court for Dane County
The Honorable Richard G. Niess, Presiding
Circuit Court Case No. 19-CV-84

NON-PARTY BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* ON RETROSPECTIVITY OF RULING

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INTEREST OF *AMICI CURIAE*

Amici are professors at law schools across the country who, in their teaching and research, have studied issues related to the retrospectivity and prospectivity of judicial decisions. *Amici* have a professional interest in ensuring that courts apply remedial rules with full awareness of the relevant doctrinal landscape. As a group, *amici* take no position regarding the appropriate interpretation of Article IV, § 11 of the Wisconsin Constitution. *Amici* submit this brief instead to emphasize that *if* this Court determines that the Legislature's December 2018 "extraordinary session" violated the Wisconsin Constitution, the Court need not conclude that all prior laws enacted during similar extraordinary sessions are null and void. *Amici* are listed by name in the Appendix, with institutional affiliations provided for identification purposes only.

INTRODUCTION

This case presents a question of first impression: Whether the Wisconsin Legislature has authority under the

State Constitution to enact laws when it meets neither pursuant to statute nor during a special session convened by the Governor. *See* Wis. Const. art. IV, § 11 ("The legislature shall meet at the seat of government at such time as shall be provided by law, unless convened by the governor in special session ...."). If this Court agrees with the Circuit Court that the Legislature lacks authority to act under such circumstances, then it will confront a second, much more familiar, question: Whether its holding should apply on a purely prospective basis, prospectively *and* to the case at bar, or to all acts past, present, and future. *Amici* address only this issue of retrospectivity and prospectivity, which—unlike the underlying merits question—has been the subject of countless judicial opinions over the course of many decades.

Throughout these proceedings, the Legislature has presumed that if this Court affirms the Circuit Court's decision with respect to the underlying merits question, it must apply its holding to every law enacted by the Legislature in every extraordinary session not convened in accordance

with Article IV, § 11. *See, e.g.*, B–App303 (stating that Court would have "no basis" for declining to apply its rule retrospectively). That conclusion does not follow from the premise. This Court most certainly can apply its decisions non-retrospectively—and, indeed, often has. If the Court determines that the Legislature's December 2018 extraordinary session was unconstitutional, it would have compelling doctrinal and prudential reasons to apply its decision to legislative acts in that session and future sessions convened in violation of Article IV, § 11, but not to laws enacted in extraordinary sessions prior to December 2018.

I. THIS COURT HAS WIDE DISCRETION TO DETERMINE THE RETROSPECTIVE REACH OF ITS RULINGS

In a run-of-the-mill case, judicial holdings apply uncomplicatedly to the case at bar as well as to cases arising out of events past and future. But when the application of a holding to cases arising out of earlier events will give rise to extraordinary "inequities" or "hardships," an alternative approach is appropriate. *See Harmann v. Hadley*, 128 Wis. 2d

371, 377–379 (1986). In those instances, courts have adopted a number of different strategies for mitigating the collateral consequences of legal change.

One such strategy is for a court to apply its holding on a purely prospective basis. *See, e.g.*, *Sunburst Oil & Ref. Co. v. Great N. Ry.*, 7 P.2d 927, 929 (Mont. 1932), *aff'd*, 287 U.S. 358. This approach has justly drawn criticism on the ground that it gives litigants little incentive to advocate for the recognition of new rules. *See State v. Shoffner*, 31 Wis. 2d 412, 426 (1966) ("[I]f we were to merely announce the new rule without applying it here, ... there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it."). A related problem with pure prospectivity is that the party who benefits from the status quo may have diminished incentives to defend it, because that party does not stand to lose in the instant case if the court departs from precedent or past

practice.[1] Pure prospectivity thereby sacrifices many of the advantages of a genuinely adversarial process in which each party is motivated to bring the best arguments for its position to the court's attention.

Acknowledging the problems of pure prospectivity, courts more commonly have adopted a middle ground between the extremes of pure prospectivity and full retrospectivity: applying the new rule to the case at bar and to cases arising out of future but not past events. This approach has notable virtues. Like pure prospectivity, the middle-ground approach—as one of this Court's most esteemed former members observed—"limit[s] the undermining of stability which a judicially pronounced change would otherwise produce." Thomas E. Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: 'Prospective Overruling' or 'Sunbursting,'* 51 Marq. L. Rev. 254, 254

[1] These concerns are at least somewhat allayed if the parties are repeat litigants who will likely face the same issue again. *See, e.g.*, *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶101. It is far from clear, though, when if ever the plaintiffs in the present case and the current members of the Legislature will again find themselves on opposite sides of the underlying merits issue here.

(1968). It thereby facilitates the evolution of the law and the correction of past errors while still "serv[ing] the same social interest in stability which is at the root of *stare decisis*." *Id.* at 269. Unlike pure prospectivity, however, this middle-ground approach still generates strong incentives for litigants on both sides to bring forward the best arguments for and against legal change.[2]

This Court has repeatedly recognized the virtues of the middle-ground approach and has embraced it as the preferred route when the Court concludes that "traditional retroactivity would wreak more havoc in society than society's interest in stability will tolerate." Fairchild, *supra*, at 254. Some of the cases in which the Court has applied this approach have involved the interpretation of statutes, the interpretation of administrative rules, and the modification of common law

[2] Moreover, a major criticism of the middle-ground approach—that it leads to different outcomes for parties who engaged in the same conduct at the same time, based on which case the court chose to announce its new rule—has little bearing on this dispute. All parties subject to statutes enacted in extraordinary sessions prior to December 2018 would remain subject to those statutes, and all parties subject to statutes enacted in extraordinary sessions from December 2018 onwards would be subject to those statutes only if the Legislature complied with the strictures of Article IV, § 11.

doctrines. *See, e.g.*, *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶¶19, 39 (interpretation of statute and administrative rule); *Theama v. Kenosha*, 117 Wis. 2d 508, 513, 528 (1984) (modification of common law doctrine). But the middle-ground approach applies equally to decisions of state constitutional law such as the judgment of the Circuit Court below. For example, in *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 432 (1967), this Court held that a tax-related statute violated the Wisconsin Constitution, but it acknowledged that retrospective application of its decision would "create fiscal problems for the city of Milwaukee" and "to some degree impair the operations" of certain private corporations. The Court therefore concluded that it would apply its decision only to the current and future tax years, and would allow prior tax assessments issued in reliance on the now-invalidated statute to stand. *Id.* at 432–433.[3]

[3] Another version of the middle-ground approach that this Court has employed is to apply its new rule to the instant case and then provide an interval before the rule applies to future cases. *See, e.g.*, *Koback v. Crook*, 123 Wis. 2d 259, 276–277 (1985) (social host liability applied to case at bar and causes of action arising more than four months after decision); *Sorensen v. Jarvis*, 119 Wis. 2d 627, 648 (1984) (dram shop

In addition to the disfavored "pure prospectivity" approach and the more common middle-ground approach, a third option—sometimes employed by the United States Supreme Court—is to apply a new rule to the case at bar and then to defer any decision regarding retrospectivity until a later case. *Compare, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 470 (2012) (holding that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment), *with Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (holding that the rule in *Miller* applies retrospectively to cases on collateral review). The advantage of this third approach is that it postpones a decision on retrospectivity until the court can resolve the question with the benefit of genuinely adversarial briefing and argument on that issue. After all, parties to the case in which the new rule is announced—unless they are repeat players—have little incentive to argue

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liability applied to case at bar and causes of action arising at least 65 days after decision); *Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 657 (1963) (abolition of religious-institution immunity applied to case at bar and causes of action arising more than two months after decision).

over retrospectivity if the rule will apply to them anyway. The disadvantage of deferring a decision on retrospectivity is that it allows uncertainty to linger longer—a consideration of particular relevance to the present case. *See* B–App303 (arguing that if retrospective reach of Court's rule is unclear, criminal prosecutions "would need to be halted, until the courts sort all of this out").

Within broad parameters, this Court has discretion to adopt any one of these three approaches for itself or to apply its holdings to all cases past, present, and future.[4] As Justice Cardozo wrote for the United States Supreme Court in the *Sunburst* case: "A state in defining the limits of adherence to precedent may make a choice for itself between the principle

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[4] There are, to be sure, instances in which a state court's decision regarding retrospectivity could violate the Due Process Clause of the Fourteenth Amendment, though no such instances are implicated here. To use an outlandish hypothetical, a court might indeed violate the constitutional guarantee of due process if it decided to apply its decision to all future cases and to cases arising out of past events that occurred on Tuesdays. Due process also requires that when a court adopts a "new rule for the conduct of criminal prosecutions," it must apply that rule to cases then pending on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Although the decision in this case potentially would apply to criminal statutes enacted during extraordinary sessions, it would not be a "rule for the conduct of criminal prosecutions"—it would instead be a rule for the conduct of legislative business—and therefore *Griffith*'s holding does not apply.

of forward operation and that of relation backward." *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932); *accord Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 177 (1990) (plurality opinion) ("When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions."). "The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Sunburst*, 287 U.S. at 365; *see also Bell v. City of Milwaukee*, 134 Wis. 2d 25, 31 (1986) ("The decision to apply a judicial holding prospectively is a question of policy and involves balancing the equities peculiar to a given rule or case.").

II. DOCTRINAL AND PRUDENTIAL FACTORS FAVOR APPLYING THE RULE IN THIS CASE TO THE DECEMBER 2018 EXTRAORDINARY SESSION AND FUTURE SESSIONS

While this Court has wide discretion to determine the retrospective reach of its rulings, its own precedents provide wise guidance regarding the exercise of that discretion. The

Court has identified "three factors to be considered in deciding whether a holding ought not be applied retrospectively." *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 108 (1979). Those three factors are:

> (1) Does the rule "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed"?
>
> (2) Will retroactive operation further or retard the operation of the rule in question?
>
> (3) Will retroactive application produce substantial inequitable results?

State ex rel. Brown v. Bradley, 2003 WI 14, ¶15 (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971)); *see also Burlington Northern, Inc. v. City of Superior*, 149 Wis. 2d 190, 198–203 (Ct. App. 1989) (applying three-factor test to determine retrospective reach of constitutional decision). These are sometimes known as the "*Chevron/Kurtz* factors," in reference to the United States Supreme Court case that announced them and the Wisconsin Supreme Court case that adopted them as a matter of state judicial policy. *See, e.g.*,

Trinity Petroleum, Inc. v. Scott Oil Co., 2007 WI 88, ¶76. Although the United States Supreme Court no longer follows *Chevron Oil*, *see Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993),[5] "this court continues to adhere to the *Chevron/Kurtz* standard." *Trinity Petroleum*, 2007 WI 88, ¶76.

If this Court holds that Wisconsin Legislature can meet only pursuant to statute or during a special session convened

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[5] In *Harper*, the United States Supreme Court said that decisions of federal law generally must be given full retrospective effect, but it did not alter its longstanding holding that state courts may determine for themselves the retrospective reach of their own state law decisions. *See Harper*, 509 U.S. at 100 (citing *Sunburst Oil*, 287 U.S. at 346–366). The general rule of retrospectivity for interpretations of federal law, moreover, comes with a number of caveats. In the habeas corpus context, the rule is almost exactly the opposite: The presumption—outside of narrow exceptions—is that rules of federal law do not apply retrospectively to convictions that already have become final and are now under challenge on collateral review. *See Teague v. Lane*, 489 U.S. 288, 310–313 (1989) (plurality opinion); *Penry v. Lynaugh*, 492 U.S. 302, 329–330 (1989). The Court also has held that when legislators are elected in accordance with an unconstitutional apportionment, a ruling against the apportionment need not be applied retrospectively to invalidate past legislative acts. *See Connor v. Williams*, 404 U.S. 549, 550–551 (1972); *Ryder v. United States*, 515 U.S. 177, 183 (1995); *see also Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (according de facto validity to past acts of unconstitutionally appointed federal commissioners); *Bhatti v. Fed. Hous. Fin. Agency*, 332 F. Supp. 3d 1206, 1223–1225 (D. Minn. 2018) (applying *Buckley's* de facto validity holding).

by the Governor, then the *Chevron/Kurtz* factors would weigh heavily in favor of applying the holding to the acts at issue in the case at bar and to acts passed after the decision date.

First, all parties agree that the Wisconsin Supreme Court has never squarely answered the merits question at issue here, and that the Legislature has long proceeded under the assumption that acts passed during extraordinary sessions such as the one convened in December 2018 are valid. Thus, consistent with the first *Chevron/Kurtz* factor, the Court would be "deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106; *Kurtz*, 91 Wis. 2d at 109.

Second, retrospective application of the Court's holding to pre-December 2018 extraordinary sessions would do little to "further ... the operation of the rule in question." *See Chevron Oil*, 404 U.S. at 107; *Kurtz*, 91 Wis. 2d at 109. According to the Circuit Court, the rule in Article IV, § 11 is "designed specifically to foster the people's rights to attend legislative sessions, petition, lobby, and keep apprized of

legislative activity." B-App006. Absent the possibility of backward time travel, applying the rule in this case to pre-December 2018 extraordinary sessions will not foster anyone's right to attend legislative meetings that occurred long in the past. And wiping away statutes that have been on the books for years or decades will not aid anyone's efforts to "keep apprized of legislative activity."

Third, at least according to the Legislature, applying the rule in this case to pre-December 2018 extraordinary sessions would be deeply disruptive. The Legislature describes such a scenario as a "rolling disaster," *see* B–App227, and while the Legislature itself could contain the "disaster" by reenacting statutes passed in previous extraordinary sessions, reenactment is not a panacea. For example, reenactment of a criminal law would not serve to preserve sentences issued under the earlier version of the statute. *See Miller v. Florida*, 482 U. S. 423, 430 (1987).

Applying the Court's holding to the case at bar, by contrast, would lead to no serious difficulties. The statutes

approved in the December 2018 extraordinary session could not have engendered substantial reliance interests in the three months between the time of enactment and the Circuit Court's decision—especially in light of the well-publicized legal challenges to those statutes that were pending through most of the three-month period. And weighing against a purely prospective holding here is the potential inequity to the plaintiffs, who have expended considerable time, energy, and resources in their effort to enforce Article IV, § 11. In this Court's words: "To refuse to apply the new rule here would deprive the [plaintiffs] of any benefit from their effort and expense in challenging the old rule which we now declare erroneous. That, we conclude, would be the greater injustice." *Jacque v. Steenberg Homes*, 209 Wis. 2d 605, 625–626 (1997).

CONCLUSION

For the foregoing reasons, if this Court concludes that the December 2018 extraordinary session contravened the Wisconsin Constitution, the Court need not apply its ruling to

laws enacted in extraordinary sessions prior to December 2018.

Dated: May 3, 2019

Respectfully submitted,

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CERTIFICATION

I certify that the foregoing brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,979 words.

Dated: May 3, 2019.

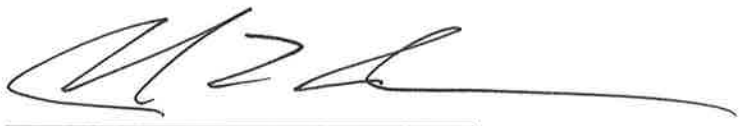
Hal Harlowe

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief and appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12)-(13). I further certify that this electronic copy is identical in content and format to the printed form of the brief and appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief and appendix filed with the court and served on all parties in this matter.

Dated: May 3, 2019.



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