IN THE SUPREME COURT OF WISCONSIN

Appeal No. 2021AP802

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

Plaintiffs-Respondents,

v.

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

Defendants-Appellants-Petitioners.

On Appeal From The Dane County Circuit Court
The Honorable Stephen E. Ehlke, Presiding
Dane County Case No. 2021-CV-589

PLAINTIFFS-RESPONDENTS' RESPONSE BRIEF

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STATEMENT OF ISSUE FOR REVIEW

On the record made before the circuit court, which is reviewed by this Court *de novo*, are the Plaintiffs-Respondents entitled to a summary judgment in their favor holding that the contracts entered into by the Defendants-Appellants-Petitioners for representation of the Wisconsin Assembly and Wisconsin Senate, respectively, by counsel other than the Wisconsin Department of Justice in an action which had not been filed, void *ab initio*?

The circuit court answered: Yes

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is scheduled for November 1, 2021. Publication of the court's decision is appropriate so that the current and future Speakers of the Assembly and Majority Leaders of the Senate understand the limitation on their authority to hire outside counsel in the absence of an existing action.

STANDARD OF REVIEW

When reviewing a summary judgment granted by a circuit court:

> [t]he Wisconsin Supreme Court] review[s] a circuit court's grant of summary judgment de novo, applying the same methodology as the circuit court, and benefiting from its analysis. *Atkins v. Swimwest Family Fitness Center*, 2005 WI 4, ¶ 11, 277 Wis. 2d 303. According to Wis. Stat. § 802.08(2), summary judgment will be granted "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 fact and that the moving party is entitled to a judgment as a matter of law."

Everson v. Lorenz, 2005 WI 51, ¶ 9, 280 Wis. 2d 16.

STATEMENT OF UNDISPUTED FACTS

These are the undisputed facts in the record before the circuit court:

1. The Plaintiffs-Respondents are citizens of and taxpayers to the State of Wisconsin. (R.38-41)
2. 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.[1]
3. 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.[2] (R.1,p.20:App'x.99)
4. Devin LeMahieu became the Majority Leader of the Wisconsin Senate for the 2021-2022 on January 4, 2021. [3]
5. On December 23, 2020, Robin Vos, in his 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

[1] https://docs.legis.wisconsin.gov/2021/related/journals/assembly/20210104. All web pages last visited September 8, 2021.

[2] 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.

[3] 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.

contract") for pre-litigation consulting, strategic litigation direction, and legal representation in future possible litigation related to redistricting. (R.1,pp.15-20:App'x.94-99) The scope of representation 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.
>
> 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.

(R.1,p.15:App'x.94)

6. 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") (R.1,pp.21-23:App'x.100-02)
7. Besides providing representation in possible redistricting litigation, BGSJ also agreed to provide other legal services and confidential legal advice to Vos and LeMahieu 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. . .
>
> ###
>
> **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.

(R.1,pp.21-22:App'x.100-01)

8. When Vos and LeMahieu executed the contracts, there was no action pending in any Wisconsin or federal court about the state's decennial redistricting. (R.42,¶¶ 4-7)
9. Vos and LeMahieu knew that no such action existed because the BGSJ contract states that litigation services will be provided "in judicial or proceedings relating to redistricting, should such an action be brought," and 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." (R.1,pp.15, 21-22:App'x.94, 100-01)

10. The Assembly Policy Manual for the 2021-2022 legislative session[4] 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, 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).

11. When Vos entered into the Consovoy and BGSJ contracts, the Assembly Committee on Organization had not authorized him to do so pursuant to Wis. Stat. § 16.74(2). (R.21,pp.22, 151:App'x.130, 259; R.1,pp.19-23:App'x.98-102)[5]

12. 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). **(**R.21.pp. 20, 121:App'x.128, 229; R.1,p. 20:App'x.99)

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[4] Available at https://legis.wisconsin.gov/lhro/media/1144/combined-policy-manual-web-version-1-6-21.pdf.

[5] Also see https://legis.wisconsin.gov/lhro/media/1144/combined-policy-manual-web-version-1-6-21.pdf.

13. The Wisconsin Assembly and Senate were billed and have paid $30,000 per month to Consovoy pursuant to the terms of the contract and have also made payments under the BGSJ contract. (R.31, 32)
14. The Secretary of the Department of Administration has not, pursuant to Wis. Stat. §16.74(4), received any bills submitted for audit and payment authorization under the Consovoy or BGSJ contracts. (R.37,p.14)

ARGUMENT

I. Introduction and summary of argument

Without the passage of any resolution, bill, or other type of prior approval from the Senate or Assembly, Senate Majority Leader-Elect Devin LeMahieu and Assembly Speaker Robin Vos engaged two law firms to represent the Assembly and Senate in redistricting litigation that did not exist. This case is not about the authority of the Legislature to hire outside counsel. It is about Robin Vos and Devin LeMahieu doing so in violation of the requirements of and limitations on that authority found in Wis. Stat. § 13.124. Despite the positions they hold, Vos and LeMahieu are not the "Legislature." They are "Legislators" and will be referred to as such in this brief.

Wis. Stat. § 13.124, enacted in 2018, created a process to engage counsel, other than the Attorney General, to represent the legislature or either of its houses "in any action in which [any of those bodies] is a party or in which [the body's] interests are affected." For the first time in Wisconsin history, it allowed the Speaker of the Assembly and the Majority Leader of the Senate in specified circumstances to ***unilaterally,***

in their ***"sole discretion,"*** engage private counsel to represent the Assembly or Senate and use unlimited taxpayer dollars to pay those outside attorneys ***with absolutely no oversight from any legislative entity or any other branch of state government***.

In signing the contracts, the Legislators purported to use authority granted to the Majority Leader and Speaker in Wis. Stat. § 13.124 to hire outside counsel but did so when the conditions precedent to using that authority did not exist. Now recognizing their *ultra vires* behavior, they pivot to claim their authority came from several other sources.

To avoid limitations on their authority under Wis. Stat. § 13.124, the Legislators ask this Court to add words to the statute by interpreting "action" to mean "imminent action," to find authority in what they claim is the legislature's "regular process" for hiring private counsel under the Department of Administration procurement process described in Wis. Stat. § 16.74, or to conclude that Wis. Stat. § 20.765, the sum-sufficient appropriation for legislative functions authorized elsewhere, itself authorizes these Legislators to hire attorneys at their whim. The Legislators even claim that the Constitution itself gives them authority to hire private counsel as they did here, asking the Court to read that power into the Constitution, a task that the Court lacks the power to do.

This brief will explain why none of those sources provided the Legislators with the authority to enter into the subject contracts.

Giving two legislators, through Wis. Stat. § 13.124, the authority to spend unlimited taxpayer funds on private attorneys without any oversight was unprecedented. When it enacted that statute the

legislature arguably could have given the Speaker and Majority Leader the unilateral authority to hire private lawyers, at any time and for any purpose, but it did not do so. Instead, it limited that authority to times when a civil "action" existed.

This lawsuit is neither about the constitutional powers of the legislature nor the scope of its ability to use its sum sufficient budget. It is about the ***ultra vires* actions of two legislators** and the Court's duty to uphold the requirements of Wis. Stat. § 13.124 ***as it is written***.

II. The contracts at issue unlawfully exceeded the Legislators' authority under Wis. Stat. § 13.124 to engage counsel other than the Wisconsin Department of Justice.

In 2018, the Wisconsin Legislature enacted Wis. Stat. § 13.124, entitled "Legal Representation," which plainly and simply specifies the circumstances under which legislative leaders like Vos and LeMahieu may unilaterally engage private counsel on behalf of legislative bodies.

All parties agree that at least one of those prerequisite circumstances—the existence of a legal action to which a legislative body is a party or in which its interests are affected—was lacking when Vos and LeMahieu entered into the contracts here. That rendered the contracts unlawful.

A. Wis. Stat. § 13.124 does not independently authorize the contracts here.

Under Wis. Stat. § 13.124, the Legislators each "may obtain legal counsel other than from the department of justice . . . ***in any action*** in which the [applicable house] is a party or in which the interests of the [applicable house] are affected" (emphasis added). The Legislators oversimplify this Section as "allow[ing] legislative leaders to engage

outside counsel, on behalf of the Assembly or the Senate, in their '***sole*** discretion.'" (Opening Brief of Defendants-Appellants-Petitioners, hereinafter "Br.", at 34-35 (emphasis in original))

Although the discretion granted by the statute is indeed placed solely in those officers and not other actors, it is still bounded: it may only be exercised to provide representation "in any action in which [the relevant house] is a party or in which [the relevant leader determines that the house's] interests are affected." Wis. Stat. § 13.124(1)(b), (2)(b). The leaders are plainly not given discretion to determine whether an "action" exists. An action exists when it is filed. See Wis. Stat. § 802.01(1).

The Legislators now admit that Wis. Stat. § 13.124 does not of its own force authorize the contracts, because there was no action related to redistricting pending in any court when the contracts were entered into; the first was filed a month ago, on August 13, 2021. (Br. at 12) They therefore seek to expand its reach of to cover actions in which the Assembly or Senate may someday be parties, or in which their interests may someday be affected.

They attempt this through use of § 990.001(3), which states: "***Tenses***. *The present tense of a verb includes the future when applicable.*" They claim that using Section 990.001(3) saves the contracts' validity because it is a "command . . . requiring Section 13.124's present-tense verbs 'is' and 'are' to include the future tenses of 'will be.'" (Br. at 38)

Section 990.001(3) does not solve their lack of authority problem because neither "is" nor "are"—nor even, for that matter, any other verb in the relevant text of Section 13.124—applies to the word "action." Instead, those verbs only appear in relation to the terms

"party," and the "interests" of the assembly and the senate.[6] Thus, while the statute may allow the Legislators to retain private counsel for the Assembly or Senate in an action that the body ***will be*** party to, or in which the body's interests ***will be*** affected, the action itself must exist, in the present, at the moment the leaders contract with private counsel. *See* Wis. Stat. § 13.124(1)-(2).[7]

Therefore, as the circuit court recognized, what the Legislators ***actually*** want is for the Court "to construe 'action' to include anticipated, likely, or impending actions." (R.51,p.15:App'x.30) Although they deny this (Br. at 38), they do explicitly ask the Court when interpreting Section 13.124 to construe it to include "***imminent*** 'action[s]'" (Br. at 12, 35-36) and "***not-yet-filed*** action[s]". (Br. at 38) (emphasis added). These are distinctions without a difference. The Court may not construe Section 13.124 as they request, because that cannot be accomplished by applying Section 990.001(3)'s power to allow for ***verbs*** to be read in their future tense.

Similarly, Section 13.124's text only allows Vos and LeMahieu to retain outside counsel "***in*** an action." That choice of preposition unmistakably signals—more than even the words "for" or "regarding" might—that the counsel's role is limited to appearing on behalf of the

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[6] For example, the operative language of Section 13.124(2)(b), with present tense verbs emphasized, is "The senate majority leader . . . may obtain [outside] legal counsel . . . in any action in which the senate ***is*** a party or in which the interests of the senate ***are*** affected." After shifting these verbs to the future tense in accordance with § 990.001(3), it reads "…in any action in which the senate ***will be*** a party or in which the interests of the senate ***will be*** affected."

[7] Section 990.001(3)'s rule of interpretation applies only "when applicable." Vos and LeMahieu advance no argument that this rule of interpretation applies to Section 13.124 . The Court should reject their argument for this reason as well.

legislative body in a lawsuit that has already been commenced which, by definition, is action that already exists. The Legislators' interpretation would impermissibly insert more words to make the statute read "***for*** an ***anticipated*** action."

Wis. Stat. § 990.001(3) does not allow adjectives, nouns, or prepositions to be read in to convert other nouns ("action") into future contingencies ("possible future action"). In order to adopt the Legislators' interpretation of the statute, the Court would not only have to disregard the plain text of Section 990.001(3), but also wreak havoc on the countless other nouns throughout the Wisconsin Statutes.

Further, the Court may not legislate by reading into the statute something which is not there, and which the Legislature could have easily written had it so intended: "The Legislature is presumed . . . to have chosen its words carefully." *Vill. of Slinger v. City of Hartford,* 2002 WI App 187, ¶ 14, 256 Wis. 2d 859. Had the Legislature intended for the Speaker and Majority Leader to have the authority to obtain private legal counsel to represent legislative bodies in connection with actions that do not yet exist, it would have written the statute differently. This court cannot rewrite unambiguous legislation – words cannot be read into a statute to save an interpretation. *See State v. Hall,* 207 Wis. 2d 54, 82, 557 N.W.2d 778 (1997).

Finally, the Legislators' proffered interpretation would impermissibly render the power conferred by Section 13.124 to be un-policeable and essentially limitless. It would effectively allow the Speaker and Majority Leader to tie up literally unlimited amounts of taxpayer money in contracts with outside counsel—even without any substantive work being performed by that counsel—simply by vaguely

citing supposedly "impending" litigation. Such unfettered spending authority might necessarily deprive the other branches of government of the funds with which to fund their own operations, or even hobble future legislatures. Such an absurd possibility would logically have been rejected by any reasonable Legislature and must be rejected by this Court. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633.

The basic rules of statutory construction reinforce the obvious import of the plain language of both Wis. Stat. § 13.124 and § 990.001: The Speaker and Majority Leader may hire outside counsel to represent legislative bodies only in an extant legal action.

B. The Legislators' attempts to distort and distract from Wis. Stat. § 13.124 are unavailing.

The Legislators implicitly acknowledge their lack of authority from Wis. Stat. § 13.124 to sign the contracts at issue by now asserting in their defense a series of atextual attempts to distort and distract from the statute's significance. None of these attempts can rescue them.

1. Wis. Stat. § 13.124 controls as the most specific statute governing the Speaker and Majority Leader's hiring of outside counsel.

First, the Legislators argue that they were authorized to enter into the contracts not only by Section 13.124, as they read it through § 990.001(3), but also by Wis. Stat. §§ 16.74, 20.765, and the Legislature's alleged "inherent" constitutional power. However, because Section 13.124 plainly limits the circumstances under which the Speaker and Majority Leader may hire outside counsel, each of those claims of authority is false. Whatever authority the Speaker and Majority Leader

may have had to hire outside counsel to represent legislative bodies prior to the enactment of Section 13.124,[8] the statute alone is what shapes their authority now.

"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 (1970). Therefore, even if Wis. Stat. §§ 16.74(1) or 20.765 ***would*** have, in a vacuum, authorized the Legislators to contract for legal services generally, the contracts here could only be authorized by Wis. Stat. § 13.124.

Wis. Stat. § 13.124, enacted in 2018, [9] is a much more recent and infinitely more specific statute than Sections 16.74 or 20.765 regarding the Speaker's and Majority Leader's authority to retain outside counsel on the taxpayers' dime. Section 16.74 simply provides procedure for institutional purchasing generally. Section 20.765 simply provides a pool of funds for purchase of otherwise-authorized goods and services. In fact, it referenced ***within*** Section 13.124 as the source of funds to which outside counsel contracts ***authorized*** by Section 13.124 may be charged. Section 13.124 is, therefore, the only statute that may now authorize the Legislators to act as they did here.

[8] None of these claimed alternate sources of authority independently would have authorized the Legislators' behavior, even if Section 13.124 did not exist.

[9] https://docs.legis.wisconsin.gov/2017/related/acts/369.

The Legislators cannot deny that Section 13.124 is the more specific statute on the topic of the Speaker and Majority Leader's authority to retain outside counsel, and completely fail to confront *Martineau*'s "cardinal rule" dictating that that section should therefore govern.[10] Instead, the Legislators raise a straw man argument about "implied repeal." (Br. at 20-21) Their baseless reference to the Legislature's "long-exercised authority" notwithstanding, the issue here has never been about whether any language in Section 16.74 was repealed by implication when Section 13.124 was passed.

As its name suggests, the "implied repeal" doctrine concerns whether statutory language—such as an element of crime—is actually, completely nullified by a later enactment. *See State v. Villamil*, 2017 WI 74, ¶¶ 34-38, 377 Wis. 2d 1. If it did not, then the doctrine would be irreconcilable with the cardinal rule of the specific controlling over the general. That doctrine therefore has nothing to do with this case.

2. The Legislature's intent in Section 13.124 was to grant limited new authority to the Speaker and Majority Leader to engage outside counsel.

In addition to ignoring the text and the controlling specificity of Section 13.124, the Legislators also attempt to sidestep the statute's limits on their unilateral authority by repeatedly describing it as merely some sort of "streamlined" or "expedited" alternative authority for them to retain outside counsel to authority that already existed. They claim that Section 13.124 "enables the Houses . . . to avoid the delays

[10] The Legislators also cannot argue that Section 13.124 is not on point because they argue that the contracts are independently authorized by that Section. (*See* Br. at 34-38.)

that can sometimes occur from the Legislature's more-standard practice." (Br. at 5, 12, 20, 34 & n. 4, 35) However, there is no support for those characterizations, and they must be disregarded.

a. The legislative intent is found in the statute's plain language.

> Ours is "a government of laws not men," and . . . [i]t is the ***law*** that governs, not the intent of the lawgiver.... Men may intend what they will; but it is only the laws that they enact which bind us."

Kalal, 2004 WI 58 at ¶ 52 (emphasis in original) (quoting Antonin Scalia, *A Matter of Interpretation,* at 17 (Princeton University Press, 1997).

The plain language of Section 13.124 recognizes that ordinarily, legal counsel for the Assembly and Senate is provided by the Wisconsin Department of Justice. It also recognizes the prudence of a limitation on when the Speaker and Majority Leader, with absolutely no oversight, could access the Legislature's sum-sufficient budget to pay the high hourly rates of outside counsel when the Attorney General and his or her team are paid through the Department of Justice's budget.[11]

The Court should look no further than the plain text of Section 13.124 to determine what the Legislature intended in passing it. That intent was to grant limited new authority to the Speaker and Majority Leader to engage outside counsel.

While the traditional rule is that "'resort to legislative history is not appropriate in the absence of a finding of ambiguity'" this Court

[11] "The Legislature is presumed . . . to have chosen its words carefully." *Vill. of Slinger*, 2002 WI App 187 at ¶ 14. Further, one may presume that even the Speaker and Majority Leader understand that they will not hold those offices forever, and that good government is unlikely to be served by concentrating such power in the hands of so few.

has recognized that "[o]n occasion . . . we consult legislative history to show how that history supports our interpretation of a statute otherwise clear on its face." *Seider v. O'Connell*, 2000 WI 76, ¶¶50, 52, 236 Wis. 2d 211. At the same time it enacted Section 13.124, the Legislature enacted Wis. Stat. §§ 13.365 and 803.09(2m). Those sections ***expanded*** legislative authority to engage in litigation, including through private counsel. From both that context and from its plain language, it is apparent that Section 13.124 was a ***limited grant*** of authority, further ***adding*** to the Legislature's statutory authority to engage in litigation, here by giving two legislative leaders authority to hire outside attorneys to represent the Legislature in specific actions without obtaining permission from anyone else.

b. No legislative history supports the Legislators' theory of legislative intent.

Even if the Court were to consider the Legislators' arguments regarding legislative intent, i.e. that Section 13.124 is a "streamlined" process for exercise of authority also provided to them elsewhere, there is no legislative history to support those arguments. The Legislators present absolutely nothing to show the intent they ascribe to the enactment of Section 13.124. Neither do they present any record evidence of any "delay" resulting from any alternative practice that the Legislature might have used (see Br. at 35), or that the usage of Section 13.124 would somehow ameliorate such delay. Nor, for that matter, is there any statutory reference between Section 13.124 and Section 16.74 providing any hint that Section 13.124 was merely an additional procedure to use the same authority.

In fact, there are logical reasons to reject the Legislators' theory. For instance, they now primarily argue that they were authorized to sign the contracts by Wis. Stat. § 16.74. However, the procedure for executing contracts under that statute hints at no delay or need for streamlining: "Contracts for purchases by the senate or assembly shall be signed by an individual designated by the organization committee of the house making the purchase." Wis. Stat. § 16.74(2)(b). That process appears no more arduous or time-consuming than the process under Section 13.124—in both cases the contracting authority for each house resides in a single person.

The Legislators' unsupported claims of legislative intent also include many assertions about the reason for the passage of Section 13.124. For example, their proposition that Section 13.124's constraints should be disregarded because its passage was an "unusual" action of the Legislature (Br. at 20) is flawed not only because, as described *supra*, this is not an "implied repeal" case, but because it is without support of any kind.

In fact, it is the Legislators' legal theory that is logically "unusual." Their theory that Section 13.124 is merely a "streamlined" grant of authority that is also granted to them elsewhere begs the question: if Wis. Stat. §§ 16.74 and 20.765 and/or the Legislature's constitutional powers already granted them unfettered authority to hire outside counsel for legislative bodies with taxpayer funds, before 2018, why did the Legislature enact Wis. Stat. § 13.124? Under their theory, this statute is surplusage, their baseless "streamlined procedure" argument notwithstanding. This renders their interpretation impermissible. *Kalal*, 2004 WI 58 at ¶ 46.

c. No legislative practices show that any statute other than Section 13.124 governs here.

The Legislators also claim that they "did not intend to use [Section 13.124] to engage in these contracts," which they say is evidenced by the fact that "both Houses went through their formal committee processes" to authorize their actions. (Br. at 6, 36, n. 5) Although this claim would be irrelevant even if true (as it does not change the fact that since 2018, Section 13.124 is their sole source of authority), it is false.

The Senate committee vote that the Legislators cite as creating LeMahieu's authority was taken on January 5, 2021 (R.21,p.20:App'x.132), weeks ***after*** LeMahieu signed the Consovoy contract. (R.1,p.20:App'x.99) Similarly, after this lawsuit was filed, Vos claimed his authority derived from a 2017 Committee on Assembly Organization ballot connected to different litigation. (R.21,p.22:App'x.130) Then two weeks after this suit was filed, that committee took another vote, purporting to affirm that the 2017 vote authorized the contracts here. (R.21,p.151:App'x.259) The fact that this occurred after the Plaintiffs-Respondents filed this action, and months after both contracts at issue had been signed, is a plain admission that when Vos and LeMahieu executed the contracts, they lacked legal authority to do so.

Notably, none of those votes even took place in the 2019-2020 biennium—the biennium in which Vos and LeMahieu signed the Consovoy contract. (R.1,pp.19-20:App'x.98-99) Thus, if anything, the irregularity of the committee procedures employed around the contracts here is evidence that Vos and LeMahieu knew that, acting in

the wake of the enactment of Section 13.124, any prior-existing authority did ***not*** apply.

Moreover, the committee processes now cited by Vos and LeMahieu as pre-approving or ratifying their engagement of legal counsel is not required by Section 16.74(2)(b), which requires only a blanket designation of contracting authority. Nor is committee action required by ***any*** of the sources of authority that the Legislators now claim. Therefore, their "practices" are no less consistent with Section 13.124 than they are with any other claimed source of authority.

Section 13.124 is ***the*** process by which Vos and LeMahieu are authorized to retain outside counsel for the Legislature, its houses, and/or its members. Because the contracts were for legal services outside of an extant action, they acted unlawfully.

III. No other Wisconsin statute or Constitutional provision independently authorized the Legislators to hire outside counsel.

The Constitution requires that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law." Wis. Const. art. VIII, §2. This is the sole source of the Legislature's spending powers. *Flynn v. Dep't. of Administration,* 216 Wis. 2d 521, 540, 576 N.W.2d 245 (1998). Every withdrawal from the State Treasury involves three features: (1) authority to spend money; (2) a pool of funds from which the expenditure will be withdrawn; and (3) a bureaucratic process by which the bill is submitted and paid. There is no question that Wis. Stat. § 13.124 provides authority for specific expenditures (Speaker and Majority Leader may hire outside lawyers to represent the Assembly and Senate in certain actions) and identifies the source of

funding for those expenditures (the appropriations made under Wis. Stat. §20.765 (1)(a) and (b)). It even describes a modification to the usual bureaucratic process for payment described in Wis. Stat. § 16.74 (rather than being subject to audit before payment, payment is at the leader's "sole discretion").

Unable to derive authority and a source of funding for hiring outside counsel in the absence of an existing "action," which is a necessary precedent to doing so under Wis. Stat. § 13.124, the Legislators seek to transform statutes which represent feature (2)--Wis. Stat. § 20.765, a pool of funds from which payment may be withdrawn, and (3)--Wis. Stat. § 16.74, a bureaucratic process for payment, into feature (1)--independent authority to hire private counsel. They also attempt to find independent authority for their acts in the state Constitution itself. As detailed below, all of these arguments fail, and would fail even in the absence of Section 13.124.

A. Wis. Stat. § 20.765 does not independently authorize the contracts here.

The Legislators' argument that Wis. Stat. § 20.765 independently authorized them to hire outside counsel (Br. at 31-34) is a desperate attempt to find authorization where there is none. That statute, by its plain terms, provides a sum-sufficient appropriation for legislative functions that are ***already*** authorized; it is not an independent basis for their actions here. It reads, in relevant part, as follows:

> 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.[12]

Wis. Stat. § 20.765(1)(a).

The statute is clear on its face: it provides ***support,*** i.e., funding**,** for functions; it does not affirmatively ***authorize*** any functions. In order for the legislature to use its "sum-sufficient budget" to pay for goods or services furthering its functions, the purchase of those items must be authorized elsewhere. This is also supported by case law interpreting that statute.

State ex rel. Moran v. Dep't of Admin., 103 Wis. 2d 311, 307 N.W.2d 658 (1981), explained that whether an officer has the ***authority*** to make a purchase generally and whether Wis. Stat. § 20.765 allows the officer to determine that an authorized purchase comes under a particular appropriation are two different questions, ***each*** of which must be answered in the affirmative in order for the officer's purchase under Section 20.765 to be valid.

The Legislators attempt in vain to turn *Moran* to their own benefit, by quoting this statement out of context: "the persons charged with administering [a sum sufficient] appropriation are those who are to determine whether an expenditure of funds falls within the terms of the appropriation." *Moran*, 103 Wis. 2d at 319. (Br. at 33-34)

Moran addressed whether the Secretary of Administration was entitled to deny a particular payment from a sum sufficient

[12] Section 20.765(1)(b) is a twin provision covering the Senate.

appropriation administered by another person (in that case, the director of state courts) by declaring that the expenditure was not authorized by the appropriation. *Id.* at 315. The Legislators' quoted language plainly meant that persons charged with administering a sum sufficient fund (and not the Secretary) were allowed to make the initial, ***procedural*** determination on the matter. It did not concern whether the ***legal*** authority to make the expenditure existed, or whether the administrator was entitled to assess that legal authority without review by the courts. That is abundantly clear because, as a prerequisite step in the same decision, the Court thoroughly examined whether such legal authority actually did exist in that case. *Id.* at 316-319.

If, as the Legislators argue, sum sufficient appropriations were affirmative grants of spending authority for whatever their administrators sought fit to do within the scope of their general functions, then the *Moran* court would not have analyzed the underlying authorization in the first place, and sum sufficient fund administrators would realize absurd aggrandizements of power.

The remainder of the Legislators' Section 20.765 argument ignores both statutory language and statutory context and suggests virtually no limit to the power they seek to accrete to themselves under this statute. The circuit court aptly summarized their position as follows: that certain members of the Legislature have *carte blanche* to "do whatever [they] want[] under the provision so long as [the] expenditure is related to a function of the Assembly [or] Senate" (R.50,p.18:App'x.33). That is not only absurd, but dangerously unconstitutional. (*See* R.50,p.19:App'x.34 (circuit court's decision, citing *Fabick v. Evers*, 2021 WI 28, ¶ 14, 396 Wis. 2d 231.)

The Legislators argue that "[b]ecause the Legislature determines what its own functions are under the statute, the fact that it appropriated money to engage outside counsel is conclusive evidence that such an act is a 'function[] of' the Legislature." (Br. at 32 citing *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 13, 334 Wis. 2d 70). *Ozanne* stands for no such thing. It concerned courts' ability to police the Legislature's adherence to its internal procedures, and did not prohibit the courts from determining whether legislators were authorized to act under a statute.

The "Legislature" also did not "appropriate money to engage outside counsel" by the Legislators' execution of the subject contracts, or otherwise. (Br. at 32) Their misuse of the term "appropriate" underscores the Legislators' fundamental misconstruction of this statute, which, like all of Chapter 20, concerns allocations of ***money***, not of ***authority***. It no more gives the Legislature (or its officers) the authority to spend money on anything they want than it does, for example, the Governor (Section 20.525), the Veterinary Examining Board (Section 20.115), or the Labor and Industry Review Commission (Section 20.427).

The Legislators' distortions continue with their argument that, "given the importance of counsel to the operations in the 'highly specialized and complex area of redistricting law,' the Legislature's hiring of skilled counsel to draft, evaluate, and prepare to defend 'the once-every-decade issue of redistricting,' App'x.505–06, is unmistakably a 'function[ ] of' the Legislature.'" (Br. at 32) Their effort to find authority in Section 20.765 to engage outside counsel under the

contracts at issue here by calling that engagement a "function" of the Legislature falls flat.

Although drafting maps for redistricting is a function of the Legislature, the contracts here do ***not*** include, and expressly ***exclude***, drafting services. The Consovoy contract is limited to "possible litigation," and the BGSJ contract explicitly states that the representation "does not include . . . the drawing of redistricting maps." (R.1,pp.14, 20-21:App'x.94, 100-01) Yet the Legislators repeatedly and falsely assert or imply that the contracts here involve map-drawing. (See Br. at 6, 27, 29, 30-31, 32)

Moreover, hiring private lawyers in connection with any redistricting task is decidedly not a legislative function. The Legislature has created for itself, by law, a panoply of redistricting-related and legal counsel services in the form of its own service agencies and the Department of Justice. *See* Wis. Stat. §§ 13.91, 13.92, and 13.96. Per design and historical practice, the Legislative Reference Bureau provides legal and information services to legislators regarding redistricting and, along with the Legislative Technology Services Bureau, assists legislators in putting together redistricting maps according to legislators' desires.[13] Meanwhile, the Wisconsin Legislative Council also provides confidential legal advice and analysis at legislators' request; the attorney general is required to "[g]ive his or her opinion in writing, when required, without fee, upon all questions of law submitted to him or her by the legislature;" and the Department of

[13] Wisconsin Legislative Reference Bureau. *Redistricting in Wisconsin 2020: the LRB Guidebook*. 2020. P. 74. Available at http://lrbdigital.legis.wisconsin.gov/digital/collection/p16831coll2/id/1942/rec/1

Justice (or, potentially outside counsel once an action commences) is available to provide litigation services upon request.[14]

B. Wis. Stat. § 16.74 does not provide the Legislators authority to independently enter into the contracts here.

The Legislators claim that Wis. Stat. § 16.74(1) "clearly authorizes the Legislature . . . to engage in contracts for '***all*** services,' via specific procedures." (Br. at 14), emphasis in original). In so arguing, they flip the statute on its head. "Specific procedures" applicable to certain purchases—not authorization for the purchases themselves—are ***all*** that the statute provides.[15] That is, this Section only lays out the bureaucratic process by which expenditures authorized and funded elsewhere are submitted and paid. Both the plain text and the context of Section 16.74 demonstrate that, like Wis. Stat. § 20.765, it does not grant independent authority to the Speaker or Majority Leader to pay for what was not already authorized and funded by the Constitution or other statutes.

Wis. Stat. § 16.74 establishes the bureaucratic process for procurement through the Department of Administration ("DOA") of

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[14] Wisconsin Legislative Council. *About the Wisconsin Legislative Council.* https://legis.wisconsin.gov/lc/about-us/. Wis. Stat. § 165.015(1); Wis. Stat. §§ 13.124, 13.365, 803.09(2m), 165.08(1), 165.25(6)(a)1., and 165.25(1m).

The Legislators provide no evidence that the outside counsel retained under the contracts here is necessary in light of these services.

[15] The Legislators distort Wis. Stat. § 16.70(3) by omission. Contrary to their contention (Br. at 14), this statute does not resolve the meaning of the term "services" itself. Rather, it provides that "***contractual*** services" includes those "services, materials to be furnished by a service provider in connection with services, and any limited trades work involving less than $30,000 to be done for or furnished to the state or any agency." Thus, the scope of the term "services" is appropriately interpreted in light of the context to exclude the services at issue here. (R.58,pp.9-10:App'x.480-81)

"[a]ll supplies, materials, equipment, permanent personal property and contractual services required within the legislative branch." Wis. Stat. § 16.74(1). By its plain terms, it lays out not what may be purchased, but who exercises, through DOA, the purchasing authority on each institution's behalf; 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. *Id.*

The statute does not grant power; it bureaucratizes the use of it. Accordingly, the scope of purchase types covered by the statute- "[a]ll supplies, materials, equipment, permanent personal property and contractual services required within the legislative branch"—is drawn not to give broad spending authority to the purchasing institutions, but to clarify which purchases are processed subject to the statute's regulations.[16] 64 Wis. Op. Att'y Gen. 4, 5 (1975) (describing predecessor statutes as "statutory purchasing regulations" and stating that "the purpose for the purchase . . . determines whether the statutory purchasing requirements apply").

That the statute does not grant spending authority is also evidenced by the key verb: here, the passage upon which the Legislators claim authority merely states that certain purchases "required within the legislative branch ***shall*** be purchased by" the designated purchasers. As opposed to the permissive "may," "shall" is presumed to be mandatory, and "[w]hen the words "shall" and "may"

[16] To the extent that there is any "authorization," therefore, it is the authorization of officers to act on behalf of their institution, not of the institution to make purchases it could not absent independent authority. *Compare* Wis. Stat. §§ 16.74(1) (referencing committees and agencies) *and* (3) (referencing "legislative and judicial officers").

are used in the same section of a statute, one can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings." *Karow v. Milwaukee Cty. Civ. Serv. Comm'n*, 82 Wis. 2d 565, 571, 263 N.W.2d 214 (1978).

In Section 16.74(3), the Legislature indeed used "may" when granting officers authority to prescribe requisition and contract forms. Therefore, the key prescription in Section 16.74(1) clearly signifies that the actors are not given discretion to decide what to purchase, but rather that they simply are the actors who must execute any contracts for otherwise authorized purchases.

Contrary to the Legislators' claims, the text similarly reveals a lack of purchaser discretion by limiting the purchasables to those things "***required*** within the legislative branch." Wis. Stat. § 16.74(1) (emphasis added). This use of "required" as an adjective or passive voice verb, particularly without any reference to ***any*** actor designating the purchasables as "required," indicates that the statute applies only if the purchasables are ***objectively*** required within the branch, not if someone in the branch deems they are so. *See Dean v. United States*, 556 U.S. 568, 572 (2009). Consistent with plain meaning and logic, when Wisconsin statutes refer to a purchasable as "required," they mean that it is not merely "convenient," but "essential."[17] 36 Wis. Op. Att'y. Gen. 75, 77 (1947).

[17] Thus, even if Section 16.74(1) ***were*** to be deemed a grant of spending power to members of the Legislature, that power would still be cabined by the objective term "required." Because, as explained in Section III.C, *infra*, the contracts here were not required for the legislative process, any general grant of power in this statute would still be inapplicable here.

Consideration of statutory context – "the language of surrounding or closely-related statutes" is an obligatory part of statutory interpretation. *Kalal*, 2004 WI 58 at ¶ 46. It, too, makes clear that Section 16.74 is simply an administrative management mechanism for otherwise-authorized purchases by the legislative and judicial branches. The provision, entitled "Legislative and judicial branch purchasing," appears not in the statutory chapters governing either the legislative (Ch. 13) or judicial (Chs. 751- 758) branches, but rather in the chapter governing the DOA, which is a cabinet agency within the executive branch, and situated squarely among other DOA-managed regulations over government office purchases. *See, generally,* Wis. Stat. Ch. 16, Subchapter IV ("Purchasing").

The Legislators contend that Plaintiffs-Respondents' position — though clear from both text and context—would "lead to absurd results . . . including that both the Legislature and the judicial branch could not purchase ***any*** 'supplies, [etc.,]' unless they could point to ***other*** statutory or constitutional authorization." (Br. at 20 (emphasis in original)) That argument is baseless.

First, this action is not a challenge to the Legislature's ability to purchase items or services generally. For instance, numerous statutes besides Section 13.124 authorize specific legislative functions for which such purchasables may be required. (*See, e.g.*, Wis. Stat. §§ 13.14, 13.22, 13.25, 13.36.)

Second, the Legislators fail to explain ***what*** is so absurd or unreasonable about the proposition that Section 16.74 is not an independent, limitless grant of spending authority to them. They do not and cannot provide a single case in which any entity or individual

successfully relied on Section 16.74 for purported spending authority—the natural consequence of the statute never having been meant to confer the authority they claim, or needed to allow the government to function.

The Legislators analogize Section 16.71 to Section 16.74 in order to prop up their argument. (Br. at 14) Their theory is that these sections give the purchaser complete discretion over what may be purchased, and without an underlying legal necessity (or funding source) for the purchases.

Yet under the Legislators' logic, the DOA and the legislative and judicial branches have essentially unfettered authority to decide what they "require" to purchase and to do so without limits or funding source. That is, if Section 16.74 grants the Legislature and/or the Speaker or Majority Leader authority to hire outside counsel and an unlimited, unidentified budget to pay them, it gives DOA and court officials that same kind of authority and budget.[18] Plainly, it is the Legislators' interpretation of not only Section 16.74 specifically, but Chapter 16 generally, that would render absurd results and must be rejected. *Kalal*, 2004 WI 58 at ¶ 46.

Finally, the Legislators falsely claim that the Plaintiffs-Respondents previously did not dispute that Section 16.74 authorizes their actions and instead only asserted that the Legislators did not comply with procedural requirements. (*See* Br. at 15 & n. 3, 22-23)

[18] That would also mean that the DOA has sole discretion to decide to what to purchase for all other agencies and, prior to the creation of Section 16.74 by 1985 Wisconsin Act 29, it had similar dominion over the legislative and judicial branches as well. See https://docs.legis.wisconsin.gov/1985/related/acts/29.

To the contrary, Plaintiffs-Respondents have always clearly identified, as the dispositive and principal failures of the Legislators' Section 16.74 defense, that Section 16.74 simply does not authorize the Legislators to sign the contracts and that their only authority to hire outside counsel comes from Wis. Stat. § 13.124. (*See* R.36,p.20:App'x.346)

It is also true that in executing the contracts, the Legislators did not even attempt to act in accordance with the procedures in Section 16.74—belying the Legislators' claims that they were consciously utilizing this statute, not Wis. Stat. § 13.124. The Legislators do not deny these failures.

Most notably, the undisputed evidence demonstrates that the DOA received no bills submitted for payment authorization and audit under the Consovoy or BGSJ contracts pursuant to Wis. Stat. § 16.74(4). (R.37,p.14) The Legislators admit this, offering in their defense only that the violation is not isolated, but rather a standard practice (Br. at 21-22), which is an excuse that does not expiate their noncompliance with the law.

Similarly, the Legislators argue that payment under Section 16.74 is not conditioned upon DOA processing and audit, because the statutory requirement that the DOA "audit and authorize payment" is "without a discussion on the order in which these duties occur." (Br. at 22) To the contrary, the ***plain text*** of the statute provides for the audit to occur first. *See also Moran*, 103 Wis. 2d at 318 ("Without audit, there can be no payment of money out of the state treasury.").

The Legislators otherwise address their lack of compliance with Section 16.74 by claiming that their failures are "beyond the courts' jurisdiction" because they only violated "internal legislative

procedures." (Br. at 23) They are wrong again. Only legislative acts ***in the process of making law*** are considered "internal legislative procedures." (See Section III.C, *infra*.) Wis. Stat. § 16.74 is a statute that describes how the legislature's bills are processed and paid through the executive branch. Moreover, litigation, the subject of the context at issue, is not a process of making law. It is the process of interpreting and enforcing it.

C. The Wisconsin Constitution does not independently authorize the Legislators to enter into the contracts here.

Last, the Legislators argue that the Wisconsin Constitution itself authorized them to hire outside counsel. Their argument is entirely based on misstatements of law and distortions of the record and the contracts at issue here.

1. *This Court's doctrine makes clear that independent authorization does not exist.*

The Legislators' attempted constitutional refuge is a nebulous and shifting assertion of powers belonging to the Legislature that have nothing to do with contracts for "pre-litigation" services entered into by certain members of the Legislature. (See Br. at 23-29)

For the first time, they claim that the relevant core powers here are "core legislative and redistricting powers." (Br. at 25, 27)[19] They

[19] Also for the first time here, the Legislators claim in passing the relevant sources of their powers are not just "core" powers, but "shared" powers as well. (Br. at 27) They fail to elaborate, either to (a) identify what shared power(s) they claim provides such authorization here, or (b) explain how such a shared power could independently authorize the Legislators to enter the contracts without statutory authority. Any such claim must therefore be considered forfeited and, at any rate, would be contrary to law. *See Fabick v. Evers*, 2021 WI 28 at ¶ 14.

provide no support for the proposition that there is a "core redistricting" power, because it does not exist. Instead, they simply cite a constitutional provision that, when read in its entirety, clearly makes redistricting (at an appointed time) a ***duty*** of the Legislature, not a separate ***power,*** and not vested in the Speaker and Majority Leader alone. *See* Wis. Const. art. IV, § 3 ("Section 3. At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants.") That duty is performed, of course, through legislation, not litigation. *See*, e.g., 2011 Wisconsin Act 43; Wis. Stat. Ch. 4.

Their constitutional argument thus comes down to the Legislature's "core power to make the law." (Br. at 25) That power does not independently authorize the Speaker and Majority Leader to sign the contracts here. As the circuit court correctly recognized, "if an activity is not concerned directly with the process of making law itself, then it is not part of any 'core' legislative function," and the contracts signed by the Legislators clearly are not directly concerned with the process of making law itself. (R.50,p.8:App'x.23, *citing Custodian of Records for the LTSB v. State*, 2004 WI 65, 272 Wis. 2d 208.)

The legislative "core powers," and judicial deference thereto, are the powers necessary to the actual process of enacting law; not behavior of two individuals, purporting to act in their official capacities, entering into contracts for "pre-litigation" legal services to legislative bodies and paid for by taxpayers. This has repeatedly been made clear by the bounds that courts draw to respect core legislative powers: "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 (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 (emphasis added).

This 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 [at] ¶ 30[.] 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. *[] Stitt*, 114 Wis.2d [at] 364.

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

Here, neither the contracts at issue nor the statutes that the Legislators 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 *LTSB,* 2004 WI 65, 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 the Legislators refer to, when describing the retention of outside counsel for redistricting, as tools useful to help the "efficient exercise" of its core legislative power.[20] (Br. at 27)

However, this Court made 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. *LTSB*, 2004 WI 65 at ¶ 30 (emphasis added).

The *LTSB* case thus makes clear that, 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. Here, the circuit court correctly determined that the contracts are not part of such a function because they serve at least a primary purpose of "do[ing] pre-litigation work." (R.50,p.12:App'x.27)

[20] Ironically, and lest the Legislators argue that "redistricting assistance" is somehow of a higher order of benefit than the LTSB's functions so as to exempt it from this Court's holding, it must be observed some of the LTSB's statutorily-prescribed duties are indispensable to the redistricting process. *See* §§ 13.96(1)(b), (c); *See* also Section II.A, *supra*, describing the LTSB's role in redistricting.

By contrast, were the contracts about advice to inform the ***legislative process*** (which ***is*** a core function), then they would at the very least have had different terms.[21] Indeed, as the Plaintiffs-Respondents have shown, the contracts here are not made to serve the process of enacting laws. (R.50,pp.11-12:App'x.26-27) Unrebutted record evidence makes clear that participation in, and benefit from, those contracts is in fact ***completely withheld*** from at least some members of the Legislature. (R.44) Rather than illuminating the Legislature's path in passing redistricting legislation, the contracts are designed to keep many of the Legislature's members entirely in the dark, and to instead set up for litigation anticipated after the work of legislating is done.

The Legislators do not contest that all of the above is so. Nor do they confront *LTSB* or the circuit court's recognition that "if the [legislature] has authority to exercise certain powers not provided in our constitution, it must be because the legislature has enacted a law that passes constitutional muster and gives it that authority." (R.50,p.19:App'x.34, citing *Fabick*, 2021 WI 28 at ¶ 14.)

[21] The Legislators can make no serious argument that they retained outside counsel for the core purpose of "drafting redistricting legislation." They argue now that "[t]he Legislature concluded, . . . that the 'most eligible and appropriate' means to complete redistricting . . . include seeking the guidance of sophisticated outside counsel to offer map-drawing and prelitigation advice." (Br. at 27) This is the first time that they have claimed that the contracts here provided "map-drawing" advice, and that claim is false. In fact, the Consovoy contract is limited to "possible litigation," and the BGSJ contract explicitly states that its representation "does not include . . . the drawing of redistricting maps." Neither even mentions the provision of any services until after redistricting legislation is drafted. (App'x.94, 100-101)

2. *The Legislators attempt to evade this absence of constitutional authority by distorting and misapplying the law.*

The Legislators' constitutional argument misstates and distorts the law. They provide no legal authority addressing the Legislature's alleged constitutional core powers to hire outside counsel to participate in litigation, let alone the authority of the Speaker and Majority Leader to do so before there is any litigation but after such legislation has been drafted. That is, of course, because no such authority exists.

The Plaintiffs-Respondents urge the Court to even more carefully than usual examine the case law that the Legislators cite, some of which they distort far beyond any reasonable interpretation. For example, they cherry pick words to mine a sweeping grant of all power appropriate to achieve the ends for which any express authority is granted. (Br. at 24), *citing Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 54 & n. 38, 373 Wis. 2d 543.) In fact, the cited passage ***constrains*** the use of power: "Governments . . . exercise only that amount of authority they rightfully receive from those they represent. And they must use that authority ***only*** in ways that are appropriate to achieve the ends for which they were granted the authority." *Id.* (emphasis added).

Similarly, the Legislators rely heavily on a distortion of the *Minneapolis* case for the purported authority of individual legislators to undertake any activity they deem "eligible and appropriate" for the "efficient exercise" of general legislative powers. *Minneapolis, St. P. & S. S. M. Ry. Co. v. R.R. Comm'n of Wis.*, 136 Wis. 146, 116 N.W. 905 (1908).

In fact, that holding gave such deference to the Legislature not for activities undertaken ***toward making*** legislation, but for activities selected ***by legislation*** for the implementation of public policy. *See id.* at 910-911 (holding that, through a legislative enactment, the Legislature can make certain policies conditional, or delegate limited decision-making powers to other regulatory bodies).

All of the legislative powers cases cited by the Legislators simply reinforce that the legislature has broad authority to accomplish tasks ***by*** legislation. None support a finding of broad authority in the Speaker and Majority Leader to hire lawyers in anticipation of litigation over legislation.

The Constitution itself, which requires that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation ***by law***." Wis. Const. art. VIII, § 2; *see also Flynn*, 216 Wis. 2d at 540 (citing this provision as the lone source of the Legislature's spending powers). The Legislators' entire argument that the Constitution ***independently*** authorizes them to enter into the contracts here depends on this unsupported and illogical premise: that, in direct contradiction of this express prohibition, the Constitution *sub silencio* allows individual members of the legislature to expend treasury funds ***without*** appropriation by law.

The Legislators argue that "pre-litigation advice is necessary to ensure that the Legislature's maps are able to survive a litigation challenge." (Br. at 28) (citing *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706 (per curiam)). Their citation to *Jensen* does ***not*** support their claim at all. In fact, if anything, it militates ***against*** the

Legislators' cynical claims that litigation is inextricably interwoven with the redistricting process.

In that case, the Court admonished members of the Legislature that the "political legitimacy" of the redistricting process depended on good faith attempts to enact legislation, not looking ahead to litigation: "Despite the reality that redistricting is now almost always resolved through litigation rather than legislation, we are moved to emphasize the obvious: redistricting remains an inherently political and legislative—not judicial—task. . . . The framers in their wisdom entrusted this decennial exercise to the legislative branch because the give-and-take of the legislative process, involving as it does representatives elected by the people to make precisely these sorts of political and policy decisions, is preferable to any other." *Jensen*, 2002 WI 13 at ¶¶ 10, 23 (denying legislators' petition for original jurisdiction over issue of redistricting, in part because of lack of extant legislative redistricting bill). This only underscores the anti-democratic nature of the Legislators' contracts here: they entered into these contracts as litigants, not as lawmakers in a democracy.

Ultimately, for all the Legislators' attempts at distortion, they fail to present any authority for what they really seek: a constitutional litigation power for the Legislature that applies to laws that have not yet been passed and litigation that does not yet exist, and exercised not by the Legislature, but two members of it.

3. *No "historical practices" provide legal support for the contracts.*

Unable to support an independent authorization for the contracts on the basis of the Constitution itself, the Legislators seek support from "historical practices" as extrinsic sources of a Constitutional grant of power. (Br. at 28), *citing State ex rel. Williams v. Samuelson*, 131 Wis. 499, 111 N.W. 712, 717 (1907); *State v. Schwind*, 2019 WI 48, ¶ 13, 386 Wis. 2d 526.) This argument is wrong on multiple levels.

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 (internal quotation omitted).[22]

Because their purported source giving them authority to enter into the subject contracts is the Constitution's original Art. IV, § 1, the debates, prevailing practices, and "first laws" germane to the issue are those from the time of the Constitution's original adoption or "from time immemorial." *State v. Schwind*, 2019 WI 48, ¶ 13, 386 Wis. 2d 526.

[22] The Legislators err from the outset in positing that this Court "looks to three categories of . . . sources to interpret the Wisconsin Constitution": (1) plain meaning, (2) historical sources, and (3) "what the people understood the purpose" to be. (Br. at 23-24) (citing *Williams*, 2012 WI 59 at ¶ 15)) This distorts *Williams*. "What the people understood the purpose" to be is not a third category of allowable sources, but rather simply a consideration that can only be obtained from text and the specific, original historical sources described in *Williams*. *See State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520 (cited by *Williams*, 2012 WI 59 at ¶ 15). The Legislators' distortion is an implicit acknowledgement that the text and those historical sources do not support their interpretation.

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." *Samuelson*, 131 Wis. 499 (emphasis added).[23]

Nothing they offer in the way of evidence passes muster under those standards. (*See* Br. at 4-5, 28) 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 also underscores the complete absence of any statutory authority for Vos and LeMahieu's execution of the contracts here.

Moreover, none of their "evidence" is even remotely contemporaneous enough with the adoption of the Constitution to indicate the framers' intentions or merit consideration under *Williams* and *Schwind*. While decennial redistricting predates Wisconsin itself, their 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 their "evidence" fell within the necessary time frame, its substance 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 for outside counsel.

[23] They argue that *Samuelson* holds "historical practice over 'a quarter of a century' is 'a long [enough] period of time.'" (Br. at 29) This is another distortion. Such language, even if accurately attributed, would have been overturned by the far more recent precedents cited above. More importantly, even *Samuelson* itself only describes a quarter century of ***legislation*** as being relevant to establishing a constitutional interpretation—not at all a mere "historical practice" such as a history of contracting. *Id.*

There is no evidence of any history of contracts like those at issue here; the Legislators have produced not a single past contract with similar scope or terms. Neither is there any evidence of any meaningful approval of such contracts. Nor have they produced any evidence that the lawfulness of such contracts has ever been reviewed.

Further, most of the historical instances of the Legislature receiving the services of any outside counsel, including ***all*** of those prior to 2000, were in conjunction with court actions.[24] (*See* App'x.117, 135, 180-81, 197-98.) Because this case challenges the lawfulness of two legislators signing contracts with outside counsel in the ***absence*** of litigation, such evidence is irrelevant.

IV. The Court should decline to further comment on the standards for issuing a stay pending appeal.

The only matter pending before this Court is a *de novo* review of the judgment issued by the circuit court declaring that the Consovoy and BGSJ contracts were void *ab initio*.

This Court reviewed the circuit court's denial of stay, determined that it had erroneously exercised its discretion by improperly applying the *Gudenschwager* factors and in its July 15, 2021 order directed that the circuit court's judgment be stayed pending appeal. Having done that, this Court disposed of the issue. It is moot.

The question of whether the Court's stay order merits publication has already been decided. Supreme Court Rule 80.003(2)(b) states that orders of this Court may be published when "[t]he order contains

[24] The Legislators' earliest cited evidence is a newspaper article that includes the argument of at least one legislator that there was no legal authority for the retention of counsel even in that litigation-driven circumstance. (*See* R.21,p.9:App'x.117)

significant discussion or explanation of the state constitution, or any law, statute, or court rule." The Court has exercised its discretion and not published its July 15 order. There is no reason why the Court should revisit that decision by incorporating its July 15 order into its decision on the sole remaining issue before it.

If the Legislators want a binding recitation of the factors the courts of this state must consider when a stay is sought pending appeal of a judgment that will be reviewed *de novo*, they can introduce legislation to enact them. They do not need a published decision for further guidance.

IV. Conclusion

This Court should affirm the circuit court's judgment that the contracts are void *ab initio*.

Respectfully submitted this 14th day of September 2021.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b),(c) for a brief produced with a proportional serif font. The length of this brief is 10,975 words.

Dated this 14th day of September 2021.

Electronically signed by Lester A. Pines
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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) AND OF SERVICE

I hereby certify that:

I have submitted an electronic copy of this brief excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 14th day of September 2021.

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