SUPREME COURT OF WISCONSIN

No. 19AP614-LV

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, SEIU HEALTHCARE WISCONSIN, MILWAUKEE AREA SERVICE AND HOSPITALITY WORKERS, AFT-WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS, RAMON ARGANDONA, PETER RICKMAN, AMICAR ZAPATA, KIM KOHLHAAS, JEFFREY MYERS, ANDREW FELT, CANDICE OWLEY, CONNIE SMITH AND JANET BEWLEY,
PLAINTIFFS-RESPONDENTS,
V.
ROBIN VOS, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY SPEAKER, ROGER ROTH, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE PRESIDENT, JIM STEINEKE, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY MAJORITY LEADER AND SCOTT FITZGERALD, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE MAJORITY LEADER,
DEFENDANTS-PETITIONERS,
JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN AND TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,
DEFENDANTS-RESPONDENTS.

No. 2019AP622

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, SEIU HEALTHCARE WISCONSIN, MILWAUKEE AREA SERVICE AND HOSPITALITY WORKERS, AFT-WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS, RAMON ARGANDONA, PETER RICKMAN, AMICAR ZAPATA, KIM KOHLHAAS, JEFFREY MYERS, ANDREW FELT, CANDICE OWLEY, CONNIE SMITH AND JANET BEWLEY,
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JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN AND TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,
DEFENDANTS.

On Appeal/Petition from the Dane County Circuit Court,
The Honorable Frank D. Remington, Presiding,
Case No. 2019CV000302

OPENING BRIEF OF LEGISLATIVE DEFENDANTS-PETITIONERS/DEFENDANTS-APPELLANTS

Misha Tseytlin
State Bar No. 1102199
TROUTMAN SANDERS LLP
1 N. Wacker Drive, Ste. 2905
Chicago, IL 60606
Telephone: (608) 999-1240
Facsimile: (312) 759-1939
misha.tseytlin@troutman.com

Eric M. McLeod
State Bar No. 1021730
Lisa M. Lawless
State Bar No. 1021749
HUSCH BLACKWELL LLP
33 E. Main Street, Suite 300
P.O. Box 1379
Madison, WI 53701
Telephone: (608) 255-4440
Eric.McLeod@huschblackwell.com

Counsel for Legislative Defendants

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STATEMENT OF ISSUES PRESENTED

1. Whether the Legislature may enact statutes that give it a seat at the table with the Attorney General, in a particular category of litigation.

The Circuit Court held that the Legislature was not entitled to dismissal of Plaintiffs' claims and further held that Plaintiffs had a substantial likelihood of success in their challenge to two of these provisions.

2. Whether joint committees of the Legislature may review certain actions taken by administrative agencies.

The Circuit Court held that the Legislature was not entitled to dismissal of Plaintiffs' claims and further held that Plaintiffs had a substantial likelihood of success in their challenge to one of these provisions.

3. Whether the Legislature may impose certain requirements on agencies' issuance of guidance documents and make certain other related changes in Wisconsin law.

The Circuit Court held that the Legislature was not entitled to dismissal of Plaintiffs' claims and further held that Plaintiffs had a substantial likelihood of success with regard to all but one of these provisions.

4. Whether the Circuit Court abused its discretion in issuing its temporary injunction.

By issuing a temporary injunction, the Circuit Court held, by implication, that it did not abuse its own discretion.

INTRODUCTION

The laws at issue address two serious threats to the separation of powers and the liberties of Wisconsinites. First, under preexisting statutes, the Attorney General[1] had unilateral authority to settle or compromise away the laws of this State and there was often nothing the Legislature could do about it. Second, administrative agencies made ever more decisions that governed the conduct of Wisconsinites, and both the people and their elected representatives often had no say in these actions.

The Legislature dealt with these issues with a measured, constitutional response, following the landmark separation of powers decisions in *State v. City of Oak Creek*, 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526, *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), and *J.F. Ahern Co. v. Wisconsin State Building Commission*, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983). Rather than taking

[1] This brief refers to statutes that reference the "Department of Justice" as the "Attorney General." *See Burkes v. Klauser*, 185 Wis. 2d 308, 322, 517 N.W.2d 503 (1994) ("[t]he Attorney General is head of the Department of Justice")

away the Attorney General's settlement authority entirely, as even Plaintiffs concede the Legislature could do under *Oak Creek*, the Legislature merely provided that if the Attorney General wanted to compromise away Wisconsin law, the Legislature would need to have a seat at the table. To provide additional oversight over agencies, the Legislature added to the large stock of legislative committee review provisions, of the type that *Martinez* and *Oak Creek* approved. The Legislature also provided that when agencies issue guidance documents, the people and the courts should have a say, through the common, well-respected procedures of notice-and-comment and judicial review.

Plaintiffs' challenge to these provisions is unprecedented and meritless. While Plaintiffs seek facial invalidation of dozens of statutory provisions, they are unable to cite *any* decision in this Court's history ever overturning even one provision under any of their theories. This Court should reject Plaintiffs' attack on Wisconsin law.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By asserting jurisdiction over these appeals, on its own motion, this Court has indicated that the case is appropriate for publication. This Court has already scheduled oral argument for October 21, 2019.

STATEMENT OF THE CASE

A. Challenged Statutory Provisions

1. In December 2018, the Legislature enacted 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370, hereinafter Acts 369 and 370. The provisions that the Circuit Court temporarily enjoined are indicated in **bold**.

Provisions impacting the Attorney General's litigation authority. Before December 2018, the Attorney General had broad statutory authority to concede away the State's interests, including settling away the constitutionality of duly enacted laws. Under pre-December 2018 law, when the Attorney General represented state parties in defense-side actions, he had the unilateral authority to "compromise and settle the action as the attorney general determines to be in the best interest of the state." Wis. Stat. § 165.25(6)(a)

(2017). And when the Attorney General filed a civil action, that civil action could be compromised at the direction of the relevant "officer, department, board or commission" or the Governor, without any legislative input. *Id.* § 165.08 (2017).

This created the possibility that the Attorney General would concede away the State's interests, including the constitutionality of laws that the Legislature enacted. In a nationwide trend, state attorneys general have begun abandoning their defense of controversial state laws, using similar authorities. *See, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1949 (2019); *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399, 1399 (2017) (statement of Roberts, C.J., respecting denial of certiorari). Indeed, while the statutes in this case sat enjoined, the Attorney General abruptly abandoned his office's long-running defense of a key portion of Wisconsin's right-to-work law, leaving in place a 2–1 decision from the Seventh Circuit blocking the law. *See Int'l Ass'n of Machinists v. Allen*, 904 F.3d 490 (7th Cir. 2018). The Attorney General took these actions after the petition for

certiorari—supported by numerous *amici*, including other States—sat fully briefed. *See* App. 163–64.

The Legislature sought to address this troubling trend with several statutory provisions.

Under Sections 3, 5, 28, 29, 97, 98, and 99, the Legislature is entitled to notice when the constitutionality or validity of a state statute is challenged, Wis. Stat. § 806.04(11), has the right to intervene "at any time," *see id.* §§ 165.25(1)–(1m), or where a statute's constitutionality or other basis of validity is challenged "in state or federal court," *id.* §§ 803.09(2m); § 13.365, and can obtain its own counsel, other than the Attorney General, *id.* § 13.124.

Under **Section 30**, "if the action is for injunctive relief or there is a proposed consent decree," the Attorney General cannot "compromise or settle" the case unless the Legislature, as intervenor, agrees; or, if the Legislature has not intervened, without approval by the Joint Committee on Finance ("JFC"). *See* Wis. Stat. § 165.25(6)(a)1.

Under **Section 26**, the Attorney General may not "compromise[] or discontinue[]" a case that he is prosecuting

unless the Legislature, as intervenor, agrees; or, if the Legislature has not intervened, unless the JFC approves the Attorney General's "proposed plan." *Id.* § 165.08(1).

When he seeks to act under either Section 30 or Section 26, the Attorney General may not submit a proposed plan that "concedes the unconstitutionality or other invalidity of a statute" without first securing "the approval of the joint committee on legislative organization ['JCLO']." *Id.* §§ 165.08(1); 165.25(6)(a)1.

Provisions increasing legislative joint committee oversight over certain administrative agency actions. "The very existence of [an] administrative agency . . . is dependent upon the will of the legislature; its or his powers, duties and scope of authority are fixed and circumscribed by the legislature and subject to legislative change." *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 56, 158 N.W.2d 306 (1968). It is thus "incumbent on the legislature, pursuant to its constitutional grant of legislative power, to maintain some legislative accountability over rule-making." *Martinez*, 165 Wis. 2d at 701. For four decades following the Court of

Appeals' decision in *Ahern* and this Court's decision in *Martinez*, the Legislature achieved agency "accountability" by giving committees oversight over agency actions, most usually by the JFC. *See* Wis. Legis. Fiscal Bureau, J. Comm. on Finance, Info. Paper No. 76 (Jan. 2019), http://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2019/0076_joint_committee_on_finance_informational_paper_76.pdf ("JFC Report").

In Acts 369 and 370, the Legislature added to this large cache of legislative committee provisions. Section 87 of Act 369 authorizes the JFC to review the Wisconsin Economic Development Corporation's designation of new enterprise zones. Wis. Stat. § 238.399(3)(am). Section 11 of Act 370 authorizes the JFC to review the reallocation of certain funds by the Department of Children and Families. *See id.* § 49.175(2)(a). Section 10 of Act 370, as relevant here, authorizes the JFC to approve certain actions by the Department of Health Services related to federal "waiver or renewal, modification, withdrawal, suspension, or termination of a waiver of federal law or rules or for

authorization to implement a pilot program or demonstration project." *Id.* § 20.940. Section 16 of Act 369 authorizes the JCLO to evaluate changes by the Department of Administration to security at the Capitol. *Id.* § 16.84(2m). **Section 64 of 2017 Wisconsin Act 369** modifies the preexisting authority of the Joint Committee for Review of Administrative Rules ("JCRAR") to review rules, which this Court upheld in *Martinez*, to now permit the suspension of a rule more than once. *See id.* § 227.26(2)(im).

Provisions regulating guidance documents and certain other duties and limitations on agencies. 2017 Wisconsin Act 369 imposes certain additional duties and limitations on agencies, mostly relating to guidance documents. **Section 31** defines "guidance document." *See id.* § 227.01(3m). **Section 38** requires a 21-day public notice-and-comment procedure for the issuance of any new guidance document, unless the Governor provides for a shorter period. *Id.* § 227.112(1). This follows the notice-and-comment procedure for guidance documents that the Department of Natural Resources has used for years. *See* Wis. Dep't of Nat.

Res., Proposed DNR Program Guidance, https://dnr.wi.gov/news/input/guidance.html (last visited July 31, 2019); Wis. Dep't of Nat. Res., New Public Input Process for Creating or Updating DNR Guidance (Apr. 8, 2013), https://dnr.wi.gov/about/nrb/2013/April/04-13-3D1.pdf; *see Johns v. State*, 14 Wis. 2d 119, 125, 109 N.W.2d 490 (1961) (judicial notice of state records). Section 38 also gave agencies until July 1, 2019 to put all extant guidance documents through the notice-and-comment process. Wis. Stat. § 227.112(7). **Sections 65 through 71** permit impacted parties to challenge guidance documents in court. *See id.* § 227.40(1)–(4). **Section 33** requires certain agencies to "identify the applicable provision of federal law or the applicable state statutory or administrative code provision that supports any statement or interpretation of law" in agency publications. *See id.* § 227.05. Section 35 prohibits deference to an agency's conclusions of law, *id.*, § 227.10(2g), codifying *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21.

B. Procedural Background

On January 10, 2019, Plaintiffs—eight individual taxpayers and five labor organizations—filed this lawsuit against Legislative Defendants, the Governor and the Attorney General, seeking declaratory and injunctive relief blocking the challenged provisions as violating the Wisconsin Constitution. Dkt. 1. Plaintiffs thereafter sought a temporary injunction blocking the challenged provisions. Dkt. 8, 9. Legislative Defendants moved for dismissal, opposed Plaintiffs' temporary injunction, and sought a stay should the Circuit Court grant a temporary injunction. Dkt. 42, 43. The Governor and Attorney General, in turn, supported many of Plaintiffs' constitutional claims, while not defending any of the challenged provisions. Dkts. 52, 69, 74, 75.

On March 26, 2019, the Circuit Court issued its combined decision on the pending motions. The Circuit Court first denied Legislative Defendants' motion to dismiss in its entirety, without any substantive discussion as to whether Plaintiffs had stated a claim. App. 3. The Circuit Court did not even grant the motion to dismiss as to Section

35 of Act 369, even though it later recognized that this provision "merely codifies" *Tetra Tech*. App. 44. As to Plaintiffs' motion for a temporary injunction, the Circuit Court enjoined provisions in **bold** above, while declining to enjoin the remaining provisions. App. 48–49. The Circuit Court conducted no irreparable harm or public interest analysis, but merely declared that unconstitutional provisions cause irreparable harm. App. 3–4. The Circuit Court denied a stay of its temporary injunction. App. 4 n.2.

On June 11, 2019, this Court stayed the temporary injunction, except as to the requirement that agencies withdraw any guidance documents that had not gone through the notice-and-comment by July 1, 2019. App. 59.

STANDARD OF REVIEW

"Whether a complaint states a claim upon which relief can be granted is . . . a question of law" that this Court reviews "independently of the determination[] rendered by the circuit court . . . but benefiting from [its] analys[i]s." *PRN Assocs. LLC v. State of Wis. Dep't of Admin.*, 2009 WI 53, ¶¶ 26–27, 317 Wis. 2d 656, 766 N.W.2d 559. "[A]n

injunction ordered by a circuit court will be reviewed to determine whether there was an erroneous exercise of discretion." *Hoffmann v. Wis. Elec. Power Co.*, 2003 WI 64, ¶ 10, 262 Wis. 2d 264, 664 N.W.2d 55. Where the denial of the motion to dismiss and issuance of a temporary injunction both turn on contested "interpretation[s] of constitutional and statutory provisions," this Court reviews those "questions of law" "de novo." *League of Women Voters v. Evers*, 2019 WI 75, ¶ 13, 387 Wis. 2d 511, 929 N.W.2d 209.

SUMMARY OF THE ARGUMENT

I. All of Plaintiffs' claims fail as a matter of law, and this case should be remanded for dismissal.

A. Plaintiffs' lawsuit faces a particularly steep climb because they have brought a separation of powers lawsuit focused upon alleged burdens that statutory provisions impose on the Attorney General and administrative agencies. But the Attorney General's powers are subject to plenary legislative control, while administrative agencies are creatures of the Legislature. In addition, Plaintiffs have bought facial challenges to a vast number of statutory

provisions, rather than bringing a more focused, as-applied challenge to one or two provisions.

B. Plaintiffs' challenge to the Attorney General provisions fail for two independently sufficient reasons. As a threshold matter, under this Court's decision in *Oak Creek*, the Attorney General has no constitutional authority, with his powers being subject to plenary legislative control. Accordingly, statutory provisions that limit or impact the Attorney General's authority have no constitutional import, as all of his powers are statutory. In any event, if this Court concludes that these provisions are subject to separation of powers scrutiny, these provisions easily survive the shared power analysis. The Attorney General provisions merely give the Legislature a seat at the table when the Attorney General wishes to make consequential litigation decisions for the State, such as conceding away the constitutionality of state law. Under binding caselaw, such as *Ahern*, such a cooperative regime is constitutional because the Attorney General and the Legislature must agree for any litigation compromise to occur.

C. All of the legislative committee review provisions are constitutional under *Martinez* and *Ahern*. The Legislature has relied for four decades on these landmark decisions, which upheld legislative committees reviewing the actions of administrative agencies. The new provisions that the Legislature enacted in December 2018 are entirely in line with what *Martinez* and *Ahern* approved, and with four decades of legislative practice, spanning dozens of statutory provisions. Indeed, adopting Plaintiffs' theory here would require overturning *Martinez* and *Ahern*, as well as numerous, long-standing committee review provisions, which have proven to be an essential tool for effective legislative oversight over administrative agencies.

D. The guidance document and other provisions that impose duties and limitations on administrative agencies are plainly constitutional. These provisions are just garden-variety legislation, with the Legislature staying entirely in its own lane of articulating the powers and duties of administrative agencies, which are a legislative creation. The Circuit Court's critique of these provisions rests largely

on its policy disagreement with whether these duties are too cumbersome, which is not a valid basis for judicial review, including in the separation of powers context.

II. The Circuit Court erroneously exercised its discretion in temporarily enjoining several of the provisions in this case. Even putting the Circuit Court's errors on the merits aside, the Circuit Court simply conducted no analysis of irreparable harm, the balance of the equities, or the public interest. Had the Circuit Court engaged in this mandatory analysis, no injunction would have issued. For most of the provisions that the Circuit Court enjoined, Plaintiffs and their supporters did not put in any evidence that could lead to a finding of irreparable harm, let alone public benefit from an injunction. In any event, neither the Circuit Court nor Plaintiffs addressed the serious harms that would befall the Legislature and the people from an injunction here, including permitting the Attorney General to unilaterally settle away the constitutionality of state law, just as occurred during the injunction's short lifespan.

ARGUMENT

I. Plaintiffs' Claims Fail As A Matter Of Law

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (citation omitted). A complaint is not legally sufficient where the claims fail as a matter of substantive law, after assuming the truth of all of plaintiffs' factual (but not legal) allegations. *Id.* ¶¶ 19, 21, 31. As explained below, all of Plaintiffs' challenges fail, as a matter of law.

A. Plaintiffs' Separation of Powers Lawsuit, Challenging Provisions That Impact Only The Attorney General And Administrative Agencies, Faces A Particularly Steep Climb

Plaintiffs have brought a species of lawsuit that, so far as the parties have been able to determine, has never succeeded under the Wisconsin Constitution, in any case, for any statutory provision: a facial challenge to provisions allegedly burdening the Attorney General and administrative agencies. Several aspects of Plaintiffs' lawsuit make clear why the type of claims that Plaintiffs allege have never succeeded in this State's history.

The principal reason that Plaintiffs' lawsuit is such a longshot is the nature of the alleged separation of powers issues that they raise. Under the Wisconsin Constitution, the "Legislative power is vested in a senate and assembly, executive power is vested in a governor, and judicial power is vested in a unified court system." *Koschkee v. Taylor*, 2019 WI 76, ¶ 10, 387 Wis. 2d 552, 929 N.W.2d 600 (citing Wis. Const. art. IV, V, VII). Pursuant to the "implicit" doctrine of separation of powers, a branch violates the separation of powers when it "interferes with a constitutionally guaranteed 'exclusive zone' of authority vested in another branch." *Martinez*, 165 Wis. 2d at 696–97. Outside of the narrow, "exclusive zone," "Wisconsin courts interpret the Wisconsin Constitution as requiring shared and merged powers of the branches of government rather than an absolute, rigid and segregated political design." *Id.* at 696–97. "When there exists a sharing of powers . . . one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's role and power." *Id.* at 696

(citation omitted). This Court has applied the separation of powers "liberally" in the shared powers context, explaining that the Constitution "envisions a government of separated branches sharing certain powers." *Ahern*, 114 Wis. 2d 102–03 (quoting *State v. Holmes*, 106 Wis. 2d 31, 43, 315 N.W.2d 703, (1982)); *accord Martinez*, 165 Wis. 2d at 701 n.13 (approving *Ahern*'s "liberally applied" characterization).

Both the Attorney General and agencies have no "exclusive zone" of constitutional authority, meaning that any burden or limit on their authority is viewed either with no separation of powers analysis, or at most, through the mixed powers analysis. The Attorney General lacks *any* constitutional authority. *Oak Creek*, 2000 WI 9, ¶ 24. Administrative agencies, while "considered part of the executive branch[,]" have "only those powers that are expressly conferred or that are necessarily implied by [] statute[s]." *Koschkee*, 2019 WI 76, ¶ 14 (citation and alterations omitted). Since the "very existence of [an] administrative agency . . . is dependent upon the will of the legislature . . . [a]n administrative agency does not stand on

the same footing as a court when considering the doctrine of separation of powers." *Schmidt*, 39 Wis. 2d at 56–57.

Plaintiffs' lawsuit faces an uphill climb for two additional reasons. First, Plaintiffs must show that each of the statutes that they are challenging is "unconstitutional beyond a reasonable doubt," with "[a]ny doubt" being "resolved in favor of upholding the statute." *Martinez*, 165 Wis. 2d at 695. Second, Plaintiffs have brought facial challenges to numerous provisions, not a more limited, as-applied challenge to one or two provisions. To succeed on a facial claim, a plaintiff must show that the provision cannot lawfully "be enforced 'under any circumstances.'" *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 33, 383 Wis. 2d 1, 914 N.W.2d 678 (citation omitted).

B. The Attorney General Provisions Are Constitutional

In Act 369, the Legislature enacted several provisions that seek to reign in the Attorney General's authority to abandon the defense of the State's litigation interests, including the constitutionality of state law. Under Sections 3, 5, 28, 29, 97, 98, and 99, the Legislature has the right to

intervene, *inter alia*, in cases where the constitutionality or other basis of validity of a statute is at stake. Under Section 30, the Attorney General cannot settle or concede away the constitutionality or other basis of validity of state law in these defense-side cases without the Legislature's consent, as intervenor; or, if the Legislature has not intervened, without the JFC's consent. Similarly, under Section 26, in plaintiff-side cases, the Attorney General may not "compromise[] or discontinue[]" the case without the Legislature's consent, as intervenor; or, if the Legislature has not intervened, without the JFC's consent.

These provisions are facially constitutional for two independently sufficient reasons.

1. No Separation Of Powers Analysis Is Warranted Because, Under *Oak Creek*, The Attorney General Lacks Any Constitutional Authority And Plaintiffs' Invocation Of The Governor's Authority Here Is A Red Herring

a. The Attorney General is the officer "elected for the purpose of prosecuting and defending all suits for or against the State." *Orton v. State*, 12 Wis. 509, 511 (1860). Under Article VI, Section 3 of the Wisconsin Constitution, "[t]he

powers, duties and compensation of the . . . attorney general shall be prescribed by law." In an unbroken line of cases, culminating with *Oak Creek*, 2000 WI 9, this Court has held that the Attorney General lacks any constitutional authority: "the attorney general's powers are prescribed *only* by statutory law." *Id.* at ¶24 (emphasis added); *accord State v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 179, 190, 116 N.W. 900 (1908); *State ex rel. Haven v. Sayle*, 168 Wis. 159, 163, 169 N.W. 310 (1918); *State v. Snyder*, 172 Wis. 415, 417, 179 N.W. 579 (1920); *State ex rel. Jackson v. Coffey*, 18 Wis. 2d 529, 538, 118 N.W.2d 939 (1963).

Oak Creek reached this conclusion after conducting a detailed textual and caselaw analysis. As a matter of constitutional text and this Court's decisions, it is clear that "the Wisconsin Constitution removed all of the attorney general's powers and duties which were found in that office under common law," replacing these powers with whatever authorities the Legislature decides to give to the Attorney General. 2000 WI 9, ¶ 22 (citation omitted). That is the

import of the "shall be prescribed by law" constitutional text, and more than a century of caselaw. *Id.* at ¶¶ 19–24.

Oak Creek bolstered that text- and caselaw-based conclusion by examining the constitutional debates and early legislative practice. 2000 WI 9, ¶¶ 25–33. In the debates during Wisconsin's constitutional conventions, the framers expressed their understanding that the phrase "shall be prescribed by law," which appears in Article VI, Section 3, "meant statutory law." *Id.* at ¶¶ 26–28. Early legislative practice supports the same conclusion, as the Legislature set out the Attorney General's powers in statute "[t]wo weeks after the first elected attorney general took office in 1848," and then adding "[a] number of statutes further defin[ing] the attorney general's powers in 1849." *Id.* at ¶ 30. For example, this 1848 law provided that "either branch of the legislature" could require the Attorney General to "appear for the state in any court or tribunal . . . in which the state may be a party or be interested," with similar language appearing in the 1849 statutes. *Id.* at ¶¶ 30 nn.15–16 (quoting Laws of Wis., 1848 St. Approved June 21, 1848).

b. The implications of *Oak Creek* here are straightforward: the Attorney General provisions are constitutional without *any* separation of powers analysis because legislation impacting or limiting the Attorney General's authority lacks constitutional import. While Plaintiffs claim that Sections 3, 5, 26, 28, 29, 30, 97, 98, and 99, variously impact the Attorney General's powers, *Oak Creek* makes clear that his powers are statutory. It thus makes no sense to discuss whether the Legislature has trampled upon the Attorney General's "'exclusive zone' of authority," *Martinez*, 165 Wis. 2d at 697, or has "unduly burden[ed] or substantially interfere[ed] with" the Attorney General's shared constitutional authority, *id.* at 696 (citation omitted), because the Attorney General has no *constitutional* zone, exclusive or otherwise.

c. The Circuit Court's contrary conclusion—that the courts have the authority to inquire whether "the shift in power caused by the new statutes, unconstitutionally undermines the Attorney General's" authority, App. 27—is incompatible with *Oak Creek* and the constitutional text and

history that *Oak Creek* reviewed. Article VI, Section 3 provides that "[t]he powers, duties and compensation of the . . . attorney general shall be prescribed by law." Under this constitutional text, "the attorney general's powers are prescribed only by statutory law." *Oak Creek*, 2000 WI 9, ¶24. That means the Legislature could give the Attorney General no powers to settle cases at all, as even Plaintiffs conceded below. Dkt. 59, at p. 6.

Showing its further disregard for *Oak Creek*, the Circuit Court redid the historical analyses that this Court conducted in *Oak Creek*, 2000 WI 9, 25–32, and then came to the opposite conclusion. The Circuit Court, for example, concluded that legislation that the Legislature enacted in 1849, giving certain litigation authority to the Attorney General, meant that "the people of Wisconsin understood that the power to initiate and defend cases to be at the core of the Attorney General's authority." App. 30. *Oak Creek* took the opposite lesson from this exact same 1849 legislation: that the early Legislature gave the Attorney General certain powers supports the conclusion that the

Attorney General's powers are subject to the Legislature's plenary control. *Oak Creek*, 2000 WI 9, ¶¶ 30–32.

d. In their Complaint and briefing below, Plaintiffs appeared to understand that these statues do not violate the Attorney General's constitutional authority, arguing, instead, that the provisions violate the *Governor*'s constitutional duty under Article V, Section 4, to "take care that the laws be faithfully executed." *See* Dkt. 1, ¶¶ 101–09; Dkt. 9 at pp. 9–11. The Circuit Court agreed with this argument, in an alternative holding. App. 11.

Plaintiffs' argument that statutes that impact or limit the Attorney General's statutory authority can violate the Governor's constitutional authority finds no support in Wisconsin constitutional law. The Attorney General is the State's constitutional officer "elected for the purpose of prosecuting and defending all suits for or against the State." *Orton*, 12 Wis. at 511. The Attorney General is an independently elected constitutional officer, having no constitutional accountability to the Governor. Instead, the Attorney General in Wisconsin occupies a "unique position,"

with the Constitution classifying him as an "administrative" officer. Arlen C. Christenson, The State Attorney General, 1970 Wis. L. Rev. 298, 300. He is thus not under the Governor's supervision, but is the "legal advisor" to both the Governor and the Legislature. *Id.* Given the Attorney General's constitutional independence from the Governor, it is logically impossible for the Attorney General's loss of authority to impact the Governor's constitutional powers.

So while the Circuit Court asserted that "administrative officers became part of the executive branch and serve the people of this state *under the supervision of the Governor*," App. 11 (emphasis added) the Circuit Court made this revolutionary claim without any support. As the Attorney General properly explained below, "the offices of the Governor, Attorney General, Secretary of State, Treasurer, and State Superintendent of Public Instruction . . . [e]ach is constitutionally established as an office elected on a statewide basis and independently accountable to the voters." Dkt. 75, at p. 10. Indeed, the disputes in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, and

Koschkee, 2019 WI 76, would have been nonsensical if officers like the Superintendent of Public Instruction (or, here, the Attorney General) were constitutionally subject to the Governor's "supervision," App. 11.

Plaintiffs have cited no Wisconsin authority for their bank-shot theory that depriving the Attorney General of his *statutory* authority can violate the Governor's unrelated *constitutional* authority. Instead, they relied on inapposite, out-of-state cases dealing with attorneys general who are constitutionally subordinate to the President or governor. *See* Dkt. 9, at pp. 9–11 (citing *Buckley v. Valeo*, 424 U.S. 1, 138–40 (1976), *In re Op. of Justices*, 162 N.H. 160, 169, 27 A.3d 859 (2011), etc.). Plaintiffs "must cite to another [sovereign's] case law to support [their] . . . theory because no Wisconsin case supports it." *Oak Creek*, 2000 WI 9, ¶ 49.

Looking at the provisions at issue in this case further belies Plaintiffs' theory. Under Sections 3, 5, 28, 29, 97, 98, and 99, the Legislature has the right to notice and intervention in a specific category of cases. The Governor has no statutory right, let alone a constitutional right, to

take any part in the overwhelming majority of these cases, either before or after Act 369. Indeed, the *only* change that Act 369 makes to the Governor's *statutory* authority is in the narrow category cases where the Attorney General brings a plaintiff-side lawsuit on his own initiative. *See Id.* § 165.08 (2017). This change has no constitutional significance because the Governor's role here was statutory, not constitutional. And, in any event, this involves only a single application of one provision in Act 369 and cannot support facial invalidation of that entire provision, let alone other provisions. *See Mayo*, 2018 WI 78, ¶ 33.

Plaintiffs' position on Section 30 is especially devastating to their effort to rope in the Governor's constitutional authority. Again, Section 30 changes a situation where the Attorney General had unilateral authority to settle defense-side cases, to one where he must give the Legislature a seat at the table. *The Governor had no role in this regime before Act 369, and has no role after Act 369.* The following depiction of what Legislative Defendants'

take to be Plaintiffs' position on defense-side cases well-illustrates the incoherence of Plaintiffs' entire theory:

	Violates Attorney General's Constitutional Authority?	Violates Governor's Constitutional Authority?
Pre-Act 369 Wis. Stat. § 165.25(6)(a), which gives the Attorney General unilateral settlement authority, while giving the Governor no role.	No.	No.
Hypothetical statute eliminating Attorney General's Wis. Stat. § 165.25(6)(a) settlement authority, while giving the Governor no role.	No.	No.
Section 30, allowing Attorney General to retain Wis. Stat. § 165.25(6)(a)1. authority, while giving the Legislature a seat at the table and giving the Governor no role.	No.	Yes, for some reason.

2. Even if A Separation Of Powers Analysis Applies, These Provisions Are Constitutional

Assuming this Court were to conclude that statutory provisions that impact or limit the Attorney General's statutory authority are subject to a separation of powers

analysis, either as to the Attorney General, the Governor or both, these provisions would easily survive.

a. As a threshold matter, litigation on behalf of the State's interests—especially the State's sovereign interest in the continuing validity of Wisconsin law—is demonstrably not within the "exclusive zone," *Martinez*, 165 Wis. 2d at 697, of either the Attorney General or the Governor, to the exclusion of the Legislature. As this Court explained just three months ago, "the Legislature . . . and the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." App. 57. This conclusion follows from the fact that the Legislature, the body "vested" with the power to make law, Wis. Const. art. IV, § 1, has a substantial interest in protecting the laws it enacts from invalidation. In this very case, the Legislature—"represented by the Legislative Defendants," App. 57—is the *only* body or officer speaking for the State's interest in the validity of several statutory provisions

"enacted by the people's elected representatives," *id.*, while both the Attorney General and the Governor have attacked these provisions. Much the same recently occurred in *League of Women Voters*, 2019 WI 75, where only the Legislature spoke for the State's and the people's interest in upholding Wisconsin law, while the Governor attacked State law. Similarly, as discussed below, *see infra*, p. 43, in *Martinez*, the Attorney General attacked state law, and the Legislature, speaking through its committees, was the only public body or officer that defended state law.

The Legislature's authority in the area of litigation, including in constitutional cases, is long-standing and well-established, going back to the State's founding. Under preexisting (and still current) law, "either house of the legislature" has the right to "direct[]," *Oak Creek*, 2000 WI 9, ¶ 44, the Attorney General to "represent the state, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in

which the state or the people of this state may be interested." Wis. Stat. § 165.25(1m). Similar authority for the Legislature to require the Attorney General to appear in court was part of the State's early laws, in both 1848 and 1849. *Oak Creek*, 2000 WI 9, ¶ 30 nn.15–16. Furthermore, the Legislature, its committees, or individual legislators have litigated many cases in Wisconsin courts, including before this Court in original actions often filed by legislative parties. *See State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988); *Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997); *Citizens Util. Bd. v. Klauser*, 194 Wis. 2d 484, 534 N.W.2d 608 (1995); *State ex rel. Reynolds v. Zimmerman*, 23 Wis. 2d 606, 128 N.W.2d 16 (1964). Preexisting statutory (and still current) law permits the Legislature, through its committees, to be "heard" as a "party" in other cases. Wis. Stat. § 227.40(5); *id.* § 13.56.

These principles, cases, and long-standing laws refute the Circuit Court's assertion that "the ability to control litigation" on behalf of the State is "the exclusive power" of the Attorney General and/or Governor. App. 8 n.4. Indeed,

if the Circuit Court's "exclusive power" view was correct, then the Legislature would have not been able to litigate on behalf of the State's interests in the validity of State law in this very case (or in *League of Women Voters*, *Martinez*, or any of the other cases referenced above), and could not have long exercised its founding-era authority to "direct[]" the Attorney General, *Oak Creek*, 2000 WI 9, ¶ 44, to appear in litigation, *id.* at ¶ 30 nn.15–16.

b. Accordingly, if this Court finds that the Attorney General provisions are subject to any separation of powers analysis, *but see supra*, p. 22, these provisions would implicate no "exclusive authority." Rather, the inquiry would be, at most, a "shared powers" analysis, where there is only a constitutional violation where "one branch of government . . . unduly burden[s] or substantially interfere[s] with the other branch's role and powers." *Martinez*, 165 Wis. 2d at 696 (citation omitted). These provisions easily survive scrutiny under that flexible, permissive analysis.

The two leading cases regarding whether the Legislature has violated the separation of powers by "unduly burden[ing] or substantially interfer[ing]" with the Governor[2] (as opposed to, for example, burdening or substantially interfering with the unified court system, *see, e.g.*, *Flynn v. Dep't of Admin*, 216 Wis. 2d 521, 576 N.W.2d 245 (1998)) are this Court's decision in *Martinez* and the Court of Appeals' decision in *Ahern*, which *Martinez* repeatedly cited and relied upon. Legislative Defendants discuss *Martinez* below, when dealing with the committee review provisions, *see infra*, p. 52, but it is *Ahern*'s holding and reasoning that are directly relevant here.

In *Ahern*, the State Building Commission—a "legislative committee," controlled by six legislators, out of eight total members—had the authority to approve building contracts, as well as waive certain competitive bidding requirements. 114 Wis. 2d at 76–77, 99–100. The Court of Appeals explained that although "the right to grant or

[2] So far as Legislative Defendants have been able to determine, no cases have decided whether the Legislature unduly burdened or substantially interfered with the Attorney General's constitutional authority. This is unsurprising because this Court has held for over a century that the Attorney General's authority is subject to the Legislature's plenary control. *See supra*, p. 27.

withhold approval of a construction contract" was "beyond dispute . . . an executive function," there was no separation of powers violation because the Commission only had the "a right solely to prevent construction not meeting the commission's approval at the contract stage, not a right to administer or supervise the construction itself." *Id.* at 105–06. That is because for a contract to become final, the Department of Administration and (usually) the Governor had to agree to the contract. *Id.* at 107. "A practical requirement of unanimity between the legislative members of the Building Commission, on the one hand, and the governor . . . converts the shared power over building construction into a cooperative venture between the two governmental branches." *Id.* at 108.[3]

Applying *Ahern*'s reasoning and holding to Sections 30 and 26 leads to the conclusion that these provisions would be constitutional under the "shared powers" analysis, if such an analysis were necessary. Just as the Building

[3] This Court denied the petition for review of the Court of Appeals' opinion in *Ahern*, 114 Wis. 2d 601, 340 N.W.2d 201 (Table) (1983), meaning that this decision is binding, statewide precedent, *Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997).

Commission could not actually finalize a building contract without the Department of Administration's and (usually) the Governor's agreement, the JFC cannot enter into a settlement agreement without the Attorney General's agreement. Indeed, unless the Attorney General submits a plan for settling or compromising an action, under Sections 30 and 26, the JFC has no authority to require any action. There is thus "[a] practical requirement of unanimity between the legislative members" of the JFC and the Attorney General, which is constitutional under *Ahern*, even if this Court concludes that an Attorney General's litigation decision is an "exercise of executive power." *Id.* at 108.

Sections 3, 5, 28, 29, 97, 98, and 99, are similarly constitutional, under a "shared powers" framework. These provisions merely give the Legislature the right to notice and to intervene in a category of cases, much like the Legislature's preexisting statutory authority to appear, through its committees, in certain cases. Wis. Stat. § 227.40(5); *supra*, p. 34. The Attorney General retains his right to appear in the vast majority of these cases, Wis. Stat.

§§ 162.25; 806.04(11), meaning there can be no plausible argument that this intervention will "unduly burden or substantially interfere with" the Attorney General's powers. *Martinez*, 165 Wis. 2d. at 696 (citation omitted). Indeed, in his briefing below, the Attorney General declined to argue that these provisions burdened or interfered with his office. To the exact contrary, as the Circuit Court noted, App. 37, the Attorney General asserted that the Legislature "could (and surely would)" seek to intervene "to defend the law," Dkt. 75, at p. 33, 34.

Finally, the Attorney General position below—that Sections 30 and 26 are unconstitutional, but Sections 3, 5, 28, 29, 97, 98, and 99 are constitutional—is not only legally wrong as to Sections 30 and 26, as demonstrated above, but deeply problematic from a practical point of view. If the Legislature has the right to intervene in cases where the constitutionality or validity of its statutes is at risk—as Sections 3, 5, 28, 29, 97, 98, and 99 provide—but loses its seat at the table under Sections 30 and 26, the Legislature would then need to undergo the expense of intervening in

any case where there is doubt as to whether the Attorney General will vigorously defend state law. And even this may not be enough in federal court cases. After all, state law intervention provisions cannot, and were not intended to, bind federal courts. The Legislature invokes these intervention provisions in federal court as a matter of comity and respect, which the Legislature can only request that federal courts will honor and respect. *See Planned Parenthood of Wis., Inc. v. Kaul*, No. 19-cv-038-wmc, 2019 WL 1771929, at *6 (W.D. Wis. Apr. 23, 2019) (denying the Legislature's motion to intervene to defend state law), *appeal pending*, No. 19-1835 (7th Cir).

Critically, if the Legislature has not successfully intervened at the outset of a case—either because the federal court denied the Legislature's intervention motion, notwithstanding comity considerations, *id.*, or the Legislature did not seek to intervene because it thought the Attorney General would vigorously defend state law or just out of concern for the public fisc—it may be too late thereafter. A recent example that occurred when Section 30

sat enjoined by the Circuit Court in this case is instructive. In *Allen v. International Association of Machinists*, No. 18-855 (S. Ct. Apr. 19, 2019), the Attorney General abruptly abandoned his defense of a key provision of Wisconsin's right-to-work law before the U.S. Supreme Court, after previously defending the statute in the district court and the Seventh Circuit. *See supra*, p. 6. When the Attorney General stipulated to the dismissal of his petition, one day before the Supreme Court was set to consider the case at its April 18, 2018 conference, this ended his defense of state law by ministerial operation of Supreme Court Rule 46.1, leaving unchallenged a permanent federal injunction blocking this law. With Section 30 disabled by the Circuit Court's order, the Legislature was powerless to protect both itself and "the public" from the "substantial and irreparable harm" that results from an injunction blocking "a statute enacted by the people's elected representatives." App. 57.

c. The Circuit Court reached the conclusion that Sections 30 and 26 are, in its view, likely unconstitutional, including under *Ahern*, by inaccurately describing these

provisions' operations. The Circuit Court reasoned that "Act 369 took the power to discontinue or compromise civil cases away from the Attorney General *and gave it to either the Senate, Assembly, the Senate/Assembly Committee on Organizations or to the Legislature itself*." App. 25 (emphasis added). But that is wrong because, just as in *Ahern*, the power at issue here is now *shared* between the Legislature and another officer; there is "[a] practical requirement of unanimity between the legislative members" and the Attorney General in order to settle a case. 114 Wis. 2d at 108. If the Attorney General does not want to settle a case where he is representing a state party, there is nothing the JFC can do under Sections 30 and 26 to force settlement.

The Circuit Court also inaccurately claimed that Legislative Defendants agreed that the Attorney General will "always" represent the State. App. 26. Legislative Defendants' position was consistent with another statement in the Circuit Court's decision: that the Attorney General may "represent and be the lawyer for the state, *when that representation is authorized by law*." *Id.* (emphasis added).

In Sections 30 and 26, the Legislature changed that "law," creating "a cooperative venture between the two governmental branches." *Ahern*, 114 Wis. 2d at 108. More generally, in the present case, the Attorney General, the Governor and Legislative Defendants *all* represent the State to some extent, and only the Legislature is, in fact, representing the State's and the people's core interest in protecting "a statute enacted by the people's elected representatives." App. 57. Much the same occurred in *League of Women Voters* and *Martinez*. *See supra*, p. 33. As the Court of Appeals correctly noted in its stay decision in *League of Women Voters*, "the Legislature and the Governor each represent[ed] the State" in that case. App. 67.

C. The Committee Review Provisions Are Constitutional

Plaintiffs challenge several committee review provisions in Acts 369 and 370 as violating the Governor's authority to "faithfully execute" the law, Wis. Const. Art. V, § 4, as well as the requirements that the Legislature follow bicameralism and presentment, and have a quorum present, in order to enact new laws, Wis. Const. art. IV, § 1, Wis.

Const. art. V, § 10, Art. IV, § 1. The Court of Appeals' decision in *Ahern* and this Court's decision in *Martinez*, which approved and expanded upon *Ahern*'s holding, already rejected all of Plaintiffs' core theories, making clear that: (1) the Legislature does not violate the Governor's constitutional authority when it supervises agencies, which are creatures of legislative creation; and (2) the constitutional requirements for lawmaking have no application to such supervision through joint committees because supervision is not "legislation as such." *Martinez*, 165 Wis. 2d at 699. Plaintiffs have offered no convincing reason for this Court to overrule *Martinez* and *Ahern*, nor explained how their challenges to these provisions can survive those cases' reasoning and holdings. Notably, adopting Plaintiffs' theory would disrupt far more than the provisions that the Legislature enacted in December 2018, as the Legislature has been enacting committee review provisions for decades, in reliance on *Martinez* and *Ahern*.

1. *Martinez* And *Ahern* Already Held That Legislative Committee Review Is Constitutional And The Legislature Has Repeatedly Relied Upon These Holdings

A. As discussed above, in *Ahern*, the Court of Appeals upheld the constitutionality of the Building Commission review of contracts against a separation of powers challenge. *Ahern* concluded that even though the approval of building contracts was "beyond dispute . . . an executive function," there was no separation of powers violation for the Building Commission to have an equal say with the Governor and the Department of Administration in this area. This was because the Building Commission merely had a right to "prevent construction not meeting the commission's approval at the contract stage, not a right to administer or supervise the construction itself." 114 Wis. 2d at 105. Because the Department of Administration and (usually) the Governor *also* had to agree to the building contract for any such contract to be finalized, there was "[a] practical requirement of unanimity between the legislative members of the Building Commission, on the one hand, and the

governor . . . convert[ing] the shared power over building construction into a cooperative venture between the two governmental branches." *Id.* at 108. Notably, *Ahern* rejected the challenger's analogy to out-of-state cases invalidating similar commissions by pointing to Wisconsin's "liberally applied" separation of powers regime, including because the separation of powers doctrine in this State is implicit, whereas that doctrine is explicit in many other States' constitutions. *Id.* at 102.

In *Martinez*, this Court cited *Ahern* with approval and then upheld Section 227.26, which authorizes the JCRAR "to temporarily suspend administrative rules pending bicameral review by the legislature and presentment to the governor for veto or other action." 165 Wis. 2d at 691, 702. After the Committee blocked an agency rule, the Attorney General—representing the agency, *see* App. 84–114—argued that the Committee's actions and structure violated the Governor's authority to faithfully execute the law, as well as the presentment and bicameralism requirement, while citing to other States' authorities and *INS v. Chadha*,

462 U.S. 919 (1983). The Legislature, speaking through two of its committees, defended state law, relying heavily on *Ahern*, while citing to the *Chadha* dissent and *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990). App. 137–61.

This Court unanimously agreed with the Legislature's argument, rejecting the Attorney General's position and holding that Section 227.26 complied with the Wisconsin Constitution. *Martinez*, 165 Wis. 2d at 702. *Martinez* first explained that, under this State's flexible separation of powers framework, the case should be evaluated under a "shared" powers framework because "administrative agencies are creations of the legislature." *Id.* at 696–97. "The rule-making power exercised by [agencies] . . . is derived from authority delegated . . . by the legislature," and it is "incumbent on the legislature" to oversee the use of this authority. *Id.* at 697, 701. As for the Attorney General's bicameralism and presentment objections to Section 227.26, "[i]t is understood that an administrative rule is not legislation as such." *Id.* at 699. That Section 227.26 involved the suspended rule thereafter undergoing bicameralism and

presentment, "further[ed] bicameral passage, presentment and separation of powers principles." *Id.* But, importantly, this post-action bicameralism was not the touchstone; the committee's actions need only be subject to "proper standards or safeguards." *Id.* at 701 (citation omitted). And, like *Ahern*, *Martinez* gave short shrift to non-Wisconsin authorities, not mentioning *Chadha* and curtly dismissing out-of-state authorities in a footnote. *Id.* at 700 n.12

B. *Martinez* and *Ahern* have stood the test of time, while generating substantial "reliance interests," *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶ 99, 264 Wis. 2d 60, 665 N.W.2d 257, especially in the robust, ongoing operation of the JFC, *see* JFC Report, the JCRAR, *see* Wis. State Leg., 2019 J. Comm. for Rev. of Admin. Rules (last visited July 31, 2019), https://docs.legis.wisconsin.gov/2019/committees/joint/1965, and the Building Commission, *see* Div. of Facilities Dev., Dep't of Admin., Intro. to the State of Wis. Bldg. Comm. (Dec. 2010), https://doa.wi.gov/DFDM_Documents/State-Building-Program/BldgCommissionIntro.pdf.

These committee review regimes are a core part of maintaining the balance of powers in this State. Today's administrative agencies make numerous rules, decisions, policies, and the like, often dealing with relatively detailed matters. *See Koschkee*, 2019 WI 76, ¶¶ 42–57 (Bradley, J., concurring). As this Court recognized in *Martinez*, it is "incumbent on the legislature" to oversee the use of this authority, which the Legislature delegated to the agencies in the first place. 165 Wis. 2d at 697, 701. Under the Attorney General's wooden rule in *Martinez*, which Plaintiffs replicate here—requiring the Legislature to enact new legislation any time it wants to oversee any decision, by any agency—the result would be predictable and detrimental to the separation of powers: unaccountable agencies exercising authority without effective legislative oversight. Consider, for example, the various decisions that the JFC reviews, without following bicameralism and presentment. *See, e.g.*, Wis. Stat. § 5.05(2q) (reviewing Elections Commission's appropriation for ongoing investigations); *id.* § 84.54(2) (reviewing alternative funding plan of federal monies by

Department of Transportation); *id.* § 16.405(3) (reviewing Department of Administration's request to Building Commission to issue funds); *id.* § 49.131(3m) (reviewing Department of Children and Families' programs to deliver Wisconsin Works benefits or child care subsidies); *id.* § 49.45(3m) (reviewing appropriations by Department of Health Services to hospitals serving low-income patients under certain circumstances); *id.* § 49.45(24g) (reviewing Department of Health Services proposal to increase medical assistance reimbursement to certain health-care providers); *id.* § 202.041(2) (reviewing Department of Financial Institutions proposed initial registration and registration renewal fee adjustments). As *Martinez* and *Ahern* properly concluded, nothing in the Wisconsin Constitution imposes upon the Legislature the impracticable, unrealistic mandate of enacting legislation every time it wishes to overturn or check these oft-prosaic agency decisions.

While *Martinez* and *Ahern* have stood the test of time, the Attorney General's position in *Martinez* has proved "unworkable" at the federal level, where this position

prevailed, at least to some extent, in *Chadha*. *Johnson Controls*, 2003 WI 108, ¶ 99. Congress and the President responded to *Chadha*'s holding that Congress can overrule decisions by agencies by enacting *hundreds* of such committee oversight provisions, which are plainly inconsistent with *Chadha*. *See* Louis Fisher, Cong. Res. Serv., RS22132, Legislative Vetoes After Chadha CRS-5 (May 2, 2005), http://www.loufisher.org/docs/lv/4116.pdf. It appears that these committee review provisions have evaded court invalidation only because of the federal prohibition against taxpayer standing. *See* Louis Fisher, Cong. Res. Serv., RL33151, Committee Controls of Agency Decisions CRS-31 (Nov. 16, 2005), https://www.everycrsreport.com/files/20051116_RL33151_dfe022acc379aae6449382404737f041810b3a8b.pdf. Wisconsin, of course, has a robust taxpayer standing doctrine. *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878–80, 419 N.W.2d 249 (1988).

2. The Committee Review Provisions Here Are Constitutional Under *Martinez* And *Ahern*

a. Applying *Martinez* and *Ahern* to the present case demonstrates that the committee review provisions that Plaintiffs challenge are constitutional.

i. *JFC Review Provisions*. Most of the committee review provisions that Plaintiffs challenge involve the JFC, which is comprised of eight senators and eight representatives and is "charged with the review of all state appropriations and revenues" under a multitude of committee review provisions, as discussed above. *See* JFC Report; *supra*, p. 8. The new JFC provisions include Section 87 of Act 369, which authorizes the JFC to review the Wisconsin Economic Development Corporation's designation of new enterprise zones, Wis. Stat. § 238.399(3)(am); Section 11 of Act 370, which provides for JFC review of reallocation of funds by the Department of Children and Families, *see id.* § 49.175(2)(a); Section 10 of Act 370, which provides for several varieties of JFC review of Department of Health Services submissions for waivers, renewals or modifications

to the Federal Government, *Id.* § 20.940; and Sections 30 and 26 of Act 369, which involve JFC approval of certain Attorney General litigation decisions, *see supra,* p. 7.[4]

These provisions satisfy all relevant constitutional analysis under *Martinez* and *Ahern* because they each involve "a cooperative venture" between the agency and the JFC, *Ahern*, 114 Wis. 2d at 108, in which the JFC's actions are subject to "proper standards or safeguards." *Martinez*, 165 Wis. 2d at 701 (citation omitted), and none of the JFC's actions enact "legislation as such," *id.* at 699. Most of the JFC's decisions are made pursuant to Wis. Stat. § 13.10, which applies to "all matters before the joint committee on finance which require affirmative action of the committee," and involves a substantial power-sharing arrangement with the Governor. Wis. Stat. § 13.10(1). After a request is submitted for review to the JFC, the Governor must submit

[4] Given that the Legislature has plenary control over the Attorney General's authority, Legislative Defendants' position is that no further analysis is warranted as to Sections 30 and 26 of Act 369. *See supra*, p. 27. In any event, these provisions easily survive any constitutional challenge, for the same reason as all of the other JFC provisions. And to the extent that the JCLO is involved under Sections 30 and 26, it is only as an adjunct to the JFC's process, under the Section 13.10 procedures described below.

a recommended action on the request. *See id.* § 13.10(3). The JFC "shall afford all such requests a public hearing and the secretary of the committee shall give public notice" of the hearing. *Id.* After the request is voted upon by the committee, *id.* § 13.10(4), within fifteen days the Governor has the authority to approve, veto, or partially veto. *Id.* § 13.10(4). Should the Governor veto some or all of the decision, this part is returned to the JFC for reconsideration. *Id.* Within fifteen working days of the Governor's objection, a meeting or vote must be held whereby a two-thirds vote of the JFC may override the Governor. *Id.*

Even aside from this robust procedure under Section 13.10, none of the JFC provisions here allow the JFC to take executive action that the relevant agency does not want to take, *Ahern*, 114 Wis. 2d at 108, or allow the JFC to enact "legislation as such," *Martinez*, 165 Wis. 2d at 699. Under each provision challenged here, the agency must submit the proposed plan or action to the JFC, and if there is no submission, there is nothing for the JFC to approve or not.

ii. *JCLO Capitol Security Review Provision.* The JCLO is comprised of the Speaker of the Assembly, the President of the Senate, and the majority and minority leaders and assistant majority and minority leaders of the Senate and Assembly. *See* Wis. Stat. § 13.80. Under Section 16 of Act 369, the JCLO has authority to evaluate changes by the Department of Administration to security at the Capitol. Wis. Stat. § 16.84(2m). Just as with the JFC provisions, this provision involves "a cooperative venture" between the agency and JFC, *Ahern*, 114 Wis. 2d at 108, with "proper standards or safeguards," *Martinez*, 165 Wis. 2d at 701 (citation omitted), and does not involve the JCLO enacting "legislation as such," *id.* at 699. If the Department does not want to make any change to capitol security, there would no change, as the Department would not submit any change for JCLO approval.

Notably, Section 16 involves only a minor adjustment to the status quo. Under the pre-Act 369 regime, management of the capitol building—whether the Legislature, this Court and many executive branch officials

sit—was already a "cooperative venture," *Ahern*, 114 Wis. 2d at 108, between the Department of Administration and the Legislature, with the Department managing all "state office buildings and facilities," while the Legislature maintained control "of areas in the state capitol building reserved for use by the legislature, the use of which shall be determined by the legislature," Wis. Admin. Code § 2.04, and the JCLO approving parking plans at the Capitol building. Section 16 merely adjusts this balance to a minor degree, without any disruption of the separation of powers.

iii. *JCRAR Rule Review Provision*. The JCRAR is comprised of five senators and five representatives, from both the majority and minority parties. See Wis. Stat. § 13.56(1). As this Court described in *Martinez*, Section 227.26 sets forth a robust procedure for the use of the JCRAR's powers, including the filing of a "meritorious complaint to [the JCRAR] which it must investigate by public hearing. After reviewing testimony presented at a public hearing, a majority of a quorum of the committee may vote to suspend the rule or a part of the rule only on the basis

of one or more of six enumerated reasons, which provide a check against arbitrary agency rulemaking." *Martinez*, 165 Wis. 2d at 699–700 (citing Wis. Stat. § 227.26(2)(6)(c) & (d)). After the JCRAR votes to suspend an administrative rule, a bill repealing the rule must be introduced in both houses of the Legislature within thirty days, Wis. Stat. § 227.26(2)(f), and a repeal must be passed into the law to repeal the rule. *See id.* § 227.26(2)(i); *see Martinez*, 165 Wis. 2d at 700.

In Section 64 of Act 369, the Legislature modified this regime—which *Martinez* unanimously upheld—by making just one change: permitting the JCRAR to suspend a rule more than once. This provision survives Plaintiffs' constitutional challenge for two independent reasons.

First, and sufficient to dispose of Plaintiffs' facial challenge to Section 64, there is no plausible argument that the most common use of this new provision—a second rule suspension to consider a particular complicated or consequential rule—is unconstitutional under *Martinez*. As noted above, for a plaintiff to prevail on a facial challenge, the plaintiff must establish that the statute cannot

constitutionally "be enforced 'under *any* circumstances,'" *Mayo*, 2018 WI 78, ¶ 33 (emphasis added) (citation omitted). Given the facial posture of Plaintiffs' lawsuit, Plaintiffs' speculation about hypothetical, indefinite suspension of rules under Section 64 is irrelevant to this case. If such an indefinite, serial suspension ever occurs, an aggrieved party can bring an as-applied challenge.

Second, even if this Court were to consider a hypothetical, as-applied challenge to a string of multiple suspensions under Section 64, there would be nothing unconstitutional. If JCRAR were to repeatedly suspend a rule, its actions would still be subject to the numerous "proper standards or safeguards" in Section 227.26, which *Martinez* described. *Martinez*, 165 Wis. 2d at 701 (citation omitted). Further, a suspension of an agency rule, no matter how many times it occurs, is not "legislation as such," requiring bicameralism and presentment. *Id.* at 699. After all, an agency did not go through bicameralism and presentment to create its rule, so it would be incongruous to require the Legislature to go through those procedures to

block the rule. Rather, just like with the Building Commission's actions in *Ahern*, a hypothetical string of suspensions by JCRAR would, at most, give the JCRAR "a right solely to prevent [a rule] not meeting the [JCRAR's] approval" from coming into effect, "not a right" to enact a new rule "itself." 114 Wis. 2d at 105.

d. In concluding that Plaintiffs are reasonably likely to prevail on their challenge to Section 64, the Circuit Court did not address Legislative Defendants' argument that Plaintiffs' lawsuit fails under the well-established standard for facial challenge. The conclusions the Circuit Court did reach are legally wrong.

As a threshold matter, the Circuit Court's overbroad understanding of *Martinez*—that legislative committees cannot block an agency rule unless the Legislature ultimately goes through all of the steps necessary to enact a law, App. 13—is not only inconsistent with *Martinez*'s reasoning, as explained above, but would require overruling *Ahern*. In *Ahern*, the Building Commission could permanently block any building contract that it opposed

without enacting a law. Attempting to downplay this point's relevance, the Circuit Court erroneously claimed that *Martinez* "only" gave a "nod" to *Ahern* in a "footnote." App. 20. In fact, *Martinez* cited *Ahern* three times, more than any other opinion. *See Martinez*, 165 Wis. 2d at 697. Relatedly, the Circuit Court believed that, unlike in *Ahern*, Wis. Stat. § 227.26 "does not include any provision requiring the approval of the Governor." App. 23. But the decision-making structure as between *Ahern* and Wis. Stat. § 227.26 are identical for constitutional purposes because there is a requirement in "unanimity between" the agency and the JCRAR under Wis. Stat. § 227.26, just as between the Governor and Building Commission in *Ahern*, *see* 114 Wis. 2d at 108. After all, no rule can even go to JCRAR approval unless the agency finalizes that rule first.

The Circuit Court also put great emphasis on a series of Attorney General opinions issued before *Martinez*, apparently believing that *Martinez* adopted these opinions' reasoning as the law of the land. App. 16–18.; *see State v. Ludwig*, 31 Wis. 2d 690, 698, 143 N.W.2d 548 (1966)

(Attorney General opinions are only "persuasive" authority (citation omitted)). But the opposite is correct. In *Martinez*, the Attorney General attacked Wis. Stat. § 227.26 by relying on the same rationale as he had articulated in his prior opinions, including pointing to how other states had addressed committee review under their state constitutions, App. 84–114; *see* 63 Op. Atty. Gen. 168, 172 (1974) (explaining that a temporary suspension would be unconstitutional); 63 Op. Atty Gen. 159, 163 (1974) (same). This Court in *Martinez* unanimously rejected the Attorney General's position and the rationale underlying that position. So while *Martinez* misquoted one of the Attorney General's opinions, as the Circuit Court noted, App. 17, the relevant point is that *Martinez* is binding and this Court *rejected* the Attorney General's position in *Martinez*.

D. The Guidance Document Provisions And Other Provisions Imposing Duties And Limitations On Administrative Agencies Are Plainly Constitutional

1. In Act 369, the Legislature enacted several provisions that made agencies' exercise of their legislative-delegated authority more transparent and accountable.

These provisions require agencies to use a modified version of the Chapter 227 notice-and-comment procedure to finalize new guidance documents and to retain extant guidance documents, Wis. Stat. §§ 227.112(1), (6), (7); *accord* Wis. Stat. §§ 227.136, 227.52–.58, give the public a voice when an agency wishes to announce how it intends to interpret or enforce a statute; subject guidance documents to judicial review, under Chapter 227's judicial review provisions, *see id.* § 227.40(1)–(4); *Clintonville Transfer Line v. Pub. Serv. Comm'n*, 248 Wis. 59, 75–76, 21 N.W.2d 5 (1945), so that Wisconsinites can challenge legally dubious guidance documents in court; mandate that agencies identify the statutory source of claimed authority in agency publications, Wis. Stat. § 227.05, so that citizens know the agency's source of its asserted powers; and prohibit agencies from seeking deference for interpretations of law, *id.* § 227.10(2g), bringing agency conduct in line with *Tetra Tech*.

That these provisions are plainly constitutional follows from a structural analysis of the relationship between the Legislature and administrative agencies. In

enacting these provisions, the Legislature used the primary tools that it possesses over these agencies: because agencies "are creations of the legislature and . . . can exercise only those powers granted by the legislature," *Martinez*, 165 Wis. 2d at 697, "the [L]egislature may withdraw powers which have been granted [to agencies], prescribe the procedure through which granted powers are to be exercised, and, if necessary, wipe out the agency entirely." *State ex. rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 508, 220 N.W. 929 (1928). It follows that the Legislature does not "unduly burden or substantially interfere with the other branch's role and powers," *Martinez*, 165 Wis. 2d at 696 (citation omitted), when it merely sets the terms under which the agencies operate, by exercising the Legislature's *own* core authority. Since all of these provisions merely set the terms of agency action—for example, providing what agencies must do in order to issue guidance documents—they are entirely constitutional.

2. In concluding that Plaintiffs were nevertheless reasonably likely to prevail in their challenge to the vast

majority of these provisions, the Circuit Court eschewed analyzing the structural relationship between the Legislature and administrative agencies and, instead, explained that it believed itself to have the authority to determine whether each of these provisions "unduly burdens" agencies, by imposing overly cumbersome duties on them, which, in the Circuit Court's judgment, "serve[] little to no . . . purpose." App. 42.

With all respect, the Circuit Court misconceived the proper scope of judicial review when the Legislature imposes duties on administrative agencies. As cases like *Martinez* and *Ahern* demonstrate, when dealing with agencies—which, again, are creatures of legislative creation—courts can look no further than the structural relationship between the Legislature and agencies. It would not have mattered if the agencies in *Martinez* or the Department of Administration in *Ahern* had submitted affidavits attesting that complying with the provisions in those cases cost them overly much time, or distracted them from other statutory duties they would rather be performing. Rather, all that

mattered was the *nature* of the Legislature's actions, and how this interacted with the structural relationship between agencies and the Legislature. Beyond that, if an agency believes that new statutory duties will cost more money or require more staff than its current budget provides, its resort is not to the courts but through the budget process. *See* Informational Paper No. 73, Legislative Fiscal Bureau, "State Budget Process" 24 (Jan. 2017), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2017/0073_state_budget_process_informational_paper_73.pdf.

The unprecedented inquiry that the Circuit Court thought appropriate would be entirely unwieldly, as this case well shows. To prevail on their facial challenge, Plaintiffs would need to show that each of these provisions is unconstitutional in "any" circumstance and application. *Mayo*, 2018 WI 78, ¶ 33 (citation omitted); *accord* Wis. Stat. § 990.001(11). That means that to adjudicate Plaintiffs' claims, under the Circuit Court's practical burdens approach, the Court would have needed to analyze whether

Plaintiffs have showed that *each* of the provisions—notice-and-comment for new guidance documents, notice-and-comment for extant guidance documents, identification of statutory authority for agency publications, judicial review, and no deference—were each "too much" work for *each* agency. After all, some duties may be hard for some agencies to comply with, but easy for other agencies.

Finally, while the Circuit Court seemed to believe that most these provisions were poor public policy, "[a] constitutional statute cannot be *contrary* to public policy—it *is* public policy." *Borgnis v. Falk Co.*, 147 Wis. 327, 351, 133 N.W. 209 (1911) (emphasis in original). Legislative Defendants are always eager to explain the merits of these good government reforms to interested citizens. They would be happy to show, for example, why DNR had it right when it concluded that when an agency that announces how it intends to enforce a statute—e.g., how it intends to enforce a broadly worded statute that DNR could apply to shut down a family business or farm—the agency should first give people an opportunity to provide their feedback as to the

proposed interpretation. And Legislative Defendants would be glad to explain why permitting citizens to challenge such important agency documents in court is a worthwhile reform. But the courts have never been the proper forum for such policy arguments, and this case should be no different.

II. The Circuit Court Erroneously Exercised Its Discretion By Issuing Its Temporary Injunction

Temporary injunctions, like all injunctions, are "extraordinary remed[ies]," *Wolf River Lumber Co. v. Pelican Boom Co.*, 83 Wis. 426, 428, 53 N.W. 678 (1892), and "are not to be issued lightly," *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977); *accord Pure Milk Prods. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). A moving party must make four showings to obtain a temporary injunction: (1) a reasonable probability of success on the merits; (2) lack of adequate remedy at law; (3) irreparable harm absent injunctive relief; and (4) equities, on balance, favoring injunctive relief. *See Pure Milk Prods. Co-op*, 90 Wis. 2d at 800; *Werner*, 80 Wis. 2d at 520; *see also* Wis. Stat. § 813.02(1)(a); App. 54–55. On the merits prong, "where the parties are in dispute

concerning their legal rights, [a temporary injunction] will not ordinarily be granted until the right is established, especially if the legal or equitable claims asserted raise questions of a doubtful or unsettled character." *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 509, 66 N.W.2d 157 (1954) (citation omitted). As to irreparable harm and the public interest, a party must show that it is "likely to suffer irreparable harm if a temporary injunction is not issued," *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154, and an injunction is unlawful if it is "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted).

Here, Plaintiffs are not entitled to any injunction because, as explained above, they have no probability of success. At the very minimum, no temporary injunction should have issued because all of Plaintiffs' claims are of a "doubtful or unsettled character," *Mogen David*, 267 Wis. at 509, as Plaintiffs have not cited a single Wisconsin case

invalidating any provision under any of their theories, not even in a more narrow, as-applied case, let alone in Plaintiffs' overbroad, facial posture.

Turning to the three equitable factors, the Circuit Court observed at the start of its opinion that "[g]enerally speaking, when constitutional rights are deprived, irreparable harm results and there is really no other adequate remedy available," App. 3, *and then never discussed any harms or public interest considerations for any of the provisions that it enjoined*. The Circuit Court's implicit premise—that an injunction is always appropriate whenever a trial court believes that that a challenger has a reasonable probability of success on the merits of a constitutional challenge—ignores the principle that injunctions are "extraordinary remed[ies]," *Wolf River*, 83 Wis. at 428, not to be "issued lightly," *Werner*, 80 Wis. 2d at 520.

Had the Circuit Court properly conducted the equitable analysis for the provisions that it blocked, the Court would have issued no injunctive relief.

Sections 30 and 26 of Act 369. Plaintiffs, the Governor and the Attorney General presented no evidence to the Circuit Court that could possibly support a finding of irreparable harm or a balance of the public interest favoring a temporary injunction blocking these provisions. Although the Attorney General thereafter submitted affidavits claiming that these provisions impose burdens on him*, the Attorney General did not submit those affidavits until the stay briefing in the Court of Appeals*, meaning that those affidavits could have played no part in the Circuit Court's decision to issue the injunction. In any event, those affidavits demonstrate, at most, that being in a cooperative regime with the Legislature takes more time and slows final decisions as compared to a regime of unilateral settlements. As this Court correctly explained in staying the temporary injunction, the Attorney General's affidavits do not establish *irreparable* harm: "An opposing party that wishes to settle may be willing to extend the time period for settlement or to renew its settlement offer (or to make a similar new offer)

later in the case that will provide the same or similar benefits to the state." App. 58.

On the other end of the equitable and public interest balance, "the Legislature . . . and the public suffer a substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." App. 57; *accord* *Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018) ("the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"). The harm from staying Sections 30 and 26 is irreparable because, as this Court properly observed, the nature of litigation settlement is such that the "right of the Legislature to review and consent to those settlements will be gone forever" if these provisions are stayed throughout the entirety of the case. App. 57. As Legislative Defendants explained to the Circuit Court, enjoining these provisions would potentially be disastrous for the State's interest in the validity of its laws because "the Attorney General could choose to appear in controversial

cases and concede away the validity of laws that he does not like." Dkt. 43, at p. 29. Just what Legislative Defendants warned about happened in the right-to-work *Allen* case, as a result of the Circuit Court's injunction, where the Attorney General abandoned his defense of state law, and there was nothing the Legislature could do about it. *See supra*, p. 6. Had this Court not stayed the Circuit Court's injunction, there is no telling how many other laws the Attorney General would have settled away before the end of this litigation.

Section 64 of Act 369: Plaintiffs, the Governor and the Attorney General presented no evidence to the Circuit Court that would support a showing of irreparable harm or public interest benefit from enjoining this provision, which allows the JCRAR to suspend a rule more than once. On the other hand, by blocking this provision, the Circuit Court imposed "irreparable harm of the first magnitude" on the Legislature and the people, App. 57, by disrupting a regime of "legislative accountability over rule-making," without any equitable justification. *Martinez*, 165 Wis. 2d at 701.

Guidance Documents provisions. Before the Circuit Court, the Governor submitted a series of affidavits claiming that some of these provisions—mainly, the notice-and-comment provisions, dealing with existing guidance documents—would be difficult or expensive to comply with for certain agencies. While these affidavits have no relevance for the separation of powers *merits* analysis because they do not discuss the *structural* relationship between the Legislature and administrative agencies, *see supra*, pp. 64–65, they do bear to some extent on the equitable analysis for purposes of the motion for temporary injunction.

These affidavits cannot be reconciled with the judicially noticeable, *Johns*, 14 Wis. 2d at 125, submissions that many of these *same* agencies made to the Legislature, when it was considering whether to adopt the guidance document provisions. In those submissions, many of the same agencies told the Legislature that they could comply with these provisions with existing agency resources, Public

Service Commission[5]; Department of Administration[6]; or with "minimal" resources, Legislative Reference Bureau[7]; Legislative Counsel[8]; such as "less than $100," Department of Safety and Professional Services,[9] or at "no cost[]," Department of Transportation.[10] If these estimate are now incorrect, it is the agencies' duty to submit this information to the Legislature, as part of the biennial budget process. *See supra*, p. 65. For clarity, Legislative Defendants cite these judicially noticeable documents only for purposes of

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[5] Pub. Serv. Comm., Fiscal Estimate of AB-0880 2 (Feb. 5, 2018), https://docs.legis.wisconsin.gov/2017/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2017_ab_0880/01_ab_880/17_4507fepscorg.pdf.

[6] Dep't of Admin., Fiscal Estimate of AB-0880 3 (Feb. 8, 2018), https://docs.legis.wisconsin.gov/2017/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2017_ab_0880/01_ab_880/17_4507fedoaorg.pdf.

[7] Leg. Reference Bureau, Fiscal Estimate of AB-0880 2 (Jan. 31, 2018), https://docs.legis.wisconsin.gov/2017/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2017_ab_0880/01_ab_880/17_4507felrborg.pdf

[8] Leg. Counsel, Fiscal Estimate of SB-884 2 (Dec. 3, 2018), https://docs.legis.wisconsin.gov/2017/related/drafting_files/wisconsin_acts/2017_act_369_sb_884/02_sb_884/17_6076felcorg.pdf.

[9] Dep't of Safety & Prof'l Servs., Fiscal Estimate of AB-0880 2 (Feb. 5, 2018), https://docs.legis.wisconsin.gov/2017/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2017_ab_0880/01_ab_880/17_4507fedspsorg.pdf.

[10] Dep't of Transp., Fiscal Estimate for AB-0880 2 (Mar. 3, 2018), https://docs.legis.wisconsin.gov/2017/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2017_ab_0880/01_ab_880/17_4507fedotorg.pdf.

the injunction analysis, where practical burdens are relevant, and not to support their motion to dismiss arguments.

In contrast to the agencies' inconsistent, uncertain claims of practical burden, the harm to the public and the Legislature from enjoining these provisions is crystal clear: a loss of duly enacted laws, as well as the transparency and accountability that those laws bring to administrative agencies' operation. In enjoining these provisions, the Circuit Court frustrated the Legislature's right and obligation to oversee administrative agencies, *see Martinez*, 165 Wis. 2d at 701, and to make those agencies accountable through public notice and judicial review procedures.

Finally, the Circuit Court's injunction had another perverse effect, which Legislative Defendants warned about: it made compliance with the July 1, 2019 deadline for noticing extant guidance documents exceeding complicated. Dkt. 43, at p. 31. The Circuit Court's erroneous injunction led this Court to leave that lawful deadline enjoined because the Circuit Court's injunction put the agencies "under the

impression that they would not have to meet the July 1, 2019 deadline." App. 59. Legislative Defendants respectfully request that if this Court rules in their favor on the constitutionality of the notice-and-comment provision for existing guidance documents, that this Court should make clear that the agencies cannot forever avoid their statutory obligation to put these guidance documents through the beneficial process of public notice-and-comment.

CONCLUSION

This Court should vacate the temporary injunction and remand to the Circuit Court for dismissal.

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TROUTMAN SANDERS LLP
By:

Misha Tseytlin
State Bar No. 1102199
TROUTMAN SANDERS LLP
1 N. Wacker Drive, Ste. 2905
Chicago, IL 60606
Telephone: (608) 999-1240
Facsimile: (312) 759-1939
E-mail:
misha.tseytlin@troutman.com

Eric M. McLeod
State Bar No. 1021730
Lisa M. Lawless

State Bar No. 1021749

HUSCH BLACKWELL LLP
33 E. Main Street, Suite 300
P.O. Box 1379
Madison, WI 53701
Telephone: (608) 255-4440
E-mail:
Eric.McLeod@huschblackwell.com

Counsel for Legislative Defendants

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 12,774 words.

Dated this 1st day of August, 2019.

Misha Tseytlin
Troutman Sanders LLP

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 1st day of August, 2019.

Misha Tseytlin
Troutman Sanders LLP