Politics, Process, and the Petition for Bypass in the Wisconsin Supreme Court

Quinn J. Kennedy[*]

ABSTRACT: The Wisconsin Supreme Court has entered a politically tumultuous landscape. The Court has recently flipped from a long-held conservative majority to a liberal one, causing many new developments throughout the Wisconsin court system. Prime among them is the increased use of a relatively obscure procedure for expedited Supreme Court review: the petition for bypass. At a high level, this procedural mechanism allows litigants to bypass the court of appeals entirely to get direct Supreme Court review of a trial court decision. And often, the Supreme Court grants these petitions in politically controversial cases in Wisconsin. Although relatively unused historically, the newfound use of the petition for bypass in Wisconsin reveals several issues. First, the effect on litigation in the court of appeals is thrown into disarray since lower court litigation is not immediately paused when a bypass petition is pending. Second, it is not always clear when the Supreme Court will grant these petitions, as the rule governing the petition for bypass lacks clarity as to what factors bear on the Court's consideration of whether to grant one. This opacity in the rule enables abuse by both litigants and the Supreme Court—often for political reasons. This Note argues for reforming the Wisconsin Rules of Appellate Procedure to provide clarity, predictability,

[*] J.D. Candidate, The University of Iowa College of Law, 2026; B.A., Political Science, University of Wisconsin-Madison, 2021. This Note is the result of my standing on the shoulders of giants. I would like to thank my mom and dad, Tammy and Jeff, as well as my sister, Cara, for their lifelong support and encouragement. I must further thank Chase Hanson, whose early comments on this Note improved its arguments substantially, and Alex Parizot, whose disbelief that the "shadow docket" was not mentioned in early drafts, and willingness to engage with me about it in thoughtful discussions in the small New York City office we shared, were instrumental in developing this piece. I am likewise immensely grateful to the Student Writers and Editorial Boards of Volumes 110 and 111 of the *Iowa Law Review*, particularly my Note & Comment Editor, Maitri Patel, whose kindness, patience, and valuable feedback made this Note something worth reading. I am also grateful to Spencer Clark, James Koepplin, Aidan Bruton, Jacob Murphy, Luke Montney, Sean McQuade, Annie Colwell, Nicholas Johnson, and Jess Pray Patel for their excellent editorial assistance and thoughtful feedback throughout the editing process. Finally, this Note is dedicated to my former coworkers: the staff at the Office of the Clerk of the Wisconsin Supreme Court and Court of Appeals. Each of you are the reason the Wisconsin appellate courts function, and why this Note was written.

and transparency to the court of appeals, litigants, and the public in the petition for bypass process.

INTRODUCTION

"Process matters."[1] These two words proliferate throughout the Wisconsin Supreme Court's rulings on an—until recently—obscure procedural mechanism

1. Becker v. Dane County, No. 2021AP1343, at 4 (Wis. Nov. 16, 2021) (order dismissing petition for bypass) (Rebecca Grassl Bradley, J., dissenting).

called the petition for bypass.[2] Generally, the Wisconsin Supreme Court reviews the decisions of the court of appeals after a losing party petitions the Supreme Court for review.[3] But a petition for bypass is different: It allows the Supreme Court to take jurisdiction of a case after a trial court has entered a final judgment, bypassing the court of appeals entirely.[4]

Due to its unique nature, the petition for bypass has not been regularly used. Yet, the number of petitions for bypass that have been filed and granted with the Supreme Court has steadily increased in recent terms.[5]

This increase is particularly noteworthy because it coincided with a flip to a liberal majority on the Court through the election of Justice Protasiewicz in 2023.[6] Importantly, these petitions have been filed and granted on cases concerning issues of high political importance in the State of Wisconsin.[7]

---

2. *Id.*; *see, e.g.*, State *ex rel.* Kaul v. Prehn, No. 2021AP1673, at 2 (Wis. Nov. 16, 2021) (order granting petition for bypass) (Rebecca Grassl Bradley, J., concurring); Jane Doe 4 v. Madison Metro. Sch. Dist., No. 2022AP2042, at 3 (Wis. Mar. 3, 2023) (order holding petition for bypass in abeyance) (Dallet, J., dissenting) (quoting *Prehn*, No. 2021AP1673, at 2 (Rebecca Grassl Bradley, J., concurring)).

3. *See* WIS. STAT. § 809.62(1m)(a)(1) (2025) ("A party may file with the supreme court a petition for review of an adverse decision of the court of appeals . . . .").

4. *See id.* § 808.05.

5. *See* WIS. SUP. CT. OFF. OF THE CLERK, ANNUAL STATISTICAL REPORT: 2022–2023 TERM 5 (2023) [hereinafter ANNUAL STATISTICAL REPORT: 2022–2023], https://www.wicourts.gov/sc/DisplayDocument.pdf?content=pdf&seqNo=715271 [https://perma.cc/54VH-RZLE] (indicating that sixteen petitions for bypass were filed in the Court's 2020–21 term, twelve were filed in the Court's 2021–22 term, and twenty-two were filed in the Court's 2022–23 term); *see also* WIS. SUP. CT. OFF. OF THE CLERK, ANNUAL STATISTICAL REPORT: 2023–2024 TERM 5 (2024) [hereinafter ANNUAL STATISTICAL REPORT: 2023–2024], https://www.wicourts.gov/sc/DisplayDocument.pdf?content=pdf&seqNo=865441 [https://perma.cc/2N49-6RE4] (indicating thirty-four petitions for bypass were filed in the Court's 2023–24 term). *But see* WIS. SUP. CT. OFF. OF THE CLERK, ANNUAL STATISTICAL REPORT: 2024–2025 TERM 5 (2025), https://www.wicourts.gov/sc/DisplayDocument.pdf?content=pdf&seqNo=1029046 [https://perma.cc/YY7J-WKGD] (indicating that only twelve petitions for bypass were filed in the Court's 2024 to 2025 term). Out of the twelve petitions for bypass that were filed, however, four were granted, which was an increase over previous years. *See id.* Moreover, the trend seems to have dipped right at the point where Justice Crawford was elected—which solidified the liberal majority—and potentially indicates that the Court did not see the need to take up politically controversial cases as quickly as when the majority was under threat. *See infra* text accompanying notes 103–04.

6. *See* ANNUAL STATISTICAL REPORT: 2023–2024, *supra* note 5, at 5 (indicating twenty-two petitions for bypass were filed in the Court's 2022–23 term and thirty-four petitions for bypass were filed in the Court's 2023–24 term); *see also* Patrick Marley, *Wisconsin Supreme Court Flips Liberal, Creating a 'Seismic Shift,'* WASH. POST (Aug. 27, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/08/27/wisconsin-supreme-court-liberal (on file with the *Iowa Law Review*); *Justice Janet C. Protasiewicz*, WIS. CT. SYS. (July 26, 2023) [hereinafter *Justice Protasiewicz*], https://www.wicourts.gov/courts/supreme/justices/protasiewicz.htm [https://perma.cc/8W7K-HL3U].

7. *See, e.g.*, Brown v. Wis. Elections Comm'n, No. 2024AP232, at 1–2 (Wis. May 3, 2024) (order granting petition for bypass) (absentee voting procedures); Kaul v. Urmanski, No. 2023AP2362, at 2 (Wis. July 2, 2024) (order granting petition for bypass) (abortion access).

This trend deserves further scrutiny as the bypass petition's current statutory standards are not particularly informative.[8] To begin, the Wisconsin Rule of Appellate Procedure governing the petition for bypass—codified in chapter 809 of the Wisconsin Statutes[9]—presents procedural hurdles that complicate litigation in the court of appeals.

Specifically, the rule does not pause all proceedings in the court of appeals once a petition for bypass is filed.[10] As a result, parties can find themselves in the costly and inefficient position of simultaneously litigating a case in both the court of appeals and the Supreme Court.

Further, the rule does not establish criteria for granting a petition for bypass, stating only that the Court will grant a petition under conditions it deems appropriate.[11] This vague standard provides the Court with broad discretion to determine which cases it believes warrant bypass.[12] The court of appeals, litigants, and the public are left to guess which cases the Court will take up on bypass, with little guidance from the rule, or from the Court itself. This lack of guidance, coupled with the Court's broad discretion and increasing willingness to grant petitions in politically sensitive cases, presents a very real danger of abuse.[13]

This Note argues for reform of the Wisconsin Rules of Appellate Procedure to increase clarity and transparency in the bypass process. Part I discusses the development of the Wisconsin court system, the procedural

---

8. *See infra* Section I.B.4 (analyzing the statutory process for bypass petitions). *See generally* WIS. STAT. § 809.60 (statute governing petitions for bypass).

9. The Wisconsin Supreme Court has been given statutory authority to develop rules that "regulate pleading, practice, and procedure" for the Wisconsin courts. *See* WIS. STAT. § 751.12(1). Rules that relate to appellate procedure are codified under chapter 809 of the Wisconsin Statutes and are, for all intents and purposes, considered statutes themselves. *See id.* ch. 809 (Wisconsin Rules of Appellate Procedure); *see also id.* § 751.12(2) ("All statutes relating to pleading, practice, and procedure may be modified or suspended by rules promulgated under this section."); Rao v. WMA Secs., Inc., 752 N.W.2d 220, 228 (Wis. 2008) ("A rule adopted by this court in accordance with Wis. Stat. § 751.12 is numbered as a statute, is printed in the Wisconsin Statutes, may be amended by both the court and the legislature, has been described by this court as 'a statute promulgated under this court's rule-making authority,' and has the force of law." (footnotes omitted)).

Thus, the distinction between a rule and statute is blurred when it comes to the Wisconsin Rules of Appellate Procedure and this Note uses the terms statute and rule interchangeably. Further, and as discussed more below, although the Court can modify or change rules related to procedure in the courts, this right does not infringe on the legislature's right to do the same. *See* WIS. STAT. § 751.12(4) ("This section shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure."); *see also infra* note 190 (explaining the role of the Court in amending the rules of judicial procedure).

10. *See* WIS. STAT. § 809.60(3).

11. *Id.* § 809.60(4).

12. *See id.*

13. *See, e.g.*, Brown v. Wis. Elections Comm'n, No. 2024AP232, at 11 (Wis. May 3, 2024) (order granting petition for bypass) (Hagedorn, J., dissenting) (indicating that the Court's grant of the petition for bypass "jettison[s] longstanding rules for favored litigants and pet issues . . . send[ing] a clear message that judicial process matters, until it doesn't"); *see also id.* at 4 (Ziegler, C.J., dissenting) ("This new majority seems unable to resist the allure of political control.").

mechanisms that litigants can use to bring a case before the Wisconsin Supreme Court, and the Court's current political composition. Part II examines the procedural issues the petition for bypass currently presents, the vague standards that control its use that give the Court broad discretion to grant a bypass petition, and the Court's current use of the petition for bypass in politically sensitive cases. Finally, Part III proposes amendments to the Wisconsin Rules of Appellate Procedure to provide clearer and more workable standards for using the petition for bypass.

I. HISTORICAL DEVELOPMENT OF APPELLATE PRACTICE IN WISCONSIN

The development of the court system in Wisconsin has not always been straightforward. At its inception, the state had to figure out how to set up and structure its courts and what procedures to enact to guide its judges and court officials. The Wisconsin Rules of Appellate Procedure, and the current political climate of the Supreme Court, can be traced back to the creation of the courts and their structural development throughout Wisconsin's history.

This Part traces that history of creation and development of the Wisconsin appellate courts and procedure. First, Section I.A discusses the creation of the Wisconsin court system and the purpose behind the expansion of the appellate courts. Then, Section I.B outlines the four procedural avenues available to litigants to bring their cases before the Wisconsin Supreme Court: (1) petitions for review;[14] (2) petitions for original action;[15] (3) petitions for supervisory writs;[16] and (4) petitions for bypass.[17] Finally, Section I.C concludes with policy considerations underlying the creation of these mechanisms and analyzes the current political makeup of the Wisconsin Supreme Court to contextualize the petition for bypass in view of the Court's current political position in the state.

A. HISTORY OF THE WISCONSIN COURT SYSTEM AND CREATION OF THE COURT OF APPEALS

Interestingly, Wisconsin did not always have a court of appeals.[18] The state's constitution originally divided Wisconsin into five judicial circuit districts, with the five judges presiding over those districts convening annually in Madison, the state capital, to form a "Supreme Court."[19] This practice continued until the legislature formally established a state supreme court in 1853.[20] In the years that followed, the legislature increasingly created more

14. WIS. STAT. § 809.62.

15. *Id.* § 809.70.

16. *Id.* § 809.71.

17. *Id.* § 809.60.

18. *History of the Courts: How Wisconsin's Judicial System Was Established*, WIS. CT. SYS. (Feb. 13, 2022) [hereinafter *History of the Courts*], https://www.wicourts.gov/courts/history/index.htm [https://perma.cc/7XC3-GC3M].

19. *Id.*

20. *Id.*

courts with varying types of jurisdiction.[21] Predictably, this led to extensive confusion, as there were numerous special laws, no uniformity among the county courts, and inconsistent procedures across the court system.[22]

Recognizing this disarray, the legislature initiated efforts to reorganize the courts by enacting Chapter 315, Laws of 1959.[23] This law established a standardized system of jurisdiction and procedure for county courts and a more balanced distribution of workload across all courts.[24] Two constitutional amendments were subsequently passed, abolishing justices of the peace and establishing municipal courts.[25] These changes led to the reorganization of the court system to consist of a supreme court, circuit courts, county courts, and municipal courts.[26]

In April 1977, voters ratified a final amendment to article VII, section 2 of the Wisconsin Constitution, which outlined the structure of Wisconsin's state courts as they exist today.[27] That amendment provides that:

> The judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the legislature may create by law, and a municipal court if authorized by the legislature under section 14.[28]

Thus, the court of appeals was created. Notably, as this history demonstrates, Wisconsin voters clearly expressed a desire for an intermediate appellate court system that would handle appellate review of cases from the lower courts.[29]

B. MECHANISMS FOR SUPREME COURT REVIEW IN WISCONSIN

Litigants in Wisconsin have at their disposal four main mechanisms[30] to bring a case before the Wisconsin Supreme Court: (1) petitions for review;

---

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*; WIS. CONST. art. VII, § 2.

27. *History of the Courts*, *supra* note 18; WIS. CONST. art. VII, § 2.

28. WIS. CONST. art. VII, § 2.

29. *See History of the Courts*, *supra* note 18 (discussing the voters' ratification of the constitutional amendments creating the court of appeals); *see also* WIS. CONST. art. VII, § 2 (outlining the current makeup of the Wisconsin court system).

30. Although these four procedures vary in frequency, they are the most common petitions. However, additional procedures exist that, while not substantially relevant for the purpose of this Note, are worth noting for comprehensiveness.

There are two other mechanisms for Supreme Court review in Wisconsin that are used in very specific instances. The first mechanism is a variation of the petition for review. Covered under section 809.32, this variation is called a "No-merit petition for review." WIS. STAT. § 809.32(4) (2025). A no-merit petition for review is a petition where "the attorney is of the opinion that a petition for review in the supreme court . . . would be frivolous and without any arguable merit."

(2) petitions for original action; (3) petitions for supervisory writs; and (4) petitions for bypass. As a preliminary matter, petitions for review and bypass fall under the Court's appellate jurisdiction,[31] while petitions for original action and supervisory writs fall under the Court's original jurisdiction and superintending jurisdiction, respectively.[32] Thus, petitions for review and bypass may only be brought after a case has been litigated to a final judgment in the courts below—whether that be at the circuit court level or in the court of appeals.

In contrast, petitions for original action are brought directly in front of the Supreme Court, and the Court has broad discretion on whether to hear these actions.[33] Similarly, petitions for supervisory writs are generally brought

---

Id. § 809.32(4)(a). In this situation, "the attorney shall advise the person of the reasons for this opinion and that the person has the right to file a petition for review." *Id.* If the client elects to proceed, the attorney will file a petition for review, absent a section for an argument discussing the reasons why review by the Supreme Court is required, which the client will file in their "supplemental petition." *See id.* § 809.62(2)(e); *see also id.* § 809.32(4)(a).

Finally, section 809.61 allows the Supreme Court to "take jurisdiction of an appeal or other proceeding in the court of appeals upon certification by the court of appeals or upon the supreme court's own motion." *Id.* § 809.61. The Court's internal operating procedures make clear that "[c]ertifications are granted on the basis of the same criteria as petitions for review." WIS. CT. SYS., INTERNAL OPERATING PROCEDURES 8 (2025) [hereinafter INTERNAL OPERATING PROCEDURES], https://www.wicourts.gov/sc/IOPSC.pdf [https://perma.cc/3H53-7PUS]. As outlined in the statute and the Court's internal operating procedures, requests for certification are not employed by litigants and, among the mechanisms utilized for bringing a case before the Supreme Court, their use by the court of appeals is exceedingly rare. *See, e.g.*, ANNUAL STATISTICAL REPORT: 2022–2023, *supra* note 5, at 6 (indicating that seven petitions for certification were filed in the Court's 2020–21 term, five were filed in the Court's 2021–22 term, and one was filed in the Court's 2022–23 term).

31. *See* WIS. STAT. § 809, subch. VI (placing rules governing petitions to bypass and petitions for review within the heading of "Appellate Procedure in Supreme Court"); *see also* INTERNAL OPERATING PROCEDURES, *supra* note 30, at 4 ("The court's appellate jurisdiction is sought to be invoked by the filing of a petition for review . . . [or] by the filing of a petition to bypass . . . .").

The distinction between original and appellate jurisdiction merits a brief discussion. Original jurisdiction refers to a court's ability to hear and decide a case for the first time before any other court reviews it. *Original Jurisdiction*, BLACK'S LAW DICTIONARY (12th ed. 2024). Conversely, appellate jurisdiction refers to a court's authority to review lower court decisions. *Appellate Jurisdiction*, BLACK'S LAW DICTIONARY (12th ed. 2024). The Wisconsin Statutes dictate that, unless otherwise provided by law or the constitution, the Supreme Court only has appellate jurisdiction. WIS. STAT. § 751.05. Finally, the Wisconsin Constitution vests the Wisconsin Supreme Court with a third type of jurisdiction: superintending jurisdiction. WIS. CONST. art. VII, § 3(1). Superintending jurisdiction refers to the Supreme Court's general authority to exercise superintending control over all lower courts. 1 JAY E. GRENIG, WISCONSIN PLEADING AND PRACTICE § 2:47 (5th ed. 2025).

32. *See* WIS. STAT. § 809, subch. VII (placing rules governing original actions and supervisory writs within the heading of "Original Jurisdiction Procedure in Supreme Court"); *see also* 1 GRENIG, *supra* note 31, § 2:47 ("The Supreme Court is given, by the constitution, a general superintending control over all courts, and, apparently, over all court officers, and officers or tribunals acting in a quasi-judicial capacity." (footnotes omitted)).

33. *See* State *ex rel.* Swan v. Elections Bd., 394 N.W.2d 732, 734 (Wis. 1986) ("The supreme court's jurisdiction is clearly plenary . . . ."); *see also* WIS. CONST. art. VII, § 3(2) ("The supreme court . . . may hear original actions and proceedings.").

in front of the Supreme Court before a case has been completely litigated in the lower courts[34] and, like a petition for original action, can be brought even where a case has not yet been filed in the lower courts.[35] This Section covers each in turn.

1. Petitions for Review

The petition for review is, by far, the most used procedural mechanism in Wisconsin for bringing a case before the Wisconsin Supreme Court.[36] This favored mechanism is outlined in sections 809.62 and 808.10 of the Wisconsin Rules of Appellate Procedure. Section 808.10 provides the time limit for filing a petition for review with the Supreme Court, requiring a petition for review to be filed with the Court within thirty days after the court of appeals' decision.[37] Of course, this implies that a petition for review may only be filed after a final decision from the court of appeals.[38]

Further, section 809.62, which governs the substance of petitions for review, is comprehensive and provides explicit criteria for the Court to use when determining whether to grant review.[39] Section 809.62(2) provides an extensive outline of what must be included in the contents of a petition for review.[40] Further, section 809.62(1r) specifies that the following criteria are considered in determining whether a petition for review will be granted:

> (a) A real and significant question of federal or state constitutional law is presented.

---

34. *See, e.g.*, State *ex rel.* CityDeck Landing LLC v. Cir. Ct. for Brown Cnty., 922 N.W.2d 832, 835–36 (Wis. 2019) (vacating a lower court order staying an arbitration of a private construction dispute to decide an insurance coverage issue).

35. *See, e.g.*, State *ex rel.* Kalal v. Cir. Ct. for Dane Cnty., 681 N.W.2d 110, 114 (Wis. 2004) (affirming the denial of a petition for supervisory writ previously filed in the court of appeals of a motion for reconsideration of the trial judge's determination that the district attorney had refused to issue a criminal complaint).

36. *See, e.g.*, *Disposition of Petitions to the Wisconsin Supreme Court May & June 2025*, WIS. CT. SYS. (July 21, 2025), https://www.wicourts.gov/sc/DisplayDocument.pdf?content=pdf&seqNo=987596 [https://perma.cc/Y976-36VT] (disposing of a substantial amount of petitions for review compared to petitions for original action, supervisory writ, and bypass); ANNUAL STATISTICAL REPORT: 2023–2024, *supra* note 5, at 4 (indicating 624 petitions for review were filed in the Court's 2021–22 term, 573 were filed in the Court's 2022–23 term, and 566 were filed in the Court's 2023–24 term).

37. WIS. STAT. § 808.10(1).

38. *See id.* ("A decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court."); *see also id.* § 809.62(1g)(a) (defining "adverse decision," in part, as "a final order or decision of the court of appeals"); *id.* § 809.62(1m)(a)(1). ("A party may file with the supreme court a petition for review of an adverse decision of the court of appeals . . . .").

39. *Id.* § 809.62(1r).

40. *See id.* § 809.62(2).

(b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.

(c) A decision by the supreme court will help develop, clarify or harmonize the law, and

1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

2. The question presented is a novel one, the resolution of which will have statewide impact; or

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

(d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

(e) The court of appeals' decision is in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.[41]

The rule further states that the Supreme Court has discretion to decide which cases to review and that these enumerated criteria are "neither controlling nor fully measuring [of] the court's discretion."[42] The Court's internal operating procedures provide some additional clarification as to when a petition for review will be granted, stating "the court's principal criterion in granting or denying review is not whether the matter was correctly decided or justice done in the lower court, but whether the matter is one that should trigger the institutional responsibilities of the Supreme Court."[43] Thus, the Wisconsin Rules of Appellate Procedure provide extensive guidance to litigants on what will be considered when the Court is deliberating on whether to grant a petition for review, what litigants should include in their petitions for review, and the time frame for when a petition for review must be filed.

41. *Id.* § 809.62(1r).

42. *Id.*

43. INTERNAL OPERATING PROCEDURES, *supra* note 30, at 5.

2. Petitions for Original Action

In contrast to the recurrent use of petitions for review, the petition for original action is used much less frequently.[44] Section 809.70(1) of the Wisconsin Rules of Appellate Procedure states that a litigant may file a petition for original action with an optional memorandum requesting the Court to exercise its original jurisdiction.[45] Section 809.70(1) further outlines what must be contained in the petition.[46] Section 809.70(2) establishes timelines for responses from the opposing party,[47] and section 809.70(3) provides the Court with discretion to set deadlines for briefing and oral argument if the petition is granted.[48]

Although still limited, the Court's internal operating procedures provide additional—albeit vague—guidance on the criteria for granting a petition for an original action, indicating briefly that these criteria "are set forth in case law."[49] These procedures further note that the Court will usually refrain from exercising its original jurisdiction on factual questions.[50] Yet, outside these criteria, little guidance exists for original action petitions and, similar to the petition for bypass, the Justices have disagreed on what conditions are appropriate for granting original actions under the rule.[51]

---

44. *See* ANNUAL STATISTICAL REPORT: 2022–2023, *supra* note 5, at 7 (indicating nineteen filings classified as "Other (including Original Actions)" were filed in the Court's 2020–21 term, four were filed in the Court's 2021–22 term, and one was filed in the Court's 2022–23 term).

45. WIS. STAT. § 809.70(1).

46. *Id.* Section 809.70(1) requires four components of a petition for original action: (1) a statement of the issues; (2) a statement of the relevant facts; (3) a statement of the relief that is sought; and (4) a statement of reasons why the court should take jurisdiction of the case. *Id.*

47. *Id.* § 809.70(2). Section 809.70(2) provides that the Court can either deny the petition or order the opposing party to respond. *Id.* When a response is required, the opposing party must file that response within fourteen days of receiving the order from the Court requiring a response. *Id.*

48. *Id.* § 809.70(3).

49. INTERNAL OPERATING PROCEDURES, *supra* note 30, at 11 (citing *In re* Heil, 284 N.W. 42, 50 (Wis. 1939)).

50. *Id.*

51. *See, e.g.*, Colin Thomas Roth, *Wisconsin Supreme Court Jurisdiction: Original Actions*, WIS. LAW. (Oct. 12, 2022), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=95&Issue=9&ArticleID=29369 [https://perma.cc/CP57-YMZD] (recognizing disagreement among the Wisconsin Supreme Court Justices regarding the use of petitions for original action); Katelyn Ferral, *The Outlier: Brian Hagedorn Explains Why He Breaks Rank with Other State Supreme Court Conservatives*, CAP TIMES (Dec. 24, 2020), https://captimes.com/news/local/govt-and-politics/the-outlier-brian-hagedorn-explains-why-he-breaks-rank-with-other-state-supreme-court-conservatives/article_771e01d7-9e52-5e30-a8b2-36c9c8ec9432.html [https://perma.cc/ADM5-MW6W] (stating that Justice Hagedorn argues "there is 'somewhat of a disagreement over the nature of what we do as a court,' when it comes to original action cases").

Justice Hagedorn has frequently sided with the liberal Justices on decisions on petitions for original action. *See* Roth, *supra*. But he seems to have formed a view slightly different than the liberals on original actions, creating a tripartite split on when original actions should be granted. *See id.* The liberal bloc of the Court saw original actions "as unwise shortcuts that ignore the virtue of refining disputes through the crucible of lower-court litigation" whereas the conservative wing

All told, the statutes and procedure governing petitions for original action do not provide a model of clarity.[52] Yet, the Court has been granted wide latitude to decide cases under its original jurisdiction by the Wisconsin Constitution.[53] So, for this reason, the vague standards of the rule giving the Court broad discretion over original actions makes sense.[54]

3. Petitions for Supervisory Writs

Like petitions for original action, the statutes also give cursory treatment to supervisory writs. A petition for supervisory writ requests the Supreme Court to exercise its superintending authority over the lower courts[55] by asking the Supreme Court to order the court of appeals or a trial court to take a certain action in a case.[56] A petition for supervisory writ is governed by the same procedures as a petition for original action,[57] with one wrinkle: A party must file a petition for supervisory writ in the court of appeals before doing so in the Supreme Court unless filing the writ in the court of appeals would be "impractical."[58] In contrast, petitions for review, original action, and bypass are all only filed in the Supreme Court.[59]

"viewed original actions as necessary to protect the liberty of Wisconsin residents, for whom justice delayed in the appellate process would be justice denied." *Id.*

Meanwhile, Justice Hagedorn advocated for a more pragmatic approach, where original action petitions would be analyzed to determine whether factual questions or legal questions were in dispute, with the intent to deny those based on factual questions and entertain those petitions based on legal ones. *See id.* Nevertheless, determining what conditions are appropriate for granting an original action has remained elusive for the Justices.

52. *See* discussion *supra* note 51; Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930-OA, at 2 (Wis. Dec. 4, 2020) (order denying petition for original action) (Hagedorn, J., concurring) (stating that the original action petition "depends upon disputed factual claims" and "[t]hat alone means this case is not well-suited for an original action").

53. WIS. CONST. art. VII, § 3(2).

54. *See Wis. Voters All.*, No. 2020AP1930-OA, at 5 (Roggensack, C.J., dissenting) ("Our [broad subject matter] jurisdiction is grounded in the Wisconsin Constitution." (citing City of Eau Claire v. Booth, 882 N.W.2d 738, 741 (Wis. 2016)). *See generally* Skylar Reese Croy, *As I See It: Examining the Supreme Court's Broad Original Jurisdiction*, WIS. LAW. (July 16, 2021), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=94&Issue=7&ArticleID=28514 [https://perma.cc/7D8X-QMHQ] (arguing the Wisconsin Constitution provides that the Supreme Court's original jurisdiction has great breadth).

55. INTERNAL OPERATING PROCEDURES, *supra* note 30, at 12. For a helpful discussion of the history and origin of the supervisory writ, see *State ex rel. CityDeck Landing LLC v. Circuit Court for Brown County*, 922 N.W.2d 832, 836–44 (Wis. 2019).

56. ANNUAL STATISTICAL REPORT: 2022–2023, *supra* note 5, at 7.

57. INTERNAL OPERATING PROCEDURES, *supra* note 30, at 12–13; *see also* WIS. STAT. § 809.71(1) (2025) (providing procedure for filing a petition for supervisory writ).

58. WIS. STAT. § 809.71(1).

59. *Id.* § 809.62(1m)(a)(1) (stating petitions for review "may [be] file[d] with the supreme court"); *id.* § 809.70(1) ("A person may request the supreme court to take jurisdiction of an original action by filing a petition . . . ."); *id.* § 809.60(1)(a) ("A party may file with the supreme court a petition to bypass the court of appeals . . . .").

Additionally, the Judicial Council Committee's notes to this section of the Rules of Appellate Procedure make plain that "[t]he supreme court will not exercise its supervisory jurisdiction where there is an adequate alternative remedy,"[60] such as an appeal that would accomplish the same result.[61] Further, since petitions for supervisory writs fall within the Court's superintending jurisdiction, the Court has broad discretion in determining whether to grant the requested relief.[62] In terms of popularity, the petition for supervisory writ is the second-most-used appellate procedure mechanism in the Wisconsin Supreme Court, after the petition for review.[63]

4. Petitions for Bypass

The petition for bypass is the other mechanism, alongside the petition for review, that falls under the Supreme Court's appellate jurisdiction.[64] Unlike the petition for review, however, the provisions governing the use of the petition for bypass are less developed. Section 809.60(1)(a) provides that a party may file a petition for bypass "no later than 14 days following the filing of the respondent's brief [in the court of appeals] or response."[65] The rule further states that by filing a petition for bypass, the court of appeals is prevented from taking the case under submission for a final decision.[66]

In contrast to the enumerated examples of criteria for granting a petition for review, section 809.60(4) provides only that "[t]he supreme court may grant the petition [for bypass] upon such conditions as it considers appropriate."[67]

---

60. *Id.* § 809.71 note (Judicial Council Committee of 1981).

61. *See* State *ex rel.* Kalal v. Cir. Ct. for Dane Cnty., 681 N.W.2d 110, 117 (Wis. 2004). The Court requires four elements to be satisfied before granting a petition for supervisory writ: "(1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result; (3) the duty of the trial court is plain and it must have acted or intends to act in violation of that duty; and (4) the request for relief is made promptly and speedily." *Id.* (quoting Alt v. Cline, 589 N.W.2d 21, 30 (Wis. 1999)).

62. It is true that the four factors outlined in *Kalal* must be met for the Court to grant a petition for supervisory writ. *See id.* Even so, the Court still retains broad authority under its superintending jurisdiction to use any existing writ or any other writs that are necessary and proper to exercise its supervisory power, even if that means inventing new ones. 1 GRENIG, *supra* note 31, § 2:47; *see also* State *ex rel.* Fourth Nat'l Bank of Phila. v. Johnson, 79 N.W. 1081, 1089 (Wis. 1899) ("[T]he constitutional grant of superintending control over all inferior courts vested in this court an independent and separate jurisdiction enabling and requiring it, upon sufficient occasion, by the use of all proper and necessary writs to promptly restrain the excesses and quicken the neglects of inferior courts . . . .").

63. *See* ANNUAL STATISTICAL REPORT: 2022–2023, *supra* note 5, at 7 (indicating that forty-one petitions for supervisory writ were filed in the Court's 2020–21 term, fifty-one were filed in the Court's 2021–22 term, and forty-nine were filed in the Court's 2022–23 term).

64. *See* INTERNAL OPERATING PROCEDURES, *supra* note 30, at 4 ("The court's appellate jurisdiction is sought to be invoked by the filing of a petition for review . . . [or] by the filing of a petition to bypass . . . .").

65. WIS. STAT. § 809.60(1)(a).

66. *Id.* § 809.60(3).

67. *Id.* § 809.60(4).

The Court clarifies this standard slightly in its internal operating procedures, stating "[a] matter appropriate for bypass is *usually* one which meets one or more of the criteria for [a petition for] review . . . [and] one . . . the court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues."[68] Again, like the rules governing the mechanisms utilized under the Court's original jurisdiction,[69] section 809.60 does not provide a model of clarity. But unlike the petition for original action or supervisory writ, a petition for bypass is not an exercise of the Court's original or superintending jurisdiction.[70]

At this stage, it is important to highlight two key provisions of the rule. The first provision is what this Note will refer to as the "procedural component." Although section 809.60(3) prohibits the court of appeals from taking a case under consideration for a decision, that does not mean that all proceedings are paused in the court of appeals when a petition for bypass is filed with the Supreme Court. It only means that the court of appeals cannot issue a final decision on the case while a petition for bypass is pending.[71]

The second provision is what this Note will refer to as the "discretionary component." Section 809.60(4) establishes a highly discretionary standard for the Supreme Court to apply when determining whether to grant a petition for bypass.[72] The Court itself has stated that a petition for bypass is typically assessed using the same criteria as a petition for review.[73] Additionally, in what is becoming an increasingly neglected practice, the Court has noted that it "generally den[ies] as premature petitions for bypass prior to the filing of briefs in the court of appeals."[74] But the Court does not always follow these standards,[75] and it does not have to, due to the absence of any guidance to the contrary. Although the petition for bypass has not traditionally been a widely

68. INTERNAL OPERATING PROCEDURES, *supra* note 30, at 8 (emphasis added).

69. *See supra* Sections I.B.2–.3.

70. *See supra* notes 31–32 and accompanying text.

71. *See* WIS. STAT. § 809.60(3).

72. *See id.* § 809.60(4).

73. *See* INTERNAL OPERATING PROCEDURES, *supra* note 30, at 8 ("A matter appropriate for bypass is usually one which meets one or more of the criteria for [petitions for] review . . . .").

74. Brown v. Wis. Elections Comm'n, No. 2024AP232, at 3 (Wis. May 3, 2024) (order granting petition for bypass) (Dallet, J., concurring) (quoting Becker v. Dane County, No. 2021AP1343, at 1 (Wis. Nov. 16, 2021) (order dismissing petition for bypass)).

75. *Id.* (noting exceptions to premature denial of petitions for bypass). Justice Dallet enumerates at least two exceptions in her concurrence, stating first, "[o]ne such . . . circumstance is when 'relief is urgently needed or not practically available from a lower court.'" *Id.* (quoting *Becker*, No. 2021AP1343, at 2 (Hagedorn, J., concurring)). Second, "is when a case alleges an ongoing injury that threatens the functioning of government, such that '[d]elaying access to this court while the parties file briefs in the court of appeals may unnecessarily prolong that alleged harm.'" *Id.* (quoting State *ex rel.* Kaul v. Prehn, No. 2021AP1673, at 3 (Wis. Nov. 16, 2021) (order granting petition for bypass) (Dallet, J. concurring)). These exceptions are explored further below. *See infra* Section II.B.1.

used mechanism for Supreme Court review in Wisconsin, litigants have started to increasingly use it over the past few years.[76]

C. Policy Considerations and Political Composition of the Wisconsin Supreme Court

Given the various procedural mechanisms established by the Wisconsin Rules of Appellate Procedure for bringing a case in front of the Supreme Court, it is worthwhile to briefly explore the underlying policy considerations of these mechanisms, particularly the petition for bypass. The history of the Wisconsin courts suggests that the legislature had two primary concerns when it reorganized the court system: (1) the standardization of procedure across the courts; and (2) the management of caseload on the court system.[77] The establishment of the court of appeals addressed both.[78]

These concerns are also reflected in the Wisconsin Statutes and Rules of Appellate Procedure, which discuss the procedural mechanisms to get a case in front of the Wisconsin Supreme Court. The petition for bypass appears to have been created to both address the caseload problem and to provide a procedural avenue to expedite important cases before the Supreme Court. However, as this Note explores, it is unclear whether the rule accomplishes those objectives as currently written. The petition for bypass appears, at best, to have no impact on the caseload problem and, at worst, exacerbates it.[79]

Further, the Court's general practices in determining petitions for bypass do not conclusively demonstrate that this mechanism gets cases in front of the Court very quickly to begin with.[80] Moreover, if the Court chooses to expedite the process further, it can create broader concerns, including deciding issues that may not be ready for Supreme Court review[81] and fostering the appearance

---

76. *See* ANNUAL STATISTICAL REPORT: 2022–2023, *supra* note 5, at 5 (indicating that sixteen petitions for bypass were filed in the Court's 2020–21 term, twelve were filed in the Court's 2021–22 term, and twenty-two were filed in the Court's 2022–23 term); *see also* ANNUAL STATISTICAL REPORT: 2023–2024, *supra* note 5, at 5 (indicating thirty-four petitions for bypass were filed with the Court in the 2023–24 term).

77. *See History of the Courts*, *supra* note 18 (discussing the implementation of "a uniform system of jurisdiction and procedure" and correcting "the imbalance of caseloads").

78. *See id.*; *see also* Richard S. Brown, *Allocation of Cases in a Two-Tiered Appellate Structure: The Wisconsin Experience and Beyond*, 68 MARQ. L. REV. 189, 189 ("The addition of an intermediate appellate court provides assistance by: (1) reducing the sheer number of cases on the calendar of the highest court, and (2) releasing the highest court to address itself solely to the determination of significant questions of law . . . .").

79. *See infra* Section II.A.

80. *See infra* Section II.B.1.

81. *See infra* Section II.B.1; *see also* Becker v. Dane County, No. 2021AP1343, at 2 (Wis. Nov. 16, 2021) (order dismissing petition for bypass) (Hagedorn, J., concurring) (indicating that petitions for bypass can be denied because "the issues are not well-presented or are unclear"); Brown v. Wis. Elections Comm'n, No. 2024AP232, at 11 (Wis. May, 3 2024) (order granting petition for bypass) (Hagedorn, J., concurring) ("The main purpose [of waiting for briefs to be filed in the court of appeals] is to ensure we know the full scope of what we are being asked to decide.").

of political impropriety.[82] Thus, the petition for bypass mech-anism presents unique problems for the Wisconsin Supreme Court and court of appeals that need to be addressed.

As a final matter, petitions for bypass have been filed and granted in some of the most highly politically controversial cases in the State of Wisconsin.[83] Because of this reality, understanding the current political composition of the Court, and how this composition came to be, is central in determining which cases are ultimately granted bypass.[84] Currently, the Court has a 4-3 liberal majority.[85] Yet, prior to Justice Janet Protasiewicz's election by Wisconsin voters in 2023, a conservative majority dominated the Court for the previous fifteen years.[86] That era was defined by limits placed on labor unions, the approval of voter identification laws, and limiting the powers of Tony Evers, the Democratic governor, among other conservative rulings.[87]

---

82. Kennedy v. Wis. Elections Comm'n, No. 2024AP1872, at 2 (Wis. Sept. 20, 2024) (order granting petition for bypass) (Rebecca Grassl Bradley, J., dissenting) ("The majority's arbitrariness in following its professed procedure [of denying premature bypass petitions] in one case while discarding it in another sends a message to litigants that judicial process will be invoked or ignored based on the majority's desired outcome in a politically-charged case.").

83. *See e.g.*, Priorities USA v. Wis. Elections Comm'n, 8 N.W.3d 429, 431 (Wis. 2024); Teigen v. Wis. Elections Comm'n, 976 N.W.2d 519, 525 (Wis. 2022); Becker v. Dane County, 977 N.W.2d 390, 395 (Wis. 2022).

84. As the Court's internal operating procedures indicate, a petition for bypass is granted on the affirmative vote of four or more members of the Court. *See* INTERNAL OPERATING PROCEDURES, *supra* note 30, at 8–9. Notably, a petition for review is granted on the affirmative vote of only three or more members of the Court. *Id.* at 6. Thus, the political composition of the Court appears to be even more important when it comes to petitions for bypass, as a majority of the Court must agree to grant one. *Id.* at 8–9.

85. Marley, *supra* note 6.

86. Scott Bauer, *Wisconsin Supreme Court Enters a New Era as It Flips to Liberal Control After 15 Years*, ASSOCIATED PRESS (Aug. 2, 2023, 5:57 AM), https://apnews.com/article/wisconsin-supreme-court-liberal-880ofc9d37e6194f777c2fed261c5d37 [https://perma.cc/38CR-WHM5].

87. Marley, *supra* note 6. The Court, in 2014, upheld then-Governor Walker and the Republican-backed legislature's controversial "Act 10" law, which drastically curtailed collective bargaining rights and other labor protections for most public employees. *See* Madison Teachers, Inc. v. Walker, 851 N.W.2d 337, 346–47 (Wis. 2014); *see also* Monica Davey, *Wisconsin Justices Uphold Union Limits, a Victory for the Governor*, N.Y. TIMES (July 31, 2014), https://www.nytimes.com/2014/08/01/us/wisconsin-union-limits-and-voter-id-law-upheld-by-court.html (on file with the *Iowa Law Review*) (describing the Court's decision in *Madison Teachers*). Among strong public dissent, the conservative Court upheld Act 10 in its entirety, stating "[n]o matter the limitations or 'burdens' a legislative enactment places on the collective bargaining process, collective bargaining remains a creation of legislative grace and not constitutional obligation." *Madison Teachers*, 851 N.W.2d at 384; *see also* James Kelleher, *Inside Capitol, Wisconsin Protesters Create a City*, REUTERS (Feb. 22, 2011, 7:50 PM), https://www.reuters.com/article/us-wisconsinprotests-camping-idUSTRE71MoA220110223 [https://perma.cc/RF76-SEYL] (documenting protests of Act 10 at the state capitol building).

In this same term, the conservative majority upheld another law enacted by the Walker Administration that required photo identification to vote. *See* League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302, 305 (Wis. 2014) (concluding requiring photo identification to vote is not an additional elector qualification); Milwaukee Branch of the NAACP v. Walker, 851 N.W.2d 262, 265 (Wis. 2014) (holding that the burdens associated with presenting

However, the shift in majority in 2023 brought quick changes to the Court. The new liberal majority started off by firing the long-term conservative director of state courts.[88] Right afterward, the liberal Justices voted to curtail then-Chief Justice Ziegler's power to appoint a new director of state courts by requiring a majority vote of the Justices to approve a new director.[89] These actions were met by strong responses from the conservative minority upset with the route the liberal Justices took,[90] which were followed in kind by similar replies from the new liberal majority.[91]

---

a photo identification for voting are not undue burdens on the right to vote); *see also Wisconsin Supreme Court Upholds Law Requiring Photo ID to Vote in Elections*, STATE BAR WIS. (Aug. 5, 2014), https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=11730 [https://perma.cc/8RFP-32TZ] (describing the Court's decision in *League of Women Voters* and *Milwaukee Branch of the NAACP*). More recently, a conservative majority of the Court has upheld laws that curbed Governor Evers's gubernatorial powers. In 2018, the Republican-dominated legislature passed several laws limiting the incoming governor's powers in a lame-duck legislative session. *See* Laurel White, *Wisconsin Supreme Court Sides with GOP Lawmakers to Limit Democratic Governor's Power*, NPR (June 21, 2019, 10:35 AM), https://www.npr.org/2019/06/21/734722467 [https://perma.cc/77TR-LFCQ]. Several voters' associations in Wisconsin challenged the legislature's decision to hold this special session, arguing that extraordinary sessions are unconstitutional, and that all legislation passed during the 2018 session was invalid. League of Women Voters of Wis. v. Evers, 929 N.W.2d 209, 213 (Wis. 2019). The Court disagreed, holding that extraordinary sessions were constitutional because the Wisconsin "constitution directs the Legislature to meet at times as 'provided by law,' and . . . the Legislature [has] the [statutory] discretion to construct its work schedule." *Id.* Thus, the Court effectively greenlit all the laws passed by the Republican legislature in that session, significantly limiting Governor Evers's powers.

88. *See* Adam Edelman & Shaquille Brewster, *The New Liberal Majority on the Wisconsin Supreme Court Is Off to a Tense Start*, NBC NEWS (Aug. 7, 2023, 6:00 AM), https://www.nbcnews.com/politics/politics-news/new-liberal-majority-wisconsin-supreme-court-tense-start-rcna98052 [https://perma.cc/D55D-8AC6] (stating the Court fired its long-term conservative director of state courts following Justice Protasiewicz's swearing in and voting to curtail then-Chief Justice Ziegler's power to appoint the state courts director).

89. *See id.*

90. *See* Annette Kingsland Ziegler, *Opinion: Firing of State Courts Director Unwarranted*, CAP TIMES (Aug. 3, 2023), https://captimes.com/opinion/guest-columns/opinion-firing-of-state-courts-director-unwarranted/article_db230a72-247e-53e9-ae5f-63348c0e0832.html [https://perma.cc/453W-DHM6] (accusing liberal colleagues of having "secret discussions" in deciding to fire the director of state courts); *see also* Press Release, Wis. Ct. Sys., Statement of Chief Justice Annette Kingsland Ziegler (Aug. 4, 2023), https://www.wicourts.gov/news/archives/view.jsp?id=1578&year=2023 [https://perma.cc/JL6D-AWK4] ("Today, four rogue members of the court met in a secret, unscheduled, illegitimate closed meeting in an attempt to gut the Chief Justice's constitutional authority as administrator of the court.").

91. *See* Press Release, Wis. Ct. Sys., Statement of Supreme Court Justice Rebecca Dallet Regarding Court Meeting (Aug. 4, 2023), https://www.wicourts.gov/news/archives/view.jsp?id=1580&year=2023 [https://perma.cc/74YR-K72N] ("On behalf of a majority of justices on the Wisconsin Supreme Court, I want to express my disappointment that the Chief Justice, rather than collegially participate in a scheduled meeting of the court today, is litigating issues . . . through media releases."). In this same statement, Justice Dallet further reiterated that "it is deeply inappropriate for the Chief Justice to continue to refuse to engage with her colleagues, but instead to publicly litigate these issues." *Id.* And just before releasing that statement, Justice Dallet had released a statement with the liberal Justices' plan to reform the internal operating procedures of the Court to remove the authority of the Chief Justice to appoint the director of

Until April 2025, that 4-3 liberal majority remained vulnerable. Liberal Justice Ann Walsh Bradley announced that she would not seek reelection after her term expired on July 31, 2025,[92] sparking a fierce race for the open seat on the Court. Then, on April 1, 2025, in a race that "was projected to be the most expensive state supreme court election ever," Wisconsin voters elected Justice Susan Crawford to replace Justice Ann Walsh Bradley, cementing a 4-3 liberal majority on the Supreme Court for the time being.[93]

But this majority is by no means guaranteed to stand for long. Justices in Wisconsin are elected to ten-year terms[94] and five different Justices' terms are expiring from 2026 to 2030.[95] The terms of both Justice Dallet and Chief Justice Karofsky—part of the current liberal majority—are set to expire in 2028 and 2030, respectively.[96] Likewise, Democratic and Republican party organizers, along with independent interest groups, have exercised substantial spending and campaigning efforts in recent races for the Wisconsin Supreme Court seats.[97] These efforts will likely only increase in

---

state courts in the name of "transparency." *See* Press Release, Wis. Ct. Sys., Statement of Supreme Court Justice Rebecca Dallet Regarding Transparency and Accountability Measures (Aug. 4, 2023) [hereinafter Statement of Justice Dallet Regarding Transparency and Accountability], https://www.wicourts.gov/news/archives/view.jsp?id=1579&year=2023 [https://perma.cc/DMF9-PLHK]. Thus, the political infighting on the Wisconsin Supreme Court was at an all-time high just following Justice Protasiewicz's swearing in, and it is not clear that tensions have subsided. *See, e.g.*, Rebecca Bradley (@JudgeBradleyWI), X (Aug. 4, 2023, 4:08 PM), https://x.com/JudgeBradleyWI/status/1687571189521113090 [https://perma.cc/Q9EC-RR9C] ("Ann Bradley & her cabal of extreme leftists-Rebecca Dallet, Jill Karofsky & Janet Protasiewicz-met in secret, without their colleagues, to usurp the power the people gave the Chief Justice.").

92. Press Release, Wis. Ct. Sys., Statement from Justice Ann Walsh Bradley (Apr. 11, 2024) [hereinafter Statement from Justice Ann Walsh Bradley], https://www.wicourts.gov/supreme/docs/041124statement.pdf [https://perma.cc/9NMU-8C42]; *see also* Patrick Marley, *Wisconsin Supreme Court Liberal Won't Run Again, Shaking Up Race for Control*, WASH. POST (Apr. 11, 2024, 11:00 AM), https://www.washingtonpost.com/politics/2024/04/11/wisconsin-supreme-court-justice-reelection (on file with the *Iowa Law Review*) (noting that Justice Bradley's decision to step down "shake[s] up a consequential race in a swing state and improv[es] the odds that conservatives can retake the control they lost last year").

93. Anya van Wagtendonk, *Trump and Musk's Backing Wasn't Enough to Flip Wisconsin Supreme Court*, NPR (Apr. 1, 2025, 10:19 PM), https://www.npr.org/2025/04/01/nx-s1-5345862/wisconsin-supreme-court-crawford-schimel-election-results [https://perma.cc/6RML-5JB2].

94. *Supreme Court: Justices*, WIS. CT. SYS., https://www.wicourts.gov/courts/supreme/justices [https://perma.cc/39SP-3Z67].

95. Peter Cameron, *Wisconsin to Hold a State Supreme Court Election Every Spring from 2025 to 2029*, PBS WIS. (Apr. 1, 2025), https://pbswisconsin.org/news-item/wisconsin-to-hold-a-state-supreme-court-election-every-spring-from-2025-to-2029 [https://perma.cc/7Z6A-JCYW]; *see also Jill Karofsky*, BALLOTPEDIA, https://ballotpedia.org/Jill_Karofsky [https://perma.cc/6EST-BZQH] (indicating Chief Justice Karofsky's term ends on July 31, 2030).

96. *Rebecca Dallet*, BALLOTPEDIA, https://ballotpedia.org/Rebecca_Dallet [https://perma.cc/4TN7-PQLK] (indicating Justice Dallet's term ends on July 31, 2028); *Jill Karofsky*, *supra* note 95.

97. *See* Ian Vandewalker & Douglas Keith, *Wisconsin Supreme Court Race Breaks Spending Record, Fueled by Out-of-State Money*, BRENNAN CTR. FOR JUST. (Mar. 24, 2025), https://www.brennancenter.org/our-work/analysis-opinion/wisconsin-supreme-court-race-breaks-spending-record-fueled-out-state [https://perma.cc/LFS2-9YFB] ("The upcoming election [between Brad Schimel

future Wisconsin Supreme Court elections, creating a situation where the ultimate winning candidate is more likely to be decided by which one has better financial backing.[98] Combine this new reality with President Donald Trump's recent efforts to fill the federal judiciary with conservative judges[99] and Republicans' attempts to do the same with state courts,[100] and it becomes clear that Wisconsin's liberal majority is far from secure.

Thus, in a politically divided swing state whose Supreme Court races are highly contentious, it is plausible that the liberal majority will flip back to a conservative one in as little as two years.[101] If this flip happens, the threat of using the petition for bypass in a retaliatory fashion by a conservative majority upset with a yearslong reshaping of Wisconsin's legal landscape by the current liberal majority looms large. This strong political tension within the Court, and the political uncertainty that lies in its future, will have significant implications on how the petition for bypass mechanism is used.

---

and Susan Crawford] for a seat on the Wisconsin Supreme Court just became the most expensive judicial race in American history."); *see also* Shawn Johnson, *For the First Time in 15 Years, Liberals Win Control of the Wisconsin Supreme Court*, NPR (Apr. 4, 2023, 9:57 PM), https://www.npr.org/2023/04/04/1167815077/wisconsin-supreme-court-election-results-abortion-voting-protasiewicz-kelly [https://perma.cc/P9PB-BYXY] ("The race [between Daniel Kelly and Janet Protasiewicz] shattered the previous national record for spending in a state Supreme Court race.").

98. *See* Cameron, *supra* note 95 (indicating that in each subsequent Supreme Court election there "is likely [going to be] a one-upping, record-breaking amount of spending" which "could also mean more flip-flopping on the state's highest court").

99. *See* John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges [https://perma.cc/H9DE-ZASW] ("Donald Trump leaves the White House having appointed more than 200 judges to the federal bench, including nearly as many powerful federal appeals court judges in four years as Barack Obama appointed in eight."); Russell Wheeler, Commentary, *How Much Will Trump's Second-Term Judicial Appointments Shift Court Balance?*, BROOKINGS (May 12, 2025), https://www.brookings.edu/articles/how-much-will-trumps-second-term-judicial-appointments-shift-court-balance [https://perma.cc/E73M-VC78] ("Trump will likely, by the end of his second term, secure confirmation of the 150 appointments he needs for bragging rights for having named more judges than any president, topping Ronald Reagan's 383.").

100. Aaron Mendelson, *How Republicans Flipped America's State Supreme Courts*, CTR. FOR PUB. INTEGRITY (July 24, 2023), https://publicintegrity.org/politics/high-courts-high-stakes/how-republicans-flipped-americas-state-supreme-courts [https://perma.cc/DCU7-8HJX].

101. *See* Cameron, *supra* note 95 (indicating that there "could [be] more flip-flopping" on the Court with each election); *see also 'Ultimate Swing State': Wisconsin's Battleground Status Not in Jeopardy*, NBC 26 NE. WIS. (Nov. 6, 2024, 6:13 PM), https://www.nbc26.com/news/local-news/ultimate-swing-state-wisconsins-battleground-status-not-in-jeopardy [https://perma.cc/2C2A-6RKG] (explaining that Wisconsin remains a swing state, with likely tight margins in future political races); J. Miles Coleman & Kyle Kondik, *A Brief History of Electoral College Bias*, CTR. FOR POL. (July 6, 2023), https://centerforpolitics.org/crystalball/a-brief-history-of-electoral-college-bias [https://perma.cc/NE5Q-56LM] ("In 4 of the previous 6 presidential elections, [Wisconsin] has been decided by less than a percentage point.").

II. THE CURRENT THREAT OF THE PETITION FOR BYPASS

In the Court's 2022–23 and 2023–24 terms, there was a marked uptick in the number of petitions for bypass filed in the Wisconsin Supreme Court compared to previous terms.[102] This increased filing continued into the Court's 2024–25 term, as the Court granted two petitions for bypass in September 2024 alone,[103] equaling the number of petitions it granted in the whole 2022–23 term and just one fewer than the three petitions for bypass it granted in the entirety of its 2023–24 term.[104] Like the petitions for bypass in previous terms, the petitions granted in the 2024–25 term were in politically sensitive cases.[105]

---

102. *See* ANNUAL STATISTICAL REPORT: 2022–2023, *supra* note 5, at 5 (indicating that twenty-two petitions for bypass were filed in the Court's 2022–23 term); *see also* ANNUAL STATISTICAL REPORT: 2023–2024, *supra* note 5, at 5 (indicating thirty-four petitions for bypass were filed in the Court's 2023–24 term). The Court's terms, as defined by the statistical reports, run from September 1st through August 31st of each year. ANNUAL STATISTICAL REPORT: 2022–2023, *supra* note 5, at 2; ANNUAL STATISTICAL REPORT 2023–2024, *supra* note 5, at 2. Therefore, the Court's 2022–23 term ran from September 1, 2022, through August 31, 2023, and its 2023–24 term ran from September 1, 2023, through August 31, 2024.

103. Wis. Elections Comm'n v. LeMahieu, No. 2024AP351, at 1 (Wis. Sept. 11, 2024) (order granting petition for bypass); Kennedy v. Wis. Elections Comm'n, No. 2024AP1872, at 1 (Wis. Sept. 20, 2024) (order granting petition for bypass).

104. *See* OFF. OF THE CLERK OF THE WIS. SUP. CT., TABLE OF PENDING CASES 9 (Oct. 17, 2024) [hereinafter TABLE OF PENDING CASES (OCT. 2024 UPDATE)], https://web.archive.org/web/20241110080702/https://www.wicourts.gov/sc/sccase/DisplayDocument.pdf?content=pdf&seqNo=865501 [https://perma.cc/RH99-WZVX]. The Court granted a third petition for bypass in *Service Employees International Union Healthcare Wisconsin v. Wisconsin Employment Relations Commission* in December of 2024, equaling the three total that were granted in its 2023–24 term in the first few months of its 2024–25 term. *See* Serv. Emps. Int'l Union Healthcare Wis. v. Wis. Emp. Rels. Comm'n, No. 2024AP717, at 1 (Wis. Dec. 10, 2024) (order granting petition for bypass); *see also* OFF. OF THE CLERK OF THE WIS. SUP. CT., TABLE OF PENDING CASES 12 (Dec. 19, 2024) [hereinafter TABLE OF PENDING CASES (DEC. 2024 UPDATE)], https://www.wicourts.gov/sc/sccase/DisplayDocument.pdf?content=pdf&seqNo=894173 [https://perma.cc/88W4-68Y3] (indicating the petitions for bypass granted at the start of the Court's 2024–25 term).

105. *See* Kennedy v. Wis. Elections Comm'n, 11 N.W.3d 786, 789 (Wis. 2024) (affirming circuit court's order denying presidential candidate Robert F. Kennedy, Jr.'s request for a temporary injunction to require the Wisconsin Elections Commission to remove his name from the general election ballot in Wisconsin); Brief for Appellant at 7, Wis. Elections Comm'n v. LeMahieu, 16 N.W.3d 469 (Wis. Ct. App. June 12, 2024) (No. 2024AP351) (stating the questions presented for the Court as whether the Wisconsin Elections Commission must appoint a new Administrator and if the circuit court should issue a writ of mandamus requiring the appointment of a new Administrator); Brief for Appellant at 12, Serv. Emps. Int'l Union Healthcare Wis. v. Wis. Emp. Rels. Comm'n, 22 N.W.3d 876 (Wis. Ct. App. June 10, 2024) (No. 2024AP717) (stating the question presented for review as whether the Wisconsin Employment Peace Act applies to the University of Wisconsin Hospitals and Clinics Authority and its employees). The reply brief in *Service Employees International* illustrates why the question presented is controversial in Wisconsin, since if the University of Wisconsin Hospitals and Clinics Authority is considered an employer under the Peace Act and is thus subject to its requirements, it would be required to engage in collective bargaining with its employees. *See* Reply Brief for Appellant at 5, *Serv. Emps. Int'l Union Healthcare Wis.*, 22 N.W.3d 876. For a discussion of Wisconsin's political track record regarding collective bargaining, see *supra* note 87. *See also* Mitch Smith, *Wisconsin Judge Strikes Down Limits on Public Sector Unions*, N.Y. TIMES (Dec. 2, 2024), https://www.nytimes.com/2024/1

Even if this trend does not continue in future terms, this recent increase in the filing and granting of petitions for bypass presents cause for concern. Broadly speaking, three issues arise with the petition for bypass mechanism as it exists in its current form. First, section 809.60(3)'s procedural component provides little direction for the procedure in the court of appeals when a petition to bypass is pending before the Supreme Court, since there is no provision that stays proceedings in the court of appeals.[106] Thus, cases are effectively stuck in limbo in the court of appeals while the Supreme Court deliberates on whether to grant a petition.

Second, section 809.60(4)'s discretionary component grants the Supreme Court wide latitude in deciding whether to grant a petition, providing a standard that is unclear and vague. This highly discretionary standard is particularly important at the current moment, as the Court seems increasingly willing to grant petitions before all briefs have been filed in the court of appeals. This practice, in turn, presents the danger of, among other things, providing underdeveloped issues for the Court to review.[107]

Finally, the Court almost exclusively grants petitions for bypass in controversial and politically sensitive cases. By increasingly granting petitions for bypass, the Court appears to be engaging in the political process by accepting cases on bypass to advance a certain political position.[108] Fundamentally, underlying each of these issues with the petition to bypass mechanism are increased costs of litigation and risks to transparency and predictability in the appellate courts.

In this Part, Section II.A analyzes the procedural uncertainty that results in the court of appeals when a petition for bypass is filed with the Supreme Court. Then, Section II.B examines the criteria the Court uses to decide whether to grant a petition to bypass and how expansively the Court can exercise its discretion in doing so. Finally, Section II.C discusses the political nature of the recent use of the petition for bypass by the Court and its resulting political effect.

2/02/us/wisconsin-court-decision-unions.html (on file with the *Iowa Law Review*) ("A Wisconsin judge on Monday struck down portions of a 2011 law that stripped most government workers in the state of collective bargaining rights and set off fierce demonstrations.").

106. *See* WIS. STAT. § 809.60(3) (2025).

107. *See, e.g.*, *Kennedy*, No. 2024AP1872, at 2 (Rebecca Grassl Bradley, J., dissenting) ("The members of the majority do not follow their ostensible 'rule' regarding so-called 'premature' petitions with any consistency."); *see also id.* at 2 n.1 (providing examples of other cases where petitions for bypass were granted before briefing was completed in the court of appeals).

108. *See id.* ("[J]udicial process will be invoked or ignored based on [a] desired outcome in a politically-charged case."); *see also* Brown v. Wis. Elections Comm'n, No. 2024AP232, at 4 (Wis. May 3, 2024) (Ziegler, C.J., dissenting) (order granting petition for bypass) (stating that the majority's decision to grant the petition for bypass appears to result from the majority's inability "to resist the allure of political control"); *id.* at 11 (Hagedorn, J., dissenting) (noting that the grant of the petition for bypass before briefing had occurred in the court of appeals caused "[p]olitical actors [to] believe—not without reason—that they are likely to have their complaints given special treatment").

A. THE COURT OF APPEALS IS PROCEDURALLY STUCK

Because no provision exists for pausing proceedings in the court of appeals, litigation in the court of appeals does not stop when a party files a petition for bypass with the Supreme Court.[109] For this reason, litigants in the court of appeals—along with the court itself—are put in an awkward position when a petition for bypass is filed: They must both litigate the case in the court of appeals and the Supreme Court.[110]

Indeed, section 809.60(3)'s procedural component ostensibly allows the Supreme Court to accept petitions for bypass at any point up until fourteen days after the respondent's brief has been filed in the court of appeals.[111] Therefore, it is not uncommon for litigants to file briefs or motions in the court of appeals while, at the same time, litigating a petition for bypass in the Supreme Court.[112] In the alternative, some litigants may file a case in the court of appeals solely to use as a vehicle for the purpose of filing a petition for bypass in the Supreme Court.[113]

---

109. *See* WIS. STAT. § 809.60(3) (providing that only the submission of the appeal is stayed in the court of appeals).

110. *See id.* § 809.60(1)(a), (2) (providing that a party filing a petition for bypass must do so "no later than [fourteen] days" after the respondent's brief is filed in the Court of Appeals and that the opposing party has fourteen days to file a response after receiving the petition).

111. *See id.* § 809.60(1)(a) ("A party may file with the supreme court a petition to bypass the court of appeals . . . no later than 14 days following the filing of the respondent's brief . . . .").

112. For example, in *Wisconsin Elections Commission v. LeMahieu*, a petition to bypass was submitted to the Supreme Court on July 19, 2024, seven days after the filing of the respondent's brief. *Wisconsin Elections Commission v. Devin LeMahieu: Case History*, WIS. CT. SYS., https://wscca.wicourts.gov/appealHistory.xsl?caseNo=2024AP000351&cacheId=A9A9977DCAC07C1564961CFB06AD3B2A&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC [https://perma.cc/H4QS-9R8S]. While that petition was pending in front of the Supreme Court, a motion to extend time to file the appellant's reply brief was filed *with the court of appeals* on July 25, 2024. *Id.* The Supreme Court ultimately granted the petition for bypass on September 11, 2024. *Id.* This example of litigants filing motions to extend time with the court of appeals while a petition for bypass is pending before the Supreme Court is common because the appellant will still want the ability to file a reply brief in the court of appeals if the petition for bypass is denied by the Supreme Court. Thus, if the litigants wait until after the respondent's brief is filed before filing a petition for bypass, the appellant will likely need to file a motion to extend time in the court of appeals to preserve the timelines for filing a reply brief. *See* WIS. STAT. § 809.19(4)(a) (requiring the reply brief to be filed either "[f]ifteen days after the date of service of the respondent's brief" or "[f]ifteen days after the date on which the respondent's brief is filed," whichever is later).

113. For example, in *Kennedy v. Wisconsin Elections Commission*, presidential candidate Robert F. Kennedy, Jr. filed a petition for bypass two days after initiating an appeal in the court of appeals. *Robert F. Kennedy, Jr. v. Wisconsin Elections Commission: Case History*, WIS. CT. SYS., https://wscca.wicourts.gov/appealHistory.xsl?caseNo=2024AP001872&cacheId=813E0190444 0B14C9311E355C798DE8B&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC [https://perma.cc/VF2D-MB9A]. Only two briefs had been filed in the court of appeals at the time the petition for bypass was granted—the appellant's brief and an amicus curiae brief. *Id.* Similarly, in *Brown v. Wisconsin Elections Commission*, a petition for bypass was filed one week after the appeal was initiated. *Kenneth Brown v. Wisconsin Elections Commission: Case History*, WIS. CT. SYS., https://wscca.wicourts.gov/appealHistory.xsl?caseNo=2024AP000232&cacheId=460FCD9B857BFE9BA028DD740CEB9C73&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC [htt

This practice naturally presents significant procedural and efficiency problems for the court of appeals and the parties litigating the case. On the one hand, the parties must dedicate time, money, and resources to both filing briefs and motions in the court of appeals and responding to, or filing, the petition for bypass in the Supreme Court. Further, the parties must go through the initial process of docketing the appeal in the court of appeals before even filing the petition for bypass.[114] Thus, a party that suffers an adverse judgment in the trial court must treat the beginning stages of the case like a normal appeal to the court of appeals, even if they will ultimately file a petition for bypass.[115]

This process is extensive, expensive, and complicated for litigants. Not only do litigants have to initiate the appeal, but they also must pay a filing fee, both to the court of appeals for the appeal, as well as to the Supreme Court for

---

ps://perma.cc/9YVV-WAXD]. No briefs were filed in the court of appeals, and the Supreme Court ultimately granted the petition. *Id.*

114. *See* WIS. STAT. § 808.05 ("The supreme court may take jurisdiction of an appeal or any other proceeding *pending in the court of appeals* . . . ." (emphasis added)). Thus, as the statute implies, and the petition for bypass mechanism itself suggests, a case must be pending in the court of appeals before a petition for bypass can be filed.

115. Appealing a case to the Wisconsin Court of Appeals is an extensive and confusing process. Although the entire process itself is lengthy, the number of filings required are substantial and their deadlines move at a fast clip. A party must appeal a final judgment or order of the trial court within forty-five days of the judgment or order being entered in the trial court, if written notice is provided by the trial court within twenty-one days of that judgment or order being entered. *Id.* § 808.04(1). For the appeal to be docketed in the court of appeals, the party must file a notice of appeal and, rarely, a docketing statement *with the trial court*. *Id.* § 809.10(1)(a), (d); *see also* CLERK OF THE WIS. SUP. CT. & CT. APP., GUIDE TO WISCONSIN APPELLATE PROCEDURE FOR THE SELF-REPRESENTED LITIGANT 11 (2023) [hereinafter APPELLATE PROCEDURE FOR THE SELF-REPRESENTED], https://www.wicourts.gov/publications/guides/docs/proseappealsguide.pdf [https://perma.cc/WA3G-F6PY] (noting a docketing statement is not normally necessary in the vast majority of cases, and its primary purpose is only to ask the court of appeals to determine whether a case may be expedited).

Once a notice of appeal is filed with the trial court, the clerk of the trial court must transmit the notice of appeal and docketing statement (if there is one) within three days to the clerk of the court of appeals. WIS. STAT. § 809.11(2). The clerk then dockets the appeal in the court of appeals. *Id.* § 809.11(3). Further, within fourteen days of filing the notice of appeal with the trial court, the appealing party must then file a statement on transcript, again *with the trial court*. *Id.* § 809.11(4)(b). This statement informs the court of appeals whether a transcript from the trial court will be needed in the appeal. APPELLATE PROCEDURE FOR THE SELF-REPRESENTED, *supra*, at 11–12. The clerk of the trial court has three days after the statement on transcript is filed with the trial court to transmit it to the court of appeals. WIS. STAT. § 809.11(4)(b).

Finally, after all the above documents are filed and docketed, the clerk of the trial court must then transmit the record on appeal to the court of appeals either: (1) within twenty days of the filing of a statement on transcript stating that no transcript is necessary; or (2) within twenty days of the filing of the last requested transcript in the trial court. *Id.* § 809.15(4)(a). All told, the process for appealing a case is quite long and it can be significantly longer if transcripts are requested. *See id.* § 809.11(7)(a) (providing that, where transcripts are requested by a party, a court reporter must serve copies on the parties, file the transcript with the trial court, and notify the court of appeals of service and filing of the transcript, within sixty days after it was requested). And this is all before briefing in the court of appeals even starts.

the petition for bypass.[116] And these costs do not even include the costs of writing and drafting briefs in the court of appeals, coupled with writing and drafting the petition for bypass and response in the Supreme Court.

On the other hand, when a petition for bypass is filed, the court of appeals is effectively bound. It cannot take the case under consideration while a petition is pending.[117] But if the petition is denied, it must continue as if the petition had not been filed in the first place.[118] Conversely, if a petition for bypass is granted, jurisdiction over the appeal is removed from the court of appeals and the case is promptly transferred to the Supreme Court.[119] At that point, the court of appeals is procedurally stuck: It cannot take a case under consideration that is properly before it, but it still must rule on procedural motions and accept briefs for filing.[120] As a result, much like the litigants, the court of appeals is left in a "wait and see" position.

All of these issues arise because the procedural component of section 809.60(3) only prevents the court of appeals from deciding a case—it does not stay proceedings in the court of appeals when a petition for bypass is pending.[121] As a consequence, the procedural component creates litigation in two appellate courts—the court of appeals and the Supreme Court—instead of pausing litigation in the court of appeals to wait for a decision on the petition by the Supreme Court. This dual litigation increases, rather than decreases, the appellate case load. If a single case is being litigated in the court of appeals and Supreme Court, both appellate courts expend judicial resources to manage that single case.

Furthermore, this procedural issue is particularly confounding in view of the provisions for the petition for review—the other mechanism for obtaining Supreme Court review under the Court's appellate jurisdiction.[122] Written directly into the language of the rule for the petition for review is a provision that states when a petition for review is filed, all other proceedings are stayed in the court of appeals.[123] Of course, from a procedural standpoint, a petition for review should only be filed after a party has suffered an adverse final

116. WIS. STAT. § 809.11(1) (requiring a filing fee to be paid for initiating an appeal); *see id.* § 809.25(2)(a)(1) (providing that the clerk shall charge $195 "[f]or filing an appeal, cross-appeal, petition for review, petition to bypass, or other proceeding"). Likewise, not only do litigants have to pay the $195 filing fee to the court of appeals for initiating an appeal, they also must pay a $15 transmittal fee to the trial court for transmitting the record to the court of appeals. APPELLATE PROCEDURE FOR THE SELF-REPRESENTED, *supra* note 115, at 7.

117. WIS. STAT. § 809.60(3).

118. *Id.* § 809.60(5).

119. *Id.* § 808.05; 6 GRENIG, *supra* note 31, § 51:31 ("The Supreme Court may choose to take jurisdiction of an appeal pending in the court of appeals by bypassing that court's jurisdiction.").

120. *See* WIS. STAT. § 809.60(3); *see also supra* text accompanying note 112.

121. WIS. STAT. § 809.60(3).

122. *See generally id.* § 809.62 (statutory guidance for petitions for review).

123. *Id.* § 809.62(5).

judgment in the court of appeals,[124] so any proceedings in the court of appeals would have already been completed, rendering a provision staying proceedings in the court of appeals when a petition for review is filed unnecessary.

Therefore, it is odd that the Rules include a provision staying proceedings in the court of appeals for the petition for review, where most proceedings in the court of appeals have already concluded, while neglecting to include a provision for staying proceedings when a petition for bypass is filed, where proceedings in the court of appeals will almost certainly be ongoing.[125] For this reason, it would make more sense to include the provision staying all proceedings in the court of appeals within the rule governing petitions for bypass.

B. THE SUPREME COURT'S RUNAWAY DISCRETION

Not only does the petition for bypass create procedural inconveniences for the court of appeals and litigants, but the guidance of section 809.60(4) provides the Supreme Court with broad discretion in deciding whether to grant a petition for bypass.[126] The rule unhelpfully states that the Court may grant a petition for bypass "upon such conditions as it considers appropriate."[127] Yet, it is not immediately clear what those appropriate conditions are, and the Supreme Court has not articulated them with any specificity.[128]

Accordingly, this Section examines three areas where the vague guidance of the rule is glaring. To begin, Section II.B.1 analyzes the Court's current articulation of the appropriate conditions for bypass, the vagueness of these conditions, and where the Court has made exceptions to its general practice. Next, Section II.B.2 explains the anomaly that the petition for bypass presents in the context of the overall statutory scheme of the Wisconsin Rules of Appellate Procedure. Finally, Section II.B.3 discusses the potential for judicial abuse that results from these issues.

1. Unclear Appropriate Conditions and Exceptions

At first blush, it appears that appropriate conditions for bypass are generally those that meet the criteria the Court would use to grant a petition for review anyway, and the cases are often those that the Court would choose to consider regardless of how the court of appeals may decide the issue.[129] The Court has further articulated that it generally does not grant petitions

124. *See id.* §§ 808.10(1), 809.62(1m)(a)(1).

125. *See supra* text accompanying notes 111–12.

126. *See* WIS. STAT. § 809.60(4).

127. *Id.*

128. *See, e.g.*, Becker v. Dane County, No. 2021AP1343, at 2 (Wis. Nov. 16, 2021) (order dismissing petition for bypass) (Hagedorn, J., concurring) (stating that, in denying a petition for bypass deemed premature, the Court "[g]enerally . . . do[es] not give reasons" as to why it denies petitions for bypass "because we deny cases for all sorts of reasons").

129. INTERNAL OPERATING PROCEDURES, *supra* note 30, at 8.

for bypass until after briefing has completed in the court of appeals.[130] It has rightly recognized that accepting a petition for bypass before briefs have been filed in the court of appeals can be precarious, as it can introduce the possibility of underdeveloped issues for the Court to review.[131]

However, even with this stated procedure, the Court has notably started to deviate from waiting for briefing to complete in the court of appeals.[132] The Court has stated that it will make "exceptions to this practice . . . based on 'the unique circumstances of [the] case.'"[133] And so far, the Court has enumerated two such unique circumstances: (1) when a lower court cannot practically provide relief or where relief is needed urgently;[134] and (2) when a case alleges a continuous injury that "threatens the functioning of government, such that '[d]elaying access to this court while the parties file briefs in the court of appeals may unnecessarily prolong that alleged harm.'"[135]

Moreover, Wisconsin's vague petition for bypass rule seems to be an anomaly compared to other versions of this procedural mechanism. Other courts have fashioned more specific guidance for the same, or similar, practice.[136] For example, Nebraska's bypass statute enumerates six factors that its supreme court may consider when deciding whether to grant a petition.[137] Similarly,

---

130. *See* Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Soc. Servs., 387 N.W.2d 245, 247 (Wis. 1986) ("This court dismissed the bypass petition as premature because briefs on the appeal had not been filed."); *see also Becker*, No. 2021AP1343, at 1 ("This court generally denies as premature petitions for bypass prior to the filing of briefs in the court of appeals." (citing *Milwaukee Brewers*, 387 N.W.2d at 247)).

131. *Becker*, No. 2021AP1343, at 2 (Hagedorn, J., concurring) (indicating that petitions for bypass can be denied because "the issues are not well-presented or are unclear"). A potential concomitant pit fall for the Court arises in determining the proper standard of review to apply where issues are not well presented. *See, e.g.*, Adam N. Steinman, *Law, Fact, and Appellate Review*, 110 IOWA L. REV. 1, 38 (2024) (stating that when appellate courts review lower court decisions "[w]hat matters . . . is how the appellate court chooses to analyze and resolve the issue" and that appellate courts should "identify the rules, tests, principles, or standards that govern a particular issue").

132. *See, e.g.*, State *ex rel.* Kaul v. Prehn, No. 2021AP1673, at 2 (Wis. Nov. 16, 2021) (order granting petition for bypass) (Rebecca Grassl Bradley, J., concurring) ("[T]he court unanimously grants this petition to bypass, despite the fact that briefing has not been completed in the court of appeals."); Brown v. Wis. Elections Comm'n, No. 2024AP232, at 1 (Wis. May 3, 2024) (order granting petition for bypass); Kennedy v. Wis. Elections Comm'n, No. 2024AP1872, at 1 (Wis. Sept. 20, 2024) (order granting petition for bypass).

133. *Brown*, No. 2024AP232, at 3 (Dallet, J., concurring).

134. *Id.* (quoting *Becker*, No. 2021AP1343, at 2 (Hagedorn, J., concurring)).

135. *Id.* (quoting *Kaul*, No. 2021AP1673, at 3 (Dallet, J., concurring)).

136. *See, e.g.*, SUP. CT. R. 11 (2019); NEB. REV. STAT. § 24-1106(2) (2024); COLO. APP. R. 50 (2025); IND. R. APP. P. 56(A) (2025); KAN. SUP. CT. R. 8.02 (2016). This list is by no means comprehensive.

137. NEB. REV. STAT. § 24-1106(2). Specifically, Nebraska's statute provides that the Supreme Court may consider:

> (a) Whether the case involves a question of first impression or presents a novel legal question;

the U.S. Supreme Court has set a high bar for which cases it will accept that seek to bypass the federal courts of appeals, indicating that the case must be of "such imperative public importance" to justify immediate consideration.[138] Wisconsin's statutes notably lack any of the specificity that the above examples demonstrate.

2. Inconsistency in the Statutory Structure

Additionally, the other mechanisms that are available to litigants in Wisconsin for bringing a case before the Supreme Court recognize the role the court of appeals plays in the appellate process and provide standards the court of appeals can use for predicting the outcomes of those petitions. For example, the petition for review may only be filed after the court of appeals has issued a final decision in a case.[139] And, as noted above, the rule governing the petition for review enumerates a list of factors the Court may consider when determining whether to grant it.[140] The petition for bypass lacks these concrete characteristics.

The other two mechanisms—the petition for supervisory writ and petition for original action—fall under the Court's original and supervisory jurisdiction, respectively. Thus, no criteria are necessary to provide to the court of appeals, both because the Supreme Court's original and supervisory jurisdiction is broad,[141] and, at least with respect to the Court's original

---

(b) Whether the case involves a question of state or federal constitutional interpretation;
(c) Whether the case raises a question of law regarding the validity of a statute;
(d) Whether the case involves issues upon which there is an inconsistency in the decisions of the Court of Appeals or of the Supreme Court;
(e) Whether the case is one of significant public interest; and
(f) Whether the case involves a question of qualified immunity in any civil action under 42 U.S.C. [§] 1983, as the section existed on August 24, 2017.

Id. § 24-1106(2)(a)–(f).

138. SUP. CT. R. 11. The U.S. Supreme Court calls its procedure for bypassing the courts of appeals "Certiorari . . . Before Judgment." *Id.* However, this is effectively the same thing as Wisconsin's petition for bypass mechanism, since a petition for a writ of certiorari before judgment asks the Court to review a pending case in one of the federal courts of appeals before a final decision has been made in the appellate court. *Id.* It should be noted that the U.S. Supreme Court's rule is not entirely clear or specific either, which makes Wisconsin's rule even more suspect. Indeed, some commentators have levelled similar criticisms regarding the clarity of the U.S. Supreme Court's use of certiorari before judgment as have been stated in this Note against the Wisconsin Supreme Court's use of the petition for bypass. *See generally* James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 SUP. CT. REV. 259.

139. *See* WIS. STAT. § 809.62(1m)(a)(1) (2025).

140. *Id.* § 809.62(1r).

141. *See* Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930-OA, at 5 (Wis. Dec. 4, 2020) (order denying petition for original action) (Roggensack, C.J., dissenting) ("Our [broad subject matter] jurisdiction is grounded in the Wisconsin Constitution." (citing City of Eau Claire v. Booth, 882 N.W.2d 738, 741 (Wis. 2016))). *See generally* Croy, *supra* note 54 (arguing the Wisconsin Constitution provides that the Supreme Court's original jurisdiction has great breadth).

jurisdiction, the mechanisms that fall under it refer to the Court's ability to hear a case in the first instance.[142] Even so, the rule governing petitions for supervisory writs, at least, still provides the concrete requirement that a party first file a petition with the court of appeals, and only then file a petition for supervisory writ with the Supreme Court if it is impractical to seek the requested relief in the court of appeals.[143]

Thus, the discretion afforded to the Supreme Court in deciding a petition for bypass is ostensibly much greater than for deciding a petition for supervisory writ. In other words, the guidance for both the petition for review and petition for supervisory writ require either some type of decision from the court of appeals or, in the alternative, reasoning from the parties as to why the intermediate court cannot adequately provide the requested relief.[144] In this way, the Rules explain the role the court of appeals possesses in a given case and provide it with predictive standards for when a petition for supervisory writ is properly filed.

But the guidance for the petition for bypass relegates the court of appeals to a mere spectator in cases before it once a petition for bypass is filed. This relegation seems to be in strong tension with the overall scheme of the Rules that indicates both a preference for the court of appeals' active involvement in appellate decision-making and a preference for enumerated criteria for the Supreme Court's exercise of its appellate jurisdiction.[145] Consequently, under the current Rules, a petition for bypass functions more like a petition for original action, in the sense that: (1) the amount of active involvement of the court of appeals is practically nonexistent; and (2) no statutory guidance exists providing how the Supreme Court will—or should—decide a given petition.

Further, as opposed to a petition for original action, where the court of appeals does not have any vested interest in needing to predict the Supreme Court's decision, the grant or denial of a petition for bypass has instant effects on the proceedings at the court of appeals. Thus, the lack of guidance for when a petition for bypass will be granted by the Supreme Court reduces the ability of the court of appeals and litigants to predict what the Supreme Court will ultimately do when a petition is brought before it, which presents a troubling inconsistency from the statutory guidance for the other mechanisms of Supreme Court review involving the court of appeals.[146]

3. Potential for Judicial Abuse

Importantly, these vague standards open the door to judicial abuse of the petition for bypass mechanism, reducing transparency in Wisconsin courts

142. *Original Jurisdiction*, BLACK'S LAW DICTIONARY (12th ed. 2024).
143. WIS. STAT. § 809.71(1).
144. *See id.* §§ 809.71(1), 809.62(1m)(a)(1).
145. *Id.* § 809.62(1r).
146. *See id.* § 809.60(4).

and diminishing the public's trust in the judiciary. Most of what determines when the Court will grant a petition for bypass hinges on the Court's own articulated rules and exceptions[147] or what it has written in its internal operating procedures.[148]

Yet, judicial rulings can be—and often are—changed, and exceptions can be made.[149] Furthermore, the Court's internal operating procedures serve only a guidance purpose; they are neither Rules of Appellate Procedure nor statutes and, as such, they lack the full force of law.[150] Likewise, the internal operating procedures can be changed or removed by the Court at any time.[151] Therefore, not only does the Court have almost unrestrained discretion in deciding whether to grant a petition for bypass, it also can dictate almost any standard for doing so without providing reasons for its decision.[152] This lack of transparency provides a breeding ground for abuse of judicial discretion and, as Section II.C of this Note explains, the Court's current use of the petition to bypass mechanism is approaching this concerning territory.[153]

---

147. *See, e.g.*, Brown v. Wis. Elections Comm'n, No. 2024AP232, at 3 (Wis. May 3, 2024) (order granting petition for bypass) (Dallet, J., concurring).

148. *See, e.g.*, INTERNAL OPERATING PROCEDURES, *supra* note 30, at 8–10.

149. *See, e.g.*, Becker v. Dane County, No. 2021AP1343, at 4 (Wis. Nov. 16, 2021) (order dismissing petition for bypass) (Rebecca Grassl Bradley, J., dissenting) ("[T]he majority inconsistently applies a mere practice without disclosing any standards by which it will choose whether to apply it.").

150. *See* INTERNAL OPERATING PROCEDURES, *supra* note 30, at 1 ("These internal operating procedures are merely descriptive of how the court currently functions.").

151. *Id.* ("Any internal operating procedure may be suspended or modified by a majority vote of the court.").

152. This relatively unrestrained discretion, and resulting lack of transparency, raises serious "shadow docket" concerns. *See generally* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–4 (2015) (explaining the shadow docket as the U.S. Supreme Court's "non-merits work" and that, in the Court's non-merits decisions, "[t]he Court [does] not explain[] their legal basis and it is not even clear to what extent individual Justices agree with those decisions"); STEPHEN VLADECK, THE SHADOW DOCKET 12–13 (2024) (explaining the U.S. Supreme Court's recent use of the shadow docket has led to the Court "with increasing frequency, interven[ing] preemptively, if not prematurely, in some of our country's most fraught political disputes through decisions that are unseen, unsigned, and almost always unexplained"); Rebecca Frank Dallet & Matt Woleske, *State Shadow Dockets*, 2022 WIS. L. REV. 1063, 1065–67 (discussing the shadow docket as it relates to state courts—specifically Wisconsin).

As Justice Dallet explains, although the Wisconsin Supreme Court's orders denying or granting petitions for bypass "are technically public, they are nearly impossible to access." Dallet & Woleske, *supra*, at 1078. And these orders might not be particularly informative even if they can be accessed since "[m]ost orders contain little or no written reasoning for the court's conclusions, due at least in part to the limited briefing, lack of oral argument, and inherent time constraints imposed by emergency requests." *Id.* at 1080.

153. *See infra* Section II.C; *see also* Brown v. Wis. Elections Comm'n, No. 2024AP232, at 6 (Wis. May 3, 2024) (order granting petition for bypass) (Ziegler, C.J., dissenting) ("Granting the petitions for bypass, while circumventing traditional practices, procedures and process, needlessly tramples over those safeguards once espoused by [the majority].").

C. THE POLITICAL WEAPONIZATION OF THE PETITION FOR BYPASS

The lack of guidance governing petitions for bypass and the wide discretion the Court is afforded are made all the more concerning considering the fact that the Court has generally granted petitions for bypass in cases of significant political importance, which has become increasingly true in recent terms.[154] This trend became more pronounced in the Court's 2024–25 term as, at the time of writing, it had six cases before it that were up on bypass,[155] all of which involved contentious and controversial political issues, such as abortion access and election procedures.[156] The increase in filing and granting of petitions to bypass coincided with Justice Protasiewicz's election to the Court in 2023, which flipped the political composition of the Court to a liberal majority.[157] Consequently, since Justice Protasiewicz has been on the bench, the new

154. *See, e.g.*, *Brown*, No. 2024AP232, at 1 (absentee voting procedures); Kaul v. Urmanski, No. 2023AP2362, at 2 (Wis. July 2, 2024) (order granting petition for bypass) (abortion access); Kennedy v. Wis. Elections Comm'n, No. 2024AP1872, at 1 (Wis. Sept. 20, 2024) (order granting petition for bypass) (ballot access for prospective presidential candidate); Wis. Elections Comm'n v. LeMahieu, No. 2024AP351, at 1 (Wis. Sept. 11, 2024) (order granting petition for bypass) (legislature's ability to appoint administrator of Wisconsin Elections Commission). All of these petitions were granted in cases that were decided in the Court's 2024–25 term. Issues on which bypass in previous terms was granted include whether drop boxes for ballots were permissible under Wisconsin law and whether a government official lawfully held over a government position, among others. *See* Teigen v. Wis. Elections Comm'n, 976 N.W.2d 519, 525 (Wis. 2022), *overruled by* Priorities USA v. Wis. Elections Comm'n, 8 N.W.3d 429, 431–32 (Wis. 2024) (lawfulness of ballot boxes); State *ex rel.* Kaul v. Prehn, 976 N.W.2d 821, 823 (Wis. 2022) (government official lawfully holding over position).

155. *See* TABLE OF PENDING CASES (OCT. 2024 UPDATE), *supra* note 104, at 6–9; TABLE OF PENDING CASES (DEC. 2024 UPDATE), *supra* note 104, at 9–10, 12; OFF. OF THE CLERK OF THE WIS. SUP. CT., TABLE OF PENDING CASES 10, 12 (July 15, 2025) [hereinafter TABLE OF PENDING CASES (JULY 2025 UPDATE)], https://web.archive.org/web/20250813225818/https://www.wicourts.gov/sc/sccase/DisplayDocument.pdf?content=pdf&seqNo=985269 [https://perma.cc/CNY7-LNSL] (accounting for the grant of bypass on January 24, 2025, in *Wisconsin State Legislature v. Wisconsin Dep't of Public Instruction*, 22 N.W.3d 932 (Wis. 2025)). The Court granted petitions for bypass in two of these cases before the 2024–25 term began. *See* TABLE OF PENDING CASES (OCT. 2024 UPDATE), *supra* note 104, at 9; *see also Brown*, No. 2024AP232, at 1; *Urmanski*, No. 2023AP2362, at 2. However, both cases were still pending at the start of the Court's 2024–25 term and were decided in that term. *See* Kaul v. Urmanski, 22 N.W.3d 740, 742 (Wis. 2025) (holding a nineteenth-century Wisconsin law banning abortion was invalid and "does not ban abortion in the State of Wisconsin"); Brown v. Wis. Elections Comm'n, 16 N.W.3d 619, 621 (Wis. 2025) (holding an elector did not have "standing to seek judicial review of a Wisconsin Elections Commission (WEC) decision regarding the in-person absentee voting procedures" of a local election).

156. *See, e.g.*, *Brown*, No. 2024AP232, at 1 (absentee voting procedures); *Urmanski*, No. 2023AP2362, at 2 (abortion access).

157. *See* ANNUAL STATISTICAL REPORT: 2023–2024, *supra* note 5, at 5 (indicating thirty-four petitions for bypass were filed with the Court in 2023–24, up twelve from the previous term). Justice Protasiewicz was elected to the Supreme Court on April 4, 2023, and officially took office on August 1, 2023, one month before the beginning of the Court's 2023–24 term. *Justice Protasiewicz*, *supra* note 6; *see also* ANNUAL STATISTICAL REPORT: 2023–2024, *supra* note 5, at 2 (indicating that the Supreme Court's 2023–24 term covers the Supreme Court's functions "from September 1, 2023, through August 31, 2024").

majority granted six petitions for bypass in cases with profound consequences on the political landscape.[158] Thus, there is a very real danger that the petition for bypass has turned into a newfound political weapon.[159]

In the years preceding Justice Protasiewicz's assumption of her seat, the Court denied or dismissed petitions for bypass in several politically sensitive cases, including compelling a healthcare provider to administer alternative treatments for COVID-19,[160] whether local officials could issue public health orders responding to the COVID-19 pandemic,[161] public school policies allowing students to choose their pronouns without informing parents of their child's choice,[162] and the proper governmental body responsible for changing voter registration status.[163] With one exception,[164] each of these petitions were filed before briefing had been completed in the court of appeals, and each one was ultimately resolved by the Supreme Court after the litigants filed petitions for review or filed a petition for bypass after briefing

158. BRYNA GODAR, STATE DEMOCRACY RSCH. INITIATIVE: UNIV. WIS. L. SCH., WISCONSIN SUPREME COURT 2023 TERM REVIEW AND 2024 PREVIEW 5–7 (2024); *see also* Priorities USA v. Wis. Elections Comm'n, No. 2024AP164, at 1 (Wis. Mar. 12, 2024) (order granting petition for bypass); *Brown*, No. 2024AP232, at 1; *Urmanski*, No. 2023AP2362, at 2; Wis. Elections Comm'n v. LeMahieu, No. 2024AP351, at 1 (Wis. Sept. 11, 2024) (order granting petition for bypass); Kennedy v. Wis. Elections Comm'n, No. 2024AP1872, at 1 (Wis. Sept. 20, 2024) (order granting petition for bypass); Serv. Emps. Int'l Union Healthcare Wis. v. Wis. Emp. Rels. Comm'n, No. 2024AP717, at 1 (Wis. Dec. 10, 2024) (order granting petition for bypass).

159. *See Brown*, No. 2024AP232, at 6 (Ziegler, C.J., dissenting) ("Our court should not prematurely and needlessly wander, once again, into the political thicket."); *see also id.* at 11 (Hagedorn, J., dissenting) (stating that the Court's traditional role of "deciding important legal (not political) issues after they have been vetted by courts below. . . . is fading fast").

160. Gahl *ex rel.* Zingsheim v. Aurora Health Care, No. 2021AP1787-FT, at 3 (Wis. Oct. 25, 2021) (order denying petition for bypass).

161. Becker v. Dane County, No. 2021AP1343, at 2 (Wis. Nov. 16, 2021) (order dismissing petition for bypass).

162. Jane Doe 4 v. Madison Metro. Sch. Dist., Nos. 2022AP2042, 2023AP305, 2023AP306, at 2 (Wis. June 14, 2023) (amended order denying petition for bypass).

163. State *ex rel.* Zignego v. Wis. Elections Comm'n, No. 2019AP2397, at 2 (Wis. Jan. 13, 2020) (order denying petition for bypass).

164. *Jane Doe 4* was voluntarily dismissed in the court of appeals following the Supreme Court's denial of the petition for bypass. *Jane Doe 4 v. Madison Metropolitan School District: Case History*, WIS. CT. SYS., https://wscca.wicourts.gov/appealHistory.xsl?caseNo=2022AP002042 [https://perma.cc/CM8X-N3Q5] (indicating a notice of voluntary dismissal was filed on June 30, 2023, and granted that same day).

had been completed.[165] As these examples illustrate, the Court has not always taken up politically sensitive cases on bypass in the expedited way it does now.[166]

Although it is not immediately clear why the Court decided to expedite so many cases so quickly on bypass, one very likely reason is informed by the political uncertainty the Court was facing before Justice Crawford was elected. The slender 4-3 liberal majority was under threat due to liberal Justice Ann Walsh Bradley's impending retirement.[167] Likewise, the Court was in the midst of political turmoil within its ranks.[168] Knowing the stakes that these cases

---

165. Gahl *ex rel.* Zingsheim v. Aurora Health Care, 989 N.W.2d 561, 566 (Wis. 2023) (dismissing petition for bypass filed before briefing had finished in the court of appeals but ultimately deciding case after a petition for review was filed); Becker v. Dane County, 977 N.W.2d 390, 395 (Wis. 2022) (deciding case after petition for bypass was granted following completion of briefing in court of appeals); State *ex rel.* Zignego v. Wis. Elections Comm'n, 957 N.W.2d 208, 211 (Wis. 2021) (deciding case after denying petition for bypass but then granting a petition for review).

166. Brown v. Wis. Elections Comm'n, No. 2024AP232, at 11 (Wis. May 3, 2024) (order granting petition for bypass) (Hagedorn, J., dissenting) (stating that the Court has traditionally "focused on deciding important . . . issues *after they had been vetted by courts below*" (emphasis added)).

167. Statement from Justice Ann Walsh Bradley, *supra* note 92.

168. The political infighting at the Court has made its way into many judicial orders and opinions. For example, in the order granting the petition for original action in *Planned Parenthood of Wisconsin v. Urmanski*, then-Justice Jill Karofsky, part of the Court's liberal wing, wrote a concurrence to address Justice Rebecca Grassl Bradley's "ad hominem attacks that would be more at home in an ill-advised late-night rant on social media than in a judicial writing." Planned Parenthood of Wis. v. Urmanski, No. 2024AP330-OA, at 2 (Wis. July 2, 2024) (order granting petition for original action) (Karofsky, J., concurring). Justice Rebecca Bradley, in her dissent, accused the liberal Justices of leading a "crusade to impose their values on the people of Wisconsin, wielding raw political power constitutionally vested in the legislature alone." *Id.* at 5 (Rebecca Grassl Bradley, J., dissenting). Justice Karofsky dismissed Justice Bradley's strong words, stating "[n]ot much of the vitriol deserves to be dignified with a substantive response." *Id.* at 3 (Karofsky, J., concurring).

Likewise, in the order granting the petition for bypass in *Brown v. Wisconsin Elections Commission*, then-Chief Justice Ziegler wrote a strong dissent where, among other things, she asserted that the majority's decision to grant bypass in this case was "directly contrary to positions [it] ha[d] taken in the past" and this change of direction was potentially due to the fact that the new majority is "unable to resist the allure of political control." *Brown*, No. 2024AP232, at 4 (Wis. May 3, 2024) (order granting petition for bypass) (Ziegler, C.J., dissenting). Then-Chief Justice Ziegler further questioned Justice Protasiewicz's decision to not recuse herself, asking "given my colleagues' campaign promises to voters that they would not sit on cases which involved the Democratic Party, how is it that they can even accept bypass of this case and ignore the parties' call for recusal?" *Id.* at 9 (footnote omitted). And just before Justice Protasiewicz took her position on the bench, the Court, in its decision denying bypass in *Jane Doe 4*, displayed how far the political rift among the Justices could extend. *See generally* Jane Doe 4 v. Madison Metro. Sch. Dist., Nos. 2022AP2042, 2023AP305, 2023AP306 (Wis. June 14, 2023) (amended order denying petition for bypass).

The petition for bypass in this case had originally been denied on May 19, 2023. Jane Doe 4 v. Madison Metro. Sch. Dist., Nos. 2022AP2042, 2023AP305, 2023AP306, at 2 (Wis. May 19, 2023) (order denying petition for bypass). However, after this order was released, an amended order followed where Justice Rebecca Bradley wrote a dissent almost exclusively responding to Justice Hagedorn's original concurrence, but also taking stabs at the rest of the majority. *See Jane Doe 4*, Nos. 2022AP2042, 2023AP305, 2023AP306, at 54–66 (Rebecca Grassl Bradley, J., dissenting). In an exchange that was maybe better suited for a courtroom drama than

presented, and understanding the Court's uncertain political future, the slim liberal majority may have been taking up more cases on bypass at an expedited rate to stave off unwanted political outcomes.[169] But even if the Court's reasons for granting these petitions were more benign, by taking up more of these controversial cases on bypass, and on a more expedited schedule, the Court still appeared to engage in the practice of resolving politically sensitive cases in the above fashion, bringing their objectivity into question.[170]

A striking example of this practice comes from the first petition for bypass filed after the flip to liberal control in *Priorities USA v. Wisconsin Elections Commission*, which was filed on February 9, 2024[171] and granted by the Court on March 12, 2024.[172] The case concerned one issue only: "Whether to overrule the Court's holding in *Teigen v. Wisconsin Elections Commission* . . . that Wis. Stat. § 6.87 precludes the use of secure drop boxes for the return of absentee ballots to municipal clerks . . . ."[173]

---

a judicial opinion, Justice Rebecca Bradley accused Justice Hagedorn of "lacing his concurrence with vaguely sexist suggestions" and that both he and the liberals that made up "[t]he majority should revisit the judicial oath and resign if unwilling to fulfill it." *Id.* at 66. Justice Hagedorn responded by adding a footnote to his original concurrence stating the following:

> Following the release of this order, Justice Rebecca Grassl Bradley determined she wished to engage with my concurrence. . . .
>
> I . . . do not respond to this supplemental writing because of its abandonment of basic judicial decorum. Knives-out bluster may scratch the itch of political activists lusting for the fight, but it does not serve the rule of law. There are important debates to be had over how this court carries out its duties, and spirited intellectual sparring is fair game. I will not, however, further dignify a writing that engages in personal attacks rather than a respectful debate over ideas.

Id. at 3 n.1 (Hagedorn, J., concurring). In light of the strong language of this order, it is worth noting that, although Justice Hagedorn is a conservative member of the Court, he sided with the liberal Justices in this case, which presented the politically controversial issue of whether public-school policies allowing students to choose their pronouns without informing parents of their child's choice. *See id.* at 3 (framing the issue as, "[H]ow does the generally recognized but vaguely defined unenumerated right to parent one's child intersect with a school district's policy on sex and gender expression?").

169. *See* Kennedy v. Wis. Elections Comm'n, No. 2024AP1872, at 2 (Wis. Sept. 20, 2024) (order granting petition for bypass) (Rebecca Grassl Bradley, J., dissenting); *see also Brown*, No. 2024AP232, at 10 (Ziegler, C.J., dissenting) ("Courting political shenanigans via cherry-picking certain cases and issues . . . should be reprehensible to a court of law.").

170. *See Brown*, No. 2024AP232, at 10 (Hagedorn, J., dissenting) ("The court once again moves to expedite a case raising politically charged issues, rather than allow the normal judicial process to play out.").

171. *Priorities USA v. Wisconsin Elections Commission: Case History*, WIS. CT. SYS. (2024), https://wscca.wicourts.gov/appealHistory.xsl?caseNo=2024AP000164&cacheId=B10C175BA0B89C43CA08DE1F726E569B&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC [https://perma.cc/KK9R-DCMK].

172. Priorities USA v. Wis. Elections Comm'n, No. 2024AP164, at 1 (Wis. Mar. 12, 2024) (order granting petition for bypass).

173. *Id.* (citation omitted).

Notably, *Teigen* was decided in 2022, when the Court still had a conservative majority. Predictably, the Court there split 4-3 along ideological lines, with the three liberals in strong dissent, which is best evidenced by Justice Ann Walsh Bradley's scathing words in her dissenting opinion: "[T]he majority/lead opinion blithely and erroneously seeks to sow distrust in the administration of our elections and through its faulty analysis erects yet another barrier for voters to exercise this 'sacred right.'"[174] So it is not too surprising that when the opportunity came for the new liberal majority to reconsider *Teigen*, it jumped at the chance.[175] The Court ultimately overruled *Teigen* in *Priorities USA*, holding that Wisconsin law *does* allow ballot drop boxes and that they may be lawfully utilized in the administration of elections.[176]

Of course, it is not the case that all briefing had concluded in the court of appeals for every petition for bypass filed and granted by the Supreme Court before Justice Protasiewicz's election.[177] Similarly, not every decision on a petition for bypass was devoid of any disagreement on perceived political grounds among the Justices.[178] Some of this disagreement is to be expected as Wisconsin Supreme Court Justices are elected in highly contested elections,[179] and the cases coming in front of the Court on bypass are generally controversial. Yet, of the six petitions for bypass that have been granted by the Court immediately following the flip to a liberal majority, four of them were granted before briefing had been completed in the court of appeals.[180] Likewise, at least one conservative member of the Court dissented

174. Teigen v. Wis. Elections Comm'n, 976 N.W.2d 519, 576 (Wis. 2022) (Ann Walsh Bradley, J., dissenting) (footnote omitted).

175. *See Priorities USA*, No. 2024AP164, at 2 (Rebecca Grassl Bradley, J., dissenting) ("[E]mboldened by a new makeup of the court, this new majority embraces the opportunity to overturn *Teigen*.").

176. Priorities USA v. Wis. Elections Comm'n, 8 N.W.3d 429, 432 (Wis. 2024).

177. *See, e.g.*, State *ex rel.* Kaul v. Prehn, No. 2021AP1673, at 1 (Wis. Nov. 16, 2021) (order granting petition for bypass); Teigen v. Wis. Elections Comm'n, No. 2022AP91, at 3 (Wis. Jan. 28, 2022) (order granting petition for bypass).

178. *See, e.g.*, Jane Doe 4 v. Madison Metro. Sch. Dist., Nos. 2022AP2042, 2023AP305, 2023AP306, at 3 n.1 (Wis. June 14, 2023) (amended order denying petition for bypass) (Hagedorn, J., concurring) (indicating that he would not engage with Justice Bradley's dissent "because of its abandonment of basic judicial decorum").

179. *See Wisconsin Supreme Court Elections, 2023*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_Supreme_Court_elections,_2023#Election_news [https://perma.cc/9HAK-VDJZ] (indicating the election between Justice Protasiewicz and conservative nominee Daniel Kelly "set a new record for campaign spending in state judicial elections"); *see also Wisconsin Supreme Court Elections, 2020*, BALLOTPEDIA, https://ballotpedia.org/Wisconsin_Supreme_Court_elections,_2020 [https://perma.cc/PL3M-YQA7] (indicating that, before Chief Justice Karofsky's landslide election over Daniel Kelly, "[r]ecent elections to the Wisconsin Supreme Court had been decided by narrow margins").

180. The only petitions granted where briefs had been filed in the court of appeals were in *Wisconsin Elections Commission v. LeMahieu* and *Service Employees International Union Healthcare Wisconsin v. Wisconsin Employee Relations Commission*. *See* Wis. Elections Comm'n v. LeMahieu, No. 2024AP351, at 1 (Wis. Sept. 11, 2024) (order granting petition for bypass); Serv. Emps. Int'l

in three out of the six orders granting these petitions.[181] Thus, more petitions for bypass are being granted at a quicker pace,[182] and they are bringing about more significant disagreement among the Justices.[183]

As the above illustrations indicate, the Court's use of the petition for bypass mechanism is becoming a formidable political weapon.[184] Litigants are increasingly likely to file petitions for bypass, and the Court is increasingly likely to use it for seemingly political purposes. By doing so, the Court is engaging in the political process in a way that can substantially reshape the state's political landscape.[185]

Further, because the petition for bypass rule gives the Court broad discretion in deciding which cases it will grant,[186] the Court can grant bypass petitions in cases that serve the current majority's political goals.[187] This practice opens the door to the use of the petition for bypass mechanism for retaliatory purposes if and when the majority of the Court flips. Not only is this

---

Union Healthcare Wis. v. Wis. Emp. Rels. Comm'n, No. 2024AP717, at 1 (Wis. Dec. 10, 2024) (order granting petition for bypass).

181. The only orders without a dissent from a conservative member of the Court were in *Wisconsin Elections Commission v. LeMahieu*, *Kaul v. Urmanski*, and *Service Employees International Union Healthcare Wisconsin v. Wisconsin Employee Relations Commission*. *See LeMahieu*, No. 2024AP351, at 1; Kaul v. Urmanski, No. 2023AP2362, at 2 (Wis. July 2, 2024) (order granting petition for bypass); *Serv. Emps. Int'l*, No. 2024AP717, at 1. Although there was no dissent in the order granting the petition for bypass in *Kaul v. Urmanski*, there was a vigorous dissent from Justice Rebecca Grassl Bradley in the order granting a petition for original action in *Planned Parenthood of Wisconsin v. Urmanski*. *See* Planned Parenthood of Wis. v. Urmanski, No. 2024AP330-OA, at 7–10 (Wis. July 2, 2024) (order granting petition for original action) (Rebecca Grassl Bradley, J., dissenting). The two cases both involve the issues of abortion, but *Kaul* concerns a statutory challenge, whereas *Planned Parenthood* concerns a constitutional challenge. *See id.* at 5 ("Planned Parenthood's original action petition raises a constitutional issue, which need not and should not be decided before the court resolves the statutory challenge in *Kaul v. Urmanski*."). Thus, lest the reader be confused, abortion access is a highly controversial political issue in the State of Wisconsin, and the lack of dissent in the Court's order granting a petition for bypass in *Kaul* should not be taken to indicate the Justices' views align on that issue.

182. *See* Brown v. Wis. Elections Comm'n, No. 2024AP232, at 11 (Wis. May 3, 2024) (order granting petition for bypass) (Hagedorn, J., dissenting).

183. *See generally* Priorities USA v. Wis. Elections Comm'n, No. 2024AP164 (Wis. Mar. 12, 2024) (order granting petition for bypass); *Brown*, No. 2024AP232 (order granting petition for bypass); Kennedy v. Wis. Elections Comm'n, No. 2024AP1872 (Wis. Sept. 20, 2024) (order granting petition for bypass).

184. *See e.g.*, *Priorities USA*, No. 2024AP164, at 2 (Rebecca Grassl Bradley, J., dissenting) ("By granting this petition to bypass, the majority again aims to increase the electoral prospects of its preferred political party."); *Brown*, No. 2024AP232, at 11 (Hagedorn, J., dissenting) ("Political actors believe . . . that they are likely to have their complaints given special treatment. . . . [W]e should [therefore] not be surprised when the flood of . . . petitions for bypass . . . continues.").

185. *See e.g.*, *Priorities USA*, No. 2024AP164, at 2 (Rebecca Grassl Bradley, J., dissenting).

186. *See* WIS. STAT. § 809.60(4) (2025).

187. *See Priorities USA*, No. 2024AP164, at 3–4 (Rebecca Grassl Bradley, J., dissenting) ("The new majority . . . succumbs to . . . its preferred political party . . . ."); *see also Brown*, No. 2024AP232, at 11 (Hagedorn, J., dissenting); *Kennedy*, No. 2024AP1872, at 2 (Rebecca Grassl Bradley, J., dissenting).

usage harmful to the institutional legitimacy of the Court,[188] but it undermines predictability and transparency of the Court for litigants and the public alike.

III. REFORMING THE PETITION FOR BYPASS

The increased use of the petition for bypass mechanism counsels for clearer guidance for its use. Indeed, members of the Wisconsin Supreme Court also appear to realize this concern.[189] The petition for bypass rule as it currently stands is vague, unclear, and highly deferential to the Supreme Court's will. As a result, it is increasingly vulnerable to abuse by both litigants and the Court, ultimately reducing transparency, increasing litigation costs, and causing procedural nightmares for the court of appeals.

This Part argues for amending the rule governing petitions for bypass to address the concerns discussed in this Note. This Part thus proceeds on two fronts. First, Section III.A addresses the procedural component of the petition for bypass to better address the procedural obstacles the mechanism presents for litigants and the court of appeals. Second, Section III.B addresses the discretionary component, advocating for implementing clearer standards for whether and when a petition for bypass will be granted as well as the codification of statutory guidance on the Court's increasingly common practice of granting petitions for bypass before briefs are filed in the court of appeals.[190]

---

188. *Priorities USA*, No. 2024AP164, at 3–4 (Rebecca Grassl Bradley, J., dissenting) ("The majority further erodes the legitimacy of this court by 'frequent[ly] and careless[ly]' departing from precedent, as the current majority has done and is poised to do again in this case." (alterations in original) (footnotes omitted)). Justice Rebecca Bradley's concerns in this order are well-founded, as institutional legitimacy has become a real issue for even the U.S. Supreme Court, not just Wisconsin, arising from public dissatisfaction. *See generally* Scott Dodson, *The Supreme Court and Public Opinion*, 111 IOWA L. REV. 117 (2025) (examining the U.S. Supreme Court's eroding public support and its effect on the Court's ability to confront the political branches of government); Richard J. Lazarus, *Lessons from the States for Promoting Procedural Regularity in U.S. Supreme Court Justice Recusals*, 111 IOWA L. REV. 895 (2026) (examining the recent loss of public faith in the U.S. Supreme Court due to lack of recusals for potential ethical issues and suggesting solutions borrowed from state supreme courts).

189. Jane Doe 4 v. Madison Metro. Sch. Dist., No. 2022AP2042, at 3 (Wis. Mar. 3, 2023) (order holding petition for bypass in abeyance) (Dallet, J., dissenting) ("I suggest we should codify in Wis. Stat. § (Rule) 809.60(1)(a) our usual practice of dismissing premature bypass petitions and the unwritten exceptions we sometimes apply.").

190. Ostensibly, either the legislature or the Court itself could implement these amendments since both have the authority to promulgate rules having to do with judicial procedure. *See* WIS. STAT. § 751.12(1), (4); *see also In re* E.B., 330 N.W.2d 584, 588 (Wis. 1983) ("[T]he legislature and the judiciary share the power to regulate practice and procedure in the judicial system."). To be sure, the standard practice for amending the Wisconsin Rules of Appellate Procedure appears to be through a petition to amend a rule filed with the Supreme Court, which holds a public hearing on the petition, and then makes the ultimate decision on whether or not to make the amendment. *See* WIS. STAT. § 751.12(2); *see also* INTERNAL OPERATING PROCEDURES, *supra* note 30, at 27 (describing rule for reconsideration of petitions to bypass). *See generally* WIS. SUP. CT. ADVISORY COMM. ON RULE PROCS., REPORT AND RECOMMENDATIONS: SUPREME COURT'S RULE MAKING FUNCTION 2–11 (2011), https://www.wicourts.gov/scrules/docs/committeereport.pdf [https://perma.cc/43SN-2GWY] (describing possible reforms to rule-making process). Even so,

A. FIXING THE PROCEDURAL OBSTACLES OF THE PETITION FOR BYPASS

Amending section 809.60(3) to stay all proceedings in the court of appeals when a petition for bypass is filed can solve many of the problems that the procedural component of 809.60 currently presents. Section 809.60(3) currently states that "[t]he filing of the petition [for bypass] stays the court of appeals from *taking under submission* the appeal or other proceeding."[191] As discussed in Section II.B, this provision still requires the court of appeals to rule on motions and accept briefs for filing when a petition is pending before the Supreme Court, since it only prevents the court of appeals from issuing a decision on that case.[192] Accordingly, section 809.60(3) should be amended to state that "the filing of the petition stays further proceedings in the court of appeals," mirroring section 809.62(5)'s staying requirement for petitions for review.[193]

The effect of this amendment would be to pause all proceedings in the court of appeals while a petition for bypass is pending before the Supreme Court, resolving some of the confusion and cost that section 809.60(3) currently presents. As a result, parties will only need to litigate in the Supreme Court, instead of both the court of appeals and Supreme Court, while the petition is pending. Because proceedings would be put on pause in the court of appeals while a petition for bypass is pending, there would be nothing to litigate there. In this way, by only having to litigate in one of the appellate courts, litigation becomes more efficient and cost-effective.

From an efficiency standpoint, this change provides parties with the ability to focus solely on the petition for bypass and response in the Supreme Court without the added necessity of having to file procedural motions or briefs in the court of appeals. Thus, litigants will likely be able to make more developed arguments and conduct more substantive legal research than they may otherwise be able to do currently. This practice would make the Supreme Court better informed about a case and whether it is appropriate for bypass, ultimately leading to a more informed decision on granting or dismissing the petition for bypass. Further, the court of appeals will not have to worry about ruling on motions or monitoring other filings in a case where a petition for bypass is pending.

Likewise, from an expense standpoint, staying proceedings in the court of appeals while a petition for bypass is pending reduces the number of filings made in both the court of appeals and the Supreme Court. This, in turn, reduces the costs to the parties of preparing and filing motions, briefs, and

---

this Note takes no position on whether the legislature or the Court should be the one amending the rule governing the petition for bypass.

191. WIS. STAT. § 809.60(3) (emphasis added).

192. *See supra* Section II.B.2; *see also* WIS. STAT. § 809.60(3).

193. *See* WIS. STAT. § 809.62(5).

other filings with both courts. Overall, the burden on the appellate courts and litigants will significantly diminish.

This amendment is made even more appealing because it can be adopted relatively easily. The legislature, or the Court itself, simply has to copy a provision that it already included in the statutes under section 809.62(5), and place that same language in section 809.60(3).[194] The amendment requires no further drafting or consideration, and it would have the effect of better serving the goal of the petition for bypass mechanism to decrease the workload on the appellate courts while also preserving a mechanism to get important cases in front of the Supreme Court quickly.[195]

B. LIMITING THE SUPREME COURT'S BROAD DISCRETION

Perhaps the most concerning aspect of the petition for bypass is the broad discretion it affords to the Supreme Court.[196] This discretion arises from section 809.60(4)'s vague discretionary component governing when the Court can grant a petition for bypass.[197] Further, the Court has been increasingly likely to use the discretionary component to take up cases on bypass before briefing has completed in the court of appeals and, importantly, nothing in the discretionary component's guidance exists to either permit or forbid this practice.[198] Therefore, clear standards should be codified in the Wisconsin Statutes to specify the conditions that are appropriate for bypass in order to increase transparency and predictability for litigants in the Wisconsin appellate courts, and to reduce the appearance of, and opportunity for, judicial decision-making based on political ideology.

Accordingly, this Section proposes two sets of amendments to address the Court's wide discretion. First, Section III.B.1 proposes an amendment to section 809.60(4) that enumerates the factors the Supreme Court can consider when determining whether to grant a petition for bypass. These factors largely mirror the factors the Court considers when determining whether to grant petitions for review. Second, Section III.B.2 proposes an amendment codifying the Court's general rule against granting petitions for bypass before briefs have been filed in the court of appeals, as well as the exceptions to this practice.

1. Enumerate the Factors the Court May Consider

Currently, the discretionary component allows the Supreme Court to grant a petition on conditions it considers "appropriate."[199] The word "appropriate" is highly deferential to the Supreme Court's discretion, and ostensibly any

194. *See id.* §§ 809.60(3), 809.62(5).

195. *See supra* Section I.C.

196. *See* WIS. STAT. § 809.60(4) ("The supreme court may grant the petition upon such conditions as it considers appropriate.").

197. *See id.*

198. *See supra* Section II.C.

199. WIS. STAT. § 809.60(4).

petition for bypass could meet this standard. Instead, section 809.60(4) should be amended to state that the Supreme Court may consider the same factors for deciding whether to grant a petition for bypass as it does for deciding whether to grant a petition for review.[200]

Further, section 809.60(4) should add a factor that comes from the guidance in the Court's internal operating procedures that a petition for bypass may be granted if it presents an issue the Court will ultimately consider regardless of the court of appeals' decision.[201] Similarly, section 809.60(4) should add, as a factor for the Court to consider for granting petitions for bypass, the guidance from its internal operating procedures that the petition presents an instance where there is a clear need to hasten an appellate decision.[202] Finally, to further increase transparency, section 809.60(4) should be amended to include a provision that states the Court should, upon denying or granting a petition for bypass, give its reasons for doing so. Thus, section 809.60(4) would be amended to state the following:

> Supreme court review is a matter of judicial discretion, not of right, and will only be granted when special and important reasons are presented. The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:
>
> (a) A real and significant question of federal or state constitutional law is presented.
>
> (b) The petition for bypass demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.
>
> (c) A decision by the supreme court will help develop, clarify or harmonize the law, and
>
> 1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
>
> 2. The question presented is a novel one, the resolution of which will have statewide impact; or
>
> 3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.
>
> (d) The issue is one the supreme court would ultimately choose to consider regardless of how the court of appeals may decide the issue.

200. *See id.* § 809.62(1r).

201. INTERNAL OPERATING PROCEDURES, *supra* note 30, at 8.

202. *See id.*

> (e) The petition presents an issue where there is a clear need to hasten the ultimate appellate decision.
>
> The Court shall, upon granting or denying a petition for bypass, give its reasons for granting or denying a petition in the order disposing of the petition.[203]

Again, as with the amendment to 809.60(1)'s procedural component,[204] this amendment to the discretionary component largely adopts the language used in section 809.62(1r) for granting petitions for review.[205] The last two subsections add some language directly from the Court's internal operating procedures.[206] Thus, the amendment can be easily adopted, at least as to the added factors the Court will consider in granting a petition for bypass, as it essentially codifies the factors the Court already currently considers when a petition for bypass is before it.[207] Codifying these factors, however, provides more insight for the public and litigants into the Court's decision-making, further increasing transparency and predictability in the petition for bypass process. The last clause, requiring the Court to indicate the reasons for granting a petition for bypass, is a further transparency safeguard.[208]

Of course, these amendments do not guarantee that the Court will remain unaffected by politics in determining whether to grant a petition for bypass. As Wisconsin's highest court, it will necessarily review controversial cases, regardless of if they come on bypass.[209] The above amendments do not seek to change this standing. Nor do they ensure that the Court will only consider the above factors when deciding whether to grant a petition for bypass. The Supreme Court still retains its authority to exercise its appellate jurisdiction over lower courts[210] and, as such, should still maintain some discretion to determine what constitutes an appropriate case for bypass, just as it maintains discretion to determine what constitutes an appropriate case for granting a

---

203. Subsections (a)–(c) come directly from the statutory language outlining the factors the Court considers for granting a petition for review. *See* WIS. STAT. § 809.62(1r). Subsections (d)–(e) borrow the language used in the Court's internal operating procedures. *See* INTERNAL OPERATING PROCEDURES, *supra* note 30, at 8.

204. *See supra* Section III.A.

205. *See* WIS. STAT. § 809.62(1r).

206. *See* INTERNAL OPERATING PROCEDURES, *supra* note 30, at 8.

207. *See id.* ("A matter appropriate for bypass is usually one which meets one or more of the criteria for [petitions for] review . . . .").

208. Indeed, this amendment has the effect of reducing some of the shadow docket concerns that Justice Dallet has expressed. *See* Dallet & Woleske, *supra* note 152, at 1072 ("[T]he Court's shadow docket decisions are always unsigned, do not indicate the majority Justice's votes, and lack significant (if any) reasoning.").

209. *See* Planned Parenthood of Wis. v. Urmanski, No. 2024AP330-OA, at 5 (Wis. July 2, 2024) (order granting petition for original action) (Karofsky, J., concurring) ("[I]t is the job of this court to decide matters of law important to this state even when they arouse passionate disagreement.").

210. *See* WIS. CONST. art. VII, § 3(2) ("The supreme court has appellate jurisdiction over all courts . . . .").

petition for review.[211] Because the Supreme Court is a court of last resort,[212] and any requests for review of lower court decisions are matters of judicial discretion, not right,[213] the Court's discretion should not be removed entirely.

What the amendments do guarantee, however, is a transparent framework for litigants and the Court to better determine appropriate conditions for bypass. Litigants and the court of appeals will be able to look at the enumerated factors listed in the statute to determine if a given case falls within those criteria. In this way, litigants and the court of appeals will be able to analyze a case before them, determine whether that case meets one or more enumerated factors, and predict what the Supreme Court may do if a petition for bypass is filed in that case. Litigants can appraise whether there is a reasonable chance the case gets taken up on bypass and, in turn, will be able to decide whether it is worth trying to file a petition for bypass or just simply follow the normal appellate process.

Similarly, litigants will be able to refer to the statutory criteria in their petitions for bypass and argue to the Court how the case they are bringing matches those criteria.[214] This practice would lead to better arguments for bypass and help better inform the Court in its decision-making. These amendments also create a more cohesive statutory scheme by positioning the petition for bypass mechanism to be consistent with the petition for review in indicating the criteria the Supreme Court uses when exercising its appellate jurisdiction.[215]

Thus, the Court itself will need to be more transparent in its decision-making process as a result of these amendments. The proposed amendments, in requiring the Court to provide its reasoning in granting petitions for bypass, can reduce both the appearance of, and actual engagement in, judicial decision-making based on political considerations. These reasons can provide the court of appeals, litigants, and the public with a clearer understanding as to why the Court decides to grant a bypass petition, both holding the Court accountable and keeping the court of appeals, litigants, and the public more informed.[216]

---

211. *See* WIS. STAT. § 809.62(1r) (2025) ("Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented.").

212. Jane Doe 4 v. Madison Metro. Sch. Dist., Nos. 2022AP2042, 2023AP305, 2023AP306, at 13 (Wis. June 14, 2023) (amended order denying petition for bypass) (Ziegler, C.J., dissenting) ("We are a court of last resort.").

213. *See* WIS. STAT. § 809.62(1r) ("Supreme Court review is a matter of *judicial discretion, not of right*, and will be granted only when special and important reasons are presented." (emphasis added)).

214. *See infra* note 226.

215. *See* WIS. STAT. § 809.62(1r); *see also supra* Section II.B.

216. It would seem, as well, that this amendment would likely be supported by most members of the Court, since the liberal majority has expressed a willingness to increase transparency and accountability measures. *See* Statement of Justice Dallet Regarding Transparency and Accountability, *supra* note 91 (indicating that the majority voted to initiate a "series of actions . . . intended to be a first step in making our court more accessible and more accountable to the people of Wisconsin").

2. Deny Premature Petitions for Bypass Unless Exceptions Apply

Finally, guidance providing for granting petitions for bypass before briefing has completed in the court of appeals is warranted since the Court is increasingly engaging in this practice.[217] In this way, section 809.60(1)(a) should be amended to codify the Court's current practice of dismissing petitions for bypass as premature when briefing has not been completed in the court of appeals unless an exception applies.[218] The added provision of section 809.60(1) would reflect the Court's current articulation of the rule and its exceptions as follows:

> (b) A petition for bypass will be denied as premature if the petition is filed before the respondent's brief has been filed in the court of appeals unless:
>
> 1. Relief is urgently needed that is not practically available from a lower court;
>
> 2. An injury is alleged that threatens the functioning of government where delaying access to the supreme court may unnecessarily prolong the alleged harm;
>
> 3. There exists another unique circumstance where a showing has been made that an issue is of such imperative public importance to justify bypassing the court of appeals.

Like the other proposed amendments, this change is relatively easy to make, as much of the language merely codifies in statutory form the guidance that the Court has provided through its own judicial rulings.[219] Further, this amendment has the added benefit of already being specifically endorsed by members of the Wisconsin Supreme Court.[220] As Justice Dallet has made clear, codifying this practice "improve[s] the consistency of [the Court's] decision-making, provide[s] useful guidance to attorneys and parties, and avoid[s] the appearance that [the Court is] favoring some litigants over others."[221]

It should be noted, however, that subsection 3 borrows language from the U.S. Supreme Court's rule governing when it will bypass the federal courts of appeals and has not been explicitly endorsed by the Wisconsin Supreme

---

217. *See* Jane Doe 4 v. Madison Metro. Sch. Dist., No. 2022AP2042, at 3 (Wis. Mar. 3, 2023) (order holding petition for bypass in abeyance) (Dallet, J., dissenting) ("I suggest we should codify in Wis. Stat. § (Rule) 809.60(1)(a) our usual practice of dismissing premature bypass petitions and the unwritten exceptions we sometimes apply." (citation omitted)); *see also* State *ex rel.* Kaul v. Prehn, No. 2021AP1673, at 2 (Wis. Nov. 16, 2021) (order granting petition for bypass) (Rebecca Grassl Bradley, J., concurring).

218. *See* Brown v. Wis. Elections Comm'n, No. 2024AP232, at 3 (Wis. May 3, 2024) (order granting petition for bypass) (Dallet, J., concurring).

219. *See id.* (noting rule and exceptions to premature denials of petitions for bypass).

220. *See Jane Doe 4*, No. 2022AP2042, at 3 (Dallet, J., dissenting); *see also Prehn*, No. 2021AP1673, at 2.

221. *Jane Doe 4*, No. 2022AP2042, at 3 (Dallet, J., dissenting).

Court.[222] Nevertheless, the Wisconsin Supreme Court has made clear that granting premature bypass petitions should be the exception, not the norm,[223] and that the exceptions the Court has enumerated are made based on "unique circumstances" in a given case.[224] Subsection 3 thus allows the Court some discretion in determining these "unique circumstances" but the amendment, by articulating that the circumstances must be of imperative public importance, provides some clarity as to what these "unique circumstances" could be in the future.

This proposed guidance, like the proposed amendments enumerating appropriate factors for bypass,[225] would give both the court of appeals and parties a measure of predictability in determining whether a petition for bypass may be granted before briefing has completed in the court of appeals, further increasing judicial efficiency. Likewise, where parties are seeking to bring a petition for bypass before filing briefs in the court of appeals, they would be able to appeal to the stated exceptions, allowing for more developed arguments and more informed decision-making by the Court.[226] Thus, just as with the amendments enumerating appropriate factors for bypass, the added statutory provisions providing guidance for handling premature petitions for bypass provides more transparency and predictability to the court of appeals, litigants, and the public regarding the Court's decision-making process.

CONCLUSION

The petition for bypass mechanism is a tool that should be used sparingly. However, litigants increasingly use it, and the Court increasingly indulges them. The implications of the abuse of the petition for bypass mechanism extend beyond just the case in which it is used. Moreover, the rules that govern its use are unclear, and allow the Supreme Court to essentially make up procedure as it goes. Thus, the Supreme Court can use this mechanism for political purposes, and it seems increasingly willing to do so. As a result, the court of appeals, litigants, and the public suffer.

---

222. *See* SUP. CT. R. 11.

223. *See, e.g.*, *Brown*, No. 2024AP232, at 6 (Ziegler, C.J., dissenting) ("Granting the petitions for bypass, while circumventing traditional practices, procedures and process, needlessly tramples over those safeguards once espoused by [the majority]."); *id.* at 3 (Dallet, J., concurring) (noting rules and exceptions to premature denial of petitions for bypass); *Jane Doe 4*, No. 2022AP2042, at 3 (Dallet, J., dissenting).

224. *Brown*, No. 2024AP232, at 3 (Dallet, J., concurring).

225. *See supra* Section III.B.1.

226. As has been explained, if a party wants to bypass the court of appeals it must file a petition for bypass that includes "a statement of reasons for bypassing the court of appeals." WIS. STAT. § 809.60(1)(a) (2025). Litigants would be able to include, in this statement of reasons, why a bypass petition should be accepted before briefs have been filed in the court of appeals. The responding party could indicate why this is not the case. *See id.* § 809.60(2). The same is true for why a petition for bypass may or may not fall within the proposed enumerated criteria. *See supra* Section III.B.1.

Reforming the rules governing petitions for bypass is necessary to ensure that the petition is not abused by the Court, or litigants, for political gain, and to ensure that procedural obstacles in the court of appeals are removed for more efficient judicial outcomes. By creating clearer standards, efficiency among Wisconsin's appellate courts would improve. Further, the Supreme Court will be better positioned to make judicial determinations that are not informed by political positions. And if a decision does turn on politics, the public and litigants will be better positioned to hold the Court accountable.

Political judgments undoubtedly have their place in a democratic society. Wisconsin is no exception in this regard, and this Note does not dispute that foundational idea. But that place properly lies with the legislature. It cannot lie with the Court because, as should now be clear, "Process matters."[227]

227. Becker v. Dane County, No. 2021AP1343, at 4 (Wis. Nov. 16, 2021) (order dismissing petition for bypass) (Rebecca Grassl Bradley, J., dissenting).