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SUPREME COURT OF WISCONSIN
 Appeal No. 2024AP001298

DISABILITY RIGHTS WISCONSIN, LEAGUE OF WOMEN VOTERS
 OF WISCONSIN, MICHAEL R. CHRISTOPHER, STACY L. ELLINGEN,
 TYLER D. ENGEL AND DONALD NATZKE,
Plaintiffs-Respondents,

v.

WISCONSIN ELECTIONS COMMISSION, MEAGAN WOLFE,
 as Administrator of WEC, DON MILLIS, as Commissioner of WEC,
 ROBERT SPINDELL, JR., as Commissioner of WEC, MARGE BOSTELMANN,
 as Commissioner of WEC, ANN JACOBS, as Commissioner of WEC,
 MARK THOMSEN, as Commissioner of WEC and CARRIE RIEPL,
 as Commissioner of WEC,
Defendants,

WISCONSIN STATE LEGISLATURE,
Intervenor-Defendant-Appellant.

On Appeal From The Dane County Circuit Court,
 The Honorable Everett Mitchell, Presiding,
 Case No. 2024CV1141

PETITION FOR BYPASS

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INTRODUCTION

Under Wisconsin’s current at-home absentee voting system, voters with print disabilities (*i.e.*, a disability that prevents an individual from independently reading or marking printed materials) must forfeit their opportunity to vote absentee privately and independently because Wisconsin law prohibits clerks from sending anyone but military and overseas voters electronic, accessible (*i.e.*, capable of being read, perceived, and/or marked by a voter with print disabilities) ballots. Non-disabled Wisconsin voters need not make this same sacrifice. Plaintiffs brought this suit challenging Wisconsin’s failure to accommodate and enhance accessibility under the Americans with Disabilities Act (“ADA”), Rehabilitation Act, and the Wisconsin and U.S. Constitutions. Plaintiffs obtained a temporary injunction (“TI”) that required the Wisconsin Elections Commission (“WEC”) to facilitate the availability of electronically delivered, accessible absentee ballots for voters with print disabilities for the November 2024 general election and enjoined statutes, as to those voters, that prohibited the same. WEC, the only party with any obligations under the TI, *did not* appeal the circuit court’s decision. The Legislature, an intervenor below, *did* appeal and obtained a stay from District II¹ of the court of appeals (“District II”), primarily on the basis that the Legislature would be harmed by the TI’s effect on Wisconsin absentee ballot laws, which the Legislature passed.²

At bottom, the merits of this case present issues of first impression concerning voting rights of Wisconsinites, which this Court is uniquely positioned to address. Accepting this petition would provide certainty for print-disabled voters and elections officials across Wisconsin as to the underlying merits of Plaintiffs’

¹ Plaintiffs specify the district because this case involves two appeals: one by WEC that was transferred from District IV to District I, and one by the Legislature in District II. *See Disability Rights Wis. et al v. Wis. Elections Comm’n*, 2024AP1347.

² Notably, the Legislature does not *solely* pass laws. Any bill passed by the Legislature must be presented to the Governor prior to passage. Wis. Const. art. V, § 10. Any implication that the Legislature is the sole branch of government with a vested interest in the interpretation and enforceability of passed legislation is fundamentally wrong.

claims, which are based on rights under federal law and state constitutional law that have not been directly evaluated by any Wisconsin court.

In addition, this case presents the opportunity for this Court to resolve significant and outstanding questions regarding the relevant standards for mandatory temporary injunctions and stays pending appeal. Among these is the Legislature's problematic reliance on its own claimed "harm" in *any* case where the plaintiff seeks a statute be enjoined, regardless of whether that statute is unconstitutional or preempted, or both. In *both* the TI and stay contexts, the Legislature bases its claim to a right to intervene here on a generalized harm it purportedly experiences any time a court issues a ruling that enjoins a statute from being enforced. This position, and District II's validation of it in granting the Legislature's motion to stay the circuit court's TI, absolves the Legislature, like other litigants, of having to identify a *particularized* harm, with proof of that harm, and further violates the separation of powers, necessitating this Court's review.

Finally, the petition also presents a pressing question regarding the unitary nature of the court of appeals. While WEC chose not to appeal the circuit court's issuance of a TI in this case, it did appeal the circuit court's decision to grant the Legislature intervention as violating the Wisconsin Constitution's separation of powers doctrine. Due to application of Wisconsin's special venue statute, Wis. Stat. § 752.21, that appeal is currently before District I of the court of appeals ("District I"), while the instant matter is before District II. This presents the unique situation where District II is poised to enter a ruling on the merits of the circuit court's TI determination (and has already entered a ruling on a motion for stay) at the request of a party that another district in a unitary court, District I, may soon determine has no right to be a part of this case *at all*.

ISSUES PRESENTED

1. Did the circuit court, having considered and applied all of the temporary injunction factors and the ample undisputed record before it, properly exercise its discretion in issuing temporary injunctive relief allowing print disabled voters access to vote absentee privately and independently on equal terms as other Wisconsin voters?

2. Did the court of appeals err in concluding that the circuit court erroneously exercised its discretion in denying the Legislature's motion for stay pending appeal despite the circuit court having considered and applied all four stay factors. This issue necessarily has three subparts:

- i. When evaluating a motion for a stay pending appeal, this Court has instructed lower courts to consider whether the movant has shown, with proof, that, absent a stay, it will suffer irreparable injury. In light of that factor, must courts presume the Legislature necessarily has suffered the requisite "harm" when a statute is enjoined?
- ii. If legislative harm is presumed anytime a statute is enjoined, does such a presumption violate the separation of powers under the Wisconsin Constitution?
- iii. When evaluating a motion for a stay pending appeal, this Court has also instructed lower courts to consider whether the movant has made a strong showing that it is likely to succeed on the merits of the appeal. Must a court presume this factor is satisfied if the issue before it implicates de novo review on appeal or involves enjoinder of a statute?

3. Did District II err in failing to hold the Legislature's appeal in abeyance, under Wis. Stat. § 808.07(2), pending the outcome of District I's review as to the Legislature ability to intervene?

LEGAL STANDARDS

A. Standards for a petition for bypass

Wisconsin Stat. § 808.05(1) provides that this Court may take jurisdiction of an appeal pending in the court of appeals on a petition for bypass. The Court may grant the petition “upon such conditions as it considers appropriate.” Wis. Stat. § 809.60(4). Pursuant to the Court’s internal operating procedures, which provide more clarification and detail than the statute, a “matter appropriate for bypass is usually one which meets one or more of the criteria for review, Wis. Stat. § 809.62(1)[r], and one the Court concludes it ultimately will choose to consider regardless of how the Court of Appeals might decide the issues.” Sup. Ct. IOP § III.B.2. Additionally, “at times,” a petition for bypass will be granted “where there is a clear need to hasten the ultimate appellate decision.” *Id.*

B. Standards for a temporary injunction and a motion for stay pending appeal

This appeal implicates both the standards for temporary injunctions and stays pending appeal, and appellate review of the same. Those standards largely overlap:

| Temporary Injunction | Stay Pending Appeal |
|---|--|
| <p>A movant must show:</p> <ul style="list-style-type: none"> (1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. <p><i>Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cnty.</i>, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154.</p> | <p>Reviewing court must consider:</p> <ul style="list-style-type: none"> (1) whether the movant makes a strong showing that it is likely to succeed on the merits of the appeal; (2) whether the movant shows that, unless a stay is granted, it will suffer irreparable injury; (3) whether the movant shows that no substantial harm will come to other interested parties; and (4) whether the movant shows that a stay will do no harm to the public interest. <p><i>Waity v. LeMahieu</i>, 2022 WI 6, ¶49, 400 Wis. 2d 356, 969 N.W.2d 263.</p> |

Specific to the stay analysis, the factors “are interrelated considerations that must be balanced together.” *Waity*, 2022 WI 6, ¶49 (quoting *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)). A party seeking a stay pending appeal must “demonstrate more than a mere possibility of success on the merits.” *Id.*, ¶54 (quote source omitted). The different factors are not considered in isolation: “the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay.” *Id.* (quoted source omitted). In other words, where a movant is clearly likely to succeed on the merits, less harm need be shown; where the harm is substantial and imminent, a lesser probability of success is required.

A decision to grant a TI is reviewed for an erroneous exercise of discretion and *must* be upheld if the issuing court “examine[d] the relevant facts, applie[d] a proper standard of law, and, using a demonstrated rational process, reache[d] a conclusion that a reasonable judge could reach.” *Gahl ex rel. Zingsheim v. Aurora Health Care, Inc.*, 2023 WI 35, ¶18, 989 N.W.2d 561. The review of a TI is “limited” insofar as the reviewing court only evaluates “whether the circuit court erroneously exercised its discretion by issuing the subject temporary injunction.” *Id.*, ¶19. A circuit court order denying a motion for stay pending appeal is also reviewed for an erroneous exercise of discretion using the same factors above. *Gudenschwager*, 191 Wis. 2d at 440.

BACKGROUND

A. General background on electronic ballot delivery and marking

All qualified electors in Wisconsin are eligible to vote absentee. *See* Wis. Stat. § 6.87(1)-(2). Wisconsin law previously provided that any absent elector was eligible to receive their absentee ballot electronically. *See* Wis. Stat. § 6.87(3)(d) (2009-2010). Until 2011, a municipal clerk could, upon request, “transmit a[n]...electronic copy of the absent elector’s ballot to that elector in lieu of mailing.” *Id.* In 2011, the Legislature passed, and the Governor enacted, 2011 Wis. Act 75,

which amended Section 6.87(3)(d) by striking out “absent elector” and replacing it with “military elector” or “overseas elector.” *See* 2011 S.B. 116 (Dec. 1, 2011). That amendment “prohibit[ed] election officials from sending [electronic] absentee ballots via email [] to all but a few categories of voters” (*i.e.*, **only** military members and overseas voters). *Luft v. Evers*, 963 F.3d 665, 676 (7th Cir. 2020). Starting in 2016, any absent elector was again able to request absentee ballots by electronic delivery under the injunction issued in *One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896, 902 (W.D. Wis. 2016). That injunction was lifted in 2020 following the Seventh Circuit’s ruling in *Luft*, 963 F.3d at 681.

Wisconsin continues to provide electronic absentee ballots to military and overseas voters. Some of those voters can and do mark their ballots electronically with the proper technology before they print the ballot and mail it to their municipal clerk.

B. Procedural history

1. Circuit Court

In April 2024, Plaintiffs-Respondents (“Plaintiffs”) brought this action in Dane County Circuit Court challenging Wisconsin’s absentee voting system as applied to voters with print disabilities. (R.9; Pet.App.003–62) Plaintiffs alleged that Wisconsin must provide an option for voters with print disabilities to receive, mark, and return their absentee ballot electronically in order to comply with a myriad of accommodation and equal-access and equal-protection requirements under state and federal law, as well as Wisconsin’s constitutional guarantee to a secret ballot.

On May 1, 2024, Plaintiffs moved for a TI to compel Defendants to “make available for the upcoming August 2024 primary and November 2024 general elections an option to request and **receive** an electronic absentee ballot that can be marked electronically using an at-home accessibility device.” Plaintiffs **never**

requested electronic ballot *return* in their TI motion.³ WEC opposed the TI motion. The Legislature moved to intervene in the case and also opposed the TI motion.

A week before the scheduled TI hearing, WEC's administrator, Meagan Wolfe, confirmed that between 2016 and 2020 clerks emailed ballots to voters, and some clerks made those ballots accessible. She also testified that emailing accessible ballots would be a "less significant project" for WEC to implement in the months before the November election than modifying WEC's web platform, MyVote, to deliver electronic absentee ballots to print-disabled voters. Given the timing considerations and Administrator Wolfe's testimony, Plaintiffs withdrew their request for relief for the August primary election and narrowed their requested relief to the November general election and for only email delivery of an accessible ballot.

On June 24, 2024, the circuit court held a hearing on both the TI and intervention motions. Over the course of the over three-hour hearing, the circuit court heard the parties' arguments, received evidence, and asked questions about their respective positions. The next day, the circuit court entered an order granting the narrowed TI relief requested (R.104; Pet.App.063-64) and also granted the Legislature's motion to intervene.

On July 3, 2024, Plaintiffs requested that the circuit court clarify its TI by issuing a written ruling explaining its reasoning. (R.120; Pet.App.065-90) The circuit court ultimately "reconsider[ed] and amend[ed]" its TI. (R.139; Pet.App.113-19) In that decision, the circuit court explained that "plaintiffs satisfied each of the[] four criteria" for a TI and considered each separately. (R.139 at 5-6; Pet.App.117-18) The court also noted that "consistent with many other courts that

³ District II, in ultimately granting the Legislature's emergency motion for stay of the circuit court's TI, repeatedly, and incorrectly, stated that electronic *return* was part of Plaintiffs' TI request. (Pet.App.159 ("The respondents not only sought an injunction that would allow them to receive and mark their ballot electronically, but they also sought to be able to *return* it to the elections clerk electronically.") (emphasis in original); *id.* at n.3 ("We assume the circuit court declined to order electronic return of ballots due to security concerns that would accompany such a manner of return."); *see also* Pet.App.159 at n.7)

have addressed apparently unlawful restrictions on the right of the disabled to vote... the public interest [would] be served” by the TI. (R.139 at 6; Pet.App.118)

The Legislature—*but not WEC*—moved the circuit court to stay the TI pending appeal. The circuit court, after receiving more briefing and carefully considering and applying the stay-pending-appeal factors, denied the Legislature’s motion:

Considering these factors together, I conclude that a reasonable jurist would likely not grant the legislature any relief on the merits of the appeal and that a stay would inflict significant harm on both the disability rights advocates and the public interest. These factors outweigh the harm the legislature may suffer, especially given the unlikelihood that it will succeed on the merits of the appeal. Accordingly, the legislature does not demonstrate that it is entitled to a stay pending appeal.

(R.157 at 10; Pet.App.129)

The circuit court recognized that “the issues in this case are unsettled issues of law that the court of appeals will review de novo” and issues as to which “a reasonable jurist may reach a different conclusion[.]” (R.157 at 3; Pet.App.122) The circuit court further noted that “the legislature urge[d] [it] to consider that, on appeal, a court will presume that Wis. Stat. §§ 6.87(3)(a) and (4)(b)1. are constitutional” but reasoned that “the presumption of constitutionality will not assist the challenged statutes against claims based on a conflict with federal law.” (*Id.*)

While it ultimately stated that “[g]iven these unsettled issues and de novo review, the legislature benefits from the presumption of constitutionality on at least some of the claims and may prevail on the merits of the appeal,” the circuit court struggled with finding any harm to the Legislature. (R.157 at 4; Pet.App.123) Although admitting that “the legislature has shown that it will suffer this irreparable injury—that of a statute being enjoined—if the stay is not granted,” the circuit court reasoned that “the legislature does not further illustrate how it is injured in the absence of a stay” or “how it is harmed by these absentee ballots being made accessible to voters with print disabilities.” (R.157 at 6; Pet.App.125) In stark contrast to the illusory harm faced by the Legislature, the circuit court found that if

the TI was stayed, print-disabled voters' right to a secret ballot would be impaired: "the right to a secret ballot or any other fundamental part of the right to vote, once lost in an election, cannot be reclaimed for that election." (R.157 at 7-8; Pet.App.126-27)

2. District I

WEC *did not* appeal the circuit court's TI order. Instead, it filed a notice of appeal in District IV challenging the circuit court's decision to grant the Legislature's motion to intervene. (R.130; Pet.App.091-112) That appeal was ultimately transferred to District I. As part of its petition for leave to appeal the Legislature's intervention, WEC expressed concern that an appeal of the TI could "harm the Commission, municipal clerks, Wisconsin voters, and predictability in the elections process." (R.130 at 8; Pet.App.098) If WEC is successful on appeal, the circuit court's grant of intervention to the Legislature would be reversed and the Legislature would lose party status in this action.

3. District II

The Legislature appealed the TI order to District II. The Legislature also moved the court of appeals for an emergency stay pending that appeal. Plaintiffs asked District II to hold the Legislature's stay motion in abeyance in light of WEC's contemporaneous appeal of the circuit court's order granting the Legislature intervention. (Pet.App.131-52) The day after Plaintiffs filed their response to the Legislature's emergency motion for stay, District I granted WEC's petition for leave to appeal the intervention decision and set a merits briefing schedule.

As Plaintiffs noted in their brief, if WEC is successful in its appeal challenging the Legislature's ability to intervene, the Legislature would lose party status and thus its ability to appeal, resulting in dismissal of the appeal pending before District II altogether. Undeterred by the progress of the appeal in District I, District II granted the Legislature's motion for a stay less than a week after District I set its briefing schedule.

On the merits, District II's stay decision was characterized by the following:

First, District II combined the TI and stay factors from the two analyses, stating that it was “review[ing] the stay factors in light of the injunction order factors.” (Pet.App.156) In doing so, the court of appeals conducted a hasty and superficial de novo review of the merits of the circuit court's TI order, rather than reviewing the circuit court's decision on the motion for stay under the lens of an erroneous exercise of discretion and “search[ing] the record for reasons to sustain” it. *State v. Dobbs*, 2020 WI 64, ¶48, 392 Wis. 2d 505, 945 N.W.2d 609.

Second, District II heavily relied on a statute's presumption of constitutionality, largely ignoring Plaintiffs' arguments that the statutes are preempted by, and violate, state and federal law, including the ADA and Rehabilitation Act. District II said that it was “review[ing] the injunction order under the erroneous exercise of discretion standard,” but it also emphasized it was “mindful that a significant underlying question is whether WIS. STAT. §§ 6.87(3) and (4) violate the Americans With Disabilities Act and Rehabilitation Act, as well as constitutional provisions, which are questions of law we review de novo.” (Pet.App.157) The court of appeals concluded that “regularly enacted statutes are presumed to be constitutional, and thus, for purposes of deciding whether or not to grant a stay pending appeal, the State has made a strong showing that it is likely to succeed on the merits of its appeal where the challenge is to the constitutionality of the statutes.” (Pet.App.164 (internal quotations omitted))

Third, as to harm, District II concluded that the legislature “will suffer substantial and irreparable harm from a duly enacted statute being declared unenforceable and enjoined before any appellate review of that decision can occur.” (Pet.App.165 (internal quotations omitted)) The court of appeals noted that “the legislature did play a very necessary and critical role in enacting the current statutory voting scheme, and it did not do so so that scheme could be ignored or unenforced. Disregard of duly enacted laws of course harms the legislature and the public it represents... .” (Pet.App.166) Relatedly, the court of appeals noted that “the public

has a strong interest in the laws enacted by the legislators they elect being effectuated and implemented as written and in national elections proceeding smoothly based upon familiar and well-established laws, not laws made by judicial intervention.” (Pet.App.166-67)

Finally, District II emphasized what it perceived as “fact issues” not borne out in the record or raised by either party. For example, the court of appeals repeatedly and erroneously asserted that Plaintiffs sought electronic ballot *return* as part of their TI request—they did not. (*See supra* n.3) Further, while the Individual Plaintiffs’ declarations have gone unrebutted, the court of appeals second guessed their assertions that they could vote an electronic ballot if they had the requisite technology and also mused about “whether they would be able to execute in the first instance all of the necessary functions to return a ballot without any assistance, and if needing assistance, whether they could utilize the assistance in a manner which successfully conceals their vote from that person... .” (Pet.App.166)⁴

Although District II imposed a stay on August 19, 2024, merits briefing of the TI concluded only on September 6, 2024, and District II has not yet ruled.

ARGUMENT

This Court should grant the petition for bypass and accept jurisdiction over this case because the issues presented meet several of the criteria for review outlined in Wis. Stat. § 809.62(1r), namely: (a) (“real and significant question[s] of federal or state constitutional law is presented”); and (c) (the opportunity for “[a] decision by the supreme court [that] will help develop, clarify or harmonize the law”). Additionally, there is a “clear need to hasten the ultimate appellate decision,” and

⁴ Voters like Plaintiffs Natzke and Christopher, who are blind, would use an audible ballot and headphones to privately mark their ballot and have not claimed they require assistance mailing their ballots. Voters like Plaintiffs Ellingen and Engel may require assistance returning their ballot, but it has never been challenged that simple steps exist to conceal ballot markings and ensure secrecy, including printing the certificate sheet so that markings are not revealed.

this Court will likely choose to consider this appeal regardless of how the court of appeals decides these issues. *See* Sup. Ct. IOP § III.B.2

This case provides the Court with the perfect vehicle to develop and clarify outstanding points of confusion in the stay-pending-appeal standard, particularly with regard to the likelihood of success on appeal and the “harm” factors necessary to the analysis in assessing such a stay. Where the Legislature is concerned, the question of its “harm” when a statute is enjoined is not limited to the stay analysis, but is also implicated in the threshold TI determination, as the Legislature’s arguments in this case demonstrate. These are questions that this Court has yet to clarify and which are likely to recur in this case, warranting this Court’s review. Moreover, because of the separation of powers issues implicated here, the legal import of the Legislature’s harm anytime a statute is challenged and enjoined also presents critical issues of state constitutional law.

Additionally, because this case involves issues of law not previously addressed by Wisconsin courts (to wit: the application of ADA/Rehabilitation Act claims to election laws and claims under the Wisconsin Constitution’s secret ballot provision), this case also presents an opportunity for the Court to clarify the elusive “strong likelihood of success on the merits of the appeal” factor in a stay analysis, while also cohesively addressing an issue of voter accessibility.

Finally, the procedural irregularities of this case alone warrants bypass. Currently, this case is split on parallel tracks between two districts of the court of appeals, which must speak with unanimity under longstanding precedent. It is well within this Court’s authority to articulate a policy that reviewing courts should employ when dual-tracked appeals land in two appellate districts, a phenomenon likely to recur with increased reliance on the special venue statute, Wis. Stat. § 752.21.

- I. This Court should grant this petition to clarify two factors of the stay-pending-appeal analysis.**
- A. Wisconsin’s stay-pending-appeal standards have engendered a great deal of confusion and warrant this Court’s reexamination and clarification.**

With the exception of *Waity*, this Court’s stay-pending-appeal analysis has in many ways developed via its unpublished orders. In the last five years, the Court has issued unpublished orders that have modified the standard of review for motions for relief pending appeal, including in *League of Women Voters* (“LWVWI”) and *Service Employees International Union* (“SEIU”). See *SEIU v. Vos*, No. 2019AP622, unpublished order (Wis. June 11, 2019); *League of Women Voters of Wis. v. Evers*, No. 2019AP559, unpublished order (Wis. Apr. 30, 2019). This development has focused on two factors in a stay analysis: (a) whether a movant has a strong likelihood of success on the merits, and (b) whether a movant faces an irreparable injury in the absence of a stay.

As to the first prong, whether a movant has shown a strong likelihood of success on the merits, this Court explained in its *SEIU* and *LWVWI* orders that the respective circuit courts erred in refusing to stay their own injunctions because they did not recognize that their conclusions of law would be reviewed de novo by the appellate court. The de novo review greatly increased the Legislature’s likelihood of success on the merits and presumptively satisfied the first factor of the stay analysis.

As to the movant’s purported irreparable injury in the absence of a stay, the *SEIU* and *LWVWI* orders also posit that per se harm to the Legislature surpasses all other considerations in the harm-balancing portion of the analysis: “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.” (*LWVWI* Order

at 8; *see also SEIU* Order at 8.) Although unpublished orders, the Court has treated these orders as precedential authority. *See, e.g., Waity*, 2022 WI 6, ¶¶57-58.

In *Waity*, the Court issued its first published decision changing the rules governing stays pending appeal. While *Waity* provided some clarity on motions to stay, significant questions remain. For example, while the *SEIU* and *LWVWI* orders seemingly tilted the scales heavily in the Legislature’s favor with respect to harm, the *Waity* decision did not feature a similar discussion. Further, even after *Waity*, there remain outstanding questions about the intertwined role the presumption of constitutionality and de novo review play in analyzing a movant’s likelihood of success on appeal.

Members of the Court have more recently echoed the need to revisit and clarify the standards surrounding a stay pending appeal. *See Brown v. Wis. Elections Comm’n*, 2024AP232 at 6-7 (Wis. June 11, 2024) (Dallet, J., concurring) (“I write separately to point out, as I’ve done previously, that our case law governing the likelihood of success on appeal prong of the stay analysis is flawed” but noting that “no one asks us to revisit our stay pending appeal jurisprudence in this case”); *id.* (“As I’ve written before, it’s ‘hard to make sure of [this] claim,’ since ‘de novo appellate review, on its own, says nothing about whether a party has ‘more than a mere possibility of success’ on appeal” (quoted source omitted)); *see also id.* at 10 (Grassl Bradley, J., dissenting) (noting that the stay-pending-appeal standard forces “circuit courts [to] peer into the minds” of an appellate court and “divine how they would interpret a statute,” placing circuit courts “in an untenable position”).

Illustrating the ongoing confusion, in early 2023, several individuals filed a rule petition asking the Court to amend Wis. Stat. § 809.12 to clarify the standard of review for a decision on a motion for stay pending. Rule Petition No. 23-01. In particular, those individuals requested that the Court clarify “that an appellate court’s deferential review applies only to the circuit court’s assessment of the harms surrounding the motion for a stay” and that “[r]egarding the movant’s likelihood of

success on appeal, the proposed amendment would clarify that de novo review applies.” Memorandum in Support of Rule Petition No. 23-01.

After receiving written comments from interested parties and having a public hearing on the rule petition, the Court voted 6-0 to deny the petition. *See In the Matter of Amending Wis. Stat. § 809.12, Relating to Appellate Review of Motions for Relief Pending Appeal* (July 5, 2024). Justice Rebecca Grassl Bradley abstained from voting and, in her concurrence, noted that “[i]f the standard of review [for a decision on a motion for stay pending appeal] requires revision, ***it should be done through our case deciding process, with the benefit of full adversarial briefing and argument.***” (*Id.*, ¶2 (emphasis added)) This case provides such an adversarial vehicle for the Court to revisit and clarify the standard.

B. District II improperly inflated the significance of the Legislature’s illusory “harm” when it granted the motion for stay pending appeal, an error the Legislature also perpetuates in its TI analysis.

With respect to the stay analysis, District II’s determination that the Legislature faces a qualifying (and sufficient) harm every time a statute is enjoined from being enforced should be rejected outright by this Court. Such a theory of harm presents a burgeoning separation of powers issue. Generally, enjoining a law that the Legislature plays no role in enforcing or executing cannot cause it harm. And, here, it certainly cannot cause a harm sufficiently substantial to, per se, outweigh the harm to voting rights that the Individual Plaintiffs and the public will suffer.

Any interest the Legislature may have in the enforcement of its laws cannot be harmed where a state law violates and is preempted by federal rights. It is unclear how the Court’s assertion that the “harm that stems from refusing to stay an injunction against the enforcement of a law passed by the Legislature ... is an irreparable harm of the first magnitude” can apply or govern challenges like this, which turn on a conflict between state and federal law. *See Carey v. Wis. Elections Comm’n*, 624 F. Supp. 3d 1020, 1032 (W.D. Wis. 2022) (“The effect of the Supremacy Clause is that state laws that are contrary to or interfere with federal

laws are preempted and therefore unenforceable.”). The Court cannot elevate the Legislature’s purported state-based interest in having the laws of the state enforced in the way it sees fit over the protections Congress federally provided to individuals nationwide in the ADA and Rehabilitation Act.

That fundamental premise is amplified where the state laws are challenged only on an as-applied basis. In the context of this case, while the TI was in effect, Wisconsin’s absentee voting laws remained valid and enforceable except with respect to a *small subset* of electors whose rights would otherwise be denied. The TI did nothing to diminish the Legislature’s power to write laws, nor did it create new ones by judicial fiat. The Legislature simply cannot—and did not—point to any particularized harm nor any proof of actual harm it did or would suffer. Far from harming the Legislature, the TI advanced fundamental democratic principles by ensuring that Wisconsin’s election laws will be administered consistent with federal disability law and state and federal constitutional guarantees.

The circuit court in its stay analysis struggled to find or understand how there was an injury or harm to the Legislature—and rightly so—“Far from suffering an irreparable injury, however, the legislature’s interest is actively protected in this litigation: it has intervened as a party and is appealing the temporary injunction. . . . [The legislature] retains the same right to defend the statute, both on appeal and in subsequent proceedings.” (R.157 at 5; Pet.App.124)

The circuit court also properly rejected the Legislature’s argument that it had an “interest in the ‘integrity and orderly administration’ of Wisconsin elections.”⁵ (*Id.*) As the circuit court properly noted, that interest belongs to WEC and the public generally. (*Id.*) Ultimately, the circuit court concluded that “the legislature has not stated how it is harmed if such [WEC] guidance and training results in voters who are eligible to vote in-person or absentee with an assistant...voting instead in a

⁵ As the Legislature made clear to the circuit court when it was arguing in support of its motion for intervention: “this is not a situation where we’re trying to enforce the election laws, administer the elections law.” (Pet.App.135)

method already used by military and overseas voters” or “how it is harmed by these absentee ballots being made accessible to voters with print disabilities.” (R.157 at 6; Pet.App.125) Ultimately, the Legislature provided neither proof, by evidence or argument, of an institutional harm nor of a curtailment to their constitutionally prescribed law-making power.

Saying there is substantial harm whenever a law the Legislature authored is not “enforced” or “executed” the way it would like cannot withstand scrutiny. That position not only encroaches into the executive branch’s duty to execute and administer the law, it also encroaches on the judicial branch by functionally wiping out a state jurist’s ability to interpret the laws (both state and federal) and fashion injunctive relief upon a finding the statute is unconstitutional or preempted. That is the exact function of the judicial branch, as structured and defined under the Wisconsin’s constitutional separation of powers. *Compare* Wis. Const. art. VI, § 32, *with* art. VII, §§ 2, 8.

Foundationally, the court of appeals failed to meaningfully engage with the fact that there are different types of harms under the stay analysis versus the types of harms under the TI analysis. When deciding whether to enter a TI, a circuit court analyzes whether the movant has shown that it will suffer irreparable harm in the absence of a TI. On the other hand, in the context of a motion to stay an injunction, the court considers “whether the harm [to the movant for a stay] can be undone if, on appeal, the circuit court’s decision is reversed. If the harm cannot be ‘mitigated or remedied upon conclusion of the appeal,’ that fact must weigh in favor of the movant.” *Waity*, 2022 WI 6, ¶57 (quoting *SEIU* Order); *see also* *SEIU* Order at 6-7 (noting that the court “must weigh the irreparable harm that the movant for a stay would face in the absence of a stay during the appeal in the event that the movant is ultimately successful in having the injunction vacated on appeal versus the irreparable harm that the party who prevailed at the circuit court would suffer without the injunction during the appeal...”).

The Legislature endeavors to repeat this error—an apparent presumptive harm, without proof of actual harm, where a statute is enjoined that functions to preclude any temporary injunctive relief—in the TI analysis itself. It argues that the public interest counsels against temporary injunctive relief because the Legislature’s “irreparable harm” outweighs any harm Plaintiffs experience by virtue of their state or federal rights being violated.

This case provides the Court with the perfect vehicle to clarify the TI and stay-pending-appeal standards with regard to the “harm” factor, as well as the quantum of proof of harm the Legislature must show to establish it has been harmed.

C. This petition also presents the Court with an opportunity to clarify how courts are to apply the likelihood of success factor of the stay-pending-appeal analysis.

In its stay decision, the court circuit court noted that “[t]he legislature is correct that the issues in this case are unsettled issues of law that the court of appeals will review *de novo* and that a reasonable jurist may reach a different conclusion.” (R.157 at 3; Pet.App.122) The circuit court recognized that “the legislature urges this Court to consider that, on appeal, a court will presume that Wis. Stat. § 6.87(3)(a) and (4)(b)1. are constitutional because they were regularly enacted,” but reasoned that “the presumption of constitutionality will not assist the challenged statutes against claims based on a conflict with federal law.” (*Id.*)

While the *Waity* decision noted that “[w]hen reviewing the likelihood of success on appeal, circuit courts must consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis,” it did not explain how a *de novo* standard of review impacted this factor. *Waity*, 2022 WI 6, ¶53; *see also id.*, ¶90 (Dallet, J., dissenting) (reasoning that the majority “falsely equat[es] a ‘strong showing’ of likely success on appeal with the fact that the court of appeals reviews questions of law *de novo*” but does not provide an “explanation for how the *de novo* standard of review, on its own, gives the moving party more than a mere possibility of success on appeal); *see also LWVWI* Order

at 11 (Ann Walsh Bradley, J. dissenting) (“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.”).

The confusion regarding the import of the appellate standard of review was also borne out here: the circuit court felt hamstrung by the de novo appellate review standard for questions of law. Thus, the court of appeals hung its hat on the facts that because a de novo standard of review applies on appeal with regard to the underlying merits and a presumption of constitutionality applies, Plaintiffs were unlikely to succeed. (Pet.App.124 (“the State has made a strong showing that it is likely to succeed on the merits of the appeal where the challenge is to the constitutionality of the statutes”)); *see also id.* (“[W]e must continue to presume that the duly enacted statutes the respondents challenge are legally sound”).)

The de-novo-review-plus-presumption-of-constitutionality intertwining standards are directly in tension with each other and create an unworkable rule for reviewing courts to apply, especially in the context of a motion for a stay. The presumption of constitutionality hinders a reviewing court’s ability to conduct a robust review of the statute in question in conjunction with the record below. The fact that there will be de novo review on appeal should not preclude courts from adjudicating motions for stay. Such a rule would essentially strip circuit courts of their fundamental authority to issue injunctions. To require judges to act based upon a presumption that the statute must be constitutional and that they will be overruled any time they are subject to de novo review on appeal effectively forecloses their ability to make reasoned decisions—applying fact to law—in the first instance and the Court should reject that proposition.

As applied in the case below, in its stay analysis, the court of appeals started with the presumption of constitutionality and did not meaningfully engage with the underlying merits of Plaintiffs’ case *at all*. It overlooked the strength of Plaintiffs’ claims under the ADA and Rehabilitation Act, supported by unanimous series of on-point persuasive authority, and the Wisconsin Constitution (and the circuit

court's finding of the same). Rather than searching the record to understand why the statute violated federal and constitutional law, as applied, the court of appeals circularly moved to its end conclusion that Plaintiffs could not be successful because of the presumption of constitutionality. In doing so, rather than conducting de novo review, it wholesale adopted the Legislature's arguments, which wholly miscomprehend the ADA claim and how it applies in the context of voting rights cases.

This Court should reiterate that appellate courts, in reviewing a circuit court's discretionary determination, are tasked with "search[ing] the record for reasons to sustain" the circuit court's decision, not manufacturing reasons to reverse it. *Dobbs*, 2020 WI 64, ¶ 48. That is, so long as the record supports the circuit court's demonstrated "rational process[] and [its] reaching [of] a decision that reasonable judge could make," an appellate court must affirm, even if it would have reached a different conclusion. *Weber v. White*, 2004 WI 63, 272 Wis. 2d 63, 681 N.W.2d 137. This Court should take the opportunity to clarify what exactly it means for the circuit court that their ruling on injunctive relief will be reviewed de novo and whether the presumption of constitutionality is dispositive where there is a conflict with federal law.

II. This Court should grant this petition because it presents significant questions surrounding the Wisconsin Constitution's secret ballot provision and federal preemption under the ADA and Rehabilitation Act.

While granting the petition and accepting jurisdiction over this case would chiefly involve development of the TI and stay analyses, the merits of the underlying action would be involved to the extent the Court is addressing the likelihood of success on the merits and the claims involving pure legal questions. The TI presents issues of first impression regarding the application of the ADA and Rehabilitation Act to print-disabled voters in Wisconsin and its harmonization with the Wisconsin Constitution's secret ballot provision—which this Court is uniquely fit to address.

See contra Zignego v. Wis. Elections Comm'n, 2019AP2397 unpublished order at 2 (Grassl Bradley, J., dissenting) (“In declining to hear a case presenting issues of first impression immediately impacting the voting rights of Wisconsin citizens and the integrity of impending elections, the court shirks its institutional responsibilities to the people who elected us to make important decisions, thereby signaling the issues are not worthy of our prompt attention.”). This Court is the only court in the state that can decide the issues presented with finality. It should do so to provide guidance to both the bar and the bench, and to further develop Wisconsin law.

The court of appeals sidestepped the merits of Plaintiffs’ ADA claim in its stay analysis. As fully covered in Plaintiffs’ merits response brief, the ADA claim is straightforward, and as a result of WEC and the Legislature’s concessions, the only thing the circuit court needed to decide was whether Plaintiffs had been denied “meaningful access” to voting absentee and whether the requested accommodation of an accessible electronic ballot by email was reasonable. The circuit court heard arguments and examined evidence regarding the burdens (or lack thereof) to implementing the requested accommodation. The court of appeals’ failure to fully consider the merits of the federal statutory arguments is particularly egregious given that the law is clear-cut in Plaintiffs’ favor. An unbroken, and unrebutted, series of federal cases from states with near-identical election laws to Wisconsin have all concluded that failure to provide accessible electronic absentee ballots to print-disabled voters violates the ADA and that the option of assistance is not a sufficient accommodation. *See generally Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016); *Taliaferro v. N.C. State Bd. of Elections*, 489 F. Supp. 3d 433 (E.D.N.C. 2020); *Johnson v. Callanen*, 2023 WL 4374998 (W.D. Tex. July 6, 2023). The court of appeals erred by failing to engage with this authority in conducting its supposed de novo review.

Likewise, Plaintiffs’ claims under the Wisconsin Constitution’s guarantee to a secret ballot are straightforward. The right to a secret ballot is enshrined in the Wisconsin Constitution. *See Wis. Const. art. III, § 3*. Despite unequivocal language,

the Legislature thus far advances a flawed, atextual reading of “secret ballot” that belies the historical context of secret-ballot voting and decries common sense. The Legislature is wrong that as long as a vote is not “public,” (i.e., widely known) it remains secret (Leg Br.22 at n.8), a contorted definition impacting only Plaintiffs and other voters with print disabilities. No one would accept the Legislature’s definition for “secret” ballot to all voters, but they ask voters with disabilities to look the other way.

Contrary to the Legislature’s assertion, “secret ballot” means that one’s vote must be kept private, unless one chooses to share it, a definition that applies wholesale to all Wisconsin electors. *Secret Ballot*, Am. Heritage Dictionary (“a method of voting in which each person writes their choice...so that ***no one else knows*** how they have voted” (emphasis added)).

The Legislature has consistently asserted that Plaintiffs are necessarily foreclosed from injunctive relief (a position the court of appeals glommed on to) because, as it sees it, no one is harmed when Wisconsin law discriminates against voters with disabilities who retain ***some*** opportunity to vote, no matter how burdensome or invasive of their privacy. This is patently incorrect. As Plaintiffs have repeatedly reiterated, giving a voter no option but to use assistance does not provide a reasonable accommodation under the ADA, does not accord with Wisconsin and federal permissive voting assistance statutes (*see* Wis. Stat. § 6.87(b)(5); 52 U.S.C. § 10508), and does not resolve the as-applied constitutional defect for “secret ballot” absentee voting. And specifically, under the ADA, there does not need to be a showing that Plaintiffs were disenfranchised—it is sufficient to show that they were not given the full benefits and enjoyment of the challenged program. Requiring Plaintiffs and voters like them to use an assistant deprives them of their right to vote privately and independently, which denies them equal opportunity to participate in absentee voting—such a denial is sufficient under the ADA. *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189,

198-199 (2d Cir. 2014). The court of appeals, like the Legislature, completely overlooked this analysis.

Similarly, the court of appeals' rationale with respect to the status quo (that Plaintiffs "may only be able to [vote absentee] with the assistance of another person in the same circumstances under which they have regularly and successfully voted, even if that is in a less private and independent manner than they desire") entirely misses the mark. This case is not about desires—it is about violations of federal law and the Wisconsin Constitution. It is the coercion of third-party assistance under current law that is unconstitutional as applied to print-disabled voters and violates federal law.

The court of appeals' wholesale adoption of the Legislature's status quo arguments also creates a rule by which mandatory TIs are, essentially, unavailable in Wisconsin to remedy federal rights. Under the Legislature's theory, endorsed by the court of appeals, a party will never be able to obtain a TI to modify or restrain enacted statutes in an as-applied challenge, even where the harm to the plaintiff is substantial and will occur by a date certain. This rule effectively forecloses actions under the ADA despite the ADA's requirement to provide reasonable accommodations (*i.e.*, affirmative modifications) in programs already in effect, foreclosing post-enactment challenges.⁶

⁶ Further muddying the issue is the lack of clarity as to when an already enacted law is sufficiently entrenched to be considered the "status quo." Although the Legislature contends that Wisconsin law has limited electronic ballot delivery to military and overseas voters since 2011, that law was challenged shortly after and was enjoined from 2016 to 2020.

III. The Court should grant this petition because there is a clear need to hasten the ultimate appellate decision.

Waiting so that the TI can be initially reviewed by the court of appeals (to the extent that court has not already showed its hand in its pseudo-de-novo review of the Legislature's motion for stay) will only delay a definitive declaration of what the ADA, Rehabilitation Act, and Wisconsin and U.S. Constitutions are likely to require for print-disabled voters in Wisconsin. Waiting not only deprives printed-disabled voters of their right to vote privately and independently, but also deprives election officials of the requisite knowledge to carry out elections in accordance with state and federal law.

This Court has consistently, expeditiously heard cases involving voting rights via petitions to bypass. As this Court's acceptance of past election cases on bypass reflects, the time sensitivity and public importance of election cases justifies avoiding the potentially lengthy wait for appellate rulings. *See Teigen v. Wis. Elections Comm'n*, 2022AP91 (Jan. 28, 2022) (granting bypass on an election-related issue); *Priorities USA v. Wis. Elections Comm'n*, 2024AP164 (March 12, 2024) (same); *see also Zignego* order at 5 (Grassl Bradley, J., dissenting) (noting the court's "lengthy and consistent history of hearing cases involving voting rights and election processes in the first instance—as part of the court's original jurisdiction—or by bypassing the court of appeals").

If, as the circuit court concluded, the merits indicate that application of Wis. Stat. § 6.87 to print disabled voters contravenes federal law and the Wisconsin Constitution's secret ballot provision, granting bypass is critical to ensure that the issues are resolved in an orderly fashion and that Wisconsin's print-disabled voters can access the franchise to the full extent provided by Wisconsin Constitution via the secret ballot provision and to the full extent afforded under state and federal law and on the same terms as their non-disabled peers. Further, granting bypass is critical to ensure that the (as-refined and clarified) TI and stay-pending-appeal

standards can be argued and applied by parties, circuit courts, and appellate courts in the context of the 2025 statewide elections.

This Court should accept this petition and handle it in an expedited fashion since many of the issues are sure to recur and the likelihood of these issues arising again, (not only in this action but in others, too) both before and after the 2025 statewide elections, make this Court's immediate review all the more necessary. *See Zignego* order at 2 (Grassl Bradley, J., dissenting) (“With no less than five upcoming elections in Wisconsin, including the presidential election in November, there is an obvious need to hasten the ultimate appellate decision in this case in order to afford the voters, election officials, candidates, and poll workers clear and final direction regarding who may vote in this state.”).

IV. The Court should grant this petition because this case presents an important question regarding the unitary nature of the court of appeals and judicial modesty.

As explained above, WEC did not appeal the TI order, but it did file an appeal regarding the circuit court's decision to grant the Legislature's motion to intervene. While that appeal was originally filed in District IV, it was ultimately transferred to District I and now merits briefing is underway. *Disability Rights Wis. et al v. Wis. Elections Comm'n*, 2024AP1347. If WEC succeeds in challenging the circuit court's decision to grant the Legislature's motion for intervention, it will result in dismissal of this appeal because the Legislature will lose its standing in this action (and WEC has not joined in the appeal of the TI).

District II sua sponte set an accelerated briefing schedule on the merits of the TI decision. While the Legislature ultimately filed an emergency motion for stay with the court of appeals in District II at the same time it filed its opening merits brief, the next day, Wednesday, August 7, 2024, District II also sua sponte issued an order directing Plaintiffs to file an expedited response to the Legislature's emergency motion by the following Monday, August 12, 2024. In its response brief, Plaintiffs explicitly asked that District II hold the Legislature's motion for stay in

abeyance until the threshold intervention question was answered in WEC's contemporaneous appeal. Plaintiffs explained that, under Wis. Stat. § 808.07(2), abstaining from deciding the stay and appeal was necessary to "preserve...the effectiveness of the judgement subsequently to be entered" because WEC's potential success on appeal would strip District II of its jurisdiction to entertain and rule on the Legislature's appeal. Despite this, District II accelerated its review and issued a decision granting the stay within days of Plaintiffs' response brief and did not address, much less acknowledge, Plaintiffs' request.

If District I ultimately reverses the circuit court's decision granting the Legislature's motion to intervene, the Legislature would be stripped of party status and its ability to appeal the circuit court's TI decision. This presents an untenable risk of conflicting decisions and a constitutional calamity. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (noting that the court of appeals "must speak with a unified voice" which should not "become fractured, threatening the principles of predictability, certainty and finality relied upon by litigants, counsel, and the circuit courts").

The Court should accept this petition and rule on what District II should have done as to the Legislature's appeal and motion for emergency stay while the underlying, threshold intervention question was pending before another district of the court of appeals.

V. The Court could also take jurisdiction over the appeal in District I regarding the Legislature's ability to intervene in the underlying action.

In the interests of judicial economy and efficiency, the Court could take jurisdiction over the appeal pending in District I on its own motion. *See Wis. Stat. § 808.05(3)*. As such, the Court could decide the important separation of powers question presented in that appeal, which is a threshold, dispositive issue here. If the Legislature is ultimately denied intervention it could moot the issues presented in this appeal since the Legislature would not have been able to appeal the TI decision (and it is the sole appellant).

VI. If this petition is granted, the Court should order supplemental briefing on the issues that are not addressed by the briefs already filed with the court of appeals.

While briefing is complete on the underlying merits of the TI decision, the parties would need supplemental briefing on Issues 2 and 3. Plaintiffs request that the supplemental briefing be expedited and more condensed than the merits briefing outlined in Wis. Stat. § 809.19 to ensure a timely resolution before the 2025 statewide elections.

While the TI order by its own terms is limited to the November 2024 general election, the Court should accept jurisdiction to provide clarity for (1) litigants and the bench as to the proper standards for deciding a TI and motion for stay pending appeal and (2) print-disabled voters and election officials statewide as to the merits for this significant voting rights case. To the extent the Legislature may argue these issues are (or may, in the event District I or this Court reverses the Legislature's intervention, become) moot, there are several established exceptions under which this court may elect to address moot issues: "(1) the issues are of great public importance; (2) the constitutionality of a statute is involved; (3) the situation arises so often a definitive decision is essential to guide the trial courts; (4) the issue is likely to arise again and should be resolved by the court to avoid uncertainty; or (5) the issue is capable and likely of repetition and yet evades review." *Portage Cnty. v. J.W.K.*, 2019 WI 54, ¶12, 386 Wis. 2d 672, 927 N.W.2d 509. This case warrants review under all factors. It involves the constitutionality of state statutes, there is a demonstrated need for clarity of this Court's TI and stay-pending-appeal standards, and the deference to be afforded in review thereof, and even in this specific action, Plaintiffs will be functionally precluded from obtaining an extension of the circuit court's TI relief in advance of future elections absent clarification.

CONCLUSION

For the reasons stated above, this Court should grant the petition for bypass and take jurisdiction over this case. The Court should then proceed to order supplemental briefing on issues 2 and 3 on an expedited basis and schedule this matter for oral argument.

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Respectfully submitted,

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