STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

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

Case No. 2021-CV-589

v.

ROBIN VOS and DEVIN LEMAHIEU,
in their official capacities,
Defendants.

REPLY BRIEF IN SUPPORT OF DEFENDANTS' CONVERTED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION[1]

Plaintiffs' Response Brief only further demonstrates that their lawsuit is based upon a failure to understand the basics of legislative contracting, the Legislature's constitutional authority, and the plain terms of Wisconsin statutes. In their Complaint, Plaintiffs' only theory was that the contracts here are unlawful because Section 13.124 does not authorize the contracts. Defendants responded by explaining that while Section 13.124 authorizes these contracts, Section 13.124 is of recent vintage, and the Legislature has for decades been entering into materially indistinguishable contracts under its constitutional and statutory authority. Having no answer for these authorities and longstanding practices, Plaintiffs remarkably double-down. Plaintiffs now argue that the same procedure that the Legislature has used to pay its expenses for many years—from phone bills, to attorney invoices, to any other bill—is unlawful because Plaintiffs are now unhappy about how much information the Legislature has always given to the Department of Administration ("DOA"), a concern Plaintiffs did not even mention in their Complaint. Plaintiffs now even appear to concede that the Legislature can hire outside counsel when no lawsuit is pending, disclaiming the core of their own suit, so long as the Legislature follows Plaintiffs' novel view of how much information the Legislature should send to DOA.

[1] At the March 25, 2021, hearing in this case, this Court converted the Legislature's Motion To Dismiss into a Motion For Summary Judgment and also held that the Legislature may also rely on its "arguments in [its] temporary injunction opposition"—filed at Docket 31—to support that now-converted Motion For Summary Judgment. Dkt.41 (Tr. of Mar. 25, 2021, Oral Args.) at 15–16, 19–20.

Plaintiffs' ever-changing lawsuit is meritless. With regard to the Wisconsin Constitution, the Supreme Court has held that the Legislature has the authority to take any appropriate steps to carry out its functions, and Plaintiffs offer no serious argument that hiring outside consultants—including attorneys—is an inappropriate method for the Legislature to study the complex issue of decennial redistricting. Even if this Court goes beyond the Legislature's constitutional argument, this is also an exceedingly easy statutory case. Section 20.765 authorizes the Legislature to expend funds to carry out its functions, and even Plaintiffs appear to concede that hiring outside counsel for purposes of redistricting falls within those statutorily authorized functions. Further, Section 16.74 authorizes the Legislature to enter into contracts for legal services, and Plaintiffs appear to admit that the Legislature could hire these very lawyers to offer the same exact services, under Section 16.74. Plaintiffs' objections as to Section 16.74 are based upon a misunderstanding of the basics of legislative contracting, as well as quibbles with internal legislative procedure. Finally, Section 13.124—when read in conjunction with Section 990.001(3)—also authorizes these contracts, and Plaintiffs muster no text-based response.

ARGUMENT

I. The Wisconsin Constitution Independently Authorizes These Contracts[2]

The Wisconsin Constitution "vest[s]" the "legislative power" in the Legislature, Wis. Const. art. IV, § 1, along with the power to conduct redistricting, *id.* § 3, and this

[2] Plaintiffs criticize the Legislature for presenting its constitutional argument first, claiming that this "impliedly acknowledges that statutory authority for the contracts does

grant of authority also necessarily endows the Legislature with the power to take any steps appropriate to carrying out this core law-making and redistricting function, Dkt. 31 ("Leg.Br.") at 8–11. The contracts at issue here fall squarely within the Legislature's authority, as these contracts enable the Legislature to establish "efficient[ly]" the factual and legal foundation "necessary" for "enacting" a redistricting law. *Minneapolis, St. P. & S. S. M. Ry. Co. v. R.R. Comm'n of Wis.*, 136 Wis. 146, 116 N.W. 905, 910–11 (1908) (citation omitted); Leg.Br. 16. This is why the Legislature has hired outside counsel in the redistricting context—under circumstances indistinguishable from those here—for decades. Leg.Br. 14–16.

Plaintiffs' counterarguments are all unpersuasive.

Most importantly, and entirely fatal to Plaintiffs' case, Plaintiffs do not: (1) engage in their own constitutional analysis under the Wisconsin Supreme Court's well-established, multi-part approach to such analysis, *Serv. Emps. Int'l Union, Loc. 1 v. Vos ("SEIU")*, 2020 WI 67, ¶ 35, 393 Wis. 2d 38, 946 N.W.2d 35; (2) coherently explain what they believe to be the scope of the Legislature's constitutional authority to study potential legislation; or (3) articulate any theory as to why hiring counsel to advise on redistricting legislation is not "appropriate to achieve the ends for which

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not exist." Dkt. 48 ("Pls.Resp.") at 9 n.10. But the Legislature led with its constitutional-authority argument because it is duty bound to "jealously guard[ ]" its core constitutional power to conduct all "activities [that] are appropriate to legislatures," free from the approval from any other branch. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 6 n.4, ¶¶ 31–34, 376 Wis. 2d 147, 897 N.W.2d 384 (citations omitted). While the Legislature has also powerfully argued that three independent pieces of "enabling legislation" authorize its contracts here, *see* Pls.Resp. 9, that statutory authority initially depended upon the Governor's "approv[al]" by signing the laws, *see* Wis. Const. art. V, § 10(1)(b).

[the Legislature] w[as] granted" its express "authority" to make law, including redistricting laws. *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 54 & n.38, 373 Wis. 2d 543, 892 N.W.2d 233. Plaintiffs' failure to develop any discernable constitutional arguments on any of these three points is reason enough for this Court to grant summary judgment to the Legislature. *See Parsons v. Associated Banc-Corp*, 2017 WI 37, ¶ 39 n.8, 374 Wis. 2d 513, 893 N.W.2d 212.

Instead of articulating any serious argument with respect to the Legislature's vested constitutional authority, Plaintiffs offer a series of disjointed, meritless criticisms of the Legislature's constitutional arguments.

First, Plaintiffs claim that the Legislature's constitutional powers are "limited to the actual process of enacting law." Pls.Resp. 10. But the Supreme Court has held that the Legislature has all "authority . . . appropriate to achieve the ends" of its express law-making authority, *Wis. Carry*, 2017 WI 19, ¶ 54 & n.38, and may select "the means to be employed in the execution of [the express legislative] power," *Minneapolis*, 116 N.W. at 910 (citation omitted); Leg.Br. 8–10. This means that the Legislature's power to engage in "the actual process of enacting law," Pls.Resp. 10, necessarily includes the authority to take any appropriate action or use any appropriate means to carry out this power, *Wis. Carry*, 2017 WI 19, ¶ 54 & n.38; *Minneapolis*, 116 N.W. at 910; Leg.Br. 8–10. The Legislature's hiring of outside counsel to advise and evaluate draft legislation, including redistricting legislation, is plainly one such appropriate action or means. Leg.Br. 15–16.

While Plaintiffs do not develop a coherent theory as to what they mean by "the actual process of enacting law," Pls.Resp. 10, their argument could, perhaps, be read to suggest that the Legislature has no constitutional authority to study the laws it will enact (unless the Legislature can first get the Governor to sign a bill authorizing such study). If this is Plaintiffs' theory—and, frankly, it is unclear what Plaintiffs' theory is—the Legislature would apparently have no inherent constitutional authority to divide itself into committees, hold hearings, accept studies, or receive expert testimony and other evidence in the course of evaluating potential legislative proposals. Leg.Br. 11 (citing LeRoy Aff., Exs. 11–16, and *Mayo*, 2018 WI 78, ¶ 15).

Second, Plaintiffs claim that *In re John Doe Proceeding*, 2004 WI 65, 272 Wis. 2d 208, 680 N.W.2d 792 (hereinafter "*LTSB*"), places the hiring of outside counsel outside the Legislature's constitutional power, Pls.Resp. 11–12, but Plaintiffs misunderstand this case. *LTSB* explained that the Legislature has the exclusive authority to enact and interpret its own "rule of proceeding," under Article IV, Section 8 of the Wisconsin Constitution. 2004 WI 65, ¶ 28–30. *LTSB* did not rule on or discuss the scope of the Legislature's inherent constitutional authority to take appropriate measures under Article IV, Sections 1 and 3, which are at issue here. In any event, the Legislature's hiring of outside redistricting counsel to advise and evaluate the legislative drafting is plainly part of "the process the legislature uses to propose or pass legislation," as *LTSB* uses that phrase. *Id.* ¶ 30. This is because the process of enacting redistricting legislation necessarily includes consideration of "legal advice about the validity of any draft redistricting legislation if enacted," Dkt.3

("Compl.") Ex. B (outside-counsel engagement letter)—just as "the process of enacting a law" often requires "the preliminary determination of a fact" or law "by the Legislature," *Minneapolis*, 116 N.W. at 911. That is different in kind than the activities in *LTSB*: "assistance with electronic data and for an electronic storage closet for communications" associated with the Legislature. *LTSB*, 2004 WI 65, ¶ 30.

Third, Plaintiffs argue that the Legislature's reliance on *Minneapolis*, 116 N.W. 905, and *Mayo*, 2018 WI 78, is misplaced because the legislative powers discussed in those cases resulted in "legislation itself." Pls.Resp. 13. Plaintiffs' reading of *Minneapolis* and *Mayo* is circular and nonsensical: if the Legislature has the power to make "preliminary determination[s]" of fact and law to support proposed legislation, *Minneapolis*, 116 N.W. at 911, or to accept "studies," "the testimony of experts," and "documentary evidence" to evaluate legislative proposals, *Mayo*, 2018 WI 78, ¶ 15, when these actions culminate in "legislation itself," then the Legislature must have the constitutional power to take these actions during the legislative-drafting process, Pls.Resp. 13. Regardless, the Legislature has the constitutional duty to enact redistricting legislation every decade. Wis. Const. art. IV, § 3.

Fourth, Plaintiffs offer several criticisms of the Legislature's reliance on decades of historical practice, Pls.Resp. 14–15, but those attacks fall flat. Plaintiffs' claims that the Legislature's historical precedent is irrelevant because it does not come in the form of legislation, but rather as legislative practices, Pls.Resp. 15, is confused because the whole issue in the constitutional part of this case is what the Legislature can do without relying upon any statute. And Plaintiffs' claim that this

historical evidence must be "contemporaneous enough with the adoption of the Constitution," Pls.Resp. 15, lacks support in Supreme Court precedent. For example, the Court has relied on historical practices "extending over a period of more than a quarter of a century" without reference to the enactment of the constitutional provision at issue, *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 111 N.W. 712, 717 (1907), and on other "historical custom[s]" without any noted temporal reference, *Barland v. Eau Claire Cty.*, 216 Wis. 2d 560, 592, 575 N.W.2d 691 (1998).

Fifth, Plaintiffs' argue that the Legislature's constitutional argument would render superfluous "huge swaths" of multiple statutes. Pls.Resp. 16. This argument is misplaced because the canon against surplusage operates only as between related *statutory* language, *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110, or as between related *constitutional* language, *Wagner v. Milwaukee Cty. Election Comm'n*, 2003 WI 103, ¶ 33, 263 Wis. 2d 709, 666 N.W.2d 816. That canon could not possibly apply as between related constitutional and statutory language because the enactment of a statute cannot logically or coherently narrow the scope of a preexisting constitutional power. *See, e.g.*, *Blair v. Crawford*, 275 F.3d 1156, 1159 (9th Cir. 2002) ("A state statute cannot repeal constitutionally authorized power."); *Edge v. Brice*, 253 Iowa 710, 717; 113 N.W.2d 755 (Iowa 1962) ("The General Assembly of course cannot by subsequent legislation define the scope of constitutional provisions.").

Sixth, Plaintiffs argue that the Constitution does not empower individual legislators to enter into outside-counsel contracts. Pls.Resp. 9–10, 12–13, 15–16, 17–

18. This argument is irrelevant to the outside-counsel contracts at issue here because both the Assembly and the Senate authorized Speaker Vos and Majority Leader LeMahieu to enter into these contracts on their respective Houses' behalf. LeRoy Aff., Exs. 5, 6, 25. These Committees' providing authorization on the Legislature's behalf is consistent with past historical practice, Leg.Br 3; LeRoy Aff., Exs. 4, 7, 8, 9, 10, and Plaintiffs do not argue that these Committees somehow lack constitutional authority to bind their respective Houses, or the Legislature as a whole. *See generally* Pls.Resp. 9–10, 12–13, 15–16, 17–18.

Finally, Plaintiffs hyperbolically argue that the Legislature's constitutional argument "destroys[ ] separation of powers principles." Pls.Resp. 17. But the Legislature has argued here, consistent with longstanding Wisconsin Supreme Court precedent and robust historical practice, that it has the authority to retain outside counsel to advise it during the process of legislating. *See* Leg.Br. 12–16. Nothing about the hiring of such counsel as outside legal experts even arguably encroaches on the functions of any other branch of Wisconsin government. If the Legislature took an action that arguably encroached upon the power of a co-equal branch, then the courts would conduct a separation-of-powers analysis to determine "where the functions of [the legislative] branch end and those of another begin." *SEIU*, 2020 WI 67, ¶ 34 (citations omitted).[3]

[3] *Amicus* Wisconsin Democracy Campaign oddly argues that these contracts are unlawful because litigation power resides in the Attorney General and the Governor. Dkt. 55 ("Am.Br.") at 6–8. But Plaintiffs' entire lawsuit is about the Legislature's ability to hire counsel for advice *before* litigation, so *Amicus*' argument on this score is misplaced. In any

II. Even If This Court Concludes That The Legislature Needed Specific Legislation To Enter Into These Contracts, This Would Be An Exceedingly Easy Statutory Case In Light Of Plaintiffs' Concessions

A. Section 20.765 Authorizes The Legislature To Expend Funds To Carry Out Its Functions—Which Functions Plaintiffs Appear To Admit Include Retaining Legal Experts To Assist With Redistricting—And That Concession Is The End Of This Case

Section 20.765 provides independent statutory authority for the Legislature to enter into the outside-counsel contracts here, given that the Section explains—in entirely unambiguous terms—that the Legislature can spend "[a] sum sufficient" amount of money, so long as it is doing so "to carry out the functions of the assembly [and senate]." Wis. Stat. § 20.765(1)(a)–(b); Leg.Br. 17–19. Those "functions" under Section 20.765 plainly include completing the decennial redistricting process, including by hiring legal counsel to assist with complex redistricting legislation. Leg.Br. 18–19; Wis. Const. art. IV, § 3.

Plaintiffs abbreviated response to this argument is so insubstantial as to end their case. Plaintiffs appear to concede, as they must, that the outside-counsel contracts here meet the statutory definition of legislative "functions." Pls.Resp. 19–

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event, the Supreme Court in *SEIU* held that litigation on behalf of the State falls "within th[e] borderlands of shared powers," and so falls within the Legislature's sphere. *SEIU*, 2020 WI 67, ¶ 63. *Amicus* also makes an extended, unsupported argument—not raised by Plaintiffs in their Complaint, and thus no permissible basis for relief here, *Adams Outdoor Advert. Ltd. P'ship v. City of Madison*, 2018 WI 70, ¶ 24 n.8, 382 Wis. 2d 377, 914 N.W.2d 660—that "the interest advanced by the contracts is not public in nature, but is narrowly partisan," violating the implied public-purpose doctrine, Am.Br. 10. *Amicus*' *ad hominem* assertions here are baseless. *Amicus* offers no evidence whatsoever that the contracts at issue are different in any respect from the contracts that the Legislature (and both political parties) have entered into for decades, in multiple, consecutive decennial-redistricting efforts. LeRoy Aff., Exs. 1, 2, 3, 4, 5, 6; Leg.Br. 2–3.

20. That apparent concession dooms their case, as Section 20.765 allows the Legislature to spend its money in support of *any* "functions of the assembly [and senate]," Wis. Stat. § 20.765(1)(a)–(b), and the "common, ordinary, and accepted meaning," *Kalal*, 2004 WI 58, ¶ 45, of the term "functions" includes the Legislature's redistricting duties in this context, especially in light of the Legislature's constitutional redistricting duty, Wis. Const. art. IV, § 3.

To the extent that Plaintiffs offer any counterpoint to the Legislature's authority under Section 20.765, beyond apparently conceding that hiring counsel for redistricting is a "function" under that Section, their arguments are so insubstantial as to amount to waiver. *Parsons*, 2017 WI 37, ¶ 39 n.8. Plaintiffs assert that Section "20.765 does not provide any mechanism through which outside counsel contracts may be entered into," Pls.Resp. 20, but the statute's explicit textual provision for both Houses to spend funds "to carry out the[ir] functions" goes precisely to the core of Plaintiffs' quarrel with Defendants' actions: that Defendants "compl[ied] with the statutes that are meant to control and limit their authority to spend funds." Pls.Resp. 19. Further, Plaintiffs' *ipse dixit* assertion that Section 20.765 "does not authorize any particular individuals to act on behalf of the Assembly and Senate to engage outside counsel," Pls.Resp. 20, likewise fails for lack of any textual support. No text in Section 20.765 limits *how* the Legislature may authorize certain expenditures "to carry out its functions." Wis. Stat. § 20.765(1)(a)–(b). And here, both Houses acted through the Committee on Assembly Organization and the Committee on Senate Organization, which passed ballots authorizing Speaker Vos

and Majority Leader LeMahieu to enter into the outside-counsel contracts. LeRoy Aff., Exs. 5, 6, 25. Acting through such committees is a well-recognized pathway for the Legislature to contract. *See* Leg.Br 3; LeRoy Aff., Exs. 4, 7, 8, 9, 10, 25.

B. Plaintiffs Concede That Section 16.74 Authorizes The Legislature To Enter Into Contracts For Legal Services And Their Arguments That These Contracts Somehow Fall Outside Of Section 16.74 Are Based Upon A Basic Misunderstanding Of Legislative Contracting

1. Section 16.74 independently authorizes the outside-counsel contracts here. Leg.Br. 19–20. Section 16.74 permits the Assembly and the Senate to enter into "[c]ontracts for purchases"—which contracts include legal-services contracts in this context—provided that they are "signed by an individual designated by the organization committee of the house making the purchase." Wis. Stat. § 16.74(2)(b); Leg.Br. 19–20. Here, both Houses have "designated" their respective leaders as the contracting authority under Section 16.74, *see, e.g.*, LeRoy Aff., Ex. 24, and these Legislative Leaders consummated the outside-representation agreements, *see* Leg.Br. 20; Compl. Exs. A & B; *accord* Dkts. 42–43.[4] Additionally, both Houses have also authorized these contracts via the formal balloting procedures of their respective Committees on Organization. Leg.Br. 20; LeRoy Aff., Exs. 4, 5, 6, 25.

[4] *Amicus* offers no support for it claims that Section 16.74 is unconstitutional to the extent it allows the Senate to appoint the Senate Majority Leader as the individual who may enter contracts for purchases. *See* Am.Br. 17–18. Section 16.74 permits each House's organization committee to select "an[y] individual" member it wants to make such purchases, Wis. Stat. § 16.74(2)(b), consistent with each House's constitutional prerogative to determine its own internal functions under Article IV, Section 8, *LTSB*, 2004 WI 65, ¶ 27; *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 36–37, 387 Wis. 2d 511, 929 N.W.2d 209.

2. Plaintiffs appear to concede that the Legislature can hire outside counsel under Section 16.74, including without an active, ongoing case, so long as the Legislature complies with the procedures under that Section. Pls.Resp. 21–22.[5] And Plaintiffs nowhere allege in their Complaint that the Legislature failed to follow all relevant requirements for legislative contracting under this Section. Compl. pp. 1–11. Again, this concession proves fatal to their case.

Plaintiffs' statutory argument here is that the Legislature cannot rely on Section 16.74 because, in Plaintiffs' submission, the Legislature failed to "comply with the audit and billing requirements" of this Section with regard to how much information the Legislature sent to DOA. Pls.Resp. 26, 28–30 (emphasis omitted). Plaintiffs repeat this same point at the very end of their Brief, asking this Court "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" DOA. Pls.Resp. 33. Plaintiffs' argument is deeply confused, borne of their unfortunate misunderstanding of the basics of legislative contracting and DOA payment practices.

To understand why Plaintiffs are so confused on this score, a little background on legislative contracting under Section 16.74 is instructive, which shows that what

[5] In this regard, even Plaintiffs appear to agree that *Amicus* is simply wrong to claim that any legislative expenditure of "public dollars" requires the Legislature to comply with the "special quorum requirement of three-fifths of the members in each chamber" under Article VIII, Section 8 of the Wisconsin Constitution. Am.Br. 16. That section applies only to "passage in either house of the legislature of any law which . . . continues or renews an appropriation of public or trust money." Wis. Const. art. VIII, § 8.

has occurred here is no different in any respect with regard to the Legislature's contracting practices under Wis. Stat. § 16.74. As explained in detail by the affidavit of Senate Business Manager Meggan Foesch—who has been processing payments for the Senate for thirteen years—the information that the Legislature submitted to DOA with regard to these contracts did not differ in any respect with the information the Legislature has submitted to DOA for all contracts or other bills, whether the contracts are for cellular phone services or legal services. For all such bills—including the ones at issue here—each House provides the State's PeopleSoft software with "the name of the bill payee"; "the invoice number"; "the invoice date"; "the dollar amount"; and "an accounting code for the bill, which code" the PeopleSoft program provides. Affidavit of Meggan Foesch ("Foesch Aff.") ¶¶ 4, 5, 6. Once a bill is submitted through PeopleSoft, the program automatically forwards it to the Chief Clerk of the House who must approve the bill or statement, and upon his approval, PeopleSoft automatically submits the bill or statement to DOA, which will run an automatic batch process to pay the expenditure, either via electronic payment or by mailing a physical check. Foesch Aff. ¶¶ 4–5. Simply put, and fatal to Plaintiffs' argument, "the process to pay the bills for the outside-contracts at issue here is identical to the process for paying any other legal-services bills, and substantially similar to the payment of bills and statements for all other purchases and engagements that the [Houses[ha[ve] incurred." Foesch Aff. ¶ 14. To be absolutely

clear, "[n]o part of the bill-paying process for the outside-counsel contracts at issue here was unusual or different in any respect." *Id.*[6]

Plaintiffs are thus simply incorrect when they allege that the Legislature failed to comply with Section 16.74(4)'s auditing and billing requirements for these contracts, and, by way of implication, *every single expenditure and contract that the Legislature has processed for payment with DOA for many years*. *See* Pls.Resp. 26–27; *see also* Pls.Resp. 25. The Legislature's well-established process complies with all duties incumbent upon the Legislature under Section 16.74(4), which merely requires the Legislature to "file all bills and statements for purchases and engagements made by the officer under this section with the secretary [of DOA]," Wis. Stat. 16.74(4). The Legislature meets that statutory requirement by way of its compliance with the State's PeopleSoft system, which submits to the DOA Secretary all necessary and relevant bill information. Foesch Aff. ¶¶ 4–6.

No better is Plaintiffs' related argument that Section 16.74 requires DOA to audit all bills *before* authorizing payment, in order for a contract to fall within Section 16.74's scope. *See* Pls.Resp. 26. Section 16.74(4) does not condition "authorize payment" on "audit," but states simply that DOA "shall audit and authorize payment," without a discussion on the order those duties should occur. Wis. Stat. § 16.74(4). Regardless, Plaintiffs do not explain how *DOA's* obligation to "audit" could

[6] While Ms. Foesch's affidavit discusses the Senate's bill-paying procedures, she understands that process to be "identical to the bill-paying process for the Wisconsin Assembly," Foesch Aff. ¶ 15, meaning both Houses comply with Section 16.74.

impact the *Legislature's* statutory authority to procure legal services under this section. *See* Wis. Stat. § 16.74(1), (2)(a).

Turning from their own misunderstanding of Section 16.74 and the uniform method that the Legislature uses to pay for all contractual and other purchases, Plaintiffs make a series of arguments regarding the Senate and Assembly Policy Manuals and certain other internal legislative procedures. Pls.Resp. 21–23. But *all* of these arguments—that is, the rest of the arguments discussed in this subsection—are beyond the scope of judicial inquiry under Article IV, Section 8, as they rely upon Plaintiffs' view that the Legislature failed to comply with various *internal* manuals and procedures, and the "failure to follow the legislature's procedural rules" amounts to no more than "an ad hoc repeal of such rules, which the legislature is free to do at any time." *LTSB*, 2004 WI 65, ¶ 28; *see also Ozanne*, 2011 WI 43, ¶ 13 ("[T]his court will not determine whether internal operating rules or procedural statutes have been complied with by the legislature . . . in the absence of constitutional directives to the contrary[.]"). In any event, each of Plaintiffs' arguments also fail on its own terms.

Plaintiffs claim that the Houses' various internal policy manuals cannot support the Legislature's actions under Section 16.74. On the Senate Policy Manual, Plaintiffs claim that it does not support the Senate's authorization of the Senate Majority Leader as the contracting authority under Section 16.74, since that manual is dated "2019–2020." Pls.Resp. 21–22; LeRoy Aff. Ex. 24. But the Senate Policy Manual simply states that it was "[a]dopted by the Committee on Senate Organization on March 22, 2019," and contains no expiration date. LeRoy Aff., Ex. 24

at tit. page. In fact, the Senate's practice is to maintain the same policy manual until it determines, in its considered judgment, that a new manual is necessary. Further, the Senate *did* make the payments on the outside-counsel contracts at issue here through the Chief Clerk, *see* Foesch Aff. ¶¶ 5, 11, 14, and the Senate Policy Manual *explicitly* provides that the "[r]equirements for solicitation of bids . . . do not apply if . . . the purchase is for legal services," a point Plaintiffs inexplicable fail to disclose. *See* LeRoy Aff. Ex. 24 at 24; *see* Pls.Resp. 22. As for the Assembly Manual, Plaintiffs point to no evidence to question that Speaker Vos is the "designated" individual to enter such agreements for the Assembly under Section 16.74(2)(a). Further, Plaintiffs are incorrect that the Assembly Manual only provides for payment of attorney costs incurred by individual legislators, Pls.Resp. 23, as it also acknowledges the existence of "other rules and regulations" by the Assembly that could apply, and also *explicitly* notes that, "under the Wisconsin Constitution, the Assembly has inherent authority to obtain legal counsel for itself, its members, and its employees."[7]

Plaintiffs continue to quibble with internal legislative matters by arguing that Majority Leader LeMahieu lacked authority to enter into the Consovoy McCarthy PLLC/Adam Mortara agreement—but not the Bell Giftos & St. John agreement—because he was Senate Majority Leader-*elect* when he signed this contract. Pls.Resp. 21–22. As a threshold matter, Majority Leader LeMahieu qualifies to enter and sign the contracts based upon the Senate Policy Manual, given

[7] Wis. State Assembly, *Policy Manual*, acknow. form, 11 (2021–2022), *available at* https://legis.wisconsin.gov/lhro/media/1144/combined-policy-manual-web-version-1-6-21.pdf.

that he was elected and began acting in that position once former-Senate Majority Leader Scott Fitzgerald was elected to Congress. This is consistent with the Senate Policy Manual's own admonition that it is "intended to function as a general guide," and cannot "address every situation that may arise." LeRoy Aff., Ex. 24, preface. In any event, the Legislature entered into a revised agreement with Consovoy McCarthy PLLC/Adam Mortara in March 2021, which was after Majority Leader LeMahieu began his term, rendering this argument moot. *See* Second LeRoy Aff., Ex. 1.[8]

Plaintiffs also make an extended argument that the House and Senate Committees on Organization's ballots authorizing the outside-counsel contracts here cannot invoke the Legislature's authority under Section 16.74, because those votes occurred *after* Defendants executed these contracts. Pls.Resp. 24–26; *compare* Leg.Br. 20; LeRoy Aff., Exs. 4, 5, 6, 25. But for purposes of the Legislature's authority under Section 16.74, those Committee ballots ratified these contracts, "manifest[ing]" the Legislature's "willingness to go on with the contract" and be "*bound as from the outset*." Restatement (Second) of Contracts § 380 cmt. a (1981) (emphasis added). That is, the Committee's execution of these ballots after the consummation of the outside-counsel contracts is the hallmark of contract ratification, rendering Plaintiffs' sequence-of-timing arguments legally irrelevant. *Id.*

[8] The parties entered into this revised agreement—which the Legislature required in order to postpone the time period for which the outside-counsel firms could bill the State certain larger monthly sums, thereby saving taxpayer funds—in light of the U.S. Census Bureau's recent statement regarding its delayed timeline for provision of redistricting data to the States. Second LeRoy Aff., Ex. 2.

No more meritorious are Plaintiffs' concerns with the wording of the Assembly's February 2, 2017, Assembly Committee ballot, which authorized the House to engage outside counsel for all "legislative redistricting and . . . ancillary matters," LeRoy Aff. Ex. 6, claiming that it is time limited to "one [or] two legislatures" and so cannot cover the contracts here, Pls.Resp. 25. No such time limit appears in the ballot's text. LeRoy Aff. Ex. 6. In any event, the Assembly's March 24, 2021, ballot explicitly authorizes these specific agreements, and so ratifies them under Section 16.74. Restatement (Second) of Contracts § 380.

C. Section 13.124, Read Consistent With Section 990.001(3), Also Authorizes These Contracts, And Plaintiffs Offer No Cogent Answer

Section 13.124 also authorizes the outside-counsel contracts here because this Section empowers Speaker Vos and Majority Leader LeMahieu to obtain legal counsel for their respective Houses both in *commenced* actions and in *imminent* actions, including the certainly impending redistricting actions expected here. Leg.Br. 21–26. The text of Section 13.124 provides that the Speaker and the Majority Leader, "in [their] sole discretion, may obtain legal counsel other than from the department of justice . . . in any action in which the assembly [or the senate] is a party or in which the interests of the assembly [or the senate] are affected." Wis. Stat. § 13.124(1)(b), (2)(b). Under Section 990.001(3)'s interpretive rule that "the present tense of a verb includes the future when applicable," Wis. Stat. 990.001(3), Section 13.124's scope explicitly includes actions in which either House will be "a party or in which the interests" of either House will be "affected," Leg.Br. 22–23. The streamlined procedure created by Section 13.124 empowers Legislative Leaders to obtain outside

counsel on an expedited basis—avoiding potential delays from the ballot procedures or committee votes necessary under the Legislature's preexisting practices and procedures—thus allowing Legislative Leadership to protect the Legislature's interests even in fast-paced, emergency litigation. Leg.Br. 22.

Plaintiffs counterarguments on this statute are exceedingly limited and divorced from the relevant statutory text. Plaintiffs argue that Section 13.124 applies only when there are "action[s] *pending* in which the legislature is a party or in which its interests are affected," and that Section 990.001(3) cannot expand that scope to include imminent actions. Pls.Resp. 30–31. Yet Plaintiffs do not explain *why* Section 990.001(3)'s interpretive rule is not "applicable" here. Pls.Resp. 30–31. Indeed, the context of Section 13.124 supports application of Section 990.001(3)'s rule to include imminent lawsuits within Section 13.124's scope, given Section 13.124's concern for the Legislature's need for expedited litigation authority. Leg.Br. 22–23. So, while Plaintiffs criticize the Legislature as attempting to use Section 990.001(3) to "add an adjective to § 13.124," Pls.Resp. 31, their criticism rings hollow in light of Section 990.001(3)'s clear, text-based rule.

Plaintiffs' only other argument is that "there is no evidence that any action regarding redistricting in Wisconsin is imminent," given the U.S. Census Bureau's delay in reporting redistricting data. Pls.Resp. 30 n.17. But Plaintiffs do not dispute that "redistricting is now almost always resolved through litigation rather than legislation." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam). Indeed, legal proceedings involving redistricting have

already begun, as the Wisconsin Supreme Court is currently considering a rules petition related to the upcoming decennial redistricting, which petition the Legislature appeared before the Court to support, represented by counsel under one of the outside-counsel contracts at issue here. Leg.Br. 24–25.

CONCLUSION

The Court should grant the Legislature's converted Motion For Summary Judgment.

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Respectfully Submitted,

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