



DANE COUNTY  
DISTRICT ATTORNEY  
ISMAEL R. OZANNE

#55  
17 pages



VIA HAND DELIVERY

June 1, 2011

Mr. A. John Voelker  
Acting Clerk  
Wisconsin Supreme Court  
PO Box 1688  
Madison WI 53701-1688

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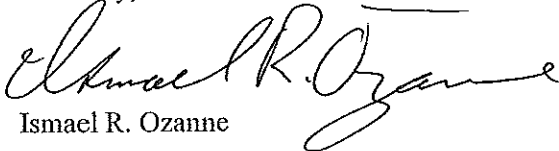
CLERK OF SUPREME COURT  
OF WISCONSIN

RE: *State of Wisconsin, et al. v. Circuit Court of Dane County*  
Appeal Case # 2011AP765-W

Dear Mr. Voelker,

Please find enclosed for filing the District Attorney's Memorandum Of Law In Support Of Motion To Dismiss Petition For Supervisory Writ And Motion To Deny Petition For Leave To Appeal, and the District Attorney's Motion To Dismiss Petition For Supervisory Writ And Motion To Deny Petition For Leave To Appeal. Copies are being served on all other parties as well.

Sincerely,



Ismael R. Ozanne

cc: Atty. Susan Crawford (*representing Mark Miller*)  
Carlo Esqueda, Dane County Clerk of Courts  
Atty. Robert Jambois (*representing Peter Barca*)  
Atty. Jina Jonen (*representing WI Education Association Council*)  
Atty. Steven Kilpatrick (*representing Michael Huebsch, Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis, Scott Suder, Joint Committee on Conference, Wisconsin State Senate, Wisconsin State Assembly*)  
Atty. Kurt Kobelt (*representing WI Education Association Council*)  
Atty. Maria Lazar (*representing Michael Huebsch, Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis, Scott Suder, Joint Committee on Conference, Wisconsin State Senate, Wisconsin State Assembly*)  
Atty. Eric McLeod (*representing Michael Huebsch*)  
Atty. Joseph Olson (*representing Michael Huebsch*)  
Atty. Tamara Packard (*representing Mark Miller*)  
Atty. Lester Pines (*representing Mark Miller*)  
Atty. Roger Sage (*representing Douglas LaFollette*)  
Atty. Michael Screnock (*representing Michael Huebsch*)  
Atty. Kevin St. John (*representing Michael Huebsch*)  
Atty. Marie Stanton (*representing Maryann Sumi*)  
Atty. Dean Strang (*representing Maryann Sumi*)

STATE OF WISCONSIN  
SUPREME COURT

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APPEAL NO. 2011AP765-W

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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 LAFOLLETTE,  
JOINT COMMITTEE ON CONFERENCE,  
WISCONSIN STATE SENATE and  
WISCONSIN STATE ASSEMBLY,

RESPONDENTS.

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APPEAL NO. 2011AP613-LV  
TRIAL COURT CASE NO. 2011CV1244

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CLERK OF SUPREME COURT  
OF WISCONSIN

STATE OF WISCONSIN *ex rel.*  
ISMAEL R. OZANNE,

PLAINTIFF-RESPONDENT,

V.

JEFF FITZGERALD,  
SCOTT FITZGERALD,  
MICHAEL ELLIS,  
SCOTT SUDER,

DEFENDANTS,

AND

DOUGLAS LAFOLLETTE,

DEFENDANT-PETITIONER-MOVANT

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**DISTRICT ATTORNEY'S MEMORANDUM OF LAW  
IN SUPPORT OF MOTION TO DISMISS PETITION  
FOR SUPERVISORY WRIT AND MOTION TO DENY  
PETITION FOR LEAVE TO APPEAL**

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**INTRODUCTION**

Respondent, Ismael R. Ozanne, District Attorney for Dane County, Wisconsin, and Plaintiff-Respondent, State of Wisconsin *ex rel.* Ismael R. Ozanne (hereinafter, "District Attorney") respectfully submits this Memorandum of Law in

support of his Motion To Dismiss Petition For Supervisory Writ and Motion to Deny Petition for Leave to Appeal.

On May 26, 2011, the Honorable Maryann Sumi, Dane County Circuit Court Branch 2 (“Circuit Court”), issued a final judgment and order (“Final Judgment”) in Dane County Case Number 2011CV1244 regarding *State of Wisconsin ex rel. Ozanne v. Fitzgerald, et al.* (“*Ozanne v. Fitzgerald*”). See Respondent’s Motion To Supplement The Record, filed May 26, 2011. As part of the Final Judgment, the Circuit Court declared 2011 Wisconsin Act 10 (“Budget Repair Bill”) “to have no force or effect” as a result of its decision to void actions of the Wisconsin Legislature and its committees made in violation of Wisconsin’s OML (OML). See Findings Of Fact And Conclusions Of Law, p. 18, contained in Final Judgment. By its terms, the Final Judgment “supersedes previous orders entered in this case,” which includes prior temporary restraining orders and amended temporary restraining orders entered by the Circuit Court. See *id.*; see Prior Orders at Petitioners’ Appendix APP. – 95; APP. – 284-

85; APP. – 518-19; APP. – 710. The Final Judgment renders moot the Petition for Supervisory Writ (“Petition for Writ”) filed by Petitioners, State of Wisconsin and Michael D. Huebsch, Secretary of the Wisconsin Department of Administration (“Secretary Huebsch”). The Final Judgment also renders moot the Petition For Leave To Appeal Non-Final Order (certified by the Court of Appeals for District IV to this Court) (“Petition for Leave to Appeal”).

Furthermore, in making its reply arguments in favor of this Court, both granting the Petition for Writ and proceeding to the merits, the Attorney General, on Secretary Huebsch’s behalf, has impermissibly asked this Court to find the OML unconstitutional as applied to the Legislature. The Attorney General is specifically barred from making this type of argument and therefore, for this additional reason, the Petition for Writ must be dismissed.

## ARGUMENT

### I. BOTH PETITIONS ARE MOOT.

“Ordinarily, this court, like courts in general, will not consider a question the answer to which cannot have any practical effect upon an existing controversy.” *State ex rel. La Crosse Tribune v. Circuit Court for La Crosse County*, 115 Wis.2d 220, 228, 340 N.W.2d 460 (1983). “In the interest of judicial economy, moot cases are generally dismissed without discussion on the merits.” *State v. Leitner*, 2002 WI 77, ¶ 13, 253 Wis.2d 449, 646 N.W.2d 341. The Final Judgment renders the Petition for Writ moot, because it resolves the issue as far as Secretary Huebsch is entitled to a resolution, namely “[the] uncertainty resulting from the Circuit Court’s actions” that Secretary Huebsch alleged “[created] a budget and implementation nightmare for state and local governments.” Petition, p. 3-4. In his reply brief, filed after the Final Judgment, Secretary Huebsch adds that state and local budgets need the (alleged) savings in the Budget Repair Bill:

In order to survive the difficult cuts outlined in the state budget.... While the status of [the Budget Repair Bill] remains unresolved, school districts and all other political subdivisions, cannot responsibly make decisions about essential budget matters....

.... Importantly, the fact that the Circuit Court has voided [the Budget Repair Bill] in a final decision does not change the analysis or the posture of this matter in any respect. The legal questions presented remain the same.

Petitioners' Reply Brief in Support of Petition for Supervisory Writ ("Petitioners' Reply Brief"), p. 3.

Setting aside questions of Secretary Huebsch's standing to pursue the Petition (which are substantial), and without minimizing the importance to the people of Wisconsin of both the passage and implementation of legislation and structural issues regarding the relationship of co-equal branches of government, the controversy framed by Secretary Huebsch no longer exists. Specifically, there is no longer a controversy regarding whether this Court should intervene in *Ozanne v. Fitzgerald* prior to the entry of a final decision, exercise supervisory jurisdiction pursuant to Wis.

Stat. § 809.71, and issue a Writ of Mandamus directing the Circuit Court to take actions as ordered by this Court.<sup>1</sup>

Furthermore, the legal landscape has changed. Now there is a final disposition that is appealable by right of an aggrieved party. Given this additional adequate remedy at law, the Petition for Writ should be dismissed.

It is immaterial whether the legal questions posed by Secretary Huebsch remain the same. The enduring character of legal questions does not add to the shelf life of a moot factual situation. The Petition for Writ is moot and this Court should dismiss it.

The Petition for Leave to Appeal is also moot. Like the Petition for Writ, the Petition for Leave to Appeal involved a challenge to a non-final order issued by the Circuit Court. *See* Petitioners' Appendix APP. – 95. The Circuit Court has proceeded to a Final Judgment, superseding its previous non-final orders. Furthermore, an aggrieved party to *Ozanne v.*

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<sup>1</sup> The District Attorney acknowledges that this Court has asked parties to this action to answer whether this action should be recast as a petition for an original action *publici juris*. The District Attorney believes that the mooting of the Petition itself is an additional reason to not recast the Petition as an original action.



*Fitzgerald* can potentially now pursue an appeal of right from the Final Judgment. *See* Wis. Stat. § 808.03(1). The Legislature has also always had the right, in its discretion and beyond the Circuit Court's control, to re-vote on the Budget Repair Bill in compliance with the OML. Therefore, this Court should deny the Petition for Leave to Appeal.<sup>2</sup>

## II. EXCEPTIONS TO DISMISSAL ON MOOTNESS GROUNDS DO NOT APPLY.

Under a variety of circumstances, courts prefer to proceed to the merits of an otherwise moot case instead of dismissal. These circumstances include:

- Issues of great public importance;
- The constitutionality of a statute;

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<sup>2</sup> The District Attorney also acknowledges that Respondents and Defendants Jeff Fitzgerald, Scott Fitzgerald, Michael Ellis, and Scott Suder have asserted legislative immunity pursuant to Article IV, § 15 of the Wisconsin Constitution as a defense before the Circuit Court. In granting its Final Judgment, the Circuit Court held it could proceed to grant declaratory and injunctive relief despite this claim of immunity. The Circuit Court did bifurcate the issue of whether Messrs. Fitzgerald, Fitzgerald, Ellis, and Suder should be subject to forfeitures pursuant to Wis. Stat. §§ 19.96 and 19.97. thus honoring their claim of immunity.

- Where the precise situation under consideration arises so frequently that a definitive decision is essential to guide the trial courts;
- Where the issue is likely to arise again and should be resolved by the court to avoid uncertainty; or
- Where a question was capable and likely of repetition and yet evades review because the appellate process usually cannot even be undertaken within the time that would have a practical effect upon the parties.

*See La Crosse Tribune*, 115 Wis.2d at 229, 340 N.W.2d 460 (citations omitted).

The controversy as framed in the Petition for Writ does not justify this Court proceeding to a determination on the merits of that petition. Although a question has arisen regarding the constitutionality of a statute, as argued below, the Attorney General cannot pursue it. Nor does this precise situation arise so frequently that this Court must rule now to guide lower courts. There is no showing that the Legislature intends to violate the OML in the future. This case presents

unique factual circumstances that do not justify this Court, in its discretion, reaching out to grant jurisdiction. The Final Judgment itself remains subject to appellate review. A person who is a party can still pursue a timely appeal.

This leaves only a consideration of whether this case poses an issue of great public importance. The rationale for the Petition for Writ is the need to have the Budget Repair Bill take effect so that state government and local political subdivisions will know how or if the bill impacts their budgets. Unique to OML based challenges to the actions of the legislature (or any covered entity) is that the entity remains free to take the same course of action, and to promulgate the same policies it wants to promulgate, so long as it does so in compliance with the OML. Although the issue of public importance as framed in the Petition for Writ is whether courts can void acts of the Legislature pursuant to the OML, the reasons offered in favor of the Petition for Writ stem more from a strategic determination that provoking a decision on the constitutionality of the Circuit Court's actions

is a better alternative than asking the Legislature to follow the OML and vote again on the Budget Repair Bill.

**III. THE ATTORNEY GENERAL MAY NOT CHALLENGE THE CONSTITUTIONALITY OF THE OML AS APPLIED TO THE LEGISLATURE.**

Clearly established Wisconsin law prohibits the Attorney General from challenging the constitutionality of a statute. *See State v. City of Oak Creek*, 2000 WI 9, ¶ 33, 232 Wis.2d 612, 605 N.W.2d 526. By way of the Petition for Writ, however, the Attorney General is asking this Court to find the OML unconstitutional as applied to the Legislature. “The analysis of an as-applied challenge is determined by the constitutional right that is alleged to have been affected by the application of the statute.” *Tammy W-G v. Jacob T.*, 2011 WI 30, ¶ 49, \_\_\_ Wis.2d \_\_\_, \_\_\_ N.W.2d \_\_\_. The OML contains no blanket exemption for the Legislature from the reach of a court’s power to grant legal or equitable relief under Wis. Stat. § 19.97(1), or to void actions taken at meetings of governmental bodies in violation of the OML

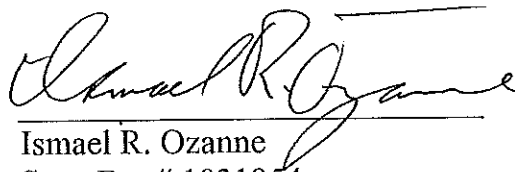
pursuant to Wis. Stat. § 19.97(3). Like all statutes, the OML is presumed to be constitutional. *See State v. Joseph E.G.*, 2001 WI App 29, ¶ 5, 240 Wis.2d 481, 623 N.W.2d 137.

In his May 27, 2011, pleading, the Attorney General now makes clear beyond all doubt that, through the Petition for Writ, he seeks to overturn as unconstitutional the OML as applied to the legislature. In particular, he argues that the legislature is constitutionally powerless to pass a statute that authorizes a court, through an enforcement action, to void legislation on account of a violation of the statute. *See* Petitioner's Reply Brief, p. 17-18. Since the clear, unambiguous, statutory language expressly authorizes this result, this is nothing more than the Attorney General's arguing, against "almost 100 years of precedent and with constitutional history," that the State (the Circuit Court) has applied the OML in an unconstitutional matter. *See City of Oak Creek*, 2000 WI 9, ¶ 33, 232 Wis.2d 612, 605 N.W.2d 526. This argument is forbidden to the Attorney General and must be denied.

CONCLUSION

For the reasons stated herein, and upon the record in this matter, the District Attorney respectfully requests that this Court dismiss the Petition for Writ as moot and deny the Petition for Leave to Appeal as moot.

Dated this 1<sup>st</sup> day of June, 2011.



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STATE OF WISCONSIN  
SUPREME COURT

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APPEAL NO. 2011AP765-W

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STATE OF WISCONSIN and  
STATE OF WISCONSIN EX REL. MICHAEL D. HUEBSCH,  
Secretary of the Wisconsin Department of Administration,

PETITIONERS,

V.

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**DISTRICT ATTORNEY'S MOTION TO DISMISS PETITION  
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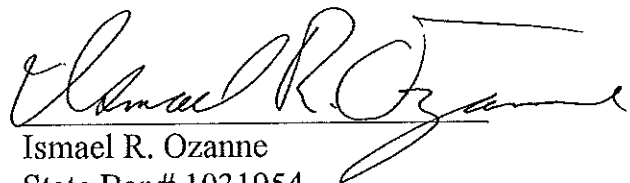
Respondent, Ismael R. Ozanne, District Attorney for Dane County, Wisconsin, and Plaintiff-Respondent, State of Wisconsin *ex rel.* Ismael R. Ozanne (hereinafter, "District Attorney") respectfully gives notice of and does move this Court, pursuant to Wis. Stat. § 809.14, for relief as follows: (i) an Order dismissing the Petition for Supervisory Writ ("Petition for Writ") filed by Petitioners, State of Wisconsin and Michael D. Huebsch, Secretary of the Wisconsin



Department of Administration, (“Secretary Huebsch”); and (ii) and Order denying Petition for Leave to Appeal Non-Final Order filed by Respondent and Defendant-Petitioner-Movant Douglas La Follette, Secretary of State of Wisconsin (“Secretary La Follette”) (certified by the Court of Appeals for District IV to this Court) (“Petition for Leave to Appeal”).

As is more fully set forth in the accompanying Memorandum of Law, both the Petition for Writ and Petition for Leave to Appeal are now moot. Further, the Attorney General may not argue that Wisconsin’s Open Meeting Law, see Wis. Stat. §§ 19.81 through 19.98, is unconstitutional as applied to the Legislature.

Dated this 1<sup>st</sup> day of June, 2011.



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