OFFICE OF THE CLERK

Supreme Court of Wisconsin

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June 19, 2023

To:

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

No. 2022AP123 State v. Thayer, L.C.#2018CF17

The court having considered the motion of Emily North (a pseudonym, see Wis. Stat. § (Rule) 809.86(4)) for leave to file a non-party brief amicus curiae;

IT IS ORDERED that the motion is granted. The brief filed with the motion is accepted as filed.

ANNETTE KINGSLAND ZIEGLER, C.J. (*concurring*). I concur with the court's order and write separately to clarify that nothing in this order should be understood as declaring any rights or duties under the law. As our internal operating procedures counsel, "The decision to deny a motion file an amicus brief is the court's." Wis. S. Ct. IOP § III.B.6.c (Apr. 20, 2023). In deciding whether to grant leave to file an amicus brief, we generally consider whether "it appears that the movant has a special knowledge or experience in the matter at issue in the proceedings so as to render a brief from the movant of significant value to the court." Id. Accordingly, we do not always grant nonparties' motions for leave to file. See, e.g., Southport Commons, LLC. v. DOT, No. 2019AP130, unpublished order (Wis. Dec. 21, 2020); County of Dane v. PSC of Wis., 2021AP1321-LV / 1325, unpublished order (Wis. Dec. 10, 2021).

In her motion for leave to file an amicus brief, the victim in this case argued she has a "state constitutional right to submit" her brief, citing Article I, Section 9m(2)(j) of the Wisconsin Constitution and Wis. Stat. §§ 950.02(4)(a)1., (4)(a)4.a., 950.04(1v)(pm). This court has not yet fully evaluated to what extent, if any, victims' constitutional or statutory rights entitle them to file amicus briefs in this law-declaring court. Nor have we had the benefit of thorough research, analysis, briefing, or argument on these important issues. To be clear, this court is not declaring a right to submit an amicus brief by this order.

REBECCA GRASSL BRADLEY, J. (*concurring*). I concur with the court's order granting the victim's motion to file a non-party brief but write separately to respond to Justice Jill J. Karofsky's concurrence. She discusses a recent amendment to the Wisconsin Constitution commonly referred to as "Marsy's Law" as well as a statutory bill of rights for victims in existence for several years. Justice Karofsky asserts Marsy's Law and the statutory bill of rights separately confer on victims the right to file a non-party brief. As Chief Justice Annette Kingsland Ziegler explains in her concurrence, this court has not decided whether either source of law entitles a victim to do so. While Marsy's Law is relatively new, the statutory bill of rights, which contains similar language, is not, and Justice Karofsky's interpretation of it is novel and far-reaching.

Contrary to Justice Karofsky's concurrence, we need not analyze Marsy's Law or the statutory bill of rights—and the court's order does not address either. Although the victim cites Marsy's Law and the statutory bill of rights in her motion, she also states this court may assume without deciding that neither source of law is applicable and still grant her motion because hearing from her is "desirable." See Wis. Stat. § (Rule) 809.19(7)(a) (2021–22). Customarily, this court takes an especially permissive approach to accepting non-party briefs. See Teigen v. WEC, No. 2022AP91, unpublished order (Wis. Mar. 28, 2022) (Rebecca Grassl Bradley, J., concurring) (explaining a United States Senator could file a non-party brief in a case about election law).[1] We have discretion to grant almost any non-party brief, and our primary concern is usually "whether reading the person's arguments will assist the court in analyzing the law." Id. at 3; see also Wis. Sup. Ct. IOP III.B.6.c (Apr. 20, 2023) (indicating a motion to file a non-party brief should be granted "if it appears that the movant has a special knowledge or experience in the matter at issue in the proceedings so as to render a brief from the movant of significant value to the court"). In this case, the victim's arguments may aid us in deciding whether to grant the petition for review. The petition opens with the following:

> The victim in this criminal case came to . . . [the defendant]'s sentencing hearing and recommended that he be given a stiff sentence. The sentencing court heard that recommendation and obliged, giving . . . [the defendant] a long sentence . . . . Years later, the victim came to regret her heavy-handed recommendation, believing instead that a more lenient sentence was appropriate. Relying on the victim's changed opinion as to the appropriate sentence, . . . [the defendant] sought downward modification of his sentence. Without even holding a hearing or taking testimony from the victim, the postconviction court denied . . . [the defendant]'s motion, concluding that the victim's changed opinion was not a new factor.
>
> . . . .
>
> When, after sentencing, a crime victim changes their mind regarding the appropriate sentence for a criminal defendant, can that change of opinion constitute a new factor for sentence modification purposes?

[1] For reference, a copy of this order is attached as an appendix.

Given the relatively unique facts of this case, reading the victim's non-party brief would be prudent. After all, her change of heart underlies the question presented. Notably, other courts have permitted victims to file non-party briefs. See, e.g., Brief of Amicus Curiae Coles Whalen in Support of Respondent, Counterman v. Colorado, at 2 (U.S.) (No. 22-138); State v. Tedesco, 69 A.3d 103, 109 (N.J. 2013) ("The victim's arguments should be heard and evaluated, if not as a party with standing, then as an amicus[.]"). The court correctly grants the motion without ruling on whether a victim is entitled to file a non-party brief. Justice Karofsky "muddles" this simple order by suggesting otherwise.

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March 28, 2022

To:

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

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

The court having considered: (1) the March 18, 2022 motion of Senator Ron Johnson for leave to file a non-party brief amicus curiae along with 22 copies of the proposed brief, together with his motion asking this court to grant him leave to participate in oral argument; (2) the March 21, 2022 motions of Matthew M. Fernholz, counsel on behalf of Honest Elections Project, for an order admitting non-resident Attorneys Cameron T. Norris and James P. McGlone, pro hac vice, and for leave to file a non-party brief amicus curiae; (3) the March 22, 2022 motions of Attorney Michael D. Dean, counsel on behalf of True the Vote, Inc., for an order admitting non-resident Attorney James Bopp, Jr., pro hac vice, and for leave to file a non-party brief amicus curiae, together with 22 copies of the proposed brief; (4) the March 23, 2022 motion of the Republican

National Committee, et al. for leave to file a non-party brief amicus curiae, along with 21 copies of the proposed brief; (5) the March 23, 2022 motion of the League of Wisconsin Municipalities for leave to file a non-party brief amicus curiae no later than March 30, 2022; and (6) a joint motion of Disability Rights Wisconsin, League of Women Voters of Wisconsin, and Wisconsin Faith Voices for Justice, Wisconsin Elections Commission, and Democratic Senatorial Campaign Committee to allot 45 minutes of oral argument time per side;

IT IS ORDERED that Senator Ron Johnson's motion for leave to file a non-party brief amicus curiae is granted and the accompanying brief is accepted for filing; and

IT IS FURTHER ORDERED that Senator Ron Johnson's motion for oral argument time is denied. Amici are generally not granted oral argument time in addition to the argument time allotted to the parties, but amici are generally allowed to speak at oral argument if any party cedes time. Senator Johnson is directed to ask the parties if they would be willing to cede any oral argument time to him. Senator Johnson is further directed to inform the court by email to the clerk of this court at clerk@wicourts.gov, no later than 4:00 p.m. on April 4, 2022, whether the parties are or are not willing to cede any argument time; and

IT IS FURTHER ORDERED that the motions admitting Attorneys Cameron T. Norris, James P. McGlone and James Bopp, Jr., pro hac vice, are granted. A copy of Supreme Court Rule (SCR) 10.03(4), setting forth the requirements for attorneys appearing pro hac vice, is attached to the moving parties' copies of this order; and

IT IS FURTHER ORDERED that Honest Elections Project's motion for leave to file a non-party brief is granted. Twenty-two copies of the brief shall be filed on or before March 30, 2022. In light of the oral argument scheduled on April 13, 2022, requests for briefing extensions will be viewed with disfavor; and

IT IS FURTHER ORDERED that True the Vote's motion for leave to file a non-party brief amicus curiae is granted and the accompanying brief is accepted for filing; and

IT IS FURTHER ORDERED that the Republican National Committee et al.'s motion for leave to file a non-party brief amicus curiae is granted and the accompanying brief is accepted for filing; and

IT IS FURTHER ORDERED that the League of Wisconsin Municipalities' motion for leave to file a non-party brief amicus curiae is granted. Twenty-two copies of the brief shall be filed on or before March 30, 2022. In light of the oral argument scheduled on April 13, 2022, requests for briefing extensions will be viewed with disfavor; and

IT IS FURTHER ORDERED that the joint motion to allot 45 minutes or oral argument time per side is granted.

REBECCA GRASSL BRADLEY, J. (*concurring*). I concur with the court's order. I write separately to address Justice Karofsky's separate writing, in which she explains why she would not grant Senator Ron Johnson's motion for leave to file a non-party brief.

Justice Karofsky begins by defining the Latin phrase, "amicus curiae." Referencing a standard English dictionary, she says it means a "friend" or "impartial adviser." Justice Karofsky declares Senator Johnson is not our friend, let alone an impartial one: "Senator Johnson makes no secret of his personal stake in this dispute over absentee ballot return procedure, acknowledging that he will appear as a Senate candidate on an upcoming ballot. Indeed, he argues this 'direct interest in the outcome' is a reason we should accept his amicus curiae motion."

"[T]he beginning seems to be more than half the whole, and many of the points being sought seem to become manifest on account of it." 1 Aristotle, Nicomachean Ethics ch. 7 (approximately 340 B.C.). Justice Karofsky should have begun with the text of the relevant rule, Wis. Stat. § (Rule) 809.19(7) (2019–20), which states:

> NONPARTY BRIEFS.
>
> (a) A person not a party may by motion request permission to file a brief. The motion shall identify the interest of the person and state why a brief filed by that person is desirable.
>
> (b) If the brief will support or oppose a petition under s. 809.62 or 809.70, the brief shall accompany the motion and shall be filed within the time permitted for the opposing party to file a response to the petition. If an unpublished opinion is cited under s. 809.23 (3) (a) or (b), a copy of the opinion shall be provided in an appendix to the brief.
>
> (c) Except as provided in par. (b), the motion shall be filed not later than 14 days after the respondent's brief is filed, and the brief shall be filed within the time specified by the court. If an unpublished opinion is cited under s. 809.23 (3) (a) or (b), a copy of the opinion shall be provided in an appendix to the brief.
>
> (d) A nonparty brief shall comply with sub. (1) (e) and (f).

Nowhere in the statutory text does any Latin phrase appear (let alone amicus curiae). Nor does the text suggest a non-party with an interest in the case cannot submit a brief. To the contrary, the statute requires non-parties to disclose their interest in the case, inherently recognizing that all—or at least most—persons who take the time to write a brief will have an interest. Additionally, the text contemplates some non-parties will openly advocate in "support or opposition" of a position taken by a party. Whether to grant a motion for leave to file a non-party brief in light of the person's interest is left to our discretion. We should primarily consider whether reading the person's arguments will assist the court in analyzing the law.

Customarily, this court refers to a non-party as an amicus curiae, so Justice Karofsky's attempt to define the phrase has some utility, if for no other reason than to help illuminate how some members of this court may determine what non-party briefs to accept.[1] Problematically, Justice Karofsky does not consult a legal dictionary in deriving a definition, even though amicus curiae is a "legal term[] of art" with an "accepted legal meaning."[2] Black's Law Dictionary defines the phrase as:

> [Latin "friend of the court"] (17c) Someone who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter. — Often shortened to amicus. — Also termed friend of the court.[3]

As this seminal source states in its definition of the phrase, amici curiae often have "a strong interest in the subject matter."[4] They are not, in other words, "impartial adviser[s]," as Justice Karofsky purports. In fact, a leading treatise on Wisconsin appellate practice and procedure advises non-parties who wish to file an amicus curiae brief that in some cases "the court is less interested in a dispassionate review of the applicable law than it is in an interpretation that frankly represents the interests of the amicus, albeit in a temperate manner."[5] These sources support the common sense position that "friends of the court" often have reasons for filing non-party briefs that are not purely altruistic.

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[1] Our Internal Operating Procedures use the word "amicus" in describing the procedure used to grant or deny a motion for leave to file a non-party brief. Wis. Sup. Ct. IOP III.B.6.c ("A motion to file a brief by a person not a party to a proceeding is assigned to the commissioner to whom the matter has been assigned for analysis, who may grant the motion if it appears that the movant has a special knowledge or experience in the matter at issue in the proceedings so as to render a brief from the movant of significant value to the court. If the commissioner questions the propriety of granting the motion or if it appears that the motion should be denied, the commissioner reports the matter to the court with a recommendation that it be denied. The decision to deny a motion to file an amicus brief is the court's. The commissioner prepares an appropriate order and arranges for its issuance by the office of the clerk."). This IOP indicates the primary factor in determining whether to grant such a motion is "the movant[s] . . . special knowledge or experience in the matter at issue in the proceedings[.]" Id.

[2] See Bank Mut. v. S.J. Boyer Const., Inc., 2010 WI 74, ¶23, 326 Wis. 2d 521, 785 N.W.2d 462 (quoting Estate of Matteson v. Matteson, 2008 WI 48, ¶22, 309 Wis. 2d 311, 749 N.W.2d 557).

[3] Amicus Curiae, Black's Law Dictionary (11th ed. 2019).

[4] Id.

[5] Michael S. Heffernan, Appellate Practice and Procedure in Wisconsin § 11.27 (2022).

Elected officials regularly ask for and receive leave to file non-party briefs in election disputes because the insight they can provide a court is normally of sufficient value to outweigh their partiality. Earlier this term, we granted several congressmen leave to file a non-party brief in a redistricting dispute to which they eventually became a party. No justice dissented.[6] This redistricting dispute eventually reached the United States Supreme Court, which granted Wisconsin State Senator Lena C. Taylor leave to file a non-party brief.[7] A simple Google search of "congressmen and amicus briefs" demonstrates the novelty of Justice Karofsky's position. See generally Rorie L. Spill Solberg & Eric S. Heberlig, Communicating to the Courts and Beyond: Why Members of Congress Participate as Amici Curiae, 29 Legis. Stud. Q. 591, 591 (2004) ("[B]etween the 1979 and 1996 (October) terms, members of Congress filed 105 amicus curiae briefs with the [United States] Supreme Court.").

Senator Johnson's non-party brief will likely provide unique insight into the factual and legal issues at stake in this case. No party to this action is an office holder or an elected official like Senator Johnson. He has real-world experience with Wisconsin elections. Additionally, he was the chairman of the United States Senate Committee on Homeland Security and Government Affairs, and in that capacity he conducted an investigation and held hearings on the 2020 election. He may have learned something about drops boxes, ballot harvesting, and other election-related activities at the heart of this dispute.

Justice Karofsky's vote to deny Senator Johnson's motion is difficult to reconcile with her vote to allow the Republican National Committee to file a non-party brief.[8] Justice Karofsky seems to be less troubled by amicus briefs submitted by people with a collective interest in the outcome of a case. In conclusory fashion, she indicates only groups of individuals should be permitted to file non-party briefs, but not individuals. Not only is her suggestion inconsistent with our practice, but no discernable principle supports extending a privilege to a group of people with a collective interest while denying the same privilege to individuals.[9] An unspoken rule of "amicus briefs for

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[6] Johnson v. WEC, No. 21AP1450-OA, unpublished order (Wis. Sept. 8, 2021).

[7] Brief of Amicus Curiae Senator Lena C. Taylor in Support of Neither Party, Wis. Legislature v. WEC, 595 U.S. __ (2022) (per curiam), (No. 21A471).

[8] The Democratic Senatorial Campaign Committee is a party to this dispute.

[9] Nothing in Appellate Practice and Procedure in Wisconsin suggests we have a custom of not accepting non-party briefs from individuals. Earlier this term, we accepted a non-party brief filed by Daniel R. Suhr. Non-Party Brief of Daniel R. Suhr in Support of Petitioners, Johnson v. WEC (Wis. 2021), (No. 2021AP1450-OA). Last term, we accepted a non-party brief filed by Professor Ryan J. Owens. Non-Party Brief of Professor Ryan J. Owens in Support of Petitioners, Wis. Council of Religious & Indep. Schs. v. Heinrich, 2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 350, (No. 2020AP1420). Both motions were granted without dissent.

them, but not for him" lacks any foundation in our rules or practice. Wisconsin Stat. § (Rule) 809.19(7)(a) informs the public "[a] person" can ask for leave to file a non-party brief. Although it does not promise we will grant any particular motion, nothing in the rule suggests the court disfavors motions filed by a specific category of persons, much less "individuals."

In recent terms, this court has apparently developed a catalog of procedural customs accorded the rank of "rule"—but these "rules" are likely known only to the most elite members of the Wisconsin bar. In ghoulish fashion, they have come out of nowhere and derailed cases. Worse still than this lack of transparency, they seem to be applied (or not) in an inconsistent manner that smacks of partiality, precisely because of their opaque nature.[10] When a "rule" is little more than a tacit understanding among some justices, it is no rule at all but a blunderbuss they employ (or not) without any accountability other than their colleagues' separate writings in unpublished orders.

For the foregoing reasons, I respectfully concur.

JILL J. KAROFSKY, J. (*concurring in part, dissenting in part*). We should adhere to our long-standing practice of not accepting any movant as an *amicus curiae* ("friend of the court") when that movant has a personal stake in the ultimate ruling. Such a personal interest means that movant comes to us not as an "impartial adviser" or "friend,"[11] but instead as an advocate for his or her own interest. Here, Senator Johnson makes no secret of his personal stake in this dispute over absentee ballot return procedure, acknowledging that he will appear as a Senate candidate on an upcoming ballot. Indeed, he argues this "direct interest in the outcome" is a reason we should accept his *amicus curiae* motion.

But that rationale conflicts with our past practice. For example, we recently denied *amicus curiae* status to a public interest organization, Clean Wisconsin, whom we otherwise frequently grant such status. See County of Dane v. PSC, Nos. 2021AP1321-LV & 2021AP1325, unpublished order (Wis. Dec. 10, 2021). Although Clean Wisconsin's unique experience regularly aids our review, its litigation of a sufficiently similar—but not identical—legal issue in a separate

[10] Kaul v. Prehn, No. 2021AP1673, unpublished order, at 2 (Wis. Nov. 16, 2021) (Rebecca Grassl Bradley, J., concurring) ("At the same time the court grants the bypass petition in this case—notwithstanding the Attorney General's noncompliance with the court's 'premature petitions' rule—a majority denies the bypass petition in Jeffrey Becker v. Dane County, asserting that '[t]his court generally denies as premature petitions for bypass prior to the filing of briefs in the court of appeals' and citing a 1985 case for this practice. There is no rule prohibiting the filing of a petition to bypass prior to the parties completing their briefing before the court of appeals."). When the inconsistent application of these "rules" is called out, the response is often little more than a statement that "the unique circumstances of this case warrant an exception to practice." Id. at 3 (Rebecca Frank Dallet, J., concurring).

[11] Amicus Curiae, Oxford English Dictionary (3d ed. 2021).

case gave it too much of a personal stake in the outcome to trust its proposed brief was truly friendly (i.e. impartial) rather than self-interested.[12]

Senator Johnson comes to us with an even more direct individual interest[13] than that which warranted denial of Clean Wisconsin's *amicus curiae* request. Perhaps his experience investigating the 2020 national election as chairperson of the U.S. Senate's Committee on Homeland Security and Government Affairs may provide a different perspective on this state election law dispute; but his profound countervailing personal interest in the outcome of this case should disqualify him from filing a brief *amicus curiae*. If it were otherwise, how could this court, not to mention the public, be confident that *amici curiae* come to us as impartial friends rather than as self-interested advocates? As we have historically decided when movants come before us with an even lesser stake in the ultimate ruling, I would deny Senator Johnson's motion for leave to participate as *amicus curiae*.[14]

I am authorized to state that Justices ANN WALSH BRADLEY and REBECCA FRANK DALLET join this separate writing.

Sheila T. Reiff
Clerk of Supreme Court

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[12] Contrast Clean Wisconsin's disqualifying interest in County of Dane v. PSC, Nos. 2021AP1321-LV & 2021AP1325, with the Department of Transportation's interest in another upcoming case, Backus v. Waukesha County, No. 2020AP307. We permitted the Department to file an *amicus curiae* brief even though it may at some point in the future rely on our legal ruling to its own ends. This speculative interest was insufficient to outweigh the potential insight that the agency's experience with the underlying substantive issue might provide the court. Senator Johnson's personal stake in this case's outcome, however, far exceeds that of either Clean Wisconsin or the Department of Transportation in their respective cases.

[13] Historically, the court has particularly disfavored *amicus curiae* briefs filed by individuals, as opposed to groups, because accepting such briefs may open the door to accepting briefs from any interested person, regardless of whether they provide a helpful perspective to the court not otherwise provided by the parties.

[14] I concur that the Honest Elections Project, True the Vote, Inc., the Republican National Committee, et al., and the League of Wisconsin Municipalities do not have a disqualifying personal interest and agree to grant their *amicus curiae* motions.

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JILL J. KAROFSKY, J. (*concurring*). We are asked to consider whether a crime victim may have a voice when her case is considered by the Wisconsin Supreme Court. This is not a close call. Victims have both a statutory and constitutional right to be heard by this court, in this case via a non-party brief.

Constitutionally, a victim is entitled, "[u]pon request, to be heard in any proceeding during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon." Wis. Const, art. I, § 9m(2)(i). Victims also have the constitutional right to "have information pertaining to the economic, physical, and psychological effect upon the victim of the offense submitted to the authority with jurisdiction over the case and to have that information considered by that authority." Wis. Const. art. I, § 9m(2)(j). Similarly, our statutes protect a victim's right "to have the court provided with information pertaining to the economic, physical and psychological effect of the crime upon the victim and have the information considered by the court." Wis. Stat. § 950.04(1v)(pm). In summary, victims have a right to be heard "in any proceeding" where their rights are implicated and to inform either "the court" or, more broadly, "the authority with jurisdiction over the case" of the crime's effect on them. This case is a proceeding, and we are both a court and the authority with jurisdiction over the case.

Chief Justice Ziegler's attempt to "clarify" that we are not declaring that a victim has a right to file a non-party brief because this court has not yet "fully evaluated" the relevant provisions muddles the issue. Victims have a right to be heard. That is the law whether or not we, as a law declaring court, have had the opportunity to fully evaluate and declare that to be so. And that is the law whether or not this court's internal operating procedures, which do not trump the Wisconsin Constitution, give this court the discretion to grant leave to file an amicus brief. Here, we are not being asked to declare the law in the context of a contested cause of action. Rather, we are being asked to follow the law. Nothing in this order should cause victims to question their right to be heard by this court.

Because both the Wisconsin Constitution and the statutes give victims the right to inform this court of their experiences, we are duty bound to grant the victim's request to be heard. While this court may one day designate a different mechanism, at this juncture, granting the victim's request to file a non-party brief honors her request to be heard.

I am authorized to state that Justice ANN WALSH BRADLEY joins this concurrence.

Samuel A. Christensen
Clerk of Supreme Court