FILED
11-21-2023
CLERK OF WISCONSIN
SUPREME COURT

In the Supreme Court of Wisconsin

No. 2023AP2020-OA

TONY EVERS, GOVERNOR OF WISCONSIN, DEPARTMENT OF NATURAL RESOURCES, BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES, and MARRIAGE AND FAMILY THERAPY, PROFESSIONAL COUNSELING, AND SOCIAL WORK EXAMINING BOARD,
Petitioners,
v.
SENATOR HOWARD MARKLEIN, and REPRESENTATIVE MARK BORN, in their official capacities as chairs of the joint committee on finance; SENATOR CHRIS KAPENGA AND REPRESENTATIVE ROBIN VOS, in their official capacities as chairs of the joint committee on employment relations; and SENATOR STEVE NASS and REPRESENTATIVE ADAM NEYLON, in their official capacities as co-chairs of the joint committee for review of administrative rules,
Respondents.

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE, INC.

Nathan J. Kane
Wis. Bar No. 1119329
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
nkane@wmc.org

Attorney for Wisconsin Manufacturers & Commerce, Inc.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Introduction

Self-defeating is the most apt description of this petition. At its core, this petition strives to "restore the constitutional balance of power to Wisconsin's state government." Assuming the petitioners (collectively, the Governor) are correct, and our state government is imbalanced, this petition cannot solve that problem. Whatever imbalances it can solve, this petition will only create more. To be specific, this petition will, if granted, hyper-augment the power of the judiciary. So even if it resolves the Governor's complained-of imbalance between the executive and the legislative branches, this petition will simply replace that imbalance with one between the judiciary and the political branches. Why? The issues presented come packaged in a petition for original action. That is a problem. By their nature, the issues presented should come via a petition for review. This distinction matters—because "[j]udicial process matters." *Fabick v. Wis. Elections Comm'n.*, No. 2021AP428-OA at 3 (order denied June 25, 2021). As a result, the Court should deny this petition for original action, allowing the issues presented to wend their way through the ordinary course of the judicial process.

Discussion

I. The ordinary judicial process is constitutionally preferred.

Our judicial system is a three-tiered hierarchy, each level of which performs an important role in the judicial process. Typically, circuit courts do much of the judicial legwork—finding facts,

making discretionary and evidentiary decisions, taking the first pass at complex legal issues. The court of appeals primarily corrects errors that arise at the circuit courts. *Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997). Secondarily, it engages in "law defining and law development." *Id.* Performing this ancillary function, the court of appeals "adapts the common law and interprets the statutes and federal and state constitutions in the cases it decides." *Id.* Finally, this Court plays a limited but ever-important role. Its primary purpose is not to correct errors but to clarify and develop the law. *Id.*, ¶ 51.

Typically, cases begin in the circuit courts, proceed through the court of appeals, and come before this Court in a petition for review. This three-step process is important. Through it, each court's expertise is applied to a case, giving parties the assurance their disputes were probed from all angles necessary to develop sound decisions.

In the end, this multi-judicial participation reinforces the finality and authority of this Court's decisions, and the reason for this has nothing to do with law. A proverb salient not only in day-to-day life, the adage "two heads are better than one" undergirds our appellate system. Indeed, the belief that multiplicity of opinion produces superior results is the reason appellate courts, for instance, are not one-judge tribunals. "Wisconsin uses the three-judge system because of the belief that three different people looking at the law based on their own experiences may hold a different perspective of a decision made by a trial court judge."

Matthew E. Gabrys, *A Shift in the Bottleneck: The Appellate Caseload Problem Twenty Years After the Creation of the Wisconsin Court of Appeals*, 1998 Wis. L. Rev. 1547, 1560 (1998). Justice Cardozo echoed this well-founded belief. However steeped in law and logic a judge might be, Cardozo wrote, he "may try to see things as objectively as [he] please[s]. None the less, [he] can never see them with any eyes except [his] own." Benjamin N. Cardozo, *The Nature of the Judicial Process*, 13 (1921). Multiplicity is a check on all people's inherent subjectivity.

Justifying more than multijudge panels, this truth reinforces the need for appellate review in the first place. "Appellate review offers an aggrieved party the opportunity to have another group of people versed in the law review a decision often made in the midst of trial by a trial court judge." Gabrys, *A Shift in the Bottleneck*, 1560. Otherwise put, "[a] recognized need exists to test the decision of a judge at a higher level, without statistical evidence that a second decision is any better than the first. This need is satisfied by our appellate system, and there appears to be little prospect of eliminating or even modifying it." Robert J. Martineau, *The Appellate Process in Civil Cases: A Proposed Model*, 63 Marquette L. Rev. 2, (Winter 1979).

Yet this Court effectively eliminates appellate review when it grants petitions for original action. In those cases, no court can review this Court's decisions (besides of course the United States Supreme Court). If it is true that high courts "are not final because [they] are infallible, but [they] are infallible only because [they] are

final," *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring), then, out of simple judicial humility, this Court should encourage that cases be heard by lower courts first. That way, citizens of this state can be sure that, at the very least, the relevant issues in each of this Court's cases were thoroughly plumbed and debated by judges of different views before a final and infallible decision was issued.

II. The petition raises no exigency that would justify spurning the ordinary three-step judicial process.

Because this process of decision, review, and further review is the constitutionally preferred course, aberrating from it and exercising the "extreme" and "extraordinary" power to hear an original action demands especial justification. *State ex rel. Bolens v. Frear*, 148 Wis. 456, 134 N.W. 673, 679 (1912); *State ex rel. Time Ins. Co. v. Smith*, 184 Wis. 455, 200 N.W. 65, 70 (1924). To begin with, original actions require that the issues involved be important. *In re Exercise of Original Jurisdiction of Supreme Ct.*, 201 Wis. 123, 229 N.W. 643, 645 (1930). And important not just to the petitioner but to the state as a whole. *Id.* Cases of such grand importance are termed to be publici juris (that is, they belong to the public). *See State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 94, 394 N.W.2d 732 (1986). But statewide importance is typically not alone enough to justify eschewing the benefits of the ordinary judicial process. Aberrations are most justified when a case displays this paramount importance "*in combination with circumstances creating an exigency*." *Petition of Heil*, 230 Wis. 428,

284 N.W. 42 (1938) (emphasis added); *see also Gahl on behalf of Zingsheim v. Aurora Health Care, Inc.*, 2023 WI 35, __ Wis. 2d __, 989 N.W.2d 561, 603 (App. D) (explaining this Court should "reserve [its] original jurisdiction for rare cases that involve purely legal questions of statewide concern that, because of some exigency, cannot satisfactorily proceed through the traditional legal process") (Dallet, J., dissenting from order granting leave to commence an original action). Indeed, "this court will not exercise its jurisdiction … unless the exigency is of such an extreme nature as obviously to justify and demand the interposition of the extraordinary superintending power of the court of last resort of the state." *In re Mielke*, 120 Wis. 501, 98 N.W. 245, 247 (1904) (citing *State v. Pollard*, 112 Wis. 232, 87 N.W. 1107 (1901)). As discussed above, the ordinary judicial process gives parties and citizens confidence that the judicial decisions binding them have been deeply considered and thoroughly reviewed. In original actions, that assurance cannot be offered because final decisions often go completely unchecked. This is why petitions for original action should be granted only under exigent circumstances—times when, to be frank, it is more important the people be given *an* answer than the correct and thoroughly reviewed answer.

Yet those times are rare, so exigency is a high bar. In the recent past, this Court's original actions have for the most part involved only an election (an immovable, all-important event) or a pandemic (an erratic, extraordinary event). In all those recent cases, exigency was apparent. Take what might be this Court's

noteworthiest opinion during the COVID-19 pandemic, *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. When that case arose, a deadly pandemic had already claimed thousands of lives across the nation, and each day the virus infected—and killed—scores more. Amid all this, the Secretary-designee of the Department of Health Services issued Emergency Order 28. *Palm*, 391 Wis. 2d 497, ¶ 2. Under that order, most businesses needed to cease, and most people could not go to work. *Id*. No one could see friends, and no one could visit family living outside the household. *Id*. Given the crawl of the virus and the magnitude of the emergency order, the people had an interest in knowing quickly whether the order was valid. *Id*. Had that question gone through the ordinary course—first to a circuit court, then to an appellate court—the people would have heard "conflicting guidance regarding the state of the law, creating chaos and confusion. Perhaps worse, public health officials [would have] struggled to craft orders to combat a serious pandemic because they were subjected to conflicting court decisions, each coming from a judge or panel of judges with a different understanding of the law." Skylar Reese Croy, *As I See It: Examining the Supreme Court's Broad Original Jurisdiction*, 94 Wis. Law. 30-34 (July/Aug 2021). The circumstances there exceeded exigent and became importunate.

So too in this Court's recent election cases. In those cases, this Court has recognized the necessity in expediting the judicial process. Elections, of course, cannot be rescheduled. In many

election-related cases, therefore, a trip through the ordinary course of the judicial process could not be complete before the election must be held. Therefore, these cases of great statewide importance could not be heard by a court with a statewide constituency unless this Court exercised its original jurisdiction. Enabling this Court to exercise this jurisdiction in such cases reflects a political decision ingrained in the constitution: if only one court can decide a case with statewide impacts, this Court—the only court elected by the entire state—should have the power to step in if it so chooses.

Unlike the COVID-19 and election cases, this case has no need for expediency. The Governor, in fact, almost concedes that no emergency exists. To take the first issue, in discussing the veto power of the Joint Committee on Finance (JCF), the Governor admits the JCF "has often exercised its power to veto Knowles-Nelson Program projects since 2019," blocking 27 projects in total. (Pet. at 13.) The Governor fails to distinguish those 27 former projects from the project the JCF is currently blocking. This raises questions: wasn't the issue presented exigent in 2019, when JCF began exercising the veto? If it was not, then why is the issue an emergency today? The Governor answers neither of these questions. This Court should not assume the circumstances warrant an extreme exercise of its powers, and it should therefore deny the Governor's request to pass judgment on this issue.

As for the next issue, about UW System employees' pay raises, it is unclear from the petition how this issue presents an

emergency. While it would no doubt benefit employees to receive a pay increase, their livelihoods are not threatened because they are yet to be paid more per year. This issue, as described in the petition, appears to be the mere result of political gridlock. While the Governor seeks to increase these employees' pay, the legislature (the Joint Committee on Employment Relations, to be exact) has demanded a concession before complying. This is a normal part of the legislative process, and it serves an important role in our system of separated powers. Indeed, gridlock is a virtue, not a vice. *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., concurring). In fact, the framers of our federal Constitution "went to great lengths to make lawmaking difficult." *Id.* Therefore, if every case of gridlock were enough to warrant the exercise of "extreme" judicial power, our system (which is similar to the federal government's in this respect) would in important ways be designed to invoke this Court's extreme, extraordinary powers. That, however, is simply not how our government is structured.

As with the other issues, inaction from the Joint Committee for Review of Administrative Rules (JCRAR) on the commercial building standards and the ethical requirements for counselors and therapists (the third issue) presents no emergency. According to the petition, "[o]ver three years have elapsed since JCRAR first blocked the proposed rule" at issue here. (Pet. at 34.) Implicit in this reasoning is the contention that at some point—perhaps immediately, perhaps the day the petition was filed—JCRAR's

inaction became an emergency. Yet the Governor does not say when this inaction constituted an emergency and why that occurred. The Governor ignores the exigency component of this issue. Indeed, based simply on what the Governor argues in his petition, this Court has reason to believe only that this is no emergency at all: over three years have passed, and the Governor points to no harmful effects that have come from JCRAR's inaction.

The Governor also fails to explain why he did not bring this suit right after JCRAR made clear its intention to block these rules. As a result, it appears the Governor has, for no reason at all, waited three years to bring suit. If the emergency here, whatever it might be, has arisen due to this prolonged period of legislative inaction, then this Court should not exercise its original jurisdiction. This Court has already stated why: "The original jurisdiction of this court may, as we have seen, be put in operation in a proper case, to prevent a delay which would otherwise occur, and which would destroy or greatly impair the public right sought to be enforced; but never where (as in this case) the *laches* of the party who invokes the jurisdiction has made the delay probable." *State ex rel. Cash v. Juneau Cnty. Sup'rs*, 38 Wis. 554, 558 (1875). In his petition, the Governor gives this Court no reason to believe that the emergency here (if one exists at all) is not the result of the Governor's waiting three years to bring this suit. To grant the petition on this issue would be to repudiate this Court's own observation in *Cash* and invoke an extraordinary power because of the Governor's laches. Such a decision would encourage parties to

sit on their rights and manufacture emergencies to justify the invocation of this Court's original jurisdiction. Our laws do not countenance such an extraordinary result.

Finally, had the Governor filed this suit in circuit court, he could have sought a temporary injunction, halting any exigent or harmful circumstances and avoiding any harm. The availability of adequate lower-court relief undercuts the Governor's argument that this case presents an emergency needing this Court's immediate attention. *See Petition of Heil*, 284 N.W. 42, 48. "[T]his court will not exercise its [original] jurisdiction when there is another adequate remedy." *Pollard*, 87 N.W. 1107, 1108.

III. The Governor lacks standing to bring this suit.

All the issues of exigency aside, the Governor lacks standing to pursue this case. In general, "public officers cannot question the constitutionality of a statute unless it is their official duty to do so, or they will be personally affected if they fail to do so and the statute is held invalid." *Fulton Found. v. Dep't of Tax'n*, 13 Wis. 2d 1, 11, 108 N.W.2d 312 (1961). Basic rules of standing hold that "no one can question in the courts the constitutionality of a statute already enacted except one whose rights are impaired." *Id.* "This rule extends to public officers whose private rights are not involved." *Id.* at 11–12.

In his petition, the Governor does not address this threshold issue. But these general tenets prohibit the Governor from bringing this suit. Although statutes can enable a public officer to bring a suit when his or her rights are not involved, WMC has

found no statute granting the Governor this power—and the Governor, for his own part, points to no such statute, effectively conceding that one does not exist.

The Governor seems to assert that Wis. Stat. § 165.25(1m) authorized Attorney General Kaul to file this suit upon the Governor's request. (Pet. at 9.) But this statute does not authorize the Attorney General to file a suit challenging the constitutionality of a statute. *State v. City of Oak Creek*, 2000 WI 9, ¶ 34, 232 Wis. 2d 612, 605 N.W.2d 526 (citing *State Pub. Intervenor v. Wisconsin Dep't of Nat. Res.*, 115 Wis. 2d 28, 36, 339 N.W.2d 324 (1983)). Creatures of the state "have no standing to challenge the actions of their creator, such as drawing into question the constitutionality of legislation the state has enacted." *Silver Lake Sanitary Dist. v. Wisconsin Dep't of Nat. Res.*, 2000 WI App 19, ¶ 8, 232 Wis. 2d 217, 607 N.W.2d 50 (citing *Dane County v. Health & Soc. Servs. Dep't*, 79 Wis.2d 323, 330, 255 N.W.2d 539 (1977)).

For that reason, the Court should deny this petition for original action. Because the Governor is barred from bringing this suit, this petition "does not present a clear opportunity to address the merits of the questions presented." *Fabick*, No. 2021AP428-OA at 3. If the Court were to grant this petition, these procedural deficiencies would "preclude [the Court] from ever addressing the substantive questions," bringing the Governor "no closer to reaching definitive answers" to the questions he seeks to have answered. Detrimental not only to the Governor, granting this petition would therefore "be a poor use of judicial resources." *Id.*

Conclusion

This Court should deny the petition for an original action.

Dated this 21st day of November 2023.

Respectfully Submitted,

Electronically signed by
Nathan J. Kane

Nathan J. Kane
Wis. Bar No. 1119329
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
nkane@wmc.org

Attorney for Wisconsin Manufacturers & Commerce, Inc.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,995 words.

Dated this 21st day of November 2023.

Electronically signed by
Nathan J. Kane

Nathan J. Kane
Wis. Bar No. 1119329
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
nkane@wmc.org

Attorney for Wisconsin Manufacturers & Commerce, Inc.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12).

Dated this 21st day of November 2023.

Electronically signed by
Nathan J. Kane

Nathan J. Kane
Wis. Bar No. 1119329
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Attorney for Wisconsin Manufacturers & Commerce, Inc.