STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH NO. 8

Service Employees International Union (SEIU), Local 1, *et al.*,
Plaintiffs,
v.

Robin Vos, *et al.*,
Defendants.

Case No. 19-CV-302

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

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INTRODUCTION

The legislative defendants ask this Court to embrace an anemic view of separation of powers that will allow the Wisconsin Legislature to exercise unprecedented authority over state government. They ask that the Legislature, and in many cases single legislative committees, be permitted not only to pass the State's laws but also to control their execution and enforcement.

What the legislative defendants want is not permitted by the Wisconsin Constitution. The Constitution (1) vests the Executive Branch with authority to "take care that the laws be faithfully executed," which necessarily includes authority to interpret, apply, 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 and agency guidance, as well as over implementation of state policy through coordination with the federal government. Even the simplest of executive functions—requirements that forms "be submitted during business hours" or that "permit applications be stapled"—must now proceed through notice-and-comment and be certified by an agency head. In making these changes, the legislation improperly invades Executive Branch authority and also violates the basic constitutional requirements of bicameralism and presentment, and of a quorum. In many cases, the Acts enable legislative committees to manage the affairs of the Executive Branch even without passing any bills. Laws like these, which purport to grant the Legislature

extensive authority over executive functions, are unconstitutional because they materially impair and practically defeat the proper functioning of the Executive Branch.

In resisting this conclusion, 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 than it does anywhere else and permits the 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. Not so. While Wisconsin's Constitution does vary from others in some respects, it is not so "flexible" as to make ordinary separation of powers principles inapplicable. On the contrary, the Wisconsin Supreme 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, 897 N.W.2d 384. 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 state Legislature, designed to circumvent a democratic election and ensure one 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. The Wisconsin Constitution demands a different result.

ARGUMENT

I. The motion to dismiss should be denied and a temporary injunction granted.

A. The plaintiffs state a claim for relief and are likely to succeed on the merits.

As the plaintiffs explained in their opening brief, the extraordinary-session laws, 2017 Wisconsin Act 369 and 2017 Wisconsin Act 370, violate at least three sections of the Wisconsin Constitution. The Acts' provisions regarding litigation control (2017 Act 369 §§ 5, 26, 30, 97) and guidance documents (2017 Act 369 §§ 31, 38) impermissibly infringe on the Governor's power and duty to take care that the State's laws be faithfully executed. Wis. Const. Art. V, § 4. Those provisions, along with several others, also violate the Wisconsin Constitution's requirements of bicameralism and presentment, *see* Wis. Const. Art. IV, § 17, Art. V, § 10, by purporting to empower legislative committees to act with the force of law without giving the Governor the opportunity to exercise his veto (2017 Act 369 §§ 16, 64, 87; 2017 Act 370 §§ 10, 11). Finally, those provisions also violate the Wisconsin Constitution by purporting to authorize legislative committees or their leaders to act without a quorum, contrary to the Constitution's Article IV, § 7. *See* (2017 Act 369 §§ 16, 26, 30, 64, 87; 2017 Act 370 §§ 10,11).

The legislative defendants offer a series of arguments in defense of these provisions that require discarding inconvenient constitutional provisions and ignoring contrary holdings from the Wisconsin Supreme Court. As explained below, these arguments fail.

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

The provisions regarding litigation control improperly infringe on the Governor's authority. 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 behalf of the state. As the Supreme Court explained four 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 consistently reached the same conclusion. *See, e.g., Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So.3d 704, 724 (Ala. 2010) ("The right of the Governor to bring suit in the name of the state, in matters *publici juris*, has been conceded by the courts of last resort throughout this Union ever since the early days of this republic. . . . [This right] is placed upon the high ground of his duty, under the Constitution of the state, to cause the laws to be faithfully executed, and not upon any statutory ground.") (quoting *State ex rel. Haskell v. Huston*, 1908 OK 157, 21 Okla. 782, 97 P. 982, 985); *In re Opinion of the Justices of the Supreme Judicial Court*, 2015 ME 27, ¶ 5, 112 A.3d 926 (concluding that, by requiring the Governor to "take care that the laws be faithfully executed," the Maine Constitution requires the Governor, "through his office or the offices of the Executive Branch," to "advocate and litigate before federal and state administrative agencies, the courts of Maine, and other federal and state courts").

The lame-duck legislation upsets this settled understanding. The bills simultaneously strip the Executive Branch of key litigation powers and hand that power to the Legislature (or its committees) instead. *See* 2017 Act 369 §§ 5, 26, 30, 97. More specifically, the legislation grants the Legislature power to control state litigation by intervening as a party, by dictating day-to-day litigation decisions via committee, or both. *Id.* 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 offer two arguments in response, but neither has merit.

First, the legislative defendants argue that, notwithstanding the Wisconsin Constitution's language vesting authority in the Governor to "take care that the laws be faithfully executed"

(language that has universally been interpreted to include power over state litigation), the Wisconsin Governor actually has no constitutional power over state litigation because all litigation authority has been assigned to the Attorney General. Opp. 12–13. The Wisconsin Constitution says no such thing.

To be sure, the Wisconsin Constitution provides for an Attorney General and, as the legislative defendants point out, establishes that the Attorney General's powers and duties may be set by statute. Wis. Const. Art. VI, § 3. Under these provisions, the Legislature may by law transfer some portion of the Governor's power to execute the law (i.e., some of the portion that involves litigating on behalf of the state) to the Attorney General. But if the Legislature does not exercise that authority to transfer litigation power to the Attorney General, or if the Legislature strips the Attorney General of litigation power he once had, then, under the Constitution's "take care" clause, any litigation power no longer residing with the Attorney General is necessarily left to the Governor.

Consider a hypothetical bill passed by the Wisconsin Legislature to withdraw all of the Attorney General's litigation authority. Since the Attorney General's "powers" and "duties" are "prescribed by law," Wis. Const. Art. VI, § 3, such a statute might be permissible. But the effect of such a law would not be to rob the state of any official representation in court, nor would it permit the Legislature to step in and act as litigator for the State. Instead, the Governor, as chief executive, would retain control over litigation for the State. *See* Wis. Const. Art. V, § 4; *see also 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*, 2015 ME 27 (same).

The lame-duck legislation violates Article V's embodiment of this basic constitutional principle. Sections 26 and 30 of Act 369 purport to withdraw key litigation powers from both the Attorney General *and* the Governor and then to vest them in the Legislature. But the Legislature cannot allocate litigation authority once held by the Attorney General to itself. Under the "take care" clause, that authority necessarily reverts to the Governor.

The legislative defendants offer no textual basis for their contrary view. They fault (at 13) the plaintiffs' reliance on "federal and out-of-state caselaw" in interpreting the "take care" clause to include litigation authority, but they offer no authority at all—whether textual, historical, or decisional. The legislative defendants also contend that because no "Wisconsin case" has held that "the power to control litigation is any part of the Governor's constitutional authority," the meaning of the "take care" clause in the Wisconsin Constitution must be different than it is everywhere else. Opp. 13. That conclusion does not, however, follow from the defendants' premise. The fact that Wisconsin courts have not interpreted the relevant scope of the Constitution's "take care" clause likely reflects that the courts have not been confronted before by a legislative attempt to re-allocate what had been the Attorney General's role to the Legislative Branch. The extraordinary-session laws now place that question directly in issue.

The legislative defendants next claim that because "the Attorney General's authority is subject to plenary legislative control," the Legislature can, at a minimum, strip him of control over litigation. Opp. 10. But this argument falls one important step short. Although the Wisconsin Constitution grants the Legislature authority to circumscribe the Attorney General's role in litigation, it nowhere permits the Legislature then to transfer that authority to itself rather than accept that it remains with the Executive. Instead, once the Legislature exercises its constitutional authority to delimit the *Attorney General's* powers, the Legislature's authority

ends. Even if the Attorney General is "devoid of the inherent power to initiate and prosecute litigation intended to protect or promote the interests of the state," *In re Sharp's Estate*, 63 Wis.2d 254, 261, 217 N.W.2d 258, 262 (1974), under the "take care" clause that authority continues to reside with the Governor and firmly within the Executive Branch.

In sum, although the Legislature has some constitutional authority to define the powers of the Attorney General by statute, it has far overstepped that authority here. The Legislature may not take what had been the Attorney General's power over litigation and transfer that power to itself rather than allowing litigation control to revert to the Governor. Put another way, the Legislature may not use its authority to establish the Attorney General's powers and duties to bootstrap itself into an executive role as litigator, or litigation supervisor, for the state. On the contrary, the rule in Wisconsin, as elsewhere, is that the Executive Branch rather than the Legislative Branch retains all power to faithfully execute the law that is not otherwise constitutionally delegated.[1]

The provisions regarding guidance documents also improperly infringe on the Governor's authority. As the plaintiffs explained in their opening brief, 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. The letters, manuals, and handbooks that constitute agency guidance are a quintessential "function of the executive branch" because they "carry[] out those programs and policies" that the Legislative Branch has created and provide the public with critical information for the implementation of

[1] As discussed in more depth below, the provisions giving the Legislature control over key Executive-Branch litigation decisions also violate the Wisconsin Constitution for the additional independent reasons that (1) they are impermissible legislative vetoes, and (2) they violate the Wisconsin Constitution's quorum requirement for legislative action. The Wisconsin Constitution does not permit legislative committees to enact legally binding litigation decisions without observing the bicameralism, presentment, and quorum requirements.

state law. *J.F. Ahern Co. v. Wis. State Bldg. Comm'n*, 114 Wis.2d 69, 105, 336 N.W.2d 679, 695 (1983); *see also* Wis. Const. Art. V, § 4 ("take care" clause).

None of the legislative defendants' arguments in defense of these provisions has merit. First, defendants are wrong to claim that the process of issuing guidance documents "falls squarely within [the Legislature's] . . . authority" over administrative agencies. Opp. 25. Although it is true that administrative agencies are an area of "share[d] inherent interests" between the Executive and Legislative Branches, *Martinez v. DILHR*, 165 Wis.2d 687, 697, 478 N.W.2d 582, 585 (1992), 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 the Court of Appeals explained in the leading case, *J.F. Ahern*, 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 105.

The legislative defendants are therefore mistaken when they assert that the entire process of issuing guidance documents falls within the Legislature's authority to control. 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. This 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, 914 N.W.2d 21; *see also State v. Whitman*, 196 Wis. 472, 220 N.W. 929, 942 (1928) (identifying the Executive's "power to give advice" as existing apart from any legislative delegation of authority).

The lame-duck legislation's provisions regarding guidance documents obliterate this division of power. They attempt to extend legislative control over administrative agencies far beyond the Legislature's appropriate role and deep into the Executive Branch's sphere of control over day-to-day interpretation and implementation. For example, the lame-duck legislation purports to dictate procedural and substantive requirements for everything from agency websites, to instructive brochures, to handbooks explaining basic requirements or processes for obtaining state benefits. *See* Compl. ¶¶ 82–84. But agencies' authority to issue such documents is executive, not legislative—agency guidance, for instance, does not have the force or effect of law. Wis. Stat. §§ 227.01(3m), 227.112(3). As a result, only the Executive Branch can set terms for how administrative agencies exercise what are otherwise executive functions that have been delegated to them by the Governor.

Second, the legislative defendants misread *Martinez v. DILHR* when they claim it stands for the proposition that the Legislature "could simply prohibit the issuance of guidance documents," Opp. at 24, and so can also do anything short of that. While *Martinez* describes administrative agencies as "creations of the legislature" to the extent they exercise "powers granted by the legislature," 165 Wis.2d at 697, *Martinez* is also clear in explaining that the Legislature can only delegate (and later restrict) powers that it has in the first place, namely,

"[l]egislative power," including "rule-making power." *Id.* 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* power that the agency holds as a result of its position within the Executive Branch, including "the power to give advice," *Whitman*, 196 Wis.2d at 472, and the ability to "carry[] out those programs and policies" the Legislative Branch has created, *JF Ahern*, 114 Wis.2d at 105. Both of those functions are "of the executive branch," *id.*, and agencies' manner of carrying them out cannot be dictated by the Legislature.

Nor could the challenged guidance provisions survive even if agencies' authority over implementation and explanation of the law were a shared power. The provisions regarding guidance documents would still violate the Constitution because, at a minimum, they impose an undue burden and substantially interfere with the Executive's part of that power, i.e., the ability to ensure that the laws are faithfully executed. The power to create (or destroy) administrative agencies, in other words, does not bring with it the power to unduly burden the Executive Branch. The Wisconsin Supreme 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. Beck*, 208 Wis. 650, 660, 242 N.W. 576 (1932)). The lame-duck legislation's notice-and-comment, rescission, and certification requirements for guidance documents violate that rule by imposing so significant a burden that they effectively prevent the Governor from ensuring "that the law be faithfully executed."

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, *see, e.g.*, Richard Aff. ¶3; guidance documents are a critical part of fulfilling that mission, *id.* ¶¶ 8, 10, 13; and the new rules regarding guidance documents are a substantial burden on agencies' executive, interpretation and implementation function, *id.* ¶¶ 3, 5–11, 16–19; Karaskiewicz Aff. ¶ 7; Koplien Aff. ¶ 8; Rowe Aff. ¶¶ 6, 8–12; Nilsestuen Aff. ¶¶ 3, 13–14, 16–19; Kerschensteiner Aff. (Ex. A to Packard Aff.) ¶¶ 14–18; Cain Aff. (Ex. B to Packard Aff.) ¶¶ 5, 8–12. 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. Agency heads estimate that they would have to hire numerous additional, full-time staff to accomplish the review task by July 1, 2019. Richard Aff. ¶ 3; Rowe Aff. ¶¶ 8–12; Karaskiewicz Aff. ¶¶6–7. Since no additional employees are funded, however, agencies must either divert staff resources from other responsibilities and leave important tasks (like budget preparation, application processing, and responding to citizen inquiries) undone, or the Executive Branch must find millions of dollars to hire new personnel to complete this onerous process by an arbitrary deadline. Karaskiewicz Aff. ¶¶ 6-7; Rowe Aff. ¶¶ 11-12; Cain Aff. ¶ 9–10.

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 could eliminate all guidance documents, or even eliminate agencies themselves, the Legislature must also have authority to restrict agency action in any way short of destruction.

Opp. at 24. But, as explained above, control over the minutiae of agencies' daily communications with the public falls outside the scope of the Legislature's power.

The Wisconsin Supreme Court's separation-of-powers case law highlights the fundamental flaw in legislative defendants' argument. The Supreme Court has recognized that agency action is an area of shared power and has repeatedly analyzed certain legislative actions as potentially violating separation of powers with respect to administrative agencies. *See, e.g.*, *Martinez*, 165 Wis.2d at 697. If the legislative defendants' view of plenary legislative control over agencies were correct, however, such legislation could never constitute an undue burden on executive authority, because the legislation has always done something less than completely extinguish administrative agencies' existence. There is no way to square the legislative defendants' position—that anything short of destruction is permissible—with the Supreme Court's well-established framework that the Legislature cannot impose an undue burden on Executive Branch functions. This Court should decline defendants' invitation to re-write that framework here.

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

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 legal decisions 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.

Martinez establishes that the challenged provisions are unconstitutional. The legislative defendants' principal defense of these provisions rests again on a misreading of *Martinez*. In *Martinez*, the Wisconsin Supreme 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 that 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 Supreme 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 law arising from the suspension or adoption of a rule by [the committee] 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. 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.

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. While 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, *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 21–25, 232 Wis.2d 612, 605 N.W.2d 526, 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.

In response, the legislative defendants try to suggest that *Martinez* actually *approved* legislative vetoes by arguing that *Martinez* distinguished cases from other jurisdictions that had

found legislative vetoes to be unconstitutional. Opp. 18. But *Martinez*'s distinction between the at-issue Wisconsin statute and the unconstitutional out-of-state statutes did not reflect a belief that the meaning of Wisconsin's Constitution is unique, or that Wisconsin's separation-of-powers doctrine permits legislative vetoes. *See Martinez*, 165 Wis.2d at 700 n.12 (collecting cases). Instead, *Martinez* distinguished the out-of-state examples because they did not "involve a procedure comparable to that found" in the Wisconsin statute; unlike the Wisconsin law, none required the "full involvement of both houses of the legislature and the governor." *Id.* It was those "critical elements" of bicameralism and presentment that distinguished the Wisconsin law "from the statutory schemes found to violate separation of powers doctrines in other states." *Id.* at 700. The challenged statute, in short, was constitutional because it adhered carefully to Wisconsin's bicameralism and presentment requirements, not because (as defendants would prefer) Wisconsin lacks such requirements.

With respect to the procedures regarding suspension of administrative rules, the legislative defendants also try to downplay the significance of Act 369 by describing it as having made only "one change" to what was upheld in *Martinez*. Opp. 22. But that "one change" makes all the constitutional difference. The procedure upheld in *Martinez* provided for a single temporary suspension by committee; if the Legislature did not vote to repeal the rule or if the Governor vetoed the repeal, the Joint Committee for the Review of Administrative Rules could not suspend the rule again. 165 Wis.2d at 700. Act 369, by contrast, 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. 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 respect to the litigation-control provisions, the legislative defendants stretch the Wisconsin Constitution and the *City of Oak Creek* line of cases beyond recognition. The Wisconsin Constitution provides that the "powers, duties and compensation of the . . . attorney general shall be prescribed by law." Art. VI, § 3. The Wisconsin Supreme Court, in turn, has read "by law" to mean "only by statutory law," concluding that the Wisconsin Constitution removed the powers and duties that the Attorney General had previously possessed under the common law. *City of Oak Creek*, 2000 WI 9, ¶¶ 22–25. In other words, the Attorney General, like some other state officers, is limited to the duties and powers defined by statute. But the legislative defendants ignore the role of statutory law here entirely, instead converting *City of Oak Creek* into a license for "plenary control" (at 1) by the Legislature over the Attorney General that goes beyond legislation and allows for supervisory control by committee. *Cf. Coyne v. Walker*, 2016 WI 38, ¶ 67, 368 Wis. 2d 444, 879 N.W.2d 520 ("The essence of supervision includes the power to prevent an action at one's discretion.").

Nor are the constitutional defects in these provisions "hypothetical" as the legislative defendants suggest. Opp. 20. 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. Put another way, 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*, 376 Wis.2d 147, ¶ 44, because a committee's latent power to "disapprove rules and regulations" is "in

practical effect the power to prescribe the rules and regulations," *State v. 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 (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*, 376 Wis.2d 147, ¶ 44. That is exactly what is happening here.

In sum, *Martinez* reflects that Wisconsin's Constitution, no less than any other constitution, imposes the requirements of bicameralism and presentment on "any legislative action" that has permanent legal consequence. 165 Wis.2d at 700. Because the challenged provisions of Act 369 fail to comply with those requirements, they are unconstitutional.

Martinez did not water down the Wisconsin Constitution's bicameralism and presentment requirements. The legislative defendants also err in claiming that *Martinez* held that the statute at issue "complied with bicameralism and presentment because the Legislature had followed those constitutional formalities in adopting" the statute itself. Opp. 17. On the contrary, the Court in *Martinez* upheld the statute not because that statute itself had gone through bicameralism and presentment but because the statute created a procedure according to which "only the formal bicameral enactment process coupled with executive action [could] make permanent a rule suspension." 165 Wis.2d at 699 (explaining that the statute "further[ed] bicameral passage, presentment and separation of powers principles by imposing mandatory checks and balances on any temporary rule suspension"). What mattered, in other words, was the "full involvement of both houses of the legislature and the governor" with respect to the rule-change process in each

instance of legislative suspension, not—as the legislative defendants would have it—with respect to the underlying statute alone. *Id.* at 700.

Nor is it true that *Martinez*'s reference to the need for "standards or safeguards" frees the challenged lame-duck laws from their constitutional obligations. Opp. 19. *Martinez* of course did use that phrase, but the opinion makes clear that the safeguards to which the Court was referring are the bicameralism and presentment requirements in the Wisconsin Constitution. 165 Wis.2d at 700; *see also id*. (identifying those specific safeguards as "critical"). By contrast, the asserted "safeguard[]" that the legislative defendants invoke here—Wisconsin Statute 13.10—does not come close to satisfying the Wisconsin Constitution's "presentment and bicameral requirements." *Martinez*, 165 Wis.2d at 692.

For one thing, Section 13.10 provides no opportunity for the Governor to veto inaction by the Joint Committee, even though, under the challenged provisions, Committee inaction can effectively operate as a disapproval. Sections 26 and 30 of Act 369, for instance, require the Committee's affirmative approval for a settlement plan. The Committee may reject such a plan simply by scheduling a meeting to consider it and then doing nothing, rendering Section 13.10's "veto" procedure useless. What's more, Section 13.10 allows the Joint Committee to override the Governor's veto with a vote of two-thirds of the *Committee*'s members—a far cry from Article V of the Wisconsin Constitution, which requires two-thirds of the entire Legislature to override a gubernatorial veto. *See* Wis. Const. Art. V, § 10(2). 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. Finally, Section 13.10 applies only to the Joint Committee on Finance, and so 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.

For all these reasons, Section 13.10 is not a "safeguard" that satisfies *Martinez*'s requirements. As the Supreme Court made clear, a legislative committee may take an action that has permanent legal consequences only if it does so pursuant to procedures allowing for "[t]he full involvement of both houses of the legislature and the governor." *Martinez*, 165 Wis.2d at 700. The extraordinary-session legislation falls far short.

Under Martinez, legislative action that creates a permanent legal consequence must comply with bicameralism and presentment requirements. The legislation's basic constitutional defects also are not cured by *Martinez*'s statement that "an administrative rule is not legislation." 165 Wis.2d at 699. Although the legislative defendants claim this observation means approval or disapproval of agency action does "not create 'law,'" Opp. 19, *Martinez* simply recognizes that administrative rules are different from *legislation*. *Martinez* nowhere suggests that administrative rules are not "law." To 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)).[2]

Indeed, that principle is black-letter law in Wisconsin and everywhere else. "Administrative rules enacted pursuant to statutory rulemaking authority have the force and effect of law." *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't of Nat. Res.*, 2004 WI

[2] Nor does *Martinez* provide any basis to support the legislative defendants' assertions that the Wisconsin Supreme Court has approved legislative committee oversight over "agency actions." Opp. 16. *Martinez* dealt with a procedure involving legislative oversight over agency rulemaking; nothing in the decision supports oversight over all "actions."

40, ¶ 5 n.5, 270 Wis.2d 318, 677 N.W.2d 612 (quoting *Staples v. DHSS*, 115 Wis.2d 363, 367, 340 N.W.2d 194 (1983)). So it is that "any law arising from the suspension or adoption of a rule by" the legislative committee "must meet both the bicameral passage and presentment requirements." *Martinez*, 165 Wis.2d at 699. Similarly, because all the legislative vetoes purportedly authorized by the extraordinary-session legislation carry the force and effect of law, and bind constitutional officers, other government officials, and, in some circumstances, change the legal obligations of Wisconsin citizens, they require bicameral passage and presentment to pass muster.

This view has in fact prevailed in this State for more than half a century. Beginning in 1954, the Attorney General issued a series of opinions making clear that any effort by the Legislature to repeal, rescind, or otherwise void administrative rules either by joint resolution or by committee action would be invalid. *See* 43 Op. Att'y Gen. 350 (1954); 52 Op. Att'y Gen. 423 (1963); 63 Op. Att'y Gen. 168 (1974). The Attorney General explained 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." 52 Op. Att'y Gen. at 424. Thus, such "legislative act[s]" "must be enacted by a bill" and "presented to the governor for approval or disapproval." *Id.* Failure to satisfy these requirements would violate both Article IV and Article V; "deprive the executive branch of government the opportunity to exercise its power to veto an act of the legislature"; and "unconstitutionally encroach[] on the executive branch." 63 Op. Att'y Gen. at 163. The legislative defendants' argument cannot survive this settled understanding.

The existence of other state statutes imposing similar legislative-veto schemes does not save the challenged provisions here. The legislative defendants' final argument with respect to

bicameralism and presentment is that Wisconsin statutes are peppered with "analogous" legislative vetoes. Even if true, 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'.

The possibility that other statutory provisions might be constitutionally problematic is also not nearly so surprising as defendants would have the Court believe. The federal government and many states have in the past experimented with legislative vetoes and passed many statutes creating them. When those statutes have been challenged, however, courts have not hesitated in striking them down. In the U.S. Code, for example, there were more than 160 legislative veto provisions in the years leading up to the U.S. Supreme Court's decision in *I.N.S. v. Chadha*. *See* 462 U.S. 919, 944–45 (1983)*; see also* James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 Ind. L.J. 323, 324 (1977). And the states were "even more active than the federal government" when it came to legislative vetoes. L. Harold Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 Wm. & Mary L. Rev. 79, 81 (1982). Yet none of those provisions forestalled the Supreme Court's near-unanimous conclusion that they violated separation of powers. Nor has the existence of those many provisions forestalled the same conclusion by state courts. *See* 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 examples).

The legislative defendants suggest that "[c]ourts in other jurisdictions have . . . com[e] to divergent conclusions" on the constitutionality of legislative vetoes like the ones at issue here, referring to "jurisdictions" in plural but citing only the example of Idaho. Opp. 18. As it turns out, Idaho's is "the only legislative veto scheme that has affirmatively withstood judicial or attorney general scrutiny." Falkoff, *The Legislative Veto in Illinois*, 47 Loy. U. Chi. L.J. at 1084; *see also id.* at 1085 n.169 (describing *Martinez* as a decision "finding no constitutional problem with a legislative review scheme in which a joint committee was authorized only to *recommend* that the legislature pass legislation through the usual enactment process in order to prevent agency rules from being implemented"). At least as of 2016, every other state supreme court—a dozen in total—has disagreed. *Id.* at 1084. And Idaho's system at least requires the full bicameral involvement of the legislature. "[N]o scheme authorizing a *committee* to exercise veto powers over agency rulemaking has ever been upheld as constitutional in any jurisdiction, federal or state." *Id.* at 1084–85.

3. The challenged provisions also violate the Wisconsin Constitution's quorum requirement, which the legislative defendants failed to address.

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. *See* Compl. ¶¶ 121–31. Beyond a bare assertion that *Martinez* "disposes" of the quorum-requirement problem, the legislative defendants offer no actual response with respect to this issue, and *Martinez* does not in fact discuss the matter at all. *See* 165 Wis.2d at 687–702.

Under the Wisconsin Constitution, the Legislature cannot "do business" without a quorum consisting of a majority of each house. Wis. Const. Art. IV, § 7. 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 (1781), 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 Stud. in Am. Pol. Dev. 142, 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, 110–20; 2017 Act 369 §§ 16, 26, 30, 64, 87; 2017 Act 370 §§ 10, 11. These provisions exemplify the danger Thomas Jefferson warned of: the phenomenon of 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 an important constitutional protection, and they certainly cannot be upheld on the basis of *Martinez*, which did not even address the relevant issues.

4. The legislative defendants' inaccurate description of plaintiffs' claims as "novel" is not a sufficient basis for denying injunctive relief.

For all the reasons previously given, the plaintiffs state viable claims and are likely to succeed on the merits of their claim. In response to the plaintiffs' request for injunctive relief, the

legislative defendants contend that the Court should nevertheless deny such relief "because each of the theories that Plaintiffs espouse is novel, and thus of a 'doubtful or unsettled character.'" Opp. 26 (quoting *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 509, 66 N.W.2d 157, 160 (1954)). This argument is without merit.

To begin, plaintiffs' claims are not "novel" but are instead founded on well-settled rights and constitutional principles. They rest on the "tripartite separation of independent governmental power," which the Wisconsin Supreme Court has described as "the bedrock of the structure by which we secure liberty in both Wisconsin and the United States." *Gabler*, 2017 WI 67, ¶ 3. In *Gabler*, the Supreme Court detailed the long history of separation of powers and explained that separation 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," *id.*, which has embodied the tripartite division of power since it was adopted in 1848.

The authority assigned to the Executive Branch is also well-settled under Wisconsin law. The Executive possesses the authority to enforce the law, which includes the authority to interpret and implement the law. *Tetra Tech EC, Inc.*, 2018 WI 75, ¶ 53; *Schuette v. Van De Hey*, 205 Wis.2d 475, 480–81, 556 N.W.2d 127, 129 (1996). In short, plaintiffs' claims are neither novel nor based on "unsettled" rights.

The legislative defendants are wrong in any event to suggest that a disputed legal question makes preliminary injunctive relief improper. To support this position, the defendants rely on *Mogen David Wine Corp. v. Borenstein*'s statement that preliminary relief will not be granted where the claims involved "raise questions of a doubtful or unsettled character." 267 Wis. at 509. But *Mogen*, which has not been cited for this or any other proposition in more than

forty years, was entirely different. There, the dispute the court was referencing was a factual dispute regarding the very premise of the case—the existence of contracts that formed "essential" elements of the plaintiffs' claims. *Id.* at 507. Here, in contrast, the plaintiffs' claims are at their core pure questions of law. To hold that a disputed legal issue renders a case unfit for preliminary relief would be to make such relief unavailable in nearly any case. That is not the law, and never has been.

Any doubt as to that conclusion can be resolved by considering *Pure Milk Products Co-op. v. National Farmers Organization*, 64 Wis.2d 241, 252, 219 N.W.2d 564, 570 (1974). In *Pure Milk Products*, the Wisconsin Supreme Court cited to *Mogen*, but upheld the issuance of preliminary relief even though it was clear that the underlying legal right at issue had not been previously established. *See id.* at 254–57. *Pure Milk Products* thus demonstrates that *Mogen* should not be read to prohibit the issuance of preliminary relief where legal disputes involve new legal questions.

Ultimately, the legislative defendants' attempt to raise the specter of "doubtful" or "unsettled" legal principles falls flat. This case is about well-established legal principles embodied in the Wisconsin Constitution and the decisions of its highest court.

B. The plaintiffs will suffer irreparable harm if an injunction is not granted.

The plaintiffs demonstrated in their opening brief that they are suffering and will continue to suffer irreparable harm absent an injunction. Opp. 18–25. The Governor's submission provides strong support for plaintiffs' position with respect to harm.

The extraordinary-session legislation is causing irreparable harm in a number of ways. As an initial matter, the legislation's continuing violations of the Wisconsin Constitution are irreparable harm per se. *See* Order Denying Motion for Stay at 6, *Madison Teachers, Inc. v.*

Walker, No. 11CV3774 (Wis.Cir.Ct. Oct. 22, 2012), https://perma.cc/9XHQ-53QH; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that the loss of constitutional freedoms "for even minimal periods of time . . . unquestionably constitutes irreparable injury"). When the government violates the constitution, it erodes the public's trust and thus the government's legitimacy. Because such trust is "not easily restored," courts consider its erosion to be an irreparable harm. *Chicago v. Sessions*, 321 F. Supp. 3d 855, 877 (N.D. Ill. 2018).

Ongoing constitutional violations are particularly damaging when separation of powers is undermined, because separation of powers is a "bedrock" principle and even small encroachments upset the balance of power. *Gabler*, 376 Wis.2d 147, ¶ 3. The Wisconsin Supreme Court has specifically recognized that harm is done if "the legislature [can] with impunity violate the constitutional limitations of its powers." *City of Appleton v. Town of Menasha*, 142 Wis.2d 870, 879, 419 N.W.2d 249, 253 (1988) (quoting *Columbia Cnty. v. Wis. Ret. Fund*, 17 Wis.2d 310, 319, 116 N.W.2d 142 (1962)).

The legislative defendants argue that constitutional injury is too "general" to justify an injunction, but their argument is both inaccurate and unsupported by case law. Affidavits submitted by the Governor provide a number of specific examples of the irreparable harm being done, as did plaintiffs' opening brief. As just one example, the disagreement among Governor Evers, the Attorney General, and the Legislature over the State's participation in the *United States v. Texas* case has already caused real confusion: Following the Governor's direction to withdraw from the Affordable Care Act (ACA) case, the Attorney General wrote a public letter to the Governor on January 23, 2019, in which he first opined that it would be "reasonable" to believe the State could withdraw because the case "will not be compromised or discontinued even if the State withdraws." Letter from Joshua L. Kaul, Att'y Gen., to Tony Evers, Governor

(Jan. 23, 2019), https://perma.cc/9D7N-D5BY. Nonetheless, the Attorney General found "ambiguity" in the Legislature's language and concluded that, given the Legislature's "intent in enacting Wis. Stat. § 165.09(1)," that provision "would likely be interpreted to apply to a motion to withdraw . . . as a party to the ACA litigation." *Id.* Confusion continues because, as defendants point out, the Attorney General has not been given authorization to withdraw from the ACA litigation yet also "appears not to be participating in the litigation at present." Opp. at 28.

To sum up this state of affairs, the Attorney General apparently believes he could withdraw from the ACA case without violating the plain terms of the challenged statute but also believes that the statute would be interpreted as covering such a withdrawal. The Attorney General wants to withdraw from the litigation (as Attorneys General have been able to do for more than 100 years) but feels he cannot because the Legislature has not approved that step. At the same time, the Attorney General is also not participating actively in the litigation (in which the state is still a party) and has not noticed an appearance. Meanwhile, the State's citizens are left in the lurch, clear that they voted for a Governor who advocated withdrawing from the ACA case but still left with the threat of that case hanging over what, for many of them, are life and death concerns. Argandona Aff. ¶ 8; Rickman Aff. ¶ 10; Zapata Aff. ¶ 9; Kohlhaas Aff. ¶ 9; Owley Aff. ¶ 10. If the legislative defendants truly believe (as they say at 28) that "any confusion" about the state of the ACA litigation and the State's participation in it has "end[ed]," they are likely alone in that belief.

In addition to the per se irreparable harm of constitutional violations, and the turmoil just described, the lame-duck legislation has already caused taxpayer funds to be spent that can never be recovered. The legislative defendants attempt to minimize the amount being spent, but even if the amount were small, the harm would still be irreparable. 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. Karaskiewicz Aff. ¶ 6. Other affiants predict similar expenditures, *see* Koplien Aff. ¶ 7, and the Attorney General's inability to settle or withdraw cases will also soon cost money. Although the Attorney General has not yet appeared on behalf of the State in the ACA case, he will inevitably have to do so if Wisconsin remains a party in the litigation.

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. Nilsestuen Aff. ¶ 14; *see also* Rowe Aff. ¶ 10 (Department of Human Services has over 29,105 existing documents and communications); Richard Aff. ¶¶ 4, 5, 12 (Department of Workforce Development has "thousands" of documents, including 72,000 related to worker's compensation alone); Koplien Aff. ¶¶ 5–6 (Department of Veterans Affairs has 806 existing documents with 100–200 new documents created annually); Karaskiewicz Aff. ¶¶ 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 regular jobs.

These opportunity costs are significant, especially for the most vulnerable Wisconsin citizens who are 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. Rickman Aff. ¶¶ 13–15. Yet because of the unconstitutional lame-duck legislation, the State's agencies are unable to turn to new work. And the time that the Evers Administration is losing can never be regained. His administration is 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. Karaskiewicz Aff. ¶ 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. Rowe Aff. ¶ 10. And all of the agencies will face difficulty because the legislation's July 1 deadline aligns with implementation of the newest state budget, Nilsestuen Aff. ¶ 19, which will contain hundreds of pages of new state law that must be implemented through agency rulemaking. *Id.* Under these circumstances, hundreds or thousands of guidance documents on which Wisconsin residents rely will almost certainly disappear, not because they are somehow "unlawful" as defendants suggest (at 30), but because there are not enough agency personnel to do regular agency work and the Legislature's useless make-work at the same time.[3]

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

[3] And even if an agency were somehow able to somehow meet the July 1 deadline, it would likely still have to remove many guidance documents that appear in formats such as video or interactive webpage because the Legislative Reference Bureau simply has no way to review guidance documents unless they are submitted via PDF. Nilsestuen Aff. ¶¶ 7–11, 16.

citizens. Richard Aff. ¶ 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* Rowe Aff. ¶¶ 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. Richard Aff. ¶ 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. Richard Aff. ¶¶ 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." Richard Aff. ¶ 15.

Unlike plaintiffs and the public, legislative defendants will not suffer any irreparable harm if an injunction is entered returning Wisconsin to the governing system under which it operated for decades. Defendants claim an injunction will prevent them from intervening in

League of Women Voters of Wis. v. Knudson, No. 19cv84, but that is not necessarily so. Legislators may move to intervene under the standards that have always applied and, if not successful, can participate as amici. Nor will there be, as legislative defendants claim (at 29–30), "grave doubt" about the validity of any withdrawal or settlement by the Attorney General during the period of an injunction. An injunction would merely preserve the status quo that Wisconsin enjoyed for almost a century, during which the Attorney General was able to withdraw from and settle lawsuits on behalf of the State. Any action by the Attorney General will have full legal force as it always has, and, in any event, defendants should not be able to use their unconstitutional laws to bootstrap themselves to "grave doubt."

Finally, the legislative defendants claim (at 30) that an injunction may cast doubt on "the validity of dozens of preexisting legislative oversight provisions." But, as described in detail above, the existence of many similar provisions has been a hallmark of legislative-veto cases, and courts have not hesitated to strike those unconstitutional vetoes down. Given the near-unanimity of the nation's courts on the issue of legislative vetoes, any reasonable observer would have regarded those provisions with some doubt. The issuance of preliminary relief in this case, which would not finally resolve the status of those statutes one way or another, would not create any meaningful harm.

II. The legislative defendants do not meet the standard for a stay pending appeal.

In a last-ditch effort to keep the challenged Acts in effect, the legislative defendants ask for a stay pending appeal. A stay is not justified in this case.

"A stay pending appeal is appropriate where the moving party: (1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other

interested parties; and (4) shows that a stay will do no harm to the public interest." *State v. Gudenschwager*, 191 Wis.2d 431, 440, 529 N.W.2d 225, 229 (1995). In other words, the legislative defendants must demonstrate the inverse of all the factors plaintiffs must demonstrate for an injunction, and the entirety of the plaintiffs' opening and reply briefs refute the case for a stay. Indeed, if the Court concludes that the plaintiffs have met the requirements for injunctive relief, it would be inconsistent to also conclude that the defendants have satisfied the criteria for a stay pending appeal.

CONCLUSION

This Court should grant the plaintiffs' request for preliminary injunctive relief and deny the defendants' motion to dismiss.

Respectfully submitted,

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/s/ Jeremy P. Levinson

JEREMY P. LEVINSON (SBN 1026359)
STACIE H. ROSENZWEIG (SBN 1062123)
320 E. Buffalo Street, Suite 700
Milwaukee, WI 53202
(414) 271-3400
(414) 271-3841 (fax)
jpl@hallingcayo.com
shr@hallingcayo.com

TIMOTHY E. HAWKS (SBN 1005646)
BARBARA ZACK QUINDEL (SBN 1009431)
HAWKS QUINDEL S.C.
222 E. Erie Street, Suite 210
P.O. Box 442
Milwaukee, WI 53201
(414) 271-8650
(414) 271-8442 (fax)
thawks@hq-law.com
bquindel@hq-law.com

MATTHEW W.H. WESSLER*
DEEPAK GUPTA*
DANIEL TOWNSEND*
GUPTA WESSLER PLLC
1900 L Street, NW, Suite 312
Washington, DC 20036
(202) 888-1741
(202) 888-7792 (fax)
matt@guptawessler.com
daniel@guptawessler.com

NICOLE G. BERNER*
CLAIRE PRESTEL*
SERVICE EMPLOYEES INTERNATIONAL UNION
1800 Massachusetts Avenue, NW
Washington, DC 20036
(202) 730-7468
nicole.berner@seiu.org
claire.prestel@seiu.org

DAVID STROM*
AMERICAN FEDERATION OF TEACHERS
555 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 879-4400
(202) 393-6385 (fax)
dstrom@aft.org

Counsel for Plaintiffs

**admitted pro hac vice*