COMMENT ON RULES PETITION 23-01

Re: Rules Petition 23-01, In the Matter of Amending Wis. Stat. § 809.12, Relating to Appellate Review of Motion for Relief Pending Appeal

To: The Supreme Court of Wisconsin

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INTRODUCTION

This memorandum contextualizes legal developments discussed in Rules Petition 23-01 and offers additional considerations relevant to Wis. Stat. § 809.12, which governs stays on circuit court orders pending appeal. The authors of this memorandum are frequent appellate litigators and attorneys with a keen interest in both court procedure and the vital role the courts play in our state government. As such, we seek to ensure that both the Supreme Court and the public approach this potential change with all relevant information and perspectives in hand. The Court should take into account the full history of the pending change to the rule, as well as the areas of confusion that the proposed rule change will leave unresolved.

I. The Court began changing the standard of review for motions for relief pending appeal before *Waity*, through unpublished orders.

Even before issuing its decision in *Waity v. LeMahieu*, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263, this Court issued at least two unpublished orders that effectively changed the standard of review for motions for relief pending appeal.[1]

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[1] One author of this memorandum published a piece on this issue in the Wisconsin Law Review. The unpublished orders we reference can be accessed through links attached to the article on the Wisconsin Law Review's website. Jeffrey A. Mandell, *The Wisconsin Supreme Court Quietly Rewrote the Legal Standard Governing Stays Pending Appeal, Leaving Circuit Courts Effectively Powerless to Enjoin*

In *League of Women Voters v. Evers*, several plaintiffs challenged the constitutionality of the Wisconsin Legislature's lame-duck "extraordinary session" in late 2018. Specifically, the plaintiffs challenged three laws that affected the balance of powers between the Legislature, on the one hand, and the Governor, the Attorney General, and Executive Agencies on the other hand,[2] as well as 82 appointments confirmed by the State Senate during that extraordinary session. The Circuit Court for Dane County enjoined those laws and confirmations on March 21, 2019, declining in the same order to stay its injunction pending appeal.[3] The court of appeals granted the Legislature's motion to stay the order on March 27, 2019.[4]

In the interim, Governor Evers had rescinded the 82 nominations that had been confirmed in the lame-duck extraordinary session and then re-nominated many, but not all, of those individuals. After obtaining a stay of the circuit court's injunction, the Legislature challenged Governor Evers's actions, but the court of appeals denied relief. Ultimately, this Court accepted jurisdiction over the appeal on plaintiffs' petition for bypass and, having done so, took up the interlocutory question about the status of the nominations. On April 30, 2019, the Court issued an unsigned, ten-page

Unconstitutional Statutes, Wisconsin Law Review 2019:3, 29–45 (Oct. 17, 2019), ********wlr.law.wisc.edu/stays-pending-appeal/.

[2] *See generally* 2017 Wis. Acts 368, 369, and 370.

[3] *League of Women Voters v. Evers*, No. 2019-AP-559, unpublished order at 1–2 (Wis. Apr. 30, 2019) [hereinafter *LWV* Order]. Attorney Mandell represented the plaintiffs in the *League of Women Voters* case.

[4] *League of Women Voters v. Evers,* No. 2019-AP-559, unpublished order (Wis. Ct. App. Mar. 27, 2019).

order granting the Legislature relief and explaining its rationale.[5] This preceded the Court's holding of oral arguments and decision of the case on the merits.[6]

In *SEIU v. Vos*, the Service Employees International Union (SEIU) and others challenged specific provisions of the lame-duck laws, alleging they violated separation-of-powers principles in the Wisconsin Constitution. The Circuit Court for Dane County granted in part and denied in part the plaintiffs' motion for a temporary injunction on March 26, 2019, simultaneously denying the legislative defendants' request for a stay of the injunction and setting an evidentiary hearing on additional aspects of the case.[7] The legislative defendants appealed and sought a stay of the temporary injunction at the court of appeals, where the issue was fully briefed before this Court *sua sponte* exercised bypass jurisdiction over the appeal and invoked its supervisory authority to consolidate all proceedings in the Supreme Court.[8] The Court granted a stay on June 11, 2019, again issuing an unsigned majority order explaining its rationale.[9] The Court subsequently heard oral argument and issued decisions on the merits in that case.[10]

Justices Abrahamson, A.W. Bradley, and Dallet dissented from both the *LWV* Order and the *SEIU* Order.

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[5] *See generally*, *LWV* Order.

[6] *League of Women Voters v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209.

[7] *Serv. Emps. Int'l Union (SEIU) Local 1 v. Vos*, No. 2019-AP-622, unpublished order at 4 (Wis. June 11, 2019) [hereinafter *SEIU* Order].

[8] *Serv. Emps. Int'l Union (SEIU) Local 1 v. Vos*, No. 2019-AP-622, unpublished order (Wis. Apr. 19, 2019).

[9] *See generally*, *SEIU* Order.

[10] *Serv. Emps. Int'l Union (SEIU) Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35.

The Court's unpublished *LWV* Order and *SEIU* Order made several changes to the standard of review for motions on relief. The elements of the circuit court's inquiry into whether to grant a stay on a temporary injunction have long been described as follows: "A stay pending appeal is appropriate where the moving party:

(1) makes a strong showing that it is likely to succeed on the merits of the appeal;

(2) shows that, unless a stay is granted, it will suffer irreparable injury;

(3) shows that no substantial harm will come to other interested parties; and

(4) shows that a stay will do no harm to the public interest.

These factors are not prerequisites but rather are interrelated considerations that must be balanced together." *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (per curiam) (citation omitted). The *LWV* and *SEIU* Orders mostly affected the first and second prongs of this standard.

First, both Orders explained that the circuit courts had erred in refusing to stay their injunctions because they did not recognize that their conclusions of law would be reviewed *de novo* by the appellate court. This *de novo* review, according to the majority, greatly increased the Legislature's likelihood of success on the merits, and indeed reached the threshold required under *Gudenschwager* to grant a temporary injunction.[11] Thus, the *LWV* Order and the *SEIU* Order broke new ground by asserting that an appeal presenting issues subject to *de novo* review would presumptively satisfy the first prong of the stay standard. This departed from prior case law, which, as the instant rulemaking petition highlights, instructed that the appellate

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[11] *LWV* Order at 7; *SEIU* Order at 6.

court was to conduct deferential review on all prongs of the stay standard, including the likelihood of success. The Orders also eliminated any opportunity that the circuit court would have to test or analyze the actual likelihood of success of any position.

Second, the Orders effectively created a rule that harm to the Legislature trumps all other considerations in the harm-balancing portion of the *Gudenschwager* analysis. The Court wrote: "[T]he harm that stems from refusing to stay an injunction against the enforcement of a law passed by the Legislature and signed by the Governor, regardless of the nature of the challenge to the law, is an irreparable harm of the first magnitude."[12] The Court offered no citation for this proposition, and the majority gave no indication in either Order that it had considered the countervailing harms to plaintiffs or the public of allowing unconstitutional laws to take effect.[13]

Although these Orders are unpublished and not available except to those who know to look for them, the Court has treated them as precedential authority. The *SEIU* Order cites the *LWV* Order.[14] And subsequent decisions do so as well, including both unpublished, interlocutory stay orders and the merits decision in *Waity*.[15]

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[12] *LWV* Order at 8; *see also SEIU* Order at 8.

[13] "[The majority] place an inordinate amount of weight on the harm that results from enjoining an enacted law while completely ignoring the harm that comes from leaving a potentially unconstitutional law in place." *LWV* Order at 12 (A.W. Bradley, J., dissenting). This harm extends not only to the public, but to other state actors, who face the prospect of enforcing statutes they believe to be unconstitutional.

[14] *SEIU* Order at 8.

[15] *See, e.g.*, *Waity v. LeMahieu*, No. 2021AP802, unpublished order at 7, 8 (Wis. July 15, 2020) (citing *LWV* Order); *id.* at 10–11 (quoting *SEIU* Order); *Waity v. LeMahieu*, 2022 WI 6, ¶¶57–58, 400 Wis. 2d 356, 969 N.W.2d 363 (citing unpublished order in *Waity*'s quotation of *SEIU* Order); *id.* ¶89 (Dallet, J., dissenting) (citing *LWV* Order).

II. In *Waity v. Lemahieu*, the Court issued its first published decision changing the rule governing stays pending appeal—but did not fully grapple with the implications of its new approach or its prior, unpublished orders.

In *Waity*, the plaintiffs challenged the Legislature's retention of private counsel at public expense in anticipation of redistricting litigation, even before the decennial Census was complete or any map-drawing work could begin.[16] The Circuit Court for Dane County granted plaintiffs' motion for summary judgment, declared the counsel contracts void *ab initio*, and entered a permanent injunction prohibiting payments under the invalid contracts.[17] The circuit court declined to stay its order, and the court of appeals similarly denied a motion for stay pending appeal.[18] The Supreme Court first took the appeal on bypass and then granted a stay pending resolution of the merits.[19] It also accepted as an issue for review the proper standard for stays pending appeal. It then decided that issue, claiming to reaffirm the continued vitality of the four-prong test from *Gudenschwager*, while actually formally endorsing (and thereby expanding the applicability of) the changes effected by the *LWV* and *SEIU* Orders.[20]

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[16] *Waity*, 2022 WI 6, ¶6 (Legislature executed contract with legal counsel on Dec. 23, 2020, for services to begin Jan. 1, 2021). Due in large part to Covid-19-related delays, the U.S. Census Bureau did not deliver any data states needed for redistricting efforts until August 12, 2021, and did not deliver the final "redistricting data toolkit" until September 16, 2021. *2020 Census Timeline of Important Milestones*, U.S. Census Bureau (last revised May 31, 2022), https://www.census.gov/programs-surveys/decennial-census/decade/2020/planning-management/release/timeline.html.

[17] *Waity*, 2022 WI 6, ¶13.

[18] *Id.* ¶¶14–15.

[19] *Id.* ¶16.

[20] *Id.* ¶¶48–61.

The Court held: "When reviewing the likelihood of success on appeal, circuit courts must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis. For questions of statutory interpretation, as are presented in this case, appellate courts consider the issues de novo."[21] This, at least, is the purported formal holding of the case. It is essentially the same rule now proposed in Rules Petition 23-01, and in and of itself, it is unobjectionable.

In applying this new rule, however, the Court made the same logical leap it had made in its prior, unpublished Orders: equating *de novo* review with a strong presumption that the circuit court will be overruled.[22] In fairness, a concurring justice disagrees with the dissent's characterization of the majority's ruling as holding that "a stay must always be granted when it is possible an appellate court might disagree on a novel question of law," labeling that "[i]ncorrect" and noting that "[a]ll the majority says on this point is that the circuit court's stay analysis should account for the standard of review on appeal."[23] But neither the majority nor the concurrence gives any sense of when a circuit court judge can be so confident in their evaluation of the merits of a case that they can opt not to place dispositive weight the possibility that a *de novo* review will lead to a different result. Given this Court's track record of equating *de novo* review with a strong likelihood of success on the merits, this is a

[21] *Id.* ¶53.

[22] *Id.*

[23] *Id.* ¶66 (Hagedorn, J., concurring).

serious gap in the rule *Waity* purports to adopt, and in the one proposed by Rule Petition 23-01.

III. The proposed rule change does not resolve the confusion created by *Waity* and the Court's unpublished orders.

The proposed rule change itself apparently codifies the Court's basic holding in *Waity v. LeMahieu*—but like that case, it leaves unresolved several key areas of confusion generated by *Waity* as well as by the *LWV* Order and the *SEIU* Order.

The proposed rule change would amend Wis. Stat. § 809.12 to specify that an appellate court "shall review the trial court's decision [on a motion for relief pending appeal] for an erroneous exercise of discretion, but it shall independently review the trial court's legal determinations." In practice, this Court has so far held that this *de novo* review of legal determinations heavily tips the scales towards granting a stay. But why should this be so? This strained interpretation of a seemingly innocuous standard is cause for concern. As Justice A.W. Bradley explained in dissent from the *LWV* Order: "Reliance on the appellate standard of review is puzzling, given that de novo review does not make the merits of a party's arguments any stronger."[24]

It is easy to imagine a trial court judge having such confidence in their decision that they think that it is nearly certain to survive *de novo* review. And, conversely, a trial court judge may issue injunctive relief based on an evaluation of the merits but acknowledge that the issue is unsettled enough that an appellate court might disagree, and hence stay its injunction order. In other words, *de novo* review should not

[24] *LWV* Order at 11.

inherently preclude courts from adjudicating motions for stays—nor did the prior state of the law prevent courts from doing so—yet this Court has interpreted the law to make the appellate standard of review nearly dispositive in any instance where the issue is a purely legal one. That reading cannot be correct because in many cases it would essentially strip circuit courts of their fundamental authority to issue injunctions.

Indeed, another case implicating a stay pending appeal that has reached the Supreme Court since *Waity* reveals the inadequacy of the *LWV-SEIU-Waity* approach. In *County of Dane v. Public Service Commission of Wisconsin*, the majority explained that the circuit court had erred in holding that a defendant was not entitled to a stay of injunctive relief because the judge disagreed entirely with the defendant's merits arguments and the defendant thus had no likelihood of success on appeal.[25] The majority wrote that the lower court "did not seem to understand that its interpretation of Wis. Stat. § 227.57(1) would be reviewed de novo by the court of appeals."[26]

But again, a judge who has carefully considered the law, reasoned through the possible outcomes, and reached legal conclusions in which they are utterly confident will not expect that a court of appeals is likely to overrule them, even on a *de novo* review. To require judges to act based upon a presumption that they will be overruled

[25] 2022 WI 61, ¶¶78–80, 403 Wis.2d 306, 976 N.W.2d 790.

[26] *Id.* ¶80.

any time they are subject to *de novo* review is to foreclose their authority to make reasoned decisions in the first instance.

The Court's recent jurisprudence on stays pending appeal suggests that circuit courts' grants of injunctive relief can nearly always be undone by appeal—at least when parties are challenging the constitutionality of legislation, and perhaps more broadly.[27] After all, the *LWV-SEIU-Waity* line of cases all implicated the Legislature's interest, but that was not true in *County of Dane*, when the Court nevertheless relied on the *de novo* review standard in deciding a stay was incorrectly denied. This is a severe intrusion on the jurisdiction of the lower courts. To the extent the proposed rule change simply confirms the *LWV-SEIU-Waity* interpretation of the law, it offers no more clarity on *how* circuit court judges should weigh the importance of the impending *de novo* review. (And to the extent it changes the standard enunciated in the *LWV* Order, the *SEIU* Order, and *Waity* decision, the Court should make that clear in its disposition of the rulemaking petition.)

[27] A notable but unexplained exception to this new rule occurred when the Supreme Court declined to extend a stay the court of appeals had issued on the circuit court's order erecting barriers to absentee voting. *See Teigen v. Wis. Elections Comm'n*, No. 2022AP92, unpublished order (Wis. Feb. 11, 2022). The circuit court and court of appeals conducted their stay analyses before January 27, 2022, when *Waity* was published. *See Teigen v. Wis. Elections Comm'n,* Wauk Cnty. Cir. Ct. No. 21-cv-958, Dkt 142, Order Granting Summary Judgment for Plaintiffs (Jan. 20, 2022) (Bohren, J.); *Teigen v. Wis. Elections Comm'n,* No. 2022-AP-92, unpublished order (Wis. Ct. App. Jan. 24, 2022). The circuit court declined to issue a stay, but the court of appeals stayed the effect of its order through February 15, 2022, to allow the spring primary election to proceed under the existing rules and policies. Before the spring primary, the Supreme Court granted bypass and assumed jurisdiction over the appeal. On February 2, 2022, intervenor-defendants-appellants (represented by Law Forward and Stafford Rosenbaum) filed an expedited motion in the Supreme Court requesting an extension of the temporary stay through the latter of the April 5, 2022 election or the adjudication of the case on its merits. *Teigen*, unpublished order at 2 (Wis. Feb. 11, 2022). Just two weeks after issuing its *Waity* decision, the Court completely ignored the new standard it had created, citing only to the *Gudenschwager* factors, which it barely analyzed. *See id.*

If the answer is that this Court has intentionally disempowered lower courts, that should be made explicit, and this Court should forthrightly address the consequences of such a shift. By removing the arrow of temporary injunctive relief from circuit judges' quivers, the Court creates a situation where any litigant seeking immediate relief on a novel issue of law can obtain a prompt, effective remedy only by invoking this Court's original jurisdiction. If this Court has not intentionally disempowered lower courts, litigants and lower-court judges alike would be served by a rule clarifying what exactly it means for the circuit judge that their ruling on injunctive relief will be reviewed *de novo*.

Finally, the proposed rule change does not incorporate at all the Court's unpublished jurisprudence on how to apply the "irreparable harm" factor of the *Gudenschwager* standard when plaintiffs are challenging the constitutionality of statutes. The *LWV* Order and the *SEIU* Order appear to have tilted the scales heavily in the Legislature's favor, but *Waity* did not include a similar discussion. Preventing circuit courts from staying legislation whenever the Legislature objects is incompatible with a legal system where the Constitution is supreme over statutes and regulations. If the Legislature has passed an unconstitutional law, it is hard to see how enjoining its enforcement could cause irreparable harm. To the contrary, putting a thumb on the scales to mandate a stay that leaves such a law in effect—after a court has deemed it unconstitutional—is itself an irreparable harm and a trespass against

the limited authority that the people of Wisconsin have, through the state Constitution, entrusted to their government. The Court should correct its recent unpublished writings on this point, whether by Rule or ruling.

CONCLUSION

It cannot be true that *de novo* review automatically equates to a strong likelihood of success on the merits for the losing party in a motion for injunctive relief. Nor can it be true that in our state's unified court system unconstitutional legislation cannot be enjoined following adjudication by a lower court. If the Court is going to revisit the rules on when injunctive relief can be stayed pending appeal, it should go beyond the narrow parameters of the instant proposal and resolve the confusion around these issues that its recent decisions have created. If the Court is open to considering such an approach, we would welcome the opportunity to submit proposals or participate in any discussion about how to design a standard that would serve litigants, courts, and the administration of justice.

Respectfully submitted,

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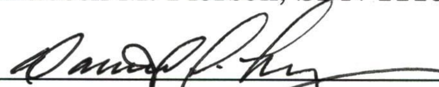

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