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,

and

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 CARE 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,

and

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

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE IN SUPPORT OF DEFENDANTS-PETITIONERS/DEFENDENTS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

INTRODUCTION AND INTEREST OF AMICUS CURIAE

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

Businesses are hesitant to make investments when longstanding administrative practices can change on a whim. The Wisconsin business community needs certainty to function properly. Many of the provisions enacted in the December 2018 Extraordinary Session provide that certainty, and conversely, the decision of the lower court has done nothing but create uncertainty.

The Plaintiffs seek to undo these reforms by calling into question the constitutionality of several statutory provisions, claiming they violate Wisconsin's separation of powers. However, it is the Plaintiffs who attempt to upset the separation of powers by attempting to weaken the longstanding scope of legislative authority.

ARGUMENT

I. Plaintiffs' Claims Fail and Should be Remanded for Dismissal.

Wisconsin's Constitution recognizes a preeminent Legislature. While the constitution vests certain executive powers with the Governor, many of the Governor's duties, and all those of the Attorney General are as "prescribed by law." Wis. Const. Art. VI, § 3. Similarly, administrative agencies are merely creatures of the Legislature, deriving all authority from it and only it. *Lake Beulah*, 2011 WI 54, ¶ 23, 335 Wis. 2d 47, 799 N.W.2d 73 (quoting *Brown Cty. v. DHSS*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (Wis., 1981)). In order to avoid the unconstitutional delegation of power to the executive branch, the Legislature must employ oversight measures to these administrative agencies. Setting aside protecting legislative authority, the public is well served by legislatively imposed accountability and transparency measures as administrative agencies wield tremendous power over the public, up to and including the imposition of criminal sanctions.

A. The guidance document reform provisions of 2017 Act 369 are constitutional.

Perhaps the most impactful reforms prescribed by 2017 Wisconsin Act 369 were good government provisions that require more transparency and accountability from administrative agencies when operating outside of the administrative rulemaking process. The Wisconsin Legislature enacted a process by which any administrative agency adopting new, or retaining previously drafted, guidance documents must hold them out for a public comment period, make them publicly accessible online, and reference the statues or rules they purport the guidance explains. *See* Wis. Stat § 227.112. What seems like a minor mandated change in agency practice – that the bureaucracy must allow the people it serves to view its work product and explain why it has authority to regulate – has engendered significant criticism. However, these reforms extend important oversight to another area of agencies' "regulatory" authority – a legislative delegation.

In theory, guidance documents explain an agency's internal policies and practices to the regulated community in an easily understandable way. Guidance does not, and cannot, have the force of law, and to the extent that it places new requirements or restrictions on the regulated community, it is invalid and unenforceable. Wis. Stat. § 227.10(2m). Nothing about the requirements of Act 369 changed these

underlying principles of administrative law. It did, however, codify these principles and provide the public and the regulated community with an opportunity to enforce these principles against their government. Prior to these reforms, absent voluntary publishing by administrative agencies, neither the public nor the Legislature had a meaningful way to review guidance documents for adherence to Chapter 227 requirements prior to their implementation. This is critical because, in practice, guidance is sometimes enforced against a regulated entity by agencies as if it were law. Agencies have used guidance documents as a substitute for the administrative rulemaking process, which they often view as too cumbersome and time consuming. Yet small business owners cannot hire lawyers or experts to identify the underlying law that guidance purportedly "explains." Small businesses often have had little recourse other than to comply with unpromulgated regulations in guidance documents, despite their dubious legality.

Prior to Act 369, administrative agencies were not required to acknowledge the creation or alteration of guidance documents. Guidance often sat in desk drawers until it was retrieved by a regulator and handed to a business along with a notice of violation. Agency reliance on what are essentially unpromulgated "rules" to the detriment of the regulated through guidance is not only illegal, but also poor public policy.

These important reforms are, on their face, constitutional. For a century, this Court has held that administrative agencies are creations of the Legislature. *See Milwaukee v. Railroad Comm.*, 182 Wis. 498, 501, 196 N.W. 853 (1924). The very existence of the administrative state is dependent upon the legislative branch, which also has the authority to change the scope of the powers and duties of their creations. *Schmidt v. Local Affairs & Development Dept.*, 39 Wis. 2d 46, 67, 158 N.W.2d 306 (1968). How can it be unconstitutional for the Legislature through its core power – legislating – to place transparency requirements on an entity that it has the authority to eliminate? It cannot. The Legislature is not "unduly burdening" the executive branch by placing procedural requirements around the delegation of authority the Legislature gave to the administrative state in the first place. The Legislature simply decided that more public input was required before an agency can develop guidance. The Legislature is free to prescribe additional safeguards to previous legislative delegations of authority to state agencies, their creations. *See Martinez v. DILHR*, 165 Wis. 2d 687, 698, 478 N.W.2d 582 (1992).

The circuit court in this case introduced a novel analysis, deciding that because the guidance provisions "substantially and unreasonably interfer[e] with the orderly operation of the various state agencies to which they apply," the provisions are unconstitutional. *SEIU v. Vos*,

Decision and Order, Case No. 19CV302, at 42 (Cir. Ct. Dane Cty., Mar. 26, 2019). This is not the standard upon which to judge constitutional encroachments according to cases such as *Martinez*, and it also misapprehends core principles of separation of powers. Under the circuit court's misguided standard, the constitutionality of this law would rest on an analysis of agency resources – namely, whether or not an agency has enough bandwidth to take on additional duties – which is a resource allocation question the constitution vests solely in the Legislature.

Requiring administrative agencies, many of which are far removed from the individuals and businesses they regulate, to explain to those they regulate the statutory basis for their authority, is an exercise of prudent legislative oversight over an entity it created. *Schmidt*, 39 Wis. 2d at 56-57 ("The legislative agency… is… an arm or agent of the legislature itself. The very existence of the administrative agency… is dependent upon the will of the legislature; its…powers, duties, and scope of authority are fixed and circumscribed by the legislature and subject to legislative change…"). Further, to require agencies to listen and respond to the regulated community's concerns and on-the-ground expertise prior to finalizing regulatory documents is well within the Legislature's constitutional prerogative.

B. JCRAR's ability to suspend rules more than once is constitutional and necessary to preserve the separation of powers.

In 2017 Act 369, the Legislature modified a longstanding procedure that administrative agencies must go through when exercising rulemaking authority delegated to them by the Legislature. Specifically, Section 64 of Act 369 allows the Joint Committee for the Review of Administrative Rules (JCRAR) to suspend a rule multiple times for one or more of six reasons enumerated in Wis. Stat. § 227.19(4)(d). Prior to Act 369, JCRAR had authority to suspend a rule once, which this Court upheld in *Martinez*. Wis. Stat. § 227.26(2)(f), (i); *Martinez*, 165 Wis. 2d at 700. To permanently repeal a rule, the Legislature must pass a bill that is then signed into law by the Governor. Wis. Stat. § 227.26(2)(h).

This narrow change to JCRAR's review procedure represents the latest step in a recent trend over the last decade of the Legislature to assert oversight over its creations to police against abuses of authority. This Court has long held up the Legislature as one of the key checks on the abuses of the administrative state.[1] Permitting JCRAR to temporarily

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[1] "To these two checks may be added a third check… that all of these administrative agencies are the creatures of the Legislature and are responsible to it. Consequently the Legislature may withdraw powers which have been granted, 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, 220 N.W. 929, 942 (Wis., 1928).

suspend a rule more than once gives the Legislature the oversight authority necessary to ensure that rules meet its intent while protecting constituents against arbitrary rulemaking. Further, multiple temporary suspensions are necessary to prevent agencies from abusing authority by simply waiting until a suspension expires before enforcing a rule that otherwise exceeds the authority delegated by the Legislature.[2] A statute allowing unelected regulators to wait out elected officials to enforce illegal or otherwise abusive rules does not provide meaningful legislative oversight.

The Plaintiffs argue Section 64 is unconstitutional under a theory that JCRAR would use this as a tool to indefinitely suspend a rule. While the circuit court raised alarms about the lack of "guidance" JCRAR would have to suspend a rule more than once, that concern was unfounded because the Joint Committee must still follow the "proper safeguards and standards" laid out in Wis. Stat. § 227.19(4)(d) when exercising this power as required by *Martinez*. *SEIU v. Vos*, No. 19CV302, at 23; *Martinez*, 165 Wis. 2d 698. Further, the circuit court erred when stating "[a] suspension of an indefinite length is essentially

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[2] Multiple temporary suspensions are also necessary to comply with this Court's holding that one legislature cannot dictate the future actions of another legislature or legislative committee. *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 450-51, 208 N.W.2d 780 (Wis., 1973).

revocation." *SEIU v. Vos*, No. 19CV302, at 23. That is because a suspension of a rule is not legislation – is not lawmaking – and thus does not need to go through the bicameralism and presentment process. *Martinez*, 165 Wis. 2d at 699.

Creating a new statutory law and temporarily suspending a rule are completely different. In the former, the Legislature and Governor take action through bicameralism and presentment resulting in a permanent statutory change that can only be undone by another affirmative action – going through the lawmaking process again. In other words, the status quo is permanently changed until another Act of the Legislature reverses it. In the latter process, affirmative action by JCRAR does not result in permanent change. The Joint Committee only temporarily suspends the rule. They then must return in a future legislative session and take another affirmative action to temporarily suspend the rule. Any lack of action results in the lapse of the suspension and a return to the status quo, the enforcement of the rule. The act of suspension – even suspension multiple times in a row – does not lead to the kind of permanent change to the status quo that comes from lawmaking. This Court got it right in *Martinez*; JCRAR is not making law when it suspends a rule.

The issue of JCRAR suspension of rules is similar to the principle at issue in *Ahren*, where the Court of Appeals upheld the Wisconsin

Building Commission's – essentially a legislative committee where legislators hold six of the eight seats – ability to withhold approvals of construction contracts. *J.F. Ahren Co. v. Wisconsin State Building Comm'n*, 114 Wis. 2d 69, 104-05, 336 N.W.2d 679 (Wis. App., 1983). In that case, the Court of Appeals noted that Wisconsin's unique separation of powers structure gave the Legislature power to "determin[e] policies and programs and review of program performance for programs previously authorized." *Ahren*, 114 Wis. 2d 69, at 101-02, citing Wis. Stat. § 15.001(1). The court held that the Commission's authority to prevent construction not meeting the Commission's approval at the contract stage did not violate the separation of powers under the shared power analysis because the Commission could not administer the construction itself, it could only "prevent construction." *Id.* at 106. In the same manner, JCRAR has authority to prevent the enforcement of a rule, not to create a new rule.

Section 64 complies with the separation of powers precedent as refined by the Wisconsin judiciary. *Martinez* and *Ahren* are clear; legislative committees can oversee and review the performance of administrative agencies operating under delegations of power from the Legislature, provided adequate safeguards – in this instance Wis. Stat. § 227.19(4)(d) – are in place.

C. The Legislature's ability to oversee the disposition of state funds or statutes is squarely within its legislative authorities and duties.

Legislative oversight of the Attorney General's settlement activity is critical to members of the public and the business community. Act 369 simply allows the client – the state of Wisconsin – to have a say when the Attorney General settles or discontinues a case on behalf of the state. 2019 Act 369 §§ 26, 30 (Wis. Stat. §§ 165.08(1); 165.25(6)(a)1)[3]. The Act allows the Legislature to have a role in settlements concerning the validity of a statute. *Id.* It provides additional client oversight of the lawyer, in this case the Attorney General. This oversight protects against a lawyer acting solely on political interests and not what is best for the client. Every other attorney in the state has an ethical duty to gain approval from their client when settling or discontinuing a case. *See* SCR 20:1.4(a)1. Since the role of the Attorney General is prescribed entirely by the Legislature, it should be uncontroversial that the Legislature retains oversight of settlement agreements entered into by the Attorney

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[3] Sections 3, 5, 28, 29, 97, 98, and 99 of Act 369 also provided that the Legislature be notified when the constitutionality or validity of any state statute was challenged, provided a right to legislative intervention, and allowed the Legislature to retain its own counsel. However, this brief will primarily focus on the two provisions – Sections 26 and 30 – which the circuit court enjoined.

General. Wis. Const. Art. VI, § 3 ("[t]he powers, duties, and compensation of the… attorney general shall be prescribed by law.").

This Court has long held as much, most recently stating, "the attorney general's powers are prescribed *only* by statutory law." *State v. City of Oak Creek*, 2000 WI 9, ¶ 24, 232 Wis. 2d 612, 605 N.W.2d 526 (emphasis ours). *Oak Creek* further elaborates that the Wisconsin Constitution eliminated all of the Attorney General's common law powers, and that the drafters of the state constitution "intended the Wisconsin statutes to be the sole authority for the Attorney General's powers." *Id.* at ¶¶ 22, 25. If the Attorney General's powers are wholly statutory, as this Court's precedent has held, then Plaintiffs' claim that the above sections of Act 369 affect the Attorney General's powers are irrelevant and no constitutional separation of powers analysis is necessary.[4]

If this Court determines that a separation of powers analysis – pertaining to either the Attorney General or Governor – is necessary as the circuit court did, the legislation still easily clears the bar of

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[4] The argument that the Legislature's modification of the Attorney General's *statutory* authority somehow impacts the Governor's *constitutional* authority is without merit. The Wisconsin Attorney General is an independently elected constitutional officer whose position is outlined under a different article of the constitution than the executive. Neither the Attorney General's nor Governor's relevant constitutional provisions outline any level of subservience by the former to the later. *See* Wis. Const. Arts. V-VI.

constitutionality. The Legislature's authority to engage in – and have a seat at the table when concluding – litigation to defend laws it has passed goes hand-in-hand with its constitutional lawmaking authority. *See Oak Creek, 232 Wis. 2d 612, ¶ 30 nn. 15-16, ¶ 44.* Therefore it cannot be either the Attorney General's or the Governor's exclusive power to control litigation on behalf of the state.

Therefore, any separation of powers analysis would be a "shared powers" analysis where there is only a constitutional violation if one branch of government unduly burdens or interferes with another. *Martinez*, 165 Wis. 2d at 696. In *Ahren*, (*supra* 9-10) the court of appeals found that the Building Commission's ability to approve construction contracts and waive competitive bidding requirements – an executive function – was constitutional because in order for the contract to become final, the Department of Administration and (generally) the Governor also had to approve it. 114 Wis. 2d at 76-77, 99-100. As such, the process was a cooperative one, and the Legislature did not unduly burden or otherwise substantially interfere with the executive. The same can be said for Sections 26 and 30. The Joint Committee on Finance cannot enter into settlement agreements on its own, it only approves agreements that the Attorney General has negotiated and submitted to the Committee. Like *Ahern*, there must be a meeting of the minds

between the Attorney General and Committee, therefore the Legislature is not unduly burdening the "executive."

Providing the Legislature with the ability to defend the validity of the very laws it passes – as well as a seat at the table when concluding a case through a settlement – is both constitutional and good policy. These provisions do not rise to the level of a separation of powers claim. Even if this Court chooses to depart from its line of earlier decisions on this topic, the contested provisions easily survive a shared powers analysis because the provisions in question foster cooperation between the Attorney General and Legislature rather than unduly burdening the "executive."

CONCLUSION

For the foregoing reasons, WMC respectfully requests that this court should vacate the temporary injunction and remand the case to the circuit court for dismissal.

Respectfully submitted this 27th day of September, 2019.

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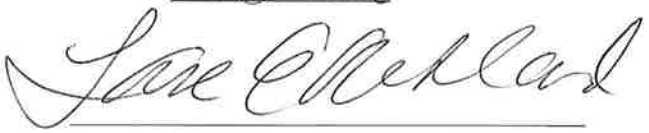

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b) and (c) for a brief and a brief produced with a proportional serif font. The length of this brief is 2,986 words.

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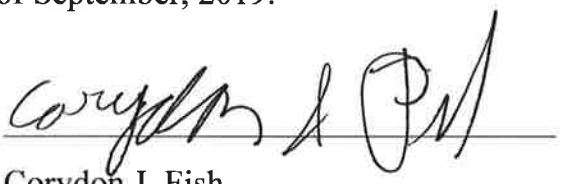
By: 

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ELECTRONIC FILING CERTIFICATION

I hereby certify that I have submitted electronic copies of this brief that complies with the requirements of Wisconsin Statutes sections 809.19(12) and (13). I further certify that the electronic copies are identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of the brief and filed with the Court and served on all opposing parties.

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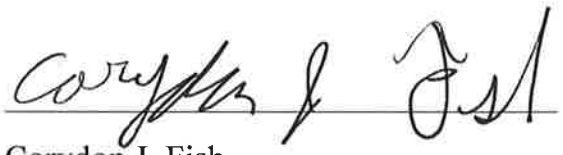
By: 

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HAND DELIVERY CERTIFICATION

I hereby certify that on September 27, 2019, this brief was hand-delivered to the Clerk of the Supreme Court. I further certify that brief was correctly addressed.

Dated this 27th day of September, 2019.

By: 

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