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November 16, 2021

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You are hereby notified that the Court has entered the following order:

No. 2021AP1343

Jeffrey Becker v. Dane County L.C. #2021CV143

The court having considered the petition to bypass the court of appeals pursuant to Wis. Stat. §§ 808.05 and 809.60 filed on behalf of Jeffrey Becker, et al., the response, and petitioners' motion to file a reply and accompanying reply, and the court noting that all opening briefs on appeal have not yet been filed. This court generally denies as premature petitions for bypass prior to the filing of briefs in the court of appeals. See Milwaukee Brewers Baseball Club v. Wisconsin Dept. of Health and Social Servs., 130 Wis. 2d 56, 62-63, 387 N.W.2d 245 (1986) (noting dismissal of initial petition to bypass as premature because the briefs on appeal had not been filed). This case does not present the kind of unique circumstances that warrant an exception to this longstanding practice. Therefore,

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IT IS ORDERED that the petitioners' motion to file a reply is granted. The reply filed with the motion is accepted as filed; and

IT IS FURTHER ORDERED the petition to bypass is dismissed.

BRIAN HAGEDORN, J. (*concurring*). This court, and therefore each of its members, has denied numerous petitions for bypass as premature because principal briefs in the court of appeals have not been filed. It is not a rule, but it has been the practice of this court for decades, and departed from only rarely. Generally we do not give reasons when either following or deviating from this practice. This is because we deny cases for all sorts of reasons. Sometimes the issues are not well-presented or are unclear. Sometimes they do not meet our criteria for review. Sometimes issues will be better clarified through further refinement in the lower courts. Sometimes the lawyering is bad, and on and on.

This background notwithstanding, for the first time, the dissent now posits we should abandon this decades-long institutional practice altogether. I disagree. Our default practice makes good sense. Among its benefits, it ensures the issues are clearly and adversely presented so that we know the full scope of what we are being asked to decide.

One circumstance where we have departed from our usual practice is when relief is urgently needed or not practically available from a lower court. That is not true here. In this case, the underlying order is no longer in effect, and the enforcement actions against the plaintiffs are currently stayed. Simply because a question could raise important constitutional questions is not, in the main, a good reason to forsake normal procedures or invent brand new ones.

I agree with the dissent that judicial process matters. Unfortunately, the message we have sent to litigants is that judicial process doesn't matter if the issue is one likely to pique the interests of some members of this court. I concur in the court's order.

I am authorized to state that REBECCA FRANK DALLET and JILL J. KAROFSKY, J.J., join this concurrence.

REBECCA GRASSL BRADLEY, J. (*dissenting*). A majority of this court denies the petition to bypass the court of appeals, asserting that "[t]his court generally denies as premature petitions for bypass prior to the filing of briefs in the court of appeals" and citing a 1986 case for this practice.¹ There is no rule prohibiting the filing of a petition to bypass before the parties complete their opening briefing before the court of appeals. Wisconsin Stat. § (Rule) 809.60(1)(a) provides that "[a] party may file with the supreme court a petition to bypass the court of appeals pursuant to s. 808.05 no later than 14 days following the filing of the respondent's brief under s. 809.19 or response. The petition must include a statement of reasons for bypassing the court of appeals." This rule establishes a deadline by which a petition to bypass must be filed, but nothing

¹ Milwaukee Brewers Baseball Club v. Wis. Dep't of Health and Soc. Servs., 130 Wis. 2d 56, 62–63, 387 N.W.2d 245 (1986).

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in either the rules of appellate procedure or this court's internal operating procedures declares petitions filed any time prior to this deadline premature.

Demonstrating that this court does not follow its ostensible "rule" regarding so-called "premature" petitions, the court unanimously grants a petition to bypass the court of appeals in State ex rel. Kaul v. Prehn, at the same time it denies this petition.² Its decision to do so is not an anomaly; just a few months ago, this court granted the Wisconsin Legislature's petition to bypass in Waity v. LeMahieu before the parties filed all of their briefs with the court of appeals.³ The court neglected to explain its reasoning for granting the petitions in those two cases while denying the petition in this case, despite all three petitions having been filed before the completion of briefing in the court of appeals. In denying this petition, the majority says only that "[t]his case does not present the kind of unique circumstances that warrant an exception to this longstanding practice." In abandoning its purported "longstanding practice" by granting other "premature" petitions, the court never explained why those cases present "unique circumstances"—a standard that appears nowhere in this court's statutory rules or operating procedures, nor in the 1986 case the majority claims establishes the custom.⁴

I would grant this petition because it satisfies multiple criteria expressed in Wis. Stat. § (Rule) 809.62(1r), which are supposed to guide our discretionary decision to review a case:

(a) A real and significant question of federal or state constitutional law is presented.

....

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

2. The question presented is a novel one, the resolution of which will have statewide impact; or

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

² State ex rel. Kaul v. Prehn, No. 2021AP1673, unpublished order (Wis. Nov. 16, 2021).

³ Waity v. LeMahieu, No. 2021AP802, unpublished order (Wis. July 15, 2021).

⁴ The 1986 case cited by the court contains absolutely no discussion of this purported rule nor does it cite any authority for it; the decision merely says "[t]his court dismissed the bypass petition as premature because briefs on the appeal had not been filed." Milwaukee Brewers Baseball Club, 130 Wis. 2d at 63.

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In this case, the petitioners allege the local health official in Dane County continues to unlawfully exercise legislative power in violation of Wisconsin statutes as well as the Wisconsin Constitution, exceeding her authority by restricting otherwise lawful activity in response to the COVID-19 pandemic. This case does more than merely "pique" our "interest;" it presents compelling circumstances warranting this court's immediate review—the allegedly unlawful infringement of Wisconsin citizens' liberty—which are at least as important as the separation of powers issues presented in the most recent cases the court decided to review, notwithstanding those petitioners' noncompliance with the court's "premature petitions" rule. "[W]hen it is presented to us that fundamental personal liberty is suppressed by an unelected official, we must act. Waiting until the matter proceeds through . . . the court of appeals will be justice denied."⁵ The people of Wisconsin deserve an answer from the state's highest court on such pressing issues of statewide importance, which would provide local health officials important guidance in executing their responsibilities.

Process matters. If the court wishes to enforce a rule against "premature petitions" it should adopt one. Instead, the majority inconsistently applies a mere practice without disclosing any standards by which it will choose whether to apply it.⁶ Such arbitrariness by courts is antithetical to the original understanding of the judicial role. See *The Federalist* No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961). ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."). The majority's arbitrariness in following its professed procedure in one case while discarding it in another sends an "unfortunate" message to litigants that judicial process will be invoked only when a majority wishes to dodge its duty to declare the law in a particular case.

I respectfully dissent.

I am authorized to state that ANNETTE KINGSLAND ZIEGLER, C.J., and PATIENCE DRAKE ROGGENSACK, J., join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

⁵ *Gymfinity, Ltd. v. Dane Cnty.*, No. 2020AP1927-OA, unpublished order, at 3 (Wis. Dec. 21, 2020) (Roggensack, C.J., dissenting).

⁶ Inexplicably, Justice Brian Hagedorn misconstrues this call for consistency as a recommendation to "abandon this decades-long institutional practice altogether." I never said that. Nor did I suggest this court "forsake normal procedures or invent brand new ones."