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No. 2024AP164

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**In the Supreme Court of Wisconsin**

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PRIORITIES USA, WISCONSIN ALLIANCE FOR RETIRED  
AMERICANS *and* WILLIAM FRANKS, JR.,  
PLAINTIFFS-APPELLANTS,

*v.*

WISCONSIN ELECTIONS COMMISSION,  
DEFENDANT-RESPONDENT,

WISCONSIN STATE LEGISLATURE,  
INTERVENOR-RESPONDENT.

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On Appeal From The Dane County Circuit Court,  
The Honorable Ann M. Peacock, Presiding  
Case No. 2023CV1900

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**RESPONSE OF INTERVENOR-RESPONDENT  
THE WISCONSIN STATE LEGISLATURE IN  
OPPOSITION TO PETITION FOR BYPASS**

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## INTRODUCTION

Petitioners ask this Court to bypass the Court of Appeals before briefing on appeal has even begun, claiming that such an unusual approach is justified because of the upcoming November 2024 election. Yet, Petitioners' appeal concerns only the Circuit Court's dismissal of their meritless, facial challenges to Wisconsin's absentee-ballot laws. Petitioners never sought temporary-injunctive relief, nor acted with any dispatch in filing or litigating this case. Thus, even if this Court reverses the Circuit Court—an exceedingly unlikely prospect—the case would simply return to the Circuit Court for further proceedings on the merits. Those proceedings, in turn, would not realistically be concluded in time to make any changes for the November election.

This Court should thus deny the Petition For Bypass.

## STATEMENT

A.1. Article III of the Wisconsin Constitution provides for the right to vote, Wis. Const. art. III, § 1, while giving the Legislature the authority to enact laws governing voting, including laws that “[p]rovid[e] for absentee voting,” *id.* § 2. The Legislature has enacted “lots of rules that make voting

easier.” *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). “Registering to vote is easy in Wisconsin,” *Frank v. Walker*, 768 F.3d 744, 748 & n.2 (7th Cir. 2014), as is voting on Election Day, *see Luft*, 963 F.3d at 672; *accord Frank*, 768 F.3d at 748 & n.2.

In addition to guaranteeing citizens the right to vote in-person on Election Day, the Legislature has also long provided citizens with the privilege of voting absentee. *See, e.g.*, 1862 Wis. Act. 11 (Special Sess.) (absentee voting for soldiers in the U.S. army during the Civil War);<sup>1</sup> 1915 Wis. Act. 461 (first comprehensive absentee-voting regime).<sup>2</sup> Wisconsinites ratified a constitutional amendment acknowledging the Legislature’s authority to enact laws “[p]roviding for absentee voting” in 1986, referenced above. Wis. Const. art. III, § 2. And today, the State has a no-excuse-needed absentee-voting regime, providing all Wisconsinites with the “privilege” of voting absentee if they so choose. Wis. Stat. § 6.84(1)–(2). Under this generous regime, a qualified,

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<sup>1</sup> Available at <https://docs.legis.wisconsin.gov/1862/related/acts/62ssact011.pdf> (all websites last visited February 23, 2024).

<sup>2</sup> Available at <https://docs.legis.wisconsin.gov/1915/related/acts/461.pdf>.

registered voter in Wisconsin may request an absentee ballot through numerous different methods, *id.* § 6.86(1)(a)1–6, and may then cast that ballot in person up to two weeks before Election Day at specific locations during designated “early voting” times, *see id.* § 6.855; or deliver the completed ballot to the municipal clerk’s office or designated polling place before or on Election Day, *id.* § 6.87(4)(b)1, 6; or simply mail the completed ballot before Election Day, *id.* § 6.87(4)(b)1.<sup>3</sup>

2. Three of Wisconsin’s absentee-voting procedures are particularly relevant to this case.

*a. The Witness Requirement.* Like many other States, Wisconsin requires absentee ballots to be witnessed. *Id.* § 6.87.<sup>4</sup> Under Section 6.87, an absentee voter must mark and fold the voter’s absentee ballot in the presence of an adult witness and then place it within the official absentee-ballot envelope. *Id.* § 6.87(4)(b)1; *see id.* § 6.875. The witness must

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<sup>3</sup> Wisconsin also offers additional options for obtaining and casting absentee ballots to voters who are living overseas, *id.* § 6.87(3)(d), in the military, *id.*; *id.* § 6.865, residing in nursing or retirement home, *id.* § 6.875, or indefinitely confined, *id.* § 6.86(2)(a).

<sup>4</sup> *See, e.g.,* Ala. Code § 17-11-9; Alaska Stat. § 15.20.203; La. Rev. Stat. § 18:1306; Minn. Stat. § 203B.07; N.C. Gen. Stat. § 163-230.1; S.C. Code § 7-15-220.



then provide his or her “[a]ddress” on the absentee-ballot envelope certificate. *Id.* § 6.87(2). “If a certificate is missing the address of a witness, the [absentee] ballot may not be counted.” *Id.* § 6.87(6d).

*b. The Drop Box Prohibition.* Under Section 6.87, absentee ballots must “be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.” *Id.* § 6.87(4)(b)1. The short-lived absentee-ballot “drop boxes” in Wisconsin arose during the COVID-19 pandemic and purported to permit individuals to drop off absentee ballots at “unstaffed” drop-box locations, later to be collected by municipal clerks. *Teigen v. Wis. Elections Comm’n*, 2022 WI 64, ¶¶ 6–8, 403 Wis. 2d 607, 976 N.W.2d 519. In *Teigen*, 2022 WI 64, this Court held that the Legislature’s “‘carefully regulated’ procedures for absentee voting do not permit voting via ballot drop boxes.” *Id.* ¶¶ 72–73 (citing Wis. Stat. § 6.87(4)(b)1). Absentee voters must either “mail[ ]” or “deliver[ ]” their absentee ballots to the municipal clerk to have their vote counted. Wis. Stat. § 6.87(4)(b)1; *Teigen*, 2022 WI 64, ¶ 87.

*c. The Cure Deadline.* Wisconsin law provides a statutory deadline for the receipt of absentee ballots by municipal clerks, and absentee ballots received after this time may not be counted. Wis. Stat. § 6.87(6). This operates as the deadline for absentee voters to cure any errors in their absentee-ballot certificates. Specifically, and like the laws of other States, Section 6.87(6) requires an absentee voter to return the voter’s ballot “so it is delivered to the polling place no later than 8 p.m. on election day.” *Id.*<sup>5</sup> “Any ballot not mailed or delivered as provided in th[at] subsection may not be counted.” *Id.* Clerks who encounter an improperly completed absentee-ballot certificate may “return” that ballot “to the elector . . . whenever time permits the elector to correct the defect and return the ballot.” *Id.* § 6.87(9).

B. Petitioners filed their Complaint on July 20, 2023—many years after the enactment of the laws that they

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<sup>5</sup> See, e.g., Iowa Code § 53.18(2) (voter may cure defective absentee ballot affidavit before polls close on election day); Ky. Rev. Stat. § 117.087(c)(5) (voter may cure defective absentee ballot before polls close on election day); Mont. Code § 13-13-245 (voter may cure defective absentee ballot before 8 p.m. on election day); Vt. Stat. tit. 17, § 2547 (voter may cure defective absentee ballot before polls close on election day).

challenge here<sup>6</sup>—asserting four declaratory-judgment claims against Defendant the Wisconsin Elections Commission (“WEC”) that allege that Wisconsin’s absentee-ballot statutes as unconstitutional under Article III of the Wisconsin Constitution. App.19, 35–43. First, Petitioners claimed that Wis. Stat. § 6.87(4)(b)1, the statutory provision requiring absentee voters to obtain a witness, “severely burdens the[ ] fundamental right to vote” and so is facially unconstitutional. App.35–37. Second, Petitioners claimed that this Court’s decision in *Teigen* that Section 6.87(4)(b)1 precludes the use of absentee-ballot drop boxes renders Section 6.87(4)(b)1 unconstitutional. App.37–40. Third, Petitioners challenged Section 6.87(4)(b)1’s deadline for an absentee voter to correct an improperly completed absentee-ballot certificate envelope to have the voter’s vote counted, again on Article III grounds. App.40–42. Fourth, Petitioners claimed that Section 6.84,

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<sup>6</sup> See 1999 Wis. Act 182, §§ 90m, 95p, available at <https://docs.legis.wisconsin.gov/1999/related/acts/182.pdf> (creating Wisconsin’s current absentee-voting regime, requiring the absentee voter to vote in the presence of one witness, in 2000); 1985 Wis. Act 304, § 68n, available at <https://docs.legis.wisconsin.gov/1985/related/acts/304> (creating Wis. Stat. § 6.84, in particular, in 1986); 2015 Wis. Act 261, § 78, available at <https://docs.legis.wisconsin.gov/2015/related/acts/261.pdf> (creating Wis. Stat. § 6.87(6d), in particular, in 2016).

which reaffirms the constitutional right to vote in Wisconsin, while clarifying that absentee voting is a privilege, also violates the Constitution. App.42–43.

Petitioners did not move for a temporary injunction in the Circuit Court on any of their four claims. *See* Wis. Stat. § 813.02; *see generally Priorities USA v. WEC*, No.23-CV-1900 (Dane Cnty. Cir. Ct.). Further, Petitioners did not otherwise seek to accelerate this matter in the Circuit Court by, for example, moving to expedite the briefing on dispositive motions. *See generally infra* pp.10–13 (discussing the motion-to-dismiss proceedings below).

C. The Legislature successfully moved to intervene as a Defendant in the Circuit Court below, Supp.App.35, while also moving to dismiss Petitioners' Complaint for failure to state a claim, App.4. The Legislature raised three independently sufficient grounds to dismiss all of Petitioners' claims. First, the Legislature argued that the right to vote under Article III of the Wisconsin Constitution does not guarantee any right to vote absentee; rather, it grants the Legislature the choice to allow for such voting at all—thus Plaintiffs' Article III challenges to Wisconsin's absentee-

voting laws all fail as a matter of law. Supp.App.14–21, 39–42, 51–54. Second, even if Article III did provide a right to vote absentee, the Legislature argued that Petitioners failed to plead that any of the challenged absentee-voting laws could not “be enforced under any circumstances,” so as to even possibly prevail on their claims that these statutes are unconstitutional facially or as applied to a category of cases. Supp.App.21–26, 42–46 (citation omitted). Finally, the Legislature argued that the Circuit Court invalidating the absentee-voting laws on state constitutional grounds would violate the U.S. Constitution’s Elections Clause, as it would impermissibly “distort” state law well “beyond what a fair reading requires” and thus “arrogate to [the judiciary] the power vested” in the Legislature to regulate the “Times, Places and Manner” of federal elections. Supp.App.31–34, 46–47 (quoting *Moore v. Harper*, 143 S. Ct. 2065, 2088–89 (2023), and then U.S. Const. art. I, § 4, cl. 1).<sup>7</sup> WEC also filed its own motion to dismiss Petitioners’ Complaint. App.4.

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<sup>7</sup> As to Petitioners’ fourth count, in particular—challenging Section 6.84’s statement that absentee voting is a “privilege” that “must be carefully regulated,” Wis. Stat. § 6.84—the Legislature

D. The Circuit Court granted the Legislature's and WEC's motions to dismiss, in part, and denied them, in part, on January 24, 2024. App.4, 12. Specifically, the Court dismissed with prejudice all of Petitioners' facial constitutional challenges to Wisconsin's absentee-voting laws, explaining that the facts alleged in the Complaint cannot support Petitioners' claims that the absentee-voting laws severely burden "all voters or even all absentee voters." App.6–10. The Circuit Court declined to dismiss Petitioners' hybrid constitutional challenge with respect to the absentee-ballot witness requirement, concluding that Petitioners had sufficiently alleged that this requirement does "severely burden" the "significant subset of absentee voters who do not live with another person that could serve as their witness." App.10–11. The Court also declined to dismiss Petitioners' challenge to Section 6.84, their fourth count, to the extent it depended upon Petitioners' hybrid constitutional claim against the absentee-ballot witness requirement. App.11. The Court did not address the Legislature's U.S. Constitution

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also argued that Petitioners lacked standing to assert this claim. Supp.App.26–29, 45–46.

Elections Clause argument in its January 24 order. *See generally* App.1–12. Finally, in the course of deciding these motions to dismiss, the Circuit Court rejected the Legislature’s argument that the challenged absentee-voting provisions fell outside of Article III. App.5.

After the Circuit Court issued its January 24 motion-to-dismiss order, Petitioners informed the Circuit Court that they were voluntarily dismissing their “hybrid constitutional challenge on the witness requirement and the claim relating to Wis. Stat. § 6.84(2) that was dependent on the success of the hybrid constitutional challenge.” App.13. Accordingly, the Circuit Court then entered a final judgment finally dismissing all of Petitioners’ claims with prejudice on January 29, 2024. *Id.* (also referencing the Circuit Court’s prior January 24 motion-to-dismiss order).

E. Petitioners then appealed to the Court of Appeals. App.139–40. The Court of Appeals has not yet set the merits briefing schedule for the parties, thus merits briefing before that Court has not even commenced.

Petitioners then filed a Petition For Bypass, asking this Court to bypass the Court of Appeals “now, well in advance of

the 2024 general election and before briefs are filed in the Court of Appeals.” Pet.1. Petitioners ask that, if this Court grants their Petition, it “set an expedited briefing and argument schedule,” Pet.3, so that the Court may “resolve this case well in advance of the November election,” Pet.19. The Petition raises three issues: First, “[w]hether laws that burden the right to vote, including by burdening absentee voting, are subject to strict scrutiny just like laws burdening other fundamental rights, such that the State must prove that the burden they impose is narrowly tailored to serve a compelling state interest.” Pet.4. Second, “[w]hether 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.” *Id.* And third, “[w]hether to overrule the Court’s holding in *Teigen* . . . that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks.” *Id.*

### ARGUMENT

This Court “may take jurisdiction of an appeal . . . pending in the court of appeals” upon “a petition to bypass filed by a party,” “certification from the court of appeals,” or



“on its own motion.” Wis. Stat. § 808.05; *see* Wis. Stat. § (Rule) 809.60; *see also* Wis. Const. art. VII, § 3(3). “A matter appropriate for bypass is usually one which meets one or more of the criteria for review [under Wis. Stat. § (Rule) 809.62(1r)], and one the court concludes it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues.” *See* Sup. Ct. IOP § III.B.2. The Section 809.62(1r) criteria include whether this Court’s review “will help develop, clarify or harmonize the law,” including by resolving “novel” legal questions of “statewide impact.” Wis. Stat. § (Rule) 809.62(1r)(c)2; *accord id* § (Rule) 809.62(1r)(a) (“A real and significant question of . . . state constitutional law is presented.”). Further, “[a]t times, a petition for bypass will be granted where there is a clear need to hasten the ultimate appellate decision.” Sup. Ct. IOP § III.B.2. Finally, “[t]his court generally denies as premature petitions for bypass prior to the filing of briefs in the court of appeals,” unless the case presents “the kind of unique circumstances that warrant an exception to this longstanding practice.” Supp.App.56–57 (Order Denying Petition For Bypass, *Becker v. Dane Cnty.*, No.2021AP1343 (Wis. Nov. 16, 2021) (citing *Milwaukee*

*Brewers Baseball Club v. Wis. Dep't of Health and Soc. Servs.*, 130 Wis. 2d 56, 62–63, 387 N.W.2d 245 (1986)); *see also* Supp.App.61–62 (Order, *Jane Doe 4 v. Madison Metro. Sch. Dist.*, at 2–3, No.2022AP2042 (Wis. Mar. 3, 2023) (Dallet, J., dissenting) (collecting cases)).

**I. This Court's Review Of The Circuit Court's Motion To Dismiss Ruling Would Not Afford Petitioners Any Actual Relief For The November 5, 2024 General Election, Which Is Reason Enough To Deny Their Petition**

Petitioners ask this Court to grant bypass and “resolve this case well in advance of the November [2024] election,” Pet.19, but that overlooks the procedural posture of this case. The only ruling on appeal is the Circuit Court’s final judgment dismissing Petitioners’ claims with prejudice. Petitioners did not, for example, move for a temporary injunction under Wis. Stat. § 813.02. Accordingly, even if this Court were to grant the Petition and expeditiously resolve this appeal entirely in favor of Petitioners before November 5, 2024—an exceedingly unlikely prospect given the Circuit Court’s well-reasoned rejection of their arguments—this would not provide Petitioners with any relief against the challenged absentee-voting statutes. Rather, should this Court reverse the Circuit

Court's judgment below, the *only* relief that Petitioners would obtain is a remand for further proceedings—including discovery proceedings, Wis. Stat. § 804.01 *et seq.*; *id.* § 907.01, *et seq.*; summary-judgment proceedings, *id.* § 802.08; and a trial, *id.* § 805.01 *et seq.*

The further proceedings that would take place in the Circuit Court after such a hypothetical (and unlikely) remand would take this case long past when election-law changes could be ordered for the November 2024 General Election. Under Petitioners' own theory of their claims, the parties must develop an extensive factual record for the Circuit Court to properly adjudicate this case—an adjudication that, given the nature of Petitioners' claims, could only come after a trial.

Consider the essential elements that Petitioners themselves have identified in their Petition for each of their constitutional claims: (1) the absentee-ballot witness requirement imposes a burden that “is in all instances unjustified,” because it does not “serve any compelling state interest,” such as “prevent[ing] fraud,” and “[e]lection officials do nothing with the information except verify its presence,” Pet.14; (2) the drop-box prohibition is “unjustified” as to “all

Wisconsin voters who would otherwise use a drop box” because “drop boxes are at least as secure, and more reliable and administrable, than mail,” *id.*; (3) the election-day cure deadline is “unjustified” as to “all Wisconsin voters who must cure their ballot, by requiring them to do so urgently by election day,” Pet.14–15; and (4) Section 6.84, which provides that “ballots cast in contravention of the [specified absentee-voting] provisions may not be counted,” Wis. Stat. § 6.84(2), “burdens every voter it disenfranchises, for no adequate reason,” Pet.15. Establishing these essential elements (and others) would require substantial factual development on remand. For example, the parties must develop a factual record regarding: how each of the multiple challenged provisions actually operate in fact; the nature and extent of the burden that each of the multiple challenged provisions impose on the relevant class of voters; the justifications for each of the multiple challenged provisions; whether each of the multiple challenged provisions sufficiently advance those justifications in fact; and so on. Pet.14–15.

Developing the robust record needed to establish these facts and then litigating Petitioners’ claims through trial will

take substantial time, such that the Circuit Court would be unlikely to afford Petitioners any relief on their claims by November 5, 2024, even assuming this Court's expedited bypass review. For example, the parties will almost certainly engage in extensive discovery, taking significant time, such as: (a) hiring experts and conducting expert discovery, including expert depositions, on such topics as voting fraud in absentee-voting regimes, the safety and security of drop boxes vis-à-vis the mail, and ballot security and integrity more broadly, *see generally* Wis. Stat. § 907.01 *et seq.*; (b) conducting discovery, including depositions, on election officials' use of absentee-ballot witness information, *see generally id.* § 804.01 *et seq.*; and (c) conducting discovery, including depositions, on the actual burdens that Petitioners (and/or those voters that Petitioners represent) face from the challenged absentee-voting provisions, *see generally id.* Thereafter, the parties will surely file cross-motions for summary judgment in the Circuit Court on some or all of Petitioners' claims, requiring still more time for briefing, argument, and a decision from the Circuit Court. *See generally id.* § 802.08. Finally, the Circuit Court would then

have to resolve any claims that survived summary judgment—which could very well be all of them, given their fact-dependent nature—at trial. *See generally id.* § 805.01 *et seq.*

In sum, the notion that this Court could decide this appeal and then that the Circuit Court could get through all of these proceedings in sufficient time to provide relief for the November 2024 General Election is entirely unrealistic, and thus reason enough to deny the Petition.

## **II. This Petition Is Premature Because The Appellate Briefs Have Not Been Filed**

A. “This court generally denies as premature petitions for bypass prior to the filing of briefs in the court of appeals,” unless the case presents “the kind of unique circumstances that warrant an exception to this longstanding practice.” Supp.App.56 (Order Denying Petition For Bypass at 1, *Becker*, No.2021AP1343 (Wis. Nov. 16, 2021) (citing *Milwaukee Brewers*, 130 Wis. 2d at 62–63)). This Court’s “decades-long institutional practice . . . makes good sense.” Supp.App.57 (Order Denying Petition For Bypass at 2, *Becker* No.2021AP1343 (Wis. Nov. 16, 2021) (Hagedorn, J.,

concurring)). Among its other positive benefits, this practice “ensures the issues are clearly and adversely presented so that [the Court] know[s] the full scope of what [it is] being asked to decide.” *Id.*

Although this Court’s practice of denying bypass petitions as premature when filed before the completion of the appellate briefing “is not a rule, . . . it has been the practice of this court for decades, and departed from only rarely.” *Id.* “Indeed, over just the last five years” before 2023, this Court “dismissed bypass petitions as premature on nine occasions, and denied another four premature bypass petitions outright.” Supp.App.61 (Order, *Jane Doe 4* at 2, No.2022AP2042 (Wis. Mar. 3, 2023) (Dallet, J., dissenting) (collecting cases) (citation omitted)). That said, “[o]ne circumstance where [the Court has] departed from [its] usual practice is when relief is urgently needed or not practically available from a lower court.” Supp.App.57 (Order Denying Petition For Bypass at 2, *Becker* No.2021AP1343 (Wis. Nov. 16, 2021) (Hagedorn, J., concurring)). Yet, simply because a bypass petition “could raise important constitutional

questions is not, in the main, a good reason to forsake [this] normal procedure[ ].” *Id.*

B. Here, Petitioners filed their Petition prior to the commencement of the parties’ briefing before the Court of Appeals, *see* Pet.1, and this Petition does not present the “rare[ ],” Supp.App.57 (Order Denying Petition For Bypass at 2, *Becker* No.2021AP1343 (Wis. Nov. 16, 2021) (Hagedorn, J., concurring)), or “unique circumstances,” Supp.App.56 Order Denying Petition For Bypass at 2, *Becker* No.2021AP1343 (Wis. Nov. 16, 2021) (majority op.)), that justify a departure from this Court’s established practice of denying such filings. Thus, this Court should deny the Petition as “premature,” under its “decades-long institutional practice.” Supp.App.57 (Order Denying Petition For Bypass at 2, *Becker* No.2021AP1343 (Wis. Nov. 16, 2021) (Hagedorn, J., concurring)).

Adherence to this longstanding practice here “makes good sense,” as it would ensure that the “issues are clearly and adversely presented” in full appellate briefing so the Court “know[s] the full scope of what [it is] being asked to decide.” *Id.* To take just a couple of examples, as part of the



first issue presented in the Petition, Petitioners appear to argue that any law burdening voting rights in any way, including laws regulating the privilege of absentee voting, should be reviewed for strict scrutiny. *See* Pet.4, 7–13. That extreme rule could threaten even the most anodyne of voting regulations—after all, “*any* procedural step filters out some potential voters,” *Frank*, 768 F.3d at 748–49—such as laws establishing minimal residency requirements, Wis. Stat. §§ 6.02(1), 6.03(1); regulating the hours of in-person voting, *id.* § 6.78(1m), (4); or providing a deadline to request absentee ballots, *id.* § 6.86(1)(b). Full appellate briefing before the Court of Appeals would sharpen those issues, facilitating this Court’s review in the ordinary course. *See* Supp.App.57 (Order Denying Petition For Bypass at 2, *Becker* No.2021AP1343 (Wis. Nov. 16, 2021) (Hagedorn, J., concurring)). Relatedly, the Legislature presented a defense to all of Petitioners’ claims below based upon the U.S. Constitution’s Elections Clause, *supra* pp.11–12, which defense the Circuit Court did not address, *supra* p.13. Merits briefing in the Court of Appeals would develop that federal-constitutional defense further, to the benefit of any review

that this Court may take. Supp.App.57 (Order Denying Petition For Bypass at 2, *Becker* No.2021AP1343 (Wis. Nov. 16, 2021) (Hagedorn, J., concurring)).

Petitioners do not “urgently need[ ]” the “relief” that this appeal seeks—the overturning of the Circuit Court’s final judgment dismissing their claims with prejudice. *Id.* As explained fully above, while Petitioners request that this Court grant bypass and resolve this appeal “well in advance of the 2024 general election,” Pet.1, they are exceedingly unlikely to obtain any relief against the absentee-ballot statutes that they challenge here before that election, even if this Court did grant bypass and resolve this appeal entirely in their favor, *supra* Part I.

Finally, while the Petition raises constitutional questions regarding the absentee-voting provisions’ compliance with Article III and the standard for facial challenges, Pet.4—questions that, as explained below, do not merit this Court’s bypass review in this case, *infra* Part III—raising constitutional questions, even “important constitutional questions[,] is not, in the main, a good reason to forsake [the Court’s] normal procedure[ ]” of denying as

premature bypass petitions filed before the completion of the appellate briefing. Supp.App.57 (Order Denying Petition For Bypass at 2, *Becker* No.2021AP1343 (Wis. Nov. 16, 2021) (Hagedorn, J., concurring)).

C. Petitioners appear to argue, Pet.18, that this Court should jettison its “decades-long institutional practice,” Supp.App.57 (Order Denying Petition For Bypass at 2, *Becker* No.2021AP1343 (Wis. Nov. 16, 2021) (Hagedorn, J., concurring)), of “generally den[ying] as premature petitions for bypass prior to the filing of briefs in the court of appeals,” Supp.App.56 (Order Denying Petition For Bypass, *Becker*, No.2021AP1343 (Wis. Nov. 16, 2021) (citing *Milwaukee Brewers*, 130 Wis. 2d at 62–63)). But this Court has recently rejected calls to abandon this policy, including on the grounds that Petitioners have raised here. See Supp.App.57 (Order Denying Petition For Bypass at 2, *Becker* No.2021AP1343 (Wis. Nov. 16, 2021) (R.G. Bradley, J., dissenting) (“There is no rule prohibiting the filing of a petition to bypass before the parties complete their opening briefing before the court of appeals.”)), with Pet.18 (“That policy is not required by any statute or rule.”). And while Petitioners claim this case is like

*Teigen*, where the Court did grant bypass before the conclusion of the appellate briefing, Pet.18, that case involved review of a *grant* of an injunction against WEC guidance in an election year, not the *dismissal* of challenges to election-related statutes at the motion-to-dismiss stage, *Teigen*, 2022 WI 64, ¶ 9.

### **III. All Of The Issues Presented In The Petition Are Meritless, In Any Event**

This Court should also deny the Petition for the independent reason that the issues presented are meritless, such that they would not satisfy any criteria in Section 809.62(1r) or warrant this Court's review. *See Sup. Ct. IOP § III.B.2.* The Legislature briefly addresses each of the Petition's three issues presented immediately below, in turn.

A. The first issue presented is “[w]hether laws that burden the right to vote, including by burdening absentee voting, are subject to strict scrutiny just like laws burdening other fundamental rights, such that the State must prove that the burden they impose is narrowly tailored to serve a compelling state interest.” Pet.4; *see also* Pet.7–13.

This Court has already held that it reviews “challenges to [voting laws] consistent with the method of analysis employed” by the U.S. Supreme Court “in *Burdick* [*v. Takushi*, 504 U.S. 428 (1992)] and *Anderson* [*v. Celebrezze*, 460 U.S. 780 (1983)].” *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 40, 357 Wis. 2d 469, 851 N.W.2d 262; *see also Wagner v. Milwaukee Cnty. Election Comm’n*, 2003 WI 103, ¶ 76, 263 Wis. 2d 709, 666 N.W.2d 816. Under this test, the Court must “focus[ ] first on the burden placed on a right related to voting,” and then, “from that determination, decid[e] what level of judicial scrutiny would be required.” *Walker*, 2014 WI 98, ¶ 39; *see also id.* ¶¶ 22, 40. “If [the Court] conclude[s] that a voter regulation creates a severe burden on electors’ right to vote, [the Court] will apply strict scrutiny to the statute, and conclude that it is constitutional only if it is narrowly drawn to satisfy a compelling state interest.” *Id.* ¶ 22. “On the other hand, if [the Court] conclude[s] that the burden on the electors’ right to vote is not severe, the legislation will be presumed valid, and [the Court] will apply a rational basis level of judicial

scrutiny in determining whether the statute is constitutional.” *Id.*

Petitioners invoke this Court’s constitutional right-to-vote cases in support of their first issue, Pet.7–10 (citing *State v. Phelps*, 144 Wis. 1, 128 N.W. 1041 (1910); *State ex rel. Frederick v. Zimmerman*, 254 Wis. 600, 37 N.W.2d 473 (1949); *State v. Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 190 N.W. 563 (1922)), but those cases do not hold that any burdens on the right to vote, no matter how slight, trigger strict-scrutiny review, *see Phelps*, 144 Wis. 1, 17–18; *Zimmerman*, 254 Wis. 600, 613–14; *Cir. Ct. for Marathon Cnty.*, 178 Wis. 468, 476. “Although these rights of voters are fundamental, not all restrictions imposed by the States . . . impose constitutionally-suspect burdens on voters’ rights.” *Anderson*, 460 U.S. at 788. Indeed, “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as [P]etitioner[s] suggest[ ], would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Burdick*, 504 U.S. at 433.

To be sure, the Legislature argued in the Circuit Court for a bright-line rule that absentee-voting provisions, in particular, fall outside of Article III's right to vote and thus are not reviewable under even the *Burdick-Anderson* standard described in *Walker*. *Supra* pp.10–11. But the Circuit Court rejected that argument from the Legislature. App.5. That the Legislature made this argument—not even accepted by the Circuit Court below—is no justification for short-circuiting the ordinary appellate process by granting bypass review of the Circuit Court's more narrow rejection of Petitioners' claims.

B. The second issue presented is “[w]hether 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, 13–15. This Court has “repeatedly stated” how a facial challenge to a statute may prevail. *State v. Christen*, 2021 WI 39, ¶ 31, 396 Wis. 2d 705, 958 N.W.2d 746.<sup>8</sup> “Under a facial challenge, the

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<sup>8</sup> See also, e.g., *State v. Roundtree*, 2021 WI 1, ¶¶ 17–18, 395 Wis. 2d 94, 952 N.W.2d 765; *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 29, 376 Wis. 2d 147, 897 N.W.2d 384; *Soc’y Ins. v. Lab. & Indus. Rev. Comm’n*, 2010 WI 68, ¶ 26, 326 Wis. 2d 444,

challenger must show that the law cannot be enforced under any circumstances.” *Id.* (citation omitted). This is contrasted with an as-applied challenge, where “the challenger must demonstrate that the challenger’s constitutional rights were actually violated,” and, “[i]f such a violation occurred, the operation of the law is void as to the facts presented for the party asserting the claim.” *Id.* ¶ 32 (citation omitted); see generally *Gabler*, 2017 WI 67, ¶¶ 28–29 (also recognizing a “hybrid” category of constitutional claims).

This Court’s longstanding doctrine for facial challenges resolves the second issue against Petitioners. Pet.4, 13–15. A facial challenge to a voting statute will fail if the Court determines that the statute may be constitutionally applied to “some voters,” even if “some [other] voters are more burdened than others.” Pet.4. For those “more burdened” voters to obtain any relief against the statute, Pet.4, they must bring either as-applied, *Christen*, 2021 WI 39, ¶ 32, or hybrid challenges, *Gabler*; 2017 WI 67, ¶¶ 28–29. Petitioners’ arguments with respect to this second issue would collapse

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786 N.W.2d 385; *State v. Cole*, 2003 WI 112, ¶ 30, 264 Wis. 2d 520, 665 N.W.2d 328.



the distinction between facial challenges and as-applied challenges for voting-related laws, *see* Pet.13–15, but there is no reason for this Court to unsettle its longstanding doctrine in this way. That is especially true where Petitioners voluntarily dismissed the as-applied claims that had survived the Legislature’s motion to dismiss here, *supra* pp.13–14, which claims could have entitled Petitioners to targeted relief against some of the absentee-voting provisions that they challenged in this case, at least under the Circuit Court’s theory of the issues at stake.

C. Finally, the third issue is “[w]hether to overrule the Court’s holding in *Teigen* . . . that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks.” Pet.4; *see also* Pet.16–17. Petitioners provide no compelling reason for this Court to overrule *Teigen*’s statutory holding now, *see Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 2003 WI 108, ¶¶ 98–100, 264 Wis. 2d 60, 665 N.W.2d 257, especially upon bypass with expedited review. To begin, *Teigen* is “a statutory interpretation case,” which increases its stare decisis weight, given that “critics of a statutory interpretation case can take their objections to the

Legislature,” which can then “correct any mistake it sees” in the Court’s opinion. *State v. Lynch*, 2016 WI 66, ¶ 39 n.18, 371 Wis. 2d 1, 885 N.W.2d 89 (citation omitted) (discussing *Kimble v. Marvel Ent., LLC*, 576 U.S. 446 (2015)). Further, *Teigen* applied this Court’s longstanding, established framework for interpreting Wisconsin Statutes, see *Teigen*, 2022 WI 64, ¶¶ 62–63 (invoking, among other authorities, *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110), and there have been no developments in Wisconsin statutory interpretation that “undermine[ ]” this approach or render it “unsound,” *Johnson Controls*, 2003 WI 108, ¶¶ 98–99. Finally, Petitioners have pointed to no “newly ascertained facts” that would displace *Teigen*’s statutory holding. *Id.* ¶ 98.

### CONCLUSION

This Court should deny the Petition For Bypass.

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Respectfully submitted,

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