STATE OF WISCONSIN
IN SUPREME COURT

Appeals No. 2021 AP 1321-LV, 2021 AP 1325, 2021 AP 1495-W

COUNTY OF DANE *ET AL.*,
Petitioners-Respondents,

v.

PUBLIC SERVICE COMMISSION *ET AL.*,
Respondents-Respondents.

MICHAEL HUEBSCH,
Petitioner,

v.

THE HONORABLE JACOB B. FROST,
Respondent.

PETITIONERS-RESPONDENTS COUNTY OF DANE, COUNTY OF IOWA, VILLAGE OF MONTFORT, TOWN OF WYOMING, GLORIA BELKEN, DRIFTLESS AREA LAND CONSERVANCY AND WISCONSIN WILDLIFE FEDERATION'S RESPONSE TO NONPARTY MICHAEL HUEBSCH'S PETITION FOR EXPEDITED REVIEW, PETITION FOR SUPERVISORY WRIT, AND MOTION FOR ADMINISTRATIVE STAY

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INTRODUCTION

Professing an emergency, Michael Huebsch petitions this Court to stay proceedings to which he is not a party so that he may obtain an interlocutory ruling about a subpoena that has been already withdrawn and two court orders that have been already vacated. In fact, Mr. Huebsch asks this Court to step in prematurely and issue a ruling based on facts that have not yet been found and evidence that has not yet been presented at a trial that has not yet taken place.

The Court of Appeals—both District III and District IV—correctly held:

> Here, the underlying controversy is whether the circuit court erred by denying Huebsch's motion to quash the subpoena and by requiring Huebsch to produce his phone pursuant to the subpoena. With the subpoena withdrawn, and the circuit court's corresponding orders vacated, there is nothing left for this court to resolve that could have any practical effect on the underlying controversy.

Appendix of Michael Huebsch (hereinafter "Huebsch App.") at 4, 9.

Nonparty Mr. Huebsch has glossed over this mootness

reality. His petitions largely focus on due process issues that he seeks to collaterally attack through an attempted interlocutory appeal, nominally of the July 30, 2021 denial of his motion to quash, but in reality, of a May 25, 2021 discovery order entered by the circuit court. None of the actual parties—the Public Service Commission, the intervenor transmission companies or others—sought permission to appeal that interlocutory May 25, 2021 Order within 14 days or otherwise. Nor did nonparty Mr. Huebsch seek leave to appeal that Order within the statutory period. He couldn't, because he has no standing to appeal that May 25, 2021 Order, either then or now.

This Court should reject Mr. Huebsch's request for special treatment, deny his motion for stay, and dismiss his various petitions because the issues he purports to challenge are moot, as the two appellate districts concluded; he lacks standing; each of his petitions is without merit; there is no emergency; and there is no basis to stay the underlying proceedings.

STATEMENT OF THE CASE AND BACKGROUND

The circuit court proceeding that Mr. Huebsch seeks to

stay is a Chapter 227 review brought by several counties and municipalities, conservation organizations, and private landowners of a contested case decision by the Public Service Commission of Wisconsin approving the transmission companies' exercise of eminent domain to take privately held land and their construction of a costly and controversial huge transmission line through environmentally sensitive areas.

One issue before the circuit court is whether Mr. Huebsch, when he led the Commission's deliberations and decision-making process as one of its three Commissioners, was biased or posed such a risk of bias that the decision-making process did not meet the minimum requirements of due process. The issue exists because Mr. Huebsch had, while the matter was pending before him, participated in many hundreds of e-mails, phone calls, and texts with the agents and lobbyists of the transmission companies that were parties in the contested case and seeking the Commission's approval of their proposed transmission line; had regularly socialized with them over repeated lunches and dinners, golfing, and other outings; and had accepted a position as a formal advisor to the board of directors of another party that had a joint litigation agreement with the

transmission companies, all without informing the public and the Petitioners below. And he had applied to become CEO of one of the transmission companies shortly after resigning from the Commission.

What's more, he had secretly communicated for years with the transmission companies' and utilities' agents and lobbyists using the "Signal" encrypted text messaging application—through which the messages disappear after having been read—in an apparent attempt to avoid the reach of the Open Records law. When his use of Signal was revealed, on June 28, 2021, it caused the transmission companies to request that the Commission rescind its decision approving the transmission line. The Commission deadlocked, though, and has taken no rescission action.

The circuit court, in a January 21, 2021 oral ruling and May 25, 2021 written decision and order, allowed discovery pursuant to WIS. STAT. § 227.57(1) on the issue of whether Mr. Huebsch's actions created a serious risk of bias, which violates due process. That tainting would undermine public confidence in the fairness, independence, and integrity of the utility regulatory decision-making process. *See* Huebsch App. 103, 180–81;

Appendix of Petitioners-Respondents' Response Brief (hereinafter "Resp. App.") at 3–5, 11. The circuit court relied on applicable case law from the Wisconsin Supreme Court, United States Supreme Court, the Seventh Circuit Court of Appeals, and other federal circuit court decisions.[1] Neither Mr. Huebsch nor any other party or nonparty sought leave to appeal that decision.

In accordance with the discovery schedule established by the circuit court, the Driftless Area Land Conservancy (DALC) and Wisconsin Wildlife Federation (WWF) issued a subpoena *duces tecum* to Mr. Huebsch to appear for a deposition on August 4, 2021, and to provide his cell phone for forensic imaging and analysis. *See, e.g.*, Huebsch App. 233–37 (reflecting an amended version of the subpoena originally issued on May 28, 2021).

[1] *See id*. (citing and discussing, *inter alia*, *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016); *In re Paternity of B.J.M.*, 2020 WI 56, 392 Wis. 2d 49, 944 N.W.2d 542, *cert. denied sub nom. Carroll v. Miller*, 141 S. Ct. 557 (2020); *In re S.M.H.*, 2019 WI 14, 385 Wis. 2d 418, 922 N.W.2d 807; *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶64, 382 Wis. 2d 496, 914 N.W.2d 21; *State v. Herrmann*, 2015 WI 84, 364 Wis. 2d 336, 867 N.W.2d 772; *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993); *Guthrie v. Wisconsin Employment Relations Comm'n*, 107 Wis. 2d 306, 314, 320 N.W.2d 213, 218 (Ct. App. 1982), *aff'd*, 111 Wis. 2d 447, 331 N.W.2d 331 (1983)).

Mr. Huebsch, apparently concerned about revealing more details of his relationship with the transmission companies, utilities, and others that had appeared before him, moved to quash the subpoena. *See* Resp. App. 41–42. When the circuit court denied his motion, *see* Resp. App. 43–114, he filed three separate appeals in two districts of the Court of Appeals and asked the appellate court to stay enforcement of the subpoena *duces tecum* pending the outcome of the appeals. *See generally* Appeals No. 2021 AP 1321-LV, 2021 AP 1322-W, 2021 AP 1325. On August 2, the appellate court granted a temporary stay of the deposition subpoena. *See* Resp. App. 115–18. As a result, the August 4 deposition of Mr. Huebsch did not occur.

DALC and WWF, aware of the strain that the three appeals were placing on their limited legal resources as they struggled to complete other depositions and resolve other discovery disputes with the transmission companies and the Commission, decided to abandon their effort to depose Mr. Huebsch. They withdrew their deposition subpoena *duces tecum* on August 12 and asked the appellate court to dismiss all three appeals as moot. *See* Huebsch App. 207–10. They made clear that they would not issue another deposition subpoena to

Mr. Huebsch, but reserved their right to call him to testify at the evidentiary hearing. Mr. Huebsch opposed the motion. *See* Resp. App. 126–27. On August 20, after the circuit court then vacated its prior orders denying Mr. Huebsch's motion to quash and requiring him to produce his cell phone, *see* Resp. App. 128, a panel of District III judges and a panel of District IV judges all agreed that the appeals were moot and dismissed them as a result. *See* Huebsch App. 1–11.

Mr. Huebsch, hoping to keep the issue alive, has now filed in this Court a petition for expedited review, a petition for supervisory writ or constitutional superintending authority, and an emergency motion to stay the trial scheduled for September 29 and 30, for which DALC and WWF have subpoenaed Mr. Huebsch's testimony. *See* Resp. App. 14 (scheduling evidentiary hearing); Huebsch App. 205 (Subpoena *Ad Testificandum* to Mr. Huebsch).

The evidentiary hearing in the circuit court is scheduled for the end of September because the transmission companies have stated that they plan to commence construction and bulldoze land, waters, and forests in south-central Wisconsin, starting in October 2021. *See,*

e.g., Resp. App. 17 n.1. The circuit court wishes to complete its review before then. *See, e.g.*, *id.* at 38. In asking for a stay, Mr. Huebsch is cognizant that a stay would delay the evidentiary hearing, permitting those with whom he socializes, emails, texts and calls, and their companies, to effectively prevail without a court ever ruling on the merits. He might achieve a triumph of procedure over substance if the procedure for which he advocates were correct.

It's not.

In the guise of a challenge to a withdrawn and vacated subpoena for deposition, what Mr. Huebsch really seeks to do is challenge the circuit court's provisional ruling about what evidence is relevant, a ruling affecting the transmission companies who, themselves, did not seek leave to appeal within the statutory allowed time period. Mr. Huebsch lacks standing to do so, and even if the transmission companies had mounted this challenge directly and on time, their petition to appeal would have been properly denied, because the issue does not qualify for interlocutory review and the circuit court correctly exercised its discretion to manage pre-trial discovery. Mr. Huebsch's failure to appeal a pre-trial discovery

order within the allowed statutory time period does not somehow constitute an "emergency."

So here's the question that Mr. Huebsch's petitions present to this Court: May a nonparty appeal a vacated court order regarding a withdrawn deposition subpoena for the purpose of having this Court review on an interlocutory basis the trial judge's preliminary and discretionary pre-trial ruling on the potential relevance of evidence when the actual parties to the proceeding have not requested review, the time for permissive appeal has passed, and the evidentiary hearing and trial judge's ruling on the merits have not yet occurred?

Both the law and common sense answer the question in the negative.

First, common sense:

Nonparties are subject to subpoenas for depositions, documents, and objects every day in every court of this State. Nonparties are likewise routinely subject to subpoenas to testify at trial. *See State v. Gilbert*, 109 Wis. 2d 501, 326 N.W.2d 744 (1982). If each could leverage the subpoena to achieve a stay of proceedings while

attempting to appeal preliminary evidentiary rulings of trial judges before trial, regardless of what the parties want or the time statutes assign to do so, no case would ever be tried on time, if tried at all. Four non-party witnesses in a case (a relatively small number) could lead to four separate appeals before trial. And, if Mr. Huebsch has his way, multiple stays of proceedings.

Second, the law:

The law conforms to common sense, as explained below.

ARGUMENT

I. This Court Should Dismiss the Petitions as Moot.

Mr. Huebsch asks this Court to review a nonfinal circuit court order that has been vacated. Six judges from two districts of the Court of Appeals have already determined that this issue is moot. They are correct, and this Court should dismiss Mr. Huebsch's petitions as a result.

"An issue is moot when its resolution will have no practical effect on the underlying controversy." *Portage County v. J.W.K.*, 2019 WI 54, ¶ 11, 386 Wis. 2d 672, 927

N.W.2d 509. That is the case here. As the Court of Appeals explained:

> Here, the underlying controversy is whether the circuit court erred by denying Huebsch's motion to quash the subpoena and by requiring Huebsch to produce his phone pursuant to the subpoena. With the subpoena withdrawn, and the circuit court's corresponding orders vacated, there is nothing left for this court to resolve that could have any practical effect on the underlying controversy.

Huebsch App. 4, 9. Mr. Huebsch asks this Court to review a moot issue. It should decline to do so.

Mr. Huebsch acknowledges that an issue is moot when the appellant is "no longer subject to the . . . order that he challenges." *State v. Fitzgerald*, 2019 WI 69, ¶ 21, 109 Wis. 2d 501, 326 N.W.2d 744. He does not dispute the general rule that moot appeals should be dismissed. *See id.* But he argues that the issue is not moot because DALC and WWF have issued a subpoena *ad testificandum* for his testimony at the September 29 and 30 trial. His argument is without merit, as the appellate court correctly concluded.

Both District III and District IV of the Court of Appeals held that "[t]he validity of a trial subpoena . . . would

present different issues" from those raised in Mr. Huebsch's appeals. Huebsch App. 4, 9. That's true. A subpoena *ad testificandum* for trial testimony differs fundamentally from the deposition and document subpoena at issue in Mr. Huebsch's appeals and petitions. When it comes to discovery subpoenas *duces tecum*, WIS. STAT. § 805.07(3) grants circuit courts the discretion to quash or modify the subpoenas if they are unreasonable or oppressive. That's the statute under which Mr. Huebsch filed the motion that gave rise to these appeals and petitions. *See* Resp. App. 41–42. But "§ 805.07(3) does not authorize the court to issue a protective order in the case of a subpoena *ad testificandum*." *Gilbert*, 109 Wis. 2d at 509. Mr. Huebsch could not challenge the trial subpoena *ad testificandum* on the same grounds that he raised in his motion to quash the deposition subpoena *duces tecum*. That's not to say that nonparties are categorically barred from contesting trial subpoenas. But the standards are different and much stricter.

Mr. Huebsch asks this Court to ignore *Gilbert*'s holding—and the plain language of § 805.07(3)—in favor of Federal Rule of Civil Procedure 45, which he argues applies a single standard for quashing subpoenas of all types. But

the federal rules do not control here. *Gilbert* was very clear: "We can find no authority in § 805.07(3) or in any statute, court rule, or court decision that a circuit court is empowered to quash a subpoena to compel testimony on the grounds that the subpoena is unreasonable or oppressive." 109 Wis. 2d at 511. The circuit court orders under § 805.07(3), of which Mr. Huebsch seeks review, have been vacated and have no bearing on the subpoena *ad testificandum* issued to Mr. Huebsch. His concerns about testifying are far less compelling that the circumstances in *Gilbert*, in which this Court upheld a subpoena *ad testificandum* for the testimony of an allegedly abused ten-year old girl. Mr. Huebsch's appeals and petitions are moot and should be dismissed.

Mr. Huebsch also argues in favor of several exceptions to the general rule that moot appeals should be dismissed. Wisconsin appellate courts have made exceptions where:

> (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 because the appellate process usually cannot be completed and frequently

> cannot even be undertaken within a time that would result in a practical effect upon the parties.

Fitzgerald, 2019 WI 69, ¶ 22 (cleaned up). None of those exceptions are present here.

First, Mr. Huebsch's appeals and petitions concern a discovery dispute of the sort usually left to the circuit court's discretion. Discretionary discovery orders are not appealable as of right and are not of great public importance. The underlying issues to be decided in the circuit court certainly are issues of great public importance: they concern the transparency, fairness, and integrity of the Public Service Commission's decision-making process, the possibility that a public official engaged in hundreds of improper, undisclosed communications with agents of the parties appearing in the docket before him, and the possibility that that same public official sought special treatment from the parties in the docket before him upon his retirement. But the circuit court has not yet entered judgment on those issues, and they cannot be decided within the context of Mr. Huebsch's appeals and petitions. The importance of those underlying issues weighs strongly in favor of dismissing his petitions and allowing the litigation to

continue, without interruption or distraction, in the circuit court below.

Second, the constitutionality of a statute is not involved.

Third, circuit courts are not in need of a definitive decision on the discovery issues presented by Mr. Huebsch's appeals and petitions. The standards governing motions to quash are well established, and circuit courts can and do decide such motions without incident or interlocutory appeals on a near daily basis. Courts must exercise their discretion to decide each motion on a case-by-case basis. The precise situation presented by Mr. Huebsch's motion to quash is unlikely to arise again, and so this Court's guidance would be of little use to trial courts in the future. Mr. Huebsch does not argue to the contrary.

Fourth, the issue presented by Mr. Huebsch's appeals will not arise again as the two appellate districts recognized. DALC and WWF stipulated that they will not issue another discovery subpoena *duces tecum* for documents, things, or deposition testimony to Mr. Huebsch in this case before the September 29 and 30 trial. Mr. Huebsch attempts to make much of the fact that

DALC and WWF have called him as a witness at trial, but as explained above, such a subpoena *ad testificandum* differs fundamentally from the deposition and document subpoena at issue in these appeals and petitions; in other words, the trial subpoena does not present the same issues as Mr. Huebsch's current appeals and petitions.

Fifth, Mr. Huebsch's appeals and petitions do not present an issue that "evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within a time that would result in a practical effect upon the parties." *Fitzgerald*, 2019 WI 69, ¶ 22 (quoting *In re G.S.*, 118 Wis. 2d 803, 805, 348 N.W.2d 181 (1984)). To the contrary, Mr. Huebsch's appeals and petitions present a discovery issue that is not often the subject of appellate review because nonfinal, discretionary discovery orders are not appealable as of right and cannot be the subject of supervisory relief. The issue presented in Mr. Huebsch's petitions doesn't *evade* review; rather, it isn't properly the subject of appellate review in the first place.

And for good reason: It cannot be "that every witness is entitled to halt a proper proceeding by an appeal or writ

of *certiorari* to test the materiality and relevancy of information requested before he is required to supply it." *State ex rel. St. Mary's Hospital v. Industrial Commission*, 250 Wis. 516, 518, 27 N.W.2d 478 (1947) (dismissing an appeal concerning a subpoena *duces tecum* issued to a witness to an administrative proceeding). "The duty of courts to review proceedings does not include interference at this stage of the proceeding with the conduct of hearings before administrative boards by advance rulings on evidence." *Id.* This reasoning also weighs strongly in favor of dismissing Mr. Huebsch's petitions as moot.

Finally, Mr. Huebsch argues that the voluntary cessation doctrine requires this Court to review the moot issue here. Under that doctrine, the party "claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000). Again, the Court of Appeals correctly concluded that DALC and WWF had met that burden:

> Huebsch argues that these matters are not moot because DALC and WWF may issue a

> new discovery subpoena. However, DALC and WWF's reply clarifies any previous ambiguity in this respect. DALC and WWF unequivocally state in their reply:
>
> "DALC and WWF will not issue any further discovery subpoenas *duces tecum* to Mr. Huebsch in the circuit court proceedings before the September 29–30 trial. DALC and WWF will not seek to depose Mr. Huebsch or obtain documents or things—including his cell phone—from him in this pre-trial discovery before the circuit court. DALC and WWF do reserve the right to call Mr. Huebsch at trial. Nothing more."
>
> DALC and WWF further state that they have abandoned discovery efforts directed at Huebsch so as to devote their limited resources to the upcoming trial. We are satisfied that DALC and WWF, by making these representations and obtaining a circuit court order vacating that court's prior orders, have made it clear that they will not issue any further discovery subpoena to Huebsch.

Huebsch App. 4, 9–10. DALC and WWF have repeatedly and unequivocally stated in multiple state court pleadings that they will not issue any further discovery subpoenas in this case to Mr. Huebsch before the September 29 and 30 evidentiary hearing. There is no reasonable possibility that they will reissue the subpoena at issue in these appeals and petitions. Therefore, the

voluntary cessation doctrine also tips in favor of dismissing Mr. Huebsch's petitions as moot.

II. This Court Should Dismiss the Petitions Because Mr. Huebsch Lacks Standing.

In challenging the Court of Appeals' decisions, Mr. Huebsch argues that his appeals of the denial of his motion to quash the discovery subpoena *duces tecum* are not moot because "any motion to quash [the new trial subpoena *ad testificandum*] would obviously fail in the circuit court, because it would be foreclosed by several of the circuit court's previous orders . . . most especially by its standing May 2021 order granting DALC discovery and a trial in what otherwise would have been a cold-record Chapter 227 proceeding." Huebsch memo. at 43. This argument, along with the issues that Mr. Huebsch presents for this Court's review, reveal the true goal of his petitions: not to obtain review of the circuit court's denial of his motion to quash, but to obtain review of the circuit court's January 21, 2021 oral ruling and May 25, 2021 written order allowing discovery pursuant to WIS. STAT. § 227.57(1). *See* Huebsch App. 103, 180–81; Resp. App. 3–5, 11. No party or non-party filed a petition for leave to appeal either of those orders within the 14-day deadline for doing so. *See* WIS. STAT. § 809.50(1). And

setting aside the timing issues, Mr. Huebsch does not have standing to appeal those orders.

To appeal a judgment or order, a person must be aggrieved by it. *Mut. Servs. Cas. Ins. Co. v. Koenigs*, 110 Wis. 2d 522, 526, 329 N.W.2d 157 (1983); *Tierney v. Lacenski*, 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983). "In essence, the judgment or order appealed from must bear directly and injuriously upon the interests of the appellant; he must be adversely affected in some appreciable manner." *Tierney*, 114 Wis. 2d at 302.

Mr. Huebsch ultimately seeks review of the circuit court's January 21, 2021 and May 25, 2021 orders, in which the circuit court concluded that DALC and WWF had made a *prima facie* showing of procedural irregularities in the contested case decision-making below sufficient to accept non-record evidence under § 227.57(1). Mr. Huebsch, having resigned from the Public Service Commission long before those orders were issued, has no dog in that fight. Those orders do not bear directly and injuriously upon his interests.

Mr. Huebsch will no doubt argue that the orders adversely affect him because without those orders, he

would not have been issued a subpoena for his trial testimony. True enough. But the same is true of any witness called to testify at a criminal or civil trial. They cannot appeal the circuit court's probable cause determination or denial of a motion to dismiss, even though without those preliminary orders, the witnesses would not have been issued subpoenas for their trial testimony.

Instead, it's the Public Service Commission and the transmission companies—the parties to the administrative proceedings below—who are the parties aggrieved by the circuit court's January 21 and May 25 Orders. They didn't seek leave to appeal those orders, likely because they knew the fruitlessness of attempting an interlocutory appeal of a discovery order. Instead, Mr. Huebsch is essentially acting as their stalking horse. This Court should recognize Mr. Huebsch's petitions for what they are—improper attempts to obtain review of the circuit court's earlier rulings to which he was not party—and should dismiss the petitions as a result.

III. This Court Should Deny the Petition for Expedited Review.

Setting aside the fact that Mr. Huebsch's petition seeks

review of moot issues and attempts to indirectly obtain review of earlier, nonfinal rulings to which he is not party and does not have standing to appeal, the issues that he presents are not worthy of this Court's review.

A. *The dismissal for mootness*

Mr. Huebsch identifies mootness as the first issue on which he seeks this Court's review. In fact, mootness is the reason why this Court should deny review in the first place. As explained above, the Court of Appeals correctly decided that Mr. Huebsch's appeals are moot based on a routine application of well-established law concerning the mootness doctrine and its exceptions. Even *if* this Court were to question the propriety of the Court of Appeals' decision, it was made within an unpublished order. This "issue" does not present a special or important reason for this Court's review.

B. *The denial of the motion to stay the deposition*

The second issue presented for this Court's review—whether the circuit court acted within its discretion when denying a stay of Mr. Huebsch's deposition—is undeniably moot. Even *if* this Court were to somehow

agree with Mr. Huebsch that his appeals and petitions, as a whole, are not moot in light of the trial subpoena *ad testificandum*, taking up Mr. Huebsch's motion to stay the deposition would have no practical effect on the underlying controversy. *See J.W.K.*, 2019 WI 54, ¶ 11. That's because shortly after Mr. Huebsch appealed, the Court of Appeals *granted* a stay of the deposition; and soon after that, DALC and WWF withdrew their deposition subpoena and stated several times on the record that they would not seek to depose Mr. Huebsch or obtain documents or things—including his cell phone—from him in the pre-trial discovery before the circuit court. There is no reason for this Court to decide whether to stay a deposition that indisputably will not occur.

And even *if* the issue were not moot, the circuit court applied the correct law when ruling on Mr. Huebsch's stay motion and acted within its discretion in denying the motion. *See* Huebsch App. 92–97. Mr. Huebsch argues that the circuit court erred in a manner identical to the error identified by this Court in *Waity v. LeMahieu*, Appeal No. 2021 AP 802 (unpublished order of July 15, 2021), *available at* Huebsch App. 514. In *Waity*, the circuit court erred in applying the first stay factor, regarding the

likelihood of success on appeal: it found that that factor was not met because the movants "had not shown the court anything new to convince it that it had potentially made a mistake in its prior legal analysis," and it "fail[ed] to take into account that when the appellate court would be reviewing the circuit court's ruling and the defendants' arguments on appeal, it would be applying a de novo standard of review on a series of legal issues of first impression." *Id.* at 521.

The circuit court here, however, did not commit any such errors. It explained: "For all the reasons that I've said already, both in today's hearing and in previous orders, I think that there is not a strong showing of likelihood to succeed on the merits." *Id.* at 93. The law does not require circuit courts to repeat themselves when ruling on motions to stay. In fact, judicial efficiency counsels against such needless repetition. And here, unlike in *Waity*, any appellate review of the circuit court's underlying ruling on the motion to quash would be reviewed (*if* permission to appeal was granted, another big if) under the deferential erroneous-exercise-of-discretion standard. *See Lane v. Sharp Packaging System, Inc.*, 2002 WI 28, ¶ 19, 251 Wis. 2d 68, 640 N.W.2d 788. The circuit court correctly determined that Mr. Huebsch

had not made a strong showing that he was likely to succeed on the merits of an appeal.

No matter how you cut it, this issue does not present a special or important reason for this Court's review.

C. *The preliminary discovery orders*

The third, fourth, and fifth issues presented for this Court's review all concern the circuit court's January 21 and May 25, 2021 preliminary rulings regarding whether DALC and WWF made a *prima facie* showing of procedural irregularities sufficient to accept non-record evidence under § 227.57(1). *See* Huebsch App. 103, 180–81; Resp. App. 3–5, 11. As explained above in Part II of the argument above, no party or nonparty filed a petition for leave to appeal either of those orders within the statutory 14-day deadline for doing so, *see* § 809.50(1), and even *if* Mr. Huebsch's petition were timely, he would not have standing to appeal those orders.

In addition, discovery orders such as the ones that Mr. Huebsch seeks to appeal are usually not appealed on an interlocutory basis, and for good reason. Review of such non-dispositive orders will not materially advance

the termination of the litigation, and as the circuit court explained, review is not necessary to protect potential witnesses like Mr. Huebsch from substantial or irreparable injury: "hav[ing] to sit for a deposition and provide some documents and access to electronic information [is] the sort of burden that parties and third parties are put to all the time in court proceedings." Huebsch App. 93. It cannot be "that every witness is entitled to halt a proper proceeding by an appeal or writ of *certiorari* to test the materiality and relevancy of information requested before he is required to supply it." *St. Mary's Hospital*, 250 Wis. at 518. Mr. Huebsch asks this Court for special treatment. His request should be denied.

Perhaps most important, the specific issues listed in Mr. Huebsch's petitions—whether "a mere 'appearance of bias' violates the Due Process Clause"; whether an adjudicator's "personal connections" to parties appearing before him, *alone*, give rise to a serious risk of actual bias; and whether an adjudicator's application for a job with a party that previously appeared before him, *alone*, gives rise to a serious risk of bias, *see, e.g.* Pet. for Review, at 1–2—have not been ruled on by the circuit court, let alone the appellate court, and likely will not be

ruled on by any court because they do not track the arguments made by the Petitioners below.[2] The circuit court's January 21 and May 25, 2021 orders found that the Petitioners made a *prima facie* case and set the stage for an evidentiary hearing for the circuit court to hear the evidence, find facts, and issue rulings. As the circuit court explained at the January 21 hearing:

> I don't have all of that evidence in front of me to make any decisions. I'm not saying if that's enough to prove what needs to be proven for a due process violation. I'm saying that is enough to raise a reasonable question whether a commissioner, who was taking those kinds of actions so quickly after rendering a decision, was truly acting impartial or if they had other considerations outside of the record in front of them on their mind when rendering the decision.

Huebsch App. 78. The circuit court reiterated in its May 25, 2021 order that it was *not* deciding the issues listed in Mr. Huebsch's petition: "I do not yet know whether Petitioners will prove that Comm. Huebsch should have recused himself." Resp. App. 3.[3]

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[2] For example, the Petitioners below have not argued that Mr. Huebsch's "personal connections," standing alone, violate the Due Process Clause.

[3] In the May 25 order, the circuit court did make one "preemptive" decision "on the sole issue whether a finding that Comm. Huebsch should have recused himself taints the

Not until the September 29 and 30 evidentiary trial hearing will the circuit court hear all of the evidence about Mr. Huebsch's improper communications and meetings with agents and lobbyists of the transmission companies and other parties in the contested case in which he led the Commission's deliberations. Presumably, following presentation of the evidence at trial, the circuit court will find facts, make conclusions of law, and issue a final, appealable judgment.

The circuit court may determine that Mr. Huebsch was improperly biased or that his participation created an objective, serious risk of bias based on Mr. Huebsch's hundreds of meetings, emails, phone calls and texts (including both regular "SMS"-type texts and an unknown number of secret, encrypted messages sent via the Signal app) with the transmission companies' agents and lobbyists and other parties supporting the transmission line during the contested case in which he

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entire proceeding and requires that I vacate the PSC's decision regardless of the fact that the other two impartial commissioners voted to approve the CPCN." *Id.* "I agree that the alleged biases of Comm. Huebsch, if proven, constitute a structural error that will require I vacate the PSC decision and remand to the PSC for further proceedings compliant with due process." *Id.* at 5. Mr. Huebsch does not seek review of that decision.

led the Commissioners' deliberations and voted in favor of the transmission companies; his acceptance of an official position as an advisor to another party in the contested case, which had entered into a written joint litigation agreement with the three transmission companies; his application to become CEO of another transmission company party shortly after he resigned from the Public Service Commission; and other evidence, including Mr. Huebsch's testimony, which has not yet been placed in the record.

Following the trial, the circuit court may determine that no due process violation occurred or that the evidence, in sum, reveals a "serious, objective risk of actual bias." *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868, 886 (2009). *None* of those determinations would raise the issues that Mr. Huebsch lists in his petition. Mr. Huebsch asks this Court to step in prematurely and issue a ruling based on facts that have not yet been found and evidence that has not yet been presented at trial, which is a ruling that no court should ever be required to make. Once again, this Court should deny Mr. Huebsch's request for special treatment.

IV. This Court Should Deny the Petition for Supervisory Writ or Exercise of Superintending Authority.

A supervisory writ is "an extraordinary and drastic remedy that is to be issued only upon some grievous exigency." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶17, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *State ex rel. Dressler v. Circuit Court for Racine Co.*, 163 Wis.2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991)). To obtain a supervisory writ, a petitioner must demonstrate that:

> (1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result; (3) the duty of the trial 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.

Id. (quoting *Burnett v. Alt*, 224 Wis. 2d 72, 96–97, 589 N.W.2d 21 (1999)). The failure to demonstrate any one of these factors is dispositive. *See id.* Mr. Huebsch fails to satisfy any of these factors, but for the sake of brevity, this response will focus on the third factor, which requires that the petition concern a duty of the trial court that is plain.[4]

[4] As for the other three factors, as discussed above in Part III.C, Mr. Huebsch is seeking the Court's review of the circuit court's rulings issued on January 21 and May 25, 2021. He has

Only nondiscretionary judicial acts are subject to review by petition for supervisory writ. *See Dressler*, 163 Wis. 2d at 640 ("We will not invoke our supervisory control over the trial court to compel a discretionary act."). In *Dressler*, the Court of Appeals denied a petition for supervisory writ because the petitioner sought a writ ordering the circuit court "to act in areas which are plainly within [its] discretionary province." *Id.* at 644; *see also id.* at 630 (explaining that "[t]he petition for a writ of supervision is not a substitute for an appeal" and that the writ will not be issued unless "the duty of the circuit court is *plain*").

As Mr. Huebsch concedes, rulings on motions to quash, like discovery orders in general, are discretionary. *See* Resp. App. 119 (citing *Lane*, 2002 WI 28, ¶ 19). Indeed, the Wisconsin Supreme Court has made clear that orders denying motions to quash nonparty deposition

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not made a prompt or speedy request for relief. No grave hardship or irreparable harm will result without this Court's review; only the normal "sort of burden that parties and third parties are put to all the time in court proceedings." Huebsch App. 93. In the unlikely event that the circuit court's final judgment raises one or more of the issues that Mr. Huebsch lists in his petition, the parties' appeals will be an adequate remedy. And as discussed below in Part V.D, Mr. Huebsch's arguments lack merit.

subpoenas, like all discovery orders, are discretionary acts that will be sustained unless the appellant clearly shows a misuse of discretion. *Lane*, 2002 WI 28, ¶ 19. This is precisely the sort of act that cannot be subject to a supervisory writ. *See Dressler*, 163 Wis. 2d at 640, 644. Therefore, discovery orders cannot be challenged through a petition for supervisory writ, and this Court should deny Mr. Huebsch's petition for supervisory writ. This Court should also decline to exercise its superintending authority. "[T]he superintending authority of the court is not to be used lightly." *State ex rel. Universal Processing Servs. of Wis., LLC v. Circuit Court*, 2017 WI 26, ¶ 47, 374 Wis. 2d 26, 892 N.W.2d 267. Mr. Huebsch, acting as a stalking horse, is attempting to obtain this Court's premature ruling on issues that may never need to be decided, and that if they are decided, will be decided in a ruling that will not directly affect Mr. Huebsch. This Court should reject his attempt to obtain special treatment on behalf of the parties to the underlying proceeding.

V. This Court Should Deny the Motion for Stay.

Even if this Court were to grant one or more of Mr. Huebsch's petitions, it should deny his motion for a

stay pending appeal pursuant to WIS. STAT. §§ 808.07(2) and 809.12.

First and foremost, Mr. Huebsch's motion should be denied because he has not met § 809.12's requirement to first "file a motion in the trial court unless it is impractical to seek relief in the trial court." Mr. Huebsch's motion asks this Court to stay "proceedings in the circuit court that would subject Mr. Huebsch to testimony at a hearing or trial." Motion for Administrative Stay and Stay Pending Appeal. Mr. Huebsch has not filed a motion in the circuit court seeking this relief. He asked the circuit court for an order staying enforcement of the deposition subpoena *duces tecum*. The circuit court denied that motion based on deposition-specific considerations. *See, e.g.*, Huebsch App. 93 (discussing the burden of "sit[ting] for a deposition and provid[ing] some documents and access to electronic information" under the irreparable injury prong); *see also supra* Part I (discussing the differences between deposition subpoenas *duces tecum* and trial subpoenas *ad testificandum*). As discussed above in Parts I and III of the argument, the deposition at issue in Mr. Huebsch's motions to the circuit court will not occur; those issues are moot.

The relief that Mr. Huebsch now seeks from this Court is fundamentally different from that he sought in the circuit court. He does not ask for his own deposition to be delayed; rather, he appears to ask this Court to stay the September 29 and 30 evidentiary hearing in its entirety. Although Mr. Huebsch has not sought that relief from the circuit court, it would not be impractical for him to do so, given that he filed his petitions and motions in this Court more than a month in advance of the evidentiary hearing. Mr. Huebsch is asking this Court to allow him to cut ahead in the line. The Court should not give him such special treatment.

Even *if* Mr. Huebsch had satisfied § 809.12's requirement to first file a motion in the trial court, his motion should be denied because he has not satisfied any of the *Gundenschwager* factors. A stay pending appeal is appropriate only if the moving party:

> (1) makes a strong showing that it is likely to succeed on the merits of the appeal;
>
> (2) shows that, unless a stay is granted, it will suffer irreparable injury;
>
> (3) shows that no substantial harm will come to other interested parties; and
>
> (4) shows that a stay will do no harm to the public interest.

State v. Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). As discussed below, Mr. Huebsch cannot make any, let alone all four, of the required showings, and so his motion for a stay pending appeal should be denied.

A. *Mr. Huebsch will not succeed on the merits of any appeal or petition.*

For the reasons discussed above, Mr. Huebsch's petitions should be denied. But even *if* the petition for leave to appeal were granted, his appeal would not succeed on the merits.

The circuit court was correct to deny the motion to quash because Mr. Huebsch did not meet his burden of showing "good cause" for a protective order under WIS. STAT. § 804.01(3). The deposition subpoena *duces tecum* did not impose any extraordinary or undue burden, just the normal inconveniences necessary in litigation. The circuit court entered a specific protocol regarding DALC and WWF's request for Mr. Huebsch's cell phone, which required any search to be performed by a neutral third party, limited the search to certain contacts, keywords, and time periods, established that Mr. Huebsch's

attorney would have an initial opportunity to review potentially privileged communications before producing them to any other party, required redaction of certain information, and limited disclosure of the records. *See* Resp. App. 122, 123–25. But again, that phone search protocol has been vacated based on the withdrawal of the subpoena *duces tecum*, rendering the issue moot.

The circuit court also applied the correct standard for bias when allowing discovery under WIS. STAT. § 227.57(1). Mr. Huebsch tries to make much of the fact that the circuit court used the word "appearance" in its written orders and oral rulings about the standard for bias that applies, suggesting that by doing so the circuit court was in direct conflict with binding Supreme Court precedent. But here's what the circuit court actually said: "I'm going to call it 'appearance' because that really is what it is saying: When we can't say that there's actually bias, but there's such a high risk of bias that we're going to call it a due process violation anyway." Huebsch App. 46. That is hardly inconsistent with the standard that Mr. Huebsch argues for, from *Caperton v. A.T. Massey Coal Company*, 556 U.S. 868, 886 (2009): a "serious, objective risk of actual bias." *Accord In re Paternity of B.J.M.*, 2020 WI 56, ¶ 24, 392 Wis. 2d 49, 944 N.W.2d 542 ("We ask

whether there is 'a serious risk of actual bias—based on objective and reasonable perceptions.'").

The circuit court has not yet applied the bias standard to the facts. That comes next, after the evidentiary hearing. The Court should not allow Mr. Huebsch to short-circuit the fact-finding process on the basis of a preliminary discovery order before the Court rules after the September 29–30, 2021 trial.

Mr. Huebsch also argues that the circuit court erred by not applying the presumption "that a judge has acted fairly, impartially, and without bias," a presumption that may be overcome by a showing of bias by a preponderance of the evidence. *In re B.J.M.*, 2020 WI 56, ¶ 16.

But the record reflects that the circuit court is cognizant of that presumption and has determined that the evidence and allegations presented to the court thus far are sufficient to overcome that presumption. The parties briefed *In re B.J.M.* and *Marder v. Board of Regents of University of Wisconsin System*, 2004 WI App 177, 276 Wis. 2d 186, 687 N.W.2d 832, *aff'd*, 2005 WI 159, 286 Wis. 2d 252, 706 N.W.2d 110, extensively below, and the circuit

court displayed familiarity with the facts and reasoning of those cases at the July 30, 2021 hearing. *See, e.g.*, Huebsch App. 47–49. In fact, the circuit court compared the allegations of *ex parte* communications alleged in this case to the facts of *B.J.M.* and *Marder* and stated that, if DALC and WWF are able to prove the allegations of procedural irregularities, then the procedural irregularities in this case would "be worse" and "far exceed[]" those in *B.J.M.* and *Marder*:

> [The allegations and evidence of bias] started with some limited things, and now it's progressed to even more communications than anyone knew when we started this process, through an encrypted service that were never mentioned previously, all of which just tends to confirm for me that I was right before when I found that the initial burden was met; and, therefore, discovery not only is warranted, but is necessary here.
>
> So I think that we've addressed that issue enough. I think this far exceeds both what happened in *B.J.M.* and what happened in *Marder*. The allegations so far do.

Huebsch App. 56–57. The circuit court applied the correct standard to its preliminary determination whether to allow discovery under § 227.57(1). Mr. Huebsch has not established a likelihood of success on the merits of his appeal.

B. *Mr. Huebsch will not suffer irreparable injury absent a stay.*

Mr. Huebsch will not suffer any irreparable injury absent a stay. Giving testimony at a hearing is the sort of burden that third parties are put to all the time in court proceedings. It is not an irreparable injury; to the contrary, it is one's civil duty.

C. *Other parties would be substantially harmed by a stay.*

Staying the evidentiary hearing would substantially harm Petitioners' ability to prosecute their case on the merits before construction begins. If the hearing does not go forward as scheduled in September, the circuit court would be unable to reschedule the hearing for calendar year 2021. *See* Huebsch App. 95–96. In the meantime, the Transmission Companies are scheduled to commence construction in Wisconsin in October 2021.

The citizens of Dane County, Iowa County, the Village of Montfort, the Town of Wyoming, and DALC and WWF's members share important interests in holding down utility costs and in enjoying the natural areas, scenic

beauty, parklands, protected wildlife and fish refuges, and important bird habitat along the transmission line route. These interests would be irreparably harmed if trees are cleared from the right of way, waterways are impaired by sedimentation and runoff, natural areas and ecological systems are destroyed by bulldozers, and huge transmission towers are installed marring scenic vistas and landscapes. The interests of those who own property along the route would be harmed if their property is taken, trees and other plants are removed from their land, and foundations for 17-story high towers are excavated. Additionally, these parties' interests in advancing more cost-effective alternative transmission solutions, and DALC and WWF's interests in preserving the scenic and ecological values of its conservation easement on the historic Thomas Barn property would be irreparably harmed if this costly, huge transmission line is allowed without judicial review on the merits of their case.

D. *The public interest would be harmed by a stay.*

Staying the evidentiary hearing will harm the public interest in disclosing and preventing governmental misconduct. As the circuit court recognized, "With such

a meaningful impact on this State, the need for public trust in a fair and impartial decision process before the PSC cannot be understated." Resp. App. 6–7.

CONCLUSION

For all the reasons explained here, Petitioners-Respondents County of Dane, County of Iowa, Village of Montfort, Town of Wyoming, Gloria Belken, Driftless Area Land Conservancy and Wisconsin Wildlife Federation respectfully request that this Court to dismiss Mr. Huebsch's petitions, and deny his motion for stay pending appeal.

Dated this the 7th day of September, 2021.

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CERTIFICATION

I certify that this brief conforms with the Court's August 31, 2021 Order and with the rules contained in WIS. STAT. §§ 809.19(8)(b), (bm), and (c) for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e), and (f) is 7781 words. *See* WIS. STAT. § 809.19(8)(c)1.

Catherine E. White

CERTIFICATE OF COMPLIANCE
WITH FORMER RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of former rule WIS. STAT. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on the opposing party.

_____

Catherine E. White

CERTIFICATE OF COMPLIANCE
WITH FORMER RULE 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of WIS. STAT. § 809.19(13). I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on the opposing party.

Catherine E. White