No. 2021AP802

In the Supreme Court of Wisconsin

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
Case No. 2021CV000589

REPLY BRIEF OF DEFENDANTS-APPELLANTS-PETITIONERS

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INTRODUCTION

This case began as an effort to hobble the Legislature during a critical period of the decennial redistricting process. By the time of their brief before this Court, however, Plaintiffs now rest their arguments on theories that would undermine the functioning of our State's government. As to Section 16.74, Plaintiffs do not even attempt to defend the Circuit Court's reading, and instead urge this Court to adopt an atexutal interpretation of the statutory language that would disable the Legislature, the courts, and administrative agencies from making standard purchases necessary to perform their functions. On the Constitution, Plaintiffs take the position that the Legislature has no inherent authority to obtain experts to study the legality of laws it is considering. Plaintiffs are wrong on the merits, and this Court should hold that Section 16.74, Section 20.765, Section 13.124, and the Constitution each independently authorize these contracts.

This Court should also answer Issue Presented V, making clear that what happened here and in multiple other cases—where circuit courts wrongly refused to stay their injunctions pending appeal, causing weeks of irreparable harm—does not recur. Notably, Plaintiffs do not engage with the merits of the Legislature's arguments on this Issue, meaning they have forfeited any contrary arguments.

ARGUMENT

I. Plaintiffs Offer No Plausible Textual Arguments To Rebut The Legislature's Showing That Section 16.74 Independently Authorizes The Contracts, And Do Not Even Attempt To Defend The Circuit Court's Analysis

Section 16.74 authorizes the Legislature to "purchase[ ]" "contractual services required within the legislative branch" "by the joint committee on legislative organization or by the house or legislative service agency utilizing the . . . services," Wis. Stat. § 16.74(1), and those contracts can be "signed" by "individual[s] designated by either house of the legislature for the house," *id.* § 16.74(2)(b). The authorized legislative leaders signed the contracts to obtain expert advice on the decennial redistricting process, and thus Section 16.74 authorizes these contracts. *See* Opening Br.13–15.

Plaintiffs do not even attempt to defend the Circuit Court's reading of Section 16.74: that "contractual services" applies *only* to those services that "relate to, or [are] required by the purchase of 'supplies, materials, equipment [or] personal property.'" *See* Opening Br.15–18. Plaintiffs also do not defend the Circuit Court's constitutional avoidance argument with regard to Section 16.74. *See* Opening Br.19.

Instead, Plaintiffs take the unprecedented, atextual position that Section 16.74 (and, logically, Section 16.71) does not authorize any contractual purchases *at all*. Response Br.25–30. Plaintiffs' argument is contrary to the statutory

text. Subsection 16.74(1) provides that "[a]ll supplies, materials, equipment, permanent personal property and contractual services required within the legislative branch shall be purchased by the joint committee on legislative organization or by the house or legislative service agency utilizing the supplies, materials, equipment, property or services," Wis. Stat. § 16.74(1), and Subsection 16.74(2)(b) specifies who may enter into these contracts. Not a word here suggests that the legislative officer making the purchase needs additional, redundant authorization, found in some other statute. To the exact contrary, Subsection 16.74(3) explains that "[e]ach legislative and judicial officer who is *authorized* to make purchases or engage services *under this section* may prescribe the form of requisitions or contracts for the purchases and engagements," making clear "this section" (that is, Section 16.74) provides the specified officers with all the necessary "authoriz[ation]." (emphases added).

Plaintiffs' focus on Section 16.74's use of the word "shall," as opposed to the word "may," Response Br.26–27, is a red herring. The distinction between "shall" and "may" deals with whether an action is "mandatory" or "discretionary." *State v. Cox*, 2018 WI 67, ¶ 13, 382 Wis. 2d 338, 913 N.W.2d 780. Here, Plaintiffs' argument is that Section 16.74 does not *authorize* any action, which has no grounding in the shall-versus-may distinction.

Plaintiffs' position produces the absurd result that the legislative and judicial branches under Section 16.74, and

administrative agencies under Section 16.71, cannot purchase *any* "supplies, materials, equipment, permanent personal property and contractual services," absent duplicative authorization found elsewhere. While Plaintiffs point to a couple of narrow statutes that they believe would authorize some purchases—like "floral pieces for deceased or ill members of the legislature and state officers," Wis. Stat. § 13.14(2); *see* Response Br.28—they are unable to point to any statute other than Section 16.74 authorizing the Legislature or the judiciary to purchase the basics needed for their functioning, such as pens, computers, or services (air conditioner maintenance services, if that breaks, etc.).

Plaintiffs also argue that Section 16.74 is inapplicable because Section 13.124 is the most specific statute on the subject. Response Br.12–14. Contrary to Plaintiffs' protestations, Response Br.14, they are clearly attempting to argue that Section 13.124, enacted in 2018, implicitly repealed a portion of the longstanding Section 16.74: the portion that authorizes the purchase of legal services. Plaintiffs admit as much, explaining that "[w]hatever authority the Speaker and the Majority Leader may have had to hire outside counsel . . . *prior to the enactment of Section 13.124*, [Section 13.124] alone is what shapes their authority now." Response Br.12–13 (emphasis added). Plaintiffs have not even attempted to satisfy the demanding standard for finding implicit repeal, *State v. Villamil*, 2017 WI 74, ¶ 37, 377 Wis. 2d 1, 898 N.W.2d 482, nor could they. Under Section

16.74, multiple legislative bodies and legislative officers can purchase contractual services, which can include legislative leaders when so designated by the respective "house[s]." Wis. Stat. §§ 16.74(1), (2)(b). Plaintiffs' implicit-repeal position appears to be that by giving two legislative leaders expedited authority to purchase a particular form of contractual services in limited circumstances, Section 13.124 implicitly repealed the preexisting authorization of the "houses" to designate anyone they choose, which could include those very leaders, as authorized agents for buying *any contractual* services under Section 16.74. Notably, Plaintiffs give this argument away elsewhere, admitting that Section 13.124 "grant[s] limited *new* authority," Response Br.15 (emphasis added), not that it takes away any authority preexisting Section 16.74.

Plaintiffs argue that these contracts "were not required for the legislative process" under Section 16.74, Response Br. 27 n.17, but that is wrong. Redistricting is "highly specialized and complex," App'x.505–06, and given the breadth of legal requirements associated with map drawing, Opening Br.28, the Legislature determined that it "required" the aid of sophisticated counsel. This was a sensible judgment, consistent with decades of bipartisan practice. There is thus no reason for this Court to abandon its general rule that courts should not second-guess those types of legislative judgments. *See State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 13, 334 Wis. 2d 70, 798 N.W.2d 436.

Finally, Plaintiffs erroneously claim that the Legislature and/or the Department of Administration ("DOA") failed to follow certain procedures as it relates to these contracts. Response Br.18–19, 30–31. As a threshold matter, challenges to the Legislature's adherence to such procedural matters in governing their own functioning are generally not matters for the courts' "determin[ation]." *Ozanne*, 2011 WI 43, ¶ 13 (citation omitted). In any event, Plaintiffs are wrong. Plaintiffs object to the timing of the committee votes authorizing the contracts. Response Br.18–19. But the committee votes merely "manifest" the Legislature's "willingness to go on with the contract" and "be bound as from the outset," under standard contractual principles. Restatement (Second) of Contracts § 380 cmt. a (1981). Plaintiffs also vaguely assert that the Legislature did not submit payment on the contracts properly and/or DOA did not properly audit them. Response Br.30. But the undisputed record evidence in this case establishes that the process to submit and pay on the contracts was the "identical . . . process for paying any other legal-services bills," in place for at least a decade, App'x.384, 388, which standard process fully complied with all aspects of Section 16.74, *see* Opening Br.21–22. Regardless, the proper defendant in a lawsuit challenging the DOA for not sufficiently auditing any payment requests is DOA, not the Legislature, and the sensible remedy in such a lawsuit would be requiring DOA to audit with some manner of additional vigor, not voiding the contracts themselves.

II. The Wisconsin Constitution Independently Authorizes The Contracts, And Plaintiffs Do Not Even Attempt To Defend The Circuit Court's Constitutional Analysis

The Constitution "vest[s]" the Legislature with "legislative power," Wis. Const. art. IV, § 1, and mandates that it "apportion and district anew the members of the senate and assembly," Wis. Const. art. IV, § 3. The Constitution grants the Legislature "a large discretion[ary] [power]" to select "any means, appearing to it most eligible and appropriate" to achieve those ends, *Minneapolis, St. P. & S. S. M. Ry. Co. v. R.R. Comm'n of Wis.*, 136 Wis. 146, 116 N.W. 905, 910 (1908) (citation omitted), including studying the legal foundations of legislation it is considering. Here, the Legislature acted squarely within its constitutional authority when it concluded that to complete the legislative task of decennial redistricting lawfully, it needed the advice of expert counsel on both the legality of proposed maps and about how to structure those maps to ensure that they survived inevitable legal challenges. *See* Opening Br.23–27.

Plaintiffs do not defend the Circuit Court's constitutional analysis—that the contracts interfered with the Attorney General's and the Governor's constitutional "enforcement authority," App'x.23–26—but, instead, appear to argue that the Legislature has *no* inherent constitutional authority to study legislation, Response Br.31–33. That is, of course, wrong. The Legislature takes multiple steps to

accomplish its constitutionally mandated duties, *see* Opening Br.26–27, including determining a proposed law's factual and legal foundation—a "necessary" component in "the process of enacting a law," *Minneapolis*, 116 N.W. at 911. Here, the Legislature decided that hiring expert counsel was the "most eligible and appropriate" means to study the legality of redistricting laws, including so that these laws would survive legal challenge. *Id.* at 910 (citation omitted).

Plaintiffs compare the issues presented here to those in *In re John Doe Proceeding ("LTSB")*, 2004 WI 65, 272 Wis. 2d 208, 680 N.W.2d 792, Response Br.33–35, but that argument does not help Plaintiffs. In *LTSB*, this Court explained that Article IV, Section 8 provides the Legislature with exclusive authority to enact and interpret its own "rule of proceeding," but that such rules must involve "the process the legislature uses to propose or pass legislation." 2004 WI 65, ¶¶ 29–30. This Court held that "assistance with electronic data and for an electronic storage closet for communications" did not meet that bar. *Id.* ¶ 30. The subject at issue here—engaging counsel to aid in "the preliminary determination of" laws or facts "by the Legislature," *Minneapolis*, 116 N.W. at 911—is a core part of "the process the legislature uses to propose or pass legislation," *LTSB*, 2004 WI 65, ¶ 30.

Finally, turning to the decades of uniform legislative practice of hiring outside counsel for redistricting advice, Opening Br.4–5, 28–29, Plaintiffs argue that this Court should disregard this evidence as being of too recent vintage,

contrary to *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 111 N.W. 712 (1907), which held that "a quarter of a century" is "a long [enough] period of time." *Id.* at 717; Response Br.40 n.23 (admitting that the Legislature "accurately attributed" the cited language from *Samuelson*). Plaintiffs' further claim that for a legislative practice to constitutionally count, that practice must be in the form of "legislation," Response Br.40, makes no sense when dealing with an argument of *inherent* legislative authority, where the entire dispute is what actions the Legislature can take under the Constitution *without* statutory authorization. And in response to Plaintiffs' claim that the Legislature presented insufficient evidence of "contracts like those at issue here," Response Br.41, the Legislature just respectfully asks this Court to review the record evidence on this point, App'x.117, 126, 130–54, 180–93.

III. Section 20.765 Independently Authorizes The Contracts

Section 20.765 provides the Legislature with "[a] sum sufficient to carry out the functions of the assembly [and the senate]." Wis. Stat. § 20.765(1)(a)–(b). This is an appropriation "expendable from the indicated source in the amounts necessary to accomplish the purpose specified" in the appropriation itself. Wis. Stat. § 20.001(3)(d). By entering into the contracts here, the Legislature was forwarding the redistricting process, which is clearly a "function[ ] of" the Legislature. Wis. Stat. § 20.765(1)(a)–(b); Opening Br.31–32.

This Court should reject Plaintiffs' contrary arguments. Plaintiffs assert that Section 20.765 does not authorize any legislative actions, Response Br.20–25, but Plaintiffs have already conceded, as they must, that hiring outside counsel of their choice is "a 'function' of the Assembly and of the Senate, App'x.345–46, and Wis. Stat. § 20.765 gives the Legislature "sum sufficient" money to carry out just these functions. Plaintiffs' reliance on *State ex rel. Moran v. Department of Administration*, 103 Wis. 2d 311, 307 N.W.2d 658 (1981), Response Br.21, fails because *Moran* held that "the persons charged with administering the appropriation are those who are to determine whether an expenditure of funds falls within the terms of the appropriation," Opening Br.28 (quoting *Moran*, 103 Wis. 2d at 319). Finally, Plaintiffs contend that the contracts do not include map-drawing advice, Response Br.24, but the contracts here, App'x.100–02, 394–95, covered expert advice that the Legislature needed regarding the legality of contemplated maps, as well as advice to ensure that the maps survived inevitable litigation challenges (which challenges, predictably, have already been filed, even in the middle of the legislative redistricting process, *see* Opening Br.12; *Johnson v. Wis. Elections Comm.*, No. 2021AP001450-OA (Wis., petition granted on Sept. 22, 2021)).

IV. Section 13.124 Independently Authorizes The Contracts

Section 13.124 offers legislative leaders a "streamlined alternative to the usual procedure" of hiring outside counsel, App'x.504–05; *see* Opening Br.5–6, and, when read in conjunction with Section 990.001(3), authorizes legislative leaders to engage outside counsel when they conclude that the Legislature will have its "interests" implicated by or will be a "party" to a lawsuit, *see* Opening Br.34–36. Section 13.124 thus sensibly allows legislative leaders, knowing that a suit will surely be filed that will implicate the Legislature's interests, to begin legal preparations. Opening Br.36–38.

Plaintiffs' claim that Section 990.001(3) is irrelevant because "is" and "are" in Section 13.124 "appl[y] to the word 'action,'" Response Br.9–12, misses the linguistic mark. "[I]s" and "are" in Section 13.124 refer to "party," and Section 990.001(3) directs courts to read "is" and "are" to "include the future" tense, where appropriate. That means if the Legislature will imminently be a party in a case, Section 13.124 authorizes legislative leaders to obtain counsel. Opening Br.35. Put another way, "in any action in which the legislature [will be a] party," includes—for example—a situation where the Legislature receives a demand letter that an action will be filed against the Legislature tomorrow, a hypothetical that Plaintiffs tellingly ignore. Opening Br.36.

Reading Section 13.124 through Section 990.001(3) does not confer "limitless" power or "unpoliceable" authority,

Response Br.11–12, but only authorizes legislative leaders to engage outside counsel under Section 13.124 when an action is *actually imminent*, such as in the context of an inevitable, imminent redistricting lawsuit at the start of a biennium.

Finally, Plaintiffs argue at length that the Legislature enacted Section 13.124, not as a "streamlined alternative to the usual procedure" to engage legal counsel, App'x.504–05, but to "grant limited new authority to the Speaker and Majority Leader to engage outside counsel" "without obtaining permission from anyone else," Response Br.15–16. Plaintiffs inadvertently defeat their own argument here, since the ability for a legislative leader to act without obtaining consent from anyone else, including the legislative organization committees that traditionally authorize attorney hiring under Section 16.74 and the Wisconsin Constitution, is *exactly* what "streamline[s]" the process. App'x.504–05.

V. This Court Should Address Issue Presented V To Give Needed Guidance To Circuit Courts And Litigants, And Plaintiffs Have Chosen To Forfeit Any Response To The Legislature's Merits Arguments On The Issue

Multiple circuit courts' continued failure to analyze properly motions for stay pending appeal and refusal to stay their injunctions based upon confidence that their decisions will survive appeal call out for this Court to decide Issue Presented V, on which this Court granted review. Here, the Circuit Court's error and Court of Appeals' subsequent delay

in ruling on the Legislature's expedited motion for a stay left the Legislature unable to consult with its counsel for more than two months during a crucial period of the decennial redistricting cycle. This Court should issue a published decision that makes clear that this kind of wrongful denial and delay should not occur again, while giving needed guidance to the bench and the bar. *See* Opening Br.39–45.

Plaintiffs have forfeited any argument on the merits of this Issue by failing to address the Legislature's arguments. *See Parsons v. Associated Banc-Corp.*, 2017 WI 37, ¶ 39 n.8, 374 Wis. 2d 513, 893 N.W.2d 212. Plaintiffs limit their response on Issue Presented V to briefly noting—as they did in their failed Motion to Strike—that this Court already stayed the Circuit Court's summary-judgment order, saying that this renders Issue Presented V "moot." Response Br.41–42. But this Court granted the Legislature's petition to bypass at the same time as it issued its stay decision, and in doing so, accepted "for consideration in this court" all "five issues presented." App'x.495. That was consistent with the entirely correct conclusion that whether a circuit court erroneously exercised its discretion in denying the stay motion is an issue "likely to arise again" and "should be resolved by the court to avoid uncertainty," an exception to the mootness doctrine. *State v. Fitzgerald*, 2019 WI 69, ¶ 22, 387 Wis. 2d 384, 929 N.W.2d 165 (citations omitted).

CONCLUSION

This Court should reverse the Circuit Court's Order granting summary judgment to Plaintiffs and order that judgment be entered in the Legislature's favor.

Dated: September 27, 2021.

Respectfully submitted,

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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 2,982 words.

Dated: September 27, 2021.

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CERTIFICATE 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: September 27, 2021.

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