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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 23AP1896-OA

JULIE UNDERWOOD, CHARLES
UPHOFF, RANDY WENDT, FATHER
TOM MUELLER, ANGELA RAPPL,
DUSTIN IMRAY and SCOTT WALKER M.D.,

Petitioners,

v.

ROBIN VOS, Speaker of the Wisconsin
State Assembly, JILL UNDERLY, Wisconsin
State Superintendent of Public Instruction
and KATHY BLUMENFELD, Secretary of
the Department of Administration,

Respondents.

**RESPONSE OF RESPONDENT BLUMENFELD
OPPOSING PETITION FOR THE SUPREME COURT
TO TAKE JURISDICTION OF AN ORIGINAL ACTION**

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By order dated October 31, 2023, this Court ordered Respondents to respond to the petition for original action in this matter. This response is filed on behalf of Respondent Kathy Blumenfeld, Secretary of the Department of Administration.

STATEMENT OF THE CASE

Petitioners ask this Court to accept original jurisdiction of multiple complaints about Wisconsin's statutes for funding education, permitting vouchers for private schools, and limiting the amounts local school districts can tax their residents. They seek to invalidate the school voucher programs and statutory levy limits, relying on four state constitutional provisions.

First, in Count 1, Petitioners assert that Wisconsin's school voucher statutes (they cite Wis. Stat. §§ 119.23, 118.40(2r) and (2x), 118.60, and 115.7915) violate Wisconsin's public purpose doctrine for four different reasons: (1) allegedly spending more for students in private school than public school; (2) structuring school funding in a way that is "designed to act like a cancer on the public school system"; (3) failing to provide adequate oversight of private schools that participate in the voucher programs; and (4) failing to require that private schools provide "essential" services to children with disabilities. (Pet. ¶¶ 91–94.)

Two of Petitioners' claims allege that the voucher statutes and statutory levy limits (Wis. Stat. §§ 121.905, 121.91, and 121.92) violate the Wisconsin Constitution's Uniformity Clause, Wis. Const. art. VIII, § 1. Count 2 appears to assert that the voucher statutes violate the Uniformity Clause indirectly: the statutes cause school districts to lose money when parents choose to use vouchers to attend private schools, and local districts raise property taxes to compensate for those losses, indirectly causing unequal taxation between school districts. (Pet. ¶¶ 105–09.) Count 4 attacks the revenue

limits, asserting that since the Uniformity Clause prohibits the Legislature from compelling local taxation, it must implicitly prohibit it from limiting how much local governments tax, as well. (Pet. ¶¶ 122–25.)

Count 3 asserts that the voucher statutes violate Wis. Const. art. X, § 1 (Petitioners title this the Superintendent Supervision Clause), on the theory that the voucher statutes unconstitutionally limit the Superintendent of Public Instruction’s control over participating private schools. (Pet. ¶¶ 112–19.)

Count 4 argues that the revenue limits in Wis. Stat. §§ 121.905, 121.91, and 121.92 violate not only the Uniformity Clause but also Wis. Const. art. X, § 4. (Pet. ¶¶ 126–32.) Their premise is that any levy limit “prevents [school districts] from providing the educational opportunities to students that they believe are appropriate.” (Pet. ¶ 129.)

Regarding relief, Petitioners assert that, “[a]t a bare minimum,” the voucher programs “must be halted before the next school year begins.” (Pet. 20.) They recognize that the remedy they seek “will impact tens of thousands of children who attend these schools.” (Pet. 17.) As that acknowledgement reflects, this would require a court to craft a remedy transferring thousands of children out of private schools and into public schools, at current space and funding levels.

This response does not address the ultimate merits of Petitioners’ claims, but simply explains why they are more appropriately adjudicated in the circuit court.

REASONS THE PETITION SHOULD BE DENIED

I. This Court exercises its discretion to take jurisdiction only in exceptional circumstances, and where specific criteria are met.

The Supreme Court “may hear original actions and proceedings.” Wis. Const. art. VII, § 3(2). Generally, this Court will exercise its original jurisdiction only in exceptional cases presenting issues of great public importance that so significantly affect the rights and liberties of the people as to warrant immediate intervention. *See State ex rel. State Cent. Comm. v. Bd.*, 240 Wis. 204, 214, 3 N.W.2d 123 (1942); *Petition of Heil*, 230 Wis. 428, 445, 284 N.W. 42 (1939). Whether to exercise that jurisdiction in a particular case is a question of judicial policy subject to the Court’s sound judicial discretion. *See Application of Sherper’s, Inc.*, 253 Wis. 224, 225–26, 33 N.W.2d 178 (1948); *State ex rel. Att’y Gen. v. N. Pac. R.R. Co.*, 157 Wis. 73, 84, 147 N.W. 219 (1914).

Beyond requiring a matter of great public importance, the exceptional circumstances that may occasionally warrant original jurisdiction require three, additional features.

First, this Court has consistently expressed “great[] reluctance” to “grant leave for the exercise of its original jurisdiction . . . where questions of fact are involved.” *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 128, 229 N.W.2d 643 (1930); *see also* Sup. Ct. Internal Operating Procedures (IOP) § III(B)(3). Indeed, this Court has recognized that circuit courts are “much better equipped for the . . . disposition of questions of fact than is this court”; accordingly, cases involving factual questions “should be first presented to” circuit courts. *In re Exercise of Original Jurisdiction*, 201 Wis. at 128.

Second, the case should present some exigency that merits bypassing the ordinary course of litigation. *Heil*, 230 Wis. at 443.

Third, as with this Court's exercise of its appellate jurisdiction, Wis. Stat. § (Rule) 809.62(1r)(c), the legal issues should be presented with sufficient clarity and exactitude that their immediate consideration by this Court is likely to successfully develop and harmonize the law. When this Court exercises its discretion to accept or reject a petition for appellate review, the legal theories on appeal have already been fully developed below. When a party files a petition for original action, it should bring a fully-formed case to the Court because it will not have the benefit of the development of the case in the lower courts.

II. The Petition does not meet the exceptional circumstances justifying this Court's exercise of its original jurisdiction.

The Petition does not satisfy the criteria for this Court's exercise of its discretion to take original jurisdiction of the matter. While the topic of educating Wisconsin's children is obviously one of great public importance, the Petition does not meet the other criteria for an original action.

A. Petitioners' claims depend on the resolution of complex facts about school finance and the oversight of voucher-funded private schools, and they seek an injunctive remedy requiring consideration of detailed factual considerations.

1. Petitioners' claims will require complex factual determinations.

Even a casual reading of the Petition reveals its factually intense nature: over 40 pages of assertions about school funding, the quality of private schools receiving vouchers, footnotes discussing the groups that sponsored these statutes, studies, and more. And the Petition's claims, if its underlying legal premises have merit, depend on those facts.

Petitioners’ legal premises for their public purpose and Uniformity Clause claims rely on factual conclusions about how state funding laws interplay with individual local districts’ funding efforts and the financial effects on different school districts. Determining those facts would require factfinding and probably expert witness reports. As just one example, Petitioners theorize that the funding mechanisms will someday cause many school districts to lose “all of their equalization payments . . . as these parasitic programs continue to expand” (Pet. ¶ 53)—a “death spiral[]” theory (Pet. 16) that would require factual determinations.

Petitioners’ oversight allegations, relating to their public purpose and Wis. Const. art. X, § 1 claims, rely on the factual premise that participating private schools operate under inadequate accountability standards. Its support for the premise there are no requirements “about [private schools’] curriculum, student promotion, suspension and expulsion, and non-harassment” (Pet. ¶ 64) comes from one page of an informational resource from the Legislative Fiscal Bureau. *See Legislative Fiscal Bureau, Informational Paper #30, Private School Choice and Special Needs Scholarship Programs, Toniolo, M. (Jan. 2023).*

As that paper discusses, Wisconsin imposes some legal requirements on private schools, including the health and safety requirements applicable to public schools and regulations as to tuition and fee policies; audit requirements; and verification of accreditation from an approved accrediting entity. *Id.* at 6–15. Petitioners presumably believe these provisions are inadequate, but it would require factual development to determine why that is so.

Petitioners’ Count 4, relating to the revenue limit statutes, depends on the factual premises that the revenue limit “has not grown at a fast enough rate to keep up with inflation and has accelerated the decline of the quality of

education available to students in Wisconsin.” (Pet. ¶ 80.) These would also require factual development.

This is not the type of matter appropriate for this Court’s exercise of its original jurisdiction. These factual questions “should be first presented to” a circuit court. *In re Exercise of Original Jurisdiction*, 201 Wis. at 128.

2. The injunctive remedy Petitioners seek would require its own factual exploration and careful crafting by a trial court.

Petitioners seek a judicial remedy that would require factual development and careful planning to navigate the potentially complicated effects on children and school systems—both public and private—throughout the State. This is another reason why this case is poorly suited for this Court’s original jurisdiction.

Petitioners seek the invalidation of Wisconsin’s voucher programs and an order permanently enjoining Respondents from distributing or providing funding for any of these private school funding programs, all in advance of the 2024–25 school year. (Pet. 20.) Petitioners “recognize that striking down these private school funding programs—which have grown to be very large in size—will impact tens of thousands of children who attend these schools” and therefore do not bring their claims “lightly.” (Pet. 18.) But they offer no suggestions for how to mitigate these impacts, and they don’t explain how a huge transfer of private school students to the public school system would work on the ground.

Petitioners’ requested remedy, especially on the timeline they desire, could lead to chaotic and unanticipated outcomes. Of the tens of thousands of students currently participating in the voucher programs, many might not be able to afford to attend their chosen school without funding assistance. These children would need to be absorbed into the public school system. Additionally, many of the hundreds of

charter and private schools in Wisconsin rely “heavily” on voucher funding. (Pet. ¶ 16.) If the voucher programs were terminated, it is reasonable to expect that some of these schools would close, and those students would need to be enrolled in the public school system beginning in the fall of 2024.

Logistically, such an unprecedented mass movement of students could lead to staffing, funding, and classroom shortages in public school systems. Petitioners seem to recognize that there would need to be some kind of mechanism in place to transition state dollars from the private school funding programs to public schools (Pet. 20–21), but don’t offer a methodology.

In short, crafting anything like the remedy Petitioners want would require a court to carefully examine the facts on the ground and develop a detailed injunction. Expert input would likely be necessary to develop a process for the complicated transfer of state resources from private to public schools. This Court could not do that work through a “speedy and authoritative determination.” *Heil*, 230 Wis. at 446.

B. Petitioners identify no exigency justifying this Court’s exercise of its original jurisdiction.

The Petition identifies no exigency of the type justifying this Court’s exercise of its original jurisdiction. To be sure, Petitioners describe what they see as the dire effects of the statutes they challenge, and predict that, over time, public schools may collapse based on the current funding mechanisms. But for purposes of the original jurisdiction analysis, the Petition needs to cite current, concrete harms and a reason why a wait of two to three years (the time it takes for a case to work its way through the lower courts) would matter. The Petition here does not do that.

C. Petitioners' legal claims require further development and refinement in the lower courts.

Petitioners' legal claims depart from current Wisconsin case law. Of course, this Court can consider such changes, but the Petition offers no legal principles or authority to explain how this Court would go in the directions Petitioners suggest. Their claims require further development and refinement in the lower courts.

1. The Petition's public purpose theories are undeveloped.

Count 1, Petitioners' public purpose claim, argues that the voucher statutes violate the public purpose doctrine in four ways: (1) allegedly spending more for students in private school than public school; (2) structuring a funding system that is "designed to act like a cancer on the public school system;" (3) failing to provide adequate oversight of private schools that participate in the programs; and (4) failing to require that private schools provide "essential" services to children with disabilities. (Pet. ¶¶ 91–94.)

Under current law, what constitutes a public purpose and whether a particular expenditure serves such a purpose are practical questions addressed to the Legislature, and the legislative determination of those questions is generally binding on the courts. *See State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 414–15, 208 N.W.2d 780 (1973); *State ex rel. Thomson v. Giessel*, 265 Wis. 207, 215, 60 N.W.2d 763 (1953).

In applying the public purpose doctrine, a court is "not concerned with the 'wisdom, merits, or practicability of the legislature's enactment,'" but rather seeks "to determine whether a 'public purpose can be conceived which might reasonably be deemed to justify or serve as a basis for the expenditure.'" *Millers Nat'l Ins. Co. v. City of Milwaukee*, 184 Wis. 2d 155, 175–76, 516 N.W.2d 376 (1994) (*quoting*

Hopper v. Madison, 79 Wis. 2d 120, 129, 256 N.W.2d 139 (1977)). “Only if it is ‘clear and palpable’ that there can be no benefit to the public is it possible for a court to conclude that no public purpose exists.” *West Allis v. Milwaukee County*, 39 Wis. 2d 356, 377, 159 N.W.2d 36 (1968).

For grounds 1, 2, and 4 of their public purpose claim, Petitioners propose to amend the doctrine, arguing that a law loses its public purpose if an expenditure of public funds has any consequence that may be contrary to the interests of the public. That proposed rule could be broad, potentially inviting judicial invalidation of any statute a court disagrees with on policy grounds. Such a change would require extensive legal development, but the Petition contains no indication of the doctrinal changes Petitioners seek or supporting legal authority.

Petitioners’ third basis for a public purpose violation, lack of oversight, begins with *Jackson v. Benson*, 218 Wis. 2d 835, 897, 578 N.W.2d 602 (1998), and *Davis v. Grover*, 166 Wis. 2d 501, 541, 480 N.W.2d 460 (1992). Those cases require that private institutions receiving public money must be “under reasonable regulations for control and accountability” to secure that public purpose. *Jackson*, 218 Wis. 2d at 897 (*quoting Davis*, 166 Wis. 2d at 542). They also hold that a private entity receiving public funds need not be regulated to the same extent as a similar public agency, *Id.* at 898–99; *Davis*, 166 Wis. 2d at 540, and that all that is required is a level of control and accountability that is “reasonably necessary to secure the public purpose.” *Jackson*, 218 Wis. 2d at 898.

Here, the Petition doesn’t explain how the current standards are deficient under those principles (or whether those principles should remain in effect) or elaborate on what the constitutional minimum should be. These allegations also need to be developed and refined in the lower courts.

2. The Petitioners' Uniformity Clause claims are undeveloped.

Two of the Petition's counts rely on novel theories about the Wisconsin Constitution's Uniformity Clause, which provides that "[t]he rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods." Wis. Const. art. VIII, § 1. Count 2 argues that the voucher statutes cause local governments to end up taxing too much—that article VIII, § 1 prohibits differences in state aid payments that indirectly result in higher local taxes. (Pet. ¶¶ 105–09.) Count 4 argues that the revenue limit statutes are unconstitutional because they don't let local governments tax enough—that if article VIII, § 1 prohibits the Legislature from compelling taxation, it implicitly must prohibit it from limiting taxation, too. (Pet. ¶ 123) ("The revenue limit at issue here is the Legislature doing the exact opposite.")

The Petition doesn't offer legal reasoning or authority to support either theory.

The Petition's indirect taxation theory (Count 2) points to this Court's decision in *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976), but *Buse* did not address the issues Petitioners raise here. In *Buse*, this Court considered statutory negative aid payments, which directly required richer school districts to send parts of their local property tax payments to the Department of Administration for deposit in the general fund. *Id.* at 556–57, 573. This Court held that this violated Wis. Const. art. VIII, § 1. *Id.* at 579. *Buse* did not address a situation where a school district's reduction in state funds, based on a resident's attendance at a private school outside the school district, amounts to non-uniform taxation. Petitioners do not explain how the reasoning of *Buse* would apply to that situation.

Petitioners' theory also does not develop a limiting principle. It would also seem to invalidate the state equalization aid program, which allocates state resources based on the wealth of a particular community: "resources are allocated on the basis of ability to raise revenue from the districts' property tax base." *Kukor v. Grover*, 148 Wis. 2d 469, 480, 436 N.W.2d 568 (1989).

Petitioners also offer no judicial authority or legal theory supporting their theory that the Uniformity Clause prohibits a legislative limit on local taxation.

3. The Petition's supervision claim is undeveloped.

Count 3 asserts that the voucher statutes violate Wis. Const. art. X, § 1, which provides that "[t]he supervision of public instruction shall be vested in a state superintendent," on the theory that they afford the Superintendent for Public Instruction inadequate supervision authority over participating private schools. This claim also presents legal questions unready for efficient and final resolution by this Court.

Article X, § 1 confers the state superintendent with supervisory authority over "public instruction," and the Petition does not offer an interpretative theory as to why the voucher statutes are "public instruction" under that provision. If the constitution does cover private schools receiving vouchers, Petitioners would also need to develop legal principles about the amount of supervision that would be constitutionally inadequate. The Petition does not do that.

Sound judicial policy supports denying the petition to allow these issues to proceed through the lower courts.

4. Petitioners' claim under Wis. Const. art. X, § 4 is undeveloped.

Petitioners' challenge to the revenue limit statutes under article X, § 4 of the Wisconsin Constitution is also undeveloped. This section provides that "[e]ach town and city shall be required to raise by tax, annually, for the support of common schools therein, a sum not less than one-half the amount received by such town or city respectively for school purposes from the income of the school fund." Wis. Const. art. X, § 4.

Petitioners rely on *Buse* for the proposition that this provision prohibits the Legislature from limiting what a local government can tax for schools, at least in some circumstances. But *Buse* does not address that issue. It states only that "the clear implication [of article X, §§ 3 and 4] is that the various districts, at least as to a part of the funding of their schools, did possess some measure of control," 74 Wis. 2d at 570, and that "[l]ocalities are empowered to raise funds for education, and to spend those funds for educational purposes over and above those required by the state." *Id.* at 572. *Buse* was not asked to consider whether towns and cities must have an unfettered ability to levy as much tax for educational purposes as they wish.

Petitioners need to develop a legal theory that goes beyond the provision's text and the holding of *Buse*. But the Petition offers no legal reasoning or authority. Like the Petition's other theories, this argument needs development and refinement before it is ready for this Court's review.

CONCLUSION

The Petition does not meet this Court's criteria for exercising its discretion to accept jurisdiction of an original action.

Dated this 14th day of November 2023.

Respectfully submitted,

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 14th day of November 2023.

Electronically signed by Brian P. Keenan

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