SUPREME COURT OF WISCONSIN

Appeal No. 2019AP614-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.

Appeal 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,

Plaintiffs-Respondents,

(Continued caption and counsel listed on inside cover)

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-Appellants,

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, DANE COUNTY CASE NO. 2019-CV-000302

RESPONSE BRIEF OF DEFENDANT-RESPONDENT/ DEFENDANT TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN

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STATEMENT OF ISSUES FOR REVIEW

I. Did the Plaintiffs' complaint state a claim for declaratory judgment when it alleged certain provisions of 2017 Acts 369 and 370 were unconstitutional and that Plaintiffs' rights were affected by those provisions?

Circuit court answered: Yes.

This Court should answer: Yes.

II. Did the circuit court erroneously exercise its discretion by temporarily enjoining certain provisions of 2017 Acts 369 & 370?

Circuit court answered: The circuit court did not address the erroneous exercise of discretion standard.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court has already scheduled oral argument. Publication may be appropriate under Wis. Stat. §809.23(1)(a)5., but the case involves only the application of well-settled laws regarding motions to dismiss and temporary injunctions, *id.*, §809.23(1)(b)1., and thus would not ordinarily warrant publication.

INTRODUCTION

Article V of Wisconsin's Constitution provides that the "executive power" vests in a Governor, who alone is granted the power to "take care that the laws be faithfully executed." Wis. Const. art. V, §§1, 4. Article IV, §1 of the Constitution provides that the "legislative power shall be vested in a senate and assembly." Service Employees International Union and others ("Plaintiffs") filed a complaint seeking a declaratory judgment as to the constitutionality of statutes enacted by 2017 Acts 369 and 370, alleging that the Wisconsin Legislature assumed or interfered with executive power in violation of the Wisconsin Constitution.

This case is before the Court only for a review of the circuit court's denial of Assembly Speaker Robin Vos and others' ("Legislative Defendants'") motion to dismiss and its grant of a temporary injunction of portions of Acts 369 and 370. Unlike *League of Women Voters v. Evers* ("*LWV*"), 2019 WI 75, 387 Wis.2d 511, 929 N.W.2d 209, where the parties requested that the Court make a merits decision and where no facts were in dispute, this case presents issues of fact that must be resolved by the circuit court before it can be finally decided.

The Plaintiffs' complaint does not challenge the Legislature's authority to regulate how agencies implement and enforce administrative

rules. It challenges Acts 369 and 370's newly-allowed intrusions by the Legislature into the Governor's exclusive power to faithfully execute the laws. Of particular concern to the Governor is legislative intrusion into power he exercises through his cabinet secretaries, other appointees, and executive agency employees, to provide advice to the public about how to comply with the law; as well as legislative intrusions into the executive power over litigation on behalf of the state, allowing the Legislature's partisan leadership to act as a *de facto* attorney general. These intrusions violate the Wisconsin Constitution's basic tenet of separation of powers among co-equal branches of government.

Separation of powers claims are analyzed by first determining if a power is exclusive to one branch or shared between two. If a power is exclusive, no other branch may even slightly impose on it. If a power is shared, there must be a factual determination of whether the power exercised by one branch "unduly burdens" or "substantially interferes" with the power of the other branch. Those principles were expressed in *State* ex rel. *Friedrich v. Circuit Court for Dane Cty.*, 192 Wis.2d 1, 531 N.W.2d 32 (1995) and remain undisturbed.

A motion to dismiss a complaint under Wis. Stat. §802.06(2)(a)6. must be decided on the precedent that has governed every such motion

since common law pleading was replaced in 1976 with the current rules of civil procedure. That precedent requires that a court consider only the allegations found within the four corners of the complaint.

The Legislative Defendants invite this Court to ignore precedent, decide the merits of multiple complex constitutional questions in a fact-intensive dispute without factfinding or final judgment in the circuit court, and contort the Wisconsin Constitution to accord the Legislature executive authority that the people never intended it to have. The Court should ignore their invitation.

Chief Justice John Roberts said at his confirmation hearing in 2012: "Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath . . . ." If the Court deviates from precedent governing how motions to dismiss are considered and without factfinding, and decides this case on the merits for the Legislative Defendants, it will by judicial fiat have allowed the Legislature to arrogate executive power to itself. That will validate the Legislature's apparent perception that the Wisconsin Supreme Court is its handmaiden rather than its co-equal.

The Court should affirm the circuit court's denial of the motion to dismiss and grant of a temporary injunction and remand the case for factfinding and a merits decision.

STATEMENT OF THE CASE AND FACTS

The Plaintiffs' complaint (R.1, Governor's Appendix-1, hereinafter "G-App-__")) challenges the constitutionality of statutes enacted in December 2018, after the voters had in November elected a Democratic Governor and Attorney General.[1] Between the filing of the complaint on February 4, 2019 and this Court's assumption of all aspects of the case on June 11, 2019, the case had an intensive, complex procedural history.

Plaintiffs' complaint and the challenged provisions

The Plaintiffs' complaint alleged that three groups of provisions in 2017 Wisconsin Acts 369 and 370 interfere with the Executive Branch's powers, strip powers from the Executive Branch, and in some cases, give those powers to the Legislative Branch. (G-App-20 ¶¶57-61.) It was

[1] Legislative Defendants' statement of the case describes the Legislature's supposed familiarity with various court cases and its motive behind the enactment of these laws. (Brief of Legislative Defendants, hereinafter "LD Br.," at 5-11.) In violation of Wis. Stat. §809.19(1)(d), Legislative Defendants have not supported these assertions with a citation to the record and have also "inappropriately interspersed legal argument" into their recitation of facts. *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶5 & n.2, 281 Wis. 2d 173, 696 N.W.2d 194.

supported by facts alleging harm to the Plaintiffs and Executive Branch. (*Id*. ¶¶1-100.) Plaintiffs simultaneously moved for a temporary injunction to enjoin enforcement of these laws. (R.3.)

First, Plaintiffs' complaint challenged §§31, 38, and 65-71 of Act 369 as intrusions on the Executive Branch's ability to communicate with the public about, and thereby faithfully execute, the law. (G.-App-1, ¶¶81-93, 101-109.) Section 31 creates the definition of "guidance document" which, with specified exceptions, is "any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin" that either explains how an agency implements or enforces a statute or rule, or offers "guidance or advice with respect to how the agency is likely to apply a statute or rule…if that advice or rule is likely to apply to a class of persons similarly affected." A guidance document is neither law nor other authority. Act 369, §§31(b)1., 38(3).

Section 38 requires agencies to undertake a detailed notice, comment, online posting, and certification process "before adopting a guidance document." Existing guidance documents not so processed by July 1, 2019 are "rescinded." Sections 65-71 of Act 369 permit judicial review of guidance documents through declaratory judgment actions.

Second, Plaintiffs' complaint challenged Act 369, §§26 and 30, which require Legislative approval before the Attorney General may settle certain cases, and Act 369, §§5 and 97, which permit Legislative intervention in certain state litigation. The main thrust of these challenges was that they infringe on the Executive Branch's duty to enforce and execute the law. (G-App-1, ¶¶62-80, 107-08, 116, 123-24.)

Third, Plaintiffs' complaint challenged §64 of Act 369, which allows a legislative committee to indefinitely suspend administrative rules, and §§16 and 87 of Act 369 and §§10 and 11 of Act 370, which require legislative supervision and approval over certain agencies and actions. The complaint alleged these provisions violate the separation of powers, as well as bicameralism, presentment, and quorum requirements, of Wisconsin's Constitution. (G-App-1 ¶¶94-100, 114-115, 117, 123, 125-126.)

Legislative Defendants' motion to dismiss

On February 15, 2019, Legislative Defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted. (R.26.) Their supporting brief also opposed Plaintiffs' motion for a temporary injunction. (R.27.) They cited in their briefing to legislative history documents and internet links to identify disputed facts. (*E.g.*, R.44 at 3-5; R.62 at 13, 20.)

The circuit court set a briefing schedule for the pending motions and scheduled oral arguments for March 25, 2019. (R.24.)

Governor Evers' filings

Governor Evers responded to Plaintiffs' injunction motion on February 20, 2019. He supported Plaintiffs' motion and included numerous affidavits. (R.30-35, 37, 53, 55.) The affidavits explained that Act 369's guidance document provisions would likely apply to tens of thousands of agency documents; that agencies lacked capacity to comply with §38 before existing documents would be rescinded; and that agencies also lacked capacity to comply on an ongoing basis, particularly for documents that are frequently updated, offered in multiple languages, exist in non-print formats like video, or are required to be produced by federal or other laws. (R.30-35, 55.) These impediments would harm agencies' ability to function and to implement the laws (*id.*) as well as harm members of the public who rely on such documents. (R.55, Ex. A at 6.) Another affidavit addressed the requirement for legislative approval of settlements, noting that "[a] decision to reject the settlement desired by the agency, forcing further litigation . . . may result in even greater financial risk to the agency and additional internal resources to be tapped into the future and further

litigation and uncertainty." (R.32, ¶21.) Plaintiffs also submitted affidavits in support of their injunction motion. (R.45-52.)

On March 21, 2019, Governor Evers filed his answer with cross-claim. (R.66.) He joined Plaintiffs' action for declaratory judgment and injunctive relief against all other Defendants, and made new allegations challenging Act 369, including that:

- §33, which requires agencies to add legal citations to agency publications, is an unconstitutional burden on and interference with the Executive Branch;
- §§5 and 97, the legislative intervention provisions challenged by Plaintiffs, also unconstitutionally burden the judicial branch;
- §§28, 29, and 99, which permit legislative intervention in many lawsuits in the circuit and appellate courts, intrude on a core executive power and unconstitutionally infringe on the judicial branch.

(R.66, ¶¶3-13.) Governor Evers simultaneously moved for a temporary injunction on these additional provisions of Act 369. (R.65.)

Legislative Defendants did not move to dismiss the cross-claim; they answered it on May 3, 2019. (R.85.)

The circuit court's decision

On March 25, 2019, the circuit held oral argument on the motion to dismiss and the motion for temporary injunction. At the argument, the court stated, "I do believe that taking all the well-pled allegations in the

complaint as true, [Plaintiffs] have stated a claim upon which relief can be granted." (R.146 at 170:24-171:2.) Thereafter, the court issued a 49-page written decision. (Legislative Defendants' Appendix-1, hereinafter "App-__".) In it the court denied the motion to dismiss and also ruled on the temporary injunction request, with an emphasis on whether the Plaintiffs were likely to succeed on the merits. (App-2-3.)

The court did not declare any provisions constitutional or unconstitutional. (*See* App-48-49.) It granted a temporary injunction, concluding that Plaintiffs were likely to succeed on the merits of their claim that Act 369, §§31, 33, 38, 65-71, and 104-05 (regarding guidance and other agency documents),[2] §§26 and 30 (regarding legislative approval for settlement), and §64 (suspension of administrative rules) are unconstitutional. (App-48.) It declined to temporarily enjoin Act 369, §§3, 5, 28-29, 97-99 (related to legislative intervention), and Act 369 §87 and Act 370, §§10-11 (relating to legislative approval of certain agency decisions). It noted the injunction request was withdrawn as to Act 369, §§16, 35, and 72,

[2] The circuit court considered Plaintiffs' omission of Act 369 §33 from their complaint as an "oversight" and that arguments relating to other guidance document provisions were applicable to §33. (R.146 at 176:21-178:3.) This is the only section challenged in the Governor's cross-claim and not in Plaintiffs' complaint that the circuit court's motion to dismiss ruling addressed. (*See* App-42-43.) Sections 104-05 of Act 369 provide the effective dates for relevant portions of the Act.

but that the legality of these provisions could be argued "as this case proceeds to final judgment." (App-48-49.)

Legislative Defendants appealed the temporary injunction and sought leave to appeal the denial of their motion to dismiss. (R.76, 77.)

The case advanced toward a decision on the merits

The circuit court held a status conference on April 10, 2019 to schedule proceedings on the merits. (R.147, G-App-204.) Legislative Defendants contended at the conference that a merits decision did not require factfinding, while acknowledging they had disputed the asserted burdens of the guidance document provisions on the Executive Branch in opposing the Plaintiffs' temporary injunction motion. (G-App-232-234.) The court recognized that the "legal standard[] is whether one agency, one branch of government has unreasonably intruded upon another, the unreasonability ultimately depends upon facts, and if it depends on facts, then it in theory would create the possibility that those facts may be disputed." (G-App-231.)

A trial on the guidance document provisions was set for June 12 and 13, 2019. (R.81, G-App-43.) Summary judgment deadlines and a phase two trial on the remaining challenged provisions were also set, to be concluded by the week of October 28, 2019. (*Id*.) Each trial was preceded by deadlines

for pre-trial submissions. (R.81, R.87, R.98, G-App-43-49.) The parties also agreed to submit proposed findings of fact and conclusions of law prior to the guidance document trial. (R.87, G-App-46.)

The parties prepared for trial

Per the scheduling orders, the parties identified witnesses and exhibits for trial. (R.82, 83, 97, 100-102, 110, 114, 140, G-App-167-203.) Legislative Defendants deposed nearly every one of the Plaintiffs' and the Governor's named witnesses for the guidance document trial. (*See* R.140 at 4, G-App-199.) Plaintiffs and the Governor collectively submitted hundreds of proposed findings of fact showing how the guidance document provisions intruded on, unduly burdened, or substantially interfered with the Executive Branch. (R.143, 144, G-App-50-128.) Legislative Defendants also submitted proposed findings of fact. (R.142, G-App-129-166.)

This Court assumed jurisdiction over all aspects of the case

Late on June 11, 2019, the day before the guidance document trial, this Court assumed jurisdiction over the petition for leave to appeal the motion to dismiss, allowed the appeal, and stayed all trial court proceedings. (Order, 6/11/19, No. 19-AP-614LV.) It also stayed most of the temporary injunction except that portion of Act 369, §38, relating to

guidance documents in existence as of March 26, 2019. (Order, 6/11/19, No. 19-AP-622, App-50.)

Additional facts are discussed below.

DECIDING SEPARATION OF POWERS DISPUTES IN WISCONSIN

By urging the Court to resolve the merits of this case without factfinding, Legislative Defendants encourage this Court to ignore how separation of powers claims are, by precedent, determined. Their entreaty is based on a distorted explanation of the purpose of the separation of powers and a calculated misstatement of the impact the disputed provisions have on Executive authority. (*E.g.*, LD Br. at 14-17.)

Separation of powers, not sharing of powers, is the rule.

Wisconsin's Constitution "create[s] three branches of government, each with distinct functions and powers." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶11, 376 Wis.2d 147, 897 N.W.2d 384 (citation and internal quotation marks omitted). Legislative power is vested in a senate and assembly by Wis. Const. art. IV, §1; executive power is vested in a Governor by art. V, §1, and judicial power is vested in a unified court system by art. VI, §2. Through the creation of these three branches, the Wisconsin Constitution adopted the separation of powers doctrine.

Martinez v. Dep't of Industry, Labor & Human Rels., 165 Wis.2d 687, 696 & n.8, 478 N.W.2d 582 (1992).

This Court recently emphasized that the concentration of governmental power in one branch presents "an extraordinary threat to individual liberty," *Gabler*, 376 Wis.2d 147, ¶4, and "undermines the checks and balances . . . designed to promote governmental accountability and deter abuse," *Panzer v. Doyle*, 2004 WI 52, ¶52, 271 Wis.2d 295, 680 N.W.2d 666, *overruled on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis.2d 1, 719 N.W.2d 408. The separation of powers is a constitutional bulwark against this threat, incentivizing each branch to resist encroachment from the others. *Gabler*, 376 Wis.2d 147, ¶7.

The Legislature's authority is limited to "determin[ing] what the law shall be." *State* ex rel. *Warren v. Nusbaum*, 59 Wis.2d 391, 449, 208 N.W.2d 780 (1973). The Governor, as the Executive, has the power to interpret and apply the law, *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶53, 382 Wis.2d 496, 914 N.W.2d 21, and to enforce the law. *Schuette v. Van De Hey*, 205 Wis.2d 475, 480–81, 556 N.W.2d 127 (Ct. App. 1996).

The Legislative Defendants glibly depict "sharing of powers" as the rule. (*E.g.*, LD Br. at 19-20.) They minimize the role of the Governor, preferring instead to frame this case as about the mere functioning of

administrative agencies (*id*. at 20-21), ignoring the fact that as the chief administrative officer of the state, the Governor exercises many of his powers through the "administrative agencies which comprise the executive branch." Wis. Stat. §15.001(2)(a), (b); *see also Koschkee v. Taylor*, 2019 WI 76, ¶14, 387 Wis.2d 552, 929 N.W.2d 600 ("Agencies are considered part of the executive branch."). "The legislature cannot interfere with, or exercise any powers properly belonging to the executive department." *Nusbaum*, 59 Wis.2d at 448. The powers disputed in this case are executive powers, and the Governor is the head of the Executive Branch.

The courts must enforce the boundaries between the executive and legislative branches because where making and enforcing the laws "is vested in one and the same man, or one and the same body of men, … there can be no public liberty." *Koschkee,* 387 Wis.2d 552, ¶50 (R. Bradley, J., concurring) (internal quotation marks and citation omitted). The Legislature is most likely of all the branches to cross these boundaries. *Gabler*, 376 Wis. 2d 147, ¶5.

Separation of powers disputes are factually intensive.

Separation of powers disputes require an understanding of the disputed powers and intrusions. "[I]n a typical separation of powers

dispute, the first order of business is to identify whether the power one branch is accused of usurping is a core power or a shared power." *Panzer*, 271 Wis.2d 295, ¶51. Intrusions by one branch on another's core powers are invalid under any circumstance. *State v. Horn*, 226 Wis.2d 637, 645, 594 N.W.2d 772 (1999). If not a core power, a power may be shared. The separation of powers doctrine may be violated in the shared powers context if one branch unduly burdens **or** substantially interferes with another branch's role and powers. *Martinez*, 165 Wis.2d at 696–97.

In assessing undue burden or substantial interference in the shared powers context, "[t]he concern is with actual and substantial encroachments by one branch into the province of another, not theoretical divisions of power." *Id.* (internal quotation marks and citation omitted). For example, in *Friedrich*, after determining that the power to compensate guardians ad litem was shared between the legislature and judiciary, the court relied on facts submitted through dozens of affidavits to find that statutes setting fees for guardians ad litem did not unduly burden or substantially interfere with the judicial branch. *Friedrich,* 192 Wis. 2d at 25-30 (describing affidavits from judges, attorneys, and others); *see also State v. Holmes*, 106 Wis.2d 31, 70, 315 N.W.2d 703 (1982) (relying on statistical evidence to assess burden to the judicial branch).

Legislative Defendants claim the Court can determine whether Acts 369 and 370 cause the Legislature to unduly burden or substantially interfere with the Executive Branch by looking at the "structural relationship between the Legislature and agencies." (LD Br. at 18, 64.) The Legislative Defendants created out of whole cloth this "structural analysis" method of analyzing a separation of powers dispute. It must be rejected because: (a) it has no basis in law; and (b) *Friedrich* and *Holmes* already demonstrate precisely how such claims are to be analyzed.

Standard of Review

Whether a complaint states a claim for which relief can be granted is reviewed *de novo*. Every court reviewing a complaint must accept all facts pleaded, and reasonable inferences that may be drawn from them, as true. *Beloit Liquidating Tr. v. Grade*, 2004 WI 39, ¶17, 270 Wis.2d 356, 677 N.W.2d 298.

A temporary injunction is a discretionary decision, appellate review of which is by the erroneous exercise of discretion standard. *Waste Mgmt., Inc. v. Wis. Solid Waste Recycling Auth.*, 84 Wis.2d 462, 465, 267 N.W.2d 659 (1978).

Legislative Defendants misinterpret *LWV* to suggest that where a denial of a motion to dismiss and grant of a temporary injunction rely on

contested interpretations of statutes and the constitution, the court reviews those disputes as questions of law. (LD Br. at 14, citing 387 Wis.2d 511, ¶13). There were no facts in dispute in *LWV*. Consequently, the issue of whether the Legislature constitutionally convened its December 2018 extraordinary session presented only questions of law. *LWV*, 387 Wis.2d 511, ¶13.

This case is not in that posture. There are contested factual issues that must be resolved before it can be decided on the merits.

ARGUMENT

Legislative Defendants urge this Court to immediately resolve issues of significant constitutional dimension at a very early stage of litigation. The Court should not and need not take the bait. First, as the circuit court correctly found, Plaintiffs' complaint alleging constitutional violations stated a claim for declaratory judgment. Second, Legislative Defendants have not met their high burden to show the circuit court erroneously exercised its discretion in granting a temporary injunction.

This Court should affirm the denial of the motion to dismiss and remand the matter to the circuit court, where Governor Evers' cross-claim remains pending, for factfinding and a merits decision. It should also affirm the circuit court's decision to grant the temporary injunction.

I. The circuit court properly denied Legislative Defendants' motion to dismiss.

A. Plaintiffs' complaint stated a claim for which relief can be granted.

1. Undisturbed precedent governs how motions to dismiss are decided.

The complaint alleged claims under the Declaratory Judgements Act ("DJA"), Wis. Stat. §806.04 *et seq*., which is "singularly suited to test the validity of legislative action prior to enforcement." *Weber v. Town of Lincoln*, 159 Wis.2d 144, 148, 463 N.W.2d 869 (Ct. App. 1990). Under it, "[a]ny person…whose rights, status or other legal relations are affected by a statute…may have determined any question of construction or validity arising under the [] statute…and obtain a declaration of rights, status or other legal relations thereunder." Wis. Stat. §806.04(2).

A DJA complaint must allege facts on four elements: (1) plaintiffs are people; (2) whose rights are affected by a statute; (3) who question the validity of the statute, i.e. its constitutionality; and (4) who request the court make a declaration.

When reviewing a motion to dismiss a complaint, the Court does not consider the merits. A motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint. *Scott v. Savers Property and Cas. Ins. Co*., 2003 WI 60, ¶5, 262 Wis.2d 127, 663 N.W.2d 715. Although it must

present "sufficient factual allegations in relation to all elements of the relief sought," a complaint is not "the full development of the [plaintiff's] position." *State* ex rel. *Luedtke v. Bertrand*, 220 Wis.2d 574, 581-82, 583 N.W.2d 858 (Ct. App. 1998), *aff'd*, 226 Wis.2d 271, 594 N.W.2d 370 (1999). That is the "important distinction between whether a [complaint] states a claim for relief… and whether the plaintiff is ultimately entitled to relief on the merits." *Id*. at 580.

The factual allegations of a complaint are "statements that describe who, what, where, when, why, and how." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶21 & n.9, 356 Wis.2d 665, 849 N.W.2d 693 (internal quotations omitted). All facts pled and all reasonable inferences from those facts must be taken as true, and a complaint may be dismissed "only if it appears *certain* that no relief can be granted under *any* set of facts that the plaintiffs might prove in support of their allegations." *Scott*, 262 Wis.2d 127, ¶5 (emphasis added). Moreover, "[a]ll pleadings shall be construed as to do substantial justice." Wis. Stat. §802.02(6).

Addressing their motion to dismiss the complaint for failure to state a claim, Legislative Defendants neither argue that Plaintiffs failed to plead facts meeting the elements of a DJA claim, nor address the facts pled in the complaint at all. Instead, they denigrate the Plaintiffs' case, calling it a

"longshot," a "bank-shot," and an "uphill climb." (LD Br. at 18, 19, 29.) But even those pejorative characterizations are admissions that the claims alleged by the Plaintiffs could succeed. That being so, the complaint cannot be dismissed.

Despite Legislative Defendants' wish, a motion to dismiss for failure to state a claim is **not** a motion for summary judgment. Summary judgment allows a court to consider facts outside the pleadings in order to determine whether any genuine issue of material fact exists and, if not, whether the movant is entitled to judgment "as a matter of law." Wis. Stat. §802.08(2). A motion for summary judgment, not a motion to dismiss, is a defendant's opportunity to test a plaintiff's legal theories prior to trial.

Unlike a motion for summary judgment, a motion to dismiss does not allow a court to stray beyond the four corners of the complaint to determine whether sufficient facts have been alleged. *CTI of Ne. Wisconsin, LLC v. Herrell*, 2003 WI App 19, ¶6, 259 Wis.2d 756, 656 N.W.2d 794; *Data Key Partners*, 356 Wis.2d 665, ¶19. This Court's review of the complaint at the motion to dismiss stage is confined to determining whether the facts within the complaint's four corners address each of the elements of the claims asserted.

Despite prolific Wisconsin case law applying the four corners doctrine to motions to dismiss, Legislative Defendants continue to assert that the motion requires a substantive review of the Plaintiffs' legal theory. (LD Br. at 18.) It does not.

The Legislative Defendants' assertion that "[a] complaint is not legally sufficient where the *claims fail as a matter of substantive law*" and that this Court must analyze substantive law to decide the merits rather than simply gauge the sufficiency of the facts (LD Br. at 18), is a distortion of this Court's words in *Data Key Partners.* There, the Court held that a complaint's sufficiency "depends on substantive law that underlies the claim" **only to the extent** that that law "drives what facts must be pled." 356 Wis.2d 665, ¶31. In other words, as this Court explained, plaintiffs are not "free to ignore substantive law that govern[s] their claim," but instead must match the pleaded facts to the elements of the claim asserted. *Id.* ¶27.

The circuit court understood how to consider a motion to dismiss. It noted the "problematic nature" of the Legislative Defendants "vacillating between stating [Plaintiffs] failed to state a claim upon which a relief may be granted which limits [the court] to accepting only the well-pled allegations in the complaint as opposed to considering [] other extraneous information," and stating "not so much that the complaint failed to state a

claim," but offering an invitation to decide Plaintiffs' challenge to Acts 369 and 370 on the merits, as a matter of law, more akin to summary judgment. (R.146 at 85:19-89:3; 12:6-17.) The circuit court declined to expand its review beyond the sufficiency of the complaint, instead concluding that, "taking all the well-pled allegations in the complaint as true, [Plaintiffs] have stated a claim upon which relief can be granted." (*Id.* at 170:25-171:2.)

The Legislative Defendants tempt this Court to now decide the underlying merits of Plaintiffs' claims—without a trial, without even a motion for summary judgment, but instead upon a motion testing the sufficiency of the complaint. (*See* LD Br. at 3, arguing that "even if a separation of powers analysis applies, these provisions are constitutional," and proceeding to analyze Plaintiffs' legal theory.)

Wisconsin courts have consistently reviewed complaints on their "four corners" for **sufficiency** on a motion to dismiss and decided the **merits** of legal claims on a motion for summary judgment, based on affidavits and other evidence when no material facts are in dispute. Otherwise, cases proceed to trial for factfinding and a decision on the merits. This Court should not deviate from those well-known, fully accepted and universally applied procedures.

Should this Court dismiss Plaintiffs' claims without allowing a full development of the legal and factual record, it will have insulated alleged violations by the Legislature of the separation of powers doctrine from being fully reviewed by the courts.

2. The complaint sufficiently states a claim for declaratory judgment; therefore, this case must be remanded for trial.

For each of their claims, Plaintiffs pled facts supporting the four elements of a declaratory judgment action: (1) they are people; (2) whose rights are affected by a statute; (3) who question the validity of the statute, i.e. its constitutionality; and (4) who request the court make a declaration. *See* Wis. Stat. §806.04(2). Therefore, their complaint is sufficient to survive Legislative Defendants' motion to dismiss.

a. The complaint states a separation of powers violation as to legislative interference with executive agency guidance.

Plaintiffs challenge §§31, 38, and 65-71 of Act 369, which concern executive agency guidance. Plaintiffs alleged these sections "unduly burdened and substantially interfered with the Executive Branch's power and responsibility to take care that the laws be faithfully executed" and "strip the Executive Branch of core executive powers," giving them to the

Legislature instead, in violation of Article V, §1 of the Wisconsin Constitution. (G-App-1, ¶¶105-109.)

Plaintiffs support this challenge with the following factual assertions in their complaint (G-App-1):

- §31 broadly defines "guidance document" to encompass executive statements about what the law requires or how individuals or companies should comply with the law, *id*. ¶¶83-84;

- §§31 and 38 create significant new hurdles for the use of any guidance document by an executive agency, like requiring them to undertake onerous new steps for every existing guidance document, *id*. ¶85;

- §38 sets a date upon which all existing guidance documents will be rescinded if not adopted in accordance with the new legislation, *id*. ¶¶86-90;

- §§31 and 38 severely burden and create extreme impediments to the Executive Branch's ability to publicly discuss state law, and consequently hamper its ability to communicate with the public about legal requirements and to implement effectively the laws and regulations of the State, *id*. ¶¶59, 81;

- The Executive Branch's ability to communicate with the public about basic matters of governance is essential to the Executive's ability to fulfill his constitutional duty to execute the State's laws, *id*. ¶¶59, 60, 81;

- §§31 and 38 will harm and impair the Plaintiffs' ability to rely on agency guidance, *id*. ¶¶15, 93;

- §§65-71 permit litigants to challenge guidance documents in court and unduly burden and substantially interfere with the Executive Branch's powers and duties, *id*. ¶¶91, 108.

Those facts, which courts are required to accept as true for purposes of the motion to dismiss, established that Plaintiffs' rights are affected by §§31, 38, and 65-71 of Act 369, and that they challenged the constitutionality of those sections as a violation of the separation of powers between the Executive and Legislative branches. The elements of a claim for declaratory judgment were met, and the claim properly survives the motion to dismiss.

b. The complaint states a separation of powers violation as to legislative body involvement in the state's litigation.

Plaintiffs next challenged §§26 and 30 of Act 369, concerning authority over litigation involving the enforcement and execution of the state's laws, and §§5 and 97, concerning legislative intervention, as a violation of the separation of powers doctrine. (G-App-1 ¶¶5-97, 101-109, 116.) Plaintiffs supported their challenge of these Sections with the following factual assertions in their complaint (G-App-1):

- §26 prevents the Governor from ending any civil action prosecuted by the Attorney General and gives that power to the Legislature or legislative committee, *id*. ¶¶68-69, 71;

- §§26 and 30 require that, in any civil litigation prosecuted or defended by the Attorney General, neither the Attorney General nor the Governor may settle or discontinue the litigation without the approval of at least one legislative committee, *id*. ¶75;

- §§26 and 30 prevent the Governor from withdrawing from litigation without permission from a legislative body, *id*. ¶16;

- §§26 and 30 politicize the litigation and settlement process, imposing considerable and unnecessary costs on both courts and litigants alike, such as Plaintiffs, *id*. ¶77;

- §§26 and 30 prevent the Executive Branch from fulfilling its key role as an independent, democratically accountable check on the Legislature should the Legislature pass an unconstitutional law, *id*. ¶78;

- §§26 and 30 remove the power of enforcement and execution of the law from the Executive Branch and give it to the Legislative Branch, *id*. ¶59, 76, 116;

- §§26 and 30 strip the Executive Branch of its authority over litigation enforcing and executing the state's laws, prohibiting Executive Branch officials from taking actions they would otherwise take, and give that authority to legislative committees, *id*. ¶¶59, 116.

Plaintiffs made similar allegations as to Act 369, §§5 and 97, which permit the Legislature to intervene in certain state litigation. (*Id*. ¶¶65-67, 108.)

Those facts clearly establish that Plaintiffs' rights are affected by §§5, 26, 30, and 97 of Act 369, and that Plaintiffs challenged the constitutionality of those sections as a violation of the separation of powers between the Executive and Legislative branches. The elements of a claim for declaratory judgment were met, and the claim properly survives the motion to dismiss.

c. The complaint states separation of powers violations as to the laws that allow for effective repeal of administrative rules by legislative committee, and legislative control of other agency decisions.

Lastly, Plaintiffs challenged §64 of Act 369, which allows the Legislature's joint committee for review of administrative rules ("JCRAR") to suspend a rule indefinitely, as depriving the Governor of the opportunity to exercise his veto power in violation of Article IV, §1 and Article V, §10 of the Wisconsin Constitution. Plaintiffs also challenged legislative control over other executive agency decisions in §§16 and 87 of Act 369 and §§10 and 11 of Act 370 as an unconstitutional infringement on Executive power. Plaintiffs supported their challenge of these Sections with the following factual assertions in their complaint (G-App-1):

- §64 gives JCRAR the authority to effectively repeal a rule by suspending it multiple times without limit and on no legal basis, *id.* ¶¶95, 115, 125;

- The challenged provisions do not require the Senate and Assembly to pass a bill as required in Article V, §§1 and 10 of the Wisconsin Constitution before effectively changing the law or preventing the Executive Branch from taking otherwise legal actions, and thereby prevent the Governor from exercising his veto power, *id*. ¶¶96-99, 117, 127-128.

- §64 does not give the Governor an opportunity to veto JCRAR's effective repeal of a rule, *id*. ¶¶97-99.

Those facts clearly establish that Plaintiffs' rights are affected by these sections, and that they challenged the constitutionality of them as a violation of the separation of powers between the Executive and Legislative branches. The elements of a claim for declaratory judgment were met, and the claim properly survives the motion to dismiss.

The Court should affirm the circuit court's denial of the motion to dismiss.

B. If the Court insists on reaching the merits through the motion to dismiss, it should find the challenged provisions unconstitutional.

If the Court proceeds to the merits of Plaintiffs' substantive claims, despite the authority demonstrating the impropriety of doing so, it should nonetheless find the challenged provisions unconstitutional.

1. Act 369's guidance document provisions violate the separation of powers doctrine.

Act 369 imposed multiple requirements on the creation and use of "guidance documents." Act 369, §§31, 38, 65-71. Without even mentioning the burden on the Governor and the Executive Branch's duty to "take care that the laws are faithfully executed," the Legislative Defendants claim these are proper directives to executive agencies. (LD Br. at 61-67.)
A properly conducted review shows that these provisions impermissibly intrude on the Governor's duty to execute the law.

a. The Governor, through the executive agencies, gives advice to the public on the law.

The Governor proactively sees that laws are "faithfully executed" by informing the public about the law and how to comply, and reactively, by engaging in law enforcement. Informing the public about how to comply with the law is called "advice" or, perhaps, "guidance."

To assess a branch's powers, and whether they are core or shared, courts look to the language of the Constitution itself, constitutional debates and practices, and early statutory interpretations. *State v. Unnamed Defendant*, 150 Wis.2d 352, 361, 441 N.W.2d 696 (1989). Courts also consider "'changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced,'" particularly when the constitutional language does not speak to the issue at hand. *Id*. (quoting *Borgnis v. Falk Co.*, 147 Wis. 327, 349-50, 133 N.W. 209 (1911)). Simply because two branches have overlapping authority over a subject does not mean that this subject is a source of "shared power" between the branches. *See Friedrich*, 192 Wis.2d at 20.

The language of the Wisconsin Constitution does not speak directly to the separation of powers, *see J.F. Ahern Co. v. Wis. State Bldg. Comm'n,* 114 Wis.2d 69, 101, 336 N.W.2d 679 (Ct. App. 1983), but contains "only the general outlines of government." Ray A. Brown, *The Making of*

the Wisconsin Constitution, Part II, 1952 Wis. L. Rev. 23, 62. These outlines were not extensively debated, *see id*. at 28, 33; Ray A. Brown, *The Making of the Wisconsin Constitution*, 1949 Wis. L. Rev. 648, 662, 664. Therefore, an examination of early interpretations is in order.

The Constitution is organized to include Article V, on the Executive, followed immediately by Article VI, "Administrative." The administrative department "is directly connected with the executive department in the character of its work, and no special gain is realized by making the separation." James Alva Wilgus, *The Government of the People of the State of Wisconsin* 58 (Eldredge & Brother, 1897). The executive power is solely vested in the Governor because "[w]hen laws are to be made, it is better to have them considered by a number of persons, so as to get the wisdom of all. But where laws are to be enforced, it is better to give all the responsibility to one man, so that what is to be done can be done speedily and thoroughly." A.O. Wright, *An Exposition of the Constitution of the State of Wisconsin* 87 (25th ed., Midland Publishing Co., 1885). It was also understood at the time that

> whatever power or duty is expressly given to, or imposed upon the executive department, is altogether free from the interference of the other branches of the government. Especially is this the case, where the subject is committed to the discretion of the chief executive officer, either by the constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise.

Attorney General ex rel. *Taylor v. Brown*, 1 Wis. 513, 522 (1853).

As society became more complex, administrative agencies were created and took on some of the duties of government. *State v. Whitman,* 196 Wis. 472, 220 N.W. 929, 938 (1928). The "practical administration" of the law could not achieve "complete, absolute, scientific separation of the so-called co-ordinate governmental powers," and agencies exercised powers of different branches of government. *Id.*; *see also Martinez*, 165 Wis.2d at 697 ("the legislative branch and the executive branch share inherent interests in the legislative creation and oversight of administrative agencies").

Whitman determined that the legislature could delegate rulemaking authority to agencies, a legislative power. *Id.* at 938 ("The regulation made by the administrative officers answers every definition of a law.") As have many opinions since *Whitman*, this Court recently confirmed that "[t]he powers delegated to administrative agencies by the legislature include the power to promulgate rules within the boundaries of enabling statutes passed by the legislature." *Koschkee*, 387 Wis.2d 552, ¶15.

Legislative Defendants, however, refuse to acknowledge that Executive power is exercised through agencies as well. *Whitman* stated that if agencies lacked rulemaking power, their authority amounted only to

"***the power to give advice***" which is an executive power. 220 N.W. at 942 (emphasis added). Further recognizing that explaining the law is an executive power, unconnected to any legislative delegation of rulemaking authority, the *Whitman* court stated, "[e]very executive officer in the execution of the law must of necessity interpret it in order to find out what he is required to do." *Id.* at 938.

This Court recently affirmed *Whitman*:

> The executive must certainly interpret and apply the law; it would be impossible to perform his duties if he did not. After all, he must determine for himself what the law requires (interpretation) so that he may carry it into effect (application). ***Our constitution not only does not forbid this, it requires it***.

Tetra Tech, 382 Wis.2d 496, ¶53 (emphasis added) (citing Wis. Const. art. V, § 1); *see also id*. ¶52 (quoting *Whitman*). While *Tetra Tech* eliminated judicial deference to Executive interpretations of law in the courts, *id*. ¶54, executive agency advice to the public is essential to seeing that the laws are faithfully executed. No other branch of government provides that service or function.

Today, the Executive Branch dispenses advice through seventeen cabinet agencies, typically overseen by secretaries who serve at the Governor's pleasure, and ten independent agencies. *See generally* Wis. Stat. Ch. 15; *State of Wisconsin Blue Book* at 307-309 (2015-16). The executive

branch agencies give advice through, for example, a bulletin issued by the Division of Motor Vehicles about driver's license exams, a pamphlet explaining how the Department of Public Instruction administers funding, forms explaining eligibility for child support by the Department of Children and Family Services, or a guide about health insurance from the Department of Health Services. (G-App-1, ¶84.) They also give advice through the thousands of emails, websites, social media posts, presentations, manuals, memos, and other documents issued annually. (R.143.)[3]

b. Act 369's guidance document provisions intrude on a core executive function.

Sections 31, 33, 38, and 65-71 of Act 369 intrude on the Executive's advice-giving function, thereby intruding on its core power to interpret, apply, and faithfully execute the law. While the Legislature certainly has a role in managing agency rulemaking, the same cannot be said of the non-rule, non-authoritative everyday communications providing information and plain-language advice which Act 369 defines as "guidance documents."

[3] For a better sense of the scope of agency guidance, the Court should review the parties' proposed findings of fact submitted for trial. (R.143, G-App-73.) Though not designed for this procedural posture, if the Court is going to make a merits decision, it should do so on the basis of fact.

Act 369, Section 31 creates an extraordinarily broad classification of materials called "guidance documents" which includes, with limited exceptions, "any formal or official document or communication issued by an agency, including a manual, handbook, directive, or informational bulletin," that either 1) explains the agency's implementation of a statute or rule that it administers, or 2) provides advice on how the agency is likely to enforce or administer a statute or rule "if that advice or rule is likely to apply to a class of persons similarly affected." Act 369, §31. Letters, manuals, emails, webpages, radio and television announcements, and even tweets may, under a plain reading of the statute, constitute "guidance documents."

The remaining provisions create an elaborate process around "guidance documents" that affects agencies' ability to issue advice, and the public's ability to rely on it. *Id*. §§31, 38. For any new "guidance documents," §38 requires agencies to

- Prepare and send a copy of the proposed guidance to the Legislative Reference Bureau with a notice of public comment period;
- Accept public comment for 21 days and indefinitely thereafter;
- Consider all public comments before finalizing the guidance;

- Retain copies of all comments and post them on the agency website;

- The agency head or Secretary must sign a detailed statement certifying that the interpretations in the guidance document comply with various statutes, and that nothing in the guidance exceeds statute or rule.

Under §38, existing documents meeting the definition of "guidance" were to be rescinded on July 1, 2019 unless these same steps were followed.[4]

Section 33 of Act 369 affects the content of guidance. It requires agencies to "identify the applicable statutory or administrative code provision that supports any statement or interpretation of law that the agency makes in any publication, whether in print or on the agency's Internet site." That provision is not limited to "guidance documents," or to statements of state law, but also includes statements of federal law. Multiple state agencies administer federal law, like the DHS and DNR. State of Wisconsin Bluebook, *supra*, at 410-11, 444.

Finally, the "legality or wisdom of a position taken" in a guidance document may be challenged in "any proceeding," Act 369, §38(3), such as

[4] Recognizing that these existing documents "assist members of the public in dealing with state government" and that they would "no longer be available" if Act 369 took effect, this Court affirmed the circuit court's stay of Section 38 as to these documents in effect as of March 26, 2019. (Order, 6/11/19 at 10; App-59.)

contested case or court hearings, and guidance documents may be challenged in declaratory judgment actions, §§65-71.

In sum, the guidance document provisions of Act 369 create across-the-board limits on how agencies implement their power to proactively see that the laws are faithfully executed, including interpretation and communication with the public about what the law is. These are core executive functions. *Whitman*, 220 N.W. at 938; *Tetra-Tech*, 382 Wis.2d 496, ¶53.

Legislative Defendants are simply wrong when they claim agencies "exercise the Legislature's *own* core authority" when they provide advice to the public. (LD Br. at 63.) The Legislative branch neither executes nor interprets the law. This Court struck down a statute that required the Governor to include certain information in his biennial budget, because despite the Legislature's interest in that information, it "cannot [keep itself apprised] in a manner that interferes or precludes the exercise of constitutionally conferred executive power." *Nusbaum*, 59 Wis.2d at 450. For the same reason, it should strike these provisions.

Legislative Defendants argue that because agencies are creatures of statute, the Legislature may unilaterally dictate how agency employees

interact with the public. (LD Br. at 63.) That overstates the Legislature's role.

Setting policy is one thing. Management of how policy is implemented is another: it is an executive power. *Whitman* stated that because agencies are creatures of the Legislature, it may "prescribe the procedure through which ***granted*** powers are to be exercised [by agencies]" or even eliminate an agency entirely. *Whitman*, 220 N.W.2d at 942 (emphasis added). Legislative powers include the power to set policy through rules. *Koschkee*, 387 Wis.2d 552, ¶18 ("agencies remain subordinate to the legislature ***with regard to their rulemaking authority***") (emphasis added); *Martinez*, 165 Wis.2d at 702. Granted legislative powers also include making policy decisions in individual cases, usually after factfinding. *See Schmidt v. Dep't of Resource Dev.*, 39 Wis.2d 46, 57, 158 N.W.2d 306 (1968) (holding statute permitting agency director to approve proposed municipal incorporations did not violate legislative non-delegation doctrine).

However, Act 369's guidance document provisions do not regulate a delegated legislative power. Act 369 specifically provides that guidance documents are ***not*** rules, do not have the force of law, and do "not provide authority for implementing or enforcing a standard, requirement, or

threshold, including as a term or condition of any license." Act 369, §§31(b)1., 38(3). It also does not set the terms for making policy decisions in individual cases, as in *Schmidt*. It does not even provide a "legislative check" on agency action, like the statutes at issue in *Ahern* and *Martinez*, because it does not set a legislative process for reviewing guidance documents (even assuming that were allowed).

Instead, Sections 31, 33, 38, and 65-71 of Act 369 make wholesale changes to and regulate the core executive function of interpreting the law and seeing that it is faithfully executed. Such an intrusion by the Legislature, no matter how slight, renders the provisions unconstitutional. *Horn*, 226 Wis.2d at 645.

c. Act 369's guidance document provisions unduly burden or substantially interfere with the Executive Branch.

Should the Court determine that advice-giving is not a core power of the Executive, Act 369's guidance document provisions are still unconstitutional because they unduly burden or substantially interfere with Executive Branch powers. *Martinez*, 165 Wis.2d at 696–97. Act 369, §§31, 33, 38, and 65-71 take notice, comment, and other procedures that are more appropriate for infrequent activity, like rulemaking, and apply them

to everyday communications, like emails and website postings, crippling the Executive Branch's ability to communicate with the public.

Legislative Defendants make the shared powers test out to be a high legal standard, devoid of factfinding. They criticize the circuit court's temporary injunction decision for assessing the burdens the guidance document provisions placed on the Executive Branch relative to the claimed necessity or benefits of the law, though the court also relied on a "careful examination of the text of the challenged statutes." (App-41.)

Whitman emphatically stated that the boundaries of power between the three branches "are to be determined according to common sense *and the inherent necessities of governmental co-ordination*," 220 N.W. at 940 (emphasis in original) (citing *Hampton v. U.S.*, 48 S. Ct. 348, 72 L. Ed. 624). *Holmes* also emphasized the importance of reviewing actual impacts, stating the shared powers test as whether one branch has materially impaired or practically defeated another's exercise of jurisdiction and power or proper functioning. 106 Wis.2d at 69-70. Those cases support the circuit court's balancing approach. Additionally, the circuit court was merely citing Legislative Defendants' own words when it described Act 369 as "cumbersome" (R.62 at 18) and noted that "absent a good

reason, good government would not unnecessarily be by design 'cumbersome'." (App-41.)

Legislative Defendants claim that to prove undue burden or substantial interference on a facial challenge to Act 369's guidance document provisions, the Plaintiffs must show *each* separate provision of the law impacts and causes "too much work" for *each* agency in state government. (LD Br. at 66, internal citation omitted.) That is a yet another made-up standard. This case is about the totality of the intrusion on Executive authority caused by Act 369, not its effect on each agency.

The complaint alleges facts showing that the guidance document provisions of Act 369 do unduly burden or substantially interfere with the Executive Branch. (*E.g.*, G-App-1 ¶¶81, 83, 85-93.) Moreover, the Governor's Proposed Findings of Fact (G-App-73), submitted in advance of the scheduled trial on guidance documents, demonstrate that the guidance documents provisions unduly burden or substantially interfere with the ability of the Executive Branch to faithfully execute the laws. If the Court is going to make a merits decision, it should be aware of these facts. *See* note 3, *supra*.

For example, the Department of Health Services and Department of Natural Resources alone estimated a combined 40,000 existing "guidance

documents" as defined by Act 369. (G-App-73, ¶¶47-49, 112.) Processing them, as required by Act 369, creates an undue burden on the Executive Branch by diverting experienced staff from other duties, resulting in delays or a complete shutdown of all other agency functions. (*Id*. ¶¶53-56, 124, 159-60, 178, 190-91.)

Equally concerning is that Act 369 prevents the Executive Branch from communicating with the public in a timely, effective way—unduly burdening and substantially interfering with its ability to execute the law. For instance:

- Act 369 rescinds existing guidance documents not processed and certified by July 1, 2019. Rescission occurs whether the documents are "legally dubious" (LD Br. at 62; R.27 at 30), or there are insufficient resources to process the documents prior to the deadline.

- Going forward, the guidance document process impairs agencies' ability to provide advice about the law, particularly on time-sensitive matters like infectious disease outbreaks, elections, employment, benefits, or construction projects. (G-App-73, ¶¶70-72, 84-90, 106-08, 126, 172-73.) It is also incompatible with social media and other modern means of communication. (*Id*. ¶¶9, 169-176 (describing DOT's use of social media to respond to weather and remind drivers about the law)).

- Permitting the "legality or wisdom" of a guidance document to be challenged in "any proceeding," as provided by §38(3), invites incarcerated persons, who are frequently litigious, to challenge the rules surrounding their confinement in disciplinary and other proceedings. Permitting the "wisdom" of DOC guidance to be challenged will interfere with the department's operations. (*Id*. ¶¶142-45, 147.)

- Cabinet secretaries and heads of independent agencies are unlikely to sign the certification required by §38(6), without confirming that it is correct. That will likely require the preparation of memoranda from staff or legal counsel, causing delay and diversion of resources. Requiring the certification of thousands of documents will disrupt the secretaries' and agency heads' ability to complete their other duties. (*Id*. ¶¶95-96, 189.)

- Many agencies strive to or are required by law to write documents for the public in plain language, to help assure understanding and improve compliance. This objective is undermined by the citation requirement in §33. (*Id*. ¶¶57-61, 105, 115, 132.)

The effect of these provisions is to delay or prevent agencies from giving information and advice about the law, forcing the Executive branch to abandon proactive advice in favor of reactive enforcement, and preventing agencies from executing other duties that also implement the law. (*Id.* ¶¶62, 108, 128, 133, 157, 160, 192.) Act 369 easily meets the *Martinez* and *Holmes* tests for undue burden or substantial interference, and defeats *Whitman*'s plea for governmental coordination.

Legislative Defendants do not address the facts in the complaint or elsewhere regarding burden and interference. They claim, without any factual support, that guidance documents could be used by agencies to "shut down a family business or farm," so the guidance documents provisions are justified. (LD Br. at 66.) They also claim matters of burden

should be addressed solely through agency budget requests to the Legislature. (*Id*. at 65.)

Yet *Martinez* and other cases make it clear that an "undue burden" on a governmental branch's powers is a violation of the separation of powers doctrine. Such burdens on power cannot be remedied with funding. Moreover, "substantial interference" by one branch with the manner in which another exercises its power is also an unconstitutional intrusion. *Martinez*, 165 Wis. 2d at 696.

Finally, Legislative Defendants go outside the pleadings to cite a voluntary notice-and-comment process DNR employed for some documents as evidence that Act 369 is constitutional. (LD Br. at 66.) Omitted is the fact that this process, implemented in 2013, is vastly different from the process in Act 369, §38. (G-App-73, ¶129.) As Governor Evers would have shown at trial, under the DNR process, program staff have discretion to choose which documents to notice, the documents they may choose from are limited, public comments need not be accepted indefinitely, documents do not have to be posted on the agency website, and there is no Secretary certification required. (*Id*. ¶129.) Only 342 new and revised guidance documents have gone through the process since

2013, or about 1% of the agency's 30,000 estimated guidance documents. (*Id*. ¶130.)

Even if the merits of Plaintiffs' claims are considered by the Court, the facts before it show that the guidance documents provisions of Act 369 are unconstitutional.

2. Act 369's settlement and intervention provisions violate the separation of powers.

Likewise, should the Court take up the merits of Plaintiffs' challenge to Act 369's unprecedented provisions inserting the Legislature into state litigation, it should find those provisions unconstitutional. Sections 5 and 97 of Act 369 entitle the Legislature to join as a party in litigation concerning the validity or even "construction" of statutes and retain its own counsel. Sections 26 and 30 give the Legislature the ability to direct litigation by and on behalf of the State by giving legislative committees veto authority over settling or discontinuing cases, and by prohibiting settlement when the validity of a statute is at issue.[5] Those sections intrude on the Executive's core law enforcement authority, and therefore are unconstitutional.

[5] Legislative Defendants also discuss §§3, 28, 29, 98, and 99 in their brief (LD Br. at 21) but these sections were neither challenged by the Plaintiffs, nor an object of the motion to dismiss, nor temporarily enjoined. They are therefore not before this Court.

a. Litigating on behalf of the State is a core power of the Executive.

"The office of prosecutor is an agency of the executive branch of government which is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the rule of law." *State v. Onheiber*, 2009 WI App 180, ¶19, 322 Wis.2d 708, 777 N.W.2d 688 (internal quotation marks and citation omitted). This is true whether prosecutorial powers are exercised by the Attorney General or the Governor, both executive officers.

The Attorney General's powers are Executive Branch powers: "[t]he attorney general is a high constitutional executive officer. He is an important law enforcement officer of the state. In a broad sense he is the attorney for our body politic." *State v. Woodington*, 31 Wis.2d 151, 167, 142 N.W.2d 810 (1966). In 1848, the framers of Wisconsin's constitution would have understood the term "attorney general" to mean the chief law officer of the state, and judicial decisions of the time demonstrate that: "The attorney-general is the law officer of the government, elected for the purpose of prosecuting and defending all suits for or against the State." *Orton v. State*, 12 Wis. 509, 511 (1860).

The Attorney General's role as attorney for the State is further evidenced by the legislation the framers enacted contemporaneously with

the Constitution. Both early and modern statutes interpreting law enforcement authority affirm this. *Compare* R.S.1849, c. 9, §36 *with* Wis. Stat. §165.25(1m); *compare* R.S.1849, c. 9, §2[6] and *Orton*, 12 Wis. at 511-12 *with* Wis. Stat. §14.11(1), (2). "The[se] enactment[s] and [their] subsequent continuance to the present day is a constitutional interpretation which is conclusive." *State v. Coubal*, 248 Wis. 247, 256, 21 N.W.2d 381 (1946).

The Governor as the state's chief executive has authority to direct litigation initiated by or against the State. This is confirmed by statute: the Governor informs the Attorney General when representation of the State is needed, *see* Wis. Stat. §§14.11(1), 165.25(1m), or employs special counsel to represent the State's interests. Wis. Stat. §14.11(2). Those portions of Wis. Stat. §§14.11 and 165.25(1m) originated with the enactment of the Constitution and are a strong statement of the Framers' intent.

This Court has long held that the power of the Governor to employ and direct special counsel in the stead of the Attorney General is exclusive. "That authority is plainly and distinctly given to another officer of the government [the Governor], who alone can exercise it, and render the State liable to pay for legal services rendered." *Orton*, 12 Wis. at 511–12. The

[6] These provisions delineate when the executive power to litigate on behalf of the State reverts from the Attorney General to the Governor.

Constitution vests this executive power in the Governor. Wis. Const. art. V, §1.

Legislative Defendants claim that because the Attorney General is elected, the Governor cannot be his superior in law enforcement. (LD Br. at 27-28.) But as discussed above, the Framers always understood the Governor to be the singular head of the executive branch, Section I.B.1.a., *supra*, including over the "subordinate executive" offices of attorney general, treasurer, and secretary of state, *see* "The Constitution—No. 5," *Racine Advocate*, February 17, 1847, reprinted in Milo M. Quaife, *The Struggle Over Ratification 1846-1847* 456 (1920) ("***The subordinate executive, or as they are called, administrative officers, are*** a secretary of state who is ex officio auditor, a treasurer, and ***an attorney-general***, all to be elected by the people of the state.") (emphasis added).

Law enforcement powers are not free-standing, which the Legislature can manipulate at will. Rather, through Constitutional and contemporaneous statutory provisions, the framers guaranteed the Executive's sole control over law enforcement in the courts. Hence, any imposition by another branch on the Executive's law enforcement authority must be analyzed as an intrusion on a core power.

b. The Legislature has no constitutional role in law enforcement.

Legislative Defendants would like this Court to find that Executive Branch power over litigation is subject to the Legislature's complete control. Their main premise is that because the Attorney General's duties are established by law under Wis. Const. art. VI, § 3, the Legislature can control all litigation through laws they enact, and the Governor has no role in litigation beyond what the Legislature deigns to give. (LD Br. at 21-31.) The fatal flaw of that argument is this: the Legislature has no constitutional role in law enforcement, particularly by representing the State in court. It cannot exercise law enforcement authority, whether it grabs that power from the Attorney General or Governor.

"Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them…" *Schuette*, 205 Wis.2d at 480–81. The court of appeals in *Helgeland v. Wisconsin Municipalities*, later affirmed by this court, stated that the Legislature's powers do not include the authority to defend the constitutionality of statutes:

> **[B]y claiming an interest in defending its statutes against constitutional challenges, the Legislature conflates the roles of our government's separate branches**. Under our tripartite system of government, the legislature's role is to determine public policy by enacting legislation. In contrast, it is exclusively the judiciary's role to determine the constitutionality of such legislation, and **it is the executive's role to defend the constitutionality of statutes.**

2006 WI App 216, ¶14, 296 Wis.2d 880, 724 N.W.2d 208, *aff'd*, 2008 WI 9, 307 Wis.2d 1, 745 N.W.2d 1 (emphasis added) (citations omitted). "The Legislature's interest in this respect is limited to establishing policy through the enactment of constitutional legislation," *id.* ¶11, and there is no need to join them in the action, *White House Milk Co. v. Thomson*, 275 Wis. 243, 249, 81 N.W.2d 725 (1957).

Legislative Defendants complain that the Attorney General may concede the invalidity of statutes, but that still does not give the Legislature standing. The U.S. Supreme Court has ruled, for example, that when the Executive confesses error, Congress's proper place, should it disagree, is participating *amici curiae. U.S. v. Windsor*, 570 U.S. 744, 760, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013); *see also Virginia House of Delegates v. Bethune-Hill*, __ U.S. __, 139 S. Ct. 1945, 1953, 204 L.Ed.2d 305 (2019) (finding that state legislatures generally do not have standing in constitutional litigation).

The cases cited by Legislative Defendants do not demonstrate that litigation on behalf of the State is a power shared or controlled by the Legislature. (LD Br. at 34.) Most of them concern legislators permissively intervening or suing in their individual capacity. *See State* ex rel. *Wis. Senate v. Thompson*, 144 Wis.2d 429, 424 N.W.2d 385 (1988) (individual

capacity); *Risser v. Klauser*, 207 Wis.2d 176, 558 N.W.2d 108 (1997) (individual capacity); *Citizens Util. Bd. v. Klauser*, 194 Wis.2d 484, 534 N.W.2d 608 (1995) (individual capacity); *State* ex rel. *Reynolds v. Zimmerman*, 23 Wis.2d 606, 128 N.W.2d 16 (1964) (gerrymandering case brought by Governor in which president pro tem and assembly speaker permissively intervened as individual officers to support respondent secretary of state). In fact, these cases highlight that the Legislature does not have authority to conduct constitutional litigation. *E.g.*, *Thompson*, 144 Wis.2d at 435–36.

Legislative Defendants extensively cite *State v. City of Oak Creek*, 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526, but this case is inapposite. (LD Br. at 22-31.) It solely concerned the Attorney General's authority to challenge the constitutionality of a statute. It neither discussed the powers of the Executive to direct litigation, nor did it recognize any power of the Legislature to enforce the law in court.

Finally, the Legislative Defendants repeatedly refer to the Legislature's power over the Attorney General as "plenary" (*e.g.*, LD Br. at 27), but at least one commentator has stated that due to the many limitations the Constitution places on the Legislature, it "has significantly less than plenary power." Jack Stark, THE WISCONSIN STATE CONSTITUTION

at 88 (Oxford Univ. Press 2011). One of those limitations is that law enforcement authority has been vested with the executive, not legislative, branches. Wis. Const. art. V, §4.

c. The intervention and settlement provisions of Act 369 unconstitutionally intrude on a core Executive power.

Sections 26, 30, 5 and 97 of Act 369 allow the Legislature to intrude on and appropriate the Executive's core power to litigate on behalf of the state. They are accordingly invalid.

Sections 5 and 97 allow the Legislature to intervene in cases the Attorney General is already prosecuting. In general, intervening parties have the right to participate in a case as fully as the original parties, including motions, trial, and other proceedings. *Kohler Co. v. Sogen Int'l Fund, Inc.*, 2000 WI App 60, ¶11, 233 Wis. 2d 592, 608 N.W.2d 746. The addition of a new party necessarily complicates the ability of other parties, including the State as represented by the executive branch, to prosecute the case and see it to an efficient resolution. *See Helgeland*, 307 Wis. 2d 1, ¶5.

Similarly, §§26 and 30 of Act 369 intrude on the Executive's power to litigate by and on behalf of the State by placing control over settlement or discontinuance of litigation in legislative hands. The power to dismiss or

settle cases is an essential element of litigation, written into the statutes, *e.g.*, Wis. Stat. §802.12 (permitting court to order parties to attempt settlement) and encouraged as a means to "'save the parties the substantial cost of litigation and conserve the limited resources of the judiciary.'" *Matter of Estates of Zimmer*, 151 Wis.2d 122, 134, 442 N.W.2d 578 (Ct. App. 1989) (internal quotation marks and citation omitted). Only the Executive is constitutionally (and practically) in a position to strategically use the State's limited resources to decide how to most efficiently and faithfully execute Wisconsin law. *See State v. Schell*, 2003 WI App 78, ¶¶15-19, 261 Wis.2d 841, 661 N.W.2d 503 (finding court exceeded its authority and encroached on Executive power to administer probation when it precluded sheriff from permitting home monitoring of inmate).

Legislative Defendants claim these provisions do not result in Legislative intrusion on a core Executive power because the Legislature has always had the ability to be the Attorney General's boss. (LD Br. at 31-41.) But the Legislature has never supervised the Attorney General. It can add or remove powers from that officer but the Legislature has never been the Attorney General's supervisor. It is the people, through elections, who exercise that function. *See* Wis. Const. art. VI, § 1 (providing for direct election of attorney general).

Legislative Defendants also rely on statutes like Wis. Stat. §165.25(1m) that give the Legislature the ability to request representation from the Attorney General for itself or other officers of state government. (LD Br. at 33-34.) Requesting representation is a far cry from directing litigation. As the circuit court found, by limiting the ability of the Executive Branch to end or settle litigation, §§26 and 30 "change[] the very meaning of what it means to be a lawyer," both practically and ethically. (App-27.) For the same reason, *Ahern*'s endorsement of "unanimity" in building construction decisions made by the Executive and Legislative branch simply does not translate to the litigation context. 114 Wis.2d at 108. Legislative Defendants' reliance on that case does not advance their cause.

Legislative Defendants portray the intervention and settlement provisions of Act 369 as "garden-variety measures" that give the Legislature "a seat at the table." The Legislature may want a seat at the law enforcement table, but they were not invited to it by the founders.

Moreover, in Act 369, the Legislature went further than that: it assigned control over state litigation to itself, thus giving it the power to enforce the law. Because the Executive's law enforcement authority is an exclusive power, the Legislature's intrusion on this authority violates the

separation of powers. *Horn*, 226 Wis.2d at 645. The challenged provisions of Act 369 are unconstitutional.

3. The new laws allowing legislative committees to effectively repeal administrative rules and granting them control over certain agencies and agency actions implicate multiple constitutional principles, and further proceedings are required to resolve these challenges.

Finally, the Court should not address the merits of §§16 and 87 of Act 369, and §§10 and 11 of Act 370, but if it does, it should find them unconstitutional.

There is "tendency, in republican forms of government, to the aggrandizement of the legislative branch at the expense of the other branches." *State* ex rel. *Kleczka v. Conta*, 82 Wis.2d 679, 709 & n.3, 264 N.W.2d 539 (1978). Prior to enactment of §64, the legislature's joint committee for review of administrative rules could temporarily suspend an existing administrative rule only once. If a bill to support the suspension did not become law, the rule resumed effectiveness and the committee could not re-suspend the rule. Wis. Stat. §227.26(2)(d), (f), (h)-(j) (2015-2016). This Court affirmed a one-time suspension, supplemented by other standards and safeguards, in *Martinez*, 165 Wis. 2d at 702.

With §64, that committee has the power to suspend a rule "multiple times," without limit. There is "no material distinction between repealing a

law and suspending or revoking it." 63 Op. Atty. Gen. 159, 163 (1974). Because limitless rule suspensions deprive the Governor of the opportunity to exercise his veto power, §64 violates the separation of powers. *See id.; see also* 43 Op. Atty. Gen. 350, 359-60 (1954); 52 Op. Atty. Gen. 423, 424 (1963). Suspensions by committee also violate the Constitution's quorum requirement. Wis. Const. art. IV, §7.

The joint committee has not yet sought to suspend a rule more than once, and in the context of a shared powers analysis, as clearly applies to agency rulemaking, "[t]he concern is with actual and substantial encroachments by one branch into the province of another, not theoretical divisions of power." *Martinez*, 165 Wis.2d at 696–97 (internal quotation marks and citation omitted). This aspect of the case could be dismissed without prejudice, allowing any future "actual and substantial encroachment" on Executive power by legislative committee to be addressed at that time.

The committee control provisions of §§16 and 87 of Act 369, and §§10 and 11 of Act 370, however, are ripe for challenge now as they are actually and substantially encroaching on Executive power now. Those provisions require Executive Branch agencies to obtain approval from various legislative committees before taking what would otherwise be

appropriate law implementation and enforcement. Section 10 even goes so far as to place control over Department of Workforce Development ("DWD") communications with the federal government in committee hands and requires DWD to report to the legislative committee as though it were the supervisor of DWD staff. Similar supervisory functions over the Department of Children and Family are imposed by Section 11, removing those functions from the Executive Branch's Department of Administration.

It can be reasonably inferred from the facts and factual allegations in the record that the affected agencies are prevented by these provisions from exercising their Executive powers with respect to the programs affected by these provisions. (*E.g.*, G-App-1, ¶¶94-100; R.31.) Factfinding at trial is necessary to determine whether the encroachments result in undue burden or substantial interference, in violation of the separation of powers doctrine.

II. The circuit court did not erroneously exercise its discretion in granting a temporary injunction.

The circuit court exhaustively considered the facts and the law in considering the Plaintiffs' and Governor's motion for temporary injunction. It did not erroneously exercise its discretion and the decision to issue the temporary injunction should be affirmed.

A. There is a high bar for overturning a circuit court's temporary injunction.

Legislative Defendants barely describe the standard by which an appellate court reviews a temporary injunction, and present argument as though the review is *de novo*. A temporary injunction is a discretionary decision, appellate review of which is by the erroneous exercise of discretion standard. *Waste Mgmt.*, 84 Wis.2d at 465; *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis.2d 400, 423, 491 N.W.2d 484 (1992).

> A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. The test is not whether this court as an original matter would have denied the motion; it is whether the circuit court abused its discretion in doing so.

Schneller v. St. Mary's Hosp. Med. Ctr., 162 Wis.2d 296, 306, 470 N.W.2d 873 (1991) (citations omitted). A "court's discretionary determinations are not tested by some subjective standard, or even by our own sense of what might be a 'right' or 'wrong' decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *State v. Jeske*, 197 Wis.2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995).

Legislative Defendants also incorrectly state the standards for granting a temporary injunction, instead describing the standard for

permanent injunctions. (LD Br. at 67). Specifically, a "balancing of the equities" is not part of the temporary injunction standard, which is primarily concerned with preserving the status quo while the merits are resolved in order to prevent irreparable harm. *Compare Werner v. A.L. Grootemaat & Sons, Inc*., 80 Wis.2d 513, 520, 259 N.W.2d 310 (1977) (standards for temporary injunction) *with Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee County,* 216 WI App 56, ¶20, 370 Wis.2d 644, 883 N.W.2d 154 (same); *Pure Milk Prod. Co-op v. Nat'l Farmers Org,* 90 Wis.2d 781, 800, 280 N.W.2d 691 (1979) (standards for permanent injunction).

Werner is the leading case articulating the standards for temporary injunctions.

> A temporary injunction is not to be issued unless the movant has shown [1] a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued [2] only when necessary to preserve the status quo. Injunctions are not to be issued without a [3] showing of a lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.

Werner, 80 Wis.2d at 520 (footnotes omitted) (bracketed numbers added for clarity). Legislative Defendants' arguments regarding "balance" have no place at the temporary injunction stage and must be disregarded.

B. The circuit court did not erroneously exercise its discretion in granting the temporary injunction.

A rational judge could have made the same decision as the circuit court in this case, relying on the same facts and law, and the court correctly granted the temporary injunction.

Plaintiffs' primary legal theory is that the challenged provisions violate separation of powers principles. That legal theory is well-developed, and as shown herein, the Legislature has violated that framework, and thus the Constitution, again and again. It does so yet again in Acts 369 and 370.

As demonstrated in Section I, Plaintiffs have a reasonable probability of success on the merits as to those issues on which the circuit court granted a temporary injunction. Arguments presented to the circuit court demonstrated that. (R.4; R.53; R.72, App-1.) The circuit court reasonably concluded that Plaintiffs were likely to succeed on the merits, based on a careful examination of the facts and law, and using a demonstrated rational process. The Legislative Defendants do not claim otherwise.

Specifically, the circuit court carefully examined Wisconsin's constitution itself, cases interpreting the separation of powers doctrine derived from it, as well as cases on quorum, bicameral passage, and

presentment. (App-6-20.) It then applied these principles to the challenged provisions and found that Plaintiffs were likely to succeed in their claims that:

- §64 violates the constitution's separations of powers requirements, particularly of presentment, by allowing suspension and re-suspension of a rule by a legislative committee limitless times, without allowing the executive branch any check on that legislative act. (App-20-23)

- §§26 and 30 unconstitutionally infringe on Executive branch power by taking from the Attorney General the power to discontinue or compromise cases and giving that power to the Legislature or legislative bodies, and, with respect to those cases brought by the Attorney General, by eliminating Governor or other Executive branch officer approval for settlement, again replacing the Legislature as the approving body. (App-23-32)

- §§31, 33, 38, 65-71, and 104-05 unduly burden the orderly functioning of the executive branch by imposing new restrictions on providing the public with advice or explanation on statutes and rules and therefore violate separation of powers. (App-40-42)

After finding a likelihood of success on the merits, a circuit court next turns to whether (2) an injunction is necessary to preserve the status quo, and (3) plaintiff has shown a lack of adequate remedy at law and irreparable harm. The third standard is met by a showing that, without it to preserve the *status quo pendente lite*, the permanent injunction sought would be rendered futile. *Werner,* 80 Wis.2d at 520.

The Legislative Defendants cannot and do not contest that a temporary injunction was necessary to preserve the status quo, nor do they

claim that the circuit court erroneously so found. The circuit court reasonably found the remaining factor, irreparable harm, was met based on the Legislative Defendants' own admission. Wondering during arguments on the motion for temporary injunction whether a party even need "show irreparable harm if the court felt the plaintiff had made a …showing that the statute was constitutional," the circuit court asked counsel for the Legislative Defendants:

> THE COURT: [Does] not every unconstitutional application cause irreparable harm without [an] []adequate remedy under the law?
> MR. TSEYTLIN: Yes, Your Honor. …

(R.146 at 152.)

In its written decision, the circuit court explicitly recognized that "when constitutional rights are deprived, irreparable harm results and there is really no other adequate remedy available" and went on to find that "where plaintiffs have established a reasonable probability of success on the merits, plaintiffs have also shown irreparable harm…" (App-3-4) Given the Legislative Defendants' acknowledgement that every unconstitutional application of law results in irreparable harm, no further analysis was necessary.

CONCLUSION

For the reasons stated above, the Court should affirm the circuit court's denial of the Legislature Defendants' Motion to Dismiss Plaintiffs' complaint, affirm the circuit court's issuance of a temporary injunction, and remand this matter to the circuit court for further proceedings.

Respectfully submitted this 4th day of September, 2019.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 13,048 words.

Dated this 4th day of September, 2019.

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

I hereby certify that:

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

I further certify that:

This electronic brief and appendix are identical in content and format to the printed form of the brief and appendix 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 4th day of September, 2019.

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