IN THE SUPREME COURT OF WISCONSIN

No. 2021AP802

ANDREW WAITY, JUDY FERWERDA,
MICHAEL JONES, and SARA BRINGMAN,

Plaintiffs-Respondents,

v.

DEVIN LEMAHIEU, IN HIS OFFICIAL CAPACITY,
and ROBIN VOS, IN HIS OFFICIAL CAPACITY,

Defendants-Appellants-Petitioners.

On Appeal from Dane County Circuit Court, case 2021CV589,
The Honorable Stephen E. Ehlke, Presiding

UNOPPOSED MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Wisconsin Democracy Campaign ("WDC") hereby moves the Court, pursuant to Wis. Stat. §§ (Rules) 809.14(1) and 809.19(7)(a), and in accordance with this Court's July 1, 2021 Order entered in the captioned action, for leave to file a brief as *amicus curiae*. In support of this motion, WDC submits the following:

1. WDC is a nonpartisan and nonprofit public-interest watchdog group. WDC advocates for transparency in government and fights corruption.
2. WDC is committed to ensuring the fairness and lawfulness of the process of the state's redistricting that will take place after the United States Census Bureau releases data from the 2020 United States Census to the State of Wisconsin, for the purpose of creating new state legislative and congressional districts.

3. WDC views the redistricting process as foundational to a well-functioning democracy. As a watchdog organization, WDC has deep knowledge of the crucial role that transparency and an orderly, established process play in building public trust. Both the immediate issues of appellate procedure and those relating the redistricting process itself implicate WDC's interests in good governance. Adherence to usual appellate procedures will strengthen predictability, transparency, and public trust that WDC seeks in the redistricting process and state government more broadly.

4. In the circuit court, WDC filed a non-party brief addressing the substance of this dispute. (Dkt. 47)

5. On July 1, 2021, this Court issued an order providing that

> any non-party that wishes to file a non-party brief amicus curiae in support of or in opposition to the petition for bypass and the motion for stay pending appeal must file a motion for leave of the court to file a non-party brief pursuant to the requirements of Wis. Stat. § (Rule) 809.19(7). … A proposed non-party brief must accompany the motion for leave to file it. … Any motion for leave with the proposed non-party brief attached shall be filed no later than 4:00 p.m. on Thursday, July 8, 2021 …

WDC submits this motion for leave to file in a timely fashion and in accordance with the Court's July 1, 2021 Order.

6. WDC's brief should be accepted for filing because it addresses the procedural issues implicated by Petitioners' expedited petition for bypass and expedited motion for a stay pending appeal. In so doing, WDC's brief advances an analysis complementary to that offered by Plaintiffs-Respondents. WDC submits this brief to aid the Court

in the analysis of the argument raised by Petitioners regarding the possibility of mootness and to illuminate why the case at hand is distinct from the stay determinations issued by this Court in *Service Employees International Union, Local 1 v. Vos*, No. 2019-AP-622 (Wis. June 11, 2019) and *League of Women Voters of Wisconsin v. Evers*, No. 2019-AP-559 (Wis. Apr. 30, 2019).

7. Counsel for movant has consulted with counsel for Petitioners and for Respondents, neither of whom opposes this motion.

WHEREFORE, movant Wisconsin Democracy Campaign hereby respectfully request that the Court grant this unopposed motion and grant WDC leave to file the brief *amicus curiae* accompanying this motion.

Dated: July 8, 2021.

By_____

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CERTIFICATE OF SERVICE

A copy of this certificate and the foregoing Unopposed Motion for Leave to File a Brief *Amicus Curiae* has been filed with the Court and served by first class mail and email on counsel of record.

Jeffrey A. Mandell

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BRIEF OF *AMICUS CURIAE* WISCONSIN DEMOCRACY CAMPAIGN

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INTERESTS OF *AMICUS CURIAE*

The Wisconsin Democracy Campaign ("WDC") is a nonpartisan and nonprofit public-interest watchdog group. WDC advocates for transparency in government and fights corruption. WDC is committed to ensuring the fairness and lawfulness of the state's redistricting process that will take place after the United States Census Bureau releases data from the 2020 United States Census to the State of Wisconsin, for the purpose of creating new state legislative and congressional districts. WDC views the redistricting process as foundational to a well-functioning democracy.

As a watchdog organization, WDC has deep knowledge of the crucial role that transparency and an orderly, established process play in building public trust. In the circuit court, WDC filed a non-party brief addressing the substance of this dispute. (Dkt. 47) Both the immediate issues of appellate procedure and those relating the redistricting process itself implicate WDC's

interests in good governance. Adherence to usual appellate procedures will strengthen predictability, transparency, and public trust that WDC seeks in the redistricting process and state government more broadly.

INTRODUCTION

This is a straightforward statutory-construction case. In an effort to evade longstanding rules of appellate procedure, Petitioners attempt to manufacture a constitutional crisis where none exists. This Court should not countenance such shenanigans. As this Court put it recently, "judicial process matters," such that the Court should not "be eager to insert [itself] at the expense of time-tested judicial norms." *Fabick v. Wis. Elections Comm'n*, No. 2021AP428-OA, at *3-4 (Wis. June 25, 2021). That principle inveighs against granting Petitioners the extraordinary and unnecessary relief they seek: bypassing the court of appeals district they chose to hear their appeal from the circuit court's judgment; staying the circuit

court's judgment despite both the circuit court's and court of appeals' refusal to do so; and expediting consideration of requests they could have presented to this Court earlier. *See, e.g.*, *id.* at 2 n.1 ("sitting on one's rights and asking for emergency relief … will not be warmly received"); *Trump v. Biden*, 2020 WI 91, ¶10, 394 Wis. 2d 629, 951 N.W.2d 568 ("equity aids the vigilant, and not those who sleep on their rights" (internal quotation marks omitted)).

The relief sought here should be denied. There is no reason this case should not proceed through usual appellate procedures (as Petitioners clearly intended to do until they became frustrated with the appellate court's perspective). If and when one or more parties seek this Court's review in the ordinary course, the Court will then determine whether the case merits its attention. Such an approach is orderly and lawful. *See, e.g.*, *St. Augustine Sch. v. Taylor*, 2021 WI 70, ¶102, --- Wis. 2d ---, --- N.W.2d --- (Grassl Bradley, J., dissenting)

("Litigants do not dictate the decisions of this court; the law does.").

LEGAL STANDARDS

Wis. Stat. § (Rule) 809.60(4) provides that this Court "may grant [bypass] upon such conditions as it considers appropriate." The Court's internal operating procedures ("IOP") further explain that bypass is appropriate where a matter "meets one or more of the criteria for review, Wis. Stat. § (Rule) 809.62(1)," and is one the Court "ultimately will choose to consider regardless of how the Court of Appeals might decide the issues." IOP § III.B.2. Referenced Rule 809.62 is far more specific. It expressly cautions that this Court's review "is a matter of judicial discretion, not of right," and "will be granted only when special and important reasons are presented." Wis. Stat. § (Rule) 809.62(1r).

Bypass at a litigant's urging is rare in Wisconsin, for good reason. The rules of civil procedure have been forged through

time and experience to serve litigants and courts alike by providing the most effective, efficient, and complete methods for fact-finding, judicial decision-making, and appellate review. Deviations from those rules—including the use of bypass to shortcut appellate procedures—must remain the exception if appellate review is to serve its intended function. For this reason, "[b]ypass should not be sought in cases involving only error correction, which is the principal responsibility of the court of appeals." Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 24.3 (8th ed. 2020).

Appellate courts apply an erroneous-exercise-of-discretion standard when conducting interlocutory review of a lower court's decision on a procedural motion. *State v. Jendusa*, 2021 WI 24, ¶16, 396 Wis. 2d 34, 955 N.W.2d 777; *State v. Scott*, 2018 WI 74, ¶37, 382 Wis. 2d 476, 914 N.W.2d 141; *Leavitt v. Beverly Enters., Inc.,* 2010 WI 71, ¶42, 326 Wis. 2d 421, 784

N.W.2d 683. "The court of appeals erroneously exercises its discretion when it applies the wrong legal standard or makes a decision not reasonably supported by the facts of record." *Jendusa*, 2021 WI 24, ¶16. Where, as here, the court of appeals applied the correct legal standard and articulated its reasons for denying Petitioners' request for a stay, its discretionary determination should not be disturbed on interlocutory appeal.

ARGUMENT

Petitioners' requests should be denied. The possibility that the dispute will become moot does not deprive Petitioners of any rights. Instead, it militates strongly against this Court stepping in to decide the case on Petitioners' preferred timeline. This statutory-interpretation dispute differs in kind from the constitutional adjudications that Petitioners cite as precedent for stays pending appeal; because the circuit court judgment does not displace an enacted statute (but merely enforces its plain terms), adhering to usual appellate process

does not implicate the constitutional concerns underlying the other cases Petitioners cite. There is no need for this Court to grant a stay, whether on its own order or by exercising its extraordinary powers to issue a supervisory writ. Indeed, doing so at this point in this case would both needlessly and dangerously reward Petitioners' mid-stream forum shopping.

I. Mootness Principles, Which Petitioners Argue Necessitate Bypass, Counsel Against The Court Choosing To Involve Itself At This Juncture.

Petitioners assert that this Court must seize control of this appeal, lest someone file a redistricting lawsuit that will cause them to retain the same outside counsel whose contracts they seek to vindicate here. (Pet'rs' Br. at 23-24) Their logic is tortured. The argument begins with Petitioners' desire to retain their chosen counsel using taxpayer dollars and the proposition that they have statutory authorization to do so in response to an "action" (the statutory prerequisite to that retention), which they anticipate could be filed imminently. It does not follow

that this Court should abandon usual procedure to hear this appeal. To the contrary, the obvious conclusion is that the dispute here will soon be overtaken by other events.

There is no need for this Court to exercise one of its extraordinary powers and deviate from ordinary process. This Court is not "on-call to answer questions from citizens, legislators, or executive branch officials whenever the answer to a statutory question is unclear." *Fabick*, at *4. It does not "let anyone bring any case they want, and [] certainly do[es]n't let the legislature bring any case it wants." *Wis. Legislature v. Palm*, 2020 WI 42, ¶243, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting).

Petitioners argue that if this dispute works itself out—that is, if events transpire so that they get to retain their chosen counsel—they will somehow have "lost [their] appellate rights." (Pet'rs' Br. at 24) Nothing could be further from the truth. They have no right to adjudication by this Court. They

have an appeal as of right to the court of appeals. Wis. Stat. § 808.03(1). They exercised that right by deliberately choosing to appeal the circuit court's decision to District III of the court of appeals, which considered and denied Petitioners' request for a stay pending appeal. Any party dissatisfied with the court of appeals' decisions may seek discretionary review here after final judgment. *Id.* § 809.62(1r).

Moreover, black-letter law makes clear that an appeal may be dismissed if the dispute becomes moot during the pendency of the appeal. *See, e.g.*, *PRN Assocs. LLC v. State, Dep't of Admin.*, 2009 WI 53, ¶29, 317 Wis. 2d 656, 766 N.W.2d 559; *State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶12, 278 Wis. 2d 24, 692 N.W.2d 219. Such an eventuality would not impair Petitioners' rights; it would occur only if the injury they claim as a result of the circuit court judgment has been obviated.

Petitioners' argument is premised on an inchoate fear of mootness. But that fear is not a legally cognizable injury.

Courts do not roam around seeking out fights to resolve; courts adjudicate concrete cases and controversies. *See, e.g.*, *Fabick*, at *4 ("It is not our institutional role to step in and answer every unsettled and interesting legal question with statewide impact. While this court must not shrink back from deciding challenging or politically fraught questions properly before us, neither should we be eager to insert ourselves at the expense of time-tested judicial norms."). If this case were rendered moot during the appellate process, Petitioners would not suffer any harm. They would, by their own assertion, hire their chosen redistricting counsel. (Pet'rs' Br. at 24) And the adverse circuit court order would be "neither precedent nor authority." *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826 (Ct. App. 1993), *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995).

Moreover, mootness is not an absolute bar to appellate review. "Mootness is a doctrine of judicial restraint." *Matter of D.K.*, 2020 WI 8, ¶19, 390 Wis. 2d 50, 937 N.W.2d 901.

Ordinarily, a court will not consider an issue that will not have practical effect upon an existing controversy. *Matter of Commitment of S.L.L.*, 2019 WI 66, ¶14, 387 Wis. 2d 333, 929 N.W.2d 140; *State v. Leitner*, 2002 WI 77, ¶13, 253 Wis. 2d 449, 646 N.W.2d 341. However, well-established exceptions apply. *Leitner*, 2002 WI 77, ¶14. If Petitioners believe, and can convince an appellate court, that this case presents important questions that could recur, an established exception to the mootness doctrine allows appellate review. *Id.*; *Matter of D.K.*, 2020 WI 8, ¶19; *Commitment of S.L.L.*, 2019 WI 66, ¶15; *Matter of G.S.*, 118 Wis. 2d 803, 805, 348 N.W.2d 181 (Wis. 1984); *Fine v. Elections Bd. of State of Wis.*, 95 Wis. 2d 162, 166, 289 N.W.2d 823 (Wis. 1980).

In sum, there is no urgency here. The circuit court judgment interprets a statutory provision; reviewing such matters is the court of appeals' bread-and-butter work, and there is no reason for this Court to be certain now that it will undertake review of

the merits once the court of appeals completes its work. Moreover, the parties' dispute is temporary—Petitioners assert that it will likely be mooted by factual developments before merits briefing is even complete. (Pet'rs' Br. at 24) And, to the extent that Petitioners or this Court see a crucial issue in this case that should be resolved regardless of mootness, Wisconsin law expressly allows for such review as an exception to the mootness doctrine. *In re Commitment of Morford*, 2004 WI 5, ¶11, 268 Wis. 2d 300, 674 N.W.2d 349; *In re John Doe Proceeding*, 2003 WI 30, ¶20, 260 Wis. 2d 653, 660 N.W.2d 260. Adhering to appellate procedure will not preclude an adjudication on the merits if, when the case is properly presented, this Court deems review appropriate.

II. Countenancing Petitioners' Mid-Stream Forum Shopping Would Undermine Public Confidence In Our Impartial Judiciary.

Petitioners' transparent forum shopping should not be encouraged. They did not view this case as urgent enough to

seek bypass initially. Instead, Petitioners availed themselves of the special venue statute, Wis. Stat. § 752.21(2), to cherry-pick the district of the court of appeals that they preferred to review the circuit court's rulings in this specific case.[1]

Only *after* the court of appeals denied their requests for a stay did Petitioners suddenly—two full months after filing their appeal from the circuit court order—decide that this case necessitates a fast track to this Court. No factual circumstances

[1] Notably, by its own plain text, the special venue statute is inapplicable here (as it has been in several other cases where Petitioners have invoked it). The special venue statute applies only to cases venued under the provision governing "actions in which *the sole defendant* is the state, any state board or commission, or any state officer, employee, or agent in an official capacity." Wis. Stat. § 801.50(3)(a) (emphasis added). Petitioners Vos and LeMahieu were both named Defendants in this action. (Pet. App. 85-86, ¶¶8-9) Because there was no "sole defendant" in this case, sections 801.50(3)(a) and 752.21(2) are inapposite. The appeal of this case is properly venued in District IV. *See* Wis. Stat. § 752.21(1).

Moreover, the complaint clearly establishes venue under Wis. Stat. § 801.50(2)(a). (Pet. App. 86, ¶12) Defendants did not contest Plaintiffs' venue allegations. (*See* Pet. App. 107) By its own terms, the special venue statute does not reach cases venued under subdivision (2)(a) of section 801.50, but only those under subdivision (3)(a). Wis. Stat. § 752.21(2). For this reason as well, the only proper appellate venue for this case is in District IV pursuant to section 752.21(1).

changed in the interim. Quite obviously, Petitioners are dissatisfied with the interim, non-merits rulings issued by the court of appeals. The remedy for such dissatisfaction is not to run to this Court with an emergency motion for bypass so that this Court, rather than the court of appeals, will immediately take over both interlocutory issues and the merits; instead, the recourse is to seek further appellate review after the court of appeals has finished its work. Petitioners' effort to circumvent the court of appeals' adjudication of this action on the merits—mid-stream—in response to that court's ruling on a procedural issue is unseemly, and this Court should not enable it.

This is especially true with regard to Petitioners' emergency motion to stay the circuit court order. Even if this Court were to grant bypass, the Court should still deny the motion for a stay pending appeal. That motion has been fully briefed before and adjudicated by the court of appeals. (Pet. App. 510-16) The court of appeals gave the motion full

consideration, applied the governing legal standard to the facts, and reached a conclusion. (*See id.*) This Court should not interfere in the regular order of the appellate process by second-guessing the motion ruling. *See, e.g.*, *Scott*, 2018 WI 74, ¶37.

Petitioners wrongly insist that the court of appeals' determination is inconsistent with stay orders in other recent cases. (Pet'rs' Br. at 25-31) Those cases applied a stay where a circuit court struck down an enacted statute as unconstitutional. *See Serv. Emps. Int'l Union, Local 1 v. Vos*, No. 2019-AP-622 (Wis. June 11, 2019) ("*SEIU*") (Pet. App. 51); *League of Women Voters of Wis. v. Evers*, No. 2019-AP-559 (Wis. Apr. 30, 2019) (Pet. App. 38).[2]

[2] *See also* Jeffrey A. Mandell, *The Wisconsin Supreme Court Quietly Rewrote the Legal Standard Governing Stays Pending Appeal, Leaving Circuit Courts Effectively Powerless To Enjoin Unconstitutional Statutes*, 2019 Wis. L. Rev. Forward 1 (2019).

The *SEIU* and *League of Women Votes* cases differ in kind from the present case, where the circuit court enforced the plain language of a statutory provision (and opted not to reach constitutional arguments raised by amicus).[3] The court of appeals' analysis on the stay question is thorough and reasoned. (Pet. App. 510-16) This Court should follow usual procedure and decline to review that decision on an interlocutory basis.

Petitioners' belated attempts to flee from the court of appeals venue they chose for their appeal of the circuit court's judgment, and to do so only after that court disagreed with

[3] Notably, the circuit court did not disagree with amicus's constitutional arguments, but held that it did not need to adjudicate those issues at this time because of its reading of the statutory provisions at issue resolved. (*See* Pet. App. 27 n.2) Should the circuit court's statutory interpretation be displaced on appeal, the constitutional issues would come to the fore and need to be adjudicated before a court could adopt Petitioners' preferred interpretation of the statute. Petitioners significantly overstate matters in asserting that "all parties and the Circuit Court itself appear to agree that the Legislature may hire outside counsel under Section 13.124 once a plaintiff files a redistricting challenge in state or federal court." (Pet'rs' Br. at 23)

them on a preliminary procedural motion, constitute blatant forum shopping. Were this Court to validate such efforts, it would extend an open invitation to similar tactics by other litigants in the future; and were this Court then not to grant relief to all such litigants, it would undermine the appearance that all courts in Wisconsin administer justice impartially. Public confidence in the judiciary and in the adjudication of cases without fear or favor is essential to the proper fulfillment of the judiciary's central role in Wisconsin's democracy, just as a restrained approach to asserting its extraordinary jurisdiction is essential to the judiciary's ability to function effectively and efficiently. The Court should not risk damaging public confidence in the judiciary, nor compromising its effectiveness, especially here, where Petitioners have provided no compelling rationale for departing from usual appellate procedure.

CONCLUSION

For the reasons set forth above, WDC respectfully requests that this Court deny Petitioners' various requests for extraordinary intervention. The Court should allow the court of appeals to do its work under time-tested and established appellate procedures. Once the court of appeals finishes adjudicating the statutory-construction dispute at issue here, if someone asks, this Court can determine whether the case merits further review.

Dated: July 8, 2021.

By _____

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CERTIFICATION

I certify that the foregoing brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the foregoing brief, exclusive of the caption, Table of Contents, and Table of Authorities, is 2,968 words.

I further certify that when an electronic copy of this brief is submitted to this Court, it will comply with the requirements of Wis. Stat. § (Rule) 809.19(12) and will be identical in content to the text of the paper copy of the brief. A copy of this certificate is included with the paper copies of this brief that are submitted for filing with the Court and served on all opposing parties.

Dated: July 8, 2021.

Jeffrey A. Mandell

CERTIFICATION OF MAILING AND SERVICE

I certify that one original and two paper copies of the foregoing Brief of *amicus curiae* Wisconsin Democracy Campaign were hand delivered to the Clerk of the Supreme Court on July 8, 2021.

I further certify that on July 8, 2021, I sent true and correct email copies as well as three paper copies, by first-class mail, postage prepaid, of the foregoing Brief of *amicus curiae* Wisconsin Democracy Campaign to the following counsel of record:

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