No. 24AP2429

In the Supreme Court of Wisconsin

ABBOTSFORD EDUCATION ASSOCIATION, AFSCME, LOCAL 47, AFSCME, LOCAL 1215, BEN GRUBER, BEAVER DAM EDUCATION ASSOCIATION, MATTHEW ZIEBARTH, SEIU WISCONSIN, TEACHING ASSISTANTS' ASSN., LOCAL 3220, AFT, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 695,
PLAINTIFFS-RESPONDENTS-PETITIONERS,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, JAMES J. DALEY, DEPARTMENT OF ADMINISTRATION, KATHY BLUMENFELD, DIVISION OF PERSONNEL MANAGEMENT AND JEN FLOGEL,
DEFENDANTS-CO-APPELLANTS,

WISCONSIN STATE LEGISLATURE,
INTERVENOR-DEFENDANT-APPELLANT,

KRISTI KOSCHKEE,
INTERVENOR-APPELLANT.

On appeal from the Circuit Court for Dane County, the Honorable Jacob B. Frost, Presiding, Case No. 2023CV3152

INTERVENOR-APPELLANT KRISTI KOSCHKEE'S RESPONSE IN OPPOSITION TO THE PETITION FOR BYPASS

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INTRODUCTION

Once again, this Court is faced with a prematurely filed bypass petition and asked to resolve a politically charged issue outside of the traditional appellate procedure.

As an initial matter, this Court should deny the Petition as premature because this case will not be fully briefed for several months. But even if it were not premature, this case also does not warrant bypass. First, this case does not present a real and significant question of state constitutional law. Rather, the legal issue being raised in the Petition simply involves the application of this Court's well-established five-part equal protection test to a fifteen-year-old state law. Relatedly, the Court is not asked to develop, clarify, or harmonize the law, but instead to simply apply a long-standing test to a statute. Finally, there is no need to hasten a decision here.

For the reasons explained herein, the Court should deny the Petition for Bypass.

STATEMENT OF THE CASE

Plaintiffs-Respondents-Petitioners (herein, "Plaintiffs") filed this case on November 30, 2023. R.7. Plaintiffs' only claim was an equal protection challenge to Act 10's distinction between general municipal

employees and public safety employees, who are exempt from most of Acts 10's requirements. *See* R.7:3, 7:25–27. The Seventh Circuit rejected a nearly identical claim, brought under the United States Constitution, in *Wis.Educ. Ass'n Council v. Walker*, 705 F.3d 640, 642 (7th Cir. 2013) ("WEAC"). The Wisconsin Supreme Court also rejected related equal protection challenges to Act 10, brought under Article 1, Section 1 of the Wisconsin Constitution, in *Madison Teachers., Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337. The Legislature moved to dismiss, relying in large part on these cases. R.64–65.

The Circuit Court denied the motion to dismiss on July 3, 2024, but rejected most of the Plaintiffs' claim. R.118. Like the Seventh Circuit in *WEAC*, the Circuit Court held that Act 10's distinction between public safety employees and general municipal employees *did not* violate the Wisconsin Constitution. R.118:14 ("To be clear, I reject Plaintiffs arguments that there is no rational basis for creating any general employee category. A rational basis exists for the distinction between most of the general employee group versus the public safety group."). Indeed, the *only* equal protection violation the Court found was based on the "exclusion of certain employees that should be . . . in the public safety

group," like, for example, "Capitol Police and UW Police and conservation wardens." R.118:14, 17.

Since the *only* constitutional violation the Circuit Court found was the exclusion of certain narrow categories of employees, like "Capitol Police and UW Police and conservation wardens," R. 118:17, there were two, and only two, proper ways to remedy that violation: either eliminate the public safety exception entirely, such that the Act 10 regime would apply to *all* municipal employees equally, or extend the public safety exception to similarly situated categories of employees. The latter remedy could and would be accomplished by enjoining Act 10's provisions as applied to those categories of employees for which there was an equal protection violation. Parties regularly bring claims as applied to certain categories, and courts regularly construct remedies in this way. *E.g.*, *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶60, 376 Wis. 2d 147, 897 N.W.2d 384 (holding that portions of Wis. Stat. § 950.09 and 950.11 are "are unconstitutional *as applied to judges*").

But when the Court issued its remedial decision and order on December 2, 2024, it went far beyond the only equal protection violation it found. The Court struck down Act 10 for *all* municipal employees, reviving the pre-Act 10 regime for everyone, including Ms. Koschkee.

While this appeal has been pending, the Circuit Court stayed its decision. Ms. Koschkee subsequently petitioned for permissive intervention and then Plaintiffs moved for bypass. Ms. Koschkee's petition was granted, and she now files this response to the Petition for Bypass as an opposing party pursuant to Wis. Stat. (Rule) § 809.60(2).

ARGUMENT

A. The Petition is premature

Wisconsin Stat. (Rule) § 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 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 have also individually 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.

The premature Petition should be denied.

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

Additionally, and even if it were not prematurely brought, this case does not warrant bypass, and the Petition should still be denied. "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.

None of the Wis. Stat. (Rule) § 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.[1] Indeed, this case simply calls for the application of well-settled equal protection analysis principles to the statutory scheme which is challenged herein—there is no need to deviate from the traditional appellate procedure.

To be clear, the Circuit Court's decision in this case *does* create a significant First Amendment issue for Ms. Koschkee and other public employees around Wisconsin, as she explained in her Petition to Intervene in this appeal. But those issues do not change the underlying analysis that an Appellate Court will engage in here in the first

[1] 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.

instance—a basic application of the Court's well-settled, five-part equal protection analysis. And for that reason, this case does not involve "the application of a new doctrine" but "merely the application of well-settled principles to the factual situation." Wis. Stat. (Rule) § 809.62(1r)(c)1. The Petition for Bypass should be denied.

1. This case deals with the application of well-settled equal protection analysis principles to the statutory scheme challenged in this action

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, all the Plaintiffs are asking for in this case is to apply well-settled equal protection analysis principles to the facts presented. That is, whether some of the classifications created by the Legislature violate the Wisconsin Constitution's guarantee of equal protection.

Under the very test the Plaintiffs want applied here, "A classification created by legislative enactment will survive rational basis scrutiny upon meeting five criteria:

(1) All classification[s] must be based upon substantial distinctions which make one class really different from another
(2) The classification adopted must be germane to the purpose of the law

(3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within a class.]
(4) To whatever class a law may apply, it must apply equally to each member thereof.
(5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation."

Porter v. State, 2018 WI 79, ¶¶ 34–35, 382 Wis. 2d 697, 913 N.W.2d 842, citing *Mayo v. Wis. Injured Patients & Families Compensation Fund*, 2018 WI 78, ¶ 42, 383 Wis. 2d 1 914 N.W.2d 678.

Plaintiffs argue that this case involves little more than an application of those factors to the challenged statutory scheme. Indeed, their entire argument appears to be that this case involves no great legal analysis, and that the entire case turns on "[t]he ultimate application of these five criteria in this case." That is no real or significant question of state constitutional law. Nor is a decision from this Court needed to develop, clarify or harmonize the law. The law in this area is developed and clear, it must simply be applied here. The Petitioners must show more, and they have not. The Petition for Bypass should be denied.

2. The Court would benefit from further analysis and clarification of the Court of Appeals, there is no need to hasten a decision here

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. "Judicial humility recognizes that this court is given a modest role in our constitutional order, and that our court's inherent limitations counsel caution when exercising our immense power. We must remember that we are designed to be the court of last resort, not the court of first resort. Rather, even when the issues are ones we are likely to consider in the end, the law is almost always better served by subjecting claims to the crucible of the multi-tiered adversarial process." *Wis. Voter All. v. Secord*, 2025 WI 2, ¶ 58 at fn. 9 (Hagedorn, J. concurring) quoting *Evers v. Marklein*, No. 2023AP2020-OA, unpublished order, at 4–5, 2024 WL 845269 (Feb. 22, 2024) (Hagedorn J., dissenting).

Indeed, the law is better served by subjecting this action to the crucible of the multi-tiered adversarial process. 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 Supreme Court makes *de novo* decisions still "benefiting from the analyses" of the circuit court and court of appeals); *PRN Associates LLC v. State Dept. of Admin.*, 2009 WI 53, ¶ 27, 317 Wis. 2d 656, 766 N.W.2d 559 (same); *Cree, Inc. v. Lab. and Indus. Rev. Comm'n*, 2022 WI 15, ¶ 13, 400 Wis. 2d 827, 970 N.W.2d 837 (same).

Bypass here would needlessly short-circuit the appellate review process and deny this Court the opportunity to benefit from that analysis. Given the straightforward legal issues presented in this appeal, 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. There is no need to hasten that process.[2]

[2] Plaintiffs implore this Court to "resolve the merits as quickly as possible to ensure a decision by the end of this Term." Petition at 22. They say this is necessary because "collective bargaining agreements covering all state public employees will expire this summer", "the Circuit Court's ruling affects the employees that comprise certain statewide bargaining units" and "hundreds of recertification elections for unions representing 'general' employees will occur this fall." Petition at 23-24. But they do not explain why they waited more than a decade to bring these changes, and their decade-plus delay should not be rewarded now with a truncated appellate process. *See Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶ 5, 393 Wis. 2d 629, 948 N.W.2d 877 (noting that the Court exercised its discretion to deny a petition for leave to commence an original action because the party seeking such leave delayed in seeking relief).

To be clear, while the legal issue here is relatively straightforward, the relief sought by the Plaintiffs in this action is extraordinarily broad and unprecedented. They seek to overturn a fifteen-year-old law under a challenge which has been previously tried and rejected. *See, e.g., WEAC*, *supra*.

Justice Hagedorn has now issued an order recusing himself from this appeal, a motion asking Justice Protosiewicz to do the same is pending.[3] Given the breadth of Plaintiffs' desired remedy here, and the fact that a full Court is not available to hear this case, it is especially important to allow the Court of Appeals to weigh in first through the traditional appellate process. "Complications that may occur when a full supreme court does not consider a case are self-evident. Citizens of the state deserve to have the entire supreme court decide all cases unless extreme circumstances require otherwise." *State v. Herrmann*, 2015 WI 84, ¶ 154, 364 Wis. 2d 336, 400, 867 N.W.2d 772 (Ziegler, J. concurring).

While "extreme circumstances" may ultimately require this Court to hear this case without all of its members, it should not do so hastily on bypass without the benefit of the Court of Appeals' analysis. "Where

[3] Intervenor-Appellant Kristi Koschkee supports that recusal motion in full.

we deal with appellate courts which customarily sit *en banc*, it seems to me scarcely debatable that decisions of important questions of statutory or constitutional law by less than a full court are, other things being equal, undesirable." *Matter of Disciplinary Proc. Against Woldt*, 2021 WI 73, ¶ 56 at fn. 2, 398 Wis. 2d 482, 961 N.W.2d 854 (Bradley, J. concurring) (emphasis in original) quoting William H. Rehnquist, Sense and Nonsense About Judicial Ethics, 28 Rec. Ass'n B. City N.Y. 694, 707 (1973).

For this additional reason, the Petition for Bypass should be denied, and this case should proceed through the traditional appellate process.

CONCLUSION

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

Dated: January 31, 2025.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
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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. (Rule) § 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 2,510 words as calculated by Microsoft Word.

Dated: January 31, 2025.

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