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

SUPPLEMENTAL APPENDIX IN SUPPORT OF THE DEFENDANTS-APPELLANTS-PETITIONERS' RESPONSE TO PLAINTIFFS-RESPONDENTS' MOTION TO STRIKE

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SUPREME COURT OF WISCONSIN

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Appeal No. 2019AP614-LV

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, SEIU HEALTHCARE WISCONSIN, MILWAUKEE AREA SERVICE AND HOSPITALITY WORKERS, AFT-WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS, RAMON ARGANDONA, PETER RICKMAN, AMICAR ZAPATA, KIM KOHLHAAS, JEFFREY MYERS, ANDREW FELT, CANDICE OWLEY, CONNIE SMITH and JANET BEWLEY,
Plaintiffs-Respondents,

v.

ROBIN VOS, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY SPEAKER, ROGER ROTH, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE PRESIDENT, JIM STEINEKE, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY MAJORITY LEADER and SCOTT FITZGERALD, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE MAJORITY LEADER,
Defendants-Petitioners,

JOSH KAUL IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN and TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,
Defendants-Respondents.

Appeal No. 2019AP622

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, SEIU HEALTHCARE WISCONSIN, MILWAUKEE AREA SERVICE AND HOSPITALITY WORKERS, AFT-WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS, RAMON ARGANDONA, PETER RICKMAN, AMICAR ZAPATA, KIM KOHLHAAS, JEFFREY MYERS, ANDREW FELT, CANDICE OWLEY, CONNIE SMITH, and JANET BEWLEY,
Plaintiffs-Respondents,

v.

ROBIN VOS, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY SPEAKER, ROGER ROTH, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE PRESIDENT, JIM STEINEKE, IN HIS OFFICIAL CAPACITY AS

WISCONSIN ASSEMBLY MAJORITY LEADER, and SCOTT FITZGERALD, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE MAJORITY LEADER,
Defendants-Appellants,

JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, and TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,
Defendants.

ON APPEAL/PETITION FROM THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE FRANK D. REMINGTON, PRESIDING,
DANE COUNTY CASE NO. 2019-CV-000302

DEFENDANT-RESPONDENT/DEFENDANT TONY EVERS' MOTION TO STRIKE A PORTION OF THE REPLY BRIEF OF LEGISLATIVE DEFENDANTS-PETITIONERS/DEFENDANTS-APPELLANTS

Defendant-Respondent/Defendant, Tony Evers, in his official capacity as Governor of the State of Wisconsin ("Governor Evers"), by Pines Bach LLP, his attorneys, hereby moves the Court, pursuant to Wis. Stat. § 809.14, for an order: (a) striking that portion of the reply brief submitted by Robin Vos, et al. ("the Legislative Defendants") which starts on page 14 with the phrase, "Or, as Judge Sykes recently put in (sic) at oral argument . . . " and ends on page 15 with the citation, "Oral Arg. at 22:15, *Wis. Legislature v. Kaul*, No. 19-1835 (7th Cir.)," and includes a footnote supporting that phrase with a website link[1] and (b) directing

[1] The footnote fails to state when the link was last visited, or even when the oral argument occurred.

the Legislative Defendants to re-submit their reply brief without the above-referenced statement and citation.

As grounds for this motion, Governor Evers respectfully represents as follows:

In its September 12, 2019, Order on the Legislative Defendants' Emergency Motion to Strike, this Court required the parties to strike from their respective briefs certain statements and arguments that cited to materials outside of the record. Yet one week later in their reply brief, the Legislative Defendants did just that by quoting a statement made by a judge during an oral argument before a three-judge panel of the Seventh Circuit Court of Appeals. The judge's statement was made well after Judge Remington's March 26, 2019 Ḍecision & Order. It is not in the record before this Court.

The quoted statement is not fact. Nor is it law. Because it is not part of a written decision by the panel that heard the case, the statement is neither binding nor persuasive legal authority and cannot have been cited for either purpose. Its use by the Legislative Defendants should not be tolerated by this Court.

Respectfully submitted this 23rd day of September 2019.

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SUPREME COURT OF WISCONSIN

No. 19AP614-LV

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, SEIU HEALTHCARE WISCONSIN, MILWAUKEE AREA SERVICE AND HOSPITALITY WORKERS, AFT-WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS, RAMON ARGANDONA, PETER RICKMAN, AMICAR ZAPATA, KIM KOHLHAAS, JEFFREY MYERS, ANDREW FELT, CANDICE OWLEY, CONNIE SMITH AND JANET BEWLEY,
PLAINTIFFS-RESPONDENTS,
V.
ROBIN VOS, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY SPEAKER, ROGER ROTH, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE PRESIDENT, JIM STEINEKE, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY MAJORITY LEADER AND SCOTT FITZGERALD, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE MAJORITY LEADER,
DEFENDANTS-PETITIONERS,
JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN AND TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,
DEFENDANTS-RESPONDENTS.

No. 2019AP622

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, SEIU HEALTHCARE WISCONSIN, MILWAUKEE AREA SERVICE AND HOSPITALITY WORKERS, AFT-WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS, RAMON ARGANDONA, PETER RICKMAN, AMICAR ZAPATA, KIM KOHLHAAS, JEFFREY MYERS, ANDREW FELT, CANDICE OWLEY, CONNIE SMITH AND JANET BEWLEY,
PLAINTIFFS-RESPONDENTS,

V.

ROBIN VOS, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY SPEAKER, ROGER ROTH, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE PRESIDENT, JIM STEINEKE, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY MAJORITY LEADER AND SCOTT FITZGERALD, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE MAJORITY LEADER,
DEFENDANTS-APPELLANTS,
JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN AND TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,
DEFENDANTS.

On Appeal/Petition from the Dane County Circuit Court,
The Honorable Frank D. Remington, Presiding,
Case No. 2019CV000302

LEGISLATIVE DEFENDANTS-PETITIONERS/DEFENDANTS-APPELLANTS' RESPONSE IN OPPOSITION TO THE GOVERNOR'S MOTION TO STRIKE A PORTION OF LEGISLATIVE DEFENDANTS' REPLY BRIEF

This is now the fourth time in these appeals that the Governor has sought to block a filing, without any legal basis. Each time, the Governor has filed a motion that cited no caselaw in support of the relief sought, *see* Gov. Mot. for Reconsideration of Order Granting Leave to File Non-Party Br., Sept. 20, 2019; Gov. Mot. to Strike, Apr. 23, 2019; Gov. Mot. to Strike, Apr. 2, 2019, and each time the Governor's motion has been denied, *see* Order

[denying Sept. 20, 2019 motion], Sept. 27, 2019; Order [denying Apr. 23, 2019 motion], May 21, 2019; Order [denying Apr. 2, 2019 motion], Apr. 3, 2019. These serial, obviously meritless motions appear to be designed simply to force the waste of resources by litigation opponents, while also needlessly taking up this Court's time. The Governor's present motion to strike is of precisely such a wasteful, serial character and should similarly be denied.

The Governor's motion seeks to block Legislative Defendants' citation in their Reply Brief of the following comment by Judge Sykes, made at oral argument in the first case where the Legislature sought to intervene in federal court under 2017 Act 369: "We are not talking about a battle between branches of government because the Attorney General is not part of the executive branch, he is an independently elected constitutional officer, but his powers are limited by the Legislature. He has no inherent power, that's the holding of [*Oak Creek*]." Reply Br. 14–15 (quoting Oral Arg. at 22:15, *Wis. Legislature v. Kaul*, No. 19-1835 (7th Cir.)). The Governor claims that this quotation was not

proper because, as relevant here, the statement is not "persuasive legal authority and cannot have been cited for [that] purpose." Mot. to Strike 3. The Governor is, of course, entirely wrong.

A statement made by a jurist in a non-binding form, whether in a law-review article, in a speech, or during oral argument (or, indeed, in a dissenting or concurring opinion) is properly and commonly cited as persuasive legal authority. This Court has, for example, cited law-review articles written, or speeches delivered, by individual jurists for just such persuasive purposes. *See, e.g.*, *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶¶ 18, 54, 57, 382 Wis. 2d 496, 914 N.W.2d 21 (citing law-review article by Chief Justice Roggensack); *Horst v. Deere & Co.*, 2009 WI 75, ¶ 71, 319 Wis. 2d 147, 769 N.W.2d 536 (citing law-review article by Justice Scalia); *State v. Reed*, 2018 WI 109, ¶ 102, 384 Wis. 2d 469, 920 N.W.2d 56 (Ziegler, J., concurring) (citing speech by Judge Sykes). Courts and litigants have also commonly cited statements by individual jurists at oral argument as persuasive legal authority. *See, e.g.*, *United States v. Robinson*, 903 F. Supp. 2d

766, 809 n.33 (E.D. Mo. 2012) (quoting oral argument comments by Justice Scalia); *In re Richards*, 148 B.R. 548, 549 (Bankr. N.D. Ill. 1993) (citing oral argument comments by Justice Scalia); *In re Scott Cable Commc'ns, Inc.*, 227 B.R. 596, 603 n.8 (Bankr. D. Conn. 1998) (citing oral argument question by Justice Kennedy); Br. for Common Cause Appellees, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422), 2019 WL 1077302, at *41–*42 (quoting several oral argument comments by Justices Kennedy, Kagan, and Alito); Br. of Amicus Curiae the Chamber of Commerce, *Phillip Morris USA Inc. v. United States*, 130 S. Ct. 3501 (2010) (No. 09-976), 2010 WL 1024220, at *10 (quoting oral argument statement by Justice Scalia); Pet. for Writ of Cert., *Jordan v. City of Darien*, 139 S. Ct. 2712 (2019) (No. 17-1455), 2018 WL 1910948, at *11 (quoting oral argument comment by Justice Kagan); Opening Br. of AT&T Mobility LLC, *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009) (No. 08-56394), 2009 WL 2494186 (quoting oral argument comment by Justice Ginsburg).

Legislative Defendants' citation to Judge Sykes' comment as persuasive legal authority, while properly attributing the comment to Judge Sykes alone, was thus wholly appropriate and entirely routine. Unsurprisingly, the Governor has not cited a single example of any Wisconsin court—or, indeed, any court, at the federal or state level, anywhere in the country—striking such a quotation to a jurist's comment in a brief. This Court should deny the Governor's unprecedented, legally meritless request.

Dated: October 2, 2019

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October 7, 2019

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You are hereby notified that the Court has entered the following order:

Nos. 2019AP614-LV Service Employees International Union (SEIU), Local 1 v. Robin Vos
2019AP622 L.C.# 2019CV302

Governor Tony Evers, in his official capacity, the defendant-respondent in Case No. 2019AP614-LV and the defendant in Case No. 2019AP622, having filed a motion to strike a portion of the reply brief of the defendants-appellants, Robin Vos, et al. (the Legislative Defendants);

IT IS ORDERED that the motion to strike is denied.

Sheila T. Reiff
Clerk of Supreme Court

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No. 2021AP802

In the Wisconsin Court of Appeals

DISTRICT III

ANDREW WAITY, SARA BRINGMAN, MICHAEL JONES,
AND JUDY FERWERDA,
PLAINTIFFS-APPELLEES,
v.
ROBIN VOS AND DEVIN LEMAHIEU, *IN THEIR OFFICIAL CAPACITIES*,
DEFENDANTS-APPELLANTS.

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

DEFENDANTS' MEMORANDUM IN SUPPORT OF EXPEDITED MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

The Legislature, represented by Defendants Speaker Robin Vos and Senate Majority Leader Devin LeMahieu, in their official capacities,[1] entered into two contracts with outside counsel to obtain sophisticated advice with respect to the current decennial redistricting process, just as the Legislature has done—regardless of the political party in the legislative majority—for decades. The Legislature below argued that these two contracts were lawful on four independently sufficient bases. In blocking these contracts, the Circuit Court relied heavily upon arguments and precedents that Plaintiffs did not invoke. Indeed, with respect to Wis. Stat. § 16.74—the Legislature's lead statutory authority—the Circuit Court based its ruling on a novel

[1] Plaintiffs sued Defendants in their official capacities as leaders of the Legislature, challenging contracts that these leaders entered, App.94–102, pursuant to their authority from each House's organizing committee, App.128, 130, 259. Thus, Defendants speak for the Legislature here, as they did in *Service Employees International Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, where defendants were also legislative leaders, sued in their official capacities. *Id.* ¶ 92 n.3, *see* ¶¶ 62–73. Defendants thus here refer to themselves interchangeably as both "Defendants" and "Legislature."

reading of this statute having no grounding in the statutory text or even Plaintiffs' arguments.

The Legislature respectfully requests that this Court stay the Circuit Court's order pending appeal ***by Friday, May 21, 2021***, so that the Legislature may resume receiving its contractual services under its outside-counsel contracts during the pendency of this appeal, consistent with decades of uniform legislative practice. Expedited relief is necessary here in light of the Circuit Court's breaking of the Legislature's ongoing contractual relationship with its counsel, which contracts the Legislature cannot continue absent a stay. This relief pending appeal is also essential because all appear to agree that the Legislature may re-enter into the outside-counsel contracts at issue here once any redistricting lawsuit is filed. Such a lawsuit is very likely to be filed before the end of this appeal, thus mooting this case before the appellate process can complete.

This Court should stay the Circuit Court's order pending appeal because the Circuit Court erroneously exercised its discretion in denying the Legislature's stay

request below, "f[alling] victim to the same legal error" that the circuit courts made in *League of Women Voters v. Evers*, No. 2019AP559 (Wis. Apr. 30, 2019), and *Service Employees International Union, Local 1 ("SEIU") v. Vos*, No. 2019AP662 (Wis. June 11, 2019), *see* App.56. Most obviously, the Circuit Court simply "relied on the [statutory] analysis it had used for deciding" its summary-judgment order. App.57. That is a failure of the Circuit Court to recognize that it "will be the first word, not the last word, on th[e] legal questions" here, and is a basis for a stay. App.56.

The Legislature is exceedingly likely to succeed on each of its four *independent* bases supporting these contracts' authority. First, these outside-counsel contracts are "[c]ontracts for purchases" of "contractual services," authorized by Section 16.74, which gives the Legislature the statutory authority to enter into any contract for "required" services. Wis. Stat. § 16.74(1), (2)(b). Second, the outside-counsel contracts are expenditures of the Legislature's "sum sufficient" appropriation to carry out its "functions" under Section 20.765, which functions include engagement of

redistricting counsel. Wis. Stat. § 20.765(1)(a)–(b). Third, Section 13.124, read in conjunction with Section 990.001(3), authorizes these contracts, because the Legislature will be a "party" to the impending redistricting litigation or will have its "interests" implicated by such litigation. Wis. Stat. § 13.124(1)(b), (2)(b); Wis. Stat. § 990.001(3). Fourth, the Constitution independently authorizes these contracts, as they are an appropriate activity supporting the Legislature's core, vested "legislative power" and power over redistricting. Wis. Const. art. IV, §§ 1, 3.

Finally, the Legislature has shown irreparable harm absent a stay pending appeal, and the equities, public interest, and status quo considerations all further justify a stay. The Circuit Court's order prevents the Legislature's traditional exercise of its core statutory authority in the vital redistricting context and interrupts the Legislature's contractual arrangements for an indefinite period of time. Further, the Circuit Court's order causes grave confusion over the privilege status of the Legislature's communications with its outside counsel here.

For all of these reasons, this Court should grant an immediate stay of the Circuit Court's injunction.

STATEMENT OF THE CASE

A. For decades, the Legislature has engaged outside counsel to provide legal advice for the drawing of redistricting maps. In the early 1980s, the Democratic Party-aligned legislative leaders engaged outside counsel for advice "throughout Wisconsin's lengthy reapportionment struggle." App.117. In the early 1990s, the Legislature engaged outside counsel to assist with redistricting. App.180–81; *see also* App.135. In 2000, then-Senate Majority Leader Chuck Chvala sent a letter to the Senate Committee on Organization seeking authorization "to contract for consulting and legal services related to redistricting of legislative and congressional districts," which letter noted that "[e]very decade the Senate has used the services of experts in this field to assist in the enactment of a constitutional redistricting plan for legislative and congressional districts." App.120. For the 2000 redistricting cycle, the Senate retained Boardman, Suhr, Curry & Field LLP for legal assistance in "researching

and potentially litigating legislative redistricting." App.183–85; *see also* App.187–88 (noting Assembly hired its own firm). The Legislature again sought to retain counsel for redistricting in 2009, with then-Senate Majority Leader Russ Decker reiterating that the Legislature had engaged redistricting counsel "[e]very decade." App.122–24. The Legislature then retained the firm Michael Best & Friedrich LLP, "for services related to redistricting of legislative and congressional districts." App.190; *see also* App.192–93. In 2017, the Legislature again approved the hiring of counsel for redistricting. App.126, 130.

Historically, the Legislature conducted a balloting procedure with either the Legislature's Joint Committee on Legislative Organization ("JCLO") or each House's own organizing committees to authorize the engagement of such outside counsel for redistricting matters or other engagements. App.126, 132–54, 259. This balloting procedure required committee members both to receive and cast a vote (or abstain) on the proposed engagement agreement before it would take effect. *See id.*

B. Two of the Legislature's recent outside-counsel contracts are relevant here, both engaging counsel for the current decennial redistricting. The Legislature entered into two contracts, with Consovoy McCarthy PLLC (joined by Adam Mortara), and Bell Giftos St. John LLC, for legislative drafting and pre-litigation advice, spanning from January 1, 2021, until the conclusion of litigation challenging the new redistricting maps (unless the parties terminate the contracts at some prior time). App.94–95, 100–102. Defendants signed these agreements in their official capacities, on behalf of their respective Houses, App.98–99, 102, with each House's Committee on Legislative Organization authorizing these contracts by official vote, fully consistent with all prior practice, as noted above, App.128, 130, 259.

C. Plaintiffs filed this lawsuit, alleging that these contracts were "void *ab initio*" for lack of statutory authority to hire counsel before a redistricting lawsuit is filed. App.84, 87. Plaintiffs sought a judgment declaring that these contracts are void, an injunction to prohibit further payments

on the contracts, and other relief. App.92–93. Plaintiffs also moved for a temporary injunction. App.103–04.

The Legislature opposed that motion and also simultaneously moved to dismiss the Complaint for failure to state a claim. App.105–08, 294–326. The Legislature argued that the Wisconsin Constitution itself independently empowers the Legislature to enter into the outside-counsel contracts here, as it is an appropriate power furthering its core, vested lawmaking authority. App.302–11.[2] The Legislature also explained that three independent sources of statutory authority support these contracts, as discussed in more detail below. App.312–21.

At a hearing, the Circuit Court denied Plaintiffs' temporary-injunction motion, converted the Legislature's

[2] As it explained before the Circuit Court, App.364–65 n.2, the Legislature led its briefing below with its constitutional argument to protect its prerogative to hire counsel without needing to rely on legislation, and it expects to lead with this constitutional argument during the merits of this appeal. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 6 n.4, ¶¶ 31–34, 376 Wis. 2d 147, 897 N.W.2d 384 (citations omitted). However, for this stay brief, the Legislature begins with statutory arguments—especially Section 16.74—because that argument is straightforward and so obviously correct, involving only a reading of simple statutory text. *See infra* Part II.A.1–3. The Legislature's constitutional argument is more complex, although no less meritorious.

motion to dismiss into a motion for summary judgment, and set a briefing schedule on that as-converted motion. Dkt.Entry 03-25-2021 ("Oral arguments").

The Circuit Court denied Defendants' converted motion for summary judgment and granted summary judgment to Plaintiffs, voiding the contracts, while largely resting its decision on arguments not raised by Plaintiffs in their relevant briefing. The Court held that these two contracts are not "contracts . . . for purchase" of "contractual services" under Section 16.74, a theory Plaintiffs never raised. App.32. Next, the Court held that Section 20.765 could not support these contracts, relying primarily on *State ex rel. Moran v. Department of Administration*, 103 Wis.2d 311, 307 N.W.2d 658 (1981), a case not cited by any party. App.34–35. The Court also concluded that these contracts fall outside of Section 13.124, without even purporting to address the Legislature's lead argument on this provision with respect to Section 990.001(3). App.28–31. The court also held that the Legislature lacks the constitutional authority for these contracts because it read *Service Employees International*

Union, Local 1 ("SEIU") v. Vos, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, as not authorizing the Legislature to hire pre-litigation counsel, App.21–27, even though Plaintiffs did not cite *SEIU* in their papers, App.334–44.

D. The day after the Circuit Court entered its summary-judgment order, the Legislature both appealed to this Court and moved in the Circuit Court for a stay pending appeal. App.402–07; *see* Wis. Stat. § 808.07; Wis. Stat. § (Rule) 809.12.

As for the likelihood of success on the merits, the Legislature argued that, under Section 16.74, the contracts here are "[c]ontracts for purchases" of "contractual services" authorized by this statute, App.413–14, and that the Circuit Court's position lacked support in Section 16.74's text and was not urged by any party, App.414–15. With Section 20.765, the Legislature explained that this "sum sufficient" authorization for the Legislature to "carry out" its "functions" also authorized these outside-counsel contracts, App.415, and that the Circuit Court's reliance on *Moran* was wrong and not argued by Plaintiffs, App.415–16. For Section 13.124, the

Legislature argued that—when read in together with Section 990.001(3)—it allows the Legislature to hire counsel for any action in which its interests will be affected, and that the Circuit Court ignored this argument, never even citing Section 990.001(3). App.416–17. Finally, the Legislature explained that, under the Constitution, these contracts were appropriately in furtherance of the Legislature's express grant of lawmaking and redistricting authority. App.411–12. The Legislature argued that the Circuit Court's contrary conclusion rested entirely on a reading of *SEIU* rejected by *Democratic National Committee ("DNC") v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423, and that Plaintiffs never even cited *SEIU*. App.412–13.

On the equities, the Legislature explained that the Circuit Court's order inflicted irreparable harm on the Legislature and the public, as it declared unenforceable three statutory bases for the Legislature's authority to hire outside counsel and restricted its constitutional authority in this area. App.418–20. The ruling also creates grave legal uncertainty about the confidentiality of the Legislature's

communications with its outside counsel, as shown by already-filed, open-records requests. App.420. These irreparable harms significantly outweigh Plaintiffs' possible harm from a stay pending appeal. App.421. A stay would also preserve the status quo, given the Legislature's decades-long practice of hiring redistricting counsel. App.421.

The Circuit Court denied the Legislature's stay motion. *See* App.2–11, 15. The Court offered no analysis of the Legislature's likelihood of success on appeal with regard to its statutory arguments, and "merely [ ] repeat[ed] what [it had] already set forth in [its] written decision" by reference. App.8. On the constitutional arguments, the Court concluded that *DNC* had no bearing on "the issue presented here," App.3, but that its prior opinion on the same point in *SEIU* supported judgment for Plaintiffs, App.4–7. And while the Circuit Court addressed some of the Legislature's equitable arguments, it failed to grapple the Legislature's lead arguments on this score. App.9–11; *see also* App.418–22; *see infra* Part II.B.

ARGUMENT

Where "a litigant asks an appellate court to grant it temporary relief pending appeal and the litigant has sought such relief unsuccessfully in the circuit court," the appellate court should consider whether the circuit court "erroneous[ly] exercise[d] [its] discretion" by failing to "(1) examine[ ] the relevant factors, (2) appl[y] a proper standard of law, [or] (3) using a demonstrated rational process, reach[ ] a conclusion that a reasonable judge could reach." App.54–55 (quoting *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)); *see* Wis. Stat. § 808.07(2)(a); Wis. Stat. § (Rule) 809.12. The relevant factors that a court must consider for a stay pending appeal are whether the movant: "(1) makes a strong showing that it is likely to succeed on the merits of appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantive harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest." App.40 n.4 (citing *Gudenschwager*, 191 Wis. 2d at 440). These are "interrelated factors to be considered," "not separate

prerequisites." App.44. Thus, a movant may demonstrate its entitlement to a stay based on the strength of its showing on the likelihood-of-success-on-the-merits factor. App.66. Further, as explained immediately below, a circuit court erroneously exercises its discretion when it "ma[kes] errors of law," including by failing to "follow the proper rules for applying" the stay factors, by "conflat[ing]" the stay-pending-appeal analysis with the analysis for granting an injunction in the first instance, and by ignoring that enjoining legislative action as unconstitutional itself meets the "strong showing" required for a stay pending appeal. App.55.

I. The Circuit Court Erroneously Exercised Its Discretion In Denying The Stay Motion In The Same Way As The Circuit Courts In The *LWV* And *SEIU* Stay Decisions

A. The Supreme Court's stay decisions in *LWV* and *SEIU* hold that a court erroneously exercises its discretion when it decides the likelihood of success portion of a stay by simply cross-referencing its merits decision. App.55–57.

In *LWV*, a circuit court enjoined several laws and then denied the Legislature's motion for a stay of the injunction pending appeal, concluding that "because it had found the

plaintiffs' interpretation of the constitution and statutes to be more compelling, that determination meant that the Legislature had 'no likelihood of success on the merits.'" App.38–39, 44. In upholding and then expanding this Court's decision to stay that injunction, App.40, 46–47, the Supreme Court overturned the circuit court for failing to "recognize[ ] that success on the merits in th[at] case turned on questions of law that would be reviewed de novo by the appellate courts," and that the circuit court had only "the first word, not the last, on the interpretation of the relevant constitutional provisions and statutes." App.44. In other words, the Supreme Court held that, for cases in which "a de novo standard of appellate review will apply, 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." App.44 n.8.

Similarly, in the *SEIU* stay proceedings, a circuit court enjoined several statutory provisions as unconstitutional and then denied the Legislature's motion for a stay of that

decision, concluding that the "balance overwhelmingly tips in favor of not granting" a stay, because the court had already "concluded that plaintiffs are likely to succeed on the merits on some of their claims" and the "legislative defendants could not identify any harm that would result." App.51–54. The Supreme Court reversed that decision as legally erroneous and granted a stay of injunction pending appeal. App.55–57, 60. The Court overturned the circuit court for an "improper conflation of the two analyses" of the plaintiff's likelihood of success on the merits and the Legislature's likelihood of success on appeal from the injunction. App.55.

B. Here, the Circuit Court made the same errors as did the circuit courts in *LWV* and *SEIU* by, *inter alia*, simply cross-referencing its prior statutory reasoning, without engaging meaningfully with Defendants' likelihood of success.

First, with respect to Section 16.74, the Circuit Court ruled in its summary-judgment order that the authorization for the Legislature retaining "contractual services" did not apply to the contracts for legal services here because such services "must relate to, or be required by the purchase of

'supplies, materials, equipment [or] personal property'" to be "allowed." App.32. In moving for a stay, the Legislature explained, App.413–15, that it was likely to prevail on appeal because Section 16.74's plain text unambiguously covers legal "services," and the Circuit Court's contrary conclusion relied on arguments not raised by any party, App.31–33. The Circuit Court did not address the Legislature's arguments for likelihood of success on appeal as to the Section 16.74 issue, only "repeating what [it] already" said, App.8. This is reversible error under *LWV* and *SEIU.* App.44, 55–56.

Second, as to Section 20.765, the Court concluded in its summary-judgment order that this provision does not give independent authority to take any actions. App.33. In support of a stay, the Legislature explained that it would likely prevail on appeal because its authority to spend a "sum sufficient to carry out the functions of the assembly [and senate]," Wis. Stat. § 20.765(1)(a)–(b), encompasses the Legislature's legal-services contracts here, and the Circuit Court's contrary interpretation found no textual support and was based on case law never raised by any party, App.415–

16. Again, in violation of the *LWV* and *SEIU* stay orders, the Court did not address the Legislature's arguments here, "repeating what [it] already" said. App.8, 44, 55–56.

Third, for Section 13.124, the Circuit Court held in its summary-judgment order that it only allowed Defendants to hire counsel for existing lawsuits. App.28–31. In seeking a stay, the Legislature argued that it is likely to prevail on appeal because Section 13.124's authorization to "obtain legal counsel," Wis. Stat. § 13.124(1)(b), (2)(b) (emphasis added)—when read in conjunction with Section 990.001(3)'s directive to interpret present tense verbs to include the future tense—authorizes the contracts, App.416–17. Again, the Court did not address the Legislature's likelihood of appellate success and merely relied on its prior ruling, in direct contravention of the *LWV* and *SEIU* stay orders. App.8.

Fourth, the Circuit Court in its summary-judgment order concluded that the Constitution did not authorize the contracts here, relying entirely on its own reading of the Supreme Court's merits decision in *SEIU*. App.21–27. In support of its motion for a stay pending appeal, the

Legislature argued that it had constitutional authority to enter into these contracts, pointing to numerous precedents and legislative practices predating *SEIU*, while arguing that *SEIU*—which Plaintiffs did not even cite in their briefing—did not support a contrary conclusion in light of *DNC*. App.411–13. In its stay decision, the Circuit Court did not analyze the Legislature's likelihood of success on appeal based upon the longstanding precedents and practices that the Legislature had cited, and, instead, defended its reliance on its reading of *SEIU*, even in light of *DNC*. App.3–8.

Finally, on the equities, the Legislature argued that, absent a stay, both it and the public would suffer grave harm because the Court had undermined three separate bases for the Legislature's statutory authority to hire outside counsel, restricted the Legislature's broad constitutional authority, and imposed severe practical difficulties in relation to these contracts; Plaintiffs would suffer at most minimal taxpayer harm if the Court granted a stay; and a stay was necessary to maintain the status quo, both over the course of the decades the Legislature had contracted for outside redistricting

counsel and in the context of this case. App.418–22. Most problematically, the Circuit Court failed to address the Legislature's lead argument regarding constitutional and statutory harm, claiming that it retains "plenty of options" if it "needs assistance in its redistricting work." App.9.

II. The Legislature Is Entitled To A Stay

A. The Legislature Has An Extremely High Likelihood Of Success On Appeal

1. Section 16.74 Independently Authorizes The Contracts, And—With All Respect To the Circuit Court—There Is No Plausible Textual Argument To The Contrary

a. The Legislature's contracts at issue here fit clearly within Section 16.74's grant of authority, which authorizes the Assembly and the Senate to engage in "purchases" of "[a]ll supplies, materials, equipment, permanent personal property and *contractual services required within the legislative branch*." Wis. Stat. § 16.74(1) (emphasis added); *see* App94–102, 394–98. As a matter of straightforward, unambiguous statutory text, *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110, then, Section 16.74 authorizes the Legislature, through "an[y]

individual designated by either house of the legislature," to enter into "contractual services required within the legislative branch," including contracts for professional services like legal-services contracts, Wis. Stat. § 16.74(1), (2)(b).

The two contracts here are plainly for "contractual services required within the legislative branch," Wis. Stat. § 16.74(1), as these contracts afford the Legislature the assistance of sophisticated counsel for the complex enterprise of redistricting, including obtaining pre-litigation advice. This is especially true here, when the upcoming legislation is decennial redistricting, given the Legislature's constitutional mandate to conduct redistricting every decade, Wis. Const. art. IV § 3, and the importance of experienced counsel in such governmental efforts, *accord Koschkee v. Evers*, 2018 WI 82, ¶ 13, 382 Wis. 2d 666, 913 N.W.2d 878. Both Houses "designated" Defendants, respectively, as their contracting authorities under Section 16.74. *See, e.g.*, App.128–30, 259. Speaker Vos and Majority Leader LeMahieu then properly consummated the outside-representation contracts by signing them, App.94–102, 394–98, and, independently, both Houses

also ratified these outside-counsel contracts through their traditional balloting procedures, *see* App.128–30, 259.

b. In their Opposition to Defendants' converted Motion For Summary Judgment, ***Plaintiffs did not dispute that Section 16.74 permitted the Legislature to contract for legal services identical to those at issue here***, and, instead, only argued, incorrectly, that Defendants did not comply with procedural requirements not at issue in the Circuit Court's decision and which, if they had any merit (and they plainly do not[3]), could not justify any relief beyond ordering compliance with those requirements. The Circuit Court offered entirely

[3] Plaintiffs' arguments below were primarily based upon their confused claim that Defendants did not follow standard Section 16.74 procedures in submitting payment requests on the disputed contracts. App.352–53. But as the unrebutted evidence below showed, "the process to pay the bills for the outside-counsel contracts at issue here was identical to the process for paying any other legal-services bills, and substantially similar to the payment of the bills and statements for all other purchases and engagements that the [Houses] ha[ve] incurred." App.388 ¶ 14. Plaintiffs' remaining arguments were based upon their squabbles with certain internal legislative procedures, App.346–52, which are beyond jurisdiction of the courts to adjudicate, *In re John Doe Proceeding ("LTSB")*, 2004 WI 65, ¶ 28, 272 Wis. 2d 208, 680 N.W.2d 792; *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 13, 334 Wis. 2d 70, 798 N.W.2d 436, and meritless in any event, App.374–80.

different bases for holding that Section 16.74 could not authorize the contracts here, never raised by Plaintiffs.

i. The Circuit Court primarily held that the only "contractual services" that Section 16.74 authorizes are those that "relate to, or [are] required by the purchase of 'supplies, materials, equipment [or] personal property.'" App.32. So, in the Circuit Court's view, the Legislature may engage contractors to install equipment for its legislative offices, but cannot hire any professional services, such as legal services. App.32. The Legislature is certain to win on appeal against this holding for two independent reasons.

First, the Circuit Court's interpretation of Section 16.74 is simply wrong, finding no support in the statutory text. No text within Section 16.74 limits the "contractual services" authorized only to service contracts that "relate to, or [are] required by," App.32, other contracts for "supplies, materials, equipment, [or] permanent personal property," Wis. Stat. § 16.74(1). Under bedrock rules of statutory interpretation, "[w]hen the legislature does not include limiting language in a statute, [a court must] decline to read any into it." *State v.*

Lopez, 2019 WI 101, ¶ 21, 389 Wis. 2d 156, 936 N.W.2d 125. Rather, the "plain language" of Section 16.74 "makes clear that the legislature's plain meaning applies broadly," *id.* ¶ 20, authorizing *any* service contracts that the Legislature "require[s]," plainly including the outside-counsel contracts at issue here, Wis. Stat. § 16.74(1)–(2).

The *noscitur a sociis* canon does not support any contrary result. That canon helps "resolve the meaning of a word having a similar but more comprehensive meaning" than the words "with which it is grouped." *Lewis Realty, Inc. v. Wis. Real Est. Brokers' Bd.*, 6 Wis. 2d 99, 108, 94 N.W.2d 238 (1959). Here, "contractual services" is a term "of equal dignity" with the other terms in Section 16.74's list, *see Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 101, 382 Wis. 2d 496, 914 N.W.2d 21, not a term of "more comprehensive meaning," *Lewis Realty*, 6 Wis. 2d at 108, thus the *noscitur a sociis* canon is inapplicable. In any event, this canon counsels the courts to interpret associated words according to their "most general [common] quality—the least common denominator, so to speak." Antonin Scalia & Bryan

A. Garner, *Reading Law: The Interpretation of Legal Texts* 196 (1st ed. 2012). And here, the most general common quality among Section 16.74's terms is "require[ments]" of the Legislature, which readily includes "contractual services" for any number of critical needs, including outside legal counsel. Wis. Stat. § 16.74(1).

Second, the Circuit Court sprung a new statutory interpretation on the parties for the first time in a final-judgment ruling, violating the "principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (citation omitted). Plaintiffs' arguments with respect to Section 16.74 were based on various procedural requirements, not on the scope of the term "contractual services." App.352–56. Yet, the Circuit Court "[e]lect[ed] *not* to address th[at] party-presented controversy," but adopted its own reading of the law. *Sineneng-Smith*, 140 S. Ct. at 1581 (emphasis added). That improperly exceeds the Circuit Court's "essentially passive" role "[i]n our adversarial system of adjudication." *Id.* at 1579.

ii. The Circuit Court also briefly suggested that interpreting Section 16.74 to authorize outside-counsel contracts would "impermissibly infringe[ ] on the core power of the executive branch to enforce the laws." App.32–33. Such nebulous constitutional concerns do not justify ignoring the clear text of a statute. *See 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. In any event, and as explained below, whatever constitutional concerns the Circuit Court had are misplaced, including because it makes no sense to suggest that the Legislature's consulting with prelitigation counsel harms any other branch's authority. *Infra* Part I.B.4. Here, too, the Circuit Court violated the "principle of party presentation," as Plaintiffs never raised this point. *See Sineneng-Smith*, 140 S. Ct. at 1579.

2. Section 20.765 Independently Authorizes The Contracts

Under Section 20.765, both Houses of the Legislature have "[a] sum sufficient to carry out the functions of the assembly [and senate]." Wis. Stat. § 20.765(1)(a)–(b). A

"[s]um sufficient appropriation[ ]" is an appropriation that is "expendable from the indicated source in the amounts necessary to accomplish the purpose specified" within the appropriation. Wis. Stat. § 20.001(3)(d). Section 20.765, therefore, endows the Legislature with an uncapped sum of money "to carry out the functions of the assembly [and senate]." Wis. Stat. § 20.765(1)(a)–(b).

Here, the Legislature's authority under Section 20.765 to spend funds "to carry out the functions of the assembly [and senate]" affords it the power to contract with counsel to assist with its redistricting efforts, including obtaining pre-litigation advice; thus, Section 20.765 also authorizes the outside-counsel contracts, giving the Legislature a high likelihood of success on appeal. Wis. Stat. § 20.765(1)(a)–(b). Retaining counsel to advise on redistricting, including both potential legal pitfalls and pre-litigation counsel to avoid those pitfalls, plainly falls within the statutory meaning of "functions of the" legislature, Wis. Stat. § 20.765(1)(a)–(b), under the text, *Kalal*, 2004 WI 58, ¶ 45.

The Circuit Court held—relying primarily upon the Supreme Court's decision in *Moran*, which neither party cited—that Section 20.765 makes "money available for activities the legislature is authorized to undertake," but "does not itself provide that authority" to take any particular function, such as hiring outside counsel. App.33. There is no textual support for this reading, as there is no doubt that redistricting *is* a function of the Legislature, as Plaintiffs appeared to concede. App.34–35. And *Moran* does not support the Circuit Court's position. *Moran* adopted an expansive view of inherent constitutional power that only highlights the strength of the Legislature's constitutional arguments here. *Moran*, 103 Wis. 2d at 315–17; *infra* Part I.B.4. *Moran* explained that "the persons charged with administering the appropriation are those who are to determine whether an expenditure of funds falls within the terms of the appropriation," *Moran*, 103 Wis. 2d at 319, which counsels against the courts "intermeddl[ing]" with the Legislature's decision here that these contracts are necessary for its function, *Ozanne*, 2011 WI 43, ¶ 13 (citation omitted).

3. Section 13.124, Read With Section 900.001(3), Independently Authorizes The Contracts

a. Section 13.124—enacted in 2018, *see* 2017 Wis. Act 369—provides a streamlined outside-counsel hiring process, enabling the Legislature to obtain legal representation for certain "action[s]." Wis. Stat. § 13.124(1)(b), (2)(b). For the Assembly, Section 13.124(1)(b) permits "[t]he speaker of the assembly, in his or her *sole discretion*, [to] 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." Wis. Stat. § 13.124(1)(b) (emphasis added). For the Senate, Section 13.124(2)(b) provides that "[t]he senate majority leader, 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)(b), in any action in which the senate is a party or in which the interests of the

senate are affected, as determined by the senate majority leader." Wis. Stat. § 13.124(2)(b) (emphasis added).

This statute provides the Assembly and the Senate with an expedited procedure to obtain legal counsel when they deem it appropriate. For both Houses, a single member of its leadership can hire outside counsel in that member's "*sole* discretion." Wis. Stat. § 13.124(1)(b), (2)(b) (emphasis added). So, the statute allows the Legislature to obtain outside counsel *quickly*, as is critical to defending its interests in fast-moving litigation. *See, e.g.*, App.79. This streamlined process avoids the delays potentially attendant with the Legislature's alternative, traditional practice of submitting proposed authorizations for hiring outside counsel to the JCLO ballot procedure or to the individual House's organization committees. *See supra* pp. 5–7.

When interpreted in light of Wis. Stat. § 990.001(3)'s interpretative rule, Section 13.124 authorizes Defendants to obtain legal counsel when faced with an imminent "action," in addition to any commenced "action." Wis. Stat. § 13.124(1)(b), (2)(b). Section 990.001(3) states that a statute's use of "[t]he

present tense of a verb includes the future when applicable." Wis. Stat. § 990.001(3). Here, Sections 13.124(1)(b) and (2)(b) use the present-tense verbs "is" and "are," allowing the Speaker and Majority Leader to hire outside counsel when the Assembly or Senate "*is* a party" to an action or the Assembly's or Senate's interests "*are* affected." Wis. Stat. § 13.124(1)(b), (2)(b) (emphases added); *see* Chicago Manual of Style § 5.101 (15th ed. 2003) (discussing "linking verb[s]," including "forms of *to be*"). Applying Section 990.001(3) to Section 13.124, then, the statute authorizes Defendants to obtain outside representation "in any action" in which the House *will be* "a party or in which the interests" of the House *will be* "affected." Wis. Stat. §§ 13.124(1)(b), (2)(b), 990.001(3).

b. The two outside-counsel contracts at issue here fall within Section 13.124's express grant of authority, when read in conjunction with Section 990.001(3).[4] These contracts

[4] To be clear, the Legislature did not specifically intend to invoke Section 13.124 when it executed the outside-counsel contracts here, which is why it conducted the balloting procedure for these contracts, *see* App.128, 259, as it had for all pre-Section 13.124 outside redistricting counsel contracts, *see supra* pp. 5–7. Nevertheless, the contracts here fall within Section 13.124's terms, and so are authorized by this Section.

themselves confirm that the Legislature "obtain[ed] legal counsel other than from the department of justice," as no one disputes. Wis. Stat. § 13.124(1)(b), (2)(b); App.94–102, 394–98. Defendants entered into these contracts because they independently determined, in their "sole discretion," that their Houses' "interests" would be "affected" or that their Houses would be "a party" in the redistricting actions that are certain to be filed (either once the Governor vetoes a proposed map, or when a plaintiff challenges the maps signed by the Governor). Wis. Stat. §§ 13.124(1)(b), (2)(b); 990.001(3); App.94–102; *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[.]").

c. The Circuit Court's contrary ruling fails to acknowledge Section 990.001(3)'s plain import on this question, as the Court did not say a word about Section 990.001(3) in its decision below. *See* App.28–31 (failing to cite Section 990.001(3)). Rather, the Circuit Court mistakenly believed that the Legislature had asked it to read the words

"anticipated, likely, or impending" into the statute before the word "action." App.30–31. That was not the Legislature's argument. Instead, the Legislature argued that Section 990.001(3)'s explicit command requires reading Section 13.124's present-tense verbs "is" and "are" to include the future tenses of "will be," App.317–18, 380, thereby covering not-yet-filed actions in which a House *will be* a party or in which its interests *will be* affected, *supra* pp. 18–19.

4. The Wisconsin Constitution Independently Authorizes The Contracts

a. When the Wisconsin Constitution vests a power in the branches of government—that is, the core legislative, executive, or judicial powers—it also necessarily vests the branches with all "authority . . . appropriate to achieve the ends for which they were granted the [express] authority." *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 54 & n.38, 373 Wis. 2d 543, 892 N.W.2d 233. That is, the Constitution grants each of the branches the power to conduct those "activities [that] are appropriate to legislatures, to executives, and to courts." *Gabler*, 2017 WI 67, ¶ 6 n.4 (citations omitted).

The Legislature's vested powers under the Wisconsin Constitution are at issue here. Article IV, Section 1 "vest[s]" the Legislature with the "legislative power," Wis. Const. art. IV, § 1; *SEIU*, 2020 WI 67, ¶ 1, which includes the core "power to make the law" and "to decide what the law should be," *SEIU*, 2020 WI 67, ¶ 1; *see also, e.g.*, *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600. Further, under Article IV, Section 3, the Legislature also has the obligation to conduct redistricting, "apportion[ing] and district[ing] anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art. IV § 3. The Constitution vests the Legislature with the power to take any steps that it determines are necessary to carry out its core law-making function. The Legislature has "a large discretion[ary] [power]" to choose "the means to be employed in the execution of [the legislative] power [expressly] conferred upon it," so that it may "efficient[ly] exercise" that power, *Minneapolis, St. P. & S. S. M. Ry. Co. v. R.R. Comm'n of Wis.*, 136 Wis. 146, 116 N.W. 905, 910 (1908) (citation omitted). Further, it is the Legislature that chooses these

steps, since the Constitution empowers the Legislature to "use *any* means, appearing *to it* most eligible and appropriate" in "the exercise of [its] general power of legislation." *Id.* (emphases added; citation omitted).

Exercising this broad constitutional power to conduct "appropriate" activities, *Gabler*, 2017 WI 67, ¶ 6 n.4 (citations omitted), in furtherance of its "power to make the law," *SEIU*, 2020 WI 67, ¶ 1, the Legislature has for decades hired outside counsel to advise on redistricting, both before and after a lawsuit has been filed, App.117–39, 180–98, 259. And such longstanding "historical practices" are generally "controlling" of the Constitution's meaning, when "not in violation of any existing judicial construction." *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 111 N.W. 712, 717 (1907) (approving of historical practice "extending over a period of more than a quarter of a century"); *Barland v. Eau Claire Cty.*, 216 Wis. 2d 560, 592, 575 N.W.2d 691 (1998) (reliance on "historical custom").

b. Here, the two outside-counsel contracts fall squarely within the Legislature's broad constitutional authority to

take "appropriate" "means" to exercise its "general power of legislation," consistent with the Legislature's decades-long practice. *Minneapolis,* 116 N.W. at 910; *Gabler*, 2017 WI 67, ¶ 6 n.4. The Legislature appropriately determined that hiring outside counsel is "necessary" for it to "efficient[ly]" navigate the complex legal rules governing redistricting maps and to begin preparing a defense of its redistricting map in the inevitable court challenges to come—which challenge will come either if the Governor vetoes the Legislature's adopted redistricting maps, resulting in litigation, or if a plaintiff challenges maps signed by the Governor. *Minneapolis,* 116 N.W. at 910–11. Therefore, the hiring of such counsel here is an "activit[y]" that is "appropriate to legislatures," and so within the Legislature's vested constitutional authority. *Gabler*, 2017 WI 67, ¶ 6 n.4 (citations omitted). Indeed, the outside-counsel contracts here are indistinguishable from the multiple outside-counsel redistricting contracts that the Legislature has entered into for decades, a point that has "controlling" weight here. *Williams*, 111 N.W. at 717.

c. In reach its contrary conclusion, the Circuit Court did not grapple with the Legislature's cited case law or longstanding practice. Instead, the Court concluded that the Supreme Court's recent decision in *SEIU*, which Plaintiffs never cited, App.334–44, somehow foreclosed that argument. In particular, the Circuit Court understood *SEIU* as affirmatively holding that the Legislature could not defend *most* of the laws it enacts in court, as defense of most laws in court would "substantially interfer[e] with the executive branch," violating the separation of powers. App.24–26. From this, the Circuit Court held—without further explanation—that hiring *pre-litigation* counsel here would substantially interfere with another branch, under *SEIU*.

The Circuit Court's decision is unlikely to survive appeal both because that Court had no answer for the vast majority of the Legislature's constitutional arguments and because the Supreme Court has already disavowed the Circuit Court's interpretation of *SEIU* in its recent decision in *DNC*. Again, according to the Circuit Court, the Legislature violates the separation of powers when it seeks to defend most

of its laws in court because such a defense would "substantially interfer[e] with the executive branch['s]" constitutional authority. App.24–26; *accord* App.477–78 (Plaintiffs' opposition to stay). The Seventh Circuit had adopted that similar reading of *SEIU* in the precursor to *DNC*, concluding that *SEIU* prohibited the Legislature from defending certain Wisconsin voting laws in court, because such defense would "violate[ ] the state's constitution, which commits to the executive branch of government the protection of the state's interest in litigation." *Democratic Nat'l Comm. v. Bostelmann*, 976 F.3d 764, 767 (7th Cir. 2020), *on reconsideration after certifying question*, 977 F.3d 639 (7th Cir. 2020) (discussing *SEIU*, 2020 WI 67, ¶¶ 50–73). The Supreme Court unequivocally rejected that reading in *DNC*, on subsequent certification from the Seventh Circuit. Specifically, the Court explained that *SEIU* "did *not* hold or imply that the institutional interests" of the Legislature "discussed" in that opinion "were the only circumstances" in which the Legislature could hire counsel and participate in litigation. *DNC*, 2020 WI 80, ¶ 6 (emphasis added). "To say

it more plainly," the Wisconsin Supreme Court "has not held"—either in *SEIU* or otherwise—that any involvement of the Legislature in litigation "runs contrary to the Wisconsin Constitution"; rather, the Court has "merely concluded" that "some" kinds of involvement "do not." *Id.* Thus, in light of *DNC*, *SEIU* provides no support for the Circuit Court's conclusion that the Legislature's hiring of pre-litigation counsel exceeds the Legislature's constitutional authority.

The Circuit Court's attempts to clarify its reliance on *SEIU* in its oral decision denying a stay only highlight the infirmity of its constitutional analysis. *See* App.3–8. There, the Circuit Court again erroneously stated that *SEIU* supported its conclusion that the Legislature "hiring counsel in anticipation of litigation does not fall within the core or shared power of the Legislature." App.8. But *DNC*'s conclusion that *SEIU* "did not hold or imply" that the Legislature's defense of state law in active litigation *alongside* the Attorney General or Governor violated the separation of powers, 2020 WI 80, ¶ 6, means that it did not disturb the Legislature's fulsome discussion of pre-*SEIU* precedent

granting the Legislature broad authority. Therefore, *SEIU* and *DNC* provide no basis for the Circuit Court's conclusion that the Legislature's mere preparation for such litigation *wholly apart* from any other branch somehow violates the separation-of-powers doctrine. *See id.*

Finally, the Circuit Court's distinction between the Legislature engaging counsel to advise on the legality of draft legislation—which the Court appeared to suggest was constitutionally authorized—and hiring counsel to prepare for legal defense of that same legislation—which the Court would invalidate—finds no grounding in the constitutional text or history. *See* App.26, 32. There is no coherent line between the Legislature obtaining outside-counsel advice to determine whether a draft redistricting map is constitutional and thus likely to survive judicial review (which the Circuit Court appears to bless), and obtaining pre-litigation advice as to what the judicial review will look like in terms of content and timing (which the Circuit Court appears to hold is not constitutionally authorized).

B. A Stay Pending Appeal Will Not Harm Other Interested Parties And Is Necessary To Avoid Irreparable Harm, To Protect The Public Interest, And To Preserve The Status Quo

1. Other factors in the stay analysis include whether the moving party shows that, absent stay, it will suffer irreparable harm, the stay will not harm the public interest, and the nonmoving party is unlikely to suffer substantial harm. App.40 n.4; *see also Gudenschwager*, 191 Wis. 2d at 440. "At times," the Supreme Court also considers whether relief pending appeal is "necessary to preserve the status quo." *See* App.69. Because the stay factors are "interrelated factors to be considered," rather than "separate prerequisites," App.42, a movant's showing on the likelihood-of-success-on-the-merits factor alone may justify the grant of a stay, App.66.

Here, all equitable factors support a stay pending appeal.

a. Both the Legislature and the public would suffer substantial harms absent a stay pending appeal. As the Supreme Court has held, "Legislative Defendants[ ] and the public suffer a substantial and irreparable harm of the first

magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." App.58; App.45. Here, the Circuit Court's order inflicts irreparable harms of this same nature on the Legislature and the public, as it thwarts the Legislature's exercise of its statutory authority, across three separate statutes and the Wisconsin Constitution, to enter into the contracts it requires to carry out its sovereign legislative functions. That decision—no less than an injunction declaring a statute unenforceable—deprives the public of the benefit of the Legislature's actions, and so is irreparable. *Accord* App.45 (irreparable harm to public from deprivation of the service of state appointees "confirmed to appointed positions"). Further, denying the Legislature the power that it is "entitled to" here also raises seriously "concern[ing] . . . implications" about the rights of "constitutional officers" to "counsel of their choice." *Koschkee*, 2018 WI 82, ¶¶ 12–13.

The practical implications of the Circuit Court's decision further accentuate these irreparable harms. Under

the Circuit Court's ruling, the Legislature cannot hire outside counsel to advise it on anticipated redistricting litigation regarding proposed redistricting maps, contrary to decades of its practice. *See* App.26, 32. Indeed, if the Circuit Court's order had been in effect, the Legislature would not have been able to appear by this very hired counsel before the Wisconsin Supreme Court in the pending rules-petition proceedings regarding this redistricting cycle because those rules proceedings did not involve an ongoing lawsuit. *See* Public Notice, *In re Petition for Proposed Rule to Amend Wis. Stat. § 809.70 (Relating to Redistricting)*, No. 20-03 (Wis. Dec. 9, 2020);[5] *Comments Of Speaker Of The Wisconsin State Assembly Robin Vos And Majority Leader Of The Wisconsin State Senate Scott Fitzgerald, Supporting Adoption Of Petition 20-03* (Nov. 30, 2020);[6] App.319–20.

[5] Available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=313527 (all websites last accessed May 12, 2021).

[6] Available at https://www.wicourts.gov/supreme/docs/2003commentsvos.pdf.

The immediate aftermath of the Circuit Court's decision also leaves the Legislature in a state of "confusion" regarding its attorney-client relationships and confidential communications related to these outside-counsel contracts. *See* App.45–46. Immediately after the Circuit Court's order, the Legislature received multiple Wisconsin Open Records Law requests, Wis. Stat. § 19.31, *et seq.*, seeking access to the communications between the Legislature and the outside counsel involved with the contracts at issue here, App.427–31. One requested access to documents that the requester claimed were previously "protected by lawyer-client privilege," but now no longer enjoy that projection given the Circuit Court's decision. App.428. That is, in this requester's view, the Circuit Court's decision means that "there was no valid lawyer-client relationship between [the Legislature] or [its] staff and the law firms ostensibly retained to represent the legislature in redistricting legislation." App.428. Thus, absent a stay, the Legislature's rights to privilege and confidentiality are put into a state of legal "confusion," App.45–46, and countless privileged communications

between the Legislature and its counsel could be subject to similar Open Records requests, threatening the "sanctity of the attorney-client relationship," *see State v. Forbush*, 2011 WI 25, ¶ 46, 332 Wis. 2d 620, 796 N.W.2d 741. That "confusion" is an independent irreparable harm. App.45–46.

Finally, this Court granting a stay pending appeal is essential to preserve this case from mootness concerns while this appeal runs its full course. *E.g.*, *Matter of Commitment of J.W.K.*, 2019 WI 54, ¶¶ 12–14, 386 Wis. 2d 672, 927 N.W.2d 509. As all parties and the Circuit Court appear to agree, the Legislature will undoubtedly have the authority under at least Section 13.124 to enter into these outside-counsel contracts once a redistricting action is filed. *See* App.28. The filing of such an action is very likely to occur while this appeal proceeds through the appellate courts of this State, either once the Governor vetoes a proposed map or if a plaintiff challenges the maps signed by the Governor, *accord Jensen*, 2002 WI 13, ¶ 10, meaning that the appellate courts' merits "resolution will have no practical effect on the underlying controversy," *J.W.K.*, 2019 WI 54, ¶ 11 (citation omitted).

Indeed, multiple such lawsuits challenging decennial redistricting have *already* been filed in other States, including Pennsylvania, *Carter v. Degraffenreid*, No. 132 MD 2021 (Pa. Commw. Ct., *filed* Apr. 26, 2021), Minnesota, *Sachs v. Simon*, No. 62-CV-21-2213 (Minn. Dist. Ct., *filed* Apr. 26, 2021), and Louisiana, *English v. Ardoin*, No. 2021-03538-C § 10 (La. Civ. Dist. Ct., *filed* Apr. 26, 2021), evidencing the extreme likelihood of such litigation here.

b. These irreparable harms to the Legislature and the public significantly outweigh whatever possible harms that Plaintiffs could allege from a stay pending this Court's resolution of this appeal. *See* App.44 ("interrelated factors to be considered"); App.57. That is, the taxpayer harms that Plaintiffs might suffer while this appeal is pending pale in comparison to the grave injuries that the Circuit Court's order inflicts on the Legislature and the public.

c. Finally, a stay pending appeal here will preserve the status quo—that is, the period immediately preceding the Circuit Court's order below. App.69. The Legislature has for decades engaged outside counsel under indistinguishable

circumstances. *See supra* pp. 5–6; App.117–26, 135, 180–93. The Circuit Court's decision disrupts that longstanding legislative practice, declaring the contracts here void *ab initio*. App.36. That stark departure from decades of consistent practice, across Legislatures controlled by both parties, strongly counsels in favor of a stay.

2. The Circuit Court's consideration of the equities in its oral decision denying the Legislature's stay motion was, with all respect, an erroneous exercise of discretion. App.6–11.

First, the Circuit Court concluded that the Legislature has "plenty of options" to seek assistance for its redistricting efforts, thus the Legislature could not suffer irreparable harm from the court's voiding of the two outside counsel contracts here. App.9. The Circuit Court's apparent comparison and evaluation of the Legislature's available redistricting resources both fails to rebut the Legislature's claimed irreparable harms and is improper "intermeddl[ing]" with the internal affairs of the Legislature. *Ozanne*, 2011 WI 43, ¶ 13 (citation omitted). The Legislature made the sovereign judgment that engaging outside counsel was necessary for the

"efficient exercise" of its redistricting powers and responsibilities, *Minneapolis,* 116 N.W. at 910–11 (citation omitted), and it is not the role of the judiciary to second-guess the necessity of those resources. Notably, this legislative determination is also consistent with the Legislature's historical practices, uninterrupted across all previous decades of the modern redistricting era. *See supra* pp. 5–6.[7]

Second, the Circuit Court discounted the irreparable harm that the Legislature is suffering from the open-records requests that it has already received, in light of the court's voiding of the contracts here. App.9. In the Circuit Court's view, the cloud surrounding the privileged status of the Legislature's attorney-client communications is simply an

[7] The Circuit Court's reliance on the Attorney General's purported ability to aid the Legislature in redistricting matters, in particular, ignores the disagreement between the Legislature and the Attorney General on the current decennial redistricting process. App.9. During the rules-petition proceedings before the Wisconsin Supreme Court, the Attorney General appeared on behalf of the Governor opposing the rules petition, *see Comments from Anthony D. Russomanno & Brian P. Keenan, Assistant Attorneys General* (Wis. Rules Pet. No. 20-03), https://www.wicourts.gov/supreme/docs/2003commentsrussomanno.pdf, while the Legislature supported the petition, *see supra* p. 44, demonstrating the Attorney General's adversity to the Legislature on redistricting matters in this cycle.

"open question[ ] to be resolved" in a future case, which does not "establish irreparable harm." App.10. That reasoning is directly at odds with *LWV*. App.45–46. There, the Supreme Court held that the "potential confusion" caused by a circuit court's enjoining of a statute, alone, established irreparable harm. App.45–46.

Finally, the Circuit Court failed to address considerations of the status quo, *see* App.6–11, which plainly favor a stay pending appeal here, *supra* pp. 47–48.

CONCLUSION

This Court should grant the Legislature's Emergency Motion For Stay Pending Appeal.

Dated: May 12, 2021.

Respectfully submitted,

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

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

Case No. 2021-CV-589

v.

ROBIN VOS and DEVIN LEMAHIEU,
in their official capacities,
Defendants.

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' lawsuit is legally meritless, based entirely upon the false premise that the Legislature only has the authority to hire outside counsel under the recently enacted Wis. Stat. § 13.124. While Section 13.124 does authorize the contracts here, there are three longstanding, independent legal sources of authority that each provide separate, lawful bases for the Legislature to enter into these contracts, as explained in detail below. Given that Plaintiffs' Complaint does not meaningfully address any of these three separate sources of authority, and given that the Complaint's arguments regarding Section 13.124 are legally wrong, there are *four* independent, compelling reasons that this Court should dismiss this Complaint.

STATEMENT

The Complaint alleges that the Legislature engaged Consovoy McCarthy PLLC, Adam Mortara, and Bell Giftos St. John LLC for legal counsel and litigation services relating to the ongoing decennial redistricting. Dkt. 3 ("Compl.") Exs. A & B. The contracts provide that, beginning on January 1, 2021, Compl. Ex. A at 1; *id.*, Ex. B at 1, outside counsel will "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," Compl. Ex. B at 1, "provide overall strategic litigation direction," "serve as lead trial counsel," and otherwise "provide additional day-to-day litigation resources," Compl. Ex. A at 1.

On March 10, 2021, Plaintiffs filed this taxpayer-standing lawsuit, challenging these contracts. Compl. ¶¶ 1, 4–7. Plaintiffs, apparently believing that newly

enacted Section 13.124 was the sole authority for the Legislature ever to engage outside counsel, claimed that these contracts are "void *ab initio* because they were entered into in violation of the specific limitations[ ] described in Wis. Stat. 13.124(1) and (2)." Compl. ¶¶ 1, 19–21. Plaintiffs seek a declaratory judgment that the agreements are void, a permanent injunction preventing Defendants from entering any other similar agreements in the future, and fees and costs. Compl. at 10–11. On March 16, Plaintiffs filed their Motion For *Ex Parte* Temporary Restraining Order And For Temporary Injunction, seeking to stop "the continued illegal expenditure of public funds" in furtherance of these contracts. Dkt. 12 at 1; *see also* Dkt. 11.

ARGUMENT

When considering a motion to dismiss for failure to state a claim, the Court assumes the truth of the facts as pleaded and gives all reasonable inferences to the nonmoving party. *H.A. Friend & Co. v. Prof'l Stationery, Inc.*, 2006 WI App 141, ¶ 8, 294 Wis. 2d 754, 720 N.W.2d 96. The Court should grant such a motion to dismiss whenever "there are no conditions under which a plaintiff may recover." *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 7, 373 Wis. 2d 543, 892 N.W.2d 233. In making its decision, the Court may consider, as relevant here, the complaint and any written instruments attached to the complaint as exhibits. *See* Wis. Stat. § 802.04(3); *see also Cook v. Pub. Storage, Inc.*, 2008 WI App 155, ¶ 19, 314 Wis. 2d 426, 761 N.W.2d 645.

I. The Contracts Are Lawful Under The Legislature's Constitutional Authority

This Court must look to three categories of "intrinsic as well as extrinsic sources" to ascertain the Constitution's meaning, according to the "understanding of the drafters and the people who adopted the constitutional provision under consideration." *State v. Williams*, 2012 WI 59, ¶ 15, 341 Wis. 2d 191, 814 N.W.2d 460. First, and most importantly, this Court must consider "the plain meaning of the words [of the Constitution] in the context used." *Id.* (citation omitted); *Coulee Catholic Schs. v. Labor & Indus. Rev. Comm'n*, 2009 WI 88, ¶ 57, 320 Wis. 2d 275, 768 N.W.2d 868 (citing *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110). Second, this Court may also consider "historical" sources, particularly any "constitutional debates relative to the constitutional provision under review; the prevailing practices [ ] 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." *Williams*, 2012 WI 59, ¶ 15 (citations omitted). Lastly, this Court endeavors "to ascertain what the people understood the purpose of the [provision at issue] to be." *Id.* (citation omitted).

Consistent with these longstanding constitutional principles, Plaintiffs' Complaint fails to state a claim because the Legislature, and therefore, Legislative Leader Defendants speaking on its behalf, has the constitutional authority to conduct all operations necessary to aid it in core legislative functions, including engaging outside counsel as the Legislature did in the challenged contracts.

A. The Wisconsin Constitution "diffus[es]" the power of the state government between "three separate branches": "legislative, executive, and judicial." *Serv. Emps. Int'l Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶¶ 1–2, 393 Wis. 2d 38; *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384. The "[l]egislative power is the power to make the law, to decide what the law should be." *SEIU*, 2020 WI 67, ¶ 1. The "[e]xecutive power is power to execute or enforce the law as enacted." *Id.* "And judicial power is the power to interpret and apply the law to disputes between parties." *Id.* These are the "core government power[s]" of the State, fundamentally "understood to be the powers conferred to a single branch [only] by the constitution." *Id.* ¶¶ 31, 35. This creates the "concomitant" rule that each branch can "exercise only the [core] power vested in it." *Id.* ¶ 2; *see generally id.* ¶¶ 30–35 (also discussing "shared powers" under the constitution, generally exercisable by two or more branches).

When the Wisconsin Constitution expressly vests the core powers within the respective branches, it also imbues those branches with all necessary "authority . . . appropriate to achieve the ends for which they were granted the [express] authority." *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 54 & n.38, 373 Wis. 2d 543, 892 N.W.2d 233 (citing *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819)); *accord Johnston v. City of Sheboygan*, 30 Wis. 2d 179, 185–86, 140 N.W.2d 247 (1966) (same). That is, these "[i]mplied power[s]" in the Constitution are "*incident of* [the] general power" that the Constitution expressly grants. *State v. Regents of University of Wis.*, 54 Wis. 159, 11 N.W. 472, 477 (1882) (emphasis added). Under the Wisconsin

Constitution, then, each branch of government is authorized to engage in "activities [that] are appropriate to legislatures, to executives, and to courts." *Gabler*, 2017 WI 67, ¶ 6 n.4 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992)); *accord League of Women Voters of Wisconsin v. Evers ("LWV")*, 2019 WI 75, ¶ 32, 387 Wis. 2d 511, 537, 929 N.W.2d 209, 222. As the Wisconsin Supreme Court has long recognized, interpreting the Constitution's broad grant of implied power otherwise would gravely "manacle[ ]" and "impair the authority of the state to exercise the just and ordinary powers usually possessed by governments" and "destroy the necessary power of the state[ ]." *Minneapolis, St. P. & S.S.M. Ry. Co. v. R.R. Comm'n of Wis.*, 136 Wis. 146, 116 N.W. 905, 910 (1908) (citations omitted).

Relevant to this dispute is the Legislature's grant of powers from the Wisconsin Constitution. The Constitution "vest[s]" the Legislature, composed of "a senate and assembly," with the "legislative power." Wis. Const. art. IV, § 1; *SEIU*, 2020 WI 67, ¶ 1. Encompassed within this "legislative power" are the core "power[s] to make the law" and "to decide what the law should be." *SEIU*, 2020 WI 67, ¶ 1. This includes the authority to "declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; and to fix the limits within which the law shall operate," *Koschkee v. Taylor*, 2019 WI 76, ¶ 11, 387 Wis. 2d 552, 929 N.W.2d 600 (citations omitted); *State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 941 (1928) (describing this power as "vested"), as well as necessarily entailing the core power to "establish" the "public policy" for the State, *State ex rel. Vanko v. Kahl*, 52 Wis. 2d

206, 216, 188 N.W.2d 460 (1971); *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶¶ 26, 31–32, 383 Wis. 2d 1, 914 N.W.2d 678.

Accompanying this express grant of "legislative power," the Constitution affords the Legislature all authority necessary to carry out its core law-making function. In other words, the Constitution grants the Legislature "a large discretion[ary] [power]" to select "the means to be employed in the execution of [the legislative] power [expressly] conferred upon it." *Minneapolis,* 116 N.W. at 910 (quotation omitted). The Legislature's powers permit it to "use any means," "consistent with the letter and spirit of the Constitution," and "appearing to it most eligible and appropriate," "[i]n the exercise of [its] general power of legislation." *Id.* (citations omitted). Consonant with "the comity and respect due a co-equal branch of state government," the judiciary does not second-guess the measures that the Legislature requires to carry out its core legislative power. *LWV*, 2019 WI 75, ¶ 36 (citation omitted). Thus, the judiciary does "not intermeddle" with these measures, which are part of the Legislature's "internal operating rules" or "procedural statutes" to structure its own internal business. *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 13, 334 Wis. 2d 70; 798 N.W.2d 436; *accord LWV*, 2019 WI 75, ¶ 36; *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 364–65, 338 N.W.2d 684 (1983).

B. The Legislature hiring outside legal counsel, where it deems appropriate, is part of its legislative practice and thus authorized under the Constitution. Hiring outside counsel allows the Legislature to "determine[e] the best methods" and "manner" of "meet[ing] the needs of the public" in developing creative policy solutions

for the issues of the day, while remaining within its constitutional bounds. *See Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 539, 576 N.W.2d 245 (1998) (citations omitted); *Mayo*, 2018 WI 78, ¶¶ 15, 31–32. The Legislature's expansive authority to make law for the State spans innumerable subject matters, requiring Legislators to study carefully the wide-ranging areas of the law so as to enact successful legislation that achieves its legitimate aims in a constitutional manner. *See, e.g.*, *State v. Cole*, 2003 WI 112, ¶ 22, 264 Wis. 2d 520, 665 N.W.2d 328; *Mayo*, 2018 WI 78, ¶ 15. Engaging outside legal counsel, where the Legislature deems appropriate, to advise the legislative drafting or defend in court the Legislature's core prerogatives, enables the Legislature to more "efficient[ly] exercise" its core powers, *Minneapolis*, 111 N.W. at 910, as it meets the needs of the people of the State, *Flynn*, 216 Wis. 2d at 539–40.

The Legislature's constitutional power to hire outside legal counsel is especially important in the redistricting contract, where the Legislature must legislate in an especially complex area and its handiwork is near-certain to end up in prolonged litigation. With redistricting, the Legislature must draw maps for the entire State, complying with multiple, complex state and federal laws. The Wisconsin Constitution assigns to the Legislature the duty to "apportion and district anew the members of the senate and assembly, according to the number of inhabitants." Wis. Const. art IV, § 3. The United States Constitution requires that redistricting adequately reflect the "one person, one vote" standard first adopted in *Reynolds v. Sims*, 377 U.S. 533 (1964). *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1123–24 (2016). Federal statutory law imposes different and additional requirements and standards

on top of that. *See, e.g.*, 52 U.S.C. §§ 10301, 10304; *Cooper v. Harris*, 137 S. Ct. 1455, 1464–66 (2017). And, sometimes, these concerns come into conflict, *see, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794, 802 (2017), requiring *especially* sensitive legislative judgments when drawing redistricting lines in the appropriate places, requiring reliance on guidance from sophisticated counsel to have any realistic hope of passing constitutional scrutiny after the inevitable court challenges. Thus, the engagement of expert, outside counsel in such matters is critical to the continued success and legal defense of Wisconsin's redistricting plans.

C. Applying these principles to the instant dispute, the Constitution gives the Legislature the authority to enter into the two contracts at issue here, as "appropriate" "means" for exercising its "general power of legislation," *Minneapolis,* 116 N.W. at 910 (citations omitted); *Gabler*, 2017 WI 67, ¶ 6 n.4, in support of critically important redistricting legislation, *see supra* pp. 7–8. Engaging expert legal counsel throughout this process empowers the Legislature to "efficient[ly]" navigate all of those varied requirements, and enables them to establish the "necessary" factual and legal foundation before "enacting a [redistricting] law," all hallmarks of the Legislature's longstanding implied authority under the Constitution. *Minneapolis,* 116 N.W. at 910 (citations omitted).

D. Plaintiffs' Complaint nowhere grapples with these dispositive constitutional arguments. Instead, Plaintiffs merely allege, without any legal support, that "no section of the Wisconsin Constitution . . . authorizes the Speaker of the Assembly, like Vos, or the Majority Leader of the Senate, like LeMahieu, in their official

capacities, to enter into contracts for legal services with private law firms," as well as that no "constitutional authority . . . allows them to direct that public funds be used to pay for such services." Compl. ¶ 18. But, as noted above, *supra*, pp. 4–6, this ignores longstanding Wisconsin Supreme Court precedent on the legislative power, both express and implied, which encompasses the broad authority to "use *any* means, appearing *to it* most eligible and appropriate," and "consistent with the letter and spirit of the Constitution," "[i]n the exercise of [its] general power of legislation." *Minneapolis,* 116 N.W. at 910 (emphases added). Plaintiffs have no answer for this precedent, and their lawsuit fails to state a claim for that reason alone.

II. The Contracts Are Independently Lawful Under Section 20.765

Statutory interpretation begins, and often ends, with the text of the "[s]tatutory language." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning," except when the statute incorporates a technical or special meaning. *Id.* And a court must both read the statute in the "context" of "the language of surrounding or closely-related statutes," and interpret the text so as "to avoid absurd or unreasonable results." *Id.* ¶ 46.

Section 20.765 of the Wisconsin Statutes grants the Legislature "[a] sum sufficient to carry out the functions of the assembly [and senate]." Wis. Stat. § 20.765(1)(a)–(b). A "[s]um sufficient appropriation[ ]" is as an appropriation that is "expendable from the indicated source in the amounts necessary to accomplish the purpose specified." Wis. Stat. § 20.001(3)(d). In other words, the Legislature has

statutory authority to use such funds for anything "necessary to accomplish," Wis. Stat. § 20.001(3)(d), any of "the functions of the assembly [and senate]," *id.* § 20.765(1)(a)–(b). Therefore, Section 20.765 provides each House of the Legislature with an open-ended authorization to spend the amount necessary to carry out any of their functions. These funds are different from, and in addition to, other specific appropriations to the Legislature, such as funds for auditing services requested by state agencies or by the federal government, Wis. Stat. § 20.765(3)(ka), and "legislative expenses for acquisition, production, retention, sales and distribution" of certain authorized legislative documents, Wis. Stat. § 20.765(1)(d).

The contracts at issue here fall squarely within the Legislature's authority under Section 20.765. The hiring of legal counsel is critical to enacting, and subsequently defending, complex legislation, with profound concerns attendant to denying a party counsel of its choice. *See Koschkee*, 2018 WI 82, ¶ 13. Such expert counsel clearly falls within Section 20.765(1)(a)–(b)'s broad spending authorization for anything that supports "the functions of the assembly [and senate]," especially in the context here—hiring counsel for "legal advice . . . on matters relating to redistricting during the decennial period," Compl. Ex. B at 1, a duty exclusively assigned to the Legislature under Wisconsin's Constitution, Wis. Const. art IV, § 3.

The Complaint disregards this statutory authorization for the representation agreements at issue here, which failure is independently sufficient to thwart their claim. Indeed, Plaintiffs merely assert the *ipse dixit* that Section 13.124 "is the sole statute that provides any authority for the Speaker of the Assembly and the Majority

Leader of the Senate, to 'obtain legal counsel,'" without addressing at all the effect of Section 20.765's sum-sufficient authorization on this issue. *See* Compl. ¶ 19; *id.* at 7 n.1, 10–11. Plaintiffs simply note, without further explication, that "Wis. Stat. § 20.765 (1)(a) and (b) appropriates a 'sum sufficient' only for the functions of the Assembly and Senate respectively," Compl. ¶ 19, without recognizing that the Legislature's very act of entering into these contracts is an exercise of its authority to determine its functions and appropriate money to carry them out, specifically authorized by Section 20.765. *See* Wis. Stat. § 20.765(1)(a)–(b).

III. The Contracts Are Independently Lawful Under Section 16.74

Section 16.74 also expressly authorizes the contracts at issue here. Under that provision, the Assembly and the Senate have the authority to enter "[c]ontracts for purchases," so long as they are "signed by an individual designated by the organization committee of the house making the purchase." Wis. Stat. § 16.74(2)(b). Section 16.74(1)—the immediately preceding subsection—explains that "purchases" includes "[a]ll supplies, materials, equipment, permanent personal property and *contractual services* required within the legislative branch." Wis. Stat. § 16.74(1) (emphasis added). Thus, the "[c]ontracts for purchases" in subpart (2)(b) necessarily include contracts for services, including contracts for legal services.

The contracts at issue here fall squarely within the Legislature's statutory authority under Section 16.74(2)(b). They fit within the statutory term "[c]ontracts for purchases," since they secure professional legal services for the Legislature, within the meaning of this Section. Wis. Stat. § 16.74(1), (2)(b); Compl. Exs. A & B.

These agreements meet all preconditions within Section 16.74(2)(b) for the Legislature's purchasing authority, which gives it independent statutory support.

Plaintiffs' Complaint nowhere acknowledges the existence of Section 16.74, and has no answer for its express authorization for the agreements at issue here. Rather, Plaintiffs allege, without any support, that only Section 13.124 authorizes the Legislature "to obtain legal counsel." Compl. ¶ 19 (citation omitted).

IV. The Contracts Are Independently Lawful Under Section 13.124

Finally, the contracts at issue here also fall squarely within Section 13.124's terms, another independent basis for dismissing Plaintiffs' Complaint.

Section 13.124, as relevant here, contains two identical provisions directed to the Assembly and Senate, authorizing each to obtain legal representation from someone other than the Department of Justice, through a streamlined authorization procedure. Section 13.124(1)(b) provides that "[t]he 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*." Wis. Stat. § 13.124(1)(b) (emphases added). Near identically, Section 13.124(2)(b) provides that "[t]he senate majority leader, 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)(b), in any action in which the senate is a party or in which the

interests of the senate are affected, *as determined by the senate majority leader*." Wis. Stat. § 13.124(2)(b) (emphases added).

As evident from their text, *Kalal*, 2004 WI 58, ¶ 49, these statutes provide the Assembly and the Senate with an expedited procedure to obtain legal counsel. Both provisions allow a single member of Legislative Leadership—either the Speaker of the Assembly or the Majority Leader of the Senate—to engage outside counsel in that member's "*sole* discretion." Wis. Stat. § 13.124(1)(b), (2)(b) (emphasis added). And that single Legislative Leader may exercise that "sole discretion" whenever any "interest[ ]" of his or her House is "affected," or when the House is simply "a party" to "any action." Wis. Stat. § 13.124(1)(b), (2)(b).

When read in conjunction with the interpretive principles encapsulated in Section 990.001(3), the text of Sections 13.124(1)(b) and (2)(b) clearly authorizes the Legislative Leaders to obtain legal counsel when faced with an *imminent* "action," in addition to any *commenced* "action." Wis. Stat. § 13.124(1)(b), (2)(b). Under black-letter principles of statutory construction in Wisconsin, a statute's use of "[t]he present tense of a verb includes the future when applicable." Wis. Stat. § 990.001(3). Here, Section 13.124(1)(b) and (2)(b) use the verbs "is" and "are," allowing the Speaker and Majority Leader to obtain counsel whenever the Assembly or Senate "*is* a party" to an action or the Assembly's or Senate's interests "*are* affected," Wis. Stat. § 13.124(1)(b), (2)(b) (emphases added); *see generally* Chicago Manual of Style ¶ 5.101 (15th ed. 2003) (discussing "linking verbs," including "forms of 'to be'"). When the statutory terms "is" and "are" are interpreted in light of Section 990.001(3),

Section 13.124 allows Legislative Leadership to hire outside counsel "in any action" in which the House will be "a party or in which the interests" of the House will be "affected." Wis. Stat. §§ 13.124(1)(b), (2)(b), 990.001(3).

The contrary interpretation pressed by Plaintiffs—limiting Section 13.124(1)(b) and (2)(b) to commenced actions only—would lead to the "unreasonable" result of removing the Legislature's authority to obtain outside counsel on an expedited basis under Section 13.124, in the many cases where such speed is most needed. *Kalal*, 2004 WI 58, ¶ 46. The Legislature, like other litigants, may need to conduct emergency actions, litigated on an accelerated basis, including by engaging outside counsel *extremely* quickly to file such cases. *See Wis. Legislature v. Evers*, No. 2020AP608-OA, slip op. at 3. To that end, Section 13.124's streamlined procedure supplements the Legislature's existing authority to hire outside counsel.

The Legislature's contracts at issue here fall within Section 13.124's express grant of authority. As shown by the two outside-counsel contracts, Legislative Leadership "obtain[ed] legal counsel other than from the department of justice." Wis. Stat. § 13.124(1)(b), (2)(b); Compl. Exs. A & B. Legislative Leadership determined, by virtue of entering these contracts themselves, either that their Houses would be "affected" or that their Houses would likely be "a party" in any action filed against the Legislature's to-be-passed redistricting plan. Wis. Stat. §§ 13.124(1)(b), (2)(b); 990.001(3); Compl. Exs. A & B. And such a redistricting action is certainly impending, not merely hypothetical, since "redistricting is now almost always

resolved through litigation rather than legislation." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam).

The Complaint incorrectly asserts that Section 13.124 does not authorize Legislative Leadership to engage counsel either for "an action that does not yet exist" or "for general representation and legal advice regarding a matter such as redistricting." Compl. ¶¶ 20–21. As for the Complaint's first assertion, Plaintiffs attempt to "read language into" Section 13.124 to exclude impending litigation from its scope, Compl. ¶ 20, which courts may not do, especially when the proposed inserted language would add "an implicit time limit" not found in the text. *State v. Hemp*, 2014 WI 129, ¶ 37, 359 Wis. 2d 320, 856 N.W.2d 811. Again, Section 990.001(3)'s instruction that the use of the present tense includes the future tense plainly extends Section 13.124 to impending actions. *See* supra, pp. 13–14. As for the Complaint's second assertion, it too lacks textual support. Section 13.124 provides that Legislative Leadership can engage outside counsel in any action "affect[ing]" the "interests of the assembly [or senate]," Wis. Stat. §§ 13.124(1)(b), (2)(b), and those interests readily include matters like redistricting, which the Constitution assigns solely to the legislative branch, Wis. Const. art IV, § 3.

CONCLUSION

The Court should grant the Legislature's Motion To Dismiss.

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Respectfully Submitted,

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