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LRB Survey of Significant Wisconsin Court Decisions, July 2020–July 2022

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The *LRB Survey of Significant Wisconsin Court Decisions, 2019–2020*, noted that "[r]arely have so many cases involving the core and essential powers of the state's political institutions been on the court's docket."[1] That statement holds true for recent court activity. Between July 2020 and July 2022, the legislature once again actively participated in litigation to represent the state's interest in the validity of state laws and to protect core legislative powers.[2] Political conflict inevitably made its way onto the court's docket.[3]

Most consequently, the legislature prevailed in convincing the Wisconsin Supreme Court, after remand from the U.S. Supreme Court, to adopt senate and assembly district maps that had passed the legislature, but were vetoed by the governor.[4] Also in the area of elections law, the Wisconsin Supreme Court rendered important decisions involving election administration, guidance, and practices, such as timeliness of challenges to election administration procedures and the legality of drop boxes for the return of absentee ballots. Litigation also centered on the rulemaking authority of executive branch agencies and the power of the governor to replace appointees whose terms of office had expired. The court even decided a case on the legal authority of the legislature to contract for legal services, a long-standing legislative practice.

State and local government responses to the COVID-19 pandemic continued to cause legal controversy, with the court adjudicating cases involving the governor's power to declare successive public health emergencies, local public health officials' power to issue public health orders and to close public and private schools, and the state's power to limit indoor gatherings across the state. While these cases centered on the immediate COVID-19 pandemic, the court's holdings may well extend to state and local government actions in other public policy areas and crises.

Finally, there were a number of other cases that received less attention, but were significant. These court decisions involved employment discrimination on the basis of domestic violence convictions, legal defenses for crimes committed by sex trafficking victims, and the legal right of an individual to change his or her name.

The following survey prepared by LRB attorneys summarizes these critical judicial decisions. The LRB attorneys who prepared these summaries practice law, conduct research, and draft legislation in these issue areas. To be sure, each decision merits a much longer discussion because the issues confronted by the court in these cases touch on

1. Wis. Legis. Reference Bureau, "LRB Survey of Significant Wisconsin Court Decisions, 2019–2020," *LRB Reports* 4, no. 17 (Madison, WI: Legislative Reference Bureau, Dec. 2020): 1.

2. This publication's scope of coverage includes supreme court cases released through July 2022 and court of appeals cases released through June 2022.

3. That political conflicts in the United States inevitably become judicial conflicts is a well-known fact of American political life. As Alexis de Tocqueville observed nearly 190 years ago, "There is hardly a political question in the United States which does not sooner or later turn into a judicial one." Alexis de Tocqueville, *Democracy in America, and Two Essays on America*, trans. Gerald E. Bevan, ed. Isaac Kramnick (London: Penguin Books, 2003), 315.

4. 2021 Wis. SB 621.

competing views of the legal authority of Wisconsin's political institutions and the role of government in society and the economy. The case summaries presented in this report serve as a concise introduction to the court's important activities in the last two years. Please contact us at the LRB offices if you would like a fuller discussion of any of these decisions, as well as the significant issues litigated in these cases.

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Legislative and congressional redistricting

Every 10 years following the U.S. Census, the Wisconsin Legislature must establish new state legislative and congressional districts to accommodate population shifts during the previous decade. State and federal law require that all state legislative districts be substantially equal in population and that all congressional districts be as nearly equal in population as is practicable. In addition, all such plans must comply with state and federal constitutional requirements and the federal Voting Rights Act (VRA). Although the legislature must create new plans, the redistricting process is a lawmaking function: the legislature passes a bill that becomes law only with the governor's approval. If the governor and the legislature cannot agree on state legislative and congressional plans, then the courts must step in to complete the process. Since the 1960s, the federal courts have generally settled redistricting disputes and adopted new plans. In Wisconsin, following the 2020 Census, the state supreme court, for the first time in nearly 60 years, adopted new state legislative and congressional redistricting plans after the governor vetoed plans adopted by the legislature.

In *Johnson v. Wisconsin Elections Commission*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469, the supreme court set forth the process it would follow for considering new state legislative and congressional redistricting plans that would ensure "equality of the people's representation in the state legislature and in the United States House of Representatives."

Wis. Const. art IV, § 3, provides the following: "At its first session after each enumeration [census] made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants." U.S. Const. Art I, § 2, requires that representatives "be apportioned among the several states which may be included within this Union, according to their respective numbers." Art. I, § 2, also requires that a census occurs once every 10 years to facilitate re-apportionment.

On August 23, 2021, Billie Johnson and three other Wisconsin voters filed a petition with the Wisconsin Supreme Court for leave to commence an original action, claiming that, following the 2020 Census, the state's legislative and congressional districts were malapportioned and no longer met the redistricting requirements of the state constitution. All parties agreed that the state legislative and congressional plans enacted in 2011 violated constitutional requirements ensuring equal representation because of shifts in the state population. The petitioners asked the court to make "only those changes necessary for the maps to comport with the one person, one vote principle while satisfying other constitutional and statutory mandates (a 'least-change' approach)." The court granted the petition, but stayed any further action, other than the consideration of preliminary matters, until the legislature passed congressional and state legislative reapportionment

plans or until the legislature failed to pass plans after having a reasonable opportunity to do so. In addition, the court allowed Governor Tony Evers and other parties to intervene. Some of the intervening parties asserted that the plans adopted in 2011 unduly favored one major political party over the other and that the court should provide a remedy for that inequality.

On November 11, 2021, the legislature adopted 2021 Senate Bill 621, establishing new state legislative districts, and 2021 Senate Bill 622, establishing new congressional districts. Governor Evers vetoed both bills seven days later. On November 30, 2021, in an opinion written by Justice R.G. Bradley, the court held that it would act on the petition "only to the extent necessary to remedy the violation of a justiciable and cognizable right" under the Wisconsin and U.S. Constitutions and the VRA, while making only minimal changes to the existing maps. In other words, the court adopted the "least-change" approach, as requested by the petitioner. In addition, the court held that it would not examine the partisan composition of any proposed legislative or congressional districts because such an inquiry would be beyond the purview of the court, consistent with recent U.S. Supreme Court decisions. Chief Justice Ziegler and Justice Roggensack joined the majority in whole, and Justice Hagedorn joined in part.

Justice Hagedorn, in his concurrence, agreed with most of the majority opinion, but disagreed with holding that the court could consider only legal rights and requirements in adopting new maps. Justice Hagedorn asserted that the court could go beyond what federal and state law required and examine "traditional redistricting criteria," such as maintaining communities of interest and minimizing the temporary disenfranchisement of voters that occurs by moving voters between odd- and even-numbered senate districts. Justice Hagedorn also invited all parties to the litigation to submit legislative and congressional plans for the court's consideration.

In her dissent, Justice Dallet took issue with the majority holding that the "least-change" approach provides a neutral, nonpartisan standard by which to judge a proposed redistricting plan. She argued that the court should not adopt an approach that would give undue deference to the policy choices of the legislature that created the legislative and congressional plans in 2011. "It is one thing for the current legislature to entrench a past legislature's partisan choices for another decade. It is another thing entirely for this court to do the same." Justice Dallet asserted a "least-change" approach was not as common as the majority determined it to be and that a truly neutral judicial approach would consider all neutral factors under the state and federal constitutions and the VRA and put greater emphasis on traditional redistricting principles. Justices A.W. Bradley and Karofsky joined Justice Dallet's dissent.

On March 3, 2022, in *Johnson v. Wisconsin Elections Commission*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402, the supreme court approved the congressional and state

legislative redistricting plans submitted by Governor Evers as the plans that best complied with the court's previously adopted criteria and "least-change" approach.

With regard to congressional maps, the court received proposed maps from four parties, including the state's five Republican Congressmen, whose map the legislature endorsed, and Governor Evers. Justice Hagedorn, writing for the majority, stated that the governor's proposed congressional district maps complied with constitutional requirements and moved the fewest individuals from one district to another, thereby receiving the highest score with regard to core retention. "Core retention represents the percentage of people on average that remain in the same district they were in previously. It is thus a spot-on indicator of least change statewide, aggregating the many district-by-district choices a mapmaker has to make."

With regard to the state legislative maps, the court received proposed maps from six parties, including Governor Evers, the legislature, and Senate Minority Leader Janet Bewley on behalf of the Senate Democratic Caucus. The plan that the legislature submitted was the plan it had adopted under 2021 Senate Bill 621 and that the governor had vetoed. The majority again found that the governor's plan performed the best under the "least-change" approach, moving fewer people from their current districts than any other plan, and resulting in "less overall change than other submissions." The court also found that the governor's plan best satisfied state and federal constitutional requirements and traditional redistricting principles. Finally, the court found that Governor Evers had "good reasons" for creating a seventh majority-black district in the Milwaukee area in order to satisfy the requirements of the VRA. However, the court acknowledged that, based on the record, it was not certain whether compliance with the VRA actually required the creation of an additional majority-black district. By comparison, the legislative redistricting plan that the legislature created in 2011 established six majority-black districts in and around the city of Milwaukee. Generally, majority-minority districts, such as the majority-black districts created in 2011 and under the governor's plan, are districts in which minority group members constitute more than 50 percent of the voting-age population and are established to give the minority group an equal opportunity to elect their preferred candidates.

Justice A.W. Bradley concurred with the majority opinion, agreeing that the governor's plans best complied with the court's "least-change" approach, but objected to using the approach, much as she had in the court's earlier decision establishing the process it would undertake. "Although I disapprove of the 'least change' approach, I am limited by that prior determination and obligated to apply it here." Justices Dallet and Karofsky joined the concurrence.

In her dissent, Chief Justice Ziegler asserted that the court should have adopted the state legislative plan submitted by the legislature and the congressional plan submitted

by the Republican Congressmen. The chief justice also suggested that the court could have, as an alternative, adopted maps submitted by the Citizen Mathematicians and Scientists, drawn its own plans, or required the parties to submit new plans. "The maps submitted by the Governor are unconstitutional and fatally flawed." Specifically, the chief justice determined that the governor's legislative plan impermissibly considered race alone as a deciding factor in drawing new districts in the Milwaukee area and that the governor did not sufficiently prove that creating an additional majority-minority district was necessary to remedy a VRA violation. Rather than increase the percentage of the minority voting-age population in the majority-black districts, the governor's plan actually decreased the minority voting-age population and increased the white voting-age population in each district. Chief Justice Ziegler also asserted that the legislature and the Citizen Mathematicians and Scientists were the only parties that submitted race-neutral plans.

The chief justice also noted that the court's opinion from November 30, 2021, establishing the process by which the court would provide a remedy, never mentioned "core retention" as the criteria the parties would need to satisfy when submitting plans. "The core retention analysis in the majority is an invention, made after-the-fact to justify a policy preference." In addition, Chief Justice Ziegler noted that the population deviations under the governor's plans were higher than that of other plans and of the plan enacted in 2011. She also noted that the governor's plans provided less deference to communities of interest. Justices Roggensack and R.G. Bradley joined Chief Justice Ziegler's dissent, but also wrote separate dissenting opinions.

Justice Roggensack, in her dissent, also took issue with the consideration of race under the governor's legislative plan. "In adopting the governor's map, a majority of this court engages in racial gerrymandering contrary to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, which prohibits separating voters into different voting districts based on the race of the voter." Justice Roggensack expressed her hope that at least one of the parties would petition the U.S. Supreme Court to review the state supreme court's decision. Chief Justice Ziegler and Justice R.G. Bradley joined Justice Roggensack's dissent.

In her dissent, Justice R.G. Bradley reiterated the point made by Chief Justice Ziegler that core retention was not a concept that the court mentioned in its previous decision. Furthermore, she concluded that the introduction of that idea by Justice Hagedorn at such a late stage in the litigation, along with his concurrence in the previous decision, created confusion and "derailed the case presentations of several parties." She also determined that the court had impermissibly put core retention above state constitutional requirements such as population equality and respecting county and municipal boundaries. Justice R.G. Bradley noted that the governor's legislative plan had a greater population

deviation and split more municipalities and wards than the legislature's plan. Chief Justice Ziegler and Justice Roggensack joined Justice R.G. Bradley's dissent.

On March 7, 2022, the petitioners and the legislature filed an application for a stay and injunctive relief to the U.S. Supreme Court with regard to the legislative plan adopted by the state supreme court. Specifically, the petitioners and the legislature asserted that the state supreme court "selected race-based maps without sufficient justification, in violation of the Equal Protection Clause" of the U.S. Constitution. On March 23, the U.S. Supreme Court issued a per curiam opinion agreeing with the petitioners and the legislature and granting relief.

In *Wisconsin Legislature v. Wisconsin Elections Commission*, 142 S. Ct. 1245 (2022), the U.S. Supreme Court found that the state supreme court misapplied the previous decisions of the higher court regarding the standards for complying with the federal constitution and the VRA. The Court noted that the governor had provided no evidence to support his decision to create a seventh majority-black district other than to indicate that he believed "there is now a sufficiently large and compact population of black residents to fill it." Both the governor and the lower court had failed to analyze the preconditions and circumstances necessary to remedy the potential for diluting the vote of a minority population. In other words, a mapmaker is legally required to have a "strong basis in evidence" in order to move voters from one district to another based on race so that a minority population has a fair opportunity to select its chosen candidates. The Court remanded the case back to the state supreme court to select another state legislative plan or to reconsider the governor's plan upon submission of additional evidence.

Justice Sotomayor, in a dissent joined by Justice Kagan, called the Court's summary reversal of the state court decision unprecedented, especially in light of the fact that she did not find the prior decisions of the Court regarding racial gerrymandering to be clear and settled law. "Despite the fact that summary reversals are generally reserved for decisions in violation of settled law, the Court today faults the State Supreme Court for its failure to comply with an obligation that, under existing precedent, is hazy at best."

The Wisconsin Republican Congressmen had also filed an application for a stay and injunctive relief to the U.S. Supreme Court with regard to the congressional plan adopted by the state supreme court. The U.S. Supreme Court denied that application.

On April 15, 2022, in *Johnson v. Wisconsin Elections Commission*, 2022 WI 19, 401 Wis. 2d 198, 972 N.W.2d 559, on remand from the U.S. Supreme Court, the Wisconsin Supreme Court adopted the state legislative redistricting plan submitted by the legislature—the same plan the legislature adopted in 2021 Senate Bill 621 and that the governor vetoed. In a majority opinion authored by Chief Justice Ziegler, the court found insufficient evidence in the record to support establishing race-based districts under the governor's plan, whereas the court determined that the legislature's plan was race-neutral.

In addition, the court held that the legislature's plan complied with all federal and state legal requirements and made "minimal changes to the existing maps, in accordance with the least change approach." Justices Roggensack, Hagedorn, and R.G. Bradley joined the majority, while Justices R.G. Bradley and Hagedorn wrote separate concurrences.

Justice R.G. Bradley wrote her concurrence, in her own words, "to expound on the primacy of color-blindness in Equal Protection jurisprudence." She also noted that the legislature was the only party to submit a plan that did not consider race as a factor for producing new maps. Chief Justice Ziegler and Justice Roggensack joined her concurrence.

In his concurrence, Justice Hagedorn stated that, in its previous opinion, the majority of the court did not believe that it needed to analyze and adjudicate a possible VRA claim or equal protection violation before selecting a plan. However, Justice Hagedorn wrote, "we anticipated further litigation involving a fully developed Equal Protection or VRA claim could, and likely would, follow." Justice Hagedorn noted that any future consideration of redistricting plans would require a fully developed record and establishment of a baseline by which the court could recognize and adopt a race-neutral district or remedy a violation of equal protection or the VRA.

In her dissent, Justice Karofsky compared the court's process for considering malapportionment and redistricting as "an odyssey—a long wandering marked by many changes in fortune." Essentially, Justice Karofsky objected to the process as a whole, and asserted that a federal court would have been the appropriate forum for adjudicating the claims that arose in the state court as the state court had no recent experience addressing such claims or adopting a legally sufficient state legislative redistricting plan. Justice Karofsky also concluded that the "least-change" approach adopted by the court "served only to entrench the prior—and blatantly partisan—district maps." In addition, Justice Karofsky asserted the court should have taken additional evidence in order to evaluate and address concerns regarding equal protection and the VRA before rejecting the governor's plan and adopting the legislature's plan. Justices A.W. Bradley and Dallet joined the dissent.

Legislature's power to defend state laws in litigation

In *Democratic National Committee v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423, the supreme court held that the Wisconsin Legislature has the authority to represent the state's interest in the validity of state laws.

The case arose in the context of litigation over state election laws challenged in federal court. In that litigation, the Seventh Circuit Court of Appeals determined that the legislature did not have standing to appeal an adverse ruling by the federal district court. When the legislature challenged that determination, the Seventh Circuit certified the question to the Wisconsin Supreme Court and requested that the court determine the

relevant question of state law. Specifically, the Seventh Circuit asked whether the legislature has the authority under Wis. Stat. § 803.09 (2m) to represent the State of Wisconsin's interest in the validity of state laws.

Wis. Stat. § 803.09 (2m) is a rule of civil procedure that gives the legislature the power to intervene in certain types of state and federal litigation. Generally, intervention allows a person that is not an original party to a lawsuit but that has a personal stake in the outcome of the lawsuit to become a party in order to protect its interests.

In a majority opinion written by Justice Hagedorn, the supreme court answered the certified question in the affirmative. The court explained that, by enacting the statute, the legislature adopted a public policy that the legislature has an interest in any litigation that (1) questions the constitutionality of a statute; (2) argues that a statute violates or is preempted by federal law; or (3) otherwise challenges the construction or validity of a statute. Furthermore, the legislature's interest is not only in protecting its own interests as a legislative body—the legislature is empowered to defend the interests of the State of Wisconsin. The court noted that, although defending state law is normally within the province and power of the Wisconsin Attorney General, the legislature has given itself concurrent power to defend the validity of state law.

In short, the supreme court informed the Seventh Circuit that, when the validity of a state statute is at issue in litigation, the legislature has a statutory right to intervene and participate as a party, with all the rights and privileges of any other party, and to defend the state's interest in the validity of its laws.

Justice Dallet dissented in an opinion joined by Justices A.W. Bradley and Karofsky.

Legislative authority to contract for attorney services

In *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263, the supreme court upheld the validity of two contracts for legal services entered into by the Wisconsin Legislature while also addressing the appropriate application of the standard for stays pending appeal.

Speaker of the Wisconsin State Assembly Robin Vos and majority leader of the Wisconsin State Senate Devin LeMahieu, on behalf of the legislature, entered into contracts for attorney services regarding the decennial redistricting process and any resulting litigation.

Andrew Waity and other taxpayers (collectively, Waity) filed suit in circuit court against Vos and LeMahieu (collectively, the Legislative Leadership), seeking a declaration that the two attorney services agreements were void *ab initio* (from the beginning). Waity argued that no legal authority permitted the Legislative Leadership to sign these contracts on behalf of the senate and assembly. Waity moved for a temporary injunction barring the legislature from issuing payment under the contracts and also prohibiting

the Legislative Leadership from seeking legal advice other than from the Department of Justice. The circuit court denied Waity's motion. In April 2021, however, the circuit court issued a decision granting Waity summary judgment, holding that there was no statutory or constitutional authority by which the Legislative Leadership could enter into and perform on the attorney services agreements. The circuit court found that the language of Wis. Stat. § 16.74 (1) would not allow the legislature to contract for stand-alone attorney services.

The circuit court enjoined the Legislative Leadership from issuing payments under the two contracts and declared the contracts void *ab initio*. The Legislative Leadership filed a notice of appeal and an emergency motion for a stay pending appeal. The circuit court denied the motion for a stay. The Legislative Leadership filed a motion for a stay pending appeal at the court of appeals. The court of appeals denied the motion, finding that the circuit court properly analyzed the relevant standard and that its decision was not an erroneous exercise of discretion.

The Legislative Leadership filed a petition to bypass the court of appeals, along with a motion to stay the circuit court's injunction pending appeal. The supreme court granted the petition to bypass and the motion for a stay, concluding that the circuit court had misapplied the relevant standard in its stay analysis.

The majority, in an opinion authored by Chief Justice Ziegler, held that Wis. Stat. § 16.74 "grants the legislature authority to enter into legal contracts to assist in redistricting and related litigation." Wisconsin Stat. § 16.74 (1) provides that "[a]ll supplies, materials, equipment, permanent personal property and contractual services required within the legislative branch shall be purchased by the joint committee on legislative organization or by the house or legislative service agency utilizing the supplies, materials, equipment, property or services." The court held that the statute "explicitly permits each house of the legislature to purchase 'contractual services' that are 'required within the legislative branch'" and does not include any requirement that the purchase of services be tied to other physical purchases, as asserted by the circuit court. The court found that the term "contractual services" in Wis. Stat. § 16.74 is unambiguous and includes attorney services.

Waity argued that Wis. Stat. § 16.74 contains no conferral of purchasing authority and that some other provision supplies the authority for the legislature to make basic purchasing decisions, but the court found that Wis. Stat. § 16.74 "is an independent grant of legal authority by which the legislature can buy the goods and services it needs." The court also rejected Waity's arguments that a more specific statute, Wis. Stat. § 13.124 (relating to legal representation), is in conflict with Wis. Stat. § 16.74, finding rather that these statutes apply in distinct circumstances. The court found that Wis. Stat. § 13.124 provides a "quick, streamlined basis for the legislature's leadership to obtain counsel for the legislature in 'any action.' By contrast, [Wis. Stat.] § 16.74 allows each house of the

legislature to obtain counsel as needed, irrespective of whether an 'action' exists." The court also rejected Waity's argument that the legislature did not comply with the procedural requirements of Wis. Stat. § 16.74, finding that the legislature "complied with Wis. Stat. § 16.74 and received the payments it properly approved, validated, and requested."

The court also addressed the standard for stays pending appeal, reiterating its existing test, requiring that a court must consider four factors when reviewing a request to stay an order pending appeal: "(1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal; (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury; (3) whether the movant shows that no substantial harm will come to other interested parties; and (4) whether the movant shows that a stay will do no harm to the public interest." The court went on to explain, however, that when evaluating a party's likelihood of success on the merits of an appeal, a circuit court "cannot simply input its own judgment on the merits of the case and conclude that a stay is not warranted," but instead should "consider[] how other reasonable jurists on appeal may have interpreted the relevant law and whether they may have come to a different conclusion." The supreme court also noted that when considering potential harm, circuit courts "must consider whether the harm can be undone if, on appeal, the circuit court's decision is reversed" and, if not, "that fact must weigh in favor of the movant." After evaluating all of the required factors, the supreme court found that the circuit court had erroneously exercised its discretion by refusing to stay its injunction pending appeal.

Justice Hagedorn joined the majority, but filed a separate concurrence, emphasizing that the supreme court was not setting a new standard for a stay pending appeal, but rather correcting an improper understanding of the existing test.

Justice Dallet wrote a dissent, joined by Justices A.W. Bradley and Karofsky.

Gubernatorial appointment authority

In *State ex rel. Kaul v. Prehn*, 2022 WI 50, 402 Wis. 2d 539, 976 N.W.2d 821, the supreme court considered whether a previously appointed member of the Natural Resources Board (the board) could continue to serve as a member of the board after his term had expired, notwithstanding the fact that a successor had been nominated.

In May 2015, Frederick Prehn was nominated by Governor Scott Walker for a six-year term to the board, a supervisory body that has advisory and policy making powers for the Department of Natural Resources. Prehn's nomination was confirmed by the senate, his term to expire on May 1, 2021. On April 30, 2021, succeeding Governor Tony Evers acted to appoint a successor for Prehn's position on the board. Prehn, however, declined to step down from the office and continued to actively serve on the board. The senate took no action on Evers's nomination of a successor.

In August 2021, the attorney general brought an action in circuit court alleging that Prehn's continued service on the board was unlawful, owing to the fact that a "vacancy" had arisen on the board that must be filled by the governor's provisional appointment. The attorney general therefore asked that Prehn be either removed from office or, alternatively, declared to be subject to removal by the governor. The circuit court dismissed the action, finding that Prehn was not unlawfully holding the office and that the governor did not have the authority to provisionally appoint a successor or to remove Prehn without cause. The attorney general appealed and filed a petition to bypass the court of appeals, which the supreme court granted, while also allowing the Wisconsin Legislature to intervene as a party. In an opinion authored by Chief Justice Ziegler that addressed both statutory and constitutional questions, the majority affirmed the decision of the circuit court to dismiss the case.

The majority first considered whether Prehn was lawfully continuing to hold office. The majority first observed that Wis. Const. art XIII charges the legislature with determining when offices are to be deemed vacant and the manner of filling vacancies, to the extent not otherwise provided in the constitution. The statutes governing the board, which also govern appointments to various other offices in state government, provide for six-year terms on the board, with members appointed by the governor but subject to senate confirmation. Once a term expires, the majority wrote, the governor has the prerogative to make a nomination for the succeeding term. The statutes also provide for the governor to make provisional appointments, not subject to senate confirmation. Provisional appointments, however, can be made only in the case of a statutorily prescribed "vacancy." While the statutes provide for vacancies in public offices to occur in a host of other circumstances, such as the death or resignation of an incumbent, the expiration of a term of an appointive state office is not among the circumstances deemed a vacancy. The majority also affirmed that an incumbent, such as Prehn, could serve as a "holdover" until a successor was properly appointed, a result that was in accord with both the common law and earlier case law. These conclusions, the majority wrote, are consistent with *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 125 N.W.2d 636 (1964), which had addressed substantially the same question.

The majority also addressed whether Prehn had "for cause" protections, in which case he could be removed only for reasons such as misconduct or malfeasance. The majority, citing to the statutes and the fact that Prehn had previously been appointed and confirmed by the senate, concluded that Prehn could still be removed only for cause. This result, the majority said, was also consistent with the common law principle that "lawful holdovers" have the same rights and responsibilities as when they hold office prior to holding over. The majority declined to hold that allowing Prehn to hold over violated constitutional separation of powers principles—it rejected analogies to the federal power

of the president of the United States and instead pointed to the history of the state constitution and early state history that suggested that the governor's appointment power was much more limited and not inherent to the office.

Justice Dallet dissented in an opinion joined by Justices A.W. Bradley and Karofsky, calling the majority's decision a threat to separation of powers principles. While agreeing that, under the common law, an office holder could "hold over" after his or her term had expired, she concluded that the statutes provided for a vacancy that could be filled by the governor as a provisional appointment. Acknowledging that her result was inconsistent with *Thompson*, Justice Dallet called for overruling *Thompson* while also distinguishing it. She also concluded that while appointive officers such as Prehn had "for cause" protections during their terms, those protections expired once their terms ended and they held over, therefore making Prehn subject to removal by the governor.

Ballot drop boxes are illegal

In *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, the supreme court held that two guidance documents created by the Wisconsin Elections Commission (WEC) pertaining to absentee voting were invalid. The court further held that ballot drop boxes are illegal and an absentee ballot must be returned by mail or personally delivered by the voter to the municipal clerk.

Prior to the 2020 general election, WEC issued two documents. The first stated that ballot drop boxes may be used for voters to return ballots and that a family member or other person may return an absentee ballot on behalf of a voter. The second specified that ballot drop boxes may be unstaffed.

Two Wisconsin voters, Richard Teigen and Richard Thom (collectively, Teigen), challenged the validity of the documents, and the circuit court granted summary judgment in their favor. The court declared that the WEC documents were administrative rules and were invalid because they were not promulgated as rules. The court further found that the guidance provided in the documents was inconsistent with state law, which provides that an elector must personally mail or deliver his or her own absentee ballot by mail or delivery to the municipal clerk. Ballot drop boxes, the court reasoned, would be legal only if staffed by the clerk and located at the clerk's office or a designated alternate site.

The court permanently enjoined WEC and ordered it to withdraw its documents and issue clarifying statements. WEC appealed the decision, and Teigen filed a petition to bypass the court of appeals, which the supreme court granted.

The supreme court, with Justice R.G. Bradley writing for the majority, held that ballot drop boxes are unlawful because Wis. Stat. § 6.87 (4) (b) 1. requires that an absentee ballot be mailed by the elector, or delivered in person, to the municipal clerk issuing the

ballot. The court noted that "municipal clerk" is a defined term and does not include a ballot drop box. The court also found that WEC erred in stating that a person may return another person's absentee ballot, noting that Wis. Stat. § 6.87 (4) (b) 1. requires that an absentee ballot be mailed by the voter or delivered in person to the municipal clerk.[5] The court noted that there is an exception to this requirement, Wis. Stat. § 6.86, which allows a voter to rely on an agent to deliver the absentee ballot, but found that this option applies only to voters who meet the exception provided by that provision.

The court did not address whether WEC's guidance should have been promulgated as administrative rules because the court found the guidance to be invalid, regardless of its origin.

In addition to the lead opinion, portions of which were the opinion of the court, there were separate concurrences filed by Justice Roggensack, Justice Hagedorn, and Justice R.G. Bradley (joined by Chief Justice Ziegler and Justice Roeggensack).

There was also one dissenting opinion, filed by Justice A.W. Bradley and joined by Justices Dallet and Karofsky. Justice A.W. Bradley argued as a preliminary matter that Teigen had no standing to challenge the WEC documents because Teigen suffered no "injury in fact." In contrast, Justice R.G. Bradley's opinion found that Teigen had standing, finding that WEC's documents threatened to interfere with Teigen's rights as a voter, but this portion of the opinion was joined only by Justice Roggensack and Chief Justice Ziegler.

On the merits, Justice A.W. Bradley's dissent noted that Wis. Stat. § 6.87 (4) (b) 1. requires that an absentee ballot be returned "to the municipal clerk" and not "to the municipal clerk's office." A ballot drop box, Justice A.W. Bradley argued, that is set up, maintained, and emptied by the municipal clerk or the clerk's designee is an acceptable means of delivering a ballot to the municipal clerk. On the issue of who may return an absentee ballot, Justice A.W. Bradley noted that Wis. Stat. § 6.87 (4) (b) 1. requires that an absentee ballot be "mailed by the elector, or delivered in person" but does not say "delivered in person by the elector."

Wisconsin Elections Commission is not responsible for changing voter status

In *State ex rel. Zignego v. Wisconsin Elections Commission*, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208, the supreme court held that the law requiring that the registration status of an elector be changed when the elector moves out of a municipality creates a duty of municipal clerks and municipal boards of election commissioners, not of the Wisconsin Elections Commission (WEC).

5. In *Carey v. Wisconsin Elections Commission*, No. 22-cv-402-jdp, 2022 U.S. Dist. LEXIS 156973 (W.D. Wis. Aug. 30, 2022), the U.S. District Court for the Western District of Wisconsin held that this interpretation is preempted by the federal Voting Rights Act "to the extent it prohibits third-party ballot-return assistance to disabled voters who require such assistance."

WEC received a report from the multi-state consortium, the Electronic Registration Information Center, Inc., that identifies registered voters who may no longer be eligible to vote at their registered address because they moved or died. WEC conducted a review of the report and sent notices to approximately 230,000 electors identified in the report, informing them how they could affirm their address. Registered electors and taxpayers Timothy Zignego, David W. Opitz, and Frederick G. Luehrs III (collectively, Zignego) filed a complaint with WEC, pleading that WEC instead change the status of non-responsive electors to ineligible. WEC dismissed the complaint, and Zignego filed suit against WEC, arguing that Wis. Stat. § 6.50 (3) required WEC to change the status of ineligible electors. The circuit court agreed and issued a writ of mandamus order compelling WEC to deactivate the registration of electors who failed to apply for continuation of their registration within 30 days of the date the notice was mailed.

When WEC took no action to comply with the writ, Zignego filed a motion asking the circuit court to hold WEC and several of its commissioners in contempt. The circuit court held a hearing and found WEC and the commissioners who voted to take no action on the writ in contempt and assessed monetary sanctions against both WEC and the commissioners. The same day, WEC filed a notice of appeal with respect to the contempt order. The following day, the court of appeals stayed both the contempt order and the writ of mandamus and subsequently issued an opinion reversing the circuit court. Zignego petitioned the supreme court for review, which the court granted.

The court, with Justice Hagedorn writing for the majority, noted that Wisconsin's decentralized election administration creates duties and responsibilities for WEC, local boards of election commissioners, and municipal clerks. The court further noted that local boards of election commissioners, which are required in counties and cities with a large population, are statutorily required to perform the same elections functions performed by county and municipal clerks throughout the state. Thus, the court noted, the phrase "municipal clerk or board of election commissioners" frequently appears throughout the election statutes and describes local election officials. WEC, the court explained, is repeatedly referred to throughout the elections statutes as simply the "commission," a term defined in Wis. Stat. § 5.025.

The court explained that the statutory provision at issue, Wis. Stat. § 6.50 (3), requires the municipal clerk or board of election commissioners to change an elector's registration status to ineligible upon receipt of reliable information that an elector no longer resides in the municipality. The court explicitly rejected Zignego's argument that WEC is a "board of election commissioners" when the statutes refer to WEC exclusively as the "commission." The court held that surrounding context made it clear that the duties created by Wis. Stat. § 6.50 (3) are duties of municipal clerks and municipal boards of election commissioners, not WEC.

The court subsequently held that the circuit court's writ of mandamus compelling WEC to comply with Wis. Stat. § 6.50 (3) was erroneously granted and must be reversed. The court further held that the circuit court's contempt order must be reversed as well. The court did note, however, that WEC had a duty to comply with the circuit court's writ of mandamus until the request for a stay was granted.

Justice R.G. Bradley, in a dissent joined by Justice Ziegler, agreed that municipal clerks and boards of election commissioners have a statutory obligation to change the status of ineligible voters, but argued that WEC has the same obligation. Justice R.G. Bradley noted that Wis. Stat. § 5.05 (15) makes WEC responsible for maintenance of the official voter registration list and Wis. Stat. § 6.36 (1) (a) requires WEC to compile and maintain an electronic registration list. These requirements, Justice R.G. Bradley argued, must mean more than simply creation of the list, but also ensuring its accuracy.

Justice R.G. Bradley also expressed concern at WEC's refusal to comply with the circuit court's writ of mandamus and criticized the court of appeals for imposing a stay on the circuit court's contempt order before deciding the merits of the order. Justice R.G. Bradley argued that the contempt order should have remained in place until the court of appeals decided the merits of the circuit court decision and the imposed sanctions should have been upheld regardless of the outcome of the appeal.

Timeliness of challenges to election procedure

In *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629, 951 N.W.2d 568, the supreme court ruled that the Trump campaign's challenges to four different categories of absentee ballots were meritless or barred by the doctrine of laches.

The initial results of the 2020 presidential election indicated that Joe Biden and Kamala Harris were to be the recipients of Wisconsin's Electoral College votes, having won the state by 20,427 votes. Donald Trump, Mike Pence, and Donald J. Trump for President, Inc., (collectively, the Campaign) sought a recount of the votes in Dane and Milwaukee Counties. The recount was conducted and resulted in an increase in the margin of victory for Biden and Harris. The Campaign appealed the results of the recount to the circuit court, which affirmed the determinations of the Dane County Board of Canvassers and the Milwaukee Elections Commission. The Campaign appealed the circuit court ruling, filing a petition to bypass the court of appeals, which the supreme court granted.

The Campaign challenged four categories of ballots in Dane and Milwaukee Counties: those cast by voters who declared themselves indefinitely confined, all in-person absentee ballots cast, all absentee ballots containing witness address information added by municipal clerks, and all ballots returned at "Democracy in the Park" events in the city of Madison.

On the issue of indefinitely confined voters, the Campaign objected to votes that had been cast by voters who declared themselves indefinitely confined following guidance provided by the clerks for Dane and Milwaukee Counties. The court, with Justice Hagedorn writing for the majority, noted that Wis. Stat. § 6.86 (2) (a) allows voters to declare themselves indefinitely confined, provided they meet the statutory requirements, and held that the Campaign's request to invalidate the votes of all indefinitely confined voters, without regard to whether any individual voter was in fact indefinitely confined, was without merit.

On the remaining three issues, the court held that the challenges failed under the doctrine of laches. As the court explained, "[l]aches is founded on the notion that equity aids the vigilant," and application of the doctrine is "within the court's discretion upon a showing by the party raising the claim of unreasonable delay, lack of knowledge the claim would be raised, and prejudice." The court noted that laches is of special importance when the challenge involves elections, which require "extreme diligence and promptness."

On the matter of unreasonable delay, the court held that it was unreasonable for the Campaign to wait until after the election to challenge the validity of the form used to obtain an absentee ballot, a form that had been used by municipalities throughout the state for at least a decade. Similarly, the court found it unreasonable that the Campaign waited until after the election to challenge guidance for handling missing witness information, guidance that had been relied on in 11 statewide elections since 2016. Finally, the court found it unreasonable that the Campaign waited until after the election to challenge the legality of "Democracy in the Park" events, at which absentee ballots were collected in reliance on representations made by municipal officials that the events were legal.

On the matter of lack of knowledge, the court held that the record was sufficient to demonstrate that Biden and Harris had no knowledge that the Campaign would challenge numerous election procedures after the election.

On the final matter of prejudice, the court held that voters who would be affected by the Campaign's claims for relief were acting according to long-standing guidance by the Wisconsin Elections Commission (WEC) and local election officials and would be unfairly prejudiced if their votes were deemed invalid.

Finally, the court noted that it is within the court's discretion to apply laches. The court held that application of the doctrine was the only just resolution of the claims, which were not of improper activity by the voters, but technical issues of election administration. The court noted that voters followed procedures and policies communicated to them and local election officials followed the guidance provided by WEC. The court affirmed the judgment of the circuit court.

In addition to the majority opinion, there were separate concurrences filed by Justice

Hagedorn and Justice Dallet (joined by Justice Karofsky). There were also three dissenting opinions.

Chief Justice Roggensack dissented in an opinion joined by Justices Ziegler and R.G. Bradley, arguing that officials in Dane and Milwaukee Counties based their decisions on erroneous advice regarding correcting witness addresses and, in Dane County, in approving "Democracy in the Park" locations. Chief Justice Roggensack argued that the court should address these errors rather than barring the claims under the doctrine of laches.

Justice Ziegler, writing separately in a dissent joined by Chief Justice Roggensack and Justice R.G. Bradley, argued that the doctrine of laches did not apply because the Campaign did not unreasonably delay making its claims and because Biden and Harris knew ballots would be challenged and failed to demonstrate that they were prejudiced by the claims.

Justice R.G. Bradley, writing separately in a dissent joined by Chief Justice Roggensack and Justice Ziegler, argued that laches should not have been applied to the claims and the court should have resolved the underlying legal disputes.

Supreme court declines to interfere with ballot for election that is underway

In *Hawkins v. Wisconsin Elections Commission*, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877, the supreme court entered an order denying Howie Hawkins and Angela Walker their petition for leave to commence an original action and their motion for temporary injunctive relief related to their request to appear on the general election ballot.

On August 4, 2020, Hawkins and Walker filed nomination papers with the Wisconsin Elections Commission (WEC) to be placed on the ballot for the November 3, 2020, general election as the Green Party's candidates for president and vice president of the United States. On August 7, 2020, Wisconsin voter Allen Arntsen filed a complaint with WEC alleging that 2,046 of the signatures appearing on the nomination papers did not list a correct address for Walker. On August 20, 2020, WEC sustained Arntsen's challenge to a portion of the signatures, rejected Arntsen's challenge to another portion of the signatures, and was deadlocked on Arntsen's challenge to the remainder of the signatures. On August 21, 2020, WEC notified Hawkins and Walker that WEC had certified a total of 1,789 valid signatures, fewer than the 2,000 required, and Hawkins and Walker would therefore not appear on the ballot.

On August 26, 2020, WEC certified the list of independent candidates for president and vice president who would appear on the ballot. On September 1, 2020, WEC certified the remainder of the list of candidates for president and vice president that would appear on the ballot. Hawkins and Walker did not appear on either list. On September 3, 2020, Hawkins and Walker filed a petition for leave to commence an original action

and motion for temporary injunctive relief, asking the supreme court to place them on the ballot.

In its order, the court noted that Wisconsin law establishes various deadlines for production and delivery of absentee ballots in advance of an election. The court further noted that, because of the COVID-19 pandemic, absentee ballot requests were unusually high for the 2020 fall general election, and local election officials were, in turn, distributing absentee ballots earlier than usual. The court argued that, by the time Hawkins and Walker filed their petition and motion, many ballots had already been printed and distributed without Hawkins and Walker listed as candidates.

In declining to grant the petition for leave to commence an original action or the motion for temporary injunctive relief, the court held that ordering the printing of new ballots would be expensive and time-consuming and would not allow local election officials to meet statutory deadlines. The court further held that ordering the printing and mailing of replacement ballots would create confusion among voters who had already received and returned ballots. The court explicitly stated that it was not considering the merits of the issues raised by Hawkins and Walker, but was declining to interfere in an election that, "for all intents and purposes, has already begun."

Chief Justice Roggensack, in a dissent joined by Justices Ziegler and R.G. Bradley, argued that WEC was required by its own administrative rules to presume that the address listed on the nomination papers was valid. Chief Justice Roggensack argued that Wis. Admin. Code EL § 2.07 (3) (a) placed the burden on Arntsen to establish the insufficiency of the address, which he lacked the personal knowledge to do.

Justice Ziegler, in a dissent joined by Chief Justice Roggensack and Justice R.G. Bradley, argued that there was sufficient time for the court to intervene and correct the ballots to include Hawkins and Walker as candidates.

In a separate dissent, Justice R.G. Bradley argued that Wisconsin law "unquestionably requires" that Hawkins and Walker appear on the ballot and expressed concern about the "pandemonium that would ensue" if the United States Supreme Court ordered Wisconsin to repeat its November election for failure to correct this ballot issue.

COVID-19 public health order authority

In several cases arising in the wake of the COVID-19 pandemic, the supreme court considered issues relating to the scope of the authority of various government officials to act in response to the pandemic.

In *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856, the supreme court held that the governor's successive declarations of a state of emergency during the COVID-19 pandemic were unlawful.

On March 12, 2020, Governor Tony Evers issued an executive order declaring a

public health emergency and setting out certain restrictions. Under Wis. Stat. § 323.10, no state of emergency may last longer than 60 days unless extended by the legislature. The original executive order expired on May 11, 2020, 60 days after it was issued. The governor issued subsequent executive orders on July 30 and September 22, 2020, and January 19, 2021, again proclaiming a public health emergency based on the COVID-19 pandemic. The legislature revoked the governor's January order in February 2021, after which the governor immediately issued a new order declaring an emergency.

Jeré Fabick filed an original action, as a Wisconsin taxpayer, directly in the supreme court, challenging the March, July, and September 2020 orders, arguing that the governor lacks authority under the statutes to declare successive states of emergency arising from the same public health emergency.

In a majority opinion authored by Justice Hagedorn, the court held that Wis. Stat. § 323.10 "must be read to forbid the governor from proclaiming repeated states of emergency for the same enabling condition absent legislative approval." The court contrasted the language of Wis. Stat. § 323.10 to the language in Wis. Stat. § 323.11, which outlines similar emergency declaration powers for local governments but, unlike Wis. Stat. § 323.10, provides that the declaration of emergency is limited "to the time during which the emergency conditions exist or are likely to exist." The court also noted that the legislature, in redrafting Wis. Stat. § 323.10 in 2002, borrowed extensively from the Model State Emergency Health Powers Act but did not adopt the model act's proposal to allow the governor to renew a public health emergency declaration every 30 days.

The court therefore agreed with Fabick and held that the governor's July 2020 and September 2020 executive orders were unlawful. The court also invalidated the governor's February 2021 order.

Justice R.G. Bradley joined the majority opinion but also filed a concurring opinion that was joined by Chief Justice Roggensack.

Justice A.W. Bradley dissented, joined by Justices Dallet and Karofsky. The dissent argued that, because Fabick did not personally sustain any losses, the court should not have considered his case in the first place. The dissent further found that, under Wis. Stat. § 323.10 and the definition of "public health emergency" under Wis. Stat. § 323.02 (16), successive declarations of emergencies are allowed when they are based on separate "'occurrences,' even if those occurrences share the same underlying cause." The dissent agreed with the governor that each successive declaration of an emergency was based on new and different on-the-ground conditions related to COVID-19, therefore justifying a new declaration of emergency.

In *James v. Heinrich*, 2021 WI 58, 397 Wis. 2d 516, 960 N.W.2d 350, the supreme court exercised its original jurisdiction to consider three consolidated cases challenging the authority of Janel Heinrich, the local health officer for Public Health of Madison

and Dane County (PHMDC), to issue an order closing all schools in Dane County for in-person instruction in grades 3–12 in an effort to limit the spread of a novel strain of coronavirus, COVID-19.

Beginning in May 2020, Heinrich and PHMDC began issuing a series of emergency orders governing Dane County in response to the COVID-19 pandemic. On August 21, 2020, Heinrich issued Emergency Order No. 9, which closed all public and private schools for in-person instruction in grades 3–12. The order exempted students in grades K–2, so long as schools provided an option for virtual learning. The order allowed schools to continue to operate in person as "child care and youth settings" and further allowed higher education institutions to remain open for in-person instruction. The order also allowed many businesses to conduct in-person operations, subject to certain capacity limits and social-distancing guidelines.

Sara Lindsey James, a parent of two students enrolled in Our Redeemer Lutheran School in the city of Madison, the Wisconsin Council of Religious and Independent Schools, along with a group of parents, other associations, individual schools, and St. Ambrose Academy, Inc., a classical Catholic school located in the city of Madison (collectively, the petitioners), filed petitions for original action challenging the lawfulness of the order. The petitioners claimed both that the order exceeded Heinrich's authority under Wis. Stat. § 252.03 and that the order violated the petitioners' fundamental right to the free exercise of religion under Wis. Const. art. I § 18. The supreme court granted the petitions for original action on September 10, 2020, and consolidated the cases. The court also enjoined those provisions of Emergency Order No. 9 "which purport to prohibit schools throughout Dane County from providing in-person instruction to students."

In a majority opinion written by Justice R.G. Bradley, the court held that local health officers do not have the statutory power to close schools under Wis. Stat. § 252.03 and, further, that Heinrich's order infringed on the petitioners' fundamental right to free exercise of religion as guaranteed under Wis. Const. art. I, § 18.

Wis. Stat. § 252.03 sets forth the powers of local health officers regarding communicable diseases, including directing a local health officer to "promptly take all measures necessary to prevent, suppress and control communicable diseases," and allowing a local health officer to "do what is reasonable and necessary for the prevention and suppression of disease," and to "forbid public gatherings when deemed necessary to control outbreaks or epidemics." The court found that "[b]ecause the legislature expressly granted local health officers discrete powers under Wis. Stat. § 252.03 but omitted the power to close schools, local health officers do not possess that power."

With respect to the arguments regarding the right to free exercise of religion under the Wisconsin Constitution, the court noted that when examining alleged violations of the freedom of religious exercise, the court has "generally applied the compelling state

interest/least restrictive alternative test." Under that test, the person or organization asserting the violation must prove (1) that it has a sincerely held religious belief, and (2) that such belief is burdened by the application of the law. If the party makes this showing, the burden shifts to the state to prove both that "the law is based upon a compelling state interest" and that the interest "cannot be served by a less restrictive alternative." The court found the petitioners had sincerely held beliefs that were burdened by Heinrich's order. While accepting that the state "certainly has a compelling interest in slowing the spread of COVID-19," the court also found that less restrictive measures in earlier orders and the distinctions among age groups of students in Heinrich's order demonstrated that less restrictive alternatives were available. As such, the court held that Heinrich's order fails the strict scrutiny test, finding that "the application of the Order burdens the Petitioners' sincerely-held religious beliefs, and Heinrich fails to demonstrate why the Order, although based upon a compelling interest, cannot be met by less restrictive alternatives."

Justice Hagedorn joined the court's opinion with the exception of one footnote relating to the court's role in addressing constitutional questions. He filed a concurrence agreeing that it was appropriate to address the religious liberty question in the case, but finding "unprecedented" the assertion in the footnote of the opinion of the court that the court is "duty-bound to address important constitutional questions raised in a case even though it can be resolved on other grounds."

Justice Dallet filed a dissenting opinion, joined by Justices A.W. Bradley and Karofsky, finding that the plain language of Wis. Stat. § 252.03, its history, and related statutes "all confirm that local health officers may close schools, so long as doing so is at least reasonable and necessary to suppress disease." Justice Dallet further found that because the majority resolved the case by striking down the order based on its statutory analysis, the majority should not have proceeded to opine on the constitutional challenge.

In *Becker v. Dane County*, 2022 WI 63, 403 Wis. 2d 424, 977 N.W.2d 390, the supreme court again considered the authority of Janel Heinrich, the local health officer and director of PHMDC, reviewing whether local health officers may lawfully issue public health orders.

Heinrich's COVID-19-related orders included orders requiring face coverings, limiting or forbidding gatherings, requiring sanitation protocols for certain facilities, limiting or forbidding certain sport activities, limiting the permissible indoor capacity for businesses, and requiring physical distancing between individuals. Heinrich issued these orders pursuant to her authority under Wis. Stat. § 252.03 (1) and (2). About the time Heinrich issued a fourth COVID-19-related public health order, Dane County duly enacted Dane County Ordinance § 46.40 relating to the prevention, suppression, and control of communicable diseases. Among other things, the ordinance made it a violation of Dane County Ordinance ch. 46 to "refuse to obey an Order of the Director of Public

Health Madison and Dane County entered to prevent, suppress or control communicable disease pursuant to Wis. Stat. s. 252.03." Under Dane County Ordinance § 46.27 (1), a violation of chapter 46 could result in a civil forfeiture of between $50 and $200 for each day that a violation exists.

Jeffrey Becker and Andrea Klein, two Dane County residents, and later, A Leap Above Dance, LLC, (collectively, Becker) sued Dane County, PHMDC, and Heinrich, challenging their legal authority to enforce Heinrich's COVID-19-related orders. The circuit court denied Becker's motion for a temporary injunction preventing enforcement, but also granted Becker's request to enter summary judgment against Becker to allow for appeal. The supreme court granted Becker's petition to bypass the court of appeals to interpret the scope of authority granted under Wis. Stat. § 252.03, whether state law preempts Dane County Ordinance § 46.40, and to "assess both provisions' constitutionality with respect to separation-of-powers principles."

In a majority opinion authored by Justice Karofsky, the court found that Wis. Stat. § 252.03 grants local health officers the authority to issue orders. The court further held that no state law preempts Dane County Ordinance § 46.40 and, finally, that a local health officer's authority to issue enforceable public health orders under Wis. Stat. § 252.03 or Dane County Ordinance § 46.40 does not constitute an unconstitutional delegation of legislative power in violation of the separation of powers.

The court held that, "based on the common and approved meaning of the operative language, the context in which it appears, and the statutory history," the authority granted by Wis. Stat. § 252.03 includes the authority for a local health officer to act via order.

With regard to preemption, the court held that state law preempts a local ordinance when "(1) the state legislature has expressly withdrawn the power of municipalities to act; (2) the ordinance logically conflicts with state legislation; (3) the ordinance defeats the purpose of state legislation; or (4) the ordinance violates the spirit of state legislation." Except in those circumstances, a county "may enact ordinances in the same field and on the same subject as that covered by state legislation." The court found that none of these circumstances exist. Rather, the ordinance at issue was not preempted because it permissibly grants authority redundant to that authorized under state statute, and the enforcement authority presents no conflict with state law.

In a portion of the decision not joined by Justice Hagedorn, and therefore not garnering a majority, the court addressed the separation of powers and whether the grant of authority to the local health officer to issue public health orders is an unconstitutional delegation of legislative power. Justice Karofsky stated in the lead opinion as to this issue that "[s]o long as the legislative grant contains an 'ascertainable' purpose and 'procedural safeguards' exist to ensure conformity with that legislative purpose, the grant of authority is constitutional." The lead opinion further stated that both Wis. Stat. § 252.03 and

the Dane County ordinance pass constitutional muster, noting that the provisions "'la[y] down the fundamentals of the law'—the who, what, when, where, why, and how[,]" and that there are substantial state and local procedural safeguards in place, including the state legislature's authority to change the granted authority, and local controls, such as supervisory authority by a local health board and the power of local elected officials to remove the local health officer.

Justice Hagedorn filed a separate concurrence to discuss Becker's request that the court revisit its precedents and "revitalize a more robust, judicially-enforced nondelegation doctrine at both the state and local levels." Justice Hagedorn noted that analysis of these issues requires "a resort to first principles" and an examination of the language as it was originally understood. While noting that he remains open to reconsidering the approach to the nondelegation doctrine in a future case, Justice Hagedorn explained that the delegation of authority under Wis. Stat. § 252.03 is supported by historical evidence. He further explained that the Dane County ordinance does not implicate the delegation doctrine because the ordinance does not separately authorize local health orders, but rather, is limited to penalizing those who violate orders lawfully issued by local health officers under authority granted by the legislature in Wis. Stat. § 252.03.

Justice R.G. Bradley filed a dissent, joined by Chief Justice Ziegler and Justice Roggensack, finding that Dane County Ordinance § 46.40 violates the Wisconsin Constitution because it impermissibly subdelegates to a local health officer the lawmaking power granted to the county board of supervisors under Wis. Const. art. I, § 22.

In *Tavern League of Wisconsin, Inc. v. Palm*, 2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261, the supreme court considered a challenge to an order limiting indoor public gatherings issued as a response to the COVID-19 pandemic by Andrea Palm, the secretary-designee of health services.

On October 6, 2020, Secretary-designee Palm issued Emergency Order No. 3, which limited the size of indoor public gatherings to either 25 percent of the total occupancy limits for the room or building, as established by the local municipality or, for indoor spaces without a limit (such as a private residence), to no more than 10 people. Emergency Order No. 3 defined a "public gathering" as "an indoor event, convening, or collection of individuals, whether planned or spontaneous, that is open to the public and brings together people who are not part of the same household in a single room." Under the order, office spaces, manufacturing plants, other facilities that are accessible only by employees or other authorized personnel, invitation-only events that exclude uninvited guests, and private residences were considered to be not open to the public, except that a private residence "is considered open to the public during an event that allows entrance to any individual" and "such public gatherings are limited to 10 people." The order provided that entities such as childcare settings, schools and universities, Tribal nations, places of religious

worship, political rallies, and other gatherings protected by the First Amendment were exempt from the limits. The limits under the order were enforceable by civil forfeiture.

The Tavern League of Wisconsin, Inc., and other plaintiffs (collectively, the Tavern League) filed suit in circuit court, seeking a temporary injunction and a declaration that Emergency Order No. 3 was unlawful because the order was a rule and the Department of Health Services (DHS) did not undertake proper rulemaking procedures as required by Wis. Stat. ch. 227 and *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. The court in *Palm* struck down an earlier COVID-19-related order by Secretary-designee Palm known as a "Safer at Home" order that limited travel and forced closures of businesses not deemed essential.[6] After initially granting an ex parte temporary injunction, the circuit court (by a different judge substituted after the initial ruling) allowed The Mix Up, Inc., and several other individuals and entities to intervene (collectively, The Mix Up), but vacated the initial order and denied the motion for temporary injunctive relief. The circuit court held that the parties seeking injunctive relief did not meet the necessary standards, finding that they did not have a reasonable probability of success on the merits, that enjoining the emergency order would disrupt the status quo, and that there was no proof of irreparable harm by the emergency order, because there was no evidence of compliance with the emergency order. The Mix Up moved for leave to appeal and, when the court of appeals granted the motion, DHS filed a petition for bypass. The supreme court denied that motion, and the case remained with the court of appeals.

The court of appeals summarily reversed the circuit court, finding that under the supreme court's prior ruling in *Palm*, Emergency Order No. 3 was invalid and unenforceable as a matter of law and that, accordingly, the standard for injunctive relief was met. The supreme court granted the DHS petition for review to determine whether Emergency Order No. 3 is a rule.

There was no majority opinion in this case. Chief Justice Roggensack, joined by Justices Ziegler and R.G. Bradley, authored a lead opinion announcing the mandate of the court and affirming the court of appeals. Justice Hagedorn concurred in the mandate, but did not join the lead opinion. The lead opinion first addressed whether the case was moot. The lead opinion noted that, although the emergency order expired, the issue regarding whether the secretary-designee of health services issued an order in violation of the laws of Wisconsin satisfied the great public importance exception to mootness.

On the merits, the lead opinion stated that "agencies must comport with rulemaking procedures set forth in Wis. Stat. ch. 227 when the agency's proffered directive meets the definition of a 'rule.'" The lead opinion explained, as the court did in *Palm*, that "agency

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6. The supreme court's opinion in *Wisconsin Legislature v. Palm* is summarized in the 2021–22 *Wisconsin Blue Book*. Wis. Legis. Reference Bureau, "Survey of Significant Wisconsin Court Decisions, 2019–20," part 3 in *Wisconsin Blue Book: 2021–22* (Madison, WI: Legislative Reference Bureau, 2021), 402–4.

action that exhibits all of the following criteria meets the definition of a rule: '(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the effect of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency.'" The lead opinion reiterated the court's conclusion from *Palm* that an order issued by an agency is a general order of general application if "the class of people regulated . . . 'is described in general terms and new members can be added to the class.'"

The lead opinion found unpersuasive the DHS argument that Emergency Order No. 3 was not a rule because it was issued under a different subsection of Wis. Stat. § 252.02 than the subsections discussed in *Palm*. The lead opinion noted that such an argument reads Palm too narrowly and that the determination of whether DHS's action meets the definition of a rule depends upon the definitional criteria explained in the *Palm* decision.

The lead opinion stated that Emergency Order No. 3 is a general order generally applied and it therefore meets the facial definition of a rule, as was explained in *Palm*. The lead opinion found Emergency Order No. 3 meets the five definitional criteria of a rule that were set forth in that decision. First, the lead opinion found that the order met the first two criteria of a rule and was a general order of general application because, by its own terms, the order applied broadly and created a class that could include new entities and members. Emergency Order No. 3 met the third definitional criterion because it was enforceable by civil forfeiture and thus had the effect of law. The order met the fourth criterion because it was issued by DHS, an agency. Finally, the lead opinion stated that by both implementing and interpreting Wis. Stat. § 252.02 (3)'s grant of authority to "forbid public gatherings . . . to control outbreaks and epidemics," Emergency Order No. 3 satisfies the fifth criterion of a rule. Because the lead opinion found that Emergency Order No. 3 satisfied all five criteria that define a rule and was not promulgated through rulemaking procedures, Emergency Order No. 3 was not valid or enforceable.

In his concurrence, Justice Hagedorn noted the court's previous ruling in *Palm*, which held, "among other things, that a statewide order limiting public gatherings met the statutory definition of an administrative rule and must be promulgated as such." The justice noted his objections to the court's analysis in *Palm* and, by extension, the rationale in the lead opinion, but agreed that the court's ruling in *Palm* controlled the outcome with regard to Emergency Order No. 3. Justice Hagedorn stated that if the doctrine of stare decisis (meaning "to stand by things decided") "is to have any import at all in our legal system, it surely must apply when a court has told a specific party that certain conduct is unlawful, and that party does the very same thing again under the same circumstances."

Justice A.W. Bradley dissented, joined by Justices Dallet and Karofsky, finding that the *Palm* decision was inapplicable to the case and that the plain language of Wis. Stat.

§ 252.02 (3) provides DHS with the authority to forbid public gatherings without going through rulemaking.

DNR authority after 2011 Wisconsin Act 21

In two cases—*Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources*, 2021 WI 71, 398 Wis. 2d 386, 961 N.W.2d 346 (hereinafter, *Clean Wisconsin v. Kinnard*) and *Clean Wisconsin, Inc. v. Wisconsin Department of Natural Resources*, 2021 WI 72, 398 Wis. 2d 433, 961 N.W.2d 611 (hereinafter, *Clean Wisconsin v. WMC*)—the supreme court held that the Department of Natural Resources has the explicit authority under state statutes to impose conditions on one permit and to consider environmental effects before approving another.

At issue in both cases was Wis. Stat. § 227.10 (2m), which was created under 2011 Wisconsin Act 21. That statute provides that "[n]o agency may implement or enforce any standard, requirement, or threshold . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule." Both cases raised the question of whether "explicit" means "specific" or whether an explicit grant of power to an agency in a statute or rule can be broad and general. In 2016, the then Wisconsin attorney general released an opinion (OAG 01-16) stating that Wis. Stat. § 227.10 (2m) barred DNR from imposing conditions on a permit unless those conditions were specifically laid out verbatim in a statute or administrative rule, and that the statute prevented DNR from relying on broad or general grants of authority.

In *Clean Wisconsin v. Kinnard*, Kinnard Farms, Inc., wanted to expand its existing concentrated animal feeding operation (CAFO) by adding 3,000 dairy cows. When DNR approved Kinnard's application for the necessary Wisconsin Pollution Discharge Elimination System (WPDES) permit, five individuals who lived near Kinnard's CAFO petitioned for a contested case hearing to review DNR's decision. Experts at the contested case hearing testified that a large number of private wells in the area were contaminated and that land features under the CAFO made the land extremely susceptible to groundwater contamination.

The administrative law judge (ALJ) presiding at the hearing ordered DNR to modify Kinnard's WPDES permit to include two conditions: a maximum number of animals allowed in the CAFO and off-site groundwater monitoring. However, the secretary of natural resources reversed the part of the ALJ's decision imposing conditions on the permit, based on OAG 01-16. The five individuals and Clean Wisconsin, Inc., petitioned for judicial review. The circuit court concluded that DNR had the explicit authority to impose the two conditions on Kinnard's WPDES permit. Kinnard appealed, and the court of appeals certified the case to the supreme court. The supreme court granted the Wisconsin Legislature's motion to intervene in the case.

Kinnard and the legislature argued that, under Wis. Stat. § 227.10 (2m), "explicit" means "specific," and any condition imposed in a permit must be included verbatim in a statute or administrative rule. The court, in a majority opinion authored by Justice Karofsky, rejected this argument, noting both that the dictionary definitions of the two words are different, and that the legislature had used the term "specific" in other statutes but had chosen not to do so here. The court instead held that "an agency may rely upon a grant of authority that is explicit but broad when undertaking agency action, and such an explicit but broad grant of authority complies with § 227.10 (2m)."

The court also looked to Wis. Stat. § 283.31 (3), which allows DNR to issue a permit "for the discharge of any pollutant . . . upon condition that such discharges will meet," among other things, effluent limitations (restrictions on the amount of pollutants that may be discharged from a particular source) and groundwater protection standards (health-based standards for groundwater set by DNR). In addition, Wis. Stat. § 283.31 (4) provides that DNR "shall prescribe conditions for permits issued under this section to assure compliance" with effluent limitations and groundwater protection standards. Based on these statutes, the court determined that DNR had the explicit authority to impose the two conditions on Kinnard's WPDES permit.

Justice Dallet filed a concurring opinion, in which Justices A.W. Bradley and Karofsky joined. Justice Roggensack filed a dissenting opinion, in which Justice R.G. Bradley joined; Justice R.G. Bradley also filed a separate dissenting opinion.

In *Clean Wisconsin v. WMC*, DNR reviewed several applications for proposed high capacity wells. A high capacity well is a well capable of pumping more than 100,000 gallons per day. Wis. Stat. § 281.34 (4) (a) requires DNR to evaluate the environmental impacts for some, but not all, high capacity well applications. In this case, DNR was not required under Wis. Stat. § 281.34 (4) (a) to perform such an evaluation but still determined that the proposed wells would negatively affect waters of the state. However, based on the attorney general's 2016 opinion, DNR stopped its practice of reviewing the potential environmental effects of all proposed high capacity wells and approved all of the high capacity well applications at issue here without imposing any conditions to limit the environmental impacts of the wells.

Clean Wisconsin, Inc., and the Pleasant Lake Management District (collectively, Clean Wisconsin) appealed DNR's approval of the wells to the circuit court, and several business associations intervened in the action. The circuit court reversed the approvals. The business associations appealed, and the court of appeals certified the appeal to the supreme court. The supreme court granted the legislature's motion to intervene in the case.

In a majority opinion authored by Justice Dallet, the court first noted that it had addressed the same issue in *Lake Beulah Management District v. State Department of Natural Resources*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73. The court explained that, in *Lake Beulah*, the court had unanimously held that "DNR has both a constitutional duty

and the statutory authority to consider the environmental effects of all proposed high capacity wells" and that DNR cannot ignore "concrete, scientific evidence of potential harm to waters of the state." The public trust doctrine in Wis. Const. art. IX, § 1, requires the state to protect its navigable waters for the public's benefit. The court noted, as it had in *Lake Beulah*, that the legislature has delegated some of its public trust duties to DNR. Specifically, the legislature charged DNR with the "general supervision and control over the waters of the state" under Wis. Stat. § 281.12 (1); granted to DNR the "necessary powers" to enhance the "quality management and protection of all waters of the state" against "all present and potential sources of water pollution" under Wis. Stat. § 281.11; and required DNR to "carry out the planning, management[,] and regulatory programs necessary for implementing the policy and purpose of [Wis. Stat. ch. 281]" under Wis. Stat. § 281.12 (1). In order to fulfill these duties, the court in *Lake Beulah* found that DNR must be able to consider the environmental effects of a proposed high capacity well. Additionally, the court noted that the legislature also required DNR, under Wis. Stat. §§ 281.34 (5) (e) and 281.35 (5) (d), to impose conditions on approved wells to ensure that the wells will not adversely affect any public water right in navigable waters or have a significant detrimental effect on the waters of the state.

The court then rejected the business associations' and legislature's argument that the enactment of Wis. Stat. § 227.10 (2m) necessarily altered the court's conclusion in *Lake Beulah*. The court held that Wis. Stat. § 227.10 (2m) requires "explicit" grants of authority rather than "implicit" grants, but that this does not mean that an explicit grant of authority cannot be broad and general. The court found that the legislature "granted the DNR the broad but explicit authority to consider the environmental effects of a proposed high capacity well" under the statutes discussed above. In considering a proposed well's potential effect on the environment, then, DNR is carrying out its explicit statutory directives.

In both cases, Justices Roggensack and R.G. Bradley dissented, finding that there is not explicit authority in the statutes or administrative rules that gives DNR the power to either impose the two conditions on Kinnard's WPDES permit or conduct an environmental impact review for proposed high capacity wells when that review is not specifically required.

Justice Hagedorn did not participate in either case.

Employment discrimination on the basis of domestic violence convictions

In *Cree, Inc. v. Labor & Industry Review Commission*, 2022 WI 15, 400 Wis. 2d 827, 970 N.W.2d 837, the supreme court considered whether an employer unlawfully discriminated against a job applicant when the employer rescinded its job offer after learning about the applicant's record of domestic violence convictions.

In June 2015, shortly after his release from prison, Derrick Palmer applied for a job as an applications specialist at the Cree, Inc., facility in Racine, Wisconsin, which manufactured and marketed lighting components. The primary responsibilities of the position included designing and recommending lighting systems to Cree's customers. Cree offered Palmer the job subject to a standard background check but then rescinded the offer after the background check revealed the details of Palmer's convictions in 2013 of multiple crimes involving domestic violence against his live-in girlfriend. Palmer filed a complaint with the Equal Rights Division (ERD) of the Department of Workforce Development, alleging that Cree unlawfully discriminated against him on the basis of his conviction record in violation of the Wisconsin Fair Employment Act (WFEA).

The WFEA generally prohibits employers from discriminating against current and prospective employees on the basis of their criminal conviction records. However, the WFEA contains an exception, known as the "substantial relationship test," that allows an employer to deny employment if the circumstances of the individual's convicted offense substantially relate to the circumstances of the particular job. ERD's administrative law judge agreed with Cree and concluded that Palmer's convictions were substantially related to the circumstances of the job, and that, therefore, Cree did not unlawfully discriminate against Palmer when it rescinded the job offer. Palmer appealed the decision to the Labor and Industry Review Commission (LIRC), which reversed ERD's decision. Cree appealed that determination to the circuit court, which reversed LIRC's decision. Palmer again appealed, and the court of appeals reversed the circuit court's decision. Finally, Cree appealed to the supreme court, which yet again reversed.

In a majority opinion authored by Justice Karofsky, the supreme court explained that the substantial relationship test requires an employer to show that the facts, events, and conditions surrounding the convicted offense "materially relate" to the facts, events, and conditions surrounding the job; however, the test does not require an exact identity between the circumstances of the offense and the circumstances of the job. The relevant circumstances are those "material to fostering criminal activity"; in other words, the circumstances must be material to the likelihood that the individual will reoffend in the workplace.

The court noted that the "seesawing" history of the case demonstrated a need for clarifying how the substantial relationship test applies to domestic violence convictions and explained that the underlying decisions were based on the common, but unsupported, belief that domestic batterers have a tendency to be violent only towards intimate partners. Rather, the court explained, the domestic setting of the offense and the intimate relationship with the victim are circumstances of the offense of domestic violence that are immaterial to determining whether a substantial relationship exists.

Regarding the circumstances of Palmer's convictions, the court analyzed the character traits revealed by the elements of Palmer's offenses and concluded that the elements

and particular facts of the offenses showed that Palmer has a "tendency to violently exert his power to control others, and thus Palmer poses a real threat to the safety of others." In addition to character traits, the court also considered other circumstances of the offense, including: (1) the seriousness and number of offenses—the more serious the offense, the less an employer should be expected to carry the risk and liability that the employee will reoffend; (2) how recent the conviction was—a recent conviction may eliminate any favorable inference of rehabilitation; and (3) whether there is a pattern of behavior—the existence of prior convictions with similar elements may increase the risk the employee will reoffend. With respect to those additional circumstances, the court concluded that Palmer's offenses were undeniably serious, the offenses were recent, and the offenses, together with a prior 2001 domestic battery conviction, indicated an emerging pattern of domestic violence convictions.

In evaluating the circumstances of the job, the court noted that the applications specialist works largely independently without regular supervision, travels to customer sites and trade shows, and has access to most of Cree's facility, including secluded areas, extremely loud places that could cover the sounds of a struggle, and portions not covered by security cameras.

In short, the court concluded that Cree had sufficiently proven that the circumstances of Palmer's domestic violence convictions substantially related to the circumstances of the applications specialist job for at least two reasons: (1) Palmer's willingness to use violence to exert power and control over others substantially relates to the independent and interpersonal nature of the job; and (2) the absence of regular supervision creates opportunities for violent encounters. Therefore, the court concluded, Cree did not unlawfully discriminate against Palmer by rescinding its job offer.

The court stressed that its holding was fact-specific and that "[n]othing in this opinion condemns all domestic violence offenders to a life of unemployment."

Justice Dallet dissented in an opinion joined by Justices A.W. Bradley and Hagedorn. In the dissenter's view, the majority focused on generic character traits at a high level of generality and general qualities of Cree's workplace, and, in doing so, undermined the WFEA's policy of reintegration of offenders into the workforce by "concluding that individuals convicted of crimes of domestic violence are unfit to work in close proximity to other people, regardless of the circumstances."

Defense for crimes committed by a victim of sex trafficking

In *State v. Kizer*, 2022 WI 58, 403 Wis. 2d 142, 976 N.W.2d 356, the supreme court (1) defined the meaning of "direct result" in the context of a defense against prosecution for crimes committed by a victim of sex trafficking and (2) held that such a defense is a complete defense against first-degree intentional homicide.

Chrystul Kizer was charged with, among other crimes, first-degree intentional homicide following an incident in which she allegedly shot and killed a man who she alleged was sex trafficking her. The supreme court's opinion in this case came after a series of pretrial appeals relating to whether Kizer could raise the defense under Wis. Stat. § 939.46 (1m): "A victim of [sex trafficking] has an affirmative defense for any offense committed as a direct result of the [sex trafficking] without regard to whether anyone was prosecuted or convicted for the [sex trafficking]."

The circuit court determined that the defense under Wis. Stat. § 939.46 (1m) is available only to a defendant who is charged with trafficking. Kizer appealed. Both Kizer and the prosecution agreed that the circuit court's interpretation of the availability of the defense was incorrect because the language of the statute specifies that the defense applies to "any offense" and applies "without regard to whether anyone was prosecuted or convicted" for sex trafficking. However, the parties disagreed about what qualifies as an offense committed "as a direct result" of sex trafficking and whether, as a threshold matter, she could raise the defense with regard to her alleged actions. The parties then disagreed about whether the defense would provide the defendant with a complete defense against first-degree intentional homicide or whether the defense would mitigate first-degree intentional homicide to second-degree intentional homicide.

The court of appeals held that "direct result" means that the victim's offense arose relatively immediately from the trafficking violation, is motivated primarily by the trafficking violation, is a logical and reasonably foreseeable consequence of the violation, and is not in significant part caused by events, circumstances, or considerations other than that violation. The court of appeals also concluded that the defense was a complete defense to first-degree intentional homicide. The state appealed.

The supreme court, in a 4–3 opinion authored by Justice Dallet, first considered the question of how to define "direct result" for the purposes of the defense statute. When the court conducts a statutory analysis, it begins with the language of the statute. If the meaning of the statute is plain, the inquiry ends there. Generally, the court gives the words in a statute their common, everyday meaning. If a word or phrase is not defined in the statute, the court consults the dictionary definition. Using this process in this case, the majority determined that an offense is "committed as a direct result" of a trafficking offense if there is a "logical, causal connection between the offense and the trafficking such that the offense is not the result, in significant part, of other events, circumstances, or considerations apart from the trafficking violation." The court declined to adopt the court of appeals' interpretation, which would require the offense to be a foreseeable result of the trafficking violation and to proceed relatively immediately from the trafficking violation.

The supreme court's decision on the question of whether the defense is mitigating or complete involved a more complicated statutory analysis. The state's interpretation of the

defense as mitigating rested on the interplay of several statutory provisions, including Wis. Stat. §§ 939.45 (1), 939.46, and 940.01 (2) (d).

Wis. Stat. § 940.01 (2) (d) is part of the first-degree intentional homicide statute. That provision states that when death was caused "in the exercise of a privilege under 939.45 (1)," the defendant has an affirmative defense to prosecution that mitigates the offense from first-degree intentional homicide to second-degree intentional homicide.

Wis. Stat. § 939.45 (1) refers to an actor's conduct that occurs under "circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47." Because the defense at issue in this case falls under Wis. Stat. § 939.46, titled "Coercion," the state argued that the defense would serve to mitigate the offense to second-degree intentional homicide.

Kizer, however, argued that the mitigation specified in Wis. Stat. § 940.01 (2) (d) does not apply to the defense under Wis. Stat. § 939.46 (1m) and that instead, the defense under Wis. Stat. § 939.46 (1m) serves as a complete defense to first-degree intentional homicide. Her argument relied on the legislative history of the relevant statutes as well as the mitigation language itself, which is present in every other statute that creates a defense referenced in Wis. Stat. § 940.01 (2), including coercion under Wis. Stat. § 939.46 (1), but which is notably absent from the defense under Wis. Stat. § 939.46 (1m).

The lead opinion authored by Justice Dallet ultimately determined that both readings of the statute are reasonable, rendering the statute ambiguous. Justices Dallet, A.W. Bradley, and Karofsky therefore ruled in Kizer's favor after applying the rule of lenity, which requires a court to resolve an ambiguity in the defendant's favor.

A concurrence and a dissent were both filed on the second issue in the case. Justice R.G. Bradley filed a concurring opinion stating that she disagreed with the lead opinion's process for applying the rule of lenity. The lead opinion stated that the rule of lenity requires the court to first look to the legislative history of a statute to resolve any ambiguity before ruling in the defendant's favor. Justice R.G. Bradley elaborated that she disagreed with this approach because it "elevates legislative history over a rule of statutory construction." This approach, she reasoned, is erroneous because nothing in the legislative history may cause the criminal law to be stricter than the text of the law itself. Therefore, the rule of lenity requires ruling in the defendant's favor regardless of what may or may not be revealed by the legislative history.

The dissent, authored by Justice Roggensack and joined by Chief Justice Ziegler and Justice Hagedorn, disagreed with the lead opinion that the statute was ambiguous. The dissent relied on the statutory structure and context to find that the defense is a "coercion" defense and therefore falls under the definition of mitigating defenses for the purposes of first-degree intentional homicide. The dissent also relied on the common law rule that coercion only serves to mitigate first-degree intentional homicide and opined that if the

legislature intended to overrule this common law rule in the context of this defense, the legislature should have clearly expressed its intent to do so in the language of the statute.

Legal name change not protected by the first amendment

In *State v. C.G.* (*In re interest of C.G.*), 2022 WI 60, 403 Wis. 2d 229, 976 N.W.2d 318, the supreme court decided that a legal name change is not a constitutionally protected form of speech.

The petitioner, C.G., was a transgender female who was prevented from legally changing her name because she was subject to the sex offender registry. C.G. entered the juvenile justice system as a male and subsequently realized she was a transgender female. C.G. had a traditionally masculine legal name but chose to go by the name of Ella. Ella believed her legal name was incompatible with her gender identity, but was prohibited from petitioning for a legal name change because of her status as subject to the sex offender registry. Ella was not prohibited from adopting and using an alias of her choosing, which would also be listed in the sex offender registry.

Ella challenged the registration requirement on two grounds: (1) it constitutes cruel and unusual punishment as applied to her in violation of the Eighth Amendment to the U.S. Constitution, and (2) it violates her right to free speech in violation of the First Amendment to the U.S. Constitution. Both arguments are based on her inability to legally change her name to conform to her gender identity as a result of the registration requirement.

In a majority opinion authored by Justice R.G. Bradley and joined by Chief Justice Ziegler and Justices Roggensack and Hagedorn, the court decided that Ella's constitutional right to be free from cruel and unusual punishment was not violated by the registration requirement. The court decided this for two reasons. First, a cruel and unusual punishment analysis may be conducted only as a facial challenge (i.e., the law does not recognize an as-applied analysis to determine whether a punishment is cruel and unusual for the purposes of the Eighth Amendment). Second, it is well-established law that a requirement to register on the sex-offender registry does not constitute "punishment" as a matter of law.

On Ella's First Amendment claim, the majority addressed two theories advanced by Ella: first, that expression of her gender identity through a legal name change is expressive conduct protected by the First Amendment, and second, that registration not only prevents Ella from expressing her gender identity, but also it impermissibly compels speech by forcing Ella to disclose her transgender status.

The court rejected Ella's argument that use of a gender-appropriate name is expressive conduct. The First Amendment protection for expressive conduct is limited to conduct

that is "inherently expressive." The court determined that the act of producing identification constitutes conduct that is not inherently expressive, and is therefore not protected by the First Amendment. The court stated that when Ella presents herself to the world as a woman, her conduct is expressive, but it becomes no less or more expressive depending on her legal name. The court opined, "The expressive component of her transgender identity is not created by the legal name printed on her identification but by the various actions she takes to present herself in a specific manner, e.g., dressing in women's clothing, wearing make-up, growing out her hair, and using a feminine alias." The majority then undertook a historical analysis of the law and determined that under the original meaning of the First Amendment, a legal name change does not constitute protected speech. The court based its analysis on the history of statutory provisions for legal name changes and noted that in most states, including Wisconsin, whether to grant a petition for a legal name change is left to the discretion of the court. "The fact that petitions may be denied under this discretionary standard," the court concluded, "suggests a legal name change, as traditionally understood, does not implicate the freedom of speech."

Next, the court turned to an analysis of Ella's argument that registration compels speech by forcing her to reveal her transgender status whenever she is required to produce her legal name. The court also rejected this argument, stating that Ella failed to explain how presenting legal documentation bearing a male-sounding name constitutes compelled speech. The court reiterated its position that identifying oneself is merely an act of providing information, not a mode of expression. The court offered an example to illustrate its point: "When the government requires a person to accurately list her hallmarks of identification on a tax form, the government does not compel her to speak but merely to produce information; Ella's claim is indistinguishable." Finally, the court concluded, "The State did not give Ella her legal name—her parents did . . . and when Ella presents a government-issued identification card, she is free to say nothing at all or to say, 'I go by Ella.'"

Justice Hagedorn filed a concurrence in part.

The dissent in this case, authored by Justice A.W. Bradley and joined by Justices Dallet and Karofsky, argued that the majority's view of expressive conduct is too narrow, and that the proposition that a name is not expressive conduct implicating the First Amendment goes against the tide of relevant case law. Instead, the dissent argued, the name-change ban is a limitation on expressive conduct subject to the First Amendment, and should be analyzed as such under the intermediate scrutiny test. Using intermediate scrutiny, the dissent argued, the court should have analyzed whether the restriction is a reasonable, content-neutral restriction that is narrowly tailored to serve a significant government interest. The dissent offered such an analysis and found that the name-change ban failed this test as applied to Ella. ■