H

Supreme Court of Wisconsin.
STATE of Wisconsin ex rel. Ismael R. OZANNE, Plaintiff–Respondent
v.
Jeff FITZGERALD, Scott Fitzgerald, Michael Ellis and Scott Suder, Defendants,
Douglas La Follette, Defendant–Petitioner–Movant.
State of Wisconsin and State of Wisconsin ex rel. Michael D. Huebsch, Secretary of the Wisconsin Department of Administration, Petitioners,
v.
Circuit Court for Dane County, the Honorable MaryAnn Sumi Presiding, Ismael R. Ozanne, District Attorney for Dane County, Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis, Scott Suder, Mark Miller, Peter Barca, Douglas La Follette, Joint Committee on Conference, Wisconsin State Senate and Wisconsin State Assembly, Respondents.

Nos. 2011AP613–LV, 2011AP765–W.
Argued June 6, 2011.
Decided June 14, 2011.

Background: County district attorney brought action against state legislature and its members, alleging that defendants had violated Open Meetings Law in enacting budget repair bill which included provisions requiring additional public employee contributions for health care and pensions, curtailing collective bargaining rights for most state and local public employees, and making appropriations. The Circuit Court, Dane County, Maryann Sumi, J., entered order enjoining publication of the bill. Defendants petitioned for leave to appeal. The Court of Appeals certified the petition. Subsequently, the state and Secretary of Department of Administration petitioned for supervisory/original jurisdiction, challenging the trial court order.

Holdings: The Supreme Court held that:
(1) trial court could not enjoin publication of bill;
(2) legislature did not violate constitutional provision requiring doors of legislature to be kept open; and
(3) separation of powers principles required Supreme Court to decline review of whether legislature violated Public Meetings Law.

Trial court orders vacated; petition for original jurisdiction granted.

David T. Prosser, J., filed a concurring opinion.

Shirley S. Abrahamson, C.J., filed an opinion concurring in part and dissenting in part, in which Ann Walsh Bradley and N. Patrick Crooks, JJ., joined.

N. Patrick Crooks, J., filed an opinion concurring in part and dissenting in part, in which Shirley S. Abrahamson, C.J., and Ann Walsh Bradley, J., joined.

*****[DELETIONS]*****

ORDER

The Court entered the following order on this date:

***73** ¶ 1 This court has pending before it a certification by the court of appeals in a petition for leave to appeal a non-final order and accompanying motion for temporary relief in Case No. 2011AP613–LV (L.C.# 2011CV1244), pursuant to Wis. Stat. § (Rule) 809.61. The petition for leave to appeal a non-final order and motion arise out of a Dane County Circuit Court case in which Dane County District Attorney Ismael Ozanne ***74** alleged violations of the Open Meetings Law, Wis. Stat. § 19.81 *et seq.*, in connection with the enactment of 2011 Wisconsin Act 10 (the Act), commonly known as the Budget Repair Bill;

¶ 2 This court also has pending before it a petition for supervisory/original jurisdiction pursuant to Wis. Stat. §§ (Rules) 809.70 and 809.71 in Case No. 2011AP765–W filed on behalf of the State of Wisconsin and State of Wisconsin ex rel. Michael D. Huebsch, Secretary of the Wisconsin Department of Administration; Peter Barca has moved to dismiss this petition; Mark Miller and Ismael Ozanne have moved to file supplemental briefs;

¶ 3 On June 6, 2011, this court held oral argument in Case No. 2011AP765–W and Case No. 2011AP613–LV; wherein this court heard argument addressing whether the court should accept either the certification or the petition for supervisory/original jurisdiction or both; the court also heard argument on the merits of the pending matters. Based on the written submissions to the court and the oral arguments held on June 6, 2011;

¶ 4 IT IS ORDERED that the certification and motions for temporary relief in Case No. 2011AP613–LV are denied.

¶ 5 IT IS FURTHER ORDERED that the petition for original jurisdiction in Case No. 2011AP765–W is granted, *State ex rel. La Follette v. Stitt*, 114 Wis.2d 358, 338 N.W.2d 684 (1983), and all motions to dismiss and for supplemental briefing are denied.

¶ 6 IT IS FURTHER ORDERED that all orders and judgments of the Dane County Circuit Court in Case No. 2011CV1244 are vacated and declared to be void ab initio. *State ex rel. Nader v. Circuit Court for Dane Cnty.*, No. 2004AP2559–W, unpublished order ***75** (Wis.S.Ct. Sept. 30, 2004) (wherein this court vacated the prior orders of the circuit court in the same case).

[1] ¶ 7 This court has granted the petition for an original action because one of the courts that we are charged with supervising has usurped the legislative power which the Wisconsin Constitution grants exclusively to the legislature. It is important for all courts to remember that Article IV, Section 1 of the Wisconsin Constitution provides: "The legislative power shall be vested in a senate and assembly." Article IV, Section 17 of the Wisconsin Constitution provides in relevant part: "(2) ... No law shall be in force until published. (3) The legislature shall provide by law for the speedy publication of all laws."

*****[DELETIONS]*****

¶ 16 Chief Justice Shirley S. Abrahamson, Justice Ann Walsh Bradley and Justice N. Patrick Crooks concur in part and dissent in part from this order.

***80** DAVID T. PROSSER, J. (concurring).

¶ 17 I join this court's order but write separately to provide additional background and analysis.

I

¶ 18 This case is an offshoot of the turbulent political times that presently consume Wisconsin. In turbulent times, courts are expected to act with fairness and objectivity. They should serve as the impartial arbiters of legitimate legal issues. They should not insert themselves into controversies or exacerbate existing tensions. In the present dispute, different parties claim to speak for the State. It is the inescapable responsibility of this court to determine the law to facilitate a resolution of the dispute.

¶ 19 Accordingly, a majority of the court has determined that this litigation qualifies for and should be accepted as an original action under Article VII, Section 3(2) of the Wisconsin Constitution. The litigation presents issues of exceptional constitutional importance. It is of high public interest. It implicates the powers of all three branches of government. It affects most public employees in Wisconsin as well as taxpayers. Although the defendants in *State ex rel. Ozanne v. Fitzgerald*, 2011AP613–LV, might be able to appeal the decision of the circuit court, the identity and posture of the defendants makes such an appeal problematic in the short term without the intervention of one or more additional parties. The time required to sort out this procedure and follow the court's traditional briefing schedule would deny the petitioners timely relief by delaying the case until the court's next term, at the earliest. The majority deems this unacceptable considering the gravity of the issues and the urgency of their resolution. I am satisfied that this case satisfies several ***81** of the court's criteria for an original action *publici juris*, *Petition of Heil*, 230 Wis. 428, 440, 284 N.W. 42 (1939), and that there are no issues of material fact that prevent the court from addressing the legal issues presented. *Wis. Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, 243 Wis.2d 512, 627 N.W.2d 807; *State ex rel. La Follette v. Stitt*, 114 Wis.2d 358, 338 N.W.2d 684 (1983); *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 239 N.W.2d 313 (1976).

¶ 20 Simply stated, no matter how long we waited to consider a perfect appeal, the legal issues before the court would not change. Whether the case is decided now or months from now at the height of the fall colors, the court would be required to answer the same difficult questions. Delaying the inevitable would be an abdication of judicial responsibility; it would not advance the public interest.

*****[DELETIONS]*****

****451 *98** SHIRLEY S. ABRAHAMSON, C.J. (concurring in part and dissenting in part).

¶ 74 I agree that the Budget Repair Bill is not in effect. I further agree that the certification by the court of appeals should be denied.

¶ 75 Moreover, I agree that the challenge to the legality of the Budget Repair Bill, a bill that significantly affects all the people of this state, presents important fundamental constitutional issues about the separation of powers; the roles of the legislative, executive, and judicial branches of government; and judicial review.

¶ 76 It is exactly because the issues in the present case are of such constitutional and public policy importance that I do not join the order.

¶ 77 In a case in which the court is called upon to review the legitimacy of the legislative process, it is of paramount importance that the court adhere to the Wisconsin Constitution and its own rules and procedures, lest the legitimacy of the judicial process and this court's decision be called into question.

*****[DELETIONS]*****

¶ 83 Justice N. Patrick Crooks explains the flaws in the order's and concurrence's attempt to recast the petition for supervisory writ as an original action. He explains why this court should decide this case in an orderly appellate review of the circuit court's order with a full opinion. I join his writing.

¶ 84 I write to emphasize that in a case turning on separation of powers and whether the legislature must abide by the Open Meetings Law and the Wisconsin Constitution in adopting the Budget Repair****452** Bill, it is ***100** imperative that this court carefully abide by its authority under the Constitution and follow its own rules and procedures.

¶ 85 A court's failure to follow rules and a court's failure to provide a sufficient, forthright, and reasoned analysis undermine both the court's processes and the decision itself. Only with a reasoned, accurate analysis can a court assure the litigants and the public that a decision is made on the basis of the facts and law, free from a judge's personal ideology and free from external pressure by the executive or legislative branches, by partisan political parties, by public opinion, or by special interest groups.

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II

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***104** A. The Order and the Concurrence Inappropriately Use This Court's Original Jurisdiction.

¶ 97 The order mistakenly asserts that the State of Wisconsin and Secretary Huebsch filed "a petition for supervisory/original jurisdiction pursuant to ****454**Wis. Stat. §§ (Rules) 809.70 and 809.71." No petition for original jurisdiction pursuant to Wis. Stat. § (Rule) 809.70 was filed in this court by any party. The petition that was filed is captioned "petition for supervisory writ pursuant to Wis. Stat. § 809.71 and for immediate temporary relief pursuant to Wis. Stat. § 809.52," and the text of the petition adheres to the caption.

¶ 98 This court's authority for review is derived from the Wisconsin Constitution, which provides that the court has two types of jurisdiction: appellate and original.[FN7] They are separate and distinct jurisdictions, serving different purposes. "The concept of original jurisdiction allows cases involving matters of great public importance to be commenced in the supreme court in the first instance." [FN8]

FN7. *See* Wis. Const. art. VII, § 3(2): "The supreme court has appellate jurisdiction over all courts and may hear original actions and proceedings."

FN8. Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 25.1 (5th ed.2011). *See also Petition of Heil*, 230 Wis. 428, 446, 284 N.W. 42 (1938); *In re Exercise of Original Jurisdiction*, 201 Wis. 123, 229 N.W. 643 (1930).

This case is not an original action in any sense of the phrase. The Dane County Circuit Court has already issued a final determination regarding each and every

question of fact and question of law that is addressed in the order.

¶ 99 There is nothing "original" or "in the first instance" here. By commencing an original action on the court's own motion to review the final judgment of ***105** the circuit court, the order and Justice Prosser's concurrence are blending the separate and distinct concepts of original and appellate jurisdiction.[FN9]

FN9. A petition for an original action will be granted when the questions presented are of such importance "to call for a speedy and authoritative determination by this court in the first instance...." *Petition of Heil*, 230 Wis. 428, 446, 284 N.W. 42 (1939).

This court has previously taken original jurisdiction in two cases despite an identical case pending before the circuit court. In both cases the issue was narrow and an emergency existed with no other remedy available; an appeal could not be taken timely to get the person on the ballot within the statutory framework for printing ballots; review was necessary to protect Wisconsin citizens' right to vote for the candidate of their choosing. *See State of Wisconsin ex rel. Nader v. Circuit Court for Dane County*, No. 2004AP2559–W, unpublished order (2004); *State ex rel. Barber v. Circuit Court for Marathon County*, 178 Wis. 468, 190 N.W. 563 (1922).

In the present case, there is no such exigency. First, the issues presented raise fundamental constitutional principles relating to the powers of the executive, legislative, and judicial branches of government, as well as questions regarding the scope of the rights of the people of this State to know about the actions taken by their government and their right to access the legislative process. The issues are not narrow, and the issues involve conflicting precedent.

Second, there is no "emergency." The Attorney General asserts that an emergency exists because each day the alleged breach of separation of powers is not resolved irreparable damage is done to the representative government of this State. But if that assertion meets the definition of "emergency," then any time any party asserts that a law or an action is unconstitutional it would constitute an "emergency" for this court to decide. That's not the law of the state or country.

The "ordinary course" of an appeal could afford the petitioners any warranted relief. In the alternative, the legislature could pass the Budget Repair Bill in conformance with the Open Meetings Law, rendering the circuit court's determinations ineffective. This court could still decide the important separation of powers issues presented.

***106** ¶ 100 Why is this important? By blending what are under our constitutional authority separate and distinct jurisdictions—original and appellate—the order and concurrence attempt to skirt the normal standards of appellate review. Faced with no record, they conjure their own facts—something this court should never ****455** do, regardless of whether it is exercising appellate or original jurisdiction.

¶ 101 If this court wishes to take jurisdiction of the factual and legal issues presented in this matter, the legitimate and constitutional route is through an appeal. And indeed Justice Prosser reviews the circuit court's decision as if this case were an appeal.

*****[DELETIONS]*****

III

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¶ 126 Each person must abide by the law. Each branch of government must abide by the law. This court must ensure that the law governing judicial decision-making is followed. Justice Brandeis stated these principles eloquently as follows:

In a government of laws, existence of the government will be imperiled if it fails to observe the law

> scrupulously.***113** Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious.
>
> If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.... Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

¶ 127 The resoluteness called for by Justice Brandeis is no less applicable to the observance of the fundamental principles of the courts in our system of government. Unreasoned judgments breed contempt for the law. The majority, by sacrificing honest reasoning, leads us down a pernicious path. The order today departs from fundamental principles. It fails to abide by the court's Constitutional authority and its own rules and procedures and harms the rights of the people from whom our authority derives.[FN12] The legitimate and constitutional route to decide the issues presented is through an appeal.

> FN12. Our state constitution declares: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." Wis. Const. art. I, § 22.

¶ 128 For the reasons stated, I do not join the order.

¶ 129 I am authorized to state that Justices ANN WALSH BRADLEY and N. PATRICK CROOKS join this writing.

N. PATRICK CROOKS, J. (concurring in part and dissenting in part).

¶ 130 These matters exemplify the importance of compliance with procedural rules and the rule of law to the legitimacy of our government. Just as ***114** there is a right way and a wrong way to proceed with the legislative process, there is a right way and a wrong way to accept the significant issues presented for review. I dissent in part because, in taking these matters as an original action and swiftly vacating the circuit court's orders without sufficient examination, the majority has proceeded the wrong way.

*****[DELETIONS]*****

¶ 133 There is no question that these issues are worthy of this court's review. But procedures matter—to the courts, the legislature, and the people of Wisconsin. There is a right way to address these issues and a wrong way. The majority chooses the wrong way by refusing to take this case through the appropriate procedural mechanism, and by rushing to issue an order without sufficient examination or a complete record. I concur in part because I agree with the majority's decision to address these important questions. I dissent in part due to the majority's decision to utilize inappropriately this court's original jurisdiction and due to its issuing a hasty order without sufficient consideration, and without adequately addressing all of the parties' arguments. I am convinced that these significant issues should be addressed through a direct appeal, which would allow this court to more fully resolve, with the benefit of a complete record, the complex legal and factual issues at stake.

*****[DELETIONS]*****

II

¶ 141 For both practical and institutional reasons, the right way to go about answering these weighty and significant questions would be for these issues to be presented to this court as a direct appeal of the final judgment entered by the circuit court for Dane County.

¶ 142 The practical reasons that a direct appeal makes the most sense are based on the desirability of deciding these issues with all the available information, and in the most focused and efficient way. They have to do with the nuts and bolts of the process of receiving cases for various types of review at this court. These matters did not come to us as a direct appeal of a judgment but rather through two separate methods: an appeal and certification of a temporary order and a rarely used process, a supervisory writ, provided by statute, both filed before the circuit court's findings, conclusions and judgment.

¶ 143 Due to the unusual posture, we have no access to the complete record that was compiled in the circuit court that included the transcripts of the days of testimony taken in the circuit court,[FN15] the exhibits ***121** entered into evidence, and the briefs filed there.[FN16] Many people would likely find it puzzling that under these circumstances we, the highest court in the state, cannot simply order up whatever information is needed from relevant court proceedings, especially since information ***122** on the testimony and evidence has been publicly disseminated, but statutes and rules prescribe the manner that cases proceed through the judicial system, and should be followed. Those procedures matter. When a case arrives before us in the posture****463** of a direct appeal, and we grant the petition for review, certification or bypass,[FN17] we have access to all the information, evidence and arguments that have been presented to the court below to answer the questions presented. These cases did not arrive in that posture, and those boxes of documents, transcripts and evidence that we ordinarily review were not made available to us. When this court heard oral arguments on the question of whether to take these cases and in what manner, we heard arguments from counsel representing six parties for more than six hours. It is rather astonishing that the court would choose to decide to take and decide such an unusual and complex case without benefit of the complete record.

FN15. While the majority's order implies that this court may consider whatever transcripts were filed in appendices to materials submitted to this court, that is a departure from settled precedent that is sure to cause grave concern among appellate lawyers. *State v. Kuhn*, 178 Wis.2d 428, 439, 504 N.W.2d 405 (Ct.App.1993) (noting that an appellate court is "limited by the record before [it] and cannot consider the extraneous material included in [a party's] appendix").

This break with precedent is yet another legal casualty of the majority's hasty decision.

FN16. This is particularly troubling because the majority and Justice Prosser's concurrence appear to make many factual assertions. The majority's conclusion that "the legislature did not employ a process that violated Article IV, Section 10 of the Wisconsin Constitution" is based on facts that either conflict with or are not found in the limited record before this court. Specifically, the majority states (1) "[t]he doors of the senate and assembly were kept open to the press and members of the public during the enactment of the Act," (2) "[t]he doors of the senate parlor, where the joint committee on conference met, were open to the press and members of the public," and (3) "WisconsinEye broadcast the proceedings live." The source of the facts is unclear. The majority's factual findings either conflict with or are unsupported by the circuit court's findings of fact in *State ex rel. Ozanne v. Fitzgerald,* which provide that the doors to the Senate Gallery were locked during the meeting and say nothing regarding the doors to the senate parlor or a WisconsinEye broadcast. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Wis. Stat. § 805.17(2).

Justice Prosser's concurrence likewise relies on numerous factual assertions, some of which are based on the circuit court's findings of fact in *Ozanne*, and others whose source is unexplained. It cannot be both ways—either these are purely legal questions that require no factual findings outside of the circuit court's findings of fact (which control unless found to be clearly erroneous) or this court needs a record and a resolution of disputed facts.

FN17. The path most frequently taken to this court is that parties appeal from the circuit court judgment to the court of appeals, which reviews and rules, and then petition this court for review. *See* Wis. Stat. § (Rule) 809.62. However, there are other routes provided by statute for a case to come to this court without first being reviewed by the court of appeals, whether at the request of the parties, *see* Wis. Stat. § (Rule) 809.60 (permitting parties to petition this court for review, bypassing the court of appeals), or the request of the court of appeals itself or on motion of this court, *see* Wis. Stat. § (Rule) 809.61 (permitting the court of appeals to send cases to this court by certification and authorizing this court to take jurisdiction of any action pending in the court of appeals). In each of those instances, the record in the underlying case is available to this court.

¶ 144 The ready availability of a direct appeal by aggrieved parties makes this all the more puzzling. The ***123** majority does not really come to grips with the obvious fact that an appeal is an available remedy here. As many of the parties to these cases have argued, it would be a simple matter for an aggrieved party to intervene in this matter and file an ordinary appeal, which would proceed the usual way.[FN18] This would have the added benefit of briefs and arguments solely focused on the merits of the substantive legal issues presented, what the heart of the case is really about, with the benefit of a complete record. It would be followed by the ordinary written decision fully explaining this court's analysis. And taking that path would, in addition, avoid creating unfortunate precedent; it would take the prudent approach, considering all the relevant evidence, and follow the way we handle many thorny issues that are presented to us: without rush or impatience or needless deviation from well-settled practice. For this very practical reason—having all the information that was presented in the circuit court for our review and being able ***124** to give the biggest questions presented our full attention—these matters, especially given the significant questions involved, would best be reviewed in the posture of a direct appeal.

FN18. I would hold that there is a final decision by the circuit court "as to the validity of the actions taken on March 9, 2011," (the date of the alleged Open Meetings Law violation). Pursuant to Wis. Stat. § 808.03, the circuit court's decision is a final, appealable judgment because it "disposes of the entire

matter in litigation as to one or more of the parties." Aggrieved parties may intervene after a circuit court decision under the permissive intervention requirements in Wis. Stat. § 803.09, and appeal from that decision. *M & I Marshall & Ilsley Bank v. Urquhart Cos.*, 2005 WI App 225, ¶ 7, 287 Wis.2d 623, 706 N.W.2d 335 ("This court has noted that motions to intervene must be evaluated 'with an eye toward disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.' ") (quoting *Wolff v. Town of Jamestown*, 229 Wis.2d 738, 742–43, 601 N.W.2d 301 (Ct.App.1999)). I recognize that the circuit court stated that the separate forfeiture claims against some legislators "are held in abeyance pending expiration or waiver of their legislative immunity."

¶ 145 But as compelling as those practical reasons are, the greater reason that a direct appeal is the best way is that it is ****464** the procedurally correct way—no shortcuts, no cut corners, no unnecessary invocation of rarely used powers. Let me be clear: taking this case as an original action [publici juris or supervisory authority] is not outside this court's power; it is just the wrong choice under these circumstances. These matters, after all, are at bottom about rules and procedures. It is about whether the legislature's stated intent to abide by the Open Meetings Law provisions, in accordance with constitutional requirements, can be enforced by way of voiding a law resulting from legislative meetings that did not comply with the law. These matters are about the integrity of the rules that one branch imposes on others and apparently on itself to govern procedures. Especially in light of the public focus and intense scrutiny we must not depart from the usual method of handling cases and employ a method that disposes of the issues with atypical speed and insufficient explanation. As this court stated, "The independence of the judiciary and the legitimate exercise of judicial discretion is necessary to maintain the balance of power among the branches of government. The judiciary is cognizant ... that it must function within established rules and precedents to maintain public trust in the integrity of the judicial process." [FN19] That principle is aptly illustrated here. The high-profile nature of these ***125** matters only gives more force to the necessity of proceeding in a way that is least likely to undermine public confidence in the independence of the judiciary. There is not only no reason to depart from the preferred method of direct review, there are many reasons to prefer it.

FN19. *State v. Speer*, 176 Wis.2d 1101, 1124, 501 N.W.2d 429 (1993).

¶ 146 Conversely, there are many infirmities in the alternatives that are argued by the State. There are two cases before us that we considered taking for review. I agree with the majority that one of them, the certification from the court of appeals concerning the issuance of a temporary restraining order in *State ex rel. Ozanne v. Fitzgerald*, is now moot, since a final judgment has been issued. Accepting the certification is therefore no longer an appropriate course of taking jurisdiction.[FN20] The petition for a supervisory writ is the wrong way, because our case law makes clear that if an appeal is an available remedy, a petition for a supervisory writ must fail.[FN21] As we stated in *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, "A supervisory writ 'is considered an extraordinary and drastic remedy that is to be issued only upon some grievous exigency.' " [FN22] We ***126** made clear in that case that "[a] petition for a supervisory writ will not be granted unless [among other things] an appeal is an inadequate remedy." [FN23] An appeal is a simple matter and is not an inadequate remedy in this case, especially given this court's power to take a directly appealed ****465** case from the court of appeals on its own motion.

FN20. The certification from the court of appeals pursuant to Wis. Stat. § 809.61 arose from Secretary of State LaFollette's "petition for leave to appeal a temporary restraining order (TRO) issued on March 18, 2011." The March 18, 2011, TRO no longer exists because it was superseded by the circuit court's May 26, 2011, decision. There is no separate question presented by the TRO; if this court addresses the significant issues addressed above concerning the circuit court's permanent injunction, it would by definition resolve any questions concerning the TRO.

FN21. *State ex rel. Dressler v. Circuit Court for Racine Cnty.*, 163 Wis.2d 622, 630, 472 N.W.2d 532 (Ct.App.1991).

FN22. 2004 WI 58, ¶ 17, 271 Wis.2d 633, 681 N.W.2d 110 (quoting *Dressler*, 163 Wis.2d at 630, 472 N.W.2d 532).

FN23. *Id.* (citations omitted).

¶ 147 These cases should not be converted into a petition for an original action and taken using our original jurisdiction for several reasons: there is nothing that merits the use of that power in this instance. Such an exercise brings more of the case than we need in order to answer the central issues and bogs us down with requiring resolution of the remaining disputed factual matters.[FN24] As I noted above, it is beyond dispute that this court has the power to exercise its authority and take an original action utilizing our original jurisdiction. But we exercise that extraordinary power only when we have a compelling reason to do so. There is no such reason in this case. The court in *Petition of Heil* took a very pragmatic and sensible approach and stated plainly the reason that taking original jurisdiction ***127** should be used sparingly and "on the basis of the nature of the issues involved rather than upon a mere consideration of convenience or expediency." [FN25] The *Heil* court urged that the system works best when the trial and appellate courts play the roles that they are designed to play:

> This court is primarily an appellate court, and it should not be burdened with matters not clearly within its province if it is to discharge in a proper and efficient manner its primary function. Mere expedition of causes, convenience of parties to actions, and the prevention of a multiplicity of suits are matters which form no basis for the exercise of original jurisdiction of this court. Because it is the principal function of the circuit court to try cases and of this court to review cases which have been tried, due regard should be had to these fundamental considerations.[FN26]

FN24. As I have noted previously, the majority's order does not give adequate consideration to the distinctions between a petition for a supervisory writ and a petition for an original action. The attorney general originally petitioned for a supervisory writ and for the first time argued in Huebsch's reply brief that the petition for a supervisory writ could be "recast as a petition for original action publici juris," but no party has actually petitioned for an original action. The majority seems to have decided to recast this petition as one for an original action, and now that it has done so, it should address the procedural problems that presented such as the lack of a complete record, the disputed factual issues that must now be resolved, and who the parties are.

FN25. *Petition of Heil*, 230 Wis. 428, 448, 284 N.W. 42 (1939).

FN26. *Petition of Heil*, 230 Wis. at 448, 284 N.W. 42.

¶ 148 "Because this court is not a fact-finding tribunal, it generally will not exercise its original jurisdiction in matters involving contested issues of fact." [FN27] There are mechanisms which have been utilized, such as appointment of a special master, perhaps a reserve judge, to conduct fact-finding under the continued jurisdiction/supervision of this court.[FN28] Comparing the use of such mechanisms to a direct appeal, such approaches are unwieldy and time-consuming. When this court takes original jurisdiction, it takes the whole ***128** tangled lot of issues and factual disputes just as if it were the trial court. Three of the parties, in their letter briefs to this court, claim that there are unresolved factual issues concerning the amount of alleged fiscal harm at stake, the rules under which the Senate and Assembly operate, the so-****466** called "good cause" exception that permits a shorter meeting notice requirement, and the role of the secretary of state in the publication process. Clearly, it is not proper to recast the supervisory writ petition as one for an original action and to take original jurisdiction without resolving the claimed factual disputes presented. While I agree with the majority that Act 10 is not in effect, a full and complete resolution of the factual questions surrounding the appropriate procedure involving a matter such as publication needs to be set forth.

FN27. *Green for Wis. v. State Elections Bd.*, 2006 WI 120, 297 Wis.2d 300, 302, 723 N.W.2d 418.

FN28. *See* *Wis. Prof'l Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 6, 243 Wis.2d

512, 627 N.W.2d 807 (referencing the reserve judge who supervised the stipulation of facts agreed to by the parties).

III

¶ 149 These cases exemplify the importance of compliance with procedural rules and the rule of law in maintaining the legitimacy of our government. Just as there is a right way and a wrong way to proceed with the legislative process, there is a right way and a wrong way to accept these issues for review. I dissent in part because, in taking these matters as an original action and swiftly vacating the circuit court's orders without sufficient examination the majority has proceeded in the wrong way.

¶ 150 I concur in part because I agree with the majority that it is imperative that this court address the weighty and complicated questions presented here. It is of great significance to the people of Wisconsin whether the legislature is required to follow the Open Meetings Law, which apparently it has tied to the Wisconsin Constitution, and if so, how it may be held accountable. ***129** It is important not only here where the Act at issue, 2011 Wisconsin Act 10, was hotly debated, but in every case where the legislature acts on behalf of the people. Those who would rush to judgment on these matters are essentially taking the position that getting this opinion out is more important than doing it right and getting it right. As this court recently stated and as the Honorable Maryann Sumi repeated in her decision in regard to those matters, "The right of the people to monitor the people's business is one of the core principles of democracy." [FN29] I also concur because I agree with the majority that Act 10 is not in effect, and that the certification and motions for temporary relief in case No. 2011AP613–LV should be denied.

FN29. *Schill*, 327 Wis.2d 572, ¶ 2, 786 N.W.2d 177.

¶ 151 Specifically, this case raises the following questions: (1) Is the Open Meetings Law [FN30] enforceable against the legislature and, if so, what sanctions are appropriate? (2) May a court ever void an Act because of an Open Meetings Law violation? (3) May a court prohibit the publication, implementation, or effectiveness of an Act passed in violation of the Open Meetings Law, or must a court wait until after the Act is published?

FN30. Wis. Stat. §§ 19.81–19.98.

¶ 152 There is no question that these issues are worthy of this court's review. But procedures matter—to the courts, the legislature, and the people of Wisconsin. There is a right way to address these issues and a wrong way. The majority chooses the wrong way by refusing to take this case through the appropriate procedural mechanism, and by rushing to issue an order without sufficient examination or a complete record. I concur in part because I agree with the ***130** majority's decision to address these important questions. I dissent in part due to the majority's decision to utilize inappropriately this court's original jurisdiction and due to its issuing a hasty order without sufficient consideration, and without adequately addressing ****467** all of the parties' arguments. I am convinced that these significant issues should be addressed through a direct appeal, which would allow this court to more fully resolve, with the benefit of a complete record, the complex legal and factual issues at stake.

¶ 153 For these reasons, I respectfully concur in part and dissent in part.

¶ 154 I am authorized to state that Chief Justice SHIRLEY S. ABRAHAMSON and Justice ANN WALSH BRADLEY join this concurrence/dissent.

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