No. 2024AP1643-OA

In the Supreme Court of Wisconsin

DAVID STRANGE, INDIVIDUALLY AND AS DEPUTY OPERATIONS DIRECTOR - WISCONSIN FOR THE DEMOCRATIC NATIONAL COMMITTEE,
PETITIONER,
V.
WISCONSIN ELECTIONS COMMISSION, MEAGAN WOLFE, IN HER CAPACITY AS ADMINISTRATOR OF WISCONSIN ELECTIONS COMMISSION, DON MILLIS, IN HIS CAPACITY AS COMMISSIONER OF WISCONSIN ELECTIONS COMMISSION, ROBERT SPINDELL, JR., IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF WISCONSIN ELECTIONS COMMISSION, MARGE BOSTELMANN, IN HER CAPACITY AS COMMISSIONER OF WISCONSIN ELECTIONS COMMISSION, ANN JACOBS, IN HER CAPACITY AS COMMISSIONER OF WISCONSIN ELECTIONS COMMISSION, MARK THOMSEN, IN HIS CAPACITY AS COMMISSIONER OF WISCONSIN ELECTIONS COMMISSION AND CARRIE RIEPL, IN HER CAPACITY AS COMMISSIONER OF WISCONSIN ELECTIONS COMMISSION, AND WISCONSIN GREEN PARTY
RESPONDENTS.

NON-PARTY BRIEF OF RITA MANIOTIS & TRAVIS KOBS IN OPPOSITION TO THE PETITION

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TABLE OF CONTENTS

INTRODUCTION **6**

ARGUMENT **6**

I. The petition is substantively underdeveloped. **7**

A. Strange oversimplifies Wis. Stat. § 8.18. 7

B. Strange oversimplifies Wis. Stat. § 8.30. 9

C. Strange's claim raises serious constitutional issues. 10

II. The petition is procedurally flawed. **14**

A. Strange lacks standing. 14

B. Declaratory judgment is an inappropriate remedy. 15

C. This Court might be incompetent to hear this action. 15

D. This action may be unripe. 15

E. This action may be time-barred. 16

CONCLUSION **16**

CERTIFICATION **18**

TABLE OF AUTHORITIES

Cases

Anderson v. Celebrezze, 460 U.S. 780 (1983) 13

Burdick v. Takushi, 504 U.S. 428 (1992) 11

Chiafalo v. Washington, 591 U.S. 578 (2020) 13

Fabick v. WEC, unpublished order, No. 2021AP428-OA (June 25, 2021) 14

Friends of Black River Forest v. Kohler Co., 2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342 14

Gymfinity Ltd. v. Dane County, unpublished order, No. 2020AP1927-OA (Dec. 21, 2020) 6

Hawkins v. WEC, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877 16

Lee v. Keith, 463 F.3d 763 (7th Cir. 2006) 11

Lister v. Bd. of Regents, 72 Wis. 2d 282, 240 N.W.2d 610 (1976) 15

Lubin v. Panish, 415 U.S. 709 (1974) 10, 11

Miller Brands-Milwaukee, Inc. v. Case, 162 Wis. 2d 684, 470 N.W.2d 290 (1991) 16

Pawlowski v. Am. Fam. Mut. Ins., 2009 WI 105, 322 Wis. 2d 21, 777 N.W.2d 67 8

Purcell v. Gonzalez, 549 U.S. 1 (2006) 16

Shopper v. Advertiser, Inc. v. DOR, 117 Wis. 2d 223, 344 N.W.2d 115 (1984) 15

State ex rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 633 8

Trump v. Anderson, 601 U.S. 100 (2024) 13

Trump v. Evers, No. 2020AP1971-OA (Dec. 3, 2020) 7

U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779 (1995) 12, 13

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 9

Williams v. Rhodes, 393 U.S. 23 (1968) 11, 12

Wis. Legislature v. WEC, 595 U.S. 398 (2022) (per curiam) 13

WMC v. Evers, 2021 WI App 35, 398 Wis. 2d 164, 960 N.W.2d 442, *aff'd*, 2022 WI 38, 977 N.W.2d 374 15

WMC v. Evers, 2022 WI 38, 977 N.W.2d 374 15

WVA v. WEC, unpublished order, No. 2020AP1930-OA (Dec. 4, 2020) 7

Statutes

Wis. Stat. § 5.01 9

Wis. Stat. § 5.02 ..... 8, 9

Wis. Stat. § 5.06 15

Wis. Stat. § 7.75 12

Wis. Stat. § 8.18 ..... passim

Wis. Stat. § 8.30 ..... 7, 9, 10

Constitutional Provisions

U.S. Const. art. II, § 1, cl. 5 12

INTRODUCTION

David Strange, the Petitioner, works for the Democratic Party. He claims to have "contributed his time and money to electing Kamala Harris and Timothy Walz," the Democratic nominees for President and Vice President. Aff. Hollander, at 9. He does not claim to be considering voting for anyone else, and no such inference could be reasonably drawn from the materials he has submitted. Yet he asks this Court to grant a petition for original action and kick the Green Party off the ballot based on an underdeveloped and potentially unconstitutional interpretation of Wis. Stat. § 8.18.

The petition fools no one. This blatant partisan power play is premised on the belief that the relief sought will benefit the Democratic Party. Strange does not care that he will also obstruct the right of some Wisconsinites to vote for a third-party candidate who is on the ballot in many other states.

The petition should be denied. This Court ought not allow itself to be used in this way. Democracy—not to mention the law—does not come second to the interests of the Democratic Party.[1]

ARGUMENT

As one justice has explained, "[t]his [C]ourt is designed to be the court of last resort, not the court of first resort." *Gymfinity Ltd. v. Dane County*, unpublished order, No. 2020AP1927-OA at 2 (Dec. 21, 2020) (Hagedorn, J., concurring). For this reason, this Court has historically been "rarely" receptive to original actions. *Id.* This Court does well to

[1] The Democratic Party gave one justice nearly $10 million for her campaign. *See WisPolitics Tracks $56 Million in Spending on Wisconsin Supreme Court Race*, WisPolitics (July 19, 2023), https://www.wispolitics.com/2023/wispolitics-tracks-56-million-in-spending-on-wisconsin-supreme-court-race/.

abide by "time-tested judicial norms," even in—and maybe especially in—"high-profile cases." *Trump v. Evers*, No. 2020AP1971-OA, at 2 (Dec. 3, 2020) (Hagedorn, J., concurring). This action is one such case—it concerns a Presidential election.

I. The petition is substantively underdeveloped.

Prudence counsels against hearing this action because the petition is substantively underdeveloped. *See WVA v. WEC*, unpublished order, No. 2020AP1930-OA, at 2–3 (Dec. 4, 2020) (Hagedorn, J., concurring) (explaining an original action petition was denied, partly because the petitioner did not present "evidence and arguments commensurate with the scale of the claims and the relief sought"). Strange appears to misunderstand Wis. Stats. §§ 8.18 and 8.30. More importantly, his arguments raise serious constitutional issues.

A. Strange oversimplifies Wis. Stat. § 8.18.

Strange oversimplifies Wis. Stat. § 8.18, which states:

> (1) Candidates for the senate and assembly nominated by each political party at the primary, the state officers and the holdover state senators of each political party shall meet in the state capitol … on the first Tuesday in October of each year in which there is a presidential election.
>
> (2) The purpose of the convention is to nominate … presidential elector[s] …. The names of the nominees shall be certified immediately by the chairperson of the state committee of each party ….

Strange says that the Green Party has no "candidates for senate and assembly," "state officers," or "holdover state senators." So, the Green Party, in his view, has no one to nominate presidential electors at the October convention.

Presumably, Strange is correct that the Green Party does not have legislative candidates or holdover senators, but the Green Party may have "state officers." "State officers" can be reasonably interpreted as referring to the officers of a political party, e.g., the co-chairs of the Green Party.

Strange argues that the Green Party lacks "state officers," relying on Wis. Stat. § 5.02(23), which states that "unless context requires otherwise," the phrase "state office" means "governor, lieutenant governor, secretary of state, state treasurer, attorney general, state superintendent, justice of the supreme court, court of appeals judge, circuit court judge, state senator, state representative to the assembly and district attorney." Strange may be incorrect.

First, Wis. Stat. § 5.02(23) defines the phrase "state office," not "state officer." Conversely, Wis. Stat. § 8.18(1) does not refer to "state offices" but rather to "state officers." "State officers," unlike "state offices," is not a defined phrase. *See Pawlowski v. Am. Fam. Mut. Ins.*, 2009 WI 105, ¶22, 322 Wis. 2d 21, 777 N.W.2d 67 (explaining different words are presumed to mean different things). This Court probably should not interpret one as a derivative of the other.

Second, context suggests that they should not be so interpreted. If "state officers" really means "state offices," the phrase "holdover state senators" in Wis. Stat. § 8.18(1) is surplusage. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 633 ("Statutory language is read where possible ... to avoid surplusage."). "State officers" would include "holdover state senators" under this interpretation, so the phrase "holdover state senators" would not have any independent effect.

Third, Wis. Stat. § 8.18(2) requires that "the chairperson of the state committee of each party" immediately certify the slate of presidential electors. So, at least one political party officer must be in attendance.

Fourth, Wis. Stats. §§ 5.02(23) and 8.18(1) are probably not "mouseholes" in which the legislature "hid[an] elephant[]." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Simply put, the interpretation proffered by Strange would prohibit a political party from only supporting a Presidential candidate. A party must, in his view, first run other candidates, which is nonsensical. *See* Wis. Stat. § 5.01 ("Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors ....").

B. Strange oversimplifies Wis. Stat. § 8.30.

Strange also oversimplifies (and largely disregards) Wis. Stat. § 8.30, which governs ballot access. Ballot access has nothing to do with the nomination of presidential electors, and while several other statutes are cross-referenced in § 8.30, Wis. Stat. § 8.18(1) is not one of them. Put differently, Wisconsin's ballot access statute does not limit access to candidates who belong to parties who have candidates for or holders of state office.

Wisconsin Stat. § 8.30(1) provides:

> (1) Except as otherwise provided in this section, the official or agency with whom declarations of candidacy are required to be filed may refuse to place the candidate's name on the ballot if any of the following apply:
>
> (a) The nomination papers are not prepared, signed, and executed as required under this chapter.
>
> (b) It conclusively appears, either on the face of the nomination papers offered for filing, or by

admission of the candidate or otherwise, that the candidate is ineligible to be nominated or elected.

(c) The candidate, if elected, could not qualify for the office sought within the time allowed by law for qualification because of age, residence, or other impediment.

Strange has not alleged that nomination papers are deficient; instead, he appears to claim that the Green Party candidates for President and Vice President, Jill Stein and Butch Ware, are either "conclusively ... ineligible to be nominated or elected" or not qualified to hold office.

Nothing in Wis. Stat. § 8.30 prohibits ballot access for a presidential candidate who belongs to a political party that does not have members who are candidates for or holders of state office. Strange conflates a purported lack of candidates for or holders of state office with evidence of "conclusive[]" ineligibility. These convention attendees (whoever they are) do not even nominate or elect a presidential candidate—they nominate presidential electors. Relatedly, the prohibition of § 8.30(1)(c) refers to the qualifications of the individual candidates for office, not the selection of electors. Stein and Ware meet all qualifications listed in the United States Constitution to hold the Offices of President and Vice President, as explained below.

C. Strange's claim raises serious constitutional issues.

This Court should be aware of two constitutional considerations. First, ballot access raises messy First and Fourteenth Amendment issues. Second, this Court must not undermine the federal government.

The United States Supreme Court has explained that "ballot access must be genuinely open to all, subject to reasonable requirements." *Lubin v. Panish*, 415 U.S. 709, 719 (1974). Statutes

restricting ballot access cannot "unfairly" or "unnecessarily" burden a "minority party's" interest in the "availability of political opportunity." *Id.* at 76. More generally, ballot access precedents embody a deep-seated fear of two-party entrenchment. *E.g.*, *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

As the Seventh Circuit has further explained, "courts must weigh the 'character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments ...' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.' " *Lee v. Keith*, 463 F.3d 763, 768 (7th Cir. 2006) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

For example, the United States Supreme Court has held a statute restricting ballot access unconstitutional because it all but prohibited a political party with a "very small number of members" from appearing on the ballot. *Williams*, 393 U.S. at 24. As the Court reasoned, voters have a right to "associate for the advancement of political beliefs" and a right to "cast their vote effectively," regardless of their "political persuasion." *Id.* at 30.

Wisconsin is justified in imposing some burdens on ballot access—not everyone can be on a ballot; however, Strange advocates for an unreasonable burden. His interpretation would require that political party members support a candidate for a state office as a precondition to them being able to support a candidate for a federal office effectively.

The unreasonableness can be demonstrated in another way. Practically speaking, Strange's proffered interpretation functions as a State-added qualification on the Office of the President. Functionally, he claims that only a person who is a member of a political party with

potential convention attendees authorized under Wis. Stat. § 8.18 can get Wisconsin's Electoral College votes.

In *U.S. Term Limits, Inc. v. Thorton*, the United States Supreme Court held that states lack the power to impose term limits on members of Congress, reasoning, "the text and structure of the Constitution, the relevant historical materials, and, most importantly, 'basic principles of our democratic system,' all demonstrate that the Qualification Clauses ... fix as exclusive the qualifications in the Constitution." 514 U.S. 779, 806 (1995).

Applying similar logic, Wisconsin cannot add, at least directly, to the list of qualifications for the Office of President, which are spelled out in Article II, Section 1, Clause 5 of the United States Constitution: A person must be "a natural born citizen," "have attained the Age of thirty five years," and have "been fourteen Years a Resident within the United States." Stein and Ware meet these qualifications.

Given that Wisconsin could not directly add a qualification, why it should be allowed to achieve the same functional effect is unclear, even considering the considerable leeway states have in determining a method of selecting presidential electors. *See Williams*, 393 U.S. at 42 (Harlan, J., concurring in the result) ("The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association. Just as a political group has a right to organize effectively so that its position may be heard in court, ... so it has the right to place its candidate for the Presidency before whatever body has the power to make the State's selection of [presidential] [e]lectors."). Notably, under Wis. Stat. § 7.75, a presidential elector must vote for the candidate of his or her political

party. So, even if every Wisconsinite voted for Stein and Ware, Strange is saying they could not possibly receive even one of Wisconsin's Electoral College votes absent an unfaithful elector.

This de facto adding of qualifications would raise significant federalism concerns. The United States Supreme Court has been clear that federalism has a role to play, especially "in the context of a Presidential election." *Trump v. Anderson*, 601 U.S. 100, 119 (2024) (Sotomayor, J., concurring in the judgment) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794–95 (1983)). As Justice Sonia Sotomayor recently said: "States cannot use their control over the ballot to 'undermine the National Government.' " *Id.* (quoting *Thorton*, 514 U.S. at 810). "[F]ederalism principles" are a meaningful limit on the otherwise broad power of a state in determining the method of selecting presidential electors. *Id.* (quoting *Chiafalo v. Washington*, 591 U.S. 578, 589 (2020)).

If states could functionally add qualifications for the Office of the President, the potential lack of uniformity across all fifty states would call into question whether the President really "represent[s] *all* the voters in the Nation." *Id.* at 116 (majority opinion) (alternations in original) (quoting *Celebrezze*, 460 U.S. at 765). States could kick a candidate off the ballot, which might make that candidate's presence on another state's ballot meaningless. *Id.*

Given these federal constitutional issues, if this Court proceeds in haste, this action could be fast-tracked to the United States Supreme Court. *See Wis. Legislature v. WEC*, 595 U.S. 398 (2022) (per curiam).

II. The petition is procedurally flawed.

Several procedural issues are also likely to prevent a merits decision. *Fabick v. WEC*, unpublished order, No. 2021AP428-OA, at 2 (June 25, 2021) (denying an original action petition after briefing revealed that the substantive issues would not be "clearly presented with no obstacles to reaching the merits").

A. Strange lacks standing.

First, Strange lacks standing. Standing is a legally recognized interest, i.e., a reason a particular litigant should be allowed to state a cause of action. *See Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶19, 402 Wis. 2d 587, 977 N.W.2d 342. Usually, this interest is constitutional (e.g., the right to vote) or statutory.

Strange has done a poor job of explaining why he has standing. This action is not about protecting his right to vote. He will undoubtedly vote for Harris and Walz. He is not asking this Court to clarify whether his planned vote could translate to electoral college votes—he knows it could.

Strange initially filed complaints with WEC under Chapter 5 of the Wisconsin Statutes; however, he is not claiming any interest under Chapter 5 in ensuring that election officials follow election law. If he were claiming such an interest, he would need first to follow the procedures outlined in Chapter 5 to assert it (see below on competency). He has not.

So, what legally recognized interest does Strange think he has? He seems to claim an interest in obstructing other people from voting for Stein and Ware. Strange assumes, without evidence, that if these candidates are kicked off the ballot, his preferred candidates, Harris and

Walz, will get more votes. For many reasons, he could be wrong. Even if he is right, he does not have an interest in his preferred candidates getting more votes.

B. Declaratory judgment is an inappropriate remedy.

Closely related to the standing issue is an issue of remedy. The point of declaratory judgment is to provide litigants with certainty so that they can structure their lives accordingly. *WMC v. Evers*, 2021 WI App 35, ¶12, 398 Wis. 2d 164, 960 N.W.2d 442, *aff'd*, 2022 WI 38, 977 N.W.2d 374. Strange will not do any material thing differently over the next few months if this Court gives him the relief he wants. Perhaps the Green Party needs to know how to proceed under Wis. Stat. § 8.18, but Strange does not work for the Green Party. By his logic, anyone can run to court anytime and get an advisory opinion.

C. This Court might be incompetent to hear this action.

On another related note, this Court may be incompetent to hear this action. *Shopper v. Advertiser, Inc. v. DOR*, 117 Wis. 2d 223, 233, 344 N.W.2d 115 (1984) (explaining "competency" is "the power to entertain an action"). This Court has instructed that declaratory judgment is usually only available when some other statute does not provide equally "speedy, effective, and adequate" relief. *WMC*, 977 N.W.2d 374, ¶12 (quoting *Lister v. Bd. of Regents*, 72 Wis. 2d 282, 307– 08, 240 N.W.2d 610 (1976)). Strange filed two complaints with WEC, and both were rejected. He has not explained why he cannot appeal those decisions under Wis. Stat. § 5.06(8) to the circuit court.

D. This action may be unripe.

Notably, Strange does not even claim to be appealing WEC's denial of his complaints; instead, he wants an "original action." Is his action

even ripe? *See Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694–95, 470 N.W.2d 290 (1991). Strange says he knows that WEC will meet on August 27, 2024, and vote to put the Green Party Presidential Candidate on the ballot, but how does he know? He is effectively asking this Court to advise WEC on how to vote.

E. This action may be time-barred.

Proving that history repeats itself, four years ago WEC voted to kick the Green Party off the ballot, relying on a borderline frivolous legal argument. *Hawkins v. WEC*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877. The Green Party filed a petition as soon as it reasonably could, and this Court declined to exercise original jurisdiction, citing a "lack of sufficient time to complete our review and award any effective relief." *Id.*, ¶9. Notably, the United States Supreme Court has similarly instructed that courts are not to meddle in federal elections on their eve. *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

Even if this action is not technically time-barred (and it may well be), this Court does not have enough time to consider the arguments thoroughly. In fact, it issued an order on August 22, 2024, requiring that the respondents and interested nonparties respond by the close of business on August 23, 2024. In contrast, Strange (or, more likely, his attorneys) have spent much time cooking up an anti-democratic petition.

CONCLUSION

This Court should deny the petition.

Dated: August 23, 2024.

Respectfully submitted,

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Electronically signed by Skylar Croy

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) and § (Rule) 809.81(4), as modified by the August 22, 2024, Order of this Court. The length of this brief is 2,966 words as calculated by Microsoft Word.

Dated this 23rd Day of August, 2024.

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