No. 19-AP-559

SUPREME COURT OF WISCONSIN

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN; DISABILITY RIGHTS WISCONSIN INC.; BLACK LEADERS ORGANIZING FOR COMMUNITIES; GUILLERMO ACEVES; MICHAEL J. CAIN; JOHN S. GREENE; AND MICHAEL DOYLE, in his official capacity as Clerk of Green County, Wisconsin,

Plaintiffs-Appellees,

v.

TONY EVERS, in his official capacity as Governor of the State of Wisconsin,

Defendant,

and

THE WISCONSIN LEGISLATURE,

Intervening Defendant-Appellant-Petitioner.

On Appeal from the Circuit Court for Dane County
The Honorable Richard G. Niess, Presiding
Circuit Court Case No. 19-CV-84

EMERGENCY PETITION FOR ORIGINAL ACTION, SUPERVISORY WRIT, WRIT OF MANDAMUS, AND/OR IMMEDIATE TEMPORARY RELIEF OF INTERVENING DEFENDANT-APPELLANT-PETITIONER WISCONSIN LEGISLATURE AND MEMORANDUM IN SUPPORT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Constitutional Provisions

Other Authorities

STATEMENT OF ISSUES

1. Do the appointees that the Legislature confirmed in December 2018 hold their positions today by statutory right?

The Circuit Court vacated the appointments because, in its view, the December 2018 session was *void ab initio*. The Court of Appeals did not address this statutory rights issue.

2. Should this Court use its powers under its original jurisdiction, supervisory writ, mandamus, and/or temporary relief authority to reinstate the appointees?

The Circuit Court and Court of Appeals did not address this issue.

3. Assuming the Court asserts original jurisdiction, did the Legislature violate Article IV, Section 11 of the Wisconsin Constitution in December 2018?

The Circuit Court held that the Legislature violated Article IV, Section 11, and the Court of Appeals has not yet addressed this issue.

INTRODUCTION

The Circuit Court issued a temporary injunction throwing the State into chaos, blocking numerous laws and vacating eighty-two appointments, including one out of three Commissioners of the Public Service Commission ("PSC"), one of the Commissioners of the Labor and Industry Review Commission, and two Regents of the University of Wisconsin Board of Regents. The Legislature filed promptly in the Court of Appeals the very next day, asking for an administrative stay while the emergency stay motion was considered, so that, *inter alia*, the Governor could not take otherwise unlawful actions in reliance on an order that is extremely unlikely to survive appellate review, to put it generously. The Governor then asked for time to respond, and *within minutes of the Court of Appeals giving him the weekend to do so*, the Governor purported to fire eighty-two appointees that the Legislature had duly confirmed in December 2018. When the Court of Appeals issued its stay, the Governor continued to bar these individuals from their jobs, leaving bodies like the PSC unable to operate as statutorily intended for the public interest.

Yesterday, the Court of Appeals issued an order that will ensure that this chaos will continue for months longer, at minimum, after concluding that any relief to these confirmed appointees must await final judgment.

The Legislature files this emergency Petition to ask this Court to put an immediate end to this needless situation, which is detrimental to the public interest, deeply unfair to long-time public servants and benefits no one. Given the fact that: (1) appointees like Commissioner Ellen Nowak of the PSC are unquestionably statutorily entitled to their jobs, (2) the Governor has already fully articulated his position (while the other parties remained silent); (3) the Governor engaged in shocking tactics in asking for time to respond to the stay petition, and then firing these individuals minutes after getting that time, without informing the courts or the Legislature that this was his intent, and (4) the Governor's actions are imposing continued uncertainty on critical bodies like the PSC, **the Legislature respectfully requests an immediate, *ex parte* order—through this Court's original**

jurisdiction authority, supervisory writ authority, mandamus, and/or immediate temporary relief authority—reinstating these individuals to their positions. If this Court does not wish to issue *ex parte* relief, the Legislature would then respectfully request emergency relief by the end of this week, so that the appointees can return to their jobs on Monday, April 15.

It bears special emphasis that the Governor's shocking actions in this matter call for an immediate response from the courts, making *ex parte* relief particularly appropriate. The Legislature did everything possible to protect its rights under the confirmation process, as well the rights of the appointees that it lawfully confirmed in December 2018, including seeking an administrative stay the very next day after the Circuit Court issued its temporary injunction. The Governor pleaded with the Court of Appeals for time to respond, never alerting the courts or the Legislature about his true designs: to use the additional time to throw these public servants out of their jobs and try to keep it that way after the Circuit Court's decision was stayed. That the

Governor acted just minutes after the Court of Appeals gave him the weekend to respond is the strongest possible evidence of the character of his conduct. It simply cannot possibly be the case that the courts of this state must sit idly by, allowing this situation to stand, or to force these appointees and the public to suffer harm *for any number of days* for the Governor's actions. That is why *ex parte* relief is particularly appropriate here. To the extent that this Court needs additional time to digest the ultimate resolution of the appointee issue, the status quo should be in favor of those whom the Legislature lawfully confirmed, not the Governor who used such tactics to procure the current situation.

Finally, if this Court takes original jurisdiction over this matter, the Legislature respectfully requests that this Court resolve this entire dispute through that procedural posture, as it did in *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 7, 334 Wis. 2d 70, 798 N.W.2d 436. This would permit this Court to settle finally the underlying merits of this whole case, not just as to the temporary injunction that the Circuit Court issued. Such a course

of action would render moot the Court of Appeals' concern that there will need to be more proceedings before the Circuit Court after adjudication of the temporary injunction appeal.

STATEMENT OF THE CASE[1]

A. Article IV, Section 11 of the Wisconsin Constitution, as amended in 1968, provides, in relevant part, that the "legislature shall meet at the seat of government at such time as shall be provided by law. . . ." WIS. CONST. art. IV, § 11. This constitutional "meet[ing]" only ends upon final, *sine die* adjournment, when the Legislature "ceases to exist." *State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 559, 267 N.W. 433 (1936).

Since the 1968 amendment to Article IV, Section 11, the Legislature has met in continuous, biennial session, not adjourning *sine die* until the next biennial session starts, while setting out a meeting schedule by enacting joint resolutions every two years, explaining that each day is devoted to some legislative business, whether a prescheduled floor day, a prescheduled

[1] Some of this Statement of the Case is taken directly from the Legislature's Response to the Bypass Petition, filed on Monday, April 8.

committee day, or some other legislative marker. *See, e.g.*, 1973 Enrolled Joint Resolution 4; 1981 Enrolled Joint Resolution 1; 1993 Enrolled Joint Resolution 1; 2005 Senate Joint Resolution 1; 2013 Senate Joint Resolution 1. The Legislature has adopted these joint resolutions consistent with the plain terms of Wisconsin Statute Section 13.02, including the authorization added in 1971, to adopt a "work schedule for the legislative session" by "joint resolution." Wis. Stat. § 13.02(3).

Since 1971, in the same biennial joint resolutions, the Legislature has always recognized its authority to turn one of its prescheduled committee days into a non-prescheduled floor period, known as an "extraordinary session." The Legislature first recognized this authority on February 12, 1971, as part of its work scheduled for the 1971-72 biennial session. *See* 1971 Enrolled Joint Resolution 8. This joint resolution provided: "BIENNIAL SESSION. The regular session of the 1971 legislature shall cover a 2-year period beginning at 2 p.m. on Tuesday, January 19, 1971, and ending at 12 noon on Monday, January 1, 1973." *Id.* The

resolution then explained that this continuous, two-year "regular session" will include prescheduled floor periods, prescheduled interim periods, and that, in addition, "[a] floorperiod may be convened at a date earlier than the date specified in this resolution, or an extraordinary session may be called during one of the interim periods, by a majority of the members of each house." *Id.* The Legislature adopted this joint resolution one month before it created Subsection 3 of Section 13.02, which was the first law authorizing the Legislature to establish a biennial working schedule under the 1968 amendment to Article IV, Section 11 of the Wisconsin Constitution. The Legislature has adopted similar work schedules, each authorizing turning prescheduled committee days into floor days, at the start of every biennial session for the last four decades. *See, e.g.*, 1973 Enrolled Joint Resolution 4; 1981 Enrolled Joint Resolution 1; 1993 Enrolled Joint Resolution 1; 2005 Senate Joint Resolution 1; 2013 Senate Joint Resolution 1.

The Legislature has used this extraordinary session procedure with regularity over the last four decades, in January

1980, December 1981, April 1988, May 1988, June 1988, May 1990, April 1992, June 1994, April 1988, May 2000, July 2003, December 2003, March 2004, May 2004, July 2005, April 2006, February 2009, May 2009, June 2009, December 2009, June 2011, July 2011, February 2015, July 2015, November 2015, March 2018, December 2018, and, most recently, in March 2019 (for Governor Evers' budget address). In total, the Legislature has enacted some 300 laws in extraordinary sessions, with a total page length stretching to over 3,000 pages.

B. The joint resolution for the 2017-2018 biennial session sets out the continuous term of the Legislature's biennial session as running from "Tuesday, January 3, 2017," to "Monday, January 7, 2019." 2017 Senate Joint Resolution 1. Just as it has done for decades, the Legislature adopted a work schedule under Subsection 13.02(3), setting out prescheduled floor periods, committee work periods, and other prescheduled legislative markers. *Id.* Most relevant, this joint resolution provided:

(3) SCHEDULED FLOORPERIODS AND COMMITTEE WORK PERIODS. (a) *Unreserved days.* Unless reserved under this subsection . . . every day of the biennial session period is designated as a day for committee activity and is available to extend a scheduled floorperiod, convene an extraordinary session, or take senate action on appointments as permitted by joint rule 81.

. . . .

(4) INTERIM PERIOD OF COMMITTEE WORK. Upon the adjournment of the last general-business floorperiod, there shall be an interim period of committee work ending on Monday, January 7, 2019.

Id. The Legislature adopted this joint resolution with a 33-0 rollcall vote in the Senate and by voice vote in the Assembly.

Just as the joint resolution contemplated, the Legislature in late March 2018 convened an extraordinary session to deal with the problems arising from Lincoln Hills, as well as to make certain other necessary changes to law. *See* 2017 Wisconsin Act 143; 2017

Wisconsin Act 185; 2017 Wisconsin Act 235; 2017 Wisconsin Act 327; 2017 Wisconsin Act 367.

Then, in December 2018, the Legislature again convened an extraordinary session, and enacted 2017 Wisconsin Act 368, 2017 Wisconsin Act 369, and 2017 Wisconsin Act 370. These laws deal with a wide range of topics. *See generally* Wisconsin Legislative Fiscal Bureau, *Summaries of December 2018 Extraordinary Session Bills as Passed by the Legislature* (December 6, 2018), *available at* http://docs.legis.wisconsin.gov/misc/lfb/bill_summaries/2017_19/0002_december_2018_extraordinary_session_bills_as_passed_by_the_legislature_12_6_18.pdf. The Legislature also confirmed eighty-two appointees. *See* S. Journal, Dec. 2017-18 Legis. Sess., 2018 Extra. Sess. (Dec. 4, 2018).

C. On March 21, 2019, the Circuit Court denied the Legislature's Motion to Dismiss, granted Plaintiffs' Motion for a Temporary Injunction, and blocked the laws and appointments that the Legislature had enacted or confirmed in December 2018.

See App. 1–16. The Circuit Court specifically provided that "[t]he appointments are ordered temporarily vacated as a necessary consequence of this temporary injunction." App. 14.

On March 22, 2019, the very next day, the Legislature appealed and sought an emergency stay while also requesting an administrative stay immediately. Plaintiffs and the Governor immediately filed letters asking for time to respond. The Court of Appeals then entered an emergency briefing schedule, giving the parties until March 25, 2019 to respond to the Legislature's emergency stay motion. "[M]inutes" after the entry of this order, the Governor purported to fire all eighty-two appointees confirmed in December 2018. App. 26–27.

On March 27, 2019, the Court of Appeals granted the Legislature's emergency motion for a stay. *See* App. 17–25.

The following day, on March 28, 2019, the Governor refused to allow at least one of the appointees—Commissioner Nowak of the PSC—to return to work. App. 47. The Governor sent a letter to the Senate Chief Clerk purporting to re-nominate the same

individuals for sixty-seven out of the eighty-two positions, App. 62–65, while not mentioning the nominees for the PSC, the Labor and Industry Review Commission, the University of Wisconsin Board of Regents, or several other state bodies. On the same day, the Governor sent appointment paperwork to individuals that he purported to re-nominate, with instructions to accept the nominations, sign the oath of office, and return the executed oaths to the Governor's office within five days. App. 66–77.

On April 1, 2019, the Legislature filed an expedited motion to enforce the stay. App. 32–40.

On April 3, 2019, Plaintiffs filed a Petition for Bypass in this Court, and this Court ordered responses by April 8, 2019.

Yesterday, April 9, 2019, the Court of Appeals denied the Legislature's motion to enforce the stay, reasoning that "our stay is prospective only," and did not have "any retroactive effect on actions taken while the injunction was in effect." App. 29–30. Further, the Court of Appeals reasoned that because the appeal only involves a challenge to the temporary injunction, the

appointees would need to wait to have rights vindicated. App. 30. "In the event that a court ultimately determines that the original confirmations were made during a properly convened extraordinary session and are thus constitutional, that court will have the power to determine the appropriate remedy, including whether the Governor's withdrawal of the nominations can be declared void." App. 30.

ARGUMENT

I. This Court Should Take Original Jurisdiction Over The Dispute And Order Immediate Reinstatement Of The Appointees

1. This Court has the authority to hear "an original action," using its original jurisdiction authority, "upon the ground that the questions presented are of such importance as under the circumstances to call for a speedy and authoritative determination . . . ." *Petition of Heil*, 230 Wis. 428, 446, 284 N.W. 42 (1939); *Wis. Prof'l Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, ¶ 4, 243 Wis. 2d 512, 627 N.W.2d 807; *see generally* Wis. Const. art. VII, § 3; Wis. Stat. § 809.70.

In *Ozanne*, 2011 WI 43, for example, this Court exercised its original jurisdiction authority because the case involved "separation of powers principles"; that is, a circuit court invading the province of the Legislature, beyond its jurisdiction. *Id.* ¶ 15. This Court asserted original jurisdiction and vacated as *void ab initio* all of the orders entered by the circuit court, which had interfered with a duly enacted law for alleged failure to comply with certain statutory requirements. *Id.* ¶¶ 6, 13–15.

2. This case—including the Governor's actions undermining critical bodies such as the PSC—calls out of this Court to assert its original jurisdiction authority, thereby rendering moot the Court of Appeals' concerns about the interlocutory posture of the appeal.

Importance of this matter. The matters in dispute—especially as they relate to the appointees—are of great, immediate consequence to this state, both as a practical matter and a matter of "separation of powers principles." *Id.* ¶ 15.

As a practical matter, the uncertain status of the appointees creates an ongoing, intolerable public interest harm. As

Commissioner Nowak explained in her affidavit, the PSC "meets weekly in open session to consider proceedings related to the state's approximately 1,100 utilities." App. 47. This will cause significant problems and needless confusion for situations such as "a vote on whether to approve a grant for expanding broadband access, to approve a new electric generation resource, or to consider an economic development tariff for utilities and customers." App. 48. And the problems will not end there. For example, "one of the two remaining acting Commissioners might need to recuse in a number of matters" due to previous work for certain regulated entities. App. 48. "Having only one acting Commissioner would greatly interfere with the mission of the [PSC]. Issues that involve substantial money and millions of customers could be stalled, and the resulting uncertainty in the regulatory field would have serious consequences for Wisconsin employers and customers." App. 48; *accord* William T. Gomley Jr., The Politics of Public Utility Regulation 3 (1983) (explaining that "[p]ublic utility regulators play a crucial role in determining price signals, supply

levels, and demand patterns"). Similar problems, disruptions, and uncertainty may well occur at the Labor and Industry Review Commission and the University of Wisconsin Board of Regents.

The Court of Appeals' conclusion that resolution of the status of appointees like Commissioner Nowak should await final judgment, App. 30, only exacerbates this deeply problematic situation. Bodies like the PSC, the Labor and Industry Review Commission, and the University of Wisconsin Board of Regents continuously need to make decisions important to the citizens, and there is no equitable reason to leave those bodies without the full complement of their members, or in a state of limbo. And even if the Governor were now to rush and fill these positions, that would make matters worse—not better—since even the Court of Appeals acknowledged that the appointees that the Senate confirmed in December 2018 may well be put back in place at the conclusion of this litigation. Notably, even if a merits decision can be entered by this Court in less than two months, as occurred in *Ozanne*, that would not sufficiently remediate the ongoing, public interest

harms, as these boards make important decisions on an continuous basis.

This matter is also fit for this Court's original jurisdiction because the Circuit Court's actions (now with an assist for the Governor)—both as to the appointees, in particular, and all of the December 2018 laws, in general—implicate the same "separation of powers principles" that animated this Court's decision to assert its original jurisdiction authority in *Ozanne,* 2011 WI 43, ¶ 15. Just as in *Ozanne,* the Circuit Court here interfered with the Legislature's core, constitutional functioning based upon a finding of statutory noncompliance. *Id.* ¶¶ 13–15. Indeed, the violation here is far more extreme than what occurred in *Ozanne,* as the Circuit Court invalidated a common legislative practice, going back four decades, which the Legislature has used to enact thousands of pages of laws. And as to the appointments, specifically, the Senate's constitutional authority under Article IV, Section 8 of the Constitution to "determine the rules of its own proceedings," applies in full on how it decides to confirm

appointees. The Circuit Court's and the Governor's actions have frustrated the Senate's exercise of this constitutional prerogative. It follows that this Court should take original jurisdiction over this matter—most immediately, to settle the appointments issue, but also to put this assault on the Legislature's constitutional authority to rest.

The Legislature had hoped that this assault would be over, as a practical matter, once the Court of Appeals properly stopped the Governor's unlawful violation of the appointees' statutory rights, which was the only remaining real-world issue after the stay. Resp. Pet. For Bypass 2–3. But given that this did not occur, prompt assertion of original jurisdiction over this entire matter by this Court is warranted. That would not mean that this case needs to be rushed to final decision. Indeed, this Court could simply enter the requested relief here with regard to the appointees and then order a merits briefing schedule that permits this case to be heard for argument in September 2019. *Id.* at 3–5.

Underlying Merits of Appointee Dispute. The Court of Appeals denied the motion to enforce the stay by concluding that its stay order "is prospective only," App. 29–30, but that misses the critical point: the appointees have their jobs by statutory right, which right reattached the moment of the stay *as a matter of law.*

The reasons that appointees like Commissioner Nowak hold their position by statutory right is simple and unambiguous: when the Senate confirms a fixed-term appointee, those appointees obtain a statutory right to their jobs, absent "for cause" removal. *Compare* Wis. Stat. § 17.07(3), *with* Wis. Stat. § 17.07(4) (those serving "at the pleasure of the governor" may be removed "at any time"); *see generally Moses v. Bd. of Veterans Affairs*, 80 Wis. 2d 411, 414-15, 259 N.W.2d 102 (1977). "Cause" means "inefficiency, neglect of duty, official misconduct, or malfeasance in office." Wis. Stat. § 17.001.

The Circuit Court's now-stayed temporary injunction enjoined all defendants from "enforcing the confirmation of the 82 nominees/appointees" and specifically provided that the

appointments were "temporarily vacated as a necessary consequence of this temporary injunction." App. 14. It was the Circuit Court's order "vacat[ing]" these appointments that temporarily deprived these individuals of their positions and their statutory rights. Once that order had been stayed, these individuals were, once again, statutorily entitled to positions to which the Senate confirmed them in December 2018, absent a finding of "cause" sufficient to deprive them of their jobs.

Put another way, the Governor's actions on March 22 *were legally ineffective* to undermine the confirmed appointees' statutory rights, once those rights reattached. At the time that the Governor took the action on March 22, the appointments had already been "vacated" by the explicit terms of the Circuit Court's order, and their statutory rights had been eliminated by judicial decree. Once that Circuit Court's order is reversed—whether by a stay or by a final judgment—those statutory rights necessarily attached again, and no action that the Governor took in the interim could possibly impact this statutory fact, as a matter of law.

The Court of Appeals' denial of the Legislature's motion to enforce the stay was premised the Court of Appeals' failure to engage with the nature of the appointees' statutory rights, rights that the Court of Appeals did not even mention. The Court of Appeals believed that the core issue in the motion to enforce was whether its stay order had "retroactive" effect, App. 30, such that the Governor's actions on *March 22* could be said to violate the stay. But that misses the mark. As explained above, the appointees obtained statutory rights as a result of their December 2018 confirmations, the Circuit Court's order deprived them of those rights, and those rights reattached as a matter of law the moment the Court of Appeals issued its stay. Accordingly, the Governor's violation of both the stay order and the statute occurred only *after* the Court of Appeals issued its stay, when the Governor refused to allow the confirmed appointees to return to work.

Importantly, neither the Governor nor the Court of Appeals explained what source of authority could possibly permit the Governor to extinguish the appointees' statutory rights. It appears

undisputed that if the Governor had not taken any action before the Court of Appeals issued its stay order, the appointees' statutory rights would be secure today by everyone's lights, *without any need for the Senate to reconfirm them*. It follows that one confirmation vote is enough to secure the appointees' statutory rights, and that sole confirmation vote becomes legally effective, once again, the moment the Circuit Court's order is stayed. Whatever actions the Governor took in the interim are irrelevant to those statutory rights, which attached in December 2018, and reattached the moment the Court of Appeals issued the stay.

Finally, to the extent that this Court agrees with the Court of Appeals that relief is not appropriate as part of the extant appeal from the temporary injunction—meaning these appointees would need to await the final merits decision by the courts of this State to have their rights vindicated, App. 30—that point would be rendered moot if this Court were to assert its original jurisdiction over this entire matter. Asserting original jurisdiction would allow this Court to render immediately *void ab initio* the Circuit Court's

injunction, and decide any matter in dispute here, either as an interim or a final matter, while fully protecting the appointees' statutory rights. *See Ozanne*, 2011 WI 43, ¶ 6. Indeed, this Court would even have the option of not discussing the statutory rights issue at all, but merely vacating the Circuit Court's injunction *ab initio*—either on an interim or final basis—thereby leaving the Governor with no possible argument.

II. In The Alternative, This Court Should Immediately Reinstate The Appointees Through A Supervisory Writ, Writ of Mandamus And/Or This Court's Specific Authority To Issue Immediate Temporary Relief

1. Wis. Stat. § 809.71 authorizes a party to request that this Court exercise its supervisory jurisdiction. *See State ex rel. Dep't of Nat. Res. v. Wisconsin Court of Appeals, Dist. IV*, 2018 WI 25, ¶¶ 8–9, 380 Wis. 2d 354, 909 N.W.2d 114 (quoting *Madison Metro. Sch. Dist. v. Circuit Court for Dane Cty.*, 2011 WI 72, ¶¶ 74, 76, 336 Wis. 2d 95, 800 N.W.2d 442). 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 must have acted or intends

to act in violation of that duty; and (4) the request for relief is made promptly and speedily." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 17, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted); *see also State ex rel. Two Unnamed Pet'rs. v. Peterson*, 2015 WI 85, ¶¶ 102–06, 363 Wis. 2d 1, 866 N.W.2d 165. In making this decision, this Court may also consider "equitable principles" and "the rights of the public and third parties." *Kalal*, 2004 WI 58, ¶ 7 (citation omitted).[2]

Meanwhile, "[a] writ of mandamus has long been recognized as 'a summary, drastic, and extraordinary writ issued in the sound discretion of the court' *to direct a public officer to perform his plain statutory duties.*" *Madison Metro. Sch. Dist.*, 2011 WI 72, ¶ 75 (quoting *Menzl v. City of Milwaukee*, 32 Wis. 2d 266, 275–76, 145 N.W.2d 198 (1966)) (emphasis added).

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[2] The prerequisite that relief must first be sought in the Court of Appeals does not apply when "impractical" to do so. Wis. Stat. § (Rule) 809.71. Where, as here, petitioner alleges that the error was committed by the Court of Appeals, this impracticality rule applies. *See generally State v. Buchanan*, 2013 WI 31, 346 Wis. 2d 735, 828 N.W.2d 847; *Dep't of Nat. Res.*, 2018 WI 25.

This Court also has authority under Wisconsin Statute Section 809.52 to issue "temporary relief" while it considers a supervisory writ petition. When this relief is injunctive, the factors that this Court considers when issuing injunctive relief on appeal apply: (1) the likelihood of success; (2) irreparable injury absent a stay; (3) that no substantial harm will come to the non-movant; and (4) that the stay will not harm the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). The factors are interrelated and must be balanced on a case-by-case basis. *Id.*

2. The overlapping considerations applicable to all three of these forms of relief—supervisory writ, mandamus, and temporary relief—all favor reinstatement of the appointees.

First, as explained above, *see supra* 20–24, the appointees have a "plain," *Kalal*, 2004 WI 58, ¶ 17; *Dep't of Nat. Res.*, 2018 WI 25, ¶ 14, statutory right to their jobs, which also means that the Legislature has a strong likelihood of success on the merits, *Gudenschwager*, 191 Wis. 2d at 440–41. Through his conduct, the

Governor is blocking them from returning to their jobs, even though he has not pointed to any "cause" that would justify removing them from jobs that they hold by statutory right. The Court of Appeals' failure to address the legal impact of its stay on these statutory rights violated its "plain" duty, *Kalal*, 2004 WI 58, ¶ 17, and the Governor's failure to honor these statutory rights violates his "plain" duty, *Dep't of Nat. Res.*, 2018 WI 25, ¶ 14.

Second, grave hardship to the public interest, to the State, and to the Legislature's statutory authority will result absent immediate court intervention, and appeal is no adequate remedy. *See Kalal*, 2004 WI 58, ¶ 17; *Dep't of Nat. Res.*, 2018 WI 25, ¶ 14. As described above, absent this Court's intervention, the public will continue to suffer needless harm as critical bodies like the PSC, Labor and Industry Review Commission and the University of Wisconsin Board of Regents are short-staffed for however long it takes this case to get to final judgment, which is when the Court of Appeals held the appointees' rights may be vindicated. App. 30.

Third, the personal toll of the Governor's actions on appointees like Commissioner Nowak should also be taken into account in this inherently equitable analysis. As Commissioner Nowak explains, the Governor's actions have blocked her from a job that she holds by statutory right until March 1, 2023, also causing her executive assistant to lose his job. App. 43. Absent this Court's intervention, Commissioner Nowak faces "the potential of unemployment for months until a decision is made on the underlying merits of this lawsuit." App. 43. Her position as PSC Commissioner is her "sole source of income," and she faces "uncertainty regarding future income and insurance coverage." App. 43. In addition, while she sits in "professional limbo," both her and her assistant will have trouble finding new jobs because they will not be able "to make a long-term commitment" given the current situation. App. 43.

Fourth, the Governor would suffer no harm from having to comply with the law. If he later finds "cause" to remove any of the appointees, he would retain his authority to do so. Wis. Stat.

§ 17.07(3). Indeed, the Governor would be in the same situation as had he waited until the Court of Appeals ruled on the Legislature's emergency stay motion, instead of using the time that the Court of Appeals gave him to respond to attempt to fire these appointees and then try to keep them out of their jobs.

Finally, this relief is sought "promptly and speedily," *Kalal*, 2004 WI 58, ¶ 17, as the Legislature is filing this emergency petition the next day after the Court of Appeals' decision.

CONCLUSION

This Court should grant the emergency relief requested, preferably on an immediate, *ex parte* basis.

Dated: April 10, 2019

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CERTIFICATION OF COMPLIANCE WITH LENGTH AND FONT REQUIREMENTS

I hereby certify that the foregoing Petition conforms to the rules contained in Wis. Stat. § 809.51, Wis. Stat. §§ (Rule) 809.62(4) and (Rule) 809.19(8)(b) and (c), for a petition produced with a proportional serif font. The length of this petition is 5,034 words, exclusive of the caption, Table of Content and Authorities, signature block, and this Certificate.

Dated: April 10, 2019

Misha Tseytlin

CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons,

specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: April 10, 2019

Misha Tseytlin