No. 2021AP802

In the Supreme Court of Wisconsin

ANDREW WAITY, JUDY FERWERDA, MICHAEL JONES,
and SARA BRINGMAN,
PLAINTIFFS-RESPONDENTS,
v.
DEVIN LEMAHIEU, *in his official capacity*, *and* ROBIN VOS, *in his official capacity*,
DEFENDANTS-APPELLANTS-PETITIONERS.

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

OPENING BRIEF OF DEFENDANTS-APPELLANTS-PETITIONERS

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ISSUES PRESENTED

1. Whether Wis. Stat. § 16.74 gives the Legislature—acting though its leadership—the authority to enter into those "contract[s]" for legal "services" that the Legislature determines to be "required within the legislative branch." Wis. Stat. § 16.74(1), (2)(a)–(b).

The Circuit Court granted summary judgment to Plaintiffs, concluding that Section 16.74 does not authorize the Legislature to enter into these contracts.

2. Whether the Wisconsin Constitution gives the Legislature—acting though its leadership—the authority to enter into those contracts for legal services that the Legislature determines to be necessary for the discharge of its constitutional duties.

The Circuit Court granted summary judgment to Plaintiffs, concluding that the Wisconsin Constitution does not authorize the Legislature to enter into these contracts.

3. Whether Wis. Stat. § 20.765 gives the Legislature—acting though its leadership—the authority to enter into contracts for legal services that the Legislature determines to be required for carrying out its "functions." Wis. Stat. § 20.765(1)(a)–(b).

The Circuit Court granted summary judgment to Plaintiffs, concluding that Section 20.765 does not authorize the Legislature to enter into these contracts.

4. Whether Wis. Stat. § 13.124 gives the Legislature—acting though its leadership—the authority to obtain legal advice for impending litigation. Wis. Stat. § 13.124(1)(b), (2)(b).

The Circuit Court granted summary judgment to Plaintiffs, concluding that Section 13.124 does not authorize the Legislature to enter into these contracts.

5. Whether the Circuit Court erroneously exercised its discretion in failing to stay its summary-judgment Order pending appeal.

Although this Court has already determined that the Circuit Court's denial of the Legislature's stay motion was an erroneous exercise of discretion, App'x.501, the lower courts' continued misapplication of the stay factors justify publication of this Court's stay decision.

INTRODUCTION

This case involves a legally baseless intrusion into the basic, long-standing functions of the Legislature. The Legislature—consistent with decades of bipartisan practice—retained expert outside counsel to assist with the complicated, once-in-a-decade task of decennial redistricting. Even though three different statutes and the Wisconsin Constitution each independently authorize these contracts, the Circuit Court voided the contracts, leaving the Legislature without the counsel of its choice. The Circuit Court's conclusion is without legal merit, including because the contracts here are plainly

contracts for "contractual services" under Wis. Stat. § 16.74. This Court should thus reverse the Circuit Court's summary-judgment Order and mandate that judgment be entered in the Legislature's[1] favor.

The Legislature also respectfully requests that this Court publish its decision staying the Circuit Court's summary-judgment Order to give guidance to the bench and the bar. As the Legislature has now experienced in three cases just in the last couple of years, circuit courts are systematically denying needed stays based upon their own confidence in the correctness of their underlying decisions, in cases subject to a de novo standard of review, thereby imposing needless irreparable harm upon defendants and the people of Wisconsin. This case presents a particularly clear example of this ongoing problem, as the Circuit Court's legally meritless order deprived the Legislature of the counsel of its choice for more than two months, harming both the Legislature and the people.

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[1] Plaintiffs sued Defendants in their official capacities as leaders of the Legislature, challenging contracts that these leaders entered pursuant to their authority from each House's organizing committee, App'x128, 130, 259. Defendants thus 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 therefore refer to themselves interchangeably as both "Defendants" and the "Legislature" throughout this Brief.

ORAL ARGUMENT AND PUBLICATION

Given the importance of the issues presented, the Legislature respectfully requests oral argument and the publication of the Court's opinion.

STATEMENT OF THE CASE

A. The Legislature has long engaged outside counsel for legal advice regarding the drawing of redistricting maps. For example, in the 1980s, "throughout Wisconsin's lengthy reapportionment struggle," Democratic Party-aligned legislative leaders retained outside counsel. App'x.117. In the early 1990s, the Legislature again engaged outside counsel to assist with redistricting. App'x.180–81; *see also* App'x.135. In 2000, then-Senate Majority Leader Chuck Chvala sought authorization from the Senate Committee on Organization "to contract for consulting and legal services related to redistricting of legislative and congressional districts," noting that in "[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'x.120. Upon receiving approval, the Senate retained Boardman, Suhr, Curry & Field LLP for legal assistance in "researching and potentially litigating legislative redistricting" for the 2000 redistricting cycle. App'x.183–85; *see also* App'x.187–88 (noting Assembly hired its own firm). In 2009, the Legislature retained Michael Best & Friedrich, LLP, and Troupis Law Office, LLC "for services

related to redistricting of legislative and congressional districts." App'x.190; *see also* App'x.192–93. At the time, then-Senate Majority Leader Russ Decker reiterated that the Legislature has hired outside redistricting counsel "[e]very decade." App'x.123. In 2017, the Legislature again approved the hiring of counsel for redistricting. App'x.126, 130.

Historically, when engaging outside counsel for redistricting or other matters, the Legislature conducted a balloting procedure through either the Legislature's Joint Committee on Legislative Organization ("JCLO") or each House's own organizing committees. App'x.126, 132–54, 259.

B. In 2018, the Legislature adopted Wis. Stat. § 13.124 to create an additional, "streamlined alternative to the usual procedure," App'x.504, allowing legislative leaders of both Houses to obtain legal counsel on an expedited basis for any "actions," without purporting to displace its prior constitutional and statutory authority to hire outside counsel using the JCLO or house-committee balloting processes. Wis. Stat. § 13.124(1)(b), (2)(b). As relevant to this dispute, 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). And Section 13.124(2)(b) gives identical authority to the Senate Majority Leader, for

the Senate. Wis. Stat. § 13.124(2)(b). In other words, recently enacted Section 13.124 provides *additional* authorization to legislative leadership to obtain outside counsel for their respective Houses, without needing to submit a proposal through the traditional committee balloting procedures.

B. Most recently, the Legislature entered into two contracts, one with Consovoy McCarthy PLLC (joined by Adam Mortara) ("Consovoy"),[2] and another with Bell Giftos St. John LLC ("BGSJ"), for legislative drafting, pre-litigation advice, or both, from January 1, 2021, until the conclusion of litigation challenging the new redistricting maps (unless either party terminates the contracts at some prior time). App'x.100–02, 394–95. The Consovoy agreement provides that Consovoy will represent the Legislature "in possible litigation related to decennial redistricting," including "pre-litigation consulting." App'x.394. The BGSJ agreement provides that BGSJ will offer the Legislature "legal advice to, represent, and appear for and defend [the Legislature] on any and all matters relating to redistricting during the decennial period." App'x.100–01. Defendants signed these agreements in their official capacities, on behalf of their respective Houses, App'x.102, 398, with each House's Committee on Legislative Organization authorizing these contracts by vote,

[2] Although Plaintiffs' Complaint cited a contract signed on December 23, 2020, App'x94–99, the Legislature and Consovoy executed a revised engagement agreement on March 3, 2021, App'x394–98.

consistent with prior practice, as discussed above, App'x.128, 130, 259.

C. Plaintiffs filed this lawsuit on March 10, 2021, alleging that both contracts were "void *ab initio*" because the Legislature lacked authority to hire outside counsel before any redistricting lawsuit is filed, and asserting that the only authority allowing the Legislature to engage in such contracts was Section 13.124, which Plaintiffs claimed did not authorize these contracts. App'x.84, 87–90. Plaintiffs sought a judgment voiding these contracts, an injunction to prohibit payments on the contracts, and other relief. App'x.92–93. Plaintiffs also moved for a temporary injunction. App'x.103–04. The Legislature both opposed and moved to dismiss the Complaint. App'x.105–08, 294–326. The Legislature argued that it had four separate, independent legal bases supporting these contracts, Section 16.74, Section 20.765, and Section 13.124, and the Wisconsin Constitution. App'x.302–21.

At a hearing on the parties' motions, the Circuit Court denied Plaintiffs' motion for a temporary-injunction, converted the Legislature's motion to dismiss into one for summary judgment, and set a briefing schedule on that as-converted motion. Dkt.Entry 03-25-2021 ("Oral arguments").

The Circuit Court thereafter denied Defendants' converted motion for summary judgment and granted summary judgment to Plaintiffs, voiding the contracts. *See* App'x.16–36. In so doing, the Court rejected each of the four independent bases that the Legislature proffered in support

of its authority to enter the contracts at issue. Regarding Section 16.74, the Court concluded that these contracts are not "contracts . . . for purchase" of "contractual services" under Section 16.74, a theory that Plaintiffs never raised. App'x.32 & n.4. The Court rejected the Legislature's arguments pertaining to its constitutional authority, holding that *Service Employees International Union, Local 1 ("SEIU") v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, means that the Legislature lacks constitutional authority to obtain pre-litigation advice. App'x.21–27. The Circuit Court also held that Section 20.765 did not authorize the contracts because, in the Circuit Court's view, that Section only guarantees that "there will be money available for activities the Legislature is authorized to undertake." App'x.33–34. Finally, the Circuit Court held that Section 13.124 did not authorize the contracts at issue here, crediting Plaintiffs' interpretation of Section 13.124 as requiring that "an 'action' be pending before outside counsel may be hired." App'x.28.

D. The next day, after the Circuit Court granted summary judgment to Plaintiffs, the Legislature both moved for a stay of that decision pending appeal in the Circuit Court and appealed to the Court of Appeals. App'x.402–07. The Circuit Court denied the stay motion, including offering 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'x.8; *see* App'x.2–11, 15. As to the

Legislature's equitable arguments, the Circuit Court held that the Legislature would suffer no harm as a result of its summary-judgment decision and injunction. App'x.9–11.

E. On May 12, 2021, two days after the Circuit Court denied the Legislature's motion for a stay pending appeal, the Legislature moved for a stay pending appeal in the Court of Appeals, asking for expedited relief by May 21, 2021. Defs. Mem. In Support of Expedited Mot. For Stay Pend. Appeal at 2, No. 2021AP802 (Ct. App. May 12, 2021). The Court of Appeals declined to provide expedited relief, denying the stay motion more than a month later, on June 23, 2021, in an order by Presiding Judge Stark. One-Judge Order Denying Mot. For Stay, No. 2021AP802 (Ct. App. June 23, 2021). After the Legislature requested that a three-judge panel decide the motion for stay because a single judge had no authority to rule on the Legislature's stay motion, Judge Stark referred the stay motion to a three-judge panel (while disagreeing that she lacked authority to rule initially), which adopted Judge Stark's prior decision without additional analysis on June 29, more than two months after the Circuit Court's summary-judgment ruling. Order Denying Mot. For Stay, No. 2021AP802 (Ct. App. June 29, 2021).

F. The Legislature then moved in this Court for bypass of the Court of Appeals and a stay of the Circuit Court's Order pending appeal the very next day, on June 30, 2021. In two orders on July 15, 2021, this Court granted the Legislature's Motion For Bypass, App'x.494–95, and stayed the Circuit

Court's Order voiding the contracts *ab initio* pending the conclusion of appellate proceedings, App'x.507.

As to the Circuit Court's merits analysis, this Court held that the Circuit Court improperly "treated [the strong showing of a likelihood of success on appeal] factor as a stand-alone prerequisite" without considering "whether defendants had demonstrated 'more than the mere possibility' of success on the merits." App'x.502. The Circuit Court "completely failed to understand that the analysis of likelihood of success on appeal in the context of a stay motion is substantively different from the analysis of likelihood of success on the merits it had previously performed in deciding to grant a permanent injunction to the plaintiffs." App'x.502. Finally, this Court concluded that the Legislature's arguments on appeal regarding Section 16.74 had "considerably 'more than the mere "possibility" of success on the merits,'" and thus the Court need not analyze the Legislature's other, independent merits arguments. App'x.505 & n.14.

As to the equities, the Circuit Court made the mistake of "engag[ing] in the same harms analysis that it used when it granted the permanent injunction to the plaintiffs." App'x.505. In doing so, "the circuit court never considered whether the harms could be undone or unwound by an appellate court at the end of the appeal." App'x.506. Finally, this Court concluded that the Legislature would suffer harm through the "inability to have counsel of [its] choice," "especially in the context of the highly specialized and

complex area of redistricting law," and that such harm "will be significant and unremedied" absent a stay. App'x.505–06.

SUMMARY OF ARGUMENT

I. Section 16.74 authorizes the contracts given that it gives the Legislature the statutory authority to enter into any contract for "required" services. Wis. Stat. § 16.74(1), (2)(b). These contracts between the Legislature and outside counsel for legal *services* fall squarely within this broad grant of contracting authority. The Circuit Court's contrary interpretation imposes an atextual limitation on Section 16.74 that appears nowhere in the statutory text. Similarly meritless are all of the different, ever-changing arguments that Plaintiffs have made with regard to Section 16.74.

II. The Wisconsin Constitution also independently authorizes these contracts, as the Legislature has determined—consistent with decades of uniform, bipartisan practice—that obtaining sophisticated legal advice regarding the once-in-a-decade decennial redistrict process is necessary for it to carry out its constitutional duties. The Circuit Court's conclusion that the contracts violate the separation of powers is plainly incorrect, as the Legislature obtaining pre-litigation advice on redistricting in no way interferes with or burdens the authority of either the Attorney General or the Governor.

III. Section 20.765 also authorizes the contracts because they are expenditures of the Legislature's "sum sufficient" appropriation to carry out its "functions," Wis.

Stat. § 20.765(1)(a)–(b), which include the engagement of outside counsel for redistricting services. The Circuit Court's contrary holding contradicts the statutory text and misreads this Court's decision in *State ex rel. Moran v. Department of Administration*, 103 Wis.2d 311, 307 N.W.2d 658 (1981).

IV. Section 13.124, when read in conjunction with Section 990.001(3), also authorizes these outside-counsel contracts. When read with Section 990.001(3)'s instruction that "the present tense of a verb includes the future when applicable," Wis. Stat. § 990.001(3), Section 13.124 authorizes the Legislature to engage in this streamlined process not only after an action has been filed, but when the Legislature concludes that it will be a "party" to, or will have its "interests" implicated by, an imminent lawsuit. Wis. Stat. § 13.124(1)(b), (2)(b); Wis. Stat. § 990.001(3). There has never been any doubt that a redistricting lawsuit is impending, and such an action has now, in fact, been filed. *See* Compl., *Hunter v. Bostelmann*, No. 21-cv-512, Dkt.1 (W.D. Wis. Aug. 13, 2021).

V. Finally, even though this Court has overturned the Circuit Court's erroneous denial of the Legislature's motion for a stay pending appeal, the Legislature respectfully requests that this Court issue a published decision on this issue. As events in this case, *League of Women Voters*, and *SEIU* make clear, circuit courts continue improperly to deny stays pending appeal, thereby imposing irreparable harm on the Legislature and the people.

STANDARD OF REVIEW

This Court reviews an order granting summary judgment de novo. *Jackson v. Wis. Cty. Mut. Ins. Corp.*, 2014 WI 36, ¶ 18, 354 Wis. 2d 327, 847 N.W.2d 384. This appeal raises issues of constitutional and statutory interpretation, which this Court reviews de novo. *League of Women Voters of Wis. ("LWV") v. Evers*, 2019 WI 75, ¶13, 387 Wis. 2d 511, 929 N.W.2d 209; *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. This Court reviews a circuit court's denial of a stay pending appeal "under an erroneous exercise of discretion standard." *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995).

ARGUMENT

I. Section 16.74 Independently Authorizes The Legislature To Enter Into Contracts For All "Contractual Services," Which Plainly Includes The Two Legal-Services Contracts Here

A. These Two Contracts Fall Squarely Within Section 16.74's Authorization

1. Section 16.74 permits the Assembly and the Senate to engage in "[c]ontracts for purchases" "signed by an individual designated by the organization committee of the house making the purchase." Wis. Stat. § 16.74(2)(b). Either House's designated individual may "purchase[ ]" "[a]ll supplies, materials, equipment, permanent personal property[,] and *contractual services required within the*

legislative branch." Wis. Stat. § 16.74(1) (emphasis added). Furthermore, the statute defines "[c]ontractual services" broadly to "include[ ] *all* services," as well as all "materials to be furnished by a service provider in connection with services," Wis. Stat. § 16.70(3) (emphasis added), thereby necessarily including legal and other professional services.

A similar statutory scheme applies to the Department of Administration's ("DOA") purchase of all services, including contractual services, as Section 16.71 gives authority to the DOA or its designees to make purchases for "all agencies." Wis. Stat. § 16.71. The lists in Sections 16.71 and 16.74 are nearly identical, with both authorizing the purchase of "contractual services." Section 16.71 notes that the DOA's authority does not apply where "otherwise . . . authorized in s. 16.74." Thus, it follows that Section 16.71 authorizes the executive branch's purchase of legal "contractual services," and Section 16.74 does the same for the legislative and judicial branches. App'x.504.

2. Section 16.74 independently authorizes the two outside-counsel contracts at issue here. These contracts qualify as "[c]ontracts for purchases" of "contractual services," since they secure professional legal services for the Legislature. Wis. Stat. § 16.74(1), (2)(b). The statutes broadly define "contractual services," a "stand-alone item," App'x.504, as including "*all* services," Wis. Stat. 16.70(3), thereby including *legal services*.

The legislative leaders who are Defendants here signed these contracts, App'x.94–102, following the statutory requirements, *see* Wis. Stat. § 16.74(2)(b). Outside counsel's services are "required within the legislative branch" here, Wis. Stat. § 16.74(1), given that Defendants lawfully and correctly determined that, in this "highly specialized and complex area of [ ] law," the Legislature "require[s]" outside counsel advice to complete its constitutional functions effectively, App'x.505–06; *accord Koschkee v. Evers*, 2018 WI 82, ¶ 13, 382 Wis. 2d 666, 913 N.W.2d 878; *see also State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 13, 334 Wis. 2d 70, 798 N.W.2d 436 (refusing to "intermeddle" in "purely legislative concerns"). That should have been the beginning and end of this case.

B. The Circuit Court's Contrary, *Sua Sponte* Interpretation Of Section 16.74 Is Wrong

The Circuit Court erroneously held that Section 16.74's authorization for the Legislature to obtain "contractual services" applies *only* to those contractual services that "relate to, or [are] required by the purchase of 'supplies, materials, equipment [or] personal property.'" App'x.32. Under this reading, the Legislature may contract to install equipment for its legislative offices, but not to hire any professional services, such as legal services. App'x.32.[3]

[3] The issue of whether Section 16.74 authorizes the Legislature to enter into contracts for legal services is one that the Circuit Court

The Circuit Court's position is entirely atextual. "[T]he circuit court's interpretation would essentially insert the word 'accompanying' in front of 'contractual services' in order to tie that term to each of the preceding terms." App'x.504. But "[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's "plain language [ ] makes clear that the legislature's plain meaning applies broadly," *id.* ¶ 20, and authorizes *any* service contracts "required" by the Legislature, such as the outside-counsel contracts at issue here, Wis. Stat. § 16.74(1)–(2). Not a word in Section 16.74 provides that the term "contractual services" is limited in any way by "supplies, materials, equipment, [and] permanent personal property." Wis. Stat. 16.74(1).

The Circuit Court's apparent reliance on the canon of *noscitur a sociis*, App'x.32 ("words 'contractual services' must

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improperly injected into this case. Plaintiffs did not argue the scope of the term "contractual services" during their summary-judgment briefing, and, instead, based their Section 16.74 arguments upon certain claimed procedural violations, which the Legislature comprehensively rebutted, *see infra* pp. 21–23. The Circuit Court "[e]lect[ed] not to address th[at] party-presented controversy," *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020), and, instead, "step[ped] out of [its] neutral role to develop or construct arguments for parties," *SEIU*, 2020 WI 67, ¶ 24. While the Circuit Court stepping out of its "neutral role," *id.*, would normally justify reversal on that basis alone, this Court granted bypass in this case, which involves "novel" legal questions of "statewide impact" that only this Court can settle. Wis. Stat. § (Rule) 809.62(1r)(c)2. The Legislature thus urges this Court to resolve all of the Issues Presented in this case on their merits.

be read in conjunction with what comes before that phrase"), is similarly misplaced. The *noscitur a sociis* canon is only available to discern the meaning of "an unclear statutory term." *Benson v. City of Madison*, 2017 WI 65, ¶ 31, 376 Wis. 2d 35, 897 N.W.2d 16. A statutorily defined term, such as "contractual services," Wis. Stat. § 16.74(1); Wis. Stat. § 16.70(3), is clear, and courts must give such defined words their "special definitional meaning," *Kalal*, 2004 WI 58, ¶ 45. Only "in the absence of an applicable statutory definition," *Dep't of Revenue v. Trudell Trailer Sales, Inc.*, 104 Wis. 2d 39, 42, 310 N.W.2d 612 (1981), are such canons relevant, *see State v. Peters*, 2003 WI 88, ¶ 14, 263 Wis. 2d 475, 665 N.W.2d 171 ("Rules of statutory construction are inapplicable if the language of the statute has a plain and reasonable meaning on its face.").

Even if the *noscitur a sociis* canon had any relevance here, the Circuit Court's conclusion does not follow. This 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), by instructing 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). In this context, "contractual services" is not a term of "more comprehensive meaning" than the other terms listed in

Section 16.74, *Lewis Realty*, 6 Wis. 2d at 108, but is instead a term "of equal dignity," *see Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 101, 382 Wis. 2d 496, 914 N.W.2d 21. The least common denominator in Section 16.74(1)'s list is—of course—"required within the legislative branch," and the Legislature here properly determined that these "contractual services" met that qualifier. *See supra* pp. 14–15.

The Circuit Court's interpretation also creates the "absurd" and "unreasonable result[ ]," *Kalal*, 2004 WI 58, ¶ 46, of mandating the conclusion that even the judiciary has no authority to enter into contracts for professional services. Section 16.74 also provides for the "purchases" of "[a]ll supplies, materials, equipment, permanent personal property and *contractual services required within the judicial branch*." Wis. Stat. § 16.74(1) (emphasis added). Following the Circuit Court's logic, if "contractual services" is limited to only services which "relate to, or [are] required by the purchase of 'supplies, materials, equipment [or] personal property,'" App'x.32, Wisconsin courts would lack the authority to enter into professional-services contracts. In drafting and enacting Section 16.74, the Legislature plainly did not intend to produce such an "absurd" and "unreasonable result[ ]." *Kalal*, 2004 WI 58, ¶ 46. A similar logic would apply to the DOA's authority to purchase "contractual services" for administrative agencies under Section 16.71, *see supra* p. 14, deepening the absurdity of the Circuit Court's reading.

The Circuit Court also suggested that these outside-counsel contracts "impermissibly infringe[ ] on the core power of the executive branch to enforce the laws," and therefore cannot be authorized under Section 16.74. App'x.33. The plain text of a statute does not change due to such vague, ill-defined constitutional concerns. *See League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶¶ 16–17, 357 Wis. 2d 360, 851 N.W.2d 302. Regardless, and as further discussed below, *infra* Part II, the Constitution independently authorizes these contracts as part of the Legislature's authority to carry out its lawmaking and redistricting responsibilities. But, at the very minimum, there is no plausible argument that the Constitution somehow *prohibits* the Legislature from entering into such contracts, under Section 16.74, after making the entirely sensible and correct determination that obtaining expert legal counsel is needed to provide advice on the "once-every-decade issue of redistricting." App'x.506–07.

C. The Various Section 16.74 Arguments That Plaintiffs Have Raised In This Case Are Wrong

In their stay briefing during this appeal, Plaintiffs went beyond even the Circuit Court's reading of Section 16.74, contending that Section 16.74 authorizes no contracts whatsoever because it was "never . . . meant to confer authority" at all. Pls.-Resp'nts Br. In Opp. to Defs. Exp. Pet. For Bypass & Exp. Mot. For Stay Pend. Appeal at 39,

No.2021AP802 (Wis. July 7, 2021). But Section 16.74 clearly authorizes the Legislature—as well as the "judicial branch"—to engage in contracts for "*all* services," via specific procedures. Wis. Stat. §§ 16.70(3), 16.74(1) (emphasis added). Plaintiffs' position would also lead to absurd results, *Kalal*, 2004 WI 58, ¶ 46, including that both the Legislature and the judicial branch could not purchase *any* "supplies, materials, equipment, permanent personal property and contractual services," unless they could point to *other* statutory or constitutional authorization. Apparently, Plaintiffs' view is that Section 16.74 does not even authorize the Legislature or the courts to enter into contracts for pens and notepads. And, since Section 16.71 uses the same terms for the DOA's purchases for "all agencies," the DOA and its agents would have no authority to make such purchases either, deepening the absurdity of Plaintiffs' position. *Kalal*, 2004 WI 58, ¶ 46.

Plaintiffs have also argued that Section 16.74 is inapplicable because Section 13.124's language is more specific. App'x.481. That argument has no textual or logical basis. Section 16.74 has for decades authorized the Legislature to enter into contracts for "supplies, materials, equipment, property or services" through JCLO's "designated" contracting individuals. Wis. Stat. § 16.74(1), (2)(a)–(b). Enacted only in 2018, Section 13.124 now provides the Legislature with a "streamlined alternative to the usual procedure," App'x.504–05, to engage legal services when such expedition is needed without going through JCLO, *see* Wis.

Stat. § 13.124(1)(b), (2)(b). Plaintiffs' contention is that Section 13.124 impliedly repeals some aspects of Section 16.74's longstanding authorization to enter into contracts for "services," including "contractual" services. But implied repeals are highly "disfavored." *See State v. Villamil*, 2017 WI 74, ¶ 37, 377 Wis. 2d 1, 898 N.W.2d 482; *see also, e.g.*, *Krueck v. Phoenix Chair Co.*, 157 Wis. 266, 147 N.W. 41, 43 (1914); *accord* Scalia & Garner, *supra*, at 327. Plaintiffs present nothing that would overcome that extremely high bar and fail entirely to grapple with why the Legislature would take such an "unusual" action as to limit, *sub silencio*, its own long-exercised authority. App'x.505.

Finally, turning to the arguments that Plaintiffs made before the Circuit Court with regard to Section 16.74, all of these arguments were entirely meritless, which is why even the Circuit Court did not rely upon them.

Plaintiffs argued below that the Legislature failed to follow standard Section 16.74 procedures in submitting payment requests on the disputed contracts, App'x.352–53, but the unrebutted affidavit of Senate Business Manager Meggan Foesch—who has been processing payments for the Senate for thirteen years—demonstrated that "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'x.388. For all such bills—

including the bills under the contracts here—each House provides the State's PeopleSoft software with "the name of the bill payee"; "the invoice number"; "the invoice date"; "the dollar amount"; and "an accounting code for the bill, which code" the PeopleSoft program provides. App'x.384–86. After submission of the bill through PeopleSoft, the program automatically forwards that bill to the Chief Clerk of the House for his approval, and, after that approval, PeopleSoft automatically submits the bill or statement to the DOA, which runs an automatic batch process to pay the expenditure, either via electronic payment or by mailing a physical check. App'x.384–85. "No part of the bill-paying process for the outside-counsel contracts at issue here was unusual or different in any respect." App'x.388.

No better or more relevant was Plaintiffs' argument that Section 16.74 requires the DOA to audit all bills before authorizing payment. *See* App'x.352. Nothing in Section 16.74(4) conditions "authorize payment" on any "audit," but merely states that the DOA "shall audit and authorize payment," without a discussion on the order in which those duties should occur. Wis. Stat. § 16.74(4). In any event, Plaintiffs do not explain how the *DOA's* obligation to "audit" could impact the *Legislature's* statutory authority to procure legal services under this Section. *See* Wis. Stat. § 16.74(1), (2)(a).

As their final Section 16.74 argument below, Plaintiffs offered a series of disconnected claims that the Legislature

failed to comply with its own internal procedures and internal policy manuals in entering into these contracts. App'x.347–52. The Legislature explained below why each of these assertions is meritless, App'x.377–78, but this Court need only look to the principle that disagreements with internal legislative procedures are beyond the courts' jurisdiction, *In re John Doe Proceeding ("LTSB")*, 2004 WI 65, ¶ 28, 272 Wis. 2d 208, 680 N.W.2d 792; *Ozanne*, 2011 WI 43, ¶ 13.

II. The Constitution Independently Authorizes These Outside-Counsel Contracts

A. The Constitution Authorizes The Legislature To Enter Into Contracts To Obtain Expert Legal Advice On Redistricting

1. This Court generally looks to three categories of "intrinsic as well as extrinsic sources" to interpret the Wisconsin Constitution 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, "the plain meaning of the words [of the Constitution] in the context used." *Id.* (citation omitted); *Catholic Schs. v. Labor & Indus. Rev. Comm'n*, 2009 WI 88, ¶ 57, 320 Wis. 2d 275, 768 N.W.2d 868 (citing *Kalal*, 2004 WI 58, ¶ 44). Second, "historical" sources, namely "the 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). Finally, "what the people understood the purpose of the [constitutional provision] to be." *Id.* (citation omitted).

The Constitution "diffus[es]" the state government's power into "three separate branches": "legislative, executive, and judicial." *SEIU*, 2020 WI 67, ¶¶ 1–2; *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384. "Legislative power is the power to make the law, to decide what the law should be." *SEIU*, 2020 WI 67, ¶ 1. "Executive 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.*

When the Constitution vests the branches of government with core powers, it thereby gives each branch all "authority . . . appropriate to achieve the ends for which they were granted [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)). When a branch's power is "core," that means "no other branch may take it up and use it as its own." *SEIU*, 2020 WI 67, ¶ 35 (citations omitted). "Shared powers" constitute the constitutional "borderlands" between the branches' core powers, with the result that multiple "branches may exercise [these] power[s]." *Id.* (citation omitted). "Implied power" in the Constitution "is an *incident of* [the] general power" of that which the Constitution expressly

grants. *State v. Regents of Univ. of Wis.*, 54 Wis. 159, 11 N.W. 472, 477 (1882) (emphasis added). In other words, the Constitution authorizes each branch to conduct those "activities [that] are appropriate to legislatures, to executives, and to courts." *Gabler*, 2017 WI 67, ¶ 6 n.4 (citation omitted); *accord LWV*, 2019 WI 75, ¶ 32.

Central to this dispute is the Legislature's grant of constitutional authority. Article IV, Section 1, "vest[s]" the Legislature with "legislative power," Wis. Const. art. IV, § 1; *SEIU*, 2020 WI 67, ¶¶ 1–2, including 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. This contains the power 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*, 2019 WI 76, ¶ 11 (citation omitted); *State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 941 (1928) (describing this power as "vested"). This also entails the 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. And under Article IV, Section 3, the Legislature must 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 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, 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). The Legislature thus has the constitutional authority to "use *any* means, appearing *to it* most eligible and appropriate," so long as such means are "consistent with the letter and spirit of the Constitution," "[i]n the exercise of [its] general power of legislation." *Id.* (emphases added; citation omitted). The means that the Legislature selects are part of its "internal operating rules" or "procedur[es]" to structure its own internal business. *Ozanne*, 2011 WI 43, ¶ 13 (citation omitted); *accord LWV*, 2019 WI 75, ¶¶ 36, 39. Thus, consistent with "the comity and respect due a co-equal branch of state government," *LWV*, 2019 WI 75, ¶ 36, the judiciary should "not intermeddle" with the means chosen and employed by the Legislature, *Ozanne*, 2011 WI 43, ¶ 13 (citation omitted).

In exercising its broad grant of "power to make law," the Legislature takes multiple steps, *SEIU*, 2020 WI 67, ¶ 1, each of which are needed for the "efficient exercise" of its core lawmaking power, *Minneapolis,* 116 N.W. at 910–11. Most relevant here, the Legislature conducts "activities [that] are appropriate to legislatures," *Gabler*, 2017 WI 67, ¶ 6 n.4 (citations omitted), to determine the factual and legal

foundation that is "frequently necessary" in "the process of enacting a law," *Minneapolis,* 116 N.W. at 911.

2. The legal-services contracts at issue in this case fall squarely within the Legislature's inherent constitutional authority, attendant to its core and shared powers. Prior to Plaintiffs' filing of this action, and pursuant to its core legislative and redistricting powers, the Legislature began conducting the process of decennial redistricting for the State. The Legislature concluded, as it has for decades, *supra* pp. 4–5, that the "most eligible and appropriate" means to complete redistricting, *Minneapolis,* 116 N.W. at 910 (citation omitted), include seeking the guidance of sophisticated outside counsel to offer map-drawing and prelitigation advice. The Legislature then entered into the two outside-counsel contracts at issue here to secure such advice and counsel. *Supra* pp. 6–7.

The Legislature has determined, through its leadership, that the two contracts here are the most "efficient exercise" by which it can conduct redistricting. *Minneapolis,* 116 N.W. at 910–11. The hiring of outside legal counsel allows the Legislature to "determin[e] the best methods" and "manner" of "meet[ing] the needs of the public" while remaining within the bounds of the Constitution. *See Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 540, 576 N.W.2d 245 (1998) (citations omitted); *Mayo*, 2018 WI 78, ¶¶ 15, 31.

The need for such outside counsel is especially clear for complex areas of the law like the decennial redistricting at

issue here. Redistricting requires the Legislature to draw maps for the entire State while navigating a plethora of laws, including state laws, federal statutory requirements, *see, e.g.*, 52 U.S.C. §§ 10301, 10304; *Cooper v. Harris*, 137 S. Ct. 1455, 1464–66 (2017), and the U.S. Constitution's "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). Given that the consequences for map-drawing errors can include invalidation of a district or, in extreme cases, the entire map, pre-litigation advice is necessary to ensure that the Legislature's maps are able to survive a litigation challenge. *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶ 10, 249 Wis. 2d 706, 639 N.W.2d 537 (per curiam).

The contracts here are also consistent with the Legislature's "historical practices." *State v. Schwind*, 2019 WI 48, ¶ 13, 386 Wis. 2d 526, 926 N.W.2d 742; *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 111 N.W. 712, 717 (1907). The Legislature has engaged outside counsel for the redistricting process for decades, as discussed in more detail in the background section of this Brief. *See supra* pp. 4–5. Legislative leaders engaged outside counsel during reapportionment in the 1980s, App'x.117; the 1990s, App'x.180–81; *see also* App'x.135; the 2000s, App'x.183–85, and the 2010s, App'x.190; *see also* App'x.192–93. The two outside-counsel contracts at issue here fall squarely within the Legislature's decades-long history of engaging with outside counsel through the redistricting process under

indistinguishable circumstances. *See Samuelson*, 111 N.W. at 717 (historical practice over "a quarter of a century" is "a long [enough] period of time").

B. The Circuit Court's Contrary Holding Was Wrong

The Circuit Court incorrectly concluded that the Legislature's constitutional argument failed because the separation of powers provides that, "[g]enerally, the executive branch, not the legislature, participates in litigation as part of its enforcement authority." App'x.23. The Circuit Court's assessment misunderstands the branches' roles in lawmaking in general, redistricting, in particular, and misinterprets this Court's case law.

The Legislature obtaining redistricting experts to help in the map drawing process, including for map drawing and pre-litigation advice, does not burden any other branch. Plaintiffs' claim is that the Legislature has no authority to engage outside counsel *prior to* any court action being filed. App'x.88–90. The Attorney General and the Governor have no constitutional role in providing guidance to the Legislature with respect to how the Legislature will choose to draw the maps for the State, including how to ensure that those maps will survive an inevitable redistricting lawsuit. While, of course, the Legislature can choose to consult with the Governor or the Attorney General during the map-drawing process, those officers suffer no constitutional burden

whatsoever if the Legislature determines for itself how best to carry out its law-making function in this area of law.

In any event, the Legislature's defense of the maps that it adopts in court—including preparation for such a defense—would not "unduly burden" or "substantially interfere" with the powers of the Governor or the Attorney General. *SEIU*, 2020 WI 67, ¶ 35. When the Legislature defends a law, that defense does not require the Attorney General to withdraw, but permits *both* the Legislature and the Attorney General to defend the law. This happened during the last redistricting cycle, where the Legislature and the Attorney General both defended the prior Assembly maps, including in briefing and oral argument before the U.S. Supreme Court. *See Gill v. Whitford*, 138 S. Ct. 1916 (2018). Thus, the Legislature defending the laws it enacts—including redistricting laws—falls squarely within the "[s]hared powers" that constitute the broad constitutional "borderlands" between the branches, such that multiple "branches may exercise [these] power[s]." *SEIU*, 2020 WI 67, ¶ 35 (citation omitted).

In reaching its contrary conclusion, the Circuit Court relied heavily on this Court's decision in *SEIU*, reading that case as standing for the proposition that most efforts by the Legislature to prepare to defend its laws would "substantially interfere[e] with the executive branch." App'x.23–26. *SEIU* says nothing of the sort, as this Court made clear in *Democratic National Committee ("DNC") v. Bostelmann*, 2020 WI 80 ¶ 6, 394 Wis. 2d 33, 949 N.W.2d 423. Not a word

in *SEIU* discusses the Legislature's authorization to engage outside counsel for advice on proposed legislation, redistricting map-drawing, or pre-litigation counsel, or supports the premise that the Legislature's preparation for the defense of its duly enacted laws in court, including redistricting laws, would violate the Attorney General's or the Governor's authority. *SEIU*, 2020 WI 67, ¶ 35.

III. Section 20.765 Independently Authorizes These Contracts Under The Legislature's Power To Spend "A Sum Sufficient" To Carry Out Its Functions

A. Section 20.765 provides both Houses of the Legislature with "[a] sum sufficient to carry out the functions of the assembly [and the senate]." Wis. Stat. § 20.765(1)(a)–(b). "Sum sufficient appropriations . . . are appropriations which are expendable from the indicated source in the amounts necessary to accomplish the purpose specified" in the appropriation itself. Wis. Stat. § 20.001(3)(d). A sum-sufficient appropriation is an uncapped sum of money provided to a government body for use as governed by the terms of the appropriation. *See id.* Thus, Section 20.765 provides the Legislature with an uncapped, sum-sufficient appropriation of money "to carry out the functions of the assembly [and senate]." Wis. Stat. § 20.765(1)(a)–(b). Although the Legislature may receive specific appropriations from other statutes, such as funds for auditing services requested by state agencies or by the federal government, Wis. Stat. § 20.765(3)(ka), or "legislative expenses for

acquisition, production, retention, sales and distribution" of certain authorized legislative documents, Wis. Stat. § 20.765(1)(d), among others, this sum-sufficient appropriation under Section 20.765 is separate.

B. The Legislature's outside-counsel contracts here fall squarely within Section 20.765's uncapped appropriation of money used "to carry out the functions of the assembly [and senate]." Wis. Stat. § 20.765(1)(a)–(b). Because the Legislature determines what its own functions are under the statute, the fact that it appropriated money to engage outside counsel is conclusive evidence that such an act is a "function[ ] of" the Legislature. *See id.*; *see also Ozanne*, 2011 WI 43, ¶ 13 (refusing to "intermeddle" in "purely legislative concerns"). And even if this Court were to review the Legislature's conclusion that these contracts fall within the Legislature's "functions," given the importance of counsel to the operations in the "highly specialized and complex area of redistricting law," the Legislature's hiring of skilled counsel to draft, evaluate, and prepare to defend "the once-every-decade issue of redistricting," App'x.505–06, is unmistakably a "function[ ] of" the Legislature, Wis. Stat. § 20.765(1)(a)–(b); *accord* Wis. Const. art. IV, §§ 1, 3; *Koschkee*, 2018 WI 82, ¶ 13.

C. The Circuit Court erroneously concluded that Section 20.765 does not itself provide [any] authority" to engage in any activities, such as hiring outside counsel for redistricting matters, so any such authority "must be found in the Constitution or some other statutory provision." App'x.33–34.

On the statutory text, as discussed above, Section 20.765 provides the Legislature with a "sum sufficient" appropriation to support *all* "functions of the" Legislature, which "functions" the statute does not delineate or limit in any way, and it does not require that the Legislature point to any further constitutional or statutory authorization to spend these funds. Wis. Stat. § 20.765(1)(a)–(b). Notably, the Circuit Court nowhere explained why engaging counsel for advice and guidance on matters related to decennial redistricting fell outside of the Legislature's functions. *See* App'x.33–34. Indeed, even Plaintiffs conceded before the Circuit Court that hiring outside counsel is "a 'function' of the Assembly and of the Senate." App'x.345–46.

Moreover, and contrary to the Circuit Court's reasoning, App'x.34–35, this Court's decision in *Moran* supports—or, at the minimum, does nothing to undermine—the Legislature's reading of Section 20.765. In *Moran*, this Court took an appropriately expansive view of inherent constitutional power, *Moran*, 103 Wis. 2d at 317—bolstering the Legislature's constitutional arguments, *supra* Part II, and supporting deference to the Legislature's understanding of its own functions. This Court then held, as a statutory matter, 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, because the Legislature is responsible for

administering its own sum-sufficient appropriations, *see* Wis. Stat. § 20.765(1), it determines whether the "expenditure . . . falls within the terms of the appropriation," *Moran*, 103 Wis. 2d at 319. And because the Legislature deemed it necessary to engage outside counsel for the complex decennial redistricting process, that determination suffices to show that the contracts "fall[ ] within," *id.*, the "functions" of the Legislature, Wis. Stat. § 20.765.[4]

IV. Section 13.124, When Read With Section 990.001(3), Independently Authorizes These Contracts

A. Section 13.124 allows legislative leaders to engage outside counsel, on behalf of the Assembly or the Senate, in their "*sole* discretion." Wis. Stat. § 13.124(1)(b), (2)(b) (emphasis added). The statutes authorize legislative leaders to enter into an agreement with outside-counsel when Defendants alone "determine[ ]" that an "interest" of their House is "affected" or when the House is simply "a party" to an action. Wis. Stat. § 13.124(1)(b), (2)(b).

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[4] In a footnote, the Circuit Court claimed that the Legislature's passing of Section 13.124 undercut its argument that Section 20.765 gave it authority to engage counsel. App'x.35 n.5. But Section 13.124 provides the Legislature with a streamlined process to quickly engage outside counsel when necessary, avoiding the customary joint committee processes by allowing legislative leadership to enter such agreements themselves. *See* Wis. Stat. § 13.124(1)(b), (2)(b). Section 20.765, on the other hand, permits either House to determine, as a unit, that various expenditures—such as legal services or otherwise—would aid the functions of that House. Wis. Stat. § 20.765(1)(a)–(b).

Section 13.124(1)(b) instructs 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). And for the Senate, Section 13.124(2)(b) states 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).

Section 13.124 thus enables the Houses, through their leadership, to avoid the delays that can sometimes occur from the Legislature's more-standard practice of submitting proposed authorizations for the hiring of outside counsel to the JCLO ballot procedure or individual House organization committees, *see supra* pp. 5–6, by allowing a "streamlined alternative to the usual procedure," App'x.504–05.

Sections 13.124(1)(b) and (2)(b), when read in conjunction with Wis. Stat. § 990.001(3), authorize legislative leaders to contract with outside-counsel, not only when faced with a *commenced* "action," but also any *imminent* "action." Wis. Stat. § 13.124(1)(b), (2)(b). Section 990.001(3) instructs

that a statute's use of "the 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 verbs "is" and "are" to show that legislative leaders may engage 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'"). Thus, Section 13.124, when properly interpreted through the lens of Section 990.001(3), explicitly allows leaders to hire outside counsel "in any action" in which the Houses *will be* "a party or in which the interests" of the Houses *will be* "affected." Wis. Stat. §§ 13.124(1)(b), (2)(b), 990.001(3). To take just one obvious example, if the Legislature receives a demand letter saying that a plaintiff will file a lawsuit tomorrow seeking emergency relief in court, the Legislature, through its leaders, need not wait until the lawsuit is filed to retain outside counsel and begin planning its litigation defense.

B. Defendants had authority to enter into the two outside-counsel contracts at issue here, under Section 13.124, to "obtain legal counsel other than from the department of justice." Wis. Stat. § 13.124(1)(b), (2)(b); App'x.94–102.[5]

[5] While the Legislature did not intend to use this provision to engage in these contracts, as evidenced by the fact that both Houses went through their formal committee processes, *see* App'x.128, 130, 259, Section 13.124 still independently authorizes these agreements.

There was never any doubt that such a redistricting action was imminent, *Jensen*, 2002 WI 13, ¶ 10, and such a suit has now been filed, as all knew it would be, *see* Compl., *Hunter v. Bostelmann*, No. 21-cv-512, Dkt.1 (W.D. Wis. Aug. 13, 2021).

That redistricting litigation was certainly impending when the Legislature entered into these contracts is well-illustrated by the rules petition that was then pending before this Court. *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).[6] The Legislature—represented by one of the outside redistricting counsel engaged by the Legislature in the agreements at issue here—submitted a public comment and appeared before this Court at its public hearing in support of that petition. *See 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);[7] *Draft Agenda for Wisconsin Supreme Court Rules Hearing For Jan. 14, 2021* (Jan. 13, 2021).[8]

C. In concluding that Section 13.124 does not authorize these outside-counsel contracts, the Circuit Court appeared to

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[6] Available at https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=313527 (all websites last visited Aug. 16, 2021).

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

[8] Available at https://www.wicourts.gov/supreme/docs/2003_2004draftagenda.pdf.

misinterpret the Legislature's argument. The Circuit Court did not even mention Section 990.001(3), *see* App'x.28–31, instead concluding that the Legislature asked it to read the words "anticipated, likely, or impending" into the statute before the word "action," App'x.30–31. This is not the Legislature's argument. Section 13.124 *must* be read through Section 990.001(3)'s explicit command, requiring Section 13.124's present-tense verbs "is" and "are" to include the future tenses of "will be," App'x.317–18, 380, meaning that the statute also allows the Legislature to engage counsel for not-yet-filed actions, as in the contracts at issue here, in which a House *will be* a party or in which its interests *will be* affected.

V. This Court Should Publish A Precedential Opinion That Makes Clear That What Occurred Here—Where A Defendant That Has Strong Merits Arguments Must Suffer Months Of Irreparable Harm Before Obtaining Stay Relief—Should Not Occur Again

The last Issue Presented in this case is "[w]hether the Circuit Court erroneously exercised its discretion in failing to stay its summary-judgment Order pending appeal." *See supra* p. 2. This Court already provided its answer in its stay decision, holding that "the circuit court erroneously exercised its discretion . . . in failing to apply the proper legal analysis under [the stay] factors. App'x.502. However, given that circuit courts continue to deny improperly stays pending appeal, and given what transpired in this case, the

Legislature respectfully requests that this Court issue a published decision on this last Issue Presented.

A. The present case is one of three recent cases just involving the Legislature where circuit courts have improperly denied stays pending appeal because of their own misplaced confidence in the correctness of their underlying decisions, thereby causing wrongful, irreparable harm to the Legislature and the people.

In *LWV*, a circuit court enjoined all actions that the Legislature had taken during the December 2017 extraordinary session and then denied the Legislature's motion for stay of the injunction pending appeal, holding 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'x.38–39, 44. On appeal, the Legislature successfully moved for an emergency stay of the injunction pending appeal from the Court of Appeals, App'x.39–40, and this Court upheld and expanded the stay, App'x.40, 46–47. This Court determined that because the circuit court was only "the first word, not the last, on the interpretation of the relevant constitutional provisions and statutes," it failed 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." App'x.44. When "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'x.44 n.8.

While the Court of Appeals acted with dispatch in initially staying the Circuit Court's *LWV* order, issuing the stay within five days, App'x.39–40, that proved insufficient to prevent irreparable harm to the Legislature and the people. During just the short period where the *LWV* order remained in effect, the Governor purported to fire numerous individuals, whose nominations the Legislature had confirmed during the extraordinary session. The Court of Appeals declined to remedy the Governor's actions, and it took actions from this Court to put those individuals back in their public-service jobs more than a month after the Governor's unlawful firings. App'x.39. Had the Circuit Court properly stayed its own order, these harms to the Legislature, the appointees, and the people would not have taken place.

In *SEIU*, a circuit court also enjoined several of the laws that the Legislature enacted during the December 2017 extraordinary session, and that circuit court also denied the Legislature's motion to stay pending appeal, claiming 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." App'x.51–54. This Court reversed the circuit court's denial, granting the Legislature's motion for stay of injunction pending appeal, App'x.55–57, 60, and holding that the circuit court again "improper[ly]

conflat[ed]" its assessment of the plaintiff's likelihood of success on the merits with the Legislature's likelihood of success on appeal from the injunction, App'x.55. On the equities, the circuit court further failed to differentiate between "the harms analysis in deciding whether to grant an injunction in the first instance and the harms analysis in deciding whether to stay that injunction pending appeal." App'x.505.

This Court's actions in *SEIU* came only after the Court of Appeals declined for six weeks to act on the Legislature's expedited request for a stay, during which time the Attorney General took full advantage of this delay to impose irreparable harm on the Legislature and the people. Most problematically, while the Legislature's request for a stay was pending appeal in the Court of Appeals, the Attorney General managed to settle away the constitutionality of a key provision in Wisconsin's right-to-work law, withdrawing a pending petition for a writ of certiorari before the U.S. Supreme Court, on the eve of the Court's consideration. *See Allen v. Int'l Ass'n of Machinists*, No. 18-855 (S. Ct. Apr. 19, 2019). One of the laws at issue in *SEIU*—Section 30 of 2017 Wisconsin Act 369, App'x.52—would have prohibited the Attorney General from taking this action, but the *SEIU* injunction blocked that law at the time.

The same type of situation transpired here. After issuing its summary-judgment Order, including based upon a theory of Section 16.74 that Plaintiffs had not even raised, the

Circuit Court brushed off the Legislature's powerful arguments against that theory by simply stating that "much of the [Legislature's] argument is a re-presentation or a slightly differently stated way of arguing what was originally before [the court], and [addressing those arguments] would merely be repeating what [the court] ha[d] already set forth in [its] written decision." App'x.8. The Legislature sought expedited relief from the Court of Appeals two days later, but the Legislature's motion for a stay languished undecided for week after week after week. *See supra* p. 9. This Court granted the Legislature's stay motion preventing any further irreparable harm. However, by that time, the Legislature and the people already suffered more than two months of such harm from the Legislature being unable to consult with its counsel during a crucial period of the decennial redistricting cycle. App'x.507.

B. Where a movant asks a 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 facts, (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'x.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. In particular, the appellate court must consider

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'x.40 (citing *Gudenschwager*, 191 Wis. 2d at 440). These are "interrelated factors to be considered," "not separate prerequisites." App'x.44. Thus, entitlement to a stay may be based largely on the strength of a movant's showing on the likelihood-of-success-on-the-merits factor. App'x.44 (citing *Gudenschwager*, 191 Wis. 2d at 440). A circuit court erroneously exercises its discretion when it "ma[kes] errors of law," such as by failing to "follow the proper rules for applying" the stay factors, by "conflat[ing]" the stay-pending-appeal analysis with the separate analysis for granting an injunction in the first instance, and by ignoring that the "strong showing" necessary for a stay pending appeal is satisfied where the action itself involves legislative action enjoined as unconstitutional. App'x.55.

This Court has already correctly concluded that the Circuit Court here erroneously exercised its discretion by denying the Legislature a stay pending appeal, and this Court should now so state, in a published decision that gives definitive, binding guidance to the bench and the bar.

On the merits, this Court already correctly concluded that the Circuit Court erred by "treat[ing] [the strong showing of a likelihood of success on appeal] factor as a stand-alone

prerequisite of a 'strong showing'" without considering "whether defendants had demonstrated 'more than the mere possibility' of success on the merits." App'x.502. This factor requires only "more than the mere possibility" of success on the merits and "is inversely proportional to the amount of irreparable injury that the moving party (and the public) will suffer in the absence of temporary relief pending appeal." App'x.501. Moreover, the Circuit Court here "completely failed to understand that the analysis of likelihood of success on appeal in the context of a stay motion is substantively different from the analysis of likelihood of success on the merits it had previously performed in deciding to grant a permanent injunction to the plaintiffs." App'x.502. Contrary to the Circuit Court's view, this factor requires an assessment that there is "more than the mere possibility" that a different court—an appellate court under de novo review—may be convinced by the movant's arguments. App'x.502.

On the equitable considerations, this Court correctly held that the Circuit Court "applied the wrong analysis." App'x.505. "The circuit court engaged in the same harms analysis that it used when it granted the permanent injunction to the plaintiffs." App'x.505. This was error because "the circuit court never considered whether the harms could be undone or unwound by an appellate court at the end of the appeal." App'x.506. Analysis of "the likelihood that each side's harms can be mitigated or remedied upon conclusion of the appeal . . . is a necessary consideration."

App'x.506. As to the Legislature's alleged harm, this Court correctly held that the Legislature's "inability to have counsel of [its] choice does qualify as real harm," determining that "[t]he harm to the representatives of the people in limiting their ability to do this difficult and complex task assigned to them in the Wisconsin Constitution will be significant and unremedied" absent a stay. App'x.506–07.

Finally, given the over-two-month-long delay before the Legislature could obtain the stay pending appeal in this case, despite acting with the fastest possible dispatch, the Legislature respectfully submits that guidance from this Court is essential to avoid the delay that happened here from recurring. To address this problem, the Legislature respectfully requests that this Court make clear that circuit courts and the Court of Appeals should rule promptly on motions for a stay pending appeal, generally granting expedited treatment to such motions, so that a party that ultimately receives that stay will not have suffered unnecessary weeks or months of irreparable harm in the interim. And, in addition, the Legislature respectfully requests that this Court provide guidance to the bar about when litigants can take a lower court's delay in ruling on a stay motion as sufficiently lengthy to justify coming directly to this Court for relief, without awaiting the lower court's ruling on a pending stay motion.

CONCLUSION

This Court should reverse the Circuit Court's Order granting summary judgment to Plaintiffs and order that judgment be entered in the Legislature's favor.

Dated: August 16, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this Brief is 10,633 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12), AND OF SERVICE

I hereby certify that:

I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of this Brief filed with the Court and served on all opposing parties.

Dated: August 16, 2021.

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