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Supreme Court of Wisconsin

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January 13, 2020

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

No. 2019AP2397 Zignego v. Wisconsin Elections Commission L.C. #19CV449

The court having considered the petition to bypass the court of appeals submitted on behalf of plaintiffs-respondents-petitioners, State of Wisconsin ex rel. Timothy Zignego, David W. Opitz, and Frederick G. Luehrs, III, and the emergency motion to reverse the court of appeals' decision to hold the stay motion in abeyance, or for this court to issue a stay of the writ of mandamus entered by the Circuit Court for Ozaukee County on December 17, 2019, filed on behalf of defendants-

appellants, Wisconsin Elections Commission, Dean Knudsen, Mark Thomsen, Marge Bostelmann, Julie Glancey, and Ann Jacobs;

IT IS ORDERED the petition to bypass is denied.

IT IS FURTHER ORDERED that the defendants-appellants' emergency motion is dismissed, given that this court has denied the petition to bypass.

DANIEL KELLY, J., did not participate.

REBECCA GRASSL BRADLEY, J. *(dissenting).* In declining to hear a case presenting issues of first impression immediately impacting the voting rights of Wisconsin citizens and the integrity of impending elections, the court shirks its institutional responsibilities to the people who elected us to make important decisions, thereby signaling the issues are not worthy of our prompt attention. "When a matter is brought to the Supreme Court for review, the court's principal criterion in granting or denying review is not whether the matter was correctly decided or justice done in the lower court, but whether the matter is one that should trigger the institutional responsibilities of the Supreme Court." Wis. S. Ct. IOP III (Sept. 13, 2019). With respect to petitions to bypass the court of appeals, this court's internal operating procedures provide:

> A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62[1r], and one the court concludes it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues. At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.

Wis. S. Ct. IOP III.B.2 (Sept. 13, 2019) (emphasis added). With no less than five upcoming elections in Wisconsin, including the presidential election in November,[1] there is an obvious need to hasten the ultimate appellate decision in this case in order to afford the voters, election officials, candidates, and poll workers clear and final direction regarding who may vote in this state. Instead, this court "chooses to sit idly by,"[2] allowing the case to proceed before the court of appeals and

[1] The same day the circuit court in this case issued the writ of mandamus precipitating the appeal, the League of Women Voters of Wisconsin, represented by the Fair Elections Center based in Washington D.C., filed a lawsuit in federal court against the members of the Wisconsin Elections Commission, alleging violations of the procedural due process requirements of the Fourteenth Amendment to the United States Constitution, demonstrating the perceived importance of this case not only statewide but nationally. See League of Women Voters of Wisconsin v. Wisconsin Elections Comm'n, No. 19-CV-1029 (W.D. Wis.; complaint filed Dec. 17, 2019).

[2] United Student Aid Funds, Inc. v. Bible, ___ U.S. ___, 136 S. Ct. 1607, 1609 (2016) (Thomas, J., dissenting from the denial of certiorari).

depriving the people of Wisconsin of a final answer to novel questions of statutory law on which only the state's highest court may have the final say. The court's "refusal to hear this case shows insufficient respect to the State of [Wisconsin], its voters"[3] and its elections.

"When justice is not forthcoming, when it is deferred too long, the result may be extreme injustice." Strachan v. Colon, 941 F.2d 128, 129 (2d Cir. 1991) ("For that reason the 40th clause of Magna Carta provided that justice be to none denied or delayed. 1 W.S. Holdsworth, A History of English Law, 57-58 (3rd ed. 1922). This ancient tenet of the law has been capsulized in the expression 'justice delayed is justice denied.'"). Nearly a century ago, this court emphasized we should "use all reasonable and lawful means to see that [our work] is done as expeditiously as circumstances will permit." See In re Snyder, 184 Wis. 10, 12, 198 N.W. 616 (1924). This court recognized "an insistent and well-founded demand by the public for a speedy and effective administration of justice, and it has been the constant effort of this court to meet such demand . . . because it is inherently reasonable and just." Id. at 13.

By deferring its inevitable decision in a case unlikely to return to us in time for this court to render a decision that could be implemented prior to the November presidential election (much less any earlier election), regardless of what the court of appeals decides, this court denies justice to the people of Wisconsin who deserve a prompt resolution of a dispute that affects important statewide and national elections this year. The case is well worthy of our attention.

Three voters/taxpayers, Timothy Zignego, Frederick Luehrs, and David Opitz (collectively, the plaintiffs) petition this court to accept the bypass of the appeal filed by the Wisconsin Elections Commission and five of its members (collectively, the WEC).[4] The plaintiffs' petition states the following issue for review:

> Whether, upon (1) receiving information from the Electronic Registration Information Center that a registered elector has changed his or her residence to a location outside of the municipality where he or she is registered and (2) notifying the elector by first class mail of the source of information, the Wisconsin Election Commission is required by Wis. Stat. § 6.50(3) to change the elector's registration from eligible to ineligible status if the elector fails to apply for continuation of registration within 30 days of the date the notice is mailed.

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[3] County of Maricopa, Arizona v. Lopez-Valenzuela, ___ U.S. ___, 135 S. Ct. 2046, 2046 (2015) (Thomas, J., dissenting from the denial of certiorari).

[4] The five members of the WEC named as defendants in this matter are Marge Bostelman, Julie Glancey, Ann Jacobs, Dean Knudsen and Mark Thomsen. The complaint explains that the sixth commissioner involved in the underlying decisions at issue in this case, Jodi Jensen, subsequently resigned so the plaintiffs did not name her (or her successor) as a defendant.

This case presents issues that trigger the institutional responsibilities of this court and satisfy multiple criteria for granting review. By denying the bypass petition, this court leaves voter rights and election integrity in flux, with no final resolution of the uncertainty in the law likely until after four statewide elections and one special congressional election. Each person's right to vote should be protected, but by its inaction, this court jeopardizes consistency in the exercise of that right.

Both parties acknowledge there is no case law interpreting Wis. Stat. § 6.50(3), the meaning of which presents a novel question of law and involves the potential deactivation of more than 200,000 voter registrations and, more generally, the manner in which the election officials of this state maintain voter registration lists. These constitute important and purely legal issues, which the state's highest court bears a responsibility to resolve. Only the final decision of the supreme court can provide the necessary clarity to guide all election officials in this state on how to conform their procedures to the law in the upcoming elections. Having the matter initially reviewed by the court of appeals will only delay a definitive declaration of what the law says, depriving election officials of the requisite knowledge to carry out elections in accordance with the law.

In deciding whether to accept a case, this court applies Wis. Stat. § 809.62(1r), which provides the following criteria for granting review applicable in this case:

> Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:
> . . . .
>
> (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.

This appeal primarily involves the interpretation of Wis. Stat. § 6.50(3), which presents novel questions of law because no cases interpreting the statute exist. These unsettled questions of law are of enormous consequence to the people of Wisconsin and demand careful and timely resolution

from this court. As framed by the parties, these issues are of special importance because they involve the democratic process in Wisconsin, the integrity of state voter rolls, and the registration of hundreds of thousands of voters.

The court of appeals hears thousands of cases a year, with disposition times approximating a year or more.[5] The workload of the state's intermediate appellate court will unnecessarily delay, in this time-sensitive case, a final pronouncement of what the law is——leaving election officials across the state in limbo and without clear guidance on how to follow it. The element of urgency in this case is paramount and warrants eliminating the time the appeal would spend in the court of appeals in favor of receiving an expeditious final decision from this court. It is difficult to reconcile the court's decision on this bypass petition with its lengthy and consistent history of hearing cases involving voting rights and election processes in the first instance——as part of the court's original jurisdiction——or by bypassing the court of appeals.[6]

Rejecting the bypass petition also signals to the federal court presiding over the related League of Women Voters case that the Wisconsin Supreme Court does not deem this matter important enough to assert its prerogative to resolve a controversy squarely within our jurisdiction on issues of state law. Historically, when a state law matter is pending before this court, federal

[5] In 2018 (the most recent year for which statistics related to the court of appeals are available), the court of appeals disposed of 2,480 cases. On average, it took 415 days for a three-judge panel to release an opinion after a notice of appeal was filed. Even cases proceeding on a "fast track" took an average of 170 days. See Wisconsin Court of Appeals, Annual Report (2018), https://www.wicourts.gov/other/appeals/statistical.jsp.

[6] See, e.g., NAACP v. Walker, 2014 WI 98, ¶¶1, 18, 357 Wis. 2d 469, 851 N.W.2d 262 (this court took jurisdiction of appeal on its own motion in order to decide constitutionality of voter identification act enjoined by lower court); Elections Bd. of Wisconsin v. Wisconsin Mfrs. & Commerce, 227 Wis. 2d 650, 653, 670, 597 N.W.2d 721 (1999) (this court granted bypass petition to decide whether express advocacy advertisements advocating the defeat or reelection of incumbent legislators violated campaign finance laws, in absence of cases interpreting applicable statutes); State ex rel. La Follette v. Democratic Party of United States, 93 Wis. 2d 473, 480-81, 287 N.W.2d 519 (1980) (original action granted to decide whether Wisconsin open primary system was binding on national political parties or infringed their freedom of association), rev'd by Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981); State ex rel. Reynolds v. Zimmerman, 22 Wis. 2d 544, 548, 126 N.W.2d 551 (1964) (deciding original action seeking to enjoin state from holding elections pursuant to legislative apportionment alleged to violate constitutional rights); State ex rel. Broughton v. Zimmerman, 261 Wis. 398, 400, 52 N.W.2d 903 (1952) (original action granted to restrain the state from holding elections based on districts as defined prior to enactment of reapportionment law), overruled in part by Reynolds, 22 Wis. 2d 544; State ex rel. Conlin v. Zimmerman, 245 Wis. 475, 476, 15 N.W.2d 32 (1944) (original action granted to interpret statutes in determining whether candidate for Governor timely filed papers to appear on primary election ballot).

courts stand down from interceding in order to allow the state's highest court to resolve it.[7] Leaving this case with the court of appeals may result in the related federal court litigation proceeding in tandem, with the issuance of potentially conflicting orders sowing confusion in the conduct of Wisconsin's elections.

The court's decision to take a pass on this case irreparably denies the citizens of Wisconsin a timely resolution of issues that impact voter rights and the integrity of our elections. The court disregards its duty to decide significant issues of statewide importance. The case is unquestionably worthy of our prompt attention. I dissent from the court's order denying the petition to bypass the court of appeals.

I am authorized to state that Chief Justice PATIENCE DRAKE ROGGENSACK and Justice ANNETTE KINGSLAND ZIEGLER join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

[7] See, e.g., Bender v. Wisconsin, No. 2019-CV-29, 2019 WL 4466973, at *3, 5-6 (W.D. Wis. Sept. 18, 2019) (in granting motion to dismiss claims made on behalf of indigent criminal defendants deprived of prompt assistance of counsel resulting from inadequate attorney compensation, court cited principles of federalism and comity in noting that federal intervention would be "particularly imprudent" given the Wisconsin Supreme Court's involvement in addressing the issue prompting the lawsuit; court held United States Supreme Court precedent "require[s] the court to abstain" from entertaining suit, citing Younger v. Harris, 401 U.S. 37, 44 (1971), which cautioned federal courts "anxious though [they] may be to vindicate and protect federal rights and federal interests, [to] always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States.").