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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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June 3, 2011

BY HAND

Mr. A. John Voelker
Acting Clerk
Wisconsin Supreme Court
Post Office Box 1688
Madison, WI 53701-1688

Re: *State of Wisconsin, et al. v. Circuit Court of Dane County*
Case No. 2011AP765-W

Dear Mr. Voelker:

This letter shall serve as the petitioners' response to the five questions listed on the Court's June 2, 2011, Order.

1. With respect to petitioners State of Wisconsin and Secretary Huebsch, an appeal is not an available remedy as a matter of right because they are not parties to the action in the Circuit Court.[1] Moreover, there are no true adverse parties in the underlying action to file an appeal. Indeed, all of the defendants over whom the Circuit Court asserted jurisdiction, with the exception of Secretary La Follette, have filed responses to the Petition asserting that the Circuit

[1]This Court has, in limited circumstances, allowed for a non-party to an action to file an appeal when they are aggrieved by a judgment. *In re Fidelity Assur. Assoc. v. Banking Commission*, 247 Wis. 619, 625, 20 N.W.2d 638 (1945) (a "party is aggrieved by a judgment or decree whenever it operates on his rights of property or bears directly on his interest.") (quoting 2 Am. Jur. 945, sec. 152). The court of appeals has expanded this doctrine somewhat and allows for a slightly more liberal construction of standing. *See e.g., Koller v. Liberty Mutual Ins. Co.*, 190 Wis. 2d 263, 266, 526 N.W.2d 799 (1994). However, regardless of which doctrine applies, a non-party does not have the ability to appeal as a matter of right, and must, instead petition the court for that extraordinary remedy.

Court has jurisdiction and/or that the Circuit Court has the power to void the Act. Secretary La Follette is clearly aligned with the District Attorney, as he previously asked this Court to dismiss his motion for leave to appeal in Case No. 2011AP613-LV once he obtained independent counsel and, his sole reply to the Circuit Court's request for briefs on the issues of immunity and indispensible parties was a single sentence in which he declared he did not object to the District Attorney's Brief. Since all defendants that have appeared in the Circuit Court are aligned in interest with the District Attorney, there is no reason to believe that any of the respondents would appeal the Circuit Court's Order.

Senator Fitzgerald, Senator Ellis, Representative Fitzgerald and Representative Suder (the four original legislator defendants to the underlying action), have invoked legislative immunity and not appeared in the Circuit Court action. It is possible that any appeal they would be able to file (without being forced to waive their immunity) would be limited to issues of the Court's jurisdiction over them in their absence.[2] Moreover, as explained below the Circuit Court has not entered a final order with regard to these defendants, nor has that Court clearly delineated whether or not these defendants' legislative immunity extends, in the Circuit Court's view, to the lower court action. Thus, any appeal brought by them, on any issue, would be not be an appeal as of right under Wis. Stat. 808.03(1).

The Senate, Assembly and the Joint Committee of Conference are not proper parties to this case due to their lack of capacity to sue or be sued and they moved for dismissal. The Circuit Court neither heard nor ruled on this motion. The Joint Committee of Conference is not a "body politic" for purposes of service of process. *Watkins v. Milwaukee County Civil Serv. Comm'n*, 88 Wis. 2d 411, 276 N.W.2d 775 (1979) (holding that to fall under the definition of

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[2]There are no cases directly on point as to whether a party may appeal a denial of his or her right to legislative immunity, however, it follows that such an appeal—limited to that issue—must be permitted, else a denial would allow a circuit court to have the final say in the matter. Appeal rights on the issue of immunity have been allowed with respect to other forms of immunity. Direct appeals have been held permissible with respect to qualified immunity. *Arneson v. Jezwinski*, 225 Wis. 2d 371, 384, ¶¶ 30-33, 592 N.W.2d 606 (1999). The United States Supreme Court has ruled that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985). The *Mitchell* court implied that the merits should not, however, be addressed on that appeal: "[a]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Id.*, at 527-28. This Court, however, when considering the *Mitchell* Court's conclusion, has disagreed and stated that the "extant issue of qualified immunity does not deprive this court of jurisdiction to review the merits. Rather, this court in its law-making function can and should address the merits in such instances especially where, as here, the court of appeals decision is published and is not an accurate reflection of existing law." *Barnhill v. Board of Regents of the UW System*, 166 Wis. 2d 395, 416, 479 N.W.2d 917 (1992). Thus, the question is not fully resolved. Again, however, it need not be addressed by this Court with respect to this Petition—that Petition can and should be considered at this time.

"body politic," an entity must be able to perform statutorily defined duties). Furthermore, under the Legislature's rules, the Joint Committee ceased to exist when it adjourned on March 9, 2011. The District Attorney has not alleged that either the Senate or the Assembly violated the Open Meetings Law and they are not proper defendants in the underlying action.

An appeal of the Circuit Court's Decision may not be an effective remedy for several reasons. First, as was true in the case below there are no true adverse parties and there is no justiciable issue. In order for a justiciable claim to exist, there must be "a controversy in which a claim of right is asserted against one who has an interest in contesting it." *Hancock v. Regents of University of Wisconsin*, 61 Wis. 2d 484, 492, 213 N.W.2d 45 (1973). As reflected in their respective filings with this Court, none of the defendants who have appeared in the Circuit Court proceedings have an interest in appealing the Decision. Indeed, the limited Circuit Court proceedings revealed that none of the defendants that appeared have any interest or intention of contesting the District Attorney's allegations of an Open Meetings Law violation. Representative Barca is the only such defendant who was actually present at the meeting in question, and it was his verified complaint to the District Attorney that prompted the Circuit Court action. Next, assuming there was someone to file an appeal, an appeal would accomplish nothing but delay. The Court of Appeals has already demonstrated its belief that the issues presented by this case should be decided by this Court in the first instance. (*See* Certification by Court of Appeals, March 24, 2011). Thus, denying the Petition in favor of an appeal does nothing more than delay the inevitable. It would also exclude the petitioners from the case, thereby denying them any remedy. Finally, the Petition for Supervisory Writ presents two discrete, yet important, legal issues that have been fully briefed and may be decided by this Court on the papers already on file.

2. The Circuit Court's May 26, 2011 Decision and Judgment are not final judgments for purposes of appeal. Pursuant to Wis. Stat. § 808.03(1), an order or judgment is final for purposes of appeal if it "disposes of the entire matter in litigation as to one or more of the parties." *Id.* This Court has established a two prong test to determine if an order or judgment satisfies this requirement:

> (1) whether the document is final in the sense of substantive law in that it disposes of all of the claims brought in the litigation as to one or more of the parties; and (2) whether the document is final in the sense that it is the last document that the circuit court intended to issue in the litigation.

Harder v. Pfitzinger, 2004 WI 102, 274 Wis. 2d 324, 682 N.W.2d 398.

The Circuit Court's Decision and Judgment fails both prongs of this test. The Decision and Judgment have not disposed of "the claims brought in the litigation as to" anyone. As noted above, there are no actual adverse parties in this case. The District Attorney made no allegations that any of the defendants who actually appeared violated the Open Meetings Law. Indeed, defendant Barca initiated the underlying case by filing a Verified Complaint with the District

Attorney and defendant Miller was not present at the meeting that was allegedly held in violation of the Open Meetings Law. Likewise, Secretary La Follette is not a member of the Senate, Assembly or the Joint Committee on Conference and was only made a party to this case for the purposes of making a temporary remedy available. And, as noted above, the Senate, Assembly and the Committee are simply not proper parties in any court proceeding due to their lack of capacity to sue or be sued.

The only defendants who are alleged to have violated the Open Meetings Law are the four original, legislative defendants who have asserted their legislative immunity. There is no doubt that "all of the claims brought" against them have not been resolved. The Circuit Court's Judgment expressly acknowledges this stating: "The separate forfeiture claims against Senator Fitzgerald, Senator Ellis, Representative Fitzgerald and Representative Suder, are held in abeyance ..." Judgment, p. 18. Accordingly, the Circuit Court's Judgment is not final for purposes of appeal.

3. This Court's exercise of its original jurisdiction includes its appellate power to review the Decision of the Circuit Court even absent the filing of an appeal. As explained in the Petition and Petitioner's Reply, there is no doubt that the issues presented fall within the Court's superintending authority and original jurisdiction. Equally without doubt is the fact that this Court's superintending authority and original jurisdiction are not limited by the lack of a notice of appeal. As the Chief Justice recently articulated:

> A careful examination of Article VII, Section 3 and the case law shows the development of the court's views about superintending power, culminating in the 1977 constitutional amendment. The court has examined and re-examined the basis of the superintending power over the years and has defined and redefined the power. The court's conceptualization ends where it began: The court's superintending power is as broad as necessary to meet the needs of changing circumstances, and that power is to be exercised judiciously. The question of this court's exercising its superintending authority over the courts and litigation "is one of policy, not power."

State v. Jerrell C.J., 2005 WI 105, ¶ 70, 283 Wis. 2d 145, 699 N.W.2d 110 (Abrahamson, C.J., concurrence) (quoting *State ex rel. Hass v. Wis. Court of Appeals*, 2001 WI 128, ¶ 12, 248 Wis. 2d 634, 636 N.W.2d 707)("The question of whether the court will exercise its superintending authority is one of policy, not power. ... The inherent power of this court is shaped, not by prior usage, but by the continuing necessity that this court carry out its function as a supreme court.")

Likewise, there can be no doubt that this Court's exercise of original jurisdiction includes the appellate power to review the Circuit Court's Judgment regardless of the filing of a notice of appeal. In *Petition of Heil*, 230 Wis. 428, 284 N.W.2d 42 (1939), this Court explained this Court's ability to deal with any related proceedings in the lower courts:

> when this court in the exercise of its judgment and discretion grants an application to commence an original action in this court upon the ground that the questions presented are of such importance as under the circumstances to call for a speedy and authoritative determination by this court in the first instance, this court then takes exclusive jurisdiction of the action, and that in aid of this jurisdiction it may exclude, set at naught, and suspend any action or proceeding in any circuit court involving the same subject matter.

Id. at 446. Additionally, once this Court exercises its original jurisdiction, "it excludes the jurisdiction of every inferior tribunal to deal with the same subject matter ...". *Id.* at 445.

If the exercise of original jurisdiction gives this Court the power to "set at naught" any related proceedings below, it must follow that the exercise of original jurisdiction allows this Court to engage in appellate review. Indeed, any argument to the contrary is antithetical to one of the fundamental basis for the use of original jurisdiction: that the matter is *publici juris* and the remedies available in the lower courts are inadequate. *Id.* at 440.

Moreover, if this Court concludes that an appellate review of the Circuit Court's Decision and Judgment are necessary as part of an exercise of its original jurisdiction this case, it may appoint or invite the Attorney General to fill the currently vacant role of appellant. *Wagner v. Milwaukee County Election Comm'n*, 2003 WI 103, 4-5, 263 Wis. 2d 709, 666 N.W.2d 816 (noting that the Attorney General accepted the Court's invitation to participate in the action when there was no adverse party). Should this Court take the review as an original action and exercise appellate jurisdiction given immunity concerns and the lack of adversity amount other parties, it could likewise invite the participation of the State of Wisconsin or the Attorney General in order to more fully bring all matters before the Court. However, such request should not delay the proceedings.

4. Whether the Findings of Fact are erroneous is irrelevant to the issues raised in the Petition because the issues the Petitioners have raised are purely legal issues that bear directly on the scope of the Circuit Court's jurisdictional power. None of the facts[3] found by the Circuit Court will impact this Court's decision of these issues. Accordingly, a review of these findings of facts is simply not necessary. Moreover, additional fact-finding is not necessary and any further delay associated with additional fact-finding would compound immeasurably the irreparable harm that the Circuit Court's actions have done to the citizens of this State. This Court should avoid getting sidetracked by delving into the minutiae of the Circuit Court's factual findings.

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[3]There is some question as to whether the Circuit Court's Findings of Fact are, indeed, facts and are not more properly considered Conclusions of Law. The petitioners are not in a position to contest whether these Findings are true facts, however, that has no bearing on the underlying Petition before this Court.

Further, these found facts relate to the defendants in the Circuit Court case and not the petitioners here before this Court. Even if all of these "facts" are found to be true at a later point in time when the adverse parties are properly before a court, the petitioners are still entitled to the relief they seek in the Petition for Supervisory Writ—and entitled to that relief now. At present, these purported "facts" should be accorded no value - they were "found" not after a fully litigated hearing, but only after the presentation of evidence and testimony by one side. (Transcript, April 1, 2011, at pages 12-14 (APP.-531-33)). The hearing was stayed by the Circuit Court and adjourned until the true adverse parties were properly before the Circuit Court. (*Id.*, 196 (APP.-715). The Circuit Court did not wait to finish that hearing or to allow testimony or evidence by the defendants, but rather issued its Decision *sua sponte*. These procedural failures are pointed out not for the purpose of reviewing the accuracy of the Circuit Court's findings but only to highlight the need for this Court to exercise its superintending authority over the Circuit Court and to do so immediately.

5. Petitioners are aware of no facts beyond those found by the Circuit Court that would be material to the issues in the Certification Case No. 2011AP613-LV or the Petition for Supervisory Writ Case No. 2011AP765-W, that are in dispute. The only facts that are relevant to the issues before this Court are those alleged in the Petition for Leave to Appeal, the Petition for Supervisory Writ and the Reply in Support of the Petition for Supervisory Writ or those of which the Court could take judicial notice, e.g., that a certain Committee existed for a certain time period; that there are rules of the Legislature; and that the Legislative Reference Bureau took certain steps to publish Act 10. There are no facts in those pleadings which are inconsistent with the Findings of Fact.

Significantly, there are no disputes of fact which must be resolved before this Court can act on the Petition for Supervisory Writ. The issues presented are all pure issues of law and they do not require additional facts or additional fact finding. Petitioners represent that for purposes of deciding the Petition, this Court can accept all facts found by the Circuit Court as true and decide the two legal issues presented by Petitioners: 1. May a court invalidate a legislative enactment on grounds of an alleged violation of the Open Meetings Law? 2. May a court enjoin a legislative act from becoming law?

Those two issues are and remain properly before this Court and are subject to consideration at the hearing on June 6, 2011.

Sincerely,

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