STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

Case No. _____

MADISON TEACHERS, INC.,
PEGGY COYNE, PUBLIC
EMPLOYEES LOCAL 61,
AFL-CIO, and JOHN WEIGMAN

Plaintiffs,

v.

SCOTT WALKER, Defendant,
JAMES R. SCOTT, Defendant-Appellant,
JUDITH NEUMANN, Defendant, and
RODNEY G. PASCH, Defendant-Appellant,

v.

WISCONSIN EDUCATION ASSOC.
COUNCIL; AFT-WISCONSIN, AFL-CIO;
SEIU HEALTHCARE WISCONSIN, CTW,
CLC; WISCONSIN FEDERATION OF
NURSES AND HEALTH CARE
PROFESSIONALS, AFT, AFL-CIO; and
KENOSHA EDUCATION ASSOC.,

Movants-Respondents.

ON APPEAL FROM AN OCTOBER 25, 2013, FINAL ORDER OF CONTEMPT IN DANE COUNTY CIRCUIT COURT, CASE NO. 11-CV-3774, THE HONORABLE JUAN B. COLAS, PRESIDING

MEMORANDUM IN SUPPORT OF COMMISSIONERS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Commissioners of the Wisconsin Employment Relations Commission James R. Scott and Rodney G. Pasch move this Court on an emergency basis, pursuant to Wis. Stat. § 809.12, for immediate relief pending their appeal of a contempt order of the Dane County Circuit Court. The contempt motion, filed by non-party movants, resulted in a contempt order restraining the Commissioners from carrying out their statutory duties as to non-parties under Wis. Stat. § 111.70(4)(d)3.b.

There are multiple reasons why the contempt order was contrary to law and a clear misuse of discretion:

- the Commissioners did not intentionally disobey any mandate of the Circuit Court;
- a circuit court's declaratory judgment cannot be enforced through contempt proceedings;
- the non-party movants were not entitled to a contempt order due to their lack of

standing and the circuit court's lack of jurisdiction or competency to hear their motion in the first instance; and

- the Circuit Court's declaration does not have statewide effect.

In seeking a prompt stay with this Court, the Commissioners seek to prevent irreparable harm to the pending certification elections for collective bargaining agents of represented school district employees. Because the harm is imminent and irreparable, the Commissioners respectfully move this Court to issue an *ex parte* order granting a temporary stay, pursuant to Wis. Stat. § 809.12. That will prevent the undermining of the pending certification election process while the motion to stay is considered.

BACKGROUND

The background of the underlying case is well documented elsewhere, and the Commissioners provide only a thumbnail here. The underlying case regards the legality of portions of the Municipal Employment Relations Act ("MERA," located at Wis.

Stat. §§ 111.70 to 111.77). The plaintiffs in the case are Madison Teachers, Inc., Peggy Coyne, Public Employees Local 61, AFL-CIO, and John Weigman. The circuit court found portions of MERA and other statutes facially unconstitutional in an order dated September 14, 2012, and provided relief limited to a declaration of its unconstitutionality. The circuit court did not impose injunctive relief, though the plaintiffs requested such relief in their complaint. (Affidavit of Steven C. Kilpatrick, October 25, 2013 ("Kilpatrick Aff."), ¶ 9, Ex. 5, p. 2.) In a subsequent September 17, 2013, order, the circuit court specifically declined to impose injunctive relief. (Kilpatrick Aff. ¶ 6, Ex. 2, p. 3.) An appeal of the September 14, 2012, final order is currently pending before the Wisconsin Supreme Court (Appeal No. 2012AP2067), with oral argument set for November 11, 2013.

During the pendency of that appeal, non-party labor unions brought a motion for contempt in the circuit court. More specifically, entities including the Kenosha Education Association and the Wisconsin

Education Association Council, among others, sought a contempt order, even though none of those entities had previously been involved in this litigation.[1] They argued that the defendant Commissioners were in contempt of the declaratory judgment because they continued to apply MERA to non-party unions.

On October 21, 2013, in an order from the bench, the circuit court breathed new life into its declaratory judgment by issuing an injunction with statewide effect for the first time, contrary to established law and the previous orders of this court. As a remedial sanction, the circuit court enjoined the Commissioners from enforcing the MERA statutes as to non-parties in other controversies. (11CV3774, Dane County, Consolidated Court Automated Program (CCAP), entry of October 21, 2013; Kilpatrick Aff., ¶ 5 Ex. 1, pp. 52-53.) On this date the

[1] Indeed, many of the *successful non-party movants* on the contempt motion before the Circuit Court were the *unsuccessful plaintiffs* in *Wis. Educ. Ass'n Council, et al.*, Case No. 11cv428, before the United States District Court for the Western District of Wisconsin, and, ultimately, before the Seventh Circuit Court of Appeals in *Wis. Educ. Ass'n Council, et al. v. Walker, et al.*, Appeal Nos. 12-1854, 12-2011, and 12-2058.

Circuit Court entered its written order of contempt. (Kilpatrick Aff., ¶ 12, Ex. 8.) The Commissioners have appealed from that contempt order, and seek a stay of it during the pendency of the appeal.[2]

LAW & ARGUMENT

I. LEGAL STANDARDS.

A stay pending appeal is appropriate when the moving party makes a strong showing that it is likely to succeed on the merits of the appeal; shows that, unless a stay is granted, it will suffer irreparable injury; shows that a stay will not harm the public interest; and shows that no substantial harm will come to other interested parties. *See State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). These factors are interrelated considerations that must be balanced together, and are not prerequisites. *See id.*; *see also id.* at 441 ("more of one factor excuses less of the other").

[2] On this date, Defendants-Appellants have filed a motion to stay the Circuit Court's September 14, 2012, Final Order and sought relief from the order pending appeal.

This Court reviews the circuit court's use of its contempt power for misuse of discretion. *Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999). Under that standard, a discretionary decision will not be sustained if the trial court did not examine the relevant facts; apply proper standards of law; or, using a demonstrated rational process, reach a conclusion that a reasonable judge could reach. *Gudenschwager*, 191 Wis. 2d at 339-40.

Pursuant to Wis. Stat. § 809.12, a motion for relief pending appeal is properly brought before this Court, without first seeking a stay in the circuit court, where it would be impractical to first seek relief with that court.

II. BRINGING THE STAY MOTION IN THE CIRCUIT COURT IS IMPRACTICAL.

Although a stay is normally first sought in the circuit court, the statutes contemplate instances where that would be impractical. This is once such instance. For a stay to prevent needless harm, it would need to issue almost immediately, as recertification

mechanisms are already under way for a scheduled November 1 vote. (Affidavit of Peter G. Davis, October 25, 2013 ("Davis Aff."), ¶ 3.) Further, and as discussed in Part IV below, irreparable harm would result if a stay is not in place by October 28, 2013, or November 5, 2013, at the very latest. (Davis Aff. ¶ 13.)

The circuit court found the Commissioners in contempt at hearing on October 21, 2013, and imposed the sanction of an injunction. Because there is inadequate time to fully brief the issues before even one court, much less multiple courts, the Commissioners respectfully submit that it is proper to make their motion to this Court in the first instance, and to seek a temporary *ex parte* stay while the motion is briefed and decided. *See* Wis. Stat. § 809.12.

Even if the stay motion proceeds only in this Court, time is short to obtain relief. Wisconsin law imposes a December 1 voting deadline for school district certification elections. *See* Wis. Stat. § 111.70(4)(d)(3)b. Prior to that deadline, the Commissioners must compile eligibility lists, provide

notice, and provide a 20-day period for the actual voting. (Davis Aff. ¶¶ 7-11.) Currently, those mechanisms have been put in place for voting to begin on November 1. A starting date after November 1 will require the creation of new eligibility lists and new notices; if voting does not begin by November 5, the election cannot be held *at all*. (Davis Aff. ¶¶ 12-13.)

The Commissioners seek *ex parte* relief because the eleven-day response time for a motion, *see* Wis. Stat. § 809.14(1), would make a response to the present motion due days *after* the scheduled voting on certification is set to begin. They ask for temporary relief so that voting can begin on time. They ask for relief from this Court, without first requesting relief from the circuit court, because the few days left barely affords time for even this Court to consider their request.

The Commissioners submit that the only workable avenue is to seek a temporary stay in this Court, followed by a ruling on the motion to stay.

III. THE COMMISSIONERS ARE LIKELY TO SUCCEED ON THE MERITS FOR MULTIPLE REASONS.

The first factor for granting a stay asks whether there is a strong showing of likelihood of success on the merits. There are multiple reasons why the circuit court erred as a matter of law and, thus, abused its discretion. First, as a prerequisite to remedial contempt, a party must have intentionally disobeyed a mandate to do, or not do, something. Here, the order in question did not contain such a mandate. The contempt order is also inconsistent with direction from this Court as to the scope of the circuit court's order. Finally, the non-parties did not have standing to seek a contempt order because they were not aggrieved by the order, and the circuit court could not expand the reach of the order to non-parties during the pendency of the appeal.

A. The Commissioners Did Not Disobey A Mandate.

The underlying September 14, 2012, circuit court order did not state that the defendants, including the Commissioners, were bound to act, or not act, in

any way. Lacking that kind of directive, the law teaches that the Commissioners cannot be held in contempt. *See, e.g., State v. Dickson*, 53 Wis. 2d 532, 541, 193 N.W.2d 17 (1972); *Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).

Under Wis. Stat. § 785.01(1)(b), "contempt of court" means "intentional . . . [d]isobedience, resistance, or obstruction of the authority, process or order of a court." Here, the Commissioners did not "intentionally" disobey the circuit court's order; indeed, they did not disobey its scope at all.

The September 14, 2012, circuit court order's mandate stated:

> For the reasons stated above, the court grants summary judgment in favor of the plaintiffs, denies the defendants' motion for judgment on the pleadings and declares that Wis. Stat. §§ 66.0506, 118.245, 111.70(1)(f), 111.70(3g), 111.70(4)(mb) and 111.70(4)(d)3 violate the Wisconsin and United States Constitution, and Wis. Stat. § 62.623 violates the Wisconsin Constitution and [sic] all null and void. This is a final order as defined by Wis. Stat. § 808.03(1) for purposes of appeal.

(Kilpatrick Aff. ¶ 9, Ex. 5, p. 27).) That is the final order, and the one that is currently under review in the Supreme Court. It did not state that the Commissioners were enjoined from doing anything, much less that they were forbidden to act regarding non-parties.

Post-judgment, the circuit court specifically declined to enjoin the defendants. In a September 27, 2013, order, the court stated that the plaintiffs had failed to show irreparable harm supporting an injunction, because it was established that the Commissioners were no longer applying the law to them. (Kilpatrick Aff. ¶ 6, Ex. 2, p. 3.) In that order, the circuit court also stated a legal conclusion that a declaratory judgment against the defendants necessarily binds them as to everyone else, even if that other entity is not a party. (*See id.* at p. 2.) However, that legal proposition was not itself an order or mandate directing the Commissioners to do something, and because the defendants were prevailing parties on the injunction motion, they had

no right to appeal this dicta's erroneous legal conclusion.

When the Commissioners sought a stay of the September 14, 2012, order, this Court declined to adopt the legal proposition that the Commissioners were forbidden, either as a matter of law or based on the circuit court's specific mandate, from applying the law at issue to nonparties, absent an injunction. In a December 28, 2012, order, this Court stated:

> Regarding the effect on parties to this action, the unions argue that the circuit court's order will have statewide effect because the state officials ... are parties to this action, and are therefore bound by it. For this proposition, the unions cite *Lister v. Board of Regents*, 72 Wis. 2d 282, 302-03, 240 N.W.2d 610 (1974). Again, however, that case did not directly address who is bound by a *circuit court* decision holding a statute facially unconstitutional.... Moreover, though none of the parties focus on this fact, we note that **the mandate portion of the circuit court order** at issue here declaring MERA void in part **does not appear to contain language enjoining WERC from taking any particular actions.**
>
> We observe that circuit-court ordered injunctions against a state

> agency or official often have statewide effect because the injunction directs the agency or official to take action or refrain from taking action and, in doing so, may direct action or prohibit action statewide. **It is not immediately apparent, however, why an agency like WERC is necessarily bound to apply a non-precedential circuit court decision declaring a statute unconstitutional to parties other than those involved in the case in which the decision arose.**

(Kilpatrick Aff. ¶ 10, Ex. 6, pp. 3-4 (bold text added and some text omitted)).

This Court made two observations: the mandate did not clearly prevent the Commission from taking action; and there was no clear reason that the Commission was bound as to non-parties.[3] This Court issued a subsequent order again declining to adopt the view that the circuit court declaration was binding statewide as to non-parties: "we reject out of hand the

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[3] There is no question that a circuit court may issue an injunction, if appropriate, in service of a declaratory judgment. However, as discussed above, the circuit court explicitly declined to issue such an injunction here. *See Town of Blooming Grove v. City of Madison*, 275 Wis. 328, 336, 81 N.W.2d 713 (1957) ("Injunctive relief may be granted in aid of a declaratory judgment, where necessary or proper to make the judgment effective.") (citation omitted).

proposition that the circuit court's decision has the same effect as a published opinion of this court or the supreme court." (Kilpatrick Aff. ¶ 11, Ex. 7, p. 14 n.1.)

Accordingly, going into the circuit court's October 21, 2013, contempt hearing, this Court had already indicated that the Commissioner's obligations were, at a minimum, unclear, and that there was no mandate plainly restraining their actions as to non-parties. Given the explanations by this Court, and the lack of an injunction from the circuit court, by promulgating and following emergency rules pursuant to Wis. Stat. § 111.70(4)(d)3.b, the Commissioners were simply attempting to carry out ongoing statutory obligations to determine certification of non-party collective bargaining agents for represented school district employees. It was an abuse of discretion for the circuit court to sanction state officers for following through on what this Court had already observed was, by all appearances, permissible.

Moreover, a declaration is not an injunction. The former is a more mild form of relief; the latter may

more forcefully bind a party to act, or not act. *See, e.g.*, *Morrow v. Harwell*, 768 F.2d 619, 627 (5th Cir. 1985) ("There is no question but that the passive remedy of a declaratory judgment is far less intrusive into state functions than injunctive relief that affirmatively commands specific future behavior under the threat of the court's contempt powers."). Here, the circuit specifically declined to issue an injunction.

Also, declaratory judgment cannot form the basis for contempt. *See Burgess v. Ryan*, 996 F.2d 180, 184 (7th Cir. 1993) (recognizing that "declaratory judgments . . . are not enforced by contempt[.]"); *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (appellate court reversed finding of contempt based on a mere declaratory judgment). *See also Joint Sch. Dist. No. 1 v. Wisconsin Rapids Educ. Ass'n.*, 70 Wis. 2d 292, 324, 234 N.W.2d 289 (1975) ("In Wisconsin, a civil contempt occurs when the violation of an **injunctional** order tends to defeat, impair, impede or prejudice the rights or

remedies of the other party.") (emphasis added) (citation omitted).

Additionally, a declaratory judgment by a circuit court only settles legal obligations with respect to the parties. The Uniform Declaratory Judgments Act, Wis. Stat. § 806.04(2) and (11), confirms that a declaratory judgment is effective between *the parties*, and that non-parties' rights are not determined.

Further, the Commissioners simply did not violate the order in the first place, much less intentionally. The circuit court's declaration did not bind the Commissioners as to non-parties absent an injunction. A circuit court's declaratory judgment that a statute is unconstitutional is not a final adjudication of constitutionality, and treating a declaration as an injunction as to all parties would create that effect.

In *City of Milwaukee v. Wroten*, 160 Wis. 2d 207, 466 N.W.2d 861 (1991), the Wisconsin Supreme Court wrote: "Of course, questions of constitutionality . . . cannot finally be laid to rest until decided by **final appellate adjudication** . . . either by the court of

appeals by published opinion or by determination by the Wisconsin Supreme Court." *Id.* at 217 (emphasis added) (footnote omitted). Treating a circuit court's declaration as final as to all parties would elevate the decision to a published appellate decision. As this Court noted, it is well-established that circuit court decisions do not have that status.

B. The Non-Party Movants Were Not Entitled To A Contempt Order.

The contempt order was also flawed because it was premised on a motion brought by non-parties to enforce a declaration. Those non-parties did not have standing to pursue that motion because they were not "persons aggrieved" within the meaning of the contempt statute. Because they were not parties in privity with the plaintiffs, they were not entitled to relief within the original scope of the action. The circuit court lacked competency, pending the appeal, to bring the non-parties into the action and expand the scope of the case.

The Wisconsin Supreme Court has explained that "the stated and principal objective of a remedial sanction is to force the contemnor into compliance with a court order for the benefit of a private party—*the litigant.*" *Christensen v. Sullivan*, 2009 WI 87, ¶ 55, 320 Wis. 2d 76, 768 N.W.2d 798 (emphasis added). Similarly, the contempt statute allows a non-party to invoke the court's power only if it is a person "aggrieved." Wis. Stat. § 785.03(1)(a).

"A person is aggrieved by a judgment whenever it operates on his rights of property or bears directly on his interest." *Town of Greenfield v. Joint County Sch. Committee*, 271 Wis. 442, 447, 73 N.W.2d 580 (1955). To be aggrieved, a party must meet two criteria. First, he must assert more than the idea that he might benefit from the ruling had he been a party; his rights must be in privity with a party in the case. *See* Wis. Stat. § 785.03 (Comments—L.1979, C.257, §11); *see also Dalton v. Meister*, 84 Wis. 2d 303, 312, 267 N.W.2d 326 (1978) ("an injunction may bind nonparties who succeed in interest to property which

is subject to litigation"). Second, the contempt must impair the rights of a party, because the non-party's rights hinge on the party's rights: "a contempt *must in some way impair* or prejudice the *rights* or remedies *of the person in the original proceeding.*" *See* Wis. Stat. § 785.03 (Comments—L.1979, C.257, §11) (emphasis added).

Here, the non-parties are not in privity with one of the plaintiffs. Further, the plaintiffs themselves are not aggrieved; the Commission is not applying the law to them, meaning there is no grievance for a third party to invoke.

As this Court suggested in its March 12, 2013, Order, the appropriate avenue for non-parties to seek the benefit of the circuit court's declaration would be to bring their own action, and argue that preclusion applies. (Kilpatrick Aff. ¶ 11, Ex. 7 p. 14 n.1). They cannot circumvent the normal process of civil litigation by jumping into other cases and announcing that

defendants have failed to honor a declaratory ruling as to them.[4]

In issuing a contempt order for non-parties not in privity with the plaintiffs in the case, the circuit court expanded the scope of the September 12, 2012, final order. The circuit court lacked competency to issue such an order pending appeal. The circuit court's powers during the pendency of an appeal are specifically limited by Wis. Stat. § 808.075. None of those powers permit a circuit court to expand the reach of a previous order to include non-parties. A

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[4] Indeed, many of the non-party movants very likely would be unsuccessful in any subsequent suit in state court under principles of claim preclusion,. As explained in footnote 1, many of the movants here brought free speech and association, and equal protection, claims against these same state officials in federal court, and were completely unsuccessful. Under the doctrine of claim preclusion, or res judicata, "a final judgment is conclusive in all subsequent actions between the same parties . . . .as to all matters which were litigated or which might have been litigated in the former proceedings." *See N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723, 727 (1995). It would be an absurd result if these non-party movants can achieve the same result they sought in a case in which they lost simply by jumping into another party's lawsuit, post-judgment, through a contempt motion.

circuit court's power under Wis. Stat. § 808.07(2)(a)3. allows the court only to preserve the existing state of affairs, not to expand the scope of the case.

Under the first *Gudenschwager* factor, the Commissioners are very likely to prevail in this appeal.

IV. ABSENT A STAY, THERE WILL BE IRREPARABLE INJURY TO THE PUBLIC AND TO THE COMMISSIONERS.

Unless a stay of the contempt order is granted, the public and the Commissioners will suffer irreparable injury.

If a stay is not granted, the Commissioners, in their official capacities acting as the Wisconsin Employment Relations Commission, will be unable to conduct the annual certification elections for represented school district general employees by December 1, 2013, per the Legislature's directive in Wis. Stat. § 111.70(4)(d)3.b.

The Commission is prepared to conduct 401 separate school district employee certification elections involving a total of more than 60,000 voters all

beginning at noon on November 1, 2013, and all ending at noon on November 21, 2013. (Davis Aff., ¶ 3.) Each of the 401 elections required the Commission to obtain a separate proposed voter eligibility list from the affected school district employers, and to allow time for the affected collective bargaining agents to review the list and request changes to it. A voter list for each election has been electronically created by the Commission for use by the American Arbitration Association, the entity that manages the telephonic voting process.

If the elections are not held beginning on November 1, the Commission will be obligated to provide affected parties with 401 new notices providing the new election details. The Commission, school districts, and bargaining representatives will be obligated to compile new voter eligibility lists in each of the 401 elections to reflect changes in the composition of the workforce. The Commission states that such action must be completed by November 5 for the elections to take place at all this calendar year

within the statutory timeframe. If the elections are not completed by December 1, compliance with the statutory mandate will be impossible, and no election can be held under the statute.

The public will be harmed if it cannot be determined this year whether or not represented school district employees will continue to be represented by an exclusive agent for the purposes of negotiating contracts with local school district employers concerning total base wages. If there are no certified agents for collective bargaining units, the school district employers, not bound by the circuit court's orders, will very likely be confused as to whether collective bargaining can take place with a union claiming to be a certified agent from pre-Act 10 law. Essentially, the parties on one side of the bargaining table may claim the benefit of the circuit court's order, while the parties on the other side may assert they are bound to follow Act 10.

Moreover, school district employees in collective bargaining units across the state possess the statutory

right to decide whether or not to keep their current representative for collective bargaining purposes, choose a new representative, or whether to have a representative at all. If the elections cannot take place, represented school district employees will have lost their only opportunity to cast their ballots this year. The loss of an opportunity to choose, by majority vote of the unit, whether to have a collective bargaining agent and who it will be, is a separate but related substantial and irreparable public harm.

If the contempt order is not stayed **by November 4**, the annual certification elections for school district employees in collective bargaining units will not take place in 2013, as the Wisconsin Legislature has directed by law. It is in the public interest to have the laws followed and enforced.

V. NO SUBSTANTIAL HARM WILL COME TO OTHER INTERESTED PARTIES.

If the contempt order is stayed, no harm will come to the unions who have chosen to participate in the certification elections. As to the non-party

movants, one union will be decertified as the exclusive bargaining agent for represented employees because it failed to submit an election petition altogether, and the others may or may not participate in the elections, depending upon a decision of the Commission concerning their petitions that were filed untimely and/or without sufficient payment. (Kilpatrick Aff., ¶¶ 7 and 8, Ex. 3 and 4.)

Any harm to the non-party movants would flow, however, from their own decisions not to participate in the certification process. Further, any harm to these few entities is significantly outweighed by the harm that would come to the thousands of represented school district employees who will be unable to exercise their statutory right to cast ballots in the certification elections.

If the supreme court ultimately upholds the circuit court's September 12, 2012, final order and finds the statutes unconstitutional, there is no harm to those who have participated in the elections: the election results can simply be put aside. The costs of

preparing for the election have already been undertaken by the many unions that chose to participate. If the supreme court reverses the circuit court's September 14, 2012, final order and upholds the law, the certification process will have been completed and the parties can conduct bargaining as provided for under MERA.[5]

CONCLUSION

For the reasons stated, the Commissioners respectfully request a temporary stay, followed by a permanent stay, pending appeal of the circuit court's contempt order. The contempt order was clearly in error for multiple reasons, and it will cause irreparable harm if that flawed order were to remain in effect during the pendency of this appeal.

Dated this 25th day of October, 2013.

Respectfully submitted,

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[5] Despite emergency rules for these elections (and others) creating Chapters ERC 70, 71, and 80 of the Wisconsin Administrative Code being approved *in July 2013*, the non-party movants waited until September 24, 2013, to file their motion for contempt and remedial sanctions with the Circuit Court. Thus, the need for an *emergency* stay was not a creation of the state officers.

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