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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2024AP164

PRIORITIES USA, WISCONSIN
ALLIANCE FOR RETIRED AMERICANS
and WILLIAM FRANKS, JR.

Plaintiffs-Appellants-Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION,
Defendant-Respondent-Respondent,

WISCONSIN STATE LEGISLATURE,
Intervenor-Defendant-Respondent.

APPEAL FROM A FINAL DECISION AND JUDGMENT
GRANTING MOTIONS TO DISMISS, ENTERED IN THE
DANE COUNTY CIRCUIT COURT, THE HONORABLE
ANN PEACOCK, PRESIDING

**WISCONSIN ELECTIONS COMMISSION'S
RESPONSE TO PETITION FOR BYPASS**

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INTRODUCTION

Petitioners seek bypass to this Court for two reasons: to create a standard of review for voting regulations and facial challenges that is different from the well-settled federal and Wisconsin constitutional test, which they present as two different issues; and to overrule this Court's decision in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519.

The Wisconsin Elections Commission opposes bypass on the first two issues. Petitioners seek a large-scale and undefined change in how courts review voting regulations—a change at odds with what they advocated for in the circuit court. And they seek that change as the November 2024 election approaches.

The Commission agrees that bypass would be appropriate regarding the third issue. Petitioners are correct that only this Court can reverse its decision in *Teigen*. The Commission believes this Court cannot accept one issue on bypass while others continue to proceed in the court of appeals. This Court should decline to take those issues and remand them to the court of appeals for consideration once this Court resolves the *Teigen* question.

ISSUES PRESENTED

1. Whether strict scrutiny applies to three voting regulations applicable to absentee voters, even without a showing of a severe burden on the right to vote: (1) requiring a witness to see a voter cast their ballot; (2) prohibiting (according to *Teigen*) clerks from offering drop boxes for absentee ballot return; and (3) requiring voters to cure mistakes on their ballots by the close of voting on Election Day, rather than the end of the week, as Petitioners suggest.

2. Whether a “voting law is immune from facial challenge where it imposes some unjustifiable burden on all voters it regulates, but some voters are more burdened than others.” (Pet. 4.)

3. Whether this Court should overrule *Teigen*.

STATEMENT OF THE CASE

Petitioners Priorities USA and the Wisconsin Alliance for Retired Americans, two advocacy organizations, and an individual affiliated with one of those organizations petition this Court to bypass the court of appeals.

Petitioners brought this case in the Dane County Circuit Court, challenging (1) the absentee ballot witness requirement in Wis. Stat. § 6.87(4)(b)1.; (2) the prohibition on drop boxes as a method for returning absentee ballots under Wis. Stat. § 6.87(4)(b)1., as interpreted by *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519; (3) the deadline to cure mistakes on absentee ballot certifications in Wis. Stat. § 6.87(6) by 8:00 p.m. on Election Day; and (4) a statement of policy and requirement in Wis. Stat. § 6.84 that certain election procedures be treated as mandatory.

Defendant Commission and Intervenors, the Wisconsin Legislature, moved to dismiss all claims. (Doc. 59; 64.) The circuit court granted the motions in large part. (Doc. 100, Pet.-App. 1–12.) Specifically, the circuit court concluded that Petitioners’ lawsuit failed to allege facts that could support facial constitutional challenges. To establish a facial challenge, a complaint must allege that a law is unconstitutional in all circumstances. (Doc. 100:7–10, Pet.-App. 7–10.) Petitioners failed to overcome this hurdle because, according to their pleading, the challenged provisions burdened only some absentee voters. (Doc.

100:7–10, Pet.-App. 7–10.) The court dismissed Petitioners’ facial challenges.

The court identified a hybrid constitutional challenge to the witness requirement that was not pleaded but raised in briefing, and permitted it to move forward. (Doc. 100:10). However, Petitioners notified the court they did not wish to pursue that claim. The court dismissed the case and entered judgment.

Petitioners appealed. (Doc. 104, Pet.-App. 139–40.) Petitioners now petition this Court to bypass the court of appeals. (Doc. 112.) In their petition, Petitioners seek to change the standard of review that applies to constitutional challenges to voting laws and to change the standard for a facial challenge to such laws. Petitioners also seek to overturn *Teigen*, which held that Wisconsin election statutes do not authorize drop boxes as a means of returning absentee ballots.

ARGUMENT

- I. **Bypass is warranted where a case meets the criteria for review on a petition for review; where this Court would likely hear the case anyway; and where there is a need to hasten the ultimate appellate decision.**

Wisconsin Stat. § 808.05(1) provides that this Court may take jurisdiction of an appeal if “[i]t grants direct review upon a petition to bypass filed by a party.” Wisconsin Stat. § (Rule) 809.60(1)(a) provides that a party may file with this 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.”

This Court’s internal operating procedures set forth circumstances where bypass is warranted. A matter appropriate for bypass is one the Court would ultimately

choose to consider “regardless of how the Court of Appeals might decide the issues.” Wisconsin Supreme Court Internal Operating Procedures, § II.B.2. “[A]t times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.” *Id.*

As with this Court’s exercise of its appellate jurisdiction, Wis. Stat. § (Rule) 809.62(1r)(c), legal issues on bypass should be presented with sufficient clarity and exactitude that their immediate consideration by this Court is likely to successfully develop and harmonize the law. Bypass is not warranted where the Court would benefit from further development of the issues and input from the court of appeals. When this Court exercises its discretion to accept or reject a petition for appellate review, the legal theories on appeal should be fully developed. Similarly, in a bypass petition, a party should bring a fully formed case to the Court because it will not have the benefit of the development of the case in the lower courts.

II. Bypass is unwarranted as to Petitioners’ request for new standards for review of voting regulations.

Petitioners seek to change the standards for constitutional challenges to voting regulations in two ways: that such regulations are subject to strict scrutiny when the right to vote is burdened to any extent at all, not just when the right to vote is severely burdened; and that the current standard for a facial challenge be replaced with one where only some voters need face a significant burden. These issues are inappropriate for bypass for two reasons: (1) the theories are novel and, more importantly for bypass purposes, undeveloped; and (2) there is no way the relief they seek could be implemented by the November 2024 elections, even if bypass were granted.

A. Petitioners' new arguments require further development.

Petitioners brought their challenge applying settled legal principles governing voting regulations, but they now seek a departure from that same Wisconsin constitutional case law. That lack of development underscores the need for further articulation on appeal.

The right to vote is fundamental, but “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Accordingly, the *Milwaukee Branch/Anderson-Burdick* framework applies to the review of voting regulations under both Wisconsin and federal law. *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶¶ 26–39, 357 Wis. 2d 469, 851 N.W.2d 262 (applying the federal *Anderson-Burdick* balancing test set forth in *Anderson*, 460 U.S. 780 and *Burdick v. Takushi*, 504 U.S. 428 (1992)). This framework allows courts to balance how a particular regulation affects voting rights with state interests in regulating elections. *Id.*

In the circuit court, Petitioners cited and applied *Milwaukee Branch/Anderson-Burdick*. (See, e.g., Doc. 85:20 (“Under Wisconsin Supreme Court precedent, ‘if a voter regulation creates a severe burden on electors’ right to vote, courts will apply strict scrutiny”¹)¹ Petitioners argued that

¹ See also Doc. 85:14 (“Plaintiffs’ allegations show that the Challenged Restrictions severely burden a fundamental right, so they are subject to strict scrutiny, which they cannot survive.”); Doc. 85:21 (“Plaintiffs have sufficiently alleged that the Witness Requirement imposes a severe burden on the right to vote and therefore must be subject to strict scrutiny under any applicable framework.”); Doc. 85:22 (“The Drop Box Prohibition similarly imposes a severe burden on the right to vote and therefore must [not] survive strict scrutiny even under the *Milwaukee Branch* framework.”); Doc. 85:24 (“the Election Day Cure deadline imposes a severe burden on the fundamental right to vote and serves no rational, let alone compelling, purpose.”).

they had sufficiently alleged severe burdens on the right to vote, and so the challenged regulations were subject to—and could not survive—strict scrutiny. (Doc 85:14.)

But now, Petitioners seek to depart from this constitutional framework. They newly contend that the *Milwaukee Branch/Anderson-Burdick* framework is incorrect and inconsistent with Wisconsin precedent. (Pet. 9–10.) Petitioners also contend for the first time that *Milwaukee Branch* cannot be squared with *League of Women Voters of Wisconsin Education Network, Inc. v. Walker*, 2014 WI 97, 357 Wis. 2d 360, 851 N.W.2d 302, which upheld the same regulations at issue in *Milwaukee Branch* on different grounds. They contend that these cases are “doctrinally unsound,” internally inconsistent, and contrary to Wisconsin precedent. (Pet. 9.)

In addition, Petitioners appear to seek a new standard to facially invalidate voting regulations: whether a “voting law is immune from facial challenge where it imposes some unjustifiable burden on all voters it regulates, but some voters are more burdened than others.” (Pet. 4.)

These theories are not appropriate for this Court’s review on bypass. They are underdeveloped and need refinement on appeal. Specifically, Petitioners propose replacing longstanding precedent with a novel and far more stringent constitutional framework for reviewing voting regulations. They do not grapple with the ramifications of these legal standards on elections administration. And they offer no legal authority in which a court has adopted this theory.

They borrow from cases that involve the fundamental right of a parent to raise his or her child, *Michaels v. Lyons*, 2019 WI 57, 387 Wis. 2d 1, 927 N.W.2d 486 and *In re Zachary B.*, 2004 WI 48, 271 Wis. 2d 51, 678 N.W.2d 831, or that otherwise have no bearing on the levels of scrutiny applied to

voting regulations, *Mayo v. Wisconsin Injured Patients & Families Compensation Fund*, 2018 WI 78, ¶ 28, 383 Wis. 2d 1, 914 N.W.2d 678. But not all fundamental rights are protected in the same way, and Petitioners fail to reckon with why both the U.S. Supreme Court and this Court have recognized that voting rights, which require government regulation and administration for their effectuation, are different from individual rights where the citizen simply seeks freedom from regulation.

Petitioners' theories should be argued in the court of appeals so that they can more clearly articulate them. Once the issues have been further developed, this Court can better assess on a petition for review whether they warrant this Court's consideration.

B. Timing weighs against bypass, not in favor.

Petitioners' bypass rationale rests heavily on the exigency created by the upcoming 2024 election cycle. But in light of the procedural posture of this case, there is no way, even with a bypass grant and this Court's consideration of their case this term, that Petitioners' case would reach final judgment by November 2024—much less in time for election clerks to make the changes they seek.

Petitioners acknowledge that they still would need to return to the trial court to prove that the challenged statutory provisions are not necessary to serve any compelling government interest. (Pet. 2 (“Petitioners allege—and *will prove if the case proceeds*—that the Challenged Restrictions accomplish nothing and therefore are not necessary to serve any compelling government interest.” (emphasis added)). In other words, Petitioners' constitutional claims cannot be resolved without factual development and determination in the trial court, and resolution of the legal questions presented here would only be one step along the way. The remand proceedings, where Petitioners would need to develop a

factual record through discovery, litigate their claims, obtain a favorable judgment, and successfully defend the judgment through the appellate process, are not possible to complete before November 2024.

And even if that years'-long process could somehow be compressed into a few months, there still would not be time for clerks to implement changes like new instructions and ballot return certificates by the November date.

III. The request to overrule *Teigen* meets the criteria for bypass; this Court could accept that issue, reject the other issues, and then stay and remand those issues to the court of appeals when it issues a decision on the *Teigen* question.

Petitioners claim that this Court in *Teigen* erroneously interpreted Wis. Stat. § 6.87(4)(b)1. to prohibit clerks from using absentee ballot drop boxes when conducting elections. (Pet. 21–22.) This issue is different from the constitutional drop box sub-issue in issues 1 and 2: whereas the Court in *Teigen* considered whether the statutes permitted clerks to offer drop boxes as a ballot-return option, Petitioners' issues 1 and 2 seek a ruling that any prohibition on drop boxes is subject to strict scrutiny.

Bypass would be appropriate as to this issue. That question is one that this Court ultimately will need to take up if the relief Petitioners seek will be granted; only this Court can overrule its own precedent. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (holding that the supreme court “is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case”). Further briefing of the issue in the court of appeals would be unlikely to provide much additional value to the court because the merits issues in *Teigen* were previously considered by the Court.

The timing of this matter could also favor bypass. Even if a decision issued a few months before the November 2024 election, clerks could choose to offer drop boxes in areas where it would benefit absentee voters in timely returning their ballots. Unlike many other changes in voting regulations, which require long-term advance planning by the clerks, providing drop boxes would be something clerks could add more expeditiously if they chose, especially since many clerks around the state used them in the fall 2020 and spring 2021 election. *See Teigen*, 403 Wis. 2d 607, ¶ 8.

The Commission took the position in *Teigen* that the statutes do not prohibit clerks from offering drop boxes as a ballot return location, and that drop boxes can be helpful to voters in getting their ballots returned on time.

Petitioners' other issues do not meet the criteria for bypass. The Commission does not believe this Court can grant bypass on one issue and allow the remainder of the case to simultaneously proceed in the court of appeals. If this Court accepts the *Teigen* issue on bypass, the other issues should be stayed and remanded to the court of appeals when this Court issues a decision on the *Teigen* question.

CONCLUSION

The Commission asks this Court to accept bypass on the statutory *Teigen* question, deny the petition as to Petitioners' two constitutional issues, and remand the constitutional questions to the court of appeals once it issues a decision on the *Teigen* issue.

Dated this 23rd day of February 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a response produced with a proportional serif font. The length of this brief is 2520 words.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of February 2024.

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