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Case No. 2019AP559

SUPREME COURT OF WISCONSIN

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN; DISABILITY RIGHTS WISCONSIN INC.; BLACK LEADERS ORGANIZING FOR COMMUNITIES; GUILLERMO ACEVES; MICHAEL J. CAIN; JOHN S. GREENE; AND MICHAEL DOYLE, in his official capacity as Clerk of Green County, Wisconsin,

Plaintiffs-Respondents,

v.

TONY EVERS, in his official capacity as Governor of the State of Wisconsin,

Defendant-Respondent,

and

THE WISCONSIN LEGISLATURE,

Intervening Defendant-Appellant.

ON BYPASS APPEAL FROM THE DECISION AND ORDER GRANTING TEMPORARY INJUNCTION DATED MARCH 21, 2019 IN DANE COUNTY CIRCUIT COURT CASE 19CV84, THE HONORABLE RICHARD G. NIESS, PRESIDING

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE IN SUPPORT OF THE INTERVENING DEFENDANT-APPELLANT

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Wisconsin Manufacturers and Commerce (WMC) is Wisconsin's chamber of commerce and manufacturers association. With approximately 3,800 members statewide, WMC is the largest general business trade association in Wisconsin. WMC members represent all sizes of business and every sector of Wisconsin's economy. Since our founding in 1911, WMC has been dedicated to making Wisconsin the most competitive state in the nation in which to conduct business.

To make Wisconsin a great place to do business, WMC advocates on behalf of its members before the Legislature, administrative agencies, and in the courts to promote statutory and regulatory certainty. Businesses are hesitant to make investments when longstanding practices can change on a whim. Therefore, the Wisconsin business community needs certainty to function properly. Many of the provisions enacted in the December 2018 Extraordinary Session provide that certainty, and conversely, the decision of the lower court has done nothing but create uncertainty.

The Legislature convened the December 2018 Extraordinary Session as it has routinely for almost half a century without any legal concerns raised about the practice. Now the plaintiffs-respondents seek to invalidate the practice of extraordinary sessions themselves,

invalidating all the laws passed in the December 2018 Extraordinary Session and every other such session held by the Legislature in the past half century. Invalidating all extraordinary sessions would create great uncertainty for our members, and the regulated community as a whole. It would invalidate many of the key policies that make Wisconsin a better place to work, live, and do business simply because certain groups disagree with certain duly enacted, noncontroversial policies.

ARGUMENT

I. The Wisconsin Legislature Properly Exercised Its Constitutional Authority In Convening The 2018 December Extraordinary Session.

The ability of the Wisconsin Legislature to meet and exercise its core constitutional function must be analyzed in the context of its plenary authority to set the rules for its own proceedings. Wis. Const. Art. IV, § 8. The Wisconsin Constitution embodies principles that create a powerful Legislature. Like the federal system, each branch of the state government is empowered to act in accordance with its designated function and is "supreme in its particular field." *Goodland v. Zimmerman,* 243 Wis. 459, 467, 10 N.W. 2d 180 (1943). However, the Wisconsin Constitution differs from the federal Constitution in that it places a greater emphasis on the notion of a "predominant" legislature.

Wisconsin courts have "repeatedly held that the power of the state legislature, unlike that of the federal congress, is plenary in nature" and that it is "competent" to exercise all legislative authority not forbidden by the constitution or delegated to the general government, or prohibited by the constitution of the United States." *State ex rel. McCormack v. Foley*, 18 Wis. 2d 264, 277, 118 N.W. 2d 211 (1962). Article IV embodies the notion that the Legislature is predominant, especially in that only it may set the rules of its proceedings. Wis. Const. Art. IV, § 8. Article IV, § 11 does require the Legislature to meet; however, it does not constrain it as severely as the circuit court posits in its decision. The circuit court fails to analyze Art. IV, § 11 in tandem with § 8, which provides the Legislature the authority to determine the rules of its own proceedings. In fact, it fails to properly analyze the Legislature's compliance with § 11 at all. Thus, the circuit court did not analyze the relevant or proper question before it. That question is whether the Legislature complied with constitutional requirements, namely, Article IV, § 11.

Section 11 provides, "[t]he legislature shall meet at the seat of government at such time as shall be provided by law…" If the Legislature has complied with these directives, this Court has previously refused to "intermeddle" in "purely legislative concerns." *See State ex*

rel. La Follette v. Stitt, 114 Wis.2d 358, 364-65, 338 N.W. 2d 684 (1983). In applying these principles, this Court, in *Ozanne*, declined to analyze compliance with specific procedural statutory requirements found in Wisconsin's Open Meetings Law. *Ozanne*. *See State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶¶ 13-15, 334 Wis. 2d. 70, 798 N.W.2d 436.. Here the Legislature complied with Art. IV, § 11. This Court should continue to apply its precedent in *Stitt* and *Ozanne* and refuse to intermeddle in purely legislative concerns. The circuit court exceeded its jurisdiction when it invalidated the laws enacted in the December 2018 Extraordinary Session based upon its analysis of the Legislature's compliance with Wis. Stat. § 13.02(2) in direct contravention to this Court's directive in *Ozanne*, 2011 WI 43.

As is required by Art. IV, § 11, the Legislature gaveled in its 2017 biennial session on January 3, 2017 at the seat of government in Madison, adopted a work schedule pursuant to Wis. Stat. § 13.02(2)-(3), and then conducted legislative business in either prescheduled floor periods, committee periods, or non-prescheduled floor periods prior to adjourning *sine die* on January 7, 2019.[1] This Court has previously held that the Legislature meets until it adjourns *sine die*. *State ex rel. Sullivan*

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[1] 2017 Senate Joint Resolution 1, https://docs.legis.wisconsin.gov/2017/related/proposals/sjr1.pdf.

v. Dammann, 22 Wis. 551, 559, 267 N.W. 433, 436 (1936). The Wisconsin Legislature's practice of meeting continuously over the two-year legislative session, rather than continuously for several months every other year prior to adjourning *sine die*, was adopted in 1971 following the ratification of a 1968 constitutional amendment creating a full time Legislature. The Legislature was still "meeting" in the constitutional sense of the term in December of 2018. In that instance, as the Legislature has done numerous times before, including on multiple occasions during the 2017-19 session, it changed one of the committee work periods to a non-prescheduled floor period, commonly referred to as an extraordinary session.

This Court previously refused to extend its jurisdiction to invalidate a duly enacted law for the alleged failure of the State Senate to abide by statutory requirements surrounding Wisconsin's Open Meetings Law. Similarly, here, the Court should not extend its jurisdiction to examine if the Legislature complied with Wis. Stat. § 13.02 once it has determined that it clearly satisfied the requirements of Section 11, as it has here.[2]

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[2] Even if the Court determines it has jurisdiction to consider whether the Legislature complied with Wis. Stat. § 13.02, by the plain language of Wis. Stat. § 13.02(3) it is obvious the Legislature complied because it adopted a "work schedule" through Joint Resolution 1. This schedule placed the Legislature in a continuous meeting from

II. Invalidating The Extraordinary Session Legislation Harms The Regulated Community And Opens The Floodgates To Future Litigation.

The Court's decision will have significant impacts far beyond the constitutional authority of the Legislature. It will directly impact main street Wisconsin businesses. While scholars and political prognosticators may debate the resulting impact of this Court's decision for years to come, there will be little debate in the business community. If these laws are stricken down by a novel legal theory, then the administrative state will be less transparent, government officials less accountable, and Wisconsin's law less clear.

A. The extraordinary session Legislation provides certainty for business by reining in the administrative state.

2017 Wisconsin Act 369, one of the acts plaintiffs-respondents seek to overturn, necessarily reins in potential for abuses by the administrative state. The Act provides predictability and meaningful opportunity for participation by the regulated community in the development of regulation. Most importantly, Act 369 requires more

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January 3, 2017 – January 7, 2019 and included the ability to turn a committee period into a non-prescheduled floor period. JR 1. In the final alternative, if this Court determines that the Legislature must act consistently with Wis. Stat. § 13.02(2), an extraordinary session is just a part of the regular session.

transparency from the administrative state as it acts *outside* of the rulemaking process. Wisconsin has long been a leader in ensuring our administrative state is transparent, accountable to the people, and open to stakeholders in the rulemaking process, however these same principles have not applied to the more widely used "guidance documents." *See* Wis. Stat. Ch. 227 (Wisconsin Administrative Procedure Act).

In theory, guidance documents explain the law – statutes and administrative rules – to the regulated community in an easily understandable way. While increased regulation in most contexts gives the regulated community pause, more troubling to them is not new administrative rules promulgated in the normal course, but rather those "rules" implemented through the issuance of agency guidance. Guidance does not, and should not, have the force of law, and to the extent that it places new requirements or restrictions on the regulated community, they are invalid and unenforceable. Wis. Stat. § 227.10(2m). However, in practice, guidance often becomes the law because small business owners cannot hire lawyers or experts to identify the underlying law that guidance purportedly "explains."

Prior to Act 369, administrative agencies were not required to even acknowledge the creation or alteration of guidance documents. Guidance often sat in desk drawers until they were retrieved by a

regulator and handed to a business along with a notice of violation. Agency reliance on unpromulgated "rules" to the detriment of the regulated community through guidance is not only illegal, but poor public policy. Act 369 does the following to remedy this: it (1) defines "guidance," (2) requires agencies to cite statutory or administrative code provisions in guidance, (3) requires that documents are made public so the regulated community may comment, and (4) requires the agency head to certify that the guidance is not an improperly promulgated rule. *See* 2017 Act 369 secs. 22 (Wis. Stat. § 35.93), 31 (Wis. Stat. § 227.01(3m)), 33 (Wis. Stat. § 227.05), 38 (Wis. Stat. § 227.112).

Moreover, and equally as critical to members of the public and the business community, is the legislative oversight of the Attorney General's settlement activity. Act 369 simply allows the client – the state of Wisconsin – to have a say when the Attorney General settles or discontinues a case on behalf of the state. 2019 Act 369 §§ 26, 30 (Wis. Stat. §§ 165.08(1); 165.25(6)(a)1). The Act allows the Legislature – the branch most directly accountable to the people of Wisconsin – to have a role in settlements concerning the validity of a statute. *Id.* It provides additional client oversight of the lawyer, in this case the Attorney General. This oversight protects against a lawyer acting solely on political interests and not what is best for the people. Every other

attorney in the state has an ethical duty to gain approval from their client when settling or discontinuing a case. *See* SCR 20:1.4(a)1. Since the role of the Attorney General is prescribed entirely by the Legislature, it should be uncontroversial that the Legislature retains oversight of settlement agreements entered into by the Attorney General. Wis. Const. Art. VI, § 3.

The inability of the Legislature to have oversight on settlements and other actions taken by the Attorney General has already negatively impacted the business community. Recently, Attorney General Josh Kaul discontinued his defense of a portion of Wisconsin's right-to-work law (2015 Act 1), which through Wis. Stat. § 111.06(1)(i) bans the use of dues-checkoff provisions that are used to narrow when a worker may "opt-out" of supporting a union. The previous Attorney General defended this statute, taking the case to the U.S. Supreme Court.[3] The case was ripe for Supreme Court review, however, at the eleventh hour, only one day before the Court was set to vote on the petition for review, Attorney General Kaul quietly dropped the appeal, effectively forcing certain Wisconsin workers to financially support a union against their

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[3] *Allen v. Int'l Ass'n of Machinists*, Petition for Writ of Certiorari, http://www.will-law.org/wp-content/uploads/2019/03/2018-12-28-petition-for-writ-of-certiorari.pdf.

will. If the circuit court in this case, in conjunction with a related case,[4] had not enjoined the enforcement of the relevant provision in Act 369, the Legislature could have had a seat at the table when this decision was made.

Further, Wisconsin Act 368, which greatly improves the tax climate in Wisconsin, hangs in the balance pending the outcome of this case. This Act does the following: it (1) allows pass-through entities (limited liability corporations, partnerships, and s-corporations) to be taxed at the entity level, and (2) provides tax relief by changing Wisconsin's taxation of online sales. Wisconsin has one of the highest business tax burdens in the nation.[5] Changes to the taxation scheme for pass-through entities provides a series of administrative and tax benefits to both the business and the controlling partners, members, or shareholders. This Act helped make our tax climate more competitive, but because of an untried legal theory, businesses do not know if they should elect to be taxed as an entity for the upcoming tax year and

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[4] *SEIU et al. v. Vos et al.*, Decision and Order Granting in Part, and Denying in Part Plaintiffs' Motion for a Temporary Injunction and Decision and Order Denying the Motion to Stay Pending Appeal, Case No. 19CV302 (Dane Cnty. Cir. Ct., March 26, 2019)

[5] Jared Walczak, Scott Drenkard, Joseph Bishop-Henchman, *2019 State Business Tax Climate Index*, TAX FOUNDATION, (Sept. 26, 2018), https://taxfoundation.org/publications/state-business-tax-climate-index/.

members of the public aren't sure if they can rely on a tax cut given the uncertainty surrounding the enforceability of the provisions.

B. Laws passed in prior extraordinary sessions will be targets for interest groups who seek to invalidate these laws.

Taking plaintiffs-respondents' legal theory to its logical end means that all laws passed during *any* extraordinary session are invalid. Thus, if this Court were to hold that all non-prescheduled floor periods of the Legislature were unconstitutional, laws passed during these floor periods over the last four decades would quickly become fodder for interest groups across the political and policy spectrum looking to invalidate those laws to further their agendas, leading to a volatile litigation climate. Instability in the legal climate often drives business away. Wisconsin's business climate would be severely damaged if the laws passed during unscheduled floor periods in the last half-century were invalidated. The subsequent race to the courthouse by these groups would create significant instability in the business community.

Meaningful economic and tort reform enacted in previous extraordinary sessions hangs in the balance. For example, 2015 Wisconsin Act 1 was passed during an extraordinary session. Act 1, also known as Wisconsin's right-to-work law, was one of the most significant economic reforms in Wisconsin's history and is of great consequence to

the business community. James Sherk, a labor economist who testified before the Wisconsin Senate's Committee on Labor and Government Reform, wrote that "[a]cademic studies find businesses make [right-to-work] laws a major consideration when deciding where to locate," and, "[b]usiness development consultants also report that roughly half of their clients will not consider locating in a non-right-to-work state."[6] Major Wisconsin employers have kept jobs in Wisconsin, and have chosen to expand in Wisconsin, because of this law.[7] There is no contention that the substantive portions of the law are constitutional nor that it met the relevant procedural requirements to pass a bill and sign it into law. *See Int'l Union of Operating Eng'rs Local 139 v. Schimel*, 863 F.3d 674 (7th Cir. 2017). The topic is still a controversial issue for certain groups as recent actions show. *See supra* 8-9. However, despite being in place for several years, this law could be invalidated not because the Legislature chose to change the law, but because of an unprecedented judicial intrusion into the Legislature's sole authority. *Id.*

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[6] James Sherk, Testimony before Wisconsin Senate's Committee on Labor and Government Reform, page 4 n. 11-12, https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2015/sb44/sb0044_2015_02_24.pdf.

[7] Caitlan Sievers, *Right-to-work law plays role in Badger Meter moving jobs to Racine*, THE JOURNAL TIMES, (Dec. 1, 2017), https://journaltimes.com/news/local/right-to-work-law-plays-role-in-badger-meter-moving/article_3809e654-6c36-532a-9c7e-eebc7aaa14a0.html.

Significant tort reform faces invalidation if the plaintiffs-respondents prevail. 2017 Wisconsin Act 235, a bill that modernizes Wisconsin's civil justice process, was also passed by the Legislature during a non-prescheduled floor period and signed into law by then-Governor Walker. As Senator David Craig testified, the legislation has "a positive impact on Wisconsin's business climate by reducing the cost and duration of litigation for state and local governments, consumers, and businesses alike."[8] The central provisions of the legislation modernized several elements of Wisconsin's rules of civil procedure surrounding the discovery process, improving the state's litigation climate. A state's litigation climate affects business decisions including where businesses decide to move or expand.[9]

Further, 2017 Act 327, passed in the same March 2018 floor period as Act 235, creates uniformity in a variety of areas of human resources law by preempting local governments from passing or enforcing a series of local labor regulations. Preemption of local governments from creating a patchwork quilt of labor laws decreases

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[8] Senator David Craig, Testimony on Assembly Bill 773, *Assembly Committee on Judiciary*, (Jan. 4, 2018), https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/ab773/ab0773_2018_01_04.pdf.

[9] *2017 Lawsuit Climate Survey*, US CHAMBER OF COMMERCE, pages 3-8, (Sept. 2017), https://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf.

businesses' compliance costs and encourages investment by creating uniformity.[10] Since the enactment of the above Acts, no subsequent act of the Legislature has overturned them and no lawsuit has stricken down the provisions for substantive reasons; however, these Acts are in danger of invalidation based on the novel legal theory presented by the plaintiffs-respondents in this case.

Invalidating all of the extraordinary session enactments would create substantial uncertainty regarding the numerous laws enacted during prior extraordinary sessions. The legislation from the December 2018 Extraordinary Session at issue in this case is of great benefit to the business community and every Wisconsinite interested in transparent and accountable government. If these laws are stricken down based on the plaintiffs-respondents' novel legal theory, the balance of power would be pulled away from the branch of government closest to the people, and significant damage would be done to Wisconsin's business climate.

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[10] *See generally State Labor Law Reform: Tools for Growth*, US CHAMBER OF COMMERCE, (2016), https://www.uschamber.com/sites/default/files/documents/files/wfi_statelaborlawreport.pdf; *How to Fight Local Balkanization of Labor and Employment Standards*, NFIB, (July 31, 2015), https://www.nfib.com/content/legal-blog/labor/how-to-fight-local-balkinization-of-labor-and-employment-standards-70289/.

CONCLUSION

For the foregoing reasons this Court should rule in favor of the intervening defendant-appellant and vacate the temporary injunction.

Respectfully submitted this 3rd day of May, 2019

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I hereby certify that his brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b) and (c) for a brief and a brief produced with a proportional serif font. The length of this brief is 2,998 words.

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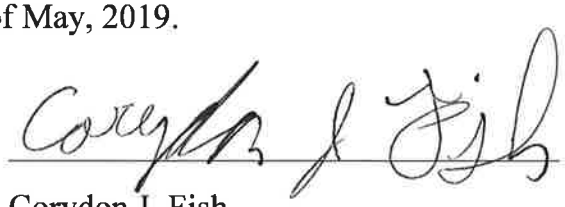
By: 

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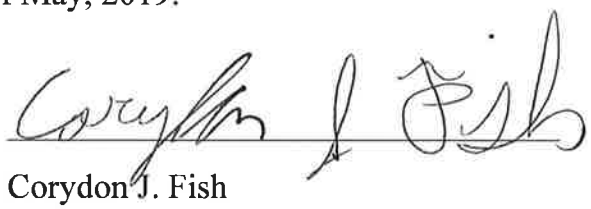
By: 

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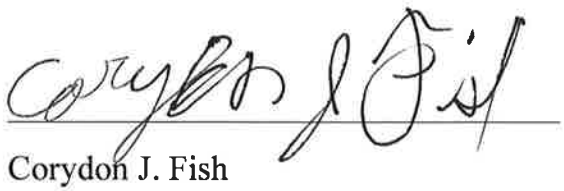
By: 

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