SUPREME COURT OF WISCONSIN

No. 19AP614-LV

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

No. 2019AP622

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 1, SEIU HEALTHCARE WISCONSIN, MILWAUKEE AREA SERVICE AND HOSPITALITY WORKERS, AFT-WISCONSIN, WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS, RAMON ARGANDONA, PETER RICKMAN, AMICAR ZAPATA, KIM KOHLHAAS, JEFFREY MYERS, ANDREW FELT, CANDICE OWLEY, CONNIE SMITH AND JANET BEWLEY,
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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,
Case No. 2019CV000302

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INTRODUCTION

Before the Circuit Court, the other parties pursued a blunderbuss facial challenge to a series of laws, based upon theories that have never succeeded in any case in this State's history. Now faced with defending before this Court the very order that they sought from the Circuit Court—a wholesale denial of Legislative Defendants' motion to dismiss—these parties beat a hasty retreat. Neither Plaintiffs nor the Attorney General defend the complaint's theory that the intervention provisions are unconstitutional. The Attorney General all but concedes that Sections 30 and 26 are constitutional in validity-of-state-law cases. The Governor concedes that the challenge to the only legislative review provision that the Circuit Court enjoined—Section 64—should be dismissed. And the parties make no effort to defend the challenges to the guidance-document-judicial-review provisions or the *Tetra Tech* provision.

While Legislative Defendants certainly welcome these belated concessions that this lawsuit is wildly overbroad, the temporary injunction should be vacated and the complaint should be dismissed in whole. Sections 30 and 26 are

constitutional in all of their applications, not just in validity-of-state-law cases, as they merely give the Legislature a co-equal seat at the table for certain client-side decisions for the State, such as approving a final settlement, while leaving the decisions vested in lawyers in the Attorney General's hands. Giving a constitutional officer/body—including the Legislature—a co-equal seat at the table in client-side decisions for the State has been common in Wisconsin well before Act 369 and, contrary to Plaintiffs' claims, is common in other States today. The committee review provisions use the structure that *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992), and *State v. City of Oak Creek*, 2000 WI 9, 232 Wis. 2d 612, 605 N.W.2d 526, approved, and the other parties do not ask this Court to overrule these cases. And the notice-and-comment-guidance-document provisions are garden variety legislative regulation of agencies, which do nothing to prevent the Governor from speaking.

ARGUMENT

I. Plaintiffs' Legally Meritless Lawsuit Should Be Dismissed

A. There Is No Separation Of Powers Exception To The Principle That A Defendant Is Entitled To Dismissal Where The Complaint Fails As A Matter Of Substantive Law

The other parties argue that a mere legal conclusion in a complaint that a statute imposes an "undue burden" on, or "substantially interferes" with, administrative agencies or the Attorney General is enough for that complaint to survive a motion to dismiss. *See* Gov. Br. 16, 19–29; AG Br. 22–23; Pls. Br. 22–24. If these arguments were to prevail, that would create an unjustified separation of powers exception to the rule that where a complaint's factual allegations, when assumed true, fail to state a claim as a matter of substantive law, the defendant is entitled to dismissal.

1. A complaint must be dismissed when a plaintiff's factual allegations, if true, would not violate the "substantive law." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693. "[L]egal conclusions asserted in a complaint are not

accepted, and legal conclusions are insufficient to withstand a motion to dismiss." *Id.* ¶ 18. In evaluating a motion to dismiss, the court interprets the law on its own, without accepting the legal conclusions and then decides whether the factual allegations, if assumed to be true, would entitle the plaintiff to relief. *See Daniel v. Armslist, LLC*, 2019 WI 47, ¶ 13, 386 Wis. 2d 449, 926 N.W.2d 710.

In an extended and surprising argument, Gov. Br. 19–24, the Governor claims that a court need not consider the substantive law at all at the motion to dismiss stage, so long as the plaintiff perfunctorily "match[es]" his alleged facts "to the elements of the claim asserted," Gov. Br. 22. But as this Court has recently explained, that would be "inconsistent with Wisconsin's pleading standard," as articulated by *Data Key*. *Daniel*, 2019 WI 47, ¶ 48. That is why since at least *Data Key*, Wisconsin cases requiring dismissal of a complaint for failure of the plaintiff's *substantive* law theory are legion. *See, e.g.*, *League of Women Voters v. Evers*, 2019 WI 75, ¶¶ 2, 12, 387 Wis. 2d 511, 929 N.W.2d 209; *Daniel*, 2019 WI 47, ¶¶ 1–2; *Voters With Facts v. City of Eau Claire*, 2018 WI 63, ¶ 24, 382 Wis.2d 1, 913 N.W.2d 131; *see also*

Security Finance v. Kirsch, 2019 WI 42, ¶¶ 8–9, 386 Wis. 2d 388, 926 N.W.2d 167. The Governor's efforts to distinguish cases such as *LWV*, Gov. Br. 17–18, fail, as the complaint there alleged a constitutional violation, and yet this Court held that it must be dismissed based upon a substantive law analysis.

2. The other parties' position here—that a mere allegation of an "undue burden" on agencies or the Attorney General is sufficient to survive a motion to dismiss—wrongly conflates legal conclusions with factual allegations. The allegation that a law imposes an "undue burden" is a legal conclusion, entitled to no weight. *Data Key*, 2014 WI 86, ¶ 18. To show that the alleged facts would constitute a burden that is legally "undue," a plaintiff would need to put forward a valid substantive theory that would establish a constitutional violation under the facts alleged. As Legislative Defendants have explained, Plaintiffs' theories fail to state a constitutional violation because the Attorney General's authority is subject to plenary legislative control, under *Oak Creek*, and/or because the practical burdens alleged are not legally "undue," under *Martinez* and *J.F.*

Ahern Co. v. Wis. State Building Comm'n, 114 Wis. 2d 69, 336 N.W.2d 679 (Ct. App. 1983).

The two leading separation of powers cases in the agency context—*Martinez* and *Ahern*—are instructive. In both cases, the courts' "undue burden" analysis was grounded entirely in *structural* separation of powers considerations, and the claims failed as a matter of law, without any inquiry into practical burdens. Opening Br. 45–47. Thus, if a plaintiff tomorrow filed a lawsuit challenging the statutes in *Martinez* and *Ahern*, that lawsuit would be dismissed as a matter of substantive law, even if the complaint alleged that the statutes imposed an "undue burden." That the plaintiff could further allege, in enumerated paragraphs, that working with the Building Commission or the Joint Committee on Administrative Rules ("JCRAR") was practically burdensome for the agency, in this or that way, would be legally irrelevant under the substantive law.

Notably, none of the other parties have cited a single case in this State's history holding that a plaintiff articulates a valid theory of "undue burden" on agencies or the Attorney

General by merely alleging that a particular statutory duty was practically burdensome. The *only* cases the other parties cite for a practical burdens inquiry—*Flynn v. Department of Administration*, 216 Wis. 2d 512, 576 N.W.2d 245 (1998); *State ex. rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995); and *State v. Holmes*, 106 Wis. 2d 31, 315 N.W.2d 703 (1982)—involved alleged burdens on the court system. But as this Court has made clear, since the "very existence of [an] administrative agency . . . is dependent upon the will of the legislature . . . [a]n administrative agency does not stand on the same footing as a court when considering the doctrine of separation of powers." *Schmidt v. Dep't of Res. Dev.*, 39 Wis. 2d 46, 56–57, 158 N.W.2d 306 (1968). And the Attorney General's authority is subject to plenary legislative control. *See Oak* Creek, 2000 WI 9, ¶ 22. It is telling that Plaintiffs cannot identify a single case in this State's history that applies their practical burdens approach to a separation of powers case involving agencies or the Attorney General.

The other parties' Response Briefs also inadvertently concede that a mere allegation of "undue burden" is not

sufficient to survive a motion to dismiss when dealing with agencies or the Attorney General. For example, the complaint here challenges Section 35 of Act 369—which codifies *Tetra Tech EC, Inc. v. Wis. Department of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21, by prohibiting agencies from seeking deference for interpretations of law—alleging that this provision imposes an "undu[e] burden[ ]." Gov. App. 36. Before this Court, all of the other parties concede by silence that they have no substantive legal theory as to why codifying *Tetra Tech* imposes an "undue burden," waiving any argument against dismissal. *See infra* pp. 41–42. The same is true of the judicial-review-guidance-document provisions, *see id.*, notwithstanding the complaint's allegation that these provisions impose an undue burden, Gov. App. 36. And no party argues that the intervention provisions fail under an "undue burden" analysis, *see infra* pp. 12–14, contrary to the complaint's allegations, Gov. App. 36.

Finally, adopting the other parties' core argument—that every complaint alleging practical burdens on agencies or the Attorney General requires a fact-intensive inquiry,

complete with discovery and trial—would regularly place courts in the middle of partisan disagreements, with high government officials of different political persuasions offering their competing views on the practical wisdom of legislation, with the courts needing to choose one side.

This case is an apt illustration. The Governor submitted a series of affidavits in support of the motion for a temporary injunction, which affidavits claim that the notice-and-comment-guidance-documents provisions would be difficult or expensive to comply with. *See* Opening Br. 73–75. These affidavits directly contradict the submissions that many of these *same* agencies made to the Legislature in 2018, when they told the Legislature that these provisions would be easy to comply with. *Id.* In order to adjudicate these practical burdens disputes, the court would need to pick between senior agency personnel from two politically disparate administrations.

Or take Section 26 of Act 369. That provision altered a statutory regime where, before December 2018, the Attorney General had to agree with the Governor to settle certain categories of lawsuits, to one where he has to agree

with the Legislature to settle such lawsuits. *See* Opening Br. 5–8. While the current Attorney General claims that Section 26 would burden his office because he finds working with the Legislature too difficult, *see infra* pp. 34–35, the next Attorney General may see the Legislature as a political ally, but the Governor as a political opponent, and may conclude that working with the Legislature, under Section 26, is less practically difficult than working with the Governor would be, if Act 369 were repealed.

This Court should not change its motion to dismiss and separation of powers doctrines in a way that draws courts into political battles masquerading as "undue burden" analyses and which makes the constitutionality of laws turn on whether current occupants of the Attorney General's office or the administrative agencies see it in their political interest to comply efficiently with the laws that the Legislature has enacted. Rather, separation of powers analyses on these types of issues should remain as in

Martinez and *Ahern*: an analysis of the structural relationship among constitutional officers.[1]

B. The Attorney General Provisions Are Constitutional As A Matter Of Law

1. The Intervention Provisions Are Constitutional, As The Attorney General And Plaintiffs Concede By Waiver

Legislative Defendants have explained that the intervention provisions are constitutional for two independently sufficient reasons. Opening Br. 21–43. First, these provisions have no constitutional import because they only tangentially impact the Attorney General's *statutory* powers under *Oak Creek*. Second, even if a constitutional analysis is warranted, the intervention provisions are constitutional under a shared-power analysis because the Attorney General retains his statutory right to appear, Wis. Stat. §§ 162.25; 806.04(11), meaning there can be no legally valid argument that this intervention will "unduly burden or

[1] The Attorney General urges this Court to jettison the presumption of constitutionality in separation of powers cases. AG Br. 10–12. In *Martinez*, as here, the Attorney General attacked a law, and this Court held that "[t]here is a strong presumption that a legislative enactment is constitutional." 165 Wis. 2d at 695. The Attorney General has not attempted to make the high showing for overturning precedent. *See Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257.

substantially interfere with" his powers, *Martinez*, 165 Wis. 2d. at 696 (citation omitted).

In his Response Brief, the Attorney General waives any argument against these provisions, just as he did in the Circuit Court. App. 37. After noting the intervention provisions in his background section, AG Br. 8, he does not say a word about them until an out-of-the-blue assertion in his conclusion that this Court should declare Sections 5, 97, and 99 invalid "to the extent they empower a legislative intervener to block a case resolution unrelated to defending the validity of a statute," AG Br. 47. This point is confused because the only provisions that give the Legislature authority to "block" the Attorney General's actions are Sections 30 and 26. In any event, the Attorney General's reference in his conclusion: (1) has no relevance to Plaintiffs' facial challenge, given that Plaintiffs must show that the provisions cannot lawfully "be enforced under any circumstances," *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 33, 383 Wis. 2d 1, 914 N.W.2d 678 (citations omitted), and (2) was waived by lack of development in the Attorney General's Response Brief, *see*

Parsons v. Associated Banc-Corp., 2017 WI 37, ¶ 39 n.8, 374 Wis. 2d 513, 893 N.W.2d 212.

Plaintiffs similarly waived any argument against these provisions. Plaintiffs do not mention these provisions in recounting the statutes that they challenge. Pls. Br. 3–6. Their argument section focuses upon the assertion that "[t]he litigation control provisions are unconstitutional," Pls Br. 13, referring to Sections 30 and 26. And while they make a single, out-of-context reference to the "authority to intervene *as the State*" on page 22 of their argument section, that is plainly insufficient to develop any argument as to these provisions, *see Parsons*, 2017 WI 37, ¶ 39 n.8.

The Governor, for his part, does attack the intervention provisions, making just one argument: that representing the State's interest in litigation, including in the validity of state law, is "exclusive[ly]" reserved to the Governor, under his authority to "take care that the laws be faithfully executed." Wis. Const. art. V, § 4. Under this view, the Governor has exclusive "authority to direct litigation initiated by or against the State," to the complete exclusion of the Legislature. Gov. Br. 2, 47. This radical argument,

which would constitutionalize a regime where the Governor could eliminate any laws that he does not like through friendly litigation with like-minded plaintiffs, is wrong.

The Governor's "exclusive power" argument finds no support under Wisconsin law. In Wisconsin, the power to "take care that the laws be faithfully executed" is vested *entirely* in Governor, Wis. Const. art. V, § 4, but that gives the Governor no constitutional power over litigation on behalf of the State's interest in the validity of state law. The vast majority of litigation for the State is conducted by the Attorney General, who is "elected for the purpose of prosecuting and defending all suits for or against the State," *Orton v. State*, 12 Wis. 509, 511 (1860), and whose powers are subject to plenary legislative control under *Oak Creek*. Or, as Judge Sykes recently put in at oral argument in the first case where the Legislature sought to intervene under Act 369 in federal court: "We are not talking about a battle between branches of government because the Attorney General is not part of the executive branch, he is an independently elected constitutional officer, but his powers are limited by the Legislature. He has no inherent power,

that's the holding of [*Oak Creek*]." Oral Arg. at 22:15, *Wis. Legislature v. Kaul*, No. 19-1835 (7th Cir.).[2]

Notably, other constitutional officials or bodies regularly litigate for the State's interest, without any input or control by the Governor or the Attorney General. This includes the Legislature, in this case, *LWV*, *Martinez*, and numerous other cases, *see* Opening Br. 32–34, where the Legislature typically has appeared by retained counsel; the courts, in cases such as *State ex rel. Department of Natural Resources v. Wisconsin Court of Appeals*, 2018 WI 25, ¶¶ 3–6, 380 Wis. 2d 354, 909 N.W.2d 114, where the Attorney General opposed District IV's interpretation of a statute, and District IV appeared by retained counsel, *see generally* SCR 81.02(1) (authorizing this Court to appoint counsel for courts); and the Superintendent of Public Instruction, in cases such as *Koschkee v. Evers*, 2018 WI 82, ¶¶ 1–2, 382 Wis. 2d 666, 913 N.W.2d 878, where the Governor and the Attorney General opposed the Superintendent, and this Court allowed the Superintendent to appear by in-house

[2] Available at http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=19&casenumber=1835&listCase=List+case%28s%29.

counsel. When this occurs, neither the Governor nor the Attorney General has *any* role in "direct[ing] litigation" on behalf of the State, Gov. Br. 47, because disagreeing state officers "each represent the State" in such cases, App. 67.

Critically, the Governor does not grapple with the implications of his theory for situations like this case, *LWV*, or *Martinez*, where the Legislature is the only state party seeking to "represent the State['s]" interest in the validity of State law. App. 67. Under the Governor's "exclusive" authority approach, such cases would never come before this Court because the Legislature would be constitutionally prohibited from speaking as a party for the State's interest in the validity of state law. In that world, the Governor (either acting alone, as he did in *LWV*, or with the Attorney General, as in this case) could work with like-minded plaintiffs to decide what provisions of state law should be enjoined, present a united front to a circuit court, and thereby effectively repeal duly enacted laws through friendly lawsuits, all while evading this Court's review.

The Governor's position would also have troubling implications for other independently elected bodies in this

State, such as the judiciary. If the Governor has "exclusive" authority to prohibit the Legislature from defending in court the laws that it has enacted, then, by the same logic, the Governor has exclusive authority to prohibit this Court from defending the rules that this Court has adopted. This could occur if, for example, the constitutionality of one of this Court's rules were challenged in federal court as a violation of a federal constitutional provision. *See, e.g.*, *File v. Kastner*, No. 2:19-cv-01063 (E.D. Wis. Jul. 25, 2019). The Governor could simply agree with a friendly plaintiff to concede away the constitutionality of one of this Court's rules in federal court, just as he sought to concede away the constitutionality of the laws here and in *LWV*, and there would be nothing this Court could do about it.

That would create the very problem that this Court discussed in *Koschkee*, 2018 WI 82, making either the Governor or "the attorney general a gatekeeper for legal positions taken by [other] constitutional officers." *Id.* ¶ 13. In fact, the Governor's position goes much further than the one that this Court rejected in *Koschkee*, as the Governor would have this Court hold that no other constitutional

officer or body could litigate on behalf of the State's interest in the validity of state laws or rules, even if that officer had statutory authority to litigate, such as through the intervention provisions challenged here. *Id.* ¶ 37 (R. Bradley, J., concurring in part; dissenting in part) (disagreeing with the majority because the Superintendent lacked statutory authority to litigate).

The Wisconsin authorities that the Governor cites do not support his position. While he cites certain early Wisconsin statutes giving his office some limited authority in the area of litigation, Gov. Br. 46–47, *Oak Creek* looked at early Wisconsin litigation provisions—the overwhelming majority of which empower the Attorney General, and not the Governor—and drew an entirely different inference: that early laws detailing litigation authority support the point that the Legislature has plenary authority over the *Attorney General*. 2000 WI 9, ¶¶ 30–32. The Governor also cites to *Helgeland v. Wisconsin Municipalities*, 2006 WI App 216, 296 Wis. 2d 880, 724 N.W.2d 208, Gov. Br. 49–50, but that decision's holding merely narrowly interpreted the Legislature's *statutory* authority to intervene to defend state

law under the pre-Act 369 version of Wis. Stat. § 803.09, and the Legislature changed that law in Act 369. And *State v. Onheiber*, 2009 WI App 180, ¶ 19, 322 Wis. 2d 708, 777 N.W.2d 682, Gov. Br. 46, says nothing whatsoever about whether the Governor's or the Attorney General's litigation authority is exclusive.

The Governor also seeks to rely upon some cases from the U.S. Supreme Court, such as *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), Gov. Br. 50, but those cases undermine his position. In *Bethune-Hill*, the Court held that the Virginia House of Delegates could not appeal to defend State law because such authority, under Virginia law, "rest[ed] exclusively with the State's Attorney General." 139 S. Ct. at 1951. The Court made clear, however, that the separation of powers difficulties that resulted from the Virginia Attorney General's decision not to defend State law could be solved by Virginia adopting a law authorizing its legislature to litigate to defend state law. *Id.* at 1952; *accord Karcher v. May*, 484 U.S. 72, 82 (1987) (permitting the leadership of the New Jersey legislature to defend state law

because "the New Jersey Legislature had authority under state law to represent the State's interests").

In the intervention provisions challenged in this case, Wisconsin made *precisely* the choice that the U.S. Supreme Court in *Bethune-Hill* explained States could make to prevent the elimination of their laws by friendly litigation between plaintiffs and a like-minded attorney general. The Governor's unprecedented view that "exclusive" litigation authority is vested in the chief executive, under any constitution with a "take-care" clause, would forbid any State from enacting the statutes that *Bethune-Hill* discussed, as well as prohibit Congress from enacting the very congressional intervention laws that the Attorney General praises. *See* AG Br. 41–42.

Finally, even if this Court concludes that litigating on behalf of the State's interest in the validity of state law is some part of the Governor's take-care authority, that authority is, at a minimum, shared with the Legislature because, as even the Attorney General concedes, the Legislature has a "shared interest in the defense of statutes." AG Br. 39. As this Court put it in this case, "the Legislature

. . . and the public suffer . . . harm of the first magnitude" when dully enacted laws are enjoined. App. 57. None of the parties argue that the intervention provisions would be unconstitutional under a shared-power analysis, meaning that any such argument has been waived. *See Parsons*, 2017 WI 37, ¶ 39 n.8.

2. Sections 30 And 26 Are Constitutional In Validity-Of-State-Law Cases, As The Attorney General All But Concedes

While the intervention provisions permit the Legislature to defend the State's interest in the validity of state law as a party to the litigation, Sections 30 and 26 empower the Legislature to advance these same sovereign interests in a different way, which is similarly constitutional. These provisions are constitutional as applied to validity-of-state-law cases, as the Attorney General all but concedes, and a holding that these provisions are constitutional in these applications is sufficient to dispose of Plaintiffs' facial challenge. *See Mayo*, 2018 WI 78, ¶ 33.

Before responding to the other parties' constitutional arguments, Legislative Defendants clarify these provisions' objective structure to dispel the other parties' misrepresentations. Sections 30 and 26 do not give the Legislature "day-to-day control" over the conduct of litigation, Pls. Br. 7, or permit the Legislature to "act as *de facto* attorney general," Gov. Br. 3. Rather, under Sections 30 and 26, when no other state party appears by separate counsel, *see supra* pp. 11–12, the Attorney General continues to serve as the State's lawyer, pursuant to Wis. Stat. § 162.25, and makes all of the decisions vested in a lawyer under the Rules of Professional Conduct. What Sections 30 and 26 provide is that the Attorney General and the Legislature have a co-equal say in certain matters that are vested in the *client*—that is, the State of Wisconsin—such as whether to settle away the State's interest in the validity of state law. *See* Wisconsin Supreme Court Rules ("SCR") 20:1.2 (2017) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . . A lawyer shall abide by a client's decision whether to settle a matter.").

Contrary to the other parties' suggestions, there is nothing new or unusual about a constitutional officer having a seat at the table in client-side litigation decisions, on behalf of the State, while the Attorney General retains his role as lawyer. Under a similar cooperative decisional structure, under the pre-Act 369 version of Wis. Stat. § 165.08 (2017), the Attorney General served as the State's lawyer in certain prosecution-side cases and made all of the decisions vested in lawyers under the Rules of Professional Conduct, but then shared with the Governor a co-equal role in making client-side decisions, such as whether to settle. Along the same lines, both the Legislature and the Governor have, *since the State's founding*, had the authority to make client-side decisions to "direct[ ]" the Attorney General, *Oak Creek*, 2000 WI 9, ¶ 44, to bring lawsuits on behalf of the State or one of its officers, *id.* at ¶ 30 nn.15–16; *see* Opening Br. 35.

Turning to the constitutional arguments here, Sections 30 and 26 are constitutional for the same two reasons that the intervention provisions are constitutional. Opening Br. 21–42. Sections 30 and 26 implicate only the Attorney General's statutory authority, as the Attorney

General has no constitutional authority under *Oak Creek*. And if these provisions implicate the Attorney General's and/or Governor's constitutional authority, these provisions are constitutional because they merely give the Legislature a co-equal seat at the table, when, as relevant to the arguments in this subsection, the validity of law is at issue.

In his Response Brief, the Attorney General disputes Legislative Defendants' understanding of *Oak Creek*, in an argument addressed below, *see infra* p. 27, but effectively concedes that Sections 30 and 26 are constitutional under a shared-power analysis, as applied to validity-of-state-law cases. The Attorney General admits that making client-side decisions on behalf of the State's interest in the validity of state law is a shared authority because "the legislative branch incurs judicially cognizable injury when a duly enacted state statute is invalidated, thereby implying a possible legislative interest in defending against such invalidation." AG. Br. 39. His *only* argument to the contrary is that Sections 30 and 26 reach beyond validity-of-state-law cases. *See infra* pp. 28–29.

The Attorney General's seeming concession is outcome-determinative. A facial challenge, like that at issue here, fails unless the plaintiff can show that the statute cannot lawfully "be enforced under any circumstances." *Mayo*, 2018 WI 78, ¶ 33. Given the Attorney General's apparent concession that Sections 30 and 26 are constitutional in validity-of-state-law cases, Plaintiffs' facial challenge must be dismissed. Indeed, even if this Court were later to invalidate other applications of Sections 30 and 26, the application of these provisions to validity-of-state-law cases would necessarily survive. *See* Wis. Stat. § 990.001(11) (if "the application of [any provision] to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application"). Notably, none of the other parties develop any argument that could support a holding that Sections 30 and 26 are unconstitutional in validity-of-state-law cases.

3. Sections 30 And 26 Are Constitutional In Their Remaining Applications

If this Court chooses to address the application of Section 30 and 26 beyond the validity-of-state-law context, it should hold that these provisions are constitutional for two independently sufficient reasons: (1) these provisions warrant no separation of powers analysis under *Oak Creek*; and (2) these provisions are constitutional under that shared-power analysis, as a matter of law, because they give the Legislature a co-equal seat at the table with the Attorney General for certain client-side decisions, under *Ahern*. The contrary arguments that the other parties make are wrong.

First, the other parties' attempts to evade *Oak Creek*'s holding fail. Plaintiffs assert that *Oak Creek* helps their cause because this Court properly concluded that "'the attorney general is not the state.'" Pls. Br. 19 (quoting *Oak Creek*, 2000 WI 9, ¶ 50). That passage supports Legislative Defendants' position, showing that making decisions on behalf of the State, as client, is separate from the Attorney General's statutory power to act as the State's lawyer.

For his part, the Attorney General argues that if *Oak Creek* means what it says, then the Legislature could assign all of the Attorney General's statutory authority to litigate on behalf of the State to another officer, including to itself. AG Br. 24–25. This Court need not decide this hypothetical. If the Legislature were ever to take away the Attorney General's authority to make lawyer-side decisions and then give it to another officer or body—whether to itself, to the Governor, or to a newly created office—this Court could consider then whether the bright-line doctrine articulated in *Oak Creek* should be revised. But Sections 30 and 26 merely give the Legislature a co-equal seat at the table for certain client-side decisions, while leaving the Attorney General with his statutory authority over attorney-side decisions for the State, when no other state party appears by separate counsel. And no party has requested that this Court reconsider *Oak Creek*, meaning that any such arguments have been waived. *Parsons*, 2017 WI 37, ¶ 39 n.8.

Second, even if this Court goes beyond the *Oak Creek* argument, it should reject the other parties' claims that making client-side decisions for the State is exclusively

within the authority of the Attorney General and/or the Governor, even outside of the validity-of-state-law context.

To begin with, the Legislature has had the authority since the State's founding to make at least one critical set of client-side decisions: to "direct[ ]" the Attorney General, *Oak Creek*, 2000 WI 9, ¶ 44, to bring lawsuits on behalf of the State or one of its officers, *id.* ¶ 30 nn.15–16. The Attorney General does not explain how that statute would be constitutional under his theory that making client-side decisions for the State is *exclusively* within the Attorney General's constitutional authority, when outside of the context of validity-of-state-law cases.

Further, even beyond validity-of-state-law cases, the Legislature has a constitutional interest in the resolution of cases that impact the State's treasury. To take just one example from the Attorney General's own brief, AG Br. 32, if the Attorney General were to agree to an injunction with a prisoners'-rights organization to overhaul the Wisconsin prison system—an injunction that would cost tens of millions of dollars to comply with—that would directly implicate the Legislature's constitutional authority to

appropriate public funds. Wis. Const. art. VIII, § 2.[3] The Legislature's same constitutional interest is at issue in other settlements that impact the State treasury, which is why legislatures in several other States have the right to approve certain settlements impacting the public fisc. *See, e.g.*, Ariz. Rev. Stat. § 41-621(N) (approval of certain settlements by the joint legislative budget committee); Kan. Stat. § 75-6106(a) (approval of certain settlements by either the "state finance council" or "the legislature"); Conn. Gen. Stat. § 3-125a(a) (approval of certain settlements by the state legislature); Neb. Rev. Stat. § 81-8,239.05(4) (same); Okla. Stat. tit. 51, § 200(A)(1) (same); Tex. Civ. Prac. & Rem. Code § 111.003 (same); Utah Code § 63G-10-202 (same).

While Plaintiffs purport to rely upon out-of-state cases, Pls. Br. 14, Plaintiffs have failed to uncover a single case from any state, at any point in this Nation's history, invalidating any statute giving the legislature a co-equal

[3] The Attorney General's point that defense-side monetary settlements "require no *special* appropriation by the Legislature," AG Br. 32 n.5 (emphasis added), supports Legislative Defendants' point that, absent Sections 30 and 26, the Attorney General could enter into settlements that impact the State's treasury without the Legislature's input, notwithstanding the Legislature's constitutional power under Wis. Const. art. VIII, § 2.

seat at the table in client-side decisions, such as settlement. The above-described analogous statutes, which give legislatures of various States the authority to approve settlements, continue to operate with no apparent state-law constitutional difficulties. *Perdue v. Baker*, 586 S.E.2d 606 (Ga. 2003), is consistent with giving the legislature a seat at the table, as that case held that the Georgia legislature "may require an appeal to the U.S. Supreme Court so that the legislature's preferred reapportionment scheme be implemented." *Id.* at 616. And *In re Opinion of Justices*, 27 A.3d 859, 868–69 (N.H. 2011), and *State Through Bd. of Ethics v. Green*, 545 So. 2d 1031, 1036 (La. 1989), did not involve a statute giving the legislature a co-equal seat at the table, but, rather, either placed the decision whether to file a lawsuit *entirely* in the New Hampshire legislature, or allowed an independent Louisiana body to *unilaterally* bring a lawsuit for the collection of certain civil penalties.[4]

[4] *Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So. 3d 704 (Ala. 2010), and *State ex rel. Haskell v. Huston*, 97 P. 982, 983 (Okla. 1908), merely held that the Governors of Alabama and Oklahoma have authority to initiate lawsuits. *In re Opinion of the Justices of the Supreme Judicial Court*, 112 A.3d 926, 938 (Me. 2015), concluded that when the Maine Attorney General approves the hiring of outside counsel and has taken an opposing litigation position, he cannot direct that counsel's decisions.

Third, Sections 30 and 26 would be constitutional under a shared-power analysis—even beyond the validity-of-state-law context—because, just as in *Ahern*, there is "[a] practical requirement of unanimity between" Legislature and the Attorney General for any settlement to occur. *See* Opening Br. 35–38 (quoting 114 Wis. 2d at 108). Because, just as in *Ahern*, the Legislature only has a co-equal say in the decision at issue with the Attorney General, there is no separation of powers violation, as a matter of law. *Id.*

The Attorney General purports to distinguish *Ahern* because, in his view, making settlement decisions is at least a "*predominantly* executive power." AG Br. 26. But even if true, *but see supra* pp. 26–27, this would not distinguish *Ahern* at all, as building contract decisions are "beyond dispute . . . an executive function," 114 Wis. 2d at 106.

The Attorney General also seeks to evade *Ahern* by arguing that "if a legislative intervenor or committee refuses to consent to a proposal to resolve an ongoing case, the practical effect may be to compel the Attorney General to continue litigating." AG Br. 25. But this conflates the client-side decision of whether to settle a case on behalf of the State

with the Attorney General's function as lawyer. In terms of the Attorney General's role in making client-side decisions—whether to settle or not—the Legislature and the Attorney General must agree under Sections 30 and 26, just as the Building Commission and the Governor/Department of Administration ("DOA") had to agree in *Ahern*. And when considering the Attorney General's role as an attorney, if the Attorney General decides that he does not want to litigate a specific case, he can decline representation or withdraw,[5] permitting the appointment of special counsel to advance the client's—the State's—interests. *See* Wis. Stat. § 14.11(2)(a)2. The same could have occurred under the pre-Act 369 version of Wis. Stat. 165.08, if the Attorney General strongly disagreed with the Governor's conclusion that a case should not be settled.

Indeed, all of the practical issues that the Attorney General raises, AG Br. 27–38, to the extent they have any relevance, *but see supra* Part I.A, only show that Sections 30 and 26 raise no difficulties beyond those already part of the

[5] This would presumably occur, for example, if the Attorney General concluded that continuing the lawsuit was "frivolous." Pls. Br. 24.

pre-Act 369 regime, with the real-world difference being whether an Attorney General sees the Legislature or the Governor as easier to work with, in a given political moment, *see supra* pp. 9–10. If the Governor and Attorney General disagreed as to whether to settle a case under the pre-Act 369 version of Wis. Stat. § 165.08, that would have complicated the "negotiated agreement" that the Attorney General would want to secure. *See* AG Br. 29–30. And the Governor could have "indefinitely refuse[d] settlement proposals, or even refus[ed] to consider them." AG Br. 33–35. And so on, for all of the Attorney General's "practical" arguments here.

Similarly, the alleged confidentiality issues, which the Attorney General waived by not raising below, are just as false as to the Legislature as they would have been had they been raised as to the Governor before Act 369. AG Br. 36–38. Communications between an attorney—here, the Attorney General—and those who have a co-equal say as the client—either the Legislature, under Sections 30 and 26, or the Governor, before Act 369—are, of course, protected by attorney-client privilege. *See* Wis. Stat. § 905.03.

Finally, the Attorney General invokes this Court's constitutional authority, AG Br. 42–46, but Plaintiffs' complaint makes no reference to this Court's constitutional authority, and the Attorney General did not raise these issues below, meaning that these arguments are not properly "before this court." *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 101, 146 N.W.2d 447 (1966).

In any event, these arguments are wrong. Again, both before and after Act 369, Wisconsin law involved a hybrid situation where the Attorney General, as the State's lawyer in most cases, had to work cooperatively to make a certain category of client-side decisions on behalf of the State, as client, with another, separately elected constitutional officer/body: either the Legislature, under Sections 30 and 26, or the Governor, before Act 369. In that hybrid arrangement, which many States have, *see supra* p. 29, it is incumbent upon the Legislature and Attorney General to come to agreement as to the client's—the State's—interests under Sections 30 and 26, just as the Attorney General and Governor had to come to agreement in the pre-Act 369 world. Any practical problems that arise from a lack of agreement

are the result of either genuine differences of opinion or fleeting political machinations, both of which are of no constitutional moment.[6]

C. The Committee Review Provisions Are Constitutional As A Matter Of Law

1. The Challenge To Section 64 Must Be Dismissed, As The Governor Concedes

In their Opening Brief, Legislative Defendants explained that the challenge to Section 64—which allows the JCRAR to suspend a rule more than once—is constitutional for two independently sufficient reasons. Opening Br. 57–58. First, there is no argument that suspending a rule twice is unconstitutional, which disposes of Plaintiffs' facial challenge. Second, even if this Court were to consider a hypothetical string of multiple suspensions of a rule, this would comply with *Martinez* and *Ahern*.

In his Response Brief, the Governor concedes that the challenge to Section 64 could be dismissed because the JCRAR "has not yet sought to suspend a rule more than

[6] This Court resolved the unusual situation of an irreconcilable conflict of this type in *Koschkee*, 2018 WI 82, AG. Br. 45—where the Attorney General fundamentally disagreed with the position sought to be advanced by another constitutional officer—by authorizing the use of separate counsel.

once." Gov. Br. 56. While the Governor urges that this dismissal should be "without prejudice," *id.*, a dismissal with prejudice of Plaintiffs' *facial* claim is mandatory, *see Mayo*, 2018 WI 78, ¶ 33. This would allow a later plaintiff to bring an as-applied challenge to a string of multiple suspensions of a rule, amounting to a permanent rule repeal, should that type of action ever occur.

Plaintiffs seek to defend their challenge to Section 64 from dismissal, but their arguments fail.

On their facial challenge problem, Plaintiffs' primary response is that a second suspension is unconstitutional because it provides "no guarantee of going through bicameralism and presentment." Pls. Br. 37 & n.4. But that is wrong because if the JCRAR suspends a rule twice, and no more, then the same procedures that this Court unanimously upheld in *Martinez* would apply, just on a somewhat longer timeframe. Plaintiffs' claim that agencies will be intimidated by the very existence of Section 64 into never finalizing any rules is baseless speculation, Pls. Br. 40–41, which even the Governor does not support.

Turning to Plaintiffs' attack on a hypothetical string of multiple suspensions, Plaintiffs put forward an incorrect reading of *Martinez* as requiring bicameralism, presentment, and a quorum whenever the Legislature seeks to oversee any agency action. Pls. Br. 32–34. As Legislative Defendants explained, Opening Br. 47–48, *Martinez* does not require bicameralism, presentment and a quorum unless the Legislature is enacting "legislation as such." 165 Wis. 2d at 699. While *Martinez* said that the statute there "further[ed]" the principles underlying bicameralism and presentment, it never held nor suggested that compliance with these procedures was necessary, unless, of course, the Legislature was enacting "legislation as such." 165 Wis. 2d at 699.

But to the extent there is doubt as to *Martinez*'s meaning on this point, that doubt is definitively resolved by *Martinez*'s repeated reliance on *Ahern*, which is also binding, statewide precedent. In *Ahern*, the legislative committee could *permanently* block a construction project that the DOA and/or the Governor supported without following bicameralism, presentment, or having a legislative quorum,

and yet that statute was constitutional, even though approval of building contracts was "beyond dispute . . . an executive function." Opening Br. 45 (*Ahern*, 114 Wis. 2d at 106). That is because the Building Commission was not enacting legislation, but taking part in "a cooperative venture" with the Governor/DOA. *Ahern*, 114 Wis. 2d at 108.

Plaintiffs' anemic response to *Ahern* amounts to handwaving. Pls. Br. 39–40. Just as the Building Commission could not enter into a contract without the Governor's/DOA's agreement in *Ahern*, so too the JCRAR cannot enact a rule without the agency's agreement here. All the JCRAR can do is block a rule, exactly like the Building Commission could only block a building contract. Because Plaintiffs do not ask this Court to overrule *Ahern*, their arguments necessarily fail.

And to the extent that Plaintiffs' Response Brief could be read as an implicit request that this Court overrule *Martinez* and/or *Ahern*, Plaintiffs fail to make the high showing necessary for overruling binding precedent. While Plaintiffs are correct that "an unconstitutional provision does not become constitutional simply by repetition," Pls. Br.

38–39, Plaintiffs do not address the critical point that *Martinez* and *Ahern* have generated substantial "reliance interests" by a co-equal branch of government, which enacted dozens of statutes in reliance on these decisions, *see* Opening Br. 48–50 (quoting *Johnson Controls*, 2003 WI 108, ¶ 99). The situation here is thus hardly analogous to one where a new constitutional issue comes along, and this Court decides it as a matter of first impression.

2. The Remaining Challenges Fail

The remaining legislative review provisions are similarly constitutional because they are subject to "proper standards or safeguards," do not involve "legislation as such," *Martinez*, 165 Wis. 2d at 699, 701 (citation omitted), and create "a cooperative venture" with executive agencies, *Ahern*, 114 Wis. 2d at 108; *see* Opening Br. 52–56.

The other parties' challenges to these provisions fail. The Attorney General criticizes Sections 30 and 26 because the Committee on Joint Finance ("JFC") does not follow bicameralism and presentment, *see* AG Br. 20–21, but the Building Commission also did not go through bicameralism

and presentment in *Ahern*, and the Attorney General does not explain how this aspect of his argument can be squared with *Ahern*, *see* AG Br. 24–26 (attempting to address *Ahern* *only* when dealing with the "undue burden" argument). Plaintiffs call the robust Wis. Stat. § 13.10 procedures—applicable to the JFC's operation—inadequate because those procedures do not satisfy bicameralism and presentment. Pls. Br. 35–36. But again, the procedures in *Ahern* did not satisfy bicameralism and presentment. And Plaintiffs summarily mention this aspect of their challenge to the capitol security review provision and the intervention provisions in a footnote, Pls. Br. 35 n.2, but their lack of analysis or attempted response to Legislative Defendants' points is insufficient to save these challenges from dismissal. *See Parsons*, 2017 WI 37, ¶ 39 n.8.

D. The Guidance Document Provisions Are Constitutional As A Matter Of Law

1. The Guidance-Document-Judicial-Review Provisions And *Tetra Tech* Provision Are Constitutional, As The Other Parties Concede By Waiver

Section 35 prohibits agencies from seeking deference for interpretations of law, thus codifying *Tetra Tech*, and Sections 65 through 81 permit interested parties to seek judicial review of guidance documents. As Legislative Defendants explained, Opening Br. 61–63, these provisions are constitutional because the Legislature does not "unduly burden or substantially interfere," *Martinez*, 165 Wis. 2d at 696 (citation omitted), with the agencies when it merely regulates agencies' operation. None of the other parties dispute the constitutionality of these provisions, meaning that they have waived any such argument. *See Parsons*, 2017 WI 37, ¶ 39 n.8.

2. The Remaining Challenges Fail

Section 38 provides a notice-and-comment procedure for new and existing guidance documents, and Section 33 requires agencies to identify the applicable legal bases that support their statements or interpretations of law. These

provisions are constitutional for the same reason that the judicial-review-guidance-document provisions and the *Tetra Tech* provision are constitutional: the Legislature does not "unduly burden or substantially interfere," *Martinez*, 165 Wis. 2d at 696 (citation omitted), with agencies when it merely establishes procedures that agencies must follow when using legislatively-granted powers, Opening Br. 61–63. After all, agencies "are creations of the legislature and . . . can exercise only those powers granted by the legislature," *Martinez*, 165 Wis. 2d at 697, meaning that the Legislature may "withdraw powers which have been granted [to agencies], prescribe the procedure through which granted powers are to be exercised, and, if necessary, wipe out the agency entirely," *State ex. rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 508, 220 N.W. 929 (1928).

The arguments that Plaintiffs and the Governor offer against this straightforward conclusion are legally wrong.

Plaintiffs and the Governor first assert that providing guidance is "exclusively" within the Governor's powers because it involves the "execution and implementation of the law," not rulemaking. *See* Pls. Br. 24–27; Gov. Br. 32–39.

These parties improperly conflate the agencies, which are creatures of legislative creation and have only those powers and authorities given by the Legislature, *Martinez*, 165 Wis. 2d at 697, with the Governor himself, who has a core of exclusive constitutional authority. In *Whitman*—a case that the Governor, Plaintiffs, and Legislative Defendants all rely upon—this Court explained that the Legislature has the constitutional authority to "prescribe the procedure through which [the agencies'] granted powers are to be exercised," 196 Wis. at 508, without limitations on what the agencies were using the procedures to do—whether that be issuing rules, or issuing guidance documents that explain to the public how the agencies intend to enforce the statutes that the Legislature charged them with administering. If the Legislature enacted a law that regulated how *the Governor* spoke, this Court would need to decide whether that implicated the Governor's "exclusive" authority. But the guidance document provisions do not apply to the Governor or his office, but only to agencies. And it is well-established, under *Martinez* and *Ahern*, that regulation of agencies is subject *only* to a shared-power analysis, including when the

agencies are exercising what is "beyond dispute . . . an executive function." *Ahern*, 114 Wis. 2d at 106.

Turning to the shared-power analysis that *Martinez* and *Ahern* mandate, the Governor and Plaintiffs argue that the complaint cannot be dismissed because it alleges that these provisions "unduly burden" agencies in various practical ways. *See* Gov. Br. 39–44; Pls. Br. 27–30. But as explained above, *see supra* Part I.A, an allegation of an undue burden is merely a legal conclusion. The practical burdens alleged in the complaint are *legally irrelevant* because they do not show any "undue" alteration in the structural relationship between the Legislature and the agencies, as *Martinez* and *Ahern* require, but merely "prescribe the procedure through which [the agencies'] granted powers are to be exercised" *Whitman*, 196 Wis. at 508. Again, the Legislature gives the agencies *all* of their powers, including the power to issue guidance documents, so it can impose restrictions on how the agencies use those legislatively given powers, *Martinez*, 165 Wis. 2d at 697, including—but certainly not limited to—requiring that the

agencies follow the Chapter 227 notice-and-comment procedures.

Finally, the Governor and Plaintiffs refuse to grapple with the absurd consequences of applying their practical burdens approach to the guidance document provisions. As Legislative Defendants explained, "to adjudicate Plaintiffs' claims, under the . . . practical burdens approach, the Court would have needed to analyze whether Plaintiffs have showed that *each* of the provisions—notice-and-comment for new guidance documents, notice-and-comment for extant guidance documents, identification of statutory authority for agency publications, judicial review, and no deference—were each 'too much' work for *each* agency." Opening Br. 65–66. Only the Governor attempts to address this point, claiming that this is a "made-up standard." Gov. Br. 41. But the Governor has no answer for the rule that where a party challenges a statute as being unconstitutional on its face, it must show that the statute cannot "be enforced under any circumstances." *Mayo*, 2018 WI 78, ¶ 33 (citations omitted). Moreover, Wis. Stat. § 990.001(11) provides that "if the application of [a law] to any person or circumstance is

invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application." If the Governor's unprecedented practical burdens approach is to become the law, then, under Section 990.001(11), that burden would need to be measured as to each agency and each statutory provision challenged (each "application," *id.* § 990.001(11), and each "circumstance[ ]," *Mayo*, 2018 WI 78, ¶ 33).

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

To obtain a temporary injunction, the moving party must make four showings: (1) a reasonable probability of success; (2) lack of adequate remedy at law; (3) irreparable harm absent injunctive relief; and (4) equities, on balance, favoring injunctive relief. *See Pure Milk Prods. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Here, the other parties have made no showing of any probability of success and have not shown that the equitable factors balance in their favor. Opening Br. 67–76.

The Governor's claim that balancing the equities is inappropriate in the temporary injunction context,

Gov. Br. 59, is incorrect. As this Court has explained, a court considering a motion for temporary injunction "analyzes whether the party moving for an injunction has shown that it will suffer irreparable harm in the absence of a temporary injunction . . . [and] also compares that showing of irreparable harm with the competing irreparable harm that the party or parties who oppose the injunction and the public will suffer if a temporary injunction is issued." App. 55.

Turning to the mandatory analysis of the equities, the other parties admit by their silence that they offered no evidence to the Circuit Court of harm flowing from Sections 26, 30, or 64, which would then be balanced against the "substantial and irreparable harm of the first magnitude when a statute enacted by the people's elected representatives is declared unenforceable and enjoined before any appellate review can occur." App. 57. They, instead, rest *entirely* upon the harm that flows from *any* allegedly unconstitutional law. The other parties' default is reason enough to vacate these aspects of the injunction.

Plaintiffs assert that the agencies' affidavits below show that the equities favor a temporary injunction as to the

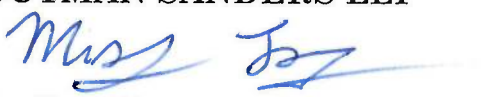
guidance document provisions, in particular, because according to these affidavits, complying with these provisions will cost significant time and money, which the agencies would rather spend carrying out other statutory duties. *See* Pls. Br. 48–52. But Plaintiffs do not explain how or why the courts are supposed to decide that the guidance provision duties are less important for the agencies to carry out than other statutory duties. Further, Plaintiffs do not attempt to reconcile these made-for-litigation affidavits with the submissions by these same agencies, less than a year before, informing the Legislature that the agencies could comply with a law with many of the same provisions with little burden. Opening Br. 73–75. Instead, Plaintiffs make the false claim that this argument was not presented to the Circuit Court. Pls. Br. 53. In fact, Legislative Defendants made the same exact argument at length before the Circuit Court. *See* Dkt. 68, at 3–4 (R.44, at 3–4).[7]

[7] Similarly false is the assertion by Plaintiffs, the Governor, and the Circuit Court that Legislative Defendants conceded below that the guidance document provisions are "cumbersome." *See* Pls. Br. 45; Gov. Br. 40; App. 41. This is the actual passage from Legislative Defendants' briefing below: "At no point . . . did the Wisconsin Supreme Court suggest that if the Legislature imposes *allegedly cumbersome* 'duties' upon an agency, this violates the Governor's authority." Dkt. 83, at 18–19 (R.62, at 18–19) (emphasis added).

CONCLUSION

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

Dated: September 19, 2019

TROUTMAN SANDERS LLP
By: 

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,982 words.

Dated this 19th day of September, 2019.

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

I hereby certify that:

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Dated this 19th day of September, 2019.

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