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April 30, 2019

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You are hereby notified that the Court has entered the following order:

No. 2019AP559 The League of Women Voters v. Tony Evers L.C.#2019CV84

Pending before this court is a motion by the intervening defendant-appellant, Wisconsin Legislature (the Legislature), for temporary relief pending appeal in this matter.

In an order dated March 21, 2019, the Dane County circuit court granted the motion of the plaintiffs-respondents, The League of Women Voters, et al. (the plaintiffs), for an injunction and enjoined the enforcement of three Acts[1] that the Legislature had passed during an

[1] The three acts passed during the December 2018 "extraordinary session" and subsequently signed by the Governor were 2017 Wisconsin Act 368, 2017 Wisconsin Act 369, and 2017 Wisconsin Act 370. This order will refer to them collectively as "the three Acts."

"extraordinary session"[2] in December 2018. The circuit court's order also enjoined the enforcement of the Senate confirmations of 82 appointees during the December 2018 "extraordinary session" and "vacated" those appointments. In the same order, the circuit court also denied the Legislature's motion for a stay of the injunction pending the completion of appellate review that is authorized as a matter of right pursuant to Wis. Stat. § 813.025(3).

The Legislature initiated the present appeal on March 22, 2019, in the court of appeals. At the same time, the Legislature filed a motion in the court of appeals for "an emergency stay," asking that court to grant it, first, an immediate administrative (ex parte) stay, and second, following the receipt of responses from the other parties, a stay pending the entirety of the appeal. It is clear from the motion that the Legislature was seeking an order from the court of appeals that would have stayed the effect of the circuit court's injunction with respect to both enjoining the three Acts and "vacating" the appointments of 82 individuals whose appointments by Governor Walker had been confirmed by the Senate during the December 2018 "extraordinary session." In other words, with respect to the appointments, the Legislature asked the court of appeals to stay the effect of the circuit court's injunction, thereby returning those individuals to their respective positions during the pendency of this appeal.

Within a few hours after the filing of the Legislature's motion for an emergency stay, the defendant-respondent, Governor Tony Evers, the plaintiffs, and the Wisconsin Department of Justice (DOJ) had asked the court of appeals to establish a briefing schedule that would allow them to file responses before the court of appeals considered issuing any stay. Later in the afternoon on March 22, 2019, the court of appeals issued an order that, inter alia, directed the parties other than the Legislature to file responses to the Legislature's motion by 4:00 p.m. on Monday, March 25, 2019.

Within a short time after the court of appeals issued that order, the Governor had a letter hand-delivered to the Chief Clerk of the Wisconsin Senate. The letter consisted of the following single sentence and a list of the 82 individuals whose appointments had been confirmed by the Senate during the December 2018 "extraordinary session": "In light of yesterday's ruling in League of Women Voters v. Knudson, et al., Dane County Case No. 19CV84,[3] this letter is to remove the following appointments from consideration for confirmation by the Wisconsin Senate: . . . ."

[2] We use the term "extraordinary session" to describe what the Legislature did in December 2018 when it convened itself to conduct floor debate and votes because that is the term used by the parties in their filings.

[3] This was the short caption and case number for this matter when it was in the circuit court. Defendant Dean Knudson was subsequently dismissed from the lawsuit. Thus, the short caption has changed on appeal to The League of Women Voters v. Tony Evers, and it has been assigned appellate case number 2019AP559.

On March 27, 2019, following receipt of the responses to the Legislature's motion and a reply memorandum filed by the Legislature, the court of appeals granted the Legislature's motion for temporary relief pending appeal. It first addressed two preliminary matters. It noted that some parties had conflated the plaintiffs' likelihood of success in the action with the Legislature's likelihood of success on the appeal challenging the injunction. It clarified that its focus at this point was on the latter and not on the merits of whether the circuit court had properly granted an injunction. Second, it further stated that in deciding the Legislature's stay motion, its task was to weigh the harms that might result from denying a stay pending appeal in the event that the injunction was ultimately reversed against the harms that might result from imposing a stay if the injunction was ultimately affirmed. That task did not include weighing the harms or benefits that allegedly flowed from the three Acts.

The court of appeals then turned to reviewing the circuit court's application of the factors for considering temporary relief pending appeal that were set forth in State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (citing Leggett v. Leggett, 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986)).[4] With respect to the first factor of the Legislature's likelihood of success on appeal of the injunction, the court of appeals did not decide whether the presumption of constitutionality which usually attaches to regularly enacted statutes should impact its consideration of that factor. It determined that it did not need to do so because the issue presented in the appeal, whether the Legislature had validly convened in December 2018, was a legal question of first impression that would be subject to de novo review on appeal. The court of appeals indicated that the circuit court had erred by failing to take these considerations into account when it concluded that the Legislature had no likelihood of success on the merits. With respect to the second factor, whether there would be irreparable injury if no stay pending appeal were granted, the court of appeals stated that the circuit court again had erred in evaluating the alleged irreparable injury by holding a view that there was no chance its legal conclusion would be overturned and by failing to consider the harm that could result from enjoining acts and confirmations of appointments that may ultimately be found valid (which would then require undoing acts done in reliance on the injunction in the intervening period). Noting that not all of the alleged harms were significant, the court of appeals did find significant the harm that the people of the state would suffer from having statutes enacted by their elected representatives declared unenforceable. Ultimately, the court of appeals concluded that when the balancing test was properly performed, the first two Gudenschwager factors weighed in favor of granting the stay and those factors outweighed any potential harm under the third and fourth factors. The court of appeals therefore ordered "that the temporary injunction issued by the circuit court on March 21, 2019, is hereby stayed pending the Legislature's appeal."

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[4] A stay or other temporary relief 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.

The parties, however, continued to dispute the effect of the "stay" granted by the court of appeals, especially with respect to the status of the 82 appointees. The Legislature took the position that the "stay" restored those appointees to the positions they had held prior to the circuit court's injunction. Governor Evers took the position that the court of appeals' stay was prospective only and that his letter had withdrawn those appointments at a time while the injunction was in effect so those appointees no longer had any claim to their positions. The Governor advised the various state agencies, commissions, boards, etc. that those appointees should not be allowed to return to their positions or have access to the physical offices some of them had occupied prior to the injunction.[5]

The Legislature therefore filed a new motion with the court of appeals, asking that court to "enforce" its March 27, 2019 "stay." In an order dated April 9, 2019, the court of appeals denied the Legislature's motion. It noted that its March 27, 2019 order had been silent as to the status of the appointees and that it had not expressly ordered the Governor to allow them to continue in their positions. The court of appeals stated that it had been the circuit court's action in denying the stay, not the Governor's subsequent action in withdrawing the nominations, that had been the subject of its review. From that premise, it concluded that the only way its March 27, 2019 order could have restored the appointees to their positions would have been by operation of law as an automatic effect of the stay. It then pointed to the general rule of law that a stay "operates upon the judicial proceeding itself . . . by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." Niken v. Holder, 556 U.S. 418, 428 (2009). It further stated that it was not aware of any legal authority for the proposition that an action taken while an injunction was in effect is invalidated by an appellate court's subsequent stay. In other words, it believed that its March 27, 2019 order could have only prospective effect and could not affect the Governor's ability to withdraw the nominations pursuant to the circuit court's injunction while that injunction was still in effect. On the other hand, however, the court of appeals acknowledged that an appellate court reviewing the merits of the injunction would still have the power to determine that the Governor's withdrawal of the nominations had been void if it ultimately concluded that those nominations had been validly confirmed during the December 2018 "extraordinary session."

On April 10, 2019, the Legislature filed in this court a document entitled "Emergency Petition for Original Action, Supervisory Writ, Writ of Mandamus, and/or Immediate Temporary Relief of Intervening Defendant-Appellant-Petitioner Wisconsin Legislature." The document was filed bearing the case caption and case number for the above-referenced appeal.

[5] Governor Evers has reappointed a majority of the 82 appointees to the positions to which they had been appointed by Governor Walker. He has not, however, reappointed the appointees to certain significant positions, including positions on the Public Service Commission (PSC), the Labor and Industry Review Commission (LIRC), and the University of Wisconsin Board of Regents.

By order dated April 11, 2019, this court separated the two portions of the Legislature's April 10, 2019 filing. The petition for original action and for a supervisory writ or writ of mandamus was assigned to a new case, Wisconsin Legislature v. Evers, No. 2019AP673-OA. That petition was subsequently denied by this court's April 17, 2019 order. The portion of the April 10, 2019 filing that sought immediate temporary relief was treated as a motion to this court in this appeal.[6] The court's April 11, 2019 order directed the other parties to the appeal to file responses to the Legislature's motion by 3:00 p.m. on Monday, April 15, 2019. On that date the court received responses from the plaintiffs and from Governor Evers. In addition, the court granted the motion of Wisconsin Manufacturers and Commerce (WMC) for leave to file a non-party brief amicus curiae in support of the Legislature's motion and accepted for filing WMC's accompanying non-party brief. The court has now considered the Legislature's motion for immediate temporary relief pending appeal, the responses to that motion, and the non-party brief in support of that motion.

The Legislature's motion for temporary relief asks this court to "order immediate reinstatement of the appointees." It argues that the uncertain status of the appointees is creating an ongoing and intolerable harm to its interest and to the public interest because the boards and commissions to which the Governor has refused to reappoint the prior appointees, including the PSC, the LIRC, and the Board of Regents, are being hindered in performing their duties. It also points to the impact that the injunction and the Governor's withdrawal of the nominations is having on the individual appointees and their assistants, who have had their salaries and benefits terminated. In addition, the Legislature asserts that if the Governor were to appoint new individuals to those positions, there would be more confusion because two people would be claiming to be the true appointee and because the court of appeals acknowledged that the original appointees may ultimately be restored after a review of the merits of the injunction. Further, the Legislature argues that it was the circuit court's injunction, not the Governor's subsequent letter to the Chief Clerk of the Senate, which had vacated the 82 appointments. The Legislature contends that since the injunction has now been stayed by the court of appeals' March 27, 2019 order, those 82 appointees are now able once more to enforce the statutory rights to their appointed positions that they gained when their nominations were confirmed by the Senate during the December 2018 "extraordinary session." It asks this court to recognize the statutory rights the appointees regained after the March 27, 2019 court of appeals' order.

In response, Governor Evers asserts that the legislature is creating a false picture of an emergency or of chaos surrounding the various boards and commissions and that there is no need for this court to grant any immediate temporary relief. For example, he relies on an affidavit from the chairperson of the PSC to the effect that this litigation and the loss of one of its three members has not hindered the PSC's ability to complete its work, pointing to an April 11, 2019 meeting of the two remaining members, at which the PSC had decided 31 agenda items. The

[6] At the time of the Legislature's April 10, 2019 filing, this appeal was still pending in the court of appeals, but a petition for bypass of the appeal to this court had been filed in this court. On April 15, 2019, this court granted the petition for bypass and assumed jurisdiction over the appeal.

Governor also argues that the court of appeals properly exercised its discretion when it denied the Legislature's motion to enforce its stay. If this court would decide to review the matter anew, the Governor contends that this court should reach the same conclusion as the court of appeals that he was permitted to withdraw the nominations when the injunction was in effect prior to the March 27, 2019 stay order.

Although the Legislature has not specifically cited Wis. Stat. § (Rule) 808.07(2), it is clear that its various motions for temporary relief pending appeal have been brought pursuant to that rule.[7] Wisconsin Statute § (Rule) 808.07(2) authorizes both a circuit court and an appellate court to grant a number of forms of temporary relief while an appeal is pending, including (1) staying execution or enforcement of a judgment or order; (2) suspending, modifying, restoring, or granting an injunction; or (3) issuing any other order appropriate to preserve the "existing state of affairs or the effectiveness of the judgment subsequently to be entered."

Where a litigant asks an appellate court to grant it temporary relief pending appeal and the litigant has sought such relief unsuccessfully in the circuit court, the motion addressed to the appellate court is not considered in a vacuum. The appellate court's review is conducted by reviewing the circuit court's decision to grant or deny such relief under an erroneous exercise of discretion standard. Gudenschwager, 191 Wis. 2d at 439. Our decision in Gudenschwager also makes clear that where a motion for relief pending appeal is directed to this court after the movant has unsuccessfully sought such relief in both the circuit court and the court of appeals, this court reviews the circuit court's exercise of discretion, not the court of appeals' exercise of discretion. 191 Wis. 2d at 444 ("Consequently, we find that [the circuit court's] decision to release Gudenschwager pending appeal amounted to an erroneous exercise of discretion."). This is the only logical way to proceed. Otherwise, this court would be reviewing the court of appeals' discretionary decision, which in turn was reviewing the circuit court's exercise of discretion.

"An appellate court will sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." Gudenschwager, 191 Wis. 2d at 440 (citing Loy v. Bunderson, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)). Our review of the circuit court's order in this case denying the Legislature's request for a stay of the injunction leads us to conclude, as did the court of appeals, that the circuit court erroneously

[7] The dissent criticizes the court for relying on Wis. Stat. § (Rule) 808.07, implying that the court is creating some new standard or basis for relief. To the contrary, the court is simply using the procedure and standards that this court has established, by rule and by case law, as the rules of decision for motions for temporary relief pending appeal. The dissent does not dispute that the Legislature's motion is clearly one for temporary relief pending appeal. Indeed, the court of appeals also relied on Rule 808.07 when it granted a stay pending appeal in its March 27, 2019 order in this case. Further, while it criticizes the court for relying on the court's long-established procedure and standards, the dissent tellingly offers no other basis on which to decide the current motion.

exercised its discretion. Although the circuit court referenced the four factors set forth in Gudenschwager, it made errors of law in the manner in which it applied them.

The four factors are set forth in footnote 2 above. It should be noted that those four items are interrelated factors to be considered; they are not separate prerequisites. Gudenschwager, 191 Wis. 2d at 440. Thus, having more of one of the factors may excuse less of another. Id.

The first factor to be considered is that the movant must make a "strong showing" that it is likely to prevail on the merits of the appeal. This "strong showing," however, is inversely proportional to the amount of irreparable injury that the moving party (and the public) will suffer in the absence of temporary relief pending appeal. The movant is obligated to show at least "more than the mere 'possibility'" of success on the merits. Id. at 441.

The circuit court did not, however, consider whether, even if it had reached an opposite conclusion in deciding to grant the injunction, the Legislature had nonetheless shown more than the "mere possibility" of succeeding on an appeal of its ruling. The circuit court simply determined that because it had found the plaintiffs' interpretation of the constitution and statutes to be more compelling, that determination meant that the Legislature had "no likelihood of success on the merits." As noted by the court of appeals, the circuit court never recognized that success on the merits in this case turned on questions of law that would be reviewed de novo by the appellate courts. The circuit court did not acknowledge that its determination was the first word, not the last word, on the interpretation of the relevant constitutional provisions and statutes.[8]

Our review of the Legislature's motion and the arguments it made below leads us to conclude that it has set forth an argument that has "more than the mere 'possibility'" of prevailing. The circuit court concluded that under Article IV, § 11 and Wis. Stat. § 13.02, the Legislature may meet only during "regular sessions" that commence in January of each year and "special sessions" called by the Governor. The Legislature points out, however, that under Wis.

[8] The dissent claims that the court is substantively changing the law to say that the presence of a de novo standard of appellate review satisfies the first Gudenschwager factor of likelihood of success on appeal. The court is merely saying that where an appeal will rest on review of a legal question, to which a de novo standard of appellate review will apply, it is an error of law for a circuit court to proclaim that because it has decided the legal issue against the appellant in granting an injunction, the appellant must therefore have "no likelihood of success on the merits" on appeal. The standard of appellate review can greatly affect an appellant's chance of success in the appellate court. An appellant facing a clearly erroneous or erroneous exercise of discretion standard of appellate review will have a much more difficult burden than one facing a de novo standard of review. Consequently, when the circuit court ignored the impact of the standard of appellate review and refused to analyze whether the appellant will have more than the mere possibility of convincing an appellate court, taking a fresh look at the legal question, to reach the opposite conclusion, it failed to properly apply the law, thereby erroneously exercising its discretion.

Stat. § 13.02(2), the "regular session" is to commence on the first Tuesday after January 8th "unless otherwise provided under sub. (3)." Subsection (3) of the statute provides that the joint committee on legislative organization shall meet and develop a work schedule for the session. The Legislature further notes that since the late 1960s or early 1970s, in each biennium, both houses have passed a joint resolution providing that the Legislature's "session" will extend from the beginning of the biennium until the end of the biennium, with certain periods of time prescheduled for floor sessions and other periods prescheduled for committee work, with the ability to convert committee work periods into floor periods. Such a joint resolution was in effect when the Legislature called itself into a floor period (or "extraordinary session") in December 2018. Moreover, the Legislature questions whether the circuit court had the authority to inquire into the manner in which the Legislature called itself into a floor period. See State ex rel. Ozanne v. Fitzgerald, 2011 WI 43, ¶15, 334 Wis. 2d 70, 798 N.W.2d 436.

As we are only at the early stage of this appeal and in the context of a motion for temporary relief pending appeal, we express no position as to whether or not any of the Legislature's arguments will ultimately prevail. That is not the focus of this analysis. We cannot say, however, that the Legislature's arguments have "no likelihood of success on the merits," as the circuit court did.

We further agree with the court of appeals that the circuit court's consideration of the irreparable harms that would flow from denying relief pending appeal was erroneously premised on the circuit court's determination that the challenged Acts and confirmations would ultimately be found to be invalid. As the court of appeals properly noted, there is a substantial harm to the Legislature and to the public where statutes enacted by the people's elected representatives are declared unenforceable and enjoined before any appellate review can occur. Indeed, the 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.

In addition, and of equal importance, the circuit court completely ignored the harms that would result from refusing to stay its order "vacat[ing]" the appointments, even temporarily. First, in the absence of a stay and in the event of an ultimate determination that the Legislature was validly convened, the 82 appointees will have been harmed by having been removed, even temporarily, from exercising the powers of their positions. Likewise, the boards and commissions to which those individuals were appointed will have been harmed by the failure to receive the votes and input of those individuals. Finally, the public will also have suffered irreparable harm if individuals who have been confirmed to appointed positions are removed from those positions without a final determination on whether their confirmations were valid.

The circuit court also failed to take into account that its injunction had not just enjoined the appointees from exercising the powers of their respective positions; it had vacated their appointments. Denying a stay, therefore, not only kept those appointees from exercising their respective powers for a period of time while the injunction was reviewed on appeal, it provided a potential basis for the Governor to withdraw those nominations permanently, as his March 22,

2019 letter purported to do. The circuit court's refusal to grant a stay of its injunction, therefore, also gave rise to the potential confusion that would ensue if the Governor nominated new individuals to the positions at issue, thereby creating a situation where two people would both claim a right to the same position.

On the other hand, staying the injunction would not have created irreparable harm, at least as to the appointees. The circuit court's injunction was based on its determination that the December 2018 confirmations of the 82 individuals were invalid because the Legislature was not properly convened. Even if the circuit court's view is ultimately determined to be the correct one, invalidating the December 2018 confirmations would not mean that those individuals lacked authority to serve. When the Governor nominates someone to serve in the types of positions at issue, that nominee serves in an acting capacity until the Senate confirms them or rejects their confirmation. If the December 2018 confirmations would ultimately be found to be invalid, those individuals could have continued to serve in an acting capacity just as they had done prior to the December 2018 confirmation vote. In other words, the invalidity of the December 2018 confirmation vote would not render the initial appointments of those 82 individuals void ab initio. The invalidity of the December 2018 confirmation vote would only return those individuals to the status of a yet-to-be-confirmed nominee serving in an acting capacity. Only by "vacat[ing]" the appointments and then refusing to stay that order did the circuit court purport to remove those individuals from their positions, even temporarily.

We therefore conclude that the balance of the four Gudenschwager factors weighs in favor of granting temporary relief until this court can complete its work on the appeal.

The question that remains is what the nature of that temporary relief should be. To answer this question, it is important to remember what this court is reviewing. We are reviewing the circuit court's decision not to grant a stay at the time that it entered its injunction. It is at this point that we depart from the court of appeals' apparent belief that its authority to issue relief pending appeal was limited to staying the circuit court's injunction and that such a stay was prospective only. As noted above, Rule 808.07 gives an appellate court a much broader range of tools to craft relief that is needed to preserve the status quo and to ensure the efficacy of any final appellate decision. Moreover, if the determination is made by the appellate court that the circuit court erred in failing to grant a stay at the same time that the injunction was issued, then the appellate court should craft its relief to return the parties to the positions they were in immediately prior to the entry of the circuit court's injunction to the extent practicable.

Indeed, that is what Rule 808.07(2)(a)3. contemplates when it authorizes an appellate court to "[m]ake any order appropriate to preserve the existing state of affairs . . . ." The "existing state of affairs" referenced in the rule, at least under these circumstances, has to mean the state of affairs in effect prior to the circuit court's injunction. If it did not mean this, but rather meant only the state of affairs as of the moment of the appellate stay, then the appellate court would be powerless to undo any acts taken by the parties before the appellate court could act on a request for a stay. This would lead to an absurd result. It would encourage litigants to move for injunctions in a circuit court, and when they obtained such an injunction, to rush

around taking all sorts of actions before the appellate court could even consider whether to issue a stay or other temporary relief--actions that the appellate court would then be unable to undo. That is antithetical to the orderly administration of justice and therefore cannot be what the rule intends. On the other hand, there are practical limits to what actions an appellate court can undo in order to return the parties to the prior state of affairs.

The state of affairs that was existing immediately prior to the entry of the circuit court's injunction in this case was that the three Acts were in effect and the 82 appointees were performing the duties of their respective positions. We therefore tailor the relief we grant to restore that state of affairs to the extent practicable. This requires two separate forms of relief. First, we continue the court of appeals' stay of the circuit court's injunction against the enforcement of the three Acts and the enforcement of the confirmations of the 82 appointees for the duration of this appeal. Second, we grant an injunction returning the 82 appointees to the respective positions to which they were appointed immediately and for the duration of this appeal. Because the circuit court should have entered a stay of its injunction at the time it was entered, and in order to ensure the effectiveness of our order returning the 82 appointees to their positions, we order that the Governor's March 22, 2019 letter withdrawing the appointments was without legal effect and will remain so for the duration of this appeal. The 82 appointees shall immediately be allowed to perform the duties of their respective positions in the same manner as they were performing those duties prior to March 21, 2019.

IT IS ORDERED that the motion of the Intervening Defendant-Appellant, Wisconsin Legislature, for temporary relief pending appeal is granted in part, as set forth below; and

IT IS FURTHER ORDERED that the court of appeals' March 27, 2019 stay of the portion of the Dane County circuit court's March 21, 2019 order in Dane County Case No. 19CV84 that enjoined enforcement of any provision of 2017 Wisconsin Act 368, 2017 Wisconsin Act 369, and 2017 Wisconsin Act 370 shall remain in effect pending this court's final decision in this case; and

IT IS FURTHER ORDERED that the court of appeals' March 27, 2019 stay of the portions of the Dane County circuit court's March 21, 2019 order in Dane County Case No. 19CV84 that enjoined the defendants from enforcing the December 2018 confirmations of the 82 nominees/appointees to the various state authorities, boards, councils, and commissions and that "temporarily vacated" those appointments shall remain in effect pending this court's final decision in this case; and

IT IS FURTHER ORDERED that the 82 nominees/appointees are hereby restored, as of the date of this order, to the positions to which they were appointed, and they may exercise all of the rights and duties of those positions as they did prior to the Dane County circuit court's March 21, 2019 injunction and order, pending this court's final decision in this case. The letter of March 22, 2019, from Governor Evers to Jeff Renk, Chief Clerk of the Wisconsin Senate, was of no legal effect and will remain so for the duration of this appeal.

ANN WALSH BRADLEY, J. (*dissenting*). Relying on an argument not advanced by any party, the majority reinstates 82 gubernatorial appointees. The danger of a court reaching out and relying on a statute not cited by the parties is twofold. First, it blindsides the parties and deprives them of notice and the opportunity to be heard. Second, the court does not have the benefit of making sure that its newly advanced theory has been tested by an adversary briefing process, thereby increasing the chance of inadvertently or sub silentio substantively changing the law. Indeed, it appears that the majority has changed the substantive law here.

Although the majority acknowledges that the Legislature has not cited Wis. Stat. § (Rule) 808.07(2), it still relies upon that rule in crafting the relief it affords. The Legislature's kitchen sink motion for relief sought a supervisory writ, writ of mandamus, unspecified "immediate temporary relief," and even an original action. Yet, a remedy pursuant to § 808.07(2) was not among the types of relief sought. Nevertheless, the majority "corrects" this deficiency in the Legislature's motion by finding relief under a stone that the Legislature did not lift. Such a practice blindsides the parties and fails to provide notice and an opportunity to be heard on the basis the court finds dispositive. See Springer v. Nohl Elec. Prods. Corp., 2018 WI 48, ¶¶50-51, 381 Wis. 2d 438, 912 N.W.2d 1 (Abrahamson, J., dissenting).

Without the benefit of briefing on the subject of § 808.07(2), it appears that the majority substantively alters existing law. The majority's initial substantive error lies in its treatment of the first Gudenschwager factor, likelihood of success on the merits of the appeal. See State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). In the majority's view, the circuit court erroneously exercised its discretion because "the circuit court never recognized that success on the merits in this case turned on questions of law that would be reviewed de novo by the appellate courts." It further opines that "[t]he circuit court did not acknowledge that its determination was the first word, not the last word, on the interpretation of the relevant constitutional provisions and statutes." As a result, the majority appears to alter the substantive law, asserting that—as a matter of law—there exists more than a "mere possibility" that the Legislature will prevail on the merits.[9]

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. Nevertheless, the majority appears to view de novo review as tantamount to meeting the "mere possibility" standard. Does this mean that even when a circuit court determines a law to be unconstitutional beyond a reasonable doubt that it must deem the first Gudenschwager factor satisfied simply because an appellate court will

[9] Yet another example of an inadvertent or sub silentio change in the substantive law lies in footnote 8 of the majority order, where it states: "An appellant facing a clearly erroneous or erroneous exercise of discretion standard of appellate review will have a much more difficult burden than one facing a de novo standard of review." Under current law, a de novo review is part and parcel of the erroneous exercise of discretion standard. See LeMere v. LeMere, 2003 WI 67, ¶14, 262 Wis. 2d 426, 663 N.W.2d 789 (setting forth that we decide de novo "any questions of law which may arise during our review of an exercise of discretion . . . .").

owe its determination no deference? Under the majority's analysis, it appears that the answer is yes.

The majority's second substantive error lies in its one-sided presentation of the irreparable harm that would be suffered absent a stay. It places 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.

The majority claims that "there is a substantial harm to the Legislature and to the public where statutes enacted by the people's elected representatives are declared unenforceable and enjoined before any appellate review can occur." Without citation to authority, it asserts that "the 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."

But what about the harm that results from a potentially unconstitutional law remaining in effect? The harm wrought by subjecting the people of Wisconsin to potentially unconstitutional "laws" should be, but apparently is not, worthy of the court's consideration. Indeed, the circuit court here determined that the laws at issue are unconstitutional beyond a reasonable doubt. The enforcement of a law that a circuit court determines is unconstitutional beyond a reasonable doubt would also appear to irreparably harm the public interest, yet the majority says nary a word about it.

For the reasons stated above, I respectfully dissent.

I am authorized to state that Justices SHIRLEY S. ABRAHAMSON and REBECCA FRANK DALLET join this dissent.

Sheila T. Reiff
Clerk of Supreme Court

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