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.

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

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INTRODUCTION

In its Order issued yesterday, this Court held that two legislative contracts—which are no different than contracts that the Legislature has entered into for decades—are void *ab initio*. Defendants Robin Vos and Devin LeMahieu, named here in their official capacities, have already appealed from that decision to the Court of Appeals. Through this Emergency Motion, Defendants seek a stay of this Court's decision pending that appeal. As to Defendants' likelihood of success on appeal, with all respect, this Court's decision is unlikely to survive appeal, including because it was based upon multiple arguments that Plaintiffs did not even raise in their filings before this Court. Further, this Court declining to stay its Order pending appeal will impose severe harm on Defendants and the public at large, while upsetting the status quo, by undermining the Legislature's longstanding practices, as well as its long-exercised constitutional and statutory authority. Given the disruptive impact of this Court's order, ***Defendants respectfully request a ruling on this Motion by no later than Friday, May 7***, so that Defendants can seek immediate relief from the Court of Appeals, if relief from this Court is not forthcoming. *See* Wis. Stat. § (Rule) 809.12.

STANDARD OF REVIEW

Under Section 808.07 of the Wisconsin Statutes, "a trial court may . . . [s]tay execution or enforcement of a judgment or order" during "the pendency of an appeal" of that order. Wis. Stat. § 808.07(2)(a); *see* Wis. Stat. § (Rule) 809.12. "[T]emporary relief pending appeal is appropriate where the moving party: (1) makes a strong showing that it is likely to succeed on the appeal; (2) shows that, unless a stay is

granted, it will suffer irreparable harm" during the pendency of the appeal; (3) shows that no substantive harm will come to other interested parties" during the pendency of the appeal; "and (4) shows that a stay will do no harm to the public interest." Third LeRoy Aff., Ex. 5 at 3 n.4 (citing *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)). These are "interrelated factors to be considered; they are not separate prerequisites." Third LeRoy Aff., Ex. 5 at 7.

ARGUMENT

I. The Legislature Has A High Likelihood Of Success Of Their Appeal

The Court of Appeals is likely to conclude that the Wisconsin Constitution, Section 20.765, Section 16.74, and Section 13.124 independently empower the Legislature to enter into the two outside-counsel contracts here, thus the Legislature has a high likelihood of success on its appeal.

A. The Court Of Appeals Is Likely To Conclude That The Wisconsin Constitution Authorizes These Contracts

As the Legislature explained, its constitutional grant of the "legislative power," Wis. Const. art. IV, § 1, and the power over redistricting, *id.* § 3, simultaneously vest the Legislature with all "authority . . . appropriate to achieve the ends for which they were granted th[is] [express] authority," *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 54 & n.38, 373 Wis. 2d 543, 892 N.W.2d 233; Dkt. 31 at 8–11; Dkt. 60 at 2–3. Here, consistent with its decades-long practice, the Legislature appropriately exercised this broad constitutional authority by hiring outside counsel to advise on its redistricting legislation and to prepare for the legal defense of the enacted redistricting map, given the inevitable court challenges to come. *See Minneapolis,*

St. Paul & Sault Ste. Marie Ry. Co. v. R.R. Comm'n of Wis., 136 Wis. 146, 116 N.W. 905, 910–11 (1908); Dkt. 31 at 15–16; Dkt. 60 at 2–3. The Court of Appeals is likely to reverse this Court's grant of summary judgment on this constitutional argument.

In holding that the Wisconsin Constitution does not authorize the outside-counsel contracts here, this Court relied upon a reading of *Service Employees International Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, ***that the Supreme Court has since explicitly rejected***, rather than any argument advanced by Plaintiffs (since, presumably, Plaintiffs were already aware that the reading of *SEIU* that this Court articulated has been rejected by the Court, given their lead counsel's involvement in those prior Supreme Court cases), Dkt. 48 at 8–18 (Plaintiffs' Opposition, failing to cite or discuss *SEIU*). Specifically, this Court interpreted *SEIU* as forbidding the Legislature from defending the laws it enacts in court, because such defense would "substantially interfer[e] with the executive branch." Dkt. 63 at 9–11. The Supreme Court explicitly rejected this reading of *SEIU* in *Democratic National Committee v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 949 N.W.2d 423. There, the Court rejected the argument that *SEIU* held that the Legislature may not defend the laws it enacts in court, instead explicitly holding 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, *id.* ¶ 6 (emphasis added). "To say it more plainly," the Wisconsin Supreme Court "has not held" that any involvement of

the Legislature in litigation "runs contrary to the Wisconsin Constitution," it has "merely concluded" that "some" kinds of involvement "do not." *Id.*

Also unpersuasive is this Court's constitutional distinction between the Legislature hiring counsel to advise on the legality of legislation, which the Court suggest was constitutionally authorized, and hiring counsel to prepare a legal defense of that same legislation, which the Court would invalidate. *See* Dkt. 63 at 11, 17. Again, Plaintiffs nowhere make this distinction in their briefing. *See* Dkt. 48 at 8–18. Regardless, this distinction is unworkable as a constitutional standard, and contrary to the Legislature's recognized interests in "efficien[cy]" in the legislative process. *Minneapolis*, 116 N.W. at 910–11 (citation omitted). No legitimate public interest is served by interpreting the Constitution to allow the Legislature to engage counsel to advise on whether redistricting legislation would survive a legal challenge, but prohibit the Legislature from engaging that same counsel for advice on a certainly impending action, including if the Legislature has a demand letter in hand.

B. The Court Of Appeals Is Likely To Conclude That Section 16.74 Independently Authorizes These Contracts

Under Section 16.74, the Assembly and Senate have the statutory authority to enter into "[c]ontracts for purchases," so long as such contracts are "signed by an individual designated by the organization committee of the house making the purchase." Wis. Stat. § 16.74(2)(b); Dkt. 31 at 19–21; Dkt. 60 at 11–18. In context, "[c]ontracts for purchases" includes contracts for legal services—like the outside-counsel contracts here—because Wis. Stat. § 16.74(1) defines "purchases" for this Section as "[a]ll supplies, materials, equipment, permanent personal property and

contractual services required within the legislative branch." Wis. Stat. § 16.74(1) (emphasis added); Dkt. 31 at 19–20; Dkt. 60 at 11. Based on this statutory authorization, the Court of Appeals is likely to reverse this Court's Order.

This Court's rejection of the Legislature's Section 16.74 authority was again premised on arguments not raised by Plaintiffs and, respectfully, lacks textual and constitutional support. *Compare* Dkt. 63 at 16–18, *with* Dkt. 48 at 20–27.

This Court held that Section 16.74 limits authorized service contracts only to those that "relate to, or [are] required by the purchase of 'supplies, materials, equipment [or] personal property,'" Dkt. 63 at 17 (citing *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58 ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110) (second brackets in original)—an argument that Plaintiffs did not make and, in fact, is contrary to Plaintiffs' apparent concessions, *see* Dkt. 48 at 21–22. Thus, in this Court's view, the Legislature may contract with contractors to install equipment for its legislative offices, but not with legal counsel to advise on its legislative enactments. Dkt. 63 at 17. That interpretation violates the fundamental principle that "[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. Section 16.74 does not include the "relate to, or [are] required by" limitation that this Court read into it, Dkt. 63 at 17, although "[t]he legislature could have written" such language had it so desired, *Lopez*, 2019 WI 101, ¶ 21. Rather, the "plain language" of Section 16.74 "makes clear that the legislature's plain meaning

applies broadly," *id.* ¶ 20, encompassing any contracts that the Legislature "require[s]," including the contracts at issue here, Wis. Stat. § 16.74(1)–(2).

Equally unpersuasive was the Court's conclusion that interpreting Section 16.74 to allow contracts for legal advice on redistricting legislation and litigation would "impermissibly infringe[ ] on the core power of the executive branch" to defend the State in "litigation" under *SEIU*. Dkt. 63 at 17–18 (citing *SEIU*, 2020 WI 67, ¶ 51). Again, the Wisconsin Supreme Court subsequently held in *DNC* that *SEIU* "did not hold or imply that the institutional interests" of the Legislature "discussed" in *SEIU* "were the only circumstances" in which the Legislature could participate in litigation on behalf of the State. *DNC*, 2020 WI 80, ¶ 6. Thus, there was no basis for this Court to limit Section 16.74's scope out of concern for the Executive Branch.

C. The Court Of Appeals Is Likely To Conclude That Section 20.765 Independently Authorizes These Contracts

Section 20.765 also provides statutory authority for the Legislature's outside-counsel contracts, given that this Section provides that the Legislature may spend "[a] sum sufficient" amount of money, so long as it is doing so "to carry out the functions of the assembly [and senate]." Wis. Stat. § 20.765(1)(a)–(b); Dkt. 31 at 17–19. Those "functions" under Section 20.765 plainly include completing the decennial redistricting process, including by hiring legal counsel to assist with complex redistricting legislation. Dkt. 31 at 18–19; Dkt. 60 at 9; Wis. Const. art. IV, § 3. This powerful argument will very likely persuade the Court of Appeals to reverse.

Here too, this Court rested its decision on this Section on arguments never raised by Plaintiffs, and with no grounding in the statutory text. Dkt. 48 at 19–20

The Court concluded that Section 20.765 only makes "money available for activities the legislature is authorized to undertake, but the provision does not itself provide that authority" and, without further explanation, that the Legislature's construction "expand[s] the power of the legislature beyond its proper authority." Dkt. 63 at 18. But the Court, thereafter, nowhere explains *how* retention of such counsel is beyond the bounds of broad legislative authority under any number of independent sources. *See* Dkt. 31 at 18–19; Dkt. 60 at 10–11.

This Court's reliance on *State ex rel. Moran v. Department of Administration*, 103 Wis.2d 311, 307 N.W.2d 658 (1981), Dkt. 63 at 19–20, a case that the parties did not discuss, is misplaced. There, the Wisconsin Supreme Court took an expansive view of inherent constitutional power, *Moran*, 103 Wis. 2d at 317—further bolstering the Legislature's constitutional arguments, *supra* Part I.A—and then, as a statutory matter, held that "[w]hen a sum sufficient appropriation has been passed, 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. Here, the Legislature administers its own sum-sufficient appropriations, so, under *Moran*, it gets to determine whether the "expenditure . . . falls within the terms of the appropriation." *Id.* Thus, *Moran* only underscores the Legislature's clear likelihood of success on appeal here.

D. The Court Of Appeals Is Likely To Conclude That Section 13.124, Read With Section 990.001(3), Independently Authorizes These Contracts

Section 13.124 provides the Speaker and the Majority Leader "sole discretion" to "obtain [outside] legal counsel . . . in any action in which the assembly [or the

senate] is a party or in which the interests of the assembly [or the senate] are affected." Wis. Stat. § 13.124(1)(b), (2)(b). Viewed through the explicit interpretive rule that "[t]he present tense of a verb includes the future when applicable," Wis. Stat. 990.001(3), Section 13.124's scope necessarily includes actions in which either House will be "a party or in which [either House's] interests" will be "affected," Dkt. 31 at 22–23; Dkt. 60 at 18. Based on the Legislature's straightforward textual analysis, the Court of Appeals is likely to reverse this Court's Order.

Respectfully, the Court did not address Legislature's argument pertaining to Section 990.001(3), nowhere citing, let alone discussing, this Section in its Order. Adopting the Plaintiffs' framing, *see* Dkt. 48 at 30–31, this Court concluded that the Legislature had asked the Court to "read[ ] into the statute something that is not there," namely the words "anticipated, likely, or impending." Dkt. 63 at 15. But that is *not* what the Legislature argued. Rather, the Legislature contended that Section 990.001(3)—an explicit, black-letter interpretive principle applicable to all statutory enactments in Wisconsin—required this Court to interpret Section 13.124's present-tense verbs "is" and "are" to include the future tenses of "will be." Dkt. 31 at 22–23; Dkt. 61 at 18. And the Court also nowhere grappled with the Legislature's contention that the validity of this decennial redistricting map, as in all decades, will be "resolved through litigation." Dkt. 31 at 24 (quoting *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam)); Dkt. 60 at 19 (same).

II. A Stay Pending Appeal Is Necessary To Avoid Irreparable Harm And To Protect The Public Interest, And Will Not Harm Any Other Interested Parties, While Also Being Necessary To Maintain The Status Quo

A. In addition to the likelihood of success on the merits, a stay pending appeal is appropriate when the moving party will suffer irreparable harm absent the stay, the stay is consistent with the public interest, and the nonmoving party is unlikely to suffer substantial harm. Third LeRoy Aff., Ex. 5 at 3 n.4; *see also Gudenschwager*, 191 Wis. 2d at 440. Additionally, "[a]t times," the Supreme Court considers whether relief pending appeal is "necessary to preserve the status quo.'" *See* Third LeRoy Aff., Ex. 3 at 2; *see also Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977).

B. Here, all of these equitable factors favor a stay of the Court's decision pending appellate review.

1. Beginning with the harm to the Legislature and the public interest, the Wisconsin Supreme Court has held that "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." Third LeRoy Aff., Ex. 4 at 8. Here, the Court's decision declares unenforceable three separate bases for the Legislature's statutory authority to hire outside counsel, effectively enjoining the straightforward, textual applications of these laws. Declaring unenforceable the Legislature's previously unquestioned statutory authority to hire attorneys, which they are "entitled to," also triggers seriously "concern[ing] . . . implications" about the rights

of "constitutional officers" to "counsel of their choice." *Koschkee v. Evers*, 2018 WI 82, ¶¶ 12–13, 382 Wis. 2d 666, 913 N.W.2d 878.

Relatedly, the Court also improperly restricted the Legislature's broad constitutional authority to take all actions in furtherance of its core legislative authority and interests, particularly pertaining to decennial redistricting. *See supra* Part I.A. The Court's constitutional theory goes significantly beyond simply holding that the Legislature lacks authority to hire counsel and appears to suggest that the Legislature has no lawful authority to litigate in court even in lawsuits challenging redistricting maps. *See* Dkt. 63 at 10–11. This would destroy even more precedent than Plaintiffs ask, because the Legislature has participated in litigation pertaining to every map in the modern era, including in defense of the most recent redistricting map in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). *See, e.g.*, Dkt. 30, Exs. 1–4, 8, 17–21. This injunction, changing the long-held status quo of the Legislature's constitutional authority, *see* Third LeRoy Aff., Ex. 3 at 2, is no less of an "irreparable harm of the first magnitude" to the Legislature and public than enjoining statutory enactments, Third LeRoy Aff., Ex. 4 at 8, as it takes away a critical tool that the Legislature needs in enacting laws within the complex legal regimes related to decennial redistricting, a core, constitutional power, obligated solely to the Legislature, *see Minneapolis*, 116 N.W. at 911; Wis. Const. art. IV § 3.

The practical implications of this Court's decision also underscore the irreparable harms that the Legislature faces. Under this Court's reasoning, the Legislature would not have been able to hire counsel to represent its interests in the

recent rules-petition proceedings before the Wisconsin Supreme Court regarding the decennial redistricting cycle. *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);* Dkt. 31 at 24–25. Nor would the Legislature be permitted to retain counsel for advice on how litigation about the maps might unfold, in order to anticipate and avoid litigation, where possible. *See* Dkt. 63 at 11, 17. Rather, the Legislature would need to enter new contracts, limited to advice about the legality and design of proposed maps, a limit that infringes the Legislature's recognized interests in "efficien[cy]" in the legislative process. *Minneapolis*, 116 N.W. at 910–11 (citation omitted).

Furthermore, the Court's decision has created grave legal uncertainty about the Legislature's attorney-client relationships and confidential communications. In the immediate aftermath of this Court's decision, the Legislature received multiple requests under Wisconsin's Open Records Law, Wis. Stat. § 19.31, *et seq.*, for communications between the Legislature and these law firms. Third LeRoy Aff., Exs. 1–2. One request explicitly noted that it was requesting documents that were previously "protected by lawyer-client privilege," but which the requester argued no longer garnered such protection because this Court's decision concluded that "there was no valid lawyer-client relationship between you or your staff and the law firms ostensibly retained to represent the legislature in redistricting legislation." Third LeRoy Aff., Ex. 1 at 2; *see Wis. Newspress, Inc. v. Sch. Dist. of Sheboygen Falls*, 199

* Available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=313527 (last accessed on Apr. 30, 2021).

Wis. 2d 768, 782–83, 546 N.W.2d 143 (1996) (attorney-client privilege "still appl[ies] under the open records law"). Absent a stay, innumerable 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, and putting into legal doubt the Legislature's rights to privilege and confidentiality.

2. This significant harm to the Legislature and the public from this Court's Order significantly outweighs any possible harm to Plaintiffs from a stay pending appeal. Whatever minimal taxpayer harms Plaintiffs *might* suffer because of a temporary stay pending appellate review, *but see Pure Milk Prods. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979), those harms pale in comparison to the grave incursions imposed on the State's sovereign interests by this decision. Therefore, the balance of harms also plainly supports a stay pending full appellate review in this case.

3. Finally, a stay is necessary to preserve the status quo, Third LeRoy Aff., Ex. 3 at 2, both historically and within the context of this case. As the Legislature has explained throughout this case, for decades it has routinely engaged outside counsel for redistricting guidance (both pre- and post-filing of a challenge to the map). Dkt. 30, Exs. 1–4, 8, 17–21. And here, the Court's decision enjoins two on-going contracts for legal services, both of which provided the Legislature critical legal advice up until the moment this Court found them void *ab initio*. Dkt. 3, Exs. A–B; Dkt. 62, Ex. 1. Therefore, a stay pending appeal would preserve the status quo that

existed before the filing of this lawsuit and this Court's entry of its decision. Third LeRoy Aff., Ex. 3 at 2.

CONCLUSION

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

Dated: April 30, 2021

Respectfully Submitted,

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