No. 24AP232

In the Supreme Court of Wisconsin

KENNETH BROWN,
PLAINTIFF-RESPONDENT

v.

WISCONSIN ELECTIONS COMMISSION,
DEFENDANT-CO-APPELLANT,

WISCONSIN ALLIANCE FOR RETIRED AMERICANS, BLACK LEADERS ORGANIZING FOR COMMUNITIES, AND DEMOCRATIC NATIONAL COMMITTEE,
INTERVENORS-CO-APPELLANTS,

TARA MCMENAMIN,
DEFENDANT-APPELLANT.

RESPONSE OF PLAINTIFF-RESPONDENT IN OPPOSITION TO THE PETITION TO BYPASS

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INTRODUCTION

This premature bypass petition must be denied. This case involves the judicial review of an administrative agency's decision. The simple question before the Circuit Court was whether the Municipal Clerk for the City of Racine (the Clerk) complied with the requirements of Wis. Stat. § 6.855 when administering an early in-person absentee voting period for the August 2022 primary election which involved the use of a "mobile voting unit"—a van—in various locations for discrete, scheduled periods of time as a polling place.

Section 6.855(1) of the Wisconsin Statutes provides, in relevant part, that:

> "The governing body of a municipality may elect to designate a site other than the office of the municipal clerk . . . as the location from which electors of the municipality may request and vote absentee ballots and to which voted absentee ballots shall be returned by electors for any election. The designated site shall be located as near as practicable to the office of the municipal clerk . . . and no site may be designated that affords an advantage to any political party. An election by a governing body to designate an alternate site under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary . . . and shall remain in effect until at least the day after the election. If the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at an alternate site may be conducted in the office of the municipal clerk . . ."

While the statute is lengthy and lists a number of considerations for alternate sites, the language itself is unambiguous and sets out the following requirements for alternate sites as pertinent to this appeal: 1) they must be located "as near as practicable" to the Clerk's office; 2) they must not "afford[] an advantage to any political party"; 3) they must "remain in effect until at least the day after the election"; and 4) if they are used, "no function related to voting and return of absentee ballots" may be conducted at the Clerk's office. Wis. Stat. § 5.25, which governs "polling places," adds a fifth requirement that polling places shall be in public buildings "unless the use of a public building for this purpose is impracticable or the use of a nonpublic building better serves the needs of the electorate."

Plaintiff-Respondent Kenneth Brown challenged the legality of the Clerk's actions in a complaint filed with the Wisconsin Election Commission (WEC). WEC dismissed the complaint, and Brown brought this action in Circuit Court pursuant to Wis. Stat. § 5.06(8).

The Circuit Court determined that the Clerk had not, in fact, complied with the statutory requirements for alternate in-person absentee voting sites and reversed WEC's decision. Several appeals

followed.[1] The Petition to Bypass, brought by one co-appellant and joined by others[2], now attempts to improperly expand the administrative record and make this appeal about issues other than those on which this case was decided, and to insert additional facts outside of the administrative record.

But this case is not about, and has never been about, whether the statute as written is the best possible mechanism to govern alternate locations for in-person absentee voting, or whether having a mobile voting unit is good or bad public policy. This case was and is simply about whether the procedures the Clerk used complied with the express language of the governing statutes. Because the factual record in this administrative appeal plainly demonstrates that the Clerk did not comply, WEC erred in dismissing Brown's complaint, and the Circuit Court correctly reversed WEC's decision.

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[1] The Plaintiff-Respondent alleged that the Clerk had violated the statutes in five separate ways and sought review of and a separate declaration relating to each of the five. The Circuit Court ruled for the Plaintiff-Respondent on two of the five and for the Defendants on the other three. The Defendant-Appellant, Defendant-Co-Appellant, and Intervenors-Co-Appellants have appealed on the two claims they lost and the Plaintiff-Respondent intends to cross-appeal on the three claims on which he lost.

[2] As of filing of this Response, the Intervenor-Co-Appellant Democratic National Committee and Defendant-Appellant Tara McMenamin have joined the bypass petition.

Now, before the circuit court has an opportunity to even consider a request for a stay in this case (a motion for a stay was filed by Intervenor-Co-Appellant Democratic National Committee (DNC) for the first time yesterday, nearly two weeks *after* the bypass petition was filed, and nearly two months after the decision and order in this case was entered[3]) or any other potential relief from the Circuit Court or the Court of Appeals, Intervenor-Co-Appellants Black Leaders Organizing for Communities, joined by Intervenor-Co-Appellants DNC and Defendant-Appellant Tara McMenamin, prematurely seek to bypass the Court of Appeals altogether and have this Court issue a final decision on issues and facts not even properly part of this case. For the reasons stated herein, the Petition to Bypass should be denied.

ARGUMENT

A. The Petition is premature

Wisconsin Stat. § 809.60 governs petitions to bypass, and states that they may be filed "no later than 14 days following the filing of the respondent's brief." This Court "generally denies as premature petitions

[3] Counsel for DNC sent electronic courtesy copies of the stay motion documents to all parties on February 29, 2024, with a note stating they had been filed with the Circuit Court. As of the filing of this response, those materials had not yet been processed by the Racine County Clerk of Courts, and so no docket number is available.

to bypass prior to the filing of briefs in the court of appeals." *See Becker v. Dane County*, No. 2021AP1343, Unpublished Order at 1 (Nov. 16, 2021) (citing *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 56, 62-63, 387 N.W.2d 245 (1986)); *See also N. Side Bank v. Gentile*, 129 Wis. 2d 208, 214, 385 N.W.2d 133 (1986) (Noting that in that case an initial bypass petition was dismissed as premature because the briefs of the parties had not been filed.) This well-known policy has also been cited in the leading treatise on appellate practice in Wisconsin. *See* Michael S. Heffernan, Appellate Practice and Procedure in Wisconsin, § 24.3. ("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.").

Several Justices individually have also noted that this practice has only been deviated from in unique circumstances, including when "relief is urgently needed or not practically available from a lower court." *See Becker v. Dane County*, No. 2021AP1343, Unpublished Order at 2 (Hagedorn, J., concurring) (Nov. 16, 2021); *see also Jane Doe 4 v. Madison Metropolitan School District*, 2022AP2042, Unpublished Order at 2 (Dallet, J., dissenting). Here there are no unique circumstances, and no such relief is urgently needed.

Additionally, the issues that must be resolved are not yet fully known in this case. Plaintiff-Respondent plans to file a cross-appeal in this matter, as is his right, but he still is within his time to do so. This premature petition attempts to short-circuit the appellate process and deny the Plaintiff-Respondent his rights under state law. The Court should not allow it, and the premature Petition should be denied.

1. The Petition here is distinguished from the bypass petition filed and granted in *Teigen*

The Petition argues that this case is similar to *Teigen v. Wisconsin Elections Commission*, in which a bypass petition was filed and granted. Pet. at 11. However, in that case the party seeking bypass had no other choice. For the Petitioners in *Teigen*, no other relief was available at the lower courts which had been presented with, and decided, motions to stay. *See Teigen v. Wisconsin*, 2022AP91, Unpublished Order at 2 (Jan. 28, 2022) (an order granting the bypass petition and explaining the background of the case, including the fact that in that case the appellants had sought a stay from both the circuit court and the court of appeals). But the same is not true here where the Petitioners filed their Petition to Bypass nearly two weeks before anyone had sought a stay from the

Circuit Court,[4] and there had been no decision made on that stay motion–and no stay has been sought from the Court of Appeals.

Here, Petitioners come to this Court arguing this is an "urgent election case[]" (Pet. at 11) because they claim it creates confusion and misunderstanding amongst municipal clerks statewide. Yet, the municipal clerk who is a party to this action only today joins this bypass petition (two weeks after it was filed, and nearly two months after the decision and order was entered), and as of yet has not even sought any stay pending appeal.

B. The petition does not meet this Court's criteria for granting bypass

"A matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1), and one the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues. At times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision." Wis. S. Ct. IOP III.B.2 (April 20, 2023). These standards are simply not met here, and the Petition should be denied.

[4] The Intervenor-Co-Appellant DNC first filed a motion for a stay with the circuit court yesterday, nearly two weeks after the Petition to Bypass was filed. *See supra,* n. 3.

None of the Wis. Stat. § 809.62 factors for granting review are present here. This case does not raise a real and significant question of federal or state constitutional law. Nor is a decision from this Court needed to develop, clarify or harmonize the law.[5] Indeed, this case simply calls for the application of well-settled statutory interpretation principles to the factual situation presented—and that is exactly what the Circuit Court did here.

The Petition also attempts to raise new issues based upon new facts which are not part of the administrative record to make this case about something it is not. But this Court should not permit such an approach.

1. The Circuit Court's decision does not limit anyone's right to vote

The Petition begins with the self-evident and non-exceptional statement that "the right to vote is of unique and substantial importance." Pet. at 12. True, but this case is not about the right to vote, and despite the Petition's best efforts to claim otherwise, nothing in the

[5] The other factors, demonstrating a need for the supreme court to consider establishing, implementing or changing a policy within its authority (Wis. Stat. § 809.62(1r)(b)), or the factors relating to a decision of the court of appeals (Wis. Stat. § 809.62(1r)(d) and (e)) are not applicable here as this action does not deal with court policy and on bypass there has been no court of appeals decision.

Circuit Court's order raises any "real and significant question of federal or state constitutional law." Wis. Stat. § 809.62(1r)(a).

This case is an administrative appeal to determine whether the Clerk followed the statutorily mandated legal process when establishing alternate sites for in-person absentee voting. No one in Racine or elsewhere in Wisconsin loses the ability to vote because of the Circuit Court's decision. The Clerk may still select alternate sites for early in-person absentee voting. She simply must do so consistent with the statutory rules for such sites.

The Petition attempts to add facts (*see e.g.*, Pet. at 14–15) to argue this case is about something other than whether the Clerk followed state law or not. But this Court should not allow it, and the Petition to Bypass should be denied.

2. There is no equal protection problem here

The Petition also argues that the Circuit Court's order in this case "poses a unique threat to voters of color and likely violates the Wisconsin Constitution's equal protection guarantees." Pet. at 14. Again, the Petition oversells itself to the Court to create a constitutional issue out of whole cloth. But nothing in this administrative appeal comes anywhere close.

The Petition seeks to expand the record of this case far beyond what is allowed and beyond what was reviewed by the agency and the Circuit Court in this case. There is *nothing* in the factual record, at all, indicating that using locations close to the clerk's office (or anything else in the statute) has any effect on a particular racial group. Further, the Petition argues that the Circuit Court's order will return voting to a "discriminatory history" and result in something less than equal access to voting as additional issues. But again, the Petitioners cite to absolutely *nothing* in the administrative record which reflects anything of the sort (and that is because there is no such evidence), and such issues cannot properly be brought via bypass petition. "Judicial review of administrative agency decisions contemplates review of the record developed before the agency." *State v. Outagamie County Bd. Of Adjustment*, 2001 WI 78, ¶ 55, 244 Wis. 2d 613, 628 N.W.2d 376; *see also* Wis. Stat. § 227.57(1) ("The review . . . shall be confined to the record . . .").

The Petitioners never sought to supplement the record with any additional evidence at the agency level or the Circuit Court, and now instead want to try the case all over again and insert new facts and new issues on bypass to this Court. The Court should not allow it.

i. *One Wisconsin Inst., Inc. v. Thomsen* does not apply

In attempting to create a constitutional crisis out of thin air, the Petition relies heavily on a federal court decision which interpreted a previous version of Wis. Stat. § 6.855: *One Wisconsin Inst., Inc. v. Thomsen,* 198 F. Supp. 3d 896 (W.D. Wis. 2016). The statute, as it existed in *One Wisconsin* was later amended, and so that case does not control here, and that case primarily challenged Wisconsin's Voter ID law, which is not at issue in this case.

Instead, the Petition attempts to turn this case into some kind of renewed challenge of Wis. Stat. § 6.855. But there is absolutely nothing in the record on this case which indicates that using particular voting locations has any effect on a particular racial group. Instead, the Petition tries to frame this appeal as a state-level re-hearing of the *One Wisconsin* case, and that's simply not what this administrative appeal is. These issues were not before the Circuit Court, there are no facts in the record to support any of the Petition's bold claims, and this Court should not allow these issues to be injected into this case on appeal via a bypass petition.

Instead, the Petition cites new facts, purporting to make them part of the record, which they are not. From those newly brought up facts, the

Petition argues that the Circuit Court decision "telegraphed" to the rest of Wisconsin's municipalities that they must discriminate based on race. These arguments are as nonsensical as they are legally wrong.

Further, unlike in *One Wisconsin*, there is no "one location" argument being made in this case. Indeed, as the statute says (and as Plaintiff has argued in this case, *see* Dkt. 95:14)–a clerk can have multiple locations and also comply with all other statutory provisions. But that is not what happened in the facts of this case.

The issue in *One Wisconsin* with the *prior* version of Wis. Stat. § 6.855(5) was about accessibility–the concern that a statute mandating only a single in-person absentee voting location would create long lines and discourage qualified electors from voting. *One Wisconsin*, 198 F. Supp. 3d at 934 ("The state's *one-location rule* ignores the obvious *logistical* difference between forcing a few dozen voters to use a single location and forcing a few hundred thousand voters to use a single location.") (emphasis added).

What's more is that in *Luft v. Evers*, the Seventh Circuit explicitly rejected *One Wisconsin*'s concerns that changes to Wis. Stat. § 6.855 were racially discriminatory; and the Petition's attempts to make those same arguments based upon *One Wisconsin* ought to go nowhere. *Luft*, 963

F.3d 665, 670 (7th Cir. 2020) (stating that *One Wisconsin's* approach "is incompatible with the standard for discriminatory intent" because "[r]acial discrimination, as a constitutional matter, occurs only when a public official intends to hold a person's race against him") (citations omitted).

And again, and most importantly: there is *nothing* in the factual record in this case to even suggest what the Petition now argues.

3. This case deals with the application of well-settled statutory interpretation principles to the factual situation presented

Rather than raise significant questions of federal and state constitutional law, or raise some novel legal arguments which require this Court to develop, clarify or harmonize the law, this case simply seeks to apply well-settled statutory interpretation principles to the facts presented. This case asks whether the Clerk's actions during the 2022 primary election complied with state law or not.

The Petition argues this Court should hear this case immediately because the Circuit Court's interpretation of Wis. Stat. § 6.84(2) in this case "threatens election administration." Pet. at 17. The Petition argues that the Circuit Court decision is an "unworkable inflation" of Wis. Stat. § 6.84(2). But the reality is nothing of the sort.

There has been no allegation in this case at the agency level or at the Circuit Court that the statutory requirements relating to proximity to the clerk's office, political advantage, use of the clerk's office, availability through election day and use of public buildings—are unconstitutional under either state or federal law. Rather, the Circuit Court decision did nothing more than determine whether the requirements set forth in the statutes were complied with by the Clerk.

This application of the law does not create the crisis that the Petition claims it does. The Circuit Court simply applied well-settled principles of statutory interpretation to the facts presented in this case. Nothing more.

4. The Court would benefit from further analysis and clarification of the Court of Appeals

Finally, if this Court is going to hear this matter, it would be beneficial to first have the Court of Appeals clarify the issues by providing its analysis before this Court attempts to sift through these issues on its own. Indeed, this Court has long held that even when reviewing a question of law *de novo*, it still benefits from the analysis of the Court of Appeals. *See, e.g., Einhorn v. Culea*, 2000 WI 65, ¶ 59, 235 Wis. 2d 646, 612 N.W.2d 78.

The bypass petition here would short-circuit the process and deny this Court the opportunity to benefit from that analysis. Given the factual and legal concerns with the Petition's claims, allowing the Court of Appeals to weigh in on these issues would benefit this Court assuming it is ultimately asked to weigh in again in the future.

For this additional reason, the Petition to Bypass should be denied.

CONCLUSION

This Court should deny the Petition to Bypass for the reasons explained herein.

Dated: March 1, 2024.

Respectfully submitted,

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Electronically signed by Lucas T. Vebber

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.81, which governs the form of documents filed in this court where Chapter 809 does not expressly provide for alternate formatting. The length of this response is 3,209 words as calculated by Microsoft Word.

Dated: March 1, 2024.

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