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Supreme Court of Wisconsin

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April 9, 2021

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

No. 2021AP428-OA Fabick v. Wis. Elections Comm'n

A petition for leave to commence an original action under Wis. Stat. § (Rule) 809.70, a "Motion for Permanent Injunction, or Alternatively a Temporary Injunction," a supporting legal memorandum, an appendix, and a reply have been filed on behalf of petitioner, Jeré Fabick. Responses to the petition and the motion for an injunction have been filed by (1) Wisconsin Elections Commission, its Commissioners in their official capacities, and its Administrator in her official capacity; (2) City of Madison and Maribeth Witzel-Behl, in her official capacity as City Clerk for the City of Madison; and (3) City of Milwaukee, City of Milwaukee Election Commission; Stephanie D. Findley, in her official capacity as Chair of the Milwaukee Election Commission, Jess Ripp, in his official capacity as Commissioner of the Milwaukee Election

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Commission, and Claire Woodall-Vogg, in her official capacity as Executive Director of the Milwaukee Election Commission. In addition, non-party memoranda amicus curiae have been filed by (1) the Wisconsin Institute for Law and Liberty; (2) the Liberty Justice Center; and (3) the Wisconsin Voting Rights Coalition.

In order to assist the court in considering whether to grant the petition for leave to commence an original action, the court concludes that it requires supplemental legal memoranda regarding the applicability or inapplicability of Wis. Stat. § 5.06 to the petition. Accordingly,

IT IS ORDERED that the parties shall file supplemental legal memoranda that address the following issue pursuant to the schedule set forth below: What is the effect, if any, of Wis. Stat. § 5.06 on the petition for leave to commence an original action?; and

IT IS FURTHER ORDERED that, at or before 4:00 p.m. on Friday, April 16, 2021, the respondents shall file one or more supplemental legal memoranda regarding the issue set forth in the preceding paragraph, and that, at or before 4:00 p.m. on Friday, April 23, 2021, the petitioner shall file a supplemental legal memorandum regarding the issue set forth in the preceding paragraph. Each supplemental legal memorandum shall not exceed 15 pages if a monospaced font is used or 3,450 words if a proportional serif font is used. Each supplemental memorandum shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. In addition to the service of paper copies on each party, each party filing a supplemental legal memorandum shall also serve a copy of the supplemental legal memorandum on all parties to the action via facsimile transmission or other electronic means prior to or simultaneous with the time that the supplemental legal memorandum is filed with this court. The filing party shall also ensure a paper original and 2 copies of the brief are received by the clerk of this court by 12:00 p.m. on the next business day following the electronic filing with the following notation on the top of the first page: "This document was previously filed via email."; and

IT IS FURTHER ORDERED that the court will not accept non-party legal memoranda regarding the issue set forth above.

PATIENCE DRAKE ROGGENSACK, C.J., ANNETTE KINGSLAND ZIEGLER, J., and REBECCA GRASSL BRADLEY, J., (*dissenting*). "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation." Greenlaw v. United States, 554 U.S. 237, 243 (2008). Abandoning our neutral role, the majority asks the parties to address an issue that neither the petitioner for an original action nor any of the responses to that petition have mentioned.

In so doing, the above order will cause confusion among all parties who have focused on the claim Fabick petitioned to raise by an original action and whether that claim should be proceeded on in an original action. The confusion will be troublesome for all because the order is issued before the court has decided whether to grant Fabick's petition for an original action, and therefore, it clouds the issue before us.

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Because we would honor the filings of all parties and make the decision about whether to grant the petition for original action based on those filings, we respectfully dissent from the above order.

Sheila T. Reiff
Clerk of Supreme Court

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