

**COURT OF APPEALS
OF WISCONSIN**

10 E. Doty Street, 7th Floor
Madison, Wisconsin 53703
TELEPHONE: (608) 266-9320
FAX: (608) 261-6644

FAX TRANSMISSION

TO:	Hon. Richard Niess	608-267-4151
	Carlo Esqueda	608-267-8859
	Tamara Packard, et al.	608-251-2883
	Carolyn Forstein, et al.	202-775-4510
	Jeffrey A. Mandell, et al.	608-259-2600
	Misha Tseytlin	312-759-1939
	Eric Baker, et al.	608-283-1709
	Colin Thomas Roth	608-267-2223
	Patrick O. Patterson	via email

FROM: COURT OF APPEALS, District III

DATE: March 27, 2019

PAGES: 10 (including cover sheet)

RE: The League of Women Voters v. Tony Evers
Appeal No. 2019AP559
(Dane County Circuit Court Case No. 2019CV84)



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

March 27, 2019

To:

Hon. Richard G. Niess
Circuit Court Judge
Br. 9, Rm. 5109
215 S. Hamilton St.
Madison, WI 53703

Jeffrey A. Mandell
Kurt Simatic
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701-1784

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Misha Tseytlin
Troutman Sanders LLP
1 N. Wacker Dr., Ste. 2905
Chicago, IL 60606-2882

Tamara Packard
Lester A. Pines
Aaron Dumas
Beauregard William Patterson
Pines Bach LLP
122 W. Washington Ave., Ste. 900
Madison, WI 53703-2718

Eric A. Baker
Barry J. Blonien
Boardman & Clark LLP
P.O. Box 927
Madison, WI 53701-0927

Deana K. El-Mallawany
Jessica Marsden
Protect Democracy
2020 Pennsylvania Ave. N.W., #163
Washington, DC 20006-1811

Patrick O. Patterson
Law Office of Patrick O. Patterson, S.C.
7481 N. Beach Dr.
Milwaukee, WI 53217-3663

Carolyn Forstein
Lawrence S. Robbins
Wendy Liu
Robbins Russell
2000 K. Street N.W., 4th Fl.
Washington, DC 20006

Colin Thomas Roth
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following order:

2019AP559

The League of Women Voters v. Tony Evers
(L. C. 2019CV84)

Before Stark, P.J., Hruz and Seidl, JJ.

The Wisconsin Legislature (the Legislature) moves to stay a temporary injunction issued by the Dane County Circuit Court in a lawsuit filed against Wisconsin Governor Tony Evers (the Governor) by The League of Women Voters of Wisconsin, Disability Rights of Wisconsin, Inc., Black Leaders Organizing for Communities, Guillermo Aceves, Michael Cain, John Greene, and Michael Doyle (collectively, the Plaintiffs), pending the Legislature's appeal of that injunction. The Plaintiffs' lawsuit seeks a declaratory judgment that a December 2018 extraordinary session held by the Legislature after the last scheduled floorperiod of the 2018 regular session, was unconstitutionally convened. Specifically, the Plaintiffs are challenging three legislative acts passed and eighty-two confirmations made during the extraordinary session on the grounds that the Legislature was not meeting at such time as provided by law, as required by WIS. CONST. art. IV, WIS. STAT. § 11. The circuit court permitted the Legislature to intervene in the declaratory judgment action as a defendant.

The legislature has provided by law, in WIS. STAT. § 13.02, that the legislature "shall meet annually," and that its "regular session" shall commence on the first Tuesday after the eighth day of January each year unless otherwise provided in § 13.02(3), which in turn authorizes the legislature's joint committee on legislative organization to provide a "work schedule" for the legislative session, to be submitted as a joint resolution. The work schedule adopted by the legislature in 2017 Senate Joint Resolution 1 provides that the biennial session period of 2017 shall end on January 7, 2019, and that every day of the biennial session period not scheduled as a floorperiod or day to conduct an organizational meeting is available to convene an extraordinary session.

In a nutshell, the Plaintiffs' central position is that the only meeting of the legislature whose time is provided by law is the regular session, and that the 2018 regular session ended

with an adjournment sine die following the last scheduled floorperiod. The Legislature's central position is that meetings of the legislature are not limited to regular sessions and can include extraordinary sessions as authorized by the work schedule in the joint resolution that itself was created pursuant to statute.

The court issued a temporary injunction that prohibits the Governor and the Legislature from enforcing any legislation that was enacted, or any confirmation of a nominee for state office that occurred, during the extraordinary session, while the declaratory judgment action is pending. The court contemporaneously denied the Legislature's request to stay the injunction pending appeal. The Legislature has now filed an appeal as of right challenging the temporary injunction, as well as the present motion seeking emergency review of the circuit court's denial of a stay. This court has permitted the Department of Justice (DOJ) to participate on the motion for relief pending appeal because the underlying case involves a challenge to the constitutionality of several statutes.

This court has the power to stay a judgment, grant an injunction, or enter other orders to preserve the existing state of affairs or the effectiveness of a judgment subsequently to be entered. WIS. STAT. § 808.07(2)(a) (2017-18).¹ Because the Legislature first sought relief in the circuit court under the procedure set forth in § 808.07(2)(a)3. and WIS. STAT. RULE 809.12, we review the circuit court's decision to deny a stay pending appeal under an erroneous exercise of discretion standard. *State v. Gudenschwager*, 191 Wis.2d 431, 439-40, 529 N.W.2d 225 (1995). We will sustain a discretionary determination as long as the court examined the relevant

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

facts, applied a proper standard of law, and employed a demonstrated rational process to make a conclusion a reasonable judge could reach. *Id.* at 440.

The criteria for staying a judgment are that: (1) the moving party is likely to succeed on the merits; (2) the moving party will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to the other interested parties if the stay is granted; and (4) the stay would not harm the public interest. *Id.* These factors are interrelated and must be balanced on a case-by-case basis. *Id.*

“[T]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the [movant] will suffer absent the stay,” but must in any case be more than a “mere ‘possibility.’” *Id.* at 441 (citation omitted). It does not require a finely calibrated evaluation of the merits, or even a determination that it is more likely than not than an appeal would succeed. *Id.* The likelihood of success on appeal may instead be based upon the standard of review or any applicable legal presumption that may apply in a particular case. See *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, ¶¶18-23, 237 Wis. 2d 498, 614 N.W.2d 565. An alleged irreparable injury “must be evaluated in terms of its substantiality, the likelihood of its occurrence, and the proof provided by the movant.” *Gudenschwager*, 191 Wis. 2d at 441-42.

As a threshold matter, we observe that some parties have conflated the Plaintiffs’ likelihood of success on the underlying declaratory judgment action with the Legislature’s likelihood of success in challenging the temporary injunction on appeal. This confusion seemingly arises from the procedural posture of this case, where we have a motion for a stay within an interlocutory appeal of a temporary injunction. To clarify, this court’s present focus is

on whether the circuit court properly denied the Legislature's request for a stay pending appeal (taking into account an analysis of the merits of the temporary injunction), not whether it properly granted the Plaintiffs a temporary injunction (taking into account the likelihood of success on the declaratory judgment action). The latter question goes to the merits of the appeal, which will be addressed after full briefing.

We further note that some parties have framed their harm arguments for the second, third and fourth *Gudenschwager* factors in terms of injuries they believe are caused, or benefits that are accomplished by, the legislative acts passed during the extraordinary session. We emphasize that it is not our role to determine the wisdom of the legislation itself. Rather, our evaluation of the second, third and fourth factors balances any harm that might result in the absence of a stay in the event that the decision on appeal is ultimately reversed against any harm that might result from the imposition of a stay in the event that the decision on appeal is ultimately affirmed.

That being said, we recognize that the interests at stake in a particular case do not always fit squarely within one of the enumerated factors in *Gudenschwager*. Here, the evaluation of the potential harms from granting or denying a stay is complicated by the fact that the Governor and the Legislature have taken different positions on behalf of the State, and each asserts conflicting public interests. Furthermore, the fact that the Legislature and the Governor each represent the State necessarily conflates their interests with those of the public. As a practical matter then, the balancing test as a whole must be flexible enough to accommodate some variation regarding under which of the final three factors a particular alleged harm is discussed. Flexibility as to where a particular harm is discussed does not alter a movant's overall burden to address any facts relevant to one of the required factors in some manner, and to ultimately demonstrate that all of the combined factors favoring a stay outweigh all of the combined factors opposing a stay.

We turn next to an evaluation of the circuit court's exercise of discretion in this case. The court explicitly considered each of the four *Gudenschwager* factors before denying the Legislature's request for a stay. The court first determined the Legislature had shown "no likelihood of success on appeal" based upon the same analysis of the merits of the underlying declaratory judgment action that the court had just employed in its decision to grant a temporary injunction. As to the second factor, the court reasoned that the Legislature suffered no irreparable injury because there is no law preventing it "from promptly reintroducing and passing the laws proposed in Acts 368, 369 and 370 during scheduled regular sessions in the current biennial period." The court characterized the Legislature's argument on the third factor as "an alarmist domino-theory collapse of laws previously produced by 'extraordinary sessions.'" It determined that the theory was purely speculative and unsupported by either the law or the facts of record. Finally, the court concluded that the public would be harmed by a stay, relying again on its conclusion regarding the merits of the Plaintiffs' claims, and further stating there was nothing "more destructive to Wisconsin's constitutional democracy than for courts to abdicate their constitutional responsibilities by knowingly enforcing unconstitutional and, therefore, non-existent laws."

We conclude that the circuit court erroneously exercised its discretion by misapplying the first two of the *Gudenschwager* factors. First, regarding the likelihood of success on appeal, the Legislature argues that the circuit court failed to provide the challenged legislative acts a presumption of constitutionality generally accorded to duly enacted statutes and otherwise ran afoul of separation of powers concerns. The other parties respond that the acts are not entitled to the presumption because they are being challenged on a procedural basis—that is to say, that they were not duly enacted. We conclude it is unnecessary to resolve that dispute here because,

regardless whether a presumption applied, the issue presented in the underlying lawsuit is still a constitutional question of first impression that will be subject to de novo review on appeal. The circuit court's failure to factor into its analysis that the underlying case presents an issue of first impression, in turn, caused the circuit court to underestimate the Legislature's chance of prevailing on its challenge to the temporary injunction. It was not necessary for the court to conclude that the Legislature was more likely than not to prevail on its appeal of the injunction; only that there was more than a "mere possibility" that it would do so. *Gudenschwager*, 191 Wis. 2d at 441. This is especially so given our following discussion of the second factor, which we find to be paramount.

Second, regarding alleged irreparable harm to the legislature in the absence of a stay, the circuit court erred in evaluating such alleged irreparable harm under the presumption that the challenged acts and confirmations would ultimately be found invalid, and it failed to evaluate the alleged irreparable harm that could result from enjoining legislative acts and confirmations that may ultimately be found to be valid, such that those acts and confirmations would continue in effect subsequent to their effective dates. We acknowledge that not all of the potential harms the Legislature alleges are equally persuasive. For instance, the Legislature's claim that, in the absence of a stay, there will be an avalanche of new challenges to other legislative acts that were enacted during other extraordinary sessions is completely inapposite because, of course, a stay of the legislative acts and confirmations at issue in this case would in no way prevent the filing of any other such lawsuits. However, the alleged irreparable harm that we deem to be the most significant is the claim that the people of a state always suffer a form of irreparable harm any time statutes enacted by their representatives are enjoined. This claim of an intangible

representational injury is the flip side of the potential harm that the circuit court recognized that would result from enforcing an invalid law, and it is no less powerful.

Taking into account the circuit court's underestimation of the Legislature's likelihood of success on appeal and the irreparable injury that could result in the absence of staying a temporary injunction that prohibits enforcement of potentially valid legislation and appointments, we conclude the court's balancing of the four *Gudenschwager* factors was inherently flawed. We conclude the first two factors outweigh any potential harms to any parties identified in the third and fourth factors. Therefore, we grant the requested stay.

Therefore,

IT IS ORDERED that the temporary injunction issued by the circuit court on March 21, 2019, is hereby stayed pending the Legislature's appeal.

IT IS FURTHER ORDERED that this appeal shall be expedited. The record shall be transmitted within three business days from this order, unless one of the parties promptly advises us that there are additional transcripts that need to be produced. The Legislature's initial appellant's brief and appendix shall be due April 10, 2019, the response briefs of the respondents and the DOJ shall be due April 23, 2019, and the Legislature's reply brief shall be due April 30, 2019.

IT IS FURTHER ORDERED that this order will be disseminated solely by email or fax to those parties who have provided such contact information to the court.

Sheila T. Reiff
Clerk of Court of Appeals