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CIRCUIT COURT
DANE COUNTY, WI
2021CV000589

**BY THE COURT:**

**DATE SIGNED: April 29, 2021**

Electronically signed by Stephen E Ehlke
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Andrew Waity, Sara Bringman, Michael Jones, and Judy Ferwerda

Plaintiffs,

vs.

Robin Vos, in his official capacity, and Devin Lemahieu, in his official capacity,

Defendants.

DECISION AND ORDER

Case No. 21 CV 589

## INTRODUCTION

Plaintiffs, Andrew Waity, Sara Bringman, Michael Jones and Judy Ferwerda (Plaintiffs) bring this declaratory judgment action under Wis. Stat. § 806.04 seeking a judgment that the contracts between the legislature and two law firms (related to work on the decennial redistricting process currently underway), entered into by the Wisconsin Speaker of the Assembly, Robin Vos, and the Majority Leader of the Senate, Devin Lemahieu (Defendants), are void because defendants had no legal authority to engage the firms. Dkt. 3. In briefing plaintiffs acknowledge that the legislature has authority under some circumstances to engage attorneys to provide services to it. Dkt. 48, p. 2. Plaintiffs also acknowledge that under some circumstances the Legislature may use its "sum sufficient" appropriation to pay for legally contracted services. In this case, however,

plaintiffs contend that Vos and LeMahieu lacked the authority to enter into the challenged contracts and, consequently, the payments being made to the law firms are not legally authorized. *Id.*

Defendants counter that they were authorized to hire the law firms based on the authority of the legislature to act under its core powers granted by the Wisconsin Constitution. In addition, defendants maintain that the contracts are lawful under several different statutory provisions.

At oral arguments on March 25, 2021, the parties agreed that defendants' motion to dismiss, and brief in opposition to plaintiffs' motion for a temporary injunction, would be converted to a motion for summary judgment, without the necessity of filing additional pleadings. At the same hearing, plaintiffs' motion for a temporary restraining order/injunction was denied. Subsequently, by stipulation, the parties agreed and the court ordered, that defendants were not required to file an answer. Dkt. 40. On April 7, 2021, by agreement of counsel, nonparty Wisconsin Democracy Campaign, was granted permission to file an amicus brief in opposition to the defendants' motion to dismiss. Dkt. 47. The issues have now been fully briefed by the parties and are ready for resolution.

## SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2); *Schmidt v. N. States Power Co.*, 2007 WI 136, ¶ 24, 305 Wis. 2d 538, 742 N.W.2d 294. Affidavits "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." Wis. Stat. §

802.08(3). Summary judgment is appropriate when "material facts are undisputed and when inferences that may be reasonably drawn from the facts are not doubtful and leave only one conclusion." *Beyak v. North Cent. Food Systems*, 215 Wis. 2d 64, 68, 571 N.W.2d 912 (Ct. App. 1997). The party moving for summary judgment has the burden of proving that there are no genuine issues of material fact. *Morris v. Juneau Co*., 219 Wis. 2d 544, 550, 579 N.W.2d 690 (1998). A "material fact is one that is of consequence to the merits of litigation." *Sherry v. Salvo*, 205 Wis. 2d 14, 31, 555 N.W.2d 402 (Ct. App. 1994).

Any inferences should be viewed in the light most favorable to the party opposing the motion. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751 (Ct. App. 2001). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *City of Elkhorn v. 211 Centralia St. Corp*., 2004 WI App 139, ¶18, 275 Wis. 2d 584, 685 N.W.2d 874 (citing *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991)). However, summary judgment shall not be a trial by affidavit or adverse examination. *Peninsular Carpets, Inc. v. Bradley Homes, Inc.*, 58 Wis. 2d 405, 410, 206 N.W.2d 408 (1973) (citing *Voysey v. Labisky*, 10 Wis. 2d 274, 103 N.W.2d 9 (1960); *Jahns v. Milwaukee Mut. Ins. Co*., 37 Wis. 2d 524, 155 N.W.2d 674 (1968)).

FACTS

The material facts are undisputed. Plaintiffs are all adult taxpaying residents of the State of Wisconsin, residing in Madison, WI. Dkt. 3 ¶ ¶'s 4-7. Defendant, Robin Vos, is the Speaker of the Wisconsin Assembly, and is being sued in his official capacity. *Id*. ¶

8. As of December 23, 2020, Robin Vos was the Speaker of the Wisconsin Assembly for the 2019-2020 term and remained the Speaker starting in the 2021-2022 term which began on January 4, 2021. Defendant, Devin LeMahieu is the Majority Leader of the Wisconsin Senate, and is being sued in his official capacity. *Id*. ¶ 9. As of December 23, 2020, LeMahieu was a Senator in the Wisconsin Senate but was not the Majority Leader of the Wisconsin Senate for the 2019-2020 term. LeMahieu became the Majority Leader of the Wisconsin Senate for the 2021-2022 term on January 4, 2021.

On December 23, 2020, Vos and LeMahieu entered into a contract for legal services with a law firm known as Consovoy McCarthy PLLC, in association with Adam Mortara. That contract provides in relevant part as follows:

> This Engagement Agreement sets forth the terms under which Consovoy McCarthy PLLC ("CM") in association with Adam Mortara ("Mortara") (collectively, "CM&M") will represent the Wisconsin State Assembly and Wisconsin State Senate (the "Legislature" or "you") in possible litigation related to decennial redistricting (the "Litigation"). CM&M's engagement hereunder is ***limited to representing the*** Legislature in the Litigation through trial and, if requested, on appeal.The parties currently do not know whether or in what venue the Litigation will occur.
>
> Scope of Representation
>
> The Legislature is also retaining Bell Giftos St. John LLC ("BGSJ") to represent it in the Litigation. CM&M is being retained to work alongside BGSJ. Mortara will provide overall strategic litigation direction, take key fact and expert discovery, and serve as lead trial counsel at trial, while BGSJ and CM will provide additional day-to-day litigation resources. Mortara hereby commits that the Litigation will take precedence over other clients as to trial scheduling matters, and that in the event of an irresolvable trial date conflict between you and another client, he will be lead trial counsel in this matter.

*Id*. ¶ 13 (bold and italics supplied).

On or about January 6, 2021, Vos and LeMahieu entered into a separate contract for legal services with the Bell Giftos St. John law (BGSJ) firm. That contract states, in relevant part:

> The purpose of this letter is to confirm the scope and terms of representation.
>
> Identity of the Clients. Our clients in this matter are the Wisconsin State Senate, by and through Senator Devin LeMahieu, and the Wisconsin State Assembly, by and through Representative Robin Vos. It is our understanding that each of you is authorized to retain counsel on behalf of your respective legislative houses.
>
> Unless and until the Wisconsin State Senate and Wisconsin State Assembly designate otherwise, we will take direction on this matter through those organizations' duly authorized agents: Senator LeMahieu as it relates to the Wisconsin State Senate; Representative Vos as it relates to the Wisconsin State Assembly.
>
> Scope of Representation. Bell Giftos St. John LLC agrees to 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 beginning on January 1, 2021. Services within the scope include all services in furtherance of this attorney-client relationship relating to redistricting. Such services include, for example, providing legal advice to the client (through its members or staff as designated by Senator LeMahieu and Representative Vos) regarding constitutional and statutory requirements and principles relating to redistricting. It also includes appearing for clients in judicial or proceedings relating to redistricting, should such an action be brought, or administrative actions relating to redistricting, such as the rule petition currently pending before the Wisconsin Supreme Court. It also includes providing legal advice about the validity of any draft redistricting legislation if enacted. It does not include, however, the drawing of redistricting maps.

*Id*. ¶ 15.

Further facts, as necessary, will be set forth in the body of this decision.

CONSTITUTIONAL POWERS

Plaintiffs assert that there is no constitutional or statutory provision that authorizes the hiring of outside counsel in these circumstances. Defendants' principal argument is that they were authorized to retain the two law firms based on the legislature's core power under the Wisconsin Constitution. In briefing, the defendants provide a succinct and accurate description of the legislature's role in our system of government.

> 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 laws 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 *Johnstonv. 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).
> Dkt. 28, pp 7-8.

Undoubtedly, one of the legislature's core powers is to enact legislation regarding redistricting.[1] The question presented, however, is narrower in scope; namely, does litigation surrounding the enactment of redistricting maps involve a core or shared power of the legislature? If it is within the core or shared power, then it was appropriate to hire the two law firms based on the legislature's role under the state constitution. If not, then it was not proper to do so.

In *Custodian of Records for the LTSB v. State,* 2004 WI 65, ¶ 30, 272 Wis. 2d 208, 680 N.W.2d 792, a John Doe subpoena was issued to the Legislative Technology Services Bureau (LTSB) (which was created under Wis. Stat. § 13.96 and is chiefly tasked with "[p]rovid[ing] and coordinat[ing] information technology support and services to the legislative branch") for electronically stored communications within LTSB's possession. Pending before the Wisconsin Supreme Court was a writ of assistance asking that the John Doe judge's subpoena be quashed. The LTSB advanced numerous arguments seeking to quash the subpoena. One of them was a separation of powers argument in which it was argued that Wis. Stat. § 13.96 constituted a "rule of proceeding" involving a "core zone" of legislative power that may only be interpreted by

[1] Wis. Const. art. IV, § 3 provides that "[a]t its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants."

the legislature. *Id*. at 226. The Supreme Court rejected this argument, concluding as follows:

> We note that Wis. Stat. § 13.96 has nothing to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members. It simply provides for assistance with electronic data and for an electric storage closet for communications created or received by legislators and other employees of the legislature.

*Id*. at 228.

*LTSB* stands for the proposition that if an activity is not concerned directly with the process of making law itself, then it is not part of any "core" legislative function. Plainly, litigation regarding redistricting involves court battles, a forum for the interpretation of legislative acts and the Constitution, which occur *after* the legislative process is concluded. Generally, the executive branch, not the legislature, participates in litigation as part of its enforcement authority. *See, e.g., Springer v. Gov't of Philippine Islands*, 277 U.S. 189, 201-02 (1928) (Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them.); *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 448 208 N.W.2d 780 (1973) (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.) Applied here, these cases compel the conclusion that hiring lawyers to prepare for anticipated litigation is not within the core power of the legislature.

Recently, in *SEIU, supra*, our Supreme Court discussed the concept of core powers – those powers vested in each of our three branches of government – and

explained that some powers are exclusive and others are shared ("determining 'where the functions of one branch end and those of another begin' is not always easy. . . Thus, we have described two categories of powers within each branch – exclusive or core powers, and shared powers")(citation omitted). 2020 WI 67, ¶ 34, 393 Wis. 2d 38. . Although *SEIU*'s procedural posture was complex, and several legal issues were presented, the nub of the case involved the legality of several state statutes (Wis. Stat. §13.365 and Wis. Stat. §803.09(2m)) which conferred approval power in the legislature for settlements reached by the state attorney general, and allowed the legislature to intervene in litigation in limited circumstances. *Id*. at ¶ 55. At issue was whether the statutes improperly took a core power of the executive branch and gave it to the legislative branch. *Id*. After a thorough review of the attorney general's powers, as well as of the legislature's role (especially in terms of spending money), the court denied plaintiff's facial challenge to the constitutionality of the statutes involved, concluding as follows:

> [W]here a legislative official, employee, or body is represented by the attorney general, the legislature has, in at least some cases, an institutional interest in the outcome of the litigation. Similarly, where a legislative body is the principal authorizing the attorney general's representation in the first place, the legislature has an institutional interest in the outcome of that litigation in at least some cases. This is true where the attorney general's representation is in defense of the legislative official, employee, or body, or where a legislative body is the principal authorizing the prosecution of a case. And in cases where spending state money is at issue, the legislature has a constitutional interest in at least some cases sufficient to allow it to require legislative agreement with certain litigation outcomes, or even to allow it to intervene.

*Id*. at ¶ 71.

Although the *SEIU* court denied the facial constitutional challenge (thus allowing the legislature to participate in litigation in some circumstances), it stressed that its decision was limited in scope. *Id*. at ¶ 73. A careful reading of the decision reveals that in

order to respect the balance of powers between the branches of government, courts should construe the constitution, and statutes authorizing the legislature to participate in litigation, narrowly. *Id* at ¶ 72, *fn*. 22. Put differently, although litigation may sometimes fall into an area of shared power between the executive and legislative branches, it is the exception not the rule. Only in circumstances in which the legislature's institutional interests are involved may it properly engage in litigation without unduly burdening or substantially interfering with the executive branch. *Id.*

In *SEIU* the court cited three cases in which the legislature participated in litigation because its institutional interests were implicated. *Risser v. Klauser*, 207 Wis.2d 176, 180, 558 N.W.2d 108 (1997) (involving use of a "write-in" veto with regard to revenue bonding limits); *Citizens Util. Bd. V. Klauser*, 194 Wis.2d 484, 487-88, 534 N.W.2d 608 (1995) (involving the validity of the "write-in" veto as a subset of governor's partial veto power); *Wis. Senate v. Thompson*, 144 Wis.2d 429, 433, 424 N.W.2d 385(1988) (involving the validity of the governor vetoing individual letters, digits, or words in proposed legislation as part of the governor's partial veto power). Each of these cases involved a question of the division of power between the executive and legislative branches. Because the cases involved resolution of the scope of authority held by the governor, *vis a vis* the legislature, they each involved an institutional interest of the legislature.

This case is different. Here, anticipated redistricting litigation does not involve a balance of power issue between the legislative and executive branches. Rather, it involves the validity of the adopted plan; *i.e*. the validity of a statute. To hold that a potential challenge to the redistricting plan implicates an institutional interest of the legislature

would mean that *any time* a statute might be challenged the legislature may, under its shared powers with the executive branch, hire counsel to participate in the litigation. Such a holding would eviscerate the limited scope of the court's decision in *SEIU* because it would (effectively) allow the legislature to participate in all challenges to state law, thereby substantially interfering with the executive branch and the office of the attorney general.

A review of the contracts at issue here reveals that the two law firms are retained for slightly different purposes. CM&M is retained ***only*** for purposes of litigation. BGSJ's scope of representation is broader. It is to provide legal advice "regarding constitutional and statutory requirements and principles relating to redistricting" in addition to assisting CM&M with litigation. Applying the reasoning of *LTSB* and *SEIU*, I conclude that the CM&M contract is void because redistricting litigation (with no direct budgetary implications) falls outside the core – or even shared-- power of the legislature, as it does not involve the process the legislature uses to propose or pass legislation, nor does it relate to a legislative institutional interest.

The BGSJ contract presents a more complicated situation. If it only related to advice "regarding constitutional and statutory requirements and principles relating to redistricting" it would arguably fall within the core powers of the legislature to enact redistricting legislation**.** To this extent I agree with defendants (Dkt. 60, pp. 6-8) that the legislature may have some limited ability to hire counsel to help it with the process of enacting legislation. The Supreme Court has held that the Legislature has all "authority . . . appropriate to achieve the ends" of its express law-making authority, *Wis. Carry*, 2017 WI 19, ¶ 54 n.38, and may select "the means to be employed in the execution of [the

express legislative] power," *Minneapolis,* 116 N.W. at 910 (citation omitted). [2] The problem here, however, is that like the CM&M contract, it also provides that BGSJ will provide litigation support, something that is outside the legislature's core function (the CM&M contract provides "[t]he Legislature is also retaining Bell Giftos St. John LLC ("BGSJ") to represent it in the Litigation. CM&M is being retained to work alongside BGSJ."). Reading the two contracts together, it appears that the primary purpose of the BGSJ contract is to do pre-litigation work in the event any lawsuit is brought challenging the redistricting plan. If litigation does commence, then BGSJ would assist CM&M. As explained above, litigation is not a core power of the legislature, and only rarely falls within the shared power of the legislature. Here, no institutional interests of the legislature are implicated, and no "official, employee, or body" has been sued. Because the BGSJ contract plainly contemplates that that firm will be involved in litigation, I conclude that it also is void because it falls outside both the core and shared power of the legislature.

Having concluded that the Wisconsin Constitution, by itself, does not grant defendants authority to hire outside legal counsel to litigate matters related to redistricting, the question becomes whether any statutory authority gives them the ability to do so. I address each of the disputed statutes in turn.

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[2] Amicus contends that it is unnecessary to hire additional counsel given that "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. See Wisconsin Blue Book 2019-2020, pp. 158, 172." Dkt 55, p. 11. Because of the resources already available to the legislature, and the seemingly blatant partisan nature of the hiring, Amicus urges this court to view counsels' hiring "warily" and to hold that retention of the firms is contrary to the public-purpose doctrine. I have seriously considered this argument; however, I believe it invites me to rule more broadly than necessary at this juncture based on my conclusion that the BGSJ contract is primarily for litigation purposes and is, therefore, void because it falls outside of the legislature's core and shared powers.

SECTION 13.124

Defendants argue that they are authorized to hire outside counsel under Wis. Stat. §§13.124(1)(b), (2)(b), which provide that the Speaker and the Majority Leader, "in [their] sole discretion, may obtain legal counsel other than from the department of justice . . . in any action in which the assembly [or the senate] is a party or in which the interests of the assembly [or the senate] are affected." Plaintiffs contend the statute is plain and unambiguous and requires that an "action" be pending before outside counsel may be hired. Defendants respond that the statute applies to "actions" that might be filed, or that are impending. After careful consideration, I conclude plaintiffs have the better argument, as the legislature certainly could have inserted those words in the statute if it intended to grant the Speaker of the Assembly and the Majority Leader such authority.

When interpreting statutory text, a court's assignment "is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58 ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. To find this meaning, courts interpret the text "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*, ¶ 46; see also Wis. Stat. § 990.01(1). To interpret statutes, courts need only look at their words. *State v. Peters*, 2003 WI 88, ¶ 14, 263 Wis. 2d 475, 665 N.W.2d 171 ("If the language of a statute is clear on its face, we need not look any further than the statutory text to determine the statute's meaning."); *State ex rel. Kalal*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory interpretation begins with the language of the statute.

If the meaning of the statute is plain, we ordinarily stop the inquiry.") (quotation marks and citation omitted).

"A dictionary provides the common and approved usage of words." *Stafford Trucking, Inc. v. ILHR Dept.*, 102 Wis. 2d 256, 262, 306 N.W.2d 79 (Ct. App. 1981). *Blacks Law Dictionary*, 5th edition, defines "action" as follows:

> [The] term in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law. . . The legal and formal demand of one's right from another person or party made and insisted on in a court of justice. An ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. In includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court." (citation omitted.)

In *In re Commitment of Alger*, 2015 WI 3, ¶28, 360 Wis. 2d 193, 211–14, 858 N.W.2d 346, 355–56 the court discussed the concept of "action."

> "'An action is an ordinary proceeding in a court of justice by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.' " *Ruediger v. Sheedy*, 83 Wis.2d 109, 121, 264 N.W.2d 604 (1978) (quoting *State ex rel. Ashley v. Circuit Court for Milwaukee Cnty.*, 219 Wis. 38, 43, 261 N.W. 737 (1935)). The word "action" "refer[s] to an entire proceeding, not to one or more parts within a proceeding." *State ex rel. Henderson v. Raemisch*, 2010 WI App 114, ¶ 22, 329 Wis.2d 109, 790 N.W.2d 242. "The word 'action' in the Wisconsin statutes denotes the entire controversy at issue." Id., ¶ 23 (emphasis added) (quoting *Gowan v. McClure*, 185 Wis.2d 903, 912, 519 N.W.2d 692 (Ct.App.1994)) (quotation marks omitted); see also id. (stating that "action" "refers to an entire proceeding, lawsuit or controversy"). For example, a motion to establish paternity is not an action. *DiBenedetto v. Jaskolski*, 2003 WI App 70, ¶¶ 25–26, 261 Wis.2d 723, 661 N.W.2d 869. Similarly, a probate matter is not an action. See *Estate of Stoeber v. Pierce*, 36 Wis.2d 448, 452, 153 N.W.2d 599 (1967).

Applied here, there is no action pending in any court (other than the instant case, of course) related to the decennial redistricting process currently underway. Under the plain terms of the statute the defendants did not have authority to enter into the two contracts at issue in this case.

Perhaps recognizing that the statute, on its face, does not directly authorize defendants' actions, they argue that the court should construe "action" to include anticipated, likely, or impending actions. Dkt. 28, p. 15; Dkt. 31, p. 27. However, as plaintiffs correctly note, the Speaker of the Assembly and Majority Leader of the Senate first acquired authority to hire outside counsel on behalf of legislative bodies only a few years ago, in 2017 Wisconsin Act 369, Section 3, which created Wis. Stat. § 13.124. Had the Legislature intended for the Speaker and Senate Majority Leader to have the authority to obtain private legal counsel for those bodies for actions that do not yet exist, it could have written the statute differently. "The legislature is presumed to know the status of existing law, and to have chosen its words carefully." *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 14, 256 Wis. 2d 859, 868, 650 N.W.2d 81, 85 (citations omitted). It would be improper for this court to legislate by reading into the statute something which is not there, and which could have easily been adopted by the legislature if that is what was intended.

Finally, if "anticipated, likely, or impending" litigation were read into the statute, as defendants suggest, it would mean the Speaker and Majority Leader could hire outside counsel *whenever* they subjectively believe litigation might occur. How would courts ever review such decisions? Is a 5% probability of litigation sufficient? What about 15%? The *SEIU* court presciently observed that there may be "individual applications or

categories of applications" by the legislature which "may violate the separation of powers." *SEIU,* at ¶ 73. Defendants' invitation to read "anticipated, likely, or impending" into the statute would do just that. It would mean the Speaker and Majority Leader could hire counsel whenever they decided to do so, contradicting *SEIU*'s narrow holding and inviting the legislature to venture from its core powers into those reserved for the executive. *Id*. By contrast, a narrow interpretation of the statute as it is written (requiring that there be an actual action pending before the Speaker and Majority Leader may decide to hire counsel) respects the separation of powers between the branches. Accordingly, I conclude that the defendants were not authorized to hire the two law firms under Wis. Stat. §13.124 because there is no "action" pending in any state or federal court.[3]

SECTION 16.74

Wis. Stat. § 16.74(1) provides, in relevant part, as follows:

> All supplies, materials, equipment, permanent personal property and contractual services required within the legislative branch shall be purchased by the joint committee on legislative organization or by the house or legislative service agency utilizing the supplies, materials, equipment, property or services.

Wis. Stat. § 16.74(2)(a) states, in relevant part, as follows:

> Requisitions for legislative branch purchases shall be signed by the cochairpersons of the joint committee on legislative organization or their designees for the legislature, by an individual designated by either house of the legislature for the house, or by the head of any legislative service agency, or the designee of that individual, for the legislative service agency. . .

[3] The issue of the constitutionality of this section, as applied, is not before me. I conclude that the defendants may not hire the firms based on this statute because no action is currently pending. This opinion should not be read to say the legislature may hire counsel in the future based on this statute. Maybe it can do so, maybe it can't. That issue is for a later day.

Defendants argue that Wis. Stat. § 16.74(1) provides authority to hire the two law firms because those contracts fall within the provision authorizing "contractual services." Dkt. 31, pp. 21-23.[4] This interpretation ignores the statutory rules of construction which direct a court "to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal*, *supra* at ¶ 44. To find this meaning, courts interpret the text "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*, ¶ 46.

Applied here, the words "contractual services" must be read in conjunction with what comes before that phrase, *i.e.*, "supplies, materials, equipment, permanent personal property." To give one example, if the air conditioning unit for the legislature breaks, the legislature may purchase not only the replacement equipment, but can also hire the contractors to install the equipment. Put simply, the "contractual services required" must relate to, or be required by the purchase of "supplies, materials, equipment [or] personal property." Contractual services not related to those items are not allowed.

Even if "contractual services" is interpreted more broadly, Wis. Stat. §16.74 still requires that the contracts relate to services "required within the legislative branch." Thus, for example, the legislature can probably purchase software to help it formulate district lines as part of its legislative function. During the redistricting process the legislature could probably also hire counsel to review maps it has drawn to ensure the maps comply with existing law. What the statute does not authorize – and what the

[4] In their response brief plaintiffs argue that defendants failed to follow appropriate audit and billing procedures in approving and signing the contracts. Dkt. 48, pp. 20-27. Defendants maintain they did follow proper procedures Dkt. 60., pp. 13-20. I need not address these arguments because I conclude Wis. Stat. § 16.74(1), by its very terms, does not authorize the legislature's actions here.

legislature has done here – is preemptive hiring of counsel to represent it in litigation that may not even occur. Once again, the defendants' suggested interpretation of Wis. Stat. § 16.74 impermissibly infringes on the core power of the executive branch to enforce the laws. *SEIU*, *supra* at ¶ 51 (recognizing the attorney general's primary role in litigation and noting that prior to 2017 the legislature had limited power to intervene in litigation).

SECTION 20.765

Wis. Stat. § 20.765 provides, in relevant part, as follows:

"**Legislature.** There is appropriated to the legislature for the following programs:

(1) ENACTMENT OF STATE LAWS. (a) *General program operations* – assembly; A sum sufficient to carry out the functions of the assembly, excluding expenses for legislative documents."

(b) *General program operations – senate*. A sum sufficient to carry out the functions of the senate, excluding expenses for legislative documents."

Defendants basically contend that the legislature can do whatever it wants under this provision so long as its expenditure is related to a function of the Assembly and Senate. Defendants argue that "the Legislature itself has the sole authority to determine what its functions are, how to appropriate money to fulfil those functions, and how much money to appropriate to carry out its functions." Dkt. 31, p. 20. In making this argument, the defendants misconstrue the meaning of this statute, greatly expanding the power of the legislature beyond its proper authority. Properly understood, the "sum sufficient" provision is more modest in scope: It provides that there will be money available for activities the legislature is authorized to undertake, but the provision does not itself provide that authority; rather, the legislature's authority, if any, must be found in the

Constitution or some other statutory provision. To hold otherwise would be to ignore our Supreme Court's recent admonishment, albeit in a different context, that "[courts] must remember that our constitutional structure does not contemplate unilateral rule by [any branch of government]. It consists of policy choices enacted into law by the legislature and carried out by the executive branch." *Jere Fabick v. Tony Evers*, 2021 WI 28, ¶ 14; citing *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 31, 393 Wis. 2d 38, 946 N.W.2d 35. "Therefore, if the [legislature] has authority to exercise certain powers not provided in our constitution, it must be because the legislature has enacted a law that passes constitutional muster and gives it that authority." Id.

*State ex rel. Moran v. Dept. of Admin*., 103 Wis.2d 311, 318-19, 307 N.W.2d 658 (1981), supports the proposition that the "sum sufficient" statute is not itself the source of legislative power. In *Moran* the director of state courts petitioned the Wisconsin Supreme Court "for a writ of mandamus to compel the secretary of administration to issue his warrant to the state treasurer so as to authorize the expenditure of funds under a contract to provide an automated legal research system" for the court. *Id*. at 312. To resolve whether the writ should issue, the court first considered whether the director of state courts had the authority to order an automated legal research system.

> The confrontation here is between the secretary and the director as to which one is authorized to control expenditures from the sum sufficient appropriations enacted by the legislature. *We must determine whether the director has authority to order the expenditure of funds for automated legal research*, and whether the secretary has a clear legal duty to comply with the order, for otherwise, under familiar legal principles, mandamus will not lie.

*Id*. at p. 315 (italics supplied).

The court answered this question in the affirmative, concluding that the court (and thus the director of state courts) had inherent authority under the constitution. *Id.* at 316-17. In addition, based on the recently reorganized and constitutionally adopted unified court system, the chief justice was designated as the administrative head of the judicial system. As such, "[p]owers were made explicit which had been implied in our decisions construing art. VII of the constitution as it existed prior to the amendment." *Id.* at 317.

Having concluded that the director of state courts had the authority to order the automated legal research system, and thus had the authority to present the demand to the secretary of administration, the court then turned to the question of whether the secretary was required to honor it. *Id*. at 318. The court concluded that the secretary was required to do so because the sum sufficient statute applicable to the courts made available an appropriation sufficient to carry out the operation of the courts. *Id*. at 319.

The reasoning and structure of *Moran* compels the conclusion that sum sufficient statutes (whether for the judicial, executive, or legislative branch) do not create or provide power for a branch of government to act. Instead, sum sufficient statutes simply provide an appropriation for those powers which are derived from the constitution or state statutes. Accordingly, I conclude the defendants were not authorized to hire outside counsel to help with redistricting under Wis. Stat. § 20.765.[5]

[5] Wis. Stat § 13.124, discussed above, also supports the conclusion that Wis. Stat. § 20.765 is not itself the source of defendants power to hire counsel as they see fit in all circumstances, so long as the interests of the legislature are implicated. As we have seen, Wis. Stat. § 13.124 gives the speaker of the assembly and president of the senate to hire private counsel when an action is pending and says the money will be provided under Wis. Stat. § 20.765. If Wis. Stat. § 20.765 already authorized defendants to hire counsel, as defendants contend, then why was it necessary to pass Wis. Stat. § 13.124?

## CONCLUSION

The contracts entered into with CM&M and BGSJ are void because defendants were not authorized to hire those firms for litigation purposes. As such, I grant summary judgment in plaintiffs' favor and order the following requested injunctive and declaratory relief:

1. The CM&M and BGSJ contracts entered into by Defendants are void *ab initio*.
2. The Defendants are permanently enjoined from authorizing any further payment on the two contracts for any services performed pursuant to them.
3. Plaintiffs shall recover statutory costs, fees and disbursements.