STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 15

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

Plaintiffs,

v. Case No. 2021-CV-589

ROBIN VOS and DEVIN LEMAHIEU,
in their official capacities,

Defendants.

BRIEF OF *AMICUS CURIAE* WISCONSIN DEMOCRACY CAMPAIGN

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INTEREST OF *AMICUS CURIAE*

The Wisconsin Democracy Campaign is a nonpartisan and nonprofit public-interest watchdog group. WDC is committed to ensuring the fairness and lawfulness of both the process and outcome of the state's redistricting that will take place after the United States Census Bureau releases data from the 2020 United States Census to the State of Wisconsin, for the purpose of creating new state legislative and congressional districts. WDC advocates for transparency in government, and fights corruption.

INTRODUCTION

Plaintiffs present a correct and compelling argument based primarily on statutory interpretation. Defendants respond that Wis. Stat. § 13.124 merely summarizes a narrow sliver of the Legislature's unbounded power to hire private counsel. *Amicus* writes separately to provide a more complete constitutional context that is vital to a proper understanding of the statutes at issue and the authority of the Defendants and the Legislature more broadly to take the actions Plaintiffs challenge as beyond the power Wisconsin law accords them. Defendants' approach in this Court is incorrect and dangerous because it contravenes fundamental constitutional principles as they have long been interpreted and applied by the Wisconsin Supreme Court.

First, Wisconsin's tripartite government separates power among its three branches. Each branch has core powers, on which the others cannot trespass. *Serv. Emps. Int'l Union, Local 1 v. Vos* ("*SEIU*"), 2020 WI 67, ¶35, 393 Wis. 2d 38, 946 N.W.2d 35; *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 722 (1999); *State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982). Litigating is fundamentally an executive power, not a legislative one. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986); *Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600; *Wis. Legislature v. Palm*, 2020 WI 42, ¶182, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting). The Attorney General and a Department of Justice (both within the Executive

Branch) represent the State's interests in court. It is the exception, not the rule, for the Legislature to seek and receive legal advice and representation from separate counsel, and to litigate on its own behalf. *See SEIU,* 2020 WI 67, ¶33. Representing the State in litigation is predominantly an executive function, though not entirely out of reach of the Legislature, which may also exercise this power when an institutional interest of the Legislature is implicated. *SEIU,* 2020 WI 67, ¶63. Regardless, the interest at stake in the contracts at issue here is not a general, institutional interest of the Legislature *qua* legislature, but is instead the interest of individual partisan actors, as explained in Section II below. The Legislature's retention of private counsel in this instance both violates the public-purpose doctrine and exceeds the limitations of its statutory authority. Even when noting the recently expanded powers of intervention created by Wis. Stat. §§ 13.365 and 803.09 (2m), the court in *SEIU* was careful to note that before the enactment of those statutes, the Legislature "had limited power to intervene in litigation." *SEIU* 2020 WI 67, ¶51. To the extent that the statutes authorize the Legislature to litigate separately from the Executive Branch under certain circumstances, those statutes must be read narrowly and enforced according to their plain terms. To do otherwise would erode the distinction among the branches and threaten the separation of powers.

Second, as Wisconsin courts have recognized since statehood, public funds may be spent only to advance a public purpose. Even if the statutes authorize the Legislature to expend taxpayer dollars on litigation, the Legislature may do so only where that litigation serves a public interest. Here, that appears not to be the situation. For one thing, there is no enacted redistricting plan that the Legislature is defending against a challenge. Even more centrally, the Assembly Speaker and the Senate Majority Leader have retained outside counsel to strategize how best to advance the narrow, private interests of the partisan caucuses they lead. Those partisan caucuses now seek to

extend the extreme partisan gerrymander they put in place in 2011 that has allowed their political party to maintain a stranglehold on democracy in Wisconsin over the past decade, regardless of whether their party, or the opposition party, wins a majority of votes state-wide. It is not in any way a public interest. That does not mean that the Legislature may not seek legal advice on *the issues* for which it hired private counsel at public expense—only that such representation does not merit public financing.[1]

Third, even if the Legislature could properly expend public monies to advance private, partisan purposes, the Wisconsin Constitution requires safeguards on how those spending decisions are made. The Legislature cannot devolve to its own leaders unfettered access to the public fisc for their own private purposes. Yet, Defendants' response to this lawsuit shows that they have acted as if that is precisely what happened here.

The overarching question posed by this case is whether scarce taxpayer dollars are properly expended to advance the partisan interests of a single political party in preparation for redistricting litigation that has not begun, that may or may not ever occur, and the necessity of which will be determined primarily by decisions that Defendants themselves will make. Plaintiffs argue that the statutory answer to that question is "no." They are correct in that assertion. This brief argues that the State Constitution compels the same answer for additional, distinct reasons.

BACKGROUND

Wisconsin conducts its redistricting through the familiar legislative process: the Legislature drafts, refines, and ultimately passes a bill that delineates new state legislative and

[1] Indeed, even if there were an "action" here as the statutes require for the Legislature to hire private counsel at public expense—and, as Plaintiffs argue, there is no "action" either present or imminent—the Legislature could not use public dollars to pay these private lawyers to advance these private interests without violating the public-purpose doctrine.

congressional district borders; the Governor then either signs that bill into law or vetoes it, sending the issue back to the Legislature for either a veto override or a new bill. Wis. Const. art. IV, §§ 3, 17; *id.* art. V, § 10; *cf. Whitford v. Gill*, 218 F. Supp. 3d 837, 845 (W.D. Wis. 2016), *vacated on other grounds*, 138 S. Ct. 1916, 1929-30 (U.S. 2018); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 126 N.W.2d 551 (1964). As with any legislative enactment, anyone who believes the final result is unlawful in some respect and has the requisite legal standing may file suit in state or federal court, and a successful voter challenge could result in court-ordered revisions to an enacted redistricting plan. Litigation can also arise if the legislative process breaks down such that the political branches—*i.e.*, either the two houses of the Legislature, or the Legislature and the Governor—reach an impasse and fail to enact a law establishing new districts. Such an impasse necessitates litigation because, under *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny, the state must rebalance district populations after each decennial census.

In most decennial cycles, the Legislature's work drawing new district maps can begin in April of the odd-numbered year following the Census.[2] In the current cycle, delays in the census process and the subsequent compilation of data have delayed the U.S. Census Bureau's release of the detailed PL 94-171 census data necessary for all states, including to Wisconsin, to apportion population into new districts at the municipal, county, legislative, and congressional levels. The Legislature likely will not receive this data until late summer or early fall of this year,[3] meaning there is no possibility that a new districting plan can be considered—much less adopted by the Legislature or approved by the Governor—before then.

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[2] Redistricting Data Program Management. United States Census Bureau. March 16, 2021. Available at https://www.census.gov/programs-surveys/decennial-census/about/rdo/program-management.html

[3] Census Bureau Statement on Redistricting Data Timeline. United States Census Bureau. Release number CB21-CN.14. February 12, 2021. Available at https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html

The Legislature has extensive in-house expertise to assist it in accurately apportioning population based on the census data while balancing several relevant constitutional requirements. Wisconsin's Legislative Technology Services Bureau (LSTB) provides the census data, the mapping software, computers and digital storage media, and other technical support necessary to draw the new district maps, while the Legislative Council provides legal advice and historical context. Both agencies exist to provide these types of services to all members of the Legislature and their staffs. *See* Wisconsin Blue Book 2019–2020, pp. 158, 172.

Given the assistance provided by the Legislature's in-house service agencies, the impetus for the Legislature to sign the contracts at issue here cannot be an actual need for assistance in accomplishing a legislative function. The only conceivable purpose of these contracts is to seek help with work that the LTSB and Legislative Council will not perform—work that entails partisan political activities or intrudes on the executive branch beyond the legislative role. Defendants point to the use of private counsel in the redistricting process that followed the 2010 Census in Wisconsin as evidence that the contracts here are proper. (Defs.' TRO Br. at 1, 14) The Court should consider that argument warily. The private counsel the Legislature hired in the last redistricting cycle allowed legislative leadership to exercise complete control and shield their work from public scrutiny. *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 845 (E.D. Wis. 2012). That work resulted in one of the most aggressive and extreme partisan gerrymanders in the country. *Whitford*, 218 F. Supp. 3d at 863-64 (detailing consequences of partisan gerrymander in 2011 Wis. Act 43); *see also, e.g.*, David Daley, "Wisconsin's Governor Called a Special Session on Police Reform. Republicans Stopped It After 30 Seconds," *Rolling Stone* (Sept. 1, 2020).[4] It appears that Defendants now seek to extend that partisan gerrymander and enshrine it

[4] "How rigged are Wisconsin's maps? So rigged that the Harvard's Electoral Integrity Project, which quantifies the health of electoral systems in America and worldwide, rated the state's electoral boundaries

for another ten years. (The fact that they have chosen to contract with private counsel who defended the results of the last redistricting process in court is a pretty clear tell. *Whitford v. Gill,* 402 F. Supp. 3d 529, 530 (W.D. Wis. 2019)). Their desire to do so, and to effectuate their plan on the taxpayers' dime, is incompatible with the Wisconsin Constitution.

ARGUMENT

I. Litigation is an Executive Function, and the Legislature Possesses Power to Litigate Only When Expressly Provided.

Wisconsin's government separates power among its three branches. Wis. Const. art. IV, § 1 (legislative); *id.* art. V, § 1 (executive); *id.* art. VII, §§ 2-4 (judicial); *State ex rel. Friedrich v. Dane Cnty. Cir. Ct.*, 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995). Under our separation of powers—"the bedrock of the structure by which we secure liberty both in Wisconsin and the United States," *Tetra Tech EC, Inc. v. Dep't of Revenue*, 2018 WI 75, ¶52, 382 Wis. 2d 496, 914 N.W.2d 21—the legislative branch "cannot interfere with, or exercise any powers properly belonging to, the executive department," *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 448, 208 N.W.2d 780 (1973).

Litigation to defend or vindicate state laws is a form of enforcement, which is fundamentally an executive power and not a legislative one. *See, e.g.*, *Bowsher*, 478 U.S. at 733-34 ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can therefore control the execution of its enactment only indirectly—by passing new legislation."); *Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 201-02 (1928) ("Legislative power, as

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as a three on a scale of one to 100. This is not only the worst rating in the nation, it's lower than any nation graded by the EIP has ever scored on this measure. This is not a rating received by a functioning democracy. It is the rating of an authoritarian state. // How little democracy exists in Wisconsin? If gerrymandering is the art of packing as many of the other party's seats into as few districts as possible, then cracking the rest by spreading them thinly amongst the remaining seats, Wisconsin Republicans are a combination of Picasso, Monet, and Michelangelo." Available at https://www.rollingstone.com/politics/political-commentary/wisconsin-legislature-jacob-blake-shooting-kenosha-gerrymander-gun-violence-1053561/

distinguished from executive power, is the authority to make laws, but not to enforce them."); *Warren*, 59 Wis. 2d at 448 ("The legislature cannot interfere with, or exercise any powers properly belonging to the executive department."); *Goodland v. Zimmerman*, 243 Wis. 459, 467, 10 N.W.2d 180 (1943) ("While the legislature in the exercise of its constitutional powers is supreme in its particular field, it may not exercise the power committed by the constitution to one of the other departments."). Consistent with this division, the Executive Branch is home to Wisconsin's Attorney General and the Department of Justice, who represent the State's interests in court. *SEIU*, 2020 WI 67, ¶57 ("The attorney general is assuredly a member of the executive branch whose duties consist in executing the law."); *id.*, ¶60 (DOJ is part of executive branch); *see also, e.g.*, *Helgeland v. Wis. Municipalities*, 2006 WI App 216, ¶14, 296 Wis. 2d 880, 724 N.W.2d 208, *aff'd*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1 ("Under our tripartite system of government, the legislature's role is to determine public policy by enacting legislation. In contrast, it is exclusively … the executive's role to defend the constitutionality of statutes." (citations omitted)); *State v. City of Oak Creek*, 2000 WI 9, ¶23, 232 Wis. 2d 612, 605 N.W.2d 526 (quoting *State Public Intervenor v. Dep't of Nat. Res.*, 115 Wis. 2d 28, 36-37, 339 N.W.2d 324 (1983)) ("it is the attorney general's duty to defend the constitutionality of state statutes"); 71 Op. Att'y Gen. 195, 196 (1982) (same). This has been true since statehood. *See* Wis. Rev. Stat. ch. 9, §§ 36-41 (1849); *Orton v. State*, 12 Wis. 509, 511 (1860) (recognizing the attorney general as "the law officer of the government, elected for the purpose of prosecuting and defending all suits for or against the State"). It is the exception, not the rule, for the Legislature to participate in litigation represented by separate counsel, rather than by the Attorney General. In those rare instances, the Legislature relies on statutes to authorize its sharing of an executive function under certain circumstances. One such circumstance is when the Legislature is defending its own institutional interests, separate and

apart from the interests of the State of Wisconsin. *SEIU*, 2020 WI 67, ¶63. Those statutes must be read narrowly and enforced according to their terms. An expansive view of the Legislative Branch's general power to enforce or defend laws would do violence to the separation of powers among the three branches of Wisconsin's government.

Defendants assert several statutory bases of authority for their contracts, and assume inherent constitutional power, referencing historical examples of the Legislature (or individual legislators) hiring outside counsel. Plaintiffs explain the inapplicability of the specific, limited statutory authority for Defendants to hire private legal counsel for the Legislature. The Court need look no further than the plain text of the statutes to recognize that they do not confer on the Legislature the legal authority to enter into the contracts at issue. Nor are Defendants saved by recourse to what they claim is a broad historical pattern of the Legislature employing private counsel. Defendants draw the wrong conclusion from the documents they provide. Their exhibits reflect specific authorizations to engage private counsel (as well as memos summarizing when such engagements have been used and newspaper clippings capturing displeasure at the costs). (*See, e.g.*, LeRoy Aff., Exhs. 1-4, 7-9, 17-23.) Both individually and as a whole, these exhibits demonstrate that legislative engagement of private counsel is rare. Historically speaking, the Legislature does not routinely engage in litigation, nor does it have broad authority to do so. Were it otherwise, past retainers and legal bills would have been unremarkable, and the memos summarizing retention of private counsel would not seek to enumerate every instance of this happening. (LeRoy Aff., Exhs. 7, 23) Consequently, Defendants' exhibits establish that such agreements have been used only in limited instances.

In fact, the Legislature's limited authority to litigate has been expanded in recent years—by statute. In its December 2018 extraordinary session, the Wisconsin Legislature made several

changes to the apportionment of powers between the executive and legislative branches. *See* 2017 Wis. Acts 368-370. These included stripping some powers over litigation on behalf of the state from the Attorney General and arrogating them to the Legislature. 2017 Wis. Act 369, §§ 27, 30. They also included the creation of Wis. Stat. § 13.124, one of the provisions Defendants claim authorizes the contracts at issue here. 2017 Wis. Act 369, § 3. If the Legislature intended little more than two years ago to give itself sweeping authority to retain private counsel for any purpose, it could have enacted such a law. But it did not. It chose instead to enact a limited authorization, one that, as relevant here, applies only where there is an "action." *See* Wis. Stat. § 13.124(1)(b), (2)(b), (3)(b).[5]

No party in this case asserts that there is an "action" pending related to legislative or congressional redistricting in Wisconsin. Therefore, as Plaintiffs establish in their brief, there is no statutory authority that permits Defendants to retain private counsel. Looking beyond this specific authority to broader constitutional provisions or "inherent" authority cannot save Defendants because there is no residual authority here: because litigation is predominantly an executive function, any residual authority related to litigating on behalf of the state is vested in the Executive Branch. Wis. Const. art. IV, § 1; *see also Warren*, 59 Wis. 2d at 448 ("The legislature cannot interfere with, or exercise any powers properly belonging to, the executive department.").

Defendants insist that they are permitted to engage private attorneys on issues related to "redistricting" because decennial redistricting is a legislative function. (Defs.' TRO Br. at 10) This argument proves too much. Simply because the Legislature has broad powers and obligations

[5] This limitation dovetails with the Legislature's simultaneous expansion of its authority to intervene in litigation. Wis. Stat. § 803.09(2m). Both new provisions anticipate the Legislature engaging in litigation that someone else initiates and the Legislature then determines impinges on its interests in some unique way that requires its involvement separate and apart from the participation of the Attorney General and the Department of Justice.

under the Wisconsin Constitution, *see* Wis. Const. art. IV, does not confer on the Legislature unfettered authority to hire private counsel at the whim of its leadership on all of those topics. Nor have Defendants shown that there is anything unique abut redistricting that gives the Legislature unlimited authority to enter into contracts on the general topic. The subject of the contracts, and this dispute, is litigation more than the task of redistricting itself.[6] That subject is not a proper one for the Legislature to engage private counsel.

II. Spending Public Funds to Advance Narrow Partisan Purposes in the Redistricting Process Would Violate the Public-Purpose Doctrine.

Even if there were an action pending here, the contracts at issue would still be invalid. As Wisconsin courts have recognized since statehood, public funds cannot be spent other than for a public purpose. *State ex rel. Hammermill Paper Co. v. La Plante,* 58 Wis. 2d 32, 48-49, 205 N.W.2d 784 (1973) (collecting cases). This bedrock principle means that, where the statutes authorize the Legislature to expend taxpayer dollars on litigation, it may do so only where the litigation serves a public interest. Here, the interest advanced by the contracts is not public in nature, but is narrowly partisan. It follows that the public-purpose doctrine prohibits the expenditure entirely—not merely in absence of a pending legal action.

A. The public-purpose doctrine forbids spending public money for private ends.

"Although not established by any specific clause in the state constitution, the public purpose doctrine is a well-established constitutional tenet." *Hopper v. Madison*, 79 Wis. 2d 120, 128, 256 N.W.2d 139 (1977). The public-purpose doctrine "commands that public funds can be used only for public purposes." *Libertarian Party v. State*, 199 Wis. 2d 790, 809, 546 N.W.2d 424

[6] The Bell Giftos St. John LLC contract's scope may be read as broader than pertaining only to "litigation," and includes language referring to legal advice "regarding constitutional and statutory requirements and principles related to redistricting." Compl. Exh. B. Any purpose beyond litigation is also impermissible here. *See* Section II, below.

(1996) (citing *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 211, 170 N.W.2d 790 (1969)). Expenditures for education, public recreation, and economic development have all be found to serve a public purpose. *See, e.g.*, *Jackson v. Benson*, 218 Wis. 2d 835, 899, 578 N.W.2d 602 (1998) (education constitutes a valid public purpose and private schools with appropriate oversight may be funded without violating the doctrine); *State v. Levitan,* 200 Wis. 271, 228 N.W. 140, 143 (1929) (providing for recreation such as parks and game preserves serves the public purpose and is within legislative power); *Libertarian Party*, 199 Wis. 2d at 809, 826 (creating jobs and enhancing the tax base is a public purpose). Courts will find that an expenditure serves no public purpose where it is "clear and palpable that there can be no benefit to the public." *Town of Beloit v. County of Rock,* 259 Wis. 2d 37, 50, 657 N.W.2d 344 (2003).

The public-purpose doctrine protects the state, and its taxpayers, from paying to advance private interests, regardless of the nobility or value of those interests. *See, e.g.*, *State ex rel. Thomson v. Giessel*, 262 Wis. 51, 64, 53 N.W.2d 726 (1952) (additional retirement benefits to former teachers not a sufficient public purpose to overcome other restrictions); *State ex rel. Consolidated Stone Co. v. Houser*, 125 Wis. 256, 104 N.W. 77, 79 (1905) (finding the purpose of the act was to appropriate the public moneys of the state to the payment of private debts, which is impermissible). While legislative declarations of a public purpose are given "great weight and wide discretion," courts are "not bound by such expressions," and have a separate constitutional burden to examine the existence of a purported public purpose independently. *Warren*, 59 Wis. 2d at 418; *Hammermill*, 58 Wis. 2d at 50-51.

B. Defendants are not furthering a public interest by defending a duly enacted law.

There is no enacted redistricting plan that the Legislature is defending against a challenge. There is not even a public proposal the Legislature is seeking to advance. Instead, the Assembly

Speaker and the Senate Majority Leader have retained private counsel at steep rates to strategize how best to advance the narrow, private interest of the partisan caucuses they lead. While courts have recognized "in certain circumstances" that the Legislature may have an independent interest in defending state laws from legal challenges, *Democratic Nat'l Comm. v. Bostelmann*, 2020 WI 80, 394 Wis. 2d 33, 35, 949 N.W.2d 423, there is no law to defend in this instance. In the absence of an enacted law, which the Legislature may indeed have an interest in defending, the Legislature must identify a *different* institutional interest it seeks to advance or defend. The previous engagements of private counsel by the Legislature identified in Defendants' exhibits include a list of institutional interests. Neither the State Assembly nor the Senate has a cognizable interest in defending a redistricting plan that never becomes law. If and when a new plan is enacted—and challenged—Defendants may choose to defend it at the public's expense, through the Attorney General's Office or through private counsel. Otherwise, they must identify another institutional interest—one consistent with the public-purpose doctrine—to litigate on behalf of the Legislative Branch.

C. Defendants' interests here are partisan, rather than institutional, and therefore run afoul of the public-purpose doctrine.

The absence of a duly enacted law raises questions about the purpose of these contracts. Wisconsin's previous redistricting cycle and its ensuing litigation suggest that Defendants entered into the contracts in an effort to extend the extreme partisan gerrymander that the same partisan caucuses implemented in 2011 and that has allowed their political party to maintain a stranglehold on control of the legislative branch of government in Wisconsin over the past decade, regardless of shifts in voting patterns. There is no respect in which a political party's use of taxpayer funds to hire private lawyers to assist that political party in retaining control over the Legislature even when the party receives far less than 50% of the vote, and fewer votes than the opposing party,

serves a public interest.[7] That does not mean that Defendants are unable to seek and receive legal advice and representation—only that such representation does not merit public financing. *See Warren,* 59 Wis. 2d at 414, ("Public funds may be expended for only public purposes. An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin.")

Defendants' goals here are illuminated by recent history. In 2011, a Republican-controlled Legislature and a Republican Governor enacted a redistricting plan that gave the Republican Party a substantial advantage in each election over the succeeding decade. *Whitford*, 218 F. Supp. 3d at 896. They did this by employing private counsel to draw maps in secret, behind locked doors, excluding even other legislators from the process. *Baldus,* 849 F. Supp. 2d at 845. Litigation challenging the enacted plan followed. *See id*; *Whitford*, 218 F. Supp. 3d at 853. That litigation unearthed a wealth of information about the process of drawing the 2011 maps, the goals of the actors involved, as well as the nature of the adopted districts. In *Baldus*, the federal court rejected statements map drafters made "to the effect that they were not influenced by partisan factors," noting "indeed, we find those statements to be almost laughable." 849 F. Supp. 2d at 851. The three-judge panel understood that "partisan motivation … clearly lay behind Act 43." *Id*.

This case offers a stunning example of the Legislature departing from the public-purpose doctrine. Advancing partisan political interests is clearly not a public purpose. Using taxpayer

[7] The fact that the U.S. Supreme Court held that federal courts lack subject matter jurisdiction to adjudicate partisan gerrymandering claims is not relevant to this conclusion. Regardless of that holding, the Supreme Court made clear the harms inflicted upon our democracy when political parties manipulate redistricting for purely partisan gain. But the fact that such gerrymandering is "incompatible with democratic principles," … does not mean that the solution lies with the federal judiciary. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (U.S. 2019) (internal citations omitted). This mirrors the federal district court's findings about 2011 Wisconsin Act 43 noted *infra*. And the Court was clear it did not mean that courts cannot reach partisan gerrymandering, or that it is in the public interest. **(**"Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void." *Id* at 2507).

funds for partisan political purposes is routinely forbidden elsewhere in the statutes. *See, e.g.,* Wis. Stat. § 230.40 (prohibiting civil service employees from soliciting contributions for any political purpose while on state time or while engaged in official duties; requiring leave if running for or assuming partisan political office); *id.* § 11.1205 (limiting mailings paid for by public funds sent by an elected official who is also a candidate, in the months preceding the election); *id.* § 11.1206 (prohibiting use of state-owned vehicles for political campaign travel, with limited security exceptions); *id.* § 11.1207(2) (political solicitation involving public officials and employees prohibited during official duties).

Defendants point to accounts of legal bills from past decennial redistricting cycles claiming those situations are "indistinguishable" from those before the Court. (Defs.' TRO Br. at 16) But that is false, and even if true, not dispositive. ***First***, in several of the redistricting cycles covered in Defendants' Exhibits, private counsel were hired in response to a legal challenge, filed or imminent, against adopted maps or in the event of impasse. (2010 cycle: LeRoy Aff., Exhs. 4 and 6, 1990 cycle: LeRoy Aff., Exhs. 8 and 17). Again, here, in contrast, there is no existing or imminent redistricting action. In other instances, outside lawyers were hired to help draw new maps (2000 cycle: LeRoy Aff., Exhs. 2 and 18-19, 2010 cycle: LeRoy Aff., Exh. 3). ***Second,*** in at least some instances, political parties—not taxpayers—paid for counsel advancing partisan interests. (See, for example, Republican Senator Walter John Chilsen's objection nearly forty years ago of using public funds, even to cover actual litigation expenses: "I don't think the taxpayers should have to cover partisan fees." (LeRoy Aff., Exh. 1)) ***Third***—and most fundamentally—in none of the cases Defendants cite was there evidence presented that both the purpose and effect of the majority party hiring private counsel was to so gerrymander the districts that the majority would entrench itself in power for another decade.

The interests advanced by the two contracts at issue here are not public interests, and not institutional interests of the Wisconsin Legislature. These are partisan political interests, focused on re-entrenching a partisan gerrymander and consolidating the individual political power of Majority caucus leaders. Even if they were authorized by statute—and, to be clear, they are not—the contracts cannot meet constitutional muster. They are impermissible under the public-purpose doctrine. The Legislature cannot expend taxpayer dollars to pay private attorneys for litigating to advance nothing more than the preferences of a political party. Minority members are not included in communications from private counsel. *See* Affidavit of Representative Gordon Hintz, Assembly Minority Leader, filed contemporaneously with this Brief. The appropriate funder of this endeavor is the political party itself. *Amicus* has no objection to the Republican Party of Wisconsin, the proper representative (and funder) of the majority party's partisan interests putting forth a failed legislative proposal as its redistricting plan. But the expenditure of *public* funds by Defendants is not simply premature, but inappropriate and unconstitutional.

III. The Wisconsin Constitution Bars the Legislature From Delegating to Its Own Leaders The Power to Access Public Funds for Their Private Purposes.

Finally, even setting aside the constitutional prohibitions against the Legislature expending taxpayer funds to litigate for purely private, partisan purposes, there is a problem in how Defendants entered into the contracts at issue here. The Wisconsin Constitution requires safeguards on how decisions about spending public dollars are made. The Legislature cannot delegate to its own leaders unfettered access to the public fisc for their private purposes. Yet that is what has happened here.

If Defendants recognize any constraint on their ability to use taxpayer dollars for their own purposes, they have so far been silent as to its parameters. Instead, they presume to act without any oversight or standards to ensure the presence of a public purpose for the expenditure, without

any finding as the necessity of retaining private attorneys (as opposed to staff of any of the professional legislative service agencies) to assist the Legislature, and without any obligation to publicly disclose the scope, nature, or progress of the work being done, ostensibly on the public's behalf.

The Legislature appropriates to itself sum-sufficient funding for its operations. That is, drawing upon taxpayer funds, it writes a blank check to itself, choosing to free itself of the budgetary constraints that it imposes upon nearly every other official, agency, and aspect of state government. That is presumably within its purview. But it takes that a step further—and a step too far—when it purports to empower a single individual in each chamber to draw upon that blank check for the payment of private lawyers. (That is doubly true where, as here, the private lawyers are performing tasks the public has already funded by paying for the legislative service agencies and the Department of Justice.) The Complaint and Defendants' own exhibits make clear that Speaker Vos engaged Adam Mortara and Consovoy McCarthy on his own, months before he belatedly sought authorization from the Assembly Committee on Organization. (Compl. Exhs. A & B, LeRoy Aff., Exh. 6) Even if he had sought the committee vote in a timely manner—rather than waiting until weeks after Plaintiffs filed this suit—that would not be sufficient. The Wisconsin Constitution sets specific procedures for decisions about spending public dollars. Wis. Const. art. VIII, § 8. Those procedures require a recorded vote in both chambers, with a special quorum requirement of three-fifths of the members in each chamber for the vote to proceed. *Id.* A committee vote does not meet that constitutional standard.

Nor is it a sufficient explanation to suggest that the Legislature permanently delegated authority to the Assembly Speaker and the Senate Majority Leader to make these commitments on behalf of their chambers (funded by the taxpayers). A grant of such unfettered discretion over

taxpayer funds to one member of the Legislature is inconsistent with the structure and principles of the Wisconsin Constitution. Even if one were to consider this purely a question of legislative power—which it is not, since spending decisions are made through bicameralism and presentment, meaning the Governor plays a key role-—delegating this kind of discretion without clear guidance and specific requirements is inconsistent, at best, with legislative and judicial pronouncements on acceptable delegations of a particular branch's authority. Indeed, the Supreme Court has held repeatedly that delegations of legislative power are "allowed only if there are 'adequate standards for conducting the allocated power.'" *Wis. Legislature v. Palm*, 2020 WI 42, ¶33, 391 Wis. 2d 497, 942 N.W.2d 900 (quoting *Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 697, 478 N.W.2d 582 (1992)); *see also, e.g.*, *Tetra Tech*, 2018 WI 75, ¶48 (quoting *Rules of Court Case*, 204 Wis. 501, 503, 236 N.W. 717 (1931) ("It is fundamental and undeniable that no one of the three branches of government can effectively delegate any of the powers which peculiarly and intrinsically belong to that branch," because "any attempt to abdicate a core power in any particular field, though valid in form, must, necessarily, be held void." (cleaned up)). The Wisconsin Supreme Court has been clear in other contexts that the power to delegate constitutional duty is limited.

Finally, there is a particular problem with respect to a legislative delegation of power to the Senate Majority Leader as the sole decision-maker on representation of the Senate. The problem is a structural one. The Senate Majority Leader is not a state officer, but the leader of one party's caucus. Wis. Stat. § 13.46(1).[8] Unlike the Senate President—or, for that matter, the Assembly Speaker—the Senate Majority Leader's election to that leadership position is not debated and voted upon by the entire chamber. *Compare* Wis. Stat. §§ 13.13(1) and (3) (elected

[8] See also the Wisconsin State Senate website, available at: https://legis.wisconsin.gov/senate/

by a vote of each chamber) with Wis. Stat. § 13.46(1) (elected by the majority party). Thus, to the extent that Wis. Stat. § 13.124(2) purports to empower the Senate Majority Leader alone to decide when the Senate will have private legal representation, who will provide that representation, how much the taxpayers will pay for that representation, and what the scope that representation will be, it violates basic principles of constitutional governance and democratic accountability.

CONCLUSION

Not only have the Defendants acted prematurely, and therefore beyond their statutory authority, but also the very nature and purpose of the contracts at issue suffer from fatal flaws. Defendants' engagement of private counsel with taxpayer funds cannot pass constitutional muster. For those reasons, as well as the statutory arguments presented by Plaintiffs, the contracts at issue here are void and must be held unenforceable.

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