No. 2021AP802

In the Supreme Court of Wisconsin

STATE OF WISCONSIN EX REL.
DEVIN LEMAHIEU, *in his official capacity,*
and ROBIN VOS, *in his official capacity*,
DEFENDANTS-APPELLANTS-PETITIONERS,

v.

WISCONSIN COURT OF APPEALS, DISTRICT III,
RESPONDENT,

and

ANDREW WAITY, JUDY FERWERDA, MICHAEL JONES,
and SARA BRINGMAN,
PLAINTIFFS-RESPONDENTS.

Petition From The Court of Appeals, District III,
Case No. 2021AP802

PETITION AND SUPPORTING MEMORANDUM FOR A SUPERVISORY WRIT BY PETITIONERS DEVIN LEMAHIEU AND ROBIN VOS

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INTRODUCTION[1]

In the underlying summary-judgment Order, the Circuit Court blocked two contracts that the Legislature, represented by Defendants Speaker Robin Vos and Senate Majority Leader Devin LeMahieu,[2] entered into with outside counsel, in order to obtain sophisticated legal advice with respect to the decennial redistricting process, just as the Legislature has done for decades. When the Legislature moved the Circuit Court for a stay pending appeal—including explaining that there was no textual basis for the Circuit Court's unprecedented, *sua sponte* holding that two contracts

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[1] In its contemporaneously filed Petition For Bypass And Motion For A Stay, Defendants seek an alternative path to the same result of a stay of the summary-judgment Order at issue here. This Court would, however, presumably not need to grant bypass of this appeal if it granted this Petition for a Supervisory Writ and ordered the Court of Appeals to stay the Circuit Court's summary-judgment Order immediately.

[2] Plaintiffs sued Defendants in their official capacities as leaders of the Legislature, challenging contracts that these leaders entered, Pet.App.94–102, pursuant to their authority from each House's organizing committee, Pet.App.128, 130, 259. Thus, Defendants speak for the Legislature here, as they did in *Service Employees International Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, where defendants were also legislative leaders, sued in their official capacities. *Id.* ¶ 92 n.3; *see id.* ¶¶ 62–73. Defendants thus here refer to themselves interchangeably as both "Defendants" and "the Legislature."

to hire lawyers are somehow not "contracts . . . for purchase" of "contractual services" under Section 16.74—the Circuit Court merely cross-referenced its own prior statutory holding. This no-likelihood-of-success-on-appeal-by-cross-reference-to-the-merits-ruling approach to deciding a stay motion is the *exact same error* that this Court held to be fatal in ordering stays of circuit court decisions in *League of Women Voters ("LWV") v. Evers*, No.2019AP559 (Wis. Apr. 30, 2019), and *SEIU v. Vos*, No.2019AP662 (Wis. June 11, 2019).

This Supervisory Writ arises from the Court of Appeals' violation of its mandatory duty to stay the Circuit Court's unlawful summary-judgment Order under *LWV* and *SEIU* (and the authorities upon which those stay decision rely), including without conducting the mandatory stay analysis under those two decisions *or even purporting to address whether the Circuit Court's underlying merits decision has any likelihood of success on appeal whatsoever*.

Given these fatal flaws in the Court of Appeals' approach to the Legislature's long-pending stay motion, the ongoing irreparable harms that the Legislature is suffering

under the summary-judgment Order by loss of its right to consult with the counsel of its choice about its constitutional redistricting responsibility, and the wholly meritless nature of Plaintiffs' lawsuit, **the Legislature respectfully requests that this Court issue a supervisory writ requiring the Court of Appeals to stay the summary-judgment Order by no later than Friday, July 9**.

The Legislature further notes that as a result of the Court of Appeals' delay in adjudicating its stay motion, the Legislature has now—remarkably—been unable to obtain legal advice as to its constitutional redistricting responsibility from its chosen counsel for *two months*, contrary to decades of prior practice. **Absent immediate action by this Court, the Legislature will suffer additional irreparable harm, while also likely losing entirely its appellate rights to defend its two entirely lawful contracts**.

ISSUE PRESENTED

Whether the Court of Appeals violates its plain duty when it fails to conduct the mandatory analysis of a motion for a stay pending appeal, including by simply noting that the

Circuit Court had cross-referenced and re-affirmed its merits ruling, and then denying that motion.

The Court of Appeals answered "no."

STATEMENT OF THE CASE[3]

A. For decades, the Legislature has hired outside counsel for legal advice to assist with the drawing and defense of redistricting maps. In the early 1980s, the Democratic Party-aligned legislative leaders relied on outside counsel for advice "throughout Wisconsin's lengthy reapportionment struggle." Pet.App.117. In the early 1990s, the Legislature similarly engaged outside counsel to assist with the redistricting process. Pet.App.180–81; *see also* Pet.App.135. In 2000, then-Senate Majority Leader Chuck Chvala sought authorization from the Senate Committee on Organization "to contract for consulting and legal services related to redistricting of legislative and congressional districts," noting

[3] For ease of this Court's consideration, the Legislature draws this Statement Of The Case from the Statement Of The Case in the Legislature's contemporaneously filed Combined Memorandum In Support Of Expedited Petition For Bypass And Expedited Motion For Stay Pending Appeal, in *Waity, et al. v. Vos, et al.*, No. 2021AP802 (Wis. June 25, 2021).

that "[e]very decade the Senate has used the services of experts in this field to assist in the enactment of a constitutional redistricting plan for legislative and congressional districts." Pet.App.120. In preparation for the 2000 redistricting cycle, the Senate retained Boardman, Suhr, Curry & Field LLP to assist with "researching and potentially litigating legislative redistricting." Pet.App.183–85; *see also* Pet.App.187–88 (noting Assembly hired its own firm). In 2009, the Legislature retained the firm Michael Best & Friedrich LLP, "for services related to redistricting of legislative and congressional districts." Pet.App.190; *see also* Pet.App.192–93. At the time, then-Senate Majority Leader Russ Decker reiterated that the Legislature engages with outside counsel in advance of redistricting "[e]very decade." Pet.App.122–24. In 2017, the Legislature again approved the hiring of counsel for redistricting. Pet.App.126, 130.

Historically, the Legislature conducted the authorization for engagement with outside counsel for redistricting or other engagements through a balloting procedure with either the Legislature's Joint Committee on

Legislative Organization or each House's own organizing committees. Pet.App.126, 132–54, 259.

B. Relevant here are two of the Legislature's recent, entirely ordinary outside-counsel contracts, engaging counsel for the current decennial redistricting. The Legislature entered into these contracts with Consovoy McCarthy PLLC (joined by Adam Mortara) and Bell Giftos St. John LLC for legislative drafting, pre-litigation, and litigation redistricting advice, covering the life of the redistricting process from January 1, 2021, until the conclusion of any litigation challenging the new redistricting maps (or earlier if the parties determine that termination of the contracts is appropriate). Pet.App.94–95, 100–102. Defendants signed the contracts in their official capacities, on behalf of each of their bodies, Pet.App.98–99, 102, and received authorization by the official vote of their respective bodies' Committee on Legislative Organization, consistent with the prior historical practice as detailed above, Pet.App.128, 130, 259.

C. Plaintiffs filed this lawsuit on March 10, 2021, alleging that the two outside-counsel contracts were "void *ab*

initio" for lack of statutory authority to hire counsel prior to the filing of a redistricting lawsuit. Pet.App.84, 87. Plaintiffs also moved for a temporary injunction to prevent the performance of the contracts during the pendency of this lawsuit. Pet.App.103–04.

The Legislature opposed Plaintiffs' motion and simultaneously moved to dismiss the complaint for failure to state a claim. Pet.App.105–08, 294–326. The Legislature argued that it is empowered to enter into contracts with outside counsel by the Wisconsin Constitution itself, as an appropriate power in support of the Legislature's core, vested authority. Pet.App.302–11. Further, the Legislature also argued that three independent statutory sources authorize the contracts at issue, including Section 16.74. Pet.App.312–21. The Circuit Court denied Plaintiffs' motion seeking a temporary injunction, converted the Legislature's motion to dismiss into a motion for summary judgment, and then set a briefing schedule on the converted motion. Dkt.Entry 03-25-2021, No.2021CV589 (Dane Cty. Cir. Ct.) ("Oral arguments").

On April 29, 2021, the Circuit Court denied Defendants' converted motion for summary judgment and granted summary judgment to Plaintiffs, thereby voiding the contracts, based largely on arguments not briefed by Plaintiffs. The Court held that the two contracts are not "contracts . . . for purchase" of "contractual services" under Section 16.74, a theory never raised by Plaintiffs. Pet.App.32. Next, the court relied on *State ex rel. Moran v. Department of Administration*, 103 Wis.2d 311, 307 N.W.2d 658 (1981), a case Plaintiffs did not cite, to hold that Wis. Stat. § 20.765 could not support the contracts, Pet.App.34–35. The Court also concluded that the contracts are not within the scope of Section 13.124, while not even mentioning the Legislature's lead argument on this provision. Pet.App.28–31. Finally, the Court held that the Legislature lacks the constitutional authority to enter into the contracts because, under the Court's own reading of *SEIU*—which Plaintiffs did not cite—the Legislature is not authorized to hire pre-litigation counsel. Pet.App.21–27, 334–44.

D. The day after the Circuit Court entered its summary-judgment order in favor of Plaintiffs, the Legislature both appealed to the Court of Appeals and moved in the Circuit Court for a stay pending appeal. Pet.App.402–07; *see* Wis. Stat. § 808.07; Wis. Stat. § (Rule) 809.12.

On the likelihood of success on the merits, the Legislature explained that Section 16.74 authorizes the contracts here because they are "[c]ontracts for purchases" of "contractual services," Pet.App.413–14, and that the Circuit Court's position (not advanced by Plaintiffs) has no basis in Section 16.74's text, Pet.App.414–15. As for Section 20.765, the Legislature explained that this Section also authorizes the Legislature to enter into outside counsel contracts as a "sum sufficient" for the Legislature to "carry out" its "functions," Pet.App.415, and that the Circuit Court's reliance on *Moran* was wrong, and not relied on by Plaintiffs, Pet.App.415–16. For Section 13.124, the Legislature argued that, when read in conjunction with Wis. Stat. § 990.001(3), this Section authorizes the Legislature to engage counsel for any action in which its interests will be affected, and that the

Circuit Court failed to address this argument or even mention Section 990.001(3) in its Order. Pet.App.416–17. Finally, the Legislature explained that the contracts are also authorized under the Constitution because they further the Legislature's express grant of lawmaking and redistricting authority, and that the Circuit Court reached its contrary conclusion based upon a reading of *SEIU* that was already rejected by *Democratic National Committee ("DNC") v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423. Pet.App.411–13.

As to the equities, the Legislature articulated that the Circuit Court's Order caused irreparable harm to both the Legislature and the public because it prohibited the Legislature from exercising the statutory and constitutional authority granted to it by the people, including stopping the Legislature from consulting with the counsel of its own choice while carrying out its constitutional redistricting responsibilities. Pet.App.418–20. Further, the court's ruling created uncertainty regarding the confidentiality of the Legislature's communications with its outside counsel, which

is already presenting immediate harm to the Legislature via multiple open-records requests. Pet.App.420. These irreparable harms significantly outweigh any possible harms experienced by Plaintiffs as a result of a stay pending appeal. Pet.App.421. Finally, the Legislature claimed that, given its decades-long practice of hiring redistricting counsel, a stay would preserve the status quo. Pet.App.421.

The Circuit Court denied the Legislature's stay motion in an oral ruling on May 10, 2021. *See* Pet.App.2–11, 15. For the Legislature's statutory arguments, the court "merely [ ] repeat[ed] what [it had] already set forth in [its] written decision" by reference, declining to analyze the Legislature's likelihood of success on appeal. Pet.App.8. For the constitutional arguments, the court acknowledged *DNC*, but held that the case had no bearing on "the issue presented here," Pet.App.3, pointing to its prior analysis of *SEIU* as supporting Plaintiffs' position, Pet.App.4–7. Finally, although the Circuit Court addressed some of the Legislature's equitable arguments, it declined to address the

most prominent arguments raised by its stay motion. Pet.App.9–11; *see also* Pet.App.418–22; *see infra* Part II.

E. Two days after the Circuit Court denied the Legislature's motion for a stay pending appeal, the Legislature moved for a stay pending appeal in the Court of Appeals on May 12, 2021, asking for expedited relief by May 21, 2021. Defs. Mem. In Support of Expedited Mot. For Stay Pend. Appeal at 2, No. 2021AP802 (Ct. App. May 12, 2021) (hereinafter "Defs. Mem.").

On June 23, 2021—fifty-five days after the Circuit Court's summary-judgment Order, and forty-two days after the Legislature sought an expedited stay—Presiding Judge Stark purported to deny the Legislature's Motion For A Stay Pending Appeal in a one-judge order. Pet.App.503. After the Legislature promptly objected to a single judge deciding its stay motion in violation of Wis. Stat. § (Rule) 809.12, Judge Stark referred the motion to a three-judge panel (while disagreeing with the Legislature's Rule 809.12 argument, Pet.App.508–09), which three-judge panel signed Judge Stark's prior decision on June 29. Pet.App.510–16.

The Court of Appeals' stay analysis simply affirmed the Circuit Court's stay denial, without even looking at whether the Circuit Court had *actually* carried out its mandatory duty under *LWV* and *SEIU*, and without so much as considering whether the Circuit Court's decision had any likelihood of surviving appeal. Addressing the likelihood of success on the merits prong, the Court of Appeals upheld the Circuit Court's decision because, in the Court of Appeals' view, the Circuit Court "reviewed its prior decision" on likelihood of success and "reaffirmed its conclusion." Pet.App.512. Notably, the Court of Appeals did not further discuss the Legislature's likelihood of success on the merits of its appeal, never explaining why the Legislature was unlikely to prevail on any of its four independently sufficient merits arguments. *See* Pet.App.512–13. On the equitable factors, the Court of Appeals agreed with and largely repeated the Circuit Court's conclusions, Pet.App.513–16, as discussed below, *see infra* pp. 34–38.

STANDARD OF REVIEW

This Court can "exercise its supervisory jurisdiction or its original jurisdiction to issue a prerogative writ over a court and the presiding judge" upon a petitioner's "filing [of] a petition and supporting memorandum." Wis. Stat. § (Rule) 809.51(1). A supervisory writ is appropriate where: "(1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result [if the writ is not granted]; (3) the duty of the [lower] court is plain and it acted or intends to act in violation of that duty; and (4) the request for relief is made promptly and speedily." *State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 9 & n.5, 380 Wis 2d 354, 909 N.W.2d 114 (citation omitted). This Court reviews de novo a lower court's legal conclusion. *See State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶¶ 102, 105, 363 Wis. 2d 1, 866 N.W.2d 165.[4]

[4] Typically, when petitioning for a supervisory writ from this Court, the petitioner must first file a petition with the Court of Appeals. Wis. Stat. § (Rule) 809.71. However, this requirement does not apply when "it is impractical to seek the writ in the court of appeals." *Id.* Here, because "th[is] writ, if granted, would lie against that court," that requirement does not apply and is "excused." *Dist. IV*, 2018 WI 25, ¶ 9 n.5.

ARGUMENT

I. An Appeal From A Final Decision By The Court Of Appeals Would Be An Inadequate Remedy

To obtain a supervisory writ against the Court of Appeals, a petitioner first must show that an appeal to this Court would be an inadequate remedy. *Dist. IV*, 2018 WI 25, ¶ 41. "[A]ppellate review in the normal course of events is inadequate" when an "appeal would come too late for effective redress" of the petitioner's alleged injuries, or when an appeal would be "too chancy." *Id.* ¶¶ 41, 44 (citation omitted).

Here, an appeal to this Court "in the normal course" is inadequate because it would come "too late for effective redress" of the grave, ongoing sovereign harm suffered by the Legislature and the public from the Court of Appeals' denial of the Legislature's Motion For Stay Pending Appeal, or would at least be "too chancy." *Id.* As the Legislature describes below, *infra* Part II, the Circuit Court's summary-judgment Order invalidating the outside-counsel contracts here imposes numerous irreparable harms on the Legislature and the public, including depriving the Legislature of being

allowed to obtain legal advice from counsel of its choice in carrying out its constitutional redistricting responsibilities.

And the Legislature will be unable to seek "appellate review" of the Court of Appeals' stay decision "in the normal course of events" to remedy these serious harms if this Court awaits review until the Court of Appeals enters a final judgment. *Dist. IV*, 2018 WI 25, ¶ 41. Merits briefing on the Legislature's appeal in the Court of Appeals will not conclude until at least September 2021, *see* Pend. Dkt. Entry, No. 2021AP802 ("Brief & Appx of Appellant(s)" "[a]nticipated" on "07-19-2021"); Wis. Stat. § (Rule) 809.19(1), (3)–(4), and then the Court of Appeals will likely take months to hear oral argument and issue a final written opinion.

By the time the Court of Appeals enters its final judgment in the ordinary course, the Legislature would have suffered *months* of additional irreparable harm, while any request for stay relief would likely be moot. As all parties and the Circuit Court below appear to agree, the Legislature has the statutory authority to enter into the outside-counsel contracts at issue here once a plaintiff files a redistricting

challenge in state or federal court, under Plaintiffs' own theory. Pet.App.28. A plaintiff will very likely file a redistricting lawsuit *before* the Court of Appeals enters its opinion here, which would allow the Legislature to re-hire the same attorneys under Plaintiffs' own theory. *See Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam) ("[R]edistricting is now almost always resolved through litigation rather than legislation[.]"). Indeed, other States have *already* seen the filing of redistricting lawsuits related to the current decennial redistricting.[5] So, by the time the Legislature may appeal to this Court in the ordinary course, Plaintiffs will have obtained all of the relief they seek—blocking the Legislature's redistricting contracts before a redistricting action is filed—while the Legislature will have suffered the full extent of all the harms from the Court of Appeals' failure to stay the summary-judgment Order.

[5] *See Carter v. Degraffenreid*, No. 132 MD 2021 (Pa. Commw. Ct., *filed* Apr. 26, 2021); *Sachs v. Simon*, No. 62-CV-21-2213 (Minn. Dist. Ct., *filed* Apr. 26, 2021); *English v. Ardoin*, No. 2021-03538-C § 10 (La. Civ. Dist. Ct., *filed* Apr. 26, 2021).

II. If This Court Does Not Overturn The Court Of Appeals' Error, Grave Hardship And Irreparable Harm Will Result

To obtain a supervisory writ, a petitioner must show that the denial of the writ would impose "grave hardship or irreparable harm" on the petitioner, which harm includes the loss of a legal "right with no means to recover it." *Dist. IV*, 2018 WI 25, ¶ 46–47 (citation omitted). The showing that a petitioner makes on the appeal-is-an-inadequate-remedy factor may be "largely the same" showing for the irreparable-harm factor. *Id.* ¶ 47.

Here, the Legislature and the public will suffer numerous, grave, and irreparable harms if this Court denies supervisory relief, including the loss of the Legislature's constitutional and statutory rights to consult outside counsel for this period with no means of recovery. *Id.* ¶¶ 46–47.

First, without this Court's immediate redress, the Legislature will continue to be deprived of its sovereign authority to engage outside counsel of its choice, in furtherance of its complex, constitutional redistricting duties. As this Court's *SEIU* stay decision explained, "prevent[ing]"

the Legislature "from exercising [its] rights" under a statute "before any appellate review can occur" is a "specific irreparable harm[ ]." Pet.App.58. Here, the summary-judgment Order inflicts these same sovereign, irreparable harms on the Legislature and the public. Specifically, the summary-judgment Order enjoins the Legislature from "exercising [its] rights" to engage outside redistricting counsel under three independent statutes and the Wisconsin Constitution, Pet.App.58—including the Legislature's Section 16.74 right to enter into "contractual services required within the legislative branch," which obviously includes legal-services contracts, Wis. Stat. § 16.74(1). Further, while prohibiting the Legislature from exercising its statutory and constitutional powers is a "specific irreparable harm[ ]" to the Legislature in any context, Pet.App.58; *see* Pet.App.45, it is especially acute here, as the Order blocks the Legislature from obtaining the sophisticated legal advice necessary to enact and defend a redistricting map for the entire State, *see generally* Wis. Const. art. IV, § 3. For much the same reasons, this raises "concern[s]" about the rights of "constitutional

officers" to the "counsel of their choice." *Koschkee v. Evers*, 2018 WI 82, ¶¶ 12–13, 382 Wis. 2d 666, 913 N.W.2d 878.

Second, the ongoing decennial redistricting timeline accentuates the Legislature's need to confer with its redistricting counsel now, and every day that the Legislature is barred from seeking legal advice from its own chosen lawyers aggravates those irreparable harms by hindering the Legislature's redistricting efforts. That the U.S. Census Bureau is now promising the delivery of the legacy format summary redistricting data file in mid-August 2021, *see* U.S. Census Bureau, *U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File*, Release No. CB21-RTQ.09 (Mar. 15, 2021),[6] further exacerbates these burdens every day that a stay is not entered by prohibiting the Legislature from obtaining legal advice from its chosen counsel in advance of that critical date.

[6] Available at https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html (last visited June 29, 2021).

Third, the summary-judgment Order precludes the Legislature from conferring with its redistricting counsel on other crucial matters relating to redistricting, including this Court's recent order in *In re Petition for Proposed Rule to Amend Wis. Stat. § 809.70 (Relating to Redistricting)*, No. 20-03, related to redistricting challenges before this Court. As a result, the Legislature cannot obtain legal advice from its counsel about redistricting matters, which would include the effects of this Court's decision to reject Rule Petition 20-03, a redistricting-related rule petition that the Legislature supported before this Court *through the very outside-counsel engaged in the contracts here*. Pet.App.494, 496.

Fourth, the summary-judgment Order imposes grave uncertainty and confusion regarding the privilege status of prior communications between the Legislature and its redistricting counsel under these two contracts. Pet.App.45–46. In *LWV*, this Court explained that "potential confusion that would ensue" from the Circuit Court's injunction of state action is itself a source of irreparable harm for the Legislature and the public. Pet.App.46. Here, immediately after the

Circuit Court declared the Legislature's outside-counsel contracts void *ab initio*, the Legislature received multiple requests under Wisconsin's Open Records Law, Wis. Stat. § 19.31, *et seq.*, for all communications between the Legislature and outside counsel, based upon the requesters' belief that such communications "are not protected by lawyer-client privilege because there was no valid lawyer-client relationship" between outside counsel and the Legislature. Pet.App.427–31. Thus, the summary-judgment Order imposes grave confusion about whether the Legislature maintains any of the "sanctity of [its] attorney-client relationship" with outside counsel, *see State v. Forbush*, 2011 WI 25, ¶ 46, 332 Wis. 2d 620, 796 N.W.2d 741, which uncertainty establishes irreparable harm, Pet.App.45–46.

The Legislature has no means to remedy any of these harms without immediate relief from this Court, for "largely the same reasons" that an appeal is an inadequate remedy, *Dist. IV*, 2018 WI 25, ¶ 46–47, as explained above.

III. The Court Of Appeals Violated Its Plain Duties By Failing To Conduct The Mandatory Stay Analysis Under This Court's Controlling Caselaw

1. To obtain supervisory relief against the Court of Appeals, a petitioner must demonstrate that the Court of Appeals violated a "plain duty," which is a duty that is "clear and unequivocal" and where "the responsibility to act [is] imperative." *Dist. IV*, 2018 WI 25, ¶ 11 (citation omitted; brackets in original). A Court of Appeals' plain duties include "mandat[es] [on] how it is to carry out specific aspects of its work." *Id.* ¶ 11 n.6. So, "[w]hen the court is under an obligation to do its business in a specific manner, a supervisory writ can be a proper method of ensuring it does so." *Id.* Finally, the Court of Appeals' violation of its "obligation[s] to do its business in a specific manner" qualifies as a violation of a "plain duty" even if that obligation "involves a novel question of law" that is not "settled or obvious." *Id.* ¶ 11 & n.6 (citations omitted).

This Court's stay decisions in *LWV* and *SEIU* explain the "obligation[s]" on the lower courts for "how [they are] to carry out specific aspects of [their] work"—adjudications of

motions for a stay pending appeal. *Dist. IV*, 2018 WI 25, ¶ 11 & n.6. As *LWV* and *SEIU* explain, when a court decides a motion for stay pending appeal, the court must consider whether 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." Pet.App.40 n.4 (citing *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)). Further, when the Court of Appeals reviews a circuit court's decision on a stay motion, the Court of Appeals must ensure that the circuit 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." Pet.App.43 (quoting *Gudenschwager*, 191 Wis. 2d at 440).

SEIU and *LWV* "mandat[e]" *how* the Court of Appeals is "to carry out" its consideration of the likelihood-of-success factor when reviewing a circuit court's decision denying a stay

motion. *Dist. IV*, 2018 WI 25, ¶ 11 n.6. Because a circuit court is merely "the first word, not the last word, on [ ] legal questions," the Court of Appeals must make sure that the circuit court has not simply concluded that the appellant does not have a likelihood of success on appeal because the circuit court itself already concluded that the appellee was likely to prevail on the merits. Pet.App.56; Pet.App.44. The likelihood of success on appeal is not the "inverse" of the likelihood of success on the merits—these are distinct "analyses" that a circuit court may not "conflat[e]." Pet.App.55. Accordingly, the Court of Appeals must *itself* consider the appellants' merits arguments so that the court may ensure for itself that the circuit court *actually conducted* the proper merits analysis. *See* Pet.App.44; Pet.App.55. This is why this Court in *LWV* independently analyzed "the Legislature's motion and the arguments it made below," Pet.App.44, and in *SEIU* conducted a fulsome review of the merits of the Legislature's arguments, Pet.App.55. Importantly, it is not enough for the Court of Appeals to ask simply whether the circuit court "set forth the proper [likelihood-of-success-on-appeal] factor[ ]

relevant to such motions"; the Court of Appeals must *also* consider whether the circuit court "failed to follow the proper rules for applying" that factor. Pet.App.55.

SEIU and *LWV* also "mandat[e]" how the Court of Appeals must "carry out" its consideration of the equitable factors when reviewing a circuit court's order on a stay pending appeal, *Dist. IV*, 2018 WI 25, ¶ 11 n.6—and, in particular, how to evaluate the equities when a sovereign entity like the Legislature is the movant. As *LWV* and *SEIU* explain, when a circuit court enjoins a statute enacted by the Legislature "before any appellate review can occur," the "Legislative Defendants[ ] and the public" will *always* "suffer a substantial and irreparable harm of the first magnitude," Pet.App.58; Pet.App.45, "regardless of the nature of the challenge to the law," Pet.App.45. Relatedly, the Legislature and the public suffer this same irreparable harm when a circuit court's injunction "prevent[s]" the Legislature from exercising its statutory rights or prevents state officials from exercising their duties for the public's benefit, during the pendency of an appeal. *See* Pet.App.58. Further, this same

sovereign harm will occur when a court's enjoining of a statute or legislative act causes legal "confusion." Pet.App.45–46. And here too, the Court of Appeals cannot ask whether the circuit court simply "set forth the proper [equitable] factors relevant to such motions"; the Court of Appeals itself must consider whether the circuit court "failed to follow the proper rules for applying" these factors. Pet.App.55; Pet.App.43 ("applied a proper standard of law" (quoting *Gudenschwager*, 191 Wis. 2d at 440)).

2. The Court of Appeals here failed entirely to apply *LWV*'s and *SEIU*'s clear "mandat[es] for "how it is to carry out" the adjudication of the Legislature's stay motion, and thus violated its "plain duty" when adjudicating the Legislature's Motion. *Dist. IV*, 2018 WI 25, ¶ 11 & n.6.

a. Most obviously, the Court of Appeals plainly failed to adhere to *LWV*'s and *SEIU*'s mandates for reviewing the Circuit Court's determination of the Legislature's likelihood of success on the merits of its appeal.

In its stay motion to the Circuit Court, the Legislature argued that it had a likelihood of success on appeal, under

LWV and *SEIU*, on each of its three statutory arguments and on its constitutional argument.

Most clearly, regarding Section 16.74, the Legislature argued that its plain text authorized the Senate and Assembly to "purchase[ ]" "[a]ll supplies, materials, equipment, permanent personal property and *contractual services required within the legislative branch*," Wis. Stat. § 16.74(1) (emphasis added), which plainly includes contracts for professional services, like the legal-services contracts at issue here, according to this Section's unambiguous terms. Pet.App.413–15. The Circuit Court's summary-judgment Order, however, adopted a novel, atextual reading of Section 16.74 that Plaintiffs themselves had not espoused—concluding that the term "contractual services" in Section 16.74 refers *only* to those services "relate[d] to, or required by the purchase of 'supplies, materials, equipment [or] personal property.'" Pet.App.414 (citing Pet.App.32). Given that the Circuit Court's adoption of this *sua sponte* reading of Section 16.74 both violated the "principle of party presentation" and had no basis in the statutory text, the Legislature argued that

it had an extremely high likelihood of success on appeal on this basis. Pet.App.414–15 (citations omitted).

Moving to Section 20.765, the Legislature argued that this Section—providing the Legislature with "[a] sum sufficient to carry out the functions of the assembly [and senate]," Wis. Stat. § 20.765(1)(a)–(b)—grants the Legislature the statutory authority to engage outside counsel to aid in its core constitutional duty of redistricting, which is indisputably a "function" of the Legislature. Pet.App.415. Thus, this statute too authorizes the contracts. Pet.App.415. The summary-judgment Order, however, rejected this argument based upon the Circuit Court's own implausible reading of *State ex rel. Moran v. Department of Administration*, 103 Wis.2d 311, 307 N.W.2d 658 (1981)—a case that *neither party* cited or discussed. Pet.App.416. The Legislature argued that it had a likelihood of success on appeal due to the Circuit Court's violation of the party-presentation principle and its atextual interpretation of the relevant statute. Pet.App.416.

As for Section 13.124, the Legislature explained that—when read in conjunction with Wis. Stat. § 990.001(3)'s

straightforward rule for interpreting all Wisconsin Statutes—this statute empowers the Speaker and Senate Majority Leader to hire outside counsel for actions in which the Legislature "will be" a party or in which its interests "will be" affected, thus authorizing the contracts here. Pet.App.417. Yet, the Circuit Court's Order did not address this Section 990.001(3) argument at all, failing to even cite this statute. Pet.App.417. Therefore, the Legislature argued, it was likely to prevail on the merits of its appeal. Pet.App.417.

Finally, under the Wisconsin Constitution, the Legislature argued that its constitutional "authority" to take any "appropriate" action "to achieve the ends for which" the Constitution vested it with the legislative and redistricting powers necessarily includes the power to hire outside redistricting counsel. Pet.App.411 (quoting *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 54 & n.38, 373 Wis. 2d 543, 892 N.W.2d 233, and citing Wis. Const. art. IV §§ 1, 3). The summary-judgment Order's rejection of this constitutional argument relied upon a reading of *SEIU*, 2020 WI 67—again a case that Plaintiffs had not cited—that this Court had

already disclaimed in *DNC*. Pet.App.412–13. Further, the Order drew a constitutional distinction between the Legislature hiring counsel to advise on a law's legality (allowed, it seems) and to prepare a legal defense of the law (disallowed)—distinctions that are not constitutionally grounded and not found in Plaintiffs' briefing below. Pet.App.413. Accordingly, the Legislature argued that it was likely also to prevail on the merits of its constitutional argument. Pet.App.411–13.

In concluding that the Legislature did not have a likelihood of success pending appeal, the Circuit Court obviously and clearly violated *LWV* and *SEIU* by "conflating" its prior determination of Plaintiffs' likelihood of success with the Legislature's likelihood of success on appeal, thus impermissibly treating the latter as the "inverse" of the former. Pet.App.55–56; *see* Pet.App.44. For each of the Legislature's three statutory arguments—including as to Section 16.74—the Circuit Court just "repeat[ed] what [it] already" said in its summary-judgment Order to conclude that the Legislature lacked a likelihood of success on appeal. Defs.

Mem.12, 17–18. Nowhere did the Circuit Court confront the Legislature's arguments that the Circuit Court's statutory conclusions violated the party-presentation principle and rested on atextual interpretations of the statutory language. *Compare* Defs. Mem.25–26, *with supra* pp. 12–13.

Despite the Circuit Court's clear violation of the *LWV* and *SEIU* stay decisions (and the authorities that those stay decisions interpreted), the Court of Appeals affirmed the denial of the Legislature's Motion without even considering whether the Circuit Court *actually* "follow[ed] the proper rules" for applying the likelihood-of-success-pending-appeal factor. Pet.App.55; Pet.App.43 ("applied a proper standard of law" (quoting *Gudenschwager*, 191 Wis. 2d at 440)). That is a violation of the Court of Appeals' plain duty. *Dist. IV*, 2018 WI 25, ¶ 11 & n.6. The Court of Appeals began its brief likelihood-of-success-on-appeal discussion by noting that the Circuit Court "reviewed its prior decision" and "reaffirmed its conclusions that there was neither constitutional nor statutory authority for [the Legislature] to hire outside counsel" here. Pet.App.512. Then, the Court of Appeals

explained that the Circuit Court "considered the arguments raised in [the Legislature's] stay request," yet "remained unconvinced by the merits of [the Legislature's] arguments." Pet.App.513. **But that is the *exact* legal error—a circuit court simply pointing to its prior merits analysis to conclude that the appellant is unlikely to prevail on appeal—that this Court rebuked in the *LWV* and *SEIU* stay decisions.** *See* Pet.App.56; Pet.App.44. The Court of Appeals thus unambiguously violated its plain duty by simply approving of the Circuit Court merely "repeating what [it] already" said on the statutory merits, Pet.App.8, which fails to respect that the Circuit Court is "the first word, not the last word, on [these] legal questions," Pet.App.56; Pet.App.44.

Further and independently fatal, nowhere did the Court of Appeals actually consider the Legislature's likelihood-of-success-on-appeal arguments, which *SEIU* and *LWV* require when considering whether a circuit court "applied a proper standard of law," App.43 (quoting *Gudenschwager*, 191 Wis. 2d at 440), or "follow[ed] the proper rules for applying" this factor, Pet.App.55. For example, the Court of Appeals failed

to explain *how* Section 16.74's authorization for "contractual services required within the legislative branch" could *possibly* exclude contracts for legal services, like the outside-counsel contracts here. Wis. Stat. § 16.74(1)–(2); Pet.App.512–13.

Finally, and also fatal to the Court of Appeals' analysis, nowhere did the Court of Appeals explain why the summary-judgment Order was consistent with the party-presentation principle, although the Circuit Court: (1) adopted an atextual interpretation of Section 16.74 not advanced by Plaintiffs; (2) relied upon *Moran* to distinguish Section 20.765, although no party cited this decision; and (3) followed its own reading of *SEIU*, not cited by Plaintiffs, that was contrary to *DNC*. This complete failure to consider independently the Legislature's likelihood of success on appeal on the basis of this powerful argument violates the Court of Appeals' plain duties. *Dist. IV*, 2018 WI 25, ¶ 11 & n.6; Pet.App.43, 55.

b. In addition to violating the plain duty to adhere to *LWV*s and *SEIU*'s mandates on the likelihood-of-success-on-appeal factor, the Court of Appeals also violated its plain duty to follow *LWV* and *SEIU* as to the equitable stay factors.

First, the Court of Appeals categorically failed to apply the equities factors correctly with respect to the consideration of the sovereign harms to the Legislature and the public, as set forth in *LWV* and *SEIU*. The Court of Appeals summarily concluded that the summary-judgment Order does not cause sovereign harm because it "did not declare any statute unenforceable." Pet.App.514. Yet, the summary-judgment Order prohibits the Legislature's exercise of its statutory and constitutional rights—namely, the right to obtain outside counsel, consistent with its decades-long practice— inflicting the kind of sovereign, irreparable harm recognized by *SEIU* and *LWV* that comes from blocking presumptively valid legislative action. *See* Pet.App.56; Pet.App.45.

Second, the Court of Appeals' endorsement of the Circuit Court's conclusion that the Legislature has not shown irreparable harm because it has "other available options" for redistricting advice and has not shown a need to "prepare for litigation . . . now" likewise violates the Court of Appeals' plain duties under *SEIU* and *LWV*. Pet.App.513–14. As noted, those decisions hold that any blocking of the

Legislature's statutory rights qualifies as irreparable harm, Pet.App.58; Pet.App.45, leaving no room for any analysis of whether the Legislature could achieve its sovereign goals through some "other available options" or truly needs to pursue its ends "now," Pet.App.513–14. Further, the Court of Appeals' analysis of these "other available options" in this context ignores the seriously "concern[ing] . . . implications" regarding the rights of "constitutional officers" to "counsel of their choice." *Koschkee*, 2018 WI 82, ¶¶ 12–13.

Third, the Court of Appeals plainly erred by rejecting the Legislature's harms with respect to the open-records requests for its privileged communications with its outside counsel, stating that such "open records issues can be resolved by the courts" in future cases, which "does not establish irreparable harm." Pet.App.514. This Court's decision in *LWV* recognized that sovereign, irreparable harm flows from the legal "confusion" of the public—there, from two appointees claiming the right to an appointment, Pet.App.42, 45–46—although subsequent litigation could have definitively resolved that confusion. This is because the very need to

dispel such confusion in future litigation permanently diverts the State's sovereign resources, including the sovereign resources of the judiciary, to the public's detriment. Here, the summary-judgment Order throws the previously unquestioned privilege status of the communications between the Legislature and its counsel into legal confusion—as evidenced by the multiple open-records requests received by the Legislature in the wake of the Circuit Court's Order. Under *LWV*'s clear terms, that causes irreparable harm, and the Court of Appeals plainly erred in concluding otherwise.

Fourth, the Court of Appeals plainly erred by rejecting the Legislature's argument that a stay would preserve the status quo because the Legislature has engaged outside counsel under circumstances indistinguishable from the outside-counsel contracts here for decades. *See supra* pp. 12–13. Instead of confronting this powerful status-quo argument, the Court of Appeals simply restated the Circuit Court's conclusion that the Legislature's "decades-long legislative practice of engaging outside counsel" was "not relevant to the present legal question." Pet.App.514–15. With all respect,

that conclusory *ipse dixit* does not at all address the Legislature's strong argument on this point.

Finally, the Court of Appeals plainly erred in rejecting the Legislature's argument with respect to its "mootness concerns." Pet.App.515. As the Legislature has explained, Plaintiffs' goal in this lawsuit is to prohibit the Legislature from engaging outside counsel prior to the filing of a redistricting action. *Supra* pp. 16–17. Yet, such redistricting litigation will almost certainly begin before the Court of Appeals and this Court resolve this appeal in the ordinary course. *Supra* pp. 16–17. Under that near-certain course of affairs, the Legislature will have suffered the full scope of harms from the summary-judgment Order, affording Plaintiffs precisely the same scope of relief they have requested. So, while the legal question of whether the Legislature may engage outside counsel prior to the filing of a redistricting action would remain unresolved and potentially subject to an exception to mootness, the *stay question* of the Order's impact on the current outside-counsel contracts would become moot under those circumstances.

Thus, without a stay, the Legislature will have lost its "right" to hire the redistricting counsel here before the filing of a redistricting action, "with no means to recover it[,] mak[ing] th[at] harm irreparable" and the Court of Appeals' contrary conclusion plainly incorrect. *Dist. IV*, 2018 WI 25, ¶ 47.

IV. The Legislature Promptly And Speedily Filed This Petition For Supervisory Writ

Finally, to obtain supervisory relief against the Court of Appeals, a petitioner must file "promptly and speedily" after the Court of Appeals has entered the relevant decision. *Dist. IV*, 2018 WI 25, ¶ 9 (quoting *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 17, 271 Wis. 2d 633, 681 N.W.2d 110). While the time for a "prompt and speedy" petition will depend on the "circumstances" of each case, this Court has concluded that a petition filed "within two weeks of the Court of Appeals' order" at issue is "unquestionably 'prompt and speedy.'" *Id.* ¶ 10; *see also, e.g.*, *Madison Metro. Sch. Dist. v. Circuit Court for Dane Cty.*, 2011 WI 72, ¶¶ 21–25, 336 Wis. 2d 95, 800 N.W.2d 442 (affirming Court of Appeals' grant of petition filed after roughly three-week gap);

State ex rel. J.H. Findorff & Son, Inc. v. Circuit Ct. for Milwaukee Cty., 2000 WI 30, 233 Wis. 2d 428, 608 N.W.2d 679 (granting petition filed after similar gap). Given that the Legislature has filed this Petition the day after the Court of Appeals' denial of its Motion For Stay, Pet.App.510, this Petition is "prompt and speedy" by any measure, *see Dist. IV*, 2018 WI 25, ¶ 9.

CONCLUSION

This Court should grant the Legislature's Petition For Supervisory Writ and require District III to grant the Legislature's Motion For Stay Pending Appeal.

Dated: June 30, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that, pursuant to Wis. Stat. § (Rule) 809.51(2), (4), this Petition was produced with a proportional serif font. The length of this Petition is 7,010 words.

Dated this 30th day of June, 2021.

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