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Supreme Court of Wisconsin

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February 10, 2022
Amended February 18, 2022

To:

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You are hereby notified that the Court has entered the following AMENDED order (amended as to correct one word in concurrence, page 3):

No. 2022AP91 Richard Teigen v. Wisconsin Elections Commission,
L.C. #2021CV958

On February 2, 2022, intervenors-defendants-appellants, Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and League of Women Voters of Wisconsin, filed an expedited motion to extend the stay in this matter at least through the April 5, 2022 election. On February 4, 2022, defendant-co-appellant, Wisconsin Elections Commission, filed a motion to stay the circuit court's final order in this matter through the conclusion of the April 5, 2022 election, or the conclusion of all appellate proceedings, whichever is later. Intervenor-defendant-co-appellant, Democratic Senatorial Campaign Committee, joins the appellants' motions to extend the stay.

On February 7, 2022, the plaintiffs-respondents-petitioners filed a brief in opposition to the intervenors-defendants-appellants' motion to extend stay, and on February 8, 2022, they filed a supplemental brief in opposition to the Wisconsin Elections Commission's motion to extend the stay. The intervenors-defendants-appellants have filed a motion for leave to file a reply brief. Therefore,

IT IS ORDERED that the intervenors-defendants-appellants' motion for leave to file a reply brief is granted and the reply brief submitted with the motion is accepted for filing; and

IT IS FURTHER ORDERED that the emergency motion to extend the stay filed by intervenors-defendants-appellants, Disability Rights Wisconsin, Wisconsin Faith Voices for Justice, and League of Women Voters of Wisconsin, and the motion to stay the circuit court's final order filed by the defendant-co-appellant, Wisconsin Elections Commission, both motions joined by intervenor-defendant-co-appellant, Democratic Senatorial Campaign Committee, are held in abeyance until further order of the court.

REBECCA GRASSL BRADLEY, J. (*concurring*). An oft-cited maxim in the law holds that "like cases should be treated alike." Consistency ensures parties are not being treated unequally based on illegitimate considerations. Of course, upon further reflection a judge may realize her prior position was in error, and might offer an explanation as simple as: "The matter does not appear to me now as it appears to have appeared to me then."[1] When, however, a judge does not explain—or even acknowledge—a shift in perspective, her inconsistency creates an appearance of partiality.[2]

Less than a month ago, three of my colleagues would have denied a similar motion. In John Doe 1 v. Madison Metro School District, this court accepted a reply brief in support of a petition for review. Justice Ann Walsh Bradley, joined by Justices Rebecca Frank Dallet and Jill J. Karofsky, dissented:

> I would deny the motion to file the reply. This court has seen an unfortunate recent trend of filing such motions. I say unfortunate because a reply to a response to a petition for review is outside of this court's established rules. . . .
>
> We should follow our rules. If we are to routinely grant such motions, the rules should change lest they be rendered illusory.[3]

[1] McGrath v. Kristensen, 340 U.S. 162, 178 (1950) (Jackson, J., concurring) (quoting Baron Bramwell).

[2] See SCR 60.04 ("A judge shall perform the duties of judicial office impartially and diligently.").

[3] John Doe 1 v. Madison Metro. Sch. Dist., No. 2020AP1032, unpublished order, at 2–3 (Wis. Jan. 13, 2022) (Ann Walsh Bradley, J., dissenting).

Nothing in "our rules" permits a reply to a response to the motion pending before the court, hence the Intervenors' request for leave to file one. Nevertheless, the court unanimously grants the motion in this case.

Like the reply in John Doe 1, this reply is worthy of our consideration. Appellate practitioners have long understood that this court retains the inherent authority to grant a motion for leave to file a reply even though no rule of appellate procedure specifically addresses them.[4] Granting this motion is completely consistent with this court's customary practice in critically important cases.[5] In fact, this court often grants these motions without any dissent[6] (even from those who recently decried that the court had "rendered illusory" the rules of appellate procedure).

This case is critically important. "Elections are the foundation of American government and their integrity is of such monumental importance that any threat to their validity should trigger not only our concern but our prompt action."[7] In addressing a threat to the validity of elections in this case, this court has a duty to ensure it is fully apprised of all relevant facts and law. I therefore respectfully concur with the court's decision to grant the Intervenors' Motion for Leave to File a Reply Brief.

Sheila T. Reiff
Clerk of Supreme Court

[4] Michael S. Heffernan, Appellate Practice and Procedure in Wisconsin § 23.13 (2022) ("There is no provision for filing a reply to a response to a petition for review. If a petitioner believes a reply is necessary because, for example, the response raises a new issue or completely misstates the facts or law, the petitioner may file a motion for leave to file a reply, accompanied by the reply itself. Replies should be brief and filed only in unusual circumstances.").

[5] Cf. Waity v. LeMahieu, No. 2021AP802, unpublished order (Wis. July 9, 2021).

[6] See id.

[7] Trump v. Biden, 2020 WI 91, ¶152, 394 Wis. 2d 629, 951 N.W.2d 568 (Rebecca Grassl Bradley, J., dissenting) (quoted source omitted).

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