

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

**DEFENDANTS' PROPOSED REPLY
MEMORANDUM IN SUPPORT OF EXPEDITED
PETITION FOR BYPASS AND EXPEDITED MOTION
FOR STAY PENDING APPEAL**

The Legislature believes that the papers presently before this Court show beyond any reasonable dispute that the Circuit Court violated its obligation to stay its summary-judgment Order, including by simply cross-referencing its own previous statutory analysis to conclude that the Legislature had no likelihood of success on this appeal. The Legislature further trusts that this Court can see through Plaintiffs' increasingly desperate efforts to salvage the underlying merits of the Circuit Court's indefensible

summary-judgment Order. Indeed, Plaintiffs' position now is that Wis. Stat. § 16.74 not only does not authorize the Legislature to contract for legal services—which is the atextual view that the Circuit Court *sua sponte* adopted below—but that Section 16.74 gives the Legislature (and, by the same statutory text, the courts) no authority ever to obtain *any* “supplies, materials, equipment, property or services” whatsoever. Wis. Stat. § 16.74(1); Pls.-Resp'nts Br. In Opp. to Defs. Exp. Pet. For Bypass & Exp. Mot. For Stay Pend. Appeal at 37–38, No.2021AP802 (Wis. July 7, 2021) (hereinafter “Opp.”). Perhaps in their next lawsuit attempting to undermine the basic, longstanding functioning of the Legislature, Plaintiffs will ask the Circuit Court to void *ab initio* the Legislature's contracts for pens and notepads.

Without belaboring the obvious point that the summary-judgment Order will not survive appellate review—and so as not to delay this Court's disposition of the Legislature's Expedited Petition and Expedited Motion For Stay—the Legislature submits this short proposed Reply Memorandum, responding to:

(1) Plaintiffs' claim that this case involves no issues of statewide importance or of constitutional scope; (2) Plaintiffs' allegations of so-called "forum shopping"; and (3) Plaintiffs' suggestion that this Court should wait the many additional months (or more) that it will take the Court of Appeals to decide this case on the merits before this Court even considers whether to issue a stay.

First, the Circuit Court's summary-judgment Order strips the Legislature of its longstanding authority, including its constitutional authority, to hire outside redistricting counsel, thus raising an issue of statewide impact. Defs. Combined Mem. In. Support Of Exp. Pet. For Bypass & Exp. Mot. For Stay Pend. Appeal at 19–21, No.2021AP802 (Wis. June 30, 2021) ("Mem."). While Plaintiffs initially claim that this case raises neither issues of statewide importance nor any "constitutional issue whatsoever," Opp. 20, they then concede—as they must—that this case has "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 [Defendants] . . . might wish to engage

counsel . . . for as long as the current constitutional and statutory schemes persist,” Opp. 71–72 n.36. Thus, even Plaintiffs appear to admit that this case squarely raises questions of statewide importance, which fully justifies this Court’s review on bypass. Mem. 19–21.

Second, as for Plaintiffs’ forum-shopping allegations, Opp. 2–3, the Legislature here acted with complete respect for the standard appellate process. The Legislature brought its stay request to this Court immediately after the Court of Appeals denied the motion for a stay below; that is, after the Court of Appeals had not ruled on that motion for almost two months, despite the Legislature’s request for expedited treatment. Mem. 4, 13; Pet.App.500–16. In seeking relief from this Court only after first requesting relief from the Court of Appeals, the Legislature acted consistent with the practice of both this Court, *see, e.g.*, Pet.App.38–47 (Order, *League of Women Voters v. Evers*, No. 2019AP559 (Wis. Apr. 30, 2019) (granting injunctive relief pending appeal with respect to reinstatement of appointees, after Court of

Appeals denied such relief), and the U.S. Supreme Court, *see, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65 (2020) (per curiam) (granting stay pending appeal after the federal court of appeals denied a stay); *Trump v. Karnoski*, 139 S. Ct. 950 (2019) (mem.) (same); *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019) (mem.) (same); *Anderson v. Loertscher*, 137 S. Ct. 2328 (2017) (mem.) (same); *Dep't of Health & Human Servs. v. Alley*, 129 S. Ct. 1667 (2009) (mem.) (same). Indeed, it would have been contrary to standard practice for the Legislature to have sought stay relief from this Court before asking the Court of Appeals for such relief.

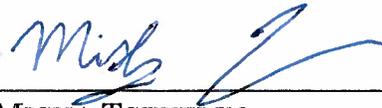
Third, as for Plaintiffs' arguments about the timing for when this Court should consider the Legislature's request for a stay pending appeal, *see* Opp. 4, 26–29, this Court's intervention on the stay-pending-appeal issue is desperately needed now, not many months from now (or more), when the Circuit Court's summary-judgment Order will have done the full measure of its damage. It cannot possibly be the case that one Circuit Court—which this

Court has correctly held is merely “the first word, not the last word” on the meaning of the law, Pet.App.56—can unilaterally control when and whether the Legislature may consult with its chosen legal experts, contrary to decades of uniform, bipartisan redistricting practice, without the Legislature being able to obtain this Court’s ruling on a stay motion in sufficient time before the crucial map-drawing period. Further, and relatedly, there is no support for Plaintiffs’ claim that the Court of Appeals can rule on the merits of this case *before* the delivery of redistricting census data, given that merits briefing alone will run until September, *compare* Opp. 27, *with* Mem. 23–24; and Plaintiffs’ suggestion, Opp. 27–28, that there will not be a redistricting lawsuit soon is entirely ahistorical, *see Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 13, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam).

* * *

In all, the Legislature respectfully requests that this Court stay the Circuit Court’s erroneous summary-judgment Order by July 9, if at all possible, so that the Legislature can re-engage with its chosen legal experts immediately.

Dated: July 8, 2021.



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