STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH NO. ___

SERVICE EMPLOYEES
INTERNATIONAL UNION (SEIU),
LOCAL 1,
250 E. Wisconsin Ave,
Milwaukee, WI 53202,

SEIU HEALTHCARE WISCONSIN,
4513 Vernon Blvd #300
Madison, WI 53705,

MILWAUKEE AREA SERVICE AND
HOSPITALITY WORKERS,
1110 N. Old World 3rd Street, Suite 304
Milwaukee, WI 53203,

AFT-WISCONSIN,
1602 S. Park Avenue,
Madison, WI 53715,

WISCONSIN FEDERATION OF NURSES
AND HEALTH PROFESSIONALS,
9620 West Greenfield Avenue,
West Allis, WI 53214,

RAMON ARGANDONA,
563 Glen Drive
Madison, WI 53711,

PETER RICKMAN,
3702 South 20th Place
Milwaukee, WI 53221,

AMICAR ZAPATA,
3654 S. 22nd Street
Milwaukee, WI 53221,

KIM KOHLHAAS,
4611 Otsego Street
Duluth, MN 55804,

JEFFREY MYERS,
342 North Yellowstone Drive
Madison, WI 53705,

Case No. _____

Declaratory Judgment: 30701
Injunction or Restraining Order: 30704

ANDREW FELT,
3641 Jordan Lane,
Stevens Point, WI 54481,

CANDICE OWLEY,
2785 South Delaware Avenue,
Milwaukee, WI 53207,

CONNIE SMITH,
4049 South 5th Place,
Milwaukee, WI 53207,

JANET BEWLEY,
60995 Pike River Road,
Mason, WI 54856,

Plaintiffs,

v.

ROBIN VOS, in his official capacity as
Wisconsin Assembly Speaker,
321 State St,
Madison, WI 53702,

ROGER ROTH, in his official capacity as
Wisconsin Senate President,
State Capitol—Room 220 South
Madison, WI 53707

JIM STEINEKE, in his official capacity as
Wisconsin Assembly Majority Leader,
2 E Main St,
Madison, WI 53703

SCOTT FITZGERALD, in his official
capacity as Wisconsin Senate Majority Leader,
206 State St,
Madison, WI 53702

JOSH KAUL, in his official capacity as
Attorney General of the State of Wisconsin
7 W Main St,
Madison, WI 53703,

TONY EVERS, in his official capacity as
Governor of the State of Wisconsin,
State Capitol—Room 115 East
Madison, WI 53702,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

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INTRODUCTION

In December 2018, the Wisconsin Legislature convened an extraordinary session to pass a series of bills that served a single purpose—strip as much power as possible from the Executive Branch and hand it directly to the Legislature. The motive behind this unprecedented power grab was clear: The people of Wisconsin had elected Tony Evers to serve as Governor, and the Legislature, along with the lame-duck Governor, planned to stymie the will of the people and prevent the incoming Governor from exercising authority that contravened the Legislature's preferences.

The Legislature's effort to arrogate power to itself violates Wisconsin's Constitution. The bills passed by the Legislature and signed by the outgoing Governor have fundamentally altered Wisconsin's system of government by shifting core functions of the Executive Branch to the Legislature, or even a single committee within the Legislature. The extraordinary legislation prevents the Governor and Attorney General from settling or withdrawing from litigation, requires the Attorney General to defend even plainly unconstitutional statutes, authorizes the Legislature to intervene and hire private lawyers at taxpayer expense in a broad range of pending litigation, allows a legislative committee to suspend unilaterally rules and regulations properly propounded by executive agencies, imposes burdensome obstacles before the Executive Branch can issue any documents explaining the laws and rules of the State to its citizens, and dictates that agencies must seek legislative approval before acting in a variety of contexts both big and small.

These provisions are unlawful because they violate the separation of powers protections embodied in the Wisconsin Constitution. They usurp the Executive Branch's authority to take care that the laws of the State are faithfully executed. They improperly allow the Legislature to evade the Governor's constitutionally required opportunity to veto legislative actions. And they vest

significant authority in small legislative committees, contravening the Wisconsin Constitution's express requirement that a majority of legislators be present to enact law.

The upshot: The extraordinary-session legislation takes core parts of what it means to enforce and execute Wisconsin law—namely, the enforcement and execution of that law in court and the responsibility to explain and communicate that law to Wisconsin citizens—and either impermissibly burdens those powers or redistributes them to the Legislative Branch. In so doing, the challenged bills have transformed the Legislative Branch from the body that passes laws (as it is described to every school child around the country) into a branch that passes *and controls execution and enforcement* of those laws.

The damage caused by the Legislature's power grab is already being felt. The extraordinary legislation is depleting the State's public funds by, *inter alia*, authorizing the expenditure of taxpayer money to pay for the defendants to hire private counsel; preventing the Executive Branch from ending unnecessary and costly litigation in which it is involved; and sowing confusion over who has authority and control over ongoing litigation. The lame-duck laws also threaten the continued use of and reliance on (by plaintiffs and others) documents that explain how state citizens can access public resources, make use of government programs, and ensure they are following state law. And the legislation will force executive agencies to defend against private lawsuits challenging nearly any document ever produced that explains State laws and procedures to Wisconsin citizens. Just as troubling, the lame-duck legislation has upset the tripartite balance of power that serves as "the bedrock of the structure by which we secure liberty in both Wisconsin and the United States." *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, 376 Wis. 2d 147, 897 N.W.2d 384, ¶ 3. In doing so, the legislation has begun and will continue to erode the public's trust in the electoral process and the legitimacy of the State's government, which is not the government the citizens voted for.

The plaintiffs, as taxpayers of the State of Wisconsin, have filed an action seeking a declaratory judgment and injunctive relief to prevent the defendants from enforcing the unconstitutional provisions of the extraordinary-session legislation. Because of the ongoing irreparable harms caused by the unconstitutional laws, the plaintiffs also seek a temporary restraining order and temporary injunction to prevent the enforcement of the lame-duck laws until a decision on the merits of this case can be made.

BACKGROUND

On November 6, 2018, defendant Tony Evers was elected Governor of the State of Wisconsin. Shortly after Governor Evers's election, state lawmakers, including defendants Vos and Fitzgerald, called a legislative session to take place before the governorship changed hands. Compl. ¶38. Going into the extraordinary session, the defendants announced a 141-page package of bills designed to strip the incoming Governor of his authority and hand the Legislature unprecedented power over traditionally executive functions. Compl. ¶39. The Legislature's Joint Committee on Finance held a single day of hearings on the proposed bills before voting along party lines to approve most of them. Compl. ¶40. The Legislature then rushed the bills through in an overnight session. Compl. ¶42. Although the extraordinary-session legislation immediately faced widespread criticism, then-Governor Walker nevertheless signed the bills into law on December 14, 2018. Compl. ¶¶45-47. On January 7, 2019, Evers became Governor of Wisconsin.

The legislation enacted during the extraordinary session and signed into law by then-Governor Walker made substantial changes to existing Wisconsin law that transformed the fundamental balance of power among the coordinate branches of government.

First, several provisions strip the Executive Branch of its authority over litigation involving the State. Section 97 of Act 369 permits the Legislature to intervene in any action in which a party "challenges the construction or validity of a statute," whether "as part of a claim or affirmative

defense," including actions in which a party "challenges in state or federal court the constitutionality of a statute, facially or as applied" or "challenges a statute as violating or preempted by federal law." Compl. ¶65. Section 5 of Act 369 provides that if the Legislature or a legislative committee intervenes under the provision created by Section 97, it may "obtain legal counsel other than from the department of justice," with the cost of representation paid from appropriations for the general program operations of the Legislature. Compl. ¶67.

Additionally, Section 26 of Act 369 prevents the Governor from ending "[a]ny civil action prosecuted by the department [of justice] by direction of any officer, department, board, or commission, or any civil action prosecuted by the department on the initiative of the attorney general or at the request of any individual." Compl. ¶68. Section 26 instead transfers the power to end civil litigation to the Legislature, providing that a civil action "may be compromised or discontinued" only with the approval of a legislative intervenor, or, "if there is no intervenor, by submission of a proposed plan to the joint committee on finance for the approval of the committee." Compl. ¶69. The Act is clear that "[t]he compromise or discontinuance may occur only if the joint committee on finance approves the proposed plan." Compl. ¶69. The Act also provides that "[n]o proposed plan may be submitted to the joint committee on finance if the plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal laws, without the approval of the joint committee on legislative organization." Compl. ¶70.

Section 30 of Act 369 imposes similar limits on the Attorney General's ability to compromise or settle litigation, mandating that if an action "is for injunctive relief or there is a proposed consent decree," the Attorney General may not compromise or settle the action "without the approval of an intervenor . . . or if there is no intervenor without first submitting a proposed plan to the joint committee on finance." Compl. ¶¶72-73. As with the governor, "[t]he attorney

general may not submit a proposed plan to the joint committee on finance under this subdivision in which the plan concedes the unconstitutionality or other invalidity of a statute, facially or as applied, or concedes that a statute violates or is preempted by federal law, without the approval of the joint committee on legislative organization." Compl. ¶74.

Second, the extraordinary legislation contains a number of provisions creating impediments to the Executive Branch's ability to publicly discuss state law in any form that constitutes a "guidance document." Section 31 of Act 369 defines "guidance document" broadly to include "any formal or official document or communication issued by an agency" that "[e]xplains the agency's implementation of a statute or rule" or "[p]rovides guidance or advice with respect to how the agency is likely to apply a statute or rule enforced or administered by the agency, if that guidance or advice is likely to apply to a class of persons similarly affected." Compl. ¶82.

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

Third, numerous provisions of the extraordinary legislation prevent the Executive Branch from acting without the approval of a legislative committee or give a legislative committee the

authority to undo an action by the Executive Branch. Section 64 of Act 369, for instance, allows the Joint Committee for Review of Administrative Rules to suspend indefinitely the rules issued by Executive Branch agencies without opportunity for the Governor to veto the Committee's action. In addition, Section 10 of Act 370 requires state agencies to submit plans to the Joint Committee on Finance before engaging in a variety of regulatory actions, including seeking an administrative waiver from federal government agencies or seeking a modification to existing administrative waivers. Compl. ¶96. The Joint Committee then has the authority to approve or disapprove of the plan. Compl. ¶96. The purpose of these provisions is clear: Preexisting wavers, like the State's Medicaid waiver imposing premium charges and work requirements on those underprivileged citizens who need healthcare assistance, are locked into place and incapable of being changed without Legislative Branch approval.

Section 16 of Act 369 likewise requires the Department of Administration to notify the Joint Committee on Legislative Organization "of any proposed changes to security at the capitol" and provides that the department may not implement the proposed changes if the Committee disapproves of them. Section 87 of Act 369 requires the Wisconsin Economic Development Corporation to notify the Joint Committee on Finance before it designates a new enterprise zone and prohibits the corporation from designating a new enterprise zone if the Committee disapproves. Finally, Section 11 of Act 370 forbids the reallocation of certain funds, including emergency assistance funds, without the approval of the Joint Committee on Finance.

The effects of this extraordinary legislation are already being felt by taxpayers and lawmakers alike. The Legislature has signed off on hiring private lawyers at taxpayer expense to fight a challenge to the lame-duck laws and has approved a plan to hand Assembly Speaker Vos "carte blanche to hire attorneys for other potential lawsuits." Compl. ¶79. Given that the Wisconsin redistricting challenge has already cost taxpayers upwards of $840,000—and is likely to

top $3.5 million in taxpayer-funded legal expenses—such free rein is certain to result in significant depletion of the public fisc. Compl. ¶79.

Other consequences are evident as well. When Governor Evers attempted to withdraw the Attorney General's authority to proceed in a multi-state lawsuit challenging the Affordable Care Act, the Attorney General said he could not because, after passage of the extraordinary legislation, he "does not have statutory authority to withdraw the State from the ACA litigation absent approval from the Joint Committee on Finance." *Wisconsin Governor's Order to Leave ACA Lawsuit Rejected*, N.Y. TIMES (Jan. 24, 2019), https://nyti.ms/2G7yHRM. As a result, the Attorney General took the position that, now, only the Republican-controlled Legislature "has the power to take such action." *Id.* Wisconsin's status in that ACA challenge has thus been thrown into confusion. The same problem has also arisen in another case challenging the lame-duck laws, with the Attorney General stating that, because of the laws, he cannot represent the State due to an ongoing "conflict of interest." Patrick Marley, *Gov. Tony Evers to use private attorneys after AG declines to defend lame-duck laws*, MILWAUKEE JOURNAL SENTINEL (Jan. 28, 2019), https://bit.ly/2t5OzeZ.

In addition, individuals who organize their work, finances, and healthcare around rules and guidance set out by Wisconsin's executive agencies can no longer be sure about whether they can rely on these sources of information. Nor will the executive agencies likely be able to spend time in the foreseeable future on productive forward-looking work; agency employees' time and resources will almost certainly be diverted to efforts to comply with new legislatively imposed hurdles.

The plaintiffs now bring suit to challenge the unconstitutional extraordinary legislation and seek a temporary restraining order and temporary injunction preventing the unconstitutional portions of that legislation from being enforced by the defendants.

LEGAL STANDARD

Courts evaluate four factors when deciding whether to issue a temporary injunction under W.S. § 813.02. First, the movant must show "a reasonable probability of ultimate success on the merits." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313 (1977). Second, the temporary injunction must be "necessary to preserve the status quo." *Id.* at 314. Third, there must be a showing "of a lack of adequate remedy at law." *Id.* Finally, the movant must demonstrate "irreparable harm." *Id.*

Where, as here, the plaintiff seeks an injunction to restrain the enforcement or execution of a state statute, the Court may grant a temporary restraining order "at any time before [a] hearing and determination of the application for an interlocutory injunction" if the Court "is of the opinion that irreparable loss or damage will result . . . unless the temporary restraining order is granted." W.S. § 813.025(2).

ARGUMENT

I. The plaintiffs are likely to succeed on the merits of their claims.

A. The plaintiffs are likely to succeed on their claim that the challenged Acts violate the Wisconsin Constitution by infringing upon the Governor's power and duty to take care that the laws be faithfully executed.

The Constitution of Wisconsin "created three branches of government, each with distinct functions and powers," and the doctrine of separation of powers "is implicit in this tripartite division." *Gabler*, 897 N.W.2d at ¶ 11 (quoting *Panzer v. Doyle*, 2004 WI 52, ¶ 48, 271 Wis. 2d 295, ¶ 48, 680 N.W.2d 666, ¶ 48).

Under the Wisconsin Constitution, each branch of government possesses both "exclusive powers and shared powers." *Gabler*, 897 N.W.2d at ¶ 30. That is because "[t]he separation of powers doctrine . . . does not require an absolute division of power without overlap." *State ex rel. Fiedler v. Wis. Senate*, 155 Wis. 2d 94, 100, 454 N.W.2d 770, 772 (1990). Rather, the State's Constitution "envisions a government of separated branches sharing certain powers." *Id.*

A branch's authority to act in an area of shared power, however, "is not unchecked." *Id.* A branch of government "is prohibited from unreasonably burdening or substantially interfering with" another branch's actions in an area of shared power. *Id.* Such an unreasonable burdening or substantial interference with another branch violates the separation of powers and is thus unconstitutional.

If one branch encroaches into another branch's exclusive power, the analysis is much simpler. "As to these [exclusive] areas of authority, the unreasonable burden or substantial interference test does not apply: *any* exercise of authority by another branch of government is unconstitutional." *Id.*

The State's executive power is vested in the Governor. *Id.* Specifically, the Governor has the power and duty to "take care that the laws be faithfully executed." Wis. Const. Art. V, § 4. The legislation challenged by the plaintiffs violates the separation of powers by encroaching on and substantially burdening the Executive's power to faithfully execute the law.

1. The Legislature may not encroach on the Executive's core authority to terminate litigation on behalf of the State

Courts both in Wisconsin and elsewhere have long recognized that the power to litigate on behalf of the State is a core executive function pursuant to the Executive's duty to "take care that the laws be faithfully executed." As the U.S. Supreme Court explained in describing the identical "take care" clause in the federal Constitution, "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take care that the laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138–40 (1976). Litigating for the State is not a power that lies with the Legislature, as the "discretionary power to seek judicial relief[] is authority that cannot possibly be regarded as merely in aid of the legislative function." *Id.*; *see also United States v. Nixon*, 418 U.S. 683, 693 (1974). "Legislative

power, as distinguished from executive power, is the authority to make laws, but not to enforce them." *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480–81, 556 N.W.2d 127, 129 (Ct. App. 1996).

Courts have thus repeatedly recognized that the powers to initiate or end civil lawsuits on behalf of a state are exclusively vested in the executive and are powers upon which a legislature may not intrude. That is because the executive is solely "responsible for initiating civil actions on behalf of the State" and so prosecuting such actions falls within the "'special province' of the executive." *In re Opinion of Justices*, 162 N.H. 160, 169, 27 A.3d 859, 868 (2011); *see also Perdue v. Baker*, 586 S.E.2d 606, 615 (Ga. 2003) (holding that executive branch has the authority "to control litigation as part of its power to execute the laws" and observing that "a law that removes from the executive branch sufficient control of litigation may well violate separation of powers"); *State Through Bd. of Ethics v. Green,* 545 So.2d 1031, 1036 (La. 1989) (holding that the "authority to file a civil lawsuit has traditionally been held to constitute an execution of the laws" and that the power to ensure that the laws are faithfully executed is committed to the governor under the Louisiana Constitution).[1]

Several key provisions of the extraordinary legislation intentionally intrude on the Executive Branch's exclusive power to litigate for the State. Section 97 of Act 369 encroaches on that Branch's litigation prerogatives by granting the Legislature a right to intervene in any litigation concerning a statute's construction, constitutionality, or preemption, and the law's provision that the Legislature may obtain legal counsel outside of the Wisconsin Department of Justice ensures that the Executive has no control over the Legislature's role. In addition, several provisions of the

[1] In Wisconsin the power to initiate *criminal* proceedings is a shared power between the Executive and the Judiciary given the longstanding tradition of John Doe criminal proceedings within the State. *State v. Unnamed Defendant*, 150 Wis. 2d 352, 363–64, 441 N.W.2d 696, 700 (1989). But the Wisconsin Supreme Court has *never* recognized any role for the Legislature in State litigation or indicated any disagreement with the prevailing understanding that such litigation is an Executive Branch function.

Acts in question prevent the Executive—in the form of either the Governor or the Attorney General—from initiating litigation, withdrawing from litigation, or settling litigation without the Legislature's consent. *See* Compl. ¶¶ 65–78 (discussing Sections 5, 26, 30, and 97 of Act 369). And other provisions bar the Executive from even *requesting* the Legislature's consent to end a suit, without prior approval, if ending the case would involve conceding that a statute is unconstitutional, violative of federal law, or preempted. *See id.* The Attorney General is thus required by these provisions to defend even plainly unconstitutional statutes notwithstanding his obligations as an officer of the court. It is hard to imagine a clearer intrusion into the Executive's exclusive constitutional authority.

Taken together, these provisions intrude upon a core power of the Executive by allowing the Legislature to dictate what laws the State will enforce and how. A law that divests the Executive Branch of its "authority to decide whether to initiate a particular civil action on the part of the State" usurps an essential executive power and is unconstitutional. *In re Opinion of Justices*, 162 N.H. at 170. And the extraordinary-session legislation goes even further than that: it empowers the Legislature to force the Executive Branch to continue litigating cases with which it disagrees and to defend plainly unconstitutional laws.

The Legislature has thus attempted to seize control over the quintessential executive function of executing and enforcing those laws. This is a clear violation of the separation of powers principle that undergirds the State Constitution and has been repeatedly reaffirmed by Wisconsin's courts. As James Madison warned several centuries ago, there "can be no liberty" when "the legislative and executive powers are united in the same person or body" because of the unchecked risk that the same body may "enact tyrannical laws" and "execute them in a tyrannical manner." The Federalist No. 47 (Madison).

2. The legislation unreasonably burdens and substantially interferes with the Executive Branch's ability to implement administrative actions and communicate the law to citizens.

Oversight of administrative agencies is a power shared by the Executive and Legislative Branches, *see Martinez v. Dep't of Indus., Labor & Human Relations*, 165 Wis. 2d 687, 697, 478 N.W.2d 582, 587 (1992), which means the Wisconsin Constitution is violated if, as here, the lame-duck legislation unreasonably burdens or substantially interferes with the Executive's ability to carry the law into effect, *Fiedler*, 454 N.W.2d at 772.

The governor's share of power over the administrative state derives from his constitutional obligation to faithfully execute the law, which necessarily involves interpreting and applying the law through administrative branch agencies. As the Wisconsin Supreme Court explained in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*: "The executive must certainly interpret and apply the law; it would be impossible to perform his duties if he did not. After all, he must determine for himself what the law requires (interpretation) so that he may carry it into effect (application). Our constitution not only does not forbid this, it requires it." 2018 WI 75, ¶53, 382 Wis. 2d 496, ¶53, 914 N.W.2d 21, ¶53.

The challenged legislation substantially interferes with this Executive Branch role in a number of ways. To begin, the requirements of Section 38 of Act 369 unreasonably burden and substantially interfere with the Executive Branch's ability to communicate about the administration and application of the law to the State's citizens. As explained above, Section 38 requires that all documents that provide guidance to citizens—from pamphlets covering driver's license exams to materials describing public employee health insurance—be submitted to the Legislative Reference Bureau, put out for a public comment period of at least 21 days, not be published until all comments are reviewed, and contain a personal certification from the head of the relevant agency. Compl. ¶85. And that certification is no pro forma task: it requires the agency head to ensure that

any "standard, requirement, or threshold" mentioned in the document is either "explicitly required or explicitly permitted by a statute or a rule." Compl. ¶85. Even the most mundane detail, such as a requirement that a permit application be submitted stapled, or have a particular font size if typed, could run the risk of preventing such a certification and requiring the entire public comment process to begin again. Section 38 also dictates that, on July 1, 2019, *every existing* document or communication that qualifies as a guidance document will be rescinded if it has not been adopted in accordance with these procedures or does not contain a specific certification signed by the secretary or head of the agency. The red tape created by this legislation applies to an extraordinary range of communication: "any formal or official document," with only limited exceptions, "including a manual, handbook, directive, or informational bulletin" that explains how a public agency implements a statute or rule.

These arduous procedures and expiration deadline significantly burden the Executive Branch's ability to implement the law. One need only consider the number and importance of guidance documents put out by executive agencies and then consider what will be required to comply with the lame-duck legislation's requirements. The inevitable results will include many wasted months, or even years, as agency employees are forced to turn from day-to-day implementation to satisfying the Legislature's procedural burdens; a sharp reduction in the guidance available to guide citizen and business behavior; and chaos and confusion as a result. *Cf. Blair v. Walker*, 349 N.E.2d 385, 389 (Ill. 1976) (recognizing that the Governor must communicate with a state's citizens about "matters committed to his responsibility"). In the blink of an eye, the Act undoes years' worth of work by state agencies and requires the Executive Branch to jump through multiple hoops to begin recreating already existing guidance documents that are necessary and important to Wisconsin citizens.

The extraordinary legislation unreasonably burdens and substantially interferes with the Executive Branch's constitutional role in several other ways as well. The Executive Branch's ability to implement the law is hamstrung by the legislation's requirement of legislative-committee preapproval for numerous agency actions, including action to seek an administrative waiver from federal government agencies, to seek a modification of an existing waiver, or even to propose changes to security at the capitol. *See* Compl. ¶¶ 96-97 (discussing Sections 16 and 87 of Act 369 and Sections 10 and 11 of Act 370). This requirement allows the Legislature to go beyond *enacting* laws and start dictating the minutiae of how those laws are implemented. As courts have long recognized, that is an improper usurpation of the executive function. *See In re Advisory Opinion to the Governor*, 732 A.2d 55, 103 (R.I. 1999) (recognizing that separation of powers prevents the legislature "or its members" from exercising "control[] over the execution and carrying out of the laws that it passes"); *see generally Springer v. Gov't of the Philippine Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . . .").

Bottom line: Given the lame-duck legislation's multiple and clear unconstitutional intrusions on Executive Branch authority, the plaintiffs are likely to succeed on the merits of their claim that the extraordinary legislation violates the separation of powers by substantially burdening the Executive's ability to take care that the laws of the State are faithfully executed.

B. The plaintiffs are likely to succeed on their claim that the challenged Acts violate the Constitution by granting the Legislature an impermissible legislative veto.

Wisconsin's Constitution guarantees that "[e]very bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor." Wis. Const. art. V, § 10(a). The Constitution then vests the Governor with the option to veto that legislation and prevent it from becoming a law absent a two-thirds override vote. Wis. Const. art. V, § 10(2)(a).

"The veto power of the governor . . . is but one example of a constitutional check and balance" that allows the Executive Branch to "protect itself from intrusions by the other branches." *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 709 n.3, 264 N.W.2d 539, 552 n.3 (1978).

The requirement of bicameral passage and presentment to the Executive mirrors the process required by the U.S. Constitution, which in turn reflects the Framers' "profound conviction" that "the powers conferred on Congress were the powers to be most carefully circumscribed." *INS v. Chadha*, 462 U.S. 919, 947 (1983). As the U.S. Supreme Court has explained, any legislative action that has the "purpose and effect of altering the legal rights, duties and relations of persons" must undergo bicameralism and presentment to pass constitutional muster. *Id.* at 952. Similarly, the Wisconsin Supreme Court has upheld the use of legislative committees to set aside agency action only when the procedures used require "[t]he full involvement of both houses of the legislature and the governor," affording the opportunity for the full bicameral involvement as well as the potential exercise of the Governor's veto power. *Martinez*, 478 N.W.2d at 587.

Numerous provisions of the extraordinary legislation violate these requirements. Section 64 of Act 369 allows the Joint Committee for Review of Administrative Rules to suspend a rule issued by an executive agency indefinitely, without opportunity for the Governor to veto the Committee's action. Under Section 64, if a state agency issues a rule that the Joint Committee does not like, the Committee can prevent that rule from taking effect. In other words, the Legislature can change the legal landscape of the State without ever presenting its proposed changes to the Executive Branch. This provision—allowing a single legislative committee to take action that has the force of law and that binds the Governor, Attorney General, and executive agencies without any opportunity for veto—is plainly unconstitutional. *Martinez*, 478 N.W.2d at 587.

Other provisions, too, improperly operate as unconstitutional legislative vetoes. These include: Sections 26 and 30 of Act 369, which allow the Legislature (either as a whole or through individual committees) to prevent the Governor or Attorney General from settling or discontinuing a case or consenting to an injunction in litigation; and Sections 16 and 87 of Act 369, and Section 10 of Act 370, which allow the Legislature to disapprove of proposed Executive Branch actions, thereby preventing agencies from taking actions they would otherwise legally take. Because these sections empower legislative committees to change the legal obligations imposed on a coordinate branch of government without the Legislature's full involvement as a bicameral body and without the potential exercise of the Governor's veto, they impermissibly violate the robust separation of powers protections embedded in the Wisconsin Constitution.

C. The plaintiffs are likely to succeed on their claim that the challenged Acts violate Article IV of the Wisconsin Constitution by authorizing legislative action without a quorum.

Article IV of the Wisconsin Constitution vests the legislative power of the State of Wisconsin in two bodies—the Wisconsin Senate and the Wisconsin Assembly. Wis. Const. Art. IV, § 1. Article IV provides further that "a majority of each shall constitute a quorum to do business." *Id.* § 7. Absent a quorum, legislators may only adjourn for the day or "compel the attendance of absent members." *Id.* Because the quorum requirement is a procedure that "is mandated by the constitution," it is not within the legislature's discretion to follow or ignore. *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 365, 338 N.W.2d 684, 687 (1983).

The challenged legislation contains multiple provisions that violate the Constitution by enabling a single legislative committee or the leaders of such a committee to take legislative action without a quorum present. Specifically, as discussed above, Sections 16, 26, 30, 64, and 87 of Act 369, and Sections 10 and 11 of Act 370, all enable individual committees comprising ten or fewer individuals to take legislative action without a quorum of the Senate or Assembly. The powers

delegated to committees include suspending agency rules (Section 64 of Act 369), overruling the Governor or Attorney General's decision to settle or discontinue a lawsuit (Sections 26 and 30 of Act 369), and overturning an executive agency's proposal for a waiver of federal law (Section 10 of Act 370). Each of these sections empowers a committee to prevent the Executive from taking otherwise-lawful action by merely scheduling a meeting, declining to act, passing a resolution, or explicitly stating its disapproval.

Because the committee actions enabled by the legislation directly alter the rights, powers, and duties of a coordinate branch of government—either by overturning legally binding rules or actions taken by the Executive Branch or preventing the Executive Branch from taking otherwise lawful action—they are "in law and fact, an exercise of legislative power." *See, e.g.*, *Chadha*, 462 U.S. at 952 (noting that action was "essentially legislative in purpose and effect" where it "had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General [and] Executive Branch officials"). Such legislative action requires a quorum. Wis. Const. Art. IV, § 7; *see also Wis. Dev. Auth. v. Dammann*, 228 Wis. 147, 277 N.W. 278, 279 (1938) (explaining that, without a quorum mandated by the Constitution, there is no "legislative body capable under the Constitution of transacting legislative business" and any attempted actions are "a nullity"). The Acts' provisions that purport to allow committee action without a quorum are therefore unconstitutional, and any actions taken by committees pursuant to those provisions are null, void, and not binding on the people of Wisconsin or on the other coordinate branches of state government. *Id.*

II. A temporary injunction is necessary to preserve the status quo.

The extraordinary legislation became effective on December 16, 2018, creating an unprecedented imbalance of power between the Legislature and Executive Branch. The legislation's effects then began to become clear after Governor Evers took power on January 7,

2019. The plaintiffs bring this action now to preserve the constitutional principle of separation of powers that applied in Wisconsin until January of this year.

Because the plaintiffs seek to maintain the constitutional system that has long prevailed in Wisconsin, their request for injunctive relief is a quintessential effort to "maintain the *status quo*." *Codept, Inc v. More-Way North Corp.*, 23 Wis. 2d 165, 173, 127 N.W.2d 29, 34 (1964) (explaining that "function of a temporary injunction is to maintain the *status quo*, not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought").[2] A temporary restraining order enjoining the enforcement of the unconstitutional provisions here will preserve the status quo by blocking any actual encroachments on the Executive's power. Without such an order, the Legislature may, at any point, decide to suspend an existing rule; deny the Governor and Attorney General from settling or otherwise ending litigation; or intervene in litigation, using private counsel funded by taxpayer dollars.

III. The plaintiffs will suffer irreparable harm for which there is no adequate remedy at law absent a temporary injunction.

The plaintiffs seek to enjoin violations of the Wisconsin Constitution that damage the fundamental balance of power in the State, diminish the public's trust in its state government, dissipate taxpayer funds in a manner that prevents those funds from being recovered, and upset ongoing reliance on guidance provided by executive agencies. These harms are already occurring and cannot be remedied at law. Every day without a temporary injunction against the extraordinary legislation saps taxpayer resources, stymies the public's ability to organize their affairs around the rules and guidance provided by the Executive Branch, and is a day lost to the time-limited

[2] Filing this motion for a temporary injunction after the extraordinary legislation has gone into effect is proper because the separation of powers is concerned only with "actual and substantial encroachments by one branch into the province of another, not theoretical divisions of power." *Martinez*, 478 N.W.2d at 585.

administration of the current Governor, which could otherwise be doing the public's business for the benefit of the plaintiffs and other citizens. A temporary injunction is therefore warranted.

A. Ongoing violations of the Wisconsin Constitution constitute irreparable harm.

Courts have long recognized that "continued violation of . . . fundamental constitutional rights" constitutes "irreparable harm." Order Denying Motion for Stay at 6, *Madison Teachers, Inc. v. Walker*, Case No. 11CV3774 (Dane Cnty. Cir. Ct. Oct. 22, 2012), https://bit.ly/2Bh6010. Separation of powers violations have, in particular, been held repeatedly to constitute irreparable injury. *See State of N.Y. v. Dep't of Justice*, No. 18-cv-6741, 2018 WL 6257693, at *19 (S.D.N.Y. Nov. 30, 2018) (holding that the imposition of conditions that "violate the separation of powers" is "an irreparable 'constitutional injury' that cannot be adequately compensated by monetary damages"); *San Francisco v. Sessions*, No. 17-cv-04642, 2018 WL 4859528, at *30 (N.D. Cal. Oct. 5, 2018) (granting permanent injunction because challenged provisions "violate[] the separation of powers" and so have "caused and will continue to cause [the plaintiffs] constitutional injury"); *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (explaining that the injury suffered by an unwarranted violation of separation of powers is "by its nature irreparable").

The reasons for this rule are twofold. *First*, ongoing constitutional violations by the government erode public trust and government legitimacy. "Trust once lost is not easily restored, and as such, this is an irreparable harm for which there is no adequate remedy at law." *Chicago v. Sessions*, 321 F. Supp. 3d 855, 877–78 (N.D. Ill. 2018); *accord State of N.Y.*, 2018 WL 6257693, at *19; *see also* 11A Wright & Miller, *Federal Practice & Procedure* § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). *Second*, the founding generation's decision to prevent a particular course of conduct by addressing it in the State's Constitution reflects the belief that such conduct would "result in harm which cannot be countenanced by the public." *Cf. Joint Sch.*

Dist. No. 1 v. Wis. Rapids Educ. Ass'n, 70 Wis. 2d 292, 299–300, 234 N.W.2d 289 (1975) ("[A]ctivity [that] has been declared unlawful reflects a legislative or judicial determination that it would result in harm which cannot be countenanced by the public."). The impact of constitutional infringements also "becomes all the more substantial when multiplied by the tens of thousands of affected" individuals. Order Denying Motion for Stay at 5, *Madison Teachers*, Case No. 11CV3774.

This understanding makes sense when it comes to the separation of powers in particular because the "tripartite separation of independent governmental power remains the bedrock of the structure by which we secure liberty in both Wisconsin and the United States." *Gabler*, 897 N.W.2d at ¶ 3; *see also id.* (explaining that the Framers well understood the importance of the separation of powers, calling this concept a critical "guard[] against the abuses to which power is liable" and "a maxim of vital importance") (quoting 5 Annals of Cong. 493 (1796), and 2 Joseph Story, *Commentaries on the Constitution of the United States* § 519, 2–3 (Boston, Hilliard, Gray & Co. 1833)). James Madison recognized that accumulating powers divided among branches of government in a single branch "may justly be pronounced the very definition of tyranny," *id.* (quoting The Federalist No. 47, at 298 (Madison) (Clinton Rossiter ed., 1961)), and that even small encroachments on this separation must be resisted to protect against "a gradual concentration of the several powers in the same department," *id.* (quoting The Federalist No. 51, at 318–19 (Madison) (Clinton Rossiter ed., 1961)).

As the plaintiffs have already demonstrated, the extraordinary legislation enacted by the outgoing Legislature during its lame-duck session violates the constitutional rule of separation of powers by usurping and unreasonably interfering with the Executive's authority to take care that state law is faithfully executed via court action and through interpretation and guidance. The Acts

further burden the Executive's ability to veto legislation and, in some sections, even interfere with the Legislature's ability to act as a whole.

Every day, this power imbalance works irreparable harm on the people of Wisconsin, including the plaintiffs, both in financial terms and in terms of the public trust. For example, within weeks of taking office, Governor Evers signaled his intention to withdraw the State from ongoing litigation challenging the Affordable Care Act. Mark Sommerhauser, *Tony Evers: Despite confusion, 'no reversal' on my handling of state's legal fight against Obamacare*, WIS. STATE J. (Jan. 26, 2019), https://bit.ly/2Se7bb2. But the Governor's statement of intent was followed by immediate "confusion and controversy" because such withdrawal—traditionally at the governor's discretion—was committed by the lame-duck laws to the Legislature's Joint Finance Committee. *Id.* This state of affairs inevitably leaves the public uncertain whether the Governor is acting in accordance with the law and Constitution and whether he is living up to or abandoning important campaign promises. The result is an unavoidable and ongoing erosion of the public's confidence in the legitimacy of the State government.

Indeed, the plaintiffs engaged in this election because Governor Evers promised that his administration would make very different policy decisions from the previous one. Every day he cannot act on these commitments—or is forced to spend his administration's time and resources dealing with the obstacles erected by these bills—is a day lost to the public's business. Not only will the plaintiffs' concrete policy proposals inevitably be delayed, *see* Compl. ¶27, but average citizens who depend on government services will almost certainly face delay and hardship, as resources are diverted to dealing with all these procedure hurdles and away from actually doing the work of government.

If anything, a temporary injunction will benefit both sides by bringing clarity to the parties and to citizens who depend on public services affected by the lame-duck legislation.

"Concentration of power in the hands of a single branch is a threat to liberty," which "is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). It is therefore incumbent on the judiciary "to act as a check on such usurpation of power" to ensure that the balance of power is maintained. *Chicago*, 321 F. Supp. 3d at 879 (quoting *City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018)).

B. The wasted expenditure of taxpayer funds constitutes irreparable harm.

Courts have long recognized that the improper or wasteful dissipation of public funds constitutes irreparable harm. *See, e.g.*, *Rath v. City of Sutton*, 673 N.W.2d 869, 885 (Neb. 2004); *White v. Davis*, 68 P.3d 74, 93 (Cal. 2003); *Smith v. Am. Trucking Ass'n*, 781 S.W.2d 3, 6 (Ark. 1989). This rule follows from a basic understanding that the dissipation of collected taxes cannot be remedied. Individual citizens cannot seek damages from the Legislature that authorized the illegal funding; nor can individual taxpayers request a return of their portion of the money improperly spent. *Id.* at 6; *Rath*, 673 N.W. 2d at 884–85. When the Legislature engages in unconstitutional expenditures, taxpayers suffer irreparable harm.

That irreparable harm is present here. *First*, the Legislature's hiring of outside counsel is wastefully dissipating public funds. The Legislature has already granted Assembly Speaker Vos free rein to hire private lawyers at taxpayer expense and there is every reason to believe the effect on the public fisc will be substantial and ongoing. In recent litigation, the cost to taxpayers for the Legislature's outside counsel has already cost the State $840,000 and is "on track to cost taxpayers $3.5 million." Patrick Marley, *Gov. Tony Evers to use private attorneys after AG declines to defend lame-duck laws*, MILWAUKEE J. SENTINEL (Jan. 28, 2019), https://bit.ly/2Bdm8jR. And the Legislature is not the only branch spending taxpayers' money: To challenge the extraordinary

legislation, Governor Evers has committed to spending up to $50,000 of public money on a private attorney. *Id.*

Second, the Executive's inability to settle or withdraw from litigation will result in the wasteful expenditure of public funds. The Affordable Care Act case again provides a good example. In his State of the State address on January 22, 2019, Governor Evers said that he would be directing the Attorney General to withdraw Wisconsin from the case. Sommerhauser, *Despite confusion*. But that effort has been stymied by the lame-duck legislation, which means the Department of Justice must continue to spend money participating in the case—money that can never be recovered and that would not be spent but for the Acts' unconstitutional violation of separation of powers.

Third, the creation of a new set of procedural hurdles that Executive agencies must overcome for all routine guidance documents will waste agency employees' time and resources. Instead of spending time in the foreseeable future on productive, forward-looking work, agency employees will almost certainly be required to devote effort and time to comply with new legislatively imposed red tape and procedural hurdles. By forcing agency employees to cast aside day-to-day implementation and focus on satisfying the Legislature's procedural burdens, the guidance available to order citizen and business behavior will be sharply diminished.

Fourth, the lame-duck provision that allows the public to challenge any guidance document created by the Executive Branch will improperly dissipate public monies. Pursuant to Sections 65 through 71 of Act 369, litigants may challenge in court any document that provides guidance on the application of laws, rules, and regulations. Given the enormous number of documents promulgated across state government, the Department of Justice and Executive agencies must prepare to expend significant resources on possible challenges to these documents. Any such litigation will again unnecessarily waste public resources.

C. The elimination of guidance documents on which the plaintiffs rely constitutes irreparable harm.

There is more. The plaintiffs in this case include several unions whose workers rely on guidance documents created by Wisconsin's agencies, most notably the Department of Workforce Development. For example, members of the plaintiff unions who have at any point become unemployed have likely relied on the DWD's handbooks on unemployment insurance and claims, which explain to unemployment applicants how to apply, what criteria they must meet, and how to protect their right to benefits. Compl. ¶89. These handbooks are likely to remain important to the unions and their members for the foreseeable future as individuals lose their jobs or decide to seek new employment opportunities.

Yet pursuant to Sections 31 and 38 of Act 369, the DWD's handbooks will be rescinded as of July 1, 2019 unless the Executive Branch complies with the unconstitutional and burdensome requirements of the lame-duck laws. They will then face an onerous process to be reinstituted by the Executive. In the interim, the plaintiff unions and their members will have no way to determine how to acquire unemployment insurance, forcing them to go without money to which they are entitled and which they may need. Indeed, absent compliance or certification, July 1, 2019 is the outer limit of the handbook's validity. If private citizens want to challenge the handbook, they may do so in court at any time pursuant to Sections 65 through 71 of Act 369.

The DWD's handbook is far from the only resource on which the plaintiffs and their members rely. The DWD's website is almost certainly a "guidance document" under the extraordinary legislation's broad definition, and it provides critical information to Wisconsin's workers about how to apply for worker's compensation, how to make use of Wisconsin's Family Medical Leave Act, and about what special programs exist to assist Wisconsin's veterans in rejoining the workforce. *See Worker's Compensation—Workers*, State of Wis. Dep't of

Workforce Dev., https://bit.ly/2RBOsBQ (providing guidance on eligibility criteria, benefits, and claim process for worker's compensation); *Equal Rights—Civil Rights Bureau—Wisconsin Family and Medical Leave Act*, State of Wis. Dep't of Workforce Dev., https://bit.ly/2RBOBoS (providing guidance on what illnesses qualify for FMLA coverage, what employers and employees must do, and answering numerous frequently asked questions); *Employment & Training—Office of Veteran Employment Services—Programs*, State of Wis. Dep't of Workforce Dev., https://bit.ly/2WEP9yb (outlining job programs benefitting veterans). These documents as well as many others are at imminent risk of challenge in court, and even if there is no court challenge, will likely be rescinded in less than six months. As a result, the plaintiffs face the impending risk of losing guidance on which they rely to access State programs and benefits.

CONCLUSION

The plaintiffs' motion for a temporary restraining order and temporary injunction should be granted.

Respectfully submitted,

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