

No. 2021AP802

In the Supreme Court of Wisconsin

ANDREW WAITY, JUDY FERWERDA, MICHAEL JONES,
and SARA BRINGMAN,
PLAINTIFFS-RESPONDENTS,

v.

DEVIN LEMAHIEU, *in his official capacity*, *and* ROBIN
VOS, *in his official capacity*,
DEFENDANTS-APPELLANTS-PETITIONERS.

On Appeal From The Dane County Circuit Court,
The Honorable Stephen E. Ehlke, Presiding
Case No. 2021CV000589

**RESPONSE TO PLAINTIFF-RESPONDENTS'
MOTION TO STRIKE PORTIONS OF DEFENDANTS-
APPELLANTS-PETITIONERS' OPENING BRIEF**

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INTRODUCTION

In its Opening Brief, the Legislature¹ cited this Court's own words to describe the objective purposes underlying Wis. Stat. § 13.124, as well as the universally understood complexity of the decennial redistricting process. These are the same exact objective purposes and complexities that the Legislature has discussed throughout each stage of this case—before the Circuit Court, before the Court of Appeals, and before this Court (at the bypass and stay stage)—without any prior motion to strike by Plaintiffs. Also in its Opening Brief, the Legislature submitted briefing on Issue Presented V, relating to the Circuit Court's erroneous exercise of its discretion in denying the Legislature's Motion For A Stay, an issue on which this Court explicitly granted review.

Plaintiffs inexplicably waited 18 days after the Legislature submitted its Opening Brief and then—just a week before their Response Brief was due—moved to strike portions of the Legislature's Opening Brief, thereby

¹ In their Motion To Strike, Plaintiffs claim that Defendants here do not speak for the Legislature, Mot.2 n.1, but that is plainly wrong, as the Legislature explained in its Opening Brief, Opening Br.3 n.1.

manufacturing this emergency briefing. Because Plaintiffs attack the Legislature for following this Court's lead in its stay and bypass orders, Plaintiffs' strike motion is a thinly veiled, untimely motion for reconsideration of this Court's orders. And, in any event, because Plaintiffs never moved to strike the Legislature's indistinguishable briefing on these issues before, they have long forfeited their arguments.

Plaintiffs' Motion To Strike is patently meritless, and this Court should thus deny it. Indeed, Plaintiffs' Motion is so clearly devoid of merit that, absent contrary indications from this Court, the Legislature intends to move to recover from Plaintiffs the attorneys' fees and costs that the Legislature had to incur in responding to the Motion.²

² Such recovery of fees and costs would be justified because of: (1) the utter lack of merit in Plaintiffs' Motion; (2) the fact that the Legislature made materially identical claims in multiple briefs in this case, without any prior motion to strike from Plaintiffs; (3) Plaintiffs' delay in filing their Motion, forcing this emergency briefing; (4) the fact that the Legislature's counsel respectfully requested that Plaintiffs withdraw their meritless Motion, but Plaintiffs declined; and (5) the serial, similarly meritless motions filed by Plaintiffs' counsel in prior proceedings before this Court. *See, e.g.*, Supp.App'x 1-4 (asking this Court to strike a reference made by Judge Diane S. Sykes of the U.S. Court of Appeals for the Seventh Circuit); Supp.App'x 5-11 (opposing that motion to strike and citing *three* prior failed motions to strike that counsel had filed in that same appeal); Supp.App'x 12-13 (denying motion to strike).

ARGUMENT

I. The Legislature Properly Discussed Objective Features Of Section 13.124 As Explicating That Statute's Underlying Purposes

A. Courts and parties often discuss a statute's objective purpose without reference to record facts about subjective legislative intent. *Force v. Am. Family Mut. Ins. Co.*, 2014 WI 82, ¶ 30 & n.13, 356 Wis. 2d 582, 850 N.W.2d 866; *see, e.g., Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 120 & n.40, 358 Wis. 2d 1, 851 N.W.2d 337 (discussing the “intense fiscal uncertainty” that Act 10 sought to mitigate); *State v. Cox*, 2018 WI 67, ¶¶ 12–16, 382 Wis. 2d 338, 913 N.W.2d 780 (confirming legislative intent of the word “shall” based upon statutory history and context); *Wis. Med. Soc’y, Inc. v. Morgan*, 2010 WI 94, ¶¶ 8, 18–28, 328 Wis. 2d 469, 787 N.W.2d 22 (looking to “Injured Patients and Families Compensation Fund” to gain a “full appreciation of the issues in [the] case”). To determine a statute's objective purposes, a court “must begin with the language employed by [the Legislature] and the assumption that the ordinary meaning of that language [is an] accurate[] express[ion] [of] the

legislative purpose.” *State v. Hall*, 207 Wis. 2d 54, 83–84, 557 N.W.2d 778 (1997) (citation omitted). Further, the statute’s purpose “may be readily apparent” from other objective features, such as “its relationship to surrounding or closely-related statutes—that is, from its context or the structure of the statute as a coherent whole.” *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 49, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory analysis generally should *not* be based upon record evidence of statements of legislators, who “cannot testify as to what the intent of the legislature was in the passage of a particular statute.” *Wis. S. Gas Co. v. Pub. Serv. Comm’n*, 57 Wis. 2d 643, 652, 205 N.W.2d 403 (1973).

B. In the Legislature’s briefing before the Circuit Court, Supp.App’x 83, the Court of Appeals, Supp.App’x 47, and *this* Court (at the stay and bypass stage), the Legislature made claims regarding Section 13.124’s objective purposes, drawn from the statute’s plain text and other applicable law, that are indistinguishable from those to which Plaintiffs now object. Specifically, in its converted Motion For Summary Judgment before the Circuit Court, the Legislature asserted that Section

13.124 “provide[s] the Assembly and the Senate with an expedited procedure to obtain legal counsel.” Supp.App’x 83. Then, in its stay briefing to the Court of Appeals, the Legislature again argued that Section 13.124 “provides a streamlined outside-counsel hiring process.” Supp.App’x 47. And in its bypass-and-stay briefing before this Court, the Legislature once more explained that Section 13.124 “provides the Assembly and the Senate with a streamlined process to engage with outside counsel.” *See* Defendants’ Combined Memorandum In Support Of Petition For Bypass And Expedited Motion For Stay Pending Appeal (“Defs. Bypass & Stay Mem.”) at 49, No. 2021AP802 (Wis. June 30, 2021). In each instance, the Legislature based these arguments on the objective features and plain text of Section 13.124, within the context of other closely related statutes, not on record evidence about the subjective intent of any particular legislators.

This Court appeared (at least tentatively) to agree with the Legislature’s characterization of Section 13.124’s objective purposes in its Order granting the Legislature’s

Motion For Temporary Relief Pending Appeal. Order Granting Stay, No. 2021AP802 (Wis. July 15, 2021) (reproduced at App'x 496–511) (hereinafter “Order” or “Stay Order”). That is, this Court’s Stay Order concluded that a “plausible interpretation” of Section 13.124 was that it was “intended to provide a streamlined alternative to the usual procedure . . . [to] approve such legal engagement agreements,” rather than “to eliminate the Legislature’s authority to purchase ‘contractual services’ under Wis. Stat. § 16.74.” Order 9–10. Looking to the statute’s text and context, this Court noted that it would be “unusual” for the Legislature to “limit[] [its] authority to take actions that it had previously been authorized to take.” Order 9–10.

The Legislature’s Opening Brief in this Court likewise follows this well-established practice, making statements about Section 13.124’s objective purpose without reference to any factual evidence about the subjective intent of individual legislators. In particular, Section 13.124 “authorizes legislative leaders to enter into an agreement with outside-counsel when Defendants alone ‘determine[]’ that an

‘interest’ of their House is ‘affected’ or when the House is simply ‘a party’ to an action.” Opening Br.34 (quoting Wis. Stat. § 13.124(1)(b), (2)(b)). That process contrasts with the standard practice of the Legislature submitting proposed authorizations to engage outside counsel to its Joint Committee on Legislative Organization’s balloting procedure or to the individual House organization committees, historical practices that are well-supported by the *undisputed* record before the Circuit Court at the summary-judgment stage, properly introduced through a sworn attorney affidavit. *See* App’x 126, 132–54, 259. So, because Section 13.124 allows each House’s leadership to engage counsel in their “sole discretion,” Wis. Stat. § 13.124(1)(b), (2)(b), the Legislature explained in its Opening Brief that—based on the text and statutory context—Section 13.124 “enables the Houses, through their leadership, to avoid the delays that can sometimes occur from the Legislature’s more-standard practice,” Opening Br.35. Thus, a reading of Section 13.124’s text—combined with undisputed record evidence of the legislature’s historical contracting practices—reveals that the

statute's objective purposes were to offer the Legislature a "streamlined alternative to the usual procedure," allowing it to obtain counsel *quickly* through the actions of one of two legislative leaders, without any reference to the subjective intent of any legislator who voted for Section 13.124. Opening Br.35 (quoting Order 9–10).

C. In their Motion To Strike, Plaintiffs complain that the Legislature failed to submit into the record below the "facts" that the Legislature now cites in its Opening Brief regarding Section 13.124, Mot.5, but Plaintiffs' arguments are both wrong on the merits and long forfeited.

Contrary to Plaintiffs' arguments that the Legislature needs record citations to support its interpretation of Section 13.124's purposes, no such "evidence" is necessary. Statutory analysis generally should *not* be based upon record evidence of statements of individual legislators. *See Wis. S. Gas Co.*, 57 Wis. 2d at 652. Rather, statutory interpretation should proceed primarily according to an objective reading of the statute's "plain language" and its "relationship to surrounding or closely-related statutes," thereby discerning a

statute's objective purpose "from its context or the structure of the statute as a coherent whole." *Kalal*, 2004 WI 58, ¶ 49. This Court correctly conducted that exact analysis in its Order, reaching (at least tentatively) the identical conclusion about Section 13.124's objective purposes as that asserted by the Legislature, noting that a contrary understanding of that provisions purposes would be "unusual." *See supra* p. 6. Plaintiffs' Motion To Strike essentially seeks reconsideration of that portion of this Court's Order—long past the deadline to seek such extraordinary relief. *See* Wis. Stat. § 809.64.

Each claim in the Legislature's Opening Brief to which Plaintiffs' object is just a repeat of the Legislature's discussion of Section 13.124's objective purposes, supported both by the statute's text and context. *See* Opening Br.5, 12, 20–21, 34 n.4, 35. The Legislature merely explained that Section 13.124 adopted a "streamlined alternative to the usual procedure" for "obtain[ing] legal counsel on an expedited basis." Opening Br.5, 20, 35; *see id.* at 12, ("streamlined process"), 34 n.4 (same). Each such claim to which Plaintiffs object provides

contextual understanding of the objective purposes of Section 13.124, based upon its text and context.

In any event, Plaintiffs have long forfeited all of their arguments to strike the Legislature's entirely conventional claims about the objective purposes underlying Section 13.124. Plaintiffs had multiple opportunities to move to strike from the Legislature's filings the same language to which they now seek to remove from the Legislature's Opening Brief. As detailed above, the Legislature made the *same* argument about Section 13.124's objective purposes at every stage of this case. *See supra* pp. 4–6. Because Plaintiffs never moved to strike those statements until seven days before their merits briefing deadline before this Court, they have forfeited any such arguments. *See Milas v. Lab. Ass'n of Wis., Inc.*, 214 Wis. 2d 1, 10, 571 N.W.2d 656 (1997).

II. The Remaining Citations To Which Plaintiffs Object Are Plainly Appropriate

A. This Court has long looked to the context of legal documents and statutes to better understand their meaning. The meaning of a contract, much like a statute, can be derived from its objective features—interpreted according to how a

“reasonable person would understand the words to mean.” *Maryland Arms Ltd. P’ship v. Connell*, 2010 WI 64, ¶ 22, 326 Wis. 2d 300, 786 N.W.2d 15 (citation omitted); *see also Dairyland v. Doyle*, 2006 WI 107, ¶ 61, 295 Wis. 2d 1, 719 N.W.2d 408. This is why the complexity of a statute or legal document may be discerned from its plain text and context, without resort to record facts. *See Kalal*, 2004 WI 58, ¶¶ 44–46. This Court has thus routinely discussed and contextualized the law without presenting record “evidence.” *See Walker*, 2014 WI 99, ¶ 120; *Cox*, 2018 WI 67, ¶¶ 12–16; *Morgan*, 2010 WI 94, ¶¶ 8, 18–28.

B. In the Legislature’s briefing before the Circuit Court, App’x 296–97, 307, 310; Supp.App’x 77–78, 80, the Court of Appeals, Supp.App’x 19, 39, 54, and this Court (at the stay and bypass stage), the Legislature made all of the same claims to which Plaintiffs now object, arguing from the outside-counsel agreement’s plain text and the applicable redistricting law. In particular, in the Legislature’s converted Motion For Summary Judgment before the Circuit Court, the Legislature explained that the redistricting process requires

it to “comply[] with multiple, complex state and federal laws,” and that the “hiring of legal counsel is critical to enacting, and subsequently defending, complex legislation,” meaning that the hiring of “[s]uch expert counsel” falls within the Legislature’s statutory and constitutional authority. Supp.App’x 77, 80. For that reason, the Legislature executed agreements with “sophisticated counsel” so as “to have any realistic hope of passing constitutional scrutiny” with regard to the “drawing [of] redistricting lines.” Supp.App’x 78. Similarly, in its stay briefing before the Court of Appeals, the Legislature argued that it needed “sophisticated advice with respect to the current decennial redistricting process” and that “these contracts afford the Legislature” crucial assistance in the “complex enterprise of redistricting, including obtaining pre-litigation advice.” Supp.App’x 19, 39. And in its bypass-and-stay briefing before this Court, the Legislature explained that it entered into these contracts “to obtain sophisticated advice” regarding “the exceedingly complex task of decennial redistricting.” Defs. Bypass & Stay Mem.1, 4; *see id.* at 42–43, 48. For each of these arguments,

the Legislature relied upon the objective features and plain text of the outside-counsel agreements, as well as pertinent redistricting laws.

This Court agreed with the Legislature's characterizations of its outside-counsel contracts and the complexity of redistricting in its Stay Order. The Stay Order explained that redistricting is a "highly specialized and complex area of . . . law" and recognized that "not every lawyer . . . will be able to provide the knowledge and advice necessary to assist the Legislature in navigating the complex legal maze of redistricting." Order 11 & n.15. This "difficult and complex task" involves the "crafting [of] redistricting legislation that will comply with the necessary statutory and case law requirements," for which "specialized lawyers [are] necessary." Order 12. Thus, this Court concurred with the Legislature's assessment that decennial redistricting is an inherently "specialized and complex" legal quagmire, for which "specialized" and sophisticated lawyers with particular expertise in such issues are especially important. Order 11–12 & n.15.

Thereafter, the Legislature filed its Opening Brief in this Court, reiterating all of the same claims that it has made throughout this case, consistent with this Court's conclusions at the stay stage. The Legislature's Opening Brief explains that the Legislature had determined the need for "outside counsel to assist with the complicated, once-in-a-decade task of decennial redistricting" so that it could "carry out its constitutional duties." Opening Br.2, 11; *see also id.* at 15 ("highly specialized and complex area of [] law"), 32 (same), 27–28 (decennial redistricting is a "complex area[] of the law"). Therefore, the Legislature sought out and obtained "expert" and "sophisticated legal advice" from the outside counsel it ultimately engaged, who will now assist the Legislature with "map-drawing and prelitigation advice" and offer "advice" on "legislative drafting" related to redistricting. Opening Br.2, 6, 11, 23, 27, 29; *see id.* at 32 ("skilled counsel").

C. In their Motion To Strike, Plaintiffs incorrectly argue that the record is "devoid" of evidence "for why the specific outside counsel were hired" or establishing that they are "sophisticated" "experts" in redistricting law. Mot.7. The

outside-counsel agreements specify that Consovoy McCarthy PLLC, Adam Mortara, and Bell Giftos St. John LLC will provide assistance with “possible litigation related to decennial redistricting,” App’x 94, and “provide legal advice . . . on any and all matters relating to redistricting during the decennial period”—including about “constitutional and statutory requirements and principles relating to redistricting” and “the validity of any draft redistricting legislation . . . enacted.” App’x 99–100. It can be reasonably inferred from the face of the outside-counsel agreements that these lawyers are sufficiently “sophisticated” and “specialized” to assist the Legislature with its complex redistricting responsibilities, *see, e.g.*, Order 11–12 & n.15; Opening Br.27, given the Legislature’s reasoned judgment in engaging these particular firms and counsel for the complex task of redistricting, *see Connell*, 2010 WI 64, ¶ 22. This Court even analogized these redistricting lawyers to specialized doctors performing “highly specialized . . . surger[ies],” where “even the top . . . surgeon available” in a region “may not have the [necessary] skill and experience,”

understanding these redistricting attorneys' expertise. Order 11 n.15. Thus, each of Legislature's references to the sophistication or expertise of counsel is entirely appropriate. See Opening Br.2, 11, 15, 19, 23, 27–28, 29, 32.

Similarly, Plaintiffs' argument that the Legislature mischaracterized the outside-counsel agreements because they do not allow counsel to assist “with the task of drafting redistricting legislation” or “with the task of drawing redistricting maps” is simply wrong. Mot.9–10. The Legislature's contract with Bell Giftos St. John LLC explicitly includes “legal advice about the validity of any draft redistricting legislation” and, more generally, “advice . . . regarding constitutional and statutory requirements and principles relating to redistricting.” App'x 100–101. Even if these outside counsel do not themselves “draw[] redistricting maps,” App'x 101, the Legislature correctly argued that this counsel would provide legal advice regarding such maps, see Opening Br.6, 27, 29, consistent with the plain text of the outside-counsel agreements, *Connell*, 2010 WI 64, ¶ 22. Such advice on “constitutional and statutory requirements” and

“legal advice about the validity of any draft redistricting legislation,” App’x 100–01, extends to legislative map drawing, which is likely to be the core issue in subsequent redistricting litigation, App’x 94 (providing services for “litigation related to decennial redistricting”); *id.* at 100 (providing “legal advice to, represent[ing], and appear[ing] for” the Legislature “on any and all matters relating to redistricting”). Indeed, litigation advice relating to map drawing is critical to the Legislature’s redistricting functions, given that any maps created as a result of this process are nearly certain to face some form of challenge. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam) (“[R]edistricting is now almost always resolved through litigation rather than legislation[.]”). Therefore, the Legislature was correct in stating in its Opening Brief that it engaged these outside counsel: (1) “for legislative drafting, pre-litigation *advice*, or both”; (2) “to offer map-drawing and prelitigation *advice*”; and (3) “to help in the map drawing process, including for map drawing and pre-litigation *advice*.” Opening Br. 6, 27, 29 (emphases added).

Plaintiffs also assert that there is no evidence that redistricting is complex, thus there is no evidence that the outside-counsel contracts deal with “complex” or “highly specialized” subject matter. Mot.7. Not so. As the Legislature explained, redistricting involves “draw[ing] maps for the entire State while navigating a plethora of laws”—state and federal, statutory and constitutional, Opening Br.27–28—all of which laws are subject to judicial notice, *see* Wis. Stat. § 902.02(1) (“Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.”); *State v. Stone*, 111 Wis. 2d 470, 477 n.2, 331 N.W.2d 83 (1983). In completing this redistricting process, the consequence of any legal or map-drawing error is the possible “invalidation of a district or, in extreme cases, the entire map.” Opening Br.28. Thus, the Legislature navigating these legal regimes as it drafts redistricting legislation is plainly a complex and high-stakes endeavor—as this Court noted as well, Order 11—meaning that Plaintiffs’ assertion that “there are no facts in the record to support those characterizations” is without

merit, Mot.9, and an untimely attempt to seek reconsideration of this Court's Stay Order.

In any event, Plaintiffs have forfeited any arguments that the Legislature's arguments on this score should be struck from its briefs (rather than opposed on the merits by Plaintiffs). Throughout this litigation, the Legislature has consistently claimed that it entered into these contracts due to its need for "sophisticated" and "expert" legal counsel to assist it in navigating the "complex" field of decennial redistricting. *Supra* pp. 11–13. Plaintiffs never before moved to strike these statements at any level of the litigation, but merely contested the claim on their merits. Because Plaintiffs only now, at this eleventh hour, seek to strike these arguments from the Legislature's briefing, they have forfeited this argument long ago. *See Milas*, 214 Wis. 2d at 10.

III. Section V Of The Legislature's Brief Properly Addresses Issue V On Which This Court Granted Review

A. Unless this Court orders otherwise, a petitioner's arguments "are limited to the issues on which [this Court] granted review." *State v. Sholar*, 2018 WI 53, ¶ 49, 381 Wis.

2d 560, 912 N.W.2d 89; *accord* Wis. Stat. §§ 809.60(4), 809.62(6). So, if this Court grants a petition for bypass and agrees to hear the specific issues set forth in that petition, those issues are both properly before this Court and should be included in the parties' subsequent merits briefing. *See id.*

B. Here, this Court explicitly granted review on the issue of whether the Circuit Court erroneously exercised its discretion in denying the Legislature's Motion For Stay Pending Appeal. Specifically, the Legislature submitted five Issues Presented in its bypass papers, listing Issue V as "Whether the Circuit Court erroneously exercised its discretion in failing to stay its summary-judgment Order pending appeal." *See* Supplement To Expedited Petition For Bypass, No. 2021AP802 (Wis. July 9, 2021). Plaintiffs, in turn, also submitted five Issues Presented, describing Issue Presented V as "Did the court of appeals incorrectly find that the circuit court properly exercised its discretion in denying Vos and LeMahieu's motion for stay of its final Decision and Order pending appeal by finding that it had examined the relevant facts, applied the correct standard of law,

demonstrated a rational process, and reached a decision that a reasonable judge could make? *State v. Gudenschwager*, 191 Wis. 2d 431, 440 (1995).” Plaintiffs-Respondents’ Response To Supplement To Expedited Petition For Bypass, No. 2021AP802 (Wis. July 9, 2021).

In its Order granting bypass, this Court noted that both the Legislature and Plaintiffs had “identif[ied] five issues presented,” and then it accepted *all five* of the Legislature’s issues by granting the entire “expedited petition to bypass” and “accept[ing]” the Legislature’s complete “appeal . . . for consideration in this court.” *See* App’x 495. This Court even observed that Plaintiffs’ response to the Legislature’s statement of issues “also identified [these] *five* issues,” the “substance” of which was “the same.” *Id.* (emphasis added). Thus, the Legislature properly addressed Issue Presented V in its Opening Brief.

C. Notwithstanding the fact that this Court unambiguously granted review of Issue Presented V, Plaintiffs attempt to strike the Legislature’s briefing on this issue. Plaintiffs’ reasons for this request are meritless and,

had they *not* wanted this Court to consider Issue Presented V, they should have long ago moved for reconsideration of that portion of the bypass order. *See* Wis. Stat. § 809.64.

Plaintiffs first contend that because the Legislature allegedly did not raise the issue of whether the Circuit Court erroneously exercised its discretion to the Circuit Court itself, the issue is not properly preserved on appeal. Mot.13. This argument makes no sense. Under *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995), the question for the Court of Appeals (and, if necessary, for this Court) is whether the circuit court “examined the relevant facts,” “applied a proper standard of law,” and, “using a demonstrated rational process, reached a conclusion that a reasonable judge could reach” on the pertinent elements for a stay pending appeal—likelihood of success, irreparable injury, and weighing of harms. *Id.* at 440. That is the issue on which this Court granted review, as Issue Presented V.

Plaintiffs next argue that whether the Circuit Court erroneously exercised its discretion is moot because this Court has already ordered that the Circuit Court’s judgment be

stayed pending appeal. Mot.13–14. But this Court granted review on Issue Presented V at the *same time* that it issued its Stay Order, which means this Court already determined that this issue is properly worthy of this Court’s plenary review. *Compare* Order Granting Pet. For Bypass, No. 2021AP802 (Wis. July 15, 2021) (reproduced at App’x 494–95), *with* Stay Order. So while this Court generally declines to reach moot issues, it has recognized several exceptions, one of which is when an issue “is likely to arise again and should be resolved by the court to avoid uncertainty.” *State v. Fitzgerald*, 2019 WI 69, ¶ 22, 387 Wis. 2d 384, 929 N.W.2d 165 (citation omitted). And as already demonstrated in this very case and others, *see* App’x 38–78, it is exceedingly likely that this issue will recur again as circuit courts continue to misunderstand the proper stay pending appeal analysis, and will continue to do so absent this Court’s intervention. The Legislature would be happy to brief the issue of mootness in

more detail in its Reply Brief, should Plaintiffs raise that issue—properly—in their Response Brief.³

Finally, Plaintiffs contend that because this Court has decided not to publish its Stay Order, there is no reason to revisit this issue in a published merits decision. Mot.14. Again, however, on the same day that this Court issued its Stay Order, this Court granted the Legislature’s petition for bypass and “accepted for consideration” the issues presented on appeal, including Issue V. *See* App’x 495; *supra* pp. 22–23. Thus, Issue Presented V is ripe for this Court to address in its published decision, as it resolves this case.

CONCLUSION

This Court should deny Plaintiffs’ Motion to Strike.

³ That Plaintiffs sought to address the issue of mootness in their Motion To Strike, rather than in their Response Brief (due to be filed in this Court tomorrow), raises serious concerns that Plaintiffs are attempting to supplement the word count under Wis. Stat. § 809.19(8)(c), without filing a proper motion under this Court’s rules.

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Respectfully submitted,



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