

STATE OF WISCONSIN  
IN SUPREME COURT

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No. 2006AP2452-OA

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GREEN FOR WISCONSIN  
and MARK GREEN,

Petitioners,

v.

STATE OF WISCONSIN ELECTIONS BOARD and  
KEVIN J. KENNEDY, in his official capacity  
as Executive Director of the State of Wisconsin  
Elections Board,

Respondents.

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AMICUS BRIEF OF THE WISCONSIN DEMOCRACY CAMPAIGN

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**I. INTRODUCTION.**

The Petition for original jurisdiction filed by Green for Wisconsin and Mark Green (hereinafter “Green”) is unprecedented. If the Supreme Court grants Green’s Petition, it will have sanctioned forum shopping, thereby encouraging plaintiffs to “try their luck” in the circuit court in matters *publici juris* before attempting to invoke the Supreme Court’s jurisdiction through an original action.

*Petition of Heil*, 230 Wis. 428 (1938) explained the modern parameters of the jurisdiction of the Supreme Court to hear original actions. Among the issues that *Heil*

determined were appropriate for the Supreme Court to hear in such actions were matters *publici juris*. *Heil* at 445-46. But *Heil* made it clear as well that the circuit courts had concurrent jurisdiction with the Supreme Court to hear matters *publici juris*. As *State ex rel Swan v. Elections Board*, 133 Wis. 2d 87, 92 (1986), the Supreme Court explained:

At one time the decided cases suggested that the circuit courts, which also had the power to issue prerogative writs, did not have authority to use them as the vehicle for raising questions *publici juris*. However, in *Petition of Heil* . . . it was held that the jurisdiction of the circuit courts in such matters was concurrent with the supreme court. . . .

**II. ONCE A PLAINTIFF HAS INVOKED THE JURISDICTION OF THE CIRCUIT COURT AND LITIGATED A SUBSTANTIVE MATTER, HE SHOULD BE FORECLOSED FROM COMMENCING AN ORIGINAL ACTION IN THE SUPREME COURT.**

**A. Plaintiffs Make A Strategic Choice About Where To Commence A Case *Publici Juris*.**

When a plaintiff has a claim that he believes is *publici juris*, that plaintiff has a choice: he may seek relief in the circuit court, which must hear his claim; or, he may ask the Supreme Court to take jurisdiction by allowing an original action to proceed. If the Supreme Court declines to hear an original action, it is sent to the circuit court. *See, State ex rel Thompson v. Jackson*, 199 Wis. 2d 714 (1996).

Circuit court defendants as a class are in a different position than are plaintiffs. For example, in *Thompson v. Craney*, 199 Wis. 2d 674 (1996), a case regarding the constitutional powers of the State Superintendent of Public Instruction, a petition for original action was filed by then Governor Thompson while he was a defendant in a circuit court case entitled *Fish, et al. v. Thompson, et al.* (Dane County Case No. 95-CV-

2008), that raised the same issues regarding the powers of the State Superintendent. The Supreme Court granted Thompson's petition, took original jurisdiction and stayed the circuit court case. Unlike the circumstance where a defendant in a circuit court action filed a petition for an original action in the Supreme Court, it appears that there is no reported case in which a plaintiff commenced an action in the circuit court and then after litigating matters in that court, petitioned the Supreme Court to allow an original action.

Green apparently believes that the State Elections Board decision directing him to divest approximately \$500,000 in campaign funds created an issue that was *publici juris*.<sup>1</sup> He filed an action in the circuit court and sought a temporary injunction against the Board. On an expedited basis the circuit court heard Green's motion, gave the parties a full and fair opportunity to be heard, and rendered a detailed decision construing the law and ruling against Green. Green had the opportunity to appeal the Circuit Court's decision, but declined to do so. Instead, he filed a petition requesting the Supreme Court to allow an original action.

Thus, Green is asking the Supreme Court to exercise its "original" jurisdiction on a matter he asserts is *publici juris* after having already invoked the circuit court's concurrent jurisdiction for the same purpose. Green cannot have it both ways. If this

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<sup>1</sup> The Wisconsin Democracy Campaign takes no position on the question of whether Green's claim, in fact, is *publici juris*.

matter is *publici juris* now, it was *publici juris* when he invoked the jurisdiction of the circuit court.

**B. The Supreme Court Should Hold Plaintiffs to Their Original Choice Of Forum.**

The Supreme Court should take the opportunity presented by Green's petition to explain that it will not hear a matter *publici juris* once the same party, as a plaintiff, has already presented that claim to a circuit court. A direct statement from this Court will force those seeking relief on matters *publici juris* to refrain from forum shopping. It will also strongly discourage plaintiffs from forcing the Supreme Court to act under an artificial time pressure created by the delay occasioned by the plaintiff's use of the circuit court.

Such a bright line would not be applied to defendants because they do not invoke the concurrent jurisdiction of the circuit court. They are forced into that court. Defendants should retain the option of seeking to invoke the Supreme Court's jurisdiction in matters *publici juris*, as did Governor Thompson in *Thompson v. Craney*, *supra*.

But a plaintiff, like Green, is in a fundamentally different position. A plaintiff initiates an action. A plaintiff requests temporary injunctive relief. But, most importantly, a plaintiff decides where he wants to litigate a case. To allow a plaintiff to use the resources of a circuit court and then, after an adverse decision, rush to the Supreme Court claiming exigent circumstances would degrade the concept of concurrent jurisdiction on matters *publici juris* and denigrate the efforts of circuit court

judges who strive to promptly and fairly adjudicate claims of great importance when they are presented.

**III. CONCLUSION.**

Green's Petition to the Court to allow an original action to proceed should be denied.

Dated this \_\_\_\_ day of October, 2006.

Respectfully submitted,

CULLEN WESTON PINES & BACH LPP

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Tamara B. Packard, SBN 01023111  
Attorneys for the proposed *amicus curiae*  
Wisconsin Democracy Campaign

Mailing Address:

122 West Washington Avenue  
Suite 900  
Madison, WI 53703  
Ph: (608) 251-0101  
Fax: (608) 251-2883