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' Brief in Opposition to Defendants' Expedited Petition for Bypass and Expedited Motion for Stay Pending Appeal

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Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
Aaron G. Dumas, SBN 1087951
Leslie A. Freehill, SBN 1095620
Beauregard W. Patterson, SBN 1102842
PINES BACH LLP
122 W. Washington Avenue, Ste. 900
Madison, Wisconsin 53703
Telephone: (608) 251-0101
lpines@pinesbach.com; tpackard@pinesbach.com
adumas@pinesbach.com; lfreehill@pinesbach.com
bpatterson@pinesbach.com
Attorneys for Plaintiffs-Respondents

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INTRODUCTION

This case is about the unauthorized and illegal effort by Defendants-Appellants-Petitioners Assembly Speaker Robin Vos and Senate Majority Leader Devin LeMahieu ("Vos and LeMahieu" or "the Legislators") to hire private lawyers with taxpayer money to advise and represent certain members of the Assembly and Senate[1] in litigation that does not exist. The circuit court, in its comprehensive April 29, 2021 Decision and Order on the merits, found for Plaintiffs-Respondents Andrew Waity, Sara Bringman, Michael Jones, and Judy Ferwerda ("Taxpayers" or "the Taxpayers"), declared that the contracts were void *ab initio* and enjoined further payment under them. The circuit court denied Vos and LeMahieu's motion for stay pending appeal. Then the court of appeals denied their motion for stay pending appeal . . .twice.

Vos and LeMahieu are disappointed. They chose District III to hear their appeal and renewed motion for stay but could not persuade its judges that the circuit court had erroneously exercised its discretion by denying their requested stay.

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[1] Members of the minority caucus have received no communications from the private counsel hired under the contracts at issue. (Dkt. 56, ¶ 6) References to materials in the record, "Dkt.," are to the "document" number assigned in the circuit court electronic filing system.

Now, without sticking with District III for a merits decision, the Legislators have gone "forum shopping" in the hope that this Court will look kindlier on their request for a stay. To do so they filed a petition for bypass which, had they believed the case was so significant that it merited immediate Supreme Court consideration, they might have filed immediately after they appealed. Instead, they decided to wait to see if their chosen district of the court of appeals would jump to their tune, first by demanding a decision on the stay before the Taxpayers' statutory deadline to respond. That demand was rejected.

Then their motions judge denied their motion for stay. Claiming that the motions judge lacked legal authority to decide a motion for stay, Vos and LeMahieu insisted that a three-judge panel immediately decide the motion for stay. The three-judge District III panel denied the motion as well.

Had Vos and LeMahieu wanted a prompt resolution on the merits of the Taxpayers' claim, they could have filed their merits brief already and requested the court of appeals to shorten the time for the Taxpayers to respond. [2] They chose not to do that.

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[2] The record was transmitted on May 27, 2021. (Dkt. 90, 91) The Legislators' brief could have been filed in substantially less than the 40 days available to them to file their merits brief. Given the alacrity with which they prepared and filed their petition for bypass,

Instead, the Legislators' entire focus has been and continues to be on their desire for a stay. Their motive for filing a petition for bypass is transparent: they think that the Supreme Court will be a more favorable forum for their arguments in favor of a stay than was District III, nothing more.

No appellants or respondents, even if they are legislators, should be allowed to first test whether they may be successful on motions in the court of appeals and then, when they are not, forum shop through a petition for bypass. Because, on its face, that is precisely what the Legislators did here, this Court should on that basis alone deny the petition for bypass and decline to consider the Legislators' attempt at obtaining a stay.

If, despite the Legislators' obvious forum shopping, this Court determines that it will nevertheless fully review their petition under the standards set forth in Wis. Stat. (Rule) § 809.62(1), as this brief will explain in Section I of the Argument below, none of the standards for bypass are met here. The appeal on the merits involves the question of whether Vos

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motion for stay pending appeal and petition for supervisory writ, along with memoranda in support of those filings (2 days after the court of appeals panel denied their stay motion), it appears that they could have filed their merits brief on Monday, May 31, at the latest.

and LeMahieu had legal authority to enter into two contracts, a narrow issue, resolution of which calls for the application of settled law on statutory construction. Try as the Legislators might to capture this Court's attention with a constitutional issue, none is presented here. Nor is there any pressing need for hastening a merits decision. This dispute should be handled according to the ordinary deliberative appellate process.

Vos and LeMahieu's insistence that the merits of this dispute will escape appellate resolution absent bypass and a stay because a redistricting lawsuit is imminent (Br.[3] at 1, 5, 22-24) is meritless. First, it is unsupported anywhere in the brief by legal authority, and therefore should be ignored. *Clean Wis., Inc. v. Public Service Commission*, 2005 WI 93, ¶ 180 n. 40, 282 Wis. 2d 250, 700 N.W.2d 768; *Racine Steel Castings v. Hardy*, 139 Wis. 2d 232, 240, 407 N.W.2d 299, 302 (Ct. App. 1987), *rev'd on other grounds*, 144 Wis. 2d 553, 426 N.W.2d 33 (1988). It is also preposterous. As shown in Section I.D. below, litigation is far from a foregone conclusion. Moreover, no litigation can occur until there is either a law or a legislative impasse upon which to sue, and there are numerous things that must happen before either of those could occur.

[3] The Taxpayers will refer to the "Defendants' Combined Memorandum in Support of Expedited Petition for Bypass and Expedited Motion for Stay Pending Appeal" as "Br." herein.

Turning to the Legislators' motion for stay, Vos and LeMahieu continue to claim that the circuit court did not properly analyze their motion for stay (Br. at 2-3), when it clearly did, as shown in Section II of the Argument below. And they repeat the baseless assertion that a failure to grant a stay will deprive them of counsel needed to prepare for a potential redistricting lawsuit.[4] As the circuit court noted in its oral decision denying their motion for stay as to why, in part, the Legislators have not shown irreparable harm:

> Defendants offer no evidence that these two law firms, both very highly regarded firms, would be unable to gear up for any litigation which might be filed in the future. Every day in this country complicated lawsuits are filed, law firms are hired, and counsel prepares for the case in the ordinary course of business. Defendants fail to show in any way that these two firms could not prepare for litigation if a lawsuit is ever filed in the future. Put differently, defendants fail to show that these firms need to start working on litigation now rather than waiting until a lawsuit is filed.

(Dkt. 82, pp.9-10; Pet.App.9-10)

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

FIRST ISSUE: Does the Taxpayers' challenge to the legality of contracts for legal services from private counsel, signed by Vos and LeMahieu putatively on behalf of the Senate and Assembly, to be paid

[4] The record contains nothing to support the Legislators' claim that their outside counsel are any more sophisticated than the highly experienced "in-house" legislative agency staff and attorneys at the Wisconsin Department of Justice, who remain fully available to advise them about redistricting while this appeal is pending and beyond.

from taxpayer money and in the absence of existing litigation, present issues that meet one or more of the criteria for review, set forth in Wis. Stat. (Rule) § 809.62(1), in that they are issues that the Court would choose to review regardless of how the court of appeals might decide them?

The Wisconsin Supreme Court is focused on law development. "It is not this court's institutional role to perform [an] error correcting function." *State v. Minued*, 141 Wis. 2d 325, 328, 415 N.W.2d 515, 516 (1987). That is the function of the court of appeals. *State v. Mosley*, 102 Wis. 2d 636, 665-66, 307 N.W.2d 200 (1981).

The decision to grant or deny a petition for bypass is within the sound discretion of the Court, "and will be granted only when special and important reasons are presented." *Minued*, 141 Wis. 2d at 327. A petition to bypass is granted upon the affirmative vote of four or more members of the Court, reflecting that bypass should be limited to cases with issues of special significance to the legal system. Sup. Ct. IOP § III.B.2.

The petition for bypass automatically stopped the court of appeals from taking the appeal under submission. Wis. Stat. (Rule) § 809.60(3). If the Court denies the petition to bypass, proceedings in the court of appeals resume, Wis. Stat. (Rule) § 809.60(5), and the Supreme Court would lack

authority to address the motion for stay absent acquiring jurisdiction through another method.

If the Court grants the petition to bypass, it may also take up the second issue raised by the Legislators, their request for a stay.

SECOND ISSUE: In denying Vos and LeMahieu's motion for stay pending appeal of its declaration that the contracts at issue were void and order enjoining Vos and LeMahieu from authorizing any further payments under the contracts, did the court of appeals correctly find that the circuit court properly exercised its discretion by examining the relevant facts, applying the correct standard of law, demonstrating a rational process, and reaching a decision that a reasonable judge could make? *See State v. Gudenschwager,* 191 Wis. 2d 431, 439-40, 529 N.W.2d 225 (1995). The court of appeals twice answered that question. The Supreme Court does not ordinarily review a court of appeals decision that only addresses the proper exercise of discretion by the circuit court. *See State v. Outlaw,* 108 Wis. 2d 112, 120, 321 N.W.2d 145 (1982).

RELEVANT PROCEDURAL HISTORY AND FACTS

Vos and LeMahieu's "Statement of the Case" incompletely and inaccurately recites the procedural history and facts underlying this dispute, and then seeks to prematurely engage the Court in the merits. It

begins with the contention that in the last several redistricting periods, "the Legislature has hired outside counsel for legal advice to assist with the drawing and defense of redistricting maps," and therefore Vos and LeMahieu must have had the legal authority to enter into the subject contracts on behalf of the Legislature. (Br. at 5-7) Whether or not those prior contracts were legally authorized is not before any court. Taxpayers challenge only the recent contracts with the law firms of Consovoy McCarthy PLLC (in association with Adam Mortara) ("Consovoy") and Bell Giftos St. John LLC ("BGSJ"), signed by Vos and LeMahieu, putatively on behalf of the State Assembly and Senate.

Even if those contracts were consistent with the Legislature's practices in the last several rounds of redistricting (which the Taxpayers dispute), it would be irrelevant as to whether they are lawful now. In 2018, the Wisconsin Legislature enacted Wis. Stat. § 13.124, entitled "Legal Representation," which limits the circumstances under which legislative leaders like Vos and LeMahieu may engage outside counsel on behalf of legislative bodies. Those circumstances are not present here.

No other statute, and certainly not the Constitution itself, authorizes them to act as they did. The circuit court so found, based on undisputed facts and settled law.

The gist of Vos and LeMahieu's contentions is that the circuit court erred, both in its ruling on the merits and in denying a stay pending appeal, and that the court of appeals also erred when it found that the circuit court did not erroneously exercise its discretion when it denied the Legislators' motion for stay. The Taxpayers strenuously disagree with those contentions, but regardless, the appeal of that ruling should proceed in the ordinary manner. The court of appeals has primary responsibility for correcting errors made in the circuit court, and as shown in Section I of the Argument below, is perfectly suited to address the Legislators' claims of error in the context of the appeal on the merits. *See Mosley*, 102 Wis. 2d at 665-66.

The balance of the Legislators' "Statement of the Case" selectively and erroneously characterizes the Taxpayers arguments, as well as the rulings and orders of the circuit court and court of appeals. The following is an accurate summary of the proceedings below, and the relevant undisputed facts.

The Taxpayers brought this action in circuit court on March 10, 2021, contending that legislators, Robin Vos and Devin LeMahieu, who executed contracts for legal services to be provided to the Wisconsin Assembly and Wisconsin Senate, respectively, had no legal authority to do so. The

Taxpayers sought a declaratory judgment that the contracts were void *ab initio* and supplemental injunctive relief. (Dkt. 3; Pet.App.80-102)

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.[5] 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.[6] Devin LeMahieu became the Majority Leader of the Wisconsin Senate for the 2021-2022 on January 4, 2021.[7]

On December 23, 2020, Robin Vos, in his official capacity as the Speaker of the Assembly on behalf of the Wisconsin Assembly, and Devin LeMahieu, as the Wisconsin Senate Majority Leader-elect, contracted with Consovoy for pre-litigation consulting, strategic litigation direction, and legal representation in future possible litigation related to decennial redistricting ("the Consovoy contract"). (Dkt. 3, Ex. A; Pet.App.94-99) The

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[5] https://docs.legis.wisconsin.gov/2021/related/journals/assembly/20210104. Last accessed April 6, 2021.

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

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

specific nature and scope of representation described in the Consovoy contract is, in relevant part, as follows:

> This Engagement Agreement sets forth the terms under which Consovoy McCarthy PLLC ("CM") in association with Adam Mortara ("Mortara") (collectively, "CM&M") will represent the Wisconsin State Assembly and Wisconsin State Senate (the "Legislature" or "you") in **possible** litigation related to decennial redistricting (the "Litigation"). CM&M's engagement hereunder is limited to representing the Legislature in the Litigation through trial and, if requested, on appeal.
>
> The parties currently do not know whether or in what venue the Litigation will occur.
>
> Scope of Representation
>
> The Legislature is also retaining Bell Giftos St. John LLC ("BGSJ") to represent it in the Litigation. CM&M is being retained to work alongside BGSJ. Mortara will provide overall strategic litigation direction, take key fact and expert discovery, and serve as lead trial counsel at trial, while BGSJ and CM will provide additional day-to-day litigation resources.
>
> Mortara hereby commits that the Litigation will take precedence over other clients as to trial scheduling matters, and that in the event of an irresolvable trial date conflict between you and another client, he will be lead trial counsel in this matter.

(Dkt. 3, Ex. A, p. 1; Pet.App.94) (emphasis added)

When Vos and LeMahieu executed the Consovoy contract, there was no action pending in any court in Wisconsin or federal court about the State of Wisconsin's decennial redistricting. (Dkt. 54, ¶¶ 4-7) As they acknowledged in their filing with this Court (*e.g.*, Br. at 5), there still is no such "action." Vos and LeMahieu knew that no such action existed because the Consovoy contract states that "[t]he parties currently do not know whether… Litigation will occur." Nevertheless, the Consovoy firm

was paid from public funds in the amount of $30,000 per month "[f]or pre-litigation consulting, beginning January 1, 2021." (Dkt. 42, 3, Ex. A, p. 1; Pet.App.94)

On January 2, 2021, Vos and LeMahieu executed a contract with BGSJ on behalf of the Wisconsin State Assembly and Senate respectively ("the BGSJ contract"). (Dkt. 3, Ex. B; Pet.App.100-102) In addition to providing representation in possible redistricting litigation on an hourly basis, BGSJ also agreed to provide other legal services and confidential legal advice to Vos and LeMahieu on an hourly basis regarding redistricting, stating:

> The purpose of this letter is to confirm the scope and terms of representation.
>
> **Identity of the Clients.** Our clients in this matter are the Wisconsin State Senate, by and through Senator Devin LeMahieu [sic], and the Wisconsin State Assembly, by and through Representative Robin Vos. It is our understanding that each of you is authorized to retain counsel on behalf of your respective legislative houses.
>
> Unless and until the Wisconsin State Senate and Wisconsin State Assembly designate otherwise, we will take direction on this matter through those organizations' duly authorized agents: Senator LeMahieu as it relates to the Wisconsin State Senate; Representative Vos as it relates to the Wisconsin State Assembly.
>
> **Scope of Representation**. Bell Giftos St. John LLC agrees to provide legal advice to, represent, and appear for and defend the Wisconsin State Senate and Wisconsin State Assembly on any and all matters relating to redistricting during the decennial period beginning on January 1, 2021. Services within the scope include all services in furtherance of this attorney-client relationship relating to redistricting. Such services include, for example, providing legal advice to the client (through its members or staff as designated by Senator LeMahieu and Representative Vos)

> regarding constitutional and statutory requirements and principles relating to redistricting. It also includes appearing for clients in judicial or proceedings relating to redistricting, should such an action be brought, or administrative actions relating to redistricting, such as the rule petition currently pending before the Wisconsin Supreme Court. It also includes providing legal advice about the validity of any draft redistricting legislation if enacted. It does not include, however, the drawing of redistricting maps.

(Dkt. 3, Ex. B, pp. 1-2; Pet.App.100-101)

When Vos and LeMahieu executed the BGSJ contract, there was no action pending in any court in Wisconsin or in any federal court related to the State of Wisconsin's decennial redistricting, and Vos and LeMahieu knew that because the BGSJ contract states that litigation services will be provided "in judicial or proceedings relating to redistricting, should such an action be brought." (Dkt. 3, Ex. B, pp. 1-2; Pet.App.100-101)

As with the Consovoy contract, the Wisconsin Assembly and Senate have been billed by and paid the Bell Giftos St. John LLC law firm pursuant to the terms of the BGSJ contract. (Dkt. 43) The Secretary of the Wisconsin Department of Administration has not received any bills submitted for payment authorization and audit under the Consovoy or BGSJ contracts pursuant to Wis. Stat. § 16.74(4). (Dkt. 49, ¶ 3, Ex. B)

On March 16, 2021, the Taxpayers filed a motion for temporary injunction with supporting affidavit and brief. (Dkt. 10-12) On March 24, 2021, the Legislators filed a motion to dismiss with supporting brief (Dkt.

26, 28), and a brief in opposition to the motion for temporary injunction, with supporting affidavit. (Dkt. 30-31) A hearing on the pending motions was held before the circuit court on March 25, 2021. The court denied the Taxpayers' requests for interim relief (Dkt. 37) but, recognizing the parties' desire for speedy resolution on the merits, and with the parties' agreement on the record, converted Vos and LeMahieu's March 24 filings into a motion for summary judgment and supporting materials. (Dkt. 41, pp. 15-16)

The Taxpayers filed their response brief on the motion for summary judgment (Dkt. 48), and with the circuit court's permission, the Wisconsin Democracy Campaign ("WDC") filed an unopposed Brief of *Amicus Curiae* and supporting affidavit. (Dkt. 45, 47, 55, 56) Vos and LeMahieu submitted a reply brief (Dkt. 60), which was oversized, by permission from the circuit court; one of the stated reasons for needing to file an oversized brief was to reply to the WDC brief as well as Taxpayers' brief. (Dkt. 57 ¶ 10, Dkt. 59)

The circuit court issued its written Decision and Order on the merits on April 29, 2021. (Dkt. 63; Pet.App.16-37) Based on the undisputed facts, applicable law, and arguments from the parties, the circuit court granted the Taxpayers' summary judgment, holding that Vos and LeMahieu had no legal authority to enter into the contracts at issue because neither the

Wisconsin Constitution itself, nor Wis. Stat. §§ 13.124, 16.74, or 20.765, authorized Vos and LeMahieu to engage the law firms to provide the legal services to the Wisconsin Assembly and Senate for representation in an "action" which did not exist. The circuit court declared that the Consovoy and BGSJ contracts were void *ab initio* and permanently enjoined Vos and LeMahieu from authorizing any further payment on those contracts. (*Id.*)

The next day, April 30, 2021, Vos and LeMahieu filed a notice of appeal, hand-picking District III of the court of appeals to hear it. (Dkt. 64; Pet.App.402-403) They also filed with the circuit court a motion for stay of its ruling pending appeal, with supporting materials. (Dkt. 65-67; Pet.App.404-471) A week later, the Taxpayers filed their brief in opposition to the motion for stay. (Dkt. 77; Pet.App.472-493) The circuit court delivered its ruling on the motion for stay pending appeal from the bench on May 10, 2021 and entered a corresponding written order. (Dkt. 80, 82; Pet.App.1-15)

On May 12, 2021, the Legislators next sought an "expedited" stay from the court of appeals by filing a motion and supporting brief. Ignoring Wis. Stat. § 908.14(1), which allows 11 days for an opposing party to respond to such a motion, they requested a ruling on their motion by May 21.

The Taxpayers brought the briefing deadline issue to the attention of the court of appeals on May 14, 2021, and on May 18, the court of appeals denied the request for an expedited decision on the motion for stay, instead assuring the parties that the motion would be "decided in due course upon receipt of [Taxpayers'] response." (Dkt. 88; Pet.App.500)

On May 24, 2021, the Taxpayers filed with the court of appeals their brief in opposition to the motion for stay, and on June 23, 2021, consistent with the court of appeals' internal operating procedures, Wis. Ct. App. IOP § VI.(3)(c) and (f) (Nov. 30, 2009), the District III presiding judge, who was serving as its motions judge, denied the motion for stay. (Dkt. 93; Pet.App.501-507)

As shown in that order, the court of appeals reviewed the circuit court's May 10 decision to deny the motion for a stay under an erroneous exercise of discretion standard, applying the four-part analysis required by *Gudenschwager*. The appeals court's analysis is clear, careful, and cogent, and most certainly did consider whether the circuit court had properly considered the motion for stay (contrary to the Legislators' claims (Br. at 14)), concluding:

> The circuit court considered the interrelated ***Gudenschwager*** factors, concluding that they weighed against granting a stay pending appeal. Because Vos has not established an erroneous exercise of the circuit

> court's discretion in assessing the factors and in denying the stay, we will deny the motion for relief pending appeal.

(Dkt. 93 p. 6; Pet.App.506)

Obviously hoping for a different result, Vos and LeMahieu demanded that the court of appeals decide their motion with a three-judge panel, claiming that the court of appeals may not legally decide a motion for stay through a single judge.[8] While rejecting their legal arguments, in a June 29, 2021 order, the presiding judge, as a matter of comity to the legislature, agreed to grant Vos and LeMahieu's request, and directed that the panel decide the motion. (Dkt. 95; Pet.App.508-509) The court of appeals then issued an amended order from the three-judge panel, denying again the motion for stay pending appeal. (Dkt. 94; Pet.App.510-516)

Before merits briefs have been filed in the court of appeals,[9] the Legislators seek now to bypass the court of appeals, to have this Court

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[8] In a June 25, 2021 court of appeals filing titled "Defendants' Expedited Motion Objecting to a Single Judge Deciding Their Long-Pending Motion for Stay Pending Appeal and Requesting a Three-Judge Panel of District III to Decide Their Motion."

[9] *Appellate Practice and Procedure in Wisconsin*, § 24.3 (8th ed. 2020), published by the State Bar of Wisconsin and authored by Michael Heffernan states: "Supreme court orders have stated a policy, not reflected in any rule, that a petition for bypass filed before the respondent's brief is filed will be dismissed as premature." Consistent with that past practice, Vos and LeMahieu's petition for bypass should be denied for that reason alone, and on that basis.

consider a motion for stay pending appeal and, consequently, to decide the appeal without the benefit of the court of appeals' analysis.

ARGUMENT

I. The Court should decline bypass because the standards of Wis. Stat. (Rule) § 809.62(1) are not met.

A. A case concerning the authority of individual legislators to enter into two challenged contracts lacks the "statewide impact" meriting bypass.

The Legislators' principal claim is that because this case (a) involves legislators, (b) those legislators wish to obtain legal advice from outside counsel for redistricting, and (c) redistricting is a statewide process then, *ipso facto*, this case has statewide impact per Wis. Stat. (Rule) § 809.62(1r)(c)2. (Br. at 18, 20-21) That claim is unsupported.

This case involves the actions of two legislators in specific positions--Assembly Speaker and Senate Majority Leader--and the limited circumstances in which they are allowed to hire counsel other than the Wisconsin Department of Justice to represent the Assembly and Senate. It impacts only Vos and LeMahieu. It does not interfere with the redistricting process itself.

Vos and LeMahieu have failed to describe or explain a single statewide impact the voiding of these two contracts has had or will have. Why? Because there is no statewide impact. An order declaring that a

legislative leader has not complied with a statute does not impact the entire state. It impacts the behavior of that individual and any individual who may subsequently hold that office.

That Vos and LeMahieu may personally believe that it is "critical" to have certain law firms on standby for potential litigation over redistricting does not prove or even suggest that a decision in this case will have statewide impact. Neither the Assembly nor the Senate is, because of the circuit court's order, deprived of access to legal services. Those bodies remain fully able to use their existing "in-house" legal expertise to assist them with the redistricting process. Those "in-house" resources include the Wisconsin Department of Justice, the Legislative Council, the Legislative Reference Bureau, and the Legislative Technology Services Bureau ("LTSB")[10] The record in this case contains no evidence that the legal services that those entities would provide the Assembly and Senate would be deficient in any way.

The circuit court's decision in no way prevents or impedes the Legislature from undertaking the statewide redistricting process once it

[10] The LTSB provides the census data, the mapping software, computers and digital storage media, and other technical support necessary to draw new district maps. The Legislative Council provides legal advice and historical context. *See* Wisconsin Blue Book 2019-2020, pp. 158, 172.

receives the census data from the Census Bureau which, as Vos and LeMahieu acknowledge, is not expected before August of this year. (Br. at 24) Redistricting involves an ordinary legislative process, as detailed in subsection D below. Litigation following completion of that process is neither imminent nor a foregone conclusion. If a lawsuit concerning redistricting is filed in the future, Vos or LeMahieu can hire outside counsel at taxpayer expense to represent the Assembly, the Senate or the Legislature as a whole, as allowed by Wis. Stat. § 13.124.

B. This case is about statutory interpretation and presents no constitutional issue whatsoever.

Wis. Stat. § 13.124 is entitled "Legal Representation." Section 1(b) of the statute states:[11]

> The speaker of the assembly, in his or her sole discretion, may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765 (1) (a), in any action in which the assembly is a party or in which the interests of the assembly are affected, as determined by the speaker. The speaker shall approve all financial costs and terms of representation.

The issue presented by this case is narrow and concerns plain statutory interpretation: whether the terms of Wis. Stat. §§ 13.124(1)(b) and 2(b) provide the Speaker of the Assembly and Senate Majority Leader with the authority to obtain "counsel other than from the department of justice" for

[11] Section 2(b) contains the same language but refers to the Senate Majority Leader instead of the Speaker of the Assembly, and to the Senate instead of the Assembly.

an "action" that does not yet (and may never) exist. Resolution of the Taxpayers' challenge to the validity of the Consovoy and BGSJ contracts signed by Vos and LeMahieu does not require constitutional interpretation.

The Taxpayers did not seek a declaration about the general scope of legislative authority to engage in litigation. Nor did they claim that any statute, law or legislative activity was unconstitutional. They simply asked for a declaration under Wis. Stat. § 806.04(2), the Uniform Declaratory Judgments Act, that Vos and LeMahieu acted without the legal authority to execute the Consovoy and BGSJ contracts and that, consequently, the contracts were void *ab initio*.

Vos and LeMahieu, however, claim that this case is about the separation of powers, citing cases such as *League of Women Voters of Wis. v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209, *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 23, 376 Wis. 2d 147, 897 N.W.2d 384, and *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 533, 576 N.W.2d 245 (1998), all of which are inapposite. This case has nothing to do with the separation of powers because the Speaker of the Assembly and Senate

Majority Leader are not constitutional officers. They are not vested with powers by the Constitution.

Rather, the office of Speaker of the Assembly is a statutory creation, Wis. Stat. § 13.13 (1), as is the office of Senate Majority Leader. Wis. Stat. § 13.46 (1). Regarding legislative officers, the Wisconsin Constitution only directs that "[e]ach house shall choose its presiding officers from its own members." Wis. Const. art. IV, § 9. It does not provide the titles, term lengths, salaries, powers, or quantity of presiding officers for each house. Rather, the powers and functions of these officers are set by statute. *See e.g.* Wis. Stat. §§ 13.0975, 13.111, 13.123, 13.124, 13.172, 13.41, 13.46, 13.52, 13.525, 13.80, 13.81.

The question of whether a **statutory** officer exceeded his or her **statutory** powers is a matter of **statutory** interpretation. *See Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 196, 391 Wis. 2d 497, 614, 942 N.W.2d 900, 958. Answering that question requires only a plain meaning analysis of the statutes governing the Speaker's and Majority Leader's authority to hire private counsel, not a constitutional separation of powers analysis. *See Moorman Mfg. Co. v. Indus. Comm'n*, 241 Wis. 200, 208, 5 N.W.2d 743, 746–47 (1942) ("The meaning of a legislative act must be determined from what it says—not by what the framer of the act intended to say or what he

thought he was saying."). *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 14, 256 Wis. 2d 859, 868, 650 N.W.2d 81, 85 (citations omitted) ("The legislature is presumed to… have chosen its words carefully.").

Vos and LeMahieu also claim that the Constitution provides the Legislature with a "core power" to engage counsel but cite to no provision of the constitution which grants that power. The Wisconsin Constitution states at Article VI, Section 1: "The Legislative power shall be vested in a senate and assembly." The Legislature then describes its organization and powers in Chapter 13 of the statutes.

When it enacted Wis. Stat. § 13.124, "Legal Representation" the Legislature understood the powers that it possessed under the Constitution. It specifically decided to allow the Speaker of the Assembly and Senate Majority Leader, at their sole discretion, to hire legal counsel other than the Wisconsin Department of Justice, to provide services that are paid for with unlimited taxpayer dollars. But the legislature limited that discretion to the circumstances when the Assembly or Senate is a party to an "action" or when the Assembly or Senate's interests are affected by an "action."

The circuit court performed the proper analysis and declared that Vos and LeMahieu did not have the authority under Wis. Stat. § 13.124 or

any other statute to engage outside counsel for representation in an action that did not yet exist. Vos and LeMahieu's efforts to gain this Court's interest in this case by attempting to manufacture a "constitutional issue" out of thin air should be rejected.

C. This case concerns only the application of well-settled statutory interpretation principles, and the issue is not likely to recur.

Wis. Stat. (Rule) § 809.62(1r)(c)2. provides two additional instances in which bypass is appropriate to "help develop, clarify or harmonize the law," but neither of them applies here. Vos and LeMahieu have not satisfied the criteria of Wis. Stat. (Rule) § 809.62(1r)(c) or any criteria for bypass.[12]

First, bypass may be warranted where "[t]he case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation." Wis. Stat. (Rule) § 809.62(1r)(c)1. This case involves no new doctrine. It is a garden-variety statutory interpretation case.

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[12] Wis. Stat. (Rule) § 809.62(1r)(d) and (e) also provide that bypass may be appropriate where the court of appeals' decision "is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions" or is "in accord with opinions of the supreme court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination," but the Legislators does not argue their petition qualifies for bypass under either of these criteria and, regardless, neither applies here.

The Taxpayers asked the circuit court to interpret a single statute, Wis. Stat. § 13.124, subsections (1) and (2) and, more specifically, the meaning of the language authorizing the Assembly Speaker or Senate Majority Leader to obtain legal representation "in any action in which the [assembly or senate] is a party or in which the interests of the [assembly or senate] are affected." (Dkt. 3 p. 5, 7-8; Pet.App.84, 89-90) Vos and LeMahieu argued that other statutes also must be interpreted—using basic statutory interpretation principles similar to the Taxpayers'—in order to discern the Legislators' powers. (Dkt. 28 pp. 9-16) The circuit court applied those principles and disagreed with the Legislators. (Dkt. 63 p. 13-21; Pet.App.28-36)

Here, the Legislators identify nothing requiring harmonization, clarification, or further development by this Court. Wis. Stat. (Rule) § 809.62(1r)(c). Rather, they merely contend the circuit court erred. A determination of whether a circuit court correctly applied established law to a particular set of facts is error correction and does not present grounds for this Court's review because the correction of error by the circuit courts is the primary function of the court of appeals, not this Court. *See Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997); *see also Blum*

v. 1st Auto & Casualty Ins. Co., 2010 WI 78, ¶ 50, 326 Wis. 2d 729, 786 N.W.2d 78.

Bypass may be appropriate where "[t]he question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by [this Court]." Wis. Stat. (Rule) § 809.62(1r)(c)3. Contrary to what the Legislators imply, the issue here is unlikely to recur just because redistricting occurs every ten years. Once the court of appeals interprets Wis. Stat. § 13.124 to say at what point the Assembly Speaker and Senate Majority Leader may hire outside counsel to represent them in "an action," then Vos and LeMahieu will understand what the statute means. The Supreme Court need not weigh in with its own interpretation of every statute on the books for there to be clarity about its meaning.

D. Vos and LeMahieu's rationale for hastening the ultimate appellate decision is unreasonable.

The court of appeals is a capable and appropriate forum for Vos and LeMahieu's appeal. In adapting the common law and interpreting the statutes and Constitution in the cases it decides, the court of appeals often serves to define and develop the law. *See Cook*, 208 Wis. 2d at 185. If one of the parties petitions for this Court's review of the court of appeals' final decision, the Supreme Court will benefit from the court of appeals'

analysis both in deciding whether to grant review, and, if granted, in reaching its ultimate decision.

Moreover, there is no deadline pressuring the Court to grant bypass in this case. As admitted by Vos and LeMahieu, the Legislature likely will not receive the Census Bureau data that is a prerequisite to the actual work of redistricting before August of this year. (Br. at 24) Then, the familiar legislative redistricting process begins: the Legislature first drafts, refines, and ultimately passes a bill delineating new state legislative and congressional district borders. The Governor then either signs the bill into law or vetoes it, sending the issue back to the Legislature for either a veto override or a new bill. Wis. Const. art. IV, §§ 3, 17; art. V, § 10; *cf Whitford v. Gill*, 218 F. Supp. 3d 837, 845 (W.D. Wis. 2016), *vacated on other grounds*, 138 S. Ct. 1916, 1929-30 (2018); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964).

As with any legislative enactment, anyone with standing may challenge the result as unlawful by filing suit in state or federal court. Litigation can also arise if the legislative process breaks down, such that the political branches—either the two houses of the Legislature, or the Legislature and the Governor—reach impasse and fail to enact a law

establishing new districts.[13] As shown by this description, litigation is far from certain or imminent.

Vos' and LeMahieu's bypass petition was not filed out of a need for haste. Had they been concerned that the court of appeals would not hear the merits of their case fast enough, they would have filed their merits brief by now, and could have moved to shorten the remaining briefing deadlines. They did not. Rather, the resolution of this dispute did not become a pressing concern for Vos and LeMahieu until after receiving unfavorable rulings on their motion for stay pending appeal in the court of appeals.

Finally, Vos and LeMahieu rely entirely on an inapposite Supreme Court order to claim that the Court must hasten the ultimate appeal decision. Specifically, they argue that the Court has recognized that harm to the Legislature and the public results "when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." (Br. at 54) They go on to claim that

[13] Litigation over redistricting, while it has occurred numerous times, is not preordained. Vos and LeMahieu, leaders of the majority party in the Assembly and Senate, could, if they desired, lead the Legislature to enact a bill delineating new state legislative and congressional district boarders that would be signed by the Governor and thereby avoid litigation arising from impasse.

"[h]ere, the Circuit Court's order inflicts irreparable harms of this same sovereign nature on the Legislature and the public by thwarting the Legislature's exercise of its statutory authority—across three separate statutes." (Br. at 54-55)

That argument is absurd. No "statute enacted by the people's elected representatives" has been challenged at all, much less declared unenforceable. Plaintiffs challenged the contracts entered into by Vos and LeMahieu. The statutory authority granted to the Speaker and Majority Leader remains fully intact. [14]

II. If the Court accepts bypass, it should nevertheless deny the requested stay.

When a circuit court has already ruled on a motion for stay pending appeal and a party then turns to the appellate courts for a stay, the appellate courts review the circuit court's ruling under the erroneous exercise of discretion standard. To do so, they ask whether the circuit court

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[14] Vos and LeMahieu claimed that the circuit court's injunction "chang[es] the long-held status quo of the Legislature's constitutional authority." (Dkt. 66 at 10, citing the Third LeRoy Aff., Ex. 3 at 2, which is Dkt. 67 at 12) The source they cite in support of this proposition is entirely inapposite, relating to lawsuits between parochial school-affiliated plaintiffs and local governments, and describing the standards for temporary injunctions. (*See* Dkt. 67 at 12, *James v. Heinrich,* No. 2020AP1419-OA; *Wis. Council of Religious and Indep. Schools, et al. v. Heinrich et al.,* No. 2020AP1420-OA; and *St. Ambrose Academy, Inc. v. Parisi, et al.*, No. 2020AP-1446-OA (September 10, 2020) at 2.)

properly exercised its discretion by examining the relevant facts, applying the correct standard of law, demonstrating a rational process, and reaching a decision that a reasonable judge could make. *See Gudenschwager*, 191 Wis. 2d at 439-40.

The court of appeals already answered that question, twice, finding that the circuit court did not erroneously exercise its discretion. The Supreme Court does not ordinarily review a court of appeals' decision that only addresses the proper exercise of discretion by the circuit court. *See Outlaw*, 108 Wis. 2d at 120. For that reason alone, the Court should deny the Legislators' motion for stay.

However, should the Court wish to determine whether the court of appeals correctly found that the circuit court properly exercised its discretion, applying the four *Gudenschwager* criteria, as shown below, it should agree with the court of appeals and deny the stay requested.

A. The Court's stay orders in *LWV* and *SEIU* did not change the review standard, nor did the circuit court here err similarly to the circuit courts in those cases.

As will be discussed in detail in subsections B and C, below, Vos and LeMahieu are unable to confront the *Gudenschwager* analysis head-on, and so chose to lead their argument with an attempt to distract the Court.

(Br. at 25-32) A few words about this spurious line of argument are required here.

Vos and LeMahieu claim that the circuit court here erroneously exercised its discretion under the Supreme Court's stay orders in *League of Women Voters v. Evers,* No. 2019AP559 (Wis. S.Ct. April 30, 2019) ("*LWV* stay order") (Pet.App.38-50) and *SEIU, Local 1 v. Vos,* No. 2019AP622 (Wis. S.Ct. June 11, 2019) ("*SEIU* stay order") (Pet.App.51-63). That is untrue. By their own terms, those decisions do not indicate any error in the circuit court's use of discretion here.

First, despite the Legislators' attempts to portray those cases as imposing a harsher standard than the *Gudenschwager* analysis the circuit court performed here, the *LWV* Court (whose analysis was then adopted by the *SEIU* Court) specifically clarified that it was not altering the standard. Rather than changing it, the Court clarified that it was "merely saying that where an appeal will rest on a legal question [with a de novo standard of review], it is an error of law for a circuit court to proclaim that because it has decided the legal issue against the appellant in granting an injunction, the appellant must therefore have '***no*** likelihood of success on the merits' on appeal." (Pet.App.44 & n. 8 (*LWV* stay order, p. 7 & n. 8) (emphasis added)) Further, the Court there expressly rejected the idea that

"presence of a de novo standard of appellate review satisfies the first *Gudenschwager* factor." *Id.*

Relatedly, by ignoring the possibility that its merits evaluation could be wrong, the *LWV* "circuit court's consideration of the irreparable harms that would flow from denying relief pending appeal was erroneously premised on the circuit court's determination that the challenged Acts and confirmations would ultimately be found to be invalid." (Pet.App.45 (*LWV* stay order, p. 8))

Understood properly, *LWV* presented no new test that the circuit court here failed. Nowhere did the circuit court claim that the Legislators had no likelihood of success on the merits or allow its evaluation of the merits to cloud its harms analysis. Instead, its oral ruling featured a methodical analysis of each of the *Gudenschwager* factors, on its own merits, in turn, which will be discussed in detail in the following subsections.

Second, as described below in subsection II.C.1, the harm analysis in those cases turned on the fact that the circuit courts overlooked that "a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." (Pet.App.58 (*SEIU* stay order, p. 8), Pet.App.45 (*LWV* stay order, p. 8)) By

contrast, this case involves a declaration that certain contracts were entered into without authority and therefore are void.

Similarly, the *SEIU* Court found that the circuit court's errors there generally arose "from its erroneous belief that the factors for deciding whether to grant a stay pending appeal are simply the inverse of the factors for granting a temporary injunction" — which the circuit court had already issued and the analysis of which it simply copied in evaluating the motion for stay. (Pet.App.55-57 (*SEIU* stay order pp. 5-7) Vos and LeMahieu's conclusory accusation notwithstanding, this "conflation" plainly did not happen here, as there was no temporary injunction and the circuit court plainly applied the *Gudenschwager* analysis entirely in the context of their motion for stay. (Pet.App.2-11)

The *LWV* and *SEIU* Courts found other, specific errors in the circuit courts' *Gudenschwager* analyses as well, but as described throughout this Section II, the circuit court here committed neither any of them, nor any other erroneous exercise of discretion that the Legislators allege. Instead, what the Legislators compare to those errors in this matter are simply the circuit court's rejection of their arguments on the merits. Essentially, the Legislators' complaints boil down to the circuit court (1) standing by its analysis on the merits in response to their re-presentation of the same

substantive arguments in their motion for stay, and (2) not specifically addressing each of the Legislators' innumerable, scattershot arguments in its oral ruling.

These complaints do not constitute erroneous exercise of discretion. Neither *LWV* nor *SEIU*, nor logic itself suggest that a circuit court ruling on a motion for stay needs to specifically cite every single shred of the movant's proffered arguments or evidence, or that it cannot be consistent in evaluating the same argument.

B. The circuit court rationally found that the Legislators did not make a strong showing of likelihood of success on the merits of their appeal.

1. Wis. Stat. § 13.124 limits the authority of the Speaker and Majority Leader to engage counsel other than the Wisconsin Department of Justice.

When considering the Legislators' "strong probability" argument, the Court should note that the Taxpayers' Complaint was based on an assertion that Wis. Stat. § 13.124 is the only source of authority for Vos and LeMahieu to engage counsel, other than the Wisconsin Department of Justice, to represent the Assembly and Senate, and that their authority to do so is triggered only when one of those entities is a party to an action or its interests are affected by an action.

The parties' arguments about, and subsequent analysis by the circuit court of, Wis. Stat. §§ 16.74 and 20.765 and the Legislature's "inherent" constitutional power were prompted only by defenses raised by the Legislators, and may distract from the fact that, whatever authority members of the Legislature may have had to hire outside counsel prior to the enactment of Section 13.124, that enactment is what shapes their authority now.

The Legislators' claims, that Wis. Stat. §§ 16.74 and 20.765 and/or the Legislature's constitutional powers grant Vos and LeMahieu unfettered authority to hire outside counsel with taxpayer funds, begged this question: "If the Speaker and Majority Leader had the power for decades to hire private lawyers like they did here, why did the Legislature enact Wis. Stat. § 13.124 in 2018, which provides at (1)(b) and (2)(b) that the Speaker and Majority Leader each

> in his or her sole discretion, may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765(1)(a), in any action in which the [legislative body] is a party or in which the interests of the [body] are affected, as determined by the [speaker or majority leader]. The [speaker or majority leader] shall approve all financial costs and terms of representation.

If the Speaker and the Majority Leader already had in 2018 the power to engage outside counsel and pay for their services from a sum sufficient budget, Section 13.124 would be surplusage. Obviously, it is not.

Section 13.124 recognizes that ordinarily, legal counsel for the Assembly and Senate is provided by the Wisconsin Department of Justice. It also recognizes that there had to be a limitation on when the Speaker and Majority Leader, with absolutely no oversight, could avail themselves of the Legislature's sum sufficient budget to pay the high hourly rates of outside counsel when the assistant attorneys general were already being paid by the taxpayers.

Thus, Wis. Stat. § 13.124(1)(b) and (2)(b), by allowing the engagement of outside counsel only when the Assembly or Senate is already a party to an action, or when an already-existing action affects the interests of the Assembly or Senate, serves an important public purpose. While allowing the Speaker and Majority Leader in limited circumstances hire outside counsel, the statute also ensures that the Legislature's sum sufficient, i.e. unlimited, budget could not be used by the Speaker and Majority Leader to spend thousands, or perhaps millions, of taxpayer dollars without any oversight by having on retainer private attorneys who would function as a shadow attorney general's office.

2. Wis. Stat. § 16.74(1) does not independently authorize the contracts here.

The circuit court rationally (and correctly) found that the contracts challenged here are not independently authorized by Wis. Stat. § 16.74(1).

As that court recognized through application of well-established principles of statutory interpretation, the Legislators read a grant of power into this statute that, given the statutory context, clearly does not exist. (Dkt. 63; Pet.App.16-37)

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.

State ex rel. Kalal v. Cir. Ct. for Dane Cty., 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. (*See* Dkt. 63 at 13, 16-18; Pet.App.28, 31-33)

The plain text and the context here both demonstrate that this statute does not grant additional powers to the Legislature, or any of its members, to do what was not already authorized by the Constitution or other statutes. Although Vos and LeMahieu claim this statute provides an independent statutory grant of authority for the Consovoy and BGSJ contracts, it is not a grant of authority to the Legislature or any its members at all, much less one for legal services like those here.

Wis. Stat. § 16.74 establishes the general process for procurement through the Department of Administration ("DOA") of "[a]ll supplies, materials, equipment, permanent personal property and contractual services required within the legislative branch." Wis. Stat. § 16.74(1). The

statute is simply an administrative management mechanism for otherwise-authorized purchases by the legislative and judicial branches. That is, after all, why this provision on "Legislative and judicial branch purchasing" does not appear in the statutory chapters governing either the legislative (Ch. 13) or judicial (Chs. 751- 758) branches, but in the chapter governing the DOA, which is a cabinet agency within the executive branch. The statute lays out not what may be purchased, but who exercises, through DOA, the purchasing authority; who is responsible for requisition and contract form and recordkeeping; and how DOA executes its duties to audit, pay, manage, and otherwise assist in the purchasing process.[15]

The Legislators' argument entirely ignores this context and the lack of any grant of authority in the statute's text. Instead, Vos and LeMahieu offer just the conclusory claim that the challenged contracts "are obviously

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[15] Vos and LeMahieu falsely and repeatedly claim (including in bold italics) that "Plaintiffs did not dispute that Section 16.74 authorizes the Legislature to engage in contracts for legal services such as those at issue here[, and, i]nstead . . . only asserted" that Legislators did not comply with the statute's procedural requirements. (*See* Br. at 33 & n. 5, 38) To the contrary, the Taxpayers have always clearly identified, as the principle failure of Vos' and LeMahieu's § 16.74 defense, the completely dispositive argument above that § 16.74 simply does not authorize the contracts and that such contracts are governed by Wis. Stat. § 13.124. (*See* Dkt. 48 at 20; Pet.App.346) The Taxpayers additionally demonstrated that, in executing the contracts, the Legislators were not even attempting to act in accordance with § 16.74. (*See* Dkt. 48 at 21-27; Pet.App.347-53) The undisputed evidence demonstrated that the DOA had not received any bills submitted for payment authorization and audit under the Consovoy or BGSJ contracts pursuant to Wis. Stat. § 16.74(4). (Dkt. 49, ¶ 3, Ex. B)

for 'contractual services required within the legislative branch.'" (Br. at 33) They point to no authority that defines what "required within the legislative branch" means in this context, because there is exactly none – the predictable consequence of the statute never having been meant to confer authority.

As the circuit court noted, Vos' and LeMahieu's argument also relies on a broad parsing of the single term "contractual services" that is inconsistent with its statutory context. The court logically and rationally observed that the context in which we understand that term must include the clause in which it sits: "supplies, materials, equipment, permanent personal property and contractual services." (Dkt. 63 at 17; Pet.App.32, *citing Kalal*, 2004 WI 58 at ¶ 44.) This is required as an application of the canon *noscitur a sociis* --"the concept that a word is known from its associates so that ordinarily the coupling of words denotes an intention that they should be understood in the same general sense." *State v. Johnson*, 171 Wis. 2d 175, 181, 491 N.W.2d 110 (Ct. App. 1992) (internal quotations omitted).

Vos and LeMahieu misunderstand the *noscitur a sociis* canon and distort the case law it incorporates, drawing a false dichotomy between terms "of more comprehensive meaning" and terms "of equal dignity."

(Br. at 35-36) Contrary to their argument, their cited cases make clear that where a term is "of equal dignity" to its neighbors, it will not be read to "swallow" the neighbors, but the *noscitur a sociis* canon remains very much applicable to the term. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 101, 382 Wis. 2d 496, 914 N.W.2d 21 (noting that, under the canon, "when two or more words or phrases are listed together, the general terms may be defined by the other words and understood in the same general sense," subsequently applying the canon, and in no way limiting the canon's application to circumstances in which one term is "of more comprehensive meaning" than its neighbors).[16]

Their argument that "the common quality among Section 16.74's terms is 'require[ments]' of the Legislature" (Br. at 36) is absurdly circular and mistaken. That phrase is not a general common quality of the listed terms, but rather a separate additional adjective only connected to those terms by the statute itself. Attempting to satisfy the canon thusly would, of course, defeat the purpose of applying the canon in the first place.

Instead, the "general sense" of the neighbor terms is that they are quotidian, regular needs of a legislative body, unlike the special contracts

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[16] Vos and LeMahieu appear to confuse the *noscitur a sociis* canon with a related canon, *ejusdem generis*, used to interpret a general catchall term found near a list of other terms. *See State v. Popenhagen*, 2008 WI 55, ¶ 46 & n. 25, 309 Wis. 2d 601.

that Vos and LeMahieu have executed here for the furtherance of their litigation aims.[17] Even if the proffered common quality, "requirements of the Legislature," is accepted to illuminate the context, it only would underscore the Taxpayers' point: it is natural that a legislature truly would ***require*** supplies and equipment in order to function; the contracts here are in no way required for that purpose, as common sense and 170 years of legislative history show. (See Section II.B.5.c, *infra*.)[18]

The Legislators' party presentation argument (Br. at 37-38), is off base as well. Even the only authority that the Legislators cite for their argument reiterates that "a court is not hidebound by the precise arguments of counsel." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581–82, 206 L. Ed. 2d 866 (2020); *see also Saenz v. Murphy*, 162 Wis. 2d 54, 57, n. 2, 469 N.W.2d 611 (1991), *overruled on other grounds by State ex rel.*

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[17] The Legislators' reliance on *State v. Lopez*, 2019 WI 101, ¶ 21, 389 Wis. 2d 156, is also misplaced. (Br. at 35) That case did not consider the meaning of a term within a list of terms, as this matter is concerned with, and is therefore inapposite.

[18] The Legislators also attack the circuit court's interpretation of Section 16.74 with a meritless scare tactic. They argue that, under the circuit court's interpretation, "all Wisconsin courts, including this Court, would also be without the power to enter into any legal services contracts, including—for example—to defend against a lawsuit in federal court." (Br. at 36-37) This argument is self-defeating. As they state elsewhere (Br. at 23), the circuit court accepted that the Legislature can enter into legal services contracts to defend itself in court. Section 16.74 simply is not the source of the Legislature's power to do so. Thus, just as this case does not challenge the Legislature's ability to hire counsel to defend itself in active litigation, even less does it touch on the courts' ability to do so (whose sources of authority for ***any*** engagement of counsel are in no way examined here).

Anderson-El v. Cooke, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821 (holding that a court is "not bound by the issues as they are framed by the parties"). In that case, the Supreme Court only remanded the case on party presentation grounds because of "radical transformation of th[e] case" by the court of appeals. *Id.* That case is inapplicable in the vastly different circumstances here, in which the circuit court's decision on the Legislators' Section 16.74 defense included a ground additional to—but entirely consistent with—the Taxpayers' arguments.[19] Further, that ground was merely one facet of the court's rejection of the Legislators' scattershot case.[20] Ultimately, Vos and LeMahieu were able to respond to each aspect of the summary judgment decision in their briefing in the circuit court on the motion for stay. The facts here plainly are not of the extraordinary and

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[19] As explained *supra*, Vos and LeMahieu also grossly miscast the Taxpayers' arguments as "based on various procedural requirements." (Br. at 38; see also Br. at 33)

[20] Vos and LeMahieu's critique of what they admit was a "brief[]" "suggest[ion]" in the circuit court's decision (Br. at 38-39, *citing League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶¶ 16-17, 357 Wis. 2d 360, 851 N.W.2d 302) also amounts to nothing. The court's observation about the constitutionality of the Legislature preemptively hiring outside counsel for litigation that may not even occur is hardly "vague." Moreover, the case Vos and LeMahieu cite is entirely inapposite, as it dealt with the presumptive constitutionality of a statute. *Id.* At any rate, the circuit court's comment was in support of its larger point that there is no support for the idea that the contracts are "requirements" of the Legislature. (See Dkt. 63 at 17-18; Pet.App.32-33) Thus, it is the Legislators, not the circuit court, who are ignoring "the plain text of the statute." (Br. at 38)

egregious type appropriate for application of the party presentation doctrine.

Finally, even if Wis. Stat. § 16.74(1) ***would*** have, in a vacuum, authorized contracting for legal services generally, the contracts here could only be authorized by Wis. Stat. § 13.124 instead because "[i]t is a cardinal rule of statutory construction that when a general and a specific statute relate to the same subject matter, the specific statute controls[,] and this is especially true when the specific statute is enacted after the enactment of the general statute." *Martineau v. State Conservation Comm'n*, 46 Wis. 2d 443, 449, 175 N.W.2d 206, 209 (1970).

Wis. Stat. § 13.124, enacted in 2018, is a much more recent and infinitely more specific statute than Section 16.74 on the Speaker's and Majority Leader's authority to retain outside counsel on the taxpayers' dime. [21] It is, therefore, the only statute that may authorize such contracts.

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[21] Perhaps because they were acting in the wake of the enactment of Section 13.124, Vos and LeMahieu did ***not***, as they claim, obtain approval of the contracts "through…traditional balloting procedures." (Br. at 33, 52 & n. 6) For instance, the Senate committee vote that the Legislators cite as creating LeMahieu's authority was taken on January 5, 2021 (Dkt. 30, p. 20; Pet.App.132 (LeRoy Aff., Ex. 5)), weeks ***after*** LeMahieu signed the Consovoy contract. (Dkt. 3, p. 20; Pet.App.99) Similarly, when this lawsuit was filed, Vos relied for his authority on a Committee on Assembly Organization ballot created in 2017 for different litigation. (Dkt. 30, p. 22; Pet.App.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. (Dkt. 30, p. 151; Pet.App.259) The fact that this occurred after the Taxpayers filed this action, and months after both of the 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 these votes

The Legislators make no attempt to show that Section 13.124 is ***not*** the more specific statute on the topic of the Legislature's authority to retain outside counsel, and completely fail to confront *Martineau*'s "cardinal rule" dictating that that section should therefore govern.[22] Instead, the Legislators raise a straw man argument about "implied repeal." (Br. at 39, *citing State v. Villamil*, 2017 WI 74, ¶ 37, 377 Wis. 2d 1, 898 N.W.2d 482; *Krueck v. Phoenix Chair Co.*, 157 Wis. 266, 147 N.W. 41, 43 (1914).) Defendants' baseless reference to the "Legislature's longstanding authority" notwithstanding, the issue here has never been 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. *See Villamil*, 2017 WI 74 at ¶¶ 34-38. If it did not, then the doctrine would be irreconcilable with the cardinal rule about the

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even took place in the 2019-2020 biennium—the biennium in which Vos and LeMahieu signed the Consovoy contract. (Dkt. 3 at 19-20; Pet.App.98-99) Further, as described in Section II.B.5.c, *infra*, the process Vos and LeMahieu used here was plainly not in keeping with any "tradition," nor is their proffered evidence about "tradition" relevant anyway.

[22] The Legislators' evasion is predictable: they cannot argue that Section 13.124 is not on point because they argue elsewhere that the contracts are independently authorized by Section 13.124. (*See* Br. at 49-53)

specific controlling over the general. Here, Section 13.124 repeals nothing in Section 16.74, which continues to operate at full force as the payment procedure statute it has only ever been—and which, if it ever did grant spending authority to the Legislature, continues to grant such authority in all contexts outside of the hiring of outside counsel.

Consequently, the circuit court was well within its discretion in determining that Vos and LeMahieu failed to make a strong showing that they are likely to win on the merits in reliance on Section 16.74.

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

The circuit court's determination that the contracts here are not independently authorized by Wis. Stat. § 20.765 is also entirely rational and reasonable and should not be disturbed as an erroneous exercise of discretion. The statute, by its plain terms, provides a sum-sufficient appropriation for legislative functions that are ***already*** authorized, not an independent basis for the contracts here. It reads in relevant part as follows:

> **Legislature.** There is appropriated to the legislature for the following programs:
>
> (1) ENACTMENT OF STATE LAWS.
> (a) *General program operations – assembly.* A sum sufficient to carry out the functions of the assembly, excluding expenses for legislative documents.

> (b) *General program operations – senate.* A sum sufficient to carry out the functions of the senate, excluding expenses for legislative documents.

Wis. Stat. § 20.765(1).

As with Wis. Stat. § 16.74, the statute is clear on its face that it provides ***support*** for functions (here, the funding; in Section 16.74, procurement procedure), not affirmative ***authority*** for functions.

Vos and LeMahieu's argument again 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" (Dkt. 63 at 18; Pet.App.33); and that is not only absurd, but dangerously unconstitutional. (*See* Dkt. 63 at 19; Pet.App.34 (circuit court's decision, citing *Fabick v. Evers*, 2021 WI 28, ¶ 14, 396 Wis. 2d 231, 956 N.W.2d 856.))

Vos and LeMahieu's only other Section 20.765 argument is based on a distortion of *State ex rel. Moran v. Dep't of Admin.*, 103 Wis. 2d 311, 307 N.W.2d 658 (1981), to claim that the case supports their position instead of the circuit court's decision. (Dkt. 63 at 19-24; Pet.App.34-35) Specifically,

they rely on the statement in *Moran* that "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. (*See* Br. at 48-49)

Moran addressed whether the Secretary of Administration was entitled to deny a particular payment from a sum sufficient 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 elsewhere in the same decision the *Moran* Court thoroughly examined whether such legal authority actually did exist in that case. *Id.* at 316-319.[23]

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[23] Vos and LeMahieu's brief reference to *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 13, 334 Wis. 2d 70, 798 N.W.2d 436 (*citing State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 364, 338 N.W.2d 684 (1983)) is also inappropriate and of no help to them. First, they misrepresent *Moran* as citing *Ozanne* or saying anything about courts "intermeddling" in legislative determinations of the scope of Section 20.765 or anything like it. (Br. at 48-49) They further misrepresent *Ozanne* as having anything to say on the matter as well. The "intermeddling" referenced in *Ozanne* and *Stitt* concerned courts' ability to police the Legislature's adherence to its internal procedures, not legislators' ability to define their

If, as Vos and LeMahieu 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 particular appropriation in the first place, and sum sufficient fund administrators would realize absurd aggrandizements of power.

The circuit court considered all of the Defendant's arguments about Section 20.765 and rationally rejected them.

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

Next, the circuit court rationally rejected Vos and LeMahieu's argument that they were independently authorized to enter into the subject contracts by Wis. Stat. § 13.124(1)(b) and (2)(b). It bears repeating that these passages provide that the Speaker of the Assembly and the Senate Majority Leader, each "in his or her sole discretion, 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

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own powers. *Id.* In other words, they limited judicial enforcement of alleged legislative errors of procedural omission; they did not limit the courts' ability to serve as a check on self-aggrandizement by actors in other branches of government. Finally, it bears repeating that, contrary to Vos and LeMahieu's argument, the "Legislature" did not make "a decision that these contracts are necessary;" Vos and LeMahieu did.

[applicable house] are affected."[24] The Legislators now admit that this section is not applicable of its own force alone, because as the circuit court noted, "there ***is no action*** [as "action" is properly understood] pending in any court" related to Wisconsin's redistricting process. (Dkt. 63 at 13-15; Pet.App.28-30 (emphasis added); *see also* Br. at 50-51)

Vos and LeMahieu are left to rely on Wis. Stat. § 990.001(3), which states: "**Tenses**. The present tense of a verb includes the future when applicable." The Legislators claim this helps them because it "commands that Section 13.124's present-tense verbs 'is' and 'are' to include the future tenses of 'will be.'" (Br. at 53) That does not avail them, however, for the clear reason that neither "is" nor "are" nor 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 "assembly," "senate," and the

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[24] Now confronted with baselessness of their Section 13.124-based defense, the Legislators repeatedly describe the statute as some sort of "streamlined" or "expedited" alternative outside counsel retention process to one that already exists. (Br. at 49-50) However, they provide no evidence for this characterization. To the contrary, as explained in Section II.B.1, *supra*, 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.

Similarly, they claim that they "did not specifically intend to invoke Section 13.124 when [they] executed these contracts," which they say is evidenced by the fact that they "conducted the traditional balloting procedure [for these contracts] as [they] had for all pre-Section 13.124 redistricting counsel contracts." (Br. at 52, n. 6) Although this claim would be irrelevant even if true (as it does not change the fact that Section 13.124 now governs the field), it is false. See Section II.B.5.c of this brief, *infra*.

"interests" of the assembly and the senate. Thus, while the statute perhaps allows retention of counsel in a particular action that the chambers ***will be*** parties to, or by which their interests ***will be*** affected, the action itself must exist in the present. *See* Wis. Stat. § 13.124(1)-(2).

Therefore, as the circuit court noted, what Vos and LeMahieu ***actually*** want is for the court "to construe 'action' to include anticipated, likely, or impending actions." (Dkt. 63 at 15; Pet.App.30) The court may not do so, however, because Section 990.001(3) plainly only allows for ***verbs*** to be read in their future tense, not for adjectives to be inserted before nouns.

Vos and LeMahieu's accusations that the circuit court ignored or mischaracterized their argument on the subject are baseless. (Br. at 53) First, the court confronted their argument head-on. (*See* Dkt. 63 at 15; Pet.App.30) Second, although they claim that they are ***not*** asking the Court to construe "action" to include "anticipated, likely, or impending actions" (Br. at 32-33), they do explicitly ask the Court to construe it to include "***imminent*** 'action[s]'" (Br. at 51) and "***not-yet-filed actions*** in which a House will be a party or in which its interests will be affected." (Br. at 53) (emphasis added). These quibbles with the circuit court's characterization of the Legislators' argument are distinctions without a difference.

Finally, as the circuit court noted, the Legislators' proffered interpretation would impermissibly render the litigation power conferred by Section 13.124 to be un-policeable and essentially limitless. (Dkt. 63 at 15-16; Pet.App.30-31) "A court should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional." *Am. Fam. Mut. Ins. Co. v. Wisconsin Dep't of Revenue*, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998).

The circuit court's interpretation of Wis. Stat. § 13.124 was careful and rational, and therefore well within its discretion.

5. The Wisconsin Constitution does not independently authorize the contracts here.

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

Vos and LeMahieu's last attempted refuge on the merits is their contention that the contracts were independently authorized because they are part of the Legislature's "core power to make the law." (Br. at 40) The circuit court was correct in rejecting this argument and well within its discretion in determining that the Legislators have not met their burden to prove this argument is likely to win on appeal, as is necessary to support a stay.

The circuit court correctly, succinctly, and rationally recognized the well-established doctrine that "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 that the contracts signed by the Legislators clearly are not directly concerned with the process of making law itself. (Dkt. 63 at 8; Pet.App.23, *citing Custodian of Records for the LTSB v. State*, 2004 WI 65, 272 Wis.2d 208, 680 N.W.2d 792.) Nothing in Vos and LeMahieu's brief undermines that conclusion.

The legislative "core powers," and judicial deference thereto, are the powers necessary to the actual process of enacting law; not behavior like two individuals, purporting to act in their official capacities, entering into contracts for pre-litigation legal services to be provided only to a limited subset of Assembly and Senate members and paid for by the taxpayers of Wisconsin. This has repeatedly been made clear by the bounds that courts draw to respect those powers: "Courts are reluctant to inquire into whether the legislature has complied with legislatively prescribed formalities ***in enacting a statute***." *Stitt*, 114 Wis. 2d at 364–66 (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***." *LWV*, 2019 WI 75 at ¶ 36 (emphasis added).

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

> Article IV, Section 8 of the Wisconsin Constitution states in pertinent part that "[e]ach house may determine the rules of its own proceedings." ***Rules of proceeding have been defined as those rules having "to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members."*** *Custodian of Records for the LTSB v. State*, 2004 WI 65, ¶ 30, 272 Wis.2d 208, 680 N.W.2d 792. We have interpreted Article IV, Section 8 to mean that the legislature's compliance with rules of proceeding is exclusively within the province of the legislature, because "a legislative failure to follow [its own] procedural rules is equivalent to an ad hoc repeal of such rules, which the legislature is free to do at any time." *Id.*, ¶ 28. Accordingly, courts will not intermeddle in purely internal legislative proceedings, even when the proceedings at issue are contained in a statute. *State ex rel. La Follette v. Stitt*, 114 Wis.2d 358, 364, 338 N.W.2d 684 (1983).

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

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

In *Custodian of Records for the LTSB*, 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 it "efficiently exercise" its core legislative power.[25] (Br. at 41)

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).[26]

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"

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[25] See footnote 10, describing the LTSB's role in redistricting, *supra*.

[26] Ironically, and lest Vos and LeMahieu 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).

constitutional legislative function. Here, the circuit court reasonably 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." (Dkt. 63 at 12; Pet.App.27) Vos and LeMahieu do not—and cannot—contest that this 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." (Dkt. 63 at 19; Pet.App.34, citing *Fabick v. Evers*, 2021 WI 28, ¶ 14, 396 Wis. 2d 231, 956 N.W.2d 856.) As a result, their constitutional argument fails, as the circuit court rationally so found.

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

The Taxpayers urge the Court to even more carefully than usual examine the case law that Vos and LeMahieu cite, some of which is distorted far beyond any reasonable interpretation. For example, their distortion of case law is on display from the first citation of their constitutional argument, cherry picking words to mine a sweeping grant of all power appropriate to achieve the ends for which any express authority is granted. (Br. at 40, *citing Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 54 & n. 38, 373 Wis. 2d 543, 892 N.W.2d 233.) 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 "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 selection 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).

Ultimately, for all Vos and LeMahieu's attempts at distortion, they fail to present any authority for a supposed constitutional litigation power for the Legislature (or any of its officers) that applies to laws that have not yet been passed and litigation that does not yet exist. And for all their promises of "extensive discussion of pre-*SEIU* precedent granting [the

Legislature] broad authority" on the topic (Br. at 46), they provided none whatsoever.

c. "Historical practices" do not change the analysis of the Legislature's constitutional powers.

Vos and LeMahieu clearly lack legal authority or factual evidence to support their constitutional argument. Instead, they attack the circuit court's ruling by distortion. (Br. at 43-47) First, contrary to their claims, the circuit court did grapple with past practices but concluded they "are not relevant to the constitutional legal issues presented here." (Dkt. 82 at 8; Pet.App.8)

They seek support from "historical practices" as extrinsic sources of the Constitution's grant of power, claiming that there is a "decades-long history and approval of this practice [which] is afforded 'controlling' weight." (Br. at 43, *citing State ex rel. Williams v. Samuelson*, 131 Wis. 499, 111 N.W. 712, 717 (1907).) This assertion is wrong on multiple levels, and the Legislators' argument does nothing to change the legal analysis.

First, there is no evidence of any history of contracts like those at issue here; Vos and LeMahieu have produced not a single past contract with similar scope or terms. Neither is there any evidence of any

meaningful approval of such contracts; Vos and LeMahieu have produced no evidence that the lawfulness of such contracts has ever been reviewed.

Second, Vos and LeMahieu ignore that allowable "extrinsic sources" are the

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

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

Because Vos and LeMahieu's vaguely purported source 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 would be those from around the time of the Constitution's original adoption or "from time immemorial." *State v. Schwind*, 2019 WI 48, ¶ 13, 386 Wis. 2d 526, 926 N.W.2d 742. 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).

Nothing they offer in the way of evidence passes muster under those standards. (*See* Br. at 5-7, 41) 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*. While decennial redistricting predates Wisconsin itself, Vos and LeMahieu's provided evidence on the matter is all less than 40 years old—most of it substantially so. It should not be considered by the Court.

Even if 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 pre-litigation outside redistricting counsel for only select legislators. For example, most of the historical instances of the Legislature receiving the services of outside counsel, including ***all*** of those prior to 2000, were in conjunction with litigation actions.[27] (*See* Pet.App.117, 135, 180-81, 197-98.) Because this case challenges the lawfulness of two legislators signing contracts with outside

[27] Vos and LeMahieu's 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* Dkt. 30, p. 9; Pet.App. 117)

counsel to consult with certain members the Assembly and Senate in the ***absence*** of litigation, such evidence is irrelevant.

d. The circuit court correctly analyzed SEIU *and considered the* Bostelmann *decision as well.*

Contrary to Vos and LeMahieu's argument, the circuit court did not misapply *SEIU* or fail to consider *Bostelmann*. (Br. at 43-46, *citing Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35; *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423.) In fact, the circuit court gave both cases extensive consideration upon both summary judgment and the Legislators' motion for stay. (See Dkt. 82 at 3-8, Dkt. 63 at 8-11; Pet.App.3-8, 23-26)

In its decision on summary judgment, the circuit court noted that *SEIU* held that in some instances litigation ***may*** fall into an area of shared power that the legislative branch might wield, that the Legislature's ability to litigate depends on it having appropriate institutional interests, and that the *SEIU* Court "stressed that its decision was limited in scope." (Dkt. 63 at 8-11; Pet.App.23-26) As the circuit court reiterated in denying Vos and LeMahieu's motion for stay:

> [w]hat my decision stands for is the proposition that enacting legislation is the core power of the Legislature. Given this and given that the *SEIU* decision stressed that the Legislature's shared power in terms of litigation is limited in scope, hiring counsel in anticipation of litigation does not fall within the core or shared power of the Legislature.

(Dkt. 82 at 7-8; Pet.App.7-8) Those assessments are rational and correct. *Bostelmann* did nothing to change them.[28] *See Bostelmann*, 2020 WI 80 at ¶ 6.

Bostelmann and *SEIU* both were concerned with whether the Constitution ***permits enactment of statutes*** that grant the Legislature limited litigation powers. *Bostelmann,* in particular, offers no support to the Legislators' argument in this case that the Constitution ***itself*** affirmatively grants the Legislature litigation powers. In that case, the Wisconsin Supreme Court upheld the right of the Legislature to litigate in that case ***not*** based on any supposed constitutional authority, but rather, exclusively based on statute. *Id.* at ¶¶ 4, 7, 8 ("[W]hat interests [in litigation] does the Legislature have? ***By enacting § 803.09(2m)***, Wisconsin has adopted a public policy that gives the Legislature a set of litigation interests." (emphasis added).) Further, the Legislature's limited litigation interests, recognized in *Bostelmann* as having been extended by statute, are activated only upon certain (and already filed in court) "challenges" by a litigant ***to a statute***. *Id.* The only challenge that exists here is the Taxpayers' challenge

[28] Vos and LeMahieu fail to show that the circuit court construed these cases incorrectly, particularly as is relevant to this matter. Here, where there is not even litigation in which the Legislature may have an interest, the exact number of active litigation contexts in which the Legislature could become a party is irrelevant.

to the contracts signed by Vos and LeMahieu; there is no challenge to any statute.[29]

e. Neither the circuit court not any other authority has "blessed" any of the Legislators' purposes under the contract.

Vos and LeMahieu's last distortion of the circuit court's constitutional discussion falsely ascribes to the court a fictional, straw man distinction to reject. (Br. at 46) First, the circuit court did not "appear[] to bless" outside counsel contracts for mere advice on whether a redistricting map would be likely to survive review; it just did not decide the constitutional issue on those terms. (*See* Dkt. 63 at 11-12; Pet.App.26-27) At any rate, the real distinction is clear: the court found that the actual contracts at issue were in the service of litigation, which is ***not*** a core legislative function. (Dkt. 63 at 8-12; Pet.App.23-27)

By contrast, if the contracts were just about advice to inform the ***legislative process*** (which ***is*** a core function), then they would at the very least have had different terms. Indeed, as the Taxpayers have shown, and

[29] Tellingly, the only source of litigation authority that the *Bostelmann* Court found was Wis. Stat. § 803.09(2m). In stark contrast to Section 16.74, Section 803.09(2m) contains an explicit and specific grant of authority to the Legislature. *See Bostelmann*, 2020 WI 80 at ¶¶ 6-8. The Legislature knows how to authorize itself to litigate; the fact that its chosen language in Wis. Stat. §§ 16.74 and 20.765 is nothing like the statutes whereby it has been recognized to so authorize itself must be viewed as a deliberate choice. *See Vill. of Slinger*, 2002 WI App 187 at ¶ 14.

the circuit court recognized, the contracts here are not made to serve the process of enacting laws. (Dkt. 63 at 11-12; Pet.App.26-27) Unrebutted record evidence makes clear that participation in, and benefit from, those contracts is in fact ***completely denied*** to at least some members of the Legislature. (*See* Dkt. 56) 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 circuit court was therefore rational in determining that the contracts were, therefore, not independently authorized by the Constitution.

C. Vos and LeMahieu utterly failed to make an adequate showing on the other *Gudenschwager* factors.

The Legislators have failed to meet their remaining burdens required for a stay pending appeal. In order to meet their burden on the harms factors, they were required to show that:

> (2) unless a stay is granted, they will suffer irreparable injury;
> (3) no substantial harm will come to other interested parties through a stay; and
> (4) a stay will do no harm to the public interest.

Gudenschwager, 191 Wis. 2d at 440-41. Because they do not make the required showings, and the circuit court properly exercised its discretion in so finding, their motion must be denied.

1. Vos and LeMahieu's claims of irreparable harm absent a stay are meritless.

Vos and LeMahieu make no attempt to show any harm to themselves, much less irreparable harm. Instead, they argue perceived harms to the Legislature, conflating themselves with it. (*See* Br. at 54-55) The law offers no support for that conflation. The contracts are not the actions of the Legislature, but rather those of rogue members of the Legislature, acting without the authority of law. The Legislature's authority is thus not even implicated here.

Similarly, even if the Legislature ***were*** a defendant here, the parade of horribles that the Legislators posit as irreparable harms to it and the public are unmoored from reality generally, and from the circuit court's Decision and Order specifically.

First, the Legislators rely entirely on inapposite Wisconsin Supreme Court orders in claiming harm to the Legislature and public. Specifically, they rely on the Supreme Court's holding that harm to the Legislature and the public results "when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." (Br. at 54, *citing* Pet.App.58 (*SEIU* stay order, p. 8); Pet.App.45 (*LWV* stay order, p. 8)) To be absolutely clear: no "statute enacted by the people's elected representatives" has been challenged here,

much less declared unenforceable. The Taxpayers challenged ***contracts*** entered into by Vos and LeMahieu. Those contracts have been found void.

The very decision that Vos and LeMahieu rely on explains that irreparable harm does not result from failing to grant instantaneous approbation of partisan legislative leaders' every act or wish. Rather, it stems from blocking "enforcement of a law passed by the Legislature and signed by the Governor." (Pet.App.45 (*LWV* stay order, p. 8)) That is plainly not at issue in this matter.

The circuit court rationally and correctly found that these contracts are void and must be enjoined because no statute authorized Vos and LeMahieu to enter into them. In other words, the statutory "bases" that the Legislators claim are jeopardized by the circuit court's decision remain perfectly intact.[30]

Similarly, the Legislators err in relying on *Koschkee v. Evers*, 2018 WI 82, 382 Wis. 2d 666, 913 N.W.2d 878, to claim that the circuit court's decision deprives them of their rights. (Br. at 55-56) In *Koschkee*, the

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[30] Vos and LeMahieu's attempt to compare this matter to the state officer appointments in *LWV* is similarly meritless. (*See* Br. at 55) As with statutes, appointments are positions ***created by law*** and filled according to law by tandem acts of the Governor and the Legislature. Further, in *LWV,* the Court noted that denying the stay would vacate the appointments entirely, not only denying the public the work required ***by law*** by the appointees, but also providing a potential basis for the nominations to be denied ***permanently***. (Pet.App.45-46 (*LWV* stay order, pp. 8-9)) Legislators do not and cannot show that any potential harm here is analogous.

concern was a requirement that certain officers be represented ***in litigation*** by the Department of Justice, such that it "would not allow a constitutional officer to take a litigation position contrary to the position of the attorney general." *Id.* at ¶ 13. That has nothing to do with this case, which entirely concerns contracts for legal services ***in the absence of*** litigation.

The Legislators' arguments about the "practical implications" of the circuit court's denial of a stay (Br. at 56-59) show no irreparable harm either. Contrary to their empty claims of "decades-long history establishing this practice," as explained *supra*, Wisconsin's long history of redistricting shows the Legislature does ***not*** require or typically utilize pre-litigation outside counsel services.

Further, the Supreme Court rule petition proceedings that the Legislators rely on (Br. at 56-57) are now concluded with no new rule adopted, rendering that argument moot and irrelevant. At any rate, Vos and LeMahieu do not and cannot explain why they needed to be represented by outside counsel for those proceedings before, or why they need such counsel now, particularly because the petition concerned only rulemaking regarding original action jurisdiction, not substantive law, and the Supreme Court's decision leaves the status quo in place. *See* S. Ct. Order 20-03, 2021 WI ___ (May 14, 2021).

Even if contracts like those at issue would be helpful to the Legislature in legitimate redistricting efforts, the Legislators point to no evidence that such efforts will be irreparably harmed by the declaration and injunction remaining in place while an appeal is pending. Nor can they. As the circuit court correctly recognized, the Legislators' argument that their inability to use the contracts becomes "more and more burdensome every day" (Br. at 56) is entirely conclusory.

First, as *amicus curiae* in this matter observed (Dkt. 55 at 4), the Legislature likely will not receive the Census Bureau data that is a prerequisite to the actual work of redistricting until late summer or early fall of this year.[31] Therefore, no new districting plan could even be considered by the Legislature before then.

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[31] Census Bureau Statement on Redistricting Data Timeline. United States Census Bureau. Release number CB21-CN.14. February 12, 2021. Available at https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html (last visited July 4, 2021). Both lower courts that reviewed this case were aware of the U.S. Census Bureau's current projected timeline for its production of data. Contrary to the Legislators' implication that delivery of "legacy format summary" data represents a material change in that timeline (Br. at 24 & n. 4, 56), even the press release they cite shows that the Bureau's key timelines have not changed. *See* U.S. Census Bureau, U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File, Release No. CB21-RTQ.09. Mar. 15, 2021. Available at https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html ("[W]e expect to meet our previously announced deadline for the redistricting data release.") (last visited July 4, 2021).

Second, while Vos and LeMahieu's appeal is pending, the Legislature retains access to the full panoply of redistricting-related 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.[32] 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, either house thereof or the senate or assembly committee on organization;" and, as described *supra*, the Department of Justice[33] (or, potentially outside counsel

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[32] 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. (last visited July 4, 2021).

[33] In their sole attempt to confront the facts on irreparable harm, Vos and LeMahieu claim that the fact that the Attorney General took a different stance on behalf of a client (the Governor) on the rule petition "show[s] that the Attorney General and the Legislature are adversity on redistricting matters in this cycle." (Br. at 61 & n. 8) That is absurd. Representing the Governor on a rules petition about original action jurisdiction has nothing to do with whether the Attorney General is "adverse" to the Legislature or unable to either represent or advise it regarding any substantive redistricting issues in the future.

once an action commences) is available to provide litigation services.[34] As a result, neither the Legislators nor the Legislature itself would be without any type of critical legal services without a stay. The circuit court appropriately recognized this. (Dkt. 82 at 9; Pet.App.9) It also appropriately noted that Vos and LeMahieu failed to show any evidence that, if and when litigation were to commence, the law firms involved in the contract would be unable to adequately prepare. (Dkt. 82 at 10; Pet.App.10)

Unable to face all these crucial facts in the irreparable harm analysis, Vos and LeMahieu brazenly tell the Court that it may not even consider them because doing so would be "intermeddling" in legislative affairs. (Br. at 61, citing *Ozanne,* 2011 WI 43, and *Minneapolis*, 136 Wis. 146.)

As discussed *supra* in Sections II.B.3 and II.B.5.b, neither of those cases grants legislators the unfettered ability to define their own powers or the "necessity of . . . resources." (Br. at 61) For the same reasons, they do not allow members of the Legislature to usurp the courts' role in applying the *Gudenschwager* factors to their own legal arguments. *SEIU*, 2020 WI 67 at ¶ 1 ("Legislative power is the power to make the law, [while] judicial

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[34] Wisconsin Legislative Council. *About the Wisconsin Legislative Council.* https://legis.wisconsin.gov/lc/about-us/. Accessed May 6, 2021. Wis. Stat. § 165.015(1).

power is the power to interpret and apply the law to disputes between parties.").

The Legislators simply may not claim irreparable harm based on a "critical" "need" (Br. at 20-21, 47, 61), while evading court evaluation of that claim. Their attempt at obfuscation notwithstanding, the facts reveal that no irreparable harm has befallen them without a stay.

The Legislators also repeatedly bemoan what they describe as a "state of . . . confusion" over the implication of the circuit court's decision on certain Public Records Law requests. (Br. at 57-58, 62) Whether communications between the contracted attorneys and the Legislators remain subject (if they ever were) to attorney-client privilege or confidentiality doctrines was not before the circuit court and is not before this Court. Neither is the question of whether any requesters under Wisconsin's Public Records Law, Wis. Stat. § 19.31 *et seq.*, are entitled to receive those communications.

As the circuit court accurately observed, the Legislators are hardly without resort if they are truly concerned about confidentiality. (Dkt. 82 at 10; Pet.App.10) They are not automatically required to surrender any records to requesters simply by dint of the circuit court's ruling in this matter. Rather, Vos and LeMahieu, as custodians of their own records, are

in control of the statutory balancing test when considering such requests and would doubtlessly be able to cite strong reasons for denying disclosure. *See Hempel v. City of Baraboo*, 2005 WI 120, ¶ 63, 284 Wis. 2d 162, 699 N.W.2d 551. If they decline to release the records and litigation ensues, the onus would be on any aggrieved requesters to act further, and another court at another time would evaluate the legal merits of that decision.[35]

Finally, Vos and LeMahieu argue for the first time here that a stay "will prevent the Legislature from effectively losing its appellate rights" because they believe redistricting litigation is imminent. (Br. at 59) They offer no case law to support this argument or explain how it factors into the *Gudenschwager* analysis at all, because it does not.[36] Further, the

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[35] The Legislators' claim that the circuit court's decision "directly contradicts" *LWV* is baseless. (See Br. at 62) *LWV* did not hold that "potential confusion" about anything created irreparable harm. (*See* Pet.App.45-46 (*LWV* stay order, pp. 8-9)) Regardless, the "confusion" discussed by the Court in *LWV* – the specter of appointees with competing nominations for the same state officer post—was an intractable practical problem that was squarely in the *LWV* Court's lap. *See id.* It had nothing to do with uncertainty of the answer to a legal question that is not before the courts and for which the Public Records Law provides Vos and LeMahieu many options.

[36] If Vos and LeMahieu's concern is essentially about a mootness-based challenge at a later juncture, then they ignore the factors (e.g. a matter of great public importance, likelihood of repetition, etc.) by which they would presumably argue then that the issues herein should be resolved despite mootness. *Matter of Commitment of J.W.K.*, 2019 WI 54, ¶¶ 11-14, 30, 386 Wis. 2d 672, 927 N.W.2d 509. At any rate, the Legislators' claim that "the question of whether the Legislature had the authority to enter into these contracts ***prior*** to the filing of a redistricting action has no practical importance ***after*** the filing of such an action" (Br. at 59, emphasis in original) is fundamentally untrue. Either the ***grant*** of a stay would destroy Taxpayers' appellate rights in the same fashion that Vos and LeMahieu claim the denial of one would destroy their own, or, because the contracts here have been declared void, they may not become operative once

Legislators' claim that this matter will soon be rendered moot and they will ultimately be able to proceed under the void outside counsel contracts, if true, underscores the ***lack*** of irreparable harm they face, and is all the more reason for this court to deny a stay.

2. Vos and LeMahieu do not—and cannot—deny the harms a stay would cause the Taxpayers and the public.

The Legislators' motion should also be denied because they completely fail to mention or consider the potential harms to the Taxpayers and the public if a stay were to issue. They neither do, nor can, show countervailing evidence that a stay of the circuit court's order would serve the public interest. As the circuit court accurately observed,

> Tens, if not hundreds of thousands of dollars of taxpayer money will be spent based on the contracts at issue. Because I have concluded the contracts were not authorized, this would constitute an improper use of taxpayer money, and, therefore, would constitute harm to the general public.

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redistricting litigation commences unless that declaration would be overturned. Should Vos and LeMahieu decide once again, following initiation of relevant litigation, that they desire counsel for the Assembly and Senate from outside the Department of Justice, they would have to re-contract for representation in such litigation (which they are plainly capable of doing quickly). Moreover, even after one lawsuit were to be filed related to redistricting in this cycle, further redistricting suits could continue to be filed for years down the road, during all of which time Vos and LeMahieu might potentially seek counsel for the Assembly and Senate. Above all, as Vos and LeMahieu elsewhere observe, this is a declaratory judgment action with a long scope affecting this State's citizens in this redistricting cycle, future such cycles, and indeed in connection with an unlimited scope of subjects in which the Legislators and their predecessors might wish to engage counsel to prepare for possible eventual litigation, for as long as the current constitutional and statutory schemes persist.

(Dkt. 82 at 11; Pet.App.11)

Indeed, "[a]ny illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961). Because the taxpayers cannot recover those funds, the harm is irreparable.[37] *Pure Milk Prods. Co-op v. National Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *see also Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304–05 (2010) (Scalia, J., in chambers); *Rath v. City of Sutton*, 267 Neb. 265, 280, 673 N.W.2d 869, 884 (2004).

Not only did the Legislators fail to show that a stay would not cause substantial or irreparable harm, they also failed to meet their burden to show "that a stay will do ***no*** harm" to the public interest. *Gudenschwager*, 191 Wis. 2d at 441 (emphasis added). Thus, they have failed to show that the circuit court erroneously exercised its discretion on that prong, too.

3. Preservation of the status quo *pendente lite* is a factor that only applies to temporary injunctions.

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[37] In contrast to the permanent deprivation to the taxpayers of the funds expended under the contracts if there is a stay, the harm to the Legislators or the Legislature if there is ***not*** a stay would be, at worst, merely a delay in the performance of the contracts (and, given the expected wait for receipt of the requisite raw data from the Census Bureau, described *supra*, perhaps not even that). This contrast in permanency tipped the circuit court's analysis even farther towards denial of the Legislators' motion and was justified by prior case law cited by the Legislators themselves. (*See* Pet.App.59 (*SEIU* stay order, p. 9))

Lastly, Vos and LeMahieu err by arguing for a stay on the basis that it would "preserve the status quo." (Br. at 60, 62-63) The preservation of the status quo *pendente lite* was not a factor that the circuit court had to consider in addition to the *Gudenschwager* factors. The seminal case of *Werner v. A.L. Grootemaat & Sons, Inc.* Wis.2d 513, 520, 259 N.W.2d 310, stated:

> Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm, ***but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo*** **pendente lite,** the permanent injunction sought would be rendered futile. (emphasis added)

This case does not involve a temporary injunction, so any discussion of the failure of the circuit court to consider preserving the status quo *pendente lite* is irrelevant.

CONCLUSION

For the reasons stated herein, the Taxpayers respectfully request that the Court deny Vos and LeMahieu's Petition for Bypass, and thereby return this matter to the court of appeals for resolution on the merits. If the Court grants that petition, it should nevertheless deny the motion for stay pending resolution of the appeal.

Respectfully submitted this 7th day of July 2021.

PINES BACH LLP

Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
Aaron G. Dumas, SBN 1087951
Leslie A. Freehill, SBN 1095620
Beauregard W. Patterson, SBN 1102842

Attorneys for Plaintiffs-Respondents

Mailing Address:
122 West Washington Ave., Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
lpines@pinesbach.com
tpackard@pinesbach.com
adumas@pinesbach.com
lfreehill@pinesbach.com