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March 3, 2023

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

No. 2022AP2042

Jane Doe 4 v. Madison Metropolitan School District
L.C. #2020CV454

A petition for bypass of the court of appeals, a motion for temporary injunctive relief pending appeal, a motion to vacate the court of appeals' order of February 6, 2023, and renewed motions for leave to file an oversized brief and for clarification having been filed by plaintiff-appellant, Jane Doe 4; and a motion for an extension of time to file a response to the petition for bypass and motion for temporary injunctive relief having been filed by defendant-respondent, Madison Metropolitan School District, and by intervenors-defendants-respondents, Gender Equity Association of James Madison Memorial High School, Gender Sexuality Alliance of Madison West High School, and Gender Sexuality Alliance of Robert M. LaFollette High School; a response to the extension motion having been filed by plaintiff-appellant-petitioner; and additional letters having been filed by the parties;

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IT IS ORDERED that the motion for an extension of time to file a response to the bypass petition and the motion for temporary injunctive relief pending appeal is granted. The response shall be filed by March 10, 2023; and

IT IS FURTHER ORDERED that the motion to vacate the court of appeals' order of February 6, 2023, and the renewed motions for leave to file an oversized brief and for clarification are denied; and

IT IS FURTHER ORDERED that this court will hold the petition for bypass and the motion for temporary injunctive relief pending appeal in abeyance and will decide those matters shortly after the primary briefs in this appeal have been filed in the court of appeals. The parties shall comply with the court of appeals' rules and orders regarding the filing of briefs in that court. The parties are advised that, if the court would decide to grant the petition for bypass following the filing of the primary briefs, counsel will need to be available on May 23 and May 25, 2023, for oral argument in this court.

REBECCA FRANK DALLET, J. (*dissenting*). We have previously said that we "generally den[y] as premature petitions for bypass prior to the filing of briefs in the court of appeals." Becker v. Dane Cnty., Nos. 2021AP1382 & 2021AP1343, unpublished order at 1 (Wis. Nov. 16, 2021) (citing Milwaukee Brewers Baseball Club v. DHSS, 130 Wis. 2d 56, 62-63, 387 N.W.2d 245 (1986)). Although this practice is not found in the bypass rule, see Wis. Stat. (Rule) § 809.60(1)(a), we do generally follow it. Indeed, over just the last five years, we have dismissed bypass petitions as premature on nine occasions, and denied another four premature bypass petitions outright.¹

As other justices and I have explained, however, sometimes "the unique circumstances of [a] case warrant an exception to that practice." See State ex rel. Kaul v. Prehn, No. 2021AP1673, unpublished order at 3 (Wis. Nov. 16, 2021) (Dallet, J., concurring); see also Becker, No. 2021AP1343, unpublished order at 2 (Hagedorn, J., concurring). One such unique circumstance is when "relief is urgently needed or not practically available from a lower court." See Becker, No. 2021AP1343, unpublished order at 2 (Hagedorn, J., concurring); see also Prehn, No. 2021AP1673, unpublished order at 1 (Dallet, J., concurring) (explaining that granting the premature bypass petition was justified because the petitioner "allege[d] an ongoing injury that threatene[d] the functioning of an important state agency"). Such unique circumstances were

¹ Specifically, we dismissed bypass petitions as premature in State v. Flynn, 2022AP1425; Becker v. Dane Cnty., Nos. 2021AP1382 & 2021AP1343; Colectivo v. Soc'y Ins., No. 2021AP413; Waukesha Cnty. v. M.I.S., No. 2021AP105; State v. Gebhart, No. 2020AP1619; State v. Stephens, No. 2020AP855; Eagle Point Solar, LLC v. PSC, No. 2019AP2281; State v. Smith, No. 2018AP927; and State v. Boruch, No. 2018AP152. And we denied premature bypass petitions in Gahl v. Aurora Health Care Inc., No. 2021AP1787-FT; Zignego v. WEC, No. 2019AP2397; Bach v. LIRC, No. 2019AP834; and Fed. Nat'l Mortg. Ass'n v. Bach, No. 2019AP631.

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present—at least in the judgment of a majority of the court—in the five cases over the last five years in which we granted premature bypass petitions.²

Petitioner argues that although her bypass petition is premature, this court should nevertheless accept it because she is seeking a temporary injunction pending appeal, and the court of appeals denied just such a temporary injunction the last time this case was on appeal. See John Doe 1 v. Madison Metro. Sch. Dist., 2020AP1032, unpublished order at 2 (Wis. Ct. App. Nov. 9, 2020). But petitioner doesn't explain why that means the relief she seeks is "not practically available" from the court of appeals this time around. Becker, No. 2021AP1343, unpublished order at 2 (Hagedorn, J., concurring).

In fact, there is reason to think that at least some relief might be available if petitioner followed the statutory process and sought a temporary injunction pending appeal from the court of appeals. See Wis. Stat. § 808.07(2)(a). That is because when the court of appeals previously denied petitioner's request for a temporary injunction pending appeal, it left in place a circuit court order temporarily enjoining aspects of the challenged policy. See John Doe 1 v. Madison Metro. Sch. Dist., 2020AP1032, unpublished order at 2 (Wis. Ct. App. Nov. 9, 2020) ("We deny the motion because the parents fail to persuade us that they are entitled to injunctive relief pending appeal beyond that already granted to them by the circuit court." (emphasis added)). Now that the circuit court has dismissed petitioner's complaint for lack of standing, however, that temporary injunction is gone. Given that difference, I see no reason to assume—as petitioner does—that it is pointless even to ask the court of appeals for temporary injunctive relief pending appeal.

Accordingly, I would follow our usual practice, dismiss the bypass petition as premature, and allow the court of appeals to decide the motion for temporary injunction in the first instance. Because the court does not do so, I respectfully dissent.

In closing, I suggest we should codify in Wis. Stat. § (Rule) 809.60(1)(a) our usual practice of dismissing premature bypass petitions and the unwritten exceptions we sometimes apply. See Prehn, No. 2021AP1673, unpublished order at 2 (Rebecca Grassl Bradley, J., concurring) ("Process matters. If the court wishes to enforce a rule against 'premature petitions' it should adopt one."). Doing so would improve the consistency of our decision-making, provide useful guidance to attorneys and parties, and avoid the appearance that we are favoring some litigants over others.

I am authorized to state that Justices Ann Walsh Bradley and Jill K. Karofsky join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

² See, e.g., Teigen v. WEC, No. 2022AP91; State ex rel. Kaul v. Prehn, No. 2021AP1673; Waity v. LeMahieu, No. 2021AP802; Trump v. Biden, No. 2020AP2038; League of Women Voters v. Evers, No. 2019AP559.

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