No. _____

In the Wisconsin Court of Appeals

DISTRICT II

ROBERT DALLAS NEWTON, JR., JANE NEWTON, DESIREE FRANK, ROBERT CHRISTOFFERSON, RICHARD BAKER, AMY PHIMISTER, JENNIFER MEYER, AND ALVIN MEYER,
PLAINTIFFS-RESPONDENTS,

v.

SCOTT WALKER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF WISCONSIN,
DEFENDANT-APPELLANT

EMERGENCY MOTION FOR AN ORDER TEMPORARILY PRESERVING THE STATUS QUO FOR EIGHT DAYS

INTRODUCTION

On March 22, 2018, the circuit court ordered Governor Scott Walker to issue an order calling for special elections for two vacant legislative seats within seven days, by noon on March 29. In reaching this conclusion, the circuit court relied exclusively on Wis. Stat. § 8.50(4)(d). Just a couple of days later, the Legislature called an extraordinary session beginning on April 4, in order to make reforms to Wisconsin's

election laws. Legislative leaders made clear that these reforms will include a provision eliminating Subsection 8.50(4)(d)—the *entire* legal basis for the circuit court's order in this case—as well as prohibiting special elections occurring after the end of the regular legislative session, as such belated elections are an unnecessary waste of taxpayer resources and confusing to voters due to their proximity to general election primaries. **Given the Legislature's actions in promptly calling this extraordinary session, as well as the public statements by legislative leaders, there is, at the minimum, a strong possibility that the circuit court's order and this lawsuit will become moot next week**.

On the same day that the Legislature ordered this extraordinary session, Governor Walker requested from the circuit court a modest eight-day extension of that court's order requiring him to order the special elections by this Thursday, while carefully crafting his request to ensure that if the Legislature did not act, no delay to the special elections would

occur. The circuit court denied the motion yesterday, March 27, after a 3:30 p.m. hearing. This means that, absent immediate emergency relief from this Court, Governor Walker must issue a call for special elections by noon tomorrow—Thursday, March 29. **Governor Walker thus respectfully asks for an immediate order from this Court, by no later than 9 a.m., Thursday, March 29, delaying his obligation to issue the call for special elections for a mere eight days, until April 6, 2018, when the planned legislative action would, if enacted, render moot this lawsuit and the special elections.**

Failure to grant this request threatens to create a situation where voters and candidates will be actively engaged in the petition process for placing candidates' names on the ballot for special elections *starting tomorrow*, just to have those elections rendered moot by legislative action *within a week*. On the other hand, if for some reason the Legislature does not act during the extraordinary session

called for such action, granting this relief will impose no harm on anyone, as Governor Walker has committed to the same deadline for the special election regardless of whether he issues the order tomorrow (as required by the current order) or April 6 (if the requested eight-day extension is granted).

BACKGROUND

1. On December 29, 2017, two legislative seats became vacant when both Representative Keith Ripp (from the 42nd assembly district) and State Senator Frank Lasee (from the 1st senate district) resigned. Dkts. 1:7; 15:2.[1] Under the Wisconsin Constitution, when legislative vacancies occur, the Legislature determines "the manner of filling the vacancy," Wis. Const. art. XIII, § 10; *see* Wis. Stat. § 8.50(4)(d), and the Governor "issue[s] writs of election to fill such vacancies," Wis. Const. art. IV, § 14.

[1] The Docket numbers cited in this motion correspond to the numbers next to the court record events in CCAP when sorted by ascending dates.

Based on the timing of the vacancies and to avoid unnecessary costs to the taxpayers, the Governor decided not to call special elections. Both seats were up for election at the upcoming general election in November 2018, and the Legislature's last general-business floorperiod was scheduled to conclude on March 22, 2018. 2017 S.J. Res. 1, https://goo.gl/1tNc82. Indeed, even if the Governor had called special elections on December 29, the earliest the elections could have been held under Wisconsin law is April 3, 2018. *See* Wis. Stat. § 8.50 ("[n]o special election may be held after February 1 preceding the spring election unless it is held on the same day as the spring election"). Given the usual post-election mechanics, no winning candidate could realistically have been seated until mid-April. *See* Wis. Stat. § 7.70(3)(a) (public "canvass[ing]," "certifications," and "determinations" must be made "within 18 days after any special election").

Nevertheless, on February 26, 2018, Plaintiffs filed a petition for mandamus in Dane County Circuit Court, asking

that court to issue "[a] writ of mandamus ordering Governor Walker to immediately issue writs of election for State Assembly District 42 and State Senate District 1," under Subsection 8.50(4)(d). Dkt. 1:10. The Governor opposed this request, arguing both that Subsection 8.50(4)(d) should not be read to require these special elections, and that, in any event, the circuit court should not exercise its mandamus discretion to order such relief in light of the waste of taxpayer resources and confusion that would result from holding special elections after the legislative session had ended and while candidates were running in primaries for the general election. Dkt. 15.

The circuit court held a hearing on Plaintiffs' mandamus petition on Thursday, March 22, 2018, App. 2,[2] and agreed with Plaintiffs' statutory and mandamus arguments. Consistent with that conclusion, the circuit court entered a final judgment against the Governor and ordered

[2] The attached appendix contains only items entered into the record in the circuit court. The Governor has reprinted them in the attached appendix solely for this Court's convenience.

him to "issue an order and any necessary writ . . . scheduling special elections to fill the vacancies in the State Assembly District 42 and Senate District 1 as promptly as possible, by no later than 12:00 p.m. (noon) on Thursday, March 29, 2018"—a seven-day deadline. App. 3 (emphasis omitted). The circuit court further ordered that, "[p]ursuant to Wis. Stat. § 8.50(2), 'the date for the special election shall not be less than 62 nor more than 77 days from the date of the Governor's Order' and there shall be compliance with all other [ ] requirements of the special election statutes." App. 3.

2. On Monday, March 26, 2018, and in response to the circuit court's ruling, the Legislature called for an "Extraordinary Session beginning at 9:00 a.m. on Wednesday, April 4, 2018, solely for consideration of Assembly Bill 947, and to introduce substitute amendment LRB 17s0436 [ ] to Assembly Bill 947." *See* App. 20 (Memorandum from Senate Majority Leader Fitzgerald (March 26, 2018), reproducing motion authorizing special session); App 21–28 (Votes of

Committee on Assembly Organization, Authorizing Extraordinary Session (March 26, 2018)). The Assembly, but not the Senate, had already passed Assembly Bill 947. *See* 2017 Assembly Bill 947, https://goo.gl/7vCsAJ.

Substitute Amendment LRBs0436 to Assembly Bill 947 makes two changes to Wisconsin's special-election laws. *See* App. 4 (text of Senate Amendment LRBs0436).

First, it "modifies current law regarding the voting procedures for military and overseas electors so that the law is in substantial compliance with the federal Uniformed and Overseas Citizens Absentee Voting Act," and, among other things, extends the time between the Governor's call of the special election and the holding of the election. App. 4–5 (change from between 62 and 77 days to between 124 and 154 days). This change would give Wisconsin military service members serving overseas and other overseas voters a feasible window in which to cast their votes in special elections, which they currently lack.

Second, the Substitute Amendment "repeal[s] and recreate[s]" Subsection 8.50(4)(d), providing that "[n]o special election for the office of state senator or representative to the assembly shall be held after the spring election in the year in which a regular election is held to fill that seat." App. 18 (Section 28).

If enacted, the Substitute Amendment would "first appl[y] to a vacancy existing on the effective date of this subsection, notwithstanding any other law, court order, or order of the governor under section 8.50(4)(d), 2015 stats." App. 18–19 (Section 30). The Governor has indicated that he would sign the Substitute Amendment if passed by the Legislature. *See* Press Release, Governor Scott Walker, *Governor Walker Statement on Extraordinary Session* (Mar. 23, 2018), https://goo.gl/EhhSAF.

3. On Monday, March 26, the Governor filed with the circuit court an emergency motion to modify its order under Wis. Stat. § 806.07(1)(h). Dkt. 34. With this motion, the

Governor requested that the circuit court extend its seven-day deadline by eight days to April 6, 2018. Dkt. 34:1. The Governor argued that this extension was warranted in light of the Legislature's call for an extraordinary session to "repeal[ ] and recreate[ ]" Subsection 8.50(4)(d). App. 18 (Section 28). Since Subsection 8.50(4)(d) was the sole basis for the circuit court's order, the action contemplated by the extraordinary session would, if enacted, moot both the circuit court's order and Plaintiffs' lawsuit. *See* Dkt 34:1–2. Further, this eight-day extension would not harm Plaintiffs since it would not change the date of any special elections, even if the Legislature did not act. Because of the original order's impending deadline, the Governor requested that the circuit court rule on his emergency motion by close of business Tuesday, March 27, 2018. Dkt. 34:1.

On March 27, the circuit court held a hearing regarding the Governor's emergency motion, Dkt. 37, and then denied

the motion for reasons stated at the hearing, Dkt. 43; App. 36.[3]

4. The Governor then filed this appeal, appealing both the circuit court's denial of his emergency motion under Wis. Stat. § 806.07(1)(h) to extend the mandamus order's deadline by eight days, and the underlying order.[4]

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[3] Due to the short turnaround between this motion and the hearing before the circuit court yesterday afternoon, it was not feasible to provide this Court with transcripts of the hearing.

[4] Given that Plaintiffs designated Dane County as their venue for their mandamus action under Wis. Stat. § 801.50(3)(a), Dkt. 1:6 (quoting Section 801.50(3)(a)), appellate venue for the Governor's appeal is established by Wis. Stat. § 752.21(2). Section 752.21(2) provides that "[a] judgment or order appealed from an action venued in a county designated by the plaintiff to the action as provided under s. 801.50(3)(a) shall be heard in a court of appeals district selected by the appellant." Wis. Stat. § 752.21(2). It further provides that "the court of appeals district" selected by the appellant "may not be the court of appeals district that contains the court from which the judgment or order is appealed." *Id.* Here, District IV "contains the court from which the judgment or order is appealed," the Circuit Court for Dane County. *See* Wis. Stat. § 752.11(1)(d). Accordingly, Section 752.21(2) authorizes the Governor to "select" District II to hear his appeal.

ARGUMENT

I. The Court Should Grant The Governor Eight Additional Days To Comply With The Circuit Court's Mandamus Order

Section 808.07 of the Wisconsin statutes gives appellate courts broad discretionary "[a]uthority to grant relief pending appeal," including authority to "stay . . . a judgment or order," to "modify . . . an injunction," or to "[m]ake any order appropriate to preserve the existing state of affairs" during an appeal. Wis. Stat. § 808.07(2)(a)1.–3.; *see generally Weber v. White*, 2004 WI 63, ¶ 34, 272 Wis. 2d 121, 681 N.W.2d 137. Here, the Governor is requesting extremely modest relief—a mere eight additional days to comply with the circuit court's mandamus order.[5] This Court should grant this limited relief because such relief could well prevent significant confusion to

[5] This requested relief could fit under any of the three types of relief authorized by Section 808.07(2). This Court could "stay" the circuit court's order for eight days, Wis. Stat. § 808.07(2)(a)1., it could "modify" the circuit court's order to extend the deadline by eight days (reading this mandamus order as equivalent to an injunction), *id.* § 808.07(2)(a)2., or it could issue some other "order . . . preserv[ing] the existing state of affairs" for eight days, *id.* § 808.07(2)(a)3.

voters, as well as cost to the State, and will not impose any harm on anyone.[6]

Specifically, the Governor requests that this Court enter an order extending the circuit court's seven-day deadline by eight days to April 6, 2018. Given the imminence of this seven-day deadline, the Governor respectfully requests that this Court issue a decision on this motion by no later than 9 a.m. on Thursday, March 29, 2018.[7]

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[6] While Governor Walker believes that Section 808.07 is the proper vehicle for granting the relief sought herein, this Court could "constru[e] the State's request" "for [an] emergency stay" "as a petition for supervisory writ." *State v. Gudenschwager*, 191 Wis. 2d 431, 438, 529 N.W.2d 225 (Wis. 1995); *accord* Wis. Const. art. VII, § 5(3) ("The appeals court shall have . . . supervisory authority over all actions and proceedings in the courts in the district"); Wis. Stat. § 752.02 ("The court of appeals has supervisory authority over all actions and proceedings in all courts except the supreme court"); *but see State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 106, 363 Wis. 2d 1, 866 N.W.2d 165 (articulating a narrower understanding of supervisory writ authority).

[7] To expedite a potential emergency motion to the Wisconsin Supreme Court, should this Court deny the Governor's requested relief, the Governor intends to notify the Supreme Court via letter today of the possibility of his filing emergency papers at 9:15 a.m. on Thursday morning. However, such an emergency filing would give the Supreme Court less than 3 hours to grant the requested relief before harm begins to accrue to voters, candidates and the State, meaning that relief from this Court is essential.

A. The standard for relief pending appeal under Section 808.07(2) depends upon the nature of the relief requested. For a full stay of an injunction pending the resolution of an appeal, this Court applies the familiar four-part standard adopted by the Supreme Court in *State v. Gudenschwager*: a movant must show he is "likely to succeed on the merits of the appeal," that he will suffer "irreparable injury" absent the stay of the injunction, that the stay would cause "no substantial harm" to other "interested parties," and that it would cause "no harm to the public interest." 191 Wis. 2d at 440. For requests of other types of relief pending appeal, this Court applies different standards, since "the *Gudenschwager* factors . . . do not adequately account for all factors relevant" to all requests for relief. *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 10, 237 Wis. 2d 498, 614 N.W.2d 565. Thus in *Scullion*, this Court applied a modified version of *Gudenschwager*'s four-factor test for whether to grant a "stay of a money judgment" pending appeal under Section 808.07(2)

"if [a] required bond is posted." *Id.* ¶¶ 11, 14. Given the nature of the request—staying the collection on a money judgment pending appeal—the Court needed to consider factors like "the need to ensure the collectability of the judgment and [ ] interest," "the interests of the appellant in securing the fruits of the appeal if it is ultimately successful," and "the harm to the respondent that may result if the judgment is not paid until the completion of an unsuccessful appeal." *Id.* ¶¶ 20–22; *accord Weber*, 2004 WI 63, ¶¶ 35–40 (applying this Court's *Scullion* standard). This Court's adoption of such tailored standards is appropriate in light of "the language of Wis. Stat. § 808.07(2)," the "history [of] Wis. Stat. § 808.07," and the "broad discretionary authority in the courts to grant appropriate relief" pending appeal. *Scullion*, 2000 WI App 120, ¶¶ 15–16 (quoting note to Section 808.07).

In the present case, this Court should grant temporary relief based entirely on the balance of the equities. The first prong of *Gudenschwager*'s four-part test (the likelihood of

success on appeal) has little applicability here, as the basis for the requested relief is that the law may well change soon, rendering this case—and any appeal—moot. *E.g., State ex rel. La Crosse Tribune v. Circuit Court for La Crosse Cty.*, 115 Wis. 2d 220, 228, 340 N.W.2d 460 (1983) (case moot when "judgment . . . cannot have any practical legal effect upon the existing controversy" (citation omitted)). Whether an appeal would be successful based on the law as it currently stands is entirely irrelevant to this justification. Furthermore, the Governor is requesting only temporary relief—eight additional days to comply with the order. Finally, because this motion involves only the circuit court's denial of the Governor's Section 806.07 motion to extend the deadline by eight days, *infra* pp. 26–27—a decision that is itself based primarily upon the "equities of the case" and any "unique or extraordinary facts," *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶¶ 10–11, 282 Wis. 2d 46, 698 N.W.2d 610 (explaining proper application of Wis. Stat. § 806.07(1)(h)), the "likelihood

of success" inquiry will ultimately depend on the equities and therefore collapses into the remaining prongs.

B. Here, the equities all favor granting the Governor's request. The Governor is respectfully requesting that this Court extend the deadline of the circuit court order by a mere eight days, thus requiring him to call for special elections no later than 12:00 p.m. (noon) on Friday, April 6, 2018, assuming the Legislature does not render this case moot. This extension is necessary given the Legislature's decision to call an extraordinary session for next week, in order to address the problem of holding special elections when no representative can be seated during the Legislature's regular session, with requirements noncompliant with federal election law and deadlines shorter than those needed to accommodate military and overseas voters. As explained below, granting the requested eight-day extension would avert unnecessary candidate and voter confusion and the

wasting of candidate, voter, and taxpayer resources, while not causing any harm to anyone.

Granting the modest eight-day extension will avert needless confusion, assuming the Legislature next week acts to achieve the very purposes that animated the calling of the extraordinary session. According to the circuit court's order, the Governor must call the special elections this coming Thursday, March 29, 2018, solely because of the requirements of Wis. Stat. § 8.50(4)(d). *See* App. 3. Yet the Legislature has called an extraordinary session just a week later, to enact a special-election reform package that will *repeal and recreate* this very same statute with Substitute Amendment LRBs0436, thereby eliminating the Governor's statutory authority to call these special elections and the Wisconsin Elections Commission's authority to hold them. App. 18 (Section 30). So if the Court does not modify the order, and the Legislature enacts the Substitute Amendment, the Governor would have to call for these special elections on

Thursday (tomorrow)—triggering the efforts of candidates and voters—only to have this election rendered unlawful by legislative action a week later. Allowing that wasteful sequence to play out "would cause candidate and voter confusion and would waste candidate and voter resources." App. 33 ¶ 6 (Affidavit of Jenny Toftness).

As for candidate confusion, the Governor's call for the special elections on March 29 would trigger "the beginning date for the circulation of candidate nomination papers," which "are necessary for securing the candidate's name on the ballot." App. 33 ¶ 7; Wis. Stat. § 8.50(3)(a). Candidates for the assembly must obtain "between 200 and 400 signatures in order to secure their place on the ballot." App 33 ¶ 9; Wis. Stat. § 8.15(6)(c)–(d) (senate candidates must obtain between 400 and 800 signatures). If the election were then cancelled due to the Legislature's amendments to Wis. Stat. § 8.50(4)(d), just a week later, "these nomination papers would be invalid." App 33 ¶ 10. Yet these same candidates

may wish to run for the next subsequent election and may, erroneously, believe their papers and their signatures valid, App 33–34 ¶ 11, especially given the cancellation of an election one week after its call. Such confusion could cause these candidates—relying on now-invalid signatures—to fail to meet the ballot-access requirements in that subsequent election. App 33–34 ¶ 11.

As for voter confusion, "voters may only sign one candidate's nomination papers for each election." App 34 ¶ 12. "Voters will sign candidates' nomination papers for the special election if it is called," App 34 ¶ 13, expressing their desire to see those candidates on the next ballot. Cancelling the special elections will void these signatures, freeing voters to sign nomination papers for the next election for their district. App 34 ¶¶ 13–14. Yet voters may be unaware of the cancellation and its voiding of their previous signatures. App 34 ¶ 13. So when candidates circulate nomination papers for the next election, these voters may well erroneously believe

that they have committed to the cancelled-special-election candidates. App 34 ¶ 13. That "confus[ion]" as to "whether they are legally allowed to sign those new set of nomination papers" may cause them to "decline to sign the next set of nomination papers, effectively removing themselves from this ballot-access process." App 34 ¶¶ 13–14.

Even confusion aside, creating a situation where candidates circulate papers for voter signatures for one week before the election is cancelled is an obvious waste of candidate and voter resources. Candidates, for their part, would have "wasted significant time and resources drafting and circulating the now-invalid nomination papers." App 33–34 ¶ 11. While voters would spend their own "time and resources identifying the candidates they would like to support with their nomination-paper signature," all would be wasted if the special elections were cancelled. App 35 ¶ 15.

In addition, this call-the-election-then-cancel sequence would waste the taxpayer resources necessary to begin the preparations for holding the special elections.

On the other end of the equitable balance, no harm would come to Plaintiffs or anyone else if this Court granted the Governor's modest extension request. The Governor has committed to selecting Tuesday, June 12, 2018, as the date of the special elections (with primary elections, if any, on Tuesday, May 15, 2018, *see* Wis. Stat. § 8.50(2)(b)) whether he must call for the elections on Thursday, March 29th, under the circuit court's order, or on Friday, April 6th, should this Court grant the eight-day extension request and assuming no intervening court or legislative action dictating a contrary course. In their filings below, Plaintiffs alleged two harms from granting an eight-day extension, but both are illusory.

First, they argued that the "proposed [eight-day] delay [would] fall[ ] squarely on the voters[ ] who remain unrepresented." Dkt. 42:8–9. But, of course, as just

explained, the date of the special election will not be impacted in the least by granting this modest 8-day extension if the Legislature does not act. And in the far more likely event that the Legislature acts during the extraordinary session called just for such action, the special elections will not be conducted either way: either they will be cancelled (with no extension) or not called for (with an extension).

Second, Plaintiffs argued that the eight-day extension would harm candidates by shortening the time to gather signatures from 19 days to 11 days. Dkt. 42:9. But an 11-day window falls in the middle of the *current* statutory timeframe for collecting signatures. The statute requires an election to be conducted between 62 and 77 days after the Governor calls for an election, Wis. Stat. § 8.50(2)(a), and requires nomination papers to be filed 56 days before the election,[8] leaving anywhere from 6 to 21 days for collecting signatures.

[8] Nomination papers must be filed "28 days" before the primary, Wis. Stat. § 8.50(3), which must be "4 weeks" before the election, *id.* § 8.50(2)(b).

Plaintiffs' own affiant, Representative Greta Neubauer, explained that she gathered 400 signatures (*double* the requirement, *see* Wis. Stat. § 8.15(6)(d)) in "roughly two weeks" with "little, if any, advance notice of the [vacancy]." App. 30–31 (Neubauer Affidavit). In any event, even if this Court were concerned about shortening the timeframe for collecting signatures by eight days, that harm will only occur if the Legislature does not amend the law to prohibit such special elections, contrary to the very purpose of the calling of the extraordinary session. *Supra* pp. 7–9.

Given that the harms from denying an eight-day extension are significant, and any harms from granting an extension are illusory, the balance of the equities weighs entirely in the Governor's favor.[9]

[9] In their papers below, Plaintiffs raised a smattering of speculative constitutional theories, bemoaning the retroactive effect of any amendment to the election laws by the Legislature, but no part of their shotgun approach is persuasive. Dkt. 42:5–8. "As with all legislation, retroactive legislation is presumed constitutional." *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 2010 WI 68, ¶ 26, 326 Wis. 2d 444, 786 N.W.2d 385. And even when such legislation affects vested rights—a

C. Even under the traditional *Gudenschwager* test, were it to apply, *but see supra* pp. 15–17, this Court should grant the Governor's request for an eight-day extension of the mandamus order.

The Wisconsin Supreme Court explained in *Gudenschwager* that the four factors are "interrelated considerations that must be balanced together." 191 Wis. 2d at 440. Thus "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay. In other words, more of one factor excuses less of the other." *Id.* at 441; *see also A&F Enterprises*, 742 F.3d at 766 (discussing this "sliding scale" approach).

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circumstance of doubtful presence here—constitutional inquiry is limited to only "rational basis" review. *Id.* ¶¶ 29–30. Plaintiffs' assertions that the Substitution Amendment would either fail that low bar or merit heightened scrutiny are meritless. *See id.* ¶ 26. Accordingly, should the Legislature pass the Subsequent Amendment "repeal[ing] and recreat[ing]" Subsection 8.50(4)(d) to completely remove the statutory authority to call and hold "special election[s]" "after the spring election," effective as to all current vacancies, this would unquestionably moot Plaintiffs' current lawsuit. *See La Crosse Tribune*, 115 Wis. 2d at 228 (judgment will have no "practical legal effect").

Given that the equitable balancing weighs completely in favor of the modest eight-day extension of the circuit court's mandamus order, *supra* Part I.B, the required showing on the likelihood-of-success prong is correspondingly low.

And the Governor has a strong chance of success in appealing the circuit court's denial of his Section 806.07 motion. An appeal from the denial of a Section 806.07 motion is distinct from an appeal of the underlying judgment. *See Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.*, 185 Wis. 2d 791, 811 n.10, 519 N.W.2d 674 (Ct. App. 1994). While the Governor has appealed both, for purposes of this motion, the relevant appeal is the circuit court's denial of the Section 806.07 motion, since the relief that the Governor requests from this Court is identical to that requested from the circuit court under Section 806.07. Therefore, the "likelihood of success" prong considers the merits of the Section 806.07 motion, not the merits of the underlying and distinct judgment. *Accord* Wis. Stat. § 808.09 ("Upon an appeal from

a judgment or order an appellate court may reverse, affirm or modify the judgment or order . . . and, if the appeal is from a part of the judgment or order, may reverse, affirm or modify as to the part appealed from.").

This Court reviews a circuit court's denial of a motion to modify a judgment under Section 806.07(1)(h) for an "erroneous[ ] exercise [of] discretion." *Sukala*, 2005 WI 83, ¶ 8. To determine "what relief, if any, should be granted," circuit courts must consider whether there are any "extraordinary or unique" "circumstances" along with "any other factors bearing upon the equities of the case." *Id.* ¶¶ 9–12.

The circumstances here are, without a doubt, "unique" and "extraordinary." The Legislature has called for an *extraordinary* legislative session "solely for consideration of" updating its outdated rules for filling legislative vacancies and to prevent pointless and costly special elections shortly before a general election for those very seats, and well after

the legislative session has ended. *Supra* pp. 7–9. Assuming the Legislature enacts the law that is the purpose of the extraordinary session, this case will be moot. *See La Crosse Tribune*, 115 Wis. 2d at 228.

And the "equities of the case" weigh heavily in favor of a short-term, eight-day extension. If the case is mooted by the Legislature's actions at the extraordinary session, the denial of an eight-day extension will impose significant costs on the State and cause confusion for both candidates and voters when the previously announced special elections are cancelled. *Supra* pp.17–22. On the other hand, if the eight-day extension is granted and the Legislature does not act—contrary to the express purpose of calling the extraordinary session to begin with—no one will suffer any prejudice. The Governor will call for the special elections on the same date (June 12) even if the extension were granted, *supra* p. 22, and the one-week delay in calling for the election will not cause any hardship to any potential candidates or voters, *supra* pp.

22–24. Given all that, the circuit court clearly abused its discretion by denying the Governor's modest request for an eight-day extension, and a successful appeal of that denial is likely.

CONCLUSION

This Court should grant the Governor's emergency motion for relief under Wis. Stat. § 808.07(2).[10]

Dated: March 28, 2018.

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[10] Under Wis. Stat. (Rule) § 809.12, "[a] person seeking relief under s. 808.07 shall file a motion in the trial court unless it is impractical to seek relief in the trial court." Here, it is plainly impractical for the Governor to seek relief in the circuit court since the relief he is requesting here, an eight-day extension of the circuit court's mandamus order, is identical in substance to the relief requested unsuccessfully in the circuit court under Wis. Stat. § 806.07(1)(h).