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March 9, 2022

Supreme Court of Wisconsin
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RE: Petitioners' Response to Legislature's Motion for a Stay
Billie Johnson et al. v. Wisconsin Elections Commission et al.
Appeal No. 2021AP1450-OA

To the Court:

Petitioners Billie Johnson, Eric O'Keefe, Ed Perkins and Ronald Zahn submit this letter brief in response to the Legislature's motion for a stay, pursuant to the Court's March 7, 2022 order in the above-referenced matter.

Petitioners support the Legislature's motion for a stay, and respectfully request this Court grant the relief sought therein.¹

I. Standard of Review

The factors to be considered when reviewing a stay request are well known: "(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." *Waity v. LeMahieu*, 2022 WI 6, ¶ 49. "At times, this court has also noted that '[t]emporary injunctions are to be issued only when necessary to preserve the status quo.'" *Id.* (citing *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)).²

¹ The Petitioners are co-applicants with the Legislature before the Supreme Court of the United States in Case No. 21A471.

² While majority opinion mentions this temporary injunction factor alongside the stay factors, whether maintaining the status quo should ever factor into a *stay* request appears to be in dispute by other members of the Court. *Compare Waity v. LeMahieu*, 400 Wis. 2d 356, ¶ 86 (Dallet, J., dissenting) (concluding "unlike with stays pending appeal, a factor for courts to consider regarding injunctions is whether an injunction is 'necessary to preserve the status quo'"). To the extent it applies, and as explained *infra*, it clearly weighs in favor of granting the Legislature's motion.

This Court has also made clear that “more of one factor excuses less of the other.” *State v. Gudenschwager*, 191 Wis.2d 431, 441, 529 N.W.2d 225 (1995). This is because the factors listed “are not prerequisites but rather are interrelated considerations that must be balanced together.” *Id.* at 440.

II. Argument

The Legislature’s request for a stay is appropriate and meets this Court’s factors to be considered when such a request is received. It has shown a strong likelihood of success on appeal, irreparable harms, and that the stay will not harm other interested parties or the public interest. Additionally, Petitioners submit that a stay is necessary to preserve the status quo *pendente lite* and should additionally be granted for that reason.

Petitioners agree with, and support, the Legislature’s arguments in support of their motion, and will not repeat those arguments herein. We will briefly address each factor.

A. The Legislature has shown a strong likelihood of success on appeal

In addition to the arguments made by the Legislature, the Petitioners want to emphasize that the relevant inquiry for Courts is not to “input its own judgment on the merits of the case and conclude that a stay is not warranted. The relevant inquiry is whether the movant made a strong showing of success on appeal.” *Waity*, 400 Wis. 2d 356, ¶ 52 (emphasis in original).³ That is, stay analysis is something different than the merits analysis. The Legislature’s motion makes a strong case that it will be successful on appeal.

A court presented with a stay request must consider “how other reasonable jurists on appeal may have interpreted the relevant law and whether they may have come to a different conclusion.” *Id.* at ¶ 53. This Court has also made clear that Courts should “consider the standard of review, along with the possibility that appellate courts may reasonably disagree with its legal analysis.” *Id.* Perhaps especially here where the reviewing court – the United States Supreme Court – has the ability to clarify any uncertainty surrounding the Voting Rights Act (e.g., must there be substantial state-imposed barriers to participation) and its interplay with the Fourteenth Amendment (are “good reasons” adequate for government to make race-based decisions) than does this Court.

For this appeal, the United States Supreme Court will review the Court’s legal conclusions *de novo*. And in its own opinion, this Court appeared to express some uncertainty regarding the requirements of the VRA. *See* Opinion at ¶ 47 (“Here, we cannot say for certain on this record that seven majority-Black assembly districts are required by the VRA.”); *id.* at ¶ 49 (“In addition, we have *some* concern that a six-district configuration *could* prove problematic under the VRA.” (emphases added)). This uncertainty further supports the substantial possibility that the United States Supreme Court may reasonably disagree with this Court’s legal analysis.

³ In *Waity* this Court was discussing how a Circuit Court should approach and analyze a stay request. Petitioners believe the same reasoning should apply to this Court when an order of this Court is being appealed to the United States Supreme Court.

B. Irreparable injury will result if a stay is not granted

Irreparable harm will result if this Court's decision is not stayed and the Legislature prevails. This Court recently noted that redistricting "can have a substantial effect on elections and the right to vote." *Waity*, 400 Wis. 2d 356, ¶ 55. Over the weeks of this appeal to come, the parties would be required to proceed under the legislative districts adopted by this Court, expending resources and time that cannot be recovered if the appeal is ultimately successful to begin complying with maps that are racially gerrymandered. As the Legislature points out, use of these maps will produce all of the harms that accompany race-based governmental decision-making.

Given the irreparable harms that will occur absent a stay, these factors weigh in favor of granting the Legislature's motion.

C. A stay will do no harm to the public interest and is necessary to preserve the status quo

Finally, the public interest will not be harmed by granting the stay request, and the request is a necessary action by this Court in order to preserve the status quo. Here again, Petitioners agree with and join the Legislature's arguments.

This Court has made clear that the relevant harm inquiry for "the stay analysis is not a mere repetition of any harm analysis conducted by the circuit court when it originally issued an order granting relief, which may consider generally all future harms to the non-movant." *Waity*, 400 Wis. 2d 356, ¶ 58. Instead, the harm analysis to the movant and others is limited to "the period of time that the case is on appeal, not any harm that could occur in the future." *Id.*

As the Legislature has explained, it expects the United States Supreme Court to indicate relatively quickly whether it will consider the appeal. *Motion* at 13 ("The Legislature anticipates that it will have an indication within two to three weeks for whether the U.S. Supreme Court intends to act on its request for emergency relief, which will indicate whether it also intends to act on its request for appellate review.").

In contrast, absent a stay, the state and the public will have to expend significant resources to begin complying with this Court's order which may result in significant confusion for voters and election officials alike.

Likewise, should this Court consider the status quo while the appeal pends (see Footnote 2, *supra*), this factor too weighs in favor of granting the motion. The status quo represents the period of time before this Court adopted the Governor's maps. A stay should be entered to maintain the status quo while the appeal before United States Supreme Court pends.

III. Conclusion

For the foregoing reasons, Petitioners support the Legislature's motion for a stay, and respectfully request this Court grant the relief sought therein.

Sincerely,

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