

STATE OF WISCONSIN      CIRCUIT COURT      DANE COUNTY  
BRANCH 6

---

ANDREW WAITY, SARA BRINGMAN,  
MICHAEL JONES and JUDY FERWERDA,

Plaintiffs,  
v.

Case No. 21-CV-589  
Case Code: 30952

ROBIN VOS, in his official capacity,  
and DEVIN LEMAHIEU, in his official capacity,

Defendants.

---

PLAINTIFFS’ BRIEF IN OPPOSITION TO DEFENDANTS’ MOTION FOR  
SUMMARY JUDGMENT

---

The Plaintiffs, Wisconsin taxpayers Andrew Waity, Sara Bringman, Michael Jones, and Judy Ferwerda, (hereinafter “the Plaintiffs”) by their attorneys, Pines Bach LLP, oppose Defendants Robin Vos and Devin LeMahieu’s Motion for Summary Judgment.<sup>1</sup>

**I. Introduction.**

The Plaintiffs claim that when Defendants Robin Vos (“Vos”) and Devin LeMahieu (“LeMahieu”), purporting to act in their official capacities, entered into contracts for legal services to be provided to the Wisconsin Assembly and Wisconsin

---

<sup>1</sup> The court, with agreement from the Defendants, converted the Defendants’ Motion to Dismiss (Dkt. 26), Brief in Opposition to Plaintiffs’ Motion for Temporary Restraining Order and Temporary Injunction (Dkt. 31), and documents supporting that opposition (Dkt. 29 and 30), into a motion for summary judgment with supporting brief and documents. Subsequently, by stipulation and order, the Affidavit of Jenny Toftness (Dkt. 29) was withdrawn and all references to in in Defendants’ brief (Dkt. 31) were also withdrawn. (Dkt. 38 & 40)

Senate, respectively, with Consovoy McCarthy PLLC (in association with Adam Mortara) (Ex. A to Plaintiffs' complaint) and Bell Giftos St. John LLC (Ex. B to Plaintiffs' complaint) ("the contracts"), they had no legal authority to do so. Consequently, Plaintiffs have asked the court for a declaratory judgment that the contracts are void *ab initio*.

In support of their motion to dismiss, which the court converted to a motion for summary judgment, Vos and LeMahieu argued that the Wisconsin Constitution provides authority to the Legislature to hire private counsel, that the statute providing it with a sum sufficient budget appropriation does so as well, that Vos and LeMahieu acted under Wis. Stat. § 16.74, and that Wis. Stat. § 13.124 does not mean what it precisely says. Each of those arguments misses the mark.

Plaintiffs do not claim that the Legislature lacks authority under all circumstances to engage attorneys to provide services to it. Nor do Plaintiffs claim that it is improper for the Legislature to use its "sum sufficient" appropriation to pay for legally contracted services. Plaintiffs simply contend that Vos and LeMahieu lacked the statutory authority to enter into the challenged contracts and consequently, the payments being made to the law firms are not legally authorized.

The Plaintiffs will first address and dispose of Defendants' constitutional and "sum sufficient appropriation" arguments. They will then explain why Vos and LeMahieu did not have authority either under Wis. Stat. § 16.74 or Wis. Stat. § 13.124 to enter into the contracts on behalf of the Assembly and Senate, respectively, and pay the lawyers according to those contracts. Finally, the Plaintiffs will dispose of Vos and

LeMahieu's request that the court re-write Wis. Stat. § 13.124 so that it can be read to allow Vos and LeMahieu's lawless behavior.

## II. The standards for summary judgment.

The standards and methodology for addressing a summary judgment motion are well-known and accepted:

"The first step of that methodology requires the court to examine the pleadings to determine whether a claim for relief has been stated." *Green Spring Farms*, 136 Wis. 2d at 315, 401 N.W.2d 816. "In testing the sufficiency of a complaint, we take all facts pleaded by plaintiff[ ] and all inferences which can reasonably be derived from those facts as true." *Id.* at 317, 401 N.W.2d 816. And we liberally construe pleadings "with a view toward substantial justice to the parties." *Id.* (citing Wis. Stat. § 802.02(6) ). "The complaint should be dismissed as legally insufficient only if it is quite clear that under no circumstances can plaintiff[ ] recover." *Green Spring Farms*, 136 Wis. 2d at 317, 401 N.W.2d 816.

Under the second step of this methodology, "[i]f a claim for relief has been stated, the inquiry then shifts to whether any factual issues exist." *Id.* at 315, 401 N.W.2d 816. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material \*448 fact and that the moving party is entitled to judgment as a matter of law." Wis. Stat. § 802.08(2); *see also Columbia Propane, L.P. v. Wis. Gas Co.*, 2003 WI 38, ¶ 11, 261 Wis. 2d 70, 661 N.W.2d 776 (citing and applying Wis. Stat. § 802.08(2) ).

*Springer v. Nohl Elec. Prod. Corp.*, 2018 WI 48, ¶¶ 10-11, 381 Wis. 2d 438, 447-48, 912 N.W.2d 1, 5-6.

This case is ripe for summary judgment.

## III. The undisputed facts.

- The Plaintiffs are citizens of and taxpayers to the State of Wisconsin. (Affidavits of Andrew Waity, Sara Bringman, Michael Jones and Judy Ferwerda)

- As of December 23, 2020, Robin Vos was the Speaker of the Wisconsin Assembly for the 2019-2020 term and remained the Speaker starting in the 2021-2022 term which began on January 4, 2021.<sup>2</sup>
- As of December 23, 2020, Devin LeMahieu was a Senator in the Wisconsin Senate but was not the Majority Leader of the Wisconsin Senate for the 2019-2020 term.<sup>3</sup> (Dkt. 3, p. 20)
- Devin LeMahieu became the Majority Leader of the Wisconsin Senate for the 2021-2022 on January 4, 2021.<sup>4</sup>
- On December 23, 2020, Robin Vos, in his official capacity as the Speaker of the Assembly on behalf of the Wisconsin Assembly, and Devin LeMahieu, as the Wisconsin Senate Majority Leader-elect, contracted with the law firm of Consovoy McCarthy PLLC (in association with Adam Mortara) (hereinafter “the Consovoy contract”) for pre-litigation consulting, strategic litigation direction, and legal representation in future possible litigation related to decennial redistricting. (Dkt. 3 (Complaint), Ex. A) The specific nature and scope of representation described in the Consovoy contract is, in relevant part, as follows:

This Engagement Agreement sets forth the terms under which Consovoy McCarthy PLLC (“CM”) in association with Adam Mortara (“Mortara”) (collectively, “CM&M”) will represent the Wisconsin State Assembly and Wisconsin State Senate (the “Legislature” or “you”) in possible litigation related to decennial redistricting (the “Litigation”). CM&M’s engagement hereunder is limited to representing the Legislature in the Litigation through trial and, if requested, on appeal.

The parties currently do not know whether or in what venue the Litigation will occur.

---

<sup>2</sup> <https://docs.legis.wisconsin.gov/2021/related/journals/assembly/20210104>. Last accessed April 6, 2021.

<sup>3</sup> <https://docs.legis.wisconsin.gov/2021/related/journals/senate/20210104>; <https://legis.wisconsin.gov/senate/09/LeMahieu/media/1171/lemahieu-elected-senate-majority-leader-2020115.pdf>. Last accessed April 6, 2021.

<sup>4</sup> <https://docs.legis.wisconsin.gov/2021/related/journals/senate/20210104>; <https://legis.wisconsin.gov/senate/09/LeMahieu/media/1171/lemahieu-elected-senate-majority-leader-2020115.pdf>. Last accessed April 6, 2021.

### Scope of Representation

The Legislature is also retaining Bell Giftos St. John LLC (“BGSJ”) to represent it in the Litigation. CM&M is being retained to work alongside BGSJ. Mortara will provide overall strategic litigation direction, take key fact and expert discovery, and serve as lead trial counsel at trial, while BGSJ and CM will provide additional day-to-day litigation resources.

Mortara hereby commits that the Litigation will take precedence over other clients as to trial scheduling matters, and that in the event of an irresolvable trial date conflict between you and another client, he will be lead trial counsel in this matter.

(Dkt. 3, Ex. A, p. 1)

- When Vos and LeMahieu executed the Consovoy contract, there was no action pending in any court in Wisconsin or federal court about the State of Wisconsin’s decennial redistricting. There still is no such “action.” (Second Affidavit of Beauregard William Patterson, (“Patterson Aff.”) ¶¶ 4-7)
- Vos and LeMahieu knew that no such action existed because the Consovoy contract states that “[t]he parties currently do not know whether... Litigation will occur.” Nevertheless, the Consovoy firm has been paid public funds in the amount of \$30,000 per month “[f]or pre-litigation consulting, beginning January 1, 2021.” (Dkt. 3, Ex. A, p. 1)
- On January 2, 2021, Vos and LeMahieu entered into a contract with Bell Giftos St. John LLC (“BGSJ”) on behalf of the Wisconsin State Assembly and Senate respectively. (“the BGSJ contract”) (Dkt. 3, Ex. B)
- In addition to providing representation in possible redistricting litigation on an hourly basis, BGSJ also agreed to provide other legal services and confidential legal advice to Vos and LeMahieu on an hourly basis regarding redistricting, stating:

The purpose of this letter is to confirm the scope and terms of representation.

**Identity of the Clients.** Our clients in this matter are the Wisconsin State Senate, by and through Senator Devin LaMahieu [sic], and the Wisconsin State Assembly, by and through Representative Robin Vos. It is our understanding that each of you is authorized to retain

counsel on behalf of your respective legislative houses.

Unless and until the Wisconsin State Senate and Wisconsin State Assembly designate otherwise, we will take direction on this matter through those organizations' duly authorized agents: Senator LeMahieu as it relates to the Wisconsin State Senate; Representative Vos as it relates to the Wisconsin State Assembly.

**Scope of Representation.** Bell Giftos St. John LLC agrees to provide legal advice to, represent, and appear for and defend the Wisconsin State Senate and Wisconsin State Assembly on any and all matters relating to redistricting during the decennial period beginning on January 1, 2021. Services within the scope include all services in furtherance of this attorney-client relationship relating to redistricting. Such services include, for example, providing legal advice to the client (through its members or staff as designated by Senator LeMahieu and Representative Vos) regarding constitutional and statutory requirements and principles relating to redistricting. It also includes appearing for clients in judicial or proceedings relating to redistricting, should such an action be brought, or administrative actions relating to redistricting, such as the rule petition currently pending before the Wisconsin Supreme Court. It also includes providing legal advice about the validity of any draft redistricting legislation if enacted. It does not include, however, the drawing of redistricting maps.

(Dkt. 3, Ex. B, pp. 1-2)

- When Vos and LeMahieu executed the BGSJ contract, there was no action pending in any court in Wisconsin or in any federal court related to the State of Wisconsin's decennial redistricting and Vos and LeMahieu knew that because the BGSJ contract states that litigation services will be provided "in judicial or proceedings relating to redistricting, should such an action be brought." (Dkt. 3, Ex. B, pp. 1-2)
- The Assembly Policy Manual for the 2021-2022 legislative session<sup>5</sup> makes no citation to Wis. Stat. § 16.74. However, its "Attorney Policy" states:

If charges of any kind are filed, (or expenses incurred in contemplation thereof), or a civil or criminal action is brought against any Representative,

---

<sup>5</sup> Available at <https://legis.wisconsin.gov/lhro/media/1144/combined-policy-manual-web-version-1-6-21.pdf>. Last accessed April 6, 2021.

Assembly officer or employee, because of such Representative's, officer's or employee's position or for acts, actions or conduct related to and within the scope of legislative duties and responsibilities; and such charges or such actions are discontinued or dismissed, or such matter is determined favorably to such Representative, officer or employee, the Committee on Assembly Organization may (by a majority vote of the membership) on behalf of the Assembly and the State, authorize payment of reasonable expenses and costs, including attorney's fees, of defending against such charges or actions when such charges or actions are not defended by the Wisconsin Department of Justice. (A Wisconsin State Assembly Legal Fees Payment Agreement must be completed and on file with the Assembly Chief Clerk).

- When Vos entered into the Consovoy contract on behalf of the Assembly, the Assembly Committee on Organization had not authorized him to do so pursuant to Wis. Stat. §16.74(2). (Dkt. 30, pp. 22, 151 (LeRoy Aff., Exs. 6, 25); Dkt. 3, pp. 19-23)<sup>6</sup>
- When Vos entered into the Bell Giftos contract, the Assembly Committee on Organization had not authorized him to do so pursuant to Wis. Stat. §16.74(2). (Dkt. 30, pp. 22, 151 (LeRoy Aff., Exs. 6, 25); Dkt. 3, pp. 19-23)<sup>7</sup>
- When LeMahieu entered into the Consovoy contract, the Senate Committee on Organization had not authorized him to do so pursuant to Wis. Stat. §16.74(2). (Dkt. 30, pp. 20, 121 (LeRoy Aff., Exs. 5, 24); Dkt. 3, p. 20)
- The Wisconsin Assembly and Wisconsin Senate were billed and have paid \$30,000 per month to Consovoy McCarthy PLLP (in association with Adam Mortara) pursuant to the terms of the Consovoy contract and have also made payments under the BGSJ contract. (Stipulations, Dkt. 42 and 43)
- The Secretary of the Wisconsin Department of Administration has not received any bills submitted for payment authorization and audit under the Consovoy contract or the BGSJ contract pursuant to Wis. Stat. §16.74(4). (Affidavit of Counsel, ¶2, Ex. 2)<sup>8</sup>

---

<sup>6</sup> Also see <https://legis.wisconsin.gov/lhro/media/1144/combined-policy-manual-web-version-1-6-21.pdf>. Last accessed April 6, 2021.

<sup>7</sup> Also see <https://legis.wisconsin.gov/lhro/media/1144/combined-policy-manual-web-version-1-6-21.pdf>. Last accessed April 6, 2021.

<sup>8</sup> Ex. 2 is admissible under Wis. Stat. § 908.03(8)

#### IV. Argument.

##### A. **The Wisconsin Constitution does not independently authorize individuals to enter into contracts for legal services to the Wisconsin Assembly and Senate.**

Defendants' principal argument in opposition to the Plaintiffs' request for a judgment declaring that the Consovoy contract and BGSJ contract are unauthorized and void *ab initio* is that these contracts are perfectly legal because the Legislature has "constitutional authority to enter into these contracts . . . regardless of any statutory authority." (Br.<sup>9</sup> at 16 (Dkt. 31 at 18))

The Defendants are flat out wrong. The Constitution does not give the Speaker of the Assembly or the Majority Leader of the Senate any authority to enter into the contracts for services on behalf of their respective houses.

Whether the Constitution provides that the Legislature *may* empower individuals, acting in their official capacities, to enter into contracts on behalf of the legislative bodies, like those contracts at issue here, is neither in dispute nor germane to this case. The Legislature may constitutionally empower an individual to do so and has in fact empowered individuals to do so in the past. The Plaintiffs have never claimed otherwise.

---

<sup>9</sup> Formally, "Defendants' Brief in Opposition to Plaintiffs' Motion for a Temporary Restraining Order/Temporary Injunction," (Dkt. 31), hereinafter "Br."



The problem here is that Vos and LeMahieu did not follow the very statutes that the Legislature has enacted governing how and when individuals, in their official capacities, may engage outside legal counsel on behalf of legislative bodies. Instead they claim that the Constitution *by itself* empowers them to enter into such contracts on behalf of the Assembly and Senate.<sup>10</sup> Yet the authorities Defendants cite do not support their claim.

The Defendants cite at length authorities that stand for nothing more than the uncontroversial proposition that the Legislature has the constitutional power to make law. (*See Br.* at 8-13 (Dkt. 31 at 10-15)) However, they gravely err when they argue that “[a]ttendant to this express grant of ‘legislative power,’ the Constitution” silently grants individuals like Vos and LeMahieu, in their official capacities, on behalf of the Legislature, the power to do *anything*—including activities outside the legislative process—that the Legislature, acting through them, “deems necessary for carrying out its core law-making function.”

None of Defendants’ cited cases even remotely contemplate the idea that the core legislative power includes legislative leaders (or leaders-elect) hiring counsel for the Assembly and Senate for redistricting purposes, much less that they can do so without enabling legislation or, as here, in the face of legislation that strictly confines the parameters for and process of hiring outside counsel, and payment of same. In fact, the cases that Defendants cite reinforce that hiring and paying outside counsel can only be

---

<sup>10</sup> That this is their principal argument impliedly acknowledges that statutory authority for the contracts does not exist.

exercised *by following the statutes that the legislature has enacted which provide the authority and mechanisms to do so.*

1. **Vos and LeMahieu must have statutory authority to enter into contracts like the Consovoy and BGSJ contracts, and such contracts are subject to judicial scrutiny because they were not undertaken pursuant to rules of legislative proceedings.**

Contrary to Defendants' argument, the cases they cite make clear that legislative "core powers" and judicial deference thereto is limited to the actual process of enacting law, not behavior like two individuals, purporting to act in their official capacities, entering into contracts for services to be provided to the Assembly and Senate: "Courts are reluctant to inquire into whether the legislature has complied with legislatively prescribed formalities *in enacting a statute.*" *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 364–66, 338 N.W.2d 684 (1983) (emphasis added). "*The process by which laws are enacted*, however, falls beyond the powers of judicial review. Specifically, the judiciary lacks any jurisdiction to enjoin *the legislative process.*" *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶ 36, 387 Wis. 2d 511, 537–38, 929 N.W.2d 209 (emphasis added). (Compare Br. at 10-11 (Dkt. 31 at 12-13))

The Wisconsin Supreme Court has been explicit about the constitutional source and limitations of this deference to legislative process:

Article IV, Section 8 of the Wisconsin Constitution states in pertinent part that "[e]ach house may determine the rules of its own proceedings." *Rules of proceeding have been defined as those rules having "to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members."* *Custodian of Records for the LTSB v. State*, 2004 WI 65, ¶ 30, 272 Wis.2d 208, 680 N.W.2d 792. We have interpreted Article IV, Section 8 to mean that the legislature's compliance with rules of proceeding is exclusively within the province of the

legislature, because “a legislative failure to follow [its own] procedural rules is equivalent to an ad hoc repeal of such rules, which the legislature is free to do at any time.” *Id.*, ¶ 28. Accordingly, courts will not intermeddle in purely internal legislative proceedings, even when the proceedings at issue are contained in a statute. *State ex rel. La Follette v. Stitt*, 114 Wis.2d 358, 364, 338 N.W.2d 684 (1983).

*Milwaukee J. Sentinel v. Wisconsin Dep't of Admin.*, 2009 WI 79, ¶ 18, 319 Wis. 2d 439, 456, 768 N.W.2d 700 (emphasis added).

Here, neither the contracts at issue nor the statutes that Defendants alternately put forth to justify them are “rules having to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members.” That is obvious from the *LTSB* case.

In *Custodian of Records for the LTSB v. State*, 2004 WI 65, 272 Wis. 2d 208, 680 N.W.2d 792, the Wisconsin Supreme Court evaluated whether Wis. Stat. § 13.96 constituted a “rule of proceeding.” That statute creates and governs the legislative service agency known as the “Legislative Technology Services Bureau” (LTSB), which is chiefly tasked with “[p]rovid[ing] and coordinat[ing] information technology support and services to the legislative branch.” Wis. Stat. § 13.96. Doubtlessly, the Legislature considers the creation and employment of the LTSB to be the kind of activities that Defendants refer to, when describing the retention of outside counsel for redistricting, as “an affirmatively beneficial legislative practice,” enabling the Legislature “to more efficiently exercise its core legislative power.” (Br. at 14-15 (Dkt. 31 at 16-17))

However, our Supreme Court made it clear that such activities do not meet the standard for judicial deference. It held that Wis. Stat. § 13.96 is not a “rule of

proceeding” left to the Legislature’s own discretion, because the LTSB “has nothing to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members. It *simply provides for assistance*” with data and communications services. *Custodian of Records for the LTSB*, 2004 WI 65, ¶ 30 (emphasis added).<sup>11</sup>

The *LTSB* case articulates a doctrine on legislative rules of proceeding and shows that it is of no consequence that a resource or activity is provided to the Legislature *in the aid of* the legislative process: If a resource or activity is not part of the process of making law itself, then it is not part of any “core” constitutional legislative function.

This case is *not* about the “process by which laws are enacted.” *League of Women Voters*, 2019 WI 75, ¶ 36. Rather, it is about the validity of two contracts for legal services. The review of the validity of a contract is squarely in the judicial branch’s wheelhouse, not the Legislature’s.

**2. There is no other legal support for constitutional authority for the contracts.**

Defendants not only ignore the clear doctrine on legislative rules of proceeding, but also distort other case law to imply a constitutional power of individual legislative leaders (and leaders-elect) to do anything they please if it is tangentially related to the

---

<sup>11</sup> Ironically, and lest Defendants argue that redistricting is somehow of a higher order of benefit than the LTSB’s functions so as to exempt it from the Court’s holding, it must be observed some of the LTSB’s statutory duties are indispensable to the redistricting process. See §§ 13.96(1)(b), (c).

legislative process. A closer examination of Defendants' other cited authorities does not abide that implication.

For example, Defendants rely heavily on the *Minneapolis* case for this purported authority for individual legislators to enlist any activity they deem necessary for the "efficient exercise" of legislative powers, including factual and legal research.

*Minneapolis, St. P. & S. S. M. Ry. Co. v. R.R. Comm'n of Wis.*, 136 Wis. 146, 116 N.W. 905 (1908). (See Br. at 11-18 (Dkt. 31 at 13-20)) Yet the Court in that case said nothing at all about individual legislators', or even the Legislature's, powers outside the legislative process. Rather, it held that *through a legislative enactment*, the Legislature can make certain policies conditional, or delegate limited decision-making powers to other regulatory bodies. See *Minneapolis*, 116 N.W. 910-911.

Similarly, the specific factfinding activities that Vos and LeMahieu cite from the *Mayo* case are simply the consideration of various sources of evidence that the Legislature was presented as part of its *regular legislative process* and as actually reported *in the resulting* legislation itself. *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 15, 383 Wis. 2d 1, 914 N.W.2d 678. (Compare Br. at 10-12 (Dkt. 31 at 12-14)) They bear no relationship to the facts or legal issues of this case.

And the Court in *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 576 N.W.2d 245 (1998) most certainly did *not*, as Defendants suggest, hold that the Legislature (or individual legislators) can undertake any act it (or they) deem(s) the "best method" of developing policy proposals. (See Br. at 12 (Dkt. 31 at 14)) Rather, it held that the Legislature, not

the judiciary, can enact *by legislation* what it views as the “best method” of taxation. *Flynn*, 216 Wis. 2d at 540.

These cases only reinforce Plaintiffs’ position here: that two legislators simply have no legal authority to hire lawyers for the Assembly and Senate unless they follow the statutory path that the Legislature previously laid out in legislation. Despite that, without any actual constitutional authority to sign the contracts, Defendants next seek support from “historical practices” as “extrinsic sources” of the Constitution’s grant of power. (Br. at 12-15 (Dkt. 31 at 14-17)) But the Defendants ignore their own proffered case law on the subject and offer no evidence that changes the legal analysis.

First, they ignore that allowable “extrinsic sources” are the

historical analysis of the constitutional debates relative to the constitutional provision under review; the prevailing practices in 1848 when the provision was adopted; and the earliest legislative interpretations of the provision as manifested in the first laws passed that bear on the provision.

*State v. Williams*, 2012 WI 59, ¶ 15, 341 Wis. 2d 191, 200, 814 N.W.2d 460 (internal quotation omitted).

Because Vos and LeMahieu’s vaguely purported source of authority is the Constitution’s original Art. IV, § 1, the debates, prevailing practices, and “first laws” germane to the issue would be those from around the time of the Constitution’s original adoption or “from time immemorial.” *State v. Schwind*, 2019 WI 48, ¶ 13, 386 Wis. 2d 526, 926 N.W.2d 742. Further, contrary to Defendants’ repeated argument that this type of evidence is controlling when not contrary to existing judicial precedent (Br. at 12, 16 (Dkt. 31 at 14, 18)), such sources may only be considered “controlling” when, among

other prerequisites, the interpretation is shown “by the general course of *legislation* covering a long period of time.” *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 111 N.W. 712, 717 (1907).

Nothing Defendants offer in the way of evidence passes muster under those standards. (*See* Br. at 14-15 (Dkt. 31 at 16-17)) None of it consists of legislation, which not only is independently fatal to the consideration of any of it as a relevant extrinsic source, but that lack also underscores the complete absence of any statutory authority for their entering into the Consovoy and BGSJ contracts.

Moreover, none of Defendants’ “evidence” is even remotely contemporaneous enough with the adoption of the Constitution to indicate the framers’ intentions or merit consideration under *Williams*. To wit, while decennial redistricting predates Wisconsin itself, Defendants’ provided evidence on the matter is all less than 40 years old – most of it substantially so. It should not be considered by the court.

Even if Defendants’ evidence fell within the necessary time frame, the substance of that evidence still fails to support their argument of “historical practices” providing “extrinsic sources” of the Constitution’s grant of power to these individuals to enter into contracts to provide legal services to the Assembly and Senate. For example, most of the historical instances of the Legislature receiving the services of outside counsel, including *all* of those prior to 2000, were in conjunction with litigation actions. (*See* Dkt. 30, pp. 9, 27, 72-73, 89-90 (LeRoy Aff., Exs. 1<sup>12</sup>, 8, 17, 23))

---

<sup>12</sup> Plaintiffs object to this exhibit as barred as hearsay. However, should the court overrule this objection, the Court should consider that, even in the earliest instance of redistricting-related

By contrast, Plaintiffs generally acknowledge that the Legislature, even at times through delegated authority to individual members, can retain outside counsel in connection with existing litigation. Plaintiffs brought this case specifically because the Consovoy and BGSJ contracts specifically do *not* involve existing litigation actions. The Defendants' mere assertion that "the Senate has [previously] used the services of experts in this field to assist in the enactment of a constitutional redistricting plan for legislative and congressional districts" (Br., p. 14, citing Dkt. 30, pp. 11-12 (LeRoy Aff., Ex. 2)) says nothing about who such previous "experts" were or whether – let alone *how* – they were retained. Finally, none of Defendants' evidence says anything about what authority – constitutional, statutory, or otherwise – Vos and LeMahieu claimed to be acting under in retaining outside counsel to provide services to the Assembly and Senate.

If the Legislature's ability to take any action that it sees fit in support of its core duties was self-executing, particularly, as Vos and LeMahieu seem to argue here, empowering individual legislators to bind the Legislature to contracts for services to be paid for from the public fisc, there would be no need for huge swaths of Chapter 13 of the statutes, not to mention significant elements of Wis. Stat. §§ 16.74 and 20.765. For example, there are statutory provisions for: legislators' mileage allowance (§ 13.08); legislators' salary, benefits, and expenses (§§ 13.121 and 13.123); legislative employees (§ 13.20); expenses for legislator attendance with the national conference of state

---

outside counsel retention Defendants cite, Defendants' own evidence reflects a perspective within the Legislature that such retention of outside counsel was not lawful.



legislatures (§ 13.57); the legislative service agencies (§§ 13.81-13.96); and of course legal representation (§§ 13.124 and 13.365) – all of which would be surplusage under Defendants’ vision. Such an interpretation is impermissible where, as here, it can be avoided. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110.

Further, at its base, Defendants’ argument amounts to the idea that the Legislature’s core powers – incapable of being checked by the other branches of government – include *any act* that the Legislature or its leadership (-elect) deems helpful to the Legislature’s purposes. Such an absurd proposition does not uphold, but rather destroys, the separation of powers principles that Defendants trumpet. “Absent separation, those who make the laws ‘may exempt themselves from obedience,’ or they might ‘suit the law, both in its making and execution, to their own private advantage.’” *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 5, 376 Wis. 2d 147, 153–54, 897 N.W.2d 384 (citing John Locke, *The Second Treatise of Civil Government* § 143 (1764)); see also *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982) (“The Wisconsin constitution creates three separate co-ordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution.”). Their position is impermissible for these reasons as well. *Id.*; *Kalal*, 2004 WI 58 at ¶ 46.

Finally, even if Vos and LeMahieu could be authorized by the Constitution itself, in the absence of legislation to the contrary, to enter into the Consovoy and BGSJ contracts, they would still be void *ab initio*. As Plaintiffs explain in Section D. below,

there *is* specific legislation to the contrary, and Vos and LeMahieu violated it. The Legislature enacted legislation governing retention of outside counsel for the Assembly and Senate through delegated authority to individual legislative leaders. Because that statute is, as explained *supra*, not a rule of legislative proceeding, the court has a duty to hold Defendants to it and declare the subject contracts void.

**B. No statutory provisions authorize Vos and LeMahieu to sign the Consovoy and BGSJ contracts.**

As an alternative to Vos and LeMahieu's argument that they were independently authorized by the Wisconsin Constitution to sign the Consovoy and BGSJ contracts for services to the Assembly and Senate, they argue that they are authorized to sign these contracts by each of three statutes: Wis. Stat. §§ 20.765, 16.74, and 13.124. (Br. at 16 (Dkt. 31 at 18)) They are wrong.

The law and record make clear that Defendants were not legitimately acting under the authority of any of these statutes when executing the contracts. Wis. Stat. § 20.765 simply provides the general pool of money upon which the Legislature draws for its expenses; Wis. Stat. § 16.74 describes the management of legislative (and judicial branch) purchasing and contracting generally, which must involve the Department of Administration in that process; and Wis. Stat. § 13.124 deals with legislative branch ability to retain outside litigation counsel in limited circumstances.

None of those statutes dictate the legislative process for proposing or passing legislation. The Defendants are, therefore, not at liberty to ignore or reinterpret them with impunity or render them free from judicial oversight. *Custodian of Records for the*

*LTSB*, 2004 WI 65, ¶ 30. Consequently, the court may not simply ignore Defendants' failures to act lawfully. Instead it must scrutinize the Defendants' failure to comply with the statutes that are meant to control and limit their authority to spend funds from the "sum sufficient appropriation" available to the Assembly and Senate for its functions.

**1. Wis. Stat. § 20.765 does not authorize Vos and LeMahieu to execute the contracts: it addresses payments on, not the formation of, contracts.**

Wis Stat. § 20.765<sup>13</sup> does not provide an independent basis for the Speaker or Senate Majority Leader-elect to hire outside counsel. The entire statute reads as follows:

20.765 Legislature. There is appropriated to the legislature for the following programs:

- (1) ENACTMENT OF STATE LAWS.
  - (a) *General program operations – assembly.* A sum sufficient to carry out the functions of the assembly, excluding expenses for legislative documents.
  - (b) *General program operations – senate.* A sum sufficient to carry out the functions of the senate, excluding expenses for legislative documents.
  - (d) *Legislative documents.* A sum sufficient to pay legislative expenses for acquisition, production, retention, sales and distribution of legislative documents authorized under ss. 13.17, 13.90(1)(g), 13.92(1)(e) and (2)(m), and 35.78(1) or the rules of the senate and assembly, except as provided in sub.3(em).
  - (e) *Gifts, grants, and bequests.* All moneys received from gifts, grants, and bequests to carry out the purposes for which made.

The statute's plain language merely provides for funds that the legislature may use for "functions." It says nothing about what activities are "functions of the assembly" or "functions of the senate." Hiring outside counsel is apparently considered by Vos and

---

<sup>13</sup> Wis. Stat. § 20.765 (1)(a) and (b) appropriates a "sum sufficient" only for the functions of the Assembly and Senate respectively. These portions of the statute are hereinafter referred to as the "sum sufficient appropriation."

LeMahieu to be a “function” of the Assembly and of the Senate. That may be accurate. But Wis. Stat § 20.765 does not provide any mechanism through which outside counsel contracts may be entered into, and specifically does not authorize any particular individuals to act on behalf of the Assembly and Senate to engage outside counsel. All it does is allow the Assembly and Senate the use of an unlimited pot of money to pay for their functions. Nothing more!

**2. Wis. Stat. § 16.74 provides for a general process through which the Assembly and Senate can procure goods and services.**

Vos and LeMahieu claim that “[t]hese contracts meet all requirements under Section 16.74.” (Br. at 20, (Dkt. 31 at 22)) Once again, they are wrong.

Wis. Stat. § 16.74 establishes the general process for procurement through the Department of Administration (DOA) of “[a]ll supplies, materials, equipment, permanent personal property and contractual services required within the legislative branch.” Wis. Stat. § 16.74(1). The statute is simply an administrative management mechanism for pre-authorized purchases by the legislative and judicial branches. That is, after all, why this provision on “Legislative and judicial branch purchasing” does not appear in the statutory chapters governing either the legislative (Ch. 13) or judicial (Chs. 751- 758) branches, but in the chapter governing the DOA, which is a cabinet agency within the executive branch. The statute lays out not what may be purchased, but who exercises that purchasing authority; who is responsible for requisition and contract form and recordkeeping; and how DOA executes its duties to audit, pay, manage, and otherwise assist in the purchasing process.

3. Vos and LeMahieu were not authorized by § 16.74(1) & (2)(a) to enter into the Consovoy and BGSJ contracts.

Despite the clarity of Wis. Stat. § 16.74, neither Vos and LeMahieu, nor any legislative body, complied with its provisions to secure the services provided for in the Consovoy and BGSJ contracts. Wis. Stat. § 16.74(1) states, *inter alia*:

All supplies, materials, equipment, permanent personal property and **contractual services** required within the legislative branch shall be purchased by the joint committee on legislative organization or by the house or legislative service agency utilizing the supplies, materials, equipment, property or **services**. (emphasis added)

Wis. Stat. § 16.74(2)(a) states, *inter alia*:

Requisitions for legislative branch purchases shall be signed by the cochairpersons of the joint committee on legislative organization or their designees for the legislature, **by an individual designated by either house of the legislature for the house**, or by the head of any legislative service agency, or the designee of that individual, for the legislative service agency. . . (emphasis added)

Defendants claim that “both Houses have ‘designated’ their respective legislative leaders with contracting authority under Section 16.74, see, e.g., LeRoy Aff., Ex. 24.” (Br. at 20 (Dkt. 31 at 22)) Yet for several reasons, that exhibit – the *only* evidence they cite in support of this proposition – plainly does not support it. Exhibit 24 only pertains to the Senate, meaning that Defendants have no evidence of any such designation in the Assembly.

Further, Exhibit 24 is the Senate Policy Manual for the **2019-20** biennium, and thus is not germane to the BGSJ contract, which LeMahieu signed in the 2021-22 biennium. (See Dkt. 3, p. 23) Although LeMahieu did sign the Consovoy contract in the

2019-20 biennium—on December 23, 2020—he was not the Majority Leader at that time, so the 2019-2020 Senate Policy Manual, to the extent it authorized anyone to execute that contract, did not authorize him. Indeed, he signed that contract as “Majority-Leader Elect.” (Dkt. 3, p. 20) Neither Defendant proffered any evidence that LeMahieu had authority to execute a contract on behalf of the Senate in that capacity in 2020. The contracts are void on that basis alone.

Moreover, the policy manual underscores the fact that the Senate did *not* act under § 16.74—or even its own policy for applying that statute. It directs that “[a]ll Senate purchases, except lease agreements for district offices, are made through the Chief Clerk’s office. Senate purchasing and procurement is governed by s. 16.74, Stats. The Chief Clerk or his or her designee shall sign all necessary contracts and requisitions.” (Dkt. 30, p. 121 (LeRoy Aff., Ex. 24))

Crucially, it also requires that:

Purchases of \$10,000 to 24,999 shall be made only after the Chief Clerk has solicited bid quotes from at least three vendors . . . .  
Purchases of \$25,000 or more, other than postage, shall be made only after the Committee on Senate Organization, or the chairperson, has solicited written responses to a request for proposals. Contracts shall be awarded in response to a request for proposals to the bidder who, in the opinion of the Committee on Senate Organization, or the chairperson, is the lowest responsible bidder meeting the specifications.

(*Id.*) The manual also names the Majority Leader as authorized to “sign” contracts under § 16.74(2), but does not permit him to evade the competitive bidding process, or to ignore any other requirement such as the requirement to submit bills to the secretary of the Department of Administration under § 16.74(4) for audit and payment.

Defendants' failure to cite the corresponding *Assembly* Policy Manual in support of its supposed authority is no benign omission. That document makes no citation to Wis. Stat. § 16.74 whatsoever. Significantly, its "Attorney Policy," the only arguably relevant provision in it, provides that

*[i]f charges of any kind are filed, (or expenses incurred in contemplation thereof), or a civil or criminal action is brought against any Representative, Assembly officer or employee, because of such Representative's, officer's or employee's position or for acts, actions or conduct related to and within the scope of legislative duties and responsibilities; and such charges or such actions are discontinued or dismissed, or such matter is determined favorably to such Representative, officer or employee, the Committee on Assembly Organization may (by a majority vote of the membership) on behalf of the Assembly and the State, authorize payment of reasonable expenses and costs, including attorney's fees, of defending against such charges or actions when such charges or actions are not defended by the Wisconsin Department of Justice. (A Wisconsin State Assembly Legal Fees Payment Agreement must be completed and on file with the Assembly Chief Clerk).<sup>14</sup>*

(Emphasis added.)

The Assembly's manual makes clear that the Assembly may only cover the cost of outside counsel (1) if a legal action is brought *against* a representative or employee, and (2) *after* a resolution of the action that is favorable to the representative or employee, including dismissal. Moreover, Defendants have shown no evidence that any "Wisconsin State Assembly Legal Fees Payment Agreement" was filed with the Assembly Chief Clerk.

---

<sup>14</sup> Available at <https://legis.wisconsin.gov/lhro/media/1144/combined-policy-manual-web-version-1-6-21.pdf>. Last accessed April 6, 2021.

Finally, if Defendants truly had the blanket authority they claim, then they would not have needed any of what they describe as their “formal, and historically utilized, balloting procedures,” on which they also rely. That Defendants had the respective organizing committees undertake votes to hire outside counsel (Dkt. 30, pp. 20, 22, 151 (LeRoy Aff, Exs. 5, 6, 25) creates a further inference that they knew they did not have blanket authority to execute the contracts under § 16.74 (or the Constitution), further reinforcing the contracts’ *ultra vires* nature.

**4. Vos and LeMahieu did not act under specific authorization under § 16.74(2), either.**

Vos and LeMahieu’s backup claim to authorization is that “both Houses have separately authorized these contracts for legal services through their formal, and historically utilized, balloting procedures . . . See LeRoy Aff., Exs. 5, 6, 25.” (Br. at 20 (Dkt. 31 at 22)) Once again, their evidence fails to support their claim.

The Senate committee vote that Defendants cite as creating LeMahieu’s authority was taken on January 5, 2021 (Dkt. 30, p. 20 (LeRoy Aff., Ex. 5)), weeks *after* LeMahieu signed the Consovoy contract. (Dkt. 3, p. 20) Similarly, contrary to Defendants’ claims that Vos was specifically authorized by the Committee on Assembly Organization, their proffered evidence shows that the Committee’s actions were incongruent with § 16.74 and that, by their timing, Vos lacked authorization when he signed the contracts.



To explain: Defendants first cite a February 2, 2017 Assembly Committee ballot “authoriz[ing] the Legislature<sup>15</sup> to hire [] law firms . . . entities or counsel deemed necessary for services related to the matter of *Whitford v. Gill* and legislative redistricting and all ancillary matters.” (LeRoy Aff, Ex. 6, p. 22) This purported authorization is flawed for multiple reasons.

First, the ballot goes on to state that “[r]eimbursement for actual and necessary expenses associated with this motion is sought from the state.” (*Id.*) It thus plainly anticipates that someone would pay the bills associated with the authorized services and seek to *subsequently* be reimbursed by the state. Yet, as described above, § 16.74(4) does not allow funds to flow through the Legislature in this manner; rather, the Secretary of the Department of Administration shall “audit and authorize payment of [the] bills and statements” directly.

Further, that ballot took place over 4 years ago and thus applied only, at best, to one and two legislatures, respectively, before the Consovoy and BGSJ contracts were executed. Defendants tacitly admit this fatal flaw by their production--through the LeRoy Affidavit, as Exhibit 25 (Dkt. 30, p. 151)—a ballot of the Committee on Assembly Organization purporting to affirm that the 2017 vote “authorizes, and has always authorized, Speaker Robin Vos to hire any law firms, entities or counsel he deems necessary for the legislative redistricting beginning on January 1, 2021.”

---

<sup>15</sup> This Assembly committee has no power to authorize hires for the entire Legislature. That this ballot purports to do so is an additional reason that Defendants’ claimed authorization here is void.

However, that vote cannot lawfully have served its intended purpose either: it was taken on March 24, 2021 – two weeks after this lawsuit was filed. The fact that this occurred after Plaintiffs filed this action, and after both of the contracts at issue had been signed months earlier, is a plain admission on the part of the committee that when the contracts were executed by Vos, he had no legal authority to do so.<sup>16</sup> Notably, *neither* of the Committee on Assembly Organization votes took place in the 2019-2020 biennium – the biennium in which Vos signed the Consovoy contract. (Dkt. 3 at 19)

**C. Defendants did not comply with the audit and billing requirements of § 16.74(4).**

Although Wis. Stat. § 16.74 has very few procedural requirements, Vos and LeMahieu here fail to meet what is arguably the simplest and most important of them, further demonstrating that they did not derive any authority to execute the subject contracts from that statute:

Each legislative and judicial officer shall file all bills and statements for purchases and engagements made by the officer under this section with the secretary [of the Department of Administration], who shall audit and authorize payment of all lawful bills and statements.

Wis. Stat. § 16.74(4).

This is no mere recordkeeping requirement. Rather, absent compliance with Wis. Stat. § 16.74(4), no money can be paid on a contract entered into under Wis. Stat. 16.74(2) until bills submitted for payment under such a contract are audited. Defendants

---

<sup>16</sup> This assumes that Vos signed the BGSJ contract around the same time that the other parties did – or shortly after BGSJ sent it to him on January 6, 2021. There is not actually any record evidence that Vos signed the contract at all. Yet Vos and LeMahieu admit that BGSJ is being paid under that contract. (Stipulations, Dkt. 42 & 43)

make no mention of § 16.74(4) for the plain reason that they have not complied with it. Indeed, Defendants have made payments on both contracts out of taxpayer funds. (Dkt. 42 & 43) Yet they have submitted not a single bill or statement to DOA, as they would be required to do if acting under § 16.74. (Aff. of Counsel, ¶ 2, Exs. A & B)

Defendants' lack of any attempt to comply with this basic requirement belies their claim to have been acting under the statute in making the contracts. It also reveals their likely motive in eschewing use of this statute: by acting under Wis. Stat. § 13.124 instead, they could avoid the audit, authorization, and recordkeeping requirements and thereby conceal their activities.

**D. The Defendants used Wis. Stat. § 13.124, not Wis. Stat. § 16.74, in their unsuccessful attempt to enter into valid contracts with Consovoy and BGSJ.**

**1. Wis. Stat. § 13.124 specifically governs legislative body contracts for outside counsel but does not allow the engagement of outside counsel in the absence of the existence of an "action."**

"It is a cardinal rule of statutory construction that when a general and a specific statute relate to the same subject matter, the specific statute controls[,] and this is especially true when the specific statute is enacted after the enactment of the general statute." *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206, 209 (1970). That is exactly the situation here.

To reiterate, Wis. Stat. § 16.74, which was enacted in 1985, is a broad general statute entitled "Legislative and Judicial Branch Purchasing" that governs purchases for "[a]ll supplies, materials, equipment, permanent personal property and **contractual services** required within the legislative branch . . ." (emphasis added)

On the other hand, Wis. Stat. § 13.124, entitled “Legal Representation,” is a very specific statute that was enacted in 2017. It states precisely when and only when the Speaker of the Assembly and the Majority Leader of the Senate may obtain legal representation for the Assembly and for the Senate, other than from the Wisconsin Department of Justice. It allows the Speaker and the Majority Leader to approve all payments and does not require submission of bills from outside counsel to the Secretary of the Department of Administration for audit and payment. Rather, neither the Speaker nor the Majority leader has any obligation to submit those bills for review by anyone.

Wis. Stat. § 13.124, therefore, allows all details about the relationship with outside attorneys for the Assembly and Senate to be kept within the control of the Speaker or Majority Leader. In other words, within the majority party of those bodies. If Wis. Stat. § 16.74 already allowed engagements with outside counsel to be structured that way, there would have been no reason in 2017 for the legislature to have passed § 13.124. Doing so would have created mere surplusage.

Instead, the Legislature, in order to avoid any interaction with the Executive Branch regarding the representation of the Assembly or Senate (or the Legislature as a whole) by outside counsel, passed § 13.124. But, at the same time, § 13.124 allowed the Speaker and Majority Leader to hire outside counsel only when “an action in which the [Assembly or Senate or Legislature] is a party or in which the interests of [the Assembly or Senate of Legislature] are affected.” Wis. Stat. §§ 13.124(1)(b), (2)(b) and (3)(b).

Because there is no action pending about redistricting, neither the Speaker nor the Majority leader had any authority to hire the Consovoy or BGSJ law firms to represent the Assembly and Senate in a redistricting action.

**2. The Defendants' conduct shows that they were attempting to act under Wis. Stat. § 13.124 outside of the limited circumstances allowed by the statute.**

Under the Consovoy and BGSJ contracts, both law firms apparently began to provide services on January 1, 2021. Each firm has billed and been paid for their services since then. (Stipulations, Dkt. 42 & 43) None of the bills from either Consovoy or BGSJ were submitted by the Speaker or the Majority Leader to the Secretary of Administration for audit, as is required for any contract entered into pursuant to Wis. Stat. § 16.74.

Attorney Anne Hanson, DOA Chief Legal Counsel, stated in response to counsel for Plaintiffs' open records request:

We understand your request to be seeking any invoices or other bills or statements originating from the above-listed law firms that may have been filed with the Department of Administration (DOA) consistent with Wis. Stat. § 16.74(4). We have searched our records, and we do not have any records responsive to your request.

DOA has received payment requests from the legislature for payments to be issued to the law firms named above, and such payments may be searched and publicly viewed on OpenBook website. (See <http://openbook.wi.gov/>, under the "Expenditures" tab.) **But when these requests were submitted to DOA for issuance of payment following the required internal approvals within the legislature, no invoices or other bills or statements were included for DOA to review or audit.** Therefore, DOA does not have access to the records you have requested. Although DOA issued the requested payments based upon the legislature's internal approvals, the payment requests alone did not

provide DOA with full visibility into what legal authority the legislature may have used to make these purchases.

(Aff. of Counsel, ¶ 2, Ex. 2, emphasis added)

Clearly, Vos and LeMahieu knew that they were not (and are not) complying with § 16.74, and therefore were not (and are not) using their ability to contract for services as allowed under § 16.74. By paying their outside attorneys as they did, they were using the only other statute which was possibly available to them: Wis. Stat. § 13.124. But under the terms of that very specific statute, neither Vos nor LeMahieu had the authority to contract with private counsel on behalf of the Senate and Assembly for the services described in those contracts because there was no redistricting action pending in which the legislature is a party or in which its interests are affected. Moreover, even if such an action existed, they would not be able to contract under that statute for the additional non-litigation redistricting services described in the BGSJ contract.

**3. Wis. Stat. § 990.001(3) does not save the Defendants from the consequences of exceeding the authority they have under § 13.124.**

Despite the clarity of Wis. Stat. § 13.124 and the obvious care with which it was drafted, Vos and LeMahieu argue that Wis. Stat. § 990.001(3) allows the court to add a word to it so that the statute applies not just to “actions” but to “*imminent* actions” as well.<sup>17</sup> (Br. at 22-25 (Dkt. 31 at 24-27) (emphasis in original).) Section 990-001(3) does not

---

<sup>17</sup> This argument would not save the contracts’ validity even if it were correct, as there is no evidence that any action regarding redistricting in Wisconsin is imminent. The census bureau will not even have the data needed by the states for redistricting until September of this year.

allow a court to re-write an unambiguous statute. It merely provides that “[t]he present tense *of a verb* includes the future *when applicable*.” (emphasis added)

Vos and LeMahieu want the court to ignore that precise requirement of § 990.001(3)’s language and invite the court to add an adjective to § 13.124. Section 990.001(3) does not authorize a court to do that. The court should decline their invitation.

## V. Conclusion

To avoid a finding that they acted lawlessly, Vos and LeMahieu cannot be allowed to hide behind either their fanciful interpretation of the Wisconsin Constitution, their strange interpretation of Wis. Stat. § 20.756, or their fictional assertion of compliance with Wis. Stat. § 16.74. They executed the Consovoy and BGSJ contracts without appropriate authorization and then directed payment on them without first submitting bills to the Secretary of the Department of Administration for audit and payment as required by § 16.74(4).

Their actions since the contracts were signed show that they fully intended to pay the bills to those firms using the secrecy allowed by Wis. Stat. §§ 13.124(1)(b) & (2)(b) through which outside counsel bills are reviewed and authorized solely under the supervision of the Speaker or Majority Leader, respectively.<sup>18</sup>

---

<https://www.census.gov/newsroom/blogs/random-samplings/2021/02/timeline-redistricting-data.html>, last accessed April 8, 2021.

<sup>18</sup> Wis. Stat. § 13.124(1)(b): For the assembly’s representation, “[t]he speaker shall approve all financial costs and terms of representation.” Wis. Stat. § 13.124(2)(b): for the senate’s

The Legislature is “presumed to know the status of existing law, and to have chosen its words carefully.” *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 14, 256 Wis. 2d 859, 868, 650 N.W.2d 81, 85 (citations omitted). In 2017, when the Legislature created and enacted Wis. Stat. § 13.124, had it intended to give the Assembly Speaker and Senate Majority Leader the authority to contract and pay for private legal counsel for those bodies for actions that do not yet exist, or for general legal advice, without submitting bills for such contracts to the DOA for audit, it would have written Wis. Stat. § 13.124 differently, or modified Wis. Stat. § 16.74. The Legislature did neither.

Instead it provided the Speaker and the Majority Leader with the power to expend public funds on private counsel without oversight in very limited circumstances: when the Assembly or Senate was a party to “an action” or in an action “in which its interests are affected.” That’s it. The words in Wis. Stat. §§ 13.124 (1)(b) and (2)(b), are clear and unambiguous. The court must “apply them as written without any further inquiry.” *In re Charles R.P.*, 223 Wis. 2d 768, 771, 590 N.W.2d 21 (Ct. App. 1998).

Because there is no action about redistricting for which the Assembly and the Senate can retain outside counsel, Vos and LeMahieu had no power to hire outside private counsel. But they did anyway. Why? Not because they were acting according to a longstanding custom of the Legislature. And not because litigation was imminent.

---

representation: “[t]he majority leader shall approve all financial costs and terms of representation.”



They did so because they thought that no one would dare challenge their power or their conduct.

Vos and LeMahieu have, since January 1, 2021, lawlessly spent tens of thousands of taxpayer dollars on private lawyers for services in a non-existent action, and other legal advice. All past and future payments from the sum sufficient appropriation under the Consovoy and BGSJ contracts were and continue to be a misuse of taxpayer funds. That must be stopped.

The court should deny the Defendants' motion for summary judgment, and under Wis. Stat. § 802.08(6), grant summary judgment to the Plaintiffs, declaring that the Consovoy and BGSJ contracts are void *ab initio*. As supplemental relief under Wis. Stat. § 806.04(8), the court should permanently enjoin the Defendants from entering into any contract for legal services that does not comply with Wis. Stat. § 13.124 and further enjoin the Defendants, if they contract for goods and services under Wis. Stat. § 16.74(2), from failing to comply with Wis. Stat. § 16.74(4) by not presenting the bills for such goods and services to the Secretary of the Department of Administration for audit and payment.

Respectfully submitted this 9<sup>th</sup> day of April 2021.

PINES BACH LLP

*Electronically signed by Lester A. Pines*

Lester A. Pines, SBN 1016543

Tamara B. Packard, SBN 1023111

Aaron G. Dumas, SBN 1087951

Beauregard W. Patterson, SBN 1102842

*Attorneys for Plaintiffs*

Mailing Address:

122 West Washington Ave.

Suite 900

Madison, WI 53703

(608) 251-0101 (telephone)

(608) 251-2883 (facsimile)

lpines@pinesbach.com

tpackard@pinesbach.com

adumas@pinesbach.com

bpatterson@pinesbach.com