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2021CV000589

STATE OF WISCONSIN CIRCUIT COURT BRANCH 15 DANE COUNTY

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

v.

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

Case No. 2021-CV-589

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

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

STATEMENT

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Contracts Are Independently Lawful Under Section 20.765

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

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

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

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

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

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

III. The Contracts Are Independently Lawful Under Section 16.74

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

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

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

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

IV. The Contracts Are Independently Lawful Under Section 13.124

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

Section 13.124, as relevant here, contains two identical provisions directed to the Assembly and Senate, authorizing each to obtain legal representation from someone other than the Department of Justice, through a streamlined authorization procedure. Section 13.124(1)(b) provides that "[t]he speaker of the assembly, in his or her *sole discretion*, may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765(1)(a), in any action in which the assembly is a party or in which the interests of the assembly are affected, *as determined by the speaker*." Wis. Stat. § 13.124(1)(b) (emphases added). Near identically, Section 13.124(2)(b) provides that "[t]he senate majority leader, in his or her *sole discretion*, may obtain legal counsel other than from the department of justice, with the cost of representation paid from the appropriation under s. 20.765(1)(b), in any action in which the senate is a party or in which the

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

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

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

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

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

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

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

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

CONCLUSION

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

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Respectfully Submitted,

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