STATE OF WISCONSIN
SUPREME COURT

Case 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,

and

JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,
Defendants-Respondents.

Case 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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ROBIN VOS, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY SPEAKER, ROGER ROTH, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE PRESIDENT,

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Defendants-Appellants,

JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF WISCONSIN,
Defendants.

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

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September 4, 2019

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The plaintiffs agree with the legislative defendants that this case is appropriate for publication and that oral argument is already scheduled.

INTRODUCTION

Our country and this State are sharply divided. Many feel strongly about their partisan affiliation. But no matter how painful an electoral loss may be, it is not worth overturning the will of the people, upending our system of government, or putting this State so perilously close to what James Madison described as "the very definition of tyranny." The Federalist No. 47 (Madison). Certain members of the Legislature would sacrifice our founding principles on the altar of party politics. It is left to this Court to check that impulse.

These are unusually strong words for a legal brief, but this is an unusual case. The legislative defendants ask this Court to embrace an anemic "separation" of powers that will allow the Wisconsin Legislature, and in many cases a single legislative committee, to exercise unprecedented authority over execution and enforcement of the law. No federal or state court anywhere in this country has ever sanctioned such a radical dismantling of core separation of powers principles. Sanctioning it here not only would make this State an extreme outlier and undermine core pillars of its constitutional system but also would imperil the legitimacy of this Court as an independent check rather than a partisan organ.

The Founders anticipated this type of threat to our constitutional order. That is why, more than two centuries ago, James Madison warned that there "can be no liberty" when "the legislative and executive powers are united in the same person or body." *Id.* There is too great a risk that "tyrannical laws" will be enacted and then executed "in a tyrannical manner." *Id.* The "separate and distinct exercise of the different powers of government" has therefore been seen since the Founding "essential to the preservation of liberty." The Federalist No. 51 (Madison). Only through separation of powers can each branch of government "counteract" encroachments of the others. *Id.*

Overreaching legislatures were the Framers' gravest concern. The creators of our constitutional system understood that, in a republican government, an unchecked legislature tends to "predominate[]." *Id.* Thus, to safeguard liberty and avoid legislative overreach, it is essential that legislators "exercise no executive prerogative." The Federalist No. 47.

The Court should heed this instruction.

BACKGROUND

1. The extraordinary-session laws. On November 6, 2018, Tony Evers was elected Governor of the State of Wisconsin. Shortly after Governor Evers's election, state lawmakers, including defendants Vos and Fitzgerald, called an extraordinary legislative session to take place before the governorship changed hands. Compl. ¶38. Going into the extraordinary

session, the defendants announced a 141-page package of bills designed to strip the incoming Governor of his authority and hand the Legislature unprecedented power over traditional executive functions. Compl. ¶39.

The Legislature's Joint Committee on Finance held a single day of hearings on the proposed bills before voting along party lines to approve most of them. Compl. ¶¶40, 42. The Legislature then rushed the bills through in an overnight session. Compl. ¶42. Although the extraordinary session legislation immediately faced widespread criticism, outgoing Governor Walker signed the bills into law on December 14, 2018. Compl. ¶¶45–47. On January 7, 2019, Evers became Governor of Wisconsin.

The extraordinary-session laws upended the balance of power among the coordinate branches of government.

First, several provisions strip the Executive Branch of its authority over litigation involving the State. Section 26 of Act 369 prevents the Governor from ending "[a]ny civil action prosecuted by the department [of justice] by direction of any officer, department, board, or commission, or any civil action prosecuted by the department on the initiative of the attorney general or at the request of any individual." Compl. ¶68. Section 26 instead transfers the power to end civil litigation to the Legislature, providing that a civil action "may be compromised or discontinued" only with the approval of a legislative intervenor, or, "if there is no intervenor, by submission of a proposed plan to the joint committee on finance for the approval of the

committee." Compl. ¶69. The Act is clear that "[t]he compromise or discontinuance may occur only if the joint committee on finance approves the proposed plan." *Id.* The Act also provides that "[n]o proposed plan may be submitted to the joint committee on finance if the plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal laws, without the approval of the joint committee on legislative organization." Compl. ¶70.

Section 30 of Act 369 imposes similar limits on the Attorney General's ability to compromise or settle litigation. It mandates that, if an action "is for injunctive relief or there is a proposed consent decree," the Attorney General may not compromise or settle the action "without the approval of an intervenor . . . or if there is no intervenor without first submitting a proposed plan to the joint committee on finance." Compl. ¶¶72–73. As with the Governor, "[t]he attorney general may not submit a proposed plan to the joint committee on finance under this subdivision in which the plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal law, without the approval of the joint committee on legislative organization." Compl. ¶74.

Second, the extraordinary session legislation contains a number of provisions impeding the Executive Branch's ability to communicate with the State's citizens about application and enforcement of the law. These provisions limit the Executive's ability to discuss state law with the public in

any form that constitutes a "guidance document." Section 31 of Act 369 defines "guidance document" broadly to include "any formal or official document or communication issued by an agency" that "[e]xplains the agency's implementation of a statute or rule" or "[p]rovides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected." Compl. ¶82.

Section 38 of Act 369 then erects new procedural hurdles that an agency must overcome for any "guidance document," including submitting the proposed guidance to the Legislative Reference Bureau, providing a 21-day period for public comment, reviewing all public comments, posting the guidance document online, and allowing for continued public comment for as long as the guidance document is in effect. Compl. ¶85. Section 38 also dictates that all previously adopted guidance documents that have not complied with this process "will be considered rescinded" on "the first day of the 7th month beginning after the effective date of this paragraph" (i.e., July 1, 2019) absent specific agency head certification. Compl. ¶¶86–87. Sections 65 through 71 of Act 369 also permit litigants to challenge guidance documents in court to the same extent as rules. Compl. ¶91.

Third, numerous provisions of the extraordinary legislation prevent the Executive Branch from acting without the approval of a legislative committee or give a legislative committee the authority to undo an action by the

Executive Branch. Section 64 of Act 369, for instance, allows the Joint Committee for Review of Administrative Rules to suspend indefinitely the rules issued by executive branch agencies without a vote by the full Legislature or an opportunity for the Governor to veto the Committee's action. In addition, Section 10 of Act 370 requires state agencies to submit plans to the Joint Committee on Finance before engaging in a variety of regulatory actions, including seeking an administrative waiver from federal government agencies or seeking a modification to existing administrative waivers. Compl. ¶96. The Joint Committee then has the authority to approve or disapprove the planned actions. *Id.* The purpose of these provisions is clear: Preexisting waivers, like the State's Medicaid waiver imposing premium charges and work requirements on those underprivileged citizens who need healthcare assistance, are now locked into place and cannot be changed without Legislative Branch approval.

2. Judge Remington's decision. On March 26, 2019, Judge Remington issued a 49-page opinion granting the plaintiffs' motion for temporary injunction in part, denying the legislative defendants' motion to dismiss, and denying the legislative defendants' motion for a stay pending appeal.

Judge Remington first concluded that plaintiffs are likely to succeed on the merits of their claim that Sections 26 and 30 of the challenged Acts—sections that attempt to hand the Legislature control over state decisions

about whether to settle or discontinue litigation—violate the separation of powers guaranteed by the Wisconsin Constitution. Judge Remington explained that, although the Legislature "has the power to change the responsibilities assigned to the Attorney General," it "may not castrate his/her ability to act as the lawyer for the State of Wisconsin nor can [the legislature] constitutionally usurp the power of the Executive Branch." Op. at 47; *see also* Op. at 8 n.4 (holding that the ability to control litigation "is the exclusive power of the Executive Branch" and is "not shared with the legislative branch").

In reaching this conclusion, Judge Remington surveyed the relevant historical record and case law, which support his assessment that the Legislature may not give itself a role in managing day-to-day litigation decisions on behalf of the State. These numerous historical authorities, which "the legislative defendants have yet to rebut," demonstrate that the Governor retains the power of litigation if not vested in the Attorney General; the Legislature may not seize that power for itself. Op. at 29–32; *see also* Op. at 36 (explaining that a lawyer representing the Legislature or a legislative committee "cannot usurp the function of the Executive Branch to enforce the laws and control the decision of the Attorney General or in the absence of the Attorney General, the power of the Governor to see that the laws are fully and faithfully executed"). Judge Remington therefore concluded that "the plaintiffs are reasonably likely to prove that the Senate's or Assembly's power

to decide whether the State of Wisconsin should discontinue or compromise a case violates the Wisconsin Constitution." Op. at 38.

Judge Remington also enjoined the so-called "guidance document" provisions as likely unconstitutional. *See* Op. at 42 (discussing Sections 31, 33, 38, 65–71, 104–05 of Act 369). Those new procedures "do[] nothing to ensure greater compliance" with agencies' obligation to make rules consistent with statutory law because those obligations already exist. Op. at 41–42. Yet, by requiring "a letter, an email, [and] anything that explains what the state agency is doing pursuant to a statute or rule" to go through a notice-and-comment period, they create a burden that "substantially and unreasonably interferes with the orderly operation of the various state agencies to which they apply." *Id.* As a result, Judge Remington concluded that the challenged provisions would unduly "hamstring the efficient and orderly functioning of the Executive Branch as it goes about to apply the laws that the legislature actually enacted." Op. at 43.

Judge Remington reached the same conclusion regarding Section 64 of Act 369. That provision is likely unconstitutional because it allows legislative committees to change the law without satisfying the constitutional requirements of a legislative quorum, bicameralism, and presentment to the Governor. Op. at 13. The legislative defendants argued that Wisconsin's constitution did not require these basic constitutional safeguards, *id.*, but Judge Remington found the legislative defendants' argument that the

Legislature could, through a committee, "constitutionally suspend a rule indefinitely" to be "incredibl[e]." Op. at 14. "The inescapable conclusion" of this Court's decision in *Martinez v. Department of Industry, Labor & Human Relations*, 165 Wis.2d 687, 478 N.W.2d 582 (1992)—not to mention the text of the Constitution—"is that the Legislature is prohibited from suspending a properly promulgated rule without subsequently convening a quorum, passing a bill in both chambers, and presenting it to the Governor for his or her signature." Op. at 13.

Having determined that the plaintiffs are likely to succeed on the merits of their challenges to the just-described provisions, Judge Remington concluded that a temporary injunction should issue to prevent enforcement of those statutory sections. *See* Op. at 48 (temporarily enjoining Sections 26, 30, 31, 33, 38, 64, 65–71, 104, and 105 of Act 369). Because the challenged sections are likely unconstitutional, allowing them to be enforced would "deprive[]" Wisconsin citizens of their "constitutional rights" and cause "irreparable harm" where "there is really no other adequate remedy available." Op. at 3. In short, as Judge Remington explained, an injunction was needed to preserve the status quo, which existed before the enactment of Acts 369 and 370, while its constitutionality is determined through this litigation. Op. at 3–4.

The legislative defendants subsequently appealed Judge Remington's decision granting in part and denying in part the plaintiffs' motion for a

temporary injunction to the Court of Appeals. Shortly after, this Court asserted jurisdiction over the entire case.

STANDARD OF REVIEW

A motion to dismiss "tests the legal sufficiency of a complaint, which a court will grant only if there are no conditions under which a plaintiff may recover." *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶7, 373 Wis.2d 543, 553, 892 N.W.2d 233, 237. A motion to dismiss "requires a court to accept all of the complaint's factual assertions as true, along with the reasonable inferences one may take from them." *Id.* This Court reviews questions of law raised in a motion to dismiss de novo. *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶12, 387 Wis.2d 511, 524, 929 N.W.2d 209, 215. Because the decision to grant injunctive relief "is within the sound discretion of the circuit court," a trial court's grant of a temporary injunction will be reversed only if there "was an erroneous exercise" of that discretion. *Hoffman v. Wis. Elec. Power. Co.*, 2003 WI 64, ¶10, 262 Wis.2d 264, 277, 664 N.W.2d 55 .

SUMMARY OF ARGUMENT

The Constitution (1) vests the Executive Branch with authority to "take care that the laws be faithfully executed," which necessarily includes authority to interpret, explain, and enforce the law; (2) mandates that the Governor be afforded an opportunity to veto laws, which functions as a critical constitutional check and protects the Executive from overreaching by the other branches; and (3) requires that the Legislature act only through bills passed by both houses, with a majority of legislators present in each.

The challenged provisions of the extraordinary-session Acts violate all three of these constitutional commands. The challenged statutes hand the Legislature sweeping control over the execution of Wisconsin law via litigation, agency rulemaking, and agency guidance. These laws purport to give a handful of legislators (in their own words) a "seat at the table" in zones of exclusive executive authority. And even if the Legislature *had* a role to play in such zones, the laws would still be unconstitutional because they materially impair and practically defeat the Executive Branch's proper functioning.

In resisting these conclusions, the legislative defendants advance an overblown theory of Wisconsin exceptionalism. In their view, the "flexible" nature of Wisconsin's separation-of-powers doctrine means that the doctrine operates differently here from anywhere else and permits unprecedented consolidation of power in a single branch—consolidation that would be impermissible under the U.S. Constitution or the constitutions of the other states. The Wisconsin Constitution allows no such thing; it is not so "flexible" as to make fundamental separation-of-powers principles inapplicable. On the contrary, this Court has explained that "separation of powers principles, established at the founding of our nation and enshrined in the structure of the United States Constitution, inform our understanding of the separation of powers under the Wisconsin Constitution." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶11, 376 Wis.2d 147, 159, 897 N.W.2d 384, 390; *see also League of Women*

Voters, 2019 WI 75, ¶30 (quoting *Gabler* and reaffirming the point). Those principles apply here to invalidate much of the challenged Acts.

At its core, the extraordinary legislation challenged in this suit amounts to an unprecedented power grab by the Legislature, designed to circumvent a democratic election and ensure the losing party's continuing control over state government from its seat in only one branch. If upheld, the challenged provisions will wipe out more than a century of understanding regarding the proper division of power among the three branches of government. Although it "can be tempting for judges to confuse [their] own preferences with the requirements of the law," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting), the Wisconsin Constitution demands better.

ARGUMENT

I. The plaintiffs have stated a claim for relief.

The plaintiffs have plausibly stated a claim for which relief could be granted by alleging that the Wisconsin Legislature's unprecedented power grab impermissibly encroaches on the Executive's power to take care that the State's laws be faithfully executed. The challenged Acts give the Legislature power to micromanage litigation decisions, unduly burden government agencies in their essential communications with the public, and block executive actions without bicameralism and presentment. Because all three of these actions violate the separation of powers embodied in Wisconsin's

Constitution, the circuit court correctly denied the legislative defendants' motion to dismiss.

A. The lame-duck legislation infringes on the Governor's power to take care that the State's laws be faithfully executed.

The extraordinary-session legislation includes several provisions that strip litigation power from the Executive Branch and hand it to the Legislature. They also include provisions that interfere with the Executive Branch's public communications about execution and enforcement of state law. These provisions run afoul of multiple constitutional requirements.

1. The litigation control provisions are unconstitutional.

a. The authority to enforce the laws through litigation is a power held exclusively by the Executive Branch.

The Wisconsin Constitution, much like the federal Constitution and other state constitutions, assigns the Executive Branch the authority to "take care that the laws be faithfully executed." Wis. Const. art. V, § 4. That authority has, over decades and across jurisdictions, consistently been understood to include the power to litigate on the State's behalf. As the U.S. Supreme Court explained decades ago, a "lawsuit is the ultimate remedy for a breach of the law, and it is to the [Executive], and not to the [Legislature], that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

State courts have unanimously reached the same conclusion, interpreting similar state "take care" clauses as granting ultimate decision-making power over litigation to the Governor and denying legislatures the ability to litigate in the name of the State or dictate the Executive's litigation decisions. *See, e.g.*, *Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So.3d 704, 724 (Ala. 2010); *State ex rel. Haskell v. Huston*, 21 Okla. 782, 97 P. 982, 985 (Okla. 1908); *In re Opinion of the Justices of the Supreme Judicial Court,* 112 A.3d 926 (Me. 2015); *In re Opinion of Justices*, 27 A.3d 859, 868 (N.H. 2011); *Perdue v. Baker*, 586 S.E.2d 606, 615 (Ga. 2003); *State Through Bd. of Ethics v. Green*, 545 So. 2d 1031, 1036 (La. 1989). The reason is obvious: "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Schuette v. Van De Hey*, 205 Wis.2d 475, 480–81, 556 N.W.2d 127, 129 (Ct. App. 1996). And the "discretionary power to seek judicial relief[]" is a decision about how to enforce the law; it "cannot possibly be regarded as merely in aid of the legislative function." *Buckley*, 424 U.S. at 138.

The challenged legislation contravenes this settled understanding. The bills strip the Executive Branch of key litigation powers and transfer those powers to the Legislature (or its committees) instead. The lame-duck statutes grant the Legislature the right to veto settlement or discontinuance of litigation even if the Attorney General would otherwise agree to it. *See* Compl. ¶¶65–78 (discussing Sections 5, 26, 30, and 97 of Act 369). The Attorney General is thus required by these provisions to defend

statutes regardless of his belief about the statute's constitutionality, about intervening changes in law after the statute's passage, or about the cost of the litigation to state taxpayers, notwithstanding his obligations as an officer of the court.

Discretion over these executive decisions is not simply eliminated for the Attorney General; instead, that discretion is given to the Legislature, whether it simply monitors day-to-day decisions of the Attorney General's office or, as recent reports have revealed, delays justice and crowds the courts by stymieing resolution of dozens of cases through inaction and confusion. *See* Molly Beck & Patrick Marley, *Lame-duck fallout: Wisconsin politicians still don't have a way to settle lawsuits as more than 12 cases sit unresolved*, Milwaukee J. Sentinel (Aug. 28, 2019), https://bit.ly/30DBlW6. By transferring to the Legislature key components of the Executive Branch's power to faithfully execute the law, the lame-duck legislation violates the Wisconsin Constitution.

The legislative defendants dismissively cast aside this basic separation-of-powers problem. They claim that the unanimous "out-of-state" authority rejecting similar efforts to override the "take care" clause is "inapposite" because the Wisconsin Constitution, in their view, operates differently. Opening Br. 29. It does not. The "take care" clause in Wisconsin's Constitution means the same thing it does everywhere else. Indeed, as this Court explained just last term, Wisconsin's Constitution must be treated "[l]ike its federal counterpart"—including the "separation of powers doctrine

[that] is implicit in [the constitution's] tripartite division." *League of Women Voters*, 2019 WI 75, ¶30 (quoting *Gabler*, 2017 WI 67, ¶11). That is why, as this Court made clear last term, "the separation of powers principles underlying the United States Constitution . . . 'inform our understanding of the separation of powers under the Wisconsin Constitution.'" *Id.*; *see also id.* ¶32 (relying on the U.S. Supreme Court's decisions in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), and *Loving v. United States*, 517 U.S. 748 (1996), in interpreting the separation of powers under the Wisconsin Constitution). The same basic principles, in short, apply here as they do everywhere else: "neither the legislature nor the executive nor the judiciary ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers." *Id.* ¶31 (quoting *Gabler*, 2017 WI 67, ¶4).

The legislative defendants offer no textual basis for their contrary view. Although they fault plaintiffs' reliance on federal and out-of-state case law in interpreting the "take care" clause, they offer no authority at all—whether textual, historical, or decisional. Throughout proceedings in the circuit court, Judge Remington repeatedly invited the legislative defendants to identify some authority supporting their assertion that the Legislature can hand itself or a legislative committee power over the execution and enforcement of state law. The legislative defendants failed to do so, and their failure is hardly surprising. There is no authority supporting their view because it runs contrary to the basic separation-of-powers regime embodied

in Wisconsin's Constitution (as in the constitutions of the other states and the United States).

Despite the absence of actual authority supporting their novel litigation-by-legislative-committee understanding of the "take care" clause, the legislative defendants press on. In their view, the Legislature can give itself the power to decide whether to withdraw or settle litigation on behalf of the State because "the Attorney General's powers are subject to the Legislature's plenary control." Opening Br. at 14; *see also id. at* 22–25. On this theory, because the Legislature is tasked with setting the "powers and duties" of the Attorney General, the Legislature can do anything with those powers—including seizing litigation control for itself—without violating the Constitution.

This unbounded interpretation of legislative power is absurd. Under the legislative defendants' interpretation, a legislature could pass laws prohibiting state attorneys from taking nearly any action without first seeking legislative approval, including filing individual criminal indictments, seeking the suppression of evidence, or moving to dismiss cases brought against the State. The legislative defendants' interpretation would even authorize a statute mandating that all litigation decisions on behalf of the State be dictated by the state speaker of the house. That is as constitutionally suspect as it sounds.

Even so, the legislative defendants argue that this Court's decision in *State v. City of Oak Creek* bears out this radical separation-of-powers view. That case, they say, held "that the Attorney General lacks any constitutional authority" and can exercise only "whatever authorities the Legislature decides to give to the Attorney General." Opening Br. 23. But even if true, *Oak Creek*'s holding was about only the Attorney General's authority, not about whether any litigation authority can be allocated *to the legislative branch of government*. The question addressed in *Oak Creek* was whether the Attorney General had authority to challenge the constitutionality of a state statute without an express statutory grant of authority to do so. 2000 WI 9, ¶1, 232 Wis.2d 612, 617, 605 N.W.2d 526, 528. There was no separation-of-powers argument in the case and no suggestion that the Legislature had, as here, reallocated state litigation power to itself. As a result, this Court had no occasion to consider the constitutional issues raised by the extraordinary-session legislation.

In any case, the argument that the Legislature can allocate litigation power to itself is, as Judge Remington recognized, wrong. While the Legislature can delineate the Attorney General's powers by statute, *see Oak Creek*, 2000 WI 9, ¶24, the Legislature cannot *give to itself* the power "to see that the laws are fully and faithfully executed" by inserting its committees as decision-makers over litigation (i.e., executive) decisions. Op. at 36. The legislative defendants' quibble over whether litigation power is located in the

Attorney General's or the Governor's office is therefore irrelevant. *See* Opening Br. 27–30. Regardless of where that power resides as between the Governor and Attorney General, it certainly cannot be given to the *Legislature*, and thus the lame-duck laws upset the constitutional separation of powers.

This Court recognized the very point in *Oak Creek* itself. The Court made clear that the Attorney General's power is not coterminous with the litigation power of the State. Whereas "the attorney general's office is a constitutional office with authority defined and limited by the legislature," the State's litigating authority is broader. *Oak Creek*, 2000 WI 9, ¶50 (explaining that "the state" holds residual power to litigate and holding that "the attorney general is not the state"). And, as every court to consider the issue has unanimously agreed, that residual power to litigate on behalf of the State is ultimately—and firmly—located in the Executive Branch because it is the Governor that the Constitution vests with authority to "take care that the laws be faithfully executed." *See supra* at 14.

This remains true even where an Attorney General is separately elected and not subject to the Governor's control. *See Riley*, 57 So.3d at 720–23 (collecting cases from numerous states and holding that governors possess inherent litigation authority on behalf of the State, even if authority is provided to the attorney general, because of governors' constitutional duty to take care that law be faithfully executed); *In re Opinion of the Justices of the Supreme Judicial Court*, 112 A.3d 926 (same). That is why no case in Wisconsin or

elsewhere has suggested that the legislative branch has any role to play in making individual litigation decisions on behalf of the State. Making those decisions is an executive function that cannot be invaded by the Legislature.

b. State litigation decisions are not an area of shared power.

The legislative defendants' attempts to transform what is an exclusive power into a shared one are equally unpersuasive. They point out that the Legislature has a statutory right to direct the Attorney General to "represent the state" in litigation and that this statutory provision has existed since 1848. Opening Br. 33–34 (quoting Wis. Stat. § 165.25(1m)). But this history supports plaintiffs not defendants. Since Wisconsin's founding, the Legislature's role has been limited to directing the Attorney General *to* represent the State; the Legislature has never been given authority to direct *how* the Attorney General represents the State. Likewise, the fact that the Legislature or its members regularly appear in litigation *as the Legislature* (Opening Br. 34) reflects the longstanding understanding that the Legislature may only participate in litigation on behalf of itself rather than *as the State*. Not surprisingly, the legislative defendants fail to cite a single case—or any authority at all—for their novel (and contrary) view.

Nor can the legislative defendants transform litigation into a shared power by unilateral action, as they suggest they did by passing the lame-duck laws at issue. *See* Opening Br. 42–43. The Wisconsin Constitution confines

the litigation power to the Executive, and, to state the obvious, the Legislature cannot change the constitutional order by statute. Indeed, this Court has rejected similar arguments in a number of cases, including *State ex rel. Fiedler v. Wisconsin Senate*, 155 Wis.2d 94, 454 N.W.2d 770 (1990). In that case, the Legislature passed a statute requiring continuing legal education credits for attorneys before they could appear as guardians ad litem. *Id.* at 101–102. The Court held that the statute encroached on the judiciary's exclusive zone of authority. The Court did not suggest that passage of the violating statute itself could have transformed attorney appointments into a zone of shared authority. Put simply, there would be no such thing as a zone of "exclusive authority" if a branch's unconstitutional action converted the zone into one of shared authority.

The legislative defendants' claim that the Legislature "has a substantial interest in protecting the laws it enacts" (Opening Br. 32) is equally misguided. An "interest" is not the same as a constitutional power to act, and the Wisconsin Constitution provided the Legislature with only the power to make laws, not the power to enforce them. The Legislature may wish it were not so, and may have an "interest" in aggregating more power to itself, but the Constitution does not permit it to do so. *See, e.g.*, *Buckley*, 424 U.S. at 138–39; *see also J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis.2d 69, 102, 336 N.W.2d 679, 694–95 (1983) ("The legislative branch has the broad objective of determining policies and programs and review of program performance for

programs previously authorized, the Executive Branch carries out the programs and policies . . . .").

Nor does the legislative defendants' invocation of the "people's interest" in how state statutes are interpreted justify the challenged legislation. *See, e.g.*, Opening Br. 32–33, 41. Of course the people have an interest in proper execution of the law. But they elect a Governor and an Attorney General to represent their interests in that sphere—it is these officers that represent the "people's interest" as to *how*, and indeed *whether*, to enforce state statutes. Overriding that authority and the will of the people of Wisconsin by re-allocating executive authority to the Legislative Branch would do violence to these bedrock constitutional norms.

Finally, it is important to note that the Legislature *has* a way to participate in litigation in which it has a cognizable stake. The Legislature may, and often does, appear *as itself* to speak as the body that passed a given statute. *See* Patrick Marley, *GOP Legislators Seek to Intervene in More Lawsuits at Taxpayer Expense—This Time over Environmental Laws*, Milwaukee J. Sentinel (Apr. 25, 2019), https://bit.ly/2NqHpos. What it seeks to do here, though, is forbidden; the Legislature has no authority to intervene *as the State* because that power is reserved exclusively to a different branch of government.

c. Even if the authority to enforce laws was a shared power, the litigation control provisions unduly burden the Executive Branch's role in exercising that power.

It defies both logic and the unanimous weight of both Wisconsin and American law to suggest that making decisions about how to litigate on behalf of the State is a shared power. But even if it was a shared power, the laws in question would still be unconstitutional because they substantially burden the Executive Branch.[1] Under the challenged provisions, the Attorney General is forced to continue to litigate cases he believes, as an officer of the court, should be settled or discontinued—requiring the expenditure of money and attorney personnel on cases that are not in the State's best interest.

This problem is not hypothetical. In the past few months, legislators have refused to express their view on settlements or discontinuances in more than a dozen cases, leaving the Attorney General in limbo. *See* Beck & Marley, *Lame-duck fallout*. As a practical matter, the Attorney General cannot even present certain settlements to the Legislature without violating preexisting confidentiality agreements, making it impossible for state lawyers to take any action in ongoing litigation. Molly Beck, *Lame-duck fallout: State lawmakers met behind closed doors and they don't know why*, Milwaukee J. Sentinel (Aug. 27, 2019), https://bit.ly/2NA9TF7. The potential ethical pitfalls are also

[1] Because the question whether a branch has been substantially burdened is a factual one, it is inappropriate to resolve at the motion-to-dismiss stage. The plaintiffs have plausibly alleged that the extraordinary legislation will substantially burden the Attorney General by preventing him from settling or discontinuing litigation and require the Department of Justice to expend resources litigating cases that the Attorney General does not believe are in the State's best interest. In addition, the parties have built a factual record on this issue in the court below, which has also been filed with this Court along with a motion for an evidentiary hearing. *See* Pl.-Respondents' Supp. Appendix.

obvious: Without legislative approval, must the Attorney General continue to pursue claims that turn out to be frivolous? File pleadings to prolong litigation that no longer serves any purpose other than harassment or increased cost for the opponent? *Contra* Wis. Stat. § 802.05(2) (requiring attorneys to attest that filings contain non-frivolous claims and are "not being presented for any improper purpose"). No similar issues were presented in *Ahern*. *See* 114 Wis.2d at 105.

The legislative defendants are essentially arguing that only legislative grace—not the Wisconsin Constitution—prevents the Legislature from micromanaging all state litigation and swallowing the Attorney General's role whole. That unprecedented view cannot be squared with the Wisconsin Constitution, any other state's constitution, or the U.S. Constitution. Whether litigation for the State is viewed correctly as an exclusive executive power or even incorrectly as a shared power, the litigation control provisions violate separation of powers principles and must be rejected.

2. The provisions regarding guidance documents improperly infringe on the Governor's sole authority to communicate how state laws will be enforced by the Executive Branch.

The lame-duck legislation's provisions relating to agency "guidance documents" (Sections 31, 38, and 65–72 of Act 369) also improperly intrude on the Governor's authority to implement state law. Communications about enforcement of the law fall within the Executive's exclusive purview, and,

once the Legislature has exercised its prerogative by enacting a state law, it cannot then control its execution and enforcement as well.

While it is true that administrative agencies are *generally* an area of "share[d] inherent interests" between the Executive and Legislative Branches, *Martinez*, 165 Wis.2d at 697, that does not mean each branch shares the *same* authority over how agencies function. Instead, each branch exercises a distinct form of control over administrative agencies that is consistent with that branch's constitutional role. The Legislature dictates the general authority and duties of agencies by "determin[ing] what the law shall be." *State ex rel. Warren v. Nusbaum*, 59 Wis.2d 391, 449, 208 N.W.2d 780, 813 (1973). The Executive Branch, on the other hand, is solely responsible for administrative agency acts that amount to "execut[ion] or administ[ration]" of the law. *Id.* As *Ahern* explains, the Legislature's role is to dictate "the broad objective of determining policies and programs" while the Executive maintains sole authority over "implementation of established law and policy." 114 Wis.2d at 102, 105. Thus, the Legislature may delegate to agencies some of its legislative power in the form of rulemaking authority, *Martinez*, 165 Wis.2d at 697; *Clintonville Transfer Line v. PSC*, 248 Wis. 59, 68–69, 21 N.W.2d 5, 11 (1945), but the Legislature does not have, and so cannot delegate or control, day-to-day authority over agency activity that falls short of rulemaking. The latter authority, which amounts to execution and implementation of the law, may only be controlled by the Governor, who is "require[d]" by the

Wisconsin Constitution to "interpret and apply the law" in order to "perform his duties." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶53, 382 Wis.2d 496, 543, 914 N.W.2d 21, 44.

This makes sense. To the extent the Legislature delegates its own power to make rules having the force of law, the Legislature can later withdraw that delegated power or circumscribe it in certain ways. It does not follow, however, that the Legislature can take away *other* non-legislative power that the agency holds as a result of its position within the Executive Branch, such as "the power to give advice," *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 506, 220 N.W. 929, 942 (1928), and to "carry[] out . . . those programs and policies," that the Legislative Branch has created, *Ahern*, 114 Wis.2d at 105. Both of these functions are "of the Executive Branch," *Ahern*, 114 Wis.2d at 105, and agencies' manner of carrying them out cannot be dictated by the Legislature.

The letters, manuals, and handbooks that constitute agency guidance are a quintessential example of this type of executive function. They "carry[] out those programs and policies" that the Legislature has created and provide the public with the Executive's interpretation of law that does not itself have any legal force. *Ahern*, 114 Wis.2d at 105; *see also* Wis. Const. art. V, § 4 ("take care" clause); *Blair v. Walker*, 349 N.E.2d 385, 389 (Ill. 1976) (recognizing that the Governor must communicate with a state's citizens about "matters committed to his responsibility"). But the lame-duck provisions encroach on

these quintessential executive functions, including by requiring all documents that provide guidance to citizens (from pamphlets covering driver's license exams to materials describing public employee health insurance) to be submitted to the Legislative Reference Bureau, put out for a public comment period of at least 21 days, not be published until all comments are reviewed, and contain a personal certification from the head of the relevant agency. Compl. ¶85. The Legislature cannot restrict how the Executive Branch explains implementation of law to citizens in this way.

Indeed, even if this Court agrees with the legislative defendants that this type of executive agency function is an area of shared power (which it is not), *see Martinez*, 165 Wis.2d at 697, the guidance document provisions still cannot stand. In an area of shared power, the Wisconsin Constitution is violated if legislation unreasonably burdens or substantially interferes with the Executive's ability to carry the law into effect. *Fiedler*, 454 N.W.2d at 772. This Court has repeatedly invalidated legislative attempts to infringe on another branch's authority in a zone of shared power, explaining that when legislative action "so limit[s] and circumscribe[s]" another branch's power "as to defeat the constitutional purpose" of that branch, the Legislature has violated the separation of powers. *State v. Holmes*, 106 Wis.2d 31, 69, 315 N.W.2d 703, 721 (1982) (quoting *John F. Jelke Co. v. Hill*, 208 Wis. 650, 660, 242 N.W. 576, 580 (1932)). And despite the legislative defendants' claims to the contrary (Opening Br. 62–63), whether one branch has unreasonably burdened or

substantially interfered with another branch is a question of fact that requires an evidentiary showing. *See Holmes*, 106 Wis.2d at 69. For instance, in *Holmes*, this Court recognized that statistics and other data are useful to "cast some light on the impact" that one branch's action may have on a coordinate branch. *Id.* at 70. Ultimately, the question is the degree to which the legislative action here "materially impairs or practically defeats" the effective functioning of executive agencies through the guidance-document requirements. *Id.*

Here, the plaintiffs have plausibly alleged—and provided substantial evidence to show—that the statute's requirements have imposed an unreasonable burden on government agencies that substantially interferes with their ability to function. As the heads of numerous agencies have made clear in their affidavit submissions, Wisconsin agencies have a mission to help individuals, businesses, and others understand how the law works and how to comply. P-Ap.25 ¶¶3, 8; P-Ap.14 ¶5. Guidance documents are a critical part of fulfilling that mission. P-Ap.26–28, ¶¶8, 10, 13. And the new rules regarding guidance documents are a substantial burden on agencies' executive, interpretation, and implementation function. P-Ap.35 ¶7; P-Ap.33 ¶8; P-Ap.25, 16–19 ¶¶3, 5–11, 16–19; P-Ap.9 ¶¶6, 8–12, 17; P-Ap.27, 29–30 ¶¶3, 13–14, 16–19; P-Ap.8–9 ¶¶14–18; P-Ap.2 ¶¶5, 8–12. For instance (to name but one example), the challenged law would almost certainly subject the DWD's entire website to the guidance document requirements and jeopardize the

agency's ability to communicate basic information to Wisconsin veterans about special programs to assist them in rejoining the workforce. *See* Employment & Training—Office of Veteran Employment Services—Programs, State of Wis. Dep't of Workforce Dev., https://bit.ly/2WEP9yb (last visited Sep. 4, 2019) (outlining job programs benefitting veterans).

In addition, Section 38, which this Court allowed to be temporarily enjoined, dictates that, on July 1, 2019, *every existing* document or communication that qualifies as a guidance document will be rescinded if it has not been adopted in accordance with these procedures or does not contain a specific certification signed by the secretary or head of the agency. The requirement that all existing guidance documents be certified and go through notice-and-comment is nearly impossible to accomplish. There are thousands of existing guidance documents that will have to be reviewed by agency personnel to ensure compliance and to begin the notice period. P-Ap.25 ¶3; P-Ap.39 ¶13; P-Ap.19–20 ¶¶18–22; P-Ap.35 ¶¶6–7.

Faced with this overwhelming evidence of significant burden, the legislative defendants simply double down on their all-or-nothing view. They insist that, because (on their theory) the Legislature has the power to "wipe out [an] agency entirely," Opening Br. 63 (quoting *Whitman*, 220 N.W. at 942), it must also have authority to restrict agency action in any way short of destruction. But the power to create (or destroy) administrative agencies does not bring with it the power to unduly burden the Executive Branch. As

explained above, control over the minutiae of agencies' daily communications with the public falls outside the scope of the Legislature's power, and the legislative defendants' novel argument that agencies, which are located in the Executive Branch and tasked with helping to execute the law, are within the sole purview of the Legislature has not been endorsed by this Court or any other of which we are aware. If the legislative defendants' view of plenary legislative control over agencies *were* correct, such legislation could never constitute an undue burden on executive authority, because the legislation will always have done something less than completely extinguish administrative agencies' existence. There is no way to square that position—that anything short of destruction is permissible—with this Court's well-established rule that the Legislature cannot impose an undue burden on Executive Branch functions.

The lame-duck legislation's notice-and-comment, rescission, and certification requirements for guidance documents impermissibly intrude on executive authority. Although administrative agencies as a whole exist in a zone of shared power, their performance of executive functions does not, and it is those executive functions with which the guidance document provisions interfere. What's more, even if agencies' executive functions *were* a shared power, the challenged provisions impose so significant a burden that they effectively prevent the Governor from ensuring "that the law be faithfully executed" and are thus unconstitutional.

B. The lame-duck legislation violates the bicameralism and presentment requirements of the Wisconsin Constitution.

1. The challenged Acts create an impermissible legislative veto.

The Wisconsin Constitution states that the Legislature cannot enact laws "except by bill" and that every bill "shall, before it becomes a law, be presented to the governor" for approval. Wis. Const. art. IV, § 17; art. V, § 10. The extraordinary-session legislation contains numerous provisions that run afoul of these clear requirements. *See* 2017 Act 369 §§ 16, 26, 30, 64, 87; 2017 Act 370 §§ 10, 11. Those provisions purport to empower a single legislative committee to enact a wide range of law without passing any bill through the Legislature or providing the Governor an opportunity to veto. *See* Compl. ¶¶94–100. As such, they violate the Wisconsin Constitution and should be enjoined.

Bicameralism and presentment of legislative action is guaranteed in Wisconsin's Constitution: "Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor." Wis. Const. art. V, § 10(a). The Constitution then vests the Governor with the option to veto that legislation and prevent it from becoming a law absent a two-thirds override vote. Wis. Const. art. V, § 10(2)(a). "The veto power of the governor . . . is but one example of a constitutional check and balance" that allows the Executive Branch to "protect itself from intrusions by the other

branches." *State ex rel. Kleczka v. Conta*, 82 Wis.2d 679, 709 n.3, 264 N.W.2d 539, 552 n.3 (1978).

The requirement of bicameral passage and presentment to the Executive mirrors the process required by the U.S. Constitution, which in turn reflects the Framers' "profound conviction" that "the powers conferred on Congress were the powers to be most carefully circumscribed." *INS v. Chadha*, 462 U.S. 919, 947 (1983). As the U.S. Supreme Court has explained, any legislative action that has the "purpose and effect of altering the legal rights, duties and relations of persons" must undergo bicameralism and presentment to pass constitutional muster. *Id.* at 952; 52 Op. Att'y Gen. 423, 424 (1963) (explaining that because "duly adopted administrative rules have the force and effect of law, any legislative action which changes or obliterates a departmental rule constitutes the making of law").

This Court addressed the importance of bicameralism and presentment in *Martinez*, and that decision resolves the present case. In *Martinez,* the Court approved a procedure for the Legislature to repeal agency rules by duly enacted legislation. In approving that procedure, the Supreme Court emphasized its compliance with the foundational requirements of bicameralism and presentment—the very requirements the lame-duck legislation flouts.

Unlike the provisions at issue here, the law that was upheld in *Martinez* enabled the Legislature to vote *as a whole* to repeal an administrative agency's

rule. The process was initiated by a legislative committee, which could trigger a temporary suspension of a rule pending the full Legislature's vote. 165 Wis.2d at 699–700. When the legislative committee temporarily suspended a rule in whole or in part, it then had to introduce a repeal bill in each house of the Legislature, and at least one of those bills had to be passed by the full Legislature and presented to the Governor before the rule's suspension could be permanent. *Id.* Any failure in that process would end the rule's temporary suspension. *Id.* The rule would go back into effect and could not be subject to committee challenge again. *Id.*

The Court described these procedures carefully and then upheld the law only because its procedures complied with the "critical" constitutional requirements of bicameralism and presentment. As the Court explained, the statute was consistent with the principle that any permanent "suspension or adoption of a rule . . . must meet both the bicameral passage and presentment requirements." *Id.* at 699. That consistency was not an accident but the result of a statute "carefully drawn" to provide for "presentment and bicameral[ism]." *Id.* at 692. In the Court's words, the statute at issue in *Martinez* passed constitutional muster precisely because it (unlike the lame-duck legislation) guaranteed "[t]he full involvement of both houses of the legislature and the governor." *Id.* at 700. This Court could not have been clearer on this point: A "suspension or adoption of a rule by JCRAR *must*

meet both the bicameral passage and presentment requirements." *Id.* at 699 (emphasis added).

None of the challenged procedures in the lame-duck legislation comply with the Constitution's bicameralism and presentment requirements. Section 64 of Act 369, for instance, allows the Joint Committee for Review of Administrative Rules to suspend a rule issued by an agency indefinitely. And Section 10 of Act 370 allows the Joint Committee on Finance to prohibit individual state agency proposals regarding the implementation of federal regulatory programs. Neither of these provisions requires a vote by the full Legislature or gives the Governor the opportunity to exercise his constitutional veto right. Where the law in *Martinez* adhered to the Constitution, the lame-duck laws defy it.

The litigation-control provisions contained in Act 369 fare no better. Sections 26 and 30 of Act 369 allow legislative committees to make decisions with the force of law, decisions that legally bind the Governor and Attorney General and affect litigants throughout the state (or country)—all without the full involvement of the Legislature or the full use of the Governor's veto. To be clear, the plaintiffs' objection to these litigation-control provisions is not that they restrict the Attorney General's authority to end litigation in general; it is that it hands supervisory power over litigation to a legislative committee in violation of the bicameralism and presentment requirements of the Wisconsin Constitution. *See* Compl. ¶116. Although the Legislature could duly

enact a statute prohibiting the Attorney General from settling certain kinds of cases or entering into particular types of consent decrees, *Oak Creek*, 2000 WI 9, ¶¶21–25, the Legislature cannot, through individual members or by committee, make decisions with the force of law that superintend the day-to-day litigation decisions of the Attorney General.

That setup leaves the legislative defendants with but one response: they argue that *Martinez* actually *approved* legislative vetoes so long as these vetoes are subject to "proper standards or safeguards." Opening Br. 48. This reading of *Martinez* turns the decision on its head. After repeatedly emphasizing that the statute guaranteed that any rule suspension would be subject to bicameralism and presentment and describing these as "critical" elements of the statute, the Court described the bicameralism and presentment requirements as "sufficient procedural safeguards," using language it had previously quoted from an Attorney General opinion. *Martinez*, 165 Wis.2d at 702. The Court certainly did *not* suggest that *other* "procedural safeguards" short of bicameralism and presentment would make the Legislature's unilateral torpedoing of executive action constitutionally permissible.

Nor do the legislative defendants suggest a meaningfully enforceable rule for what other kind of procedural safeguards would be "sufficient."[2] That

[2] Below, the legislative defendants invoked Wisconsin Statute 13.10 as a potential "safeguard," though they do not appear to seriously press that claim here. Just so. Section 13.10 does not come close to satisfying the Wisconsin Constitution's "presentment and

is because no such safeguards exist: No procedure besides bicameralism and presentment ensures that both houses of the Legislature and the Governor have a say before a particular rule is suspended. That procedure is set in the text of the Wisconsin Constitution, and the Legislature cannot fashion its own end-run around that text.[3]

The legislative defendants argue that, because Section 64 of Act 369 is *similar* to the statute approved in *Martinez*, this provision must also be constitutional. But the change the Legislature made in Section 64 makes all the constitutional difference.

The procedure upheld in *Martinez* provided for a single temporary suspension by committee with the *guarantee* that the suspension would be immediately subject to bicameralism and presentment; if the Legislature did not vote to repeal the rule or if the Governor vetoed the repeal, JCRAR could

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bicameral requirements" *Martinez*, 165 Wis.2d at 692, because it provides no opportunity for the Governor to veto inaction by the Joint Committee, even though, under the challenged provisions, the Committee inaction can effectively operate as a disapproval. Section 13.10 is also inadequate because it does not require that the Legislature as a whole consider the Committee's actions, in violation of *Martinez*'s insistence on "[t]he full involvement of both houses." 165 Wis.2d at 700. And, because Section 13.10 applies only to the Joint Committee on Finance, it is irrelevant to the legislative vetoes that the challenged provisions give to the Joint Committee for Review of Administrative Rules (Section 64 of Act 369), the Joint Committee on Legislative Organization (Sections 16, 26, and 30 of Act 369), or any committee or house of the Legislature that intervenes in litigation under Section 5 of Act 369 and is then granted a veto under Sections 26 and 30 of that Act.

[3] And the suspension of an agency rule concerns the Legislature's interaction with another branch of government and the suspension of rules that affect the Wisconsin public. The Legislature thus does not have the same latitude to dictate its procedures as it does when concerning its internal operations. *See League of Women Voters*, 2019 WI 75, ¶41 ("[T]he constitution confers no power on the judiciary to enjoin or invalidate laws as a consequence for deficiencies in the implementation of internally-imposed legislative procedures.").

not suspend the rule again. 165 Wis.2d at 700. Act 369, by contrast, allows a rule to be suspended multiple times with *no guarantee* of bicameralism and presentment. It thus purports to permit the Joint Committee to suspend a rule indefinitely, no matter the views of the rest of the Legislature or the Governor. *See* 2017 Act 369 § 64. It is irrelevant that, according to the legislative defendants' conjecture, the "most common" use of the provision will be "a second rule suspension" to further consider a rule. When a rule is suspended, there is no constitutional guarantee that the suspension will be subjected to the Constitution's requirements and lifted if it is not approved through the ordinary process.[4] Thus, this "one change" enables a complete end-run around the requirements of bicameralism and presentment that were critical to *Martinez*'s holding. Indeed, by eliminating Martinez's "critical elements"—the safeguard that no long-term legal change could be imposed without the "full involvement of both houses of the legislature and the governor"—Act 369 takes an otherwise-constitutional system and makes it unconstitutional. 165 Wis.2d at 700.

With nothing left in the way of actual authority, the legislative defendants fallback to policy preference. They insist that it would be

[4] The plaintiffs have thus satisfied the requirement for a facial challenge that the statute is unconstitutional in every circumstance—because rules are suspended with no guarantee of going through bicameralism and presentment, any suspension violates the separation of powers regardless of whether the Legislature chooses to eventually subject it to that constitutionally-required procedure. Thus, the legislative defendants' repeated reminders (at 14–15, 21, 57–58, 65) of the standard for a facial challenge are irrelevant.

advisable for agencies to be subject to more legislative oversight. *See* Opening Br. 49–50 (warning of the risk that agencies will become "unaccountable" and complaining that it would be "impracticable" for the Legislature to pass a bill every time it wants to check agency action). But these policy arguments cannot override the bedrock requirements that the Constitution itself imposes.

And even if this Court credits this concern, the legislative defendants' post-hoc policy arguments, even taken at face value, fall well short of justifying the radical intrusion into separation of powers that the lame-duck laws attempt here. That is because the Legislature already has a tool to rein in agency action of which it disapproves: the very procedure outlined in *Martinez*. The Legislature can also withdraw agency power through legislation or even eliminate an agency itself if it has the votes to do so. What the Legislature *cannot* do is act lawlessly, outside the constitutionally mandated process of enacting law through statute, by allowing a single legislative committee to undo agency action without the guarantee that the decision will be reviewed by the entire Legislature and that the Governor will have an opportunity to approve or disapprove of the suspension.

The legislative defendants also complain that acting consistent with the Wisconsin Constitution will be burdensome because it will interfere with other laws already passed that purport to allow legislative committees to review agency action. Opening Br. at 50. Suffice to say that an

unconstitutional provision does not become constitutional simply by repetition. The Constitution's requirements do not wax and wane based on a tally of potentially suspect laws, and the legislative defendants cite no cases analyzing the constitutionality of the other referenced statutes, let alone cases upholding those laws against a constitutional challenge similar to plaintiffs'. Indeed, when the federal government and state courts have ruled legislative vetoes unconstitutional, they have often faced similar circumstances. *See I.N.S. v. Chadha*. 462 U.S. 919, 944–45 (1983) (U.S. Code contained more than 160 legislative veto provisions that were nevertheless struck down); Marc D. Falkoff, *The Legislative Veto in Illinois: Why JCAR Review of Agency Rulemaking Is Unconstitutional*, 47 Loy. U. Chi. L.J. 1055, 1084 (2016) (collecting state-level examples). The federal government and more than a dozen states have nonetheless held that such legislative vetoes are constitutionally impermissible. Falkoff, *The Legislative Veto*, 47 Loy. U. Chi. L.J. at 1084, 1085 n.169.

The legislative defendants' remaining arguments are similarly unpersuasive. First, they argue that this Court should rely on *Ahern*, in which the Wisconsin Court of Appeals approved of a "cooperative venture" between the executive and legislative branches. But they largely ignore the reasoning of *Ahern*, in which the court correctly understood that the Constitution "permits legislators to serve on boards or commissions, unless that service results in a usurpation of powers reserved to another branch." 114

Wis.2d at 104. The court concluded that because the committee could not act affirmatively without the Governor's approval, the legislative members' ability to vote to reject certain contracts did not impede on the Governor's power to administer building contracts. *Id.* Those facts bear no resemblance to the present case in which the Legislature's suspension *does* effectively usurp the power of the Executive by overturning a legitimately promulgated agency rule that would otherwise govern the conduct of Wisconsinites. The Legislature can do that constitutionally in only one way: with a bill, passed by a quorum of both legislative houses, and subject to the Governor's final approval or rejection.

Nor are the constitutional defects in these provisions "hypothetical" as the legislative defendants suggest. Opening Br. at 58. The possibility that JCRAR could decide to suspend a rule indefinitely is something that agencies must take into account in advance when they decide what rules to promulgate and where to devote resources and time. If one branch must even "account for the possibility" that another will impermissibly "encroach[]" on its "independence," that alone is sufficient to create a constitutional breach, *Gabler*, 2017 WI 67, ¶44, because a committee's latent power to "disapprove rules and regulations" is "in practical effect the power to prescribe the rules and regulations." *Whitman*, 220 N.W. at 936. Courts have recognized this relationship between the power to approve or disapprove a decision and the upstream effects on the decision-maker on numerous occasions. *See id.*; *see also*

Coyne v. Walker, 2016 WI 38, ¶253, 368 Wis.2d 444, 564, 879 N.W.2d 520, 579 (Ziegler, J., dissenting) (noting that "the threat to withhold approval" of a rule can be "a means of affecting the rule content," creating a "constitutional infirmity"). Where an unconstitutional "threat . . . lurks in the background," officials "cannot fulfill" their "constitutional duty." *Gabler*, 2017 WI 67, ¶44. That is exactly what is happening here, as the plaintiffs have demonstrated through numerous affidavits from state officials.

The legislative defendants also repeatedly assert that because agency rules are "not 'legislation as such,'" the Legislature can suspend them through whatever mechanism they want. Opening Br. 58. That is wrong. The legislation's basic constitutional defects are not cured by *Martinez*'s statement that "an administrative rule is not legislation." 165 Wis.2d at 699. *Martinez* simply recognizes that administrative rules are different from *legislation*. *Martinez* nowhere suggests that administrative rules are not "law." On the contrary, *Martinez* observes that rules still have the "force and effect of law" even if "they do not rise to the level of statutory law." 165 Wis.2d at 699 n.10 (quoting *Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410, 412 (1990)); *see also Wisconsin Citizens Concerned for Cranes & Doves v. Wisconsin Dep't of Nat. Res.*, 2004 WI 40, ¶5 n.5, 270 Wis.2d 318, 328 n.5, 677 N.W.2d 612, 617 n.5 ("Administrative rules enacted pursuant to statutory rulemaking authority have the force and effect of law."). If the legislative defendants were correct,

there would be no need to pass a rule-suspension statute at all, nor would this Court have needed to conduct the thorough analysis that it did in *Martinez*.

The Legislature regularly passes laws that restrict the actions of agencies or ordinary citizens. None of the *conduct* being regulated is "legislation as such," but everyone agrees that the only way the Legislature can act is through the regular passage of bills. The legislative defendants' confused understanding of governance would authorize the Legislature, or individual legislators, to "enact" new "law" through any untold number of mechanisms. The Wisconsin's Constitution does not allow this.

2. The laws violate the quorum requirement.

The lame-duck legislation also violates the Wisconsin Constitution's quorum requirement, and that violation is an independent basis for declaring the challenged provisions unconstitutional. Compl. ¶¶121–31. Yet much as they did in the lower court, the legislative defendants essentially ignore this core constitutional requirement and effectively concede that the lame-duck statutes allow actions that do not satisfy the quorum requirement.

Article IV of the Wisconsin Constitution vests the legislative power of the State of Wisconsin in two bodies—the Wisconsin Senate and the Wisconsin Assembly. Wis. Const. art. IV, § 1. Article IV provides further that "a majority of each shall constitute a quorum to do business." *Id.* § 7. Absent a quorum, legislators may only adjourn for the day or "compel the attendance of absent members." *Id.* Because the quorum requirement is a

procedure that "is mandated by the constitution," it is not within the Legislature's discretion to follow or ignore. *State ex rel. La Follette v. Stitt*, 114 Wis.2d 358, 365, 338 N.W.2d 684, 687 (1983).

The requirement is an important one. Similar quorum requirements have been a feature of state constitutions since the founding era. Thomas Jefferson, writing about the early Virginia Constitution, noted the necessity of establishing quorum size as a matter of constitutional rather than statutory law because allowing legislators to determine their own quorum lifts the gate to a dangerous path. "From forty [the quorum] may be reduced to four, and from four to one: from a house to a committee, from a committee to a chairman or speaker, and thus an oligarchy or monarchy be substituted under forms supposed to be regular." Thomas Jefferson, *Notes on the State of Virginia* (1787), https://perma.cc/Y2ZS-FG36. Reflecting this wisdom, every state constitution in the country has included a quorum requirement for more than 150 years. Peverill Squire, *Quorum Exploitation in the American Legislative Experience*, 27 Studies in American Political Development 147 (Oct. 2013).

The provisions passed by the legislative defendants undo this settled constitutional protection. Numerous provisions of the lame-duck legislation allow a handful of legislators to make key litigation decisions for the State; to exercise authority over major implementation decisions involving the federal government; and to suspend administrative rules indefinitely. *See* Compl. ¶¶94–100, 110–120; 2017 Act 369 §§ 16, 26, 30, 64, 87; 2017 Act 370 §§ 10, 11. These

provisions exemplify the danger about which Thomas Jefferson warned: A legislative majority for one reason or another concentrating power in the hands of a smaller, and perhaps more reliably partisan, group. This phenomenon erodes public accountability by permitting many legislators to avoid votes on important matters, and it risks corruption by concentrating power in the hands of a few individuals. Upholding these provisions would trivialize this important constitutional protection as well.

II. The circuit court did not abuse its discretion when it temporarily enjoined the lame-duck laws.

The legislative defendants' attack on the circuit court's issuance of a temporary injunction fares no better. In the face of Judge Remington's thorough decision explaining why the plaintiffs are likely to succeed on the merits of their claims that several of the extraordinary-session provisions are unconstitutional, the legislative defendants assert that Judge Remington underestimated their likelihood of success or failed to consider the equities. Neither assertion is correct, and, *even if* the Court were to agree, the legislative defendants fall short of proving Judge Remington's conclusions to be so irrational that no reasonable judge could have reached them.

To begin, the legislative defendants' belief that no injunction should have issued because not "a single Wisconsin case" supports invalidating the challenged provisions is wrong. Opening Br. 68. With respect to the litigation-control provisions, for example, the Court's decision in *Oak Creek*

explicitly recognizes that the Executive Branch holds power to litigate on behalf of the State regardless of the Attorney General's authority to do so. 2000 WI 9, ¶50 (explaining that "the attorney general is not the state"). And *no case*, as Judge Remington observed, has ever held that the Legislature could grant itself a role in litigating cases on behalf of the State. This make sense because the *text of the Constitution itself* explicitly vests this power in the Governor. *Cf. League of Women Voters*, 2019 WI 75, ¶19 ("In interpreting a statute's text, we start with the language of the statute and if the meaning of the language is plain, our inquiry ordinarily ends.").

Well-settled principles support Judge Remington's conclusion that other key provisions are also likely unconstitutional. Section 64, which allows the Legislature to suspend indefinitely agency rules without the "safeguards" of bicameralism, presentment, or a quorum, is likely unconstitutional because *Martinez* held that any rule suspension must be subject to these constitutional safeguards. *See* Op. at 12–13, 21, 23. The likely unconstitutionality of the guidance document provisions likewise turns on a straightforward application of the Wisconsin Supreme Court's decision in *Flynn v. Dep't of Admin*, 216 Wis.2d 512, 546, 576 N.W.2d 245, 255 (1998), as well as on common sense: The legislative defendants actually conceded that the guidance document provisions impose a "cumbersome" duty on state agencies and "offer[ed] no cogent explanation for making the work of the state agencies cumbersome"—meaning the imposed burdens are undue. Op. at 41.

Merits aside, to overturn Judge Remington's temporary injunction, the legislative defendants must also demonstrate that no rational judge could have balanced the equities in favor of temporarily enjoining the challenged provisions. They must convincingly demonstrate that "no substantial harm will come to other interested parties" if the laws are enforced and that enforcing the laws will "do no harm to the public interest." *State v. Gudenschwager*, 191 Wis.2d 431, 440, 529 N.W.2d 225, 229 (1995). The legislative defendants have done neither. As Judge Remington correctly held, the plaintiffs and the public at large will suffer irreparable harm if the unconstitutional portions of the extraordinary-session legislation are not enjoined.

This holding stems from the proposition that, as Judge Remington explained, "when constitutional rights are deprived, irreparable harm results and there is really no other adequate remedy available." Op. at 3. Countless judicial decisions reflect this principle. *See, e.g.*, *Chicago v. Sessions*, 321 F. Supp. 3d 855, 877–78 (N.D. Ill. 2018) (constitutional violations erode trust in the government and "[t]rust once lost is not easily restored, and as such, this is an irreparable harm for which there is no adequate remedy at law"); *State of N.Y. v. Dep't of Justice*, No. 18-cv-6741, 2018 WL 6257693, at *19 (S.D.N.Y. Nov. 30, 2018); *San Francisco v. Sessions*, 349 F. Supp. 3d 924, 970 (N.D. Cal. 2018) (recognizing continued injury caused by imposing conditions that violate separation of powers); Order Denying Motion for Stay at 5, *Madison Teachers,*

Inc. v. Walker, Case No. 11CV3774 (Dane Cnty. Circuit Ct. Oct. 22, 2012) (concluding that plaintiffs would suffer "irreparable harm in the form of [the] continued violation of their fundamental constitutional rights by their government"); *St. Raymond v. City of New Orleans*, 769 So. 2d 562, 564 (La. Ct. App. 2000); *Lucas v. Peters*, 741 N.E.2d 313, 325 (Ill. App. Ct. 2000) (collecting cases); *United Auto Workers, Local Union 1112 v. Philomena*, 700 N.E.2d 936, 950 (Ohio Ct. App. 1998) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

With respect to separation of powers, in particular, this Court and many other courts have emphasized the importance of maintaining the proper constitutional balance. Ensuring that governmental power is properly balanced among the branches of government is critical "to preserv[ing] [the branches'] respective independence and integrity, and to prevent[ing] concentration of unchecked power in the hands of any one branch." *State v. Washington*, 83 Wis.2d 808, 825–26, 266 N.W.2d 597, 606 (1978). As the nation's Founders recognized, the separation of powers must be maintained because "[t]he accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (J. Madison). Indeed, the separation of powers contained in Wisconsin's Constitution "defines the structure of state government," and "its function is critical to the efficient operation of the state." Op. at 44.

The Court's opinion in *Gabler*, 2017 WI 67, reinforces this understanding. There, the Court emphasized the importance of preventing any imbalance in the separation of powers. The Court specifically identified that danger and abuse of power would result if "the same persons who have the power of making laws . . . have also in their hands the power to execute them." *Id.* ¶5 (quoting John Locke, *The Second Treatise of Civil Government* § 143 (1764)). Accordingly, it is "of vital importance" that the power of the three branches—and particularly the power to make and enforce laws—be kept separated. *Id.* ¶3 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 519, 2–3 (1833)). So it is here.

In addition to the per se irreparable harm of constitutional violations, the lame-duck legislation has already caused taxpayer funds to be spent that can never be recovered. And the amount is *not* small. The Chief Legal Counsel for the Department of Corrections estimates that for her department alone, processing all existing "guidance documents" through the notice-and-comment requirements of Section 33 of Act 369 will cost $625,000. That is more than half a million wasted taxpayer dollars that will be spent by a single agency merely to ensure that current guidance documents remain available. P-Ap.35 ¶6. Other affiants predict similar expenditures, *see* P-Ap.32 ¶7, and the Attorney General's inability to settle or withdraw cases is already costly—cases are currently languishing as their details cannot even be explained without violating confidentiality agreements, and there is no clear way to

move forward despite state attorneys' obligations to keep litigating until legislative committees decide to say otherwise. Taxpayer-funded legal fees associated with this unconstitutional legislation currently sit at more than $1 million and "will only go up." Patrick Marley & Lee Bergquist, *As the fight over Wisconsin's lame-duck laws rages, the legal tab for taxpayers tops $1 million*, Milwaukee J. Sentinel (Aug. 30, 2019), https://bit.ly/2k2l90I (noting that last week Republican lawmakers were forced to hire "another law firm to assist them in one of several disputes with lawmakers").

The extraordinary-session legislation's requirements regarding guidance documents are causing another type of irreparable harm as well: They are crippling the State's agencies. According to agency heads, more than 200,000 existing guidance documents need to be put through the new notice-and-comment procedure, as well as reviewed and certified. P-Ap.39 ¶14; *see also* P-Ap.20 ¶10 (Department of Human Services has over 29,105 existing documents); P-Ap.25 ¶¶4, 5, 12 (Department of Workforce Development has "thousands" of documents, including 72,000 related to worker's compensation alone); P-Ap.32 ¶¶5–6 (Department of Veterans Affairs has 806 existing documents with 100–200 new documents created annually); P-Ap.35 ¶¶4–5 (Department of Corrections has 450 existing guidance documents with 360 created annually). The State's agencies have no money to hire extra staff, so all this work will divert agencies from their

missions and force employees to focus on complying with the lame-duck laws rather than doing their jobs of administering state law.

These opportunity costs are significant, especially for vulnerable Wisconsin citizens who are most likely to need government assistance. As Peter Rickman of MASH describes, his organization hoped to work with the new administration on a variety of policy solutions that would benefit low-wage workers. P-Ap.51–52 ¶¶13–15. Yet because of the unconstitutional lame-duck legislation, the State's agencies are unable to turn to new work, and this time lost can never be regained. The Governor's administration is of course time-limited, and a day lost to unconstitutional demands is a day lost forever.

The consequences of the state agencies' significant staff diversion are dire in other respects, too. For example, the Department of Corrections is prioritizing updating its guidance documents over important services like fulfilling open records requests and complying with its fiscal estimates. P-Ap.35 ¶7. DHS intends to spend resources on its guidance documents that were earmarked to improve the efficient provision of Medicaid services to Wisconsin's residents. P-Ap.20 ¶10. In addition, complying with the new requirements for guidance documents is forcing several agencies to violate federal law, which could at any point result in loss of funding and complications with important state programs. DWD receives federal funding under the Workforce Innovation and Opportunities Act that allows the Department to provide resources to citizens. P-App.28 ¶17. In order to receive

this funding, DWD is required to limit its administrative costs to 10%. *Id.* As the head of DWD attests, however, that goal is already difficult to achieve and, if DWD is forced to shift resources to reviewing existing guidance documents, it will likely become impossible to reach. DWD will thus be forced out of compliance with federal law by the lame-duck legislation's unfunded and unconstitutional mandate. *Id.*; *see also* P-Ap.21 ¶¶13–17 (telling similar story for DHS).

The notice-and-comment requirement for new guidance documents will also delay the provision of time-sensitive government information and resources to the public. DWD, for example, frequently changes its guidance documents related to grant-funding formulas to account for "recent legal interpretations, legal cases, inflation, census changes, unemployment rates, major employment dislocations," and other factors. P-Ap.26 ¶8. Yet pursuant to the lame-duck laws, no new guidance documents can go into effect for 21 days, at which point they might already be outdated.

The recent federal-government shutdown provides another illustration. When the shutdown occurred, DWD's Unemployment Insurance Division extended benefits to many affected workers and issued guidance documents explaining the availability of benefits and the criteria workers had to meet. P-Ap.27, 28 ¶¶10, 15. Such resources were needed immediately, and if a 21-day notice-and-comment process existed before that

guidance became available, it would have "result[ed] in delay in benefits to families already in economic distress." P-Ap.28 ¶15.

The legislative defendants ask the Court to ignore all of this. They argue that that the equities cut the other way because, in their view, irreparable harm follows any time a legislative statute is enjoined. *See* Opening Br. 71. But that cannot be the case when, as Judge Remington correctly held, the statute at issue is likely unconstitutional. Whatever harm might follow from enjoining a statute is outweighed by the greater irreparable harm that results from ongoing violations of the Wisconsin Constitution. And with respect to separation of powers in particular, the Court has explained that any invasion by one branch into the sphere of another violates a "maxim of vital importance" and undermines "the bedrock of the structure by which we secure liberty in both Wisconsin and the United States." *Gabler*, 2017 WI 67, ¶¶3–4 (citations omitted). Given a choice between a constitutional deprivation and a statutory one, this Court's higher concern must be to prevent the constitutional deprivation. *See State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 53 N.W. 35, 62 (1892); *Norval v. Rice*, 2 Wis. 22, 31 (1853).

The legislative defendants' other assertions of harm are either too speculative to support the relief they seek or are not even assertions of harm to the defendants themselves. They are not prevented from intervening themselves in any case where, they speculate (at 72), the Attorney General "could . . . abandon[] his defense of state law"—a possibility that has not yet,

and may never, occur. An argument that something "could" occur does not come close to meeting the burden of demonstrating that the circuit court abused its discretion when balancing the harms. Even so, legislators may always move to intervene under the standards that have always applied and, if not successful, can participate as *amici*. *See Gudenschwager*, 191 Wis.2d at 229 (requiring courts to consider both "the likelihood" of the purported irreparable injury's occurrence "and the proof provided by the movant" of that likelihood when deciding the irreparable-injury factor).

And their claim that Judge Remington was wrong to credit the overwhelming evidence on the impact of the guidance provisions because it "cannot be reconciled" with the "judicially noticeable" submissions made by agencies during the passage of the law is forfeited. Opening Br. 73. Because this argument was not presented to the circuit court, it cannot serve as a basis for holding that the court abused its discretion. *E.g., Latin Am. Music Co. v. Cardenas Fernandez & Assocs., Inc.*, 60 F. App'x 843, 848–49 (1st Cir. 2003) ("The district court cannot . . . be faulted for not considering the argument, never raised directly before it. Thus, the district court's refusal to consider plaintiffs' belated section 205 argument was not an abuse of discretion."). Moreover, the legislative defendants' claim (at 75) that the temporary injunction caused harm by making compliance with the guidance document deadline "exceeding[ly] complicated" is not a harm the *legislative defendants* would suffer. And as they concede, any agency that wants to could voluntarily

submit guidance documents for notice-and-comment review during the period of the injunction. See Op. at 41.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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September 4, 2019

CERTIFICATE OF COMPLIANCE

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. This brief contains 13,066 words.

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