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February 2, 2024

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

No. 2023AP2020-OA Governor Evers v. Senator Marklein

The court having considered the petition for leave to commence an original action and the supporting memorandum filed by petitioners, Governor Tony Evers et al.; the response to the original action petition filed by respondents, Senator Howard Marklein et al.; the December 19, 2023 supplemental letter filed by the petitioners; the December 20, 2023 response to the supplemental letter filed by the respondents and the proposed intervenor; the motion to intervene as a respondent filed by the Wisconsin Legislature; the response to the motion to intervene filed by the petitioners; the January 29, 2024 supplemental letter filed by the respondents and the proposed intervenor; and the February 1, 2024 response to the supplemental letter filed by the petitioners;

IT IS ORDERED that the petition for leave to commence an original action is granted solely with respect to the first issue set forth in the petition for leave to commence an original action, and this court assumes jurisdiction over this action; and

IT IS FURTHER ORDERED that the second and third issues set forth in the petition for leave to commence an original action are held in abeyance pending further order of the court; and

IT IS FURTHER ORDERED that the Wisconsin Legislature's motion to intervene as a respondent is granted; and

IT IS FURTHER ORDERED that within 20 days of the date of this order the petitioners shall file a brief in this court that shall not exceed 50 pages if a monospaced font is used or 11,000 words if a proportional serif font is used; that within 20 days of the filing of the petitioner's brief, the respondents and intervenor-respondent shall file a single, combined responsive brief that shall not exceed 50 pages if a monospaced font is used or 11,000 words if a proportional serif font is used; and within 10 days of filing of the responsive brief, the petitioners may file a reply brief that shall not exceed 13 pages if a monospaced font is used or 3,000 words if a proportional serif font is used or a statement that no reply brief shall be filed; and

IT IS FURTHER ORDERED that the court will not entertain motions to extend the briefing time or to increase page/word limitations for the briefs; and

IT IS FURTHER ORDERED that oral argument in this matter will occur on April 17, 2024, at 9:30 a.m.

REBECCA GRASSL BRADLEY, J. (*dissenting*). Consistent with the new majority's modus operandi, the majority eagerly grants another original action petition, needlessly engulfing this court in the morass of politics. By accepting only one of the issues raised by the Governor and holding the other two issues in abeyance, the majority refashions this court as the Governor's avenue for imposing policy changes without the consent of the governed. When the majority's political allies say jump, the new majority responds: "How high?"

"As is often the case with original-jurisdiction petitions, the question is not whether we can grant the petition but whether we should." Johnson v. Wis. Elections Comm'n, No. 2021AP1450-OA, unpublished dispositional order, at 14 (Wis. Sept. 22, 2021) (Dallet, J., dissenting from grant of petition to invoke original action). Justice Rebecca Dallet once believed original actions should be reserved "for rare cases that involve purely legal questions of statewide concern that, because of some exigency, cannot satisfactorily proceed through the traditional legal process." James v. Heinrich, No. 2020AP1419-OA, unpublished dispositional order, at 8 (Wis. Sept. 10, 2020) (Dallet, J., dissenting from grant of petition to invoke original action). Now that she forms part of a majority willing to act in lockstep, Justice Dallet sets her now inconvenient principles aside. The Governor's petition presents issues properly addressed "through the traditional legal process" and should be denied.

Under current law, the Joint Finance Committee has reviewed gubernatorial appropriations under the Knowles-Nelson Stewardship Program (the Program) for more than fifteen years. 2007

Wis. Act 20, § 646t; Wisconsin Legislative Fiscal Bureau, Warren Knowles-Gaylord Nelson Stewardship Program (Informational Paper # 61, prepared by Eric Helper, Jan. 2019). The Governor suddenly asserts this legislative oversight of appropriations under the Program violates the separation of powers doctrine and urgently warrants this court invoking its original jurisdiction. The timing is no coincidence; the Governor knows he has a friendly foursome standing by to do his bidding.

This court recently rejected an original action petition involving a dispute between the Legislature's Joint Finance Committee and the Attorney General. Kaul v. Wis. State Legislature, No. 2020AP1928-OA, unpublished dispositional order (Wis. Mar. 24, 2021). This interbranch dispute continues to play out in the lower courts where the parties have engaged in discovery and developed a full factual record to facilitate future appellate review. Nothing about the present petition warrants special treatment. Allowing this case to proceed in the normal course would maintain the status quo; pending ultimate disposition, the appropriation process would simply operate just as it has for more than a decade. Before the dispute reaches this court, the parties should have the opportunity to fully develop the record.

Invoking our original jurisdiction sets this court on a perilous path to resolve interbranch disputes whenever the Governor complains the Legislature is hindering his policy agenda. Divided government may frustrate the desires of those who would prefer immediate implementation of their policy preferences, but the Founders designed American government to protect minority interests from majority impulses. Tripartite government exists to ensure the people retain the power to govern themselves, and to handcuff the executive from ruling by decree. "This is what this suit is about. Power." Morrison v. Olson, 487 U.S. 699 (1988) (Scalia, J., dissenting).

Ignoring the lessons of history, the majority forges ahead (on an expedited basis no less) to thoughtlessly revamp state government. United States Supreme Court Chief Justice John Marshall observed that policing the separation of powers of the three branches "is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825). "While the separation of powers is easy to understand in theory, it carries with it not-insignificant complications." Serv. Emps. Int'l Union, Local 1 v. Vos, 2020 WI 67, ¶32, 393 Wis. 2d 38, 946 N.W.2d 35. The majority's accelerated briefing schedule deprives the parties of adequate time to address the complexities of the separation of powers issue now before the court, putting this court in the perilous position of hastily issuing a decision by term's end that could significantly alter the functioning of state government.

The majority's activism threatens democracy by affording the executive an easy avenue for bypassing the legislative process whenever it stalls his policy agenda. In granting the Governor's original action, the new majority manifests its allegiance to the politically powerful at the expense of the people whom Justices Dallet, Ann Walsh Bradley, and Jill Karofsky once disdained as "disgruntled taxpayers" and "discontented Wisconsinite[s]." Fabick v. Evers, No. 2020AP1718-OA, unpublished dispositional order, at 2 (Wis. Oct. 28, 2020) (Dallet, J. dissenting from grant of

petition to invoke original action). Apparently the Governor is more important to the new majority than the people we were elected to serve. The new majority has destroyed the integrity of the Wisconsin Supreme Court to advance its partisan agenda. I dissent.

I am authorized to state that ANNETTE KINGSLAND ZIEGLER, C.J., joins this dissent.

BRIAN HAGEDORN, J. (*dissenting*). This petition raises substantial questions about the proper roles of the executive and legislative branches under the Wisconsin Constitution. A decision in this case could occasion a historic shift—both in the operation of state government, and in how this court interprets the boundary lines between the branches of government. In that sense, there can be no doubt the legal questions presented affect matters of statewide importance (a traditional prerequisite for our involvement) and are appropriate for our review in the proper case. In this case, however, no emergency beckons, nor is there a pressing need to short-circuit the normal litigation process.[1] Indeed, the court today entertains a challenge to a program that has been in place since the release of the first iPhone some 17 years ago.[2] So what justifies the court's decision to dive in now?

One of our guiding principles should be judicial humility. Judicial humility recognizes that this court is given a modest role in our constitutional order, and that our court's inherent limitations counsel caution when exercising our immense power. We must remember that we are designed to be the court of last resort, not the court of first resort. Rather, even when the issues are ones we will likely consider in the end, the law is almost always better served by subjecting claims to the crucible of the multi-tiered adversarial process.

This is so because the litigation process can prove to hone, winnow, and refine. As a case works its way through the lower courts, ill-fitting issues and arguments may fall away, leaving only the sharpest, most well-developed points for appellate courts to consider. Multiple rounds of briefing may lead to the discovery of additional authorities and revised theories. This helps ensure that our decisions rest on arguments that have been thoroughly vetted.

In addition, we benefit from the work of our colleagues in the circuit court and court of appeals. In my experience, especially in novel areas, they have something to teach us and the

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[1] Typically, parties file cases in the circuit court, where the court makes a record and renders a decision. The losing party may proceed to the court of appeals and if the case meets certain criteria, it could be reviewed by the supreme court. To accept an original action that skips this process, the court has traditionally required some kind of exigency. See Petition of Heil, 230 Wis. 428, 442-43, 284 N.W.2d 42 (1939).

[2] See 2007 Wis. Act 20, § 646t.

parties. Thoughtful lower court decisions usually improve the clarity of our work by framing the arguments and telling the parties what worked and what didn't.

Letting a case mature through the normal process is not the only reason we should exercise caution here. This claim involves a power struggle between the executive and legislative branches. Here, the Governor and other executive branch agencies seek to alter or eliminate legislative checks that have, to some degree or another, been in place for years. Because the court here enters the fray too quickly, we risk further incentivizing what Justice Scalia called the "overjudicialization of the process of self-governance,"[3] thereby lulling the other branches to stay in their corners rather than lead. This short-circuits political resolution by elected officials who themselves, after all, have an independent duty to conform their conduct to the Wisconsin Constitution. Without question, this court should not dodge legitimate questions and should fulfill its role in saying what the law is when necessary. But we must remember that rushing to draw constitutional lines in hazy areas of law for the sake of refereeing political power struggles comes at a cost.

The court today, however, does not see the prudence of patience and humility. Instead, it charges onward, intent on deciding this case before the term's end. I see little reason to proceed in this fashion and forgo the benefits of the ordinary litigation process. This court has already seen a resurgent wave of high-profile cases come directly to us this term, and parties will rightly see this as an invitation to keep them coming. That is unfortunate. Judicial humility counsels denying the petition and allowing the case to be brought in circuit court. I respectfully dissent.[4]

I am authorized to state that ANNETTE KINGSLAND ZIEGLER, C.J., joins this dissent.

Samuel A. Christensen
Clerk of Supreme Court

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[3] Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 881 (1983).

[4] It is rare to dissent from a court order granting a petition for us to hear a case. Even when justices vote against taking a case, our typical practice is not to publicly say so—largely to preserve neutrality and avoid prejudging a case we have yet to fully consider. I dissent here, however, not to comment on the merits of this petition, but to continue my call for a more modest and restrained judiciary.