

SUPREME COURT OF WISCONSIN

Case No. 2009AP001860-OA

JULAINÉ APPLING, JAREN E. MILLER
and EDMUND L. WEBSTER,

Petitioners,

v.

JAMES E. DOYLE, in his official capacity as
Governor of the State of Wisconsin,

KAREN TIMBERLAKE, in her official
capacity as Secretary of the Wisconsin
Department of Health Services, and

JOHN KIESOW, in his official capacity as
State Registrar of Vital Statistics,

Respondents.

INTERVENING RESPONDENT FAIR WISCONSIN'S OPPOSITION TO
THE PETITION TO TAKE JURISDICTION OF ORIGINAL ACTION

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Intervening Respondent Fair Wisconsin, Inc., through its undersigned counsel, submits this Opposition To The Petition To Take Jurisdiction Of Original Action filed by Petitioners Julaine Appling, Jaren E. Hiller, and Edmund L. Webster.

FACTUAL BACKGROUND

On June 29, 2009, Governor James E. Doyle signed into law a state budget that included the creation of a domestic partner registration system for same-sex couples under Chapter 770 of the Wisconsin Statutes (the “Domestic Partnership Law”). At the same time that the Domestic Partnership Law was enacted, the Wisconsin legislature revised certain existing state statutes so that they would be applicable to domestic partners. These revisions had the effect of granting a limited number of legal protections to domestic partners including: the right to share a room in a nursing home, the right to visit one another in the hospital, the right to inherit from the estate of a domestic partner who dies without a will, the ability to take a medical leave to care for a domestic partner with a serious medical condition, the right to sue for a partner’s wrongful death, the presumption that real estate held between domestic partners is held as joint

tenants with rights of survivorship, and an exemption from real estate transfer fees for real estate transferred between domestic partners.

The registry created by the Domestic Partnership Law went into effect on August 3, 2009. As of September 17, 2009, more than 1,030 same-sex couples have registered as domestic partners throughout Wisconsin.

On July 23, 2009, shortly before the registry went into effect, Petitioners filed their “Petition To Take Jurisdiction Of Original Action” (the “Petition”) in which they ask this Court to take jurisdiction of, and grant leave to commence, an original action challenging the constitutionality of the Domestic Partnership Law. The Petition asserts that the Domestic Partnership Law violates Article XIII, sec. 13 of the Wisconsin Constitution (the “Marriage Amendment”), which was passed by the voters of Wisconsin in November 2005. The Marriage Amendment states:

Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

The Petition asks this Court to declare the Domestic Partnership Law unconstitutional and to enjoin the Governor, the Secretary of the Wisconsin

Department of Health Services, and the State Registrar of Vital Statistics (collectively, the “Respondents”) from enforcing its provisions.

On August 17, 2009, this Court ordered the Respondents to file, by August 31, 2009, a response to the Petition containing a statement regarding the relevant facts that Respondents believed were in dispute. On August 21, 2009, the Wisconsin Attorney General issued a statement stating that he would not represent the Respondents in defending the Domestic Partnership Law. In response, Governor Doyle appointed private outside counsel and this Court granted the Respondents an extension until September 22, 2009 to respond to the Petition.

Contemporaneous with the filing of this opposition, Fair Wisconsin has filed a motion and accompanying legal brief requesting leave to intervene in these proceedings.

ARGUMENT

I. THE COURT SHOULD DECLINE TO TAKE JURISDICTION BECAUSE NUMEROUS FACTS ARE IN DISPUTE.

A. *This Court Generally Does Not Grant Original Jurisdiction If The Parties Dispute The Relevant Facts.*

This Court has previously noted that, as a general matter, it does not exercise its discretion to take original jurisdiction of a matter if the parties dispute the relevant facts necessary to resolve the matter. *See, e.g., Green*

For Wisconsin v. State Elections Board, 297 Wis. 2d 300, 302-303, 723 N.W.2d 418 (2006) (“Because this court is not a fact-finding tribunal, it generally will not exercise its original jurisdiction in matters involving contested issues of fact.”), citing *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 128, 229 N.W. 643 (1930) (“This court will with the greatest reluctance grant leave for the exercise of its original jurisdiction . . . where questions of fact are involved.”); see also *Citizens Utility Board v. Klauser*, 194 Wis. 2d 484, 488, 534 N.W.2d 608 (1995) (granting a petition to take jurisdiction of an original action because “the material facts are agreed to by the parties.”).

This Court’s reluctance to take jurisdiction in cases involving disputed factual issues stems from a recognition that such cases are best resolved, in the first instance, by a trial court. As this Court has previously noted, “[t]he circuit court is much better equipped for the trial and disposition of questions of fact than is this court and such cases should be first presented to that court.” *In re Exercise of Original Jurisdiction*, 229 N.W. at 645. Or, stated another way, this Court’s original jurisdiction is “designed to resolve important legal questions but not to referee factual disputes.” *Green For Wisconsin*, 297 Wis. 2d at 303.

Although Petitioners argue that this Court has “often” granted original jurisdiction to resolve constitutional issues raised by state budget provisions (Petition, ¶ 43), several of the cases upon which they rely for this proposition suggest that the Court should not assume jurisdiction in matters like this one where the parties dispute the relevant facts. For example, in *Wis. Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, 243 Wis. 2d 512, 627 N.W.2d 807, the parties entered into a stipulation of facts that this Court used to resolve the matter.¹ Similarly, in *Citizens Util. Board v. Klauser*, 194 Wis. 2d 484 (1995), the Court took original jurisdiction of the dispute, noting that the “material facts were agreed to by the parties.” See also *Joni B. v. State*, 202 Wis. 2d 1 (1996) (taking original jurisdiction of a matter after noting that “[t]he parties do not dispute the relevant facts”).

In contrast to the parties in the cases cited by Petitioners, and as discussed in detail below, the parties in this matter hotly dispute the facts that need to be resolved before a court can rule on the constitutionality of the Domestic Partnership Law. Furthermore, Fair Wisconsin respectfully

¹ In addition, the budgetary act at issue in *Wis. Prof'l Police Ass'n* had a specific provision requesting the Court to take jurisdiction of any original action relating to implementation of the Act. No such provision is involved in the matter presently before the Court.

submits that, based on its review of the factual allegations in the Petition, the parties' dispute is so fundamental and significant that the parties will not be able to agree to a stipulation of facts that will allow this Court to resolve the constitutional question. Thus, this Court should not assume original jurisdiction of this matter.

B. The Parties Dispute The Facts Relating To The Legislative and Ratification Debate About The Marriage Amendment.

When construing a constitutional amendment, Wisconsin courts seek to “give effect to the intent of the framers and of the people who adopted it.” *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 719 N.W.2d 408 (citation omitted). As this Court has noted:

The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time.

Id. To interpret a constitutional amendment in a manner that gives effect to the intent of the framers and the voters, Wisconsin courts consider three primary sources – the plain meaning; the constitutional debates, both in the legislature and in the subsequent voter ratification campaign; and, the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption of the amendment. *Id.*, citing *Schilling v. Wisconsin Crime Victims Rights Bd.*, 2005 WI 17, ¶

16, 278 Wis. 2d 216, 692 N.W.2d 623, *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 44, 270 Wis. 2d 318, 677 N.W.2d 612; *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996) (additional citations omitted).

Consistent with this settled law regarding the interpretation of constitutional amendments, Wisconsin courts consider a wide array of evidence to ascertain the intent of the legislature and voters. For example, in *Dairyland Greyhound Park, Inc.* – a matter which was resolved in the first instance by the Dane County circuit court – the lower court and, on review, this Court, was faced with a significant amount of evidentiary materials relating to legislative and voter intent including: letters written by the Attorney General, the Wisconsin Legislative Council, and state legislators regarding the meaning of the amendment; materials in the legislative drafting files regarding the content of earlier legislative proposals on the same subject matter; and, public statements and news accounts explaining the meaning of the amendment to voters, including newspaper articles in leading state newspapers, letters to the editor from state legislators, newspaper editorials, and polls documenting voters’ understanding of the amendment.

In this matter, Fair Wisconsin would like to submit to the trier of fact materials relating to the legislature's consideration of the Marriage Amendment and the subsequent voter ratification campaign. The public debate about the Marriage Amendment was a modern electoral campaign involving numerous messages communicated through a wide array of media. As the leading organizational opponent of the Amendment, Fair Wisconsin has a plethora of information and materials about the campaign. The evidence that Fair Wisconsin would like to submit includes: statements by legislators and the then Attorney General during the legislative debate about the meaning and impact of the Marriage Amendment; news accounts documenting statements made by legislators and about the Marriage Amendment during the voter ratification campaign; television and radio ads purchased by both the proponents and opponents of the Marriage Amendment to advocate for their respective positions; polling data indicative of the voters' understanding of the Marriage Amendment; and, numerous pamphlets, internet blog entries, newspaper editorials and other materials used to communicate with Wisconsin voters. These materials include public statements made by Petitioner Applling that Fair Wisconsin will argue demonstrate that she informed voters that legal protections like

those provided by the Domestic Partnership Law would not be prohibited by the Marriage Amendment. Furthermore, Fair Wisconsin and the other respondents should be permitted to use the discovery process to develop a complete factual record regarding what information the Petitioners disseminated about the Marriage Amendment, what Petitioner Applig said about the Marriage Amendment, and what other information Petitioners have about the legislative debate and voter ratification campaign. Fair Wisconsin may also offer expert evidence regarding the reach and effectiveness of the various communication messages. In the end, all of this evidence will ultimately assist a trier of fact in ascertaining the intent of the legislature and voters. Fair Wisconsin anticipates that the admissibility and meaning of this evidence, as well as the probative weight that it should be assigned, are likely to be vigorously debated between the Petitioners and Fair Wisconsin and the other Respondents. As a result, this matter should proceed in a trial court, which is better equipped to handle the discovery and trial processes needed to resolve the parties' disputes.

Fair Wisconsin anticipates that a trier of fact will also have to resolve issues concerning the admissibility and probative value of evidence submitted by Petitioners. Fair Wisconsin respectfully submits that

resolution of this matter ultimately requires the trier of fact to consider what was specifically said during the legislative debate and to the voters about the precise issue presented by the Petition – namely, did the Marriage Amendment preclude the legislature from providing the type of legal protections found in the Domestic Partnership Law. In contrast, the Petitioners seem to believe that this matter requires a court to determine whether the legislature and the voters embraced Petitioners’ view of the “conjugal model of marriage” – a view that “marriage is structured in a way that accommodates the differing but inherently complementary natures of men and women and establishes a set of rules, norms and expectations that accommodate the fact that such relationships are potentially procreative – frequently unintentionally so.” (Petition, ¶ 26.) By embracing this model, Petitioners argue, Wisconsin voters were rejecting the type of legal protections for same-sex couples provided by the Domestic Partnership Law. Fair Wisconsin vigorously contests this argument, as well as the relevance of the factual statements made in the Petition about the so-called “conjugal model of marriage.”

Specifically, Fair Wisconsin believes that there is scant evidence to support Petitioners’ suggestion that the voters were informed that, by

voting for the Marriage Amendment, they would be embracing “the conjugal model of marriage” and the unsupported factual allegations upon which Petitioners claim it is based. Indeed, the only actual evidence referenced in the Petition that might relate to these allegations is a DVD entitled “The Battle for Marriage in Wisconsin” that Petitioners allege was distributed during the ratification campaign. Fair Wisconsin and the other Respondents should be given the opportunity to develop a factual record regarding this DVD, including evidence of how many people received the DVD, what it said and whether it is, in fact, relevant to the issue presented by the Petition. Fair Wisconsin and the other Respondents should also be permitted – through the discovery process – to conduct a similar examination of any other evidence that Petitioners put forth to support their argument that Wisconsin voters embraced Petitioners’ “conjugal model of marriage.” Since the parties’ dispute about what occurred during the voter ratification campaign requires ample discovery, this matters should proceed, in the first instance, in a trial court.

In summary, resolution of the constitutional question presented by the Petition requires, at the very least, a factual inquiry into the legislative debates surrounding the Marriage Amendment and the subsequent voter

ratification campaign. As a result, this matter is replete with factual disputes that will require the presentation of a significant amount of evidence, as well as substantial motion practice and legal briefing. Because this Court does not grant original jurisdiction to “referee factual disputes,” the Petition should be denied.

II. THE COURT SHOULD DECLINE TO TAKE JURISDICTION BECAUSE THERE IS NO PRESENT OR PRESSING EMERGENCY SUCH THAT THERE WOULD BE NO ADEQUATE REMEDY IN THE CIRCUIT COURT.

The Court should decline to exercise its original jurisdiction in this matter for the additional reason that there is no “present or pressing emergency” that makes the usual system of trial and appeal insufficient. *See, e.g., State ex rel. State Central Committee v. Board*, 240 Wis. 204, 214, 3 N.W.2d 123 (1942) (concluding that the Court erred in taking original jurisdiction because “there is no present or pressing emergency that justifies the extraordinary intervention of an original action”). Petitioners argue that resolution of this matter by a trial court is inadequate because “permitting continuing constitutional violations any longer than practically necessary is unacceptable.” (Petition ¶ 42.) This argument, however, ignores the fact that Wisconsin trial courts routinely preside over matters raising constitutional questions and it suggests that this Court should take

original jurisdiction over any matter that alleges a constitutional violation. Such an approach would quickly burden this Court's docket with numerous cases, regardless of whether those cases present factual disputes that are better resolved by a trial court.

Petitioners also argue that a speedy resolution is necessary so that Wisconsin domestic partners will know whether their legal arrangements are valid. (Petition ¶ 42.) Here again, Petitioners' argument would apply to almost any constitutional challenge to a statute that provides legal protections or benefits to Wisconsin citizens. Same-sex couples have no compelling need to have this matter resolved on an emergency basis. Rather, they have an interest in defending their legal rights through the development of a complete factual record -- something that is best done, in the first instance, by a trial court.

Simply put, Petitioners have utterly failed to identify any present or pressing emergency that justifies expedited consideration of this matter. Indeed, if such urgency existed, one would have expected the Petitioners to have sought some form of emergency injunctive relief. Because there is no compelling rationale to circumvent the usual process of trial and appeal, the Petition should be denied and this matter should proceed in a trial court.

CONCLUSION

For the foregoing reasons, Intervening Respondent Fair Wisconsin, Inc. respectfully asks this Court to deny the Petition To Take Jurisdiction Of Original Action filed by Petitioners Julaine Appling, Jaren E. Hiller, and Edmund L. Webster.

Respectfully submitted,




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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,160 words.

A handwritten signature in cursive script that reads "Brian E. Butler". The signature is written in black ink and is positioned above a horizontal line.

Brian E. Butler