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Supreme Court of Wisconsin
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January 24, 2025

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
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Jeff Okazaki
Clerk of Circuit Court
Dane County Courthouse
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Mel Barnes
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Leslie Anne Freehill
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*Distribution List continued on Page 9.

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

No. 2024AP1713 Wisconsin State Legislature v. Wisconsin Dept. of Public Instruction, L.C. #2024CV1127

The court has before it the petition to bypass the court of appeals filed on October 29, 2024, by the Wisconsin Department of Public Instruction (DPI) and Governor Tony Evers; a response to the petition to bypass filed on November 12, 2024, by the Wisconsin State Legislature; and a motion for leave to file a reply brief in support of the petition to bypass filed by DPI and Governor Evers on November 18, 2024;

IT IS ORDERED that the motion for leave to file a reply brief in support of the petition to bypass is granted and the proposed reply brief submitted with the motion is accepted for filing;

IT IS FURTHER ORDERED that the petition to bypass is granted and the appeal is accepted for consideration in this court; and

IT IS FURTHER ORDERED that the briefs previously submitted by the parties to the court of appeals may stand as the parties' briefs in this court. The remainder of the briefing schedule

will proceed according to the schedule set forth in the court of appeals' January 15, 2025 order. The parties will be notified of the date and time for oral argument in this appeal in due course.

REBECCA GRASSL BRADLEY, J. (*dissenting*). The court grants a premature bypass petition filed by the Wisconsin Department of Public Instruction (DPI) and Governor Tony Evers, which presents issues related to the exercise of Governor Evers' partial veto authority under Article V, Section 10(1)(b) of the Wisconsin Constitution. Earlier this term, the court heard another case involving the interpretation of the same constitutional provision as applied to the Governor's partial veto authority. LeMieux v. Evers, No. 2024AP729 (Wis. Sup. Ct. argued Oct. 9, 2024). The court has not released its opinion, so the parties in this case do not have the benefit of the court's decision in LeMieux.

Earlier this month, the majority took the extraordinary step of "fixing" a jurisdictional defect that otherwise would have precluded appellate review, ordering the circuit court to enter a new (and now final) order to pave the way for this court's expedited review. Wisconsin State Legislature v. Wisconsin Dept. of Public Instruction, No. 2024AP1713, unpublished order (Wis. Jan. 8, 2025) (see Appendix 1). Because DPI and Governor Evers filed this petition before the parties filed any briefs in the court of appeals, the petition is premature. The majority grants the petition anyway, despite its professed practice in prior cases of "generally den[ying] as premature petitions for bypass prior to the filing of briefs in the court of appeals." Becker v. Dane County, No. 2021AP1343, unpublished order (Wis. Nov. 16, 2021). The members of the majority do not follow their ostensible "rule" regarding so-called "premature" petitions with any consistency.[1]

Process matters. The members of the majority sometimes enforce a rule against "premature petitions" but sometimes they don't, without disclosing any standards by which they will choose whether to apply it. Such arbitrariness by courts is antithetical to the original understanding of the judicial role. See THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."). The majority's arbitrariness in following its professed procedure in one case while discarding it in another sends a message to litigants that judicial

[1] For example, a majority of this court granted the Wisconsin Elections Commission's premature petition to bypass the court of appeals in Kennedy v. WEC, No. 2024AP1872, unpublished order (Sept. 20, 2024). Previously, the court unanimously granted a petition to bypass the court of appeals in State ex rel. Kaul v. Prehn, No. 2021AP1673, unpublished order (Wis. Nov. 16, 2021), at the same time it denied the petition in Becker. Just a few months before that, the court granted the Wisconsin Legislature's petition to bypass in Waity v. LeMahieu, No. 2021AP802, unpublished order (Wis. July 15, 2021) before the parties filed all of their briefs with the court of appeals. In each of those cases, the court neglected to explain its reasoning for granting the petitions while denying the petition in Becker, despite all of the petitions having been filed before the completion of briefing in the court of appeals.

process will be invoked or ignored based on the party filing the petition or the majority's desired outcome in a politically charged case. I dissent.

I am authorized to state that ANNETTE KINGSLAND ZIEGLER, C.J., joins this dissent.

Appendix 1

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January 8, 2025

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

No. 2024AP1713 Wisconsin State Legislature v. Wisconsin Dept. of Public Instruction, L.C. #2024CV1127

On October 29, 2024, defendants-counterclaim plaintiffs-appellants-cross respondents, Wisconsin Department of Public Instruction and Tony Evers (collectively, "DPI"), filed a petition to bypass the court of appeals pursuant to Wis. Stat. § (Rule) 809.60. The bypass petition concerns a summary judgment "Decision and Order" of the Dane County Circuit Court, Hon. Stephen E. Ehlke, presiding, entered on August 27, 2024 (the "decision"). Both DPI and plaintiff-counterclaim defendant-respondent-cross appellant, Wisconsin State Legislature, filed notices of appeal regarding the circuit court's decision. Both DPI and the Legislature identified the circuit court's decision as "final" in their notices of appeal.

In a November 4, 2024 order, the court of appeals stated that "[i]t appears . . . that the [decision] from which both sides appeal is not a final [decision]," because "[w]hile the document contains extensive reasoning and ultimately grants summary judgment to both sets of defendants," it lacks explicit language that "actually dispose[s] of either the plaintiffs' or the counterplaintiff's claims." The court of appeals explained that while it "would ordinarily take steps to address this

jurisdictional concern," it would not do so here in light of the bypass petition currently pending before this court.

We acknowledge the court of appeals' concern that the circuit court's decision may not be a final order or judgment from which an appeal can be taken. In light of the foregoing, and in order to eliminate any question as to this court's jurisdiction to consider the pending bypass petition,

IT IS ORDERED that within seven calendar days of the date of this order, the Dane County Circuit Court, Hon. Stephen E. Ehlke, presiding, shall enter a written order or judgment based on the August 27, 2024 "Decision and Order" that clearly satisfies the finality requirement of Wis. Stat. § 808.03. See, e.g., Wambolt v. West Bend Mut. Ins. Co., 2007 WI 35, ¶39, 299 Wis. 2d 723, 728 N.W.2d 670; see also Wis. Const. art. VII, § 3(2) ("The supreme court may issue all writs necessary in aid of its jurisdiction."). It is unnecessary for any party to file a new notice of appeal; the notices of appeal already filed will be considered filed as of the date the final written order or judgment required above is entered, pursuant to Wis. Stat. § 808.04(8); and

IT IS FURTHER ORDERED that within seven calendar days of the entry of the final written order or judgment required above, the clerk of the circuit court shall cause the appellate record to be supplemented with that order or judgment; and

IT IS FURTHER ORDERED that within seven calendar days of the supplementation of the appellate record with the final written order or judgment required above, defendants-counterclaim plaintiffs-appellants-cross respondents, Wisconsin Department of Public Instruction and Tony Evers, shall file an amended appendix to their opening appellate brief that includes the final written order or judgment. This requirement does not, however, affect the existing appellate briefing deadlines; and

IT IS FURTHER ORDERED that an order disposing of the pending petition for bypass will be issued in due course.

BRIAN HAGEDORN, J. (*concurring*). I understand the court's order to be an exercise in caution and join it on that basis. It appears the parties and the circuit court thought all matters in litigation had been resolved. But to avoid any lack of clarity, we send this back to the circuit court to make it explicit. If all matters in the litigation have not been resolved, then this litigation is not properly before us.

ANNETTE KINGSLAND ZIEGLER, C.J. (*dissenting*). Today's order requires the circuit court to enter an order that "clearly satisfies" the finality requirement for an appeal as a matter of right. See Wis. Stat. § 808.03(1) (stating "[a] final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties"). This court does not typically command circuit courts to enter final orders to simplify and expedite this court's potential review of cases. I cannot think of a time this court has so acted. And today's

order cites no cases in which we have done so. Courts of last resort ought not to meddle with the processes of the lower courts to ensure that an issue may be heard. Certainly, with five votes the court can take today's action. But without citing any cases and without granting the petition for bypass, the court reaches down and orders the circuit court to enter a final order to seemingly ensure review of an issue that very well may not otherwise be ready for appellate review—let alone appellate review on bypass. I see no reason to deviate from the normal course in this case. This court has, after all, regularly entertained cases in which a question presented was whether an order was final for purposes of § 808.03(1).[1] See, e.g., Harder v. Pfitzinger, 2004 WI 102, 274 Wis. 2d 324, 682 N.W.2d 398; Wambolt v. W. Bend Mut. Ins. Co., 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670; Tyler v. RiverBank, 2007 WI 33, 299 Wis. 2d 751, 728 N.W.2d 686; Sanders v. Estate of Sanders, 2008 WI 63, 310 Wis. 2d 175, 750 N.W.2d 806; Kenosha Pro. Firefighters, Loc. 414, IAFF, AFL-CIO v. City of Kenosha, 2009 WI 52, 317 Wis. 2d 628, 766 N.W.2d 577; Admiral Ins. Co. v. Paper Converting Mach. Co., 2012 WI 30, 339 Wis. 2d 291, 811 N.W.2d 351.

I would have this case continue under the normal processes and procedures, and for that reason I respectfully dissent.

REBECCA GRASSL BRADLEY, J. (*dissenting*). In 2007, this court explained that for an order or judgment to be final for purposes of appeal as a matter of right under Wis. Stat. § 808.03(1), it must "'dispos[e]' of [a] case . . . [with] an explicit statement dismissing or adjudging an entire matter in litigation as to one or more parties." Wambolt v. West Bend Mut. Ins. Co., 2007 WI 35, ¶35 n.13, 299 Wis. 2d 723, 728 N.W.2d 670. An order or judgment that contains "language [] merely grant[ing] a motion for summary judgment does not suffice to dispose of an entire matter in litigation." Id., ¶35 n.14. As the court of appeals recognized in a November 4, 2024 order, "[i]t appears [] that the order from which both sides appealed is not a final order" because the circuit court's order did not dispose of the entire matter in litigation. Ct. App. Order, Nov. 4, 2024. The court of appeals observed that while the order "ultimately grants summary judgment to both sets of defendants, it does not actually dispose of either the plaintiff's or the counterplaintiff's claims. '"Deciding" a case in the sense of merely analyzing legal issues and resolving questions of law does not dispose of an entire matter in litigation.'" Ct. App. Order, Nov. 4, 2024 (quoting Wambolt, 299 Wis. 2d 723, ¶34). Under Wis. Stat. § 808.03(1), neither party in this case possesses a right to appeal because the circuit court's order from which they

[1] Contrary to the concurrence's suggestion, whether the parties and the circuit court believed that the order was final for purposes of appeal is of no consequence. Wambolt v. W. Bend Mut. Ins. Co., 2007 WI 35, ¶30 n.9, 299 Wis. 2d 723, 728 N.W.2d 670 (explaining that an order is final whether or not a circuit court intends for an order to be final); State v. Carter, 2010 WI 77, ¶50, 327 Wis. 2d 1, 785 N.W.2d 516 (explaining that this court is not "bound by the parties' interpretation of the law" and "[t]his court, not the parties, decides questions of law").

appealed is not a final order.[2] Accordingly, neither the court of appeals nor this court have jurisdiction to hear this appeal. Rather than saying so, this court presumes the circuit court intended to enter a final order and orders the circuit court to enter a new order satisfying the finality requirement. If the rules of appellate procedure may be so casually disregarded by the state's highest court, perhaps they warrant amendment. While the rules remain in place, I would follow them and deny the petition for bypass because this court lacks jurisdiction to entertain it.

Samuel A. Christensen
Clerk of Supreme Court

[2] The concurrence mistakenly frames the finality inquiry as a matter of what the parties and the circuit court "thought." This court has repeatedly explained "it is the language of the order or judgment, and not anyone's intentions, upon which the inquiry is based." Admiral Ins. Co. v. Paper Converting Machine Co., 2012 WI 30, ¶25 n.11, 339 Wis. 2d 291, 811 N.W.2d 351.

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BRIAN HAGEDORN, J. (*dissenting*). Consistent with past practice, I would deny the petition for bypass as premature.

Samuel A. Christensen
Clerk of Supreme Court

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