

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2024AP1872

ROBERT F. KENNEDY, JR.,

Petitioner-Appellant,

v.

WISCONSIN ELECTIONS COMMISSION,

Respondent-Respondent-Petitioner.

**ROBERT F. KENNEDY, JR.'S RESPONSE IN OPPOSITION TO
THE PETITION FOR BYPASS OF
THE WISCONSIN ELECTIONS COMMISSION**

ROBERT F. KENNEDY, JR.,
Petitioner-Appellant

HURLEY BURISH, S.C.
33 E. Main Street
Madison, WI 53703
(608) 257-0945
jbugni@hurleyburish.com

Joseph A. Bugni
Wisconsin Bar No. 1062514
Cricket R. Beeson
Wisconsin Bar No. 1113820

TABLE OF AUTHORITIES

Cases

<i>Bach v. LIRC</i> , No. 2019AP834.....	3
<i>Becker v. Dane County</i> , Nos. 2021AP1382 & 2021AP1343.....	3
<i>Colectivo v. Soc’y Ins.</i> , No. 2021AP463.....	3
<i>Eagle Point Solar, LLC v. PSC</i> , No. 2019AP2281.....	3
<i>Fed. Nat’l Mortg. Ass’n v. Bach</i> , No. 2019AP631.....	3
<i>Milwaukee Brewers Baseball Club v. DHSS</i> , 130 Wis. 2d 56, 387 N.W.2d 245 (1986).....	3, 4
<i>State ex rel. Zignego v. Wis. Elections Comm’n</i> , 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208	4
<i>State v. Smith</i> , No. 2018AP927.....	3
<i>State v. Boruch</i> , No. 2018AP152; <i>Gahl v. Aurora Health Care Inc.</i> , No. 2021AP1787-FT	3
<i>State v. Flynn</i> , No. 2022AP1425.....	3
<i>State v. Gebhart</i> , No. 2020AP1619	3
<i>State v. Stephens</i> , No. 2020AP855.....	3
<i>Waukesha County v. M.I.S.</i> , No. 2021AP105	3
<i>Zignego v. WEC</i> , No. 2019AP2397	3

Other Authorities

Michael S. Heffernan, <i>Appellate Practice and Procedure in Wisconsin</i>	4
--	---

This Court should summarily deny the bypass petition as premature.

There are not two sets of Rules of Appellate Procedure in Wisconsin – one for the Attorney General and another for everyone else. Rather, this Court is blind to the parties’ stature and proudly holds everyone, rich and poor, private or public entity, to the same rule book. That rule book contains two provisions that apply here: one written, the other an established practice forged over almost forty years of consistent practice. Those provisions demand that this Court deny the bypass petition as premature.

The statutory rule governing bypass is found at Wis. Stat. § 809.60. It provides that “no later than 14 days following the filing of the respondent’s brief” a party may file a petition. The Wisconsin Elections Commission has not filed its response brief in the Court of Appeals. It is due tomorrow at 11:00 a.m., and Robert F. Kennedy Jr.’s Reply is due at 4:00 p.m. In other words, the Commission’s bypass petition is premature.

What happens when parties try to skip over the statutory command of *following* the filing of the respondent’s brief? In those cases, brought many times before this Court, the bypass petitions are denied as premature.¹ Most of those come in unpublished, per curiam orders from this Court.² A few cite the established practice.³ But they all reflect the well-known policy that petitions for bypass filed before briefing is finished will be dismissed as premature; indeed, the leading treatise on appellate practice in Wisconsin

¹ *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 56, 62–63, 387 N.W.2d 245 (1986).

² See *State v. Flynn*, No. 2022AP1425; *Becker v. Dane County*, Nos. 2021AP1382 & 2021AP1343; *Colectivo v. Soc’y Ins.*, No. 2021AP463; *Waukesha County v. M.I.S.*, No. 2021AP105; *State v. Gebhart*, No. 2020AP1619; *State v. Stephens*, No. 2020AP855; *Eagle Point Solar, LLC v. PSC*, No. 2019AP2281; *State v. Smith*, No. 2018AP927; *State v. Boruch*, No. 2018AP152; *Gahl v. Aurora Health Care Inc.*, No. 2021AP1787-FT; *Zignego v. WEC*, No. 2019AP2397; *Bach v. LIRC*, No. 2019AP834; *Fed. Nat’l Mortg. Ass’n v. Bach*, No. 2019AP631.

³ See *Becker v. Dane County*, No. 2021AP1343, Unpublished Order at 1 (Nov. 16, 2021) (citing *Milwaukee Brewers*, 130 Wis. 2d at 62–63).

has made that point plain: “Supreme court orders have stated a policy, not reflected in any rule, that a petition for bypass filed before the respondent’s brief is filed will be dismissed as premature.”⁴ And it’s not as if this rule is unknown to the Commission. The appendix to this brief contains the Commission’s response in opposition to bypass in *State of Wisconsin ex rel. Zignego, et al v. WEC*, which begins: “Petitioners are correct that this mandamus case, in a sense, presents a novel question of law. However, the fact that it is novel does not mean it is especially difficult or even bona fide, much less does it justify the extraordinary step of bypass prior to briefing in the court of appeals. Rather, this Court treats a bypass petition, like this one, ‘as premature because briefs on the appeal ha[ve] not been filed.’”⁵ Not surprisingly, that petition was (as the Commission argued) denied as premature.⁶

Here, the exact same thing should happen as has happened in scores of cases where parties have sought to ignore the rule and skip the filing of the respondent’s brief. Forty years of policy and practice usually reflects two realities. First, accepting review *before* the briefs are filed can be a waste of this Court’s precious resources – why take review and clear the decks when you don’t even know what the respondents are going to argue. Second, there’s a pragmatic concern (especially in a case like this), where the respondents’ arguments have morphed over time. It is better to see what is actually going to be at issue before this Court decides to accept bypass, order a whole new set of briefs, and re-do the work that the Court of Appeals has already done.

This petition to bypass is by every account premature. If it’s filed Monday, that’s another matter. At least then, this Court has a firmer handle on what’s at issue in the Court of Appeals. Maybe the Court of Appeals even acts by then. But more than pragmatic concerns, it sends a definite message

⁴ See Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, § 24.3.

⁵ App. 7 (quoting *Milwaukee Brewers*, 130 Wis. 2d at 63).

⁶ *State ex rel. Zignego v. Wis. Elections Comm’n*, 2021 WI 32, ¶ 43 n. 18, 396 Wis. 2d 391, 957 N.W.2d 208.

to the Commission and every other party that seeks to jump right into the Supreme Court: The procedures apply equally to everyone. Follow the Rules.

Dated at Madison, Wisconsin, September 19, 2024.

Respectfully submitted,

<p>Aaron Siri, Esq.* Elizabeth A. Brehm, Esq.* SIRI & GLIMSTAD LLP 745 Fifth Ave, Suite 500 New York, NY 10151 Tel: (888) 747-4529 Fax: (646) 417-5967 aaron@sirillp.com ebrehm@sirillp.com aperkins@sirillp.com Attorneys for Plaintiff <i>Pro Hac Vice</i> Motion forthcoming</p>	<p>ROBERT F. KENNEDY, JR., <i>Petitioner</i></p> <p><u><i>Electronically signed by Joseph A. Bugni</i></u> Joseph A. Bugni Wisconsin Bar No. 1062514 Cricket R. Beeson Wisconsin Bar No. 1113820</p> <p>HURLEY BURISH, S.C. P.O. Box 1528 Madison, WI 53701-1528 jbugni@hurleyburish.com</p> <p>(608) 257-0945</p>
--	---