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**SUPREME COURT**

**No. 22AP1076**

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IN THE  
**Supreme Court of Wisconsin**

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ARTILLIS MITCHELL,  
Petitioner-Appellant-Petitioner,

v.

CHRIS S. BUESGEN AND KEVIN A. CARR,  
Respondents-Respondents,

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On Petition for Review from the  
Wisconsin Court of Appeals, District IV,  
Affirming a Decision by the Dane County Circuit Court,  
The Honorable Susan M. Crawford, Presiding,  
Case No. 22CV1204

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**Petition for Review**

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## STATEMENT OF THE ISSUES

### Issue I.

Was Mitchell's petition for writ of certiorari timely under Wisconsin's tolling rules, when he both requested documents outside his control and mailed his petition to the Clerk of Court days before the 45-day statutory deadline, and the documents included with his petition established he had exhausted all administrative remedies? (The Court of Appeals answered "no.")

### Issue II.

If tolling does not apply, was Mitchell's petition timely, when he both requested documents outside his control and mailed his petition to the Clerk before the 45-day statutory deadline, but the Clerk did not file the petition upon receipt and, instead, filed it after the 45-day deadline because the Clerk believed Mitchell had omitted certain exhaustion documents? (The Court of Appeals answered "no.")

### Issue III.

If Mitchell's petition was not timely, was dismissal the appropriate remedy in these circumstances where the applicable statute, Wis. Stat. § 801.02(7)(c), provides that the remedy for failing to include all statutorily-required exhaustion documents with a petition for certiorari review is denial of a request for fee waiver, not dismissal? (The Court of Appeals answered "no.")

## CONCISE STATEMENT OF CRITERIA

**A.** A decision by this Court “will help develop, clarify[, and] harmonize the law,” and “[t]he question[s] presented [are] novel one[s], the resolution of which will have statewide impact.” Wis. Stat. § 809.62(1r)(c)2. *See infra* Argument I, II, and III.

**B.** A decision by this Court “will help develop, clarify or harmonize the law,” and “[t]he question[s] presented [are] not factual in nature but rather [are] question[s] of law of the type that [are] likely to recur.” Wis. Stat. § 809.62(1r)(c)3. The questions presented are pure questions of statutory interpretation. *See infra* Argument I, II, and III. The questions presented are likely to recur, as prisoners continue to seek certiorari review of prison disciplinary decisions and issues of tolling and the appropriate remedy are continually invoked.

## STATEMENT OF THE CASE

This case concerns whether a prisoner's petition for writ of certiorari was timely filed and, if not, whether, in these circumstances, statute mandates denial of the prisoner's request for fee waiver, rather than dismissal.

Though it acknowledged the logical force of Mitchell's argument that his petition was timely, the Court of Appeals nevertheless affirmed the Circuit Court's decision that his petition was untimely. The Court of Appeals deemed Mitchell's petition untimely because, even though he submitted documentation with his petition that proved he had exhausted all administrative remedies, the applicable statutes require even further—yet extraneous—documentation regarding exhaustion, which the Circuit Court did not receive until after the 45-day deadline had elapsed. Wis. Stat. §§ 893.735(2)-(3), 801.02(7)(c). As the Court of Appeals intimated, such an application of the statutes and tolling rules is non-sensical not only because it needlessly punishes a petitioner who has in fact exhausted his administrative remedies, but also because it thwarts the spirit of the statutes, which is to ensure that all remedies are exhausted before a petition is filed.

Next, the Court of Appeals affirmed dismissal of his petition. The Court of Appeals did so even though the applicable statutes—which the court observed “are not models of clarity”—provide that the appropriate remedy in these circumstances, in which the prisoner may not have included all statutorily-mandated exhaustion documents with his petition, is denial of the petitioner's request for fee waiver, not dismissal. Wis. Stat. § 801.02(7)(c), (d).

This Court should accept review to develop and clarify the law with respect to these issues of statewide importance.



1. A prisoner may seek a writ of certiorari related to prison or jail conditions if commenced within 45 days after the cause of action accrues. Wis. Stat. § 893.735(2). Forty-one days after exhausting his administrative appeals of a prison disciplinary decision, Mitchell mailed a petition for writ of certiorari for filing. Mitchell included with his petition a request for fee waiver, which required him to include certain additional documents. Among the additional documents required to be filed if a prisoner requests a fee waiver is a certified copy of his or her trust account statement. But Mitchell did not possess a certified copy of that statement. He had to request that certified document from Stanley Correctional Institute (“SCI”), which he did seven days before the 45-day deadline. In these circumstances, common-law tolling applies, and Mitchell’s 45-day deadline was tolled as of April 26, 2022, when he mailed his petition. *State ex rel. Steldt v. McCaughtry*, 2000 WI App 176, ¶ 17, 238 Wis. 2d 393, 617 N.W.2d 201; *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶ 16, 244 Wis. 2d 177, 629 N.W.2d 17. The 45-day deadline remained tolled on May 17, 2022, when the Clerk filed his petition and the Circuit Court granted his request for fee waiver. *Id.* Accordingly, Mitchell’s petition was timely.

2. However, even if the tolling rules of *Steldt* and *Walker* somehow do not apply, Mitchell’s petition still was timely. This is so because the Dane County Clerk of Courts held the petition and refused to file it upon receipt. The Clerk did so because, in the Clerk’s view, Mitchell’s petition omitted certain documents showing he had exhausted his administrative remedies. But the statutes do not grant the Clerk authority to refuse to accept any paper for filing on the basis that the Clerk believes not all papers have been received. See Wis. Stat. § 59.40(2)(a). Rather, the determination of whether the required documents have been submitted with a petition belongs exclusively to the Circuit Court. *State*

*ex rel. Locklear v. Schwarz*, 2001 WI App 74, ¶ 22, 242 Wis. 2d 327, 629 N.W.2d 30. The Clerk improperly held Mitchell's petition and filed it after the statutory deadline when he or she assumed the judicial role of determining whether Mitchell's petition included all documents pertaining to exhaustion of remedies. *Id.*; Wis. Stat. § 59.40(2)(a). Mitchell sent the additional documents to the Clerk of Courts one day after the Clerk informed him his petition required further documentation. By the time the Clerk received additional documents requested from Mitchell and filed his petition, the 45-day statutory time period had elapsed (if the original deadline was not tolled).

The Circuit Court dismissed Mitchell's petition as untimely.

In a published decision, the Court of Appeals affirmed. *Mitchell v. Buesgen*, Case No. 2022AP1076, 2024 WL 720175 (Wis. Ct. App. Feb. 22, 2024) (hereinafter "*Court of Appeals Decision*") (Pet-Appx.0001-0026). Even though the Court of Appeals acknowledged the logic of Mitchell's argument that it was inconsequential that he did not include all statutorily-required exhaustion documents with his petition because he, in fact, had exhausted all administrative remedies, the court nevertheless concluded the absence of all exhaustion documents precluded the application of tolling in these circumstances. *Id.*, ¶¶ 33-34.

3. The Court of Appeals also affirmed the remedy of dismissal of Mitchell's petition. This was error and contrary to the text of Wis. Stat. § 801.02(7)(c), (d). While § 801.02(7)(d) authorizes the remedy of dismissal, § 801.02(7)(c), does not. Rather, § 801.02(7)(c) provides that where, as here, the prisoner has made a request for fee waiver, but may not have included all exhaustion documents with his petition, the remedy is denial of his request for fee waiver, not dismissal. Despite acknowledging that Wis.

Stat. § 801.02(7)(c), (d) “are not models of clarity,” and that Mitchell’s construction of the statutes is a plausible one, the Court of Appeals nevertheless concluded dismissal of Mitchell’s petition was the appropriate remedy. *Court of Appeals Decision*, ¶¶ 39-40.

## STATEMENT OF FACTS

Mitchell’s petition for writ of certiorari relates to his challenge of a prison disciplinary determination. In September 2021, Mitchell was issued an Adult Conduct Report for violating the Wisconsin Department of Corrections (“DOC”) inmate conduct rules DOC 303.43, DOC 303.44, and DOC 303.60. (Pet-Appx.0032.) Following a hearing, Mitchell was deemed guilty of two of the violations. (Pet-Appx.0033.)

Mitchell pursued every administrative remedy challenging the decision. He appealed the decision to Warden Chris S. Buesgen. (Pet-Appx.0047.) Buesgen affirmed the disciplinary committee’s decision. (Pet-Appx.0050.) Mitchell then filed an Inmate Complaint with the Institution Complaint Examiner’s Office challenging Buesgen’s decision. (Pet-Appx.0041.) The same day, the Examiner’s Office recommended the complaint be dismissed. (Pet-Appx.0039.) Mitchell appealed that recommendation to the Corrections Complaint Examiner. (Pet-Appx.0043.) The Corrections Complaint Examiner recommended dismissal of the complaint. (Pet-Appx.0059.) Finally, on March 16, 2022, the Secretary of the DOC dismissed the complaint. (Pet-Appx.0040.)

The March 16, 2022, date of dismissal of Mitchell’s administrative claim—which constituted a final administrative decision—triggered the 45-day statutory deadline within which to file a petition for writ of certiorari in the circuit court. Wis. Stat. § 893.735(2).

Under the 45-day statutory deadline, Mitchell had until May 2, 2022, to file a petition for certiorari review: The 45th day fell on Saturday, April 30, so the deadline rolled to the following Monday, May 2, giving Mitchell a 47-day window within which to timely file his petition. Wis. Stats. §§ 801.15(1)(b), 990.001(4)(c).

On April 25, 2022, Mitchell requested from SCI a certified copy of his trust account statement, which is a document required for a circuit court's assessment of a prisoner's request for fee waiver due to indigency. (Pet-Appx.0061.)

On April 26, 2022—41 days after the Secretary dismissed his complaint, and six days before the May 2, 2022, deadline—Mitchell mailed to the Dane County Circuit Court his petition for writ of certiorari review of the Secretary's decision, along with the following other documents:

- A proposed writ of certiorari;
- A petition for fee waiver;
- An affidavit of indigency;
- An authorization to withhold money from his trust account;
- A Department of Justice (DOJ) certification indicating that he had not had three or more dismissals under Wis. Stat. § 801.02(7)(d); and
- Two exhaustion documents: the reviewing authority's decision and the Secretary's decision.

(Pet-Appx.0061.; *see also* Pet-Appx.0063.)

In his April 26, 2022 letter to the Clerk enclosing such documents, Mitchell informed the Clerk that he had requested a certified copy of his trust account statement, but that it “[might] arrive later than [sic] my filed certiorari and supporting document, due to the fact that it has to be sent

out by the records office at Stanley Corr. Inst.” (Pet-Appx.0065.)

On April 28, 2022, SCI processed Mitchell’s request for a certified copy of his trust account statement. (Pet-Appx.0068-0069.)

On May 4, 2022—two days after the 45-day statutory deadline had elapsed—Mitchell received a letter from Dane County Clerk of Courts, stating that, in the Clerk’s view, Mitchell had not included all the necessary exhaustion documents in his April 26, 2022, mailing. (Pet-Appx.0071; Pet-Appx.0082.) The Clerk’s letter also stated that, due to the perceived omission, the Clerk declined to file Mitchell’s petition for writ of certiorari. (Pet-Appx.0082)

Mitchell responded immediately. On May 5, 2022, he mailed to the Clerk the requested documents. (Pet-Appx.0066; Pet-Appx.0079.)

On May 17, 2022—fifteen days after the 45-day statutory deadline had elapsed—the Clerk filed Mitchell’s petition for writ of certiorari. (See Pet-Appx.0031 (stamped “FILED May 17 2022”).) The same date, the Circuit Court granted Mitchell’s petition for a fee waiver. (See Pet-Appx.0029.)

On May 20, 2022, the Circuit Court dismissed Mitchell’s petition, reasoning that its filing on May 17, 2022, was untimely. (Pet-Appx.0027-0028.)

In a published decision, the Court of Appeals affirmed.

## ARGUMENT

### **I. This Court should grant review to clarify whether tolling applies in these circumstances where the documentation the prisoner submitted establishes he exhausted administrative remedies.**

The Circuit Court and Court of Appeals erred in concluding Mitchell's petition for writ of certiorari was untimely under Wis. Stat. § 893.735(2). The 45-day deadline was tolled at the time Mitchell mailed his petition, and it remained tolled at the time the Clerk filed the petition on May 17, 2022.

Whether, at the time Mitchell requested a certified copy of his financial statement, the deadline for mailing his petition was tolled, and whether that deadline remained tolled when the Clerk filed the petition are novel questions of statewide importance that would benefit from this Court's review. Wis. Stat. § 809.62(1r)(c)2.

a. Wisconsin Stat. § 893.735 “governs the time within which a prisoner may begin an action challenging a governmental decision or disposition.” *State ex rel. Johnson v. Litscher*, 2001 WI App 47, ¶ 5, 241 Wis. 2d 407, 625 N.W.2d 887. This statute instructs that “[a]n action seeking a remedy available by certiorari made on behalf of a prisoner is barred unless commenced within 45 days after the cause of action accrues.” Wis. Stat. § 893.735(2). Such action “is commenced at the time that the prisoner files a petition seeking a writ of certiorari with a court.” Wis. Stat. § 893.735(3).

The 45-day deadline may be equitably tolled in certain circumstances. Three rules of tolling, applied in conjunction with each other, render Mitchell's petition timely. These tolling rules pertain to: (a) the documents required when a prisoner seeks a fee waiver due to indigency, as Mitchell did here; (b) documents the prisoner has no control over and does

not possess and, therefore, must request from prison authorities, as Mitchell did here; and (c) the time a circuit court takes to determine whether a prisoner is eligible for a fee waiver.

The first applicable tolling rule pertains to the documents required to be filed with a request for a fee waiver. Where, as here, a prisoner seeks to file a certiorari action without payment of ordinary filing fees due to indigency, the 45-day deadline is tolled upon the clerk's receipt of the following documents: the petition for writ of certiorari, the request for a fee waiver, the affidavit of indigency, and a certified copy of the prisoner's trust account statement. *Steldt*, 238 Wis. 2d 393, ¶ 17.

Here, on April 26, 2022, Mitchell sent to the Circuit Court all documents required for tolling under the *Steldt* tolling rule for fee-waiver requests, except one such document: a certified copy of his trust account statement. *Id.*; (Pet-Appx.0060-0062). But at that time Mitchell ***did not have*** a certified copy of his trust account statement. Rather, Mitchell had to request that document from SCI. As such, the previous day—April 25, 2022—Mitchell requested a certified copy of his trust account statement from SCI's business office. (*Id.*; Pet-Appx.0063-0065.)

SCI's control over the certified copy of Mitchell's trust account statement invokes the second applicable tolling rule: The 45-day deadline is tolled "when the documents over which prisoners have control have been mailed, and ***all of the documents over which prisoners have no control have been requested.***" *Walker*, 244 Wis. 2d 177, ¶ 16 (emphasis added).

Thus, taken together, under the *Steldt* and *Walker* tolling rules, the 45-day deadline for Mitchell's petition for writ of certiorari was tolled on April 26, 2022 – six days prior to the May 2 deadline. This is because, as of April 26, 2022,

Mitchell had mailed the documents in his control and had requested a certified copy of his trust account statement, which was a document outside his control. (Pet-Appx.0061; Pet-Appx.0065.) Moreover, in his letter to the Clerk of Court dated April 26, 2022, Mitchell specifically informed the Clerk that the certified copy of this trust account statement might “arrive later than [sic] my filed certiorari and supporting document, ***due to the fact that it has to be sent out by the records office at Stanley Corr. Inst.***” (Pet-Appx.0065 (emphasis added).)

On April 28, 2022, SCI processed Mitchell’s request for a certified copy of his trust account statement. (Pet-Appx.0068.) Thereafter, SCI sent the certified copy to the Circuit Court. The record does not reflect the date the Circuit Court then received that certified copy, but it is known that the Circuit Court, in fact, received that document from SCI because the docket reflects it was filed on May 17, 2022. (Pet-Appx.0027-0028.) The Circuit Court granted Mitchell’s request for a fee waiver the same date. (Pet-Appx.0029-0030.)

In short, because SCI exclusively controlled the certified copy of Mitchell’s trust account statement, Mitchell’s request for that document on April 25, 2022, together with his mailing of his petition and accompanying documents the following day, tolled the 45-day deadline on April 26, 2022, under *Steldt* and *Walker*.

Finally, the question of the duration of the tolling period and whether Mitchell’s petition was timely filed invokes the third applicable tolling rule. The third applicable tolling rule is the following: When a prisoner requests a filing-fee waiver on the grounds of indigency, as Mitchell did here, the 45-day deadline is tolled during the time the circuit court takes to determine the prisoner’s eligibility for a fee waiver. *Steldt*, 238 Wis. 2d 393, ¶ 17; *Walker*, 244 Wis. 2d 177, ¶ 13.



Here, the Circuit Court granted Mitchell's request for a fee waiver on the same date the Clerk filed his petition for writ of certiorari – May 17, 2022. (Pet.Appx.0027-0030.) Because the three tolling rules addressed here applied and tolled Mitchell's 45-day deadline from April 26 to May 17, when the Clerk filed his petition and the Circuit Court approved his petition for fee waiver, Mitchell's petition was timely.

**b.** Nonetheless, the Court of Appeals affirmed the Circuit Court's conclusion that Mitchell's petition was untimely. The Court of Appeals reasoned that Mitchell could not avail himself to tolling under *Steldt* because Mitchell did not submit all exhaustion documents required by Wis. Stat. 801.02(7)(c). *Court of Appeals Decision*, ¶¶ 30, 33-34.

In so concluding, however, the Court of Appeals acknowledged the logical force of Mitchell's argument that the omission of certain exhaustion documents from his initial mailing on April 26, 2022, is inconsequential. *Id.*, ¶ 33. Such omission is inconsequential for two inter-related reasons: **(1)** Mitchell mailed documents sufficient to evidence exhaustion on April 26, 2022, and he later mailed additional exhaustion documents immediately upon being prompted by the Clerk, (Pet-Appx.0061; Pet-Appx.0066); and **(2)** Mitchell had *in fact* exhausted all administrative remedies. (Pet.Appx.0027-0028.)

The Court of Appeals' analysis also acknowledges that the requirements in § 801.02(7)(c) can create confusion – confusion that review by this Court could alleviate:

There is logic to Mitchell's position insofar as Mitchell could not have obtained these [exhaustion] documents as they now appear in the record without having in fact exhausted all potential administrative remedies. . . . [W]hen the terms of Wis. Stat. § 801.02(7)(c) are considered as a

whole [i.e., requiring prisoners to “initially submit more documents than those strictly necessary to prove exhaustion”], it could create confusion that the statute refers in part to the requirement that a prisoner submit “documentation showing that [the prisoner] has exhausted all available administrative remedies.” Mitchell timely provided proof of exhaustion.

*Court of Appeals Decision*, ¶ 33 and n.2 (bracketed language quoting n.2 added; internal citation omitted).

The *Court of Appeals Decision* frustrates the purpose of the statutes requiring exhaustion documents. Those statutes are in place to ensure a petitioner has in fact exhausted all administrative remedies before mailing a petition. Here, Mitchell had, in fact, exhausted all administrative remedies when he timely mailed his petition. By requiring a petitioner to provide additional—but needless—exhaustion documents, the decisions of the courts below impose unnecessary administrative burdens on petitioners and courts alike. And by deeming his petition untimely for lack of extraneous exhaustion documents, the decisions of the courts below unduly punish Mitchell and contravene the spirit of the statutes.

Moreover, respectfully, the Court of Appeals’ reliance on *State ex rel. Tyler v. Bett*, 2002 WI App 234, 257 Wis. 2d 606, 652 N.W.2d 800, in deeming tolling inapplicable is misplaced. *Court of Appeals Decision*, ¶ 31. *Tyler* is distinguishable because Mitchell, unlike Tyler, did not submit a partial fee with his petition. Rather, Mitchell sought a waiver of the filing fee. This distinction makes all the difference because Mitchell’s request for a fee waiver triggered equitable tolling, which, for the reasons explained above, should be deemed to have remained in place until May 17, 2022, when the Circuit Court granted the request. As such, Mitchell did not display the “carelessness” that Tyler displayed and

which the court in *Tyler* was rightly loathe to reward. *Tyler*, 257 Wis. 2d 606, ¶ 16; *Court of Appeals Decision*, ¶ 31.

In sum, Mitchell was entitled to benefit from three tolling rules, and those rules, taken together, demonstrate that he timely filed his petition. This Court should accept review to clarify the application of the tolling rules in these circumstances.

**II. The Dane County Clerk of Court usurped the Circuit Court’s authority by refusing to file Mitchell’s petition until the Clerk had determined all required documents had been received.**

Even if tolling somehow does not apply, Mitchell’s petition still was timely. Mitchell mailed his petition to the Dane County Clerk of Courts six days before the 45-day statutory deadline, but the Clerk exceeded his or her statutory authority by holding his petition instead of filing it upon receipt. The Clerk’s unauthorized action in this regard—and not any act or omission by Mitchell—caused Mitchell’s petition to be filed after the May 2, 2022, 45-day statutory deadline (if tolling somehow does not apply).

The scope of the Clerk’s authority with respect to petitions for certiorari review is a novel issue of statutory interpretation, the resolution of which will have statewide impact. Wis. Stat. § 809.62(1r)(c)2, 3.

Here, the Clerk impermissibly determined that Mitchell had omitted certain documents required to support his petition. The determination of the sufficiency of documents supporting a prisoner’s petition belongs exclusively to the Circuit Court, not the Clerk: “The *circuit court* must determine . . . *whether all the proper papers have been submitted.*” *Schwarz*, 242 Wis. 2d 327, ¶ 14 (emphasis added). “If all conditions are met, *the circuit court* must issue an

order allowing the prisoner to commence the action without prepayment of the fees.” *Id.* (emphasis added).

The scope of the Clerk’s authority is set forth by statute. Under Wis. Stat. § 59.40(2)(a), “[t]he clerk of circuit court shall: (a) File and keep all papers properly deposited with him or her in every action or proceeding unless required to transmit the papers.” Papers “deposited with the clerk during usual business hours and at the county provided office are properly deposited for purposes of the time and place of filing.” *Granado v. Sentry Ins.*, 228 Wis. 2d 794, 805, 599 N.W.2d 62 (Ct. App. 1999).

Although the statutes grant the clerk certain discretion related to particular functions,<sup>1</sup> the statutes do not grant the clerk authority to refuse to accept any paper for filing on the basis the clerk believes not all papers have been received, as the Clerk did here. *See Steltdt*, 238 Wis. 2d 393, ¶ 16 (recognizing that “circuit court clerks have the discretion to refuse to file any paper without payment of the appropriate fees,” but that “***it is unreasonable for that discretion to be exercised in a manner that denies prisoners their ability to bring certiorari actions***” (emphasis added)).

The Clerk improperly refused to file Mitchell’s petition and accompanying documents even though Mitchell timely and “properly deposited” them with the Clerk’s office. Instead, the Clerk delayed filing until it received, in the Clerk’s view, all required exhaustion documents. By waiting to file Mitchell’s petition until the Clerk believed he or she had received all required papers, the Clerk at once exceeded his or her statutory authority and usurped the Circuit Court’s authority. *Schwarz*, 242 Wis. 2d 327, ¶ 14; *see also State v.*

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<sup>1</sup> For instance, the clerk is authorized to “collect the fees that are prescribed in ss. 814.60 to 814.63” and to “refuse to accept any paper for filing or recording until the fee prescribed in subch. II of ch. 814 or any applicable statute is paid.” Wis. Stat. § 59.40(3)(a).

*Dickson*, 53 Wis. 2d 532, 541, 193 N.W.2d 17 (1972) (“[T]he acts of the clerk of the court are ministerial and clerical, and he may not exercise judicial power except in accordance with the strict language of a statute conferring such power upon him.”). In doing so, the Clerk improperly assumed a judicial role and caused Mitchell’s petition to be filed after the May 2, 2022 statutory deadline. *Dickson*, 53 Wis. 2d at 541 (“It is well recognized in Wisconsin that a clerk of court may not exercise any judicial powers.”).

The Court of Appeals rejected this argument, reasoning that, “regardless of any act or omission of the clerk, the circuit court had the ultimate responsibility under Wis. Stat. § 893.735(2) to determine whether Mitchell had timely filed all required documents.” *Court of Appeals Decision*, ¶ 35. The Court of Appeals’ reasoning in this regard is a partial rendering of Mitchell’s *point*: It is the **Circuit Court’s** function to determine whether a petitioner’s application is complete and timely, not the Clerk’s. The Clerk here exceeded his or her authority and caused Mitchell’s petition to be filed untimely, if tolling does not apply.

In sum, because Mitchell complied with the 45-day deadline for mailing his petition for certiorari to the Clerk of Courts, but the Clerk refused to file the petition upon receipt as Wis. Stat. § 59.40(2)(a) requires—and instead improperly held it until after the deadline had passed—Mitchell’s petition was improperly rejected as untimely (even if tolling does not apply).

This Court should accept review to address the important issue of statutory interpretation of statewide importance concerning the scope of a clerk of court’s role in handling petitions for certiorari review.

**III. The Court of Appeals' conclusion that dismissal of Mitchell's petition was an appropriate remedy contravenes the plain meaning of Wis. Stat. § 801.02(7)(c).**

The Court of Appeals erroneously affirmed dismissal of Mitchell's petition for writ of certiorari. Dismissal is the improper remedy in these circumstances for two reasons. First, even if Mitchell initially omitted certain exhaustion documents from his petition at the time he mailed it, the statute directs that the remedy is to deny the request for fee waiver, not to dismiss the petition for writ of certiorari. Wis. Stat. § 801.02(7)(c). Second, any such omission was harmless because the documents show Mitchell, in fact, exhausted his administrative remedies before filing his petition for writ of certiorari.

**A. The decision below is incorrect: The statutory remedy for omission of certain documents pertaining to exhaustion of administrative remedies is denial of Mitchell's request for fee waiver, not dismissal.**

A prisoner filing his or her initial pleading for writ of certiorari must include, as part of the pleading, "documentation showing he or she has exhausted all available administrative remedies." Wis. Stat. § 801.02(7)(c). This requires the prisoner to include "copies of all the written materials" provided to him or her by the prison related to the administrative proceedings and all written materials included as part of an administrative appeal. *Id.* The last sentence of Wis. Stat. § 801.02(7)(c) prescribes the remedy for failure to include all exhaustion documents with a request for fee waiver as part of the initial pleading: the court "shall deny the prisoner's request to proceed without the prepayment of fees and costs under Wis. Stat. § 814.29(1m)."

Accordingly, the statutory remedy for the omission of any exhaustion documents was for the Circuit Court to deny Mitchell's request for a fee waiver in accordance with Wis Stat. § 801.02(7)(c) – not to dismiss Mitchell's petition. *Id.*

That the legislature intended for the remedy here to be denial of Mitchell's request for a fee waiver and not dismissal of Mitchell's petition is further supported by comparing the alternate remedies authorized by Wis. Stats. § 801.02(7)(c) and § 801.02(7)(d). Section 801.02(7)(d) mandates dismissing the petition for certiorari of a petitioner-prisoner who seeks to proceed without the payment of fees under Wis. Stat. § 814.29 but has had three or more prior actions dismissed. In contrast, the immediately preceding statutory subsection, § 801.02(7)(c)—which specifically addresses failure to include all exhaustion documents with the initial pleading—does not mandate dismissal. Instead, § 801.02(7)(c) mandates denial of the request to proceed without the prepayment of fees and costs.

The dismissal remedy mandated by § 801.02(7)(d) and the denial-of-fee-request remedy mandated by § 801.02(7)(c) is a distinction with a difference: “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2019 WI 24, ¶ 25, 385 Wis. 2d 748, 924 N.W.2d 153. The legislature chose a different remedy for each circumstance, even though it could have required dismissal of the petition for writ of certiorari if the exhaustion documentation was not included as part of the initial pleading at the time of filing. But “[i]f it had so intended, the legislature would have used the same language in both” § 801.02(7)(c) and (d) to authorize such a remedy. *Donaldson v. Bd. of Comm’rs of Rock-Koshkonong Lake Dist.*, 2004 WI 67, ¶ 58 n.17, 272 Wis. 2d 146, 680 N.W.2d 762.

Thus, the Court of Appeals misapplied the statute when it affirmed the Circuit Court's order dismissing Mitchell's petition. Indeed, the Court of Appeals expressly acknowledged that Wis. Stat. § 801.02(7)(c), (d) "are not models of clarity," and that Mitchell's construction of the statutes is plausible. *Court of Appeals Decision*, ¶ 40.

Mitchell's construction of § 801.02(7)(c), (d) is not just plausible; it is ***mandated*** by the plain meaning of the text.

This Court should address this purely statutory question to "help develop, clarify or harmonize the law." Wis. Stat. § 809.62(1r)(c)3. Left to stand, the *Court of Appeals Decision* erroneously permits dismissal of a petition for certiorari, when the text of the applicable statute does not provide for dismissal but, rather, provides for a different remedy – denial of the petitioner's request for fee waiver.

**B. Dismissal is a particularly inappropriate remedy where, as here, any initial omission of certain exhaustion documents is harmless because the petitioner *in fact* exhausted all administrative remedies before filing his petition for writ of certiorari.**

As noted, by statute, a prisoner who files a petition for writ of certiorari must include "all written materials" in his or her possession related to the administrative proceedings and appeal process. Wis. Stat. § 801.02(7)(c). This statutory requirement exists, no doubt, to ensure the prisoner has first exhausted all administrative remedies before filing with the circuit court a petition for writ of certiorari. Beyond contravening the statutorily-designated remedy, dismissal also is inappropriate here because Mitchell ***in fact*** exhausted his administrative remedies before he filed his petition.

As the Court of Appeals acknowledged, once Mitchell mailed to the Clerk additional exhaustion documents on



May 5, 2022, it was apparent that his petition was ripe for consideration by the Circuit Court all along, as § 801.02(7)(c) contemplates. *Court of Appeals Decision*, ¶ 33.

Thus, any initial omission of certain exhaustion documents with Mitchell's petition was harmless and does not warrant the imposition of the severe—and statutorily impermissible—remedy of dismissal. Wis. Stat. §§ 801.02(7)(c), 805.18(1). In other words, because Mitchell had, in fact, exhausted his administrative remedies, any such omission could not have “affect[ed] the substantial rights” of the opposing parties. Wis. Stat. § 805.18(1) (“The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.”).

This consideration serves as an additional basis upon which this Court should grant review.

### CONCLUSION

This Court should grant the petition for review.

Dated this 22nd day of March, 2024.

**Electronically signed by  
Douglas M. Raines**

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### **FORM AND LENGTH CERTIFICATION**

I hereby certify that this petition conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b)–(c) for a petition and appendix produced with a proportional serif font. The length of this petition is 4,889 words.

Dated this 22nd day of March, 2024.

**Electronically signed by**  
**Douglas M. Raines**

### **E-FILING CERTIFICATION**

I hereby certify that certify that the text of the electronic copy of this petition for review is identical to the text of the paper copy of this petition for review.

Dated this 22nd day of March, 2024.

**Electronically signed by**  
**Douglas M. Raines**

## APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wisconsin Statutes section 809.62(2)(f), (4) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; (3) any other portions of the record necessary for an understanding of the petition; and (4) a copy of any unpublished opinion cited under section 809.23(3)(a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of March, 2024.

**Electronically signed by**  
**Douglas M. Raines**