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Supreme Court of Wisconsin

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April 1, 2020

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

2020AP557-OA

Jefferson v. Dane County

The court has considered the petition for leave to commence an original action and a supporting legal memorandum filed by petitioners, Mark Jefferson and the Republican Party of Wisconsin, and the response to the petition for leave to commence an original action filed by respondents, Dane County and Scott McDonell, in his official capacity as Dane County Clerk.

IT IS ORDERED that the petition for leave to commence an original action is granted and this court assumes jurisdiction over this action.

IT IS FURTHER ORDERED that the petitioners shall file a reply to the respondents' response by 1:00 p.m. on April 6, 2020, via email addressed to clerk@wicourts.gov.

IT IS FURTHER ORDERED that the petitioners shall file a brief in this court on or before April 21, 2020; the respondents shall file a responsive brief in this court on or before May 1, 2020; and the petitioners shall file a reply brief on or before May 6, 2020.

DANIEL KELLY, J. did not participate.

Page 2

April 1, 2020

2020AP557-OA

Jefferson v. Dane County

ANN WALSH BRADLEY, J. (*dissenting*). The petition for original action sets forth two succinct questions. As presented, the questions are neither esoteric nor complex. By framing the issues with the exaggerated use of "all," the Petitioners render the answers obvious.

First, the Petitioners ask this court to address "[w]hether the Dane County Clerk has the authority to issue an interpretation of Wisconsin's election laws allowing all voters in Dane County to request and cast an absentee ballot without providing a photo ID" (emphasis added). Petitioners frame the second issue as "[w]hether all Wisconsin voters may forgo State requirements to provide a photo ID when requesting an absentee ballot on grounds that Emergency Order #12 makes them 'indefinitely confined because of age, physical illness or infirmity'" (emphasis added). The Petitioners urge the court to answer the questions in the negative.

The County's response to these statements of the issues is in complete agreement with the Petitioners. Indeed, in responding to the two issues the County states that "[t]he answer to both is obviously no, and no one has suggested otherwise."¹

Further agreement is indicated throughout the County's briefing, evidenced by such statements as:

- "No one has suggested every voter in Wisconsin can claim they are indefinitely confined due to COVID-19 and forego providing a photo ID when casting an absentee ballot."
- "No one is challenging the validity or construction of Wis. Stat. § 6.86. WEC is charged with interpreting elections laws and it has issued guidance to voters and local clerks. The Clerk has posted the WEC guidance and stated it should be followed. This is a non-issue that does not deserve the attention of this court."

¹ On March 31, 2020, this court issued a temporary injunction, determining that "McDonnell appeared to assert that all voters are automatically, indefinitely confined solely due to the emergency and the Safer at Home Order" and that because of the posting "[v]oters may be misled" Accordingly, we ordered the County Clerk for Dane County to refrain from posting advice inconsistent with the Wisconsin Elections Commission guidance quoted below:

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.
2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.

Page 3

April 1, 2020

2020AP557-OA

Jefferson v. Dane County

- "Clearly, a county clerk cannot amend the statute. . . . A Clerk must apply the law subject to the guidance of WEC."
- "There is no existing controversy that requires action by this court."
- "The matter has been clarified and there is no issue."
- "In the midst of crisis WEC has exercised their statutory authority and there is no legal issue to resolve."
- "WEC has the statutory authority to interpret election laws."

These statements in the County's briefing demonstrate clear concessions to the succinct issues placed before this court. If the issues are conceded, there is no live case or controversy, and there is no need to further consider the original action petition.²

This court has historically exercised its original jurisdiction very sparingly. See Petition of Heil, 230 Wis. 428, 284 N.W.2d 42 (1939). Heil is the seminal original action case. It sets forth the circumstances under which the court may grant an original action. Not only does the majority's order fail to discuss these circumstances, it neglects to even mention Heil. Such a dearth of analysis demonstrates a disregard for the law and a triumph of the exercise of will over legal reasoning.

For the reasons set forth above, I respectfully dissent.

I am authorized to state that Justice REBECCA FRANK DALLET joins this dissent.

Sheila T. Reiff
Clerk of Supreme Court

² The mere fact that we granted temporary relief does not compel us to grant the petition for original action. See Wis. Prosperity Network v. Myse, 2012 WI 27, ¶¶1-2, 339 Wis. 2d 243, 810 N.W.2d 356 (explaining that the court granted a preliminary injunction and subsequently granted leave to commence an original action almost three months later); Wis. Professional Police Ass'n, Inc. v. Lightbourn, 2001 WI 59, ¶54, 243 Wis. 2d 512, 627 N.W.2d 807 (observing that the court issued a preliminary injunction while in the same order directing a response to the original action petition).