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May 3, 2024

To:

Hon. Eugene A. Gasiorkiewicz
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Charles G. Curtis
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John Devaney
Electronic Notice

T.R. Edwards
Electronic Notice

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

No. 2024AP232 Brown v. WEC, L.C.#2022CV1324

The court having considered: (1) the petition to bypass the court of appeals filed by intervenor-co-appellant-cross-respondent, Black Leaders Organizing for Communities ("BLOC"); (2) the separate joinders to BLOC's petition to bypass filed by defendant-appellant-cross-respondent, Tara McMenamin, and intervenor-co-appellant-cross-respondent, the Democratic National Committee; (3) the petition to bypass the court of appeals filed by defendant-co-appellant-cross-respondent, Wisconsin Elections Commission;[1] and (4) the responses in opposition to the bypass petitions filed by plaintiff-respondent-cross-appellant, Kenneth Brown ("Brown"); and the court also taking judicial notice that, subsequent to the filing of the two petitions for bypass, Brown filed a notice of cross-appeal and a docketing statement;

IT IS ORDERED that both petitions to bypass are granted, and the court assumes jurisdiction over the entire matter, including the issues raised in Brown's cross-appeal;

IT IS FURTHER ORDERED that the briefing schedule shall be as follows:

[1] For purposes of this order, BLOC, McMenamin, the Democratic National Committee, and the Wisconsin Elections Commission will be referenced collectively as "the Bypass Petitioners."

1. The Bypass Petitioners shall file their opening briefs in this court by June 3, 2024;

2. Brown shall file a single combined brief in response to the Bypass Petitioners' opening briefs and in support of his cross-appeal by July 3, 2024;

3. The Bypass Petitioners shall each file a single combined brief in reply to Brown's response and in response to Brown's opening brief on his cross-appeal by July 23, 2024; and

4. Brown shall file a single reply brief solely in support of his cross-appeal by August 2, 2024, or a statement that no reply brief will be filed.

IT IS FURTHER ORDERED that the Bypass Petitioners may not raise or argue issues not set forth in their respective petitions to bypass in their opening briefs unless otherwise ordered by the court, and Brown may not raise or argue issues not set forth in his docketing statement in his opening brief on his cross-appeal unless otherwise ordered by this court;

IT IS FURTHER ORDERED that the length of briefs in this matter shall be as follows:

1. The Bypass Petitioners' opening briefs shall not exceed 50 pages if a monospaced font is used, or 11,000 words if a proportional serif font is used;

2. Brown's combined response/opening brief shall not exceed 110 pages if a monospaced font is used, or 24,200 words if a proportional serif font is used;

3. The Bypass Petitioners' combined reply/response briefs shall not exceed 63 pages if a monospaced font is used, or 13,860 words if a proportional serif font is used; and

4. Brown's reply brief shall not exceed 20 pages if a monospaced font is used, or 4,400 words if a proportional serif font is used.

IT IS FURTHER ORDERED that the Bypass Petitioners are encouraged to avoid repetition of arguments and, to the extent possible, file joint briefs;

IT IS FURTHER ORDERED that any non-party who wishes to file a non-party brief amicus curiae must file a motion for leave of the court to file a non-party brief pursuant to the requirements of Wis. Stat. § (Rule) 809.19(7). Non-parties should also consult this court's Internal Operating Procedure concerning the nature of non-parties who may be granted leave to file a non-party brief. A proposed non-party brief must accompany the motion for leave to file it. Any proposed non-party brief shall not exceed 20 pages if a monospaced font is used or 4,400 words if a proportional serif font is used. Any motion for leave with the proposed non-party brief attached shall be filed no later than August 2, 2024. Any submission by a non-party that does not comply

with Wis. Stat. § (Rule) 809.19(7) and any proposed non-party brief for which this court does not grant leave will not be considered by the court;

IT IS FURTHER ORDERED that the parties' opening briefs must contain, as part of the appendix, the findings or opinion of the circuit court, limited portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues, and a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b);

IT IS FURTHER ORDERED that the allowance of costs, if any, in connection with the granting of the petitions to bypass will abide the decision of this court on review; and

IT IS FURTHER ORDERED that oral argument in this matter will be scheduled in a future order for the fall of 2024.

REBECCA FRANK DALLET, J. (*concurring*). 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 County, 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 have often followed it. Indeed, over the last several years, we have dismissed bypass petitions as premature on nine occasions, and denied another four premature bypass petitions outright.[2]

We have nevertheless made exceptions to this practice in the past based on "the unique circumstances of [the] case." 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). Another such circumstance is when a case alleges an ongoing injury that threatens the functioning of government, such that "[d]elaying access to this court while the parties file briefs in the court of appeals may unnecessarily prolong that alleged harm." See Prehn, No. 2021AP1673, unpublished order at 3 (Dallet, J., concurring).

[2] Specifically, we dismissed bypass petitions as premature in State v. Flynn, 2022AP1425; Becker v. Dane County, Nos. 2021AP1382 & 2021AP1343; Colectivo v. Soc'y Ins., No. 2021AP463; Waukesha County 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.

Such unique circumstances were present—at least in the judgment of a majority of the court—in the five cases over the last several years in which we granted premature bypass petitions.[3]

Granting bypass is appropriate in this case because it falls within the exceptions we have identified previously. Petitioners allege that the circuit court's decision threatens to disrupt the fast-approaching November elections, and that delaying access to this court while the parties file briefs in the court of appeals may exacerbate that disruption. Accordingly, I respectfully concur in the court's order granting bypass.

I am authorized to state that Justice JILL J. KAROFSKY joins this concurrence.

ANNETTE KINGSLAND ZIEGLER, C.J. (*dissenting*). This case is underdeveloped for our review, and procedurally, it is a mess. Bypass cannot be properly analyzed when a case is in this posture. This case should proceed in accordance with usual process.[4] Instead, even though it is not ready for review, this case sidesteps process to be taken out of turn and advanced to the front of the line. This is directly contrary to positions members of the court have taken in the past as they cried for process and denied bypass in previous actions that did not have these procedural problems, had issues that were clearly presented, and did not have the legal gaps which exist in this case.[5] Why the change of heart? This new majority seems unable to resist the allure of political control. On any legally meritorious metric, we should not be granting the petitions for bypass now.

Not only are the issues and arguments unknown and briefing notably absent, but at the earliest, oral argument for this matter cannot be scheduled until fall 2024.[6] Brown's cross-appeal and the three additional issues raised therein further complicates the matter.[7] As this court is

[3] 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.

[4] Wis. Stat. (Rule) § 809.60(1); Wis. Stat. § 808.05; (Proposed) Wis. S. Ct. IOP IV.B.2 (Feb. 21, 2024).

[5] See n.9, n.13, infra.

[6] Order granting bypass petitions, supra at 3 ("It is further ordered that oral argument in this matter will be scheduled in a future order for the fall of 2024.").

[7] Brown filed a cross-appeal from the final judgment of the Racine County circuit court, challenging the court's finding against him on three of five claims: namely, that the court

> held against the Plaintiff in finding that under Wis. Stat. § 6.855 alternate absentee voting sites do not have to be as close as possible to the Clerk's office, that the alternate absentee voting site located in the same building as the Clerk's office was not an extension of the Clerk's office in violation of § 6.855, and that the use of alternate absentee voting sites for only a few hours on single days during the

without any arguments regarding these issues, there is no way for my colleagues to have determined if this case begins to satisfy our criteria for bypass.[8] This cross-appeal is important because by granting bypass, the entire case is before the court. In short, our court cannot accept bypass of a case when the court cannot even know the issues.

If bypass were denied, the court of appeals is still fully able to act. Thus, other relief and process remains available to the parties. Nothing militates in favor of our court prematurely grabbing power in this case. This matter currently is and belongs before the court of appeals. Instead of having this case sit stagnant until fall, the court of appeals could review briefing (which has not yet been filed in the court of appeals[9]), and take any action that might otherwise be necessary. The court of appeals is fully equipped to so act. Undeniably, most cases proceed that way and that is how the system is designed to work, particularly given the undeveloped nature of

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election period did not violate the statutory requirement that alternate sites remain in use throughout the relevant election period.

[8] Wis. Stat. § 809.62(1r).

[9] Although typically a bypass petition is considered after initial briefing has occurred in the court of appeals, this fact alone is not dispositive of whether a bypass petition is "premature." When briefs are filed in the court of appeals, it assists in our decision making and helps us not be arbitrary and inconsistent when choosing whether to accept or deny petitions to bypass. Becker v. Dane County, No. 2021AP1343, unpublished order (Wis. Nov. 16, 2021) (Rebecca Grassl Bradley, J, dissenting) (dissented to court's order denying petition to bypass). See also Milwaukee Brewers Baseball Club v. Wisconsin Dept. of Health and Social Servs., 130 Wis. 2d 56, 63, 387 N.W.2d 245 (1986) (stating this court "dismissed the bypass petition as premature because briefs on the appeal had not been filed"); but see Waity v. LeMahieu, No. 2021AP802, unpublished order (Wis. July 15, 2021) (Justices Rebecca Dallet, Ann Walsh Bradley, and Jill Karofsky dissenting to the order granting petition to bypass before the parties filed all of their briefs with the court of appeals); State ex rel. Kaul v. Prehn, No. 2021AP1673, unpublished order (Wis. Nov. 16, 2021) (Justices Rebecca Dallet and Jill Karofsky concurring in the order granting petition to bypass before briefing was completed in the court of appeals); Becker, No. 2021AP1343, unpublished order (Wis. Nov. 16, 2021) (Justices Brian Hagedorn, Rebecca Dallet, and Jill Karofsky concurring in the order denying petition to bypass where briefing was not completed in the court of appeals). In Brown, however, this lack of initial briefing at the court of appeals, combined with the complexities of this case, including the unbriefed issues raised in the cross-appeal, renders this petition premature for our review.

this case. Our court should not prematurely and needlessly wander, once again, into the political thicket.[10]

Do my colleagues grant the petitions for bypass because this case, like Priorities USA v. Wisconsin Elections Commission, has the element of unique voting practices?[11] Priorities USA was accepted on bypass despite Teigen v. Wisconsin Elections Commission[12] already settling the precedent. The circuit court in Brown relied on this court's precedent in Teigen. But, the bypass petition in Brown does not raise issues concerning drop boxes or the return of absentee ballots. Our court should not reach to take a case merely because it may have issues that relate to an upcoming election. Our court should not pretend it is able to analyze whether bypass is warranted when the case is so plainly undeveloped, nor should our court reach to decide issues not presented.

Granting the petitions for bypass, while circumventing traditional practices, procedures and process, needlessly tramples over those safeguards once espoused by my colleagues.[13] While process matters, process ought not to be used to provide an excuse when some members of the

[10] Clarke v. Wis. Elections Comm'n, 2023 WI 79, ¶¶78-184, 410 Wis. 2d 1, N.W.2d 79 (Ziegler, C.J., dissenting) (reiterating in another recent election-related case that the judiciary should not stray from its limited constitutional role to descend into the political thicket in order to deliver partisan outcomes).

[11] See Priorities USA v. Wisconsin Elections Comm'n, No. 2024AP164, unpublished order (Wis. Mar. 12, 2024) (granting original action but only on one of the three issues presented).

[12] Teigen v. Wis. Elections Comm'n, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519 (Justices Ann Walsh Bradley, Rebecca Dallet, and Jill Karofsky dissenting to the court's holding that ballot drop boxes are illegal under Wisconsin statutes).

[13] My colleagues are fond of saying that process matters. Doe 1 v. Madison Metro. Sch. Dist., 2022 WI 65, ¶39, 403 Wis. 2d 369, 976 N.W.2d 584 (Justices Brian Hagedorn, Ann Walsh Bradley, Rebecca Dallet, and Jill Karofsky deny relief sought because "[l]itigation rules and processes matter to the rule of law just as much as rendering ultimate decisions based on the law"); see also Trump v. Biden, 2020 WI 91, ¶10, 394 Wis. 2d 629, 951 N.W.2d 568 (Justice Brian Hagedorn, as joined in the majority opinion by Justices Ann Walsh Bradley, Rebecca Dallet, and Jill Karofsky, denying the requested relief because the parties' challenges "fail under the longstanding and well-settled doctrine of laches"); see also n. 9 supra.

court simply do not wish to fulfill their responsibilities to resolve significant legal issues of statewide importance.[14]

[14] See Doe 1 v. Madison Metro. Sch. Dist., 2022 WI 65, ¶¶42-99, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting) (dissenting to the majority's decision to twice deny the parents' requested relief because "[l]itigation rules and processes matter"); see also Hawkins v. Wis. Elections Comm'n, 2020 WI 75, ¶¶29-83, 393 Wis. 2d 629, 948 N.W.2d 877 (Ziegler, J., dissenting) (dissenting from the court's decision to deny requested relief because there was no time for the court to grant any feasible relief); Trump v. Biden, 394 Wis. 2d 629, ¶¶107-139, (Ziegler, J., dissenting) (see also n.13 supra); Gymfinity, Ltd. v. Dane County, No. 2020AP1927-OA, unpublished order (Wis. Dec. 21, 2020) (Hagedorn, J., concurring) (concurred in order denying both petition for original action and emergency motion for temporary injunction as moot because the case "presents complicated legal issues across a number of claims involving disputed questions of fact" so "[i]t would be imprudent and potentially counter-productive to weigh in at this time"); Trump v. Evers, No. 2020AP1971-OA, unpublished order (Wis. Dec. 3, 2020) (Hagedorn, J., concurring) (concurred in denying petition for original action and motion to intervene "so that the petitioners may promptly exercise their right to pursue these claims in the manner prescribed by the legislature"); Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930-OA, unpublished order (Wis. Dec. 4, 2020) (Hagedorn, J., concurring) (Justice Hagedorn, joined by Justices Ann Walsh Bradley, Dallet, and Karofsky concurred in order denying petition for original action and motion to intervene due to the "sought after remedy" and "glaring flaws that render the petition woefully deficient"); Mueller v. Jacobs, No. 2020AP1958-OA, unpublished order (Wis. Dec. 3, 2020) (denying petition for leave to commence original action); Zignego v. Wis. Elections Comm'n, No. 2019AP2397, unpublished order (Wis. Jan. 13, 2020) (denying petition to bypass); Stempski v. Heinrich, No. 2021AP1434-OA, unpublished order (Wis. Aug. 27, 2021) (denying petition for leave to commence original action); Gahl v. Aurora Health Care, Inc., No. 2021AP1787, unpublished order (Wis. Oct. 25, 2021) (denying petition for bypass because it "fails to establish that this case presents a sufficiently well-developed legal issue that meets our criteria for review"); State ex rel. Robin Vos v. Circ. Ct. for Dane Cnty., No. 2022AP50-W, unpublished order (Wis. Jan. 11, 2022) (Hagedorn, J., concurring) (concurred in order denying petition for supervisory writ and motion for emergency temporary relief because petition "comes nowhere close to meeting these legal standards" and the supervisory writ "is an extraordinary petition we grant only in the rarest of cases").

Unlike Brown, Doe 1 v. Madison Metro. Sch. Dist. was ripe for our review. Parents filed a complaint to prevent the school district from enforcing its gender identity policy. That policy forbade school staff from disclosing information revealing a student's gender identity to anyone, including parents or guardians. The issue clearly presented in the case was whether parents have the constitutional right to parent their own child. This court twice declined to act. In Doe 1, the parents' case "crie[d] for judicial resolution." Doe 1, 403 Wis. 2d 369, ¶47 (Roggensack, J., dissenting). The issues were not muddied or changing. The only thing that changed was that the parents ultimately gave up on our court accepting review.

Moreover, given my colleagues' campaign promises to voters that they would not sit on cases which involved the Democratic Party,[15] how is it that they can even accept bypass of this case and ignore the parties' call for recusal?

[15] Responding to questions stemming from the Democratic Party of Wisconsin's "significant" $2.5 million donation to her campaign last February, then-candidate Judge Janet Protasiewicz stated,

> I would likely recuse myself from any case involving the Democratic Party of the state of Wisconsin. I have been the only person running for this seat who's been a proponent of a recusal rule. I think that $2.5 million is obviously a significant amount of money, whether or not I could continue to be fair or impartial on a case is one matter but on the other hand, the public deserves to have, really, also the appearance of fairness, the appearance of impartiality. And I don't know that the public could really say, "Hmm, she's fair," when she's received $2.5 million from a particular entity.

Shawn Johnson, Supreme Court candidate Janet Protasiewicz says she'd recuse herself in cases involving state Democratic Party, Wis. Pub. Radio, (Mar. 1, 2023) https://www.wpr.org/justice/wisconsin-supreme-court-candidate-janet-protasiewicz-recuse-cases-democratic-party; Henry Redman, Protasiewicz says she'd recuse herself from cases involving Democratic Party, Wis. Examiner, (Mar. 1, 2023), https://wisconsinexaminer.com/briefs/protasiewicz-says-shed-recuse-herself-from-cases-involving-democratic-party/. The Democratic Party's total donations to Janet Protasiewicz's campaign, the most expensive judicial campaign in history, amounted to nearly $10 million. See Clarke, 410 Wis. 2d 1, ¶178 n.78 (Ziegler, C.J., dissenting). Now, the Democratic National Committee (DNC) has filed a motion to intervene as a party in this case. But Justice Protasiewicz denied the parties' recusal motion filed against her, claiming—in contradistinction to her earlier assertions and promises—that she can act in an impartial manner where the Democratic Party and its aligned interests are concerned. What changed? Justice Janet Protasiewicz order denying Motion to Recuse in Brown v. WEC, No. 2024AP232, unpublished order (J. Protasewicz Mar. 21, 2024) ("Having considered all the filings, legal authorities, and facts for and against recusal, I deny Brown's motion for recusal. I note that as part of my consideration I determined that I can, in fact and appearance, act in an impartial manner . . . .").

Or, is this yet another example of this court demonstrating its partisan political will in order to achieve a predetermined outcome designed to affect the fall elections?[16] Will our court otherwise act before the case can be heard in the fall? Does the court prematurely accept review to ensure that its will be realized, instead of allowing the case to meaningfully proceed through the court of appeals? The answer may be found in the motion to stay the circuit court's decision and order just filed with our court by the Wisconsin Elections Commission, well before the court even accepted bypass and after that same requested relief was already denied at the circuit court.

While campaigning for her seat on this court, then-candidate Judge Jill Karofsky called for "an impartial judiciary, especially on the Wisconsin Supreme Court." Karofsky shared similar sentiments as her fellow majority colleague, Justice Protasiewicz, pledging that, "I am going to recuse myself, when I am elected to the Wisconsin Supreme Court, on any case where the Democratic Party of Wisconsin is a party to a lawsuit that gets to the Supreme Court. Because we need to make sure that when folks get to the court that they know the decision on the court is being made for one reason, and one reason only, and that is based on what the law is, and not based on money that has come in during a judicial election." The DNC has filed a motion to intervene as a party in this case—yet, Justice Karofsky has not recused herself and neither has her colleague. So, what changed? Does Justice Karofsky still not want "outside special interests [having] an undue influence in these elections and in the decisions that are being made on the Wisconsin Supreme Court?" WisPolitics, Karofsky, Kelly trade barbs in Milwaukee debate, (Mar. 13, 2020), https://www.wispolitics.com/2020/karofsky-kelly-trade-barbs-in-milwaukee-debate/; WisEye, Milwaukee Bar Association: Supreme Court Candidate Forum, (Mar. 12, 2020), https://wiseye.org/2020/03/12/milwaukee-bar-association-supreme-court-candidate-forum-2/

When WisconsinEye interviewed now-Justice Rebecca Dallet during her campaign for a seat on this court, she called the court "broken" because of "special interest money pouring into our state to buy justice or a justice," pointing to Justice Gableman's refusal to recuse himself from a case "despite the fact that $2.25 million had been spent on his campaign by a party in that case" as "a symptom of a broken system." WisEye, Interview with Wisconsin Supreme Court candidate Rebecca Dallet, (Jan. 30, 2018), https://www.jsonline.com/videos/news/politics/2018/03/26/interview-wisconsin-supreme-court-candidate-rebecca-dallet/110665248/. Justice Dallet's campaign stated that she "believes that if an organization is spending hundreds of thousands to elect a Supreme Court justice, the justice should recuse themselves when that organization is a party in a case." Molly Beck, Group headed by Eric Holder spends $140k to back Wisconsin Supreme Court candidate, Wis. State Journal, (Mar. 9, 2018), https://madison.com/news/local/govt-and-politics/group-headed-by-eric-holder-spends-k-to-back-wisconsin/article_a6837656-cbb5-518c-8467-c0d92a5a9902.html

[16] Clarke, 410 Wis. 2d 1, ¶¶78-184, (Ziegler, C.J., dissenting).

Curiously, the motion filed seeks to employ unique absentee voting practices.[17] Can we read the tea leaves again?

Parties are owed the fundamental due process right to fair and neutral arbiters.[18] Legitimate procedural questions and concerns necessarily envelop this premature petition. Courting political shenanigans via cherry-picking certain cases and issues this way in advance of another approaching election should be reprehensible to a court of law. But here we go again. I dissent to the order granting these petitions for bypass.

I am authorized to state that Justice REBECCA GRASSL BRADLEY joins this dissent.

BRIAN HAGEDORN, J. (*dissenting*). The court once again moves to expedite a case raising politically charged issues, rather than allow the normal judicial process to play out. My disagreement would ordinarily not be cause to publicly dissent,[19] but here the court grants the bypass petition before we even understand what the disputed issues will be.

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[17] WEC's Motion for Stay Pending Appeal (Apr. 17, 2024), at 2; WEC's Memorandum in Support of Stay Pending Appeal (Apr. 17, 2024), at 14-15. The DNC joined this motion to stay, "agree[ing] in full with the rationale articulated by WEC . . . .". Letter of DNC in Support of Motion for Stay (Apr. 23, 2024), at 1. BLOC has also joined this motion to stay "for the reasons set forth" by WEC and the DNC. BLOC's Joinder in Motion for Stay Pending Appeal (Apr. 29, 2024), at 2.

[18] See Clarke, 410 Wis. 2d 1, ¶¶174-184 (Ziegler, C.J., dissenting); see also In re Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."); People v. Freeman, 222 P.3d 177, 181 (Cal. 2010) ("The operation of the due process clause in the realm of judicial impartiality, then, is primarily to protect the individual's right to a fair trial."); State v. Herrmann, 2015 WI 84, ¶113, 364 Wis. 2d 336, 867 N.W.2d 772 (Ziegler, J., concurring) (citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883-84 (2009) ("Caperton concludes that objective proof of actual bias or the probability of a serious risk of actual bias must exist before recusal is required."). In Caperton, the United States Supreme Court reversed a state supreme court because a recently elected justice failed to recuse himself even though the justice had an "unconstitutional potential for bias" due in part to a party's outsized contribution to his campaign. The Court held that "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Caperton, 556 U.S. at 883-84 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

[19] See Evers v. Marklein, No. 2023AP2020, unpublished order (Wis. Feb. 2, 2024) (Hagedorn, J., dissenting) ("Even when justices vote against taking a case, our typical practice is not to publicly say so—largely to preserve neutrality and avoid prejudging a case we have yet to fully consider.").

For good reason, this court has maintained a decades-long practice of dismissing petitions for bypass as premature when the principal briefs have not yet been filed in the court of appeals.[20] The main purpose is to ensure we know the full scope of what we are being asked to decide. While we have departed from this on occasion when timely relief is necessary, I have urged continued fidelity to this policy, as have my colleagues who now find it inconvenient.[21]

Since the court of appeals was created, the Wisconsin Supreme Court has traditionally embraced a more limited role. We recognized that we were designed to be a slow-moving, deliberative body with limited capacity for resolving emergencies. We focused on deciding important legal (not political) issues after they had been vetted by courts below. This more modest vision for the court, however, is fading fast. When we jettison longstanding rules for favored litigants and pet issues, we send a clear message that judicial process matters, until it doesn't. Litigants have gotten the message. Political actors believe—not without reason—that they are likely to have their complaints given special treatment. Given this, we should not be surprised when the flood of original actions, petitions for bypass, and petitions for extraordinary writs continues. None of this is good for the court or the rule of law.

In this case, no emergency demands our immediate intervention. We should allow the issues to be clarified through briefing below before deciding whether to take this case. Instead, the court appears eager to weigh in, risking disruption to the law before the election. Doing so is unwise, inconsistent, and unnecessary. Because this premature petition to bypass should be denied, I respectfully dissent.

Samuel A. Christensen
Clerk of Supreme Court

[20] See Milwaukee Brewers Baseball Club v. DHHS, No. 85-0855, unpublished order (Wis. May 16, 1985) (dismissing petition for bypass as premature because the briefs had not yet been filed in the court of appeals); North Side Bank v. Gentile, No. 85-0822, unpublished order (Wis. June 17, 1985) (same); Michael S. Heffernan, Appellate Practice and Procedure in Wisconsin, § 24.3 at 24-4 (9th ed. 2022) ("Supreme court orders have stated a policy, not reflected in any rule, that a petition for bypass filed before the respondent's brief is filed will be dismissed as premature.").

[21] See Becker v. Dane County, No. 2021AP1343, unpublished order (Wis. Nov. 16, 2021) (Hagedorn, J., concurring) (joined by Dallet and Karofsky, JJ.); Kaul v. Prehn, No. 2021AP1673, unpublished order (Wis. Nov. 16, 2021) (Dallet, J., concurring) (joined by Karofsky, J.); Jane Doe, 4 v. Madison Metro. Sch. Dist., No. 2022AP2042, unpublished order (Wis. Mar. 3, 2023) (Dallet, J., dissenting) (joined by Ann Walsh Bradley and Karofsky, JJ.).

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