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SUPREME COURT

March 19, 2024

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

No. 2023AP1399-OA Clarke v. Wisconsin Elections Commission

A "Motion for Clarification of Opinion and Order as it Relates to Recall and Special Elections," having been filed by respondents, the Wisconsin Elections Commission et al.;

IT IS ORDERED that all parties to this case not moving for relief shall file one or more responses to the motion by March 21, 2024.

ANNETTE KINGSLAND ZIEGLER, C.J. (*dissenting*). Any action by the court on this motion is, at a minimum, premature. This court is charged with the responsibility to answer legal questions which come in the form of a case or controversy.¹ This motion is not an independent case or controversy, nor is it a properly filed motion in another case or controversy which is awaiting any substantive legal determinations. Instead, we are now being asked to issue

¹ Gabler v. Crime Victims Rights Bd., 2017 WI 67, ¶37, 376 Wis.2d 147, 897 N.W.2d 384 ("No aspect of the judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgement in cases and controversies arising under the law."); Tetra Tech EC, Inc. v. DOR, 2018 WI 75, ¶142, 382 Wis.2d 496, 914 N.W.2d 21 (Ziegler, J., concurring).

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what amounts to an "advisory opinion." This court does not issue "advisory opinions."² This court should resist the urge to continue assuming powers and roles outside of its limited judicial purview and should deny this motion as it is procedurally fatally flawed.

More specifically, we are not the legal advisors for the Wisconsin Election Commission ("WEC"). Yet, through this motion, we are being asked to provide WEC with conclusive advice concerning which district boundaries should be used for any special or recall elections. This is a thorny and complicated matter not easily answered, even if we were the law firm for WEC. Not surprisingly, confusion over representation and which district boundaries are in effect exists because four members of this court "impose[d] their will on the entire Assembly and half of the Senate" in a pre-determined, outcome-driven political decision to remap Wisconsin and overturn this court's barely two-year old precedent in the Johnson litigation.³ This confusion was but one of the foreseeable dangers emanating from a majority of this court dragging the institution through a political, rather than a legal, process in a matter that had been concluded in Johnson. The court's conclusion that the Johnson maps were unconstitutional will most certainly have independent and thorny legal consequences for many in this state. But those scenarios will arise within their own unique factual and legal questions and will need to be independently decided in those cases. Imagine if the Wisconsin Supreme Court were tasked with the responsibility to provide legal advice to any person or entity which is affected because the court concluded (in a separate case) that something was unconstitutional.

In any event, it is premature for WEC to request this court's action in the Robin Vos recall election. At this point in time, there is no recall. News articles indicate that the recall organizers do not appear to have the votes to recall Vos under either district boundary.⁴ The court should not even pretend to be poised to issue a decision in a nonexistent case presenting a hypothetical question. Cognizant of our role, we should not "depart from our general practice" of "not offer[ing] an advisory opinion or mak[ing] a pronouncement based on hypothetical facts." State ex. rel. Collison v. City of Milwaukee Bd. of Review, 2021 WI 48, ¶46, 397

² State v. Grandberry, 2018 WI 29, ¶31 n. 20, 380 Wis. 2d 541, 910 N.W.2d 214.

³ Johnson v. Wis. Elections Comm'n, 2022 WI 19, ¶¶78-79, 401 Wis. 2d 198, 972 N.W.2d 559 (Ziegler, C.J., dissenting).

⁴ Molly Beck, Robin Vos Recall Organizers Fail to Submit Enough Valid Signatures, Initial Review Finds, Milwaukee Journal Sentinel (Mar. 12, 2024); <https://www.jsonline.com/story/news/politics/elections/2024/03/12/signatures-to-force-robin-vos-recall-fall-short-initial-review-shows/72941641007/>; Michelle Schmidt, Robin Vos Recall Effort Appears To Have Fallen Short, Wisconsin State Journal (Mar. 12, 2024); https://madison.com/news/state-regional/government-politics/robin-vos-recall-signatures-supreme-court-elections-commission-maps-legislature/article_cf63caa6-e071-11ee-88d5-d3874e3a7a26.html#:~:text=Organizers%20launched%20the%20recall%20effort,short%2C%20according%20to%20the%20review.

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Wis. 2d 246, 960 N.W.2d 1 (citing State v. Grandberry, 2018 WI 29, ¶31 n.20, 380 Wis. 2d 541, 910 N.W.2d 214). Instead, if a future case or controversy is presented to us, we can respond at that time with the process that is due.

The court should not intimate that it might rush to answer these thorny and complicated issues, which clearly will require a thorough, complete vetting. The issues presented in this standalone "motion" are resultant of the court's result-oriented conclusions in Clarke. In any other matter where something has been determined unconstitutional, the subsequent fallout of that determination does not become part of the original case. WEC's request for this court's advice in this Clarke-adjacent premature proceeding is procedurally flawed, at minimum.

WEC makes very important determinations which affect elections. Those determinations may later be determined to be wrong. WEC did not seek the court's advice on absentee ballot drop boxes.⁵ Nor did WEC seek the court's advice on Democracy in the Park.⁶ The court was not WEC's legal advisor then, and the court is not WEC's legal advisor now. The court should not condone WEC's request for legal advice here. No response to this "motion" should be ordered.

For the foregoing reasons, I dissent.

I am authorized to state that REBECCA GRASSL BRADLEY, J., joins this dissent.

Samuel A. Christensen
Clerk of Supreme Court

⁵ Teigen v. Wis. Elections Comm'n, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519.

⁶ Trump v. Biden, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568.

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